

Case C-321/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

18 April 2019

Referring court:

Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany)

Date of the decision to refer:

28 March 2019

Applicants:

BY

CZ

Defendant:

Federal Republic of Germany

Subject matter of the main proceedings

Directive 1999/62 — Article 7(9) — Direct effect — Charging of heavy goods vehicles for the use of certain infrastructures — Weighted average tolls — Principle of the recovery of infrastructure costs only — Cost overrun prohibition — Costs of operating, maintaining and developing the infrastructure network concerned — Traffic police costs — Land acquisition interest — Cost overrun of up to 3.8% — Cost overrun of up to 6% — Consequences — Ex post calculation of costs — Basis for calculation following the end of the calculation period

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Can an individual toll-payer rely, before national courts, on compliance with the provisions regarding the calculation of the toll under Article 7(9) and Article 7a(1) and (2) of Directive 1999/62/EC as amended by Directive 2006/38/EC (regardless of the arrangements in Article 7a(3) in conjunction with Annex III thereto), if, in the statutory determination of tolls, the Member State did not fully comply with those provisions or incorrectly implemented them to the detriment of the toll-payer?

2. If Question 1 is to be answered in the affirmative:
 - (a) Can traffic police costs also be treated as costs of operating the infrastructure network within the meaning of the second sentence of Article 7(9) of Directive 1999/62/EC as amended by Directive 2006/38/EC?

 - (b) Does an overrun of the infrastructure costs which can be taken into account in the weighted average toll in the range of
 - (aa) up to 3.8%, in particular when account is taken of costs which cannot in principle be taken into account,

 - (bb) up to 6%
 lead to a breach of the cost overrun prohibition under Article 7(9) of Directive 1999/62/EC as amended by Directive 2006/38/EC, with the result that national law is, to that extent, not applicable?

3. If Question 2(b) is to be answered in the affirmative:
 - (a) Is the judgment of the Court of Justice of 26 September 2000 (C-205/98, paragraph 138) to be understood as meaning that a substantial cost overrun can ultimately no longer be offset by an ex post calculation of costs filed in judicial proceedings, which is intended to prove that the fixed toll rate ultimately does not actually exceed the costs which can be taken into account?

 - (b) If Question 3(a) is to be answered in the negative:

Is an ex post calculation of costs after the end of the calculation period to be based entirely on the actual costs and the actual toll revenue, that is to say, not on the assumptions made in this regard in the original predictive calculation?

Provisions of EU law cited

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 (OJ 1999 L 187, p. 42)

Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 2006 L 157, p. 8)

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 (OJ 1993 L 279, p. 32)

Provisions of national law cited

Bundesfernstraßenmautgesetz (Law on federal road tolls; BFStrMG) of 12 July 2011 (BGBl. [Federal Law Gazette] I p. 1378), last amended by Article 1 of the Law of 4 December 2018 (BGBl. I p. 2251), in particular the first sentence of Paragraph 4(2), Paragraph 14(3), Annex 4

Bundesgebührengesetz (Law on federal charges; BGebG) of 7 August 2013 (BGBl. I p. 3154), last amended by Article 1 of the Law of 10 March 2017 (BGBl. I p. 417), in particular the second alternative of Paragraph 21(1)

Mauthöheverordnung (Toll Rate Regulation; MautHV) of 24 June 2003 (BGBl. I p. 1001), last amended by the Regulation of 8 December 2010 (BGBl. I p. 1848), in particular Paragraph 1

Autobahnmautgesetz (Law on motorway tolls; ABMG) of 5 April 2002, in the version of the Promulgation of 2 December 2004 (BGBl. I p. 3122), last amended by the Law of 29 May 2009 (BGBl. I p. 1170)

Brief summary of the facts and procedure

- 1 The applicants, who previously operated a haulage company that had its registered office in Poland, are seeking the repayment of tolls which they paid in the period from 1 January 2010 to 18 July 2011 for the use of German federal motorways.
- 2 The Verwaltungsgericht Köln (Administrative Court, Cologne, Germany) dismissed their action. The referring court is required to make a ruling on the appeal lodged against that decision.

Principal arguments of the parties in the main proceedings

- 3 The applicants claim that excessively high costs were used as a basis for calculating the toll rate applied, contrary to EU law.
- 4 The Federal Republic of Germany opposes that argument. In particular, it takes the view that the activity of the traffic police serves to safeguard traffic operations, which means that the corresponding expenditure may be taken into account as costs of operating the infrastructure network.

Brief summary of the basis for the reference

Question 1

- 5 In the opinion of the referring court, the applicants may rely on the cost overrun prohibition enshrined in Article 7(9) and Article 7a(1) and (2) of Directive 1999/62 as amended by Directive 2006/38 ('Directive 1999/62'). Directive 1999/62 has direct effect in this respect.
- 6 This is because it now contains detailed provisions regarding the toll-relevant costs (first sentence of Article 7a(1) in conjunction with Article 7(9), definitions in Article 2 and in Annex III) and regarding the road network in respect of which tolls can be applied (Article 7(1), definitions in Article 2). Although Annex III thereto is not directly applicable in the present case, it has a conceptual relevance in so far as costs allowed thereby are a fortiori to be regarded as costs within the meaning of Article 7(9) of the Directive.
- 7 These detailed provisions are effective in practice only if — notwithstanding the scope that remains in relation to calculation methodology — they are directly applicable and justiciable.
- 8 The referring court therefore assumes that the previous case-law of the Court of Justice on Article 7(9) of Directive 1999/62 in the old version (judgment of 5 February 2004, *Rieser Internationale Transporte*, C-157/02, EU:C:2004:76, paragraph 40 et seq.) has been superseded.

Question 2

- 9 Traffic police costs were taken into consideration, inter alia, as costs of operating the infrastructure network, within the meaning of the second sentence of Article 7(9) of Directive 1999/62, in the calculation of the toll rate applied. In the opinion of the referring court, such costs should not have been taken into consideration at all, and certainly not to their full extent.
- 10 The costs of operating the infrastructure network within the meaning of the second sentence of Article 7(9) of Directive 1999/62 are part of the 'infrastructure costs' (first sentence of Article 7(9) of the Directive). However, the activity of the traffic

police does not generally serve to guarantee the functioning of the infrastructure. Instead, traffic police monitor compliance with traffic rules and deal with the consequences of any infringements. This has nothing to do with the infrastructure itself or its functionality.

- 11 The fact that traffic police costs do not constitute infrastructure costs is also confirmed by the history of the legislation. Expenditure for 'police service and accidents' was treated separately as 'external costs' or 'accident costs' in the legislative process. Taking these into consideration was expressly ruled out.
- 12 In any case, the traffic police costs were clearly fixed at an excessively high level in the calculation of the toll rate applied as, in addition to expenditure for traffic surveillance, expenditure for fighting crime was obviously also taken into account. As it is unclear how the costs taken into account are to be broken down in detail, the approach taken is seriously and obviously erroneous.
- 13 The toll rate applied suffers from a further calculation defect. The land acquisition interest should have been based on the acquisition costs (applying the fiction of a public administration), and not on current values as established in 2002 (applying the fiction of a partially private or public undertaking committed to commercial planning and accounting). As the calculation objective is simply asset maintenance, the property values may not be adjusted to the current value. Otherwise, a contribution for a replacement would ultimately be made, even though the property does not have to be replaced.
- 14 Due to these calculation defects, the toll rate applied is around 6% too high, 3.8% of which is due to the consideration of the traffic police costs alone.
- 15 The question is whether such an overrun is contrary to the cost overrun prohibition pursuant to Article 7(9) of Directive 1999/62.
- 16 According to the case-law of the Court of Justice on Article 7(9) of Directive 1999/62 in the old version, the cost overrun prohibition is in any case infringed when the tolls charged exceed the costs by more than 150% (judgment of 26 September 2000, *Commission v Austria*, C-205/98, EU:C:2000:493, paragraph 135). In the opinion of the referring court, this also applies to the new version of the provision.
- 17 The Court of Justice has not previously ruled on whether a relevant breach of the cost overrun prohibition may be assumed to have occurred even in the case of a relatively minor cost overrun.
- 18 The argument that even a minor overrun is sufficient is supported by the wording of the first sentence of Article 7(9), according to which tolls are to be based on the principle of the recovery of infrastructure costs 'only'. This is because the 'exclusiveness' of the link between infrastructure costs and the toll is affected when costs which are in principle not allowable or have not been correctly applied are taken into consideration even only to a small extent.

- 19 The effectiveness of the cost overrun prohibition and the principle of charging the infrastructure costs to users (see recital 2 of Directive 2006/38/EC) may also be called into question.
- 20 Also to be taken into consideration is the fact that the Member States have broad discretion when choosing the cost determination methodology (see Court of Justice, judgment of 5 February 2004, *Rieser Internationale Transporte*, C-157/02, EU:C:2004:76, paragraph 40). However, this means that different toll rates are permissible for the same infrastructure depending on the choice of methodology. If there is also relevant scope for exceeding the rates thus determined, the harmonising effect of the Directive and its intended protection of transport undertakings subject to charges (see recital 1 of Directive 2006/38) may be called into question.
- 21 Regardless of the level of the overrun, the referring court is of the opinion that there is therefore in any case a relevant breach of the cost overrun prohibition when costs which do not constitute infrastructure costs are taken into account, when costs are actually based on erroneous assumptions, when the calculation is inconsistent in itself or when costs are included twice. That is the case here as regards the traffic police costs and the land acquisition interest.
- 22 The wording of the second sentence of Article 7(9), according to which the weighted average tolls are to be ‘related’ to certain costs, could militate against the assumption of a breach of the cost overrun prohibition in the case of a minor overrun. In his opinion in *Rieser Internationale Transporte* (C-157/02, EU:C:2003:438), the Advocate General accordingly assumed that being thus ‘related’ was not the same as strict observance.
- 23 Under German law, according to which, in contrast to EU law, a calculation error fundamentally leads to the overall invalidity of the charging rate, overruns of 3% to 12% are accepted in the case of cost overrun prohibitions, depending on the legal field. This takes account of the fact that the calculation of charges is a predictive decision in which a certain risk of error is inherent. Accordingly, no such scope for error is afforded in the case of a seriously and obviously erroneous costs estimate.

Question 3

- 24 The German case-law fundamentally assumes in respect of national law that a charging rate should merely ultimately not be excessive. It may also be offset in judicial proceedings by an ex post calculation, unless a seriously and obviously erroneous costs estimate is involved. If — as in this case — a calculation period has already come to an end, accounting using the same method as that used in the calculation must however take place on the basis of the actual costs and the actual charge revenue. In that case, possible corrections are limited to errors relating to estimates which can be established, in terms of amount, at the end of the respective calculation year.

- 25 The Federal Republic of Germany has not previously undertaken such ex post accounting. However, the referring court cannot rule out the possibility that ex post accounting will take place in further proceedings. However, it is not clear from the judgment of the Court of Justice of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493, paragraph 138) whether such ex post accounting would be relevant under EU law and how it would have to be undertaken if appropriate. Although the Court of Justice has stated that an increase in toll rates cannot, in principle, be justified by means of a calculation made subsequently, it is unclear whether this is a fundamental consideration.

WORKING DOCUMENT