ORDER OF THE PRESIDENT OF THE COURT
23 October 2002 *

In Case C-296/02 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, M. Niejahr and W. Wils, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, and by J. Sedemund and T. Lübbig, Rechtsanwälte,

and by

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

interveners,

APPLICATION for interim measures in an 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 24 July 2002 to award in full the ecopoints for 2002,

THE PRESIDENT OF THE COURT

makes the following

Order

1 By an application lodged at the Court Registry on 20 August 2002, 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 24 July 2002 to act in response to Austria's request that the Commission put forward a proposal to reduce the number of ecopoints for transit for 2002 and, in the alternative, annulment of the Commission's decision of 24 July 2002 awarding in full the ecopoints for 2002.

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 24 July 2002 and asking that the Commission be requested to adopt all the appropriate measures to freeze actual use of the quota of ecopoints for 2002 already issued but not yet used, in so far as necessary for a possible special reduction in the ecopoints for 2002, and, in the alternative, asking that the Commission be requested not to distribute the Community reserve of ecopoints for that year.

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

4 On 5 September 2002, the Commission submitted its written observations on the application for interim measures.

5 By applications lodged at the Court Registry on 30 August and 13 September 2002 respectively, the Federal Republic of Germany and 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 37 of the EC Statute of the Court of Justice and to Article 93(1) and (2) of the Rules of Procedure.

7 The Federal Republic of Germany submitted its statement in intervention by fax on 12 September 2002.

8 At the request of the Court, the Commission sent copies of various documents by fax to the Court Registry on 17 September 2002.

9 The parties submitted oral argument on 18 September 2002.

Legal and factual background

The general legal framework of the ecopoints system

10 The general legal framework of the ecopoints system is constituted by 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, hereinafter 'the Protocol'), and by Commission 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).

11 Regulation No 3298/94, which was adopted pursuant to Article 11(6) of the Protocol, was amended by Commission Regulation (EC) No 1524/96 of 30 July 1996 (OJ 1996 L 190, p. 13), by Commission Regulation (EC) No 609/2000 of 21 March 2000 (OJ 2000 L 73, p. 9), and by Council Regulation (EC) No 2012/2000 of 21 September 2000 (OJ 2000 L 241, p. 18) (hereinafter 'Regulation No 3298/94').

12 Part III of Protocol No 9, which concerns road transport, establishes special rules for the traffic of goods by road through Austria.

13 Those rules have their origin in the Agreement between the European Economic Community and the Republic of Austria on the transit of goods by road and rail, signed in Oporto on 2 May 1992 (hereinafter 'the 1992 Agreement'), approved on behalf of the Community by Council Decision 92/577/EEC of 27 November 1992 (OJ 1992 L 373, p. 4).

14 The main points of the rules are contained in Article 11(2) of the Protocol, which is worded as follows:

'Until 1 January 1998, the following provisions shall apply:

(a) The total of NOx (acidifiant gas) 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 NOx 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 NOx 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) ...

(d) Austria shall issue and make available in good time the ecopoints cards required for the administration of the ecopoints system, pursuant to Annex 5, for heavy goods vehicles crossing Austria in transit.

(e) The ecopoints shall be distributed by the Commission among Member States in accordance with provisions to be established in accordance with paragraph 6.'

15 Article 11(4) to (6) of the Protocol provides:

'4. Before 1 January 2001, the Commission, in cooperation with the European Environment Agency, shall make a scientific study of the degree to which the objective concerning reduction of pollution set out in paragraph 2(a) has been achieved. If the Commission concludes that this objective has been achieved on a sustainable basis, the provisions of paragraph 2 shall cease to apply on 1 January 2001. If the Commission concludes that this objective has not been achieved on a sustainable basis the Council, acting in accordance with Article 75 of the EC Treaty, may adopt measures, within a Community framework, which ensure equivalent protection of the environment, in particular a 60% reduction of pollution. If the Council does not adopt such measures, the transitional period shall be automatically extended for a final period of three years, during which the provisions of paragraph 2 shall apply.

...

6. 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.

...'

16 Article 16 of the Protocol provides that the Commission is to be assisted by a Committee composed of representatives of the Member States (hereinafter 'the Ecopoints Committee') and lays down the rules governing its activities.

17 In its Report to the Council on the Transit of Goods by Road through Austria (COM(2000) 862 final), the Commission stated that the objective of reducing pollution had not been achieved on a sustainable basis. Since the Council did not adopt additional measures, the provisions of Article 11(2) of the Protocol therefore continue to apply until 31 December 2003.

Implementation of the system of ecopoints

18 In order to take account of transit journeys by heavy goods vehicles registered in Finland and Sweden, Regulation No 3298/94 amended Annex 4 to the Protocol and fixed the total number of ecopoints as follows:

Year	Percentage of ecopoints	Ecopoints allocated to the 15 Member States
1991 (year of reference)	100%	23 556 220
1995	71.7%	16 889 810
1996	65.0%	15 311 543
1997	59.1%	13 921 726
1998	54.8%	12 908 809
1999	51.9%	12 225 678
2000	48.5%	11 428 150
2001	47.2%	11 121 897
2002	43.5%	10 250 317
2003	39.6%	9 321 531

Regulation No 3298/94 also fixed, in Annex D, the distribution scale of ecopoints between the Member States.

19 Article 7(1) and (2) provides:

'1. The competent authorities of the Member States will distribute their available ecopoints to interested operators, established on their territory.

2. Each year the competent authorities of the Member States shall return to the Commission, by 15 October at the latest, any ecopoints which, on the basis of available data and the estimates for traffic for the final months of the year, are likely not be used before the end of the year.'

20 Under Article 8 of Regulation No 3298/94:

'1. The ecopoints which are not distributed among Member States, in accordance with Article 6, as well as those which have been returned to the Commission, in accordance with Article 7, shall constitute a Community reserve.

2. The ecopoints of the Community reserve are to be allocated by the Commission to the Member States, according to the procedure set out in Article 16 of Protocol No 9, at least one month before the end of the year.

...'

The 108% clause

21 Article 11(2)(c) of the Protocol provides that, '[i]f 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'.

22 This safeguard clause (hereinafter '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.

23 The number of transit journeys made through Austria in 1991 was 1 490 900, and the threshold to which Article 11(2)(c) of the Protocol refers is equivalent to 1 610 172 transit journeys.

Journeys subject to the ecopoints system

24 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'.

25 Under Article 1(g), 'bilateral journeys' shall mean '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'.

26 Article 1(1a) of Regulation No 3298/94 provides:

'Transit journeys made in the circumstances listed in Annex C or under ECMT [European Conference of Ministers of Transport] authorisations that are valid on Austrian territory shall be exempt from the ecopoints system.'

27 Annex C to Regulation No 3298/94 lists 16 categories of journeys for which no ecopoints are required, such as the carriage of postal consignments or the carriage of damaged vehicles or vehicles in need of repair.

28 Furthermore, under Article 3(2) and (3) of Regulation No 3298/94:

'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 journeys:

"Fuernitz/Villach Sued, Sillian, Innsbruck/Hall, Brennersee, Graz".'

29 Finally, 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.'

30 The statement of reasons for that provision is given in recital 4 of Regulation No 609/2000, according to which '[a] vehicle setting down or picking up a complete load in Austria should be considered to have undertaken a bilateral journey and thus should not be required to pay ecopoints, irrespective of the route taken by the vehicle to enter and exit Austria'.

Control methods

31 Annex 5 to the Protocol, which is headed 'Calculation and administration of ecopoints referred to in Article 11(2)(b) of the Protocol', provides, in Point 1:

'The following documents shall be submitted for each heavy goods vehicle each time it travels through Austria (in either direction):

(a) a document showing the COP value for NOx emissions from the vehicle in question;

(b) a valid ecopoints card issued by the competent authority.

...'

32 Control of the implementation of the system of ecopoints was originally based on a method using paper forms (ecocards).

33 By Regulation No 1524/96, the Commission introduced an electronic control system using an electronic device called an 'ecotag', which is fitted to the vehicle

and enables ecopoints to be automatically debited. Its technical specifications are fixed in Annex F to Regulation No 3298/94.

34 At present, about 95% of the ecopoints are used electronically. They are managed by a private company established in Austria.

35 Under Article 2(2), (4) and (5), second subparagraph, of Regulation No 3298/94:

'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 NOx 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.

...

4. For journeys requiring ecopoints, the ecocard or the ecotag shall replace all Austrian forms hitherto used for transport statistics.

5. ...

... 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.'

36 Annex F to Regulation No 3298/94 provides, inter alia, as follows:

'*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'.

Facts giving rise to the case

37 By letter of 17 December 2001, the Republic of Austria informed the Commission that it was apparent from the forecasts of the total journeys subject to ecopoints in 2001 that the 1991 reference value would be exceeded and requested it to apply the 108% clause.

38 By letter of 12 April 2002, the Republic of Austria sent the Commission its final ecopoint statistics for 2001, which confirmed that the reference value had been exceeded. In fact, they showed a total of 1 640 416 'declared transit journeys' for 2001, which exceeded the 1991 reference value by 10.03%.

39 At its 26th and 27th meetings, held on 3 May and 18 July 2002 respectively, the Ecopoints Committee examined the Austrian statistics and discussed whether some journeys should not be discounted for the purposes of a possible application of the 108% clause.

40 Following further exchanges of letters, the Republic of Austria, by letter of 27 June 2002, finally called upon the Commission to act, pursuant to the second paragraph of Article 232 EC, and asked it to present immediately for the approval of the Ecopoints Committee a proposal for a regulation reducing the number of ecopoints for 2002.

The decision of 24 July 2002

41 On 24 July 2002, the Commission decided not to submit a proposal for reducing the number of ecopoints for 2002 in accordance with the 108% clause.

42 That decision was taken on the basis of a communication from Commissioner Loyola de Palacio dated 23 July 2002 (document SEC(2002) 855/4), points 5 to 9 of which read as follows:

'5. The problem facing the Commission in 2002 is the same as that encountered in 2001, i.e. the electronic system which registers over 95% of the ecopoints used is much less sophisticated than the Commission had been led to believe. It had been understood that the system analysed the *entry and exit* data of heavy goods vehicles in order to determine whether they had transited through Austria. However, it only reads whether the driver has set the lorry's electronic tag to "bilateral journey" on *entering Austrian territory* or left it in "transit" mode (default). If the driver has left it in "transit" mode, the trip is registered as a transit journey, regardless of whether or not the vehicle actually transits through Austria.

6. Thus the statistics provided by Austria do not report the number of transit journeys actually made, but the number of declared transit journeys.

7. On 2 April 2002, the Commission services received statistics from the Austrian authorities based on entries to Austrian territory showing that the 108% threshold had again been exceeded in 2001. The statistics showed that 1 640 416 transit journeys had been made in 2001, i.e. 110% of the total for the reference year.

8. In response to a request for additional information, the Austrian authorities supplied other statistical data on 22 April 2002 comprising inter alia information on the journeys which, in the preceding year, had given rise to differences of opinion as to their "transit" character (bilateral journeys, Rollende Landstrasse, etc).

9. The Commission services analysed these statistics and concluded that the number of trips that could indeed be considered as transit journeys in 2001 was ~~1 454 526~~, *1 488 898*, or ~~76%~~, *99.9%* of the ceiling of 1 610 172 journeys.' (the deletions and corrections appear in the quoted text).

43 It is apparent from the explanations provided by the defendant at the hearing that the number of 1 488 898 transit journeys was obtained by subtracting three categories of journey from the number of 1 640 416 registered journeys submitted by the applicants:

— journeys where both entry into and exit from Austria were effected at the same border point (49 504);

— journeys in respect of which there is no information on exit (91 250);

— journeys made on the rolling highway ('Rollende Strasse') (10 764).

44 On the basis of the decision of 24 July 2002, the Commission, on 29 July 2002, distributed the remaining electronic ecopoints for the year 2002.

Admissibility of the application

45 In its written observations, the Commission contends that both the main head of claim and the alternative head of claim are inadmissible.

46 With regard to the main head of claim, suspension of operation of the decision of 24 July 2002 is now impossible, because it has already been implemented, on 29 July 2002. The same applies to suspension of unused ecopoints, since the accounts of the Member States have already been credited with the remaining ecopoints and the Commission is therefore no longer entitled to deal with them unilaterally.

47 The alternative head of claim, in which the Republic of Austria asks that the Commission be enjoined from distributing the Community reserve for 2002, is

also inadmissible since it is not part of the subject-matter of the main proceedings, as required under Article 83(1) of the Rules of Procedure. The decision of 24 July 2002 does not relate to the Community reserve.

48 In that regard, it need only be stated that, in the light of the very general terms in which some of the claims made by the Republic of Austria are couched, the Commission's objections cannot result in a declaration of inadmissibility, but may possibly be relevant when the question of which specific interim measures should be adopted is examined.

49 The application for interim measures should therefore be examined as to the substance.

Substance

Arguments of the parties

50 The applicant claims that, by adopting the decision of 24 July 2002, the Commission failed to fulfil its obligations under Article 11(2)(c) in conjunction with Article 16, and under Annex 5(3) to the Protocol.

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

52 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.

53 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.

54 Primary legislation 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.

55 As for secondary legislation, the second subparagraph of Article 2(2) of Regulation No 3298/94 is clearly based on the principle of declaration.

56 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'.

57 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.

58 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 legislation, by derogations and precise details (the exclusion of journeys made under ECMT 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 control system, whether they are transit journeys within the meaning of that definition. The declarations of drivers therefore constitute the only reliable source.

59 The applicant asserts that, during discussions which took place in the Ecopoints Committee in connection with the preparatory documents 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.

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

61 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.

62 The applicant concludes that all journeys declared to be transit journeys should be taken into account for applying the 108% clause and that the only journeys that may, if really necessary, be deducted are journeys declared to be transit journeys where it is clear that, despite an unambiguous declaration, they cannot be so described.

63 Environmental and health nuisance which is the direct consequence of failure to apply the 108% clause constitutes serious and irreparable damage, as is confirmed 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.

64 In its written observations, the defendant states that it is clear from the definition in Article 1(c) of the Protocol that classification as a 'transit journey' depends both on the point of departure, that is to say, entry into Austrian territory, and on the point of arrival, that is, exit from that territory.

65 The provisions of Regulation No 3298/94, which describe the obligations imposed on drivers, cannot alter that definition. In any event, Articles 2 and 3 of that regulation confirm the defendant's analysis, as do the contract specifications

drawn up by the Austrian authorities for the purpose of the award of the contract for supplying and managing the electronic control system, which provides, in particular, in point 2.2.10, entitled 'Calculation of transit journeys', that '[t]he decisive criterion for determining whether there is a transit journey is the interval between entry into and exit from the country'.

66 The Commission concedes that the Protocol does not contain any specific indication of the method to be used, but points out that, in those circumstances, it has a certain discretion in that regard which, it would therefore appear, may be the subject of only limited judicial review.

67 In its written observations, the German Government points out, first, that the Austrian electronic control system is unreliable, which is confirmed, in particular, by an expert's report prepared in June 2001 and included as an annex.

68 The German Government then criticises the definition of 'transit journey' advocated by the applicant. It refers, in particular, to the 1992 Agreement, which has been referred to as the instrument which preceded the present system and served as a pattern for it, pointing out that its preamble and Article 1 use the term 'transit traffic' in conjunction with the adjective 'transalpine' or the expression 'through the Alps'.

69 Lastly, the German Government submits that the principle of declaration put forward by the applicant cannot be inferred from the legislation currently in force, or from the historical context or objectives and aims of the ecopoints system. It points out that the system is not an end in itself, but should be

interpreted in the light of the environmental objective assigned to it by primary legislation. It is therefore necessary to draw a firm distinction between, on the one hand, whether it is possible to deduct ecopoints if the ecotag is incorrectly set when it is read by the reading device at the border and, on the other, whether that journey should be registered as a transit journey in the statistics. Given that the 108% clause is designed only to make up for the unusual amount of pollution suffered by Austria as a transit country, only transit journeys actually made should be registered for that purpose.

Findings

70 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 act 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 (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 21).

71 In connection with the examination as to whether there is a prima facie case, the differences of opinion between the parties relate, essentially, to the conditions for applying the 108% clause, the interpretation of which has been discussed at length.

72 The Republic of Austria had notified the Commission of 1 640 416 transit journeys declared by drivers in 2001.

73 The Commission deducted three categories of journey from that number, still on the basis of the figures supplied by the Republic of Austria, and reached a figure of 1 488 898 journeys, which is below the 108% threshold.

74 The discounted journeys were 49 504 journeys where both entry into and exit from Austria were effected at the same border point (category A), 91 250 journeys in respect of which there is no information on exit from Austria (category B) and 10 764 journeys made on the rolling highway ('Rollende Strasse') (category C).

75 A fourth category, comprising 11 374 journeys where entry into and exit from Austria was from and to the same Member State, does not give rise to controversy in this case.

76 It is clear, in fact, from the explanations provided by the Commission at the hearing that, in spite of its doubts as to whether those journeys could be classified as 'transit journeys', it did not deduct them from the total number of journeys taken into consideration for possible application of the 108% clause.

77 In order to assess, provisionally, whether the Commission was right to deduct categories A, B and C from the total number of declared transit journeys, it is necessary to examine the criteria to be followed in order to establish which journeys should be registered as transit journeys.

78 In that regard, the arguments put forward by the applicant cannot, after initial examination, be ruled out immediately as manifestly unfounded.

79 It must be acknowledged, in fact, that the specific rules governing application of the 108% clause cannot be clearly ascertained from the evidence submitted by the parties in connection with these proceedings for interim relief in order to describe both the legislative context and the actual way in which the ecopoint system operates.

80 That being so, the principle of declaration put forward by the applicant none the less 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 defendant and the two interveners 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.

88 Moreover, at the hearing the Commission specifically set out the reasons why it considered that certain journeys should be deducted from the total declared journeys. In respect of the 91 250 journeys for which there is no information on exit from Austrian territory (category B), it stated that, since the electronic control system did not register any exit when entry had been registered more than 48 hours previously, it could be assumed that the vehicle concerned had entered Austrian territory in order to load or unload there, and not to transit through the country. Similarly, for the 10 764 journeys on the rolling highway ('Rollende

Strasse') (category C), it referred to the provisions of Article 3(2) and (3) of Regulation No 3298/94 in order to justify their exclusion.

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, the Federal Republic of Germany and the Italian Republic.

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 paragraphs 71 to 89 of 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 2002, as explained by the parties at the hearing, 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.

98 The application for interim measures must therefore 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, 23 October 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President