COMMISSION

COMMISSION DECISION

of 25 January 2006

on State aid C 54/03 (ex N 194/02) which the Federal Republic of Germany is planning to implement concerning a reimbursement mechanism linked to the introduction of a toll system for heavy goods vehicles on German motorways

(notified under document number C(2006) 89)

(Only the German text is authentic)

(Text with EEA relevance)

(2009/150/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 [1] laying down detailed rules for the application of Article 88 of the Treaty,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above [2] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 6 March 2002, received at the Commission (DG TREN) on 12 March 2002 (A(02)54606), and by letter dated 7 March 2002, registered on 7 March 2002 (A(02)54445), the Federal Ministry of Transport, Building and Housing of the Federal Republic of Germany informed the Commission that the Federal Government intended to introduce a toll reimbursement system accompanied by the introduction of a mileage-based motorway user charge for heavy goods vehicles. By letter dated 21 March 2002 (D(02)1080), the Secretariat-General of the Commission acknowledged receipt of Germany's letter and registered the notification of the draft law under N 194/02.

(2) By letter dated 23 July 2003, registered under C 54/03, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission called on interested parties to submit their comments.

(4) The German authorities replied to the questions raised by the Commission by transmitting two communications both dated 22 August 2003, registered on 1 September 2003 (A(03)/28354).

(5) The Commission further received 12 comments from interested parties. It forwarded them to the Federal Republic of Germany, which was given the opportunity to react; its comments were received by letter dated 7 November 2003, registered on 13 November 2003 (A(03)34681).

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 202, 27.8.2003, p. 5.
[3] OJ C 202, 27.8.2003, p. 5.

(6) The Commission received additional information by the German authorities transmitted on 23 October 2003, registered on 27 October 2003 (A(03)33102), on 23 December 2003, registered on 26 December 2003 (A(03)38579), on 1 July 2004, registered on 6 July 2004 (A(04)24123), 2 December 2004, registered the same date, 25 January 2005, registered on 28 January 2005, 14 July 2005, registered on 28 July 2005 (A(05)19151) and 11 November 2005, registered on 14 November 2005 (A(05)32154).

2. DETAILED DESCRIPTION OF THE AID

2.1. The toll reimbursement system

(7) As from 1 January 2005 the German authorities have introduced a mileage-based motorway toll for heavy goods vehicles and fixed the average toll rate at 12,4 cents/km. They have communicated to the Commission their intention to increase in the near future the rate to 15 cents/km while, at the same time, introducing a toll reimbursement system (hereinafter referred to as TRS) to (partially) compensate road hauliers for the increase of the total charges. The amount of this TRS consists of an annual one-off toll reimbursement of a maximum of 2,6 cents/km. However, the toll reimbursement depends on the payment of a certain amount of excise duties on fuel purchased in Germany, to be proved by presenting appropriate documents. Against proof of payment of 8,6 cents of excise duties on fuel paid within Germany, 2,6 cents/km will be reimbursed.

2.2. The objective of the aid measure

(8) The objective of the measure is to fix the toll rate per kilometre by taking into account appropriately other traffic-specific payments made by road hauliers liable for the toll within the territory of the German law. The measure takes into account that most of the users already contribute to covering infrastructure costs by paying taxes (annual vehicle tax, fuel tax), and aims at reimbursing a part of these contributions to those users who, in addition to the existing charges, pay toll now as well. As from 1 January 2005, the toll has been fixed at a rate of 12,4 cents/km. The presently intended increase by 2,6 cents/km to reach the average amount of 15 cents/km will, in the view of German authorities, fully cover the costs for the construction, development and operation of the relevant infrastructure in the sense 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 (Eurovignette Directive) ([4]), in particular Article 7(9) and (10) ([5]). Because of the increase of the total infrastructure charge for road hauliers, the German authorities propose at the same time to introduce a reimbursement system as a partial compensation.

2.3. Amount of aid

(9) The 2,6 cents/km toll reimbursement is the result of the following calculation which is based on a decision of the German authorities to compensate EUR 600 million: Considering vehicle mileage totalling 22,7 billion km per year (vehicles of not less than 12 tonnes), a toll of 1 cent/km produces a toll revenue of EUR 227 million per year. Assuming a consumption of 30 litres/100 km and EUR 0,01 excise duties per litre on fuel, 1 cent of excise duties produces excise duty revenue of approximately EUR 68 million per year ([6]). A 1 cent/km toll is therefore equivalent to about 3,3 cents of excise duties ([7]) per litre to produce the same revenue. The decision to reimburse EUR 600 million therefore results in the reimbursement of about 2,6 cents of the toll charge per km ([8]). In order to be eligible for this reimbursement, proof of payment of excise duties amounting to 8,6 cents ([9]) per litre would have to be provided.

(10) Since the overall amount of reduction envisaged by the toll reimbursement system is considered to be EUR 600 million per year, this compensation corresponds to a reduction of approximately 17,6 % of the toll revenue of about EUR 3,4 billion per year.

2.4. Duration

(11) The proposed TRS is not time-limited. However, the German authorities have indicated that, if this would become a condition imposed by the Commission, they can modify the Statutory Order and introducing a system of time-limitation.

2.5. Beneficiaries

(12) Beneficiaries of the TRS will be all road hauliers or owners of lorries using German motorways, regardless of their nationality or residence, with vehicles of not less than 12 tonnes. However, the toll reimbursement depends on the payment of excise duties on fuel purchased in Germany.

([4]) OJ L 187, 20.7.1999, p. 42.

([5]) This has been confirmed by a study carried out by the Österreichisches Institut für Raumplanung, Wien, in which the conclusion has been drawn that the costs of the infrastructure have been determined properly in accordance with Directive 1999/62/EC.

([6]) 227 million per 100 km; 227 × 30 : 100 = 68 million.

([7]) 227 : 68 = 3,3.

([8]) 600 : 227 = 2,6.

([9]) 2,6 × 3,3 = 8,6 (cents).

2.6. **Legal basis**

(13) The TRS is based on Article 1 of the Law on the imposition of mileage-based charges for the use of motorways by heavy goods vehicles adopted by the Government on 22 March 2002 (hereinafter referred to as the Law). The Law was signed on 5 April 2002, published in the Federal Law Gazette (*Bundesgesetzblatt*) on 11 April 2002 ([10]).

(14) Section 3, paragraph 2 of Article 1 of the Law empowers the government to fix the toll rate per kilometre by Statutory Order with the consent of the Bundesrat taking into account the number of axles and the emission class of the vehicles. Section 3, paragraph 3 empowers the German Government to fix the toll rate per kilometre by taking into account appropriately other traffic-specific payments made by parties liable for the toll within the territory of the Law by Statutory Order.

(15) As regards the TRS, the Federal Government of Germany has proposed a new section to be introduced in the existing 'Statutory Order on the fixing of the toll rate for heavy goods vehicles' dated 24 June 2003 ([11]). The proposal is based on Article 1, section 3, paragraph 3 of the Law. The German government has confirmed that the Statutory Order shall only be modified if the Commission takes a positive decision on the TRS.

2.7. **Technical aspects of the proof of payment of excise duties**

(16) The key element for the application of the TRS is the proof of payment of excise duties in Germany. The proof of payment will consist of presenting appropriate filling station receipts or fuel credit card company vouchers from Germany, in each case stating the registration number of the refuelled vehicle liable for the toll. The proof of payment of excise duties on fuel within Germany shall also be in accordance with the current version of the Mineral Oil Tax Law of 21 December 1992 ([12]).

(17) The toll shall be reduced only against the proof that toll payment and excise duties have been paid during the same calendar year. The total toll reimbursement amount accumulated in any one calendar year (toll credit) is generally offset against the toll debt incurred for the vehicle liable for toll in the following year. The party liable for toll must present — by 31 March of the following year at the latest — the request for a toll reimbursement for a particular vehicle to the Federal Office for Goods Transport which is the body entrusted with the application of the Law and responsible for monitoring and dealing with infringements.

(18) If, however, the toll credit cannot be offset against a toll debt in the following year, it will be paid out on request. The request must be presented by 31 March of the following year at the latest to the Federal Office for Goods Transport.

2.8. **Grounds for initiating the procedure**

(19) On 23 July 2003 the Commission opened the formal investigation procedure on the following grounds:

(a) The Commission expressed its doubts as regards the necessity of the intended replacement of the initially fixed toll rate by a system of higher rates combined with reimbursement. Therefore, Germany was asked to provide all the arguments, counterbalancing the higher administrative burden compared to the initial system applied as of the date of its introduction.

(b) The Commission also expressed its doubts whether the measure would not lead to a *de facto* discrimination against foreign road hauliers. German authorities were therefore asked to provide all the necessary information why the measure should be considered non-discriminatory.

(c) In addition, the Commission expressed the need to clarify the environmental impact of the reimbursement system since a negative environmental effect could be against the common interest. The Commission therefore invited Germany to provide further information on this issue.

(d) The Commission also could not yet conclude that the toll system as such fulfils all the conditions of Directive 1999/62/EC and that it complies with Article 28 of the EC Treaty.

([10]) BGBl. G 5702, 2002, Part I No 23, published at Bonn on 11 April 2002, p. 1234, modified by the Law dated 28 June 2003, BGBl. I, p. 1050.
([11]) Statutory Order on the fixing of the toll rate for heavy goods vehicles, 24 June 2003, BGBl. I, p. 1001.
([12]) BGBl. I, pp. 2150, 2185; 1993, p. 169.

(e) Furthermore, the Commission criticised at that time the lack of information as regards the relevant legal basis for the implementation of an eventual toll reimbursement system and therefore asked the German authorities to provide the Commission with e.g. a new draft Statutory Order on the basis of Article 1 section 3 paragraph 3 of the Law.

(f) Finally, the Commission needed further clarification whether the toll reduction system falls under the formal procedure such as laid down in Article 8.4 of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils ([13]). Hence, German authorities were asked to explain why the aid scheme was not notified following the procedure under the Directive 92/81/EEC.

3. COMMENTS FROM INTERESTED PARTIES

(20) In the framework of the formal opening of the procedure, the Commission received 12 contributions from third parties, 10 of them from national or European associations ([14]) and 2 of them from Member States ([15]). Ten contributions argue against the measure and two contributions develop arguments defending the aid scheme ([16]).

([13]) OJ L 316, 31.10.1992, p. 12. Since 1 January 2004, Directive 92/81/EEC has been replaced by Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

([14]) Belgium: FEBETRA (Fédération Royale Belge des Transporteurs) sent on 11 September 2003 and registered on 15 September 2003 (A/29597); SAV (De Beroepsorganisatie van de Vlaamse Goederentransport Ondernemers en Logistieke Dienstverleners), sent on 15 September 2003 and registered on 19 September 2003 (A/30036); Danmark: DTL (Dansk Transport og Logistik), sent on 26 September 2003 and registered on 30 September 2003 (A/30852); Germany: BGL (Bundesverband Güterverkehr Logistik und Entsorgung), sent on 22 September 2003 and registered on 23 September 2003 (A/30304); Netherlands: TLN (Transport en Logistiek Nederland), sent on 25 September 2003 and registered on 26 September 2003 (A/30535); Spain: ASTIC (Asociación del Transporte Internacional por Carretera), sent on 26 September 2003 and registered on 13 October 2003 (A/31891); ATRADICE (Asociación de Empresas de Transporte de la Región Centro), sent on 25 September 2003 and registered on 26 September 2003 (A/30540); CETM (Confederación Española de Transporte de Mercancías) sent on 26 September and registered on 9 October (A/31648); FENADISMER (Federación Nacional de Asociaciones de Transporte de España) sent on 25 September 2003 and registered on 2003 (A/30502); FROET (Federación Regional de Organizaciones Empresariales de Transporte de Murcia), sent on 22 September 2003 and registered on 23 September 2003 (A/30273).

([15]) United Kingdom: Permanent Representation, sent on 2 October 2003 and registered on 8 October 2003 (A/31558); Spain: Dirección general de Transportes del Ministerio de Fomento, sent on 24 September 2003 and registered on 26 September 2003 (A/30588).

([16]) Contributions defending the reimbursement system: BGL and United Kingdom.

3.1. **Arguments against the reimbursement measure**

3.1.1. *De facto discrimination of foreign road hauliers*

3.1.1.1. Discrimination of foreign road hauliers due to the differences in the level of excise duties in Member States ([17])

(21) A large number of interested parties argue that the reimbursement system will in practice not be given on a fair basis independently of the nationality of road hauliers due to the differences in the level of excise duties in Member States. In particular, the reimbursement system seems to be *de facto* discriminatory, as non-German road hauliers will not fill their tank in Germany due to the high excise duties on fuel in Germany and will therefore not benefit of the TRS.

3.1.1.2. Discrimination of foreign road hauliers since the measure, seen as a reduction of the tax for the use of infrastructure (toll), favours German companies ([18])

(22) It was also argued that the measure, seen as a reduction of the tax for the use of infrastructure, favours German road hauliers since, again, road hauliers from abroad will not fill their tank in Germany due to the high excise duties on fuel. As a consequence, foreign road hauliers will pay a higher infrastructure charge (i.e. the full amount) than German road hauliers benefiting from such a reimbursement system and paying *de facto* a 'reduced' infrastructure charge.

3.1.1.3. Discrimination of foreign road hauliers due to the fact that the measure leads to a partial compensation of the price difference of fuel between Germany and other countries ([19])

(23) Some interested parties specify that, as a consequence of the aid measure, German road hauliers will be able to reduce the price level for the transport of goods. This will create a disadvantage to companies transporting goods on long distance. Hence, the aid measure will indirectly discriminate against non-German road hauliers.

([17]) ASTIC, ATRADICE, CEMT, Dirección general de Transportes del Ministerio de Fomento, DTL, FEBETRA, FROET, SAV, TLN.

([18]) See e.g. ASTIC.

([19]) See e.g. DTL, FROET.

3.1.1.4. Discrimination of foreign road hauliers due to the fact that they have to contribute excessively to the harmonisation of mineral oil tax ([20])

(24) In addition, third parties argue that the increase of the toll from 12,4 cents/km up to 15 cents/km which becomes necessary to finance the compensation measure will be financed by all road hauliers, including by those who will not benefit from the toll reimbursement. Hence, non-German road hauliers will have to accept higher toll rates in order to finance the harmonisation of mineral oil tax intended by German authorities. Since interested parties consider that this is not justified, they conclude that the measure is discriminatory.

3.1.1.5. Discrimination of foreign filling stations, in particular in neighbouring regions of the German territory ([21])

(25) Interested parties argue that the TRS does not give an incentive to improve the transport infrastructure, but gives an incentive to fill the tank in Germany. As a consequence, the reimbursement system will favour German filling stations to the detriment of non-German filling stations. Hence, the reimbursement measure has also a discriminatory effect as regards foreign filling stations.

3.1.1.6. Discrimination of other Member States, due the fact that they will loose tax income ([22])

(26) As a consequence, another argument presented by interested parties is that other Member States, e.g. in neighbouring regions, will loose tax income due to a reduced purchase of fuel on their territories.

3.1.1.7. Discrimination of vehicles of less than 12 tonnes since the reimbursement has *de facto* the effect of a mineral oil tax reduction ([23])

(27) Seen as an indirect reduction of excise duties, some interested parties argue that the measure is considered to be discriminatory against those consumers of fuel using German motorways with vehicles of less than 12 tonnes.

([20]) See e.g. TLN.
([21]) See e.g. ATRADICE, ASTIC, CEMT, FROET.
([22]) See e.g. ATRADICE.
([23]) See e.g. ASTIC, ATRADICE, CEMT.

3.1.1.8. A difference in the tax burden cannot, by itself, justify the granting of State aid ([24])

(28) An additional argument presented by third parties is linked to a Court decision on an Italian aid scheme which consisted in a tax credit scheme for Italian road hauliers and provided for compensatory payments to be made to transport undertakings established in other Member States, on the basis of the estimated consumption of diesel required for the distance covered on Italian territory. The Court confirmed the Commission's decision by which the Italian Republic was obliged to recover the granted aid. Therefore, interested parties argue, in analogy to the Italian case, that a difference in the tax burden for mineral oil cannot by itself justify the granting of State aid ([25]).

3.1.2. *Discrimination of foreign road hauliers due to specific reimbursement mechanisms or administrative burden* ([26])

(29) First, the reimbursement, as it seems, is not linked to the real use of motorways in Germany. As the reimbursement mechanisms will, according to third parties, accept all filling station receipts regardless of the fact whether the vehicle used German motorways or other roads. This will favour mainly German road hauliers with a mixed fleet of vehicles below and above 12 tonnes.

(30) Secondly, third parties argue that the measure creates a discriminatory effect because the total toll reimbursement accumulated in one calendar year can be offset against the toll debt incurred in the following year. This payment mechanism advantages German road hauliers compared to non-German road hauliers which might use German motorways only occasionally.

(31) Thirdly, interested parties argue that the measure is not compatible with Directive 1999/62/EC since the reimbursement system creates linguistic and administrative obstacles and will lead to the fact that many foreign users, in particular occasional users, will not claim a reimbursement.

(32) Finally, interested parties refer to some practical aspects of the toll system (such as the lack of On-Board Units (OBUs), etc.) which in their view also has an indirect impact on the aid measure itself.

([24]) See e.g. ASTIC, CEMT.
([25]) In this context, interested parties refer to Case C-6/97, *Italy v Commission* [1999] ECR I-2981, in particular paragraph 21.
([26]) See e.g. ATRADICE, CEMT, FROET.

3.1.3. *Violation of Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils* ([27])

(33) Several third parties argue that since the reimbursement system leads to an indirect reduction of excise duties, Directive 92/81/EEC is violated if specific procedural rules, such as Article 8(4) on notification procedure, is not respected ([28]).

3.1.4. *Negative effects on the environment* ([29])

(34) It should also be mentioned that one interested party argues that the measure favours the consumption of fuel in view of the fact that the amount of reimbursement depends directly on the amount of fuel consumption. As a consequence, the measure would be against the Community interest.

3.1.5. *Additional arguments related to the toll system*

(35) In addition, all interested parties arguing against the aid measure criticise the toll system as such, without sometimes clearly distinguishing the toll from the TRS. With regard to the toll, the following main arguments were raised by interested parties:

(36) The fact that the increased toll is levied only on vehicles of at least 12 tonnes is discriminatory since it charges mainly international transport of goods and favours indirectly the mainly national transport of goods on vehicles of less than 12 tonnes ([30]). In this respect, interested parties referred to several Court cases ([31]).

(37) According to interested parties, the toll system infringes Directive 1999/62/EC, in particular Article 7(4), since the toll is considered to be discriminatory on the grounds of the nationality of the haulier or the origin or destination of the vehicle ([32]).

(38) The practical difficulties ([33]) of the toll system create a disadvantage for non-German road hauliers. The lack of efficient alternatives to the installation of OBUs also violates Article 7(5) of Directive 1999/62/EC.

(39) Interested parties also expressed their doubts as regards the amount of the toll and its compliance with Article 7(9) of the Eurovignette Directive ([34]). As the costs for the construction of the German motorways seem to be mostly depreciated, the calculation of the costs should mainly be related to the operating and developing costs of the infrastructure network concerned. In addition, it is argued that the toll system is discriminatory due to the fact that the toll will be levied by 100 % upon heavy goods vehicles of not less than 12 tonnes while — according to information provided by German authorities — they cause only 45 % of the costs. The exemption for private vehicles for tourism purposes also seems to be discriminatory. Furthermore, it is stated that the average toll rate of 12,4 cents/km seems to be too high. It appears that Germany uses the higher toll rate to cross-subsidise other transport modes which would violate both the 'users-pay'-principle and Article 9(2) of the Directive 1999/62/EC.

(40) It is further argued that the German toll system, as it seems, contradicts with recital 17 of Directive 1999/62/EC, since it will create artificial barriers, distort competition within Europe and lead away from a harmonised European model of infrastructure charging, guaranteeing interoperability.

(41) The German law introducing the new toll also seems to be discriminatory to the detriment of non-German road hauliers as regards the emission classes of vehicles.

(42) Finally, it is argued that the toll system violates other Treaty provisions such as Article 28, 97, 90 and 92 ([35]).

([27]) See e.g. ASTIC, ATRADICE, CEMT.
([28]) Now Article 19 of the Directive 2003/96/EC.
([29]) See e.g. Dirección general de Transportes del Ministerio de Fomento.
([30]) ASTIC, ATRADICE, CEMT.
([31]) See Case C-205/98, *Commission v Austria* [2000], ECR I-7367, in particular paragraphs 76, 78 and 86; Case C-6/97 *Italy v Commission* [1999], ECR I-2981, in particular paragraphs 15, 21, 23; Case C-200/97 *Ecotrade* [1998]; Case C-90/94, Haar Petroleum [1997], ECR I-4085, in particular paragraphs 34, 35, 37 and 40.
([32]) In this context, it is also referred to *Commission v Austria* in particular paragraphs 76, 78, 85, 86, 101 and 104.
([33]) Such as the lack of authorised workshops for the installation of OBUs, the non-access of road hauliers to the Internet system, the problem of registration and re-routing and the language problem at terminals, insufficient forms of payment (OBU, Internet, Terminal), language problems, etc.
([34]) See also Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 43 of the judgment and in particular paragraphs 85, 101 and 120 to 123 of the Opinion of Advocate General Alber, together with the case-law cited there.
([35]) See also *Haar Petroleum* in particular paragraphs 34, 35, 37 and 40.

3.2. **Arguments favouring the reimbursement system**

(43) It is said that the aid is necessary, in the interest of the Community and respects the principle of proportionality by using the following arguments: The Commission's White Paper on transport policy ([36]) as well as Article 7 ter of the new draft of the Eurovignette Directive ([37]), both allow a fiscal compensation for traffic users charged for using the infrastructure in order to avoid an overall increase of taxes. The measure itself does not reduce the mineral oil tax. The excise duty is only serving as a reference to calculate the reimbursement of the toll. In addition, it can be shown that the income of mineral oil tax in Germany is declining due to the lesser purchase of fuel in Germany. The reimbursement system is therefore considered to be a necessary measure to keep the overall increase of charges proportionate, which is also in the interest of the Community.

(44) The aid measure clearly respects the principle of non-discrimination, since German and non-German road hauliers can both benefit from the aid measure. In the view of the interested party, any discrimination which exists stems from the inactivity of the Council, where the harmonisation question is dormant since 1985. Given this lack of harmonisation on excise duties, the TRS would only help to neutralise the disadvantages encountered by German road hauliers. In this connection, it can be shown that the German share of the carried tonnenage of cross-border road haulage has been continuously declining from 39,0 % in 1985 to 21,6 % in 2002. In addition, cross-border road haulage is becoming increasingly dominant: In 2015, more than half of the whole traffic volume on German motorways will be allocated to cross-border trade of goods. It is also said that discrimination would only appear if road hauliers not having their office registered in Germany had to bear higher expenses or were submitted to a higher administrative burden for the reimbursement than German road hauliers, which is not the case.

(45) Third parties also stated that the aid measure does not lead to a distortion of competition in view of the fact that the compensation of EUR 600 million per year only corresponds to 17,6 % of the additional costs of the infrastructure charge.

(46) Finally, it is argued that the measure cannot be considered to be State aid since according to paragraph 13 of the Commission Notice 98/C 384/03 ([38]) tax measures are general measures which do not constitute State aid pursuant to Article 87(1) of the EC Treaty.

([36]) Towards gradual charging for the use of infrastructure, p. 71.
([37]) 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 (COM(2003) 448 final).
([38]) OJ C 384, 10.12.1998, p. 3.

4. **COMMENTS FROM THE FEDERAL REPUBLIC OF GERMANY**

(47) In the view of the German government, the measure does not lead to a direct discrimination as the reimbursement is made available for all road hauliers, regardless of their nationality or residence. Neither does the measure leads to a *de facto* discrimination. First, they argue that there is a direct link between the new charge for the use of German motorways and the fuel consumption which again is directly linked to the amount of excise duties on fuel. In their view, the connection between toll reduction on the one hand and the payment of excise duties on the other hand is reasonably justified as both payments can be considered as a contribution to the cost of infrastructure. In addition, the measure does not foresee any thresholds, e.g. a minimum amount of toll charge or a minimum transport volume. Furthermore, the decision whether to fill the tank within Germany or not is a purely economic decision which will be taken by German road hauliers as well as by non-German road hauliers. All road hauliers will fill their tanks where they can see an economic benefit. In other words, the decision where to fill the tank is mainly influenced by the price of fuel. The German authorities argue in this respect that in Germany both the part of the excise duty on the fuel sale price and the sales price itself are among the highest in EU Member States.

(48) The German authorities also note that the measure is fully in line with the territoriality principle.

(49) The German authorities contradict the argument that the TRS can be seen as a reduction of the tax for the use of infrastructure and that it therefore would discriminate against foreign road hauliers. In the view of German authorities, the reimbursement will be paid out to both German road hauliers and non-German road hauliers. The TRS will lead to a situation where both categories will contribute to the financing of German motorways in proportion of their use of the infrastructure.

(50) As regards the argument of a partial compensation of the price difference of fuel between Germany and other countries, the German authorities cannot see any discrimination against foreign road hauliers. They agree that the filling of tanks outside the German territory may be cheaper than the filling of tanks within Germany, even after having taken into account the amount of the reimbursement. However, this calculation will be done by German and by non-German road hauliers alike. According to the German authorities, over 80 % of the German road hauliers take advantage of lower fuel prices in other countries. However, as German road hauliers in general already suffer from a very high level of excise duties which creates a disadvantage to their competitive position, they will not be able to reduce their price level on the transport of goods, more than any other road haulier availing himself of the measure. The effect of the aid measure would therefore

only consist in a reduced distortion of competition caused by the very high level of excise duties in Germany, but will not create any advantage to German road hauliers allowing them to reduce the price level for the transport of goods.

(51) The German authorities argue that the increase of the toll is justified in spite of the TRS, given that not only German road hauliers will benefit from the compensation measure, but also non-German road hauliers. Hence, non-German road hauliers will have to pay higher toll rates but benefit from the TRS which will prevent an excessive contribution of non-German road hauliers to the harmonisation of mineral oil tax.

(52) Interested parties argue that the reimbursement system will favour German filling stations to the detriment of non-German filling stations. The German authorities, however, argue that the existing differences in the mineral oil tax between Member States have already the effect of creating so-called 'fuel tourism', in particular with neighbouring countries. Measures which help to reduce these differences — such as the TRS — should also help to reduce the so-called 'fuel tourism'. According to the German authorities, it is therefore not the aid measure which will discriminate against foreign filling stations. On the contrary, the aid measure will only lead to the fact that foreign filling stations will be less favoured than they are now.

(53) Third parties argue that as a consequence of the aid measure other Member States, e.g. in neighbouring regions, will loose tax income due to a reduced purchase of fuel. However, the German authorities argue that measures which will lead to a reduction of 'fuel tourism' are justified even if this would lead to a lower tax income in neighbouring regions.

(54) The German authorities also argue that the measure is not discriminatory against those consumers of fuel using German motorways with vehicles of less than 12 tonnes. According to the German authorities, it is clear that the reimbursement is only given under the condition that the toll on lorries exceeding 12 tonnes is paid. Therefore, the reimbursement cannot be seen without the overall effect of a net burden for these lorries. Since, on balance, they will be charged more than they receive in return, it is difficult to argue that the reimbursement itself favours these vehicles above 12 tonnes, or, in other words, discriminates vehicles of less than 12 tonnes due to an alleged *de facto* discriminatory effect of a mineral oil tax reduction. Hence, in the view of German authorities, the reimbursement can not discriminate vehicles of less than 12 tonnes as they are not subject of the new toll system.

(55) As regards the argument that a difference in the tax burden cannot, by itself, justify the granting of aid, German authorities state that the Italian case quoted by third parties in this connection is not relevant for the German case since the general framework and conditions are not the same. They argue that in the past a large proportion of the infrastructure costs in Germany have been funded through excise duties on fuel. Heavy goods vehicles that use federal motorways are now paying a double contribution to infrastructure costs, in the form of both excise duties on fuel and the toll. The TRS takes into account infrastructure costs contributions already paid in Germany and will therefore only compensate hauliers for a double payment in the interest of a fair charging for the costs of infrastructure.

(56) The German authorities also argue that the reimbursement system does not foresee in a mechanism which would allow for the acceptance of all appropriate filling station receipts regardless of the fact of whether the vehicle used German motorways or other roads. On the contrary, Germany reconfirms that receipts are only acceptable if the voucher indicates the registration number of the refuelled vehicle liable for the toll. Hence, German authorities can exclude that the measure would favour German road hauliers with a mixed fleet of vehicles below and above 12 tonnes such as has been argued by interested parties.

(57) Germany also argues that since the payment mechanism is the same for all users of German motorways, it is not clear why the system would discriminate against non-German road hauliers which might use the motorways only occasionally. The total toll reimbursement accumulated in any one calendar year may be offset against the toll debt in the following year.

(58) The German authorities note that the measure does not contradict Directive 1999/62/EC since the administrative obstacles for non-German road hauliers are not considered to be higher than for German road hauliers. According to German authorities, standardised forms will be available in an appropriate number of EU languages and the information requested will be mainly figures, so that foreign hauliers will have an easy access to the reimbursement system. The administrative burden of keeping vouchers up to one year corresponds to other procedures such as the VAT-reimbursement. It can also be shown that in many cases vouchers have to be kept until the end of the year also for other reasons such as company audits of national tax authorities. Therefore, Germany concludes that the reimbursement system does not create administrative obstacles or practical burdens that would lead to a discrimination against non-German road hauliers.

(59) With regard to the criticism of the TRS, such as the insufficient number of OBUs which might have an indirect impact on the aid measure itself, the German authorities argue that the practical aspects of the toll do not have any influence on the TRS.

(60) The German authorities do not consider that Article 8(4) of Directive 92/81/EEC is violated since the measure only reduces the level of the toll rate and is not intended to reduce excise duties on mineral oil as stipulated in this Directive.

(61) As regards the effect of the measure on the environment, Germany contradicts the argument that the aid measure would favour the consumption of fuel and therefore would have negative effects on the environment. According to the German authorities, a simple calculation shows that an increase of fuel consumption with a view to obtaining a higher reimbursement is against all economic logic. Higher consumption would mean that vehicles drive longer than necessary foreseen which would increase time and staff-costs.

(62) As regards the toll measure, the German authorities first of all note that all arguments related to it are not subject to the current State aid procedure and should therefore be kept outside the scope of this decision. In addition, Germany declares that the toll system has been introduced once all the technical problems have been solved in a way that discrimination on the grounds of nationality or inappropriate hindrance of traffic flows has been excluded.

(63) To summarise, the German authorities reply to the main arguments presented by third parties as follows:

— First, the toll is not discriminatory as the decision whether to fill the tank within Germany or not is a purely economic decision which will be taken by German road hauliers as well as by non-German road hauliers. The connection between toll reduction on the one hand and the payment of excise duties on the other hand is reasonably justified as heavy goods vehicles that use federal motorways are now paying a double contribution to infrastructure costs, in the form of excise duties on fuel and the toll. The TRS takes into account infrastructure costs contributions already paid in Germany and will avoid a double payment. The toll respects Article 7(4) of Directive 1999/62/EC since the toll does not discriminate against any road haulier on the grounds of nationality.

— Secondly, the toll is not discriminatory just because it is levied only on vehicles of at least 12 tonnes. The threshold of 12 tonnes is reasonably founded and follows the definition of vehicles stipulated in Article 2(d) of Directive 1999/62/EC. In addition, the toll does not favour German road hauliers since it cannot be shown that German road hauliers for international transport are better off using of mixed fleet of vehicles of below and above 12 tonnes in comparison to non-German road hauliers allowing them to partially compensate the toll burden within the fleet of one company. The toll is calculated in such a way that it respects Article 7(9) of Directive 1999/62/EC since the weighted average toll is related to the costs of constructing, operating and developing the infrastructure network concerned.

— Thirdly, the new toll system will respect Article 7(5) of Directive 1999/62/EC as a sufficient number of OBUs, as well as other payment mechanisms (such as terminals and the Internet) ensure that the toll is collected in such a way that the free flow of traffic is not hindered.

— Fourthly, the toll measure does not violate Article 9(2) of Directive 1999/62/EC, since it does not prevent Member States from contributing to the balanced development of transport networks a percentage of the amount of the toll.

— Fifthly, the German authorities note that the toll system will not lead away from a harmonised European model of infrastructure charging guaranteeing interoperability and does therefore not contradict recital 17 of Directive 1999/62/EC.

— Sixthly, German authorities note that the administrative requirements for the classification of the emission classes of foreign vehicles is not discriminatory because it is limited to the necessary steps needed in order to classify those vehicles.

— Finally, the German authorities also note that the toll system does not violate any Treaty provision such as Articles 28, 90, 92 and 97.

5. **ASSESSMENT OF THE AID**

5.1. **Existence of aid under Article 87(1) of the EC Treaty**

(64) Article 87(1) of the EC Treaty says that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.

(65) The Commission considers that the toll reimbursement, which can be requested from the Federal Office for Goods Transport — part of the national administration — concerns State funds and implies a loss of State resources. The measure by itself provides individual road transport undertakings with a selective advantage over competitors as they get a compensation for the charges for the use of infrastructure they are supposed to bear themselves. The TRS cannot be considered as a general measure as it is only applicable to undertakings using vehicles of not less than 12 tonnes which are liable for the toll and only if and to the extent that they can provide evidence that they have paid excise duties in Germany. Furthermore, since access to the road haulage market has been opened up to Community operators completely ([39]), it can be assumed that public financial aid, which favours certain undertakings performing road transport and, more generally, road transport over other modes, will affect trade between Member States. Any such financial aid therefore distorts or threatens to distort competition and affects trade between Member States.

(66) On the basis of these considerations the Commission finds that the notified TRS constitutes aid pursuant to Article 87(1) of the EC Treaty.

5.2. **Compatibility of the aid**

5.2.1. *Availability of relevant legal basis*

(67) At the moment the Commission initiated the procedure laid down in Article 88(2) of the EC Treaty, it was not in the possession of any legal texts concerning the introduction of the TRS. However, on 22 August 2003, the German authorities provided the relevant legal basis. Therefore this lack of information no longer exists.

5.2.2. *General comments about the toll*

(68) The introduction of a distance-based user charge, recovering the costs of the infrastructure, is one of the key elements of the EC common transport policy:

— First, the proposed introduction of the toll is in line with the Commission's thinking on a more cost-related pricing structure in the European transport policy White Paper ([40]). The White Paper contains a chapter concerning the gradual charging for the use of the infrastructure. The European Union is currently made up of a Europe of tolls, where users have to pay on toll motorways, a Europe of 'eurovignettes' paid by heavy goods vehicles throughout the entire network, and a Europe where no charges are applied at all. This situation can be improved.

— Secondly, the replacement of user charges currently levied on heavy goods vehicles with a toll system could lead to a fairer share of infrastructure costs because a considerable proportion of the cost of motorway construction, maintenance and operation is due to heavy goods vehicles.

— Thirdly, the toll will serve one of the objectives of the Community as mentioned in Article 2 of the EC Treaty, which is to promote a 'high level of protection and improvement of the quality of the environment'.

— Finally, considering the overall measure, it seems that the same applies to the potential advantages to be derived from shifting goods traffic from road to more environmentally friendly modes of transport. The change from a time-based motorway user charge to a mileage-based charge means that short distances become cheaper and long distances more expensive. This result does not only meet the need to make users bear a fairer share of the infrastructure costs, it also takes into account the fact that only on longer routes less polluting modes of transport (rail and waterway) offer an alternative to road transport.

(69) The German Federal Government aims to make users bear a more realistic share of road costs. The stated aim of the toll system is to make the users pay the price of the infrastructure, and the price of 15 cents/km is estimated by Germany as the amount that 'fully covers the costs of construction, development and operation of the relevant infrastructure in the sense of Directive 1999/62/EC (Eurovignette)'. But this goes hand in hand with putting a greater burden on the road haulage industry. Instead of the EUR 460 million collected in Germany under the Eurovignette system (in 2002), the hauliers will have to pay infrastructure costs of approximately EUR 3,4 billion. Although, according to the notified proposal of the German authorities, a compensation of EUR 600 million could be granted, the total charge for road hauliers is still increasing as this compensation would cover only 17 % of the total toll charges of EUR 3,4 billion.

([39]) Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ L 95, 9.4.1992, p. 1) and Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ L 279, 12.11.1993, p. 1).

([40]) *European transport policy for 2010: time to decide*, European Commission 2001, Table 3, p. 72.

5.2.3. *Non-application of Article 19(1) of Directive 2003/96/EC* ([41])

(70) The Commission notes that the purchase of fuel and the payment of excise duties by qualifying vehicles in Germany offer a mechanism to calculate the reimbursement of the toll.

(71) A clear legal distinction exists between the levy of excise duties and the levy of toll for heavy goods vehicles for the use of infrastructure. The two systems are based on different legal acts like the Directives on excise duties (92/12/EEC ([42]) and 2003/96/EC) and the Directive 1999/62/EC (Eurovignette).

(72) The Court has recognised the difference between toll and other levies for the use of roads on the one hand, and taxes on the other hand. According to the case-law toll is not qualified as a tax, but as a payment for using a service. The same reasoning goes for other levies for the use of roads due to the direct link between the levy and the infrastructure that can be used ([43]). On the basis of this case-law and taking into consideration that the excise duty only serves as a reference to calculate the reimbursement and that there is a clear distinction between the financial flows of excise duties on one side and the toll payment and toll reimbursement on the other, the Commission considers that the current reimbursement of the toll cannot be qualified at the same time as a reimbursement of the excise duties. Such a qualification would lead to the situation in which the reimbursement would fall under two different legal frameworks which would violate the principle of legal certainty.

(73) The fact that the reimbursement is linked to the payments of excise duties cannot change the legal qualification of the reimbursement, especially taking into account that the two financial flows are not linked. If this were to be the case, any new condition that should be added, for example the limitation of the reimbursement to a certain type of truck, would risk changing the legal qualification and, as a consequence, the legal framework, which would violate the principle of legal certainty.

(74) It should also be pointed out that there is no fiscal link between the toll rate and the excise duty on gas oil. They have each one their own source (the use of the motorway on the one hand, the consumption of the mineral oil on the other hand). The revenues of the toll will fully be used to cover the costs of construction, exploitation and improvement of the infrastructure, contrary to the revenues on the excise duty on gas oil. The reimbursement is generally deducted from the amount of toll payment due, or, it is refunded using the resources collected on the basis of the tolls.

(75) In view of the above, the Commission comes to the conclusion that Article 19(1) of Directive 2003/96/EC on the Community Framework for the taxation of energy products and electricity which replaces Article 8(4) of Directive 92/81/EEC is not applicable ([44]). As a consequence, the German authorities do not have to notify the aid measure under the framework of the procedure laid down in Article 19(1) of Directive 2003/96/EC.

5.2.4. *Assessment of the compatibility with the common market*

(76) According to Article 73 of the EC Treaty, aids which meet the needs of coordination of land transport are compatible with the Treaty.

(77) Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway ([45]) implements Article 73 of the Treaty and provides for specific exemptions for aid, which are deemed to meet the needs of coordination of inland transport. In particular, Article 3(1)(b) of Regulation (EEC) No 1107/70 stipulates that Member States may, until the entry into force of common rules on the allocation of infrastructure cost, provide aid to undertakings that have to bear expenditure relating to the infrastructure used by them while other undertakings are not subject to a like burden.

(78) According to the Commission's practice in the handling of State aid cases, three requirements must be fulfilled, so that the aid meets the needs of coordination of transport within the meaning of Article 73 of the EC Treaty ([46]) and the requirements laid down in Article 3(1)(b) of Regulation (EEC) No 1107/70:

(a) the aid is necessary to enable the realisation of the measure in the interest of the Community and respects the principle of proportionality;

([41]) Former Article 8(4) of Directive 92/81/EEC.

([42]) OJ L 76, 23.3.1992, p. 1.

([43]) Case C-276/97 *Commission v France* [2000] ECR I-6251, paragraph 36 of the judgment and the Opinion of Advocate General Alber, together with the case-law cited there. Agreements EU-Bulgaria and Hungary, C-211/01, point 50 (not yet published).

([44]) Article 19(1) stipulates that the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations.

([45]) OJ L 130, 15.6.1970, p. 1.

([46]) See Commission Decision of 18 December 2002, N 287/02 — Denmark (OJ C 34, 13.2.2003, p. 7), Commission Decision of 19 September 2001, N 500/01 — United Kingdom, *Network Grants to Licensed Heavy Rail Infrastructure Managers* (OJ C 333, 28.11.2001, p. 7); Commission Decision of 20 June 2001, N 219/01 — Austria (OJ C 224, 1.9.2001, p. 2); Commission Decision of 22 December 1999, N 617/98 — The Netherlands (Utrecht) (OJ C 71, 11.3.2000, p. 7); Commission Decision of 8 December 1999, N 412/98 — Italy (Marche) (OJ C 55, 26.2.2000, p. 11); Commission Decision of 8 July 1999, N 121/99 — Austria (OJ C 245, 28.8.1999, p. 2); Commission Decision of 21 April 1999, N 588/98 — Denmark (OJ C 166, 12.6.1999, p. 6); See also *Commission proposal for a Regulation of the European Parliament and of the Council concerning the granting of aid for the coordination of transport by rail, road and inland waterway* (COM(2000) 5 final) of 26 July 2000).

(b) access to the aid is granted on non-discriminatory terms;

(c) the aid does not give rise to a distortion of competition to an extent contrary to the common interest.

Non-discrimination

(79) Regarding the principle of non-discrimination, the Commission considers that all aid is by definition selective. If a measure is not qualified as selective it is not an aid measure in the sense of Article 87 of the EC Treaty. If the measure has been qualified as an aid, the Commission should assess the compatibility with the common market. Case-law and Commission practice have always clearly distinguished between this selectivity inherent to all aid, which means a disadvantage for some operators in relation to others operating in a Member State, and possible discriminations based directly or indirectly on nationality or on the establishment in the Member State in question ([47]). The latter is not compatible with Community law and cannot be approved under State aid rules.

(80) It is settled case-law that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial, objective differences. However, since undertakings not established in a certain territory are in a different position vis-à-vis the authority from undertakings established within that territory, it cannot be said that any mechanism that makes access to aid more difficult to them violates the principle of non-discrimination ([48]).

(81) In the case at hand, the TRS provides for offsetting the toll only on presentation of German refuelling receipts and vouchers in order to proof that excise duties have been paid in Germany. In this condition the Commission doesn't see any violation of the principle of territoriality mentioned in recital 20 of Directive 1999/62/EC. The TRS imposes the same conditions on all hauliers and is accessible for all road hauliers, irrespective of nationality or residence. The measure does not foresee any thresholds, e.g. a minimum amount of toll charge or a minimum transport volume. In addition, there is no obligation to buy fuel in Germany nor is there any restriction to do so. Therefore, the Commission considers that there is no direct discrimination on the basis of nationality.

(82) Though there is no direct discrimination, the question arises whether this link leads to a *de facto*, indirect discrimination on the basis of nationality. A difference in treatment exists between road hauliers who fill their tank in Germany and road hauliers who fill their tank in another Member State. This difference is caused by the link between the toll reimbursement and the payment of excise duties in Germany.

(83) If this difference in treatment produces different effects on German hauliers, on the one hand, and hauliers from other Member States, on the other hand, favouring the former over the latter, and does not reflect an objective difference in the respective situations, it would imply a violation of the principle of non-discrimination. The question is therefore whether the link between the toll reimbursement and the payment of excise duties can be justified by objective differences. In order to answer this question, the Commission will start examining how this link will work out in practise and which hauliers will benefit from it.

(84) Located in the core of Europe, the German motorways are already highly frequented by non-German road hauliers. While in 1998 22,1 % of heavy goods vehicles of German motorways were non-German, this share has risen to an estimated 25,5 % in 2004. EU-25 vehicles represent almost 92 % of the non-German heavy goods vehicles on the German motorways ([49]).

(85) Since fuel prices are currently higher in Germany than in most neighbouring countries, this encourages neither German nor non-German hauliers engaged in international transports to fill their tank in Germany.

([47]) Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 86 and 87.

([48]) Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 57: 'It must first of all be pointed out that the Commission's argument that there is discrimination against undertakings from other Member States, since the mechanism makes access to aid more difficult for them, is without foundation. […]. A measure to support investment adopted by a public authority can by definition apply only in respect of the territory for which it is responsible and the authority cannot be criticised for not extending the benefit of the measure to undertakings not established in its territory, since such undertakings are in a wholly different position vis-à-vis the authority from undertakings established within the territory. That statement does not, however, mean that such a measure of support cannot be classified as "aid within the meaning of Article 92(1) of the Treaty if it fulfils the conditions laid down by that provision."'

([49]) *Source*: Report on the economic effects on road hauliers of the German reimbursement system linked to the toll system for heavy goods vehicles, 21.4.2005, MVV Consultants and Engineers.

(86) The decision whether to fill the tank within Germany or not is an economic decision which will be taken under the same conditions by both German road hauliers as non-German road hauliers. Within the limits of their itinerary, all road hauliers will fill their tank where they can see an economic benefit. After introduction of the TRS, the road hauliers that will fill their tank outside Germany would not benefit from the compensation, but might have an economic advantage to do so. They will use the possibility of benefiting from the TRS if the price per km resulting from German fuel plus a reduced toll rate is lower than the price per km resulting from fuel outside Germany plus the full toll rate.

(87) In practise the benefits of the TRS will mainly concern two groups of hauliers (relative benefits as the toll will increase to an average of 15 cents/km) ([50]):

— Those hauliers engaged only in national transport and economically forced to use the motorways. These hauliers are predominantly of the German nationality, though this market segment is open to all EU-15 Member States (cabotage) and will be open to the new Member States after expiry of transitional regulations.

— All hauliers, German or non-German, who perform international transports from, to or through countries with a relatively high fuel price level. Such a situation would concern, in particular, hauliers established in France, Belgium and the Netherlands, a group of countries, which perform 32 % of all non-German vehicle kilometres on the German motorways.

(88) The German authorities have themselves admitted in their observations that a percentage close to 20 % of German road hauliers, presumably those that perform their activities mainly on the national market and particularly in the central regions of Germany, do not take advantage of lower fuel prices in other countries. On the contrary, hauliers established in other Member States will generally buy fuel not only and not predominantly in Germany, but in other Member States, notably in those with lower fuel prices, even if they perform part of their activity in Germany or even on the German local market, availing themselves of the freedom to perform cabotage transport.

([50]) See also Report on the economic effects on road hauliers of the German reimbursement system linked to the toll system for heavy goods vehicles, 21.4.2005, MVV Consultants and Engineers.

(89) In view of the foregoing, the Commission foresees that, taken into account the current level of fuel prices in the Member States, a very large portion of non-German vehicle kilometres ([51]) on the German motorways will not benefit from the TRS as a result of the link between the TRS and the payment of excise duties in Germany. Such a percentage will obviously be lower in the case of German hauliers. In addition, occasional users of German motorways, particularly from other Member States, may refrain from requesting the TRS because of administrative burdens and would be further penalised in comparison with regular users, particularly German users.

(90) This being the case, the Commission stresses that a road haulier using a German motorway and buying his fuel outside Germany is using the German road infrastructure in exactly the same way as a road haulier who fills up his tank in Germany. It can therefore be concluded that the link between the toll reimbursement and the amount of the excise duties paid in Germany resulting in different levels of toll cannot be justified by differences in the use of German motorways. As a result of this link, some hauliers, which are predominantly non-German as demonstrated in paragraphs 86 and 87, will have to pay more toll than others while transporting the same heavy goods the same distance on the same motorway. In addition, the system in question will favour national transport, largely performed by hauliers that buy fuel in Germany over transport between Member States, performed by hauliers that will more often buy fuel in other Member States, which is another form of discrimination forbidden by Community law ([52]).

(91) Linking the toll reimbursement to the amount of the excise duties paid in Germany may indicate that the system is conceived as a compensation for a high level of excise duties on fuel in Germany. However, the Commission practice and Court jurisprudence are very clear on this point: the difference in the tax burden cannot by itself ([53]) justify the granting of State aid. Granting an aid cannot be justified when the aid is meant to compensate some national operators for their comparative disadvantage resulting from regulatory or fiscal differences compared to other Member States. State aid is not a suitable instrument for levelling out, in favour of certain operators, differences in levels of taxation between the Member States. As a consequence,

([51]) The indicator for the use of the motorway by vehicles is the transport performance measured in vehicle kilometres

([52]) Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraphs 17 to 21, and Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 25.

([53]) See footnote 25. See also Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraphs 61 and 62, Case C-382/99, *Netherlands v Commission* [2002] ECR I-5163, paragraphs 60 to 66, C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 22.

the fact that the level of excise duties is high in Germany — and thus diesel prices — in Germany and a need is perceived to alleviate an alleged competitive disadvantage for German hauliers, does not justify the link between the TRS and the payment of excise duties. In addition, petrol prices are also high in other Member States and hauliers from those Member States, that for geographical and operative reasons are less likely to buy fuel in Germany, will not benefit from the compensation to the same extent as German hauliers.

(92) The fact that the German authorities argue that currently 50 % of the revenues of the excise duties is ring-fenced for infrastructure and the TRS is needed to avoid that hauliers will pay twice for the infrastructure does not prejudice to this conclusion. First, the final destination of tax revenues is not relevant in order to assess whether there is discrimination between German hauliers and hauliers from other Member States. The difference in the tax burden cannot justify the granting of aid, irrespective of the destination of tax revenues. Secondly, only 50 % of the revenues are ring-fenced for infrastructure and of this 50 %, a large share will be used to fund the infrastructure costs of the rest of the German road network for which no toll is required. Therefore, it cannot be held that — as the German authorities argue — hauliers that both pay toll and excise duties are paying a double contribution to the costs of infrastructure, as excise duties revenues are only marginally used to fund infrastructure for which toll is required. Consequently, the fact that the revenues of the excise duties are partially being used to fund infrastructure cannot justify the link between the toll reimbursement and the payment of excise duties either.

(93) In addition, it has to be noted that the character of a toll and an excise duty is different. Toll is a payment for the use of a service, and an excise duty is a tax. As already pointed out in Chapter 5.2.3 of this Decision, the events giving rise to a perception are different: the use of highway in the case of a toll, and the consumption of the mineral oil in the case of excise duties.

(94) In view of the above, the Commission does not see an objective justification for linking a reduction in toll fees to the amount of excise duties paid on German territory. As a consequence, there is no objective justification that could support the difference in treatment between hauliers that fill their tank in Germany and hauliers that fill their tank outside Germany will be subjected to since they are objectively in the same situation.

(95) In the light of these arguments, the Commission comes to the conclusion that the aid measure does not respect the principle of non-discrimination as the measure results in a *de facto* discrimination against foreign road hauliers and, for this reason already, must be considered as incompatibile with the common market.

(96) In addition, the aid measure does not respect Article 7(4) of Directive 1999/62/EC either, which stipulates that toll and user charges may not discriminate, directly or indirectly, on the grounds of nationality of the haulier or the origin or destination of the vehicle.

(97) This provision is only a particular expression of a general principle of Community law and, in particular, of transport law, namely the prohibition of any discrimination based on nationality, place of establishment or the starting point or destination the transport. This principle has been consistently applied by the Community judges ([54]), including in the specific case of road tolls ([55]).

(98) In accordance with a well-established case-law, it is clear from the general scheme of the Treaty that a procedure concerning the compatibility of State aid with the common market must never produce a result which is contrary to the specific provisions of the Treaty ([56]). The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 87 and 88 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ([57]). For the reasons explained above, the measure at stake would violate the principle of non-discrimination and, in particular, Article 7(4) of Directive 1999/62/EC. This violation is inherent in the mechanism of the TRS and therefore is indissolubly linked to it. This constitutes another reason that must lead the Commission to declare the aid incompatible with the common market.

(99) The Commission reminds the German authorities that, in case they consider the overall charges for road hauliers in Germany too high, they could modify, within the limits of existing harmonisation measures on Community level, the vehicle tax or the level of excise duties. These are horizontal and general measures that would in principle result neither in a direct nor in a *de facto* discrimination.

([54]) Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783, paragraph 35; Stylianakis, paragraph 25.
([55]) *Commission v Austria*, paragraphs 74 to 88 and 109 to 115.
([56]) Case 73/79 *Commission v Italy* [1980] ECR 1533, paragraph 11.
([57]) Case 74/76 *Iannelli & Volpi v Meroni* [1977] ECR 557.

Necessity and proportionality

(100) The Commission considers that the necessity of the aid has not been demonstrated. The German authorities argue that the measure has to be seen in the light of the transition actually being undertaken by the German authorities from a tax-based motorway charge to a mileage-based user charge. The Commission understands the wish to introduce transitional measures in view of the increase of the total charges for road hauliers, however notes that the level of the toll has been fixed at a lower level than initially planned, i.e. at 12,6 cents/km instead of 15 cents/km. Refraining from the intended increase of the toll rate would be a more straightforward way of compensating in a transitional period than increasing the toll rate up to 15 cents/km and at the same time, introducing the TRS and reimburse 2,6 cents/km. Moreover, the currently applicable lower rate equally applies to all road hauliers that use German motorways and is therefore non-discriminatory. The intended reimbursement would change this balance, which is not necessary to achieve the intended goal.

(101) In addition, the German authorities have not provided arguments in favour of the TRS which would counterbalance the higher administrative burden, for road hauliers, of the technically complicated introduction of the TRS as compared to simply maintaining the lower toll rate. Road hauliers should present filling station receipts or credit card company vouchers from Germany, each stating the registration number of the concerned vehicle, and request for a toll reimbursement within the deadline each year. Such a burden is likely to be particularly heavy for occasional users of German motorways, particularly from other Member States. The Commission reminds the German authorities that they could increase the level of the toll at any time, provided that the provisions of the Directive 1999/62/EC are taken into account, at the moment they consider it necessary.

(102) In view of these arguments, the Commission concludes that the aid measure does not respect the principle of necessity either, which again constitutes a sufficient ground to declare it incompatible with the common market.

Distortion of competition contrary to the common interest

(103) In view of the foregoing, the Commission considers that the last condition of Article 3(1)(b) of Regulation (EEC) No 1107/70 that the aid should not give rise to a distortion of competition to an extent contrary to the common interest is not fulfilled, either. As explained above, the aid will unduly favour German hauliers over their competitors from other Member States, which goes against the correct functioning of the common transport market and the very principle of freedom to provide transport. For this reason, too, the aid must be declared incompatible with the common market.

(104) Finally, it should be noted that the German authorities have not invoked any compatibility grounds other than Article 73 of the EC Treaty. In any event, the Commission confirms its preliminary assessment in paragraph 57 of the decision to open the formal investigation procedure: the aid cannot be declared compatible in accordance with Article 87(3)(a), (b) and (c), nor indeed by virtue of any other derogation.

6. **CONCLUSION**

(105) The Commission concludes that the TRS is an aid measure which does not fulfil the conditions of Article 73 and Article 3(1)(b) of Regulation (EEC) No 1107/70 and is therefore incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which the Federal Republic of Germany is planning to implement and which is based on Section 3, paragraph 2 of Article 1 of the Law on the imposition of mileage-based charges for the use of motorways by heavy goods vehicles is incompatible with the common market.

Article 2

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 25 January 2006.

For the Commission

Jacques BARROT

Vice-President