ESA | EFTA Surveillance Authority

Brussels, 16 October 2024
Case No: 92737
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Subject: **Comment by the EFTA Surveillance Authority to Norway on the draft legislation on Norwegian wages on ships operating in Norwegian waters and offshore**

1 Summary

The EFTA Surveillance Authority ("the Authority") received a request for consultation from the Norwegian Ministry of Trade, Industry and Fisheries, in line with the obligations provided for in EEA acts concerning the freedom to provide maritime transport services, as further defined in this letter. The consultation is part of an ongoing dialogue between the Government and the Authority, which started in November 2022.

As the Ministry's proposal states, introducing minimum wages on board ships registered in other EEA States could constitute a restriction to the freedom to provide services in maritime transport. While the Ministry's view is that this restriction may be justified for reasons of overriding public interest, the Authority cannot conclude that the Ministry has sufficiently supported this view in the evidence presented so far. The Authority notes that it falls to the State introducing a restriction, in this case Norway, to demonstrate, by way of appropriate evidence, that the measures in question are justified and proportionate.

On the basis of the information provided by the Norwegian Government to date, the Authority considers that the proposal would as currently drafted be incompatible with EEA law.

2 Introduction

The request for consultations was received by letter of 29 May 2024 (Doc No 1459307, your ref. 24/3002-2) of the Norwegian Ministry of Trade, Industry and Fisheries. The request concerned the draft legislation on Norwegian wages on ships operating in Norwegian waters and offshore, as presented for public consultation on 1 May 2024,[1] and its potential EEA law implications.

The draft legislation affects the application of both Council Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries[2] (hereinafter "the Freedom to Provide Maritime Transport Services

[1] https://www.regjeringen.no/no/dokumenter/horing/id3036910/?expand=horingsnotater
[2] OJ L 378, 31.12.1986, p. 1, as incorporated into the EEA Agreement at point 53 of Part I of Chapter V of Annex XIII.

Regulation"), and of 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),[3] hereinafter "the Maritime Cabotage Regulation").

Under both Acts, EEA EFTA States are obliged to consult the Authority – and EEA EU States to consult the European Commission – before adopting any laws, regulations, or administrative provisions in implementation of these Acts, and to inform the institutions consulted of any measures adopted. This consultation mechanism is an important tool in preventing obstacles to the freedom to provide maritime transport services in the EEA and to ensure the good functioning of the internal market in maritime services.

3 Scope of the proposed measures

Introducing a requirement for, or the discretion to, impose Norwegian wages for seafarers working on certain ships as described above would, if enacted, constitute a restriction to the freedom to provide maritime services. This is acknowledged by the Norwegian Government.

For a measure constituting a restriction of the freedom to provide services to be justified, it must be clear, specific, and predictable,[4] and comply with the proportionality principle. As the following sections to this comment will demonstrate, the scope of the proposed measures as it currently stands and on the basis of the information provided by the Norwegian Government is neither clear, specific, nor predictable enough to be justified as a restriction to the freedom to provide services in maritime transport.

3.1 Material scope

It is the Authority's understanding that the revised proposal to introduce a requirement for – or rather the discretion to impose – Norwegian wages for seafarers working on ships operating in Norwegian Territorial Sea, the Exclusive Economic Zone, and Continental Shelf covers the following categories of ships:

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[3] OJ L 364, 12.12.1992, p. 7, as incorporated into the EEA Agreement at point 53a of Part I of Chapter V of Annex XIII.

[4] See C-205/99, *Analir and Others v Administración General del Estado*, Reference for a preliminary ruling: Tribunal Supremo – Spain, Judgment of 20 February 2001, ECLI:EU:C:2001:107, para. 38. The case concerns a restriction to the freedom to provide maritime cabotage services, and the Court stated: "*[…] if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them.*" See also C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringenm*, Reference for a preliminary ruling: Centrale Raad van Beroep – Netherlands, Judgment of 13 May 2003, ECLI:EU:C:2003:270, para. 85.

(a) Ships carrying cargo or passengers between Norwegian ports, except if the cargo or passengers are coming from or going to a foreign port;
(b) Cruise ships that spend more than 50% of the time of their voyage sailing between Norwegian ports;
(c) Ships that carry out 'other maritime services' in Norwegian territorial waters; and
(d) Ships that provide 'maritime services' to licence holders for petroleum activities, renewable energy activities, seabed mining activities and aquaculture production at sea.

The intention of the Norwegian Government, as reflected in the Ministry's consultation note of 1 May 2024,[5] is to ensure fair working conditions and competition in the shipping sector in Norway. The Ministry refers to 'social dumping' and 'anticompetitive practices' of foreign flagged vessels paying their crew very low wages in comparison to Norwegian salary levels. The result, according to the consultation note, is that in many of the sectors of the maritime services market (see list (a) to (d) in the paragraph above), ships registered in the Norwegian Ordinary Register (NOR) are a minority compared to vessels registered in the Norwegian International Shipping Register (NIS) and other States' (including EEA States) registers.

In the light of these considerations, the Ministry has decided to propose that all ships falling under categories (a) to (c) must be made subject to the discretion of the Tariff Boards ('Tariffnemnda') established under the General Application Act ('Allmenngjøringsloven').[6] More specifically, the Tariff Boards have the power to decide, upon receipt of a complaint from an 'interested party'[7] or upon its own initiative,[8] that a national collective agreement shall apply in whole or in part to employees concerned. The General Application Act presently only covers ships registered in the Norwegian Ordinary Register (NOR). If the proposed amendments are adopted, the Tariff Boards will have the power to decide that the terms of the national collective agreement on seafarers' wages – in part or as a whole – will apply to ships providing maritime services in the Norwegian Territorial Sea, as described in categories (a) to (c) above.

Furthermore, the Ministry proposes amendments to the sectoral legislation[9] covering the different types of offshore activities in the Norwegian Exclusive Economic Zone and Continental Shelf. These amendments will require licence holders to 'impose' a condition on every maritime service provider / ship operator – as described in category (d) above – they work with, except for oil tanker operators, to comply with the terms of the Norwegian national collective agreement for seafarers' wages.

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[5] Ibid.

[6] *Lov om allmenngjøring av tariffavtaler ('allmenngjøringsloven'),* LOV-1993-06-04-58, as amended.

[7] Defined pursuant to Section 39 of the Labour Disputes Act ("*Lov om arbeidstvister (arbeidstvistloven)*"), LOV-2012-01-27-9, as referred to Section 4 of the General Application Act, supra note 3.

[8] See Section 4, last sentence, of the General Application Act, supra note 3.

[9] These are: the Petroleum Act ('*Petroleumsloven*'), LOV-1996-11-29-72; the Renewable Energy at Sea Act ('*Havenergilova*'), LOV-2010-06-04-21; the ('*Havbunnsmineralloven*'), LOV-2019-03-22-7; and the Aquaculture Act ('*Akvakulturloven*'), LOV-2005-06-17-79.

The Authority takes the view that the material scope of the proposed legislative amendments is unclear. Both in the cases to be covered by the General Application Act and in the cases to be subject to sectoral legislation amendments there are several elements that are not defined in the Ministry's proposal. For instance, there is no concrete definition and identification of 'other maritime services' covered by category (c) above. The amendments proposed for the sectoral acts all refer to the discretion of the Government to adopt regulations imposing the national wages requirement to maritime operators. In addition, in some cases – such as carbon capture and storage, offshore wind production, and seabed mineral extraction – the Ministry explicitly states that it is not clear what the market for maritime services in these sectors will look like once the planned projects become fully operational. It is therefore not possible for the moment to describe the impact of the proposed measure on potential future market operators, beyond the fact that it would with certainty affect current and potential market operators.

If the scope of the proposed measures were to remain unclear when enacted, the measures would risk failing to respect the EFTA Court's case law concerning national laws setting out mandatory rules for minimum protection of workers. EEA law requires national measures to be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for companies to benefit from rights derived under the EEA Agreement and to determine their obligations with regard to minimum pay.[10]

3.2 Temporal scope

In regard to the temporal scope of the proposal, the Ministry in its note is also open about the uncertainty of whether and of when further administrative or regulatory measures may be adopted by the Government for vessels falling under category (d) above, on the basis of the proposed legislative amendments. Without the additional administrative or regulatory measures, it is not possible to assess the economic and administrative consequences of the proposed legislative amendments.

3.3 Territorial scope

The Authority takes note of the territorial scope of the proposed measures, to the extent that they fall within the geographical scope of the EEA Agreement.

The Authority notes that 'offshore installations' and traffic therefrom and thereto have been explicitly included within the scope of both the Freedom to Provide

[10] In E-2/11, *STX Norway Offshore AS m.fl. v Staten v/ Tariffnemnda*, para. 73, the EFTA Court stated: "[…] *provisions of national law setting out mandatory rules for minimum protection must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for a firm taking advantage of its rights under the Directive [Directive 96/71/EC] and Article 36 EEA to determine the obligations with which it is required to comply with as regards minimum pay (see, to that effect, Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 43, and Laval un Partneri, cited above, paragraph 110)*".

Maritime Transport Services Regulation [11] and the Maritime Cabotage Regulation.[12] There is no adaptation text on the relevant provisions.

Furthermore, it is pertinent to note that Norwegian maritime law has consistently treated 'offshore installations' as equivalent to 'ports', such as in Act No 48 of 12 June 1987 relating to a Norwegian International Ship Register (NIS).[13] At the same time, mobile or floating offshore installations may be registered in Norway's ship registers,[14] thus also falling under the scope of EEA rules on maritime safety.

4 The compatibility of the proposed measures with EEA law

4.1 The Maritime Cabotage Regulation

The Ministry's assessment of the conformity of the proposed measures with EEA rules on maritime cabotage is premised on the argument that 'wages' do not fall under 'manning' requirements, which are reserved for the flag State of a vessel pursuant to Article 3 of the Maritime Cabotage Regulation.

As the first hearing note, published on 30 May 2022[15] alongside the first draft proposal,[16] elaborated, the position of the Ministry is that Article 3 can be subject to different interpretations, and that the Ministry disagrees with the interpretation the Commission proposes in its Communication of 2014 on the interpretation of the Maritime Cabotage Regulation.[17] Notably, the Commission states that the objective pursued in Article 3 thereof is to uphold flag State jurisdiction over manning matters, while avoiding the distortion of competition in the most sensitive routes, in particular island cabotage.[18]

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[11] Article 1(4)

[12] Article 2(1)

[13] *Lov om norsk internasjonalt skipsregister ('NIS-loven')*, LOV-1987-06-12-48 as amended. Section 4 paragraph 1 states: "[…] *oil and gas installations on the Norwegian continental shelf are regarded as Norwegian ports.*" [Original text: «*Som norsk havn anses i denne lov også innretning for olje- og gassvirksomhet på norsk kontinentalsokkel.*»]

[14] Ibid, at Section 1. In addition, *Lov om sjøfarten (sjøloven)*, LOV-1994-06-24-39 as amended. Section 4 paragraph 1 states: «*Skip utstyrt for å brukes stasjonært til boring etter eller utnytting av undersjøiske naturforekomster, anses som norsk når det ikke er innført i et annet lands skipsregister, og det eies av:*
1. norsk statsborger;
2. partsrederi eller annet selskap hvor medlemmene hefter ubegrenset for selskapets forpliktelser, dersom norske statsborgere er medeiere for minst 6/10;
3. andre selskaper, dersom selskapet er registrert i Norge.
I de tilfeller som er nevnt i nr. 1 og 2, gjelder § 1 annet til femte ledd og § 2 og § 3 tilsvarende.»

[15] Høringsnotat available at: https://www.regjeringen.no/no/dokumenter/horing-forslag-til-lov-om-norske-lonns-og-arbeidsvilkar-pa-skip-i-norske-farvann-og-pa-norsk-sokkel/id2916350/?expand=horingsnotater

[16] Ibid, «Forslag til lov om norske lønns- og arbeidsvilkår på skip i norske farvann og på norsk sokkel»

[17] *Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of the freedom to provide services to maritime transport within Member States (maritime cabotage)*, COM(2014) 232final, 22.4.2014, Section 4: "Manning Rules". The Court of Justice of the EU has confirmed this restrictive approach to any deviation from the flag State principle on matters relating to manning. See, for instance, C-288/02, *Commission v. Greece*, Judgment of 21 October 2024, ECLI:EU:C:2004:647, at paras. 53-56;

[18] Ibid, at p. 8.

In terms of what "matters relating to manning" may entail, the Commission identifies minimum wages as one such matter, which can be decided upon by the host State in very specific circumstances (i.e. island cabotage, except cruises and cargo vessels above 650 gross tonnes). More to the point, to emphasise the importance of restricting the discretion of the host State on manning matters, the Commission refers to Article 9 of the said Regulation and requires States to consult it (or ESA as the case may be) on possible national measures pertaining to manning for ships on island cabotage.[19]

The Authority cannot find any support for the argument that wages should not be considered as a "matter relating to manning" to which the flag State principle applies, under the Maritime Cabotage Regulation. Furthermore, the Authority identifies the objective of Article 3 to be to carefully carve out two specific exceptions to the flag State principle as far as "all matters relating to manning" are concerned. First, an exception for smaller vessels, under 650 gt; and second, a temporary exception for vessels carrying out island cabotage until 1 January 1999.

The Authority considers that the use of the phrase "all matters relating to" clearly denotes the intention of the legislator at the time to give this point a broad interpretation which is also compatible with international law. Notably, Article 94 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS)[20], and Article 10 of the United Nations Convention on the High Seas 1958,[21] which was replaced by UNCLOS, both confirm the jurisdiction of the flag State on "social matters" of the ship.

In view of the above considerations, the Authority notes that the proposed measures concerning domestic carriage of passengers or goods by sea in Norway, if adopted, would not be in line with Article 3 of the Maritime Cabotage Regulation. To the extent that these measures affect the implementation of the Maritime Cabotage Regulation and are in clear contravention of its provisions, it is not relevant to assess their proportionality.

4.2 The Freedom to Provide Maritime Transport services Regulation

The Freedom to Provide Maritime Transport Services Regulation applies to maritime transport services between EEA States, as well as between EEA States

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[19] Ibid, at p. 9.

[20] Signed on 10 December 1982 and entered into force on 16 November 1994 available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Article 94 on 'Duties of the flag State' states: *"1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. In particular every State shall: […] (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. […]"*

[21] Signed 29 April 1958, and entered into force on 30 September 1962, available at: https://treaties.un.org/doc/Treaties/1963/01/19630103%2002-00%20AM/Ch_XXI_01_2_3_4_5p.pdf. Article 10 states: *"Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard inter alia to: […] (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments; […]"*

and third countries. The subjects of this freedom are nationals of EEA States established in an EEA State other than the one where the services are provided, as well as nationals of Member States established outside the EEA and controlling shipping companies, on the condition that the ships are registered in an EEA State. Maritime transport services falling under the said Act are services pertaining to the carriage of passengers and goods by sea between ports, or ports and offshore installations.

The proposed measures concern maritime transport services falling under the scope of this Act. As the Ministry acknowledges in its first hearing note,[22] it is well-established in the EU Court of Justice's case law that minimum wage requirements constitute restrictions to the freedom to provide services.[23]

It would, therefore, be necessary to assess whether this restriction is justified under EEA law.

4.3 Proportionality assessment of the proposed measures

The Authority notes that it falls to the State introducing a restriction, in this case Norway, to demonstrate, by way of appropriate evidence, that the proposed measures in question are justified and proportionate. Proportionality refers to an assessment of whether the proposed measures are necessary, suitable, and proportionate in the narrow sense (i.e. that the objective could not reasonably be achieved in an equally effective manner by less restrictive means) for the purposes of the set objectives.[24]

More specifically, the Norwegian Government must *first* demonstrate that the measures are suitable to achieving the legitimate objective pursued, along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[25] According to established case-law, mere generalisations do not satisfy that threshold.[26] *Second*, the proposed measures need to be necessary and proportionate to attain the aim pursued.[27] The relevant test implies that the chosen measures must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.[28]

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[22] Supra note 15, at p. 60.

[23] See, for instance, Judgment of 17 November 2015, C-115/14 RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz, Request for a preliminary ruling from the Oberlandesgericht Koblenz, ECLI:EU:C:2015:760, at para. 69.

[24] For the conditions to be examined in a proportionality assessment of a restriction to the freedom to provide services specifically in maritime cabotage see: C-205/99, *Analir and Others*, Judgment of 20 February 2001, ECLI:EU:C:2001:107, para. 25; C-288/02, supra note 13, para. 32; C-323/03, *Commission v. Spain*, Judgment of 9 March 2006, ECLI:EU:C:2006:159, para. 45.

[25] Case E-8/16, *Netfonds Holdings*, paragraph 117 and Case E-8/17 *Kristoffersen*, paragraph 118. See also Case C-795/19 *Tartu Vangla*, EU:C:2021:606, paragraph 44, with further references.

[26] Case E-8/20 Criminal Proceedings against N, paragraph 104 and the case law quoted.

[27] Case E-8/17 *Kristoffersen*, paragraph 123.

[28] See, e.g., Case E-8/17 *Kristoffersen*, paragraph 122, Case E-8/16 *Netfonds Holdings*, paragraph 125-126, Case E-5/23 *LDL*, paragraph 82 and Case E-8/20 *Criminal proceedings against N*, paragraph 94

Third, the reasons invoked by an EEA State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness, necessity and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.[29]

In this instance, the Authority is of the view that the proportionality of the proposed amendments cannot be fully assessed as they have been presented and currently stand.

The objectives set out in the Ministry's consultation note are fair working conditions (i.e. wages) and fair competition in the shipping sector in Norway and in the Norwegian Exclusive Economic Zone and Continental Shelf.

To carry out the proportionality assessment, the scope of the proposed measure must be clear and without uncertainties. In this case, however, the scope of the proposed amendments is not yet fully defined, encompassing also future activities, whereupon no data is available regarding the maritime services provided in that context (e.g. CO2 capture and storage, deep-sea minerals mining). In addition, data regarding the distribution of the fleet that is active in the cruise sector and the offshore sector – apart from offshore supply vessels linked to oil and gas activities – is missing. Where it is clear that a measure constitutes a restriction, the lack of precision and data to make the impact of the measure quantifiable cannot be considered to support compatibility with the principle of proportionality.

In Section 5.4 of the Ministry's consultation note, it is clear that the Ministry has not completed a proportionality assessment of the proposed amendments and is leaving the question pending to be determined at a later stage.[30] More specifically, the Ministry states that the proportionality, including the suitability and necessity of the proposed measures, can only be assessed fully once and if the Tariff Boards or the Government – as the case may be – decide to use the discretion afforded to them[31] by setting Norwegian minimum wages for all ships operating in Norwegian territorial waters, Exclusive Economic Zone and Continental Shelf, under the four categories listed under (a) to (d) in Section 1 of this letter.

The Authority's view is that the principle of proportionality requires that envisaged national restrictions to the freedoms be assessed before they are enacted, as part of the identification of the least restrictive way to achieve an accepted overriding objective. For the Authority to conclude on the proportionality of the proposed measures, particularly as this affects maritime cabotage, it must be able to identify – based on the evidence submitted by Norway – the exact scope and aims of the proposed measures. As set out in the previous section of the present comments, with the proposal as it stands today, that is not possible, in particular as regards categories (c) ('other maritime services') and (d) ('maritime services to the offshore sector') of vessels.

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[29] See Case E-5/23 LDL, paragraph 85; Case E-9/11 ESA v Norway, paragraph 89; Case E-8/20 Criminal Proceedings against N, paragraph 95; and Case C-254/05 Commission v Belgium, EU:C:2007:319, paragraph 36, with further references.

[30] Supra note 1, Section 5.4.3, at p. 41.

[31] Ibid, pp. 41-42.

5 State Aid

The Authority takes note of the Norwegian Government's position that the proposed measure does not affect the approved tonnage tax scheme and consequently does not require a state aid notification. However, the Authority takes the view that it has not been provided with sufficient information or arguments at this stage to carry out a preliminary assessment of this. Therefore, it is not currently possible for the Authority to provide any assurance as to whether the proposed measure qualifies as a notifiable amendment to the approved tonnage tax scheme.

If the Norwegian authorities would like the Authority's assessment of the implications of the proposed measures for the tonnage tax scheme and whether these constitute a notifiable amendment, they are invited to provide additional information in the form of a legal certainty pre-notification memorandum. This memorandum should be forwarded to ESA through the state aid unit at the Ministry of Industry and Trade.

6 Conclusion

In response to Norway's request for consultations concerning the proposed legislative amendments to the General Application Act and the sectoral acts on offshore activities in Norwegian waters, Exclusive Economic Zone and Continental Shelf, and on the basis of the information provided by the Norwegian Government to date, the Authority considers that the proposal would as currently drafted be incompatible with EEA law.

As far as the EEA freedom to provide maritime transport services is concerned, both within Norway (maritime cabotage), and between Norway and other EEA or third States, a Norwegian minimum wages requirement would constitute a restriction. With regard to maritime cabotage services, the envisaged restriction would be contrary to Article 3 of the Maritime Cabotage Regulation. With regard to maritime transport services between EEA States or EEA States and third countries by EEA-flagged vessels, Norway has not provided enough elements to substantiate that the envisaged restriction of the freedom to provide maritime transport services would be justified and proportionate.

The Authority reiterates that it falls to the State introducing a restriction, in this case Norway, to demonstrate, by way of appropriate evidence, that the proposed measures in question are justified and proportionate.

The Norwegian Government is invited to take note of the observations contained in this letter, and to inform the Authority of any further steps in the legislative process. Moreover, the Authority would welcome further discussions on the matter.

The present Comment is annexed to College Decision 176/24/COL, adopted by the Authority on 16 October 2024.