

Brussels, 3 October 2012
Case No: 72009
Event No: 638411
Dec. No: 367/12/COL

EFTA SURVEILLANCE
AUTHORITY

Royal Ministry of the Environment
Myntgaten 2
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the rules on the use of personal watercrafts on Norwegian waters

1 Introduction

1. On 2 March 2011, Norway notified¹ to the EFTA Surveillance Authority (hereafter “the Authority”) a draft regulation relating to the use of personal watercrafts, under the information procedure laid down in the Act referred to at point 1 of Chapter XIX of Annex II to the Agreement on the European Economic Area (*Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulation*, as amended). By *College Decision No 169/11/COL of 27 May 2011 on a Comment on the Norwegian Draft Technical Regulation Notification 2011/9006/N – Personal watercrafts*, the Authority decided to issue comments to Norway.
2. In those comments, sent to Norway by letter of 1 June 2011², the Authority highlighted numerous problems with regard to the proposed system, which is based on a general ban on the use of water scooters, with limited exceptions, introduced by the Norwegian Recreational Boats Act (*lov av 26. juni 1998 nr. 47 om fritids- og småbåter*, hereafter “Recreational Boats Act”) and on the implementing measures in the form of the proposed draft regulation.
3. An amended version of the draft regulation was subsequently presented at the package meeting between the representatives of the Norwegian Government and the Authority in Oslo in November 2011, at which the latter expressed concerns as to the compatibility of the proposed rules with the EEA law. On 2 December 2011, the Authority sent a letter to Norway with a list of detailed questions concerning the draft regulation.³ On 8 February 2012, the Authority received a reply to the letter and a further amended version of the draft regulation.⁴

¹ Notification no 2011/9006/N.

² Event no 598403.

³ Event no 616200.

⁴ Your reference: 200502412-, our reference: Event no 624198.

4. On 22 June 2012, Norway adopted the *Regulation No 567 concerning the use of personal watercrafts (forskrift av 22. juni 2012 nr. 567 om bruk av vannscooter og lignende*, hereafter “Regulation No 567/2012”). It entered into force on 1 July 2012. It should be noted that of the comments made by the Authority in the letter of 1 June 2011 and by the representatives of the Authority at the meeting in November 2011, only comments on minor issues were taken into account in the adopted Regulation.
5. The Authority considers that by maintaining in force a general ban on the use of water scooters with limited exceptions, such as laid down in Sections 40 and 40a of the *Recreational Boats Act No 47 of 7 June 1998* and in the *Regulation No 567 of 22 June 2012 concerning the use of personal watercrafts*, Norway is in breach of Article 11 of the EEA Agreement.⁵

2 Relevant national law

2.1. Recreational Boats Act

6. The use of personal watercrafts in Norway is governed by Sections 40 and 40a of the Recreational Boats Act. According to the fourth paragraph of its Section 40, the aim of the provisions is to protect against the risks for the traffic on the sea or for the general public, of inconveniences related to noise and other disturbances, and, moreover, against more than insignificant risks of harm to animals and/ or plants.
7. According to the third paragraph of Section 40, the use of personal watercrafts and similar motorized watercrafts constructed to carry people, which according to common usage cannot be called “boats” (hereafter called “personal watercrafts”), is prohibited.
8. However, under the fourth paragraph of Section 40, the local governments may decide to adopt full or partial exemptions from the prohibition within limited areas, provided that the use of personal watercrafts in these areas does not involve any danger or disadvantage in terms of noise or other disturbances or harm to animals and/or plants. Furthermore, the fifth paragraph of Section 40 provides an exemption from the prohibition with regard to the use of personal watercrafts in connection with police, rescue and ambulance services, control and inspection services, military training, movements and transport as well as marine archaeological and other scientific research.
9. According to Section 40a any intentional or negligent violation of the provisions of the third paragraph of Section 40 or of any implementing provisions based on them, as well as any contribution thereto, shall be punished by fines.

2.2 Regulation No 567/2012

2.2.1. The procedure for granting exemptions

⁵ The Authority recalls that on 15 July 2009, it sent a letter of formal notice to Norway concluding that the then applicable measures were not compatible with Article 11 EEA.

10. Regulation No 567/2012 is an implementing measure pursuant to the Recreational Boats Act. As such, it pursues the aims listed in the fourth paragraph of Section 40 of this Act; additionally, in the second paragraph of its Section 3, Regulation No 567/2012 refers to the protection against “*more than insignificant danger or inconvenience to environment or to safety*”.
11. Regulation No 567/2012 outlines a procedure for establishing areas in which personal watercrafts can be used. It distinguishes two ways that the local governments can grant exemptions to the existing prohibition:
 - a) on application – the application can be filed by anyone, and must contain information on where and, if possible, when, the applicant intends to use the personal watercraft. Local governments are obliged to consider applications for exemptions from the ban and shall grant them if the concerned area is not referred to in Section 3 of the Regulation No 567/2012,
 - b) on their own initiative – local governments may grant exemptions on their own initiative if the concerned area is not referred to in Section 3 of the Regulation No 567/2012.
12. Decisions as to whether to grant exemptions shall be based on the precautionary principle referred to in Section 9 of the Act on Biodiversity⁶ and on the principle of simplification in designating the limits of the areas.⁷
13. Pursuant to the third paragraph of Section 2 the local governments must consider granting exemptions for the whole year unless the application refers to a specific time-frame.
14. According to the fourth paragraph of Section 3 the local governments may establish precise conditions and limit the time periods in which the personal watercrafts can be used on the basis of environmental or/and safety considerations.

2.2.2. The restricted areas

15. Regulation No 567/2012 enumerates a large number of areas which cannot be designated for use of personal watercrafts. According to the first paragraph of Section 3, local governments cannot allow the use of personal watercrafts in highlighted areas on the map annexed to the Regulation (“coloured areas”).
16. Moreover, local governments cannot allow the use of personal watercrafts outside the coloured areas if, in their view, such use would represent “*more than insignificant danger or inconvenience to environment and safety*”. They cannot allow such use in one of the areas listed in letters a) to h) in the third paragraph of Section 3. Additionally, the local governments cannot allow the use in areas situated within 500 meters of the areas listed in letters a) to f).
17. If it is required in order to reach an area that is exempted from the ban, local governments may allow the use of personal watercrafts in a corridor passing through a coloured area.

⁶Act of 19 June 2009 no. 100 on Biodiversity (*lov av 19. juni 2009 nr. 100 om forvaltning av naturens mangfold (naturmangfoldloven)*).

⁷ Pursuant to the second paragraph of Section 2 of the Regulation No 567/2012.

18. The Norwegian Government explains in its letter of 8 February 2012 that the list of areas in the third paragraph of Section 3 of the Regulation No 567/2012 contains the same considerations as the coloured areas annexed thereto. The letter provides also a detailed explanation of each coloured area.

2.2.3. Supervision and penalties

19. There is a system of supervision and penalties foreseen in Section 4 for intentionally or negligently violating the provisions of a regulation issued by a local government allowing the use of personal watercrafts, or for contributing to such violation.

2.2.4. Revision and evaluation

20. Section 5 foresees a procedure for regular evaluations of the Regulation No 567/2012 and its revision if necessary. As the Norwegian Government explained in its letter of 8 February 2012, any changes to the restricted areas on the map are amendments to the Regulation.
21. Furthermore, the Norwegian Government stated that it plans a revision of the map in the course of this year in order, *inter alia*, to include further restricted zones, namely with regard to the inland waterways. An update of the current coloured areas with regard to the coastal waters will also be considered.
22. It is also planned to add coloured areas marking different speed limits determined in local regulations.

3 Relevant EEA law

23. Article 11 of the EEA Agreement prohibits quantitative restrictions on imports and all measures having equivalent effect. It is settled case law of the Court of Justice of the European Union (hereafter “the Court of Justice”), that all trading rules enacted by the Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect and thus are in breach of the principle of free movement of goods.⁸
24. Regarding the restrictions on use, the Court of Justice has in recent years delivered two judgments concerning this issue, namely *Commission v Italy* and *Mickelsson and Roos*.
25. In the first of these cases the Court considered that

*“a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State”.*⁹

⁸ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5; Case E-5/98 *Fagún* [1999] EFTA Ct. Rep. 51, paragraph 29; Case C-110/05 *Commission v Italy* [2009] ECR I-0519, paragraph 33.

⁹ *Commission v Italy*, cited above, paragraph 56.

Accordingly, the restriction was caught by Article 34 TFEU (corresponding to Article 11 of the EEA Agreement).

26. In *Mickelsson and Roos* the Court observed:

*“(…)…where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article [36 TFEU] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34 TFEU]”.*¹⁰

On this basis the Court of Justice concluded that the measure in question was caught by Article 34 TFEU.

27. Measures that fall foul of Article 11 of the EEA Agreement can be maintained by the Contracting Parties if they are justified on one of the public-interest grounds enumerated in Article 13 of the EEA Agreement or by mandatory requirements developed in the case law of the EFTA Court and the Court of Justice.¹¹
28. The Court of Justice has established that restrictions or a prohibition on the use of personal watercrafts can be justified, *inter alia*, with reference to the protection of health and life of humans, animals or plants, as long as the restrictions are suitable, necessary and proportionate to the aim pursued.¹²
29. It is important to bear in mind that a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.¹³
30. The burden of proof when invoking exemptions based on Article 13 and the mandatory requirements rests with the EEA/EFTA State that invokes them.¹⁴ The EFTA Court has furthermore clarified that risk assessments have to be performed in order to establish a link between the measure taken and the risk with which it is associated.¹⁵

¹⁰ Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 28.

¹¹ Case 120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8; Case E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 28; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 29; Case C-110/05 *Commission v Italy*, cited above, paragraph 59.

¹² *Mickelsson and Roos*, cited above, paragraph 31-32.

¹³ Case E-3/00 *EFTA Surveillance Authority v Norway* [2000-2001] EFTA Ct. Rep. 73, paragraph 26; Case C-137/09 *Josemans* [2010] ECR I-13019, paragraph 70; Case C-28/09 *Commission v Austria*, judgment of 21 December 2011, not yet reported, paragraph 126.

¹⁴ Case 251/78 *Denkavit Futtermittel v Minister of Agriculture* [1979] ECR 3369, paragraph 24; Case C-286/07 *Commission v Grand Duchy of Luxemburg* [2008] ECR I-63, paragraph 37.

¹⁵ *EFTA Surveillance Authority v Norway*, cited above, paragraph 38.

4 The Authority's assessment

31. Regulation No 567/2012 is based on the Recreational Boats Act which provides for a general ban on the use of personal watercrafts, with limited exceptions. The Regulation introduces more detailed rules regarding the procedure of designation of the areas open to personal watercrafts, which is to be administered by local governments. The Authority has identified several problems with regard to the system.
32. Firstly, according to the system of exemptions, local governments are, in principle, not obliged to designate all the areas within their competence where the use of personal watercrafts does not pose any risk to the objectives pursued by the legislation in question. The obligation imposed on local governments to grant exemptions only relates to areas referred to in applications received, provided that they are not within one of the exclusion zones referred to in Section 3 of the Regulation No 567/2012. Moreover, where the application contains information about the period in which the applicant would like to use the vehicle, local government is not obliged to consider opening the area beyond that period.
33. Local governments may also designate areas on their own initiative; however, they have no obligation to do so.
34. In the view of the Authority and following the case law of the Court of Justice, the failure by Norway to designate, in a timely fashion, all areas where personal watercrafts may potentially be used, and where such use is not liable to give rise to risks, constitutes a breach of Articles 11 and 13 of the EEA Agreement.¹⁶
35. Whereas it cannot be excluded altogether that the local authorities in the present case would manage to designate all the relevant areas on their own initiative or on application in a timely fashion, and for the maximum period possible under environmental and safety considerations, this does seem highly improbable.
36. Secondly, Section 3 of Regulation No 567/2012 excludes large areas, of different kinds, from the possibility of being designated for the use of personal watercrafts.
37. When considering designation of areas, on application or on their own initiative, local governments first have to verify whether they are situated in one of the exclusion zones highlighted on the map attached to Regulation No 567/2012. The zones on the map have been established on the basis of environmental and safety considerations enumerated in letters a) to h) of third paragraph of Section 3. If the question is answered in the negative, the local governments have to double-check and consider whether the area in question falls under one of the categories enumerated in letters a) to h) of third paragraph of Section 3. Finally, they also need to consider that the use of personal watercrafts cannot be allowed in areas within 500 meters of the areas listed in letters a) to f) of third paragraph of Section 3.
38. The exclusion zones from the third paragraph of Section 3 include certain areas where the protected interest appears clearly discernable, such as areas where a high

¹⁶ Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 33; *Mickelsson and Roos*, cited above, paragraph 44.

level of environmental protection is necessary. However, the zones also include areas where the protected interest is less apparent. Examples include the exclusion of the entire immediate coast line, important areas for outdoor life (letter b), areas for holiday cottages, residential areas and recreational areas (letter c), fairways (letter g) and also areas that are within 1 km from the so-called interference free areas (letter f) considering that the buffer zone of 500m referred to in fourth paragraph would also apply to such areas.

39. In sum, there are considerable parts of the coast where Regulation No 567/2012 provides very little, or virtually no possibility to open for the use of water scooters. Among other places, illustrative examples of this may be found in the Oslofjord.
40. It should be noted that the Court of Justice has found that the use of personal watercrafts must only be prohibited in areas where it is liable to give rise to risks protected by one of the mandatory requirements. Restrictions on the use must be preceded by risk assessments establishing the link between the use and the realization of a risk.¹⁷
41. Furthermore, the burden of proof on the Norwegian Government is particularly high in areas where use of other private vessels is allowed without restrictions. In its letter of 8 February 2012, the Norwegian Government explains the lack of consistency in the proposed rules on the basis of the significant differences in the way personal watercrafts are usually driven as compared to other vessels (sharp turns, quick accelerations, high speed, criss-cross driving and jumps). In this context, it is the view of the Authority that the introduction of less trade restrictive measures than prohibition in certain areas, such as speed limits, decibel limits, obligation to drive in straight line, *etc.*, would constitute more proportionate measures to attain the aim pursued.
42. Finally, in the view of the Authority, the system of supervision and penalties which allows for the possibility of imposing criminal sanctions on persons using personal watercrafts in non-designated areas in which such use does not pose any risk to environment and/or safety, is incompatible with the jurisprudence of the Court of Justice.¹⁸ In *Urbán* the Court held that:

*“[...] measures imposing penalties permitted under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.*¹⁹

43. Pursuant to the provisions of Sections 40 and 40a of the Norwegian law on recreational and small vessels, anyone using a personal watercraft in an area where such use is forbidden, will be subject to a fine. This is the case regardless of whether the use of the personal watercraft is likely to give rise to a risk in that area or not. Thus, if local governments fail to designate all areas where the use of

¹⁷ Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paragraph 48.

¹⁸ Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 67; Case C-188/09 *Profaktor Kulesza, Frankowski, Józwiak, Orłowski* [2010] ECR I-7639, paragraph 29; Case C-210/10 *Urbán*, judgment of 9 February 2012, not yet reported, paragraph 23.

¹⁹ *Urbán*, cited above, paragraph 24.

personal watercrafts is not liable to give rise to risks, the use of personal watercrafts will also be prohibited in areas where their use does not pose any specific risk.

44. Finally, the Authority draws the attention of the Norwegian authorities to the fact that any criminal proceedings brought against users of a personal watercraft on the basis of the Norwegian legislation described above are unsound.
45. Although in principle criminal legislation is a matter for which the States are responsible, the Court of Justice has consistently held that EU law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by EU law.²⁰
46. The case law also makes clear that where a State lays down legislation or establishes a system which is incompatible with EU or EEA law, an infringement of it by an economic operator cannot be penalised by criminal penalties.²¹
47. Accordingly, the Authority considers that the current Norwegian rules on the use of personal watercrafts constitute measures having equivalent effect under Article 11 of the EEA Agreement. With regard to the justification grounds, it should be noted that the protection of health and life of humans, animals and plants are public-interest grounds referred to in Article 13 of the EEA Agreement and that environmental protection is recognized in case law as one of the mandatory requirements.²² However, the measures invoked in the present case are applied in an inconsistent way with regard to different types of vessels and are therefore not suitable; moreover, they go beyond what is necessary to attain the aim pursued and thus they are disproportionate.

5 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force a general ban on the use of water scooters with limited exceptions, such as laid down in Sections 40 and 40a of the *Recreational Boats Act No 47 of 26 June 1998* and in the *Regulation No 567 of 22 June 2012 concerning the use of personal watercrafts*, Norway has failed to fulfil its obligations arising from Article 11 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 invites the Norwegian Government to submit its observations on the content of this letter *within two months* following receipt thereof.

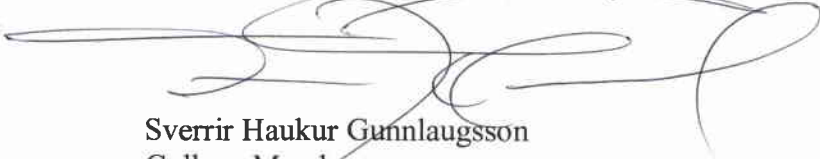
After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court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

²⁰ Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 17; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 68.

²¹ Case 5/83 *Rienks* [1983] ECR 4233, paragraphs 10 and 11; *Placanica and Others*, cited above, paragraph 69, Case C-347/09 *Dickinger and Ömer*, judgment of 15 September 2011, not yet reported, paragraph 43.

²² *Mickelsson and Roos*, cited above, paragraph 32; *Commission v Austria*, cited above, paragraph 125.

For the EFTA Surveillance Authority

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the left.

Sverrir Haukur Gunnlaugsson
College Member