



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SAUGMANDSGAARD ØE  
delivered on 18 June 2020<sup>1</sup>

**Case C-321/19**

**BY,  
CZ  
v  
Bundesrepublik Deutschland**

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

(Reference for a preliminary ruling – Charging of heavy goods vehicles for the use of certain infrastructures – Directive 1999/62/EC – Directive 2006/38/EC – Calculation of tolls – Article 7(9) – Principle of recovery of infrastructure costs – Traffic police costs – Operating costs – External costs – Costs relating to the return on capital – Article 7a(1) to (3) – Direct effect – Minor overrun of costs – *Ex post* calculation – Limitation of the temporal effects of the judgment)

### I. Introduction

1. The present case concerns the determination of toll rates applied to heavy goods vehicles for the use of German motorways.
2. The request for a preliminary ruling submitted by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany) has arisen in the context of a dispute between the operators of a transport undertaking, BY and CZ ('the appellants in the main proceedings'), and the Federal Republic of Germany ('the respondent in the main proceedings') concerning the reimbursement of tolls.
3. It concerns primarily the interpretation of Article 7(9) of Directive 1999/62/EC,<sup>2</sup> as amended by Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006,<sup>3</sup> ('Directive 1999/62, as amended'). That provision stipulates that tolls are to be based on the principle of the recovery of infrastructure costs *only* and lists the elements for the calculation of tolls.
4. The Court is asked to clarify whether that Article 7(9) of that directive has direct effect and whether the calculation of tolls may include elements such as traffic police costs. Moreover, the Court will have to decide whether a minor overrun of costs constitutes an infringement of that article and, if so, whether that provision allows for an *ex post* calculation in the context of judicial proceedings.

<sup>1</sup> Original language: French.

<sup>2</sup> Directive 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). That directive replaced 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).

<sup>3</sup> OJ 2006 L 157, p. 8.

5. In accordance with my analysis, I shall propose that the Court interpret Article 7(9) of Directive 1999/62, as amended, the direct effect of which can be relied upon by an individual, as meaning that it does not include traffic police costs. I shall also propose that the Court should rule that even a minor overrun of infrastructure costs must be regarded as an infringement of Article 7(9) and that that provision and also Article 7a(1) and (2) of that directive preclude an *ex post* calculation which seeks to demonstrate that, ultimately, the fixed toll rate does not actually exceed the costs which can be taken into account.

## II. Legal framework

### A. EU law

6. Article 2 of Directive 1999/62, as amended, provides:

‘For the purposes of this Directive:

- (a) “trans-European road network” means the road network defined in Section 2 of Annex I to Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network [(OJ 1996 L 228, p. 1) – a decision last amended by Council Regulation No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1)] as illustrated by maps. The maps refer to the corresponding sections mentioned in the operative part of and/or in Annex II to that decision;
- (aa) “construction costs” means the costs related to construction, including, where appropriate, the financing costs, of:
  - new infrastructure or new infrastructure improvements (including significant structural repairs), or
  - infrastructure or infrastructure improvements (including significant structural repairs) completed no more than 30 years before 10 June 2008, where tolling arrangements are already in place on 10 June 2008, or completed no more than 30 years before the establishment of any new tolling arrangements introduced after 10 June 2008; ...<sup>4</sup>
- ...
- (ii) ... Costs of infrastructure or infrastructure improvements may include any specific expenditure on infrastructure designed to reduce nuisance related to noise or to improve road safety and actual payments made by the infrastructure operator corresponding to objective environmental elements such as protection against soil contamination;
- (ab) “financing costs” means interest on borrowings and/or return on any equity funding contributed by shareholders;

...

<sup>4</sup> Under Article 2(aa), costs relating to infrastructure or infrastructure improvements completed before those time limits may also be regarded as construction costs under certain conditions.

(b) “toll” means a specified amount payable for a vehicle travelling a given distance on the infrastructures referred to in Article 7(1); the amount shall be based on the distance travelled and the type of vehicle;

(ba) “weighted average toll” means the total revenue raised through tolls over a given period divided by the number of vehicle kilometres travelled on a given network subject to tolling during that period, both the revenue and the vehicle kilometres being calculated for the vehicles to which tolls apply;

...’

7. Article 7(1), (9) and (10) of that directive provides:

‘1. Member States may maintain or introduce tolls and/or user charges on the trans-European road network, or on parts of that network, only under the conditions set out in paragraphs 2 to 12. ...

...

9. Tolls shall be based on the principle of the recovery of infrastructure costs only. Specifically the weighted average tolls shall be related to the construction costs and the costs of operating, maintaining and developing the infrastructure network concerned. The weighted average tolls may also include a return on capital or profit margin based on market conditions.<sup>[5]</sup>

10. (a) Without prejudice to the weighted average tolls referred to in paragraph 9, Member States may vary the toll rates for purposes such as combating environmental damage, tackling congestion, minimising infrastructure damage, optimising the use of the infrastructure concerned or promoting road safety, provided that such variation:

...

– is not designed to generate additional tolling revenue, any unintended increase in revenue (leading to weighted average tolls which are not in accordance with paragraph 9) being counterbalanced through changes to the structure of the variation which must be implemented within two years of the end of the accounting year in which the additional revenue is generated;

...’

8. Article 7(11) of that directive provides that, in exceptional cases concerning infrastructure in mountainous regions and after the European Commission has been informed, a mark-up may be added to the tolls of specific road sections in the event of acute congestion affecting the free movement of vehicles or significant environmental damage caused by the use of vehicles, subject to compliance with certain conditions and in particular maximum limits on the moderated average tolls expressed as a percentage of the latter.

5 Article 7(9) of Directive 1999/62 stipulated: ‘The weighted average tolls shall be related to the costs of constructing, operating and developing the infrastructure network concerned’. That provision itself replaced Article 7(h) of Directive 93/89, in accordance with which ‘toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned’.

9. Article 7a of Directive 1999/62, as amended, is worded as follows:

‘1. In determining the levels of weighted average tolls to be charged on the infrastructure network concerned or a clearly defined part of such a network, Member States shall take into account the various costs set out in Article 7(9). The costs taken into account shall relate to the network or part of the network on which tolls are levied and to the vehicles that are subject to the tolling. Member States may choose not to recover these costs through toll revenue or to recover only a percentage of the costs.

2. Toll rates shall be determined in accordance with Article 7 and paragraph 1 of this Article.

3. For new tolling arrangements other than those involving concession tolls put in place by Member States after 10 June 2008, Member States shall calculate costs using a methodology based on the core calculation principles set out in Annex III.

...

Tolling arrangements already in place on 10 June 2008 or for which tenders or responses to invitations to negotiate under the negotiated procedure have been received pursuant to a public procurement process before 10 June 2008 shall not be subject to the obligations set out in this paragraph, for as long as these arrangements remain in force and provided that they are not substantially modified.

...’

10. Annex III to Directive 1999/62, as amended, entitled ‘Core principles for the allocation of costs and calculation of tolls’, provides in its points 2.1, 3 and 4:

‘2.1. Investment costs

- Investment costs shall include the costs of construction (including financing costs) and the costs of developing the infrastructure plus, where appropriate, a return on the capital investment or profit margin. Costs of land acquisition, planning, design, supervision of construction contracts and project management, and of archaeological and ground investigations, as well as other relevant incidental costs, shall also be included.
- ...
- All historic costs shall be based on the amounts paid. Costs which are still to be incurred will be based on reasonable cost forecasts.
- Government investment may be assumed to be financed borrowings. The rates of interest to be applied to historical costs shall be the rates that applied to government borrowings over that period.
- ...
- Provision for estimated return on capital or profit margin shall be reasonable in the light of market conditions and may be varied for the purpose of providing performance incentives for a contracted third party with regard to quality of service requirements. Return on capital may be evaluated using economic indicators such as IRR (internal rate of return on investment) or WACC (weighted average cost of capital).

...

3. Operating, management and tolling costs

These costs shall include all costs incurred by the infrastructure operator which are not covered under Section 2 and which relate to the implementation, operation and management of the infrastructure and of the tolling system. ...

...

4. Share of goods traffic, equivalence factors and correction mechanism

- The calculation of tolls shall be based on actual or forecast HGV shares of vehicle kilometres adjusted, if desired, by equivalence factors, to make due allowance for the increased costs of constructing and repairing infrastructure for use by goods vehicles.
- The following table gives a set of indicative equivalence factors. Where a Member State uses equivalence factors with ratios differing from those in the table, they shall be based on objectively justifiable criteria and shall be made public.

...

- Tolling regimes which are based on forecast traffic levels shall provide for a correction mechanism whereby tolls are adjusted periodically to correct any under- or over-recovery of costs due to forecasting errors.'

***B. German law***

11. According to the referring court, the amount of tolls for the use of German federal motorways for the period from 1 January 2009 to 31 December 2014 was fixed, under Paragraph 14(3) of the Bundesfernstraßenmautgesetz (Law on federal road tolls) of 12 July 2011 (BGBl 2011 I p. 1378), by Annex 4 thereto. That law sets the toll rate per kilometre for vehicles or vehicle combinations with up to three axles and for those with four or more axles on the basis of four categories corresponding to the level of pollution emitted. The rates range from EUR 0.141 to EUR 0.288.

12. The referring court states that the toll rate applicable to the period of reimbursement claimed, from 1 January 2010 to 18 July 2011, was calculated on the basis of the 'Aktualisierung der Wegekostenrechnung für die Bundesfernstraßen in Deutschland', also known as the 'Wegekostengutachten' (expert report on the costs of road infrastructures in Germany), of 30 November 2007 ('the WKG 2007'), which covered a calculation period from 2007 to 2012. As regards the valuation of land used for the construction of motorways, the referring court points out that the findings of the 'Wegekostenrechnung für das Bundesfernstraßennetz unter Berücksichtigung der Vorbereitung einer streckenbezogenen Autobahnbenutzungsgebühr' (expert report on the costs of road infrastructures), of March 2002, which covered a calculation period from 2003 to 2010, were taken as the basis according to supplementary information added to the WKG 2007 on 22 September 2008.

### III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

13. Up to 31 August 2015, the appellants in the main proceedings operated a road haulage company in the legal form of a partnership governed by Polish law ('Spółka cywilna') which had its registered office in Poland and made journeys in Germany in particular. In that context, the appellants in the main proceedings paid, for the period from 1 January 2010 to 18 July 2011, a sum by way of tolls for the use of German federal motorways.

14. Taking the view that that sum was excessive, the appellants in the main proceedings brought an action, on behalf of their partnership, for reimbursement of the sum paid<sup>6</sup> before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany). Since that court dismissed their action, the appellants in the main proceedings brought an appeal before the referring court, claiming, in essence, that the calculation of the costs of the tolls applied in the present case is excessive and at variance with EU law.

15. In order to be able to resolve that matter, the referring court considers that it is first necessary to examine whether Article 7(9) and Article 7a(1) and (2) of Directive 1999/62, as amended, have direct effect and whether those provisions have been correctly transposed into German law.

16. In that regard, the referring court points out, *in the first place*, that, in the case which gave rise to the judgment in *Rieser Internationale Transporte*,<sup>7</sup> the Court held that the original version of Article 7(9) of Directive 1999/62<sup>8</sup> could not be relied upon by individuals against State authorities if that directive had not been transposed, or if it had been imperfectly transposed, into national law. According to the Court, that provision cannot be considered to be unconditional and sufficiently precise to be relied upon by individuals against State authorities.

17. However, following amendments made by the EU legislature, the referring court takes the view that Article 7(9) of Directive 1999/62, as amended, does have direct effect. That court points out that the amending directive brought legislative clarification which could be regarded as 'unconditional and sufficiently precise'. The referring court also points out that, in its view, Article 7(9) of Directive 1999/62, as amended, contains a prohibition on cost overruns in accordance with which excessive toll rates which are not justified by infrastructure costs are prohibited.

18. *In the second place*, the referring court asks, in essence, whether traffic police costs, which were taken into account when the toll rates at issue in the case in the main proceedings were set, come within the concept of 'costs of operating' within the meaning of Article 7(9) of Directive 1999/62, as amended. According to the referring court, police activities are not intended to ensure the operation of infrastructures, but rather to ensure that road users comply with the traffic rules and to deal with the consequences of any infringements of those rules. Moreover, while noting that the toll rates fixed under German law are based on calculation errors, in particular with regard to the calculation of the return on the capital invested in the acquisition of the land on which the motorways were constructed, the referring court is unsure whether an infringement of Article 7(9) of Directive 1999/62, as amended, can be established in the event of a minor overrun of infrastructure costs.

<sup>6</sup> At the hearing, the appellants in the main proceedings stated that, for reasons relating to national procedural elements, they are seeking almost full reimbursement of the toll amounts paid.

<sup>7</sup> Judgment of 5 February 2004 (C-157/02, 'the judgment in *Rieser Internationale Transporte*', EU:C:2004:76, paragraphs 41 and 42).

<sup>8</sup> See footnote 5 to this Opinion.



19. *In the third and last place*, the referring court states that national law allows for an excessive toll rate to be corrected *ex post* in the context of judicial proceedings. Referring to paragraph 138 of the judgment in *Commission v Austria*,<sup>9</sup> the national court expresses uncertainty, however, as to whether such national legislation is consistent with EU law. In that regard, it also asks whether the actual costs and the toll revenue actually collected should form the entire basis for calculating the costs *ex post* after the end of the calculation period.

20. It was in those circumstances that the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(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, as amended] (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, as amended]?

(b) Does an overrun of the infrastructure costs which can be taken into account in the weighted average toll in the range of

(i) up to 3.8%, in particular when account is taken of costs which cannot in principle be taken into account,

(ii) up to 6%

lead to a breach of the cost overrun prohibition under Article 7(9) of [Directive 1999/62, as amended], 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 in *Commission v Austria* (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?’

21. Written observations were submitted by the appellants in the main proceedings, the respondent in the main proceedings, the German Government and the Commission. The same parties and interested parties were represented at the hearing held on 4 March 2020.

<sup>9</sup> Judgment of 26 September 2000 (C-205/98, ‘the judgment in *Commission v Austria*’, EU:C:2000:493).

#### IV. Analysis

22. I propose to analyse the referring court's questions by starting with the second question referred for a preliminary ruling, which seeks, in essence, to ascertain whether traffic police costs constitute costs of operating the infrastructure network within the meaning of Article 7(9) of Directive 1999/62, as amended, and whether a minor overrun of infrastructure costs leads to an infringement of that provision (Section A). This approach will make it possible to determine the extent to which a toll calculation, such as that carried out in the present case, raises an issue of compliance with Directive 1999/62, as amended. That analysis will provide a point of reference when examining the first question referred for a preliminary ruling concerning the direct effect of the provisions of that directive (Section B). I shall then examine the third and final question referred, which concerns the *ex post* calculation (Section C). Lastly, I shall address the issue of the limitation of the temporal effects of the Court's judgment (Section D).

##### *A. Traffic police costs and a minor overrun of infrastructure costs (Question 2)*

23. I shall begin by examining whether infrastructure costs include traffic police costs and then turn to the examination of whether a minor overrun of infrastructure costs may be consistent with Directive 1999/62, as amended.

##### *1. Traffic police costs (Question 2(a))*

24. I take the view that traffic police costs do not constitute infrastructure costs, and in particular do not constitute operating costs, for the purposes of Article 7(9) of Directive 1999/62, as amended.

25. In accordance with a traditional method of interpretation,<sup>10</sup> my analysis is based on the wording of that provision, the *travaux préparatoires* relating to Directive 1999/62, as amended, and the purpose of that directive.

##### *(a) The literal interpretation*

26. Reference should be had to the wording of Article 7(9) of Directive 1999/62, as amended, in its entirety. I note, first of all, that that provision makes no mention whatsoever of traffic police costs in the calculation of 'tolls'.<sup>11</sup> Moreover, it follows from a literal analysis of the wording of that provision that it lists exhaustively the elements that may be included in that calculation.

27. The first sentence of Article 7(9) of that directive thus provides that tolls, defined as a specified amount payable for a vehicle travelling a given distance on the infrastructures, are to be based on the principle of the recovery of infrastructure costs *only*. That principle is explained in the subsequent sentences relating to a 'weighted average toll', defined by reference to the revenue raised through tolls over a given period and according to the number of vehicle kilometres travelled.<sup>12</sup> The second sentence stipulates that the weighted average tolls are to be related to the construction costs and the costs of operating, maintaining and developing the infrastructure network concerned. The third sentence clarifies that the weighted average tolls may also include a return on capital or profit margin based on market conditions.

<sup>10</sup> See, to that effect, inter alia, with regard to the consideration of the wording of the provision and the purpose of the directive concerned, judgment of 11 March 2020, *X* (Recovery of additional import duties) (C-160/18, EU:C:2020:190, paragraph 34) and, with regard to the consideration of *travaux préparatoires*, judgment of 1 October 2019, *Planet49* (C-673/17, EU:C:2019:801, paragraph 48).

<sup>11</sup> See Article 2(b) of Directive 1999/62, as amended.

<sup>12</sup> See Article 2(ba) of Directive 1999/62, as amended.



28. The link between the first sentence, relating to tolls, and the costs that may be taken into account for the purpose of calculating them is apparent from the use, in the second sentence, of the word ‘specifically’, or of comparable terminology in the different language versions.<sup>13</sup> That link is also apparent from the third sentence, which specifies which other elements the average weighted tolls ‘may also include’.

29. Article 7(9) of Directive 1999/62, as amended, therefore sets out the only elements that may be taken into consideration in the calculation of weighted average tolls.

30. The relevant costs are limited to the costs of constructing, operating, maintaining and developing the infrastructure network concerned. Construction costs are defined in detail in Article 2(aa) of Directive 1999/62, as amended, and do not include traffic police costs. Among the other costs, those relating to the maintenance and development of the network are scarcely likely to cover traffic police costs and, moreover, the referring court is asking the Court, specifically, only about *operating costs*.

31. Like the referring court, the appellants in the main proceedings and the Commission, I take the view that traffic police costs are not operating costs. The concept of ‘operating costs’ relates to the costs incurred in the operation of the motorway. The operation of a motorway does not, however, extend to police activities.

32. As the Commission has pointed out, those activities are the responsibility of the State acting in a capacity other than that of operator of the motorway infrastructure, namely as an authority exercising public powers.

33. This interpretation of ‘operating ... costs’ is confirmed Annex III, point 3, to Directive 1999/62, as amended, which states that those costs are costs incurred by the operator. Admittedly, that Annex III is not applicable *ratione temporis* to the calculation of the tolls at issue in the main proceedings since, in accordance with Article 7a(3) of that directive, it does not apply to tolling arrangements already in place on 10 June 2008, such as the arrangement at issue in the main proceedings, but it may, at the very least, be a source for interpretation of the terminology used in the remainder of that directive. In that regard, I note that the link between the costs thus referred to and the operator is particularly evident in the German-language version of Directive 1999/62, as amended, which refers to ‘Kosten für Betrieb’ (operating costs) in Article 7(9) and to ‘Kosten des Infrastrukturbetreibers’ (costs incurred by the infrastructure operator) in Annex III, point 3.<sup>14</sup> I would add that Annex III makes no mention of traffic police costs.

34. In support of that interpretation, I would add that other provisions of that directive, as amended, seek to limit the costs that may be taken into account for the purpose of calculating tolls.

<sup>13</sup> Comparable terminology is used in the following language versions: Spanish (‘en particular’), Czech (‘konkrétně’), Danish (‘specielt’), French (‘plus précisément’), Croatian (‘to znači’), Italian (‘in particolare’), Dutch (‘meer bepaald’), Polish (‘w szczególności’), Portuguese (‘especificamente’), Romanian (‘mai precis’), Slovak (‘konkrétne’), Slovene (‘to pomeni’), Swedish (‘särskilt’). The term ‘ausdrücklich’ in the German version means ‘expressly’. Likewise, the Hungarian version uses the term ‘kifejezetten’.

<sup>14</sup> See, to the same effect, the English-language version, which uses the terms ‘costs of operating’ in Article 7(9) and ‘costs incurred by the infrastructure operator’ in Annex III, point 3, to Directive 1999/62, as amended.

35. Article 7(1) of Directive 1999/62, as amended, provides that Member States may maintain or introduce tolls on the road network *only* under the conditions set out in Article 7(2) to (12) of that directive. Under Article 7a(1) of that directive, Member States are to take into account the various costs set out in Article 7(9) thereof in determining the levels of weighted average tolls. Similarly, Article 7(10)(a), and in particular the third indent of that provision<sup>15</sup> and the second indent<sup>16</sup> of Article 7(11)(b) of Directive 1999/62, as amended, limit the increase in the rates of weighted average tolls by referring to Article 7(9) of that directive.

36. I consequently take the view that it is neither expressly nor implicitly apparent from the wording of Article 7(9) of Directive 1999/62, as amended, that traffic police costs are covered by that provision and in particular by the concept of ‘costs of operating’ contained in that provision.

(b) *The travaux préparatoires*

37. The *travaux préparatoires* confirm that interpretation by dispelling any doubts as to the intentions of the legislature regarding the consideration of traffic police costs in the infrastructure costs.

38. I would point out in this regard that, as early as the adoption of the Commission’s Green Paper entitled ‘Towards fair and efficient pricing in transport’,<sup>17</sup> which examines the possibilities of internalising external costs,<sup>18</sup> the Commission had envisaged including traffic police costs in the infrastructure costs, which, like pollution costs, were regarded as external costs. However, the EU legislature rejected that approach for the purpose of adopting both Directive 1999/62 and Directive 2006/38 which led to Directive 1999/62, as amended.

39. As regards, *in the first place*, the *travaux préparatoires* relating to Directive 1999/62, the Commission had considered in the explanatory memorandum for its proposal for a directive<sup>19</sup> that external costs included *the cost of policing and accidents*,<sup>20</sup> but, at that stage, it did not envisage including them in the actual text of the directive. The text of the directive provided only that tolls should include an element intended to cover external costs, defined as ‘the costs of congestion, air pollution and noise’.<sup>21</sup>

40. Within the European Parliament, the Committee on the Environment, Public Health and Consumer Protection delivered an opinion<sup>22</sup> in accordance with which the directive had to make reference to the four main sources of external costs from transport described in the Green Paper, namely congestion, air pollution, noise and accidents. However, the Parliament did not follow that opinion and even proposed to delete any provision seeking to include external costs as it awaited further guidance on that subject.<sup>23</sup>

15 Article 7(10)(a) of Directive 1999/62, as amended, provides for a variation in toll rates, but ‘without prejudice to the weighted average tolls’. The third indent of that provision requires that the variation ‘is not designed to generate additional tolling revenue’.

16 The second indent of Article 7(11)(b) of Directive 1999/62, as amended, authorises the addition of a mark-up to tolls in exceptional cases concerning infrastructure in mountainous regions on condition that that mark-up does not exceed 15% of the weighted average toll calculated in accordance with paragraph 9, or 25% in specific cases. That provision does not provide for any other mark-up to weighted average tolls and states that it is calculated in accordance with Article 7(9) of Directive 1999/62, as amended.

17 COM(95) 691 final.

18 See the subtitle of the Green Paper: ‘Policy options for internalising the external costs of transport in the European Union’.

19 Proposal for a Council Directive on the charging of heavy goods vehicles for the use of certain infrastructures presented by the Commission, 10 July 1996 (COM(96) 331 final) (‘the Proposal for Directive 1999/62’).

20 See the Proposal for Directive 1999/62, p. 10.

21 See the Proposal for Directive 1999/62 (p. 41 (definition) and p. 46 (Article 7(8) and (9))).

22 Opinion of the Committee on the Environment, Public Health and Consumer Protection of 23 May 1997, inserted in the Report of the European Parliament on the proposal for a Council Directive on the charging of heavy goods vehicles for the use of certain infrastructures, 4 July 1997 (A4-0243/97) (‘the Parliament’s report’, pp. 19, 20 and 28).

23 See the Parliament’s report, p. 18.

41. As it did not share the Commission's view,<sup>24</sup> the Council of the European Union adopted a common position which follows the Parliament's approach and therefore does not retain the concept of 'external costs', observing that a detailed study still did not exist.<sup>25</sup> Moreover, the Council pointed out that the Member States which operate a toll system must adhere to the basic principle of linkage between toll rates and the cost of infrastructure.<sup>26</sup>

42. Directive 1999/62, as finally adopted by the Parliament and the Council, did not include a provision on external costs.<sup>27</sup>

43. As regards, *in the second place*, the *travaux préparatoires* relating to Directive 2006/38, it is clear from the proposal for a directive<sup>28</sup> that, this time, the Commission had made provision for traffic police costs to be taken into account by including accident costs in Article 7(9) of that directive, provided that those costs were not covered by insurance.<sup>29</sup>

44. The Parliament had also envisaged taking into account the cost of accidents whilst limiting its scope to the costs corresponding to actual payments made by the infrastructure operator for investments aimed at accident prevention and reduction.<sup>30</sup>

45. The Council, however, adopted a common position which makes no mention of accidents. That institution therefore did not adopt the Parliament's proposal in that regard, which, however, did not go as far as the Commission's proposal.<sup>31</sup> The text of Directive 1999/62, as amended, in the version finally adopted, contains no provision on external costs.

46. Consequently, it must be stated that the *travaux préparatoires* reinforce the interpretation that the second sentence of Article 7(9) of Directive 1999/62, as amended, in no way includes traffic police costs.

*(c) The teleological interpretation*

47. The purpose of Directive 1999/62, as amended, does not lead to any different conclusion. It is clear from its first and second recitals that the legislature decided to harmonise, in stages, the levy systems and to establish fair mechanisms for charging infrastructure costs to hauliers in order to eliminate distortions of competition between transport undertakings in the European Union.<sup>32</sup>

48. Directive 1999/62, as amended, thus provides for rules which are binding on all of the Member States while considering future modifications.

24 Amended proposal for a Council Directive on the charging of heavy goods vehicles for the use of certain infrastructures, presented by the Commission pursuant to Article 189a(2) of the EC Treaty, 13 July 1998 (COM(1998) 427 final), p. 2.

25 Common Position (EC) No 14/1999 adopted by the Council on 18 January 1999 (OJ 1999 C 58, p. 1; see in particular p. 12) ('the Common Position').

26 See the Common Position, p. 14.

27 This is why I do not share the German Government's view that the refusal by the Parliament and the Council to include external costs related only to external costs for which there was not yet sufficient knowledge to enable them to be quantified, but did not extend to traffic police costs. The rejection by the Parliament and the Council concerned all provisions on external costs.

28 Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures, presented by the Commission, 23 July 2003 (COM(2003) 448 final) ('the Proposal for Directive 2006/38').

29 See the Proposal for Directive 2006/38, p. 4 et seq., and p. 22 et seq. Annex III proposed by the Commission had included a paragraph relating to accident costs, which, according to the Commission, also covered the administrative costs of the public services mobilised in the event of accidents; see p. 33 et seq. of the Proposal for Directive 2006/38.

30 Report on the proposal for a European Parliament and Council directive amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures, 23 March 2004 (A5-0220/2004), pp. 19, 20 (Amendment 28) and 32.

31 Common Position (EC) No 33/2005 of 6 September 2005 with a view to adopting a directive of the European Parliament and of the Council amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 2005 C 275 E, p. 1; see in particular p. 17).

32 See, to that effect, the judgment in *Commission v Austria*, paragraphs 91 and 92.

49. Those modifications concern, in particular, the internalisation of external costs and, by that means, the application of the polluter-pays principle. As is apparent from recitals 18 and 19 of Directive 2006/38,<sup>33</sup> those modifications are envisaged *for the future* only. The idea that this is a *future* plan is confirmed in the third paragraph of Article 11 of Directive 1999/62, as amended, in accordance with which it is for the Commission to present a generally applicable, transparent and comprehensible model for the assessment of all external costs, as well as an impact analysis of the internalisation of external costs.

50. Consequently, in the meantime, the internalisation of external costs and in particular traffic police costs has been deliberately excluded by the EU legislature from the scope of Directive 1999/62, as amended, and, given the limits imposed by Article 7(9) of that directive, those costs could not be included by the Member States in the calculation of infrastructure costs.

51. Therefore, I do not share the German Government's view that traffic safety or the use of infrastructures, which comes under traffic policing, is a characteristic of the road network which demonstrates that the failure to take these into account as infrastructure costs would contradict the 'user-pays' and the 'polluter-pays' principles. Nor do I share the view held by the respondent in the main proceedings that the failure to take those costs into account in the case of a public operator would lead to public and private operators being treated differently, since the costs incurred in order for motorway patrols, French concessionaries or the motorway police<sup>34</sup> to ensure the safety of the infrastructure are costs which are incurred by the operator of the private infrastructure and, consequently, are operating costs under concession contracts.<sup>35</sup>

52. In this regard I would point out, first, that *specific* expenditure on infrastructure designed to improve road safety forms part of the infrastructure financing costs in accordance with the third subparagraph of point (ii) of the second indent of Article 2(aa) of Directive 1999/62, as amended. Furthermore, I share the view expressed by the Commission at the hearing before the Court, namely that traffic police costs are not operator costs, unlike those of civilian missions, as in the case of highways agents in Germany or motorway patrols in France.

53. Secondly, even Directive 1999/62 as last amended by Directive 2013/22/EU,<sup>36</sup> which provides for an 'external-cost charge' in Article 2(bb), defines such a charge as being levied for the purpose of recovering the costs incurred in a Member State related to traffic-based air pollution and/or traffic-based noise pollution. Accident costs which form part of traffic police costs are not included in that definition or in any other provision of that directive.

33 Recital 18 of Directive 2006/38 is worded as follows: 'So as to enable an informed and objective decision to be taken in the future regarding the possible application of the "polluter-pays" principle for all modes of transport, by means of the internalisation of external costs, uniform calculation principles should be developed, based on scientifically recognised data. Any future decision on this question should take full account of the tax burden already borne by road haulage companies, including vehicle taxes and fuel excise duties'. In accordance with recital 19 of that directive, 'the Commission should begin work on developing a generally applicable, transparent and comprehensible model for the assessment of external costs for all modes of transport to serve as the basis for future calculations of infrastructure charges'.

34 Where a private infrastructure operator has recourse, under a concession contract, to police assistance in order to ensure the safety of the infrastructure.

35 See Annex III, point 3, to Directive 1999/62, as amended.

36 Council Directive of 13 May 2013 adapting certain directives in the field of transport policy, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 356).

54. I would add, thirdly, that the Commission Opinion of 10 December 2014,<sup>37</sup> invoked by the respondent in the main proceedings as evidence that the Commission took the view that traffic police costs were infrastructure costs, and more specifically operating costs, and the Commission Opinion of 16 January 2019<sup>38</sup> refer to expert reports on road infrastructure costs in Germany for the years 2013 to 2017 and 2018 to 2022. They therefore do not cover the relevant period in the present case. Moreover, since a Commission opinion does not produce legal effects that are binding,<sup>39</sup> it cannot alter the legal scope of a directive adopted by the Parliament and the Council.

55. Consequently, I propose that the Court should answer Question 2(a) to the effect that Article 7(9) of Directive 1999/62, as amended, must be interpreted as meaning that it does not include traffic police costs as infrastructure costs and in particular does not include such costs as operating costs.

## *2. The minor overrun of infrastructure costs (Question 2(b))*

56. The referring court observes that, in accordance with the judgment in *Commission v Austria*,<sup>40</sup> in the case where the costs of construction, operation and development of a motorway are exceeded by more than 150%, this constitutes a failure to fulfil obligations under Article 7(h) of Directive 93/89. That court asks the Court whether a minor overrun of those costs has the same consequences.

### *(a) The overrun of infrastructure costs by taking into account costs which fall outside the scope of Directive 1999/62, as amended*

57. As I explained above,<sup>41</sup> Article 7(9) of Directive 1999/62, as amended, precludes tolls from including elements other than those mentioned in that provision. Consequently, the overrun of infrastructure costs due to the fact that those other elements have been taken into account constitutes an infringement of that provision and the obligation to pay a toll based on such elements must be regarded as having no legal basis.

58. Since traffic police costs do not come within the concept of ‘operating costs’ or, more generally, within that of infrastructure costs, Article 7(9) of Directive 1999/62, as amended, precludes an overrun of 3.8% or any overrun on that basis. Consequently, it is not relevant to examine whether a possible calculation error was made when calculating those costs in the sense that not only the traffic police costs themselves were taken into account but also the costs related to fighting crime in general.<sup>42</sup> Since all of those costs fall outside the scope of the costs referred to in Article 7(9) of Directive 1999/62, as amended, they must be excluded in their entirety. It is therefore not necessary to determine whether the costs amounting to approximately EUR 730 million for 2010 consist exclusively of costs related to traffic police costs, as has been queried by the referring court and by the appellants in the main proceedings.

59. I shall examine below the minor overrun of costs which do not fall outside the scope of Directive 1999/62, as amended, but are provided for therein: in the present case, the costs relating to a return on the capital invested, mentioned in the third sentence of Article 7(9) of that directive.

<sup>37</sup> Commission Opinion of 10 December 2014 in accordance with Article 7h(2) of Directive 1999/62/EC concerning the introduction of a new tolling arrangement in Germany (C(2014) 9313 final).

<sup>38</sup> Commission Opinion of 16 January 2019 in accordance with Article 7h(2) of Directive 1999/62/EC concerning the introduction of a new tolling arrangement in Germany (C(2019) 60) – not published.

<sup>39</sup> See judgment of 12 September 2006, *Reynolds Tobacco and Others v Commission* (C-131/03 P, EU:C:2006:541, paragraph 55), and order of 14 May 2012, *Sepracor Pharmaceuticals (Ireland) v Commission* (C-477/11 P, not published, EU:C:2012:292, paragraph 52).

<sup>40</sup> See paragraphs 135 and 140 of that judgment.

<sup>41</sup> See points 24 to 55 of this Opinion.

<sup>42</sup> The respondent in the main proceedings considers that the costs related to fighting crime in general are different from traffic police costs and claims that it has always taken care to separate the two for accounting purposes.



(b) *The minor overrun of infrastructure costs relating to a return on the capital invested*

60. I propose that the Court should rule that even a minor overrun of infrastructure costs relating to the return on the capital invested provided for in Article 7(9) of Directive 1999/62, as amended, constitutes an infringement of that provision.

61. In the present case, the overrun due to errors in the calculation of the return on capital invested would be 2.2% (6% – 3.8%).

62. Admittedly, that level of overrun is not comparable to the overrun of more than 150% found in the judgment in *Commission v Austria*.

63. However, I note that neither Article 7(9) of Directive 1999/62, as amended, nor any other provision of that directive contains a *de minimis* rule. Moreover, the first sentence of Article 7(9) of that directive stipulates that tolls are to be based on the principle of the recovery of infrastructure costs *only*, which precludes any overrun, however small.

64. Therefore, even a minor overrun of infrastructure costs relating to a return on the capital invested must be regarded as amounting to an infringement of Article 7(9) of Directive 1999/62, as amended.

65. With regard to whether there has been an overrun of infrastructure costs relating to a return on the capital invested, I would point out that an express question in that regard has not been referred to the Court. Nevertheless, in the alternative and in order to provide an answer which will be of use to the referring court, I will provide the following clarification.

66. I note that the referring court takes the view that errors have been made in so far as the value of the core asset, that is to say, the land on which the motorways concerned were constructed, which was used to calculate the interest, should not have been calculated by taking into account the current value of that asset. As a result, the calculation was wrongly based on the fiction of a partially private and partially public undertaking, since there was no serious intention to privatise the motorway network during the period concerned.<sup>43</sup>

67. According to the referring court, if another ‘fiction’ is used, namely that of a ‘public administration’, in its own words, the value of the land, on the basis of which the interest is calculated, may be taken only from the *purchase price*. Those values cannot be adjusted at a later stage, as they were in the present case, since, in those circumstances, remuneration is not only provided for the capital invested, including inflation, but additional revenue is generated, which takes account of the cost of replacing the land even though that land did not have to be replaced.

68. In that regard, I note that the possibility of a return on capital is provided for in the third sentence of Article 7(9) of Directive 1999/62, as amended. That provision expressly states that the weighted average tolls may include a return on capital based on market conditions. Moreover, Article 2(aa) of that directive provides that construction costs may include, where appropriate, financing costs, which are defined in Article 2(ab) thereof as interest on borrowings and/or return on any equity funding contributed by shareholders.

<sup>43</sup> According to the referring court, this is provided for in the Grundgesetz (German Basic Law), more specifically, in the second sentence of Article 90(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) of 23 May 1949 (BGBl 1949 I, p. 1)).



69. While Member States have a degree of flexibility when calculating tolls, in particular in order to apply one calculation methodology over another and to determine the level of return of infrastructures, the choices made must be realistic, however, and the costs must correspond to the actual or envisaged economic reality. Otherwise, Article 7(9) of Directive 1999/62, as amended, would be rendered redundant.

70. It would appear that, if there was no intention to privatise or to replace the motorways and the land on which they are built, and in the absence of other relevant economic arguments, this being a matter which it is for the referring court to ascertain, that court may legitimately take the view that it was unrealistic to take into account the current value of that land in order to calculate those tolls.

71. Accordingly, I share the referring court's view that monitoring compliance with Article 7(9) of Directive 1999/62, as amended, requires a verification that the assessment of the return on capital invested is not based on erroneous assumptions which distort the actual or envisaged economic reality.

72. In the light of all of those considerations, I take the view that Question 2(b) should be answered to the effect that even a minor overrun of infrastructure costs, as provided for in Article 7(9) of Directive 1999/62, as amended, constitutes an infringement of that provision.

73. I would point out, in the alternative, that Article 7(9) of that directive must be interpreted as precluding a calculation concerning a return on capital which is based on values which do not take account of the economic reality.

#### ***B. Direct effect (Question 1)***

74. By its first question, the referring court asks the Court about the direct effect of Article 7(9) and of Article 7a(1) and (2) of Directive 1999/62, as amended.

75. I would point out that it follows from settled case-law of the Court that, wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive are such as to define rights which individuals are able to assert against the State.<sup>44</sup>

76. After the expiry of the transposition period, on 10 June 2008,<sup>45</sup> the question which arises is solely whether the provisions referred to can be regarded as sufficiently precise.

77. As I explained in point 69 of this Opinion, Article 7(9) of Directive 1999/62, as amended, provides the Member States with a margin of discretion when calculating weighted average tolls. Nevertheless, according to the settled case-law of the Court, that factor does not affect the precise and unconditional nature of a provision, provided that it is possible to determine the minimum protection which must be provided by the Member States and provided that it can be established by means of judicial review whether that minimum content has been respected.<sup>46</sup>

<sup>44</sup> See judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 11); of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 25); of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810, paragraph 47); and of 13 February 2019, *Human Operator* (C-434/17, EU:C:2019:112, paragraph 38).

<sup>45</sup> See Article 2(2), first sentence, of Directive 2006/38.

<sup>46</sup> See judgments of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 17); of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 51); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35); and, to that effect, of 6 September 2018, *Hampshire* (C-17/17, EU:C:2018:674, paragraphs 43 to 46 and 58 to 60).

78. Moreover, discretion does not preclude judicial review of the question as to whether the national authorities exceeded it<sup>47</sup> and, therefore, whether the national legislation and its application have remained within the limits set by the European provision at issue.<sup>48</sup>

79. With regard to Directive 1999/62, the Court, in the judgment in *Rieser Internationale Transporte*, held that Article 7(9) of that directive cannot be considered to be unconditional and sufficiently precise to be relied upon by individuals against State authorities, since that provision is even less precise than Article 7(h) of Directive 93/89. It follows from that judgment that Article 7(9) of Directive 1999/62 gave the Member States general guidelines for calculating tolls but did not provide any specific mode of calculation and left the Member States *very broad* discretion in that regard.<sup>49</sup> More specifically, the wording of Article 7(9) of Directive 1999/62 was identical to that of Article 7(h) of Directive 93/89, save for the fact that it referred not to ‘toll rates’ but to ‘weighted average tolls’; however, it did not define that notion.<sup>50</sup>

80. Article 7(h) of Directive 93/89 stated that toll rates related to the costs of constructing, operating and developing the infrastructure network concerned. According to the Court, that article did not explain the nature of that relationship and did not give any definition of either the three headings of costs concerned, namely, constructing, operating and developing costs, or of the concept of ‘infrastructure network concerned’.<sup>51</sup>

81. I note that the wording of the second sentence of Article 7(9) of Directive 1999/62, as amended, also provides that weighted average tolls *must be related to* the construction costs and the costs of operating, maintaining and developing the infrastructure network concerned. Nevertheless, as I explained above,<sup>52</sup> Article 7(9) now provides clearly that tolls are to be based on the principle of the recovery of infrastructure costs *only*, these being listed exhaustively in that provision, thereby limiting the Member States’ margin of discretion.

82. Moreover, unlike the versions which preceded it, Article 2 of Directive 1999/62, as amended, defines the infrastructure network concerned, namely the ‘trans-European road network’ and the concepts of ‘weighted average tolls’, ‘construction costs’ and ‘financing costs’, which latter may, where appropriate, be included in the construction costs.

83. In my view, it follows that the main flaws highlighted by the Court in the judgment in *Rieser Internationale Transporte* and which prevented Article 7(9) of Directive 1999/62 from having direct effect have been remedied by the EU legislature in Directive 1999/62, as amended. In my view, Article 7(9) of that directive places a clear obligation on Member States to determine tolls solely on the basis of the costs listed in that provision. The existence of a margin of discretion and the inapplicability of Article III to Directive 1999/62, as amended,<sup>53</sup> in the present case do not preclude a review by a national court, at the request of an individual, of compliance with that obligation consisting in a verification, at the very least, that costs other than those provided for by that directive, such as traffic police costs, have not been included in the calculation of tolls.<sup>54</sup>

47 See judgments of 1 February 1977, *Verbond van Nederlandse Ondernemingen* (51/76, EU:C:1977:12, paragraph 24), and of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 59); see also judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 45).

48 See judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraph 25); see also judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 45).

49 See judgment in *Rieser Internationale Transporte*, paragraph 40 et seq.

50 See judgment in *Rieser Internationale Transporte*, paragraph 41.

51 See judgment in *Rieser Internationale Transporte*, paragraph 40.

52 See point 27 of this Opinion.

53 As follows from point 33 of this Opinion, that annex is not applicable *ratione temporis*.

54 See, as regards the direct reliance on a provision of EU law where discretion has been exceeded, judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 61).

84. Consequently, in my view, Question 1 should be answered to the effect that an individual may rely before a national court on the direct effect of Article 7(9) of Directive 1999/62, as amended, in order to have it ascertained whether the national legislation and its application have remained within the limits of the margin of discretion provided for in Article 7(9) of that directive by taking traffic police costs into account in the determination of tolls.

### ***C. Ex post calculation (Question 3)***

85. By its third question, the referring court asks about the consequences of an interpretation by the Court of Article 7(9) of Directive 1999/62, as amended, in accordance with which, as I propose, the calculation of the tolls examined in the case in the main proceedings is incorrect. That court seeks to ascertain whether it is possible to carry out an *ex post* calculation of infrastructure costs based on the actual costs and the revenue actually collected by way of tolls. According to the referring court, such a calculation is permitted under German law in certain circumstances, but it could result in the amounts claimed by the appellants not being reimbursed.

86. Where those costs are higher than the fees collected,<sup>55</sup> they may offset the toll rates considered to be excessive in the light of Directive 1999/62, as amended. The referring court states that such offsetting, which is carried out following an *ex post* calculation, is permitted under German law, provided that the error is not serious and manifest. However, that court is uncertain whether that offsetting is compatible with Directive 1999/62, as amended, examined in the light of the judgment in *Commission v Austria* and in particular paragraph 138 thereof.

87. I note that, in that paragraph, the Court rejected the justification for increasing the toll rates for the Brenner motorway (Austria), based on a *new method* for calculating costs presented by the Republic of Austria in the course of the judicial proceedings. The Court took the view that that Member State had not explained how that new calculation method was more appropriate for calculating the costs of the motorway concerned.

88. The Court added that Article 7(h) of Directive 93/89 implies that the adjustment of toll rates should be made *after the calculation* justifying it and that that provision cannot, therefore, justify an increase in those rates by means of a calculation made *subsequently*.

89. It is thus necessary to examine whether Directive 1999/62, as amended, and in particular Article 7(9) and Article 7a(1) and (2) thereof, examined in the light of that judgment, must be interpreted as precluding an *ex post* calculation made in the context of judicial proceedings which seeks to demonstrate that, ultimately, the fixed toll rate does not in fact exceed the costs which can be taken into account.

90. I would, in this regard, point out, *in the first place*, that a court or tribunal is required to take the necessary measures to comply with a judgment of the Court, in accordance with Article 260(1) TFEU. Consequently, if it is clear from a judgment of the Court that the calculation of the costs for determining tolls is incorrect in the light of Directive 1999/62, as amended, the national court called upon to give judgment in the dispute in the main proceedings must, if a request is made to that effect, order repayment of the amounts overcharged.

<sup>55</sup> The respondent in the main proceedings submits in its written observations that this is the case in the main proceedings and that the costs actually recovered for the period from 2009 to 2014 represent a reduction of approximately 11% in comparison with the costs estimated in an expert report.

91. That court could not, without contravening Article 260(1) TFEU and without undermining the effectiveness of Directive 1999/62, as amended, as interpreted by the Court, take account of *ex post* calculations in order to rule that it is not necessary to repay the amount overcharged on the basis of incorrect calculations.

92. I would add, *in the second place*, that Article 7(9) and Article 7a(1) and (2) of Directive 1999/62, as amended, make no reference whatsoever to the possibility of an *ex post* calculation. I also note that Article 7(9) of that directive lists exhaustively the elements that may be included in the calculation of tolls.

93. Finally, I would point out, *in the third place*, that Directive 1999/62, as amended, does not preclude an adjustment of tolls based on the actual costs, provided that the calculation system is established *prior to* that adjustment and is communicated to the public. I note that that interpretation is supported by the first and third indents of point 4 of Annex III to that directive, which provide that tolls may be adjusted and corrected at regular intervals to correct any under- or over-recovery of costs due to forecasting errors. That interpretation corresponds to the Court's analysis in paragraph 138 of the judgment in *Commission v Austria*, in accordance with which the adjustment of toll rates must be made *after* the calculation justifying it.

94. Consequently, I propose that the answer to Question 3 should be that Directive 1999/62, as amended, and in particular Article 7(9) and Article 7a(1) and (2) thereof, must be interpreted as precluding an *ex post* calculation made in the context of judicial proceedings which seeks to demonstrate that, ultimately, the fixed toll rate does not in fact exceed the costs which can be taken into account.

#### ***D. Limitation of the temporal effects of the judgment***

95. In the event that the Court should answer the third question referred for a preliminary ruling in the manner which I have proposed, the respondent in the main proceedings asks that a temporal limitation be placed on the effects of the judgment to be delivered. I would point out that that application was made at a late stage, namely at the stage of the hearing before the Court.

96. According to settled case-law of the Court, limiting the temporal effects of a judgment in which the Court interprets a provision of EU law by way of a preliminary ruling is an exceptional measure which assumes that two essential criteria are fulfilled, namely that those concerned have acted in *good faith* and that there is a *risk of serious difficulties*.<sup>56</sup>

97. The Court has taken that step only in quite specific circumstances, *inter alia* where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been *led* to adopt practices which did not comply with EU law by reason of objective and significant uncertainty regarding the scope of EU provisions, to which the conduct of other Member States or the Commission may even have contributed.<sup>57</sup>

98. In the present case, the respondent in the main proceedings has not adduced evidence which is capable of satisfying those two cumulative criteria.

<sup>56</sup> See judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraphs 61 and 62 and the case-law cited).

<sup>57</sup> See judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 62 and the case-law cited).



99. *First*, it has not demonstrated that those concerned acted in good faith. More specifically, it has not indicated how the Commission's Opinions delivered in 2014 and 2019,<sup>58</sup> by which the Commission gave a positive opinion on new tolling arrangements involving infrastructure costs related to traffic policing, contributed to the objective and significant uncertainty surrounding the scope of Article 7(9) of Directive 1999/62, as amended. The toll rates at issue in the dispute in the main proceedings, which concerned the period from 1 January 2010 to 18 July 2011, were calculated on the basis of the WKG 2007, which covered a calculation period from 2007 to 2012.<sup>59</sup>

100. The fact thus remains that those Opinions are subsequent to the period concerned and could therefore not have been taken into account in order to determine the tolls at issue in the main proceedings.

101. *Secondly*, the respondent in the main proceedings, which requested at the hearing that the temporal effects of the judgment be limited, has not provided any details concerning the existence of a risk of serious economic difficulties. I am aware of the *potential* economic significance of this case. However, the amount of EUR 200 million per annum in respect of traffic police expenses attributable to heavy goods vehicles, mentioned in the order for reference and recalled by the respondent in the main proceedings at the hearing, is not sufficient in itself, and having regard to the application of the rules on limitation laid down by national law, to establish that there is a risk of serious economic repercussions.

102. Consequently, I would suggest that the application for limitation of the temporal effects of the judgment to be delivered should be rejected.

## V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany) as follows:

1. An individual may rely before a national court on the direct effect of Article 7(9) and Article 7a(1) and (2) 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, as amended by Directive 2006/38/EC of the European Parliament and the Council of 17 May 2006, in order to have it ascertained whether the national legislation and its application have remained within the limits of the margin of discretion provided for in Article 7(9) of that directive by taking traffic police costs into account in the determination of tolls.
2. Article 7(9) of Directive 1999/62, as amended by Directive 2006/38, must be interpreted as meaning that it does not include traffic police costs as infrastructure costs and in particular does not include such costs as operating costs.

Even a minor overrun of infrastructure costs, as provided for in Article 7(9) of that directive, constitutes an infringement of that provision.

3. Directive 1999/62, as amended by Directive 2006/38, and in particular Article 7(9) and Article 7a(1) and (2) thereof, must be interpreted as precluding an *ex post* calculation made in the context of judicial proceedings which seeks to demonstrate that, ultimately, the fixed toll rate does not in fact exceed the costs which can be taken into account.

<sup>58</sup> See point 54 of this Opinion.

<sup>59</sup> See point 12 of this Opinion.