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EFTA SURVEILLANCE
AUTHORITY

Norwegian Ministry of Trade, Industry and Fisheries
Postboks 8090 Dep
N-0032 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway for failure to fulfil its obligations under Article 36 of the EEA Agreement and under Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport by imposing a geographical trade limitation on Norwegian International Ship Register ships

1 Introduction

By a letter dated 14 May 2014, the EFTA Surveillance Authority ("the Authority") informed the Kingdom of Norway ("Norway") that it had opened an own-initiative case on the incorporation of the act referred to at point 53 of Annex XIII to the EEA Agreement (Council Regulation (EEC) No 4055/86 of 22 December 1986 *applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries* ("Regulation No 4055/86" or "the Regulation")).¹

This own-initiative case concerns a geographical trade limitation imposed by Norway on ships flying the Norwegian International Ship Register ("NIS") flag.

In the light of the information received from Norway to date, the Authority considers that the trade limitation constitutes a *prima facie* restriction of the freedom to provide maritime services within the European Economic Area, contrary to Regulation No 4055/86 and Article 36 of the EEA Agreement. Moreover, this restriction has not been justified.

Accordingly, the Authority takes the view that Norway has failed to fulfil its obligations under Regulation No 4055/86 and Article 36 EEA.

2 Correspondence

By its letter of 14 May 2014 (Doc. No 706985) the Authority requested the Norwegian Government to clarify the implementation of Article 1(1) and Article 1(4) of the Regulation.

¹ OJ L 378, 31.12.1986, p. 1. Regulation No 4055/86 was included in Annex XIII to the original EEA Agreement when it entered into force on 1 January 1994. The Regulation was adapted, but the adaptations have no bearing on the present case.

In its letter of reply, dated 15 June 2014 (Doc. No 711116, your ref. 14/5350), the Norwegian Government stated that Regulation No 4055/86 had been fully incorporated in Norway, and that all EEA nationals enjoy the freedom to provide services in accordance with the provisions of Regulation No 4055/86. The Norwegian Government further stated that the right to provide maritime services as contained in Article 1(4)(a) of Regulation No 4055/86 is implemented

“by the free, open and unrestricted possibility for all established EEA nationals to provide for intra Community services through the following alternatives:

- *The ownership and operation of any EEA and non-EEA registered vessels subject to any trading area limitations imposed by the register*
- *the ownership and operation use of vessels registered in Norway;*
 - a) in the Norwegian ordinary register (NOR). Such vessels are also eligible for the ‘net wage scheme’ as approved by ESA, or alternatively*
 - b) in the NIS register, other than for scheduled passenger transportation between Norwegian and harbours in other EEA States, and between harbours in Denmark, Finland, Iceland and Sweden”*

The Norwegian Government took the view that Regulation No 4055/86 has been fully incorporated into Norwegian law and that all EEA nationals have the freedom to provide services in accordance with its provisions.

Following the initial exchange of letters, the issue was briefly discussed at the package meeting of 2014.

The Authority sent the Norwegian Government a further request for information on 18 March 2015 (Doc. No. 745161). This request for information invited the Norwegian Government to submit its observations on whether the existence of a trade limitation based on several provisions of Norwegian legislation constituted a restriction of the freedom to provide maritime services. The Authority likewise asked the Norwegian Government to discuss any potential justifications for the restriction.

The Authority followed this request by an additional letter, sent to the Norwegian Government on 24 April 2015 (Doc. No. 754570). In this letter the Authority enquired about several issues concerning cruise ships, which are the subject of a recent amendment to the Norwegian legislation governing the NIS.

In its reply of 22 May 2015 (Doc. No 758217), the Norwegian Government clarified the situation regarding cruise ships, and reiterated its view that the trading area limitations applicable for NIS flagged ships do not constitute a restriction of the freedom to provide maritime services.

3 Relevant EEA law

3.1 EEA Agreement

Article 36 of the EEA Agreement provides that within the framework of the Agreement, there are to be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

Article 38 of the EEA Agreement states that the freedom to provide services in the field of transport is to be governed by the provisions of Chapter 6 of Part III of the EEA Agreement.

Chapter 6 of Part III states, in Article 47(2), that Annex XIII contains specific provisions on all modes of transport.

3.2 Regulation No 4055/86

Article 1 of Regulation No 4055/86 reads as follows:

“1. Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

3. The provisions of Articles 55 to 58 and 62 of the [EEC] Treaty [at that time, dealing with freedom of establishment and the freedom to provide services] shall apply to the matters covered by this Regulation.

4. For the purpose of this Regulation, the following shall be considered maritime transport services between Member States and between Member States and third countries where they are normally provided for remuneration:

(a) intra-Community shipping services: the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State;

(b) third-country traffic: the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country.”

For the sake of completeness, the Authority notes that it considers as covered by Articles 36, 38 and Chapter 6 of Part III of the EEA Agreement any related situations, which fall outside the scope of Regulation No 4055/86 and which are not covered by any other provision of secondary law which has been incorporated into EEA law.

4 Relevant national law

4.1 Incorporation of the Regulation

Norway incorporated the Regulation through its Act of 4 December 1992 No 121 concerning freedom to provide maritime services (*Lov 4. desember 1992 nr. 121 om fri utveksling av tjenesteytelser innen sjøtransport mellom stater tilsluttet EØS og mellom stater tilsluttet EØS og tredjeland, og om endring i visse andre lover som følge av avtalen om EØS*, “The 1992 Act”). The 1992 Act incorporates the Regulation into Norwegian law by reference, stating in paragraph 1(2) that the Regulation applies as law.

4.2 The Norwegian law governing its ship registers

Norway has two ship registers: *Norsk Ordinært Skipsregister* (“NOR”) – the “domestic” register – and *Norsk Internasjonalt Skipsregister* (“NIS”). Both ship registers are regulated by provisions of the Norwegian Maritime Code² and by secondary legislation.

The Authority understands that both ship registers are open to all EEA nationals on the same conditions as Norwegian nationals.

4.2.1 Law governing the International Ship Register

The Norwegian International Ship Register was established in 1987 by the Norwegian International Ship Register Act (*Lov 12. juni 1987 nr. 48 om norsk internasjonalt skipsregister*) (“NIS Act”).

The relevant parts of Section 4 of the NIS Act read:

“Ships registered in the Norwegian International Ship Register are not permitted to carry cargo or passengers between Norwegian ports or to engage in regular scheduled passenger transport between Norwegian and foreign ports.

...

The King may issue regulations prescribing other trading areas for ships registered in the Norwegian International Ship than that specified in the first paragraph.” (emphasis added)³

Section 3 of Regulation 9 July 1993 No 596 on the trade area for passenger vessels registered in the Norwegian International Ship Register (*Forskrift 9. juli 1993 nr. 596 om fartsområde for passasjerskip registrert i norsk internasjonalt skipsregister (NIS)* (“Regulation 596 of 1993”)⁴ reads:

*“Ships registered in the Norwegian international ship registry are not allowed to transport passengers in regular scheduled routes between the Nordic countries. This prohibition comprises any type of passenger traffic, including seasonal traffic, between Denmark, Finland, Iceland and Sweden.”*⁵

The Authority understands these provisions to mean that:

- vessels which (i) are registered in the NIS and (ii) carry cargo or passengers, cannot trade on routes between Norwegian ports (apart from Svalbard)⁶, and
- vessels which (i) are registered in the NIS and (ii) carry passengers, cannot carry out regular scheduled services on routes between Norway and foreign ports (apart from Svalbard)⁷, or between two ports within the group of Nordic countries (Denmark, Finland, Iceland and Sweden). However, such vessels can, in principle,

² The Norwegian Maritime Code, Law of 24 June 1994 no. 39, Lov om sjøfarten

³ Office translation. In Norwegian: *Skip registrert i norsk internasjonalt skipsregister tillates ikke å føre last eller passasjerer mellom norske havner eller å gå i fast rute med passasjerer mellom norsk og utenlandsk havn.*

⁴ Last amended by Regulation 8 October 2015 nr. 1169.

⁵ Office translation. In Norwegian: *Skip registrert i norsk internasjonalt skipsregister tillates ikke å føre passasjerer i fast rute mellom nordiske land. Forbudet gjelder enhver form for slik passasjerfart, også sesongpreget fart, mellom Danmark, Finland, Island og Sverige.*

⁶ Section 2 of Regulation 596 of 1993

⁷ Section 2 of Regulation 596 of 1993

carry passengers on regular scheduled passenger services between other foreign ports outside of the Nordic countries.

4.2.2 Cruise ships

Section 7 of Regulation 596 of 1993 reads:

“Conditions for carrying passengers between Norwegian and foreign ports

- a. Cruise ships covered by this chapter are permitted to carry passengers between Norwegian ports if it calls totalling at least two foreign ports before or after the call at one or more Norwegian ports,*
- b. Passengers are not allowed to buy tickets only between Norwegian ports,*
- c. Passengers can go on board or leave the cruise ship in a Norwegian port if the ticket includes calls at least two foreign ports.”⁸*

4.2.3 Working conditions

Chapter II of the NIS Act deals with working conditions on board vessels registered in the NIS. The relevant provisions of this chapter read as follows:

“§ 6. Pay and working conditions

Terms of pay and employment and other working conditions on vessels in this register shall be fixed in a collective agreement, which expressly states that it applies to such a service. A collective wage agreement which does not so state does not apply to service on a ship in this register.

Norwegian trade unions have a right to take part in all negotiations for a collective wage agreement. Collective wage agreements may be concluded with Norwegian and / or foreign unions.

The collective wage agreement mentioned in the first paragraph shall explicitly state that the agreement is subject to Norwegian laws and Norwegian courts of law. The parties to the agreement may nevertheless agree to deviate from the provisions of subsections 2 and 3 of Section 6 and Chapter 2-5 of Act no. 1 of 5 May 1927 relating to labour disputes, if the agreement instead of referring to Norwegian courts explicitly provides that disputes concerning the agreement shall be subject to the courts and procedural rules, including rules governing arbitration, in another country.

Individual contracts of engagement for service on ships in this register shall expressly state that the contract is subject to Norwegian laws and Norwegian courts, but that cases concerning the employee's service on the ship may be brought against the owner before a Norwegian court or before a court in the employee's country of residence. A contract of engagement as referred to in the first sentence is not a hindrance to a case being brought before a court in another country when such action is permitted under the Lugano Convention in 2007.

§ 7. Hours or work and rest

The Act relating to Ship Safety and Security (the Ship Safety and Security Act) Sections §§ 23 and 24 shall apply to ships in this register.

⁸ Office translation. In Norwegian:

Vilkår for å føre passasjerer mellom norske og utenlandske havner

- a. Cruiseskip som omfattes av dette kapittelet tillates å føre passasjerer mellom norske havner dersom det anløper tilsammen minst to utenlandske havner før eller etter anløp av en eller flere norske havner,*
- b. Passasjerene har ikke anledning til å kjøpe billetter kun mellom norske havner,*
- c. Passasjerene kan gå om bord eller forlate cruiseskipet i norsk havn dersom billetten inkluderer anløp av minst to utenlandske havner.*

The rate of pay for work in excess of ordinary working hours shall be agreed between the parties.

§ 8. The Seamen's Act, mustering, etc.

In a collective agreement, the following provisions of Act no. 18 of 30 May 1975, the Seaman's Act, may be deviated from: Section §§ 3-1 fourth paragraph, Sections §§ 3-3 to 3-8 § 4-2 third paragraph, Sections § 4-6, first paragraph a, Section § 5-1, second paragraph, Section § 5-2 subsection second sentence, second and third paragraphs, Section § 5-3 second and third paragraph a to d, Section § 5.4, Section § 5-6, second and fourth paragraphs, Section § 5-7, Section § 5-9, Section §§ 5-10 and 5-12, Section §§ 6-1 to 6-3, Section §§ 7.2 and 7.3, Section §§ 7-5 to 7-12, Section § 8.4 and Chapter 11.

The cost of enrolment and mustering procedures shall be met by the owner or other employer.⁹

4.2.4 The Norwegian Ordinary Ship Register

The Norwegian Ordinary Ship Register was established in 1992 and is governed by the Regulation on the registration of vessels in the Norwegian Ordinary Ship Register, (*Forskrift 30. juli nr. 593 om registrering av skip i norsk ordinært skipsregister*) ("the NOR Regulation") FOR-1992-07-30 nr. 593).

Conditions of work on board NOR flagged vessels are governed by collective agreements subject to Norwegian Labour Law.

5 The Authority's assessment

Norsk Ordinært Skipsregister ("NOR") is a conventional register for Norwegian owned tonnage, and *Norsk Internasjonalt Skipsregister* ("NIS") is an international register designed for a foreign trading crew. If a natural person or a shipping company chooses to register their vessels in Norway they can choose between NOR and NIS.

Since late 2014 the Ministry of Trade, Industry and Fisheries has conducted several hearings having a potential impact on Regulation 596 of 1993. One of the proposed amendments, to Section 2 of Regulation 596 of 1993, would remove the restriction on NIS vessels from engaging in regular scheduled passenger services outside of the Nordic countries. If this amendment were to be adopted, NIS vessels would be allowed to transport passengers on scheduled services between Norway and foreign ports. However, the trade restriction would still apply for travel between Nordic countries. This amendment would mean that a vessel carrying passengers in scheduled services would be able to be flagged in NIS if operating between (e.g.) Oslo and Kiel, but not if operating between (e.g.) Oslo and Stockholm. Although the objective of the infringement proceedings is the legislation currently in force, the Authority would nevertheless like to note that it does not appear that the proposed amendments would resolve in a satisfactory manner the issues raised by Norway's current situation.

⁹ Translation by the Norwegian Maritime Authority
([https://www.sjofartsdir.no/PageFiles/3267/48%20of%2012%20June%201987%20Act%20relating%20to%20a%20Norwegian%20International%20Ship%20Register%20\(NIS\).pdf](https://www.sjofartsdir.no/PageFiles/3267/48%20of%2012%20June%201987%20Act%20relating%20to%20a%20Norwegian%20International%20Ship%20Register%20(NIS).pdf))

5.1 Differences between NOR and NIS

5.1.1 *Pay and conditions permitted for ships on each register*

One of the fundamental differences between the two registers is the possibility for NIS vessels of employing foreign crew on foreign wage conditions, whereas this is not possible for NOR registered vessels.

The NIS allows employment of foreign seafarers on local or national wages established through collective wage agreements between an employers' federation and a union which organises the seafarers in question. It is the understanding of the Authority that in practice this enables owners of vessels registered in the NIS to pay their crews at lower wage rates or to conclude terms of work which are more favourable for the employer than would be permitted under Norwegian domestic law.

Conversely, for vessels registered in the NOR, the Authority understands that Norwegian employment law is applied to pay and working agreements between shipowners and/or operators, and the crew of the vessels concerned.

5.1.2 *Spheres of operation*

Vessels which are registered in NOR are granted the freedom to operate under the Norwegian flag in all geographical areas. Conversely, vessels registered in NIS are subject to certain limitations in terms of their permitted zone of operations.¹⁰

In this respect, Section 4 of the NIS Act provides that NIS-registered vessels are not permitted to engage in regular scheduled maritime transport services between Norway and foreign ports.

The effect of this provision is that EEA nationals established in the EEA, and EEA nationals established outside of the EEA, who choose to register their vessels in the NIS, will not be permitted to be providers of regular scheduled passenger services between Norway and foreign ports.

In practical terms, this means that bodies falling within the scope of Articles 1(1) and 1(2) of the Regulation, who choose to register in the Norwegian Ship registers and who wish to provide scheduled maritime transport services between Norway and foreign ports and between Nordic countries, must register their vessels in the NOR if they wish to carry out this trade under Norwegian flag.

5.2 Restriction of the freedom to provide services

The key issue in the present instance is whether Section 4 of the NIS Act constitutes a restriction of the freedom to provide services under Article 1 of the Regulation, and, if so, whether it can be justified.

The Norwegian Government has stated, in its letter of 15 June 2014, that there are no rules in the EEA Agreement that harmonise the conditions for ship registration. It takes the view that this is a sovereign prerogative of every State.

The Authority agrees that ship registration is a field which has not been harmonised at EEA level. To this end, the Authority further agrees that there are no rules – either in the

¹⁰ See page 2 of the letter dated 22 May 2015 (Doc. No. 758217).

EEA Agreement, or in Regulation No 4055/86 – which specifically oblige the EFTA States to organise their shipping registers in any particular way. However, the EEA States must exercise their competences in this field in a manner which is in compliance with the Regulation, and in compliance with the general EEA principle of freedom to provide services.

It is settled case-law that the freedom to provide services, as referred to in Article 36 of the EEA Agreement, requires the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where they lawfully provide similar services.¹¹

5.2.1 *Ratione personae* scope of the Regulation

Articles 1(1) and 1(2) of Regulation No 4055/86 establish the scope *ratione personae* of that Regulation, to whom the freedom to provide maritime transport services applies, as follows:

- EEA nationals established in the EEA, and;
- EEA nationals and shipping companies not established in the EEA, who operate vessels registered under EEA flag.

In Case C-83/13 *Fonnship*,¹² the Court of Justice addressed the question whether EEA-established nationals can rely on the freedom to provide maritime services under Article 1(1) of the Regulation whenever they use a vessel which is registered in another state outside the EU or the EEA in order to provide their maritime transport services.

The Court concluded that EEA nationals established in the EEA are a category of persons which *in itself* displays a sufficiently close connection to the EEA to be included in the scope *ratione personae* of the Regulation, regardless of the flag flown by their vessels.¹³

As regards EEA nationals established outside the EEA and shipping companies controlled by EEA nationals established outside the EEA, the Regulation, as adapted, sets out a requirement that there is a connection “*if their vessels are registered in that [State that is a party to the EEA Agreement] in accordance with its legislation*” in Article 1(2) of Regulation No 4055/86. This excludes from the freedom to provide services nationals of an EEA State who operate from an establishment situated in a third country if their vessels do not fly the flag of an EEA State.

As regards the substantive scope of Regulation No 4055/86, the wording of Article 1 of the Regulation makes clear that the Regulation applies to maritime transport services between EEA States of the kind at issue in this case (i.e. scheduled transport of passengers between Norway and foreign ports).

Article 1 of the Regulation is a legislative provision which gives effect to the principle of the freedom to provide services, as established in Article 36 of the EEA Agreement (and Article 59 TFEU) in the field of maritime transport between EEA States.

¹¹ See, *inter alia*, Case C-266/96 *Corsica Ferries France*, EU:C:1998:306, para 56; Joined Cases C-369/96 and C-376/96 *Arblade and Others*, EU:C:1999:575, para 33; and Case C-205/99 *Analir and Others*, EU:C:2001:107, para 21.

¹² Case C-83/13 *Fonnship A/S v Svenska Transportarbetareförbundet* EU:C:2014:2053.

¹³ The CJEU in *Fonnship* also referred to Case C-18/93 *Corsica Ferries*, cited above, para 29.

In this respect, the Court of Justice of the European Union has held that Article 1(1) of the Regulation defines the beneficiaries of freedom to provide maritime transport services between Member States and between Member States and third countries in terms which are substantially the same as those in Article 59 TFEU.¹⁴

Pursuant to that rule, the freedom to provide services may also be relied on by an undertaking as against the State in which it is established, if the services are provided for persons established in another Member State.¹⁵

Whenever the beneficiary fulfils the requirements *ratione personae* of the freedom to provide maritime transport services of Articles 1(1) or 1 (2) of Regulation 4055/86, he/she will be entitled to rely on the freedom to provide maritime transport services, which encompasses both intra-community shipping services and third-country traffic.

It is not disputed that there are no EEA rules harmonising the conditions of registration of vessels, and the issue of access to the Norwegian registers does not raise any concerns at this point in time. It is, finally, also not contested that potential beneficiaries of the freedom to provide maritime transport services can choose the NOR Register over the NIS Register, having thus, unrestricted freedom to ply all trades under the Norwegian flag¹⁶.

Notwithstanding the lack of harmonisation at EEA level of ship registration legislation, the choice of register is an element that confers rights and obligations to its owner and/or its operator. When a vessel becomes Norwegian, being registered either in NOR or NIS, it will be subject to certain rights and obligations following the choice of register.

Norway has chosen a system of two registers in order to organise its flag. Nonetheless, it is the view of the Authority that even when two registers exist under the same flag, both registers must be subject to the fundamental principles of the EEA Agreement, in this case, the freedom to provide services. Thus, Article 1(1) of the Regulation cannot be interpreted so as to allow the existence of restrictions of freedom to provide services in one of the registers merely because the other one happens to be fully liberalised. Both registers must indeed fully comply with the provisions of Regulation 4055/86.

5.2.2 Denial of market access

The view of the Authority is that Regulation 4055/86 requires that international and inter-community trade of EEA States is to be opened to vessels of any flag for the subjects falling within the *ratione personae* (that is nationals established in the EEA and EEA-nationals established outside the EEA in case their choice of flag is an EEA flag). Thus, the imposition of any restrictions on the freedom to provide services falling within the scope of Regulation 4055/86 is contrary to EEA law.

The Authority's view is that, in accordance with the *Fonnskip case* and also *Corsica Ferries*, Regulation 4055/86 has to be understood as follows:

¹⁴ Case C-381/93 *Commission v France*, EU:C:1994:370, para 10, and Joined Cases C-430/99 and C-431/99 *Inspecteur van de Belastingdienst Douane, Rotterdam v Sea-Land Service and Nedlloyd Lijnen*, EU:C:2002:364.

¹⁵ See, inter alia, Case C-381/93 *Commission v France*, cited above, para 14; and Case C-224/97 *Ciola* EU:C:1999:212, para 11.

¹⁶ Letter of Norway dated 22 May 2015.

- any EEA State acting as flag State, but also any other flag State, is prevented from imposing trade restrictions on the freedom to provide maritime transport services, as defined in Article 1(4) of the Regulation, of the subjects mentioned in Articles 1(1) of the Regulation, that is, EEA nationals or shipping companies established in the EEA, and
- any EEA States acting as flag States may not restrict the freedom to provide maritime transport services, as defined in Article 1(4) of the Regulation, of EEA nationals or shipping companies controlled by EEA nationals established outside of the EEA, whenever these subjects choose to operate under an EEA flag.

Thus, a general trade restriction imposed on NIS registered vessels when it comes to the carriage of passengers in scheduled routes between Norwegian and foreign ports and between Nordic ports, is contrary to the principle of freedom to provide maritime transport services.

5.2.3 *Partitioning of the market*

In the alternative, the Authority takes the view that the Norwegian system of shipping registers has produced a situation of market partitioning in the EEA. The Authority considers that this amounts to a restriction on the freedom to provide services which should be enjoyed by persons falling within the scope of Regulation No 4055/86.

To illustrate this alternative line of reasoning, the Norwegian Government is invited to consider the following circumstances:

- a) where the owner of a vessel which has been providing regular scheduled passenger services between two foreign EEA ports (outside Norway but within the EEA) wishes to use that vessel to provide transport of cargo or passengers between Norway and a non-Norwegian port within the EEA; and,
- b) where the owner of a vessel which has been providing regular scheduled passenger services between two foreign EEA ports (outside of Norway but within the EEA), wishes to use that vessel to provide regular scheduled passenger ferry services between two ports in the Nordic states.

Each of these circumstances involves a change in the States in which the services are provided. The Authority takes the view that *persons who wish to effect such a change would be exercising their freedom to provide services*, as established under the EEA Agreement and under the Regulation.

In Norway, if the owner of a vessel registered in the NIS wishes to provide services falling within the scope of the exclusions set out in Section 3 of Regulation 596 of 1993, the vessel must be taken out of the NIS and re-registered in the NOR.

Accordingly, if the owners of vessels registered in the NIS wish to carry out the changes of activity described in examples (a) and (b), they must also re-register their vessels. Such a change of activity falls within the prohibition set out in the NIS, so vessels registered therein must be re-registered in the NOR.

The Authority takes the view that the Norwegian system produces a restriction on vessel owners from exercising their freedom to provide services by (for example) discouraging a NIS-registered ferry operator who had been operating regular scheduled passenger ferry

services between Poland and Germany, from stopping those services and instead using the vessel to offer the same type of services between Norway and Denmark.

In the assessment of the Authority, these requirements must be considered as restrictions on the freedom to provide services, as they produce a situation in which the internal market is artificially partitioned by the effect of the Norwegian legislation on those who seek to exercise their freedom to provide services.¹⁷

This is particularly the case in situation (b), where the Norwegian legislation singles out ferry routes to the Nordic countries, as distinct from ferry routes to other EEA States.

Moreover, a requirement to re-register implies having to expend time and energy on the process of re-registration. Although this process may not be at all onerous, it is sufficient that it exists for it to be considered as a restriction.¹⁸

Of yet more significance for shipowners is the fact that, as designed, the NIS register carries with it a number of advantages; such as lower crewing costs and conditions, of which a shipowner may want to take advantage. This means that ships which want to trade in the restricted area must adopt a particular business model, or must change their business model to one which is compatible with re-registration under NOR.

In this light, the argument advanced by the Norwegian Government, that the owner of a vessel could choose to be flagged to the NOR from the start, is not an argument which carries significant persuasive force.

5.3 Arguments advanced by the Norwegian Government

The Norwegian Government has advanced a number of arguments in defence of its system of ship registers, none of which has dissipated the Authority's concerns.

5.3.1 Pre-existing system

The Norwegian Government has argued that the trading area limitation did not raise questions during the negotiations of the EEA Agreement, and nor has it been contested since that agreement's entry into force.

The Authority cannot accept this line of argument. The absence of action to date does not prevent the Authority from taking action, and nor does it constitute evidence that a situation such as the present either does, or does not, amount to a restriction.

5.3.2 Similar systems in France

The Norwegian Government has drawn the Authority's attention to the existence of a similar system of shipping registers in France; where vessels which are registered within the French international shipping register (the *Registre International Français*, "RIF") are also subject to a territorial limitation. The Norwegian Government has likewise emphasised that the French system of shipping registers has not been made the subject of any action on the part of the Commission.

¹⁷ See, further and by analogy, the CJEU's comments on partitioning of markets in *Case 78/70 Deutsche Grammophon Gesellschaft*, EU:C:1971:59, para 12.

¹⁸ See for example, the comments of AG Jääskinen in *Case C-202/11 Anton Las*, ECLI:EU:C:2012:456: the approach of the Court of Justice has been to consider minimal limitations as constituting a restriction, and then taking their effects into account in the next stage of the analysis: justification and in particular proportionality.

Regarding Regulation No 4055/86, the Authority would suggest as a matter of logic that the French system may *also* not be compliant with the requirements of the Regulation. Such a deficiency does not provide a justification for Norway's similar lack of compliance¹⁹.

Moreover, in this respect, the Authority notes that the Commission retains complete discretion over which cases it chooses to take action upon and an absence of action on the part of the Commission for a similar system does not serve to establish any kind of presumption that the Norwegian system is in compliance with the requirements of EEA law.

In respect of the Authority's alternative argument based on market partitioning, the Authority notes that the system of two shipping registers in France differs from Norway in one important respect: vessels flagged to the RIF are subject to a territorial limitation which is *applicable to the entire EU*.

Unlike the Norwegian NIS, the RIF's territorial limitation does not distinguish different EU states, or between different parts of the EU. It therefore follows that it would not amount to a partitioning of the EEA market in the same way that the NIS does, as outlined above.

5.3.3 *Norway's assertion of free choice of register*

The Norwegian Government has advanced the argument, in its letter of 15 June 2014 and in subsequent correspondence, that since Norwegian nationals and nationals of any other EEA State are free to choose whether to register their vessels in NOR and NIS, and there is no obligation to register their vessels in the NIS-register, Norwegian law fully ensures freedom to provide services. Furthermore, the Norwegian Government has stated that the trading area limitations are open and transparent for the shipping companies and other users and they are an element to consider in the choice of register.

For the reasons given above, the Authority cannot accept this line of reasoning. It does not address the Authority's core contentions: (i) that Norway has to ensure that the freedom to provide maritime services is enjoyed by the beneficiaries of Articles 1(1) and 1(2) of the Regulation independently on their choice of register (NOR or NIS); (ii) in the alternative that the system in place in Norway produces a restriction on the freedom to provide services currently enjoyed by shipowners in that it obliges shipowners whose vessels are registered in NIS to re-register in NOR if they wish to provide services in areas falling into the territorial exclusions applicable to NIS-registered ships.

5.4 **Conclusion on restriction of freedom to provide services**

Accordingly, the Authority must conclude, at this point in time and on the basis of the information and arguments provided by the Norwegian Government thus far, that Norwegian legislation, and in particular Section 4 of the NIS Act imposes a restriction on the exercise of the freedom to provide certain intra-Community and third-country traffic maritime transport services for EEA nationals established in the EEA or outside the EEA who choose to register their vessels in the NIS and who must re-register in the NOR in order to undertake activities within the territorial limitations set out in the NIS Act.

¹⁹ Case E-1/03 *EFTA Surveillance Authority v The Republic of Iceland* [2003] EFTA Ct Rep 143, para 33.

Although such operators could re-register under the NOR register, the requirement to change register and the conditions of operation being different in both registers acts as a dissuasive element amounting to a restriction.

The Authority considers that the territorial limitations set out in the NIS register amount to market partitioning within the EEA States. As such, they must be considered to be restrictions on the freedom to provide services within the meaning of Article 36 of the EEA Agreement and within the meaning of Regulation 4055/86.

5.5 Justification of restrictions

Article 33 of the EEA Agreement permits EFTA States to restrict the fundamental principle of the freedom to provide services on grounds of public policy, public security or public health. Moreover, restrictions may be justified on overriding reasons in the public interest. Any restriction also has to be appropriate and proportionate.

The Norwegian Government has limited itself to expressing the view, in its letter of 14 June 2014 and in its subsequent letter of 22 May 2015 that the trading area limitations applying to NIS ships does not constitute a restriction of the freedom to provide maritime transport services. Accordingly, Norway has at present advanced no arguments entering into considerations of possible justifications of the restrictions.

At the present time, the Authority has not been able to identify any grounds on which the measure could be regarded as being justified. Nonetheless, the Authority would welcome any clarification by the Norwegian Government on whether the trade limitation (i) serves any overriding reasons in the public interest, (ii) is suitable for securing the attainment of the public interest objective and (iii) does not go beyond what is necessary in order to attain it.

5.6 Establishment of several national shipping registers - compatibility

For the sake of completeness, the Authority seeks to clarify its view that Article 1(1) of Regulation No 4055/86 does not, *prima facie*, preclude an EFTA State from establishing several national ship registers.

However the Authority does not consider that the Contracting States may restrict the fundamental freedom to provide services in the EEA by establishing different ship registers, one fully liberalised and one only partially liberalised (in the sense of containing a prohibition to provide services in an area within the EEA). The Authority takes the view that such a system, as described above, amounts to a restriction which is *prima facie* incompatible with the freedom to provide services to intra-Community maritime transport provided for in Regulation No 4055/86.

The Norwegian Government has argued in its letter of 15 June 2014 that France has two registers, and a system of registration which is similar to that found in Norway. It has also drawn the attention of the Authority to the lack of any action on the part of the Commission of the European Union concerning this situation. For the sake of completeness, the Authority reiterates the point made above, to the effect that this is not relevant to the present situation.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force an unjustified limitation of trade imposed on ships registered in the Norwegian International Ship Register set out in Section 4 of the NIS Act, Norway has failed to fulfil its obligations arising from the Act incorporated at point 53 of Annex XIII to the EEA Agreement (*Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, as amended*) and from Article 36 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Helga Jónsdóttir
College Member

This document has been electronically signed by Helga Jonsdottir on 09/02/2016