ORDER OF THE PRESIDENT OF THE COURT
14 November 2003 *

In Case C-393/03 R,

Republic of Austria, represented by H. Dossi, acting as Agent, with an address for service in Luxembourg,

applicant,

v

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

defendant,

supported by

Italian Republic, represented by I.M. Braguglia, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

* Language of the case: German.

intervener,

APPLICATION for interim measures in the action for annulment of the definitive refusal by the Commission of the request for action submitted to it and for annulment of the Commission's decision of 1 July 2003 to award in full the ecopoints for 2003,

THE PRESIDENT OF THE COURT,

after hearing Advocate General Geelhoed,

makes the following

Order

1 By application lodged at the Court Registry on 11 September 2003, the Republic of Austria brought an action under Article 230 EC for annulment of the definitive refusal by the Commission of the European Communities of 1 July 2003 to act in response to Austria's request that the Commission put forward a proposal to reduce the number of ecopoints for 2003 and, in the alternative, annulment of the Commission's decision of 1 July 2003 ordering that the ecopoints for 2003 be awarded in full.

2 By a separate document lodged at the Court Registry on the same day, the Republic of Austria lodged an application under Articles 242 EC and 243 EC, seeking principally suspension of operation of the Commission's decision of 1 July 2003 and asking that the Commission be requested to adopt all the measures necessary to freeze actual use of the quota of ecopoints for 2003 already issued but not yet used, in so far as necessary for a possible special reduction in the ecopoints for 2003, and, in the alternative, asking that the Commission be requested to adopt all the measures necessary to freeze actual use of the ecopoints not yet used, in the ratio corresponding to the remainder of 2003, in the event that there is a special reduction in the ecopoints in 2003 which would apply until the end of 2004, and, also in the alternative, that the Commission be requested not to distribute the Community reserve of ecopoints for 2003.

3 The applicant also requested, pursuant to Article 84(2) of the Rules of Procedure, that its requests for interim measures be granted provisionally, even before the observations of the other party had been submitted, pending an order terminating the interim proceedings.

4 On 2 October 2003, the Commission submitted its written observations on the application for interim measures.

5 By application lodged at the Court Registry on 29 October 2003, the Italian Republic applied for leave to intervene in the proceedings for interim relief in support of the form of order sought by the Commission.

6 Leave to intervene in the proceedings for interim relief was granted pursuant to the first and fourth paragraphs of Article 40 of the Statute of the Court of Justice and to Article 93(1) and (2) of the Rules of Procedure.

7 The Italian Republic submitted its statement in intervention by fax of 7 November 2003.

Legal background

8 Protocol No 9, on road, rail and combined transport in Austria, to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 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; 'the Protocol') establishes special rules for the traffic of goods by road through Austria.

9 Article 1(c) of the Protocol defines 'transit traffic through Austria' as 'traffic through Austrian territory from a departure point to a destination, both of which lie outside Austria'.

10 Article 1(e) of the Protocol defines 'transit of goods by road through Austria' as 'transit through Austria by heavy goods vehicles, regardless of whether they are laden or not'.

11 Article 1(g) of the Protocol defines 'bilateral journeys' as 'international carriage on journeys undertaken by a vehicle where the point of departure or arrival is in Austria and the point of arrival or departure, respectively, is in another Member State and unladen journeys undertaken in conjunction with such journeys'.

12 Article 11(2) of the Protocol provides:

'(a) The total of NO_x emissions from heavy goods vehicles crossing Austria in transit shall be reduced by 60% in the period between 1 January 1992 and 31 December 2003, according to the table in Annex 4.

(b) The reductions in total NO_x emissions from heavy goods vehicles shall be administered according to an ecopoints system. Under that system any heavy goods vehicle crossing Austria in transit shall require a number of ecopoints equivalent to its NO_x emissions (authorised under the Conformity of Production (COP) value or type-approval value). The method of calculation and administration of such points is described in Annex 5.

(c) If the number of transit journeys in any year exceeds the reference figure established for 1991 by more than 8%, the Commission, acting in accordance with the procedure laid down in Article 16, shall adopt appropriate measures in accordance with paragraph 3 of Annex 5.

...'

13 The safeguard clause laid down in Article 11(2)(c) of the Protocol ('the 108% clause') is designed to contain the increase in transit traffic which might result from the technical advances made in the manufacture of cleaner engines. The number of transit journeys made through Austria in 1991 was 1 490 900, and the threshold to which the clause refers is equivalent to 1 610 172 transit journeys.

14 The first subparagraph of Article 11(6) of the Protocol provides:

'The Commission, acting in accordance with the procedure laid down in Article 16, shall adopt detailed measures concerning the procedures relating to the ecopoints system, the distribution of ecopoints and technical questions concerning the application of this article, which shall enter into force on the date of accession of Austria.'

15 According to Article 16 of the Protocol, the Commission is to be assisted by a Committee composed of the representatives of the Member States ('the Ecopoints Committee') and that article states how that committee is to carry out its duties.

16 In accordance with Article 11(6) of the Protocol, the Commission adopted Regulation (EC) No 3298/94 of 21 December 1994 laying down detailed measures concerning the system of Rights of Transit (Ecopoints) for heavy goods vehicles transiting through Austria, established by Article 11 of Protocol No 9 to the Act of Accession of Austria, Finland and Sweden (OJ 1994 L 341, p. 20). That regulation was amended by Commission Regulation (EC) No 1524/96 of 30 July 1996 (OJ 1996 L 190, p. 13), Commission Regulation (EC) No 609/2000 of 21 March 2000 (OJ 2000 L 73, p. 9), and Council Regulation (EC) No 2012/2000 of 21 September 2000 (OJ 2000 L 241, p. 18), which was partly annulled by the Court in Case C-445/00 *Austria* v *Council* [2003] ECR I-8549. 'Regulation No 3298/94' refers below to the regulation as amended.

17 Monitoring of the implementation of the ecopoints system was initially based on the use of paper forms (ecocards).

18 Through Regulation No 1524/96, the Commission introduced a monitoring system based on the use of an electronic device, referred to as an 'ecotag', fitted to the motor vehicle which enables the automatic debiting of ecopoints.

19 Article 1(1)(b) of Regulation No 3298/94 provides:

'The driver of a heavy goods vehicle on the territory of Austria shall carry, and shall make available for inspection at the request of the supervisory authorities:

...

(b) an electronic device, fitted to the motor vehicle which enables the automatic debiting of ecopoints, hereinafter referred to as the ecotag'.

20 The first subparagraph of Article 1(2) of Regulation No 3298/94 provides:

'Ecotags shall be manufactured, programmed and installed in accordance with the general technical specifications laid down in Annex F. The competent authorities in each Member State are authorised to approve, programme and install the ecotags'.

21 Annex F to Regulation No 3298/94 provides inter alia:

'Transit declaration

The ecotag must have an input facility for declaring a journey exempt from the payment of ecopoints.

This facility must be clearly visible on the ecotag for control purposes; alternatively, it must be possible to set the ecotag at a defined initial position. At all events, it must be ensured that only the status at the time of entry is taken into account for evaluation in the system.'

22 Article 2(2) and the second subparagraph of Article 2(5) of Regulation No 3298/94 provide:

'2. If the vehicle [is] fitted with an ecotag, upon confirmation of it undertaking a transit journey requiring ecopoints, a number of ecopoints, equivalent to the NO_x emission information stored in the ecotag of the vehicle, shall be deducted from the total of ecopoints allocated to the Member State in which the vehicle is registered. This shall be done by infrastructure provided and operated by the Austrian authorities.

For vehicles fitted with ecotags that are making bilateral journeys, they must set the ecotag to demonstrate that a non-transit journey is being made prior to entering Austrian territory.

...

5....

Alternatively, if the vehicle is fitted with an ecotag, the Austrian authorities shall make available the necessary information to a designated authority in the Member State where the vehicle is registered within 48 hours that a transit journey has been made. Such information shall also be made available to the Commission'.

23 Article 3(2) and (3) of Regulation No 3298/94 provide:

'2. Continuous journeys which involve crossing the Austrian frontier once by train, whether by conventional rail transport or in a combined transport operation, and crossing the frontier by road before or after crossing by rail, shall be regarded not as transit of goods by road through Austria within the meaning of Article 1(e) of Protocol No 9, but as bilateral journeys within the meaning of Article 1(g) thereof.

3. Notwithstanding paragraph 2, continuous transit journeys through Austria using the following rail terminals shall be deemed to constitute [bilateral] journeys:

Fürnitz/Villach Süd, Sillian, Innsbruck/Hall, Brennersee, Graz.'

24 Lastly, Article 14 of Regulation No 3298/94 provides:

'A journey shall be deemed to be exempt from the payment of ecopoints if the vehicle either sets down or picks up its complete load in Austria and the vehicle carries suitable documentation to demonstrate this, irrespective of the route taken by the vehicle to enter and exit Austria.'

Facts

25 By letter of 21 January 2003, the Republic of Austria informed the Commission that it was apparent from the statistical data available at that date for the total transit journeys subject to ecopoints in 2002 that the 1991 reference value would be exceeded by more than 8%.

26 By letter of 4 April 2003, the Republic of Austria sent the Commission the final ecopoint statistics for 2002, which confirmed that the reference value had been exceeded. In fact, they showed a total of 1 718 622 'declared transit journeys' for that year, which exceeded the 1991 reference value by 15.27%.

27 By letter of 7 April 2003, in response to a letter from the Commission dated 6 March 2003, the Republic of Austria sent it additional data and break-downs.

28 At its 29th and 30th meetings, held on 7 May and 10 June 2003 respectively, the Ecopoints Committee examined the Austrian statistics for 2002 and discussed whether some journeys should not be discounted for the purposes of a possible application of the 108% clause. At the end of those discussions, the Commission reached the conclusion that, for 2002, the number of journeys to be taken into

account for the purpose of a possible application of the clause was 1 588 735 and that it was therefore lower than the threshold of 1 610 172 journeys laid down in Article 11(2)(c) of the Protocol.

29 In particular, the Commission considered that, in the absence of proof of transit, three categories of journey should not be counted as transit journeys and that journeys in those categories should therefore be deducted from the total number of journeys submitted by the Republic of Austria: 56 242 journeys where both entry into and exit from Austria were effected at the same border point, 69 433 journeys in respect of which there is no information on exit and 7 812 journeys made by combined transport ('Rollende Landstrasse').

30 By letter of 27 June 2002, the Republic of Austria called upon the Commission to act, pursuant to the second paragraph of Article 232 EC, and to present to the Ecopoints Committee a proposal for a regulation reducing the number of ecopoints for 2003.

31 On 1 July 2003, the Commission decided not to apply the 108% clause for 2003 and to award in full the remaining electronic ecopoints for that year.

32 On the basis of that decision, the Commission, on 1 July 2003, distributed the remaining electronic ecopoints for the year 2003.

The application for interim measures

Arguments of the parties

33 The applicant claims that, by adopting the decision of 1 July 2003, the Commission failed to fulfil its obligations under Article 11(2)(c) in conjunction with Article 16 of the Protocol and under Annex 5(3) thereof.

34 The applicant considers that the number of transit journeys exceeded the 108% limit established in Article 11(2)(c) of the Protocol.

35 In support of that assertion, the applicant states, in essence, that a journey must be classified as a transit journey if it has been declared as such on entry into Austrian territory and that the Commission should therefore have taken into account only the number of declared transit journeys, as shown in the statistics supplied by the Austrian authorities.

36 According to the applicant, it is not clear from the definition of 'transit traffic through Austria' given in Article 1(c) of the Protocol that, in order to determine whether the 108% limit established in Article 11(2)(c) of the Protocol is exceeded, only transit journeys actually made and, accordingly, verified in each case may be taken into account.

37 Primary law does not make any provision as to the method of establishing the 'number of journeys' within the meaning of Article 11(2)(c) of the Protocol.

38 As regards secondary law, a distinction must be drawn between the provisions concerning the paper form (ecocards) system and those which introduced the electronic (ecotag) system. In the system based exclusively on ecocards, the statistics and, accordingly, the mechanism for checking whether the threshold laid down in Article 11(2)(c) of the Protocol has been exceeded are based on the journeys declared by the driver to be transit journeys, when he crosses the border, by 'affixing ecopoints'. The principle of declaration therefore already forms an integral part of that system.

39 In so far as concerns the electronic system, the second subparagraph of Article 2(2) of Regulation No 3298/94 is clearly based on the principle of declaration. Under that provision, ' [f]or vehicles fitted with ecotags that are making bilateral journeys, they must set the ecotag to demonstrate that a non-transit journey is being made prior to entering Austrian territory'.

40 Those words mean that, before entering Austrian territory, the driver of a heavy goods vehicle is required to show, by setting the ecotag, whether he is making a journey exempt from ecopoints or a transit journey subject to the ecopoints system.

41 With regard to registration of the declaration made by the driver, Annex F to Regulation No 3298/94 provides that 'it must be ensured that only the status at the time of entry is taken into account for evaluation in the system'.

42 The applicant adds that the infrastructure needed to read the ecotags, which the applicant is responsible for installing under the second subparagraph of Article 1(1) of Regulation No 3298/94, is one that enables ecopoints to be deducted after the driver's declaration on entry into Austrian territory, so that it cannot be required to register data concerning exit.

43 The applicant submits that it is moreover essential that only the declarations made by the drivers be taken into account. The definition of 'transit traffic through Austria' given in Article 1(c) of the Protocol is supplemented, in secondary law, by derogations and precise details (the exclusion of journeys made under ECMT (European Conference of Ministers of Transport) authorisations, the inclusion of the carriage of part loads into Austria, the exclusion, under Article 14 of Regulation No 3298/94, of vehicles setting down or picking up a full load in Austria) with the result that it is not possible to determine, from the data appearing in the electronic monitoring system, whether they are transit journeys within the meaning of that definition. The declarations of drivers therefore constitute the only reliable source.

44 The applicant asserts that, during discussions which took place in the Ecopoints Committee in connection with the travaux préparatoires for Regulation No 1524/96, the Commission and the Member States finally agreed to use, as the decisive criterion for classifying a journey, the declaration made by the driver by means of the ecotag on entering Austria.

45 The Commission's contrary view would involve the transport documents for each journey being checked manually, which would deprive the electronic monitoring system of its rationale.

46 Finally, the applicant states that, in the past, it has always compiled and forwarded to the Commission ecopoints statistics based on the principle of declaration.

47 The applicant concludes that all journeys declared to be transit journeys should be taken into account for applying the 108% clause. The applicant is not required either in law or in fact to adduce proof that a journey has actually been made, if it has been unambiguously declared a transit journey. Only journeys declared to be transit journeys may possibly be deducted where it is clear that, despite an unambiguous declaration, they cannot be so described.

48 Environmental and health nuisance which is the direct consequence of failure to apply the 108% clause constitutes serious and irreparable damage, as is confirmed by the order of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraphs 103 to 106. In the context of the balancing of interests, that damage prevails over the minimal negative effects the interim measures sought would have on the internal market.

49 The applicant maintains that, although the ecopoints system introduced by the Protocol expires at the end of 2003, an ecopoints system will very probably also be applied during 2004. Consequently, staggering the reduction in ecopoints until the end of 2004 and making only a proportional reduction in the remaining months of 2003 (see the judgment in *Austria* v *Council*, cited above, paragraphs 75 and 76) would significantly weaken the impact on the activities of the undertakings operating in the market under consideration and, more generally, on the proper functioning of the internal market. From that point of view, the applicant seeks, as an interim measure, the freezing, in the ratio corresponding to the remaining months of 2003, of the ecopoints not yet used.

50 The Commission points out that, leaving aside, in particular, the submissions relating to the proportional freezing of the ecopoints not yet used, this application for interim relief is identical, including in its grounds, to that which the applicant brought in 2002, which was dismissed by the order of 23 October 2002 in Case C-296/02 R *Austria* v *Commission* [2002] ECR I-9159. The Commission takes that order as a basis and declares that it confines its observations to those points in the present case which differ from the matters raised by the applicant in its application in that case.

51 As regards, in particular, the applicant's new forms of order, namely those submitted in the alternative requesting that the use of the ecopoints be frozen in the ratio corresponding to the remaining months of 2003 in the event of a special

reduction in ecopoints in 2003 which would be staggered until the end of 2004, the Commission points out that the ecopoints system introduced by the Protocol expires on 31 December 2003 and that therefore some of the ecopoints from the current system cannot be made to apply to 2004.

52 Consequently, there is no change in the analysis carried out in the order in *Austria* v *Commission*.

53 The Commission adds that, at the 31st meeting of the Ecopoints Committee, held on 18 September 2003, the Member States unanimously decided to withdraw from the Community reserve the ecopoints which they had requested and to distribute them. Following that decision, a large number of those States informed the Commission of their urgent and immediate need for ecopoints.

54 The Italian Republic criticises the principle of declaration upheld by the applicant. For applying the 108% clause only 'actual' transit journeys — that is to say, journeys actually made, not those merely assumed to have been made on the basis of the driver's declaration — should be taken into consideration as transit journeys.

55 The Italian Republic maintains that, having regard to Article 1(c) of the Protocol, in order to classify a journey as a transit journey, it is necessary to consider all the information registered by the electronic system, and particularly the border post at which the vehicle entered Austrian territory and the border post at which it departed from it. The 'declaration' is therefore only one of the criteria for identifying the type of journey which has been made. The applicant also concedes that, for applying the 108% clause, it is reasonable to deduct from the total number of journeys declared to be transit journeys those which, despite an unambiguous 'declaration', clearly cannot be so described.

56 As for the requests made by the Republic of Austria, including the one relating to the possibility of applying part of the reduction in the ecopoints for 2003 to 2004, the Italian Republic points out that the ecopoints system introduced by the Protocol expires on 31 December 2003. Therefore, the effects of that system, particularly the penalties, cannot be extended beyond that date, even if a new system is introduced for 2004 to replace the system currently in force. In those circumstances, the damage, to the activities of Community hauliers, would be irreparable if the applicant's requests were granted.

Findings

57 Since the written pleadings submitted by the parties contain all the information necessary to give a ruling on the application, there is no need for them to present oral argument.

58 As a preliminary point, it must be borne in mind that, under Articles 242 EC and 243 EC, the judge hearing an application for interim relief may, if he considers that the circumstances so require, order that application of the contested measure be suspended or prescribe any necessary interim measures. In doing so, he must take account of the conditions laid down in Article 83(2) of the Rules of Procedure, as further defined in the case-law of the Court of Justice (order in *Austria* v *Commission*, cited above, paragraph 70).

59 It should also be pointed out that, with the exception of the forms of order relating to the proportional freezing of the ecopoints not yet used, the content of this application for interim measures is basically the same as that of the application for interim measures brought by the applicant in 2002, which was the subject of the order in *Austria* v *Commission*, cited above.

60 In that order, the President of the Court held as follows:

'80 ... the principle of declaration put forward by the applicant... raises certain questions.

81 The applicant acknowledges, first of all, that some of the journeys which were declared to be transit journeys and were therefore included in its statistics, should not have been included.

82 The irrebuttable presumption that it seeks to attach to the drivers' declarations may therefore lead to an artificial increase in the number of journeys to be taken into consideration for the purpose of applying the 108% clause. This is only acceptable if there are clear indications to that effect in the legislative provisions.

83 However, on first examination, no textually-based argument seems to establish beyond doubt that all declarations must be registered as transit journeys.

84 Furthermore, the fact remains that, in distinguishing between the various categories of journey excluded by the Commission from the total number of journeys registered, the applicant did not set out the reasons which led it to consider that they were definitely all transit journeys.

85 It confined itself to an assertion of principle that it is only the declaration that matters, whatever the true nature of the actual journey effected.

86 In those circumstances, it is not possible, at the stage of proceedings for interim relief, to endorse unreservedly the approach taken by the applicant, which is tantamount to considering that the uncertainties caused by the imperfections in the existing electronic control system must lead to the assumption that, for the purposes of applying the 108% clause, every declaration amounts to a transit journey.

87 Furthermore, the contrary arguments put forward by the [Commission]... seem reasonable in so far as, in particular, they are based on the actual wording of the Protocol and also appear, on initial examination, to be consistent with the aims of the ecopoints system.

...

89 It is apparent from the above that the pleas formulated by the applicant, even if they do not appear wholly unfounded, do not prevail, after an initial examination, over the justifications and explanations provided by the Commission....

90 It is therefore necessary to balance the interests concerned; serious and irreparable damage, which is the criterion for the urgency invoked, is the first point of comparison in that connection.

91 In that regard, the urgency invoked by the applicant is linked to considerations of environmental protection against, in particular, nuisance caused by traffic density.

92 Such damage, if established, is irreversible since such nuisance cannot, by its very nature, be eliminated retroactively.

93 However, in the present case, both the fact and the seriousness of the alleged damage are directly linked to findings relating to the question whether the applicant has made out a prima facie case.

94 The negative effects of road traffic transiting through Austria do not appear to constitute environmental damage which might have to be remedied unless it is established that they exceed the level which was considered acceptable when the Protocol was adopted, which is not clear after an initial examination, as is apparent from... this order.

95 To that extent, this situation differs significantly from that which prevailed in *Austria* v *Council*, cited above, in which it was the particularly serious nature of the prima facie case made out which justified taking into particular consideration the urgency which the applicant could invoke (*Austria* v *Council*, cited above, paragraph 110).

96 As regards the other interests to be taken into consideration in the balancing operation, it appears, in the light of the forecasts for the use of ecopoints in [the current year]..., that a decision taken at this stage to reduce the number of ecopoints would have a direct and considerable impact on the activities of the undertakings operating in the market under consideration and, more generally, on the proper functioning of the internal market.

97 In those circumstances, given the virtually definitive effect which the order is likely to have, the balance of interests inclines in favour of dismissing the application.'

61 The applicant has produced no evidence to show that the analysis set out in the previous paragraph, which was made in respect of the pleas and forms of order which it had put forward in *Austria* v *Commission*, cited above, should be altered in respect of the corresponding pleas and forms of order which it formulates in this application for interim measures.

62 In those circumstances, the same analysis is called for in respect of these latter pleas and forms of order.

63 With regard to the applicant's forms of order in respect of the proportional freezing of the ecopoints not yet used, it must be pointed out that they are based on the premiss that it would be possible to stagger until the end of 2004 a reduction in ecopoints which might be made in 2003. However, that possibility cannot be confirmed, because the ecopoints system introduced by the Protocol expires on 31 December 2003 and it is not clear that, if an ecopoints system is established for 2004, it will be possible to apply in that year ecopoints from the current system.

64 In the light of those factors, a decision ordering, as an interim measure, the freezing, in the ratio corresponding to the remainder of 2003, the use of the ecopoints already issued but not yet used, might lead to the loss of those ecopoints and therefore have a definitive effect on the activities of the undertakings operating in the market under consideration and, more generally, on the proper functioning of the internal market.

65 Accordingly, consideration of the applicant's interest in the ecopoints not yet used being proportionally frozen cannot alter the finding that the balance of interests inclines in favour of dismissing the application for interim measures.

66 In the light of the foregoing, the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 14 November 2003.

R. Grass — Registrar

V. Skouris — President