# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 July 2005 [1]

## I — Introduction

1. On 27 May 2003 the Landeshauptmann of Tyrol issued a decree prohibiting the transportation of certain specified goods by lorries exceeding 7.5 tonnes over a section of the A 12 motorway which runs through the valley of the Inn (hereinafter: Inntal) in Austria. This measure which was designed to reduce emissions of nitrogen dioxide from heavy goods vehicles in this zone was intended to enter into force on 1 August 2003. In this situation the Commission swiftly initiated infringement proceedings under Article 226 EC asserting that the measure contravened Community regulations on transport services, as well as the Treaty provisions on the free movement of goods.

2. The case raises important questions of principle relating to the reconciliation of measures adopted for the protection of the environment with the Treaty provisions on the establishment and the functioning of the internal market. Both are fundamental objectives of the Community, laid down in Article 2 EC and given expression in many concrete provisions of the Treaty.

3. The Treaty provisions on the free movement of goods and services, including transport services, have led to greater geographical specialisation within the Community. Partly as a result of this, transport movements have grown faster than Gross National Product: per percentage point of economic growth, transport movements grow by approximately one and a half percent. Within the transport sector, the road haulage sector, which until the middle of the 1980s was subject to restrictive national regulation in a number of Member States, profited most from this disproportionate growth. Whereas, in absolute terms, the transport of goods by rail stagnated and even decreased and the transport of goods by inland waterway could only grow slightly due to the limited availability of infrastructure required for modern, large-scale inland

1 — Original language: English.

navigation, the transport of goods by road expanded quickly. Each subsequent enlargement of the Community gave further impulses to that expansion.

4. However, there is also a negative side to the fast growth of the transport of goods by road: traffic congestion on the Community road network, particularly on the main transport axes between the centres of economic activity; faster abrasion of road infrastructure, leading to higher maintenance costs for that infrastructure; the environmental impact of noise and air pollutant emissions; and, finally, safety and health risks for humans caused by congestion and environmental pollution.

5. During the past 25 years, most Member States have adopted many measures aimed at limiting and channelling the negative side-effects of the growth of road traffic. Thus, special toll charges were introduced to finance infrastructural costs which are attributable to transport by road. Transit traffic by road is usually led around densely populated areas and areas which are vulnerable from the point of view of landscape and nature management. Various transit countries restrict the use of their road infrastructure by heavy goods vehicles at weekends or during the night. Finally, attempts are made to influence the choice of transport mode in respect of transports for more distant destinations, by introducing selective subsidies, selective charges and binding regulatory measures.

6. These measures are increasingly connected with the Member States' obligations to comply with Community provisions adopted to reduce the impact of various activities on the environment, with a view to protecting that environment and the health of humans, animals and plants.

7. In this case, the developments which I have described briefly above in a nutshell come together. It reflects the tensions between the economic expansion of the carriage of goods by road and the protection of other interests from the detrimental side-effects of that development.

## II — Relevant provisions

### A — *Community law*

8. Provisions on the transport of goods by road within the Community are laid down in

Regulation No 881/92 [2] and Regulation No 3118/93. [3]

9. Under Article 3 of Regulation No 881/92 international carriage of goods within the Community shall be carried out subject to Community authorisation. This authorisation shall be issued by the Member States to any road haulier established in their territory and entitled in that Member State to carry out the international carriage of goods by road.

10. In addition, Article 1(1) of Regulation No 3118/93 provides as follows:

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

11. Community rules on the protection of air quality are laid down in Directive 96/62 on ambient air quality assessment and management [4] and Directive 1999/30 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air [5] (hereinafter: air quality directives). Both directives were adopted on the basis of Article 130S(1) of the EC Treaty (now Article 175(1) EC).

12. According to Article 1 of Directive 96/62 the general aim of the directive is to define the basic principles of a common strategy to:

— define and establish objectives for ambient air quality in the Community

2 — Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States, OJ 1992 L 95, p. 1, as amended by Regulation (EC) No 484/2002 of the European Parliament and of the Council of 1 March 2002, OJ 2002 L 76, p. 1 (hereinafter: Regulation No 881/92)

3 — Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State, OJ 1993 L 279, p. 1, as amended by Regulation (EC) No 484/2002 of the European Parliament and of the Council of 1 March 2002, OJ 2002 L 76, p. 1 (hereinafter: Regulation No 3118/93).

4 — Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ 1996 L 296, p. 55 (hereinafter: Directive 96/62)

5 — 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 (hereinafter: Directive 1999/30).

designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,

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

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

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

13. Article 4 of Directive 96/62 provides for the setting of limit values for the pollutants listed in Annex I to the directive by the Council on a proposal of the Commission.

14. Article 7 of Directive 96/62 lays down general requirements for the improvement of ambient air quality. The first and third paragraphs of this provision read as follows:

'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.'

15. Article 8(3) of Directive 96/62 provides for measures applicable in zones where levels are higher than the limit value. The third paragraph provides:

'In the zones and agglomerations referred to in paragraph 1 [i.e. those 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.'

16. Article 4 of Directive 1999/30 provides the basis for the limit values for nitrogen dioxide ($NO_2$):

'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.'

17. Annex II of Directive 1999/30 sets the following limit values for nitrogen dioxide for the protection of human health:

— the hourly limit value is set at 200 µg/$m^3$, not to be exceeded more than 18 times a calendar year, increased by a digressive percentage until 1 January 2010;

— the annual limit value for 2002, increased by the margin of tolerance provided for, is set at 56 µg/$m^3$.

B — *Austrian law*

18. The contested measure was adopted on the basis of Articles 10, 11 and 14 of the *Immissionsschutzgesetz-Luft* (hereinafter: IG-L), which transposes Directives 96/62 and 1999/30 into Austrian law. Article 10 of the IG-L provides for the publication of a catalogue of measures which may be adopted after it has been established that a limit value has been exceeded. Article 11 lays down the principles to be observed in that context, such as the principle that the polluter should pay and the principle of proportionality. Article 14 contains provisions which are specifically applicable to the transport sector.

## III — Facts and procedure

19. Following measurements of nitrogen dioxide in excess of the limit values set

under the IG-L, on 1 October 2002 a temporary ban on night traffic of heavy goods vehicles was introduced on part of the A 12 Inntal motorway. In 2002, the yearly limit value of 56 $\mu g/m^3$ set by the IG-L, was again exceeded. Thereupon, the temporary night ban was first extended and later replaced, as from 1 June 2003, by a permanent night ban for heavy goods vehicles of more than 7.5 tonnes, applicable throughout the whole year.

20. Subsequently, acting on the basis of the IG-L, the Landeshauptmann Tyrol adopted the contested measure on 27 May 2003. This measure imposed a complete ban as from 1 August 2003 on the use of a section of the A 12 Inntal motorway by certain heavy goods vehicles carrying certain goods. According to Article 1 of the measure, the ban is aimed at reducing emissions connected with human activities, thereby contributing to the improvement of air quality in order to ensure the durable protection of, inter alia, human health and the health of fauna and flora.

21. Article 2 of the measure delimits a so-called 'sanitary zone', consisting of a section of approximately 46 km of the A 12 motorway between the municipalities of Kundl and Ampass. In this zone, it is prohibited, according to Article 3 of the measure, to use heavy goods vehicles with a total weight exceeding 7.5 tonnes and carrying the following categories of goods: all types of waste listed in the European Waste Catalogue, [6] cereals, timber and cork, non-ferrous and ferrous minerals, stone, soil, rubble, motor vehicles and trailers and building steel. The prohibition was to apply directly as from 1 August 2003, without any further action on the part of the authorities being required. Article 4 of the measure provides for an exception to the prohibition for heavy vehicles where the transported goods either originate in or are destined for the city of Innsbruck or the districts of Kufstein, Schwaz or Innsbruck-Land. Further exceptions are provided for in the IG-L itself. It directly excludes certain categories of vehicles from traffic bans, including vehicles used for road maintenance and waste collection and vehicles used in agriculture and forestry. Finally, individual exemptions may be requested in respect of other vehicles in the public interest or for important private reasons.

22. After an initial exchange of information on the compatibility of the measure with Community law, the Commission issued a formal notice to the Republic of Austria on 25 June 2003, requesting it to respond within one week. The Austrian Government replied on 3 July 2003. On 9 July 2003, the

6 — 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 amending Commission Decision 2000/532/EC as regards the list of wastes, OJ 2001 L 203, p. 18.

Commission addressed a reasoned opinion to the Republic of Austria, again setting a time-limit of one week for its reply. The Republic of Austria responded to the reasoned opinion by letter of 18 July 2003.

23. Remaining unconvinced that the contested measure was compatible with Community law, the Commission by request of 23 July 2003 initiated the present infringement proceedings before the Court under Article 226 EC. The Commission requests the Court:

— to rule that the imposition of a ban on the use of a section of the A 12 Inntal motorway between kilometre 20.359 in the Kundl local authority area and kilometre 66.780 in the Ampass local authority area by heavy goods vehicles with a total weight exceeding 7.5 tonnes which carry certain goods is incompatible with the Republic of Austria's obligations under Articles 1 and 3 of Regulation No 881/92, Articles 1 and 6 of RegulationNo 3118/93 and Articles 28 EC to 30 EC and

— to order the Republic of Austria to pay the costs.

24. The Commission, simultaneously under Articles 242 and 243 EC, requested the President of the Court to order the Republic of Austria, by way of interim measure, to take appropriate measures to ensure that the entry into force of the prohibition contained in the contested measure be suspended until the Court's judgment in the main proceedings. [7]

25. By Order of 30 July 2003, the President of the Court, at the request of the Commission under Article 84(2) of the Rules of Procedure, ordered in the interest of maintaining the status quo that the Republic of Austria refrain from introducing the prohibition contained in the contested measure until the pronouncement of the Order terminating the interim measure proceedings. [8]

26. By Order of 2 October 2003, [9] the President of the Court ordered the prolongation of the suspension of the introduction of the contested measure until 30 April 2004 and, by Order of 27 April 2004, [10] until the Court's judgment in the main proceedings.

27. By Orders of 16 September 2003 and of 21 January 2004, the President of the Court

7 — Case C-320/03 R *Commission v Republic of Austria*.
8 — [2003] ECR I-7929
9 — [2003] ECR I-11665.
10 — [2004] ECR I-3593.

permitted, first, the Federal Republic of Germany and the Italian Republic and, later, the Kingdom of the Netherlands to intervene in support of the submissions of the Commission.

## IV — Admissibility

28. The Austrian Government contests the admissibility of the action brought by the Commission in view of the extremely short time-limits set during the pre-litigation procedure for it to prepare its responses to the Commission's formal notice and reasoned opinion. Austria claims that it was unable to prepare its defence adequately in these circumstances and that, consequently, it was denied its right to a fair and equitable procedure. It also expresses its doubts as to whether the services of the Commission seriously examined the observations it made in response to the Commission's allegations.

29. Austria also asserts that the Commission should have applied the procedure provided for in Regulation No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States. [11]

30. The Commission acknowledges that the time-limits it set were indeed very short, but it considers these were justified as the contested measure was due to enter into force on 1 August 2003.

31. The Court has frequently observed that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission. [12] In the light of this dual purpose Member States must be allowed a reasonable period to respond to a formal notice, to comply with a reasoned opinion or, where appropriate, to prepare their defence. The Court has held further that in order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case and that very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts. [13]

11 — Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ1998/ L 337, p. 8 (hereinafter: Regulation No 2679/98).

12 — Case C-1/00 *Commission* v *France* [2001] ECR I-9989 at paragraph 64, Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479 at paragraph 34 and Case 293/85 *Commission* v *Belgium* [1988] ECR 305 at paragraph 14.

13 — See the cases cited in the previous footnote: Case C-1/00, at paragraph 65 of the judgment, Case C-328/96, at paragraph 51 of the judgment and Case 293/85, at paragraph 14 of the judgment.

32. The manner in which the pre-litigation is conducted must be considered in the light of all the circumstances of the present case. Following a complaint it had received, the Commission requested the Austrian authorities on 6 May 2003 to provide it with information on the, then still, proposed measure and to indicate the grounds of justification for the measure. The Austrian authorities responded on 13 June 2003. In the meantime, the contested measure had been adopted and was due to enter into force on 1 August 2003. This would create a situation which, in the Commission's view, would constitute a breach of Community law obligations by the Republic of Austria and, moreover, was likely to have irreparable consequences for the transport sector. In order to prevent this situation arising, the Commission was forced by circumstances, which were largely attributable to the time schedule set by the Austrian authorities for the introduction of the contested measure, to conduct the pre-litigation procedure expeditiously, thereby fulfilling the procedural requirements for requesting provisional measures under Article 243 EC.

33. Furthermore, the Commission's position was known to the Austrian authorities prior to the opening of the pre-litigation procedure and prior to the adoption of the contested measure.

34. In these circumstances, I consider that the Commission had no option but to conduct the pre-litigation procedure as it did and that the time-limits set cannot, in that context, be deemed to be unreasonable. To declare an action brought by the Commission against a Member State inadmissible in circumstances such as those of the present case would seriously affect the Commission's role under Article 211 EC to monitor compliance by the Member States with their Community law obligations and, if necessary to instigate proceedings under Article 226 EC.

35. The Austrian Government's assertion that the Commission should have applied the procedure laid down in Regulation No 2679/98 must also be rejected. This regulation is intended to deal swiftly with obstacles to the free movement of goods within the internal market as defined in Article 1 of the regulation. Without it being necessary to go into the details of this procedure, which was primarily inspired by situations caused by actions of private individuals such as those which gave rise to the Court's judgments in *Commission* v *France* [14] and *Schmidberger*, [15] though it is not restricted to these, suffice it to say that this procedure cannot regarded as introducing a preliminary condition to be fulfilled by the Commission before introducing the pre-litigation procedure laid down in Article 226 EC. Nor does it replace this procedure. The Court has consistently held that 'notwithstanding its other powers under the Treaty to ensure that Member States comply with Community law, the Commission enjoys a

14 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959.

15 — Case C-112/00 *Schmidberger* [2003] ECR I-5659.

discretion in deciding whether or not to commence an action for failure to fulfil obligations. It is not required to justify its decision, nor will the admissibility of the action be dependent upon the circumstances dictating its choice'. [16] The Commission's powers under Article 226 EC cannot, therefore, be qualified or restricted by acts of secondary Community law. [17] I would like to add, however, that if this procedure had indeed been followed, under the terms of Article 5 of the regulation, the Austrian Government would have been required to respond to the Commission's request within five working days of receipt of the text. Even though the context is different from the pre-litigation procedure, it is curious that the Austrian Government would, albeit implicitly through its reference to the regulation, deem this to be an acceptable time-limit.

36. In the light of these considerations, the Commission's application must be declared admissible.

16 — Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, at paragraph 17.

17 — Cf. judgment of 2 June 2005 in Case C-394/02 *Commission* v *Greece*, [2005] ECR I-4713, at paragraphs 27 and 28 and the case law cited there.

## V — Substance

### A — *Position of the Commission and the German, Italian and Netherlands Governments*

37. As indicated above, the Commission submits that the contested measure infringes the Community provisions on the freedom to provide transport services, laid down in Regulation No 881/92 and Regulation No 3118/93 and the free movement of goods, guaranteed by Articles 28 and 30 EC. Before addressing these points, the Commission discusses the immediate practical and economic effects of the introduction of the contested measure.

38. The section of the A 12 motorway, to which the measure is to apply, is used intensively as this is where the North-South traffic between Germany and Italy and the internal East-West traffic within Austria come together. According to Tyrolean statistics, on average 5 200 heavy goods vehicles use the A 12 motorway between Wörgl and Hall daily. Looking more closely at the transports affected by the measure and taking the exceptions for local traffic into account, it appears that ultimately 610 foreign vehicles and 130 Austrian vehicles would be affected on a daily basis. As the section of the A 12 involved can only be circumvented by taking large detours, the

measure effectively bans all transit traffic by road of heavy vehicles carrying the goods listed in the measure. The German Government adds that using longer alternative routes would result in more air pollution and would merely displace the problem.

39. The measure has considerable economic consequences not only for the transport sector, but also for the producers of the goods concerned as they will be confronted with higher transport costs and logistical problems in seeking alternative ways for transporting their products to their clients. The Commission and the intervening governments indicate that particularly small and medium sized transport companies, many of which specialise in carrying some of the goods concerned, will be threatened.

40. The Commission and the intervening governments all stress that the transfer to rail of the transports concerned cannot be deemed to be a realistic option in the short term. This applies to the three possibilities of transferring the transportation of the goods concerned to rail: transport by rail, unaccompanied transport and accompanied transport (*Rollende Landstrasse*). Besides the fact that it is not a road haulier's business to transfer goods by rail, this option cannot yet be regarded as a viable alternative to road traffic in view of the restricted capacity on the Brenner rail route and because of technical limitations, delays and lack of reliability and punctuality. In addition, it is impossible to extend capacity sufficiently in the short term. The planned extension of capacity in the context of the Brenner 2005 programme is intended to meet demand in the present situation and could not accommodate extra demand arising from the ban in the contested measure. Transfer to rail would make the transportation of the goods concerned less profitable.

41. In the light of these effects, the Commission and the intervening governments state that it is clear that the contested measure also restricts the freedom to provide transport services, in violation of Regulation No 881/92 and Regulation No 3118/93, and the free movement of the goods concerned, in violation of Articles 28 and 30 EC. The Italian and Netherlands Governments add that it also infringes the right of free transit through the territory of a Member State, recognised by the Court in *SIOT*.[18]

42. In addition, although the measure is drafted in neutral terms, de facto it mainly affects transit traffic. Statistics show that 80% of this traffic is carried out by non-Austrian transport companies, whereas, by contrast, 80% of the transports exempted from the measure are carried out by Austrian companies. The measure, therefore, (indirectly)

18 — Case 266 81 *SIOT* [1983] ECR 731.

discriminates between national and foreign transport companies. Consequently, it cannot be justified on grounds relating to the protection of the environment.

43. In case the Court takes a different view, the Commission, in the alternative, submits that the contested measure cannot be justified on the basis of the air quality directives. On the one hand, an indefinite sectoral ban on traffic cannot be based on Article 7(3) of Directive 96/62. On the other hand, the Commission accepts that the conditions for applying Article 8(3) of the Directive have been fulfilled, as the limit value for nitrogen dioxide, increased by the margin of tolerance, was clearly exceeded in 2002. However, the catalogue of measures contained in Article 10 of the IG-L does not contain the elements required by that provision and Annex IV to the Directive. The intervening governments also question the method applied for measuring the levels of pollution and in reaching the conclusion that the emission of nitrogen dioxide must particularly be ascribed to one category of heavy vehicles.

44. Where the Austrian Government seeks to justify the measure on grounds of both public health and the protection of the environment, it is evident, according to the Commission and the intervening governments, that the latter is the primary objective. Justification on grounds of the protection of public health under Article 30 EC is only possible where the goods concerned present a direct and demonstrable threat to health. That is clearly not the case here.

45. Moreover, the contested measure does not comply with the principle of proportionality, other measures which are less restrictive of the free movement of goods and transport services being available. In this respect, the Commission, supported by the intervening governments, refers to the possibility of gradually introducing the ban in the contested measure for the various pollutant classes of heavy vehicles (EURO-0, 1 and 2 and, even, at a future point, EURO-3). It also points out that the system of ecopoints laid down in 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 to the European Union and the adjustments to the Treaties on which the European Union is founded (hereinafter Protocol N° 9) has already contributed significantly to reconciling heavy vehicle traffic with requirements of environmental protection. Other measures which might be envisaged include the restriction of heavy traffic at peak hours, a night ban of heavy vehicle traffic, toll systems based on pollutant value of vehicles and speed limitations. Such measures, which would be more in line with the principles of rectifying environmental damage at source and of the polluter pays, would include local traffic and reduce

pollution from vehicles not targeted by the contested measure. At any rate, these parties submit that introducing a new ban on traffic of heavy vehicles before the results of the extension of the night ban have become available is premature.

46. The German Government further observes that it is not clear why the transport by road of the goods listed in the contested measure in particular contributes to air pollution. It states that the choice of goods is arbitrary and unfair. The Netherlands Government adds that the measure only applies to one of the various sources of pollution in the area concerned and even restricts the use of heavy goods vehicles which are relatively clean (EURO-3). The Italian Government points out that in Community law there is a right of transit for vehicles for which ecopoints have been allocated.

47. The German Government takes the view that before introducing such a drastic measure the Austrian authorities were obliged, under Article 10 EC, to consult with the Member States concerned and with the Commission. The Commission states that, if at all, the contested measure should have been introduced gradually to allow the sectors affected to prepare for the change in circumstances.

48. The Commission and the intervening governments finally assert that any conditions imposed on the transportation of goods which have not been provided for in the regulations on the freedom to provide transport services are unacceptable. As its observations in respect of Article 28 EC demonstrate that the measure cannot be justified, it therefore also infringes Articles 1 and 3 of Regulation No 881/92 and Articles 1 and 6 of Regulation No 3118/93.

B — *Position of the Republic of Austria*

49. The Austrian Government maintains that the contested measure is compatible with Community law. It points out that the Commission does not contest that in 2002 the limit value, increased by the margin of tolerance, of 56 $\mu g/m^3$ had been exceeded at the measuring point of Vomp/Raststätte and in 2003 had again been exceeded by a large margin (68 $\mu g/m^3$). In such a situation, Articles 7 and 8 of Directive 96/62 impose an obligation on a Member State to take measures aimed at ensuring that the limit value is respected. It is in this situation that the contested measure was adopted.

50. The Austrian Government strongly objects to the Commission's view that the limit values laid down in the air quality directives do not apply to ecopoints which are still valid. Although recognising that

Protocol No 9, which contains the ecopoint system, explicitly provides for derogations to secondary Community law, these must be regarded as being exhaustive and do not include the air quality directives.

51. As scientific studies clearly demonstrate that emissions of nitrogen dioxyde by heavy vehicle traffic are a major source of air pollution in the zone covered by the contested measure, there is an obvious need to limit the number of transports carried out by these vehicles. In order to keep the effects of a ban on the use of the relevant section of the A 12 motorway to a minimum, goods were selected for which transport by rail is a practical and feasible alternative, both from a technical and economic point of view. Contrary to the allegations of the Commission and the intervening governments, it appears from statements made by various public and private rail companies, both from inside and outside Austria, that there is sufficient capacity to deal with the increased demand as a result of the introduction of the contested measure. This concerns non-accompanied combined transport, transport of complete vehicles and the so-called *Rollende Landstrasse.* In addition, alternative road routes also exist. Indeed, almost half the transit traffic passing the Brenner corridor could use a route which is either shorter or at least equivalent to the route via the Brenner. The Commission's presumption that the transports concerned would have to take detours via Switzerland or the Tauern route are unfounded.

52. The Austrian Government objects to arguments based on the economic effects of the measure on the transport sector which is characterised by structural overcapacity and extremely low profit margins. The fact that the measure may exacerbate these problems cannot be a reason for finding it to be illegal.

53. As to the alleged discriminatory character of the contested measure, the Austrian Government emphasises that it does not apply exclusively to foreign goods. The ban affects all heavy goods vehicles, including Austrian vehicles, using the full stretch of the designated section of the A 12 motorway to carry the goods listed in the measure. The choice of goods was based on the possibility of their transportation being easily transferable to rail (*Bahnaffinität,* rail affinity) in order to restrict the effects of the measure on the free movement of goods. In fact, a sizeable proportion of the goods concerned are already transported by rail. Where the Commission argues that the measure is discriminatory, in that transports with their destination or origin in the designated zone are excluded from the ban, the Austrian Government retorts that this situation cannot be compared with transit traffic. The only true comparison to be made is that

between vehicles entering and leaving the zone. The exemption for local traffic is justified as transfer to rail within the zone would imply longer trips to rail terminals being made, which would be counterproductive in view of the objective of the measure to reduce air pollution.

54. If the Court were to find that, despite these observations, the measure does amount to indirect discrimination of goods from other Member States, it must be deemed to be justified on grounds of the protection of public health, within the meaning of Article 30 EC, and of the protection of the environment. In this respect the Austrian Government observes that the limit values in the air quality directives have been set at a level which is presumed to be necessary for the durable protection of human health and the protection of ecosystems and vegetation. It is therefore unnecessary to have to prove that every instance of the limit values being exceeded endangers human health and damages the environment.

55. The ban contained in the measure is adequate, necessary and proportionate for attaining its objective. The Austrian Government does not agree that the alternatives suggested by the Commission and the intervening governments would constitute more proportionate methods for attaining the objective of the contested measure. Banning certain classes of EURO vehicles would be either not sufficient (ban of EURO-0 and 1) or disproportionate (ban of EURO-0, 1 and 2). The latter would affect 50% of heavy goods traffic and does not take the transferability to rail into account. It further points out that the limit values were exceeded despite the operation of the ecopoint system and that in preparing the measure account was taken of the ban on night traffic of heavy goods vehicles. The ban in the contested measure must not be regarded as an isolated measure. It must be seen in relation to other structural measures taken for the purpose of reducing air pollution, such as the improvement of rail infrastructure.

56. Finally, the Austrian Government considers the Commission's complaint in respect of the alleged violation of Regulation No 881/92 and Regulation No 3118/93 unfounded, as it does not state the reasons for this infringement, but simply refers to the arguments presented in respect of the alleged violation of Article 28 EC. The conditions of Article 38(1)© of the Court's Rules of Procedure are therefore not fulfilled.

C — *General remarks: the problem in a wider context*

57. In the introduction to this Opinion, I observed that this case has arisen from a

deeper-rooted problem concerning the need to reconcile intensified use of road infrastructure with requirements of the protection of public health and of the environment. Before dealing with the legal issues *stricto sensu*, it is necessary to place the case in its wider context in order to be able to find a balanced solution which takes into account the backround to this problem.

58. Firstly, the geographical setting in which the contested measure is to apply should be given particular attention. The Alps form a natural barrier between, on the one hand, France and Germany – and the Member States which are situated further to the North — and, on the other hand, Italy and parts of the Balkans, including Slovenia. There are a number of corridors through this barrier, consisting of either passes or tunnels or a combination of both, which have been made accessible for road transport. Transalpine transit by road is concentrated in these corridors. The fast growth of intra-Community road transport has led to the increased use of road infrastructure in these routes and, consequently, to increased pressure on the environment in the corridors and their direct surroundings.

59. The heart of the Alps region consists, to the North and the East, of two relatively small countries, Switzerland and Austria, and, to the West, of the frontier area between France and Italy. There are a number of traffic corridors in the latter border area, such as the routes through the Mont Blanc tunnel and the tunnel at Fréjus. The other corridors cut through Switzerland and Austria. Because of this territorial configuration, any measure adopted by Switzerland or Austria which is aimed at restricting, channelling or influencing transport modes, necessarily will affect road transport originating in other Member States relatively more than domestic transport. Similar measures adopted in the border area between France and Italy will have such an effect to a much lesser degree.

60. As these differences in the effects of national measures aimed at limiting the negative external effects of the transport of goods by road in the corridors are wholly attributable to the natural and national borders, the question as to whether such measures are directly or indirectly discriminatory must be approached with prudence and precision.

61. Secondly, one of the characteristics of national measures designed to channel streams of transport or to influence modes of transport is that, for reasons connected with the viability of the local or regional economies, they must include exceptions for transport with its destination or origin in those regions. This is an aspect which will not escape the attention of any observant user of the main road arteries in Europe. Where relatively small transit states, like Switzerland or Austria ,adopt measures to

influence or restrict streams of transport, exceptions for traffic having its origin or destination in the area concerned almost inevitably will benefit national carriers more than carriers from other Member States. This effect, which again is the consequence of the configuration of national frontiers, cannot simply be qualified as a form of discrimination, as the Commission and the intervening governments suggest.

62. Thirdly, the nature of the environmental problem which is the subject of the contested measure needs to be analysed more closely.

63. Parties seem to agree that air pollution in the Inn Valley resulting from emissions of $NO_x$ and $NO_2$ has been increasing in the past years and that that pollution has exceeded the limits, which under Community and national law are deemed to be acceptable, more frequently, for longer periods and by a greater margin. In addition, the maximum permitted limit values are becoming stricter as time goes by.

64. Upper limits of acceptable pollution of the environment, such as those at issue in the present case, create, as it were, a 'space' which corresponds to the environment's capacity to absorb pollution from various sources in the area. Within the confines of this space, emissions from diverse sources, such as road traffic, industrial processes and home heating, are deemed acceptable. Where there is a risk of the boundaries of this 'space' being transgressed, measures must be taken in order to curb the activities causing this pollution.

65. In assessing the contested measure, it should be examined, on the one hand, whether they are adequate with a view to attaining its objective of protecting the environment, and, on the other hand, whether it does not disproportionately affect other interests which are protected by Community law. The adequacy of the measure must be judged having regard to aspects, such as the efficacy of the measure (is it likely that the measure will lead to the envisaged limitation of emissions within an acceptable time-limit?), to the question whether it is workable in practice (is the measure an efficient instrument for achieving its purpose?) and to the enforceability of the measure (is it possible to force the economic operators to adapt their behaviour in the way intended?) The proportionality of the measure must be assessed taking into account aspects, such as the availability of possible alternatives to transporting the work concerned by road and, related to this, the principle of cost efficiency of the measure. Finally, in examining the adequacy and the proportionality of the measure, it may be relevant to consider whether they are aimed at the most dynamic sources, i.e. the sources

from which the increase in emissions is relatively high and which therefore contribute relatively more to the total increase of emissions.

66. It is evident that, given the diversity of factors and interests which must be taken into account, more than one combination of measures could be envisaged which in any given situation would be adequate and proportionate. One should, therefore, be cautious in accepting that 'other' measures would be 'more effective', 'more proportionate' or 'less restrictive'. Although this may very well be the case if they are reviewed in the light of one interest, this may be otherwise if they are regarded in relation to other interests.

67. It is partly to promote the transparency of decision-making in adopting policies in this field that Articles 7(3) and 8(3) of Directive 96/62 require the Member States in the situations indicated in these provisions to draw up 'plans' or 'programmes' aimed at reducing the emissions referred to in the air quality directives.

68. Fourthly, it should be pointed out that any measure aimed at influencing streams of transport and modes of transport will have consequences for the existing structure of the transport sector. Such measures inevitably will affect the cost structure of the transport companies concerned and, particularly where they are intended to bring about a shift in the use of transport modalities, will have consequences for transport logistics. Certain categories of transport companies are better equipped to adapt to such a new situation than others. Finally, a combination of measures which for certain categories of cargo is designed to realise a substitution of road transport by rail transport, by definition will result in considerable changes in the structure of competition within and between the various transport markets. This is an inextricable, and in some cases even intended, consequence of such measures.

69. In this light, the arguments which the Commission and the intervening governments derive from the economic impact of the contested measure for certain parts of the road transport sector cannot be accepted unconditionally. They are only valid to the extent that these effects are caused by unreasonable or disproportionate elements of those measures. If this were otherwise, even necessary and proportionate measures aimed at reducing emissions from heavy goods vehicles would not be permitted. It would appear to me that the Commission's position on this matter, because of its one-sidedness, is counter-productive. I will return to this point below.

D — *Legal analysis: approach*

70. Although the Commission's primary contention is that the contested measure infringes Regulations Nos 881/92 and 3118/93, the legal analysis in its application focuses on the alleged incompatibility with Article 28 EC. The question as to the compatibility with the air quality directives is treated as an aspect of the possibility of justifying the measure on grounds relating to the protection of the environment. The alleged infringement of Regulations Nos 881/92 and 3118/93 is raised only very briefly thereafter.

71. I do not consider this approach to be wholly correct from a systematic point of view. As the Austrian Government submits that the contested measure was based on the IG-L, which transposes the air quality directives into Austrian law, it should first be examined whether and to what extent it is covered by the relevant provisions of these directives. If the air quality directives do not provide an adequate basis for the measure, it should next be considered whether, as far as the alleged restriction of free movement of the goods is concerned, it is compatible with Articles 28 and 30 EC. Finally, on the question of the restriction of the freedom to provide transport services, the alleged infringement of Regulations Nos 881/92 and 3118/93 must be dealt with.

E — *Compatibility with the Air Quality Directives*

72. The main instrument for achieving the objectives laid down in Article 1 of Directive 96/62 consists of setting limit values for various air pollutants in order to be able to gauge the quality of ambient air and to determine when preventive or corrective action should be taken. Such limit values were set in Directive 1999/30 for nitrogen dioxide ($NO_2$) and oxides of nitrogen ($NO_x$). When there is 'a risk of the limit values being exceeded', Article 7(3) of Directive 96/62 lays down that the Member States 'shall draw up action plans in order to reduce that risk'. Such action plans, according to the same provision, may include 'the suspension of activities, including motor-vehicle traffic'. Where it has been established that levels of pollutants are higher than the limit values, increased by a margin of tolerance, Article 8 (3) of Directive 96/62 determines that Member States 'shall take measures to ensure that a plan or programme is prepared or implementing the limit value within the specific time limit'. Such plans or documents must be made available to the public and contain information listed in Annex IV to Directive 96/62.

73. This, essentially, is the framework within which the compatibility of the contested measure with the air quality directives must be assessed. Having regard to the submissions made by the Commission and the

Austrian Government, the assessment must focus on two main aspects: (1) the question whether the air quality directives require the Member States to act in case a limit value is exceeded and (2) the question as to the scope of that action, i.e. the type of measures to be adopted.

74. First, I would observe that it is not contested by the Commission that the annual limit value for $NO_2$, increased by the margin of tolerance, of 56 $\mu g/m^3$ was exceeded in 2002 and 2003 at the measuring point at Vomp/Raststätte. Although the method used for measuring the levels of $NO_2$ was criticised by the German and Italian Governments, the Commission did not raise this issue. This fact was also confirmed by the President of the Court in his Order of 2 October 2003.[19] For the purposes of these proceedings it may, therefore, be accepted there is agreement concerning the factual basis of the contested measure.

75. As a second preliminary point under this heading, it should be observed that it is not disputed that the IG-L correctly transposes the air quality directives.

76. The question whether, as the Austrian Government asserts, the Austrian authorities were under an obligation to take action after having established that the annual limit value for $NO_2$ had been exceeded, can be answered on the basis of the clear wording of Articles 7 (3) and 8(3) of Directive 96/62. Both provisions are drafted in imperative terms and determine that when the events described in these provisions occur, the Member States 'shall' take the action prescribed.

77. Although, as was pointed out by the Commission and the German Government, the limit values for $NO_2$ only have to be respected as from 2010, this does not mean that, once set, such a limit value has no legal effect. On the contrary, where a directive lays down such a clearly defined result which by its nature can only be achieved gradually, this implies that the Member States must work towards achieving that result within the time-limit set. If abstaining from taking appropriate action might make the attainment of the objective within the time scale set by the air quality directives more difficult or even illusory, this would be contrary to the Member States' obligations under Article 10 EC in conjunction with Article 249, third paragraph, EC.[20] It cannot, therefore, be inferred from the fact that the limit values set for $NO_2$ and $NO_x$ in Annex II to Directive 1999/30 only have to be achieved in 2010, that Articles 7(3) and 8(3) of Directive 96/62 do not contain an obligation to act when those values have been exceeded prior to that date.

19 — Cited in footnote 9, at paragraph 57 of the Order.

20 — Cf. Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraphs 44 and 45.

78. The Austrian authorities were therefore justified in considering that they were obliged under Directive 96/62 to act upon establishing that the annual limit values for $NO_2$ laid down in Annex II to Directive 1999/30 had been exceeded.

79. The question then arises as to whether the contested measure is covered by the terms of Articles 7(3) or 8(3) of Directive 96/62. As indicated above, Directive 96/62 draws a distinction between, on the one hand, the situation that there is a risk of the limit values being exceeded and, on the other hand, the situation where the level of pollutants is higher than the limit value plus the margin of tolerance. In the present case, in which the Austrian authorities have established that the annual limit value for $NO_2$ was exceeded, it is clear that the contested measure must be assessed in the light of Article 8(3), and not of Article 7(3), of Directive 96/62. More specifically, the point to be decided is whether the contested measure is to be regarded as the implementation of a plan or programme within the meaning of Article 8(3) of Directive 96/62, the implication being that Articles 10, 11 and 14 of the IG-L constitute such a plan or programme.

80. In a general sense the concept of a plan or programme implies that a given problem has been identified and analysed and that measures deemed necessary for solving that problem are indicated, as well as a time schedule for their implementation. In the comparable context of a directive on combating water pollution, I described an action plan as a document which serves as an overarching framework for a series of projected measures aimed at the attainment of a specific objective within a specific time span and which presupposes that those measures are appropriate to that objective and that they are sufficiently coherent. What is important is that such a plan or programme constitutes an autonomous and recognisable framework for a set of measures by which it is sought to achieve a policy objective. [21] This view was succinctly endorsed by the Court, where it considered that an action programme should constitute 'an organised and coherent system intended to meet a specific objective.' [22]

81. The fact that the concept of plans or programmes referred to in Article 8(3) of Directive 96/62 is used in this sense, is confirmed by Annex IV to the directive which sets out explicitly which information must be provided in these plans or programmes. This information includes details on the localisation of excess pollution, on the origin of pollution, on an analysis of the situation and on existing and projected measures. Indeed, measures to be taken in the context of such a programme can only be effective in attaining a limit value, if they are specifically geared to reducing the levels of certain pollutants, taking into account all relevant local geographical circumstances of the region concerned.

21 — See paragraphs 16 and 17 of my Opinion in Case C-396/01 *Commission* v *Ireland* [2003] ECR I-2315.

22 — Case C-396/01, cited in the previous footnote, at paragraph 60 of the judgment.

82. A distinction should be made between, on the one hand, national legislation empowering the competent authorities to adopt certain types of measure in case limit values have been exceeded and, on the other hand, plans or programmes which indicate which measures would be appropriate and effective in reducing levels of certain pollutants in the particular natural and geographical circumstances of the zone concerned. The former provides the formal basis and the conditions for the adoption of measures, whereas the latter focus on the concrete measure to be taken in a given situation.

83. The catalogue of measures listed in Article 10 of the IG-L, together with the principles laid down in Article 11 of the IG-L and the specific provisions for transport in Article 14 of the IG-L, are too general to able to be qualified as a plan or programme within the meaning of Article 8(3) of Directive 96/62 and futher specified in Annex IV to Directive 96/62. They are not in themselves connected with any specific factual situation. Although the contested measure was adopted on the basis of those provisions of the IG-L and itself could constitute an element of a plan or programme, it clearly was not adopted in the framework of a coherent set of measures, as described in paragraph 80, aimed the reduction of $NO_2$ in the zone concerned.

84. I therefore conclude on this point, that the contested measure cannot be based on Article 8(3) of Directive 96/62.

85. However, Article 176 EC permits the Member States to adopt more stringent measures for the protection of the environment than those adopted pursuant to Article 175 EC. Such measures must be compatible with the other provisions in the EC Treaty. Consequently, the compatibility of the contested measure with the provisions on the free movement of goods and the freedom to provide transport services must be examined next.

F — *Compatibility with Articles 28 and 30 EC*

86. Articles 28 to 30 EC guarantee the free movement of goods within the Community which encompasses not only the freedom to import and export goods to and from other Member States, but also the freedom of transit of goods over the territory of the Member States. As the Court stated in *SIOT*,[23] 'it is necessary as a consequence of the customs union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community'.[24] Any (non-tariff) obstacles to these freedoms are prohibited, unless they can be justified on grounds recognised in Article 30 EC or in the Court's case-law. In the present case, the grounds of justification invoked by the Austrian Government are the protection of human health and the protection of the environment. Even if these objectives can be

23 — Cited in footnote 18.

24 — At paragraph 16 of the judgment.

invoked to justify the contested measure, it can only be considered to be compatible with the provisions on the free movement of goods if it does not impede the free flow of goods more than is necessary to attain these objectives.

1. Restriction?

87. By completely prohibiting the transportation of specific categories of goods on a section of one of the most important road routes between Southern Germany and Northern Italy with heavy goods vehicles over 7.5 tonnes, the contested measure clearly obstructs the free movement and free transit of these goods. The prohibition forces transporters and producers of the goods concerned to seek alternative routes or other modes of transport, which will raise costs and, in certain cases, may lead to the loss of markets where it becomes unprofitable to export these goods. Given the diametrically opposed views and statistics which were presented by the Commission and the Austrian Government on the sufficiency of existing rail capacity to absorb the increased demand resulting from the ban laid down in the contested measure, it is not clear that the goods concerned can be easily transferred to rail in the short term. The effects of the measure are compounded by the entry into force of the ban only two months after the adoption and publication of the measure, making it impossible for the affected sectors to find alternatives for the transport of the goods concerned within a reasonable time-limit.

88. Member States have a particular responsibility to ensure the free flow of goods on major transit routes within the Community, as was emphasised by the Court in *Schmidberger* in respect of the Brenner motorway in a case involving actions taken by individuals. [25] This means that the physical transportation of goods on the main axes of road infrastructure within the Community in the context of transit between Member States must, in principle, be guaranteed. A total ban on transporting certain categories of goods on these routes effectively constitutes a blockade equivalent to those at issue in *Commission* v *France* [26] and *Schmidberger*. In view of the broad interpretation given by the Court to the concept of a measure having equivalent effect to a quantitative import restriction, [27] it undoubtedly is a measure of the type prohibited by Article 28 EC.

25 — Cited in footnote 15, at paragraphs 62 and 63 of the judgment.

26 — Cited in footnote 14.

27 — Case 8/74 *Dassonville* [1974] ECR 837: According to paragraph 5 of the judgment this provision encompasses 'all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade.' See, too, *Schmidberger*, cited in footnote 15, paragraph 56 of the judgment.

2. Discrimination?

89. Next it must be determined whether or not the contested measure is discriminatory in character. This is important for determining which grounds can be invoked for justifying it. According to the Court's general approach to the possibility of justifying restrictions to intra-Community trade, only measures which are indistinctly applicable to national goods and goods imported from other Member States can be justified on grounds of imperative requirements relating to the general interest, including the protection of the environment. If the measure must be deemed to be indirectly discriminatory, it can only be justified on the grounds listed in Article 30 EC.

90. It is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. [28]

91. The discrimination caused by the contested measure allegedly consists in the fact that it affects road hauliers from other Member States significantly more than Austrian road hauliers. Whereas 80% of transit traffic carrying the goods concerned through the sanitary zone is carried out by road hauliers from other Member States, the exemption for local traffic and transports of the goods concerned having their origin or destination in the sanitary zone is mainly (80%) carried out by Austrian road hauliers. The question is whether this difference in the effects on Austrian and non-Austrian road hauliers carrying the goods concerned indeed amounts to indirect discrimination.

92. The Court was confronted with a similar question in *Commission* v *Austria* [29] which concerned differentiated toll rates charged for the use of the Brenner motorway. In this case, the charges imposed on vehicles with more than three axles which used the full itinerary of the Brenner motorway on average were significantly higher than those charged on the same category of vehicles using partial itineraries. Given the fact that the great majority of vehicles using the full itinerary were not registered in Austria, whereas the vast majority of those following part of the itinerary were registered in Austria and both categories of vehicles were considered to be in a comparable situation, the Court found that the effect of tariff

28 — Case C-205/98 *Commission* v *Austria* [2000] ECR I-7367, at paragraph 70.

29 — Cited in the previous footnote.

changes involved was to favour Austrian hauliers. [30] This finding was confirmed by the legislative background of the tariff changes which emphasised the need 'to protect domestic hauliers from the drastic charges deriving from those tariff changes'. [31]

93. In contrast with the toll charges which were at issue in the case of the Brenner Motorway, the measure at issue in the present case does not as such differentiate between various categories of vehicles in such a way as to directly favour transports of goods executed with Austrian vehicles. The ban applies without distinction to all heavy goods vehicles of over 7.5 tonnes carrying the goods listed in the measure. Although it is true that the prohibition contained in the measure affects transit traffic between Southern Germany and Northern Italy of foreign heavy goods vehicles more than transports effected by Austrian vehicles, the question is whether this in itself is sufficient to conclude that it indirectly discriminates against the former. In addition, there is the question whether the exception in favour of transports having their origin or destination in the sanitary zone, which benefits Austrian transport companies more, leads to that same conclusion.

94. As I explained in paragraphs 58 et seq. of this Opinion, in assessing whether or not the contested measure (indirectly) discriminates against foreign road hauliers, it is necessary to regard the measure in the particular geographical context in which it is to apply. In my view, it is too simplistic and formalistic in this respect to focus attention on a comparison of the immediate effects of the measure on the various categories of transporters involved. Given the underlying objective of the measure to divert transport of certain bulk goods from road to rail, the criterion used in selecting the goods subject to the transport ban is neutral. The measure must be regarded as a composite whole not merely directed at transport by certain vehicles as such or at the goods concerned as such. It concerns the combination of the two elements which is to be explained by the presumed feasibility of the transferability of these transports to rail. Being aimed at influencing transport modes in respect of these goods and given the particular geographical location of Austria, the measure naturally, inevitably and inherently affects foreign transit more than domestic transport of the goods concerned. It is, furthermore, inherent to such a measure that exceptions are made for transports which are destined for or originate from the sanitary zone.

95. Viewed as a whole and seen in its general context, I do not consider that the contested measure can be regarded as being (indirectly) discriminatory.

30 — See, in particular, paragraphs 79 and 88 of the judgment.

31 — See paragraph 81 of the judgment.

3. Justification?

96. The contested measure was adopted explicitly with a view to protecting the environment and public health in the sanitary zone. As I consider the measure to be non-discriminatory, both grounds can, in principle, be invoked by the Austrian Government to justify the restriction to the free movement of goods it creates.

97. In this case it is not contested that the limit value for $NO_2$ increased by the margin of tolerance was exceeded in two successive years. In such a case, the Member States are required, as I established in paragraph 78 above, by Article 8(3) of Directive 96/62 to take action to rectify this situation and to take measures in the framework of a plan or programme to ensure that the limit values are attained. Although I concluded that the measure based on the IG-L did not comply with the requirements of Article 8(3) of Directive 96/62, I do consider that it is in line with the objective of the directive to protect air quality, in particular, and to protect the quality of the environment in the zone concerned more generally. The fact that, as was observed by the Netherlands Government, the contested measure only applies to one source of air pollution and leaves other sources unaffected, does not detract from the possibility of it being justified on grounds of environmental protection. Although it may be true that an environmental problem can only be successfully tackled by taking comprehensive and more structural action, this cannot be a condition for the justification of individual measures adopted for this purpose.

98. The Austrian Government also seeks to justify the contested measure on grounds of public health within the meaning of Article 30 EC. In this regard, it should be pointed out that according to settled case-law the exceptions to the rule of free movement of goods provided for in this provision are to be interpreted strictly. National authorities invoking the ground relating to the protection of health and life of humans, animals or plants must demonstrate in each case that the products in question pose a direct risk to public health in view of the characteristics of these products. [32] It is evident that no such risk is involved in the products targeted in the contested measure. Where the protection of the environment, to a greater or lesser degree, is in the interest of the protection of public health, this latter aspect should be regarded as constituting part of the objective of environmental protection. The fact that environmental policy is designed to protect human health in this wider sense is confirmed by the description of the Community's objectives in this field in Article 174(1) EC. Where the contested measure was also adopted for reasons of the protection of public health, it was in this wider, more indirect sense. I do not consider that the

32 — See, e.g. judgment of 2 December 2004 in Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11373, at paragraph 47.

protection of public health has an autonomous role in the circumstances of the present case.

99. The more significant question which arises in this case is, however, whether the contested measure may be considered to be justified on grounds of the protection of the environment should the Court find, contrary to my opinion on this point, that it does lead to indirect discrimination of heavy goods vehicles carrying the listed goods from other Member States.

100. The Court has been confronted with this issue in a number of cases since the early 1990s. In its judgments it dealt with it in a manner which deviated from its usual approach to the possibility of invoking public interest objectives not listed in Article 30 EC to justify national restrictions to the free movement of goods.

101. Thus, in the *Walloon Waste* case,[33] after first having established that imperative requirements can only be invoked in respect of measures which apply without distinction between national and imported products, it held that 'in assessing whether or not the barrier in question [in essence, a prohibition on the import of waste from regions outside Wallonia] is discriminatory, account must be taken of the particular nature of waste.'[34] On the basis inter alia of the principle, laid down in Article 174(2) EC, that environmental damage should as a matter of priority be remedied at source, it concluded that 'having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory'.[35] Here the Court simply redefined the character of the measure concerned so that it complied with the conditions for invoking imperative requirements for the justification of an import restriction.

102. *Aher-Waggon* [36] concerned a German measure in which the first registration on its territory of an aircraft previously registered in another Member State was made conditional upon compliance with stricter noise standards than those laid down in a directive, while exempting from those standards aircraft which obtained registration in national territory before the directive was implemented. Although this measure was clearly discriminatory by treating older aircraft differently depending on the Member State

33 — Case C-2/90 *Commission* v *Belgium* [1993] ECR I-4431.

34 — At paragraph 34 of the judgment.

35 — At paragraph 36 of the judgment.

36 — Case C-389/96 *Aher-Waggon* [1998] ECR I-4473.

of registration, the Court did not address this aspect and went on to hold that 'such a barrier may ... be justified by considerations of public health and environmental protection'. [37]

103. The measure at issue in *PreussenElektra*, [38] obliged undertakings in Germany to purchase electricity produced from renewable energy sources at minimum prices and required grid operators to meet the costs entailed for no consideration. As this measure clearly favoured national producers of 'green' electricity, it could not be qualified as a measure which applies indistinctly to national and imported electricity. Nevertheless, again without considering the nature of the measure, the Court considered that 'in order to determine whether such a purchase obligation is nevertheless compatible with Article 30 of the Treaty, account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market'. [39] Having found, inter alia, that is was aimed at protecting the environment by contributing to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat in the context of international agreements, such as the Kyoto Protocol and that according to Article 174(2) EC, and later Article 6 EC, environmental protection requirements must be integrated into the definition and implementation of other Community policies, the Court held that, 'in the current state of Community law concerning the electricity market,' the measure concerned was not incompatible with Article 28 EC. [40] Significantly, the Court did not examine the proportionality of the purchase obligation in the light of its environmental objective.

104. It would appear from the three cases relating to Article 28 EC that the Court recognises the need to accommodate measures adopted for purposes of protection of the environment, even though these have a more restrictive effect on trade in imported goods than in nationally produced goods. Yet, it has not, to date, explicitly indicated under which conditions measures which do not apply without distinction to foreign and national products may nevertheless be justified on environmental grounds. The case-law remains unclear and fragmented in this regard.

105. In his Opinion in *Preussen Elektra*, Advocate General Jacobs also discussed this

37 — At paragraph 19 of the judgment.

38 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

39 — At paragraph 72 of the judgment.

40 — See paragraphs 73 to 81 of the judgment.

question and called upon the Court to clarify its position in order to provide the necessary legal certainty. He argued that there are two specific reasons for the Court to adopt a more flexible approach to applying the imperative requirement of environmental protection. The first is that since the Treaty of Amsterdam, environmental protection has been given a more prominent role in the EC Treaty than it had before. Article 6 EC requires environmental protection to be taken into account in the definition of Community policies referred to in Article 3 EC, which includes the internal market. The second reason is that national measures for the protection of the environment 'are inherently liable to differentiate on the basis of the nature and origin of the cause of the harm and are therefore liable to be found discriminatory.' [41]

106. I agree with Advocate General Jacobs' views on this issue. Since the adoption of the Single European Act in 1986, the protection of the environment increasingly has become a primary objective of Community policy, expressed not only in the policy integration principle in Article 6 EC, but also in the statement of the objectives of the Community in Article 2 EC. It has also gained recognition as a ground for justifying restrictive measures, not in Article 30 EC, but in Article 95(4) and (5) EC, where a Member State wishes to maintain or adopt stricter measures than a harmonisation measure. It is true that the Commission must verify under Article 95(6) EC whether the measure does not constitute a means of arbitrary discrimination or a disguised restriction on trade. This latter test, I would submit, does not exclude such a measure having different effects on domestic and imported goods which may be justifiable under certain conditions.

107. Where a measure adopted for reasons of environmental protection affects foreign products more than domestic products, this simple fact should not in itself be sufficient to conclude that the measure is (indirectly) discriminatory. It should be further examined whether these effects are the necessary and inherent consequence of the environmental objective of the measure. In other words, it is the question whether the objective of the measure could be achieved without affecting the foreign products more than the national products. In such circumstances I would consider that such a national measure should be eligible for justification on grounds of environmental protection, provided it is clear that the measure does not, and is not intended to, favour or protect domestic products.

108. In paragraph 94, I established that the fact that the effects of the contested measure

41 — Cited in footnote 38, at paragraphs 229 to 233.

are greater for foreign road hauliers of the goods concerned than for Austrian road hauliers is the inevitable consequence of the application of this measure in its geographical context. In addition, it is not aimed at favouring the latter in any way. I, therefore, consider that sectoral ban contained in the contested measure is eligible for justification on grounds relating to the protection of the environment, despite the unequal effects for foreign and Austrian traffic passing through the sanitary zone. It must, therefore, next be examined whether the measure is adequate in relation to, necessary for and proportionate to that objective.

4. Proportionality?

109. The main focus of attention in the submissions of the parties and the intervening governments was the proportionality of the contested measure in relation to the objective of reducing emissions of $NO_2$ in the sanitary zone. Three main aspects were raised under this heading. The first aspect is the feasibility of transporting the goods concerned by alternative means, either by rail or by other road routes. The second aspect concerns the possibility of attaining the objective of reducing the emission of air pollutants by other measures, such as introducing speed limits or toll systems relating to pollutant classes of heavy goods vehicles. The third aspect concerns the relationship between the contested measure and existing measures aimed at reducing air pollution in Austria, such as the ecopoint system.

110. As both interests involved in this case, the free movement of goods within the Community and the protection of the environment, are fundamental objectives of the Community, it should be considered whether the contested measure strikes a fair balance between those interests. [42]

111. In that regard, it should be observed that the variety of existing and envisageable measures referred to by the Commission and the intervening governments as alternatives for the prohibition laid down in the contested measure illustrate that the policy choices to be made in order to reduce emissions of $NO_2$ to acceptable levels (i.e. to levels corresponding to the limit values laid down in Directive 1999/30) are extremely complicated. It was not demonstrated that any one of these measures would be equally effective in attaining this result, whilst obstructing the free movement of goods to a lesser degree. More probably, the

42 — Cf. *Schmidberger*, cited in footnote 15, paragraph 81 of the judgment.

objective of reducing air pollution in the area concerned would call for a combination of the alternative measures which were suggested.

112. In the context of the present proceedings, the Court must determine whether or not the contested measure is proportionate in view of the objectives for which it was adopted and must not indicate which particular alternative measures might be more appropriate. In these circumstances, the proportionality test should focus on whether the measure is not unreasonable in that, prima facie, it may be considered to be effective, workable from a practical point of view and enforceable. [43] In addition, it would appear to me that the principle of proportionality requires that measures which are designed to bring about structural changes in the streams and modes of transport should be prepared and introduced in a manner which is attuned to the significance of the transition operation. It is in this latter respect that I consider the contested measure to be disproportionate.

113. The first point relates to the preparation of the measure. Before adopting such a far-reaching measure as a total ban on the transport of certain goods with heavy goods vehicles on a section of motorway which is a vital link between Member States, it is essential that the adoption of less restrictive measures has been considered and that it has been demonstrated that these would be inadequate. In particular, given the objective of the contested measure to secure a transfer of the transportation of the goods concerned from road to rail, it should have been established beforehand that there was sufficient and adequate rail capacity to accommodate this transfer. Moreover, in order to ensure transparency and to enable the compatibility with Community law to be assessed, it is important that this information is made explicit at the preparatory stage. This is also one of the purposes of the plans and programmes required by Articles 7(3) and 8(3) of Directive 96/62. It does not appear from the submissions to the Court, nor from the documents in the case-file, that the Austrian authorities, in preparing the contested measure, took into account whether the objective of reducing the emission of pollutants could be achieved by other, less restrictive, means and whether there was a realistic alternative for the transportation of the affected goods by other modes of transport or via other road routes.

114. Secondly, before introducing a measure with such structural consequences for the transport of goods over Austrian territory, necessitating drastic adaptations by the sectors affected, it follows from the obligations laid down in Article 10 EC that the Member States most affected and the Commission should be informed and consulted with. No such consultations took

43 — Cf. paragraphs 65 and 66 above

place prior to the adoption of the contested measure.

115. Thirdly, and most importantly, in view of the structural consequences which the contested measure has for a large number of sectors of economic activity, the sectors affected must be allowed time to adapt to the new circumstances within which they must operate. A measure of this content which is designed to induce a structural change in the modes of transport of certain goods can only be introduced gradually. A transitional period of sufficient length is needed not only to permit economic operators to adapt, but also to ensure that the available infrastructure is adequate to absorb increased demand. Such a transitional period could last for a number of years. The time schedule of two months envisaged by the Austrian authorities for the introduction of the sectoral ban is clearly insufficient and, therefore, disproportionate.

116. For these reasons, I conclude that the manner in which the contested measure was prepared and was intended to be introduced, infringes the principle of proportionality. It is, therefore, incompatible with Article 28 EC.

*G — Compatibility with Regulation No 881/92 and Regulation No 3118/93*

117. In its application, the Commission confines itself to asserting that other conditions for the free movement of goods than those provided for in these regulations are unacceptable and that it follows from its claim that the restriction under Article 28 EC cannot be justified, that Articles 1 and 3 of Regulation No 881/92 and Articles 1 and 6 of Regulation No 3118/93 have been infringed.

118. Both regulations are aimed at creating access to the market in the carriage of goods by road by eliminating restrictions on the provider of transport services which are related to his nationality or to the fact that he is established in a Member State other than that in which the service is to be provided. [44] The instrument to achieve this aim is a single Community authorisation issued by the Member State of establishment. In addition, Article 6 of Regulation No 3118/93 lays down that the performance of cabotage transport operations shall be

44 — See the second consideration in the preambles to Regulations Nos 881/92 and 3118/93.

subject to national laws on certain subjects, including rates and conditions governing the transport contract, weights and dimensions of road vehicles and requirements relating to the carriage of certain categories of goods.

119. On this point I would observe that the Commission has not in any way substantiated its claim that the contested measure infringes any provision of Regulation No 881/92 or Regulation No 3118/93. More specifically, it has not demonstrated that the measure infringes the single licence system laid down in the regulations and that it restricts road hauliers' right to gain access to the market.

120. Here, it is important to make the distinction between conditions for gaining access to the market and conditions for providing transport services within the Member States. As the regulations are restricted to ensuring access to the road haulage market, they do not in themselves limit the powers of the Member States to adopt measures which relate to the use of their road infrastructure for reasons of the protection of the environment or of improving road safety.

121. The fact that Article 6 of Regulation No 3118/93 does not, as was observed by the Netherlands Government, mention measures of the type at issue in these proceedings, is not relevant. Not only is that regulation restricted to cabotage services, the topics governed by that provision are clearly connected with cabotage as such and do not exclude measures of a more general nature being taken in respect of the use of roads within the Member States. I need only indicate in this respect that the provision does not refer to provisions adopted for road safety.

122. I, therefore, conclude that this limb of the Commission's argument is unfounded.

## VI — Costs

123. Under Article 89(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 asked that the Republic of Austria be ordered to pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs. In accordance with Article 69(4), the Member States which intervened in support of the Commission have to bear their own costs.

## VII — Conclusion

124. I am, therefore, of the opinion that the Court should:

— declare that, in the light of defects in its preparation, its adoption without prior consultation with the Member States and the Commission and the extremely short time-schedule for its introduction, the imposition of a ban on the use of a section of the A 12 Inntal motorway between kilometre 20.359 in the Kundl local authority area and kilometre 66.780 in the Ampass local authority area by heavy goods vehicles with a total weight exceeding 7.5 tonnes which carry certain goods is incompatible with the Republic of Austria's obligations under Articles 28 EC to 30 EC;

— order the Republic of Austria to pay the costs;

— order the Federal Republic of Germany, the Italian Republic and the Kingdom of the Netherlands to bear their own costs.