Case No: 63928
Event No: 485513
Dec. No: 755/08/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 3 December 2008

on the notification of amendments to the Norwegian Special Tax System for Shipping (Norway)

THE EFTA SURVEILLANCE AUTHORITY[1],
Having regard to the Agreement on the European Economic Area[2], 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 Justice[3], in particular to Article 24 thereof,
Having regard to Article 1(3) of Part I and Articles 4(3) of Part II of Protocol 3 to the Surveillance and Court Agreement[4],

Having regard to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement[5], and in particular Part IV on Aid to Maritime Transport[6] thereof,

Whereas:

I. FACTS

1 Procedure

The Norwegian authorities notified the amendments to the Norwegian special tax system for shipping, pursuant to Article 1(3) of Part I of Protocol 3 by letter of 21 December 2007 (Event No.: 458789).

By letter dated 14 February 2008 (Event No.: 464524), the Authority requested additional information from the Norwegian authorities.

[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] Hereinafter referred to as Protocol 3.
[5] 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 Authority on 19 January 1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 03.09.1994 p. 1 and EEA Supplement No 32 of 03.09.1994 p. 1. The Guidelines were last amended on 16 July 2008. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: http://www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/
[6] Hereinafter referred to as the Maritime Guidelines.

By letter dated 14 March 2008 (Event No.: 469774), the Norwegian authorities replied to the information request.

By letter dated 14 May 2008 (Event No.: 472870), the Authority requested that the Norwegian authorities provide further information.

By letter dated 12 June 2008 (Event No.: 481194), the Norwegian authorities provided the requested information.

By letter dated 8 August 2008 (Event No.: 487845), The Authority requested that the Norwegian authorities provide clarification on certain aspects of the notified scheme.

The requested information was provided by letter dated 6 October 2008 (Event No.: 493922).

2 Description of the proposed measures

2.1 General presentation of the Tonnage Tax system in Norway: prior Tonnage Tax, transitional measures and new Tonnage Tax

The Norwegian authorities have notified amendments to the Tonnage Tax system which was approved by the Authority on 1 July 1998 by Decision No 164/98/COL. The new Tonnage Tax system will take effect as from the income year 2007.

The previous Tonnage Tax system for shipping offered eligible undertakings a postponed taxation of profits derived from the operation of ships until either untaxed income was distributed to shareholders or the company exited the special tax system (instead of paying standard corporate tax on profit generated by eligible maritime activities). Eligible undertakings, paid a tonnage tax, *i.e.* the ship owner paid an amount of tax linked directly to the tonnage operated. Such tax was payable irrespective of the company's actual profits or losses.

The new Tonnage Tax system is an exemption regime, *i.e*. shipping income is tax exempt on a permanent basis. Only the actual Tonnage Tax is due irrespective of the company's actual profits or losses.

In addition to the new Tonnage Tax system, the Norwegian authorities have also notified transitional measures from the prior Tonnage Tax system to the new one. Indeed, as the prior Tonnage Tax system was based on postponed taxation of profits, putting an end to the prior system resulted in the question of how deferred taxation should be dealt with. The Norwegian authorities have indicated that taxable profit will be calculated as the difference between the market value of the company and the balance of the account of retained taxed income plus paid up share capital and premium. As a practical approach, the market value will be based on the accounting values per 31 December 2006. In order to address the issue of the tax treatment of the deferred taxation, the Norwegian authorities have put in place the following transitional measures:

- up to one third of the deferred tax can be set aside to an environmental fund which can be used for different kinds of environmental investments. The aim of the

environmental fund is to provide incentives to companies to achieve higher environmental protection. An environmental measure is a measure that reduces pollution from maritime transport and which has an environmental effect for at least one year. Research and development projects can also be considered as environmental measures if the projects are aimed at obtaining new information and gaining experience which is considered to be of use in the development and implementation of environmental measures.

- two thirds or more of the deferred tax may be subject to corporate tax over ten years with a 10% linear depreciation.

Undertakings will benefit from these transitional measures only if they opt for the new Tonnage Tax system. Indeed, companies which decide not to enter into the new Tonnage Tax system either because they wish to transfer the headquarters of their company(ies) outside Norway or because they choose not to enter into the new Tonnage Tax system, will not benefit from the transitional measures and will have to pay the entire deferred tax in the year of exit.

2.2 Description of the new Tonnage Tax system

The new Tonnage Tax system is based on the principle of permanent exemption from corporate tax of profits derived from eligible activities; ship owners will pay a Tonnage Tax instead of the standard corporate tax.

The new Tonnage Tax scheme provides for a lock-in period, *i.e* undertakings must commit to remain within the special tax system for a minimum period of ten years. A company exiting the new Tonnage Tax scheme within this ten year period will not be allowed to re-enter the regime before the expiry of the ten year period.

2.2.1 Eligible undertakings and eligible activities

The new Tonnage Tax system is open for limited companies formed under Norwegian law. However, qualifying assets can be held through partnerships, limited partnerships (Norwegian or foreign) and controlled foreign companies based in low tax countries. Moreover, non-resident companies that only carry out qualifying shipping activities in Norway (and no other activity elsewhere) will qualify for the special tax system.

Mixed companies carrying out both qualifying activities and other activities are not eligible under the scheme.

The decision to opt for the new Tonnage Tax system shall be taken at the level of the group of companies. Companies that opt for the special tax system have to put all their eligible vessels under the Tonnage Tax regime. In order to be eligible for the scheme, a company has to either own a ship qualifying under the scheme or own shares or interests in limited companies, partnerships or Norwegian controlled foreign companies, which own such ships. No non-shipping related assets – including real estate – may be owned by companies under the Tonnage Tax system. Companies are allowed to own financial assets. However, profits derived from financial assets are not tax exempted but are subject to standard taxation.

Qualifying ships:

All ships in operation are qualifying ships except:
- ships in domestic traffic smaller than 100 gross registered tons;
- ferries in scheduled traffic between Norwegian ports where the distance between the first and last port is less than 300 nautical miles;
- ships operating in inland waterways;
- ships conducting stationary activities (*e.g* ports) or other activities where the sailed distance is less than 30 nautical miles (applies only to domestic traffic);
- vessels which are not self-propelled;
- receiving boats, and vessels used as working platform;
- pleasure crafts, and
- fishing boats.

Companies within the new Tonnage Tax system will not be allowed to own tugboats if the tugboats carry out stationary activities or port activities as such activities are not considered to constitute maritime transport. However, the Norwegian authorities have indicated that companies will be entitled to own tugboats if more than 50% of the towage activity effectively carried out by a tug during the course of a given year constitutes maritime transport.

In addition, the following ships qualify when used in petroleum activities:
- vessels for transport of personnel and supplies;
- tugboats;
- contractor ships and
- tender vessels.

Principal activities

Qualifying activities are ownership, leasing and operation of ships whether directly owned or chartered in.

Capital gains on the sale of assets used for the purpose of qualifying shipping activities are included in the profits which are tax exempted.

Ship management companies are not eligible under the new Tonnage Tax system. Ship management companies are entities providing different kinds of services to ship owners, such as technical survey, crew recruiting and training, crew management and vessel operation; ship management companies, as defined, do not own ships.

However, the Norwegian authorities have decided to allow strategic and commercial management together with some other ancillary activities to fall under the new Tonnage Tax system. A company subject to the new Tonnage Tax system can perform strategic and commercial management, including daily technical operations and maintenance for vessels owned or chartered in by the company itself and vessels owned or chartered in by associated limited companies, associated partnerships and associated controlled foreign companies.

Ancillary activities

The Norwegian authorities have decided to allow the following ancillary activities to come within the scope of the new Tonnage Tax:

- loading and unloading of goods;
- temporary storage of goods at, or near the harbour, pending further transport;
- transport of goods and persons in the port area;
- embarking and disembarking of persons;
- sale of goods and services for consumption on board;
- leasing out of containers;
- operation of ticket offices, and passenger terminals;
- hiring out of conference rooms, and
- door-to-door transport for the maritime leg of the transport only (*i.e*. joint transport that consists of sea transport by a qualifying vessel, and inland/air transport, when the inland/air transport is carried out by an independent contractor).

Ancillary activities can only be performed for vessels owned or chartered in by the company itself, and vessels owned or chartered in by associated companies within the Tonnage Tax system. The ancillary activities will benefit from the tax exemption insofar as they are connected to transport services that are subject to the Tonnage Tax scheme.

2.2.2 Establishment of the tax base

The Tonnage Tax is calculated by reference to the net tonnage of each of the ships a participating company operates at the following rates[7] per day:

- no tax for the first 1000 net tons, thereafter,
- NOK 18 per 1000 net tons from 1001 to 10 000 net tons, thereafter
- NOK 12 per 1000 net tons from 10 001 to 25 000 net tons, thereafter
- NOK 6 per 1000 net tons above 25 000 net tons.

The rates above do not correspond to the mode of calculation used to determine a virtual profit to which corporate tax rates will be applied but to the tax which will effectively be paid by the shipping companies.

2.2.3 Requirement of a flag link

The new Tonnage Tax system requires a link with the flag of one of the EEA States. However, fleets which comprise vessels flying other flags are also eligible provided beneficiary companies commit themselves to increase or at least maintain under the flag of one of the EEA States the share of the tonnage that they would operate under such flags. The EEA tonnage share requirement does not apply to undertakings operating at least 60% of their tonnage under an EEA flag, or if the EEA flagged share of the total tonnage eligible for tax relief in Norway has not decreased on average during the previous year.

[7] The Tonnage Tax rate is directly fixed by the Norwegian authorities and is not subject to corporate taxation.

2.2.4 Ring fencing measures

In order to ensure that the Tonnage Tax only benefits eligible activities, the following ring-fencing measures have been put in place:

- Lock-in period: companies that opt for the tonnage tax regime commit to remain under the favourable tax regime for a ten year period. Should they exit the regime before the expiry of the ten year period, they will not be authorised to re-enter the tonnage tax regime before the expiry of the ten year period.

- All-or-nothing rule: a company which is eligible for the special tax system and belonging to a group of companies, in which some companies have opted for the special tax system, is obliged to opt for the tonnage tax system. The decision to opt for the special tax system is made collectively at the level of the group.

- Rule against thick capitalisation (preventing all capitalisation not producing deductible costs being attributable to non eligible activities): a minimum amount of debt for eligible companies is stipulated equal to 30% of the company's total capital. If a company has less debt than 30%, the difference between the actual debt and the minimum debt multiplied with a regulated interest rate, is treated as taxable income.

- Limitation on the granting of loans: a company within the amended special tax system is not authorised to extend loans to shareholders outside the scheme with direct or indirect interests in the company, or to persons closely related to such shareholders.

- Tax neutral effect of group contributions: companies within the Tonnage Tax system are allowed to make group contributions to and receive group contributions from companies both within and outside the special tax system. However, a group contribution shall be tax neutral, *i.e* a group contribution will not be deductible for the contributor and will not be treated as taxable income for the receiver.

- Restrictions on group contributions subsequent to an exit from the Tonnage Tax: the Norwegian authorities have decided that companies which exit the Tonnage Tax system will not be entitled to receive group contributions for tax purposes in the exit year and the two following years.

- Arm's length principle: the general provision in Norwegian tax legislation which imposes an arm's length principle will apply to transactions between associated companies and persons. Normal market conditions will be used for tax purposes where a transaction takes place within a group of companies benefiting from the Tonnage Tax system and companies subject to the standard corporate tax.

2.3 Title scheme

The scheme concerns amendments to the Norwegian Special Tax System for Shipping.

2.4 The objective of the aid measures

The objective of the aid is to ensure the competitiveness of the shipping industry in Norway.

2.5 National legal basis for the aid measure

The amendments to the prior Tonnage Tax system are found in Section 8-10 to 8-20 of the Norwegian Tax Act ("*Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt*").

2.6 Recipient

The beneficiaries of the new Tonnage Tax scheme will be all eligible undertakings carrying out eligible activities as defined above (see Section 2.2.1 and 2.2.2).

2.7 Budget and duration

The scheme will enter into force as from the income year 2007. The Norwegian authorities have committed themselves to re-notify the scheme after ten years.

The annual tax expenditure related to the previous special tax system is estimated at 1 900 million NOK (approx. Euros 220 000 000). It is expected that the tax expenditure will remain the same under the notified amended tax system.

2.8 Cumulation

The Norwegian authorities have stated that cumulation of the aid under the notified scheme with other aid measures will not be possible.

II. ASSESSMENT

1 The presence of state aid

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. The application of the lower Tonnage Tax rather than the standard corporate tax leads to a loss of state revenues. Likewise, the possibility for undertakings opting for the new Tonnage Tax to benefit from preferential conditions to settle taxes deferred under the previous Tonnage Tax also involves the foregoing by the State of tax revenues.

1.2 Favouring certain undertakings or the production of certain goods

Both the new Tonnage Tax and the transitional measures from the prior Tonnage Tax and the new Tonnage Tax give ship owners advantages by way of tax concessions. Such measures are limited to the maritime sector and therefore favour only certain undertakings. Hence, they must be viewed as selective within the meaning of Article 61(1) of the EEA Agreement.

1.3 Distortion of competition and effect on trade between Contracting Parties

The aid measure must distort competition and affect trade between the Contracting Parties. The tax relief in the form of the new Tonnage Tax and the transitional measures strengthen the ship owners' position towards their competitors within the EEA. The maritime activities in question are carried out both within the EEA and between Norway and the other EEA States and third countries. Hence, the measures affect trade between the Contracting Parties.

1.4 Conclusion

The Authority therefore takes the view that the notified support measures (transitional measures and the new Tonnage Tax scheme) constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

This view is confirmed by the Maritime Guidelines which provide specifically that "*these tax relief measures which apply in a special way to shipping are considered to be state aid. Equally, the system of replacing the normal corporate tax system by a tonnage tax is a state aid*".

2 Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, "*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 Norwegian authorities notified the amendments to the Tonnage Tax together with the accompanying transitional measures on 21 December 2007 (Event No.: 458789).

However, the Norwegian authorities put the notified measures into effect before the Authority had taken a final decision thereon. The Authority therefore concludes that the Norwegian authorities have not respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3 Compatibility of the aid

Under Article 61(3)(c) of the EEA Agreement, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the functioning of the EEA Agreement where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Authority considers Article

61(3)(c) of the EEA Agreement together with the Maritime Guidelines to form the legal basis for assessing the compatibility of the notified measures.

These Guidelines at section 1.2.(c) paragraph 4 allow the EEA EFTA States to support the maritime transport industry; "*maritime industries are inextricably linked to maritime transport. This association is a strong argument in favour of positive measures whose aim it is to maintain a fleet dependent on EEA shipping. Since maritime transport is one of the links in the chain of transport in general and in the chain of the maritime industries in particular, measures seeking to maintain the competitiveness of the European fleet have also repercussions on investments on land and maritime-related industries and on the contribution of maritime transport to the economy of the EEA as a whole, and to jobs in general*".

The Authority has already approved the prior Norwegian Tonnage Tax scheme. The European Commission has a long standing case practice in this area[8].

It should be noted that the current notification concerns operating aid, *i.e*. aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management of its usual activities. Operating aid should not normally be allowed unless it is explicitly authorised by the Authority's State Aid Guidelines. The Authority's Maritime Guidelines provide for the possibility to grant operating aid in section 3.1 - Tonnage Tax.

The Authority has examined both the transitional measures (**3.1**) and the new Tonnage Tax scheme (**3.2**).

3.1 Transitional measures from prior Tonnage Tax scheme to the new Tonnage Tax scheme

The prior Tonnage Tax scheme was approved by the Authority by Decision No 164/98/COL of 1 July 2008.

The transitional measures which have been notified with the new Tonnage Tax scheme impose a stricter financial burden on the undertakings than the scheme that was approved by the Authority. Indeed, the prior Tonnage Tax scheme allowed shipping companies whose sole activity was the ownership or leasing of ships not to pay standard corporate tax on profits derived from shipping. However, the companies qualifying for the special rules were only exempted as long as the profits were retained in companies within the scheme, *i.e*. corporate tax would become due as soon as either dividends were paid, or the eligible undertaking exited the scheme.

The transitional measures impose upon the undertakings subject to the prior Tonnage Tax that they pay standard corporate tax on at least two thirds of the deferred tax over ten years. Having approved the prior Tonnage Tax scheme as an acceptable derogation from the general prohibition of state aid prescribed by Article 61(1) of the EEA Agreement, the

[8] References for tonnage tax schemes approved by the European Commission can be found in Decision N 93/2006 – Poland, Introduction of a tonnage tax scheme in favour of international Maritime transport, which in paragraph (62) lists all the adopted decisions in this field.

Authority considers that it can also approve the transitional measures which impose higher constraints upon the eligible undertakings.

The Authority therefore considers that the transitional measures notified by the Norwegian authorities comply with the Maritime Guidelines.

3.2 The new Tonnage Tax scheme

Section 3.1 of the Maritime Guidelines sets out the conditions to be met in order for a Tonnage Tax scheme to be compatible with the EEA Agreement. In the following, the Authority will assess which undertakings and activities may be eligible (**3.2.1**), the establishment of the tax base (**3.2.2**), the requirement of a flag link (**3.2.3**) and the ring fencing measures (**3.2.4**).

3.2.1 Eligible undertakings and activities

In order to benefit from the Tonnage Tax regime, a company must fulfil the conditions described here above in Section I.2.2.1. In addition, an undertaking need not be registered with a shipping register in Norway. Similarly, a non-resident company that only carries out qualifying shipping activities in Norway may qualify for the Tonnage Tax regime.

The Authority considers that there are no restrictions with respect to registration that would infringe the terms of the EEA Agreement.

The Maritime Guidelines at section 2 paragraph 3 provide that they "*are applicable to "maritime transport" activities as defined in Regulation (EEC) No 4055/86*[9]*, incorporated into the EEA Agreement as point 53 in Annex XIII to the EEA Agreement, and in Regulation (EEC) No 3577/92*[10]*, incorporated as point 53 a in Annex XIII to the EEA Agreement*[11]*, that is to say, the "transport of goods and persons by sea". They also, in specific parts, relate to towage and dredging*".

Principal activities

The Tonnage Tax will be open to companies owning, leasing and operating qualifying ships.

The Norwegian authorities have indicated that in the petroleum sector, specific rules apply; vessels for transport of personnel and supplies, tugboats, contractor ships and tender vessels are qualifying ships.

The Maritime Guidelines at section 3.1 paragraph 12 provide that "*these Guidelines apply only to maritime transport. The Authority can accept that the towing at sea of other vessels, oil platforms, etc. falls under that definition"*.

[9] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to services to maritime transport between member States and between member States and third countries (OJ L 378, 31.12.1986, p.1).
[10] Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p.7).
[11] By Joint Committee Decision No 70/97 (OJ No L 30, 5.2.1998, p.42 and EEA Supplement No 5, 5.2.1998, p. 175), e.i.f. 1.8.1998.

Ancillary activities

As to the ancillary activities notified by the Norwegian authorities, the Authority considers that these activities are indeed closely linked with the provision of maritime transport services and may be eligible if they are provided by the tonnage tax company itself[12]. These activities are: loading and unloading of goods, temporary storage of goods at or near the harbour pending further transport, transport of goods and persons in the port area, embarking and disembarking of persons, sale of goods and services for consumption on board, leasing out of containers, operation of ticket offices, and passenger terminals and the hiring out of conference rooms.

The Norwegian authorities have indicated that door-to-door transport will not be eligible in its entirety. The Norwegian authorities have defined door-to-door transport as the joint transport that consists of sea transport by a qualifying vessel and inland/air transport when the inland/air transport is carried out by a third party contractor. The transport agreement with the third party contractor has to be made on normal market conditions and the remuneration the contractor receives for the inland/air transport is subject to standard corporate tax. The shipping company will not receive any remuneration for the inland leg of the transport, the part of the price which corresponds to the inland transport will be repaid directly to the company responsible for the inland transport and will as such be subject to standard corporation tax.

The Authority considers that the scope of the eligible principal and ancillary activities is in line with the Maritime Guidelines.

3.2.2 Establishment of the tax base

Section 3.1 paragraph 18 of the Maritime Guidelines provides that "*the notional profit rates provided for by EC States have been homogeneous up to now. However, since corporate tax rates may vary significantly across the EC, the tonnage taxes to be paid, for the same tonnage might be very uneven in the different EC States. In order to keep the present equitable balance, the EC Commission stipulated that it will only approve schemes giving rise to a tax load for the same tonnage fairly in line with the schemes already approved. Based on its experience, the Authority notes that instead of calculating virtual profits to which the ordinary corporate tax rate is applied, some States may decide to directly fix special tonnage tax rates. The Authority will likewise seek to keep an equitable balance in line with already approved systems*".

The tonnage tax rates applicable in Norway compared to the rates applicable in other EEA States are as follows:

NORWAY*	**DENMARK*** **N 171/2004**	**LITHUANIA*** **N 330/2005**	**ITALY*** **N 114/2004**
No tax for first 1000 NT	**Up to 1000 NT** EUR 0,90 per 100 NT	**Up to 1000 NT** EUR 0,93 per 100 NT	**Up to 1000 NT** EUR 0,90 per 100 NT

[12] N 114/2004 – Italy, N 330/2005 Lithuania and N 93/2006 – Poland.

From 1001 NT until 10 000 NT EUR 0,22 per 100 NT **From 10 0001 to 25 000 NT** EUR 0,15 per 100 NT	**From 1001 NT until 10 000 NT** EUR 0,70 per 100 NT **From 10 0001 to 25 000 NT** EUR 0,40 per 100 NT	**From 1001 NT until 10 000 NT** EUR 0,67 per 100 NT **From 10 0001 to 25 000 NT** EUR 0,43 per 100 NT	**From 1001 NT until 10 000 NT** EUR 0,70 per 100 NT **From 10 0001 to 25 000 NT** EUR 0,40 per 100 NT
Above 25 000 NT EUR 0,07 per 100 NT	**Above 25 000 NT** EUR 0,30 per 100 NT	**Above 25 000 NT** EUR 0,27 NT per 100 NT	**Above 25 000 NT** EUR 0,20 per 100 NT

*All the values are given per day

The rates above for Denmark, Lithuania and Italy are notional profit rates. These rates are multiplied with the actual tonnage to establish the notional profit. This notional profit is then subject to the standard corporate tax rate in the country in question. In the case of Denmark, if the Norwegian corporate tax rate of 28% is applied, the actual rate for tonnage in the brackets 10 000 to 25 000 NT is 0.112 (0.40 x 0.28). In Norway, no notional profit is calculated. The Tonnage Tax is calculated directly by multiplying the tax rates with the actual tonnage.

The Authority considers that the tonnage tax rates applicable in Norway keep an equitable balance in line with the tonnage tax regimes in other EEA States.

3.2.3 Requirement of a flag link

The Maritime Guidelines at section 3.1 paragraph 8 provide that *"(…) as a matter of principle, tax relief schemes require a link with the flag of one of the EEA States. Before aid is exceptionally granted (or confirmed) to fleets which also comprise vessels flying other flags, EEA States should ensure that beneficiary companies commit themselves to increasing or at least maintaining under the flag of one of the EEA States the share of tonnage that they will be operating under such flags when these Guidelines become applicable. (…) The EEA-tonnage share requirement set out in this paragraph does not apply to undertakings operating at least 60% of their tonnage under an EEA flag"*.

The conditions set out in the Norwegian Tonnage Tax scheme as described above under Section I. 2.2.4 comply with the Maritime Guidelines.

3.2.4 Ring fencing measures

The Maritime Guidelines at section 3.1 paragraph 19 provide that "*in all cases, the benefits of schemes must facilitate the development of the shipping sector and employment in the common interest of the Contracting Parties. Consequently, the fiscal advantages (…) must be restricted to shipping activities; hence in cases where a ship-owning company is also engaged in other commercial activities, transparent accounting will be required in order to prevent "spill-over" into non-shipping activities. This approach*

would help EEA shipping to be competitive, with tax liabilities comparable to levels applying elsewhere in the world but would preserve an EEA State's normal tax levels for other activities and personal remuneration of shareholders and directors".

One of the main conditions attached to the compatibility of tonnage tax regimes with the common market is the existence of a series of ring-fencing measures intended to ensure that no activities other than maritime transport, in the EEA State in question, or in any other EEA State or third country, would indirectly benefit from the regime.

The Authority considers that the ring fencing measures notified by the Norwegian authorities and described above under Section I.2.2.5 (rule against thick capitalisation, limitation on the granting of loans, tax neutral effect of group contributions, restrictions on group contributions subsequent to an exit from the Tonnage Tax and arm's length principle) afford a sufficient level of protection against any potential abuse of the Tonnage Tax schemes.

The Authority will review in greater detail here below the two most important ring-fencing measures: the lock-in period (**3.2.4.1**) and the all-or-nothing rule (**3.2.4.2**).

3.2.4.1 Lock-in period

Under the Norwegian Tonnage Tax system, ship owners are required to remain within the special tax system for at least ten years.

The requirement of a ten year lock-in period is in line with the Authority's practice. Indeed, on 19 December 2007 (decision No. 721/07/COL), the Authority decided to open a formal investigation concerning the Icelandic tonnage tax scheme on the ground that there was some doubt as to whether a lock-in period of a duration of five years only could be held to be compatible with the EEA Agreement[13].

As the notified scheme provides for a ten year lock-in period, the Authority considers that the notified tonnage tax scheme complies with the terms of the EEA Agreement.

3.2.4.2 All-or-nothing rule

The Norwegian tonnage tax regime provides for an all-or-nothing rule whereby the choice of opting for the regime must be made at the level of the group and not at the level of a company belonging to a group. The purpose of this rule is to avoid that tonnage tax companies put all profitable vessels under tonnage tax and the loss-making fleet under the normal corporation tax.

[13] The presence of lock-in period is also in line with the practice of the European Commission. From the European Commission's case practice, it appears that the minimal duration of the lock-in period in other tonnage tax schemes approved so far is ten years. The Commission stresses that by allowing diverging criteria for different tonnage tax schemes, a risk exists that unfair advantages are created and that there might be a competition between Member States on the level of tonnage tax schemes. Consequently, the Commission expressed doubts towards a Polish tax scheme, which allowed for a lock-in period of five years, pointing out that this might lead to a harmful divergence between tonnage tax systems as it might make the Polish Tonnage Tax system more desirable and lead to a re-flagging within the Community (State Aid N 93/20006 – Poland).

The Authority considers that this provision complies with the EEA Agreement[14].

4 Conclusion

Based on the information submitted by the Norwegian authorities, the Authority considers that the notified amendments to the Tonnage Tax scheme and the accompanying measures which the Norwegian authorities are planning to implement are compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement.

The Authority regrets, however, that the Norwegian authorities did not respect their obligations pursuant to Article 1(3) of Part I of Protocol 3.

The Norwegian authorities are reminded about the obligation resulting from Article 21 of Part II of Protocol 3 in conjunction with Article 6 of decision No. 195/04/COL to provide annual reports on the implementation of the scheme.

The Norwegian authorities are also reminded that all plans to modify this scheme must be notified to the Authority.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority has decided not to raise objections to the notified amendments to the Norwegian Tonnage Tax scheme and its accompanying measures.

Article 2

The implementation of the measures is accordingly authorised.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English version is authentic.

Done at Brussels, 3 December 2008

For the EFTA Surveillance Authority,

Per Sanderud
President

Kristján Andri Stefánsson
College member

[14] See Decision N 93/2006 – Poland, Decision C 5/07 (ex N 469/05) Denmark, Decision N 114/2004 Italy,