

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

EFTA SURVEILLANCE AUTHORITY DECISION

No 397/09/COL

of 14 October 2009

amending, for the 72nd time, the procedural and substantive rules in the field of State aid by introducing a new chapter on State aid to ship management companies

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 61 to 63 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ⁽³⁾, in particular to Article 24 and Article 5(2)(b) thereof,

WHEREAS under Article 24 of the Surveillance and Court Agreement, the Authority shall give effect to the provisions of the EEA Agreement concerning State aid,

WHEREAS under Article 5(2)(b) of the Surveillance and Court Agreement, the Authority shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if the Authority considers it necessary,

RECALLING the Procedural and Substantive Rules in the Field of State Aid adopted on 19 January 1994 by the Authority ⁽⁴⁾,

WHEREAS, on 10 June 2009, the Commission of the European Communities (hereinafter EC Commission) adopted a Communication providing guidance on State aid to ship management companies ⁽⁵⁾,

WHEREAS this Communication is also of relevance for the European Economic Area,

WHEREAS uniform application of the EEA State aid rules is to be ensured throughout the European Economic Area,

WHEREAS, according to point II under the heading 'GENERAL' at the end of Annex XV to the EEA Agreement, the Authority, after consultation with the Commission, is to adopt acts corresponding to those adopted by the European Commission,

HAVING consulted the European Commission,

HAVING consulted the EFTA States by way of a letter dated 31 August 2009 (Event Nos 526393, 526395 and 526367),

HAS ADOPTED THIS DECISION:

Article 1

The State Aid Guidelines shall be amended by introducing a new chapter on guidance on State aid to ship management companies. The new chapter is contained in the Annex to this Decision.

Article 2

Only the English version is authentic.

Done at Brussels, 14 October 2009.

For the EFTA Surveillance Authority

Per SANDERUD
President

Kristján Andri STEFÁNSSON
College Member

⁽¹⁾ Hereinafter referred to as the Authority.

⁽²⁾ Hereinafter referred to as the EEA Agreement.

⁽³⁾ Hereinafter referred to as the Surveillance and Court Agreement.

⁽⁴⁾ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19 January 1994, published in the *Official Journal of the European Union* (hereinafter referred to as OJ) L 231, 3.9.1994, p. 1, and EEA Supplement No 32 of 3.9.1994, p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁽⁵⁾ OJ C 132, 11.6.2009, p. 6.

ANNEX

GUIDANCE ON STATE AID TO SHIP MANAGEMENT COMPANIES

1. **Scope**

This Chapter deals with the eligibility of crew and technical managers of ships for the reduction of corporate tax or the application of the tonnage tax under Section 3.1 of the Chapter on State Aid to maritime transport ⁽¹⁾ (hereinafter 'the Maritime Guidelines'). It does not deal with State aid to commercial managers of ships. This Chapter applies to crew and technical management irrespectively of whether they are individually provided or jointly provided to the same ship.

2. **Introduction**2.1. *General context*

The Maritime Guidelines provide for the possibility that ship management companies qualify for the tonnage tax or other tax arrangements for shipping companies (Section 3.1). However, eligibility is limited to the joint provision of both technical and crew management for a same vessel ('full management'), while those activities are not eligible to the tonnage tax or other tax arrangements when provided individually.

The Maritime Guidelines stipulate that the EFTA Surveillance Authority (hereinafter the 'Authority') will examine the effects of the Maritime Guidelines on ship management after three years ⁽²⁾. This Chapter sets out the results of that fresh assessment and draws conclusions on the eligibility of ship management companies for State aid.

2.2. *Ship management*

Ship management companies are entities providing different services to ship owners, such as technical survey, crew recruiting and training, crew management and vessel operation. There are three main categories of ship management services: crew management, technical management and commercial management.

Crew management consists, in particular, in dealing with all the matters relating to crew, such as selecting and engaging suitably qualified seafarers, issuing payrolls, ensuring the appropriateness of the manning level of ships, checking the certifications of seafarers, providing for seafarers' accident and disability insurance coverage, taking care of travel and visa arrangements, handling medical claims, assessing the performance of the seafarers and, in some cases, training them. Crew management represents by far the largest part of the ship management industry worldwide.

Technical management consists in ensuring the seaworthiness of the vessel and its full compliance with technical, safety and security requirements. In particular, the technical manager is responsible for making decisions on the repair and maintenance of a ship. Technical management represents a significant part of the ship management industry, although much smaller than crew management.

Commercial management consists in promoting and ensuring the sale of ships' capacity, by means of chartering the ships, taking bookings for cargo or passengers, ensuring marketing and appointing agents. Commercial management represents a very small part of the ship management industry. To date the Authority does not have complete information about commercial management at its disposal. Commercial management is therefore not addressed by this Chapter.

Like any maritime activity, ship management is a global business by nature. In the absence of international law regulating third party ship management, the standards in this field have been settled within the framework of private law agreements ⁽³⁾.

In the EEA, ship management is mainly carried out in Cyprus. There are, however, ship management companies in the United Kingdom, Germany, Denmark, Belgium and the Netherlands. Outside the EEA, the management companies are mainly established in Hong Kong, Singapore, India, United Arab Emirates and the USA.

⁽¹⁾ Available on the EFTA Surveillance Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

⁽²⁾ See footnote 20 of the Maritime Guidelines.

⁽³⁾ An example is the BIMCO's Standard Ship Management Agreement 'Shipman 98' which is frequently used in relations between ship management companies and ship owners.

2.3. *Review of the eligibility conditions for ship management companies*

Since the adoption of the Maritime Guidelines in March 2004, several maritime countries have entered the EEA, amongst them Cyprus, which features the largest ship management industry in the world.

The accession of Cyprus and its preliminary work for complying with the Maritime Guidelines, as well as a study realised by a consortium for the administration of that EEA State ⁽¹⁾, allowed for a more complete understanding of this activity and of its evolution. More awareness has been acquired in particular in respect of the link between technical and crew management on the one hand, and shipping on the other, as well as the possibility that crew and/or technical managers can help achieving the objectives of the Maritime Guidelines.

3. **Assessment of eligibility of ship management companies**

Unlike other maritime-related services, ship management is a standard core activity of maritime carriers, normally provided in-house. Ship management is one of the most characteristic activities of ship operators. Nowadays, however, it is outsourced to third party ship management companies in some cases. It is because of this link between ship management and shipping that third party management companies are professional operators with the same background as ship owners, although segmented according to their specialisation, operating in their same business environment. Ship owners are the only customers of ship management companies.

Against this background the Authority considers that outsourcing of ship management should not be fiscally penalised with respect to in-house ship management, provided that the ship management companies meet the same requirements as are applicable to ship owners and that the provision of the aid to the former contributes to the achievement of the objectives of the Maritime Guidelines in the same way as the provision of aid to ship owners.

In particular, the Authority considers that, precisely because of their specialisation and the nature of their core business, ship management companies may substantially contribute to the achievement of the objectives of the Maritime Guidelines, in particular the achievement of an 'efficient, secure and environment friendly maritime transport' and of the 'consolidation of the maritime cluster established in the EEA States' ⁽²⁾.

4. **Extension to ship management companies of eligibility to State aid**

On the basis of what has been explained in Section 3 above, the Authority will authorise under Article 61(3)(c) of the EEA Agreement, tax relief for ship management companies, as referred to in Section 3.1 of the Maritime Guidelines, with respect to joint or separate crew and technical management of ships, provided that the conditions set out in Sections 5 and 6 of this Chapter are fulfilled.

5. **Conditions for eligibility applicable to both technical and crew managers**

In order to qualify for aid, ship management companies should present a clear link with the EEA and its economy, in line with Section 3.1 of the Maritime Guidelines. Moreover, they should contribute to the objectives of the Maritime Guidelines, such as those laid down in Section 2.2 of the said Guidelines. Technical and crew managers are eligible to State aid, provided that the ships they manage comply with all the requirements set out in Sections 5.1 to 5.4 of this Chapter. Eligible activities must be entirely carried out from the territory of the EEA.

5.1. *Contribution to the economy and employment within the EEA*

The economic link with the EEA is proven by the fact that ship management is carried out in the territory of one or more EEA States and that mainly EEA nationals are employed in land-based activities or on ships.

5.2. *Economic link between the managed ships and the EEA*

Ship management companies may benefit from State aid with respect to ships entirely managed from the territory of the EEA, irrespective of whether management is provided in-house or whether it is partially or totally outsourced to one or more ship management companies.

However, since ship management companies do not have full control of their customers, the above requirement is deemed to be fulfilled if at least two thirds of the tonnage of the managed ships is managed from the territory of the EEA. Tonnage in excess of that percentage which is not entirely managed from the EEA is not eligible ⁽³⁾.

⁽¹⁾ Study on ship management in Cyprus and in the European Union of 31 May 2008, carried out for the Cypriot government by a consortium under the direction of the Vienna University of Economics and Business Administration.

⁽²⁾ Section 2.2 of the Maritime Guidelines.

⁽³⁾ While the fact of not complying with the 2/3 rule does not affect the eligibility of the ship management company as such.

5.3. Compliance with international and Community standards

Ship management companies are eligible if all the ships and crews they manage comply with international standards and Community law requirements are fulfilled, in particular those relating to security, safety, training and certification of seafarers, environmental performance and onboard working conditions.

5.4. Flag-share requirement (flag link)

The flag-share requirement, as laid down in the eighth paragraph of Section 3.1 of the Maritime Guidelines applies to ship management companies. The share of EEA flags to be considered as the benchmark is that of the day on which this Chapter is adopted. For new companies the benchmark is to be calculated one year after the date on which they started activity.

6. Additional requirements for crew managers

6.1. Training of seafarers

Crew managers are eligible for State aid as long as all seafarers working onboard managed ships are educated, trained and hold a certificate of competency in accordance with the Convention of the International Maritime Organisation on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW), and have successfully completed training for personal safety on board ship. Moreover, crew managers are eligible if they fulfil the STCW and Community law requirements regarding responsibilities of companies.

6.2. Social conditions

In order to be eligible for State aid, crew managers must ensure that on all managed ships the provisions of the Maritime Labour Convention, 2006, of the International Labour Organisation (MLC) ⁽¹⁾, are fully implemented by the seafarer's employer, be it the ship owner or the ship management companies. The ship management companies must ensure, in particular, that the provisions of the MLC concerning the seafarer's employment agreement ⁽²⁾, ship's loss or foundering ⁽³⁾ medical care ⁽⁴⁾, ship owner's liability including payment of wages in case of accident or sickness ⁽⁵⁾, and repatriation ⁽⁶⁾ are properly applied.

Crew managers must also ensure that the international standards regarding hours of work and hours of rest provided for by MLC are fully complied with.

Finally, in order to be eligible, crew managers must also provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard.

7. Calculation of tax

Also in the case of ship management companies the Authority will apply the principle contained in the Maritime Guidelines, according to which, in order to avoid distortion, it will only authorise schemes giving rise to a homogeneous tax load across the EEA States for the same activity or the same tonnage. This means that total exemption or equivalent schemes will not be authorised ⁽⁷⁾.

The tax to be used for ship management companies can obviously not be the same as that applied to ship owners since, with respect to a given ship, the turnover of the ship management companies is much lower than that of the ship owner. According to the study mentioned in Section 2.3, as well as to notifications received in the past, the tax base to be applied to ship management companies should be approximately 25 % (in terms of tonnage or notional profits) of that which would apply to the ship owner for the same ship or tonnage. The Authority therefore, requires that a percentage of no less than 25 % is applied under ship management tonnage tax schemes ⁽⁸⁾.

⁽¹⁾ It should be recalled that the European social partners adopted an agreement taking up the relevant part of the maritime Labour Convention 2006 which has been integrated into Community law by 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, and amending Directive 1999/63/EC (OJ L 124, 20.5.2009, p. 30). Directive 2009/13/EC is in the process of being incorporated into the EEA Agreement.

⁽²⁾ Regulation 2.1 and Standard A2.1 (Seafarer's employment agreement) of Title 2 of MLC.

⁽³⁾ Ibid. Regulation 2.6 and Standard A2.6 (Seafarer compensation for the ship's loss or foundering) of Title 2.

⁽⁴⁾ Ibid. Regulation 4.1 and Standard A4.1 (Medical care onboard ship and ashore. Shipowners' liability); Regulation 4.3 and A4.3 (Health and safety protection and accident prevention); Regulation 4.4 (Access to shore-based welfare facilities) of Title 4.

⁽⁵⁾ Ibid. Regulation 4.2 and Standard A4.2 (Shipowners' liability) of Title 4.

⁽⁶⁾ Ibid. Regulation 2.5 and Standard A2.5 (Repatriation) of Title 2.

⁽⁷⁾ The Authority takes this opportunity within the present chapter of its Guidelines to emphasise that the mechanism used to calculate the tax to be paid by both ship management companies and ship owners is irrelevant as such; in particular, it is irrelevant whether or not a system based on notional profit is applied.

⁽⁸⁾ The ship owner, if eligible, remains liable for the whole tonnage tax.

If ship management companies engage in activities which are not eligible for State aid under the present Chapter, they must keep separate accounts for those activities.

In case ship management companies subcontract part of their activity to third parties, the latter are not eligible to State aid.

8. Application and review

The Authority will apply the guidance provided in this Chapter from the date of adoption.

State aid to ship management companies will be included in the general revision of the Maritime Guidelines such as foreseen in Section 13 of the latter.
