

Press and Information Division

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Opinion of Advocate General Mischo in Case C-445/00

Republic of Austria v Council of the European Union

ADVOCATE GENERAL MISCHO PROPOSES THE ANNULMENT OF CERTAIN PROVISIONS OF THE "ECOPPOINTS REGULATION" CONCERNING HEAVY GOODS VEHICLES TRANSITING THROUGH AUSTRIA

The provision introducing the principle of spreading the reduction of ecopoints over several years and those applying that principle establish a system which is incompatible with the provisions laid down in the Protocol to the Act of Accession of Austria to the Community.

Nevertheless, in view of the circumstances and in order to maintain legal certainty, it is recommended that the effects of the contested provisions should be maintained for the period from 2000 to 2003

A protocol annexed to the Act of Accession of Austria to the Community provides for the adoption by the Community of a temporary system of transit duties - ecopoints. That system is designed to limit the pollution and noise caused by heavy goods vehicles travelling through Austria. For that purpose, the total emissions of nitrogen oxide (NO_x) by heavy goods vehicles transiting through Austria must be reduced by 60% during the period from 1 January 1992 to 31 December 2003. Those emissions are deemed to correspond to the harmful effects on the environment and public health. The total number of ecopoints is reduced each year and distributed by the Commission among the Member States in proportion to the amount of pollution caused by their heavy goods vehicles.

A second system of reduction is triggered if the number of transit journeys in any year exceeds, by more than 8%, the figure for 1991, the reference year. Under the Protocol, that reduction is to be applied in the year following the year in which the threshold was exceeded. In March 2000, the Austrian statistics indicated that in 1999 the 1991 reference figure was exceeded by 14.57%, which led the Commission to apply the protection clause and to propose to the Council that the regulation on ecopoints should be amended by spreading the reduction over the period until 2003 and distributing it proportionally among the Member States whose hauliers had contributed to the threshold being exceeded. That proposal did not receive the support of a qualified majority of the "Ecopoints Committee" composed of representatives of the Member States which contested the figures recorded. It was only after several months, on 21 September 2000, that a compromise text amending the Commission's proposal on the method of calculating the reduction of ecopoints was submitted and adopted

by the Council.¹ The Republic of Austria voted against the text and brought an action for annulment before the Court of Justice.

Advocate General Mischo gives his Opinion in this case today.

The Advocate General's Opinion is not binding on the Court. Its purpose is solely to propose to the Court, entirely independently, a legal solution which might help it in ruling on the cases brought before it.

Austria claims that the contested regulation should be annulled in its entirety but Mr Mischo takes the view that that claim should be rejected because **there were no substantive defects in the formal adoption procedure.**

However, he advocates the annulment of the provision of the regulation introducing the principle that the reduction of ecopoints is to be spread over several years and of those provisions which apply that principle to the period 2000 to 2003.

To that extent, he shares the view of the Austrian Government, which submits that the contested regulation is invalid in so far as it definitively amends the spreading system initially provided for by the Protocol to the Act of Accession, which required the reduction to be applied in the year following the finding that the fixed emission levels had been exceeded. The Council, concurring with Commission's position, took the view that to impose the whole reduction of ecopoints solely in 2000 would to all intents and purposes, have the effect of stopping transit traffic through Austria. It therefore adopted a provision which, according to the Advocate General, must be interpreted as requiring that, from now on, the reduction of ecopoints is always to be spread over several years. **That results in the establishment of a system which is incompatible with the provisions laid down by the Protocol.**

Moreover, the Advocate General takes the view that, despite the special circumstances in 2000, an exceptional spreading of the reduction over four years cannot be justified either. He considers that the step most compatible with the concept of an "appropriate measure" would have been to spread the reduction over a period of twelve months beginning with the entry into force of the decision on the level of that reduction. Consequently, Article 1 of the Regulation should be annulled.

Nevertheless, in view of the circumstances and in order to maintain legal certainty, he recommends that the effects of the provisions to be annulled should be maintained for the period 2000 to 2003; otherwise annulment would result in the paradox of an increase in the number of ecopoints which should have been distributed in the past and of those which are yet to be distributed in 2003. Austria is entitled to a reduction of ecopoints, which, admittedly, should have been effected in 2000 or, at least, within the twelve months following the Council's decision. Since that was not done, it is more in keeping with the logic of the system to grant Austria the remaining part of that reduction over the course of the following years than not to grant it at all.

¹ Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18)

As regards the redistribution among the Member States of the reduction of ecopoints for those four years, Mr Mischo states that, in the absence of an indication in the Protocol as to the method to be applied in that regard, the institutions have a discretion which the Council did not exceed in applying the "polluter pays" principle.

Note: The judges of the Court of Justice now begin their deliberation in this case. The judgment will be delivered at a later date.

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