

Case No: 81611
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EFTA SURVEILLANCE
AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

of 3 July 2019

closing a complaint case against Norway regarding an alleged violation of Directive 2004/54/EC in connection with a proposed additional tube for the Oslo Fjord tunnel

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 17 January 2018, the EFTA Surveillance Authority (“the Authority”) received a complaint which was lodged on behalf of the organisation Bedre Veier (“the complainant”) against the Norwegian Government, regarding the adoption by the Norwegian Government on 19 June 2017 of the National Transport Plan (NTP) which provides for construction of an additional tunnel tube close to the existing Oslo Fjord tunnel. The complainant alleges that the Norwegian Government’s decision to construct an additional tube with a gradient of 7% in parallel to the existing Oslo Fjord tunnel constitutes a violation of Directive 2004/54/EC *on minimum safety requirements for tunnels in the Trans-European Road Network*¹ (“the Tunnel Directive”).

2 Correspondence

Following receipt of the complaint, the Authority’s Internal Market Affairs Directorate (“the Directorate”) sent a request for information to the Norwegian Government on 23 January 2018 (Doc No 894927) to which the Norwegian Government replied by letter dated 15 March 2018 (Doc No 902706).

By letter of 22 June 2018 (Doc No 918522), 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

¹ Directive 2004/54/EC of the European Parliament and of the Council of 29 April 2004 on minimum safety requirements for tunnels in the Trans-European Road Network (OJ L 167, 30.4.2004, p. 3). Incorporated as point 17i of Annex XIII of the EEA Agreement by Decision of the Joint Committee No 10/2006 of 27 January 2006.

present any new information by 23 July 2018. By email dated 9 July 2018 (Doc No 923073), the Directorate extended the deadline to submit observations to 17 August 2018.

By letters dated 17 August 2018 (Doc No 927329) and by email dated 12 September 2018 (Doc No 929646) the complainant submitted new observations in response to the Authority's letter of 22 June 2018.

By letter dated 9 November 2018 (Doc No 1037801), the Norwegian Hauliers Association (*Norges Lastebileier-Forbund*) ("NLF") submitted a separate complaint to the Authority in which it declared that it fully supports and joins the complaint submitted by the complainant, including the description of the facts and the legal analysis.

By email dated 22 November 2018, the complainant shared a report by the Norwegian Accident Board from November 2018 on an incident in the Oslo Fjord Tunnel.

By email dated 6 May 2019, the Royal Norwegian Automobile Club submitted a separate complaint to the Authority in which it declared that it fully supports and joins the complaint submitted by the complainant, including the description of the facts and the legal analysis.

On 19 June 2019, the Directorate sent an email to the Ministry of Transport requesting clarification on certain facts presented by the Norwegian Government. By letter dated 21 June 2019 (Doc No 1076442), the Norwegian Ministry of Transport replied to that email, confirming that decision to continue with the second tunnel tube had been taken by the Norwegian Government.

3 Legal assessment of the complaint

The Authority has assessed the arguments submitted by the complainant and concludes that the Norwegian Government's decision to construct the second tunnel tube is compatible with EEA law, and in particular with the minimum safety requirements laid out in the Tunnel Directive.

3.1 The complainant's arguments

The complainant claims that construction of the additional tunnel tube as outlined in the design plans of the Norwegian administration would constitute an infringement of Article 3(1) in connection with Annex 1, point 2.2.2 of the Tunnel Directive. Article 3(1) provides that "*Member States shall ensure that tunnels in their territory, falling within the scope of this Directive meet the minimum safety requirements laid down in Annex I*", and Annex 1, point 2.2.2 of the Tunnel Directive provides that "*longitudinal gradients above 5% shall not be permitted in new tunnels, unless no other solution is geographically possible*".

The Oslo Fjord tunnel runs on the national road Rv23 and consists of a 7.3 kilometres long, single-tube, partly two-lane, partly three-lane subsea tunnel with a maximum gradient of 7%. Under the project proposal, the existing road would be upgraded to motorway standard, with an additional, second tunnel tube being built in parallel to the existing tube, located on the southern side of the existing tube. The maximum longitudinal gradient in the additional tunnel tube would be 7% on the eastern side of the tube and 6.5 to 7% on the western side of the tube. The proposal foresees that there would be "lay-bys" in the tunnel at every 500 metres and emergency exits as cross-connections between the tubes would be built at every 250 metres. Cross-connections were partly blasted already when the first tube was constructed.

According to information submitted by the Norwegian Government on 15 March 2018 (Doc No 902706), no final decision had been taken on whether or not to construct the second tunnel tube in the Oslo Fjord tunnel. Each of the three different alternatives that had been identified by the Norwegian Government for crossing the Oslo Fjord (the construction of a bridge north of Drøbak, the construction of a new subsea tunnel north of Drøbak or the completion of the second tunnel tube) could, therefore, be realised. According to the Norwegian Government, the final decision on which of these alternatives should be chosen would be taken in the near future. By letter dated 21 June 2019 (Doc No 1076442), the Norwegian Government replied to the request for clarification from the Authority confirming that the Government had informed the Royal Road Administration of its decision to continue with the completion of the second tunnel tube in July 2018. The Norwegian Government informed the Authority in the same letter that no action was being taken while the complaint was being assessed by the Authority.

According to the information provided by the Norwegian Government in its letter of 15 March 2018, building the additional tube with a gradient of 5% would result in the second tube being 2.3 kilometres longer and would complicate the connection between the Rv23 and secondary roads, and ultimately lead to longer and costlier cross-connections due to the height difference between the tubes. The Norwegian Government also takes the view that the alternative of locating the portals for the second tube at the same point as for the existing tunnel would result in a complex curvature of the second tube and lead to long cross-connections.

Moreover, according to the Norwegian Government, a risk analysis for an upgraded Oslo Fjord tunnel with the addition of a second tube with a maximum gradient of 7% was carried out in 2013. The risk analysis recommends certain measures to enhance safety in the tunnel as well as on the adjoining road. Following the recommendation, a number of risk reduction measures were adopted for the project, which are relevant for the risks related to the longitudinal gradient, such as, *inter alia*, the construction of lay-bys in both tubes, emergency exits (cross-connections between the tubes), emergency stations every 125 metres in both tubes, as well as the installation of automatic traffic control cameras for speed limit enforcement.

3.2 Applicability of the Tunnel Directive

The Tunnel Directive is applicable to tunnels in the Trans-European Road Network with lengths of over 500 metres, whether they are in operation, under construction or at the design stage. The road on which the second tunnel tube of the Oslo Fjord Tunnel is proposed to be built (*Riksvei 23*) forms part of the Trans-European Transport Network, pursuant to Article 2(2) and Annex III of Regulation (EU) No 1315/2013 *on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU*.²

3.3 Minimum safety requirements

Article 3 (1) of the Tunnel Directive states that

“Member States shall ensure that tunnels in their territory, falling within the scope of this Directive meet the minimum safety requirements laid down in Annex I”.

² Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1). Incorporated into the EEA Agreement by Decision of the Joint Committee No 280/2015 of 30 October 2015.

Annex 1, point 2.2.2 of the Tunnel Directive foresees that
“longitudinal gradients above 5% shall not be permitted in new tunnels, unless no other solution is geographically possible”.

Under the current planning design, the proposed second tunnel tube is to be built with a gradient of 7%, therefore potentially in breach of Article 3(1) in connection with Annex 1, point 2.2.2 of the Tunnel Directive.

In this context, the Authority has assessed whether the second tunnel tube qualifies as a “new tunnel” within the meaning of the Tunnel Directive. The complainant submits that the second tunnel tube constitutes a new construction project that will be built separately from the existing tunnel and therefore qualifies as a new tunnel. In this regard, the complainant refers to Recital (23) of the Tunnel Directive for the interpretation of the term “new tunnel” which reads:

“Where the requirements of this Directive necessitate the construction of a second tube for a tunnel in the design or construction phase, this second tube to be constructed should be considered as a new tunnel. The same applies if the requirements of this Directive necessitate the opening of new legally binding planning procedures, including planning permission hearings for all related measures.”

The complainant submits that for the purposes of interpretation of the above recital, a differentiation should be made between a situation where an existing tunnel is merely being extended and a situation where a completely new tunnel tube is being constructed. In the view of the complainant, the second tunnel tube in the Oslo Fjord tunnel constitutes a new construction project that is separate from the existing one and therefore does not constitute a mere build-up of the existing tunnel tube.

The complainant furthermore takes the view that if the necessity of construction of a second tube was established after the Tunnel Directive came into force, the construction of that new tube should even more be considered as a new tunnel. In addition, the complainant argues that even if one were to conclude that the second tube tunnel should not be considered a “new tunnel”, on the premise that it was already under construction at the time of entry into force of the Tunnel Directive, the second tunnel tube is nevertheless to be qualified as a “new tunnel” taking into consideration the second sentence of Recital (23). In this regard, the complainant claims that under the applicable Norwegian rules, the building of a new tube requires new permissions, and that therefore a second Oslo Fjord tube will constitute a new tunnel.

In its letter dated 15 March 2018, the Norwegian Government states that when planning for the second tunnel tube, it was assumed that the second tunnel tube constitutes an “existing” tunnel with regard to the qualification under the Tunnel Directive. The Norwegian Government contends that the second tunnel tube does not constitute a new tunnel, but must rather be seen as the development of an existing tunnel.

3.4 Assessment

The Authority has assessed whether Recital (23) of the Tunnel Directive is relevant to the case at hand in order to ascertain whether a second tunnel tube should be qualified as a new tunnel.

3.4.1 First sentence of Recital (23)

The **first sentence of Recital (23)** does not appear to be relevant to the Oslo Fjord tunnel, because that provision expressly refers to a situation where the requirements of the Tunnel Directive *necessitate* the construction of a second tube for a tunnel *in the design or construction phase*. In this regard, the Authority notes that at the time of entry into force of the Tunnel Directive³, the existing tube of the Oslo Fjord tunnel was neither in the design phase nor in the construction phase. According to the information available to the Authority, the existing tunnel tube was completed and has been in use since 2000.

In its new submissions of 17 August 2018, the complainant has questioned the Authority's view on this point, arguing that since the second tube had been foreseen and planned at the same time as the first tube, and since the construction phase of the second tube has not been launched yet, the entire project should be regarded as still being “in the construction phase”.

The Authority does not concur with this view. However, the question whether or not the existing tube of the Oslo Fjord tunnel qualifies as “a tunnel in the construction phase” can ultimately be left open for the purpose of the assessment at hand. For even if one were to follow the complainant's argument that, in cases where the necessity of a second tunnel tube was established only after the entry into force of the Directive, the construction of the second tube should *a fortiori* be also considered a new tunnel, the first sentence of Recital (23) would still not apply, since there are no indications that the *requirements of the Tunnel Directive necessitate* the construction of the second tunnel tube, for the following reasons:

First, Norway has proposed a number of risk reduction measures proposed in connection with the building of the second tunnel tube. These measures meet or even exceed the minimum requirements of the Tunnel Directive. Therefore, there are no indications that the requirements in the Tunnel Directive necessitate the construction of the second tube tunnel.

Second, even if the decision to construct the second tunnel tube were also to be based on the objective of improving the level of safety for road users envisaged by the Tunnel Directive and building the tunnel would include taking safety measures to reduce the risks related to the 7% gradient,⁴ it would undoubtedly be feasible to enhance the safety level in the existing tunnel tube in accordance with the Tunnel Directive without the construction of a second tube.

Consequently, the requirements of the Tunnel Directive do not “necessitate” the construction of a second tube and therefore, the first sentence of Recital (23) does not apply to the Oslo Fjord tunnel.

Furthermore, according to the information provided by the Norwegian Government, the proposed upgrading of the Oslo Fjord tunnel with a second tube will achieve two objectives: (1) improving the safety in the existing tunnel and (2) improving capacity due to traffic growth. While the Tunnel Directive aims at, *inter alia*, ensuring a minimum level

³ The Tunnel Directive was incorporated into the Annexes of the EEA Agreement by Joint Committee Decision No 10/2006 of 27 January 2006 and entered into force in the EEA on 1 December 2006.

⁴ According to the information provided by the Norwegian Government, the following main risk reduction measures are foreseen: lay-bys for each 500 metres in both tubes, emergency exits (cross-connections between the tubes) for each 250 metres, emergency stations for each 125 metres in both tubes, and automatic traffic control cameras for speed limit enforcement.

of safety for road users in tunnels in the Trans-European Road Network, there are no indications that the decision to construct a second tube tunnel in the Oslo Fjord would be taken solely or primarily in order to meet the minimum safety requirements foreseen in the Tunnel Directive.

The complainant, in its new submission dated 17 August 2018, has presented new reasons to challenge the Authority's conclusions on this point. In the complainant's view, the requirements of Directive do in fact necessitate the construction of a second tube. In this regard, the complainant makes reference to point 2.1 of Annex I of the Directive,⁵ read in conjunction with point 1.3 of the same Annex.

Point 2.1 of the Annex provides:

“2.1.1 The main criteria for deciding whether to build a single or a twin-tube tunnel shall be projected traffic volume and safety, taking into account aspects such as the percentage of heavy goods vehicles, gradient and length

2.1.2 In any case, where, for tunnels at the design stage, a 15-year forecast shows that the traffic volume will exceed 10,000 vehicles per day per lane, a twin-tube tunnel with unidirectional traffic shall be in place at the time when this value will be exceeded.”

The Authority notes that the provision in point 2.1.1 of Annex I of the Directive, by its very wording, applies only to situations where the initial decision whether to build a single or a twin-tube tunnel has not yet been taken by the competent authorities. Similarly, the provision in point 2.1.2 concerns situations where an entirely new tunnel is still at the design stage and stipulates that, based on the projected traffic volume in the future, provisions shall be made already at the design stage for a second tunnel tube to be constructed when the respective traffic volume is reached.

The Authority recalls that in the case of the Oslo Fjord Tunnel, both tunnel tubes were already included in the zoning plan when the initial plans for the new national road 23 were presented to the Norwegian Parliament in 1996. Accordingly, it was decided already at the time to carry out the project with two tunnel tubes, with the proviso that the second tube be constructed at a later time, based on the traffic volume in the future. Hence, point 2.1.1 of Annex I to the Directive is not applicable to the current situation because the decision whether to build a single or a twin-tube tunnel has already been made, prior to the entry into force of the Directive. For the same reason, the requirement under point 2.1.2 of Annex I does not apply in the present case because the Oslo Fjord tunnel is undoubtedly no longer at the design stage, and, in addition, the requirement to have a twin-tube tunnel in place when the respective traffic volume is in line with the initial planning decision at the inception of the Oslo Fjord tunnel.

Consequently, the Authority concludes that the requirements of the Tunnel Directive do not necessitate the construction of a second tunnel tube and therefore, the first sentence of Recital (23) is not relevant in the context of this assessment.

⁵ Article 3(1) of the Tunnel Directive provides that EEA States are to ensure that tunnels in their territory, falling within the scope of the directive, meet the minimum safety requirements laid down in Annex I.

3.4.2 Second sentence of Recital (23)

In addition, the Authority has assessed whether the qualification as a “new tunnel” follows from the **second sentence of Recital (23)**, which refers to a situation in which “*the requirements*” of the Tunnel Directive “*necessitate the opening of new legally binding planning procedures, including planning permission hearings for all related measures*”. The complainant claims that the construction of the second tunnel tube requires new permissions under Norwegian law and must therefore be qualified as a new tunnel. In this regard, the Authority has requested information from the Norwegian Government in order to ascertain whether under the applicable Norwegian rules the building of the additional Oslo Fjord tunnel tube necessitates the opening of new legally binding procedures, including planning permission hearings for all related measures.

According to the information provided by the Norwegian Government, both tubes for the Oslo Fjord tunnel were already included in the 1996 zoning plan when the initial plans for the new national road 23 were presented to the Norwegian Parliament. Accordingly, it was decided at the time to carry out the project with two tunnel tubes, with the proviso that the second tube be constructed at a later time, based on the traffic volume in the future. The Norwegian Government explained that for this reason, parts of the cross-connections for a future tunnel upgrade were already blasted when the first tunnel tube was constructed. Furthermore, the Norwegian Government explained that the two municipalities on the western side of the Oslo Fjord approved two zoning plans in 1992 which entailed a two-lane road with interchanges and that in 1995, the zoning plan for the western part of the tunnel was adopted, entailing two tunnel tubes for the Oslo Fjord tunnel. Furthermore, for the eastern side of the Oslo Fjord, the 1996 zoning plan entailed two tunnel tubes for the Oslo Fjord tunnel and a four lane road with interchanges between the tunnel and the E6 road at Vassum. Moreover, a 1996 proposition of the Government to the Norwegian Parliament (*Storting*) foresees developing the tunnel in accordance with traffic growth, thus to be constructed in two phases, with the first construction phase entailing the construction of a single-tube tunnel with three lanes, and the second phase foreseeing the construction of the second tube with two lanes in parallel to the first tube.⁶ The proposition recommends that the Oslo Fjord tunnel be developed in two phases and to make decisions later with regard to the second construction phase, when traffic growth and needs are more clarified.

The Norwegian Government furthermore clarified that building the second tube tunnel requires a re-approval of the zoning plan due to the fact that under the applicable Norwegian legislation, permission to carry out expropriation can only be granted within ten years after the public announcement of an adopted zoning plan. In addition, the Norwegian Government clarified that adjustments to the existing zoning plans are needed for building the second tube tunnel, including a new layout of the interchange east of the Oslo Fjord tunnel and an addition of a control area for vehicle inspection. According to the Norwegian Government, these new zoning plans for the whole project (from the E6 at Vassum to Verpen on the western side of the tunnel) were approved in February 2015.

Taking into account the above information, the requirement for new legally binding planning procedures for the construction of the second tube tunnel follows from the fact that Norwegian law requires zoning plans to be re-approved once their validity expires after ten years. The requirement for new legally binding planning procedures is therefore not a direct result of “*the requirements of the Directive*”, given that the Directive does not mandate the construction of a second tunnel tube. Under these circumstances, it can be

⁶ Proposal of the Norwegian Government to Parliament, 28 June 1996, *St prp nr 87* (1995-1996).

concluded that the second sentence of Recital (23) is not relevant to the Oslo Fjord tunnel either.

3.5 Conclusion

Against this background, it can be concluded that there are no provisions in the Tunnel Directive stipulating that the second tunnel tube is to be qualified as a “new” tunnel.

In its new submission dated 17 August 2018, the complainant argues that the structure and rationale of the Directive suggests that any second tube added to an existing single-tube tunnel “*should be considered a new tunnel for the purpose of the five per cent gradient rule*” and that Recital (23) does not define in an exhaustive manner the notion of a “new” tunnel.

The Authority does not agree with this view. Beyond recital (23), the Directive does not specify what should qualify as a new tunnel. The second tunnel tube is a development of an existing tunnel. It follows directly from the planning history for the Oslo Fjord tunnel that the second tube should be regarded as an existing tunnel and not as a new tunnel. To qualify the second tunnel tube as an entirely “*new tunnel*” in itself would disregard the fact that the second tunnel tube was already foreseen in the initial planning documents at the time of the construction of the existing tunnel tube and in the parliamentary proposition for the Oslo Fjord tunnel, which foresees a tunnel development in two phases, with the second tube to be built in accordance with traffic needs.

In addition, the Authority notes that even if one were to argue that the construction of the second tunnel tube should nevertheless be qualified as a new tunnel, there are good arguments to submit that there is no breach of Article 3(1) read in conjunction with Annex 1, point 2.2.2 of the Tunnel Directive because “*no other solution is geographically possible*”.

Firstly, as the Norwegian Government has demonstrated, the second tube is constructed, *inter alia*, in order to improve the safety levels in the existing tunnel, due to the change to unidirectional traffic and the construction of emergency exits (cross-connections) at regular intervals of 250 metres. The Authority understands that it would defeat the purpose of the second tube as a means of improving the safety levels in the existing tunnel, i.e. as a “solution”, if the second tube were constructed with a gradient below 5%. This is because, as the Norwegian Government points out, this would lead to the tubes being no longer parallel which *inter alia* would have implications for the cross-connections between the tubes. Secondly, the Authority notes that the term “*no other solution*” in the context of point 2.2.2 of the Annex 1 of the Tunnel Directive refers to solutions which are within the scope of the directive. Therefore it is not required to consider other solutions, such as a bridge in such assessment.

Finally, the Authority observes that a number of very specific risk reduction measures are foreseen in order to compensate for the high tunnel gradient, such as, *inter alia*, the construction of lay-bys in both tubes, emergency stations and telephones, safety signage and traffic control cameras. These risk reduction measures, which will be adopted following the recommendations in the risk assessment that the Norwegian Government has carried out (as mandated by Article 3(2) of the Tunnel Directive), go beyond the minimum safety requirements foreseen in the Tunnel Directive.

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 provisions of Directive 2004/54/EC in connection with a proposed additional tube for the Oslo Fjord tunnel is hereby closed.

For the EFTA Surveillance Authority

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