

Case No: 84698
Document No: 1160732
Decision No: 141/20/COL

REASONED OPINION

**delivered in accordance with Article 31 of the Agreement between the EFTA
States on the Establishment of a Surveillance Authority and a Court of
Justice concerning Norway's breach of minimum safety requirements for
tunnels in the Trans-European Road Network**

1 Introduction

In the present reasoned opinion, the EFTA Surveillance Authority (“the Authority”) takes the view that Norway has failed to fulfil its obligations under Article 3(1) and Article 11 of the act referred to at point 17i, Chapter II of Annex XIII of the EEA Agreement, *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. 39 (“the Act”). The Act was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 10/2006, which entered into force on 1 December 2006.

The Act sets out minimum safety measures relating to the infrastructure and operation of tunnels with lengths of over 500m in the Trans-European Road Network (TERN). All tunnels are to be subject to the requirements regardless of whether the tunnels are in operation, under construction or at the design stage.

According to Article 3(1) of the Act, the EU Member States and EEA EFTA States are to ensure that tunnels in their territory falling within the scope of the Act meet the minimum safety requirements laid down in Annex I to the Act. The Act sets out a deadline of 30 April 2019 for implementation of the minimum safety requirements in tunnels that were in operation at the time the Act entered into force.

The Norwegian Government concedes that the requirements of Article 3(1) of the Act have not been met within the set deadline. Though the Norwegian Government continues its best possible efforts to upgrade the tunnels, it is not able to provide a binding timeframe for the upgrading of the remaining non-complaint tunnels.

2 Correspondence

In 2007 and 2009, the Authority received reports from the Norwegian Public Roads Administration, on planned measures on TERN tunnels in Norway (“the Planned Measures”), pursuant to the reporting obligation under Article 11(5) of the Act.¹ Moreover, on 28 October 2013 the Authority received a report² regarding details on the operational program 2014-2017, pursuant to the reporting obligation under Article 15(2) of the Act,³ which concerns implementation of the Planned Measures.

In a letter to the Norwegian Government, dated 23 July 2015, the Authority requested further information concerning the state of implementation of the Act.⁴ Following a discussion at the package meeting which took place in November 2015, the Norwegian Government on 11 April 2016 submitted a report pursuant to Article 15(2) of the Act.⁵

¹ Doc. No 453804 and Doc. No 540501, your ref. 2005/081677-089 and 2005/081677-130.

² Doc. No 688626, your ref. 11/1651.

³ According to article 15(2) of the Act, every two years, the EEA EFTA States are required to inform the Authority of the state of implementation of the plan and of any changes made to it.

⁴ Doc. No 765774.

⁵ Doc. No 801126, Doc. No 801127 and Doc. No 801128, your ref. 15/1923.

In a letter to the Norwegian Government, dated 10 October 2016, the Authority requested further information concerning the latest report from Norway.⁶ Specifically, the Norwegian Government was invited to clarify the numbers of tunnels falling within the scope of the Act, including the number of tunnels where it did not expect the April 2019 deadline to be met, and further details on the improvement plans for these tunnels.

In its reply to the Authority, dated 24 November 2016, the Norwegian Government confirmed that 173 tunnels fall within the scope of the Act, of which 37 tunnels were expected not to meet the April 2019 deadline, and that the delay would last no later than 2020/2021.⁷

The Norwegian Government sent the Authority a new report dated 17 January 2019, pursuant to Article 15(2) of the Act.⁸ In this report, the Norwegian government stated that at least 64 tunnels would not be in full compliance with the Act by the end of 2019.

Based on all the information received and pursuant to Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority addressed a letter of formal notice to Norway on 22 April 2020, drawing attention to the fact that Norway has failed to fulfil its obligations under Article 3(1) and Article 11 of the Act as regards minimum safety requirements in at least 64 tunnels falling under the scope of the Act.⁹

On 29 June 2020, the Norwegian Government replied and provided updated information on the state of compliance, confirming that out of the tunnels that fall within the scope of the Act at the date of the letter, 68 tunnels are reported not to be in full compliance with the Act.¹⁰

3 Relevant EEA law

The Act, as adapted by the EEA Agreement, sets out a number of obligations on the EU Member States and the EEA EFTA States.

Article 3 paragraph 1 reads as follows:

“1. Member States [and EEA EFTA 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.”

Article 9, relating to tunnels whose design was not approved at the time of incorporation of the Directive into the EEA Agreement, reads as follows:

“1. Any tunnel whose design has not been approved by the responsible authority by 1 May 2006 shall be subject to the requirements of this Directive.
2. The tunnel shall be commissioned in accordance with the procedure laid down in Annex II.”

⁶ Doc. No 820749.

⁷ Doc. No 828239, your ref. 15/1923.

⁸ Doc. No 1047362 and Doc. No 1047364, your ref. 15/1923.

⁹ College Decision 036/20/COL, Doc. No 1108913.

¹⁰ Doc. No 1140991 (with attachment Doc. No 1140989), your ref. 15/1923.

In case of tunnels in the EEA EFTA States, the applicable date in this relation is 1 December 2006, as that is the compliance date of the Directive within the EEA.

Article 10, relating to tunnels whose design had been approved but which were not open at the time of incorporation of the Directive into the EEA Agreement, reads as follows:

- “1. In the case of tunnels whose design has been approved but which have not been opened to public traffic by 1 May 2006 [or as regards the EEA EFTA States, before 1 December 2006], the administrative authority shall assess their compliance with the requirements of this Directive, with specific reference to the safety documentation provided for in Annex II.
2. Where the administrative authority finds that a tunnel does not comply with the provisions of this Directive, it shall notify the Tunnel Manager that appropriate measures must be taken to increase safety and shall inform the Safety Officer.
3. The tunnel shall then be commissioned in accordance with the procedure laid down in Annex II.”

Article 11 paragraphs 6 and 7, relating to tunnels that were already in operation at the time of incorporation of the Directive into the EEA Agreement, reads as follows:

- “6. The refurbishment of tunnels shall be carried out according to a schedule and shall be finished by 30 April 2014.
7. Where the total tube length of existing tunnels divided by the total length of the part of the trans-European road network located on their territory exceeds the European average, Members [sic] States [and EEA EFTA States] may extend the period stipulated in paragraph 6 by five years.”

4 The Authority's Assessment

According to information provided in their letter dated 29 June 2020, and taking account of the information provided in the report of 17 January 2019, the Norwegian Government has informed the Authority of the following:

- 173 tunnels fall within the scope of the Act, of which;
- 105 tunnels do fully conform to all requirements set out in the Act, and;
- 68 tunnels do not fully conform to all requirements set out in the Act. All of these tunnels fall under the scope of Article 11 of the Act, as they were opened to public traffic before 1 December 2006.

As regards the refurbishment and adaptations that are necessary for the 68 tunnels to achieve full compliance with the Act, the Norwegian Government informed the Authority of the following planning schedule:

- 18 tunnels are expected to be in conformity by end of the Norwegian Public Roads Administration's current action plan for 2018-2021.
- 28 tunnels are under refurbishment or scheduled to start in 2020 according to the National budget for 2020.

- 20 tunnels will be replaced by new road constructions and consequently be taken out of the TERN. No investment decisions to refurbish these tunnels have therefore been made. Concerning the new road constructions, the start date of construction for one road project, which will result in 6 tunnels being taken out of the TERN, is scheduled for 2022 at the earliest. For a second road project, which will result in 12 tunnels being taken out of the TERN, the construction start date is yet to be decided. A third road project, which will result in the remaining 2 tunnels being taken out of the TERN, has a planned construction start date between 2018-2029. For all of these projects, construction start is dependent on the priority given to the projects in the new National Transport Plan for 2022-2033.
- For 2 tunnels, a final investment decision to start the refurbishment is still pending.

In its reply, the Norwegian Government stated that the current National Transport Plan 2018-2029 and the Norwegian Public Roads Administration's corresponding Action Plan (2018-2021) will expire at the end of 2021. The planning process for the National Transport Plan (2022-2033) is ongoing. The new National Transport Plan will presumably pass the Norwegian Parliament during the spring session of 2021. Before that time, the Norwegian Government cannot commit the Parliament to an action plan beyond 2021. However, the Norwegian Government asserts that it is still making its best possible effort to upgrade tunnels on the TERN.

The Authority is concerned about the high number of tunnels still not in conformity with the Act to date and takes the view that possibilities should be sought to advance the refurbishment works and to commit to a more ambitious time schedule.

For the 68 tunnels, for which Norway recognises non-compliance with the Act, the Norwegian Government declares that "in those cases where tunnel upgradings have not taken place by the given deadline (i.e. cases of delay), the Norwegian Administrative Authority on tunnel safety in road tunnels on the TERN requires that the Tunnel Manager implements temporary risk reduction measures." Furthermore, it states that "only when the tunnel upgrading has been completed may the temporary risk reduction measures be discontinued."¹¹

The Authority does not consider it clear whether alternative risk-reduction measures have actually been implemented, and for which tunnels this is the case. The Authority expects in general that any alternative risk-reduction measures accepted by the Norwegian Administrative Authority be notified, either in accordance with Article 3(2) or, insofar as it may concern for limited derogations within the meaning of point 1.2.1 of Annex I of the Act, in accordance with that provision. The Authority cannot see that the Norwegian Government has notified any alternative risk-reduction measures in accordance with those rules.

The Norwegian Government has further contended that "the timeframe set in the Directive is too progressive and unproportional"¹². The Authority notes that the Directive and the deadlines it provides, as set out in this reasoned opinion, was accepted by the Norwegian government when the Joint Committee incorporated it into Annex XIII of the EEA Agreement by Decision No 10/2006.

¹¹ Cf. Letter from the Norwegian Government, dated 29 June 2020, p. 5.

¹² Ibid. p. 4-5.

The Norwegian Government has alluded to “significant unforeseen difficulties when refurbishing the tunnels to the required standard”.¹³ However, the Norwegian Government has not elaborated further and has furnished the Authority with no evidence to show that it is materially impossible in the circumstances to perform its obligations in due time.

Considering the above, noting that the 68 tunnels subject to this reasoned opinion are currently not in conformity with the Act, observing that the Norwegian Government has failed to provide relevant and sufficient reasons which might preclude responsibility, the Authority therefore concludes that Norway has failed to fulfil its obligations under Article 3(1) and Article 11 of the Act.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by not implementing the minimum safety requirements for tunnels falling under Article 11 of the Act by 30 April 2019, Norway has failed to fulfil its obligations under Article 3(1) and Article 11 of the Act.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels, 3 December 2020

For the EFTA Surveillance Authority

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

¹³ Ibid. p. 5.