JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 *

In Case C-28/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 January 2009,

Commission of the European Communities, represented by P. Oliver, A. Alcover San Pedro and B. Schima, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

Italian Republic, represented initially by I. Bruni and subsequently by G. Palmieri, acting as Agents, and G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

* Language of the case: German.

Kingdom of the Netherlands, represented by C. Wissels, Y. de Vries and M. Noort, acting as Agents,

interveners,

v

Republic of Austria, represented by E. Riedl, G. Eberhard and C. Ranacher, acting as Agents, and L. Schmutzhard and J. Thudium,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J. Malenovský, U. Lõhmus, A. Prechal, Presidents of Chambers, A. Rosas (Rapporteur), E. Levits, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 By its application the Commission of the European Communities asks the Court to declare that, by prohibiting lorries of over 7.5 tonnes carrying certain goods from using a section of the A 12 motorway in the Inn valley (Austria), the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC.

Legal context

European Union law

2 European Union 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'). The aim of those two directives, as stated in their preambles, is to protect the environment and human health.

3 Those directives were repealed as from 11 June 2010 by Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1), without prejudice to the obligations on the Member States relating to time-limits for transposition or application of those directives. In view of the date of the material facts, however, they remain applicable to the present proceedings.

4 In accordance with Article 1 of Directive 96/62, its general aim 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, and

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

5 Article 4 of Directive 96/62 provides that the Council of the European Union, on a proposal by the Commission, is to set limit values for the pollutants listed in Annex I to the directive. That annex, entitled 'List of atmospheric pollutants to be taken into consideration in the assessment and management of ambient air quality', includes inter alia nitrogen dioxide (NO_2).

6 Article 7 of Directive 96/62 provides:

'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.'

7 Article 8(3) of Directive 96/62 further provides:

'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.'

8 The information listed in Annex IV includes information on the localisation of excess pollution, the main emission sources responsible for pollution, and existing and proposed measures.

9 Limit values for nitrogen dioxide are set in Directive 1999/30. According to the fourth recital in the preamble to that directive, the limit values are minimum requirements and the Member States may, in accordance with Article 130t of the EC Treaty (subsequently, after amendment, Article 176 EC), maintain or introduce more stringent protective measures.

10 In accordance with Article 4, 'Nitrogen dioxide and oxides of nitrogen', of Directive 1999/30:

'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.'

11 In accordance with Section I of Annex II to Directive 1999/30, for nitrogen dioxide:

— the hourly limit value for the protection of human health is fixed at 200 μg/m^3, 'not to be exceeded more than 18 times per calendar year', plus a percentage margin of tolerance decreasing until 1 January 2010;

— the annual limit value for the protection of human health is fixed at 40 μg/m^3 plus the same percentage margin of tolerance decreasing until 1 January 2010, namely 48 μg/m^3 for 2006, 46 μg/m^3 for 2007, 44 μg/m^3 for 2008 and 42 μg/m^3 for 2009.

12 European Union legislation sets, for new motor vehicles sold in the Member States, maximum limits for emissions of pollutants, in particular for particulates and oxides of nitrogen (NO_x). For emissions of gaseous and particulate pollutants from compression-ignition engines for use in vehicles and emissions of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied petroleum gas for use in vehicles, those standards are designated Euro I, II, etc, while for passenger and light commercial vehicles the form Euro 0, 1, 2, etc. is used.

National law

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

14 Under Paragraph 3(1) of the IG-L, the emission limit values laid down in Annexes 1 and 2 to that law apply to the protection of human health throughout Austrian territory. Annex I sets an annual emission limit value of 30 μg/m^3 for nitrogen dioxide. That annex also provides for a margin of tolerance of 30 μg/m^3 which decreases progressively. On that basis, the limit values for emissions of nitrogen dioxide are 40 μg/m^3 for 2006 to 2009 and 35 μg/m^3 for 2010.

15 Pursuant to Paragraph 10 of the IG-L, measures are to be taken by way of regulation no later than 24 months after the end of a year in which a limit value is found to have been exceeded. Among the measures that may be taken, in accordance with Paragraph 16(1)(4) of that law, are prohibitions on the movement of motor vehicles.

16 The Landeshauptmann (First Minister) of the Province of Tyrol on 17 December 2007, on the basis of the IG-L, adopted a regulation prohibiting the carrying of certain goods on the A 12 motorway in the Inn valley (sectoral traffic prohibition) (Verordnung des Landeshauptmannes vom 17. Dezember 2007, mit der auf der A 12 Inntalautobahn der Transport bestimmter Güter verboten wird (Sektorales Fahrverbot-Verordnung), *Landesgesetzblatt für Tirol*, No 92/2007, 'the contested regulation'). That regulation, which prohibits lorries of over 7.5 tonnes carrying certain goods from using a section of that motorway ('the sectoral traffic prohibition'), entered into force on 1 January 2008.

17 According to Paragraph 1 of the contested regulation, its aim is to reduce emissions of pollutants influenced by human activity and thereby to improve air quality, so as to ensure the long-term protection of human health and fauna and flora.

18 Paragraph 2 of the regulation defines an 'improvement zone' ('Sanierungsgebiet'). This comprises a 90-kilometre section of the A 12 motorway between the municipality of Zirl (about 12 km west of the city of Innsbruck) and the Austrian-German frontier (about 78 km east of the city of Innsbruck) with a 100-metre strip of land on either side of the motorway.

19 In accordance with Paragraph 3 of the regulation:

'Driving on the A 12 Inn valley motorway in either direction between km 6.350 in the municipality of Langkampfen and km 90.00 in the municipality of Zirl is prohibited with the following vehicles:

Lorries or semi-trailer units of a maximum authorised gross weight of over 7.5 t and lorries with trailers where the sum of the maximum authorised gross weights of both vehicles amounts to over 7.5 t, for the transport of the following goods:

(a) from 2 May 2008 ["the first stage"]:

1. all wastes listed in the European Waste Catalogue, in accordance with 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)], in the version of [Council Decision] 2001/573/EC [of 23 July 2001 (OJ 2001 L 203, p. 18)],

2. stones, earth, excavated material.

(b) from 1 January 2009 ["the second stage"]:

1. logs and cork,

2. non-ferrous and ferrous ores,

3. motor vehicles and trailers,

4. steel, except reinforcing and construction steel for delivery to building sites,

5. marble and travertine,

6. tiles (ceramic).'

20 Paragraph 4 of the contested regulation excepts certain motor vehicles from the sectoral traffic prohibition, in particular motor vehicles loaded or unloaded in the 'core zone' and the 'extended zone', motor vehicles in traffic antecedent to rail transhipment travelling to the Hall rail terminal eastbound and the Wörgl rail terminal westbound, and motor vehicles in traffic subsequent to rail transhipment travelling from the Hall rail terminal westbound and the Wörgl rail terminal eastbound.

21 The political districts of Imst, Innsbruck Land, Innsbruck Stadt, Kufstein and Schwaz are in the 'core zone'. The 'extended zone' covers the political districts of Kitzbühel, Landeck, Lienz, Reutte and Zell am See in Austria, the districts of Bad Tölz, Garmisch-Partenkirchen, Miesbach, Rosenheim (including the town of Rosenheim) and Traunstein in Germany, and the district communities of Valle Isarco/Eisacktal, Val Pusteria/Pustertal and Wipptal in Italy.

22 Paragraph 4 also refers to the exceptions provided for by the IG-L. Certain categories of motor vehicles are thus excluded from the sectoral traffic prohibition, including highway maintenance vehicles, refuse collection vehicles and agricultural and forestry vehicles. An individual derogation may also be requested for other vehicles on grounds of the public interest or a significant private interest.

23 After the expiry on 8 June 2008 of the period prescribed in the reasoned opinion, several amendments were made to the contested regulation.

24 Implementation of the sectoral traffic prohibition was postponed in part. For the section to the east of Innsbruck, it was provided that from 1 January 2009 that prohibition would apply, in addition to the carriage of the goods previously concerned, namely waste, stones, earth and excavated material, only to the carriage of logs and cork and of motor vehicles and trailers. As regards the carriage of ceramic tiles and steel, the sectoral traffic prohibition took effect only from 1 July 2009 (the third stage), and, as regards the carriage of ferrous and non-ferrous ores and of marble and travertine, from 1 July 2010 (the fourth stage).

25 For the section to the west of Innsbruck (Innsbruck-Zirl), implementation of the sectoral traffic prohibition was postponed to 1 January 2011 for all goods referred to in the contested regulation.

26 Finally, various exceptions were laid down by decree. These related in particular to aid convoys of recognised organisations and to military transport.

Background to the dispute

27 The A 12 motorway, approximately 145 kilometres in length, links the municipality of Kufstein to the east of Innsbruck with the municipality of Landeck to the west of Innsbruck. Pollution in excess of the annual limit value for nitrogen dioxide, as fixed in Section I of Annex II to Directive 1999/30, was found on that motorway from 2002. The highest concentrations of that atmospheric pollutant were measured at the Vomp/Raststätte monitoring point. During that year, the annual average concentration recorded for that pollutant was 61 $\mu g/m^3$, whereas under Section I of Annex II

the annual limit value plus the margin of tolerance had been fixed at 56 μg/m^3. For the years 2003 to 2008, even higher excess values were found. In 2008, for example, the concentration of nitrogen dioxide recorded at that monitoring point was 66 μg/m^3, representing an excess of 50 % of the limit value fixed for that year plus the margin of tolerance, amounting to 44 μg/m^3. The excess values were even greater in relation to the limit values for nitrogen dioxide laid down by the IG-L, including the margins of tolerance provided for by that law.

28 In order to ensure that the limit values for nitrogen dioxide were complied with, the Austrian authorities adopted a number of measures aimed at reducing the specific emissions of motor vehicles and the density of road traffic.

29 On 1 October 2002 those authorities imposed a temporary night traffic ban for lorries on a section of the A 12 motorway. That measure was subsequently extended and then replaced as from 1 June 2003 by a permanent night traffic ban applying to the transport of goods by lorries of over 7.5 t, the prohibition being applicable for the whole year.

30 On 27 May 2003 the First Minister of the Province of Tyrol adopted a regulation prohibiting, from 1 August 2003 and for an indefinite period, lorries of over 7.5 t carrying the goods listed in that regulation from using a section of that motorway between the municipalities of Kundl and Ampass. The goods concerned were more particularly waste, cereals, logs and cork, ferrous and non-ferrous ores, stones, earth, excavated material, motor vehicles and trailers and steel. However, the transport of goods from or to the territory of the city of Innsbruck and the districts of Kufstein, Schwaz or Innsbruck Land was excepted from the prohibition. In addition, the sectoral traffic prohibition did not apply to certain categories of motor vehicles, such as highway

maintenance vehicles, refuse collection vehicles and agricultural and forestry vehicles. Finally, an individual derogation for other motor vehicles could be requested in certain cases on grounds of the public interest or a significant private interest. The measure was to apply immediately, as from 1 August 2003.

31 Since it took the view that the prohibition laid down by that regulation constituted an infringement of the free movement of goods within the meaning of Articles 28 EC and 29 EC, the Commission on 24 July 2003 brought an action under Article 226 EC against the Republic of Austria for failure to fulfil obligations.

32 After ordering the Republic of Austria, as an interim measure, to suspend operation of the prohibition, the Court held in its judgment of 15 November 2005 in Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871 that the Republic of Austria had failed to fulfil its obligations under Articles 28 EC and 29 EC, since the regulation at issue was to be regarded as a measure having equivalent effect to quantitative restrictions which, because of its disproportionate nature, could not validly be justified on the ground of the protection of air quality.

33 Following that judgment, the Austrian authorities prepared new measures to improve the air quality on the A 12 motorway. From 2006 a package of measures, including the sectoral traffic prohibition which is the subject of the present action, was progressively introduced.

34 Thus from 1 November 2006 to 30 April 2007 a speed limit of 100 km/h was imposed on the A 12 motorway between the Austrian-German frontier and the municipality of Zirl. In November 2007 that temporary measure was replaced by a speed limit varying according to the general emission level actually measured and the meteorological factors ('the variable speed limit').

35 In addition, a traffic prohibition for semi-trailer units and lorries with trailers of over 7.5 t not complying with standard Euro II was introduced between the municipalities of Zirl and Kufstein with effect from 1 January 2007. Since 1 November 2008 that measure has also applied to motor vehicles of that kind which do not comply with standard Euro III. Since 1 November 2009 a general traffic ban has applied to all lorries of over 7.5 t whose emissions do not comply with standard Euro II.

36 Finally, with effect from 1 January 2007, the geographical scope of the night traffic ban applying to lorries on a section of the A 12 motorway was extended. An exception had been introduced temporarily for lorries in classes Euro IV and Euro V, but it was abolished on 31 October 2009.

37 The sectoral traffic prohibition and the other measures mentioned in paragraphs 34 to 36 above form part of a plan drawn up by the Austrian authorities, pursuant to Article 8(3) of Directive 96/62, in order to ensure, in the Province of Tyrol, compliance with the limit value for nitrogen dioxide fixed in Section I of Annex II to Directive 1999/30.

Pre-litigation procedure

38 The proposed sectoral traffic prohibition was communicated to the Commission by the Republic of Austria on 11 January 2007, in the prior consultation procedure provided for by Council Decision of 21 March 1962 instituting a procedure for prior examination and consultation in respect of certain laws, regulations and administrative provisions concerning transport proposed in Member States (OJ, English Special

Edition 1959-1962, p. 96), as amended by Council Decision 73/402/EEC of 22 November 1973 (OJ 1973 L 347, p. 48).

39 The Commission reacted by issuing an opinion on 20 July 2007, in which it concluded that the sectoral traffic prohibition would, if adopted, constitute a restriction of the free movement of goods, contrary to the obligations under Articles 28 EC and 29 EC.

40 Since the contested regulation was none the less adopted on 17 December 2007 and entered into force on 1 January 2008, the Commission on 31 January 2008 sent the Republic of Austria a letter of formal notice confirming its previous position and inviting the Republic of Austria to submit is observations within 15 days from receipt of the letter.

41 In its reply of 15 February 2008, the Republic of Austria disputed the Commission's complaint. It stated that the sectoral traffic prohibition, which aimed to improve the air quality on the A 12 motorway, had the objective of transferring to rail goods that had an 'affinity with rail'. The prohibition therefore did not constitute a restriction of the free movement of goods, and was in any event justified by objectives of the protection of health and the environment. The geographical situation of Austria should also be taken into account. The rapid growth of road transport in the European Union had brought about increased pressure on the environment in the Alpine corridors and their immediate surroundings.

42 As that reply failed to convince the Commission, it sent the Republic of Austria a reasoned opinion on 8 May 2008, inviting it to take the necessary measures to comply with the opinion within one month from the date of its receipt.

43 The Republic of Austria replied to the reasoned opinion by letter of 9 June 2008, maintaining its previous position. In a further letter of 2 December 2008, it informed the Commission that, for the section to the west of the city of Innsbruck, the sectoral traffic prohibition would not enter into force until 1 January 2011.

44 Since the Commission was not satisfied with those explanations, it decided to bring the present action.

Procedure before the Court

45 By order of the President of the Court of 19 June 2009, the Italian Republic and the Kingdom of the Netherlands were given leave to intervene in support of the form of order sought by the Commission.

46 By order of the President of the Court of 19 August 2009, the Kingdom of Denmark was given leave to intervene in support of the form of order sought by the Republic of Austria. After the Kingdom of Denmark informed the Court, by letter of 2 March 2010, that it was withdrawing its intervention, the President of the Court, by order of 7 May 2010, ordered the Kingdom of Denmark to be removed from the register as an intervener in the case.

Admissibility

Arguments of the parties

47 The Republic of Austria raises a plea of inadmissibility against the statement in intervention of the Kingdom of the Netherlands. It submits that the Kingdom of the Netherlands is attempting to extend the subject-matter of the action by arguing that the sectoral traffic prohibition constitutes indirect discrimination, in that it does not affect all lorry traffic, but only traffic by lorries of over 7.5 t.

48 The Republic of Austria also raises a plea of inadmissibility against the statement in intervention of the Italian Republic. It submits that the Italian Republic is putting forward a new plea in law by mentioning, as an alternative to the sectoral traffic prohibition, a measure that was not considered by the Commission, namely the possibility of introducing a prohibition of traffic relating to passenger and commercial vehicles of less than 7.5 t, according to the Euro class to which they belong.

49 The latter plea of inadmissibility was contested by the Italian Republic at the hearing.

Findings of the Court

50 In assessing whether the pleas of inadmissibility raised against the statements in intervention are well founded, it must be recalled that under the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union an application to intervene is to be limited to supporting the form of order sought by one of the parties. That provision does not, however, preclude an intervener from putting forward arguments that are new or different from those of the party it supports, as long as its purpose is to support the form of order sought by that party (see, inter alia, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1; Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36; and Case C-334/08 *Commission* v *Italy* [2010] ECR I-6869, paragraphs 53 to 55).

51 The argument of the Kingdom of the Netherlands relates to the Commission's complaint that the sectoral traffic prohibition is discriminatory. The argument of the Italian Republic relates to the allegedly disproportionate nature of that prohibition, and more particularly to the complaint that the Republic of Austria failed to examine closely the possibility of having recourse to measures that were less restrictive of the free movement of goods.

52 While those arguments differ from those of the Commission, they none the less relate to complaints raised by the Commission and are intended to support the form of order sought by it. They are intended to contribute to the success of the action for failure to fulfil obligations by shedding further light on the dispute (see, to that effect, Case C-185/00 *Commission* v *Finland* [2003] ECR I-14189, paragraph 92).

53 It follows that the pleas of inadmissibility must be rejected.

Substance

Arguments of the parties

54 The Commission starts by emphasising that it by no means underestimates the problems connected with transalpine traffic. It also acknowledges that since 2002 values in excess of the limit value for nitrogen dioxide fixed in Section I of Annex II to Directive 1999/30 have been found on the A 12 motorway, and that Directive 96/62 laid down an obligation in such circumstances for the Republic of Austria to take action. While most of the proposed measures intended to improve air quality in the zone in question could have been approved, the fact remains that the contested regulation is not consistent with European Union law.

55 In the Commission's view, the sectoral traffic prohibition is a measure having equivalent effect to quantitative restrictions within the meaning of Articles 28 EC and 29 EC, in so far as it hinders the free movement of goods, in particular their free transit.

56 The fact that the contested regulation forms part of a package of measures adopted by the Austrian authorities has no bearing on whether or not there is a restriction of the exercise of that freedom, since all national measures have to be assessed individually to establish whether they are compatible with those articles.

57 The present case concerns a measure that is more radical than that at issue in Case C-320/03 *Commission* v *Austria*. The traffic concerned by the implementation of the prohibition is not only that on the 'north-south axis' (the

Italy-Brenner-Innsbruck-Langkampfen-Germany link) and the 'north-west axis' (the Vorarlberg-Eastern Europe link) but also that on the 'south-west axis' (the Italy-Innsbruck-Vorarlberg/Lake Constance region link). According to estimates, when the first stage of the sectoral traffic prohibition was implemented on 2 May 2008, 35 000 journeys a year by lorry were affected. With the implementation of the second stage on 1 January 2009, the measure was to affect 200 000 journeys a year, representing 7.3 % of total journeys by lorry on the A 12 motorway. The effects of the measure extended to about 300 km of the Austrian network of fast highways.

58 The Commission submits that, to transport the goods mentioned in the contested regulation, it is necessary either to use rail transport or to use longer routes by road, which creates additional costs for the operators concerned. The sectoral traffic prohibition thus has substantial economic repercussions not only for the transport industry but also for manufacturers of the goods concerned by the regulation, who will have to bear higher transport costs, which will affect their competitiveness.

59 According to the Commission, the contested regulation is discriminatory. Since local and regional traffic is excepted from the scope of the sectoral traffic prohibition, the prohibition de facto affects predominantly the international transit of goods. In addition, it may be feared that transport undertakings able to benefit from that exception will take advantage of the exception provisions to offer long-distance road transport which can no longer be offered by undertakings established outside the region.

60 Moreover, in so far as the sectoral traffic prohibition does not relate directly to the emissions produced by goods vehicles but to the goods to be transported by them, it may have a discriminatory effect on trade between Member States. The Commission

observes that inter alia the trade in wood and wood products and the trade in marble and travertine could be affected.

61 As to the existence of a possible justification for the sectoral traffic prohibition, the Commission accepts that the prohibition may contribute to attaining the objective of protection of the environment. It calls into question, however, the compatibility of the measure with the principle of proportionality.

62 The sectoral traffic prohibition is vitiated by internal contradictions, so that it has not been shown to be appropriate to the objective sought.

63 According to the Commission, the principal objective of the contested regulation is not to reduce the emissions produced by motor vehicles but to reduce road traffic. Such a reduction has only an indirect influence on air quality.

64 Since the sectoral traffic prohibition relates to the goods to be transported, not directly to the emissions produced by goods vehicles, it has the consequence that lorries producing more pollution are permitted if they carry goods that do not fall within the scope of the prohibition, while less polluting lorries are prohibited if they carry ceramic tiles, for example.

65 Moreover, the decision to direct goods with an 'affinity with rail' towards that mode of transport ignores the fact that the possibility of having recourse to rail transport often depends on various logistic parameters of the transport operation to be performed,

such as the volume to be transported. In addition, that criterion is too vague, and it is not impossible that the goods to which the prohibition was to apply were selected in an arbitrary or discriminatory manner, the selection later being extended to cover other classes of goods.

66 In the Commission's view, not all the conceivable alternatives to the sectoral traffic prohibition were examined and, if appropriate, adopted by the Austrian authorities. The various measures that would be less restrictive of the free movement of goods include, in its opinion, replacing the variable speed limit by a permanent 100 km/h speed limit.

67 It argues that the report of the Institut für Energie- und Umweltforschung Heidelberg of 30 November 2007 ('the IFEU report') shows that a permanent speed limit of 100 km/h could bring about a reduction by 2010 of nitrogen dioxide emissions by approximately 7.5 %. With respect more particularly to the effect of such a limit as opposed to that of the variable speed limit, according to the calculations submitted by the Austrian authorities, the application of the variable limit makes it possible to reduce nitrogen dioxide emissions in the zone in question by approximately 3.6 % to 3.8 % annually. The Republic of Austria accepted, in its reply to the reasoned opinion, that the effect of the variable speed limit was equivalent to 67 % of the effect of a permanent speed limit of 100 km/h. It follows that replacing the variable speed limit by such a measure would make it possible to attain an additional reduction of those emissions by 1.8 %, which is greater than the effect of the sectoral traffic prohibition, namely an annual reduction of those atmospheric pollutants by 1.5 %.

68 As regards the analysis by Ökoscience of the effect on air quality of the application of the variable speed limit from November 2007 to October 2008 ('the Ökoscience report'), relied on by the Republic of Austria to show that such a replacement would allow an additional annual reduction of only 1.1 % of nitrogen dioxide emissions, that

report was published in March 2009 and contains information that could only have been obtained after the expiry of the period prescribed in the reasoned opinion on 8 March 2008.

69 It would also have been possible to consider extending the traffic ban on lorries in certain Euro classes to those in other more advanced classes. The Republic of Austria opposed that suggestion in its reply to the reasoned opinion, asserting that lorries corresponding to standard Euro IV often emit more nitrogen dioxide than those corresponding to standard Euro III. Even if that were correct, the fact remains that a traffic prohibition for lorries in class Euro III would encourage many undertakings to make an early switch to class Euro V.

70 The Commission also mentions the possibility of introducing traffic control measures such as the drop-counter system, establishing systems of tolls based on the quantity of pollutants emitted by vehicles, or adjusting the tax on mineral oils or consumption tax in order to encourage the purchase of motor vehicles equipped with petrol engines.

71 The Commission submits that, before deciding to implement the sectoral traffic prohibition, the Austrian authorities failed to make sure that there was sufficient and appropriate rail capacity for road transport of the goods concerned to be transferred to rail. The existence of such capacity has not been shown either for the section to the west of Innsbruck or for the section to the east of Innsbruck as regards the implementation of the second stage of the prohibition.

72 As regards the possibility of making use of the highway on rails ('Rollende Landstrasse'), that is, a method of transport in which lorries are loaded onto rail wagons for only part of the journey, that alternative exists only for the section east of Innsbruck. For that section, it was possible to ensure only part of the transport of the goods concerned by the implementation on 1 January 2009 of the second stage of the sectoral traffic prohibition, as originally provided for. While the highway on rails had sufficient capacity on 1 January 2009, that was simply because of changes made by the Republic of Austria after the expiry of the period prescribed in the reasoned opinion.

73 As regards the alternative of unaccompanied combined transport, that was of interest from an economic and logistical point of view only over long distances.

74 With respect to the possibility of using alternative routes, it appears that the local alternative routes are either closed to transit traffic or unsuitable for heavy vehicles. Transit traffic by the foreign lorries concerned would thus have to be diverted either via Switzerland or via the Tauern route in Austria, which would involve a considerably longer journey. Furthermore, the additional costs caused by the Swiss customs formalities would also have to be taken into account.

75 Finally, in the absence of realistic alternative solutions for the transport of the goods referred to in the contested regulation, the periods laid down for the implementation of the sectoral traffic prohibition are insufficient for reasonably enabling the operators concerned by the measure to adjust to the new circumstances.

76 For the sector to the west of Innsbruck (Zirl-Innsbruck), the sectoral traffic prohibition has not been shown to be necessary, in the absence of adequate assessments showing how that section is affected. There is also no specific impact analysis capable of demonstrating that such a measure is appropriate and necessary.

77 In any event, the fact that the contested regulation was amended on several occasions after the expiry of the period prescribed in the reasoned opinion shows that the Republic of Austria did not correctly analyse the proportionality of the sectoral traffic prohibition.

78 The Kingdom of the Netherlands submits in its statement in intervention that the contested regulation constitutes indirect discrimination. It affects transit traffic conducted by foreign undertakings to a greater extent than traffic operated by Austrian undertakings because, first, it relates not to all lorry traffic but only to lorries of over 7.5 t, by which transit traffic is generally operated, and, secondly, it concerns a road axis that is of great importance for traffic of that kind.

79 The Italian Republic for its part proposes, as an alternative to the sectoral traffic prohibition, the introduction of a traffic ban for passenger and commercial motor vehicles of less than 7.5 t, depending on the Euro class to which they belong. As regards the Commission's suggested alternative of extending the traffic bans imposed on older lorries to those in other, more advanced Euro classes, more particularly those in class Euro III, that could have substantial economic repercussions for the economy of the Italian Republic because of the composition of its lorry fleet.

80 In addition, the intervening States state that there are problems deriving from the implementation of the sectoral traffic prohibition. The alternatives of rail transport and the use of alternative routes do not meet the needs of the operators concerned. The Italian Republic points out in particular the additional administrative and financial burden produced by the transport of goods through Switzerland.

81 The Republic of Austria disputes the existence of a restriction of the free movement of goods within the meaning of Articles 28 EC and 29 EC.

82 As regards the factual context, the Republic of Austria submits that, despite the measures intended to improve ambient air quality in the Province of Tyrol, the nitrogen dioxide concentration on the A 12 motorway clearly exceeds the annual limit values fixed in Section I of Annex II to Directive 1999/30 plus the margin of tolerance. The situation is becoming more serious because of the degressive progression of that margin. About 60 % of nitrogen dioxide emissions on that motorway are attributable to lorries. The transport of goods by road is thus the principal source of emissions of that atmospheric pollutant in the zone in question.

83 The Republic of Austria emphasises that Directive 96/62 in conjunction with Directive 1999/30 imposes an obligation on the Member State concerned to act, if the annual limit value for nitrogen dioxide is exceeded. Moreover, the Austrian authorities are obliged to ensure respect for the private and family life of citizens, enshrined in Article 7 of the Charter of Fundamental Right of the European Union ('the Charter') and Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, including the right to be protected against harm to health and the quality of life. In the present case, a fair balance was struck between the interests involved, in accordance with the line of case-law starting with Case C-112/00 *Schmidberger* [2003] ECR I-5659.

84 The Republic of Austria submits that the compatibility with European Union law of the contested regulation must be assessed not in isolation but in the light of the package of measures of which it forms part. To achieve as substantial and effective a reduction as possible of the emissions caused by road traffic, an overall plan combining several measures was necessary. Those measures relate not only to the specific emissions of motor vehicles but also to the density of road traffic. Implementation of that plan makes it possible substantially to reduce the pollution caused by nitrogen dioxide in the zone concerned and to achieve in 2010 a mean annual concentration of approximately 55 $\mu g/m^3$ of that atmospheric pollutant in that zone. Despite the adoption of that plan, however, the concentration of nitrogen dioxide in the air considerably exceeds the limit value of 40 $\mu g/m^3$ fixed in Section I of Annex II to Directive 1999/30 for that year.

85 The sectoral traffic prohibition, in its final version following the decision not to include the transport of cereals in the scope of the prohibition, concerns approximately 194 000 lorry journeys a year, representing 6.6 % of total journeys by lorries on the A 12 motorway. It is not such as to obstruct trade in goods between Member States, but merely prevents the use of one method of transport in a transalpine transit corridor. The journeys in question can be carried out partly by transferring road transport of the goods affected by the contested regulation to rail and partly by using alternative routes.

86 According to the Republic of Austria, the prohibition has not had significant economic consequences. Its effects are too uncertain and indirect to be regarded as being capable of hindering trade between Member States. In practice, no hindrance of trade in goods has been established since the implementation of the first stage of the prohibition on 2 May 2008.

87 As regards the allegedly discriminatory nature of the contested regulation, the goods covered by it were chosen in accordance with objective and non-discriminatory criteria.

88 As regards the exception for regional and local road transport, that is explained by the fact that transferring traffic of that kind to rail, by definition within the zone itself, would involve additional journeys to the rail terminals, which would have an effect contrary to the objective pursued by the contested regulation. Moreover, the 'extended zone' defined by the regulation includes local authority areas outside Austrian territory, which supports the non-discriminatory character of the system in question.

89 As regards the fear that transport undertakings benefiting from the derogations may offer long-distance road transport services, the Austrian authorities have taken steps to combat possible evasion or abuse.

90 In addition, the Republic of Austria observes that, for certain transport operations, derogations from the sectoral traffic prohibition may be granted, on a case-by-case basis, where a request is made to that effect. The derogation provisions make it possible to arrange road transport of goods where it is established that they cannot be transferred to rail because of special circumstances. Those provisions are applied flexibly by the competent authorities.

91 In the alternative, the Republic of Austria submits that the sectoral traffic prohibition is justified on grounds of protection of health and the environment and is proportionate to the objectives pursued.

92 The Republic of Austria argues that the Commission is wrong to criticise it for deciding to target the transport of goods by road. Such a measure is consistent with the objectives recognised in the context of the common transport policy, in particularly in the Communication from the Commission to the Council and the European Parliament, 'Keep Europe moving – Sustainable mobility for our continent – Mid-term review of the European Commission's 2001 Transport White Paper' (COM(2006) 314 final of 22 June 2006).

93 Moreover, scientific research shows clearly that the approach taken by the Republic of Austria is justified. The Commission relies on studies that adopt incorrect hypotheses, leading to an overestimation by the Commission of the effects of measures relating to passenger vehicles.

94 As regards the Austrian authorities' decision to extend the scope of the sectoral traffic prohibition to the section to the west of Innsbruck, that measure is necessary because of the level of pollution of the ambient air in the zone concerned. Furthermore, as that section represents only a small proportion of lorry traffic in the Brenner corridor, namely about 1.8 %, the effect of the extension on cross-border lorry traffic is slight.

95 Before adopting the sectoral traffic prohibition, the Austrian authorities carefully examined the possibility of taking alternative measures that were less restrictive of the free movement of goods. The measures studied were introduced and applied in so far as they were appropriate and effective. The authorities thus decided to introduce a variable speed limit depending on pollution and a traffic ban for certain lorries that did not comply with standards Euro II or Euro III. In addition, the geographical scope of the night traffic ban was extended and the exception for lorries in classes Euro IV and Euro V was removed.

96 As regards the possibility of introducing a permanent speed limit of 100 km/h, the Commission is wrong to submit that such a measure could reduce nitrogen dioxide emissions in the zone concerned by approximately 7.5 % and would reduce the annual concentration of that atmospheric pollutant in that zone more than the sectoral traffic prohibition. According to the Republic of Austria, the IFEU report relied on by the Commission to show that those assertions are correct is based on unverifiable data and hypotheses.

97 For assessing the effect of replacing the variable speed limit by a permanent 100 km/h speed limit, the basis should be the Ökoscience report, which contains data on the application of the variable speed limit from November 2007 to October 2008. According to that data, the effect of that replacement would be to obtain an additional annual reduction of 1.1 % of nitrogen dioxide emissions in optimum conditions, which would represent a markedly worse result that that of the sectoral traffic prohibition, for which a reduction of 1.5 % of those emissions is claimed.

98 In this connection, the Republic of Austria states that the level of reduction of emissions deriving from a permanent speed limit of 100 km/h depends essentially on that measure's effect on the speed actually practised by road users, which itself depends on their acceptance of the measure. The average speed of traffic does not correspond to the maximum permitted speed. At the time when a speed limit of 130 km/h applied in Vomp, the average speed of passenger vehicles was approximately 116 km/h, while during the investigation period in which a permanent speed limit of 100 km/h was applied the average speed fell only to 103 km/h. The actual reduction in average speed was thus not 30 km/h but only 13 km/h.

99 As to the possibility of extending the traffic bans for older lorries to lorries in other Euro classes, such an extension would lead to contradictory results. Nitrogen dioxide emissions of lorries in class Euro IV are greater than those of motor vehicles in class Euro III. In addition, account should be taken of the date from which vehicles in the Euro class concerned by the traffic ban no longer correspond to the standard, and of whether an obligation to replace those vehicles by newer vehicles could be imposed. At the time when the package of measures intended to improve ambient air quality in the Province of Tyrol was proposed, three-quarters of the lorry fleet still consisted of vehicles corresponding to standard Euro III.

100 The Austrian authorities studied the effects on air pollution of traffic control measures, measures relating to tolls and other steering measures. They were rejected in part because of their disadvantages, and are in the course of application in part.

101 Furthermore, the Commission is suggesting, as alternatives to the sectoral traffic prohibition, measures which will be effective only in the long term, such as economic measures aimed at reducing the proportion of passenger vehicles with diesel engines. In any event, such measures have already been adopted.

102 As regards the possibility of ensuring transport of the goods mentioned in the contested regulation, the Republic of Austria distinguishes between transports of goods for which the A 12 motorway is the shortest route ('best route'), those for which there is an at least equivalent alternative route ('alternative route'), and those for which there is a better alternative route ('longer route'). Of the transport operations affected by the sectoral traffic prohibition, 45 % are to be classified as best-route operations, 25 % as alternative-route operations and 30 % as longer-route operations.

103 Where goods are transported as transit traffic, recourse should be had, in the view of the Republic of Austria, to rail transport if the operations correspond to a 'best route' or an 'alternative route'. In this connection, account should be taken of the total capacity resulting from all available forms of rail transport.

104 The available capacity of the highway on rails, conventional wagon-load traffic and unaccompanied combined traffic is more than enough to cope with all the goods covered by the contested regulation. As regards more particularly the use of the highway on rails, that does not require a logistical restructuring.

105 Despite the existence and the availability of sufficient and appropriate rail capacity, the Austrian authorities postponed the entry into force of the second stage of the sectoral traffic prohibition by introducing a third stage from 1 January 2009 and then a fourth stage from 1 July 2010. Those additional periods enabled a larger proportion of the undertakings concerned by the prohibition to perform the transport operations in question by means of the highway on rails, which meant that they did not have to adapt their logistics.

106 Contrary to the Commission's submissions, the alternative routes via the Resia/Reschen pass are not reserved for regional and local traffic. Transit traffic operations by foreign lorries for which this route is a 'best route' can use it. For rerouting goods transport journeys in the 'alternative route' and 'longer route' categories, there are numerous other routes available. As regards routes by road through Switzerland, the Agreement of 21 June 1999 between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road (OJ 2002 L 114,

p. 91) ensures that transport operations from one Member State to another Member State may pass through Switzerland without quota restrictions.

107 Finally, the periods laid down for implementing the sectoral traffic prohibition enabled the operators concerned to adapt to the new conditions. The phasing of the various measures strengthens the proportionality of the overall plan. The Commission has not been able to show the existence of problems attributable to the allegedly too rapid implementation of the prohibition.

Findings of the Court

— Existence of a restriction of the free movement of goods

108 The first point to consider is the assertion by the Republic of Austria that the contested regulation cannot constitute a breach of Article 28 EC et seq. in view of the obligation to act deriving from Article 8(3) of Directive 96/62 in conjunction with Directive 1999/30.

109 In the present case, the Republic of Austria and the Commission agree that the annual limit value for concentrations of nitrogen dioxide in the ambient air fixed in Section I of Annex II to Directive 1999/30 was exceeded at the Vomp/Raststätte monitoring point in the years 2002 to 2009. The Republic of Austria thus had to ensure, in view of

the wording of Article 8(3) of Directive 96/62, that a plan or programme was prepared or implemented to enable the limit value to be complied with. It is not disputed that, formally, the contested regulation forms part of such a plan.

110 In accordance with that provision, the plan must incorporate at least the information listed in Annex IV to Directive 96/62, such as information on the localisation of excess pollution, the main emission sources responsible for pollution, and existing and proposed measures. Directive 96/62 does not, however, contain precise indications of the scope and content of the measures to be taken by the Member States.

111 In those circumstances, it is for the Member States to take appropriate and consistent measures aimed at compliance with the limit value, having regard to all the material circumstances and the interests in play (see, to that effect, Case C-320/03 *Commission* v *Austria*, paragraph 81, and Case C-237/07 *Janecek* [2008] ECR I-6221, paragraphs 45 and 46). While they have a discretion in that respect, they must none the less exercise it consistently with the provisions of the EC Treaty, including the fundamental principle of the free movement of goods.

112 The contested regulation must therefore be assessed from the point of view of Articles 28 EC to 30 EC.

113 It must be recalled that the free movement of goods is one of the fundamental principles of the Treaty. That freedom entails the existence of a general principle of free transit of goods within the European Union (see, inter alia, Case 266/81 *SIOT* [1983] ECR 731, paragraph 16; Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 14; and Case C-320/03 *Commission* v *Austria*, paragraphs 63 and 65).

114 In the present case, the contested regulation prohibits lorries of over 7.5 t carrying certain goods which, according to the Austrian authorities, have an 'affinity with rail' from using a section of the A 12 motorway. It thus prevents the use of a mode of transport for those goods in that transalpine corridor.

115 The Republic of Austria submits that there are alternative routes or other modes of transport capable of carrying the goods in question.

116 However, the existence of such alternative solutions does not negate the existence of a restriction of the free movement of goods (see, to that effect, Case C-320/03 *Commission* v *Austria*, paragraph 67). The section of the A 12 motorway is one of the principal land transport routes between southern Germany and northern Italy. By forcing the undertakings concerned to seek viable alternative solutions for the transport of the goods covered by the contested regulation, the sectoral traffic prohibition is liable to have a substantial effect on the transit of goods between northern Europe and northern Italy (see, to that effect, Case C-320/03 *Commission* v *Austria*, paragraphs 66 and 68).

117 In those circumstances, the sectoral traffic prohibition must be regarded as constituting a measure having equivalent effect to quantitative restrictions, which in principle is incompatible with the obligations under Articles 28 EC and 29 EC, unless that measure can be justified.

— Possible justification of the restriction

118 The Republic of Austria submits that the sectoral traffic prohibition is justified on grounds of protection of health and the environment and by the need to ensure respect for private and family life enshrined in Article 7 of the Charter and Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

119 It is settled case-law that national measures liable to obstruct intra-Community trade may be justified on one of the public-interest grounds set out in Article 30 EC, such as the protection of human health and life, or one of the overriding requirements relating inter alia to protection of the environment, provided that the measures in question are proportionate to the objective sought (see, inter alia, Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECR 649; Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 9; Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 21; Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705, paragraph 75; and Case C-320/03 *Commission* v *Austria*, paragraph 70).

120 It should be recalled that the protection of health and the protection of the environment are essential objectives of the European Union. Article 2 EC states that the Community has, as one of its tasks, to promote 'a high level of protection and improvement of the quality of the environment' and Article 3(1)(p) EC states that the activities of the Community are to include a contribution to the attainment of 'a high level of health protection' (see, to that effect, Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13; Case C-195/90 *Commission* v *Germany* [1992] ECR I-3141, paragraph 29; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 91).

121 Furthermore, in accordance with Articles 6 EC and 152(1) EC, the requirements of environmental protection and public health must be taken into account in the definition and implementation of Community policies and activities (see, to that effect, Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 60). The transversal and fundamental nature of those objectives is also reaffirmed in Articles 37 and 35 respectively of the Charter.

122 As to the relationship between the objectives of protection of the environment and protection of health, it is apparent from Article 174(1) EC that the protection of human health is one of the objectives of Community policy on the environment (see, inter alia, Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 32, and Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-13533, paragraph 71). Those objectives are closely linked, in particular in connection with the fight against air pollution, the purpose of which is to limit the dangers to health connected with the deterioration of the environment. The objective of protection of health is therefore already incorporated, in principle, in the objective of protection of the environment (see, to that effect, Case C-524/07 *Commission* v *Austria*, paragraph 56).

123 In those circumstances, the arguments of the Republic of Austria on protection of health need not be considered separately from those on protection of the environment (see, to that effect, Case C-524/07 *Commission* v *Austria*, paragraph 56).

124 In the present case, the sectoral traffic prohibition was adopted with the aim of ensuring ambient air quality in the zone concerned in accordance with the obligations deriving from Article 8(3) of Directive 96/62 in conjunction with Directive 1999/30.

125 It is settled case-law that overriding requirements of protection of the environment can justify national measures that are liable to obstruct intra-Community trade, provided that those measures are suitable for securing the attainment of that objective and do not go beyond what is necessary for attaining it (see, to that effect, Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, paragraphs 19 and 20; Case C-463/01 *Commission* v *Germany*, paragraph 75; and Case C-524/07 *Commission* v *Austria*, paragraph 57).

126 A restrictive measure can be regarded as suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (see, to that effect, Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42; and Case C-137/09 *Josemans* [2010] ECR I-13019, paragraph 70).

127 First, as regards the appropriateness of the contested regulation, the Commission considers that the Austrian authorities' decision to adopt a measure relating to the transport of goods by road is inappropriate. The Republic of Austria is aiming not to reduce emissions from motor vehicles but to reduce the density of road traffic. The Commission also submits that the contested regulation does not really reflect a concern to attain the objective pursued in a consistent and systematic manner.

128 It must be observed that, to improve air quality in the zone concerned, the Austrian authorities adopted various measures to reduce emissions from motor vehicles, namely a speed limit of 100 km/h on a section of the A 12 motorway, subsequently replaced by a variable speed limit, and a prohibition on that motorway under certain conditions of night lorry traffic and traffic of lorries in certain Euro classes. As it considered those measures insufficient, the Republic of Austria also adopted a measure

aimed at reducing the total number of transport operations by lorry, namely the sectoral traffic prohibition. As a result of the adoption of those measures, the mean annual concentration of nitrogen dioxide in the zone concerned should have been approximately 55 μg/m^3 in 2010.

129 It is common ground that the implementation of measures aimed at limiting road traffic, such as the sectoral traffic prohibition, brings about a reduction of emissions of atmospheric pollutants and so contributes to the improvement of air quality. In the present case, it is not disputed that that prohibition allows nitrogen dioxide emissions to be reduced by about 1.5 % a year in the zone concerned.

130 In this context, it must be recalled that the need to reduce the transport of goods by road, if appropriate by directing operators towards other more environment-friendly modes of transport such as rail transport, has been acknowledged in the framework of the common transport policy, as the Commission accepted at the hearing. Mention should also be made of Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States (OJ 1992 L 368, p. 38), the third recital in the preamble to which states that 'the increasing problems relating to road congestion, the environment and road safety call, in the public interest, for the further development of combined transport as an alternative to road transport'.

131 As regards the criterion of 'affinity with rail' used by the Austrian authorities to designate the goods to be covered by the sectoral traffic prohibition, it is common ground that certain goods are particularly suited to rail transport.

132 As to the Commission's assertion that the criterion adopted raises the possibility that the goods concerned by the sectoral traffic prohibition may have been chosen arbitrarily, suffice it to state that the Commission has not put forward any arguments to support the contention that that was the case with respect to the goods listed in Paragraph 3 of the contested regulation. Since in infringement proceedings the Court must give a ruling by taking account only of the facts of the case, excluding any suppositions, this assertion must be rejected (see, inter alia, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41, and Case C-335/07 *Commission* v *Finland* [2009] ECR I-9459, paragraph 46).

133 As regards the question whether the contested regulation reflects a concern to attain the objective pursued in a consistent and systematic manner, it is true that it has the consequence of authorising the use of more highly polluting lorries where they carry goods that are not within the scope of the prohibition, whereas the use of less polluting lorries is prohibited where they carry inter alia ceramic tiles. However, it cannot be regarded as inconsistent for a Member State which has decided, in accordance with an objective that is recognised in the context of the common transport policy, to direct goods transport towards rail to adopt a measure focusing on products suitable for transport by various means of rail transport.

134 As regards the exclusion of local and regional traffic from the scope of the sectoral traffic prohibition, it must be observed that a characteristic feature of national measures intended to channel transport flows or influence modes of transport is that they include, as a rule, exceptions for transport operations whose point of departure or destination is inside the zone concerned. Clearly, as the Republic of Austria rightly submits, the use of rail transport for traffic of that kind is likely to involve longer journeys, since journeys to the rail terminals will be added to the original journeys, which would have an effect contrary to the objective sought by the sectoral traffic prohibition. Moreover, it is not disputed that rail transport is a viable alternative to road transport only for journeys of a certain distance.

135 In addition, in so far as the exception relates to lorries that are loaded and unloaded in the 'extended zone', it should be recalled that that zone also includes local authority areas outside Austrian territory.

136 Furthermore, according to the documents submitted to the Court, the Republic of Austria has taken steps to combat possible evasion or abuse in the application of that exception.

137 In those circumstances, the exclusion of local and regional traffic from the scope of the sectoral traffic prohibition cannot call into question the consistent and systematic nature of the contested regulation.

138 Having regard to those factors, it must be concluded that the sectoral traffic prohibition is appropriate for attaining the objective of protection of the environment.

139 Next, as regards the question whether the restriction of the free movement of goods goes beyond what is necessary to attain that objective, the Commission submits that measures such as an extension of the traffic prohibition for lorries in certain Euro classes to lorries in other classes or the replacement of the variable speed limit by a permanent 100 km/h speed limit, although liable to affect the free movement of goods, would have enabled the objective sought to be attained while restricting the exercise of that freedom to a lesser extent.

140 As the Court stated in Case C-320/03 *Commission* v *Austria*, paragraph 87, 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 inappropriateness to the objective pursued was clearly established.

141 With respect, first, to the possibility of extending the traffic prohibition for lorries in certain Euro classes to lorries in other classes, it must be recalled that the limit for emissions of oxides of nitrogen was fixed at 5 g/kWh for lorries in class Euro III and that class Euro IV reduced this to 3.5 g/kWh.

142 The Republic of Austria takes the view, however, that lorries corresponding to class Euro IV often emit more nitrogen dioxide than those corresponding to standard Euro III. For that reason, it considers that, before extending the traffic prohibition for lorries to lorries in class Euro III, a more thorough study should be made of the impact of nitrogen dioxide emissions on the environment.

143 In view of the fact that each successive Euro class undeniably includes a substantial reduction of emissions of oxides of nitrogen, it has not been shown that extending the traffic prohibition for lorries in certain Euro classes to lorries in other classes would not have been able to contribute to the objective sought as effectively as the implementation of the sectoral traffic prohibition.

144 With respect, secondly, to the Commission's suggestion of replacing the variable speed limit by a permanent 100 km/h speed limit, the Republic of Austria submits, relying on the data in the Ökoscience report, that that replacement would lead only to an additional annual reduction of 1.1 % of nitrogen dioxide emissions in the zone concerned, whereas a reduction of those emissions by 1.5 % is claimed for the sectoral traffic prohibition.

145 It must be observed that the information in the Ökoscience report relates inter alia to the speeds at which road users actually drove in that zone from November 2007 to October 2008. A significant part of that information thus relates to the situation of the Republic of Austria as it appeared at the end of the period prescribed in the reasoned opinion, which was 8 June 2008. That information may be taken into account in the assessment of the merits of the present action.

146 According to that report, at the time when a speed limit of 130 km/h applied at Vomp, the average speed of passenger vehicles was approximately 116 km/h, while during the investigation period in which a permanent speed limit of 100 km/h was introduced their average speed was 103 km/h. The introduction of the permanent speed limit thus brought about a reduction of only 13 km/h compared to the periods in which the speed limit was 130 km/h.

147 While the effect of a speed limit on the speed actually practised by road users may indeed be influenced by the way in which they accept the limit, the fact remains that it is for the Member State concerned to ensure that such a measure is actually complied with, by adopting compulsory measures with penalties if need be. The Republic of Austria cannot thus rely on the average speed measured in the zone concerned, 103 km/h, to assess the effect of implementing a permanent speed limit of 100 km/h.

148 Consequently, it appears that replacing the variable speed limit by a permanent speed limit of 100 km/h offers a potential for reducing nitrogen dioxide emissions which was not sufficiently taken into account by the Republic of Austria. Moreover, as may be seen from paragraph 67 above, the existence of that potential is corroborated by the IFEU report.

149 In addition, it must be noted that the restrictive effect on the free movement of goods of replacing the variable speed limit by a permanent speed limit of 100 km/h is less than that of implementing the sectoral traffic prohibition. That replacement would not affect the movement of lorries whose maximum authorised speed is in any case limited.

150 In those circumstances, it must be concluded, having regard to the criteria set out in paragraph 140 above, that it has not been shown that the two principal alternative measures put forward by the Commission as measures less restrictive of the free movement of goods are not appropriate. Without it being necessary to examine the other measures suggested by the Commission, the present application must therefore be allowed.

151 In the light of all the foregoing, it must be held that, by prohibiting lorries of over 7.5 tonnes carrying certain goods from using a section of the A 12 motorway in the Inn valley (Austria), the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC.

Costs

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

153 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Italian Republic and the Kingdom of the Netherlands, which have intervened in the proceedings, must bear their own costs.

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

1. **Declares that, by prohibiting lorries of over 7.5 tonnes carrying certain goods from using a section of the A 12 motorway in the Inn valley (Austria), the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC;**

2. **Orders the Republic of Austria to pay the costs;**

3. **Orders the Italian Republic and the Kingdom of the Netherlands to bear their own costs.**

[Signatures]