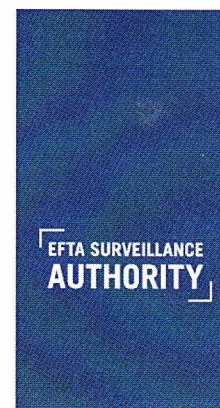


Case No: 81441  
Document No: 932912  
Decision No: 053/19/COL



## EFTA SURVEILLANCE AUTHORITY DECISION

of 10 July 2019

closing a complaint case arising from an alleged failure by Norway to comply with the certain provisions in Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures regarding the toll road project Nordhordlandspakken

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

#### **1 Background**

On 14 December 2017, the EFTA Surveillance Authority (“the Authority”) received a complaint (Doc No 888958) against Norway concerning the toll road project Nordhordlandspakken. The complainant alleges that this project, which was approved by the Norwegian Parliament in August 2017, is not compatible with Directive 1999/62 *on the charging of heavy goods vehicles for the use of certain infrastructures*<sup>1</sup>, as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011<sup>2</sup> (the “Directive”), and, in particular with the so-called “user pays-principle” enshrined in the Directive, according to which infrastructure charges shall be used to recover the cost of construction, maintenance and operation of infrastructure on which the charge is levied.

The road project consists of a bundle package of 19 separate infrastructure projects divided between seven municipalities in the area. The complainant argues that the tolls in the package will be collected on the E39 motorway, whereas the bulk of the amounts collected through tolls will be used for infrastructure measures on other local roads in the package that will have relatively low traffic figures and will have little or no relevance to any of the access points to the E39. The complainant argues that against this background, no discernible connection exists between the tolls levied on the E39 and the construction cost on the infrastructure concerned. The complainant submits that as a consequence, users of the E39 motorway receive very little or nothing in return for the tolls they have to pay.

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<sup>1</sup> OJ L 187, 20.7.1999, p. 42, as incorporated into the EEA Agreement at Annex XIII Point 18a.

<sup>2</sup> OJ L 269, 16.2.2011, p. 1, as incorporated into the EEA Agreement at Annex XIII Point 18a.

In the view of the complainant, such a situation is not compatible with the principles laid down in the Directive.

After having examined the complaint in detail and taking into account the information obtained in the course of its investigation, the Authority takes the view that there is no evidence of any breach by Norway of the Directive in relation to the collection of tolls in the Nordhordlandspakken. The present decision sets out the main reasons for the Authority's conclusions.

## 2 Correspondence

The Authority's Internal Market Affairs Directorate ("Directorate") sent a request for information to the Norwegian Government by letter dated 16 January 2018 (Doc No 892738), to which the Norwegian Government replied by letter dated 19 February 2018 (Doc No 898511). The complainant subsequently submitted further information and arguments by e-mails dated 1 March 2018 (Doc No 900484) and 2 March 2018 (Doc No 900897).

By letter of 26 March 2018 (Doc No 904685), the Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Directorate's assessment of the complaint or present any new information by 28 April 2018.

By letter of 26 April 2018 (Doc No 910847), the complainant replied to this letter and submitted new observations. The complainant submitted further observations by informal communication dated 9 October 2018 (Doc No 933437).

## 3 Relevant EEA law

Under Article 1 of the Directive, the Directive applies to vehicle taxes, tolls and user charges imposed on vehicles as defined in Article 2. Article 2d of the Directive specifies that:

*“‘vehicle’ means a motor vehicle or articulated vehicle combination intended or used for the carriage by road of goods and having a maximum permissible laden weight of over 3,5 tonnes”*

Under Article 7(1) of the Directive, EEA States may maintain or introduce tolls and/or user charges on the trans-European road network or on certain sections of that network, and on any other additional sections of their network of motorways which are not part of the trans-European road network under the conditions laid down in Article 7(2) to (5) and in Articles 7a to 7k of the Directive.

Article 7(3) of the Directive provides that tolls and user charges shall not discriminate, directly or indirectly, on the grounds of the nationality of the haulier or the origin or destination of the vehicle.

Article 7b of the Directive provides:

*“1. The infrastructure charge shall be based on the principle of the recovery of infrastructure costs. The weighted average infrastructure charge shall be related to the construction costs and the costs of operating, maintaining and developing the infrastructure network concerned. The weighted average infrastructure charge*

*may also include a return on capital and/or a profit margin based on market conditions.*

*2. The costs taken into account shall relate to the network or the part of the network on which infrastructure charges are levied and to the vehicles that are subject thereto and, in this context, EEA States may choose to recover only a percentage of those costs.”*

#### **4 Assessment**

Having examined the information and arguments in the complaint as well as the information provided by the Norwegian Government, the Authority concludes that there are no reasons suggesting that the collection of tolls at issue is in conflict with EEA law. In particular, the collection of tolls is compatible with the provisions in the Directive.

##### **4.1 Applicability of the Directive and other relevant EEA rules**

The tolls at issue fall within the scope of the Directive only insofar as they are levied on heavy goods vehicles (“HGV”) with a maximum permissible gross laden weight above 3.5 tonnes in accordance with Article 1 of the Directive. Insofar as tolls are also levied on other road users which fall outside the scope of the Directive, in particular, light vehicles and busses with a weight of over 3.5 tonnes, national measures related to toll collection are not covered by the Directive and must, therefore, be disregarded for the assessment of the measures at hand. However, such toll collection measures must nevertheless comply with the fundamental EEA law principles of non-discrimination.

Furthermore, Article 7(1) of the Directive applies to the collection of tolls on roads in the trans-European road network (“TERN”) and on any other additional sections of their network of motorways which are not part of TERN. The Directive, therefore, applies in relation to the three planned infrastructure measures on the E39 motorway, which forms part of the TERN. Consequently, any assessment as to whether the collection of tolls complies with the Directive is limited to measures taken in relation to the infrastructure projects on the E39, and HGV vehicles which are subject to the toll.

As regards the rest of the projects in the *Nordhordlandspakken* (i.e. infrastructure projects where tolls will be levied on the local road network which are not part of the motorway network), the assessment must be limited to the question whether the toll collection is in line with the fundamental EEA law principle of non-discrimination, which prohibits not only direct but also indirect discrimination.<sup>3</sup> From the information available to the Authority, there are no indications that the tolls at issue are directly or indirectly discriminatory in relation to any category of vehicles, neither on grounds of the nationality of the haulier, nor of the vehicle owner, nor of the origin or destination of the vehicle. Consequently, there is no indication that the principle of non-discrimination has not been met.

##### **4.2 No infringement of the “user-pays principle” (Article 7b of the Directive)**

Based on the information available to the Authority, there are no reasons to conclude that the collection of tolls on the E39 is incompatible with the conditions set out in Article 7b

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<sup>3</sup> Judgement of 18 June 2019 in case C-591/17, *Republic of Austria v The Commission*, paragraph 42.

of the Directive. The complainant did not bring forward any arguments supporting the conclusion that the conditions laid down in these provisions are not met.

At the outset, it should be clarified that the charges levied at the toll sections in the Nordhordlandspakken qualify as tolls within the meaning of the Directive. Article 2(b) of the Directive defines as toll a specified amount payable for a vehicle based on the distance travelled on a given infrastructure and on the type of the vehicle comprising an infrastructure charge and/or an external-cost charge.

Pursuant to Article 7b(1) of the Directive, infrastructure charges shall be based on the principle of the recovery of the infrastructure costs, and the weighted average infrastructure charge<sup>4</sup> shall be related to the construction costs and the costs of operating, maintaining and developing the infrastructure network concerned (and may also include a return on capital and/or a profit margin based on market conditions). The Court of Justice of the European Union (CJEU) has clarified that, in this context, the term “*infrastructure network concerned*” refers to the section of the infrastructure for the use of which the toll is paid.<sup>5</sup> Consequently, for the assessment of the toll measures in question here, the infrastructure network concerned includes all sections of the E39 on which the tolls are levied.

Furthermore, it has to be established whether there is a sufficient link between the applicable toll rates and the costs of construction, operation and development of the section in question, as stipulated by Article 7b(1) of the Directive.

According to the information provided by Norwegian Government, a total of three infrastructure projects with two toll sections will be implemented on the E39 as part of the Nordhordlandspakken. These infrastructure projects to be realised on the E39 will involve total investments of NOK 317 million. According to the Norwegian Government’s projections, HGV covered by the Directive will be charged at a rate of ca. 31 NOK for using the toll road sections in question. Taking into consideration a collection period of twelve years and a projected annual average daily traffic of around 1,400 to 1,700 HGV on these sections, the Norwegian Government estimates that tolls collected for HGV covered by the Directive will contribute an amount of ca. NOK 200-240 million to the overall infrastructure costs. This amount represents approximately 55-70 per cent of the total investment costs for the projects on the E39. The Norwegian Government clarified that under Norwegian legislation the tolls collected will be used only to cover the costs associated with the construction of road infrastructure and the toll road operator’s costs associated with borrowing and collection of tolls and financing.

Based on this information, it can be concluded that the overall toll contribution by HGV, being the only vehicles relevant for the purposes of the present assessment, on the toll road sections in question will be lower than the projected costs associated with the respective investment projects on the E39. Consequently, the complainant’s claim that the majority of the toll collected from these vehicles on the E39 will be used to subsidise projects on the local road network must be rejected.

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<sup>4</sup> The “weighted average infrastructure charge” is defined as the total revenue of an infrastructure charge over a given period, divided by the number of vehicle kilometres travelled on the road sections subject to the charge during that period (cf. Article 2 lit. (be) of the Directive).

<sup>5</sup> CJEU, Judgement of 26 September 2000, Case C-205/98 *Commission v. Austria* [2000] ECR I-7367, paragraph 130.

In its new observations, in the letter dated 24 April 2018 as well as the email dated 9 October 2018, the complainant raised doubts about the accuracy of the above information presented by the Norwegian Government. In particular, the complainant points to the fact that projected tolls levied from light vehicles on the E39 toll stations in question represent a much higher overall amount than the respective projected amount stemming from tolls levied from HGV at the same stations. Against this background, the complainant questions the accuracy of the Norwegian Government's claim that the amount raised through tolls levied from HGV will be used exclusively to cover the costs of the projects on the E39. The complainant argues that given the total amount of tolls to be collected from both HGV and light vehicles on the E39, it must be assumed that the amounts raised from HGV tolls will also be used to finance other projects in the Nordhordlandspakken. More specifically, the complainant claims that only 15% of the overall contribution from HGV tolls raised on the E39 can be associated with the costs for the project on the E39, whereas the remaining 85% will contribute to the other 16 projects in the package. To support this claim, the complainant refers, in particular, to the parliamentary bill<sup>6</sup> regarding the financing of the Nordhordlandspakken, which lists the estimated project cost for each separate project in the package. The complainant claims that it follows from that information that the tolls collected at all five toll sections in the package will contribute equally to the financing of all projects in the package and that, therefore, the majority of the toll collected from HGV will be used to subsidise projects on the local road network.

In response to these observations, the Authority notes that it has no reasons to doubt the accuracy of the information provided by the Norwegian Government. First, it should be recalled that the Authority only reviews the compatibility of the toll measures with EEA law and, in particular, with the provisions of the Directive. As the Directive only applies to tolls and user charges imposed on HGV as defined in Article 2, the Authority's assessment of the toll measures in question is limited to assessing the compatibility of toll measures related to HGV. As far as tolls levied on passenger vehicles are concerned, the Authority can only assess them with regard to the principles of non-discrimination. On the basis of the facts available to the Authority, there are no indications that the principle of non-discrimination has not been complied with.

With regard to proportionality, and the provisions contained in Article 7b(1) of the Directive, the Authority has no reasons to doubt the statements of the Norwegian Government according to which the toll revenue collected from HGV on the E39 will be used to recover the infrastructure costs associated with the planned investments on the E39. The Authority is not aware of any evidence that the revenues stemming from HGV, being the only vehicles relevant for the purposes of the present assessment, at all five toll stations in the Nordhordlandspakken will be used to finance all 19 projects in the package and therefore be disproportionate. Furthermore, the proportionality requirement under Article 7b(1) of the Directive stipulates that the weighted average infrastructure charge shall be related not only to the construction costs, but also to the costs of operating, maintaining and developing the infrastructure network concerned. The information brought forward by Norway gives no indication that the foreseen collection of tolls would breach this principle.

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<sup>6</sup> Prop. 164 S (2016 –2017), Proposisjon til Stortinget (forslag til stortingsvedtak), Finansiering av Nordhordlandspakken i Hordaland, 25 August 2017.

## 5 Conclusion

In light of the above, the Authority concludes that there are no reasons to doubt that the tolls to be levied on the E39 are based on the principle of the recovery of the infrastructure costs and that the weighted average infrastructure charge is related to the construction costs and the toll road operator's cost associated with borrowing, toll collection and financing the relevant infrastructure projects on the E39. The collection of tolls at issue, therefore, is not in conflict with EEA law, and in particular not with the provisions in the Directive.

By letter of 26 March 2018 (Doc No 904685), the Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Directorate's assessment of the complaint or present any new information by 28 April 2018.

By letter of 26 April 2018 (Doc No 910847) and by informal communication dated 9 October 2018 (Doc No 933437), the complainant submitted new observations.

However, the Authority does not consider that these new observations alter the conclusions set out in its letter of 26 March 2018.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with the certain provisions in Directive 1999/62 *on the charging of heavy goods vehicles for the use of certain infrastructures* regarding the toll road project Nordhordlandspakken, is hereby closed.

For the EFTA Surveillance Authority

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College Member

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*This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.*