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19 August 2022

Messrs.
CARNIVAL CORPORATION & Plc
3655 NW 87th Avenue.
Miami, FL. 33178
U.S.A.

k.a. Avv. Cristina Porcelli

Dear Cristina,

Norway – Proposal for an Act on Norwegian Wages and Working Conditions on Ships in Norwegian Waters and on the Continental Shelf – Legal Analysis

You have requested us to examine the draft Proposal for an Act on Norwegian Wages and Working Conditions on ships in Norwegian Waters and on the continental shelf (hereinafter also referred to as the "Proposal") that on 30th May 2022 the Norwegian Ministry of Trade, Industry and Fisheries (the "Ministry" or the "Government") submitted for consultation to the Norwegian authorities and to Norwegian and international shipowners association, requesting all interested parties to submit their responses to the Proposal within the 31st August 2022.

In order to prepare the eventual response to the Proposal to be submitted within the above deadline, you have, in particular, requested us to analyse the provisions of the Proposal applicable to Carnival Corporation & Plc cruise ships and their compatibility with the international legal obligations undertaken by Norway.

The Proposal was submitted accompanied by a Consultation Note (hereinafter, the "Consultation Note"), summarizing the contents of the previous studies and reports that the Ministry took into consideration in drafting the provisions of the Proposal and that, according to the Ministry, would support its implementation.

We have examined the Proposal and the arguments raised by the Ministry in the Consultation Note to justify the adoption of the act and its scope of application. We have conducted the assessment in light of the analysis of international law principles and instruments and of the European Economic Area Agreement (hereinafter the "EEA Agreement").

You also requested Oslo Economics to prepare an Economic Analysis to assess the potential impact of the Proposal on the cruise industry and its seafarers. We made use

of Oslo Economics' work and findings to provide a solid and scientific basis to some of our legal considerations.

Overview of the Proposal and the Consultation Note

With specific regard to ships in cruise operations, Section 6 of the Proposal provides as follows:

"*Workers employed on board cruise ships sailing between Norwegian ports shall have Norwegian wages and working conditions. The requirement also applies if the ship operates exclusively out of one Norwegian port.*

Cruise ships are passenger ships carrying persons for tourist purposes or to offer experiences.

In the case of cruise ships coming from or going to a foreign port, the requirement of Norwegian wages and working conditions only apply if more than half of the voyage, measured in time, takes place in Norwegian territorial waters. The requirement applies from the time the vessel leaves the first Norwegian port until the vessel arrives at the last Norwegian port.

The Ministry may by regulation lay down additional rules concerning the vessels covered by this provision".

In the Consultation Note, the Government indicates that the Proposal aims at promoting a fair and decent working life in Norwegian waters by ensuring the application of Norwegian wages and working conditions to all workers on board any commercial ship navigating or sailing in Norwegian waters (see Section 1 of the Proposal).

However, in the same Consultation Note, the Government also expresses its interest, with the Proposal, in strengthening the competitiveness of Norwegian-flagged vessels and protecting Norwegian seafarers against the competition of low-waged foreign seafarers.

As will be further addressed below, the goal of protecting Norwegian seafarers seems to be a main aim pursued by the Proposal. This is underscored by the reply recently provided by the Minister of Local Government and Regional Development Sigbjørn Gjelsvik to a member of Norwegian Parliament, indicating that the goal of the law is to contribute to the recruitment and employment of Norwegian seafarers, by ensuring Norwegian wages and working conditions.[1]

1 See https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=90010.

In the Consultation Note, the Ministry analyses and discusses the obligations undertaken by Norway under both public international law and the EEA Agreement.

The main issues addressed by the Ministry are the following:

- the general principles of international law and the United Nations Conventions on the Law of the Seas of 1982 (hereinafter, the "UNCLOS"), including *(i)* the coastal State jurisdiction in the waters subject to its sovereignty, *(ii)* the exclusive jurisdiction of the flag State in the high seas, *(iii)* the doctrine of internal matters and *(iv)* the right of innocent passage of ships in the territorial waters;
- the right of coastal States to limit access to their ports applying the cabotage regulations;
- the other international legal obligations binding for Norway, and in particular the obligations arising from the EEA Agreement.

Summary of Conclusions

We have thoroughly considered the arguments raised by the Ministry and investigated the consistency of the Proposal with relevant principles of public international law as well as international and supranational legislations.

As the below assessment will illustrate, it is controversial whether Norway has the requisite jurisdiction to implement and enforce the obligations contained in the Proposal. On this background, it is particularly concerning that the Government intends to include the cruise industry in the Proposal, without having thoroughly considered the effects of this expansion. The decision to expand the scope of the Proposal to include the cruise segment was done late in the preparatory process. The majority of legislative and economic assessments made prior to the Consultation Note did therefore not specifically consider the Proposal's impacts on the cruise industry. We believe this poses a significant risk with regards to the Proposal's compliance with Norway's international and regional legal obligations, as the cruise industry has several unique aspects compared to other maritime segments covered by the Proposal.

One example is that cruise vessels are more intrinsically international than the other segments covered by the Proposal. The cruise industry is seasonal in nature, mainly offering their services in the summer months. This is different from cargo ships and other passenger vessels, which are regularly employed throughout the year. This entails that Norway, as a coastal state, has a weaker connection to cruise ships, which accentuates the legal issues highlighted below. Another unique aspect concerning the cruise industry is that cruise vessels employ significantly larger crews than other vessels, many of which are employed in non-maritime positions (such as guest service operations, hospitality, entertainment, etc.). The Proposal will therefore have a larger impact on shipowners in this segment, as well as the cruise industry as a whole.

The expansion therefore raises several legal, economic and political questions that ought to be assessed further. In any event, the inclusion should only relate to the maritime personnel.

Moreover, turning to the Government's specific legal arguments, we have noticed that the starting point of the assessment of the Norwegian Ministry with regard to the consistency of the proposed legislation with the obligations arising from public international law – more precisely, from the specific field of the law of the sea – is that, according to art. 2 UNCLOS, Norway, as a coastal State, has exclusive and absolute sovereignty over foreign flagged ships sailing inside its territorial waters and can prescribe and enforce national law provisions within its territory. Furthermore, the voluntarily presence of foreign vessel in internal waters and in ports give Norway a strong jurisdictional regulatory claim though its role as port state. The Consultation Note recognizes that costal and/or port state jurisdiction might be subject to restrictions *(i)* for reasons of emergency situations such as ship in distress, *(ii)* for the right of innocent passage that all ships enjoy, *(iii)* for the tradition of refraining from regulating the so called "internal matters", and *(iv)* by rules and principles of international law.

We argue that the Consultation Note to a larger degree should have recognized that the full and unrestricted right to exercise port state jurisdiction when it comes to imposing national regulations regarding seafarers' wages and working conditions is not clear and raises some principal questions regarding the scope of port state jurisdiction vs. the protection of the global character of international shipping. The starting point is that the presence of a ship in port is not in itself a sufficient jurisdictional basis for imposing any type of enforcement measure or requirement.

Finally, it seems quite evident that the desired aims of promoting worker's rights and preventing low-wage competition would be more universally achieved if the contents of the Proposal were included in an additional protocol to the MLC. This would also be uncontroversial from a legal point of view. The Ministry should focus their efforts on implementing the contents of the Proposal in the recognized international fora, rather than contributing to the erosion of the same instruments.

For the purpose of our analysis and the preparation of the response, after having considered all the arguments of the Norwegian Government and the possible issues to be raised, we deem that the main arguments to limit Norway's authority to impose national law provisions on foreign flagged ships, can be summarize as follows:

- the unique legal questions for the cruise sector have not been sufficiently assessed;
- there is a substantial risk of inconsistency and incompatibility of the Proposal with the Maritime Labour Convention of 2006 (hereinafter, the "MLC"); and

- there is a substantial risk of inconsistency and incompatibility of the Proposal with the EEA law and principles, especially considering that the burdensome obligations the Proposal imposes on the EEA-flagged vessels could be tantamount to a *de facto* exclusion from the Norwegian market.

All the above considered, please find below an overview of the counter-arguments we believe more fit to challenge Norwegian Ministry's position supporting the alleged lawful adoption of the Proposal.

I. The Legal Basis Under International Law for Prescribing and Enforcing National Regulations on Wages and Working Conditions

1.1 Scope of Jurisdiction

The concept of port state jurisdiction has developed due to trends in the international maritime shipping industry, especially the need to ensure sufficient compliance due to lack of flag state control and oversight. This trend has manifested itself in international treaties conferring more jurisdictional powers to port states at the expense of flag states, and port states have started to unilaterally enact with the same effect.

The legal basis for port state jurisdiction is that port states are, under customary international law and the sovereignty principle, allowed to refuse entry to their ports based entirely on their discretion (with the exception of ships in distress). The legal reasoning behind port state jurisdiction is that a port state should then also be allowed to qualify a foreign vessel's entry to port based on their own criteria, including adherence to rules of national legislation.

The wide discretion of port states is, however, not without limits. Limitations could follow from either treaty commitments, commitments following the safeguard provisions of UNCLOS Part XII, section 7, or from the application of more general principles of general international law.

Furthermore, it is widely accepted that the extent of a port state's prescriptive jurisdiction over foreign ships differs depending on the subject matter of the requirements at issue, where especially 'static' matters is regarded as matters that should be dealt by at a global level. The limitation of the coastal states jurisdiction to prescribe laws and regulation regarding the design, construction, manning or equipment of foreign ships in the territorial sea unless they are giving effect to generally accepted international rules or standards in UNCLOS art 21 (2) is an expression of this.

Port state requirements of a 'non-static' nature, which relate to specific conduct or other operational requirements on foreign ships, are not as clear cut. Ringbom and Røsæg argue that "*most employment conditions do not easily fit into either of these broad categories… Yet, to limit for example wage requirement to the time during which the ship*

is in the port, or even territorial water, of the port state would defeat the object and the purpose of the requirement. In reality, the payment of wages is not a requirement which can be easily defined in geographical (or jurisdictional zones) at all."[2]

The legal literature does not provide a clear conclusion on the subject matter.

Limitations to the port state's prescriptive jurisdiction are also necessary to guarantee the certainty of the legal regime applicable to specific matters pertaining to the operation of ships, such as wages and working conditions of the seafarers, and allow the navigation.
In case a port State was allowed to impose its national legislation to ships flying the flag of other States, also other port States would be entitled to impose their national legislation, with the result that ships would be subject to a different regime for any different port of call and the exercise of navigation would be practically impossible.

For this reason, there seems to be a general reluctancy to unilaterally impose national requirements regarding seafarers' wages and working conditions, and a preference to take a global regulatory approach. The MLC is an example of the latter. We argue that the weak or uncertain jurisdictional basis for executing jurisdiction is, if not by itself, then together with the following points raised, a strong argument in favour of the Proposal not being in line with general international principles.

1.2 Restriction of Jurisdiction following Treaty Commitments

The MLC is a comprehensive international employment convention adopted by the ILO International Labour Conference in February 2006.

Even though the MLC contains seafarers' rights to decent conditions of work, it is also considered "*an essential step toward ensuring fair competition and a level-playing field for quality owners of ships flying the flags of ratifying countries"*. It provides a comprehensive set of global standards, based on previous ILO maritime labour instruments, and consolidates and revises existing international law on all matters regarding seafarers' working conditions. The Convention aims at becoming "*globally applicable, easily understandable, readily updatable and uniformly enforced*".[3]

The Convention sets forth the standards that all the ratifying States are bound to respect. The question is thus whether this is to be interpreted as restricting national authorities of the ratifying States from applying stricter national provisions.

[2] Henrik Ringbom and Erik Røsæg, Norwegian Employment Conditions for Foreign-Flagged Offshore Service Ships, 16 December 2014. https://www.regjeringen.no/no/dokumenter/horing---utredning-av-norske-lonns--og-arbeidsvilkar-pa-utenlandske-skip/id2662188/Download/?vedleggId=f138a257-0bd4-4b03-b1d4-983a1f10b389
[3] See https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.html.

The Convention comprises two different but related parts: the Articles and five Titles. The Titles are as follows:

Title 1: Minimum requirements for seafarers to work on a ship
Title 2: Conditions of employment
Title 3: Accommodation, recreational facilities, food and catering
Title 4: Health protection, medical care, welfare and social security protection
Title 5: Compliance and enforcement

Each Title comprises the Regulations and the Code. The Articles and Regulations set out the core rights and principles and the basic obligations of States ratifying the Convention that, through Title 5, are properly complied with and enforced by the ratifying States. The Code contains the details for the implementation of the Regulations.

The Norwegian Government's Position on the Matter

Norway ratified the MLC in February 2009. In the Consultation Note, there are several references to the standards set out by the MLC.

Firstly, in item 3.2 of the Consultation Note (which provides an overview of the existing legislation), it is reported that "*Norwegian wages and working conditions as set out in the Ship Labour Act, the Ship Safety Act and collective wage agreements with effect for NOR ships apply to ships registered in NOR. The Ship Labour Act mainly contains legislation related to the private law relationship between the employer and employee, while the public law relationship regarding the ship as a workplace is set out in the Ship Safety Act. Together, these laws form the basis for the regulation of working conditions at sea in Norwegian law, and meet the majority of Norway's obligations under MLC*".

Secondly, as to the legislative jurisdiction and power to impose Norwegian wages and working conditions (see item 5.2.2 (p. 37) of the Consultation Note), the Government indicates that the Convention is based on the developments of minimum requirements and that MLC's Preamble, paragraph 11 – which refers to the ILO Constitution Section 19 (8) – would allow States to apply more favourable conditions. The ILO Constitution Section 19 (8) has the following wording:

> *"No convention or recommendation adopted by the conference and no convention which is ratified by a Member State, in any case shall be considered to affect any law, arbitration, customs or agreement which ensures more favourable conditions for the workers concerned than that which the convention has been decided in the convention*."

Thirdly, further reference to the MLC is made in item 8 of the Consultation Note, concerning the enforcement of the Proposal. For instance, the Consultation Note indicates that the supervision of the Proposal will take place "*on a national basis*", as it

is currently carried out in connection with other provisions (sulphur content requirements), and will be conducted in addition or in connection with the inspections carried out in accordance with international instruments, such as Port State Control and MLC supervision.

On a general level, therefore, even if the MLC is expressly referred to, the Consultation Note does not thoroughly assess the Proposal's compatibility with Norway's obligations under the MLC.

Critical Observations

i) Possible Non-Compliance with the MLC with regards to Norway's Legislative Jurisdiction

The first question is whether the MLC limits Norway's legislative jurisdiction as a port State to implement Norwegian wages on foreign cruise ships. Specifically, the question is whether the MLC not only prevents its contracting States from imposing requirements which are lower than the minimum standards set out therein, but also restricts contracting States from unilaterally implementing stricter, national rules related to the subject matter covered by the Convention.

The legal starting point is MLC art. I and art. V. Before analysing these provisions in detail, the relevant rules of interpretation will be briefly set out below.

International treaties are to be interpreted pursuant to Art. 31 of the 1969 Vienna Convention on the Law of Treaties, which reads as follows:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

Even if Norway is not part of the Vienna Convention, the relevant rules on the interpretation of treaties (Arts. 31-33) shall in any case apply since it is well-established and undisputed that such rules constitute general principles of international law, which the Vienna Convention has merely crystallised.

The above means that, in principle, international conventions are to be interpreted literally and by taking into consideration the specific objectives pursued by the treaty from time to time considered.

Art. I of the MLC reads as follows:

> "*1. Each Member which ratifies this Convention undertakes to give complete effect to its provisions in the manner set out in Article VI in order to secure the right of all seafarers to decent employment.*
>
> *2. Members shall cooperate with each other for the purpose of ensuring the effective implementation and enforcement of this Convention*."

Subsequently, art. V para. 1 – 4 provides the following:

> "*1. Each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction.*
>
> *2. Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws.*
>
> *3. Each Member shall ensure that ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance as required by this Convention.*
>
> *4. A ship to which this Convention applies may, in accordance with international law, be inspected by a Member other than the flag State, when the ship is in one of its ports, to determine whether the ship is in compliance with the requirements of this Convention*".

The two provisions have to be read and applied together, as they complement each other.

As to the literal meaning, it clearly stems from the wording of relevant provisions of the MLC – in particular of Art. I and V – the mandatory nature, towards the ratifying States, of the duty, *inter alia*, to comply with seafarer standards and conditions set forth therein.

Standards which – according to the literal construction of relevant provisions – are conceived as common and widely shared standards, the respect of which – by all ratifying States – is strictly functional to the achievement of the aims forming the ratio of the Convention.

As to the MLC's objectives and purposes – in light of which the Convention has to be literally interpreted – it is to be noted that the goal of the MLC is to harmonize the sensitive field of sea labour law at a global level, in order to fight the related so-called "race to the bottom" as to the seafarers work conditions.

As above reported, for this purpose, the MLC clearly and firmly sets a number of rights and principles on seafarers' work conditions shared and accepted by the ratifying States. The Convention also requires that said rights and principles are properly complied with and enforced by each State.

The above is functional to the *ratio* of the Convention, which is to guarantee seafarers' rights to decent conditions of work by, at the same time, creating and preserving conditions of fair competition among shipowners, by the achievement of "level-playing field" for shipowners.

Both these aspects – which in the framework of the negotiation and drafting of the Convention have been subject to a delicate balance – must be pursued by the implementation of the MLC, and thus taken into account in interpreting the Convention.

Therefore, it is clear that enabling a State party – such as Norway in the present case – to impose on ships flying the flag of other State parties higher standards than those agreed upon in the Convention, would negatively affect the whole system that the MLC intends to create.

This would lead, in fact, to a global jeopardization of the standards of seafarers' working conditions adopted by the States, and thus result in the frustration of the MLC itself. This underscores the point in item 1.1, that the legislative jurisdiction of the port state is limited in matters that should be dealt with at a global level.

In other terms, by becoming a party to MLC, it is arguable that Norway agreed not only to adopt national legislation implementing the standards of the MLC but also – specularly – to "accept" foreign legislations which are in compliance with the standards set forth by the MLC.

In conclusion, it is arguable that MLC limits Norway's legislative jurisdiction to implement Norwegian wages on foreign cruise ships when the ships are located in Norwegian territorial waters.

Further, even if it is held that the contracting States are authorized to impose stricter national rules, another question is whether the MLC allows for the contracting State to impose stricter rules only for its own ships (i.e. as a flag State), or whether the contracting State also can impose stricter rules for ships flagged elsewhere. Put differently, the question is if the MLC limits the authority of contracting States to impose such stricter national rules for foreign ships. We believe there are several arguments which support such a conclusion.

The first argument is the wording of MLC art. V. Taking into consideration the other provisions of art. V, MLC art. V paragraph 1 stating that any ratifying State "*shall implement and enforce laws or regulations […] with respect to ships and seafarers under*

its jurisdiction" has to be read as "in respect of ships that fly its flag" and not "in respect of ships in their territorial waters", as wrongfully maintained by Norwegian Government. MLC art. V sets out a clear distinction between the flag State and the port State, where the flag state is awarded the main responsibility to ensure compliance with the Convention. The port State, on the other hand, is only awarded a limited supervisory role.

Moreover, the MLC does not make, or even take into account, any distinction regarding the navigation in the high seas or navigation in territorial waters. Therefore, we see limited arguments to maintain that the obligations under arts. I and V of the MLC have no territorial limitation and cannot be implemented only in the high seas or not implemented in the territorial waters. This further supports the argument that MLC art. V no. 1 refers to the jurisdiction of the flag State, as it would otherwise create a difficult situation of concurrent jurisdiction.

The flag State's legislative authority under the MLC also follows from the assessment of the regulations and standards contained in the Title 2 of the MLC, which deals with the conditions of employment, that expressly targets the flag State. For example, Regulation 2.2 Standard A2.A no. 1 (Wages), has the following wording:

> *"Each Member shall require that payments due to seafarers working on ships that fly its flag are made at no greater than monthly intervals and in accordance with any applicable collective agreement."*

Moreover, the flag State's legislative authority is supported by the MLC's Preamble. The Preamble includes, *inter alia*, the express intention to embody the fundamental principles of the ILO Constitution within the framework of the UNCLOS (see paras. 9 to 11 of the Preamble). Further, the Preamble holds that art. 94 UNCLOS establishes the duties and obligations of a flag State with regard to, inter alia, labour conditions onboard ships that fly its flag (see para. 10 of the Preamble).

In this respect, the Preamble and the preparatory reports (as referenced below) indicate that art. 94 has been considered as a particularly important provision of international law regarding the duty of the flag State to effectively exercise its jurisdiction and control. This is reflected in the Articles, especially in article V.

Even if the legislative authority of the flag State has been construed more narrowly in recent legal theory, the reference must be interpreted in accordance with the understanding of the flag states' legislative authority when the MLC was drafted.

Despite of the above, it is noted that the Preamble is not a significant part of the Convention. As expressly indicated in the Explanatory Note to the Regulations and Code, only "*the Articles and Regulations set out the core rights and principles and the basic obligations of the Members ratifying the Convention*".

In fact, as reported in the preparatory works and reports to the MLC,[4] the Preamble does not set out binding rights and obligations for the States ratifying the instrument and is aimed at providing information on the overall context and intention of the Convention in relation to other relevant international law and principles.

The assertion as per the Consultation Note according to which the power to adopt and impose Norwegian wages and working conditions as more favourable to the seafarers would find its justification from para. 11 of the Preamble is contrary to the contents and the appropriate interpretation of MLC.

Art. 19.8 of the ILO Constitution,[5] mentioned in para. 11 of the Preamble (which we stress that, in any case, it is not binding), allows Norway to adopt laws establishing working conditions which are more favourable to seafarers pursuant to art. 94 of the UNCLOS, only to ships flying its own flag. It does not authorise Norway to impose said conditions to ships flying the flag of other States.

In conclusion, although the MLC allows its contracting States to impose stricter working conditions onboard ships flying their flag, there are several arguments which support the assertion that the MLC does not allow contracting States to impose such stricter national rules on foreign ships.

The above reasons suggest that the adoption by Norway of the Proposal – to be considered in contrast with the MLC – could constitute a breach of international law.

ii) Non-Compliance with the MLC with regards to Norway's Enforcement Jurisdiction

The second question is whether the MLC limits Norway's enforcement jurisdiction as a port State to enforce a requirement of Norwegian wages on foreign cruise ships.

With regard to enforcement, art. V indicates that the flag State bears the main responsibility for inspection of ships and verification of the compliance with the requirements of the Convention.

The role that is attributed to the port State is a secondary role. In fact, port States are under no obligation to inspect the ships entering their ports. Paragraph 4 of art. V indicates that the ship "*may*" be subject to inspection by the port State, whilst paragraphs

[4] See the Report on the "Adoption of an instrument to consolidate maritime labour standards", submitted to the International Labour Conference 94th (Maritime) session of 2006; available on-line at following link: https://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1a.pdf.

[5] Art. 19.8 of ILO Constitution: "*8. In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation*".

1-3 expressly hold that the flag State "*shall*" enforce the Convention. Moreover, when port States exercise the faculty of inspection, art. V para. 4 states that they are limited to determine whether the ship is "*in compliance with the requirements of this Convention*".

The inspection is carried out primarily with the recognition and acceptance of the validity of the certificates issued by the flag States in accordance with the MLC, namely the Maritime Labour Certificate and the Declaration of Maritime Labour Compliance, ref. MLC Regulation 5.2.1 no. 2.

This means that the port States are, as the main rule, bound to recognise the MLC certificates issued by the flag State. MLC States cannot conduct additional inspections on the compliance of the ship with their national laws/standards.

In this sense, with regard to Port State control, the European Court of Justice ("ECJ") has repeatedly held that there is a clear division of powers between the flag State and the port State where the ship is subject to inspection. Such a division would be prejudiced in case of refusal to recognise a flag State certification. In a recent judgment regarding the compliance of a ship with safety requirements and relevant certification, the ECJ stated the following:

"[A] control which disregards that division of powers, such as the act, by the port State, of demanding that ships which are subject to a more detailed inspection hold certificates other than those with which they were issued by the flag State or that they comply with all the requirements applicable to ships covered by another classification, would be contrary not only to the relevant rules of international law, as is apparent from paragraphs 98 to 100 of the present judgment, but also to Directive 2009/16. Such a control would ultimately be tantamount to calling into question the way in which the flag State has exercised its powers in the area of conferring its nationality on ships, as well as the area of classifying and certifying those ships".[6]

If the MLC had intended to authorise port States to enforce higher standards, for the customary principle of *ubi lex voluit dixit, ubi noluit tacuit*, the provisions of art. V would have included said authorization and port States would have been authorized to verify, together with the compliance of a foreign flagged ship with the standards of MLC, also their compliance with their national standards.

As stated above, the Consultation Note contains a chapter devoted to the enforcement of the Proposal, which indicates that enforcement of the legislation will take place "*on a national basis*" and will be conducted in addition or in connection with the inspections

[6] See paragraph 138 of ECJ decision in the cases 14/21 and 15/21 Sea Watch eV v. Ministero dei Trasporti e delle infrastrutture: https://curia.europa.eu/juris/document/document.jsf?text=&docid=263730&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9743.

carried out in accordance with international instruments, such as Port State Control and MLC supervision (ref. item 8.1 in the Consultation Note).

This proposed enforcement is likely contrary to Norway's obligations under the MLC, as the Convention likely prevents MLC States from enforcing unique, national requirements covered by the subject matter of the MLC.

iii) Inconsistency with national collective bargaining agreements

A further, final, argument – still relating to the MLC – that, in our opinion, could be raised refers to the seafarers' employment agreements and relevant collective bargaining agreements.

The imposition of different national provisions might render the seafarers' employment agreements invalid and not compliant with the relevant collective bargaining agreements incorporated therein, thus frustrating the obligations assumed by each flag State under its national law (see also Regulation 2.1.3 of the MLC providing "*To the extent compatible with the Member's national law and practice, seafarers' employment agreements shall be understood to incorporate any applicable collective bargaining agreements*").

II. The Legal Basis Under EEA Law for Prescribing and Enforcing National Regulations on Wages and Working Conditions, especially with the Freedom to Provide Services

Legal Framework

Norway is part of the EEA and subject to the provisions of the EEA Agreement, that basically provides for the inclusion of EU legislation throughout the 30 EEA States.

According to art. 1(2) of the EEA Agreement, one of the overarching purposes of the Agreement is the promotion of the free movement of services between member States.

With specific regard to the freedom to provide services, art. 56 of the Treaty on the Functioning of the European Union ("TFEU") provides that "*…restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*".

Similarly, art. 6 of the EEA Agreement provides that "*Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended*".

The term "restriction" has been interpreted broadly by the ECJ, as to cover not only national measure that prohibit the exercise of the freedom, but also national measures that *"hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty*" (see Gebhard, C-55/94, para. 37).[7]

According to settled case-law of the ECJ, any restriction to the freedom to provide services has to be justified by overriding reasons of public interest and it has to meet the following criteria:

a) Appropriateness

The appropriateness of a measure is the extent to which there is a logical link between the measure adopted and the objective pursued. This requirement does not imply that the Member State must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose.

b) Necessity

The measure should not go beyond what is necessary to achieve the objective pursued. The national legislation restricting the freedom to provide services is considered necessary to protect a public interest, and thus justified, "*when it emerges that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established*" (see C-539/11, Ottica New Line, para 47).

In the Consultation Note, the necessity criterion is connected to the so-called "home-state control/duplication ban" criterion, namely the investigation on the existence of similar measures of protection of the interest in the home State legislation that would render the proposed measure an unnecessary duplication.

c) Consistency

The requirement of consistency implies that "*the national legislation as a whole and the various relevant rules are appropriate for ensuring attainment of the objective relied upon*

[7] The above principle is clearly stated also in the Portugaia case, where the ECJ held that "*the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services … the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens*." (Portugaia, C-164/99, para 16).

[…] they genuinely reflect a concern to attain that objective in a consistent and systematic manner" (see C-539/11, Ottica New Line, para 47).

The above-mentioned criteria have been summarised in the so-called "principle of proportionality", one of the main general principles of EU law. [8]

Norway's Position on the Matter

In the Consultation Note, the Norwegian Government maintains that the Proposal fulfils the principle of proportionality.

According to Norway's Ministry, the Proposal would be justified as it is aimed at the protection of workers. Moreover, the Ministry indicates that the legislation may be justified also as an instrument to guarantee fair competition between shipowners, but we note that the argument is then dismissed. Throughout the Consultation Note, only the matters related to the protection of workers are addressed for the purpose of demonstrating the existence of the requisite of overriding reasons of public interest: "*Protection of worker's basic rights and considerations of fair competition are considered legitimate reasons that may justify restrictions on free movement. According to the Ministry's assessment, a requirement for Norwegian wages and working conditions in Norwegian waters and on the Norwegian continental shelf could be justified with reference to these considerations. However, it is in the Ministry's assessment most apparent to justify regulation of wages and working conditions with regard to the protection of worker's basic rights*".

This being said, as to the above-mentioned additional criteria being satisfied, our interpretation of the Government's line of arguments is as follows:

a) Appropriateness

The Proposal would be appropriate, as suitable for achieving the purpose of protecting workers. In this respect, no further explanation on the satisfaction of the criterion is provided in the Consultation Note.

b) Necessity

The Proposal would be necessary for the protection of Norwegian seafarers, as other possible alternative measures - such as the mere strengthening of existing measures of Norwegian legislation - would not allow to achieve the same level of protection of workers. In particular, according to the Ministry, *(i)* the tax refund scheme would only

[8] Note that "consistency " is often considered as part of the appropriateness, whereas "proportionality" (*stricto sensu*) is often included as a separate criterion, referring to the chosen level of protection. The choice to discuss "consistency" separately in this memo reflects the Ministry's approach in the Consultation Note. For the sake of simplicity, proportionality *stricto sensu* is discussed in conjunction with appropriateness.

strengthen the competitiveness of Norwegian-registered ships that are covered by the scheme; *(ii)* requirements in connection with public procurements and requirements in awarding licenses may lead to Norwegian wages and working conditions also on foreign ships, but for a more limited scope; *(iii)* an extension of the scope of the Ship Labour Act will not be effective for many ships and will also not lead to seafarers on board foreign flagged ships obtaining wages corresponding to Norwegian wages.

In the Consultation Note, the Norwegian Government maintains that the proposal would be necessary also for the protection of foreign seafarers, thus implying that the existing measures in their national systems are not sufficient. As mentioned above, in the Consultation Note, the necessity criterion is connected to the so-called the "home-state control/duplication ban" criterion, namely the investigation on the existence of similar measures of protection of the interest in the home State legislation that would render the proposed measure an unnecessary duplication.

With regard to this criterion, the Consultation Note indicates that it is necessary to conduct an investigation on whether the same protection of seafarers is satisfied through the legislation in the service provider's home state, but then we note that it lacks any assessment in this regard.

The assessment is dismissed and the Norwegian Government merely indicates that "*it is difficult to assume that the principle of home-state control constitutes any limitation of which measures may be considered necessary to protect employees*".

c) Consistency

Finally, the Consultation Note's assessment of the consistency of the Proposal is rather brief. The Ministry indicates that such evaluation would require to focus on how Norwegian authorities handle the protection of workers in general and on the protection of employees onboard NIS-registered ships. Actually, there is currently no requirement of Norwegian wages onboard NIS-registered ships.

The Norwegian Government maintains that the lack of regulation for NIS-registered ships is justified on the basis of the fact that "*NIS-registered ships move mainly outside Norwegian territory*". Therefore, with the exception of cases where NIS-registered ships operate in Norwegian waters, the Government maintains that it is questionable whether the absence of a similar requirement to NIS-registered vessels is "at all relevant" in a consistency assessment.

<u>Critical Observations</u>

In our opinion, there are good reasons to question the Proposal's compliance with the principle of proportionality and the above-mentioned requirements to justify the

restriction to the freedom of providing services and being compliant with the obligations arising from EEA Agreement.

The protection of workers – including, as in this case, seafarers - is indeed a reason of public interest that may justify the adoption of measures restricting the freedom of foreign shipowners to provide their services in Norwegian waters.

Ensuring the competitiveness of Norwegian companies and strengthening the Norwegian flag, on the contrary constitutes an economic reason not justifying the legislation. An economic reason such as the protection of domestic business cannot be considered an "*overriding reason of public interest*" (see C-352/85, *Bond van Adverteerders*, para. 34; C-288/89, *Gouda*, para. 11; and C-220/12, *Meneses,* para. 44).

The Government states that the aim of the legislation is not that of protecting the domestic business, but rather that of protecting seafarers. As Oslo Economics makes clear, however, there is no doubt that the proposed regulation will actually improve the competitive situation of domestic (NOR) cruise lines, since they are already subject to Norwegian salary and working condition requirements, whereas foreign cruise lines will be subject to a significant financial burden and will end up in competitive disadvantage (p. 11 and 13).

Furthermore, seafarers, whether Norwegian or of other nationalities, could arguably be better protected if the same conditions that the Proposal intends to apply within Norwegian territorial waters were made applicable to NIS ships in international waters and not in territorial waters only. Conversely, if the justification for excluding NIS-registered vessels in international waters is linked to the absence of a sufficient link with the national territory, it is inconsistent to require compliance with Norwegian law and levels of pay with respect to seafarers who have no connection to Norway with the exception of the limited number of hours they spend aboard the vessel while it operates in Norwegian waters. As it will be mentioned below, this aspect is also relevant to establish the lack of necessity and consistency (as per paragraph b) and c) above, respectively).

As to the fulfilment of the requirements, we observe as follows.

a) Appropriateness and proportionality *stricto sensu*

With regard to the appropriateness of the measure, we consider that the Norwegian Government has paid insufficient attention to the fact that the Proposal would in fact largely subject service providers to the same conditions as those exercising the freedom of establishment, which raises doubts about compliance with fundamental characteristics of the freedom to provide services.

As the ECJ stated in several occasions, *"a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services" (see* C-164/99, *Portugaia*, para 17; see also C-346/06, *Rüffert*, para 36-37; C-341/05, and *Laval*, Opinion of the Advocate General, para 236*).* While it is arguable that the proposed legislation would not require service providers to comply with *all* conditions required for establishment, it is clear that some of the most onerous requirements, relating, in particular, to minimum rates of pay, will be made applicable to service providers.

In our opinion the Norwegian Government did not consider the fact that the Proposal might make the provision of services *de facto* too burdensome for the foreign service providers.

As clarified by the ECJ, even a national legislation treating the foreign service provider in the same way as the national service provider may turn out to be discriminatory as well: often, indeed, those conditions which may be considered fair for the national service provider constitute an extremely burdensome obstacle to the free provision of services for the foreign service provider.[9]

The implementation of Norwegian wages and working conditions on board foreign flagged cruise ships would render the provision of services in Norwegian waters too burdensome for the foreign shipowner and would *de facto* frustrate the freedom to provide the services. In fact, the burden on foreign flagged ships, which will have to comply with a different legal regime in connection to provide a limited share of its services in Norwegian waters, clearly exceeds the burden on domestic ships which are entirely under Norwegian laws. With respect to the cruise industry in particular, regard must be had to the fact that these vessels employ a far higher number of people than other ships and will be disproportionately affected by e.g. the requirement to pay Norwegian wages.

In its Economic Analysis (p. 10), Oslo Economics observes that, if the Proposal was to be implemented, foreign cruise lines would experience a cost increase up until 870 million Norwegian Krones per year. Some of them may continue to operate in Norwegian waters - albeit with a lower or no profit margin – while others are likely to spend less time

[9] In the Säger case, the ECJ held that the freedom to provide services "*requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services*" (C-76/90, Säger, para. 12). Similarly, in the Rüffert case the ECJ held that "*by requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the 'Buildings and public works' collective agreement, a law such as the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC*" (C-346/06, Rüffert, paras 36-37).

in Norwegian waters or to directly move their activity to different waters. Some cruise lines may also reduce their fleet.
According to the Analysis (p. 11), one of the consequences of such changes may be the reduction of people employed by foreign cruise lines: a legislation which is intended to protect seafarers would thus turn out to have the opposite effect.

The cruise industry, even in light of the limitations applicable to international cruises set out in Section 6 of the proposal, is therefore disproportionately affected by the proposal. As we will revert to below, this burden is insufficiently addressed in the Consultation Note.
b) Necessity

As to the criterion of necessity, the Consultation Note does not contain any indication and/or evidence of the circumstance that seafarers employed by foreign shipowners do need further, and somehow peculiar protection whilst navigating in Norwegian territorial waters.

An essential requirement to justify any restriction of fundamental freedoms concerns the assessment on the occurrence of a prejudice or a concrete threat to the right that the restriction aims to protect. With specific regard to the fundamental rights of workers in the maritime sector, in the leading case *Viking Line* the ECJ held that, even though a national measure could be considered to fall, at first sight, within the objective of protecting workers, it would not be necessary if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat[10].

Although the case pertains to the freedom of establishment - and not the freedom to provide services - it sets out a general principle from which Member States should not deviate. Interestingly, in the Consultation Note there is almost no mention of this leading

[10] Viking Line was a Finnish, operating several ferries between Tallinn, Estonia, and Helsinki, Finland. Among those ferries was the Rossella, which was flying the Finnish flag and was therefore subject to Finnish working conditions. Since the wages paid to Estonian crews were lower than those enjoyed by Finnish crews, Viking Line was considering to re-register the Rossella under Estonian flag. The Finnish seafarers' union threatened the shipowner with collective action and strikes. Required to decide on the question whether the action taken by the Finnish seafarers' union was compatible with EU law, the ECJ held that "*It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it … First, as regards the collective action taken by FSU, even if that action — aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the Rosella — could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat. If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU s members liable to be adversely affected by the reflagging of the Rosella are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective."* (C-438/05, Viking Line, paras 75; 81).

case, in which the ECJ expressly clarified under which conditions the protection of workers is *actually* necessary.

The Consultation Note does not contain any evidence that a concrete prejudice to the employment of neither Norwegian nor foreign seafarers exist. On the contrary, as noted by Oslo Economics (p. 11 and 13), "*it is unlikely that the proposed regulation will have direct effect on [NOR] employees".* The number of Norwegian seafarers working in the cruise industry and their wage and working conditions are unlikely to change and, although the demand for seafarers with the skills and competence needed to work on cruise ships in the NOR-register may increase, such increase will not make up for the reduction in the number of people employed on the ships in foreign registries.

With specific regard to foreign seafarers/seafarers employed on foreign-flagged ships, it is also necessary to make a reference to the already-mentioned "home-state control/duplication ban" criterion, i.e. the investigation on the existence of similar measures of protection in the home State legislation. In the present case, the Proposal does not take sufficiently into consideration that the legislations of the various flag States - in particular of those which are part of the MLC - already contain measures to protect the right of seafarers and to guarantee decent working conditions.
In fact, all flag States that have ratified the MLC have implemented the Convention by setting forth those same standards in their respective domestic legislations. The pre-existence of standards of working conditions implemented both at national and EU level would, in our opinion, call for a much more extensive evaluation of whether there is a genuine need for specific Norwegian legislation aimed at protecting those exact same interests.

Moreover, it is to be reminded that the standards of MLC have also been adopted by the EU through three Directives[11], and are now part of the EU legislation.
These EU Directives have also been adopted by the EEA and inserted in the ANNEX XVIII (health and safety at work, labour law, and equal treatment for men and women) of the EEA Agreement.

Therefore, one could argue that the Proposal of the Norwegian Government is unnecessary also at EEA level, as it would constitute a sort of duplication of legislation aimed at seafarers' protection.

[11] See Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement.
concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention: Council Directive (EU) 2018/131 of 23 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, 2006, as approved by the International Labour Conference on 11 June 2014.

With respect to the level of pay specifically, we fail to see that the Norwegian government has demonstrated a genuine need to ensure seafarers a specific, Norwegian rate of pay while in Norwegian waters. The ECJ has clarified that the rationale for allowing a state to require payment of the national minimum salary to posted workers whose employment relationship is principally governed by the law of another member state, would be the exposure of that worker (e.g. in the case of posting) to the cost level of the host member state.[12] This is why, in case of posted workers covered by the Posted Workers Directive (directive 96/71/EC, as amended), the relevant benchmark is the cost level in the host member state. By contrast, workers aboard foreign cruise vessels in Norwegian waters are not, or only to a very limited extent, exposed to Norwegian cost levels as they generally work and live aboard the vessel. This is true even if the proposal excludes cruise sailings that predominantly take place in international waters from its ambit. We note that, in sectors where the Posted Workers Directive applies, situations similar to those of cruise vessels would often fall outside its ambit due to the absence of a sufficient link with the national territory.[13]
In such a situation, in order to justify a general requirement that workers aboard foreign flagged cruise vessels be paid Norwegian salaries, it would be necessary to ascertain that they are insufficiently protected by minimum pay requirements in their home state, that there is a genuine need to protect these workers *as a group,* and, probably, to provide exemptions where home state protections are sufficient. In the Consultation Note, the choice to require a Norwegian rate of pay is seen as falling within the state's freedom to define its own level of protection. While generally correct, stretching the state's right to determine its protection level thus far ignores the requirement to ensure that the measure caters to a genuine need and does not impose disproportionate burdens on economic operators.

In that regard, we also find the Norwegian Government's argument in the Consultation Note (p. 70), relating to the need not only to protect workers whose employment relationship is governed by foreign law from insufficient pay when working in Norway, but also to protect Norwegian workers against "social dumping", unconvincing, as workers aboard Norwegian flagged vessels are, in any event, protected by Norwegian rules on minimum pay (see further below).

As noticed by Oslo Economics, there are already measures in place to avoid “social dumping” effects on Norwegian seafarers: according to the Economic Analysis (p. 11), the tax refund scheme already addresses this issue for NOR registered ships. As a side effect, the tax refund scheme also “*disproportionally benefit cruise ships in the NOR-register*”. If the Proposal was to be implemented, cruise lines with ships in the NOR-

[12] C-549/13 *Bundesdrückerei*
[13] C-16/18 *Dobersberger* and C-815/18 *Van den Bosch.* While the latter case indicates that road cabotage would generally be sufficient for a posting to occur, it is not obvious that this view can automatically be applied in the maritime sector, where i.a. the conditions of board and lodging are very different and would seem to connect the employee more closely to the home state employer than to the host state territory.

registry will continue to disproportionately benefit from these remedying measures, putting cruise lines with ships in foreign registries at a competitive disadvantage instead.

c) Consistency

As mentioned above, NIS registered ships are not required to comply with Norwegian working conditions. According to the Norwegian Government this is justified on the basis of the fact that "NIS-registered ships move mainly outside Norwegian territory". We believe, however, that if Norway had genuinely intended to protect workers, it would have made Norwegian wages applicable to NIS ships outside Norwegian territorial waters as well.

In this respect, the Norwegian Government already has an instrument to apply Norwegian wages and working conditions to all seafarers employed on board Norwegian flagged ships carrying out cruise services in Norway, that is the EU Regulation n. 3577/1992 on the freedom to provide maritime transport services within a Members Stare (the "Cabotage Regulation"), adopted also by EEA.
The Cabotage Regulation, as interpreted by the ECJ and the European Commission, is applicable to cruise services that are carried out only between ports of the same State and to international cruise services when passengers are embarked/disembarked in the Member State where the cabotage leg takes place.
Art. 3 of Regulation provides that "*all matters relating to manning*" for ships carrying out cruise services shall be the responsibility of the State in which the ship is registered (flag state).

It follows that seafarers employed on board Norwegian ships, both NOR registered and NIS registered, would be protected by the Norwegian wages and working conditions by applying art. 3 of the Cabotage Regulation.

We understand that ships registered in NIS are in principle banned from transporting passengers between Norwegian ports, but that the Government may impose different rules through national regulation. In this sense, Norwegian Regulation No. 2257 of 6/28/2021 states that a cruise ship registered in NIS is allowed to transfer passengers between Norwegian ports as long as the vessel also calls to two consecutive foreign (non-Nordic) ports before or after calling to the Norwegian port. NIS-registered cruise ships may also transport passengers between Svalbard and the Norwegian mainland.

The above argument shows that if Norway had genuinely intended to protect workers in a consistent way, it would have first started making Norwegian wages applicable to NIS ships outside Norwegian territorial waters as well, rather than adopting a new specific legislation and imposing it on foreign ships.

Furthermore, in support of its Proposal, Norway keeps referring to the regime of the Posted Workers Directive (see pp. 48, 61, 66-70 of the Consultation Note).
While it is common ground that Article 1(2) of the Directive expressly provides that the Directive "*shall not apply to merchant navy undertakings as regards seagoing personnel*", the Norwegian Ministry maintains that the situations where workers from a Member State are posted in another Member State "*has clear similarities with situations where maritime transport services or other services are delivered using foreign-registered ships in Norwegian waters*" (see p. 67 of the Consultation Note).

While there are similarities between the two situations, it should be recalled that international maritime services are very different from other industries: seafarers are transnational workers by definition, and if they were subject to the labour laws of all States in which they are "temporarily posted", they would be subject to a continuous series of different working conditions - which is exactly what art. 1(2) of the Directive aims to avoid by excluding the merchant navy from its scope of application. The need to comply with several legal regimes during the same sailing could become unmanageable. Also, as explained above, a seafarer's link with the national territory is much weaker than what is normally the case of posted workers. This calls for a much more scrupulous assessment than found in the Consultation Note of the proportionality – in terms of the burden on the foreign shipping operator weighed against any benefit to the employee – of any measure imposing Norwegian working conditions on foreign vessels.

For all the above, we believe that the Ministry, in the Consultation Note, has not provided sufficient and convincing arguments to justify the imposition of a restriction of the freedom of foreign flagged shipowners within the cruise industry to provide their services in Norway.

Therefore, in the absence of further assessments of the actual need for additional protection of workers on foreign-flagged cruise ships in Norwegian waters and the burden it imposes on foreign cruise operators, there is a significant risk that the adoption of the Proposal would constitute a violation of the obligations arising from the EEA Agreement.

Conclusions

In the Consultation Note, the Norwegian Government indicated that its authority to implement and enforce Norwegian wages and working conditions in the territorial waters originates from its exclusive and absolute sovereignty on the territorial waters, as indicated by art. 2 of UNCLOS.
As indicated in our analysis, the discretion of Norwegian Government is, however, not without limits. Limitations could follow from either treaty commitments, commitments following the safeguard provisions of UNCLOS Part XII, section 7, or from the application of more general principles of general international law.

As discussed above, the effects of the expansion of the scope of the Proposal to cover the cruise industry has not been sufficiently considered and, therefore, there is a significant risk with regards to the Proposal's compliance with Norway's international and regional legal obligations, as the cruise industry has several unique aspects compared to other maritime segments covered by the Proposal.

In particular, we believe there are sufficient and grounded arguments for Carnival Corporation & Plc to challenge the adoption of the Proposal and maintain that the authority of Norwegian Government is limited by the provisions of MLC 2006 and of the EEA Agreement.