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Case No: 59390
Event No: 380072

EFTA SURVEILLANCE
AUTHORITY

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Dear Sir/Madam,

Subject: Complaint regarding the "Finnfast" road and toll project

I. Introduction

On 28 February 2006 the Norwegian Parliament approved the Norwegian Government's proposal to construct a tunnel under the Talgjefjord, between Hanasand in the municipality of Rennesøy and Ladstein in the municipality of Finnøy, with a connection road to the island of Talgje. The decision is, i.a., based upon a financial contribution of NOK 65 mill 2006 from prolonged toll collection at the Sokn toll station.

As the Authority's Internal Market Affairs Directorate (hereinafter "the Directorate") has informed the Norwegian Government by letter dated 2 March 2006 (Case No: 59390, Event No: 363268), the Authority has received a complaint with regard to the financial contribution of NOK 65 mill 2006 from prolonged toll collection at the Sokn toll station. On 28 March 2006 (Your re.: 06/550-TF), the Norwegian Government replied to that letter.

According to the information provided by the Norwegian Government, Norway takes the view that the collection of road toll at Sokn toll station regarding the "Finnfast" 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/EC").

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 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

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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...*"

III. The Brenner case

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. Austria had interpreted the term "the infrastructure 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 ([*th*e weighted average tolls instead of toll rates) is of no interest for the matter at hand.

IV. 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.

Following the Court of Justice's reasoning in *Brenner*, the Directorate takes the view that the prolonged toll collection at the Sokn toll station, which is used for the financing of the "Finnfast" project, 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 the "Finnfast" project, as approved by the Norwegian Parliament on 28 February 2006, road users passing the Sokn toll station on the E39 and who do not go to Finnøy, but continue along the E39, are paying tolls for a tunnel project they actually do not use.

Hence, as indicated in the above-mentioned letter of 2 March 2006 from the Directorate, the main issue is whether the toll charges at the Sokn toll station after 15 March 2006 are related to the network concerned within the meaning of Directive 1999/62/EC.

¹ Paragraph 130.

² Paragraph 131.

It is noted that the Norwegian Government has not been able to provide relevant traffic statistics to the Directorate, as requested in the letter of 2 March 2006. Nor did Norway provide any statistics on the destination of the vehicles passing through the toll station.

The main justification presented by Norway in its letter of 28 March 2006, is that the road users who are paying road toll at the Sokn toll station are paying for the development of a comprehensive infrastructure network in Ryfylke, and that the "Finnfast" project is part of this infrastructure network.

Furthermore, the Norwegian Government also claims that road users to and from Finnøy have contributed with approximately 130 million NOK to the financing of the "Rennfast" project since the opening in 1992. Therefore, in their view, the collection of road tolls at the Sokn toll station is directly related to the financing of a comprehensive infrastructure in the area.

Finally, Norway declares that the down-payment period for Rennfast was initially estimated to be 16 years and that even though the toll collection is prolonged to contribute to the financing of "Finnfast", the total toll collection period at the Sokn toll station will only be approximately 14 years. This is due to lower interest payment than originally foreseen when the project was approved by the Parliament.

In the light of these statements, the Directorate would like to make the following observations:

First, according to traffic statistics provided to the Directorate by the complainant, it seems that according to official statistics from the Directorate of Public Roads from 2004, a total of 4360 (small and large) vehicles per day passed through the Sokn toll station. Out of these, 398 vehicles, or 9.13%, continued to Finnøy / Talgje.

It is also noted that traffic through the Sokn toll station has three destinations:

Across Boknafjorden:	2323 vehicles (53%)
To/from Rennesøy:	1639 vehicles (38%)
To/from Finnøy:	398 vehicles (9%)

This shows that the majority of the traffic passing through the Sokn toll station on the E39 is through traffic to other destinations north of Rennesøy. Coming from Ålborg, it is assumed by the Directorate that a substantial share of this through traffic on the E39 at the Sokn toll station is traffic to/from other EEA States heading towards/coming from the various industrial areas of West-Norway.

Furthermore, it is noted that according to the information provided by Norway, as this is a road development strategy, the projects are put into operation in stages, with individual financing arrangements being made for each project package. In the view of the Directorate, it is the project related to each individual financing arrangement that must be considered as constituting "the infrastructure concerned". Thus, the financing package of the project is the decisive element in defining "the infrastructure concerned". The Norwegian Parliament's Decision of 28 February 2006 only concerns the financing package of "Finnfast". The financing of the other elements in the so-called Ryfylke package are/have been decided upon in other Decisions by the Norwegian Parliament. Consequently, the Directorate takes the view that, in the meaning of Directive

1999/62/EC, "the infrastructure concerned" in the present case must be the "Finnfast" project as decided upon by the Norwegian Parliament and not the overall Ryfylke plan.

The Directorate also observes that road users from Finnøy have actually used the infrastructure they have been paying for since the opening of the "Rennfast" project. Whether the use of that infrastructure was due to the closure of the ferry connection from Judaberg to Stavanger is immaterial. Hence, they have contributed to the costs of constructing and developing an infrastructure which they have been using since the beginning of the toll charging system for the Rennfast project.

The Directorate takes the view that the collection of tolls for financing the construction of an infrastructure project should cease immediately when the loan related to the project concerned has been fully paid. This is in line with the requirements of Directive 1999/62/EC that the weighted average tolls shall be related to the costs of constructing, operating and developing the infrastructure network concerned. Further prolongation or extension of charging, e.g. in order to finance the construction of other projects, would run contrary to this principle.

Finally, the Directorate would like to add that it is duly noted that the prolongation of the toll collection at the Sokn toll station has been planned to end after the collection of the 65 million NOK. In the view of the Directorate, however, this issue is without relevance for the case at hand.

Conclusion

On the basis of available information, it is, therefore, the Directorate's preliminary assessment, that by imposing tolls at the Sokn toll station on Rennesøy to finance the tunnel project between Finnøy and Rennesøy, Norway does not comply with the Act referred to at point 18a of Annex XIII to the EEA Agreement, *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.*

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