NORGES HØYESTERETT

EFTA Court
1, rue du Fort Thüngen
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Luxembourg

Doc 30

Case No 23-183851SIV-HRET, civil case, appeal against judgment: Request for an Advisory Opinion

1. INTRODUCTION

(1) Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), read in conjunction with section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*), the Supreme Court of Norway (*Norges Høyesterett*) hereby requests an Advisory Opinion from the EFTA Court for use in Case No 23-183851SIV-HRET. The appellant in the case is Nordsjø Fjordbruk AS, whilst the respondent is the Norwegian State, represented by the Ministry of Trade, Industry and Fisheries (*Nærings- og fiskeridepartementet*).

(2) The case concerns the validity of the Norwegian Food Safety Authority's decision of 29 April 2022, by which Nordsjø Fjordbruk AS's application for approval of its operating plan for 2022 was refused. Nordsjø Fjordbruk AS has claimed that the decision is contrary to Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ("**the Animal Health Law**"). Both the District Court (*tingretten*) and the Court of Appeal (*lagmannsretten*) held that the decision is not contrary to the Animal Health Law. Hence the decision was valid.

(3) The case raises questions concerning the interpretation of the Animal Health Law and its underlying acts. The Animal Health Law is implemented in Norwegian law through Regulation No 631 of 6 April 2022 on animal health (Regulation on animal health) (*forskrift om dyrehelse (dyrehelseforskriften) av 6. april 2022 nr. 631*), whilst its underlying acts are implemented through a number of different regulations. The regulations have been issued on the basis of Act No 124 of 19 December 2003 relating to food production and food safety, etc. (Food Act) (*lov om matproduksjon og mattrygghet mv. (matloven) av 19. desember 2003 nr. 124*) and Act No 75 of 15 June 2001 relating to veterinarians and other animal health personnel (Law on animal health personnel) (*lov om veterinærer og annet dyrehelsepersonell (dyrehelsepersonelloven) av 15. juni 2001 nr. 75*).

(4) At this point, the Supreme Court requests an Advisory Opinion from the EFTA Court on whether the Animal Health Law, in particular Articles 9, 10, 176, 181, 183–184, 191–192, 226 and 269 thereof, must be interpreted as meaning that the Member States' central veterinary authorities are precluded from prohibiting the movement of farmed fish from one aquaculture establishment to another within national borders, or are precluded from refusing to approve an operating plan for an aquaculture establishment, subject to certain conditions.

2. OVERVIEW OF THE PARTIES TO THE CASE

(5) The parties involved in the case before the Supreme Court are:

(6) Appellant: Nordsjø Fjordbruk AS

Counsel: Advokat Jan Magne Langseth
Advokatfirmaet Simonsen Vogt Wiig AS
P.O. Box 2043 Vika
0125 OSLO

(7) Respondent: Norwegian State, represented by the Ministry of Trade, Industry and Fisheries
(*Staten ved Nærings- og fiskeridepartementet*)

Counsel: Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*)
Represented by Advokat Helge Røstum
P.O. Box 8012 Dep
0030 OSLO

3. FACTS – BACKGROUND TO THE CASE

(8) Nordsjø Fjordbruk AS is a subsidiary of Alsaker Fjordbruk AS. The company is engaged in food fish production of salmon in Norway at a number of different sites in the counties Vestland and Rogaland. In order to operate an aquaculture establishment at sea, the aquaculture establishment must be approved. In addition, there must at all times be an approved operating plan in place for the establishment: see section 40 of Regulation No 822 of 17 June 2008 on the operation of aquaculture establishments Regulation on aquaculture operations) (*forskrift om drift av akvakulturanlegg (akvakulturdriftsforskriften) av 17. juni 2008 nr. 822*). In the autumn of 2021, Nordsjø Fjordbruk AS applied for approval of the operating plan for the Nappeholmane site. In the operating plan there was a plan to move fish from the Nappeholmane site to the Ulvøyo and Flatholmen sites, approximately 39 kilometres away. Nappeholmane is located in a different fallowing zone to Ulvøyo and Flatholmen. Fallowing entails that all establishments within the zone in question are empty of fish for a period of time, that nets are taken up from the sea and that all equipment is cleaned and disinfected. This is a measure to reduce the risk of the spread of transmissible fish diseases.

(9) On 10 November 2021, the Norwegian Food Safety Authority (*Mattilsynet*) adopted a decision by which approval of the operating plan for Nappeholmane was refused. Nordsjø Fjordbruk AS appealed against that decision on 30 November 2021. The Norwegian Food Safety Authority's appeals body upheld the refusal by decision of 29 April 2022.

(10) The reason given for the refusal was that the risk of the spread of disease associated with the planned movement of fish was considered to be too high. In the appeal decision, it was stated that section 40 of the Regulation on aquaculture operations, section 19 of the Food Act and the preparatory works for the Food Act, Ot.prp. nr. 100 (2002–2003), pages 52 and 153, were to the effect that it is sufficient, for the refusal of an application for approval of an operating plan, that the Norwegian Food Safety Authority has found, following a specific assessment, objective support for the position that implementation of the operating plan will entail an

unacceptable risk of spread of disease and infection. It was further stated, with reference to the preparatory works, that the Norwegian Food Safety Authority must show "due diligence" in its treatment of operating plan applications, and that precautionary considerations are to be a guiding principle in the assessments and findings forming the basis of the decision. In the specific assessment, reference was made to the fact that the Nappeholmane site is an open marine facility which is not situated so as to be protected against infection from fish farming facilities in the immediate area, and that the establishment is situated approximately nine kilometres from two different surveillance zones for the fish disease *infectious salmon anemia* (ISA). It was also stated that the site has had previous detected incidences of the fish disease *pancreas disease* (PD) and that, as a result, there was a risk that the fish would be exposed to infection prior to movement. By reference to the precautionary principle, it was stated that it was not decisive that there was no detected disease or actual suspected presence of disease at the site, since the fish could still be a carrier of latent diseases. It was further stated that there was a high risk of spread of disease to other fish farming facilities during transport of the fish involving the use of well boats. On that basis, the Norwegian Food Safety Authority found that the overall risk of the spread of infection exceeded what was an acceptable risk, and that "considerations of fish health" warranted non-approval of the operating plan: see the second sentence of the sixth paragraph of section 40 of the Regulation on aquaculture operations.

(11) On 19 August 2022, Nordsjø Fjordbruk AS lodged proceedings against the Norwegian State, represented by the Ministry of Trade, Industry and Fisheries, seeking to have the Norwegian Food Safety Authority's decision of 29 April 2022 declared invalid.

(12) On 1 March 2023, Haugaland and Sunnhordland District Court (*Haugaland og Sunnhordaland tingrett*) delivered judgment in favour of the Norwegian State, represented by the Ministry of Trade, Industry and Fisheries. The District Court found that the Norwegian Food Safety Authority's decision was not contrary to the Animal Health Law and is therefore valid. Nordsjø Fjordbruk AS appealed against that judgment.

(13) By judgment of 31 October 2023, Gulating Court of Appeal (*Gulating lagmannsrett*) dismissed the appeal. The Court of Appeal also held that the decision is not contrary to the Animal Health Law. Both the District Court and the Court of Appeal referred in particular to Article 269(1)(a) and its reference to Article 10 as grounds for finding that the decision is in accordance with the Animal Health Law.

(14) Nordsjø Fjordbruk AS's appeal to the Supreme Court is directed at the Court of Appeal's application of the law in relation to the rules in the Animal Health Law and its underlying acts. By decision of 4 February 2024 of the Appeals Selection Committee of the Supreme Court (*Høyesteretts ankeutvalg*), leave to appeal was granted.

4. LEGAL BACKGROUND TO THE CASE

4.1 Relevant Norwegian legislation

(15) By decision of 29 April 2022, the Norwegian Food Safety Authority applied the rules in the first and sixth paragraphs of section 40 of the Regulation on aquaculture operations, which read as follows:

> "An operating plan for aquaculture establishments in seawater shall be in place at all times. In the event of joint operations, a joint operating plan shall be in place.
>
> …
>
> The Norwegian Directorate of Fisheries (*Fiskeridirektoratet*) shall, in consultation with the Norwegian Food Safety Authority, adopt decisions on approval of that part of the plan which concerns the first year. The Norwegian Food Safety Authority may, by decision, refuse approval if considerations of fish health (*fiskehelse*) at the individual site or in an area so warrant."

(16) Under section 69 of that regulation, violation can give rise to penalties and other sanctions, including closure and quarantine of the operation pursuant to section 25 of the Food Act.

(17) Section 40 of the Regulation on aquaculture operations was issued on the basis of section 19 of the Food Act, which reads:

> "Everyone shall show due diligence, so that a risk of development or spread of transmissible animal diseases does not occur.
>
> Live animals shall not be placed on the market, kept, moved or released when there are grounds for suspecting the presence of transmissible animal disease which may entail significant societal consequences.
>
> The King may issue specific regulations for the prevention, surveillance and control of animal diseases and infectious agents, including concerning:
>
> a. classification and grouping of diseases and infectious agents;
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> b. creation of zones with different health and disease status and epidemiologically separate regions;
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> c. approval and use of vaccines and other medicinal treatment of animals;
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> d. movement, transport, placing on the market and use of live and dead animals, animal by-products, objects, etc.;
>
> e. control of breeding animals, withdrawal of germinal products and reproduction of animals; and
>
> f. restrictions on permission for persons who may carry infection to buildings used for animals, animal feed or equipment, and concerning obligations to allow his or her person and accompanying objects to be disinfected."

(18) Following a specific assessment, the Norwegian Food Safety Authority concluded that "considerations of fish health" warranted refusal to approve Nordsjø Fjordbruk AS's operating plan for the Nappeholmane site. Nordsjø Fjordbruk AS has not claimed before the courts that the Norwegian Food Safety Authority's decision is contrary to section 40 of the Regulation on aquaculture operations and section 19 of the Food Act per se. The question in the case is accordingly whether those rules are contrary to the Animal Health Law or any of its underlying acts.

4.2 The Animal Health Law

4.2.1 General remarks about the Animal Health Law

(19) The Animal Health Law is an overarching legal framework containing harmonised principles for the entire area of animal health and concerns both terrestrial animals and aquatic animals. The Animal Health Law and its underlying acts lay down rules for the prevention and control of transmissible animal diseases. The rules are intended inter alia to reinforce preventive efforts aimed at reducing the number of outbreaks of disease through better biosecurity measures, surveillance, knowledge and contingency preparedness. The Animal Health Law regulates responsibilities and competence for private parties, national authorities, the Member States and the Commission. It is assumed in the present case that Nordsjø Fjordbruk AS is an *operator* and that the Norwegian Food Safety Authority is the *competent authority* in Norway, as those terms are defined in Article 4(24) and (55) respectively of the Animal Health Law.

(20) As far as the Supreme Court is aware, there is no case-law from the EFTA Court or the Court of Justice of the European Union (ECJ) concerning the interpretation of the relevant rules of the Animal Health Law.

4.2.2 Article 269(1)(a) and (2)

(21) The Norwegian Food Safety Authority, the District Court and the Court of Appeal have referred in particular to Article 269(1)(a) of the Animal Health Law as justification for the position that the decision is not contrary thereto. Article 269 is found in Part VIII, Title III of the Animal Health Law and reads:

> "**Additional or more stringent measures by Member States**
>
> 1. In addition to what follows from other provisions in this Regulation, allowing the Member States to adopt national measures, Member States may apply within their territories measures that are additional to, or more stringent than, those laid down in this Regulation, concerning:
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> (a) responsibilities for animal health as provided for in Chapter 3 of Part I (Articles 10 to 17);
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> (b) notification within Member States as provided for in Article 18;
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> (c) surveillance as provided for in Chapter 2 of Part II (Articles 24 to 30);
>
> (d) registration, approval, record-keeping and registers as provided for in Chapter 1 of Title I (Articles 84 to 107), and Chapter 1 of Title II, of Part IV (Articles 172 to 190);
>
> (e) traceability requirements for kept terrestrial animals and germinal products as provided for in Chapter 2 of Title I of Part IV (Articles 108 to 123).

2. The national measures referred to in paragraph 1 shall respect the rules laid down in this Regulation and shall not:

(a) hinder the movement of animals and products between Member States;

(b) be inconsistent with the rules referred to in paragraph 1."

(22) The question of interpretation in the present case concerns inter alia how Article 269(1)(a) and its reference to Article 10 are to be construed. The parties to the case disagree in particular as to the significance to be attached to the provision's reference to Article 10, which is found in Part I, Chapter 3, Section 1 of the Animal Health Law.

(23) Article 10(1) reads:

"**Responsibilities for animal health and biosecurity measures**

1. Operators shall:

(a) as regards kept animals and products under their responsibility, be responsible for:

(i) the health of kept animals;

(ii) prudent and responsible use of veterinary medicines, without prejudice to the role and responsibility of veterinarians,

(iii) minimising the risk of the spread of diseases;

(iv) good animal husbandry;

(b) where appropriate, take such biosecurity measures regarding kept animals, and products under their responsibility, as are appropriate for:

(i) the species and categories of kept animals and products;

(ii) the type of production; and

(iii) the risks involved, taking into account:

– geographical location and climatic conditions; and

– local circumstances and practices;

(c) where appropriate, take biosecurity measures regarding wild animals."

(24) Article 10(4)(b) further reads:

"4. The biosecurity measures referred to in point (b) of paragraph 1 shall be implemented, as appropriate, through:

…

(b) management measures, which may include:

(i) procedures for entering and exiting the establishment for animals, products, vehicles and persons;

(ii) procedures for using equipment;

(iii) conditions for movement based on the risks involved;

(iv) conditions for introducing animals or products into the establishment;

(v) quarantine, isolation or separation of newly introduced or sick animals;

(vi) a system for safe disposal of dead animals and other animal by-products."

(25) The parties also disagree as to whether Article 269(2) precludes the Member States from adopting national rules allowing the competent authority to prohibit movement of fish in individual cases, within national borders, if considerations of fish health so warrant.

(26) Article 269 is indirectly referred to in Recital 165 of the Animal Health Law, which reads:

> "This Regulation lays down general and specific rules for the prevention and control of transmissible animal diseases and ensures a harmonised approach to animal health across the Union. In some areas, such as general responsibilities for animal health, notification, surveillance, registration and approval or traceability, the Member States should be allowed or encouraged to apply additional or more stringent national measures. However, such national measures should be permitted only if they do not compromise the animal health objectives set out in this Regulation and are not inconsistent with the rules laid down herein, and provided that they do not hinder movements of animals and products between Member States, unless this is necessary in order to prevent the introduction, or to control the spread, of disease."

4.2.3 Articles 191 and 192

(27) The case also raises questions about whether the rules on movement of fish are exhaustively regulated in Part IV, Title II, Chapter 2 (Articles 191–221) of the Animal Health Law, and the supplementary rules on movement of fish laid down by the Commission in that law's delegated acts. In that connection, Nordsjø Fjordbruk AS has referred in particular to Articles 191 and 192 of the Animal Health Law, which lay down general requirements concerning the movement of aquatic animals and specific rules on which disease-prevention measures operators are to take in connection with transport, respectively.

(28) Article 192(2) provides that the Commission is empowered to adopt delegated acts in accordance with Article 264 concerning, inter alia, requirements for cleaning and disinfection of equipment and means of transport, and also other biosecurity measures during transport. More detailed rules such as these have been adopted in Commission Delegated Regulation (EU) 2020/990 of 28 April 2020, which is implemented in Norwegian law through Regulation No 624 of 5 April 2022 supplementing the Regulation on animal health with provisions on

biosecurity requirements for approval of aquaculture establishments and movements of aquatic animals, etc. (Regulation on aquatic biosecurity) (*forskrift som utfyller dyrehelseforskriften med bestemmelser om krav til biosikkerhet ved godkjenning av akvakulturanlegg og forflytninger av akvatiske dyr mv. (akvabiosikkerhetsforskriften) av 5. april 2022 nr. 624*).

4.2.4 Article 226 and Article 9

(29) The parties have not relied on Article 226 of the Animal Health Law. Nevertheless, in order to provide context, the provision is found in Part IV, Title II, Chapter 4, and contains rules on national measures aimed at limiting the effects of diseases other than listed diseases. *Infectious salmon anemia* (ISA) is a listed disease: see Annex II to the Animal Health Law, read in conjunction with Article 5(1)(b) thereof. *Pancreas disease* (PD) is a nationally listed disease under national category F: see section 6 of the Regulation on animal health, but the disease is not listed under the Animal Health Law. Since the Norwegian Food Safety Authority's decision is based inter alia on the risk of spread of ISA, the parties have submitted that Article 226 does not apply in the present case.

(30) For listed diseases, rules on which measures are to be implemented are to be found in Article 9, with further references. Article 9(2) to (4) provides that the Commission is to determine specific rules for the prevention and control of listed diseases by means of implementing acts. Such rules are laid down in Commission Implementing Regulation (EU) 2018/1882 of 3 December 2018, amended by Commission Implementing Regulation (EU) 2022/925 of 14 June 2022 and Commission Implementing Regulation (EU) 2024/216 of 11 January 2024. Regulation (EU) 2018/1882 is implemented in Norwegian law through the Regulation on animal health. However, the parties are in agreement that none of the measures referred to in Article 9 are relevant to the present case, since there was no detected disease or actual suspected presence of disease at the site in question.

4.2.5 Articles 176, 181, 183, 184 and 269(1)(d)

(31) Questions may also be asked as to whether the Norwegian Food Safety Authority's decision refusing the application for approval of the operating plan *also* brings into play the rules on approval of certain aquaculture establishments in Part IV, Title II, Chapter 1, Section 2 (Articles 176–184) of the Animal Health Law, including the rules on withdrawal and suspension of such approvals.

(32) If an aquaculture establishment is obliged to apply for approval pursuant to Article 176(1), the establishment must inter alia satisfy the requirements laid down in Article 181(1). Under inter alia Article 181(1)(a)(i), the competent authority is to approve only those aquaculture establishments which comply with requirements for:

> "quarantine, isolation and other biosecurity measures taking into account the requirements provided for in point (b) of Article 10(1)) and any rules adopted pursuant to Article 10(6)[.]"

(33) Article 181(1)(c) further provides that the competent authority is to approve only those aquaculture establishments which:

> "do not pose an unacceptable risk as regards the spread of diseases, taking into account the risk-mitigation measures in place[.]"

(34) The term *establishment* is defined in Article 4(27).

(35) Under Article 181(2), the Commission is to adopt delegated acts in accordance with Article 264 on quarantine, isolation and other biosecurity measures as well as surveillance, premises and equipment. More detailed rules such as these are adopted in Commission Delegated Regulation (EU) 2020/691 of 30 January 2020, which is implemented in Norwegian law through the Regulation on aquatic biosecurity.

(36) Under Article 183(3), the competent authority is to grant approval if the requirements laid down in Article 181 are satisfied.

(37) Article 184(2) further reads:

> "**Review, suspension and withdrawal of approvals by the competent authority**
>
> …
>
> 2. Where a competent authority identifies serious deficiencies in an establishment as regards compliance with the requirements laid down in Article 181(1) and the rules adopted pursuant to Article 181(2), and the operator of that establishment is not able to provide adequate guarantees that those deficiencies will be eliminated, the competent authority shall initiate procedures to withdraw the approval of the establishment.
>
> However, the competent authority may merely suspend, rather than withdraw, approval of an establishment where the operator can guarantee that it will eliminate those deficiencies within a reasonable period of time."

(38) In the light of the assessments carried out by the Norwegian Food Safety Authority in the present case, it may be relevant to examine the decision refusing approval of the operating plan under those rules. If the competent authority refuses approval of an aquaculture establishment under Article 181, or withdraws or suspends the approval pursuant to Article 184(2), this will have implications for whether an operator may move fish from the establishment in question: see Article 191(2)(a)(ii).

(39) If the Norwegian Food Safety Authority's decision must be considered to apply to the approval of aquaculture establishments or to the withdrawal/suspension of such approval, as regulated in the Animal Health Law, this also brings Article 269(1)(d), reproduced above, into play.

5. BRIEF DESCRIPTION OF THE BACKGROUND TO THE REQUEST

(40) In the light of the foregoing, the case raises a number of different questions about which rules in the Animal Health Law apply and whether certain of the rules regulate exhaustively the situation at issue in the present case. The overall question, however, is at any rate whether the Member States may adopt national rules allowing the central veterinary authority to prohibit movement of farmed fish from one aquaculture establishment to another within national

borders, or refuse approval of an operating plan for an aquaculture establishment if considerations of fish health so warrant. The Supreme Court has accordingly reached the conclusion that the EFTA Court should be asked for an Advisory Opinion on the matter.

6. SUBMISSIONS OF THE PARTIES

6.1 Nordsjø Fjordbruk AS

(41) The observations submitted by Nordsjø Fjordbruk AS are set out below:

> "The Animal Health Law entails full harmonisation of the rules on animal health in a number of areas, including the rules on movement of fish. Accordingly, EEA States are not free to avail themselves of national rules in order to apply more stringent rules than what follows from the Animal Health Law itself and its implementing provisions. A decision prohibiting (future) movement of fish must, therefore, be assessed in the light of the provisions of the Animal Health Law, including the exceptions laid down for the application of differing national rules. The appellant does not dispute that movement of fish may be refused if that law (or delegated acts) confer such authority, but submits that individual decisions refusing approval may not be adopted by reference to the general 'precautionary' principle in section 19 of the Food Act, unless the Animal Health Law itself confers authority for refusal on such a basis.
>
> The general requirements for movements of aquatic animals are laid down in Article 191 of the Animal Health Law. The conditions for movement are laid down in Article 191(2), which provides that the operator may move the fish only if the conditions are fulfilled. Article 191(2)(a) provides that the establishment must be: (i) '*registered by the competent authority in accordance with Article 173*', and (ii) '*approved by that competent authority in accordance with Articles 181 and 182 …*'. The State has not claimed that those conditions are not fulfilled by the appellant. Article 191(2)(b) further provides that the animals are not to be covered by:
>
> > '(i) movement restrictions affecting the species and categories concerned in accordance with the rules laid down in Article 55(1), Article 56, Article 61(1), Articles 62, 64 and 65, point (b) of Article 70(1), Article 74(1), Article 79 and Article 81 and the rules adopted pursuant to Article 55(2), Articles 63 and 67 and Articles 70(3), 71(3), 74(4) and 83(2); or
> >
> > (ii) the emergency measures laid down in Articles 257 and 258 and the rules adopted pursuant to Article 259.'
>
> Nor has the State claimed that the conditions for movement under those provisions and the delegated acts adopted on the basis of the Animal Health Law were not fulfilled at the time the decision was adopted. The Animal Health Law contains a number of supplementary provisions on, inter alia, movements of aquatic animals within the EEA, including requirements for health certificates, self-declarations and movement documents.
>
> In the light of the foregoing, the appellant submits that the Norwegian Food Safety Authority was not empowered to refuse approval of an operating plan that includes future planned movement of clinically healthy fish on the basis of an assessment of a future, hypothetical risk of spread of infection at the planned time of movement. Fish health is not static and, for that reason, the assessment of health status and whether movement is to be permitted must be undertaken proximately to the time of movement: see Article 15(3)

of Commission Delegated Regulation (EU) 2020/990 [1] on movements of aquatic animals, which supplements the Animal Health Law.

The State has claimed that the Animal Health Law lays down only minimum requirements and that Article 269 allows national authorities complete freedom to adopt more stringent rules for movement of fish. The appellant takes the view that Article 269(1)(a) of the Law cannot be interpreted as meaning that further measures coming within *'responsibilities for animal health'* can be used as a basis for more stringent national measures for movement of fish than the Animal Health Law's own provisions on movement. The provisions referred to in Article 10 are not substantive rules governing permission to engage in the movement of fish. Article 269(2) further provides that national measures are to '*… respect the rules laid down in this Regulation and shall not … (b) be inconsistent with the rules referred to in paragraph 1*.'

The State has not claimed that Article 226 can provide a basis for a prohibition on movement in the present case, but the provision is nevertheless discussed for the sake of completeness. Article 226 regulates '*National measures designed to limit the impact of diseases other than listed disease*'. As is apparent from the wording of Article 226(1), the Member State concerned may adopt national measures to prevent the introduction or control the spread of diseases which are not listed at EEA level in those cases where the disease '*constitutes a significant risk for the health of aquatic animals in a Member State*' provided that '*national measures do not exceed the limits of what is appropriate and necessary in order to prevent the introduction, or to control the spread, of the disease in question within the Member State concerned*'.

Nordsjø Fjordbruk submits that the national measures in question do not apply in the present case. The appellant takes the view in any event that Article 226 does not apply to an individual decision based on 'the precautionary principle' in section 19 of the Food Act, which differs from the harmonised rules of the Animal Health Law on movement of fish, even though a non-listed disease is included on the 'national list'."

6.2 Norwegian State, represented by the Ministry of Trade, Industry and Fisheries

(42) The observations submitted by the Norwegian State, represented by the Ministry of Trade, Industry and Fisheries, are set out below:

"The State disagrees that the Animal Health Law must be interpreted as precluding refusal of an operator's application for approval of an operating plan, where the veterinary authority finds that the operating plan entails an unacceptable risk of infection and that considerations of fish health weigh against approval.

The Animal Health Law has as its overall objective to prevent infection and ensure better animal health: see Articles 1 and 2, and Recital 165, and must be interpreted in the light of that objective.

The Animal Health Law cannot be interpreted as giving an operator an unconditional right to move clinically healthy fish, where the general conditions in Articles 191 and 192 of the Animal Health Law are fulfilled, in a case where aspects of the operating plan in question are found to entail an unacceptable risk of infection.

[1] Commission Delegated Regulation (EU) 2020/990 of 28 April 2020 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council, as regards animal health and certification requirements for movements within the Union of aquatic animals and products of animal origin from aquatic animals.

According to the wording of Article 269(1), the States may adopt rules in certain areas that are additional to, or more stringent than, those laid down in the Animal Health Law. One of those areas is responsibilities for animal health under Articles 10–17. This includes biosecurity measures and measures for avoiding the spread of infection in the course of movement: see Article 10 of the Animal Health Law. The rule used as a basis for refusing approval of the operating plan in the present case concerns considerations of fish health and is a measure to reduce the risk of the spread of infection. The wording, context and purposive considerations all weigh in favour of the States being allowed to adopt rules that are additional to, or more stringent than, those laid down in the Animal Health Law in this area. The letter of 21 September 2022 (Case No 87217) from ESA is to similar effect. It also follows from Recital 165 that the States should be encouraged to apply more stringent measures in the area of responsibilities for animal health where necessary to prevent the spread of infection.

This does not mean that the States have unfettered discretion. Article 269(2) provides that national rules that are additional to, or more stringent than, those laid down in the Animal Health Law must not be contrary to the rules laid down therein or hinder movement between the Member States in the EU/EEA. The present case does not concern movement between Member States. Nor is the refusal decision contrary to Articles 191 and 192, since those provisions cannot be interpreted as giving an operator an unconditional right to movement where the conditions are fulfilled."

7. QUESTION REFERRED TO THE EFTA COURT

In the light of the abovementioned circumstances of the case, and in the spirit of a wish for dialogue between the EFTA Court and the national courts, the Supreme Court hereby requests the EFTA Court to answer the following question:

Must Regulation (EU) 2016/429, in particular Articles 9, 10, 176, 181, 183–184, 191–192, 226 and 269 thereof, be interpreted as meaning that the Member States' central veterinary authorities are precluded from prohibiting the movement of farmed fish from one aquaculture establishment to another one within national borders, or are precluded from refusing to approve an operating plan for an aquaculture establishment, in a situation where:

- there is no detected disease or concrete suspicion of disease in the fish,

- but the veterinary authority, following a specific assessment, has found that considerations of fish health at the individual site or in an area warrant such a prohibition or refusal?

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Oslo, 17 April 2024

Aage Thor Falkanger
Supreme Court Justice