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Brussels, 20 July 2006
 Case No: 3092
 Event No: 380428

EFTA SURVEILLANCE
 AUTHORITY

Dear Sir/Madam,

Subject: Complaint regarding methods of toll collection at the E39

I. Introduction

On 13 December 2001 the Norwegian Parliament approved the Norwegian Government's proposal to initiate a tunnel project at the E39 between Lavik and Vadheim in the municipality of Høyanger. The decision was partly based upon a financial contribution by road tolls.

As the Authority's Internal Market Affairs Directorate (hereinafter "the Directorate") has informed the Norwegian Government in a letter dated 19 July 2004 (Case No: 3092, Event No: 285468), the Authority has received a complaint with regard to the collection of tolls in connection with this project. On 13 September 2004, the Norwegian Government replied to that letter (Ref.: 06/550-TF). Further correspondence has taken place by letters dated 15 September 2005 (Event No.:333381), 1 November 2005 (your reference: 04/1622-TF) and 1 March 2003 (your reference: 04/1622-TF). The issue has also been discussed at the package meetings in Oslo in 2004 and 2005.

According to the information provided by the Norwegian Government, Norway seems to take the view that the collection of road toll in connection with this project is in conformity with the requirements of *Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures* (hereinafter "Directive 1999/62").

In the following, the Directorate invites the Norwegian Government to provide some additional information/comments on this issue.

II. Relevant EEA law

Directive 1999/62/EC was incorporated into the EEA Agreement by Joint Committee Decision No. 5/2002 and became applicable in the EEA EFTA States on 2 February 2002. Directive 1999/62/EC replaces *Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures*.

Article 2(b) of Directive 1999/62/EC states that toll "means payment of a specified amount for a vehicle travelling the distance between two points on the infrastructures referred to

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in Article 7(2); the amount shall be based on the distance travelled and the type of the vehicle". The term "vehicle" is defined in Article 2(d), and means "a motor vehicle or articulated vehicle combination intended exclusively for the carriage of goods by road and having a maximum permissible gross laden weight of not less than 12 tonnes". Article 7(2)(a) stipulates that "[t]olls and user charges shall be imposed only on users of motorways or other multi-lane roads with characteristics similar to motorways, or users of bridges, tunnels and mountain passes". Article 7(9) establishes that "[t]he weighted average tolls shall be related to the costs of constructing, operating and developing the infrastructure network concern".

According to the Annex to the EEA Joint Committee Decision No. 5/2002, Article 1(d) the following subparagraph shall be added at the end of Article 7(2)(a): *"In the case of Norway, tolls and user charges may also be imposed on specific secondary roads..."*

In Case C-205/98, the Commission had brought an action against Austria for raising the tolls for the Brenner motorway, and for not imposing the said tolls only to cover the costs of constructing, operating and developing the Brenner motorway. According to the Commission, the Republic of Austria had failed to fulfil its obligations under Article 7(b) and Article 7(h) of Council Directive 93/89/EEC. Article 7(h) reads as follows: *"Toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned"*. Austria had interpreted the term "the infrastructure network concerned" to cover the financing of the total road networks in Austria under the management of the company Asfinag. This was rejected by the Court, which held that the "infrastructure network concerned" refers only to the section of the infrastructure for the use of which the toll is paid¹. Furthermore, the Court held that if the Austrian Government's argument were accepted, Member States would be able, through the financing arrangements chosen, to evade the requirement of a link between toll rates and the costs of construction, operation and development of the section in question².

Article 7(h) of Council Directive 93/89/EEC was replaced by Article 7(9) in Directive 1999/62/EC. The amended wording in the beginning of Article 7(9) of Directive 1999/62/EC (*[t]he weighted average tolls instead of toll rates*) is of no interest for the matter at hand.

III. Observations

It is the Directorate's view that the principles established by the Court of Justice in the case law cited above are relevant in the EEA perspective.

The Directorate takes the view that the actual collection of road toll on the E39 in connection with the tunnel project at the E39 between Lavik and Vadheim in the municipality of Høyanger constitutes an infringement of Directive 1999/62/EC and in particular Articles 2(b) and 7(9) thereof. This is so because as a consequence of this toll collection, certain heavy goods vehicles above 12 tonnes are paying tolls for an infrastructure network they actually do not use.

In Lavik, there is a three axis road division. The E39 continues (from the ferry jetty) eastward to the new tunnel, Rv 607 is heading west to the region centre of Dale, the community centres of Hyllestad, Askvoll and the outer islands of Solund. Finally, a local

¹ Paragraph 130.

² Paragraph 131.

road sets off north from Lavik, joining Rv 607 after approximately 25 kilometres. Those who, after having paid the toll on the ferry between Oppedal and Lavik, are continuing on the Rv 607 westwards, as well as those who are continuing along the local road towards north, are paying tolls for the tunnel they actually do not pass through. The same applies for those coming from west on the Rv 607 and from the local road from the north and continuing southwards on the same ferry without having passed the tunnel for which toll is levied.

Hence, the main issue of concern is whether the toll being paid on the ferry is in accordance with the requirement of Article 2(b) of Directive 1999/62/EC which establishes that toll "*means payment of a specified amount for a vehicle to be considered as a payment for a vehicle travelling the distance between two points on the infrastructures referred to in Article 7(2)*", and that "*the amount shall be based on the distance travelled and the type of the vehicle*".

The Norwegian Government has argued that the toll collection is in conformity with Directive 1999/62/EC, and in particular Article 7(5) thereof, which provides that tolls and user charges shall be applied in such a way as to cause as little hindrance as possible to the free flow of traffic and avoid any mandatory controls and checks at the Community's internal borders. According to the Government, Directive 1999/62/EC does not regulate where the toll is to be collected and the Norwegian Government claims that using the ferry for toll collection, is less costly and creates less hindrance to the traffic than collection of the tolls at a standard toll plaza on the road.

Furthermore, the Norwegian Government argues that the authorities are aware that approx. 5% of those who pay the road toll on the ferry do not pass the tunnel. However, according to the Norwegian Government, for those who are driving on the Rv 607 west of Lavik and do not want to pay the toll, there exists an alternative routing including a ferry on the Rv 57 between Rysjedalsvika and Rutledal, situated west of the ferry crossing the E39 Lavik - Oppedal. According to Norway, this route is 4.8 km longer and estimated travel time is 15 minutes longer. Norway argues that this ensures correspondence between benefit and payment.

The Directorate, however, takes the view that Norway's argument that according to Article 7(5) of Directive 1999/62/EC, tolls and user charges shall be collected in such a way as to cause as little hindrance as possible to the free flow of traffic must be dismissed. In the Directorate's view, the question to be raised is not whether the toll is collected on board the ferry or at a toll plaza. The issue of concern is that tolls under Directive 1999/62/EC may only be levied for the actual use of the infrastructure concerned, and in this case not all passing the fjord on the ferry are using the tunnel for which the toll is paid on the ferry. In addition, the Directorate has noted that no information concerning the toll charging system seems to be provided prior to boarding the ferry.

Furthermore, the Directorate would like to underline that there is no *de minimis* rule applying to internal market affairs. The issue of the small number of vehicles paying tolls without using the infrastructure in question, is, therefore, considered irrelevant³.

As regards the argument that there is an alternative routing on the Rv 57, which avoids the ferry where the toll is levied, the Directorate notes that this is a much smaller road which also necessitates two ferry connections instead of one. In addition, it seems that no

³ See Judgment C-49/89 Corsica Ferries France.

apparent information is provided to the road users as regards the alternative routing. Therefore, in the Directorate's view, this may not be considered as an acceptable alternative routing for the vehicles covered by Directive 1999/62/EC, which are heavy goods vehicles above 12 tonnes. And even if some would choose that routing, that would be immaterial for the case at hand. Those vehicles still choosing the normal, and faster, routing along the E39 would nonetheless have to pay the toll on the ferry, even if they would not make use of the tunnel in question.

IV. Conclusion

On the basis of available information, it is, therefore, the Directorate's preliminary assessment that by imposing tolls on the ferry between Lavik and Oppedal to finance the tunnel on the E39 between Lavik and Høyanger, Norway does not comply with the Act referred to at point 18a of Annex XIII to the EEA Agreement, *Directive 1999/62/EC/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures.*

Consequently, in light of the above, the Norwegian Government is hereby invited to submit its observations on the content of this letter no later than *15 September 2006*. After that date, the Authority will proceed to consider, in light of any observations received from Norway, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,



Hallgrímur Asgeirsson
Director
Internal Market Affairs Directorate