

IV

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

EFTA SURVEILLANCE AUTHORITY DECISION**No 660/07/COL****of 12 December 2007****on compensation to the ‘Hurtigruten companies’ for increased social security contributions
(Norway)**

THE EFTA SURVEILLANCE AUTHORITY ⁽¹⁾,

HAVING REGARD to the Authority’s Decision 172/02/COL of 25 September 2002 to propose appropriate measures to Norway with regard to State aid in the form of regionally differentiated social security taxation on employers,

HAVING REGARD to the Agreement on the European Economic Area ⁽²⁾, in particular to Articles 59(2) and 61 to 63, and to Protocol 26 thereof,

HAVING REGARD to the Authority’s Decision 218/03/COL of 12 November 2003 on a 3-year transition period in Zones 3 and 4 for the regionally differentiated social security contributions,

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

HAVING REGARD to the Decision of the Standing Committee of the EFTA States No 2/2003/SC of 1 July 2003 whereby it was decided that the regionally differentiated social security contributions in Zone 5 were compatible with the EEA Agreement due to exceptional circumstances in that zone,

HAVING REGARD to Article 1(2) in Part I and Article 14 in Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD to the Authority’s Decision 215/05/COL of 5 July 2006 to open the formal investigation procedure provided for in Article 6 in Part II of Protocol 3 to the Surveillance and Court Agreement,

HAVING REGARD to the Authority’s Guidelines ⁽⁴⁾ on the application and interpretation of Articles 61 and 62 of the EEA Agreement, and in particular the chapter on aid to maritime transport,

HAVING CALLED on interested parties to submit their comments pursuant to those provisions ⁽⁶⁾,

Whereas:

HAVING REGARD to the Authority’s Decision 417/01/COL of 19 December 2001 on compensation for maritime transport services under the ‘Hurtigruten Agreement’ ⁽⁵⁾,

I. FACTS**1. Procedure**

On 2 August 2004, the Authority sent an information request to the Norwegian authorities regarding a payment to Ofotens og Vesteraalens Dampskibsselskab ASA and Troms Fylkes Dampskibsselskap ASA ⁽⁷⁾ as compensation due to the changes in the Norwegian differentiated social security system (Event No 289240).

⁽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 EFTA Surveillance Authority on 19 January 1994, published in OJ L 231, 3.9.1994, p. 1, and in EEA Supplement No 32 of 3.9.1994. The Guidelines were last amended on 3 May 2007. Hereinafter referred to as the ‘State Aid Guidelines’.

⁽⁵⁾ The Authority’s decisions are available on <http://www.eftasurv.int/>

⁽⁶⁾ OJ C 314, 21.12.2006, p. 115, and EEA Supplement No 63/2006, p. 33.

⁽⁷⁾ Hereinafter referred to as the ‘Hurtigruten companies’.

The Norwegian authorities replied by letter from the Ministry of Trade and Industry dated 1 September 2004, forwarding a letter from the Ministry of Transport and Communications of the same date, received and registered by the Authority on 1 September 2004 (Event No 291435).

By letter dated 12 October 2004, the Authority asked for further information (Event No 294990). In this letter, the Authority's Competition and State Aid Directorate stated its view that as the measure had not been notified to the Authority but had apparently already been put into effect, the payment would have to be considered as unlawful aid within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement.

The Norwegian authorities replied by letter from the Norwegian Mission to the EU dated 18 November 2004, forwarding letters from the Ministry of Modernisation, dated 17 November 2004, and the Ministry of Transport and Communications, dated 16 November 2004. The letter was received and registered by the Authority on 22 November 2004 (Event No 300326).

By letter dated 26 October 2005, the Authority's Competition and State Aid Directorate informed the Norwegian authorities that it had doubts concerning the compatibility of the payment to the Hurtigruten companies with the functioning of the EEA Agreement (Event No 329347).

The Norwegian authorities replied by letter from the Norwegian Mission to the EU dated 22 December 2005, forwarding letters from the Ministry of Modernisation and the Ministry of Transport and Communications, both dated 15 December 2005, received and registered by the Authority on 3 January 2006 (Event No 355950).

By letter dated 9 March 2006, the Authority commented on the Norwegian reply (Event No 364024). The Norwegian authorities responded by letter from the Norwegian Mission to the EU dated 29 March 2006, forwarding letters from the Ministry of Government Administration and Reform, dated 27 March 2006, and the Ministry of Transport and Communications, dated 24 March 2006. The letter was received and registered by the Authority on 30 March 2006 (Event No 368446).

By Decision 215/06/COL of 5 July 2006, the Authority decided to open the formal investigation procedure provided for in Article 6 in Part II of Protocol 3 to the Surveillance and Court Agreement. The Government of Norway was invited to comment on the decision. By letter dated 12 October 2006, the Norwegian authorities submitted their comments. The letter was received and registered by the Authority on 13 October 2006 (Event No 393258).

The Authority's decision to initiate the procedure was published in the *Official Journal of the European Union* and the EEA Supplement thereto⁽⁸⁾. The Authority called on interested parties to submit their comments. The Authority did not receive any comments from interested parties.

By letter dated 3 December 2007, received and registered by the Authority on the same date (Event No 455223) the Norwegian authorities submitted additional information.

2. Background

The Hurtigruten companies operated maritime transport services along the Norwegian coastal line from Bergen to Kirkenes.

From 1 January 2002 until 31 December 2004, the 'Hurtigruten service' was covered by the agreement between the Norwegian authorities and the Hurtigruten companies concerning operation of maritime services along the Norwegian coast⁽⁹⁾. The Hurtigruten Agreement was notified by the Norwegian authorities to the Authority in July 2000 and approved by the Authority on 19 December 2001⁽¹⁰⁾.

According to the Hurtigruten Agreement, the Hurtigruten companies were under an obligation to maintain daily transport services consisting of the combined transport of persons and goods between Bergen and Kirkenes according to a fixed route plan. This obligation implied that the Hurtigruten companies operated with 11 ships and stopped daily at 34 ports along the coast. In 2004, approximately 8 % of the turnover related to transport of goods, whereas 92 % related to transport of passengers.

The Hurtigruten companies were also engaged in commercial business activities which were not part of the Hurtigruten service, such as operating high-speed ferries. The routes which comprise the Hurtigruten service are themselves partly commercially viable, notably during the summer season. However, it is accepted that these routes, served at the frequency required by the Hurtigruten Agreement, are not commercially viable during the winter season.

In its 2001 Decision, the Authority considered that the compensation granted under the Hurtigruten Agreement could be regarded as compatible with the functioning of the EEA Agreement as the services covered by it were considered to be services of general economic interest and the conditions laid down in Article 59(2) of the EEA Agreement had been respected.

⁽⁸⁾ See footnote 6.

⁽⁹⁾ Hereinafter referred to as the 'Hurtigruten Agreement'.

⁽¹⁰⁾ Decision 417/01/COL, hereinafter referred to as the '2001 Decision'.

On 25 September 2002, the Authority decided to propose appropriate measures to Norway with regard to the Norwegian system concerning regionally differentiated social security contributions⁽¹¹⁾. In that letter, the Authority proposed that Norway should take any legislative, administrative and other measures necessary to eliminate State aid resulting from the system of regionally differentiated social security contributions or render such aid compatible with the EEA Agreement with effect from 1 January 2004. However, the appropriate measures also stated that the Authority might agree to a later date should that be considered objectively necessary and justified by the Authority in order to allow an appropriate transition for the undertakings in question to the adjusted situation. The proposal to adopt appropriate measures was accepted by Norway on 31 October 2002.

On 12 November 2003, the Authority authorised a 3-year transitional period for the regionally differentiated social security contributions in Zones 3 and 4 in order to achieve a smooth phasing out of the system⁽¹²⁾.

During the Autumn of 2003, the Norwegian Parliament adopted changes to the differentiated social security system which entered into force on 1 January 2004. The changes led to higher social security costs for the Hurtigruten companies. Part, but not all, of the increase in costs was covered by the Authority's Decision of 12 November 2003.

Section 10 of the Hurtigruten Agreement contained a clause whereby both parties to the Agreement could set in motion a re-negotiation procedure in the event of substantial changes in the premises upon which the Hurtigruten Agreement was based. The Hurtigruten Agreement ended as foreseen on 31 December 2004. The operation of the service for the period 1 January 2005 to 31 December 2012 was the subject of a tender procedure in June 2004. The Hurtigruten companies won that tender and merged in March 2006 to form the entity now operating the service, Hurtigruten ASA.

3. Description of the measure

The present case concerns a payment to the Hurtigruten companies contained in Post 70, Chapter 1330 (*Særskilte transporttiltak*) of the Norwegian 2004 State Budget, whereby the Hurtigruten companies would be granted up to NOK 8,5

million (approximately EUR 1,1 million) as compensation due to the changes in the differentiated social security system⁽¹³⁾.

The payment would compensate the Hurtigruten companies for that part of the increased social security contributions which was not already compensated for as a result of the scheme concerning a 3-year transitional period, approved by the Authority in its Decision of 12 November 2003.

The compensation payment granted to the Hurtigruten companies was intended to compensate fully the increase in social security costs in 2004. No distinction was made between the part of the social security costs pertaining to the commercial activities of the companies and those activities which might be considered a public service within the meaning of Article 59(2) of the EEA Agreement.

In this respect, an amount of NOK 7,352 million (approximately EUR 900 000) was in fact paid out to the Hurtigruten companies in 2004. This corresponds to the increased costs incurred by the companies due to the changes in the differentiated social security system.

4. The decision to open the formal investigation procedure

In its Decision 215/06/COL to open the formal investigation procedure, the Authority came to the preliminary conclusion that compensation for increased social security contributions constituted State aid within the meaning of Article 61(1) of the EEA Agreement.

The Authority expressed its doubts as to whether the Norwegian State's support measure could be declared compatible with the functioning of the EEA Agreement, and more specifically, whether the aid measure was compatible with Article 59(2) of the EEA Agreement. These doubts concerned, in particular, the question of whether the aid granted was necessary for the Hurtigruten companies to be able to fulfil their public service obligations.

⁽¹¹⁾ Decision 172/02/COL.

⁽¹²⁾ Decision 218/03/COL. The transitional period did not apply to the very northernmost part of Norway (Zone 5 in the social security tax system), as the EFTA States by decision No 2/2003/SC of 1 July 2003 decided that the regionally differentiated social security contributions in this area were compatible with the EEA Agreement due to exceptional circumstances in this zone.

⁽¹³⁾ The comments to Post 70 read as follows: 'Av budsjettforslaget på 200,8 mill. kr for 2004, er 192,3 mill. kr direkte relatert til den gjeldende avtalen med hurtigruterederiene. Restbeløpet på 8,5 mill. kr er knyttet til ev. kompensasjon som følge av endringer i ordningen med differensiert arbeidsgiveravgift. Endelig kompensasjonsbeløp vil bli bestemt når forhandlingene mellom hurtigruteselskapene og departementet er avsluttet.' [Unofficial translation by the Authority: Of the budget proposal of NOK 200,8 million for 2004, NOK 192,3 million are directly related to the current agreement with the Hurtigruten companies. The remainder of NOK 8,5 million is related to possible compensation as a consequence of amendments to the system concerning differentiated social security contributions. The final compensation will be determined when the negotiations between the Hurtigruten companies and the Ministry are finished].

5. Comments by the Norwegian authorities

The Norwegian authorities are of the opinion that the compensation was within the limits of the compensation authorised by the Authority in its 2001 Decision, and should therefore be classified as 'existing aid' in line with the definition of Article 1(b)(ii) in Part II of Protocol 3 to the Surveillance and Court Agreement.

The Norwegian authorities consider the payment to be covered by the Hurtigruten Agreement in force at the time when the payment was granted. They rely, in this respect, on Section 10 of the Hurtigruten Agreement, a clause whereby both parties to the Hurtigruten Agreement may demand a re-negotiation in the event of substantial changes in the premises upon which the Hurtigruten Agreement was based. The Norwegian authorities state that they regard the changes in the differentiated social security system to fulfil this criterion. They could not have been foreseen by the Hurtigruten companies. As a result of the negotiations with the companies, the compensation for these costs was set at NOK 7,352 million for 2004, i.e. the actual increase in costs as a result of the changes to the social security system. The purpose of compensating for the amendments to the social security scheme was, according to the Norwegian authorities, to ensure the status quo with regard to the agreed level of transport along the Norwegian coastline, by enabling the Hurtigruten companies to continue to carry out the public service obligation entrusted to them in the Agreement.

The Norwegian authorities take the position that Section 10 of the Hurtigruten Agreement constitutes a legal basis for the re-negotiation of the Agreement and that the clause was recognised by the Authority in its 2001 Decision. On this basis, the compensation for increased social security contributions would, according to the Norwegian authorities, not constitute new aid provided that the compensation was compatible with the State aid provisions of the EEA Agreement.

Concerning the compatibility of the aid, the Norwegian authorities claim that the compensation for the changes in the social security scheme was granted to the Hurtigruten companies in order to maintain the transport standard fixed by the Norwegian Parliament. Without the compensation, the standard of the public service obligations entrusted to the companies would have declined; either by the application of higher fares or by reduced frequency of the services. Against this background, the Norwegian authorities consider the compensation to be necessary.

The Norwegian authorities refer to Section 1 of the Hurtigruten Agreement whereby a substantial part of the profits generated by the Hurtigruten companies in the summer season should be used to finance the unprofitable activity in the winter season. The public service compensation should then be calculated on the basis of the profitability throughout the year. The

Norwegian authorities are of the opinion that the Authority, by accepting the principle laid down in Section 1 of the Hurtigruten Agreement, has accepted the fact that no clear separation of the commercial and non-commercial services of the Hurtigruten companies is made. According to the Norwegian authorities, the system of transferring profits from the profitable to the non-profitable season gave the Hurtigruten Companies a disadvantage compared to other undertakings providing maritime services, as it increased the risk of 'cream-skimming' by other companies in the profitable season. This risk was increased further as a result of the changes to the social security scheme, and the Norwegian authorities consider it legitimate to counteract this by increasing the compensation.

The Norwegian authorities furthermore take the view that separation between profitable and non-profitable services is not decisive when the cross-subsidisation is so clearly in support of the non-profitable services, as in this case. In this regard, the Norwegian authorities refer to the annual report of the Hurtigruten companies for 2004 and the monthly results, where the winter months, after the public service compensation had been included, had a deficit of approximately NOK 211 million. The total deficit was of approximately NOK 45 million. Moreover, the Norwegian authorities stress that the compensation granted for 2004 does not alter the fact that the commercial services covered by the Hurtigruten Agreement support the activities linked to the public service obligation of the Hurtigruten companies.

Finally, the Norwegian authorities refer to the fact that, following the tender procedure in 2004, the annual average compensation for the period 1 January 2005-31 December 2012 is NOK 237,5 million, and thus significantly higher than it was for the period from 1 January 2002 until 31 December 2004. According to the Norwegian authorities this demonstrates that the level of compensation in 2004 was necessary and not disproportionate.

As an additional argument, the Norwegian authorities claim that NOK 4,29 million of the compensation granted relates to increased social security contributions for the winter season whereas the remaining NOK 3,06 million constitutes additional public service compensation for the same season as the public service obligation turned out to entail higher costs for the Hurtigruten companies than expected by both parties to the Hurtigruten Agreement. The Ministry of Transport and Communications maintains this view, despite the fact that the State Budget for 2004 referred to the compensation as 'possible compensation as a consequence of amendments to the system concerning differentiated social security contributions' ⁽¹⁴⁾. According to the Norwegian authorities, the name given to the contributions in the State Budget should not be decisive when assessing the legality of the compensation.

⁽¹⁴⁾ Translation by the Authority, cf. footnote 13.

II. ASSESSMENT

1. The presence of State aid within the meaning of Article 61(1) of the EEA Agreement

Article 61(1) of the EEA Agreement reads as follows:

'Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.'

The compensation granted to the Hurtigruten companies for the increase in social security contributions is financed directly through a budgetary allocation and is thus granted by the State. Furthermore, the compensation relieves the companies of social security charges which they would normally have to bear in the ordinary course of business, and thus strengthens the position of these undertakings compared with other undertakings engaged in intra-EEA trade. Moreover, the Hurtigruten companies are active on the markets for passenger and cargo transport and on the tourism market, in particular by offering cruises/round trips along the Norwegian coast. The Hurtigruten service, to a large extent, attracts foreign tourists, and the Hurtigruten companies thus compete with other undertakings offering similar services in attracting these customers. The compensation granted to the Hurtigruten companies may therefore have an effect on competition on these markets and is liable to affect trade between the Contracting Parties to the EEA Agreement.

The Authority thus considers the payment of NOK 7,352 million (approximately EUR 900 000) to the Hurtigruten companies to constitute State aid within the meaning of Article 61(1) of the EEA Agreement.

2. New or existing aid

According to Article 1(c) in Part II of Protocol 3 to the Surveillance and Court Agreement, 'new aid' shall mean 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

In its 2001 Decision, the Authority considered that the compensation granted to the Hurtigruten companies under the Hurtigruten Agreement could be regarded as compatible with the functioning of the EEA Agreement as the services covered by it were considered to be services of general economic interest and the conditions laid down in Article 59(2) EEA had been respected.

Aid which has been approved by the Authority is existing aid. However, in 2004, the Norwegian authorities granted an additional NOK 7,352 million to the Hurtigruten companies. The aid was granted in order to compensate the companies for

increased social security contributions in 2004, and was not part of the aid to the Hurtigruten companies authorised by the Authority's 2001 Decision.

The Norwegian authorities argue that the compensation was in line with the Authority's 2001 Decision, since Section 10 of the Hurtigruten Agreement contained a clause whereby both parties to the Hurtigruten Agreement may initiate a re-negotiation procedure in the event of substantial changes in the premises upon which the Hurtigruten Agreement was based. The Norwegian authorities have stated that they regard the changes in the differentiated social security system to constitute a substantial change. According to the Norwegian authorities, the compensation should thus be regarded as existing aid.

The Authority would like to point out that annual compensation of NOK 170 million, expressed in 1999-prices, under the Hurtigruten Agreement had been approved by the Authority. In contrast, the Authority's decision did not deal with Section 10 of the Hurtigruten Agreement as such, and nothing in the Authority's decision suggested that any future amendments of the Hurtigruten Agreement based on this clause would, as argued by the Norwegian authorities, automatically be considered to be in compliance with the State aid provisions of the EEA Agreement.

Section 10 of the Agreement merely allows for the possibility of amending the contract due to unforeseen substantial changes of circumstances. It does not prescribe an automatic increase in the compensation to the Hurtigruten companies in the event of raised costs, but merely opens up the possibility for both parties to the Hurtigruten Agreement to request a re-negotiation procedure without prescribing the result of such re-negotiations. Furthermore, the provision does not explicitly mention augmentation of costs as a result of a tax increase as a reason for renegotiation, let alone as a fact that would require an automatic adjustment of the agreement by the exact amount flowing from the tax increase. A change in the tax situation of one contracting party is normally not a factor that the other party is obliged to bear. Hence, even if the original Hurtigruten Agreement in its entirety was notified to the Authority in 2000 and approved in 2001, the Authority could not reasonably have been expected to foresee all possible effects of the provision, and the Authority's silence about the provision in its 2001 Decision cannot be held to imply that all uses of the provision were hereinafter automatically acceptable from a State aid point of view.

It is the view of the Authority that the existence of the contractual provision needs to be distinguished from the separate question of whether the chosen re-adaptation complies with the EEA Agreement, and in particular with the State aid provisions. Each question needs to be assessed on its own merits for each case of re-adaptation and only the first question relates to whether the aid is new or existing.

The Authority observes that as a result of the increase in social security costs, an additional NOK 7,352 million was paid out to the Hurtigruten companies in 2004. This represented an increase, and therefore also an alteration, to the State aid to the Hurtigruten companies authorised in the Authority's 2001 Decision. The Authority thus considers the aid to be new aid within the meaning of Article 1(c) in Part II of Protocol 3 to the Surveillance and Court Agreement.

3. Procedural requirements

Pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement, 'the EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until the procedure has resulted in a final decision'.

As stated above, the Authority considers the aid to the Hurtigruten companies to be new aid within the meaning of Article 1(c) in Part II of Protocol 3 to the Surveillance and Court Agreement. This implies that the compensation should have been notified to the Authority, according to Article 1(3) in Part I and Article 2 in Part II of Protocol 3 to the Surveillance and Court Agreement, and should not have been put into effect unless and until the Authority approved the compensation. The Norwegian authorities, however, decided to grant the compensation in disregard of that obligation. The compensation is therefore considered as 'unlawful aid' within the meaning of Article 1(f) in Part II of Protocol 3 to the Surveillance and Court Agreement.

4. Compatibility of the aid

4.1. Introduction

Direct aid aimed at covering operating losses is, in general, not compatible with the functioning of the EEA Agreement. Since the increased compensation granted to the Hurtigruten companies covers costs concerning the day-to-day operation of the Hurtigruten service, this payment is to be regarded as operating aid. Such operating aid may be approved, exceptionally, if the conditions set out in derogation provisions of the EEA Agreement are fulfilled.

In the 2001 Decision, the Authority took the view that the aid to the Hurtigruten companies did not qualify for an exemption from the general prohibition of State aid in Article 61(1) of the EEA Agreement on the basis of Article 61(2) or (3) of the EEA Agreement. However, the Authority concluded that the aid was compatible with the functioning of the EEA Agreement on the basis that the conditions laid down in Article 59(2) of the EEA Agreement had been respected.

In the decision to open the formal investigation procedure in the present case, the Authority expressed doubts as to the compatibility of the increased aid granted to the Hurtigruten companies with Article 59(2) of the EEA Agreement.

During the course of the investigation, the Authority has reached the conclusion that the compatibility of the aid granted to the Hurtigruten companies as compensation for the additional costs resulting from the changes to the social security system must first be assessed on the basis of Article 61(3)(c) of the EEA Agreement.

4.2. Legal basis for the compatibility assessment

Article 61(3)(c) of the EEA Agreement provides that aid may be considered as compatible with the functioning of the EEA Agreement if its purpose is to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions between the Contracting Parties to an extent contrary to the common interest. The Authority has issued guidelines for the application of Article 61(3)(c) of the EEA Agreement with regard to State aid to maritime transport (hereinafter 'the Maritime Transport Guidelines').

Section 3.2 of the Maritime Transport Guidelines deals with State aid for labour related costs. According to paragraph 1 of Section 3.2, support measures for the maritime sector should aim primarily at reducing fiscal and other costs and burdens borne by EEA shipowners and EEA seafarers towards levels in line with world norms.

According to paragraph 2 of that Section, the following action on employment costs should be allowed for EEA shipping:

- reduced rates of contributions for the social protection of EEA seafarers employed on board ships registered in an EEA State,
- reduced rates of income tax for EEA seafarers on board ships registered in an EEA State.

For the purposes of the above, 'EEA seafarers' is defined as:

- citizens of the EEA States, in the case of seafarers working on board vessels (including ro-ro ferries⁽¹⁵⁾) providing scheduled passenger services between the ports of the EEA,
- all seafarers liable to taxation and/or social security contributions in an EEA State, in all other cases.

⁽¹⁵⁾ Ro-ro ferries are defined as 'seagoing passenger vessel[s] with facilities to enable road or rail vehicles to roll on and off the vessel, and carrying more than 12 passengers', cf. footnote 22 of the Guidelines which refers to Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services (OJ L 138, 1.6.1999, p. 1), as incorporated at point 56 ca) in Annex XIII to the EEA Agreement.

Paragraph 3 goes on to clarify that some EEA States may, for internal fiscal reasons, prefer not to apply reduced rates as mentioned above, but instead reimburse shipowners — partially or wholly — for the costs arising from these levies. Such an approach may generally be considered equivalent to the reduced-rate system as described above, provided that there is a clear link to these levies, no element of over-compensation, and that the system is transparent and not open to abuse.

4.3. Assessment

As described in Section I.3 above, NOK 7,352 million (approximately EUR 900 000) was granted to the Hurtigruten companies in order to compensate for their increased costs in relation to social security contributions for the year 2004. According to the State Budget for 2004, this grant to the Hurtigruten companies consisted of compensation 'as a consequence of amendments to the system concerning differentiated social security contributions' ⁽¹⁶⁾.

It follows from the above that the aid was granted to the Hurtigruten companies in order to reimburse them for increased social security contributions made by them in 2004. Thus the aid granted must be considered as reimbursement of contributions for social protection of seafarers in accordance with paragraphs 2 and 3 of Section 3.2 of the Maritime Transport Guidelines.

Paragraph 2 of Section 3.2 of the Maritime Guidelines only allows for aid in the form of reduced rates of contributions for the social protection of EEA seafarers employed on board ships registered in an EEA State.

The Norwegian authorities have confirmed that all ships used for the Hurtigruten service in 2004 were registered in Norway. The Authority therefore considers the registration condition to be fulfilled.

Concerning the condition that the social protection must be for 'EEA seafarers', this expression is defined as either citizens of the EEA States, in the case of seafarers working on board vessels (including ro-ro ferries) providing scheduled passenger services between the ports of the EEA or all seafarers liable to taxation and/or social security contributions in an EEA State, in all other cases.

In the Hurtigruten Agreement, the Hurtigruten service was described as services of combined transport of passengers and goods between Bergen and Kirkenes. According to the information submitted by the Norwegian authorities, approximately 92 % of the Hurtigruten companies' turnover for 2004 was related to passenger transport, whereas

approximately 8 % was related to transport of goods. Some of the Hurtigruten ships had facilities to enable passenger cars to roll-on and roll-off the vessel. However, it was not possible for commercial vehicles (lorries, trailers, etc.) to roll-on and roll-off the ships. Furthermore, the Hurtigruten service, as explained in Section I.2 above, provided scheduled transport services along the Norwegian coast, and thus within the EEA.

On this basis, the Authority considers that the ships of the Hurtigruten companies must be considered to fall under the first alternative definition above i.e. vessels providing scheduled passenger services between the ports of the EEA. This implies that the compensation for increased social security contributions granted to the Hurtigruten companies is only compatible with Section 3.2 of the Maritime Transport Guidelines insofar as the compensation was granted with regard to seafarers who were citizens of an EEA State.

The Norwegian authorities have provided information to the effect that all employees on the ships used for the Hurtigruten service in 2004 were citizens of an EEA State.

It was explicitly stated in the State Budget that the additional aid to the Hurtigruten companies was granted in order to cover additional social security costs for the companies. Therefore, there was a clear link between the grant and the social security charges. Furthermore, the size of the grant corresponded exactly to the increase in social security costs of the companies. As will be shown below in Section II.4.4, the grant did not imply any over-compensation. Finally, the aid was a one-off payment which was announced in the State Budget. Hence, the aid was granted in a way which was transparent and not open to abuse. It follows that the conditions for considering reimbursement of social security charges as equivalent to a system of reduced rates for contributions are fulfilled.

On this basis, the Authority concludes that the aid granted to the Hurtigruten companies for increased social security contributions in 2004 is in line with Section 3.2 of the Maritime Transport Guidelines.

4.4. Over-compensation and cumulation

According to paragraph 2 of Section 11 of the Maritime Transport Guidelines, a reduction of contributions for the social protection of EEA seafarers may be granted up to a ceiling of 100 %, i.e. a reduction to zero social charges. In the present case, the Hurtigruten companies had been charged increased social security contributions in 2004 compared to the rate applied in previous years.

⁽¹⁶⁾ Translation by the Authority, cf. footnote 13.

The Authority considers that the amount of aid granted under Sections 3 to 6 of the Maritime Transport Guidelines did not exceed the total amount of taxes and social security contributions collected from shipping activities and seafarers and that the criterion contained in Section 11, paragraph 2, of those Guidelines has been fulfilled.

In addition to the aid for labour-related costs granted to the Hurtigruten companies on the basis of the Maritime Transport Guidelines, the Hurtigruten companies also received aid according to the Hurtigruten Agreement on purchase of transport services and according to the Authority's Decision of 12 November 2003 to approve the transitional period for the differentiated social security contribution on employers. To ensure that no over-compensation took place, it is necessary to verify that the Hurtigruten companies were not compensated for the same costs under each of these measures.

In this regard, the Authority notes that the increase in the companies' social security costs arose as a result of the Authority's Decision 172/02/COL to propose appropriate measures to Norway regarding the Norwegian system of differentiated social security contributions. The Norwegian State notified a plan for managing the transition to non-differentiated social security contributions. This plan was approved by the Authority by decision of 12 November 2003 and implied that the Hurtigruten companies' social security costs increased in 2004 compared to what was the case when the Hurtigruten Agreement was negotiated. Thus, it is clear that the extra social security costs incurred by the Hurtigruten companies in 2004 were not covered by the Hurtigruten Agreement, i.e. the compensation paid out on the basis of the Hurtigruten Agreement did not cover those additional costs. Moreover, the transfer of additional funds in 2004 would only compensate the Hurtigruten companies for that part of the increased social security contributions which was not already compensated for as a result of the scheme concerning a 3-year transitional period. Hence, the compensation for the increase in social security costs for 2004 granted on the basis of the Maritime Transport Guidelines did not result in any over-compensation.

On the basis of the above, the Authority concludes that the compensation for additional social security costs granted to the Hurtigruten companies for 2004 is compatible with Article 61(3)(c) of the EEA Agreement read in conjunction with the Maritime Transport Guidelines.

5. Conclusion

In light of the foregoing considerations, the Authority concludes that the compensation of NOK 7,352 million (approximately EUR 900 000) granted to the Hurtigruten companies is compatible with Article 61(3)(c) of the EEA Agreement.

The Authority regrets, however, that the Norwegian authorities did not respect their obligations pursuant to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement to notify the measure and to refrain from putting it into effect until it was approved by the Authority,

HAS ADOPTED THIS DECISION:

Article 1

The compensation amounting to NOK 7,352 million granted to the Hurtigruten companies constitutes State aid within the meaning of Article 61(1) of the EEA Agreement. The aid was awarded in contravention of the procedural requirements of Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement. The aid is compatible with Article 61(3)(c) of the EEA Agreement read in conjunction with the Maritime Transport Guidelines.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

This Decision is authentic in the English language.

Done at Brussels, 12 December 2007.

For the EFTA Surveillance Authority

Kristján A. STEFÁNSSON
College Member

Kurt JÄGER
College Member