

Case Nos: 59423 and 57304
Event No: 364065
Decision No: 280/06/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 4 October 2006
on the alterations to the tax refund schemes to shipowners for seafarers aboard
vessels in the Norwegian Ordinary Shipping Register (NOR) and the Norwegian
International Shipping Register (NIS)

(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

Having regard to the Agreement on the European Economic Area², in particular to Articles 61 to 63 and Protocol 26 thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

Having regard to Article 1(3) of Part I and Article 4(3) of Part II of Protocol 3 to the Surveillance and Court Agreement,

Having regard to the Authority's Guidelines⁴ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular Chapter 24A on aid to maritime transport thereof,

Having regard to the Authority's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 to the Surveillance and Court Agreement⁵,

Having regard to the Authority's Decisions Nos 164/98/COL, 117/02/COL, and 187/03/COL⁶,

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 03.09.1994, p.1 and EEA Supplements No 32, p.1. The Guidelines were last amended 19 April 2006. Hereinafter referred to as the State Aid Guidelines.

⁵ OJ L 139, 25.5.2006, p. 37.

⁶ Decision 164/98/COL, OJ C 337, 5.11.1998, p. 6; Decision 117/02/COL, OJ C 293, 28.11.2002, p.8 Decision 187/03/COL, OJ C 11, 15.1.2004, p.14. The full text of the decisions can be found on the Authority's webpage, <http://www.eftasurv.int/fieldsOfWork/fieldStateAid/stateAidRegistry/>

Whereas:

I. FACTS

1 Procedure

By letter dated 1 February 2006 from the Norwegian Ministry of Government Administration and Reform, forwarding a letter from the Ministry of Trade and Industry of the same date, received and registered by the Authority on 7 February 2006 (Event No 361785), the Norwegian authorities notified an alteration to three existing aid schemes for aid to maritime transport, pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement.

By letter dated 13 February 2006 (Event No 362193), the Authority requested additional information.

On 3 March 2006, the Norwegian Ministry of Government Administration and Reform submitted a letter from the Ministry of Trade and Industry of the same date, providing further information. This letter was received and registered by the Authority on 3 March 2006 (Event No 365173).

By letter dated 10 March 2006, the Norwegian Ministry of Government Administration and Reform forwarded a letter dated 9 March 2006 from the Ministry of Trade and Industry, providing further information. The letter was received and registered by the Authority on 14 March 2006 (Event No 366441).

By letter dated 23 March 2006 (Event No 366362), the Authority requested further information.

By letter dated 25 April 2006, the Norwegian Ministry of Government Administration and Reform forwarded a letter from the Ministry of Trade and Industry of the same date, received and registered by the Authority on 25 April 2006 (Event No 371309), the Norwegian authorities replied to the information request.

By letter dated 12 June 2006, the Authority requested further information (Event No 376229). The case was further discussed in a meeting between the Norwegian authorities and the Authority on 15 June 2006.

By letter dated 27 June 2006, the Norwegian Ministry of Government Administration and Reform forwarded a letter from the Norwegian Ministry of Trade and Industry dated 26 June 2006, providing further information. The letter was received and registered by the Authority on 27 June 2006 (Event No 379413).

By letter dated 1 August 2006, the Norwegian Ministry of Government Administration and Reform, forwarding a letter by the Norwegian Ministry of Trade and Industry, submitted an amended notification. The letter was received and registered by the Authority on 2 August 2006 (Event No 383069). By emails dated 14 September 2006 (Event No 388177) and 21 September 2006 (Event No 388896), the Norwegian authorities provided further information.

2 Description of the notified alteration to the existing aid scheme

2.1 Background to the notification

2.1.1 History of the support by the Norwegian State to maritime transport

On 1 July 1998 the Authority authorised a Norwegian aid scheme on tax-related measures in favour of the maritime transport sector (Decision No 164/98/COL). The authorisation *inter alia* concerned a refund scheme for the employment of Norwegian seafarers (*Refusjonsordningen for sysselsetting av norske sjøfolk*), which applied to passenger ships in the Norwegian international shipping register (*Norsk Internasjonalt Skipsregister*, hereinafter NIS register) and to ships in the ordinary Norwegian shipping register (*Norsk ordinært skipsregister*, hereinafter NOR register) of at least 100 GT used for transportation (including cargo and passenger ships, tugs and ships used for transport in petroleum activity). The aid was operated as a so-called gross wage scheme, i.e. the refund corresponded to 12% or 9.3 % (from formerly 20%)⁷ of the gross income of the seafarer. This system is also sometimes called a partial refund scheme.⁸

In 2002, the Norwegian authorities notified a special refund scheme for ferries engaged in foreign trade and registered in NOR. This special refund scheme, which, for these vessels, partially replaced the earlier scheme for NOR registered ships, was authorised by the Authority on 10 July 2002 (Decision No 117/02/COL). The refund for employment of seafarers on these vessels was operated as a so-called net wage schemes, under which 100% of the social security contributions, as paid by the shipowner and the seafarer, and the taxes paid by the seafarer were refunded⁹.

By decision dated 29 October 2003 (Decision No 187/03/COL), the Authority authorised another refund scheme in the area of maritime transport, this time for offshore vessels and shuttle tankers registered in NOR, which, for these vessels, partially replaced the 1998 aid scheme. The refund for the employment of seafarers on these vessels was also operated as a net wage schemes, entitling the shipowner to a 100% refund of the taxes and social security contributions related to wage income.

In short, the Authority so far authorised two net wages schemes, which provide for a 100% refund of the taxes paid by the seafarer and the social security contributions paid by the seafarer and the shipowner and which apply to specific NOR ships (not to NIS ships). The gross wages scheme, which has been authorised by the Authority already in 1998, provides only for a partial refund (9.3% or 12% based on the gross income of the seafarer) and applies to NOR and NIS ships.

⁷ The different rates depend on the ship concerned; ships with petroleum activities entitle the owner to only 9.3% refund.

⁸ The legal basis for the gross wage refund scheme is now laid down in Article 3, second paragraph, point (a) of Regulation 1720/2005 which provides that "*en refusjonsordning for en prosentvis andel av rederiets lønnsutgift for visse grupper av sjøfolk på de aktuelle skip. Med lønnsutgift menes brutto utbetalt lønn til sjøfolkene*", former Regulation of 20.11.2003.

⁹ The legal basis for the net wage refund schemes is now laid down in Article 3, second paragraph, point (b) of Regulation 1720/2005 which provides that "*en nettolønnsordning med refusjon av rederiets innbetaling av norsk skattetrekk, trygdeavgift og arbeidsgiveravgift for visse grupper av sjøfolk på de aktuelle skip. Det legges til grunn at skattetrekket er blitt fastsatt slik at sjøfolk ikke forventes å få noen tilbakebetaling av skatt*", former Regulation of 20.11.2003.

For all the three schemes, the refund of taxes and social security contribution was linked to the seafarer's tax liability. The schemes provided to the shipowner a refund of his own social security contributions as an employer and social security contributions and wage related taxes levied on the seafarer and collected by the shipowner:

- (i) liable for taxation in Norway
- (ii) eligible for the seafarer's tax deduction and
- (iii) whose wages are reported to the National Pension Insurance for Seafarers.

The support measures aimed to correct the situation that Norwegian shipping companies were losing out in the increasing competition from low-cost countries in Asia and Eastern Europe, but also increasingly from other EEA countries enjoying more generous tax and refund schemes. The measures aimed at preventing a flagging out of the vessels covered by the scheme, securing employment on board these vessels and maintaining maritime knowledge, experience and skills.

The schemes did not contain a nationality requirement and, in the notifications submitted to the Authority, the Norwegian authorities stated that the refund schemes covered Norwegian and EEA seafarers.

2.1.2 Case 57304 (complaint regarding the net wage refund scheme for seafarers)

On 2 December 2004 the Authority received a complaint (Event No 301472) against Norway concerning the Norwegian special tax refund scheme regarding offshore vessels and shuttle tankers. The complainant alleged that the interpretation and application of the refund scheme in accordance with section 5 of the Regulation governing the scheme (*Forskrift om forvaltning av tilskudd til sysselsetting av norske sjøfolk*¹⁰, hereinafter "the Regulation") resulted in discrimination of seafarers who were not (tax) domiciled in Norway and was thus contrary to Article 28 of the EEA Agreement.

The condition laid down in section 5 of the Regulation provided that taxes and social security contributions were reimbursed only in relation to seafarers who were liable for taxation in Norway in accordance with section 2-1. of the Norwegian Tax Act¹¹. Section 2-1. of the Norwegian Tax Act provided for a tax liability resulting from being a resident in Norway. However, according to the complainant, seafarers could also be tax liable to the Norwegian State without having a residence in Norway, see section 2-3. of the Tax Act. Section 2-3.(1)h. of the Tax Act reads:

§2-3. *Person som ikke er bosatt og selskap m.v. som ikke er hjemmehørende i riket*

(1) Person, selskap eller innretning, som ikke har skatteplikt etter §§ 2-1 eller 2-2, plikter å svare skatt av

h. inntekt ved arbeid om bord på skip m.v. etter følgende regler:

1. Skatteplikten omfatter inntekt vunnet ved arbeid om bord i tjeneste hos rederi eller hos arbeidsgiver som driver virksomhet på norsk registrert fartøy, begrenset etter § 2-36 fjerde ledd. Dette gjelder ikke når det godtgjøres at vedkommende er

¹⁰ FOR 2003-11-20 nr 1361.

¹¹ Lov 1999-03-26 nr. 14: Lov om skatt av formue og inntekt.

skattepliktig til bostedsstaten av hele sin hyreinntekt og dobbeltbeskatning ikke er forebygget gjennom skatteavtale med vedkommende stat.

Translation:

§2-3. Person who is not resident in and company etc. not registered in the kingdom

(1) Person, company or organization that is not subject to tax duty on the basis of §§ 2-1 or 2-2, is obliged to pay tax on

h. revenue from employment on a ship etc on the basis of the following rules:

1. The tax duty applies to revenue obtained by employment on board in the service of a shipping company or of an employer engaged in activity on a Norwegian registered vessel, limited on the basis of §2-36, fourth paragraph. This does not apply when it is established that the person concerned is tax liable to his state of residence on the basis of the entire wages and double taxation is not prevented through a tax convention with the state concerned¹².

This entailed that a Norwegian shipping company would have had an economic advantage if it hired a (e.g. Norwegian) seafarer who were domiciled in Norway (i.e. liable for tax under section 2-1. of the Tax Act), rather than a seafarer who is not domiciled in Norway, but who is liable for tax under 2-3. of the Tax Act. Therefore, according to the complainant, the Norwegian system resulted in indirect discrimination on the grounds of nationality prohibited by Article 28 of the EEA Agreement.

The Authority registered the complaint as a state aid case (57304, net wage refund scheme for seafarers). The assessment of the complaint was not limited to the aid scheme for offshore vessels as addressed by the complainant, but extended to the three maritime transport schemes authorised by the Authority in its earlier decisions.

The Norwegian authorities clarified that section 2-1. of the Norwegian Tax Act, which provides for a tax liability of persons having their residence in Norway, is considered in administrative practice to be the so-called ‘*general*’ tax liability. For seafarers, a tax liability can however also arise on the basis of section 2-3. of the Norwegian Tax Act. This tax liability was considered by the Norwegian authorities to constitute a ‘*limited*’ tax liability, so-called source liability applying to non-residents. The limited tax liability did not entitle the shipowner to any claims of refunds.

With a view to correcting the provisions of the tax refund schemes, so that taxes and social security contributions of non-resident, but tax liable seafarers would be refundable, the Norwegian authorities submitted the current notification¹³.

¹² Translation by the Authority.

¹³ The notification is registered as case number 59423, i.e. as a different case from the complaint case.

2.2 Description of the notified alterations to the existing aid schemes

2.2.1 Title of the aid scheme

The new scheme is entitled “*Tax refund scheme for seafarers employed aboard vessels in the Norwegian Ordinary Shipping Register (NOR) and the Norwegian International Shipping Register (NIS)*”.

2.2.2 Objective of the aid scheme and the notified alterations

The notified tax refund scheme will replace the existing schemes as authorised by the Authority’s Decisions Nos 164/98/COL, 117/02/COL, 187/03/COL¹⁴. The objective of the support schemes is to promote employment of EEA seafarers. According to the Norwegian authorities, EEA seafaring personnel is exposed to an increasing competition from foreign seafarers from low cost countries e.g. in Asia. However, there is also increasing competition from other EEA countries employing more generous tax and refund schemes. With a view to prevent flagging out, the purpose of the schemes is to grant aid to ship-owners by the refund of taxes, or by a refund of taxes and social security contributions, for seafarers employed on vessels in the NIS and NOR registers. When it comes to the social security contributions, this covers both contributions levied on the seafarer and on the employer. Social security contributions are understood as the “*arbeidsgiveravgift*” as paid by the shipowner and “*folketrygdavgift*” as paid by the employed seafarer.

The notified change from the previous schemes is that the new schemes will cover all EEA seafarers and not only seafarers with a tax residence in Norway. In order to fulfil this objective, the Regulation setting out the provisions of the scheme has been changed. Instead of containing a reference to section 2-1. of the Tax Act, which, indirectly, lays down a requirement of residence in Norway, the notified new section 5 of the Regulation now defines seafarers, which create entitlements to the refund as:

- (a) seafarers tax resident in Norway or another EEA State¹⁵, and
- (b) seafarers who are tax liable to Norway for income earned aboard, and
- (c) who are eligible for the seafarers’ tax deduction according to 6-61 of the Tax Act and
- (d) whose wages are reported to the National Pension Insurance for Seafarers.

Section 5 and the eligibility criteria therein will apply to both, the net wage and the gross wage schemes. The new rule will take retroactive effect from 1 January 2006.

2.2.3 Further amendments to the schemes

The Norwegian authorities have committed themselves to amend the schemes further, in the amended notification of 1 August 2006 and in further correspondence of 14 September 2006.

¹⁴ Statement by the Norwegian authorities under point 6 of the general notification form.

¹⁵ (i) and (ii) constitute the notified amendments, see in comparison the former formulation of section 5, section I.2.1.1 of this Decision.

The envisaged amendments, as communicated by the Norwegian authorities to the Authority, can be described as follows:

Further amendment to section 5 of the Regulation

The Norwegian authorities committed themselves to amend the Regulation in order to include “or EEA nationals” at the end of section 5(a) of the Regulation. This change should ensure that also EEA nationals with a tax residence outside Norway or the EEA can entitle the ship-owner to a refund.¹⁶ This rule will take retroactive effect from 1 July 2006.

Amendments of the net wage schemes

The Norwegian authorities further stated in the amended notification that a proposal will be made to the Norwegian Parliament for a revision of the net wage schemes. According to section 2-3.(1)h.1 second sentence (see above, page 5 of this Decision) of the Tax Act, a tax liability in Norway does not exist if the seafarer is liable for the taxation of his entire wages in his state of residence and if double taxation is not prevented through a tax agreement with the respective State¹⁷. A shipowner will consequently not be able to claim any refund for such a seafarer who is not tax liable in Norway. However, the social security contributions might still be charged, which would not entitle the shipowner to a refund due to the missing tax liability of the seafarer.

As stated in the amended notification, the Norwegian Government will propose to the Norwegian Parliament that the scope of the refund scheme be broadened in this regard, i.e. the social security contributions would be made independent from the tax liability and entitle the shipowner to a refund, even if the seafarer does not pay any taxes in Norway. Subject to approval of Parliament, the Norwegian authorities state that this rule may enter into force from 1 January 2007.

Amendments of the gross wage scheme

In the amended notification, the Norwegian authorities made further amendments to the gross wage scheme in order to take account of the effect of 2-3.(1)h.3 of the Tax Act. This provision of the Tax Act states that a tax liability does not arise for seafarers, who have a residence outside the Nordic countries and are working on NIS ships. Due to this missing tax liability to Norway, this group of seafarers would consequently not create entitlements for any refund under the Regulation governing the schemes. As they are not paying taxes in Norway, any social security contributions would, consequently, not be refunded. At the moment NIS shipowners can only receive refund under the gross wages scheme, as the net wage schemes only apply to NOR registered ships.

In the amended notification, the Norwegian authorities informed the Authority that the reimbursement under the gross wage scheme, which covers both NOR and NIS registered ships, intends to cover only the collected taxes, regardless of and independently of any social security contributions. The previous scheme was intended to cover both taxes and social security contributions. The new gross wage scheme will however be limited to the reimbursement of taxes. The reimbursement will not exceed any taxes collected.

¹⁶ The text would then read: “*er skattemessig bosatt i Norge eller annet EØS-land, eller er EØS-borgere*”.

¹⁷ E.g. Norway does not have a double taxation agreement with the Principality of Liechtenstein.

The Ministry will further formalise as a new rule that the 9.3% or 12% compensation can only be claimed to the extent that it applies to the amounts (based on income) paid as taxes on a person-by-person basis. The application for the refund has to include a copy of the voucher to the Norwegian tax authorities. Based on this, the Norwegian Maritime Directorate will assess and adjust the refund if needed so that there is no overcompensation possible in relation to the actual taxes paid.

These rules will take retroactive effect from 1 July 2006.

2.2.4 National legal basis for the aid measure

The legal basis for the amended scheme is the fiscal budget according to Decision 76 by the Norwegian Parliament of 6 December 2005, c.f. *Budsjett-innst.*S.nr. 8 (2005-2006) and *St.prp.nr. 1 Tillegg nr. 1* 2005-2006.

The decision is implemented by the Regulation of 21 December 2005, number 1720 (*Forskrift om forvaltning av tilskudd til sysselsetting av sjøfolk*), whose section 5 replaces the former section 5 in the regulation of 20 November 2003.

2.2.5 Recipients/scope of the scheme

The recipients will be shipowners for the income tax and social security contributions paid in respect of all EEA seafarers with tax liability in Norway.

The scope of the three authorised schemes by the notified amendment will be extended to also cover the employment of, at present, approximately 600 EEA seafarers who are taxable in Norway according to section 2-3. of the Norwegian Tax Act and for whose employment the shipowners were previously not allowed to claim any refunds. It will further be extended to cover EEA nationals without a tax residence in the EEA. As far as the net wage schemes are concerned, they will also be extended to refund social security contributions independent of tax liability.

As to the vessels covered by the refund, the scheme's scope has been described in Authority's Decisions Nos 164/98/COL, 117/02/COL, 187/03/COL. Refunds are however not to be granted in respect of ships whose operation qualifies them for other public subsidies (except the special rules on corporate taxation of shipping companies). This applies, in particular, to ferries which are considered to form part of the national road and transport system. Fishing vessels are also excluded from the scheme.

2.2.6 Budget and duration

The inclusion of the seafarers for whose employment the social security contributions and income tax payments so far have not been refundable in the new scheme, is estimated to be at NOK 25 million (approximately Euro 3,14 million)¹⁸ for approximately 600 new seafarers for the fiscal year 2006.

For the scheme as such, i.e. including the complete refund for Norwegian seafarers, EEA seafarers with a tax domicile in Norway as well as the newly covered seafarers without a tax domicile in Norway, the budget is at NOK 1 225 million (approximately Euro 154 million)¹⁹ for the fiscal year 2006. The schemes (i.e. the inclusion of approximately 600

¹⁸ Exchange rate NOK/Euro 7.9615 for 2006 as published on the Authority's website.

¹⁹ See fn. 18.

EEA seafarers who are tax liable under section 2-3.(1)h.1.first sentence of the Tax Act) will start as of 1 January 2006.

The inclusion of EEA nationals in section 5(a) of the Regulation will enter into force on 1 July 2006. This amendment will apparently not have any significant budgetary effects.

However, the new rules regarding the gross wage scheme (submittal of the seafarer's tax voucher to the Maritime Directorate, statement/rule that the 9.3% or 12% refund shall not exceed taxes and statement that the refund only covers the amount paid in taxes) will only take effect as of 1 July 2006.

The extension of the schemes to cover also a refund of social security contributions for seafarers who do not have a tax liability in Norway due to section 2-3.(1)h.1 second sentence of the Tax Act, which according to the Norwegian authorities may enter into force, subject to approval of the Norwegian Parliament, on 1 January 2007. The budgetary effect of the last two measures will not be significant.

The scheme will be re-notified to the Authority in ten years, i.e. before 31 December 2015.

3 Further explanations by the Norwegian authorities

The Norwegian authorities confirmed that there is no other, direct or indirect, requirement under Norwegian law, after the notified amendments, which would directly or indirectly treat EU/EEA seafarers differently from Norwegian seafarers with regard to the possibility of obtaining a refund under the different aid schemes.

In particular the requirement that the seafarers' wages should be reported to the Pension Fund for Seafarers (Lov-1948-12-3-7) does not, in the Norwegian authorities' view, constitute an additional hindrance.

According to the Norwegian authorities, while the Norwegian Pension Insurance Act for Seafarers of 1948 contains a residence requirement, citizens from countries within the EU/EEA area on board Norwegian ships (NOR or NIS registered) are, as a primary rule, encompassed by the Pension Insurance in the same manner as Norwegian nationals. This is a result of the EEA Agreement and Council Regulation No 1408/71²⁰. The website of the Norwegian pension fund confirms that the pension fund covers EU/EEA citizens²¹.

Exceptions from this rule concern, for example, persons employed in the hotel and restaurant business on board tourist ships registered in NIS, who are excluded from taking part in the Pension Insurance for Seafarers. This exception, as stated in Circular IB 697 B of the Pension Insurance for Seafarers, applies to Norwegian citizens as well as to EEA citizens.

Another derogation from the primary rule is that Norway has concluded agreements with Poland and Latvia according to which seafarers on NIS ships are not subject to the Pension Insurance for Seamen. However, as confirmed by the Norwegian authorities, that

²⁰ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L149, 05.07.1971, p. 2, incorporated into the EEA Agreement as point 1 of Annex VI to the EEA Agreement. Incorporated into Norwegian law by *Forskrift om inkorporasjon av trygdeforordningen i EØS-avtalen*, FOR 2000-12-02-1204.

²¹ <http://www.pts.no/Engelsk/default.htm>

does not exclude these seamen from the refund. For seafarers comprised by those agreements it is not necessary to submit a report on Pension Insurance for Seamen to the Norwegian Maritime Directorate. Instead the Maritime Directorate shall receive a copy of the documentation given to the Norwegian National Office for Social Insurance abroad. Polish and Latvian seafarers on NOR ships however, fall under the primary rule, as no agreements have been concluded for them.

II. APPRECIATION

1 The presence of state aid

State aid within the meaning of Article 61(1) EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

1.1 Presence of state resources

The aid measure must be granted by the State or through state resources. As the refund of the income tax and the social security contributions will be financed by budgetary allocations, this criterion is fulfilled.

1.2 Favouring certain undertakings or the production of certain goods

The support under the new scheme grants an advantage to the shipowners of the different vessels covered by the new scheme. The refund of the social security contributions paid by the shipowners compensates the shipowners for charges which are normally borne from their budgets. The refund of the employees’ taxes and their parts of the social security contributions is a direct grant corresponding to the income tax and social security contributions paid by the shipowner’s employees. The support also constitutes a selective measure as it is only addressed to the maritime sector and shipowners of certain vessels within this sector.

1.3 Distortion of competition and effect on trade between Contracting Parties

The shipowners benefiting from the scheme carry out an economic activity in competition with shipowners/companies from other countries of the EEA and the support strengthens their position. The support therefore distorts or threatens to distort competition and affects trade between the Contracting Parties.

1.4 Conclusion

Based on the above findings, the Authority comes to the conclusion that the notified alterations and subsequent changes to the schemes constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

2 New aid

As stated by the Norwegian authorities, the notified alterations²² concern all three aid schemes authorised by the Authority.

According to Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement, alterations to existing aid are to be regarded as new aid. The notified alterations are not of a purely formal or administrative nature, which cannot affect the evaluation of the compatibility of the aid measures with the common market (see Article 4 of the Authority's Decision No 195/04/COL of 14 July 2004).

One needs to assess whether the notified alterations change the authorised aid schemes as such, transforming them into new aid schemes. According to the case law of the European Court of First Instance, it is only where the alteration affects the actual substance of the original scheme (i.e. the existing aid) that the latter is transformed into new aid. If the alteration is clearly severable from the initial scheme, only the alteration (and not the scheme as such) would constitute new aid²³.

By way of the current notification the scope of the schemes is now extended to also cover the reimbursement for the employment of seafarers, who are tax liable to the Norwegian State without having a residence in Norway. While the extension of an aid scheme to another group of beneficiaries might, in certain situations, constitute a severable act, in this case, however, the extension of the aid scheme to also cover the seafarers who fall under 2-3 of the Tax Act is of a different nature.

The exclusion of the above mentioned group of seafarers due to a residence requirement could seem to constitute indirect discrimination²⁴ which is not compatible with the rules of the EEA Agreement on free movement of workers, unless justified. It follows from the general scheme of the EEA Agreement that state aid, certain of whose conditions contravene other provisions of the Treaty, should not be declared compatible with the functioning of the EEA Agreement²⁵. The possible indirect discrimination of non-resident seafarers from other EEA States would consequently affect the entire scheme and its compatibility as such under the state aid provisions.

²² This Decision assesses the schemes after the respective alterations have come into effect. It does not assess the compatibility of the three schemes from 30 June 2005, from which all existing maritime transport schemes should have been in line with the Chapter 24A of the Authority's Guidelines, and the respective dates when the various proposed changes to the schemes enter into force.

²³ Case T-195/01 and T-207/01 *Gibraltar v European Commission*, [2002] ECR II-2309.

²⁴ See for instance Case E-3/05 *EFTA Surveillance Authority v Norway*, cited above, paragraph 56, Case C-29/95 *Pastors* [1997] ECR I-285, paragraph 17, Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521, paragraphs 29 and 30 and Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 28 and 29.

²⁵ Case C-204/97 *Portugal v Commission* [2001] ECR I-3175, paragraph 41.

The support under the new scheme, which replaces the existing three schemes, is therefore to be considered as new aid in its totality.

3 Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement, *“the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision”*.

The proposed alterations to the schemes will take effect as of 1 January 2006, 1 July 2006 and probably 1 January 2007, respectively (see point I.2.2.6 of this Decision). By submitting the notification of the alterations to the existing schemes, by letter from the Norwegian Ministry of Government Administration and Reform of 1 February 2006 (Event No 367185), as amended, and by explicitly stating that no payment would be effectuated until the new schemes have been authorised by the Authority, the Norwegian authorities have complied with the above notification requirement and the standstill obligation.

4 Compatibility of the aid

Article 61(3)(c) of the EEA Agreement provides that aid may be considered as compatible with the functioning of the EEA Agreement, if its purpose is to facilitate the development of certain economic activities, where such aid does not adversely effect trading conditions between the Contracting Parties to an extent contrary to the common interest.

The Authority has issued guidelines for the application of Article 61(3)(c) of the EEA Agreement with regard to state aid to maritime transport, the so-called Maritime Guidelines.

The current version of the Maritime Guidelines was adopted by the Authority on 31 March 2004 and suggests appropriate measures to the EFTA States. Norway accepted the proposal for appropriate measures by letter from the Norwegian Mission to the EU dated 2 July 2004 (Event No 286799). The EFTA States were required to comply with these Guidelines as of 30 June 2005.

The Authority takes the view that the aid scheme needs to comply with the new Maritime Guidelines of 2004, because – as explained above – the current notification alters the so far authorised schemes in substance, without the amendment being able to be considered as a severable act.

The Maritime Guidelines provide that aid in the form of the alleviation of the burden of labour-related costs in respect of EEA seafarers should be allowed, provided that those seafarers are employed on board ships registered in an EEA State. The Maritime Guidelines allow such aid up to a maximum ceiling of 100% relief from contributions. Such measures should seek to safeguard EEA employment, both on board and onshore, preserve and develop maritime know-how in the EEA and improve safety. With regard to labour costs, section 24A.3.2(2) of the Guidelines provides that the following action on employment costs should be allowed for EEA shipping:

- Reduced rates of contributions for the social protection of EEA seafarers employed on board ships registered in an EEA State,

- reduced rates of income tax for EEA seafarers on board ships registered in an EEA State.

For the purposes of the above, “EEA seafarers” is defined as:

- citizens of the EEA States in the case of seafarers working on boards vessels (including ro-ro ferries), providing scheduled passenger services between ports of the EEA:
- all seafarers liable to taxation and/or social security contributions in an EEA State, in all other cases.

The Authority finds that it can still largely refer to its assessment made in Decisions Nos 164/98/COL, 117/02/COL, 187/03/COL, regarding the support of labour-related costs, as the Maritime Guidelines 2004 only differ from the 1997 Guidelines in a few aspects.

4.1 The compatibility of a refund system instead of zero tax rates

Norway proposes to operate a refund scheme rather than applying directly zero tax rates. Sections 24.A3.2(3) and 24A.11 of the Maritime Guidelines establish that instead of reduced contributions, the EFTA States may also operate, as done in the present case, a refund system, if there is a clear link to the levies, no element of overcompensation and if the system is transparent and not open to abuse. As found in the Authority’s earlier decisions, the refund is granted to the shipowner in relation to the income tax and social security contribution paid by the seafarer and the social security contribution by the employer. The Authority finds that there is a clear link between the levy of these charges and the refund, which is also expressed in the application modalities.

For the net wage schemes, the refund application shall be forwarded to the Maritime Directorate by the same date as the bi-monthly tax and social security payments are due, and covers exactly the amount paid by the employer on behalf of himself and his employees for the two preceding months. As the refund is limited to the total amount of income tax and social security contributions paid by the employer and the seafarer, there is also no element of over-compensation.

When it comes to the gross wage scheme, the Norwegian authorities have changed the requirements and state that the refund, which is given in the form of a lump sum payment of 9.3% or 12% of the gross wage, is now meant to cover (both for NOR and NIS registered ships) taxes only and does not, as before, extend to also cover social security costs. The refund is done on a person-by-person basis and the shipowner has to include in his application to the Maritime Directorate the tax voucher to the Norwegian tax authorities. The Maritime Directorate will assess and readjust the refund payment accordingly. This guarantees that there is not only a clear link between the refund and the taxes paid, but that the refund will never exceed the amount of taxes which have actually been paid. There is therefore no danger of overcompensation.

4.2 Compatibility of a 100% refund

Section 24.A.3.2 of the Maritime Guidelines allows for the reduction of contributions for the social protection of EEA seafarers and a reduced rate of income. According to section 24A.11 of the Maritime Guidelines, a reduction might be granted up to a ceiling of 100%, i.e. the reduction can go down to a zero rate of taxation and social charges. The Norwegian net wage schemes, which provide – contrary to the gross wage schemes - for a

total refund of all taxes and social security costs under the net wage schemes, are therefore in line with the Maritime Guidelines.

4.3 Cumulation and quantified effects of the measures

There is also no risk of cumulation of support from various sources, see section 24A.11 of the Maritime Guidelines, as the companies will not receive any additional support, as confirmed by the Norwegian authorities²⁶.

The Authority does not insist on the calendar indication of the quantified effects of the changes for the next six years, see section 24A.12 of the Maritime Guidelines. The Authority considers that the notified alterations do not extend the support scheme to other boats and vessels, but rectify a problem of discrimination resulting from the existing schemes.

4.4 No discrimination of non-Norwegian seafarers

It is necessary to assess whether the scheme does not involve any discrimination which would infringe other EEA provisions, in particular the provisions on the four freedoms. A state aid scheme which infringes other provisions of the EEA Agreement cannot be authorised.

4.4.1 General eligibility criteria — The inclusion of seafarers, who do not have a residence in Norway, but are tax liable according to section 2-3.(1)h.1. of the Tax Act

The notified formulation of section 5(b) of the Regulation governing the scheme states that the shipowner is eligible for support for every seafarer (with a tax residence in the EEA, see section 5(a) of the Regulation) who is tax liable in Norway for his income earned aboard. This means that not only will the taxes and charges relating to seafarers who have a residence in Norway be reimbursed, but also taxes and charges in relation to seafarers who pay taxes in Norway according to section 2-3.(1)h.1 of the Tax Act, despite not being residents. Norwegian residents, who are likely to be Norwegian citizens, and other EEA residents are therefore put on the same footing for purposes of eligibility for the aid scheme. The shipowner therefore does not have any apparent incentive to hire a Norwegian resident over other seafarers, who also are tax liable in Norway.

Since the Norwegian authorities have also committed themselves to reformulate section 5 (a) of the Regulation by integrating the words “or EEA nationals”, it is ensured that a shipowner will be eligible for support in relation to EEA nationals who have neither a tax residence in Norway nor in the EEA (but in a country outside the EEA). While Norway is not obliged under the Maritime Guidelines, see section 24A.3.2 of the Guidelines, to grant a tax relief to all seafarers²⁷, the exclusion of EEA nationals from the scheme would have otherwise to be assessed under Article 28 of the EEA Agreement. The insertion of the wording “EEA nationals” into the provision now puts the EEA nationals on the same footing with Norwegian citizens.

²⁶ But see with regard to the special rules, “tonnage tax”, on corporate taxation, see point I 2.2.5 of this Decision.

²⁷ This section of the Guidelines explains the second indent of the “EEA seafarer” definition in section 24A.3.2 (2) of the Guidelines. Section 24.A.3.2 (3) states that “preventing EEA States from granting tax relief to all seafarers in the case of international freight transport would have very negative effects on the competitiveness of European shipowners. However, that does not mean that the EEA State is obliged to have such a wide an aid scheme.

4.4.2 Discrimination resulting from section 2-3.(1)h.1. second sentence of the Tax Act

The Norwegian authorities (see point 2.2.3 on page 7 of this Decision) have also committed themselves to present a proposal to the Norwegian Parliament for a revision of the net wage schemes, which should avoid any discrimination resulting from 2-3.(1)h.1. second sentence of the Tax Act. As stated above, according to section 2-3.(1)h.1. second sentence of the Tax Act, a tax liability in Norway does not exist if the seafarer is liable for the taxation of his entire wages in his state of residence, and if double taxation is not prohibited in a tax agreement with the respective State²⁸. A shipowner will consequently not be able to claim any refund for such a seafarer who is not tax liable in Norway. However, social security contributions may be charged for the seafarer.

The Norwegian authorities suggest to broaden the aid scheme in this regard and to make the refund of social security contributions independent of the tax liability. The Authority is satisfied with these changes, as long as it is ensured that the refund of the social security contributions is fully independent of the tax liability. This might also involve that other conditions, which establish a link to the tax liability - as e.g. it would be for section 5(c) of the Regulation in conjunction with section 6-61 of the Tax Act²⁹ - have to be amended accordingly to cut the link between tax liability and social security refund.

4.4.3 Discrimination resulting from section 2-3.(1)h.3. of the Tax Act

The Authority has examined further whether discrimination could result from section 2-3.(1)h.3. of the Tax Act, which provides that for certain seafarers, namely those employed on NIS registered ships and being resident outside the Nordic countries, no tax liability occurs. While these seafarers falling under section 2-3.(1)h.3. of the Tax Act would not pay any taxes in Norway (and consequently the shipowner cannot claim any refund for them), social security contributions may be charged, as e.g. contributions to the Norwegian National Insurance Fund³⁰. Due to the missing tax liability resulting from a residence requirement, the social security costs would not be refunded under the scheme.

The effect of this provision will be investigated below for the gross wage scheme and for the net wage schemes.

Gross wage scheme

As far as the gross wage refund scheme is concerned, the Authority takes into account that the Norwegian lump sum refund of 9.3% or 12% of gross wages is now meant to cover only the taxes paid and does not, as before, extend to also cover social security costs. This is ensured by the fact that the shipowner now has to provide a copy of the tax voucher of the seafarer for whom the reimbursement is claimed to the Maritime Directorate. In other words, the gross wage scheme concerns the refund of taxes only and does in any event not extend to the refund of social security contributions. Section 2-3.(1)h.3. of the Tax Act, which prevents the refund of social security costs due to the missing tax liability, therefore does not – for the gross wage scheme – lead to a preclusion of a refund of social security costs for seafarers with a residence outside the Nordic countries, since social security costs are not refunded under the gross wage scheme anyway.

²⁸ E.g. Norway does not have a double taxation agreement with the Principality of Liechtenstein.

²⁹ See point I.2.2.2 of this Decision.

³⁰ Which is the statutory Norwegian pension scheme, which is not to be confused with the Pension Fund for Seafarers.

The net wage refund schemes

The Authority examined whether a potential discrimination could result from the application of section 2-3.(1)h.3. of the Tax Act for the net wage schemes which, contrary to the above discussed gross wage scheme, provide for a refund of both taxes and social security costs. Due to the application of section 2-3.(1)h.3. of the Tax Act, a NIS registered shipowner would not be able to claim any refund of the social security contributions under the net wage schemes for those seafarers who are not tax liable in Norway because they are residents outside the Nordic countries. By comparison, for seafarers who are residents of Norway (or another Nordic country) and consequently incur a tax liability, the shipowner would be able to claim the whole refund of taxes as well as of social security costs, which would seem to lead to a problem of discrimination. Likewise shipowners registered in NOR, to which 2-3(1)h.3. of the Tax Act does not apply, would be able to claim the whole refund of taxes and social security costs.

However, currently the only ships proposed to be eligible for reimbursement under the net wage schemes, are ships registered in NOR. That means that section 2-3.(1)h.3. of the Tax Act, which refers to NIS ships, is at the moment not relevant for the refund under the net wages schemes.

According to the Norwegian authorities, there are currently no plans to encompass NIS ships under the net wage schemes. In case the Norwegian authorities would like to extend the net wage schemes to cover also NIS ships, they would have to notify the Authority under the state aid provisions of any plans thereof and at that moment the Authority would have to assess, whether the application of section 2-3.(1)h.3. of the Tax Act would result in a discrimination contrary to the provisions of the EEA Agreement.

4.4.4 Seamen working on passenger ships providing scheduled passenger services between EEA ports

For seamen working on passenger ships providing scheduled passenger services between ports of the EEA, only EEA citizens can qualify for support. This is in accordance with section 24A.3.2(2) first indent of Maritime Guidelines³¹.

4.4.5 No other elements of discrimination

The Norwegian authorities stated that there are no other elements which would prevent the shipowner from claiming a refund for non resident seafarers.

The Authority has not found that any additional discrimination was arising from section 5(c) of the concerned Regulation, which requires that the seafarer is eligible for tax deduction. This refers to section 6-61 of the Norwegian Tax Act, which regulates the tax deduction. The seafarer has a tax free income of 30% of his income onboard, limited to NOK 80 000, if he is working at least 130 days on a ship³².

The Authority also does not object to the requirement in section 5(d) of the Regulation to report the seafarers' wages to the Norwegian Pension Fund for Seafarers (Lov-1948-12-03-7), which in section 1 refers to Norwegian nationals or those with a residence in

³¹ See also point II 4 of this Decision.

³² See also the remark under point II 4.4.2 page 15 of this Decision.

Norway. Norway adopted a Regulation to incorporate Regulation 1408/71³³ into the Norwegian legislation³⁴. As a consequence of that, although the Act on the Norwegian Pension Fund for Seafarers requires formally a residence requirement, in reality such a criterion of residence is not necessary to be covered by the Norwegian seafarers pension fund system. The website of the Norwegian pension fund confirms that the pension fund covers EU/EEA citizens³⁵. On that basis, the Authority finds, while some clearer legal drafting in this respect would be desirable, in substance the criterion that the seafarer's wages have to be reported to the pension fund does not result in any additional discrimination, as all wages are reported.

The Norwegian authorities explained further that - with the exception of Polish and Latvian seafarers - the reporting of the wages to the Norwegian Pension Insurance for Seafarers is done regularly by the shipowner and will not function as an additional criterion to limit the number of eligible seafarers. The shipowner is obliged to submit bi-monthly contribution lists covering all employees encompassed by the Pension Insurance, which means Norwegian nationals and persons domiciled in Norway. EEA citizens are encompassed by the Insurance in the same way as Norwegian citizens during service on Norwegian registered ships (NOR or NIS)³⁶.

For Polish and Latvian seafarers, who are not reported to the Pension Insurance for Seafarers, it is not necessary to submit a report, but the Maritime Directorate will instead receive a copy of the documentation given to the Norwegian National Insurance Office for Social Insurance Abroad.

5 Conclusion

On the basis of the foregoing assessment, the Authority considers that the notified scheme, which alters the existing schemes for aid to maritime transport (as authorised by the Authority's Decisions 164/98/COL, 117/02/COL, 187/03/COL), which the Norwegian authorities are planning to implement is compatible with the functioning of the EEA Agreement within the meaning of Article 61 (3)(c) of the EEA Agreement.

In this regard, the Authority does not raise any objections to the new rules which include under the refund schemes seafarers who derive their tax liability from section 2-3.(1)h.1. of the Tax Act, which apply from 1 January 2006 as well as the inclusion of EEA nationals in section 5(a) of the Regulation and which applies from 1 July 2006.

It neither raises objections to the alterations to the refund under the so-called gross wage schemes (that the gross wage scheme only comprises taxes and no social security contributions, submittal of the seafarer's tax voucher to the Maritime Directorate, statement/rule that the 9.3% or 12% refund shall not exceed taxes), which retroactively enter into force on 1 July 2006.

The Authority does not raise objections to the extension of the net wage schemes to cover also a refund of social security contributions for seafarers who do not have a tax liability in Norway due to section 2-3.(1)h.1. second sentence of the Tax Act, which according to

³³ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L149, 05. 07. 1971, p. 2.

³⁴ See above, fn. 20.

³⁵ <http://www.pts.no/Engelsk/default.htm>

³⁶ See Circular IB 697 E of 22 February 2005 of the Pension Insurance for Seafarers, submitted by the Norwegian authorities by letter dated 25 April 2006.

the Norwegian authorities may enter into force, subject to approval of the Norwegian Parliament, on 1 January 2007.

The Norwegian authorities are reminded of the obligation resulting from Article 21 of Part II of Protocol 3 to the Surveillance and Court Agreement in conjunction with Article 6 of Decision 195/04/COL to provide annual reports on the implementation of the scheme. The Norwegian authorities are required to present to the Authority as soon as possible all legislative and administrative texts implementing the above alterations to the aid schemes, where this has not already been done.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority. The Authority draws the Norwegian authorities attention to the fact that the Maritime Transport Guidelines, under which the above measures have been approved, will be reviewed in 2011. In case the rules of the Maritime Guidelines will change, this will have an effect on all existing aid schemes falling under the Guidelines, including the schemes authorised by this decision.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided not to raise objections until 1 January 2016 to the alterations to the tax refund scheme for seafarers aboard vessels in the Norwegian Ordinary Shipping Registers (NOR) and the Norwegian International Shipping Register (NIS), as notified by the Norwegian authorities by letter dated 1 February 2006 and 1 August 2006 and correspondence of 14 September 2006. The schemes are compatible with Article 61 (3)(c) of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English version is authentic.

Done at Brussels, 4 October 2006

For the EFTA Surveillance Authority,

Bjørn T. Grydeland
President

Kristján Andri Stefánsson
College Member