JUDGMENT OF THE COURT (Grand Chamber)

15 November 2005 *

In Case C-320/03,

Action under Article 226 EC for failure to fulfil obligations, brought on 24 July 2003,

Commission of the European Communities, represented by C. Schmidt, W. Wils and G. Braun, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

Federal Republic of Germany, represented by W.-D. Plessing and A. Tiemann, acting as Agents, assisted by T. Lübbig, lawyer,

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. De Bellis, Avvocato dello Stato, with an address for service in Luxembourg,

* Language of the case: German.

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

interveners,

v

Republic of Austria, represented by E. Riedl and H. Dossi, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Schiemann, Presidents of Chambers, R. Schintgen (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis and A. Borg Barthet, Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 24 May 2005,

having heard the Opinion of the Advocate General at the sitting on 14 July 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is asking the Court to hold that, by prohibiting lorries of more than 7.5 tonnes, carrying certain goods, from being driven on a section of the A 12 motorway in the Inn valley (Austria), following the adoption of a regulation by the Landeshauptmann (First Minister) of the Tyrol limiting transport on the A 12 motorway in the Inn valley (sectoral prohibition on road transport) [Verordnung des Landeshauptmanns von Tirol, mit der auf der A 12 Inntalautobahn verkehrsbeschränkende Maßnahmen erlassen werden (sektorales Fahrverbot)], of 27 May 2003 (BGBl. II, 279/2003; 'the contested regulation'), the Republic of Austria has failed to fulfil its obligations under Articles 1 and 3 of 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 1992 L 95, p. 1), as amended by Regulation (EC) No 484/2002 of the European Parliament and of the Council of 1 March 2002 (OJ 2002 L 76, p. 1; 'Regulation No 881/92'), under Articles 1 and 6 of 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 1993 L 279, p. 1), as amended by Regulation No 484/2002 ('Regulation No 3118/93'), and under Articles 28 EC to 30 EC.

Legal and factual background

Community legislation on the internal road transport market

2 Regulations Nos 881/92 and 3118/93 govern the transport of goods by road in Community territory.

3 Regulation No 881/92, which, in accordance with Article 1(1) thereof, applies to the international carriage of goods by road for hire or reward for journeys carried out within the territory of the Community, provides in Article 3 that Member States are to issue Community authorisation to hauliers established in their territory and entitled to carry out the international carriage of goods by road.

4 Under Article 1(1) of Regulation No 3118/93:

'1. Any road haulage carrier for hire or reward who is a holder of the Community authorisation provided for in Regulation (EEC) No 881/92 and whose driver, if he is a national of a non-member country, holds a driver attestation in accordance with the conditions laid down in the said Regulation, shall be entitled, under the conditions laid down in this Regulation, to operate on a temporary basis national road haulage services for hire or reward in another Member State, hereinafter referred to respectively as "cabotage" and as the "host Member State", without having a registered office or other establishment therein.'

5 Under Article 6 of Regulation No 3118/93, the performance of cabotage transport operations is to be subject, save as otherwise provided in Community Regulations, to the laws, regulations and administrative provisions in force in the host Member State in the zones referred to in Article 6(1) and those provisions are to be applied to non-resident transport operators on the same conditions as those which that Member State imposes on its own nationals, so as to prevent any open or hidden discrimination on grounds of nationality or place of establishment.

Community directives on the protection of ambient air quality

6 Community legislation on the protection of ambient air quality consists in particular of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55) and Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41), as amended by Commission Decision 2001/744/EC of 17 October 2001 (OJ 2001 L 278, p. 35; 'Directive 1999/30').

7 According to Article 1 of Directive 96/62, the aim of that directive is to define the basic principles of a common strategy to:

— define and establish objectives for ambient air quality in the Community designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,

— assess the ambient air quality in Member States on the basis of common methods and criteria,

— obtain adequate information on ambient air quality and ensure that it is made available to the public, inter alia by means of alert thresholds,

— maintain ambient air quality where it is good and improve it in other cases.

8 Article 4 of Directive 96/62 provides that the Council of the European Union, on a proposal by the Commission, is responsible for setting limit values for the pollutants listed in Annex I to that directive.

9 Article 7 of Directive 96/62 provides:

'Improvement of ambient air quality

General requirements

1. Member States shall take the necessary measures to ensure compliance with the limit values.

...

3. Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded.'

10 Article 8(3) of Directive 96/62 goes on to provide:

'In the zones and agglomerations [in which the levels of one or more pollutants are higher than the limit value plus the margin of tolerance], Member States shall take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit.

The said plan or programme, which must be made available to the public, shall incorporate at least the information listed in Annex IV.'

11 Limit values for nitrogen dioxide (NO_2) are laid down in Directive 1999/30.

12 According to Article 4 of Directive 1999/30:

'Nitrogen dioxide and oxides of nitrogen

1. Member States shall take the measures necessary to ensure that concentrations of nitrogen dioxide and, where applicable, of oxides of nitrogen, in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex II as from the dates specified therein.

The margins of tolerance laid down in Section I of Annex II shall apply in accordance with Article 8 of Directive 96/62/EC.

2. The alert threshold for concentrations of nitrogen dioxide in ambient air shall be that laid down in Section II of Annex II.'

13 Section I of Annex II to Directive 1999/30 shows that, in relation to nitrogen dioxide:

— the hourly limit value is fixed at 200 $\mu g/m^3$ 'not to be exceeded more than 18 times per calendar year', increased by a degressive percentage tolerance until 1 January 2010;

— the annual limit value is fixed at 40 $\mu g/m^3$, likewise increased by the same degressive percentage tolerance until 1 January 2010, giving 56 $\mu g/m^3$ for the year 2002.

14 Section I also provides that the abovementioned limit values must be complied with on 1 January 2010.

15 According to the fourth recital of Directive 1999/30, the limit values laid down in that directive are minimum requirements and, in accordance with Article 176 EC, Member States may maintain or introduce more stringent protective measures and in particular introduce stricter limit values.

National law and the facts of the dispute

16 Directives 96/62 and 1999/30 were transposed into Austrian law by means of amendments to the Law on Air Pollution (Immissionsschutzgesetz-Luft BGBl. I, 115/1997; 'the IG-L').

17 Article 10 of the IG-L provides that a catalogue is to be published of measures to be taken in the event of a limit value being exceeded. Article 11 of that law sets out the principles to be observed in that event, such as the principle that the polluter pays and the principle of proportionality. Article 14 of the law contains provisions particularly applicable to the transport industry.

18 On 1 October 2002, having noted that the limit value for nitrogen dioxide, as defined in Section I of Annex II to Directive 1999/30, had been exceeded, the Tyrol authorities imposed a temporary night traffic ban on lorries on a section of the A 12 motorway in the Inn valley.

19 During 2002, the annual limit value fixed at 56 $\mu g/m^3$ by Annex II was again exceeded at the Vomp/Raststätte measuring point on that section of motorway, the annual average registered being 61 $\mu g/m^3$.

20 The temporary night traffic ban was then extended and subsequently replaced, from 1 June 2003, by a permanent night traffic ban on the transportation of goods by lorries over 7.5 tonnes, that prohibition being applicable for the whole year.

21 On 27 May 2003, on the basis of the IG-L, the Landeshauptmann of the Tirol adopted the contested regulation, prohibiting a category of lorries carrying certain goods from using the relevant section of the A 12 motorway for an indeterminate period from 1 August 2003.

22 According to Article 1 of the contested regulation, its aim is to reduce emissions of pollutants linked to human activities, thereby improving air quality so as to ensure lasting protection of human, animal and plant health.

23 Article 2 of the contested regulation defines a 'sanitary zone', consisting of a 46 km section of the A 12 motorway, between the municipalities of Kundl and Ampass.

24 Article 3 of the contested regulation prohibits lorries or semi-trailers with a maximum authorised weight of over 7.5 tonnes, and lorries with trailers whose combined maximum authorised weights exceed 7.5 tonnes, from driving on that section while transporting the following goods: all types of waste listed in the European Waste Catalogue [appearing in Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3), as amended by Council Decision 2001/573/EC of 23 July 2001 amending Commission Decision 2000/532/EC as regards the list of wastes (OJ 2001 L 203, p. 18)], cereals, timber and cork, ferrous and non-ferrous minerals, stone, soil, rubble, motor vehicles and

trailers or building steel. The prohibition was to apply immediately, as from 1 August 2003, without the need for any further action by the competent authorities.

25 Article 4 of the regulation exempts from the prohibition under Article 3 lorries beginning or ending their journey on the territory of the city of Innsbruck or in the districts of Kufstein, Schwaz or Innsbruck-Land. In addition, the IG-L itself includes other derogations: it excludes various categories of vehicle from the traffic ban, including highway maintenance vehicles, refuse vehicles and agricultural and forestry vehicles. Special derogation may, in addition, be sought for other categories of vehicles when justified in the public interest or for important private reasons.

Pre-litigation procedure

26 Following an initial exchange of letters with the Republic of Austria, the Commission sent that Member State a letter of formal notice on 25 June 2003, requesting a reply within one week. The Austrian Government replied by letter of 3 July 2003.

27 On 9 July 2003, the Commission sent the Republic of Austria a reasoned opinion under Article 226 EC, likewise laying down a period of one week for compliance. The Republic of Austria replied to the reasoned opinion by letter of 18 July 2003.

28 The Commission, finding the explanations given by the Republic of Austria in its reply to the reasoned opinion unsatisfactory, decided to bring this action.

Suspension of operation of the sectoral traffic ban

29 By order of 30 July 2003, *Commission* v *Austria* (C-320/03 R [2003] ECR I-7929), as an interim measure, the President of the Court of Justice ordered the Republic of Austria to suspend operation of the traffic ban in the contested regulation until pronouncement of the order terminating the interim measure proceedings.

30 By order of 2 October 2003, *Commission* v *Austria* (C-320/03 R [2003] ECR I-11665), the measure suspending operation of the traffic ban was extended until 30 April 2004, and, by order of 27 April 2004 (C-320/03 R [2004] ECR I-3593), that extension was maintained until the Court's judgment in the main proceedings.

Admissibility of the action

31 The Republic of Austria challenges the admissibility of the action by reason of the extremely short time-limits it was set during the pre-litigation procedure for

preparing its replies to the letter of formal notice and the reasoned opinion which it was sent by the Commission. It considers that its defence rights and the right to a fair procedure have been infringed, and questions whether the Commission's officials seriously examined the observations of the Austrian authorities at that stage of the procedure.

32 The Republic of Austria adds that the Commission should have used the procedure under Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (OJ 1998 L 337, p. 8).

33 In that respect, this Court finds that the very short deadlines which the Commission set the Republic of Austria for replying to the letter of formal notice and complying with the reasoned opinion were made necessary by the date, fixed by the Austrian authorities themselves, on which the contested regulation was to take effect. Moreover, it is undisputed that those authorities knew the Commission's position before the opening of the pre-litigation procedure and even before the contested regulation was adopted, since, as the documents before the Court show, the Commission, having received a complaint, had asked those authorities by letter of 6 May 2003 for information on the text which was in the course of being drafted.

34 In those circumstances, the Commission, which has the responsibility under Article 211 EC for ensuring that Member States comply with their obligations under Community law, cannot be blamed for fixing deadlines which took account of the specific circumstances of the case, and particularly its urgency (see, to that effect, Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 14; Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraphs 34 and 51, and Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraphs 64 and 65).

35 As for the procedure under Regulation No 2679/98, which is designed to bring as speedy an end as possible to obstacles to the free movement of goods between Member States, as defined in Article 1 of that regulation, the Court finds, as the Advocate General has pointed out in paragraph 35 of his Opinion, that engaging such a procedure is in no way a precondition which the Commission must satisfy before commencing the pre-litigation procedure under Article 226 EC, and that that regulation does not in any way restrict the Commission's powers under Article 226 EC (see, to that effect, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4715, paragraphs 27 and 28, and the case-law cited therein).

36 This action must therefore be declared admissible.

Substance

Arguments of the Commission and the intervening Member States

37 The Commission argues that the contested regulation infringes the Community provisions on the freedom to provide transport services, contained in Regulations Nos 881/92 and 3118/93, and obstructs the free movement of goods, guaranteed by Articles 28 EC to 30 EC.

38 De facto, the prohibition imposed by the contested regulation mainly affects the international transit of goods. Transit traffic, affected by such a measure, is carried out as to more than 80% by non-Austrian undertakings, whereas over 80% of the transport not affected by that measure is carried out by Austrian undertakings. The regulation is therefore, at least indirectly, discriminatory, contrary to Regulations Nos 881/92 and 3118/93 and Articles 28 EC to 30 EC.

39 Being discriminatory in its application, such a measure cannot be justified on environmental protection grounds. Although the Republic of Austria seeks to justify the contested regulation on grounds relating both to public health and environmental protection, it is obvious, the Commission and the intervening Member States argue, that the latter is the primary objective. Justification on public health grounds under Article 30 EC is possible, they argue, only where the goods concerned present a direct and demonstrable threat to human health. That is clearly not the case here.

40 Should the Court take the view that, although applying in a discriminatory way, the contested regulation might validly be based on considerations of environmental protection, the Commission considers, in the alternative, that that regulation cannot be justified on the basis of Directives 96/62 and 1999/30. In the first place, a sectoral ban on traffic for an unlimited duration cannot be based on Article 7(3) of Directive 96/62, which concerns only urgent and temporary measures. Moreover, even if the limit value under that directive for nitrogen dioxide, increased by the margin of tolerance, was clearly exceeded in 2002, the catalogue of measures contained in Article 10 of the IG-L does not contain the elements required by Article 8(3) and by Annex IV to Directive 96/62.

41 The intervening Member States also criticise the method used in Austria for measuring pollution levels and in reaching the conclusion that nitrogen dioxide emissions must particularly be ascribed to one category of heavy vehicles. The German Government in particular argues that, according to Section I of Annex II to Directive 1999/30, the annual limit value for the protection of human health does not become binding until after 1 January 2010. Before that date, it argues, an exceeding of the limit values fixed for the various years does not justify Member States taking immediate measures. They are authorised to do so only if the 'alert threshold' referred to in Article 2(6) of, and Section II of Annex II to, Directive 1999/30 is exceeded, which the Republic of Austria has not argued or even alleged. Moreover, the German and Italian Governments argue, the exceeding of the limit value for nitrogen dioxide on which the contested regulation is based has not been established in accordance with the requirements under Annexes V and VI to Directive 1999/30. The German Government further points to a number of methodological weaknesses in the Austrian authorities' sampling. The use of longer detours, it adds, would cause more air pollution and only displace the problem.

42 In any event, the interveners argue, the contested regulation does not comply with the principle of proportionality.

43 In that respect, the Commission states that in 2002, according to the statistics of the Tyrol authorities, an average of 5 200 heavy goods vehicles used the A 12 motorway between the agglomerations of Wörgl (close to the German border) and Hall (10 km from Innsbruck) daily. The effect of the contested regulation is to deny international transit to all heavy vehicles carrying the goods specified in the regulation, other possible itineraries involving large detours for the operators concerned.

44 The Commission and the intervening Member States further stress that rail transport does not constitute a realistic alternative solution in the short term for the undertakings concerned, given the restricted capacity of the Brenner rail route and also having regard to the technical limitations, delays and lack of reliability of rail transport in general, whichever possibility of transferring the goods concerned to rail were used.

45 The Commission further points to the considerable economic consequences which would result from implementation of the prohibition laid down by the contested regulation, not only for the transport industry but also for the manufacturers of the goods concerned, who would be confronted with higher transport costs, German and Italian undertakings being the first affected. The Commission and the intervening Member States indicate that small and medium-sized transport companies in particular, many of which specialise in carrying some of the goods concerned, are threatened.

46 The Commission, supported by the intervening Member States, mentions various measures which, according to those parties, would be likely to hinder the free movement of goods and the freedom to provide transport services to a lesser degree, while still being suitable for attaining the objective envisaged by the contested regulation, namely:

— the possibility of gradually introducing the traffic ban for the various EURO classes of heavy goods vehicles;

— the system of ecopoints laid down in Protocol No 9 on road, rail and combined transport in Austria ('Protocol No 9') to the Act concerning the conditions of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), that protocol having already contributed significantly to reconciling heavy vehicle traffic with requirements of environmental protection;

— restriction of heavy vehicle traffic at peak hours;

— a night ban of heavy vehicle traffic;

— the introduction of toll systems based on the quantity of pollutants emitted, or

— speed limits.

47 Those various measures, which would be more in line with the principle of rectifying environmental damage at source and the polluter pays principle, would include local traffic and reduce pollution from vehicles not targeted by the contested regulation. In any event, these parties submit that, without an assessment of the effects on the nitrogen dioxide concentration of the night traffic ban imposed some months before the adoption of the contested regulation, the contested regulation is premature.

48 The German Government adds that the choice of goods covered is arbitrary and unfair. The Netherlands Government adds that the measure applies only to one of the various sources of pollution in the zone concerned and even restricts the use of heavy goods vehicles that are relatively clean, falling into class EURO-3. The Italian Government argues that the regulation also infringes the right of transit conferred by Community law to vehicles to which ecopoints have been allocated.

49 Finally, the German Government argues that Article 10 EC required the Republic of Austria to consult with the Member States concerned and the Commission before adopting such a drastic measure as the sectoral traffic ban. According to the Commission, such a measure should, at the very least, have been introduced gradually so as to allow the industries concerned to prepare for the change in circumstances resulting from its implementation.

Arguments of the Republic of Austria

50 The Republic of Austria considers that the contested regulation complies with Community law. It was adopted in compliance with the directives on the protection of ambient air quality and, in particular, with Articles 7 and 8 of Directive 96/62, as transposed into the Austrian legal system.

51 That latter directive, combined with Directive 1999/30, placed an obligation on the Member State concerned to act where the annual limit value for nitrogen dioxide was exceeded. In this case, the Commission does not deny that in 2002 the limit value, increased by the margin of tolerance, of 56 $\mu g/m^3$ was exceeded at the measuring point of Vomp/Raststätte, and that in 2003 it was again exceeded by a

large margin with nitrogen dioxide concentrations in ambient air reaching 68 $\mu g/m^3$. It was in that situation that the contested regulation was adopted.

52 The Republic of Austria recognises that Protocol No 9, which lays down the rules on ecopoints, explicitly provides for derogations from secondary Community law. It argues, however, that those derogations are exhaustively listed and do not include Directives 96/62 and 1999/30.

53 Since scientific studies clearly demonstrate that emissions of nitrogen dioxyde by heavy vehicle traffic are a major source of air pollution in the zone covered by the contested measure, the Government argues that there is an obvious need to limit the number of transports carried out by those vehicles. For that purpose, the Austrian authorities selected goods for which transport by rail was a feasible alternative from a technical and economic point of view. The Republic of Austria refers in that regard to documents emanating from various public and private rail companies, both from inside and outside Austria, demonstrating that there is sufficient capacity to deal with the increased demand as a result of the introduction of the contested regulation. It also argues that there are alternative routes by road, almost half the heavy vehicle traffic in transit through the Brenner corridor having a shorter, or at least equivalent, route at its disposal.

54 Given those alternative solutions, the Commission's alarmist concerns, based on the assumption that all the foreign heavy vehicle transit traffic concerned would have to be diverted either through Switzerland or via the Tauern route in Austria, are, it maintains, unfounded.

55 The Republic of Austria also challenges the arguments based on the economic effects of the contested regulation on the transport industry, which, it maintains, is characterised by structural overcapacity and extremely low profit margins. The fact that the regulation might exacerbate those problems is not, the Government submits, a reason for regarding it as illegal.

56 As for the allegedly discriminatory character of the contested regulation, the Republic of Austria argues that the traffic ban also affects Austrian vehicles and that the choice of goods made in the regulation was based on the possibility of their transportation being easily transferred to rail.

57 The fact that transport operations having their origin or destination in the designated zone are excluded from the ban is, the Government argues, not sufficient to establish the existence of discrimination against non-Austrian operators. The derogation in favour of local traffic is inherent in the system established, since transferring that type of traffic to rail, *ex hypothesi* within the zone itself, would involve longer trips to rail terminals, which would have an effect contrary to the objective sought by the contested regulation.

58 In any event, even if the Court were to hold the contested regulation indirectly discriminatory, the Republic of Austria argues that the traffic ban is justified on grounds of protecting both human health and the environment. The limit values in Directives 96/62 and 1999/30 were fixed on the basis of scientific criteria at a level presumed to be necessary for the durable protection of human health and the protection of ecosystems and vegetation. It is therefore unnecessary, it submits, to prove that every instance of the limit values being exceeded threatens public health or the environment as a whole.

59 The ban contained in the contested regulation is, the Government argues, appropriate, necessary and proportionate for attaining its objective. The Commission did not challenge the appropriateness of the measure, at least until the reply stage of the proceedings, or its necessity, having regard to the fact that the annual limit values were exceeded. By contrast, the Republic of Austria challenges the appropriateness of the alternative solutions proposed by the Commission and the intervening Member States. Banning certain classes of EURO vehicles would be either insufficient (banning classes 0 and 1), or disproportionate (banning classes 0, 1 and 2). The latter prohibition would affect 50% of heavy goods traffic and does not take its transferability to rail into account. The Republic of Austria further points out that the limit values were exceeded despite the operation of the ecopoints system and that, in preparing the regulation, the ban on night traffic of heavy goods vehicles was taken into account.

60 Moreover, the sectoral traffic ban on heavy vehicles was not an isolated measure, other structural measures having also been undertaken, such as extension of the rail infrastructure and improvement in the public transportation of local and regional passengers.

61 Finally, the Republic of Austria considers that the Commission's argument in support of its plea of infringement of Regulations Nos 881/92 and 3118/93 is unclear and excessively brief. More particularly, the Commission did not explain in what way those regulations were infringed, with the result that the conditions under Article 38(1)(c) of the Rules of Procedure of the Court of Justice have not been fulfilled.

Findings of the Court

62 The action by the Commission is, in a general way, seeking a declaration by the Court that, by prohibiting lorries of more than 7.5 tonnes, carrying certain goods, from driving on a section of the A 12 motorway in the Inn valley, the contested regulation introduces an obstacle that is incompatible with the free movement of goods guaranteed by the EC treaty and infringes Regulations Nos 881/92 and 3118/93. Those two complaints should therefore be examined in order.

The alleged infringement of the Treaty rules on the free movement of goods

— The existence of an obstacle to the free movement of goods

63 It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Treaty (Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 24).

64 Thus, Article 3 EC, inserted in the first part of the Treaty, headed 'Principles', provides in paragraph 1(c) that, for the purposes set out in Article 2 of the Treaty, the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to, inter alia, the free movement of goods. Similarly, Article 14(2) EC provides that 'the internal market is

to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty', such provisions being found primarily in Articles 28 EC and 29 EC.

65 Such freedom of movement entails the existence of a general principle of free transit of goods within the Community (see Case 266/81 *SIOT* [1983] ECR 731, paragraph 16).

66 Clearly, by prohibiting heavy vehicles of more than 7.5 tonnes carrying certain categories of goods from travelling along a road section of paramount importance, constituting one of the main routes of land communication between southern Germany and northern Italy, the contested regulation obstructs the free movement of goods and, in particular, their free transit.

67 The fact that, as the Republic of Austria argues, there are alternative routes or other means of transport capable of allowing the goods in question to be transported does not negate the existence of an obstacle. It has been established in the case-law since the judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, that Articles 28 EC and 29 EC, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 56).

68 In this case, it cannot be denied that the prohibition on traffic laid down by the contested regulation, by forcing the undertakings concerned, at very short notice

moreover, to seek viable alternative solutions for the transport of goods covered by that regulation, is capable of limiting trading opportunities between northern Europe and the north of Italy.

69 The contested regulation must therefore be regarded as constituting a measure having equivalent effect to quantitative restrictions, which in principle are incompatible with the Community law obligations under Articles 28 EC and 29 EC, unless that measure can be objectively justified.

— Possible justification of the obstacle

70 It is settled case-law that national measures capable of obstructing intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued (see, in particular, Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705, paragraph 75, and Case C-309/02 *Radberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 75).

71 In this case, it is undisputed that the contested regulation was adopted in order to ensure the quality of ambient air in the zone concerned and is therefore justified on environmental protection grounds.

72 In the first place, protection of the environment constitutes one of the essential objectives of the Community (Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13;

Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8; Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 32; and Case C-176/03 *Commission* v *Council* [2005] ECR I-0000, paragraph 41). With that objective in mind, Article 2 EC states that the Community shall have as its task to promote a 'high level of protection and improvement of the quality of the environment', and, for that purpose, Article 3(1)(l) EC provides for the establishment of a 'policy in the sphere of the environment'.

73 Furthermore, in the words of Article 6 EC '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities', a provision which emphasises the fundamental nature of that objective and its extension across the range of those policies and activities (*Commission* v *Council*, cited above, paragraph 42).

74 Secondly, more particularly concerning the protection of ambient air quality, it should be noted that, in Annex II, Directive 1999/30 lays down limit values for nitrogen dioxide and oxides of nitrogen for the purpose of assessing that quality and determining at what point a preventive or corrective measure must be taken.

75 In that context, Directive 96/62 makes a distinction between the situation where there is a 'risk of the limit values being exceeded' and that where they have in fact been exceeded.

76 In respect of the first situation, Article 7(3) of that directive provides that Member States 'shall draw up action plans ... in order to reduce that risk'. Those plans, the

provision continues, may 'provide for measures to ... suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded'.

77 In the second situation, namely where it has been established that the levels of one or more pollutants exceed the limit values, increased by the margin of tolerance, Article 8(3) of Directive 96/62 provides that Member States 'shall take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit'. Those plans or programmes are to be made available to the public and contain the information listed in Annex IV to that directive.

78 In so far as the Republic of Austria is arguing that the contested regulation, based on the IG-L which transposes Directives 96/62 and 1999/30 into national law, is designed precisely to implement the provisions of Articles 7 and 8 of Directive 96/62, the Court must as a preliminary step examine whether that regulation does indeed have such a purpose.

79 In that regard, although the method used for measuring the level of nitrogen dioxide in ambiant air has been criticised by the Federal Republic of Germany and the Italian Republic, the Commission itself does not deny that, in 2002 and 2003, the annual limit value fixed for that pollutant, increased by the margin of tolerance, was exceeded at the Vomp/Raststätte measuring point.

80 In those circumstances, having regard to the provisions of Article 8(3) of Directive 96/62, the Republic of Austria was under a duty to act. It is true that, in accordance with Section I of Annex II to Directive 1999/30, the limit values established for nitrogen dioxide do not have to be complied with until after 1 January 2010. The fact remains, however, that, where limit values are exceeded, a Member State cannot be

censured for acting in accordance with Article 8(3), before the deadline, in order progressively to bring about the result prescribed by the latter directive and thereby attain the objective it sets within the prescribed period.

81 Article 8(3) of Directive 96/62 requires more particularly that, where limit values are exceeded, the Member State concerned must prepare or implement a plan or programme, which must contain the information listed in Annex IV to that directive, concerning such matters as the place where the values were exceeded, the principal sources of emissions responsible for the pollution and measures existing or envisaged. By definition, such a plan or programme must contain a series of appropriate and coherent measures designed to reduce the pollution level in the specific circumstances of the zone concerned.

82 However, the measures under Article 10 of the IG-L, the principles set out in Article 11 of that law and the specific provisions concerning the transport industry, contained in Article 14 of the IG-L, cannot be described as a 'plan' or 'programme' within the meaning of Article 8(3) of Directive 96/62, since they are not in any way connected to a specific situation in which limit values have been exceeded. As for the contested regulation itself, adopted on the basis of the abovementioned provisions of the IG-L, even if it could be described as a plan or programme, it does not, as the Commission has pointed out, contain all the information listed in Annex IV to Directive 96/62 and, in particular, that referred to in points 7 to 10 of that annex.

83 In those circumstances, even if one were to concede that the contested regulation is based on Article 8(3) of Directive 92/62, it cannot be regarded as constituting a correct and full implementation of that provision.

84 The above finding does not, however, preclude the possibility that the obstacle to the free movement of goods arising from the traffic ban laid down by the contested regulation might be justified by one of the imperative requirements in the public interest endorsed by the case-law of the Court of Justice.

85 In order to establish whether such a restriction is proportionate having regard to the legitimate aim pursued in this case, namely the protection of the environment, it needs to be determined whether it is necessary and appropriate in order to secure the authorised objective.

86 On that point, the Commission and the intervening Member States stress both the lack of any genuine alternative means of transporting the goods in question and the existence of many other measures, such as speed limits, or toll systems linked to different classes of heavy vehicles, or the ecopoints system, which would have been capable of reducing nitrogen dioxide emissions to acceptable levels.

87 Without the need for the Court itself to give a ruling on the existence of alternative means, by rail or road, of transporting the goods covered by the contested regulation under economically acceptable conditions, or to determine whether other measures, combined or not, could have been adopted in order to attain the objective of reducing emissions of pollutants in the zone concerned, it suffices to say in this respect that, before adopting a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established.

88 More particularly, given the declared objective of transferring transportation of the goods concerned from road to rail, those authorities were required to ensure that there was sufficient and appropriate rail capacity to allow such a transfer before deciding to implement a measure such as that laid down by the contested regulation.

89 As the Advocate General has pointed out in paragraph 113 of his Opinion, it has not been conclusively established in this case that the Austrian authorities, in preparing the contested regulation, sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes.

90 Moreover, a transition period of only two months between the date on which the contested regulation was adopted and the date fixed by the Austrian authorities for implementation of the sectoral traffic ban was clearly insufficient reasonably to allow the operators concerned to adapt to the new circumstances (see, to that effect, the judgments referred to above in *Commission* v *Germany*, paragraphs 79 and 80, and *Radlberger Getränkegesellschaft and S. Spitz*, paragraphs 80 and 81).

91 In the light of the above, it must be concluded that, because it infringes the principle of proportionality, the contested regulation cannot validly be justified by reasons concerning the protection of air quality. Therefore, that regulation is incompatible with Articles 28 EC and 29 EC.

Infringement of Regulations Nos 881/92 and 3118/93

92 According to the Commission, the contested regulation also infringes Articles 1 and 3 of Regulation No 881/92 and Articles 1 and 6 of Regulation No 3118/93.

93 Suffice it to say in that respect that the Commission has not, in its application, in its reply or at the hearing, put forward any specific argument in support of such a plea.

94 That plea must therefore be dismissed.

95 In view of the above considerations as a whole, the Court holds that, by prohibiting lorries of over 7.5 tonnes, carrying certain goods, from driving on a section of the A 12 motorway in the Inn valley, following the adoption of the constested regulation, the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC.

Costs

96 Under Article 69(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs against the Republic of Austria, and the latter has

been essentially unsuccessful in its pleadings, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States who intervene in support of the Commission are to bear their own costs.

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

1. **By prohibiting lorries of over 7.5 tonnes, carrying certain goods, from driving on a section of the A 12 motorway in the Inn valley, following the adoption of the Regulation of the First Minister of the Tyrol limiting transport on the A 12 motorway in the Inn valley (sectoral prohibition on road transport) [Verordnung des Landeshauptmanns von Tirol, mit der auf der A 12 Inntalautobahn verkehrsbeschränkende Maßnahmen erlassen werden (sektorales Fahrverbot)], of 27 May 2003, the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC.**

2. **The remainder of the application is dismissed.**

3. **The Republic of Austria is ordered to pay the costs.**

4. **The Federal Republic of Germany, the Italian Republic and the Kingdom of the Netherlands are ordered to bear their own costs.**

[Signatures]