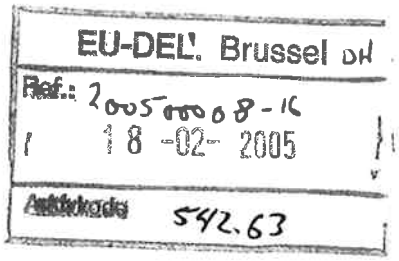
Brussels, 16 February 2005
Case No: 2982, 2729
Event No: 306345
Dec. No: 31/05/COL

EFTA SURVEILLANCE AUTHORITY



REASONED OPINION
delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice regarding the failure by Norway to fulfil its obligations arising from Article 14 of the EEA Agreement

1. Introduction and relevant national law

In accordance with Section 1-3 of the Norwegian Regulation No. 268 of 19 March 2001 on registration tax (*Forskrift 19 mars 2001 nr. 268 om engangsavgift på motorvogner*), hereafter "Regulation No. 268", a motor vehicle registered for the first time into the national motor vehicle registry (*Det sentrale motorvognregisteret/Autosys*) is subject to registration tax. The tax (*engangsavgiften)* is a specific one-time tax which applies, as a general rule, to all vehicles, whether new or used. The tax is calculated according to the net weight, engine power and cylinder capacity of the vehicle, the rates being set out in the Annual Tax Decree (*Stortingets avgiftsvedtak*).

When a *used* motor vehicle is registered in Norway for the first time, deduction is made from the registration tax in accordance with a fixed scale set out in Section 3-3 of Regulation No. 268. The deduction, which is based solely on the age of the vehicle, is granted to vehicles in the following manner:

Up to	6 months	2% per month
Older than	6 months	12%
Older than	1 year	17%
Older than	2 years	30%
Older than	3 years	36%
Older than	4 years	42%
Older than	5 years	45%
Older than	6 years	50%

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Older than	7 years	55%
Older than	8 years	59%
Older than	9 years	63%
Older than	10 years	67%
Older than	11 years	70%
Older than	12 years	73%
Older than	13 years	76%
Older than	14 years	78%
Older than	15 years	80%

The age of the motor vehicle is calculated from the first time the vehicle was registered abroad to the date of its registration in Norway. The minimum amount of tax levied equals the registration tax for vehicles of 30 years old or more, which is a flat rate set by the Annual Tax Decree.

The scale of reductions laid down in Section 3-3 of Regulation No. 268 is based on a report made by an independent Norwegian research institute (*Transportøkonomisk Institutt*) in 1995. In the report, the average relative market value of second-hand vehicles in the Norwegian market was measured as a fraction of the original price of a new vehicle. For each year, each model's depreciation was weighted using that model's share in total sales during that particular year. The report was based on data on vehicle prices collected between years 1985-1993.

A Working Group, set up to evaluate the present Norwegian regime on passenger vehicle taxation in general, was also supposed to evaluate the registration tax on imported second-hand vehicles. Accordingly, new data regarding prices of second-hand vehicles on the Norwegian market was collected for the purpose of updating the scale contained in Section 3-3 of Regulation No. 268. The Working Group's report was presented 1 May 2003. However, the timeframe for the adoption of the report did not allow the data collected to be processed. As far as the EFTA Surveillance Authority (hereafter "Authority") has been informed, the Norwegian authorities have since then not taken any concrete initiatives to update the fixed depreciation scale.

2. Relevant EEA law

Article 14(1) of the EEA Agreement prohibits EEA States from imposing, directly or indirectly, on products imported from other EEA Sates any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

As Article 14 of the EEA Agreement is identical in substance with Article 90 of the EC Treaty, the jurisprudence of the Court of Justice of the European Communities (hereafter "Court of Justice") in relation to Article 90 is of importance when assessing the compatibility of the Norwegian provisions.[1]

The Court of Justice has over the years in a number of cases dealt with issues regarding taxes levied upon importation of second-hand vehicles. Most of the cases involve systems of taxation where the amount of tax is calculated on the basis of fixed criteria or a scale rather than the value of the vehicle (*ad valorem* taxation). The Court of Justice has strived to ensure that the rules of calculation do not have the effect of discriminating against

[1] See in that respect, Case E-1/01, *Hörður Einarsson v the Icelendic State*, [2002] EFTA Court Report page 1, at paragraph 24.

imported vehicles, and has repeatedly stated that it is incompatible with Article 90 of the EC Treaty (Article 14 of the EEA Agreement) for a Member State to levy on second-hand vehicles from other Member States a tax which, calculated on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, without taking the vehicle's actual depreciation into account, exceeds the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory. Reference is made to the rulings of the Court of Justice in, *inter alia,* cases *Nunes Tadeau,*[2] *Gomes Valente*[3], *Siilin*[4] and *Weigel.*[5]

3. Developments in the present cases

At the Special Package meeting in Oslo on 14 November 2002, the services of the Authority drew the attention of the Norwegian authorities to the case law of the Court of Justice. In particular, it was pointed out that there should be an opportunity for an importer of a second-hand vehicle to challenge the application to his vehicle of a fixed depreciation scale based on general criteria. Following the discussions at the Package meeting, the Authority summarised its position in a follow-up letter to Norway dated 17 December 2002, on which Norway submitted its observations by a letter dated 29 January 2003 (your ref. 01/2400 SL RHN/KR).

On 16 April 2003, the Authority's services sent a letter to Norway concluding that the system for calculating the depreciation in value of imported second hand vehicles appeared to be contrary to Article 14 of the EEA Agreement and invited the Norwegian Government to submit observations on the contents of the letter. In its reply dated 18 June 2003 (your. ref. 01/2400 RHN), Norway argued that the implications of the ruling of the Court of Justice in *Gomes Valente* regarding the possibility to challenge the scale for the assessment of registration tax were unclear. Nevertheless, the Ministry of Finance indicated that it would examine the possibility of providing a right for an importer of a second-hand vehicle to adduce evidence that the fixed depreciation scale laid down in Section 3-3 of Regulation No. 268 is inadequate in order to determine the real value of the second-hand vehicle imported by him.

At the Package meeting of 23 September 2003, Norway informed the Authority's services that a closer assessment of possible differences between the Norwegian system and the Portuguese system addressed by the Court of Justice in *Gomes Valente* had not yet been conducted and, consequently, no amendments to the Norwegian rules had yet been considered. In the follow-up letter to Norway dated 10 October 2003, the Norwegian Government was invited to communicate to the Authority its position regarding the question of introducing a right for the importer of a second-hand vehicle to adduce evidence that the fixed depreciation scale is inadequate to determine the real value of the imported vehicle. Norway was also invited to communicate to the Authority the proposed amendments to Section 3-3 of Regulation no. 268 which would extend the application of the depreciation scale to imported second-hand vehicles younger than six months.

In its letter dated 12 November 2003 (your ref. 01/2400 SL RHN/KR), Norway informed the Authority that as of 1 January 2004, the fixed depreciation scale contained in Section

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[2] Case C-345/93 *Fazenda Pública and Ministério Público v Américo João Nunes Tadeu* ECR [1995] I-479.
[3] Case C-393/98 *Ministério Público and António Gomes Valente v Fazenda Pública* [2001] ECR I-1327.
[4] Case C-101/00 *Tulliasiamies and Siilin* ECR [2002] I-7487.
[5] Judgment of 29 April 2004 in Case C-387/01 *Harald and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg,* not yet reported.

3-3 of Regulation No. 268 would include vehicles younger than six months. In respect of such vehicles, a two percent depreciation per month would apply.

In a letter dated 22 December 2003 (your ref. 01/2400 SL RHN/rla), Norway maintained its earlier position that the Norwegian tax-regime on imported second-hand vehicles is compatible with Article 14 of the EEA Agreement. Norway nevertheless noted that "Article 14 of the EEA Agreement does not prevent the continued use of the fixed table set down in regulation No 268 if the owner of an imported vehicle is given the right to subsequently present documentation and ask to tax-authorities for reconsideration of the decision taken. This could be put into practice in different ways, and the Ministry would appreciate if the Authority could express its opinion on the following principles for such a system."

At the Package meeting of 23 September 2003, the Authority's services also informed Norway about a recently received complaint from an association of vehicle importers, alleging that the residual amount of tax incorporated in the value of a second-hand vehicle on the domestic market is always lower than the tax imposed on a similar importer vehicle. In order to assess the complaint, the Authority's services, by a letter dated 30 October 2003, requested information from Norway concerning the fixed depreciation scale. In its reply dated 22 December 2003 (your ref. 03/3508 SL RHN/rla), the Norwegian Government stated that "new evaluations [of prices of second-hand vehicles on the Norwegian market] indicate that the present deduction in the registration tax according to the table set down in Regulation No 286 s. 3-3 might be somewhat low".

On 5 March 2004, the Authority's services sent two letters to Norway. In the letter concerning the degree of precision of the fixed depreciation scale, the Authority's services expressed the opinion that as the fixed depreciation scale does not appear to reflect with sufficient precision the actual depreciation of vehicles, the Norwegian system for calculating the depreciation in value of imported second-hand vehicles is contrary to Article 14 of the EEA Agreement.

In the other letter concerning the right of an importer to challenge the application of the fixed depreciation scale on his vehicle, the Authority's services emphasised that a system of taxation of imported second-hand vehicles such as that in place in Norway, which takes into account the actual depreciation of imported vehicles on the basis of general criteria, is compatible with Article 14 of the EEA Agreement only if it is arranged in such a way as to exclude any discriminatory effect. The exclusion of any discriminatory effect presupposes that the taxpayer has a right to challenge the application of the fixed scale to his vehicle by demonstrating that it leads to taxation higher than the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory. However, it was recalled that it was for Norway to decide on the particulars of the system allowing importers to adduce evidence that the fixed depreciation scale was inadequate to determine the real value of the second-hand vehicles imported by him.

In its replies of 30 March 2004 to the two letters, Norway upheld its previously stated position that the Norwegian tax regime on imported second-hand vehicles is compatible with Article 14 of the EEA Agreement. As regards the right of an importer to challenge the application of the fixed scale to his vehicle, the Authority's services were, however, informed that the Directorate of Customs and Excise had been asked to give a preliminary evaluation of a possible system where the taxpayer is given such a right (your ref. 01/2400 SL RHN/HKT). No time-frame was indicated in the letter for such evaluation. In its reply concerning the degree of precision of the fixed depreciation scale (your ref. SHB),

Norway merely made a reference to its views previously communicated to the Authority in the letters of 29 January 2003, 18 June 2003 and 22 December 2003.

In these circumstances, on 14 July 2004, the Authority issued a letter of formal notice to the Norwegian Government, in which it concluded that the Norwegian system for calculating the depreciation in value of imported second-hand vehicles is contrary to Article 14 of the EEA Agreement as it fails to guarantee that the amount of tax does not exceed, even in a few cases, the amount of residual tax incorporated in the value of similar vehicles already registered in the national territory. Norway was invited to submit its observations on the content of the letter within three months following the receipt thereof. By an e-mail of 12 October 2004, Norway requested a one month extension of the deadline in order to be able to submit its observations "in a satisfactory manner".

The Norwegian Government submitted its observations on the letter of formal notice by a letter dated 23 November 2004 (your ref. 01/2400 SA RHN/kala), upholding its previously stated position that the Norwegian tax regime on imported second-hand vehicles is compatible with Article 14 of the EEA Agreement. As regards the legal argumentation by Norway, a reference was made to the previous observations submitted by the Norwegian Government by letters dated 29 January 2003, 18 June 2003 and 30 March 2004.

As no new arguments were brought up by Norway despite the granting of the requested one month extension to submit observations to the letter of formal notice, the Authority cannot but reiterate its assessment already given in the letter of formal notice.

4. The Authority's Assessment

In assessing the Norwegian provisions on registration tax, regard must be paid to the rulings of the Court of Justice mentioned above in Point 2. In *Gomes Valente*, the Court assessed the Portuguese system of car tax, the structure of which seems to be very similar to the Norwegian system. According to the Portuguese system, as it was at the time of the judgment, the sole depreciating factor taken into account in order to determine the fixed percentages of reduction on registration tax was the number of years' use of the vehicle.

The questions put before the Court of Justice by the national court in *Gomes Valente* related to the question whether the first paragraph of Article 90 of the EC Treaty (Article 14 of the EEA Agreement) permits a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the real value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales laid down by statute, regulation or administrative provision, without requiring the national authorities to carry out an individual assessment of the value of each imported second-hand vehicle.

Regarding the possibility to calculate the depreciation of imported second-hand vehicles in a general and abstract manner, the Court of Justice referred to its earlier judgments regarding registration tax and recalled, *inter alia*, the principle formulated in *Nunes Tadeau*. Accordingly, it is incompatible for a Member State to charge on second-hand vehicles imported from another Member State a tax which, being calculated without taking the vehicle's actual depreciation into account, exceeds the residual tax incorporated in the value of a similar second-hand vehicle already registered in the national territory.[6]

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[6] Case C-393/98 *Gomes Valente*, cited above, at paragraph 23.

The Court of Justice pointed out, however, that it did not follow from the case law that the actual depreciation of the vehicles cannot be taken into account otherwise than by means of an assessment or an expert examination of each vehicle. Consequently, the Court held that:

> "Avoiding the administrative burden inherent in such a system, a Member State *might be able to establish*, by means of fixed scales determined by statute, regulation or administrative provision and calculated on the basis of criteria such as a vehicle's age, kilometrage, general condition, method of propulsion, make or model, a value of second-hand vehicles which, as a general rule, would be very close to their actual value."[7] (emphasis added)

The Court of Justice, however, emphasised that in order for a system of taxation of imported second-hand vehicles - which takes into account the actual depreciation of the vehicles on the basis of general criteria - to be compatible with Article 90 of the EC Treaty (Article 14 of the EEA Agreement), it would have to be arranged in such a way as to exclude any discriminatory effect.[8]

As in *Gomes Valente* regarding the Portuguese registration tax, the two essential points concerning the Norwegian system of registration tax at issue here are, first, the degree of precision with which the fixed scale contained in Section 3-3 of Regulation No. 268 reflects the actual depreciation of vehicles and, second, the opportunity of the owner of an imported second-hand vehicle to challenge the application to his vehicle of the fixed scale based on general criteria.

(i) Degree of precision with which the fixed scale reflects the actual depreciation of the vehicle

Although the Court of Justice has not precluded the application of a fixed taxation scale for imported second-hand cars, even if based on a single criterion of depreciation, it has nevertheless noted that taking *other factors* of depreciation into account in addition to a vehicle's age, would be likely to result in the "*fixed scale reflecting the actual depreciation of vehicles much more precisely*".[9]

Irrespective of the criteria used for calculating the depreciation in the value of second-hand vehicles, in order to be compatible with Article 14 of the EEA Agreement, a fixed scale must *reflect precisely* the actual depreciation of imported second-hand vehicles in such a way as to exclude any discriminatory effect. As the Court of Justice pointed out in *Gomes Valente*, the Portuguese Government had been unable to demonstrate that depreciating factors other than the number of year's use of the vehicles had been taken into account in order to determine the percentages of reduction in the tax and, moreover, had acknowledged that the scale of reduction "*did not reflect with sufficient precision the actual depreciation of vehicles*".[10]

Consequently, the reduction in the registration tax must be *directly proportional to the loss in value* of the vehicle so that the amount of tax on imported second-hand vehicles

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[7] Case C-393/98 *Gomes Valente*, cited above, at paragraph 24.
[8] Case C-393/98 *Gomes Valente*, cited above, at paragraph 26.
[9] Case C-393/98 *Gomes Valente*, cited above, at paragraph 28.
[10] Case C-393/98 *Gomes Valente*, cited above, at paragraph 29.

does not exceed that of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory.[11]

As in Portugal at the time of the judgment, the Norwegian depreciation scale for imported second-hand vehicles is based on a single criterion of depreciation, i.e. the number of years for which the vehicle has been used. The percentages of reduction in Norwegian registration tax as contained in Section 3-3 of Regulation No. 268 were calculated in 1995 on the basis of the average value of second-hand vehicles on the Norwegian market between years *1985 and 1993*. It does not seem unlikely to the Authority that the patterns of depreciation have changed since 1995. Indeed, as stated by the Norwegian Government in its letter of 22 December 2003, "new evaluations [of prices of second-hand vehicles on Norwegian market] indicate that the present deduction in the registration tax according to the table set down in Regulation No 286 s. 3-3 *might be somewhat low*" (emphasis added). Furthermore, it can be assumed that depreciation differs between different brands and models, as well as according to, for instance, the general condition and kilometrage of the vehicle.

Consequently, it is the opinion of the Authority that the Norwegian scale of tax reductions as laid down in Section 3-3 of Regulation No. 268 does not reflect with sufficient precision the actual depreciation of vehicles. Therefore, the scale is not capable of guaranteeing that the amount of tax due does not exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory.

(ii) Opportunity for the owner of an imported second-hand vehicle to challenge the application to his vehicle of a depreciation scale based on general criteria

In *Gomes Valente*, the Court of Justice considered whether a fixed scale, whilst reflecting the general trend of depreciation in vehicles but only in an imprecise manner, might nevertheless be compatible with Article 90 of the EC Treaty if the owner of an imported vehicle had an opportunity to challenge the application of that scale to his vehicle. In this respect, the Court held that:

> "[S]uch a possibility, for the owner of an imported vehicle to challenge the application of the fixed scale to his vehicle by demonstrating that it leads to taxation higher than the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory, would prevent any possible discriminatory effects of a system of taxation based on such a scale."[12]

Furthermore, as the Court of Justice later also confirmed in *Siilin*, the requirement concerning the exclusion of any discriminatory effect presupposes, first, that the criteria on which the flat-rate method of calculating the depreciation of vehicles is based are brought to the knowledge of the public and, second, that the owner of a used vehicle imported from another Member State is able to challenge the application of a flat-rate method of calculation to that vehicle. This may mean that the particular characteristics of the vehicle have to be examined in order to ensure that the tax applied does not exceed the residual tax incorporated in the value of similar used vehicle already registered in the national territory.[13]

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[11] Case C-393/98 *Gomes Valente*, cited above ,at paragraph 41.
[12] Case C-393/98 *Gomes Valente*, cited above, at paragraph 32.
[13] Case C-101/00 *Siilin*, cited above, at paragraph 89.

Accordingly, the importer of a vehicle must have a right to adduce evidence that the fixed scale is inadequate to determine the real value of the second-hand vehicle imported by him. Such a right to challenge the application of the fixed scale must exist within the system of taxation. It is therefore not sufficient that a tax always might be challenged before the courts.[14] Furthermore, the criterion or criteria on the basis of which the scale is calculated must be made public.[15]

As the Norwegian depreciation scale contained in Section 3-3 of Regulation No. 268 is based on the average actual depreciation of motor vehicles in Norway, the depreciation of imported vehicles is defined in a general and abstract way and reflects only a general trend of depreciation of vehicles. The scale might therefore lead to an imprecise calculation of depreciation in an individual case. In previous correspondence, Norway has not demonstrated the existence, within the system of car taxation, of a right for the taxpayer to adduce evidence that the fixed scale was inadequate to determine the real value of the second-hand vehicle imported by him. Furthermore, the factors on the basis of which the percentages of reduction in the tax were calculated are not indicated in Regulation No. 268.

Norway indicated in its letter of 18 June 2003 that it is "not clear what the Court's reference in Gomes Valente to the possibility to challenge the application of the fixed scale within the system of taxation actually implies". Norway is of the opinion that the reference must be seen in light of the Portuguese legislation, as "[e]ven if the judgment constitutes a right for the importer to present relevant documentation and challenge the tax stipulated according to a fixed scale at an administrative level under the Portuguese regime, this does not necessarily constitute an equal right under the Norwegian regime".

The Authority fails to see any differences between the Portuguese and the Norwegian systems that would warrant different results in this respect. Both systems apply a fixed scale to calculate the depreciation in value of imported second-hand vehicles. Both of these depreciation scales are based on the sole criterion of age, and are consequently only able to reflect the depreciation in value in an imprecise manner. As under the Portuguese system, an individual is not able to challenge the scale for the assessment for tax on his imported used car under the Norwegian system.

In the view of the Authority, the Norwegian system of registration tax in which the depreciation in the actual value of imported second-hand vehicles is calculated in a general and abstract manner, on the basis of a fixed scale determined by Regulation No. 286, and which does not provide a right for the taxpayer to adduce evidence that the fixed scale is inadequate to determine the real value of the second-hand vehicle imported by him, is not capable of guaranteeing that the amount of the tax due does not exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory.

5. Conclusion

In these circumstances, the Authority must conclude that the Norwegian system for calculating the depreciation in value of imported second-hand vehicles as laid down in Regulation No. 268 of 19 March 2001 on registration tax is contrary to Article 14 of the EEA Agreement as it fails to guarantee that the amount of tax does not exceed, even in a

[14] Case C-393/98 *Gomes Valente*, cited above, at paragraph 35.
[15] Case C-101/00 *Siilin*, cited above, at paragraph 87. See also *Gomes Valente*, cited above, at paragraphs 34 and 36.

few cases, the amount of residual tax incorporated in the value of similar vehicles already registered in the national territory.

FOR THE ABOVE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

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

DECLARES AS ITS REASONED OPINION

that by failing to guarantee that the amount of registration tax payable upon registration of second-hand vehicles imported from other EEA States does not exceed, even in a few cases, the amount of residual tax incorporated in the value of similar vehicles already registered in the national territory, Norway has failed to fulfil its obligations arising from Article 14 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires the Norwegian Government to take the measures necessary to comply with this reasoned opinion within *two months* following notification thereof.

Done at Brussels, 16 February 2005

For the EFTA Surveillance Authority,

Yours faithfully,

Bernd Hammermann
College Member

Niels Fenger
Director