



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

28 October 2020\*

(Reference for a preliminary ruling – Directive 1999/62/EC – Directive 2006/38/EC – Charging of heavy goods vehicles for the use of certain infrastructures – Article 7(9) – Article 7a(1) and (2) – Tolls – Principle of the recovery of infrastructure costs – Infrastructure costs – Operating costs – Costs related to traffic police – Cost overrun – Direct effect – *Ex post* justification of an excessive toll rate – Limitation of the temporal effects of the judgment)

In Case C-321/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany), made by decision of 28 March 2019, received at the Court on 18 April 2019, in the proceedings

**BY,**

**CZ**

v

**Bundesrepublik Deutschland,**

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2020,

after considering the observations submitted on behalf of:

- CZ and BY, by M. Pfnür and A. Winczura, Rechtsanwälte,
- Bundesrepublik Deutschland, by J. Hilf, F. Montag and M. Schleifenbaum, Rechtsanwälte,
- the German Government, by D. Klebs and J. Möller, acting as Agents,
- the European Commission, by W. Mölls and N. Yerrell, acting as Agents,

\* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 18 June 2020,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation 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 (OJ 1999 L 187, p. 42), as amended by Directive 2006/38/EC of the Parliament and of the Council of 17 May 2006 (OJ 2006 L 157, p. 8) ('Directive 1999/62, as amended').
- 2 The request has been made in proceedings between BY and CZ, on the one hand, and Bundesrepublik Deutschland (Federal Republic of Germany), on the other, concerning the claim by BY and CZ for reimbursement of sums paid as tolls for the use of German federal motorways.

### **Legal context**

#### *European Union law*

- 3 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) – Decision as 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; costs regarding infrastructure or infrastructure improvements completed before these time limits may also be considered as construction costs where:
    - (i) a Member State has established a tolling system which provides for the recovery of these costs by means of a contract with a tolling system operator, or other legal acts having equivalent effect, which enter into force before 10 June 2008, or
    - (ii) a Member State can demonstrate that the case for building the infrastructure in question depended on its having a design lifetime in excess of 30 years.

In any event, the proportion of the construction costs to be taken into account shall not exceed the proportion of the current design lifetime period of infrastructure components still to run on 10 June 2008 or on the date when the new tolling arrangements are introduced, where this is a later date.

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;

...

- (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;

...’

4 Article 7 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. This shall be without prejudice to the right of Member States, in compliance with the Treaty, to apply tolls and/or user charges on roads not included in the trans-European road network, *inter alia* on parallel roads to which traffic may be diverted from the trans-European road network and/or which are in direct competition with certain parts of that network, or to other types of motor vehicle not covered by the definition of “vehicle” on the trans-European road network, provided that the imposition of tolls and/or user charges on such roads does not discriminate against international traffic and does not result in distortions of competition between operators.

...

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.

...’

5 Under Article 7a(1) to (3) of that directive:

‘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. Tolls 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.

For new concession tolls put in place after 10 June 2008, the maximum level of tolls shall be equivalent to, or less than, the level that would have resulted from the use of a methodology based on the core calculation principles set out in Annex III. The assessment of such equivalence shall be made on the basis of a reasonably long reference period appropriate to the nature of a concession contract.

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.'

6 Annex III to Directive 1999/62, as amended, entitled 'Core principles for the allocation of costs and calculation of tolls', provides, in point 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. They shall include in particular:

- the costs of constructing, establishing and maintaining toll booths and other payment systems,
- the day to day costs of operating, administering and enforcing the toll collection system,
- administrative fees and charges relating to concession contracts,
- management, administrative and service costs relating to the operation of the infrastructure.

The costs may include a return on capital or profit margin reflecting the degree of risk transferred.

Such costs shall be apportioned on a fair and transparent basis between all vehicle classes that are subject to the tolling system.'

### ***German law***

7 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 is fixed, under Paragraph 14(3) of the Bundesfernstraßenmautgesetz (Law on federal road tolls) of 12 July 2011 (BGBl. 2011 I S., p. 1378), by Annex 4 thereto. That annex sets those tolls on the basis, on the one hand, of a fixed amount per kilometre for vehicles or vehicle combinations with up to three axles and those with four or more axles and, on the other, of the vehicle category, which depends on the level of pollutant emissions. The toll rates vary between EUR 0.141 and EUR 0.288.

8 The referring court states that the toll rate applicable to the period in respect of which reimbursement is claimed, from 1 January 2010 to 18 July 2011, was calculated on the basis of the *Aktualisierung der Wegekostenrechnung für die Bundesfernstraßen in Deutschland* (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 and took into account, in particular, the costs of the capital invested in

acquiring the land on which the motorways were constructed and the operating expenses of road infrastructure, that is to say, maintenance costs, construction costs, costs relating to the toll collection system and costs relating to traffic police.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 9 BY and CZ operated, until 31 August 2015, a company governed by Polish law that was engaged in the business of road haulage, including in Germany.
- 10 On that basis, BY and CZ paid, for the period from 1 January 2010 to 18 July 2011, a total sum of EUR 12 420.53 to the Federal Republic of Germany as tolls for the use of German federal motorways.
- 11 Having taken the view that that sum was excessive, BY and CZ brought an action for its reimbursement before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany), which dismissed the action.
- 12 BY and CZ brought an appeal against that decision before the referring court, claiming, in essence, that the calculation method used to set the toll rates that they were obliged to pay had resulted in rates that were excessive, contrary to EU law.
- 13 In order to rule on the issue before it, the referring court considers that it is necessary to examine first of all 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.
- 14 In that regard, the referring court points out, in the first place, that, in the case which gave rise to the judgment of 5 February 2004, *Rieser Internationale Transporte* (C-157/02, EU:C:2004:76), the Court held that Article 7(9) of Directive 1999/62 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. However, following the amendments made to that directive by the EU legislature under Directive 2006/38, the referring court takes the view that Article 7(9) of Directive 1999/62, as amended, has direct effect, and that that provision now contains a prohibition on cost overruns in accordance with which excessive toll rates which are not justified by infrastructure costs are prohibited.
- 15 In the second place, the referring court asks, in essence, whether costs related to traffic police, which were taken into account when the toll rates at issue in the case in the main proceedings were set, fall within the concept of ‘costs of operating’ within the meaning of Article 7(9) of Directive 1999/62, as amended.
- 16 Moreover, whilst noting errors in the method of calculating toll rates laid down under German law, in particular with regard to the taking into account of costs corresponding to the return on capital invested in the acquisition of land on which the motorways were constructed, the referring court queries 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.
- 17 In the third and last place, the referring court states that, under national law, the excessive nature of a toll rate can be corrected by an *ex post* calculation of costs that is produced in the context of judicial proceedings. Referring to paragraph 138 of the judgment of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493), it queries, however, whether such national legislation is consistent with EU law. In the event that it is, the referring court also questions the method that should be followed in making such a calculation.

18 In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice 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], 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 of the Court of Justice of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493, 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?

## Consideration of the questions referred

### Question 2(a)

- 19 By part (a) of its second question, which it is appropriate to examine first, the referring court asks whether Article 7(9) of Directive 1999/62, as amended, must be interpreted as meaning that costs related to traffic police fall within the concept of ‘costs of operating’ within the meaning of that provision.
- 20 The first sentence of Article 7(9) of Directive 1999/62, as amended, provides that tolls are to be based on the principle of the recovery of infrastructure costs only. The second sentence of that provision specifies 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 of that provision states that the weighted average tolls may also include a return on capital or profit margin based on market conditions.

- 21 Article 7a(1) of Directive 1999/62, as amended, provides that, 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 are to take into account the various costs set out in Article 7(9) of that directive. Paragraph 2 of Article 7a states that tolls are to be determined in accordance with paragraph 1 of that article and with Article 7 of the directive.
- 22 It follows from the wording of those provisions that the weighted average tolls must be determined taking into account only the ‘infrastructure costs’ referred to in Article 7(9) of Directive 1999/62, as amended, which refers in that respect to the costs of constructing, operating, maintaining and developing the infrastructure network concerned.
- 23 As the Advocate General stated in point 30 of his Opinion, it is appropriate from the outset to consider the relevant costs for the purposes of answering the present question to be those relating to the operation, rather than to the construction, maintenance or development of the infrastructure network concerned.
- 24 As regards, in particular, the concept of ‘costs of operating’, referred to in the second sentence of Article 7(9) of Directive 1999/62, as amended, this relates to the costs arising from the operation of the infrastructure concerned.
- 25 That interpretation is supported by the provisions of point 3 of Annex III to Directive 1999/62, as amended, according to which operating costs are to include all costs incurred by the infrastructure operator which relate to the operation of the infrastructure. It should be noted in that respect that, while it is apparent from Article 7a(3) of the directive that the core principles set out in Annex III thereto are to be applied to the calculation of weighted average tolls for tolling arrangements put in place after 10 June 2008, and that that annex is not, therefore, applicable in the case in the main proceedings, it nevertheless provides indicia as to the meaning of equivalent concepts used in the context of that directive.
- 26 As the Advocate General stated in point 32 of his Opinion, police activities are the responsibility of the State acting in the exercise of its public powers, and not as operator of the road infrastructure.
- 27 Costs related to traffic police cannot, therefore, be considered to be ‘costs of operating’ as referred to in Article 7(9) of Directive 1999/62, as amended.
- 28 That interpretation is supported by the *travaux préparatoires* relating to that directive. It is apparent from the Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62, presented on 23 July 2003 (COM(2003) 448 final, p. 4), that the European Commission had initially proposed that, for the purpose of determining toll rates, external costs such as the cost of accidents not covered by insurance, which are borne by society in general, should be taken into account. Those costs should include, in particular, the administrative costs of the public services mobilised in the event of road accidents. However, that proposal was not accepted by the EU legislature in Directive 1999/62, as amended.
- 29 Having regard to all of the above considerations, the answer to Question 2(a) is that Article 7(9) of Directive 1999/62, as amended, must be interpreted as meaning that costs related to traffic police do not fall within the concept of ‘costs of operating’ within the meaning of that provision.

### **Question 2(b)**

- 30 By part (b) of its second question, which it is appropriate to examine second, the referring court asks, in essence, whether Article 7(9) of Directive 1999/62, as amended, must be interpreted as precluding the weighted average tolls from exceeding the infrastructure costs of the infrastructure network concerned by 3.8% or by 6%, in particular because costs that do not fall within the concept of ‘infrastructure costs’ within the meaning of that provision have been taken into account.
- 31 In that regard, as is apparent from paragraphs 20 and 22 of the present judgment, the first sentence of Article 7(9) of Directive 1999/62, as amended, provides that tolls are to be based on the principle of the recovery of infrastructure costs only. Moreover, Member States must determine the weighted average tolls taking into account only the ‘infrastructure costs’ as expressly set out in that article.
- 32 It follows that Article 7(9) of Directive 1999/62, as amended, precludes any overrun of the infrastructure costs of the infrastructure network concerned that results from what are not insignificant calculation errors, or from costs having been taken into account that are not covered by those referred to in that provision, such as costs related to traffic police.
- 33 Consequently, the answer to Question 2(b) is that Article 7(9) of Directive 1999/62, as amended, must be interpreted as precluding the weighted average tolls from exceeding the infrastructure costs of the infrastructure network concerned by 3.8% or by 6% as a result of what are not insignificant calculation errors or because costs that do not fall within the concept of ‘infrastructure costs’ within the meaning of that provision have been taken into account.

### **Question 1**

- 34 By its first question, which it is appropriate to examine third, the referring court wishes to know, in essence, whether an individual may rely on the provisions of Article 7(9) and of Article 7a(1) and (2) of Directive 1999/62, as amended, before national courts, against a Member State where that Member State has failed to comply with those provisions or has failed to transpose them correctly.
- 35 According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by individuals against a Member State before its courts where that Member State has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 21 November 2018, *Ayubi*, C-713/17, EU:C:2018:929, paragraph 37 and the case-law cited).
- 36 A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. It is sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 1 July 2010, *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 45).
- 37 In paragraph 42 of the judgment of 5 February 2004, *Rieser Internationale Transporte* (C-157/02, EU:C:2004:76), the Court held that neither Article 7(h) of 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) nor Article 7(9) of Directive 1999/62 could be relied upon by individuals against State authorities if those directives had not been transposed, or had been imperfectly transposed, into national law.



- 38 As regards Article 7(h) of Directive 93/89, according to which ‘toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned’, the Court held, in paragraphs 40 and 41 of that judgment, that that provision could not be considered to be unconditional and sufficiently precise to be relied upon by individuals against State authorities, on the ground, first, that that provision did not explain the nature of the relationship that had to exist between toll rates and the costs of constructing, operating and developing the infrastructure network concerned; second, that it did not define those three headings of costs; and finally, third, that while that provision gave general guidelines for calculating toll dues, it did not provide any specific mode of calculation and left the Member States very broad discretion in that regard.
- 39 In paragraph 41 of that judgment, the Court considered that that finding applied all the more to Article 7(9) of Directive 1999/62, inasmuch as the wording of that provision was identical to that of Article 7(h) of Directive 93/89, save for the fact that it referred not to the concept of ‘toll rates’ but to that of ‘weighted average tolls’, without, however, defining it.
- 40 In the present case, as is apparent from paragraph 22 of the present judgment, it is clear from the first sentence of Article 7(9) of Directive 1999/62, as amended, and from Article 7a(1) and (2) of that directive, that the average weighted tolls must be determined taking into account ‘infrastructure costs’ only.
- 41 By providing for tolls to be based on the principle of the recovery of ‘infrastructure costs’ only, Article 7(9) of Directive 1999/62, as amended, clearly explains the nature of the relationship that must exist between toll rates and the infrastructure costs concerned.
- 42 In addition, it follows from reading Article 7(1) in conjunction with Article 7(9) of Directive 1999/62, as amended, that the ‘infrastructure network concerned’ referred to in the latter provision corresponds to an infrastructure network situated on the ‘trans-European road network’, which is defined in Article 2(a) of that directive. The directive also defines, in Article 2, the concepts of ‘toll’, ‘weighted average toll’ and ‘construction costs’.
- 43 As the Advocate General observed in point 83 of his Opinion, the main flaws highlighted by the Court in the judgment of 5 February 2004, *Rieser Internationale Transporte* (C-157/02, EU:C:2004:76), and which prevented Article 7(9) of Directive 1999/62 from having direct effect have therefore been remedied by the EU legislature in the amendments made to that directive by Directive 2006/38.
- 44 While Directive 1999/62, as amended, still leaves the Member States a margin of discretion as regards the modalities of calculating tolls, that does not affect the precise and unconditional nature of the obligation to determine tolls taking into account ‘infrastructure costs’ only, as referred to in Article 7(9) of that directive.
- 45 It follows from this that Article 7(9) of Directive 1999/62, as amended, and Article 7a(1) and (2) of that directive impose on Member States which introduce or maintain tolls on the trans-European road network a precise and unconditional obligation to determine the level of those tolls taking into account ‘infrastructure costs’ only, that is to say, the costs of constructing, operating, maintaining and developing the infrastructure network concerned.
- 46 Consequently, the answer to Question 1 is that an individual may directly rely, before national courts, on the obligation to take into account only the infrastructure costs referred to in Article 7(9) of Directive 1999/62, as amended, that is imposed by that provision and by Article 7a(1) and (2) thereof, against a Member State where that Member State has failed to comply with that obligation or has failed to transpose it correctly.

### Question 3

- 47 By its third question, which it is appropriate to examine last, the referring court asks whether Directive 1999/62, as amended, read in the light of paragraph 138 of the judgment of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493), must be interpreted as precluding an excessive toll rate from being justified *ex post* by a new calculation of the infrastructure costs that is produced in the context of judicial proceedings. In the event that that is not the case, the referring court asks whether such a calculation must be based exclusively on the actual costs and the actual toll revenue, and not on the assumptions that had been made in the predictive calculation.
- 48 The Court held, in paragraph 138 of that judgment, that the Republic of Austria could not justify the increase in the toll rates applicable to the motorway concerned by producing a new method of calculating the costs, since, first, it had not explained how that method was more appropriate and, second, Article 7(h) of Directive 93/89, according to which the toll rates are related to the construction costs and the costs of operating and developing the infrastructure network concerned, implied that the adjustment of toll rates should be made after the calculation justifying it.
- 49 Those considerations are equally applicable in a case such as that of the main proceedings, in which the justification for toll rates that are considered excessive results not from the *ex post* application of a new calculation methodology but from the updating, in the context of judicial proceedings, of the infrastructure costs originally taken into account.
- 50 In those circumstances, the answer to the third question is that Directive 1999/62, as amended, read in the light of paragraph 138 of the judgment of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493), must be interpreted as precluding an excessive toll rate from being justified *ex post* by a new calculation of the infrastructure costs that is produced in the context of judicial proceedings.

### Limitation of the temporal effects of the present judgment

- 51 At the hearing, the Federal Republic of Germany asked the Court to limit the temporal effects of the present judgment, should the Court rule that the provisions of Article 7(9) and of Article 7a(1) and (2) of Directive 1999/62, as amended, produce a direct effect.
- 52 In support of its request, the Federal Republic of Germany submitted, in the first place, that there is uncertainty about the scope of the concept of ‘costs of operating’ within the meaning of Article 7(9) of Directive 1999/62, as amended, largely as a result of the Commission’s conduct. According to the Federal Republic of Germany, in its Opinions 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), and 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), the Commission considered costs related to traffic police to be covered by that concept.
- 53 In the second place, the Federal Republic of Germany drew the Court’s attention to the serious financial consequences that would flow from the retroactive application of the present judgment.
- 54 According to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the

application of that rule before the courts having jurisdiction are satisfied (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 55 and the case-law cited).

- 55 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 56 and the case-law cited).
- 56 More specifically, the Court has taken that step only in quite specific circumstances, notably 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, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 57 and the case-law cited).
- 57 In the present case, it must be held that the Federal Republic of Germany has not adduced evidence which is capable of satisfying the criterion that those concerned should have acted in good faith.
- 58 In particular, as the Advocate General stated in points 99 and 100 of his Opinion, the Federal Republic of Germany has not explained why the Opinions of the Commission mentioned in paragraph 52 of the present judgment, by which that institution gave a positive opinion on new tolling arrangements involving infrastructure costs related to traffic policing, contributed to objective and significant uncertainty as to the implications of Article 7(9) of Directive 1999/62, as amended.
- 59 The toll rates at issue in the case 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. It must be noted that those opinions of the Commission are subsequent to that calculation period and could not, therefore, be taken into account for the purposes of determining the toll rates at issue in the main proceedings.
- 60 In those circumstances, it is not appropriate to limit the temporal effects of the present judgment.

### Costs

- 61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. Article 7(9) 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 Parliament and of the Council of 17 May 2006, must be interpreted as meaning that costs related to traffic police do not fall within the concept of ‘costs of operating’ within the meaning of that provision.**

2. **Article 7(9) of Directive 1999/62, as amended by Directive 2006/38, must be interpreted as precluding the weighted average tolls from exceeding the infrastructure costs of the infrastructure network concerned by 3.8% or by 6% as a result of what are not insignificant calculation errors or because costs that do not fall within the concept of ‘infrastructure costs’ within the meaning of that provision have been taken into account.**
3. **An individual may directly rely, before national courts, on the obligation to take into account only the infrastructure costs referred to in Article 7(9) of Directive 1999/62, as amended by Directive 2006/38, that is imposed by that provision and by Article 7a(1) and (2) thereof, against a Member State where that Member State has failed to comply with that obligation or has failed to transpose it correctly.**
4. **Directive 1999/62, as amended by Directive 2006/38, read in the light of paragraph 138 of the judgment of 26 September 2000, *Commission v Austria* (C-205/98, EU:C:2000:493), must be interpreted as precluding an excessive toll rate from being justified *ex post* by a new calculation of the infrastructure costs that is produced in the context of judicial proceedings.**

[Signatures]