

**MEMO**

To: Offshore Norge  
Attn: Øystein Joranger

From: Advokatfirmaet BAHR AS  
Senior Associate Christian Jordal  
Attorney in charge: Arne Torsten Andersen

Date: Oslo, 22 August 2022

**The impact of the proposed legislation on Norwegian wage and working conditions on ships in Norwegian territorial waters and on the Norwegian continental shelf on the Norwegian aid scheme on tax refunds for employing EEA seafarers**

**1. Introduction**

We have been requested to assess the impact of the current legislative proposal on Norwegian wage and working conditions on ships in Norwegian territorial waters and on the Norwegian continental shelf on the aid scheme on tax refunds for employing EEA seafarers (the “aid scheme”). The stated objective of the legislative proposal is to promote fair and decent working conditions by providing seafarers Norwegian wage and working conditions. The proposal applies regardless of the flag state of the ship.

On 30 May 2022, the Norwegian authorities launched a consultation on the legislative proposal.<sup>1</sup> We note that the memo for the hearing<sup>2</sup> does not assess the legal consequences of the legislative proposal on the aid scheme. We are familiar with the memo from Lund & Co (“Lund”) of 14 February 2020 assessing the implications of requiring Norwegian wages and working conditions for the aid scheme. In that memo, Lund argues that the introduction of a requirement of Norwegian wages would not have any impact on the compatibility of the aid scheme. The assessment is based on relatively general considerations, *i.a.* that the legislative proposal and the scheme do not have the same geographical scope, and that the aid scheme would continue to serve a purpose after the adoption of the legislative proposal. The assessment does not, in our opinion, fully examine the effects of the legislative proposal on the aid scheme.

In the following, we firstly assess an important procedural issue, whether the adoption of the legislative proposal can be held to change the approved aid scheme to the extent that the aid scheme becomes a new aid scheme (section 3.3). Secondly, we consider the implications of the legislative proposal on the aid scheme and its compatibility with the EEA Agreement (section 3.4).

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<sup>1</sup> <https://www.regjeringen.no/no/dokumenter/horing-forslag-til-lov-om-norske-lønns-og-arbeidsvilkår-på-skip-i-norske-farvann-og-på-norsk-sokkel/id2916350/>

<sup>2</sup> Høringsnotat - Forslag til lov om norske lønns- og arbeidsvilkår på skip i norske farvann og på norsk sokkel.

## 2. Main findings

Our view is that there is a substantial risk that the proposed legislation will affect the approved aid scheme for EEA seafarers in two ways. Firstly, there is a risk that the proposed legislation substantively affect the approved aid scheme so as to require a new assessment of the compatibility of the scheme. Secondly, there is a risk that it will render the aid scheme incompatible with the EEA Agreement.

If the legislation is adopted without a notification process, the aid risks being unlawful and incompatible with the EEA Agreement and subject to recovery from the beneficiaries.

## 3. Impact of the proposed legislation on the compatibility of the aid scheme

### 3.1 The approved aid scheme

The EFTA Surveillance Authority (“ESA”) approved the current aid scheme on tax refunds for employing EEA seafarers in 2016.<sup>3</sup> The scheme was approved with a duration of 10 years - until 2026.<sup>4</sup> ESA has approved changes to the scheme on five occasions.<sup>5</sup> The scheme provides reimbursements of taxes and social security contributions paid for EEA seafarers.

The scheme is justified by the fierce competition faced by Norwegian registered ships from non-EEA registers.<sup>6</sup> Ship owners with ships registered in non-EEA states typically use crews of non-EEA state nationals.<sup>7</sup> The objective of the scheme is to safeguard and promote the employment of EEA seafarers on Norwegian registered vessels, to secure recruitment and qualified training of seafarers and to improve the competitive position of companies employing such seafarers.<sup>8</sup>

### 3.2 Existing v new aid

Approved aid is classified as so-called “existing aid”.<sup>9</sup> Existing aid is lawful and cannot be subject to recovery claims. If the aid scheme remains unchanged, aid granted on the basis of it<sup>10</sup> will be existing aid until the end of the duration of the approval of the aid scheme (in casu; 2026).

If the scheme is substantially changed, it turns into “new aid”.<sup>11</sup> New aid is subject to the notification obligation. In the notification procedure ESA has to consider the compatibility of the aid. If ESA has “doubts”, it has to open a formal investigation procedure before reaching a final conclusion.<sup>12</sup> This normally takes at least a year, but frequently more. If new aid is implemented without prior ESA approval, the aid is unlawful.<sup>13</sup> Unlawful aid is subject to recovery. The recovery of unlawful aid is the natural consequence of a violation of the stand still obligation (the obligation not to grant aid

<sup>3</sup> ESA decision No 085/16/COL of 27 April 2016.

<sup>4</sup> It appears that the scheme expires on 28 February 2026, although this is not expressly stated in the decision (see ESA decision No 085/16/COL of 27 April 2016, paragraph 60).

<sup>5</sup> ESA decision No 156/17/COL of 14 September 2017 (NIS deep sea), ESA decision No 043/17/COL (NIS ferries in foreign trade), ESA decision 088/20/COL of 9 July 2020 (Temporary COVID-19 amendments, 1 July - 31 August 2020), ESA decision No 011/21/COL of 18 February 2021 (2<sup>nd</sup> decision on temporary COVID-19 amendments, 1 January - 30 June 2021) and ESA decision No 218/21/COL of 21 September 2021 (3<sup>rd</sup> decision on temporary COVID-19 amendments, 1 July - 30 August 2021).

<sup>6</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 3.

<sup>7</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 3.

<sup>8</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 5.

<sup>9</sup> Article 1(b)(ii) of Part II of Protocol 3 to the Surveillance and Court Agreement.

<sup>10</sup> Judgment of 22 August 2011 of the EFTA Court in case E-14/10, Konkurrenten.no, paragraph 76.

<sup>11</sup> Article 1(c) of Part II of Protocol 3 to the Surveillance and Court Agreement.

<sup>12</sup> Article 4(4) of Part II of Protocol 3 to the Surveillance and Court Agreement.

<sup>13</sup> Article 1(f) of Part II of Protocol 3 to the Surveillance and Court Agreement.

that has not been approved or is subject to an exemption from the notification obligation). The aim of recovery is to restore the illegal marked distortion created by the aid by taking away the unlawful advantage it received. Aid is recovered with interest in order to fully take account of the financial advantage the beneficiary has benefited from whilst the aid has been at its disposal. Recovery of unlawful aid can be ordered by national courts as well as by ESA.

The incompatibility of an *unchanged existing aid scheme* can be addressed by ESA with so-called appropriate measures.<sup>14</sup> The Norwegian authorities are not required to accept the appropriate measures. ESA can however make the measures binding by going through a formal investigation procedure.<sup>15</sup> Such existing aid procedures are typically time consuming. If ESA were to launch such a procedure, it is not unlikely that it would first be able to conclude after the expiry of the approval of the scheme in 2026.

### 3.3 Does the proposed legislative amendment turn the aid scheme into “new aid”?

In order to assess whether an existing aid scheme has turned into new aid, the starting point is to examine whether the provisions providing for the aid have been amended.<sup>16</sup> In the decision approving the aid scheme, the national legal basis for the aid is described as the regulation on subsidies for employing seafarers,<sup>17</sup> as well as the annual budgetary decisions by Parliament.<sup>18</sup>

For the purposes of this assessment, we assume that the Norwegian authorities let the legislative amendment enter into force without amending the regulation, and that Parliament does not deviate from established practice.

The question is thus whether the introduction of a new legislative requirement to pay Norwegian wages can be considered as a change to an existing aid scheme, even though it is technically not amending the national legal basis for the aid scheme.

With the proposed legislation, the Norwegian authorities are in essence introducing a new policy instrument<sup>19</sup> in the maritime sector, that concerns the wages of seafarers. When assessing whether aid is compatible with Article 61(3)(c) of the EEA Agreement one has to determine whether aid is the appropriate instrument. In a sense, that assessment has been carried out *ex ante* in the Maritime Guidelines section 3.2(2) where it is clarified that reduced rates for the social protection and income tax of EEA seafarers should be allowed. This conclusion in the Maritime Guidelines is based on the notion that such aid measures are effective and necessary, in other words that companies benefitting from such tax reliefs would act differently (by for example flagging out to a third country registry) in the absence of the tax reliefs. Where a new policy instrument is introduced in the same sector as an aid scheme and targeting the same wage cost issue, it is our view that such a targeted new legislative requirement has the potential to affect the substance of the aid scheme and turn the approved existing aid scheme into new aid.

<sup>14</sup> Article 18 of Part II of Protocol 3 to the Surveillance and Court Agreement.

<sup>15</sup> Article 19(2) of Part II of Protocol 3 to the Surveillance and Court Agreement.

<sup>16</sup> Judgment of 9 August 1994 in case C-44/93, *Namur-Les Assurances*, paragraph 28.

<sup>17</sup> FOR-2016-02-26-204.

<sup>18</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 52.

<sup>19</sup> Compare for example to the Guidelines on state aid for climate, environmental protection and energy 2022 (“CEEAG”) (OJ C 80, 18.2.2022, p. 1), incorporated into the EFTA-pillar by ESA decision No 029/22/COL, paragraphs 39-46.

Changes in market conditions or broader regulatory amendments do not generally have the effect of turning existing aid into new aid.<sup>20</sup> This however is different from the situation at hand, where an aid scheme is in place that covers the tax costs of hiring EEA seafarers and a new sector-specific obligation requiring all shipowners to pay Norwegian wages is introduced while the scheme is still in force.

In Article 4(1) of the Implementing Provisions Decision<sup>21</sup> ESA stresses that “an alteration of existing aid is any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market”. In recent judgments, the Court of Justice has also taken a more effects-based approach to the question of whether a change has turned existing aid into new.<sup>22</sup> The Court emphasises that in assessing whether an alteration can turn existing aid into new, one must assess whether the alteration has the potential to impact the assessment of the compatibility of the aid with the EEA Agreement. As we argue in the following, the proposed legislative requirement will risk making the aid scheme incompatible with the EEA Agreement (see section 3.4.5 of this memo). There are also other elements of the legislative proposal that risk rendering the scheme incompatible (see sections 3.4.3 and 3.4.4 of this memo).

In light of the above, it is our view that there is a clear risk that the legislative amendment turns the existing aid scheme into new aid.

### 3.4 Compatibility of the aid scheme with the EEA Agreement

#### 3.4.1 Introduction

The compatibility of aid to cover the cost of employing EEA seafarers is assessed on the basis of Article 61(3)(c) of the EEA Agreement. In 2004 ESA adopted a set of Maritime Guidelines that give more specific guidance on how it assesses the compatibility with Article 61(3)(c) of such aid.<sup>23</sup> It is however the European Commission (the “Commission”) that shapes the policy in this domain. The ESA guidelines therefore reflect the substance of the Commission guidelines on state aid to maritime transport.<sup>24</sup>

#### 3.4.2 The compatibility assessment in ESA’s decision of 2016

Under the approved aid scheme, the Norwegian authorities seek to promote the employment of EEA seafarers by reimbursing taxes and social security contributions.<sup>25</sup>

In the Maritime Guidelines, ESA stresses that “state aid must be restricted to what is necessary to achieve its purpose”,<sup>26</sup> and that aid for labour related costs should “directly stimulate the development of the sector and employment, rather than provide general financial assistance”.<sup>27</sup> This point is highlighted in ESA’s assessment of the compatibility of the scheme.<sup>28</sup> ESA furthermore stresses

<sup>20</sup> Judgment of 9 August 1994 in case C-44/93, *Namur-Les Assurances*.

<sup>21</sup> Decision No 195/04/COL amended several times, lastly on 4 July 2017.

<sup>22</sup> Judgment of 28 October 2021 in joined cases C-915-917/19, *Eco Fox*; judgment of 20 September 2018 in case C-510/16 *Carrefour Hypermarchés* and judgment of 13 June 2013 in joined cases C-630-633/11 P, *HGA*.

<sup>23</sup> ESA state aid guidelines on aid to maritime transport of 31 March 2004 (OJ L 240, 13.9.2007, p. 9).

<sup>24</sup> OJ C 13, 17.1.2004, p. 13.

<sup>25</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 53.

<sup>26</sup> Maritime Guidelines, section 2.1(2).

<sup>27</sup> Maritime Guidelines, section 3.2(1).

<sup>28</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 71.

that the Norwegian authorities provided information indicating that there is a real danger that the vessels covered by the scheme would flag out in the absence of the scheme.<sup>29</sup>

ESA's assessment is not restricted to the effect of the aid in isolation. The compatibility assessment is made on the basis of a broad assessment of the actual regulatory framework under which the beneficiaries act. Indeed, ESA assesses the impact of legislative requirements on the aid scheme, notably the trade area limitations for ships registered in NIS.<sup>30</sup> ESA also assesses the financial impact of aid granted from other sources on the aid under the scheme, whether the fact that one beneficiary under the scheme, Hurtigruten, receives aid from other sources leads to overcompensation,<sup>31</sup> and the effect of aid for cultural heritage preservation for sailing vessels.<sup>32</sup>

### 3.4.3 Compatibility of the new aid with Article 61(3)(c) and the Maritime Guidelines

In keeping with what is required when carrying out the compatibility assessment, that assessment must encompass the effects of the proposed legislative measure. The proposed legislative measure is targeted specifically at the maritime sector. It imposes Norwegian wage and working conditions on ships in Norwegian territorial waters and on the Norwegian continental shelf. Although the Norwegian authorities have not elaborated on the exact extent of the Norwegian wage condition in detail, it is our view that the proposed legislation will have an effect on whether, or how much, aid can be legitimately granted under the scheme.

The introduction of the legislative requirement fundamentally changes the broader framework under which the aid scheme exists. When a shipowner becomes legally obliged to provide Norwegian wage conditions to its seafarers, regardless the flag state of the ship, the question is whether the aid under the scheme would be compatible with Article 61(3)(c) of the EEA Agreement and the Maritime Guidelines. In other words it has to be assessed whether the aid still would be necessary to achieve its purpose and whether the aid directly stimulates the development of the sector and employment, rather than provide general financial assistance.<sup>33</sup> The compatibility of the aid scheme would rest on whether it under the new legislative regime continues to contribute to its stated goals such as preventing the flagging out of vessels to third country registers, and to the employment of EEA seafarers.

For ships that, for the most part, carry out their activities within the geographic scope of the proposed legislation, flagging out and hiring non-EEA seafarers will not enable them to realise the same savings on wage costs. This demonstrates that the proposed legislation has clear and foreseeable effects on the assumptions underpinning the justification of the aid scheme.

The support for the employment of EEA seafarers represents operating aid. The Maritime Guidelines stress that “as a matter of principle operating aid should be exceptional, temporary and degressive”.<sup>34</sup> The guidelines conclude that this kind of operating aid is nevertheless still justified due to the

<sup>29</sup> ESA decision No 085/16/COL of 27 April 2016, paragraph 72.

<sup>30</sup> ESA decision No 085/16/COL of 27 April 2016, paragraphs 11-12, 45 and 50.

<sup>31</sup> See in particular ESA decision No 085/16/COL of 27 April 2016, section II.3.3.

<sup>32</sup> ESA decision No 085/16/COL of 27 April 2016, paragraphs 42 and 83.

<sup>33</sup> Maritime Guidelines, sections 2(2) and 3.2(1).

<sup>34</sup> Maritime Guidelines, section 1.2(10). This stance on the compatibility with the EEA Agreement of operating aid has become even more restrictive following the judgment of the Court of Justice of 22 September 2020 in case C-594/18 P Austria v Commission (Hinkley Point C), paragraph 119.

competition from third country registers and open registers. It is our view that operating aid is only justified when it clearly contributes to this objective. The introduction of the proposed legislative requirement weakens the link between the objective and the aid. This further undermines the compatibility of the aid scheme.

In sum, it is our view that the introduction of the legislative requirement casts the aid scheme in a new light. The compatibility analysis carried out by ESA in its 2016 decision does not take into account the legislative requirement. State aid compatibility rules require ESA to examine the scheme in its regulatory consequences, hence ESA would have to take into account the effect of the regulatory requirement in carrying out its compatibility analysis.

#### 3.4.4 The Commission's recent decisional practice on non-discrimination of EEA registers

State aid law has evolved substantially since the Maritime Guidelines were adopted in 2004.<sup>35</sup> The Maritime Guidelines have not been amended since then. To our knowledge, the Commission currently does not have a plan to update the guidelines. In applying the Maritime Guidelines, the Commission has however built a consistent decisional practice, making certain requirements clearer.

A key feature of the recent decisional practice is the requirement of non-discrimination of the registers of EEA States in national aid schemes. At least since 2018, the Commission has quite consistently<sup>36</sup> required Member States to open their aid schemes to ships registered in all EEA State ship registers.<sup>37</sup> This is based on the notion that such discrimination would infringe on internal market rules indissolubly linked to the compatibility of the scheme.<sup>38</sup>

The Norwegian scheme does not fulfil the non-discrimination requirement. The scheme is restricted to ships registered in NOR or NIS. ESA approved the main bulk of the scheme in 2016 before the Commission had firmly established the non-discrimination requirement. ESA has yet to make the Norwegian authorities adhere to this requirement, either through an existing aid procedure, or in connection with notified amendments to the scheme submitted by Norway since 2018. In that context we note that the amendments to the scheme that have been notified since 2018 have been quickly processed<sup>39</sup> temporary measures related to the COVID-19 pandemic.<sup>40</sup>

The Norwegian aid scheme in its current form discriminates between EEA State registers. All else equal, this discrimination would be compounded by the introduction of the proposed legislative

<sup>35</sup> The Commission has carried out two large reforms of the state aid framework, the State Aid Action Plan ("SAAP") that was launched in 2005, and the State Aid Modernisation ("SAM") reform that was launched in 2012. Additionally, in 2019, the Commission launched its Fitness Check, an evaluation of the rules of the SAM era as well as some earlier rules. The Maritime Guidelines are not subject to the Fitness Check.

<sup>36</sup> We have only identified one case of a decision since 2018 where such a requirement has not been made, in Decision of 17 May 2018 in case SA.46852 (Denmark).

<sup>37</sup> Decision of 25 October 2021 in case SA.62065 (Denmark). Decision of 22 June 2021 in case SA.62571 (Germany). Decision of 11 June 2021 in case SA.59537 (France). Decision of 27 August 2020 in case SA.57641 (Estonia). Decision of 9 July 2020 in case SA.55760 (Denmark). Decision of 27 April 2020 in case SA.56475 (Belgium). Decisions of 16 December 2019 in cases SA.46470 (Sweden), SA.51809 (Cyprus), SA.4638 (Poland), SA.52069 (Denmark), Decision of 22 February 2019 in case SA.51325 (Denmark), Decision of 6 April 2018 in case SA.48929 (Portugal), Decision of 14 February 2018 in case SA.49248 (Ireland), Decision of 14 September 2015 in case SA 38336 (Belgium).

<sup>38</sup> See for instance Decision of 22 June 2021 in case SA.62571 (Germany), paragraph 57.

<sup>39</sup> The average duration process for these three cases is 3.5 working days (from notification to approval).

<sup>40</sup> ESA decision 088/20/COL of 9 July 2020 (Temporary COVID-19 amendments, 1 July - 31 August 2020), ESA decision No 011/21/COL of 18 February 2021 (2<sup>nd</sup> decision on temporary COVID-19 amendments, 1 January - 30 June 2021) and ESA decision No 218/21/COL of 21 September 2021 (3<sup>rd</sup> decision on temporary COVID-19 amendments, 1 July - 30 August 2021).

measure. In that case, shipowners with NOR or NIS registered ships would be subject to the requirement of Norwegian wages etc. but would receive aid to compensate a substantial part of that burden. On the other hand, shipowners subject to Norwegian taxes with ships registered in other EEA State registers would have to pay Norwegian wages without being eligible for aid under the scheme. Should the proposed legislation enter into force, we assume that ESA would make it a priority to address the discrimination issue.

#### 3.4.5 Consequences for the compatibility of the aid scheme of the incompatibility of the proposed legislation with other provisions of the EEA Agreement

The compliance with the proposed legislative requirement on Norwegian wages etc. with the EEA Agreement (the four freedoms and the cabotage regulation<sup>41</sup>) has been the subject of extensive debate.<sup>42</sup> The debate demonstrates that there is considerable doubt as to whether the proposed legislation complies with the EEA Agreement. Indeed, the conclusion of the Ministry in the memo for the hearing is that the legality of the proposal is uncertain.<sup>43</sup>

According to the Matra case law,<sup>44</sup> an aid measure cannot be declared to be compatible with the EEA Agreement where there is an indissoluble link between the object of the aid and a breach of other provisions of the EEA Agreement.

In the case at hand, both the legislation and the aid measure are specifically targeted at the maritime sector, both are targeting the wage situation of seafarers and they have similar objectives. In our assessment above we have elaborated on the interplay between the legislation and the aid scheme, and how the legislation would compound the negative effects of the aid scheme. In light of these circumstances, it is our view that there is a risk that an incompatibility of the legislation with other provisions of the EEA Agreement could be held to be indissolubly linked to the aid scheme. If that would be the case, the aid scheme could not be held to be compatible with the EEA Agreement. As noted above, the unlawful and incompatible aid is subject to recovery.

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<sup>41</sup> Regulation (EEC) No 3577/92.

<sup>42</sup> See the memo for the hearing (høringsnotat), section 2.3. See also the memo from Professor dr. juris Erling Hjelmeng of 9 August 2022 *Vurdering av NFDs høringsnotat om forslag om å innføre norske lønns- og arbeidsvilkår i norske farvann og på norsk sokkel*.

<sup>43</sup> Memo for the hearing (høringsnotat), section 5.3.8: «I fravær av en klargjørende dom fra EU- eller EFTA-domstolen må rettstilstanden inntil videre betraktes som uavklart.»

<sup>44</sup> Judgment of 15 June 1993 in case C-225/91 in Matra.