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EFTA SURVEILLANCE AUTHORITY DECISION
of 10 July 2002
on a special refund scheme for ferries registered in the Ordinary Norwegian Shipping Register (NOR) and engaged in foreign trade
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

HAVING REGARD TO the Agreement on the European Economic Area[1], in particular to Articles 61 to 63 and to Protocol 26 of the Agreement,

HAVING REGARD TO the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice[2], in particular to Article 24 and Article 1 of Protocol 3 thereof,

HAVING REGARD TO the Procedural and Substantive Rules in the Field of State Aid[3], in particular Chapter 24A[4] thereof,

WHEREAS:

I. FACTS

A. Procedure

By letter from the Ministry of Trade and Industry dated 26 April 2002, received and registered by the Authority on 3 May 2002 (Doc. No. 02-3489-A), the Norwegian Government notified the above-mentioned aid scheme in accordance with Article 1(3) of Protocol 3 to the Surveillance and Court Agreement. By letter dated 16 May 2002 (Doc. No. 02-3653-D), the Authority acknowledged receipt of the notification.

By letter dated 31 May 2002 (Doc. No. 02-4090-D), the Authority requested additional information, which was submitted by the Norwegian Government by letter from the Ministry of Trade and Industry dated 6 June 2002, received and registered by the Authority on 11 June 2002 (Doc. No. 02-4402-A).

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[1] Hereinafter referred to as the EEA Agreement.
[2] Hereinafter referred to as the Surveillance and Court Agreement.
[3] 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 1994 L 231, EEA Supplements 03.09.94 No. 32, last amended by the Authority's Decision No. 370/01/COL of 28 November 2001, not yet published; hereafter referred to as the 'Authority's State Aid Guidelines'.
[4] Chapter 24A on Aid to maritime transport, hereinafter referred to as the 'Maritime Guidelines'.

B. Description of the special refund scheme

Objectives and introduction of special refund scheme

According to the Norwegian authorities, Norwegian seafaring personnel is exposed to an increasing competition from foreign seafarers from low cost countries in Asia and Eastern Europe, but increasingly also from other EEA countries enjoying more generous tax and refund schemes.

According to the Norwegian authorities, the transportation activity now conducted by companies operating ferries in foreign trade might in a situation without an expanded Norwegian scheme for refunding of taxes and social security contributions be gradually taken over by foreign competitors with a considerably lower fiscal cost level. However, in the Norwegian Government's opinion, the ferry companies engaged in foreign trade would most likely relocate their activity by re-flagging their vessels, replacing the crew and in addition moving whole or parts of their onshore operations abroad in order to be able to compete on equal terms.

According to the Norwegian authorities, the ferry companies and their employees are considered an important part of the maritime cluster in Norway. The Norwegian authorities, therefore, considered it important to maintain the employment opportunities on board in order to obtain the relevant competence and experience.

In the context of the presentation of the revised State Budget for 2001 (cf. *St.prp. nr. 84 (2000-2001)*), the Government announced that it would present a proposal with a view to ensuring that the Norwegian ferry companies were given the same external conditions as its competitors in the other Nordic countries. Following this announcement, the Norwegian Government proposed as part of the State Budget for 2002 to introduce a special tax and social security contribution refund scheme for ferries engaged in foreign trade and registered in the ordinary Norwegian shipping register ("*Norsk ordinært skipsregister*", NOR) (St.prp. nr. 1 (2001-2002), Chapter 909, post 71 "*Tilskudd til fergerederier i utenriksfart i NOR*").

The objectives pursued by the introduction of the special refund scheme are to:

- Prevent flagging out of ferries in foreign trade registered in NOR,
- maintain the employment on these ferries, and
- give Norwegian ferry companies a financial framework which is harmonized with the conditions in other countries.

The new scheme will partly replace the existing refund scheme, which was approved by the Authority in 1998.[5] The scope of the special refund scheme is limited to ferries engaged in foreign trade and registered in NOR[6]. The existing scheme, on the other hand, covers all ships of at least 100 GT used for transportation (including cargo ships, passenger ships, tugs and ships used for transportation in petroleum activity),

[5] Authority's decision of 1 July 1998, Dec. No. 164/98, SAM 030.97.001.

[6] It should be recalled that the Authority's decision approving the fiscal measures in the maritime sector in 1998 also covered a special refund scheme for NIS-ships. Since the Norwegian International Shipping Register (NIS) is not open to ferries operating within the Nordic area, NIS-registered vessels are not benefiting from the notified special refund scheme.

irrespective of whether or not they are engaged in domestic or international trade and irrespective of whether they are registered in NOR or NIS (Norwegian International Shipping Register, "*Norsk Internationalt Skipsregister*"). The existing refund scheme will continue to be applied for those vessels not falling within the scope of the special refund scheme. In one respect, the scope of the new scheme is broader, since it provides for refund concerning all employees on board, whereas the existing scheme does not cover certain categories of employees, namely passenger attendants.

Refund mechanism under the special refund scheme

The notified scheme will be administered by the Norwegian Maritime Directorate. The scheme is based on the annual budgetary allocation as well as rules for the existing refund scheme, as adopted by the Ministry of Trade and Industry on 1 July 1998 ("*Regelverk for forvaltning av tilskudd til sysselsetting av sjøfolk*"). In addition, the Maritime Directorate will issue guidelines and application forms for the special refund scheme. These guidelines will be based on the current guidelines applicable to the existing refund scheme ("*Refusjonsordning for å sikre sysselsetting av norske sjøfolk – generell veiledning 2002*"), subject to certain adaptations. These adaptations will be based on additional requirements outlined in a letter from the Ministry of Trade and Industry to the Maritime Directorate (so-called "*tildelingsbrev*").

According to the relevant rules, shipping companies are entitled to receive refunds with respect to seafarers on Norwegian ships. The rules further stipulate which categories of seafarers and which categories of ships may benefit from the refund scheme.

Covered by the refund scheme are income tax and social security contributions paid by seafarers who are liable for taxation in Norway, who are eligible for the seafarers' tax deduction and whose wages are reported to the pension scheme for seafarers ("*Pensjonstrygden for sjømenn*"). Social security contributions levied on employers are also covered by the refund scheme.

Refunds are not to be granted with respect to employees on ships whose operation qualifies for other public subsidies. In addition, and based on the letter from the Ministry of Trade and Industry to the Maritime Directorate, ships coming under the special refund scheme are only those vessels which are engaged in all year traffic on a scheduled regular basis. Furthermore, the Norwegian authorities considered it to be necessary that the scheme is limited to ferries that provide a useful transport capacity and standard, in order not to stimulate establishment of new routes serving only recreational and alternative shopping needs.

The income tax and social security contributions for the employee are deducted from his gross salary and paid by the employer together with the employer's part of the social security contributions to the tax authorities every second month. The amounts are reported on the 8 March and paid by 15 March for the period January/February by the employer to the tax authorities and likewise in next months.

The companies eligible under the scheme then have to submit to the Norwegian Maritime Directorate an application for the refund covering the respective two-months periods including a copy of the report on payment to the pension scheme for seafarers. Application forms shall be forwarded to the Maritime Directorate by the same date as the bi-monthly tax and social security payments are due. Refunding will normally be made at the latest 1-2 months upon receipt, after processing of the applications by the Maritime Directorate.

Refunds will cover the seafarers' income tax and social security contributions as well as the employers' social security contributions. Contributions to the pension scheme for seafarers are not refunded. [7]

The refund will be granted provided that the relevant criteria laid down in the rules and guidelines governing the special refund scheme are fulfilled. The companies will be subject to the Maritime Directorate's established control mechanisms. The information submitted might be checked against registration and payment of contribution for the employees to the pension scheme for seafarers and to the tax authorities. The refund to the ferry companies will also contain provisions whereby the companies will have to add up and document the amounts paid as income tax and social security contributions for the eligible persons for each vessel.

The Maritime Directorate may request the repayment of refunds granted where the information submitted by the shipping company shows to be incorrect.

Aid intensity

The aid scheme allows for a 100% reimbursement of the aforementioned income tax and of employees' and employers' social security contributions. The Norwegian Government has pointed out that the companies will not receive refund for persons employed on board during peak seasons.[8] This implies, according to the Norwegian authorities, that the ferry companies will only receive a partial refund of total income taxes and social security contributions (estimated to be approximately 80%).

The Norwegian Government informed the Authority that ferry companies benefiting from the new refund scheme do not make use of the tonnage tax scheme[9], but are subject to ordinary company taxation. The Norwegian Government has also confirmed that ferry companies eligible under the special refund scheme will not benefit from other, in particular regional aid schemes (the regional aid scheme administered by the Norwegian Industrial and Regional Development Fund, SND, which includes as from a January 2002 aid to coastal freight shipping, will not apply to foreign going ferries), so that there will be no cumulation of aid.

Aid beneficiaries and market concerned

Beneficiaries under the new refund scheme are ferry companies engaged in foreign trade and registered in NOR. According to the Norwegian authorities, there are at present two ferry companies operating ferry lines between Norway and abroad with

[7] The legislative framework for the relevant tax provisions was explained in more detail in the Authority's decision of 1 July 1998, see above.

[8] According to the Norwegian authorities, this is due to the condition that only persons eligible to the seafarers deduction are eligible under the scheme; a condition for being eligible is that the seafarer is employed more than 130 days a year.

[9] Approved by the Authority in its decision of 1 July 1998 mentioned above.

ferries registered in NOR (Color Line and Fjord Line). Color Line operates 9 vessels employing 4000 persons, of which 1000 work onshore. Fjord Line operates 3 vessels and employs 500 persons, of which 90 work onshore. Most of the employees on board are Norwegian (92%) or other EEA nationals (7%).

According to the Norwegian authorities, the main competitors on foreign trade are the Danish DFDS and the Swedish Stena Line which operate more or less on the same markets and compete for the same customers. The Norwegian authorities claimed that these two companies benefited from zero taxation and social security contributions for all persons employed on board vessels registered in Denmark or Sweden.

Budget

The amount allocated for the operation of the special refund scheme in 2002 is 120 million NOK (cf. State Budget for 2002, Chapter 909, post 71).

Entry into force and duration

The scheme is supposed to come into effect as from 1 July 2002. For the months July and August 2002, applications for refund are to be submitted to the Maritime Directorate by 15 September 2002. The refund scheme is not limited in time. It is, however, subject to the annual budget appropriation decided by the Norwegian Parliament.

II. ASSESSMENT

A. Procedural requirements

According to Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, the EFTA States are obliged to notify to the EFTA Surveillance Authority any plans to grant or alter aid in sufficient time to allow the Authority to decide on the case, and not to put the proposed measures into effect until the Authority has taken a decision on the case.

In May 2002, the Norwegian Government notified the Authority of the new refund scheme, which was supposed to enter into force on 1 July 2002. The Authority regrets that the Norwegian Government implemented the aid scheme without having awaited the Authority’s assessment of the scheme in question.

The Authority was, however, satisfied that the payments of refunds for the months July and August 2002 are not expected to be made before October 2002, i.e. after the Authority’s decision.

B. Presence of State aid

Article 61(1) of the EEA Agreement provides that “*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 the EEA Agreement".
The special refund of the employees' income tax and social security contributions is paid not to the seafarers, but to the shipping companies and thus gives these companies a financial benefit. Furthermore, and as regards the employers' social security contributions, the refund relieves the ferry companies of costs they would normally have to bear. The refund leads to a cost for the Norwegian State. The refund scheme is selective in nature as it is addressed only to the maritime sector, and in particular to ferries operating in foreign trade and being registered in NOR. The ferry companies benefiting from the scheme carry out an economic activity facing competition with ferry companies from other countries of the EEA.

It follows from the above that the notified refund scheme is to be considered as State aid within the meaning of Article 61(1) of the EEA Agreement.

C. Compatibility assessment

Article 61 (3) (c) of the EEA Agreement provides that aid may be considered 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 affect 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.

Chapter 24A of the Authority's State Aid Guidelines on State aid to maritime transport ('Maritime Guidelines') provides that aid in the form of the alleviation of the burden of social security contributions in respect of EEA seafarers should be allowed, provided those seafarers are employed on board ships registered in an EEA State. The Maritime Guidelines allow such aid up to a maximum 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.

Point 24A.3.2 of the Maritime Guidelines deals with the compatibility with the common market of State aid measures relating to different types of labour-related costs, which are defined as being the following:

- 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.

Pursuant to point 24A.3.2. (6) of the Maritime Guidelines, for this kind of aid, a maximum reduction of liabilities to zero may be permitted. Point 24A.3.2. (7) clarifies that EEA States may decide not to apply reduced rates as mentioned above but instead may reimburse shipowners for the costs resulting from these levies: "*Such an approach may generally be considered as equivalent to the reduced rate system*

described above, provided that there is a clear link to these levies, no element of overcompensation, and that the system is transparent and not open to abuse."
First of all, the Authority notes that the new refund scheme covers tax and social security contributions paid with respect to seafarers employed on board ships registered in Norway (NOR) and liable to taxation in Norway. There are no nationality requirements for crews on vessels registered in NOR. Thus, the scheme is applicable to EEA seafarers employed on board ships registered in an EEA State, as required by the guidelines. The conditions under which refunds may be granted, while being neutral with respect to the nationality of the seafarer, are designed to bring down fiscal costs and social security contributions and thus to reduce the competitive handicap caused by the level of such duties in Norway.

The refund scheme in question consists of a relief granted to shipping companies rather than of an alleviation of social security contributions and income taxes through reduced rates at the direct benefit of seafarers. Under such circumstances, the guidelines require the Authority to ascertain that there is a clear link to these levies, no element of overcompensation and that the system is transparent and not open to abuse.

The notified scheme will refund the exact amounts paid by the companies as employees' income tax and employees' and employers' social security contributions for eligible persons. The refund is limited to a maximum of 100% of such contributions.[10]

The Authority can therefore conclude that the refund of such contributions does not entail any element of over-compensation. The measure is also clearly linked to the levies, since it provides for the reimbursement of specific contributions paid.

According to point 24A.11. (2) of the Maritime Guidelines, a reduction to zero of taxation and social charges for seafarers is the maximum level of aid which may be permitted.

The Authority takes note that, according to information provided by the Norwegian Government, the ferry companies eligible under the new refund scheme do not make use of the tonnage tax scheme, but are subject to ordinary company taxation.

The Norwegian Government confirmed that regional aid administered by the Norwegian Industrial and Regional Development Fund (SND) which included, as from 1 January 2002, coastal freight shipping would not be applicable to shipping companies benefiting from the special refund scheme.

There are, to the Authority's knowledge no other schemes under which aid could be cumulated with aid under the present refund scheme.

[10] As has been explained by the Norwegian authorities, in practice the refund would be limited to approximately 80%, due to the fact that the eligible ferry companies will not receive refund for persons employed on board during peak seasons.

Given the rules for reimbursement, as described above, and the control mechanisms established by the Maritime Directorate, the refund is considered to be transparent and not open to abuse.

D. Conclusions

The refund scheme contains aid within the meaning of Article 61 (1) of the EEA Agreement.

The refund scheme pursues objectives which are recognized in the rules on aid to maritime transport laid down in Maritime Guidelines, namely to safeguard EEA employment on these ferries. At the same time, the scheme has a rational and wider strategic objective of preventing the flagging out of the outbound ferries and providing Norwegian ferry companies with a financial framework which is harmonized with conditions in other EEA States. The aid also meets other relevant conditions and requirements set out in Maritime Guidelines. In particular, the special refund to ferry companies does not provide for more aid than is allowed under these Guidelines.

For the reasons stated above the Authority concludes that the notified aid scheme does not adversely affect trading conditions between the Contracting Parties contrary to the common interest. In this respect, the Authority notes in particular that similar schemes are in place in other EEA States.[11] Consequently, the notified special refund scheme is found to be compatible with Article 61(3)(c) of the EEA Agreement.

In view of the fact that the EC Commission is currently carrying out a review of the Maritime Guidelines, the Authority reserves the right to reassess, in accordance with Article 1 (1) of Protocol 3 to the Surveillance and Court Agreement, the refund scheme's compatibility with the functioning of the EEA Agreement.

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority has decided not to raise objections to the refund scheme for ferries engaged in foreign trade registered in NOR, as notified by the Norwegian Government in its letter dated 26 April 2002, received and registered by the Authority on 3 May 2002 (Doc. No. 02-3489-A) and supplemented by letter from the Ministry of Trade and Industry dated 6 June 2002, received and registered by the Authority on 11 June 2002 (Doc. No. 02-4402-A).

2. With reference to Chapter 32 of the Authority's Procedural and Substantive Rules in the field of State Aid, the Norwegian authorities shall submit annual reports on the operation of the scheme in a form comparable to the format set out for simplified annual reports in Annex IV of those Guidelines.

Done at Brussels, 10 July 2002.

For the EFTA Surveillance Authority

Einar M. Bull

[11] E.g. State aid N 542/2001 – Sweden, "*Fiscal Measures for Maritime Transport*".

President

Hannes Hafstein
College Member