ORDER OF THE PRESIDENT OF THE COURT
23 February 2001 *

In Case C-445/00 R,

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

applicant,

v

Council of the European Union, represented by A. Lopes Sabino and G. Houttuin, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

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

* Language of the case: German.

and by

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

interveners,

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

THE PRESIDENT OF THE COURT

makes the following

Order

1 By an application lodged at the Court Registry on 4 December 2000, the Republic of Austria brought an action under Article 230 EC for annulment of Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation (EC)

No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18, hereinafter 'the contested Regulation').

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 for suspension of operation of the contested Regulation and for the adoption of interim measures.

3 On 15 January 2001 the Council of the European Union submitted its written observations on the application for interim measures.

4 By applications lodged at the Court Registry on 27 December 2000 and 8 January 2001 respectively, the Federal Republic of Germany and the Commission of the European Communities applied for leave to intervene in the proceedings for interim relief in support of the form of order sought by the defendant.

5 The applications to intervene in the proceedings for interim relief have been granted pursuant to the first and fourth paragraphs of Article 37 of the EC Statute of the Court of Justice and Article 93(1) and (2) of the Rules of Procedure.

6 The Federal Republic of Germany and the Commission submitted their statements in intervention on 16 January 2001.

7 By a statement lodged at the Court Registry on 31 January 2001, the Commission, at the request of the Court, communicated various additional documents and items of information.

8 The parties submitted oral argument on 5 February 2001.

9 The applicant claims that the Court should:

— provisionally suspend the operation of the contested Regulation;

— declare that the Commission is required, in order to ensure the allocation of ecopoints and, accordingly, the opportunity to transit through Austria, while preventing irreparable damage pending adjudication on the substance of the case, to make, from the year 2001 and for the duration of the main proceedings, a greater reduction in the ecopoints than that prescribed in the contested Regulation, provided that this is divided proportionally between the Member States.

10 The Council contends that the Court should:

— declare the application inadmissible in so far as it requests the Court to instruct the Commission, which is not a party to the case, to adopt a new and different act;

— dismiss the remainder of the application for interim measures as unfounded;

— order the applicant to pay the costs.

11 The Commission and the German Government contend that the Court should declare the application for interim measures inadmissible and dismiss the application for suspension of operation.

Legal and factual background

12 Protocol No 9 on road, rail and combined transport in Austria (hereinafter 'the Protocol') 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 Act of Accession') establishes in Part III, which concerns road transport, 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 those 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 NO_x emissions from heavy goods vehicles crossing Austria in transit shall be reduced by 60% in the period between 1 January 1992 and 31 December 2003, according to the table in Annex 4.

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

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

(d) ...

(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.

5. At the end of the transitional period, the *acquis communautaire* in its entirety shall be applied.

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 Under Article 16 of the Protocol:

'1. The Commission shall be assisted by a Committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. When reference is made to the procedure laid down in this Article, the representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the EC Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall without delay submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

4. If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.'

17 Annex 5 to the Protocol, which is entitled 'Calculation and administration of ecopoints referred to in Article 11(2)(b) of the Protocol', provides, in point 3:

'If Article 11(2)(c) applies, the number of ecopoints for the following year shall be established as follows:

The quarterly average NO_x emission values for lorries in the current year, calculated in accordance with paragraph 2 above, will be extrapolated to produce the average NO_x emission value anticipated for the following year. The forecast value, multiplied by 0.0658 and by the number of ecopoints for 1991 set out in Annex 4, will be the number of ecopoints for the year in question.'

18 In accordance with Article 11(6) of the Protocol, the Commission adopted Regulation (EC) No 3298/94 of 21 December 1994 laying down detailed measures concerning the system of Rights of Transit (Ecopoints) for heavy goods vehicles transiting through Austria, established by Article 11 of Protocol No 9 to the Act of Accession of Norway, Austria, Finland and Sweden (OJ 1994 L 341, p. 20). That Regulation amends Annex 4 to the Protocol and fixes the total number of ecopoints as follows:

Year	Percentage of ecopoints	Ecopoints allocated for EU-15
1991 (base)	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	49.8 %	11 730 998
2001	48.5 %	11 424 767
2002	44.8 %	10 533 187
2003	40.0 %	9 422 488

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

19 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.

20 According to undisputed information provided by the applicant, the ecopoint statistics showed 1 706 436 journeys during 1999, which represented a 14.57% increase over the figure for 1991.

21 Acting in accordance with the procedure laid down in Article 16 of the Protocol, the Commission on 20 May 2000 submitted a proposal for a Commission Regulation to the committee provided for by Article 16 of the Protocol (hereinafter 'the Ecopoints Committee'). The Commission points out that, according to the calculation method laid down in Annex 5(3) to the Protocol, the number of ecopoints for the year 2000 was to be reduced by about 20% (that is, 2 184 552 ecopoints). It states that the consequence of that reduction would have been that, during the last quarter of the year 2000, there would have been practically no ecopoints available, so that all transit of lorries through Austria would have been prohibited. Therefore, pointing out that the applicable provisions of the Protocol had to be interpreted in the light of the fundamental freedoms, the Commission proposed to distribute the reduction in the number of ecopoints over the final four years, from 2000 to 2003, covered by the transitional rules. 30% of the reduction was to take effect in 2000, 30% in 2001, 30% in 2002 and the remaining 10% in 2003.

22 Considering that the Protocol provided no guidelines concerning the distribution of the reduction between the Member States, the Commission also proposed that

the burden of the reduction should be borne by those Member States whose hauliers had contributed to the threshold prescribed in Article 11(2)(c) of the Protocol being exceeded during 1999.

23 Since its proposal was not approved by a qualified majority of the Ecopoint Committee, the Commission, on 21 June 2000, submitted to the Council an identical proposal for a Council Regulation (COM(2000) 395 final).

24 According to undisputed information provided by the applicant, on 21 September 2000 the French Presidency submitted to the Council a compromise proposal which, while retaining the Commission's original proposal to stagger the reduction in ecopoints until 2003, adopted a new calculation method which gave a reduction figure of 1 009 501 ecopoints. The Commission then amended its initial proposal in line with the French compromise proposal. This allowed the Council to adopt by a qualified majority the Commission's amended proposal, which became the contested Regulation. The Republic of Austria voted against it.

25 The fifth to seventh recitals in the preamble to the contested Regulation are worded as follows:

'Protocol No 9 must be applied in accordance with the fundamental freedoms established by the Treaty. It is therefore imperative to take measures which are capable of ensuring the free movement of goods and the full functioning of the internal market.

To impose the whole reduction of ecopoints solely in 2000 would have the disproportionate effect of stopping, to all intents and purposes, transit traffic through Austria. As a result, the reduction in the total number of ecopoints should be spread over the years 2000 to 2003.

Proportionality of the reduction of ecopoints also requires that those Member States who contributed most to the 8% threshold being exceeded should have their allocations of ecopoints cut to ensure that the total reduction is met. This calls for a revision of the distribution key of ecopoints to the Member States.'

26 Article 1 of the contested Regulation amends Annex 4 to the Protocol so as to fix the new annual ecopoint quotas resulting from the decision to spread the reduction over the years from 2000 to 2003.

27 Article 2(1) of the contested Regulation replaces the second subparagraph of Article 6(2) of Regulation No 3298/94 with the following provision:

'In the circumstances provided for in Article 11(2)(c) of Protocol No 9, the number of ecopoints shall be reduced. The reduction shall be calculated using the method laid down in point 3 of Annex 5 to Protocol No 9. The reduction of ecopoints thus calculated shall be spread over several years.'

28 Finally, Article 2(4) of the contested Regulation amends Annex D to Regulation No 3298/94 so as to effect a new distribution of the ecopoints between the Member States.

29 Pursuant to Article 11(4) of the Protocol, on 21 December 2000 the Commission adopted a Report to the Council on the Transit of Goods by Road through Austria (COM(2000) 862 final). The report contains a proposal for a regulation of the European Parliament and the Council with the aim of abolishing Article 11(2)(c) and point 3 of Annex 5 to the Protocol.

30 Since the Commission, in its report, did not reach the conclusion that the objective of reducing pollution by 60% had been achieved on a sustainable basis, and since the Council had not adopted the measures prescribed in the third sentence of Article 11(4) of the Protocol, the transitional period was automatically extended for a final period of three years from 1 January 2001 to 31 December 2003, during which the provisions of Article 11(2) of the Protocol, and, in particular, point (c), apply.

Arguments of the parties

Preliminary observations on the application for interim measures

31 According to the applicant, it is necessary to bring an application for interim measures under Article 243 EC. It considers that, if its application for suspension

of operation of the contested Regulation is upheld, the legal basis on which the Commission allocates ecopoints will disappear, so that, in those circumstances, if the interim measures also sought in these proceedings were not granted, no further ecopoints could be allocated to the Member States.

32 As regards the content of the interim measures, the applicant explains that, in view of the fact that the measures cannot relate to the year 2000, it is requesting the Court to instruct the Commission to fix, on an interim basis, for the duration of the main proceedings, a greater reduction in the number of ecopoints than the one prescribed in the contested Regulation and to divide it proportionally between the Member States. The reduction made because the threshold number of journeys had been exceeded in 1999, after deducting the 30% reduction already made in the year 2000, could be applied during 2001.

33 The Council, the German Government and the Commission consider that the application for interim measures is inadmissible. First, the application in the main proceedings is not directed against an act of the Commission and proceedings have not been brought against that institution by the applicant. The Commission states, in that regard, that the Court is precluded from ordering any measures whatsoever against it owing to its capacity as intervener. Second, it is settled case-law that the Community judicature may not assume the role of the other Community institutions. In the present case, if the Court wished to order the measures sought by the applicant, it would need to undertake factual and economic assessments which do not fall within its jurisdiction.

34 The German Government also maintains that the application for interim measures is inadmissible on the grounds that it is not sufficiently precise in the light of the requirements of Article 83(2) of the Rules of Procedure, and that to

grant an interim measure ordering the Commission not to take account of the ecopoint quotas set by the contested Regulation would be tantamount to prejudging the main action.

35 The Commission, for its part, disputes the applicant's argument that suspension of operation of the contested Regulation would cause the legal basis for the allocation of ecopoints to disappear. It considers, on the contrary, that the only consequence of suspension of the operation of the contested Regulation, as of its annulment in the proceedings on the merits, would be to remove the legal basis for the reduction made in the number of ecopoints owing to the fact of the threshold number of journeys having been exceeded in 1999. In the absence of the Regulation, the transit traffic through Austria would remain governed by the Protocol.

The requirement to establish a prima facie case

36 With regard to the requirement to establish a prima facie case, the applicant refers to the complaints raised against the contested Regulation in its application for annulment, in which it puts forward six different pleas; three of them are also expounded in the application for interim measures.

37 By its first plea, the applicant maintains that there has been an infringement of essential procedural requirements in the adoption of the contested Regulation. It asserts, in particular, that the Commission's decision to amend its initial proposal for a regulation in order to endorse the compromise submitted by the Presidency of the Council was not a collegiate decision. The applicant adds, in that regard, that to authorise the relevant Commissioner to amend, if necessary, a Commission proposal so as to adopt a new formulation commanding a qualified majority in the Council, constituted a failure to observe the Commission's

internal rules, which limited authorisations to the adoption of clearly defined management and administration measures.

38 By its second plea, the applicant claims that, under the procedure laid down in Article 16 of the Protocol, the Commission did not have the authority to amend, *a posteriori* and substantially, the proposal it had submitted to the Council.

39 By its third plea, the applicant submits that, as regards the calculation of the extent of the reduction in the number of ecopoints, the key for distributing the reduction between the Member States, the spreading of the reduction at issue in this case over four years, and the introduction of a general rule for spreading the reduction in the number of ecopoints over several years if the threshold number established in Article 11(2)(c) of the Protocol is exceeded, the contested Regulation does not comply with the obligation to give an adequate statement of reasons.

40 By its fourth plea, the applicant maintains that the contested Regulation infringes the EC Treaty and the Protocol in several respects.

41 First, according to the applicant, the wording of the relevant provisions in the Protocol was unequivocal and clear and left no room for interpretation: since the threshold established in Article 11(2)(c) of the Protocol had been exceeded in 1999, the reduction in the number of ecopoints for the year 2000 had to be determined using the calculation method provided for in point 3 of Annex 5 to the Protocol. However, Article 1 of the contested Regulation did not provide for application in the year 2000 of the whole of the reduction made in the number of ecopoints on account of the threshold number of journeys having been exceeded in 1999; instead, that reduction was spread over the four years of the current transitional regime, that is, from 2000 to 2003. Since the Protocol is anchored in primary law, its formal amendment by the contested Regulation, which is a piece of secondary legislation, without the Council having express powers in primary law, was manifestly illegal.

42 In addition to Article 1 of the contested Regulation, Article 2(1), which amends the second subparagraph of Article 6(2) of Regulation No 3298/94, also alters the primary-law objectives, inasmuch as it provides generally for an extraordinary reduction in the number of ecopoints to be 'spread over several years'. The conversion of the method of spreading the reduction in the number of ecopoints into a general rule for every case to which Article 11(2)(c) of the Protocol applies has no legal basis in the Protocol and is manifestly contrary to the regime established therein.

43 The applicant considers that the reasons given by the Council in the preamble to the contested Regulation concerning the disproportionate effect of imposing the whole reduction of ecopoints solely in 2000 and the fact that the Protocol must be applied in accordance with the fundamental freedoms established by the Treaty are unacceptable, since it believes that the Council's method of interpretation is contrary to the clear wording of the Protocol. Furthermore, even if it were permitted to proceed in that way, the regime introduced by the contested Regulation was still unlawful, for it would clearly have been possible to implement the Protocol without detriment to the internal market by adopting less restrictive measures, for example, by spreading the reduction only over the years 2000 and 2001.

44 Second, the applicant considers that the new distribution of ecopoints between the Member States is incompatible with Community law. It maintains that, in the absence of any guidance in the Protocol relating to the distribution method, distribution should be effected taking account of general legal principles, in particular the principle of solidarity, and also the 'polluter pays' principle and the principle of proportionality.

45 First of all, the fact that, under the contested Regulation, the reduction in ecopoints concerns only those Member States which have contributed to the significant increase in traffic transiting through Austria, was, as a matter of principle, fundamentally incompatible with the principle of solidarity. Moreover, the first criterion used by the Council to determine the 'main perpetrators' of the

increase, that is to say, the extent to which the Member States contributed to the exceeding of the threshold established in Article 11(2)(c) of the Protocol, was also incompatible with the principle of proportionality. It appears disproportionate that a Member State which has barely exceeded that threshold should suffer a reduction in its ecopoints quota, whereas a Member State which was just below the threshold should escape a reduction altogether. Finally, as regards the second criterion, based on a comparison between the volume of traffic in 1999 and in the years 1995 to 1997, the applicant maintains that the reference years were arbitrarily chosen.

46 According to the fifth plea, the method used in the contested Regulation to calculate the reduction in ecopoints is incompatible with the general objectives of the Protocol and thus constitutes an infringement of the Protocol and a misapplication of the calculation method laid down in point 3 of Annex 5. The use of that calculation method resulted in a lesser reduction than that provided for by the Protocol. The contested Regulation is also vitiated by a seriously inadequate statement of reasons, since it contains no specific information concerning the calculation method which forms the basis of the reduction in ecopoints imposed in Article 1.

47 In order to prove the illegality of the calculation method used, the applicant observes, first of all, that the ecopoint statistics for 1999 include not only the journeys made through Austria with deduction of ecopoints but also those regarded as being on the 'blacklist', that is to say, 'illegal' transit journeys made without deduction of ecopoints. The applicant notes that the 1999 ecopoint statistics recorded in the electronic ecopoint system showed an NO_x emission value of zero for those 'illegal' journeys through Austria, since, in fact, no ecopoints were deducted for those journeys.

48 When applying the formula provided for by point 3 of Annex 5 to the Protocol for the purposes of calculating the reduction in ecopoints, the Council took into account only the actual average level of NO_x emissions per lorry, thus omitting to take into consideration 'illegal' journeys, which are counted as zero in the statistics. The applicant considers that the Council should have taken account of

the average value of NO_x emission per journey, which would have included the 'illegal' journeys. That failure to take account of 'illegal' journeys nullified or, at the very least, seriously impaired the practical effect aimed at by the Protocol, namely the protection of the environment and public health.

49 By its sixth plea, the applicant considers that the provisions of the contested Regulation are without any legal basis because neither Article 11(2) nor Article 16 nor any other provision in the Protocol conferred authority for their adoption. In accordance with the principle of conferred powers, the institutions may act only within the framework of the powers conferred on them.

50 In respect of the first plea, the Council and the German Government contend that the applicant is relying on a mere assumption, and the Commission states that the Commissioner responsible, anticipating the progress of negotiations in the Council, had obtained authorisation to amend the proposal if a compromise formula obtained the support of a qualified majority of the Council. The German Government considers, in addition, that possible fault on the part of the Commission cannot render an act of another institution illegal.

51 As regards the second plea, the Council and the interveners consider that the Commission may amend its proposal at any time, pursuant to Article 250(2) EC.

52 Disputing the arguments put forward under the third plea, in which it is alleged that the statement of grounds for the contested Regulation was defective, the Council maintains that it contains an adequate statement of grounds and that, according to case-law, the contested act need not explain all the calculation methods, rates and amounts. It points out that the statement of grounds must be assessed in the light of the context and all the rules governing the matter concerned.

53 With regard to the part of the fourth plea alleging infringement of the Protocol inasmuch as the contested Regulation provides for the reduction in ecopoints made after the threshold number of journeys was exceeded in 1999 to be spread out, the Council considers that to apply the whole reduction in ecopoints solely in the year 2000 would have had the disproportionate effect of stopping all transit traffic through Austria, a consequence expressly acknowledged by the applicant in its application. The Council points out that the objective of the ecopoint system is to reduce pollution and that that objective has already been largely achieved. The possible problem of noise, apart from the fact that it did not actually give rise to the ecopoint system, should yield to the requirements of the proper working of the internal market. Moreover, the applicant's interpretation of the Protocol would have the effect of penalising the existence of lorries which cause less pollution.

54 Consequently, the Council maintains that it was necessary to apply the Protocol in the light of its objectives and those of the Act of Accession, namely the full integration of the Republic of Austria into the regime established by the Treaty for the free movement of goods and the internal market. The ecopoint system is an exceptional, temporary arrangement terminating in 2003 at the latest, and the *acquis communautaire* is applicable 'in its entirety' during that transitional period, in accordance with Article 11(5) of the Protocol. In view of these constraints and of the objectives of the Protocol, the only logical way to interpret the Protocol was to spread the reduction in ecopoints over several years.

55 According to the German Government, it is apparent from the second sentence of Article 11(3) of the Protocol, which places 'the proper functioning of the internal market' on an equal footing with the 'protection of the environment in the interest of the Community as a whole', that the Commission and the Council are not entitled, within the framework of the mechanism for reducing the ecopoints established in Article 11(2)(c) of the Protocol, to take measures which would seriously disrupt the proper functioning of the internal market. Furthermore, when the provisions implementing the reduction mechanism were adopted, the Community legislature had a degree of latitude, as is apparent from the words 'appropriate measures' in Article 11(2)(c) of the Protocol. If the Commission or the Council were required, under that provision, to transpose the calculation method contained in point 3 of Annex 5 to the Protocol without being able to

take account of the impact on the internal market, the reference to 'appropriate measures' would be superfluous.

56 In respect of the part of the fourth plea relating to the distribution of the reduction in ecopoints between the Member States, the German Government states that Article 11(6) of the Protocol shows that the Commission has a wide discretion when distributing ecopoints. It is not possible to ascertain from the Protocol which principle, the principle of solidarity or the 'polluter pays' principle, must have priority in that regard, particularly because the latter, under the second sentence of the first subparagraph of Article 174(2) EC, is one of the founding principles of Community environmental law.

57 As regards the complaint that the contested Regulation was adopted too late, the Commission points out that such a delay is inherent in the system, since the Commission and the Member States depend entirely on the statistical data provided by the Republic of Austria, which did not supply the data for 1999 until March 2000. In view of the procedure which had to be followed under Article 16 of the Protocol, the contested Regulation could not be adopted before the summer of the year 2000, and its adoption in September of that year was normal, not belated.

58 With regard to the fifth plea, relating to the method of calculating the reduction in ecopoints made as a consequence of the fact that the threshold number of journeys for 1999 had been exceeded, the German Government points out that, contrary to what the applicant seems to be claiming, the inclusion in the statistics of the 'illegal' journeys did not correspond to the Commission's view. The existence of those 'illegal' journeys was due, essentially, to administrative shortcomings on the part of the Republic of Austria. The applicant has omitted to mention that the Commission and the Member States agreed, within the Ecopoints Committee, that the 'illegal' journeys should not be included in the calculation of ecopoints and that they did not reach any agreement on the definition of the 'blacklist' of journeys.

59 In respect of the same plea, the Commission also states that the Republic of Austria submitted incorrect statistics which did not take into account the fact that the journeys on the 'blacklist', which avoid the ecopoint system, nevertheless caused pollution. According to the Commission, the Republic of Austria must therefore have known that, when the error it had made in calculating the statistics was detected, the other Member States would dispute the calculation and the adoption of the contested Regulation would be delayed.

Urgency and the balancing of interests

60 The applicant considers that the implementation of the contested Regulation would give rise to serious and irreparable damage to the environment and to public health.

61 Irrespective of whether NO_x emissions were reduced, the traffic of goods caused emissions of other substances and generated noise. The whole point of the system of setting a limit on the number of journeys, introduced by Article 11(2)(c) of the Protocol, was to protect the public against a disproportionate increase in traffic and against the related problems of toxic emissions, noise, traffic jams and lack of road safety.

62 The damage caused to forests and to physical and mental public health following an increase in toxic emissions, noise, dirt and traffic congestion is irreparable and cannot be made good by financial compensation. If a further reduction were made in the transit traffic, in the event of annulment of the contested Regulation in the main proceedings, that could not possibly compensate for the damage already caused to the environment and to public health, still less repair it.

63 The applicant maintains that, when the interests are weighed against each other, account should be taken of the fact that, if its application for annulment in the main proceedings is dismissed, a reduction in the number of journeys, previously imposed as an interim measure, could subsequently be offset by the grant of additional quotas, whereas, conversely, the harm caused to health and the environment by 'illegal' journeys could not, under any circumstances, be made good if its application in the main proceedings were upheld.

64 The Council considers that, with regard to the damage which suspension of operation is intended to prevent, the applicant merely makes vague assertions which are not based on facts. In particular, the applicant does not in any way indicate how retention of the regime introduced by the contested Regulation could give rise to damage or why such damage would be attributable to the Regulation. According to the Council, most of the vehicles using Austrian roads are not affected by the ecopoint system and, even if damage is caused to public health and the environment by road traffic, it is impossible to know to what extent it is caused by the lorries which are subject to the ecopoint system.

65 The Commission points out that, since 1991, the total pollution generated by transit traffic has fallen by 55% in real terms and that most of the lorries driving in Austria are not subject to the ecopoint system. Moreover, what the application of the threshold established in Article 11(2)(c) of the Protocol is designed to guarantee is an acceleration in the reduction of pollution but, even if that threshold is not exceeded, the ecopoint system in itself ensures a gradual reduction in pollution.

66 The German Government also disputes the applicant's arguments in that regard. It notes that the ecopoint system has, until now, achieved the objective aimed at by the Protocol, namely, a continual reduction in average NO_x emissions by lorries transiting through Austria. As regards the harm to public health, the applicant has not specified in which part of Austria, amongst which group of people and with which pathological symptoms such harm would appear. Since the allegedly irreparable damage to health feared by the applicant did not

manifest itself, even where toxic emissions were higher, until the end of 1999 or even in 2000, it is highly unlikely that damage of this nature will appear during the following years, from 2001 to 2003, when the quota of ecopoints available will be significantly lower than in the preceding years. The need to adduce proof of damage is all the greater in this case because the applicant, by invoking the protection of health, is seeking to justify restrictions on the free movement of goods and freedom to provide services.

67 The German Government adds that the application does not make it clear how the Austrian population affected by the alleged damage to health will suffer, as a result of the application of the contested Regulation, greater damage than nationals of other Member States living in the immediate vicinity of motorways carrying heavy traffic. The German Government maintains that the traffic on the transit roads can scarcely have had a significant adverse effect on public health. It points out that the Brenner section is one of the stretches of Austrian motorway carrying the least lorry traffic.

68 As regards environmental damage, the German Government also points out that the applicant has not specified in which parts of the country this might be expected to occur, nor which specific types of plants and animals would be the victims of the lorries in transit. As to the alleged permanent damage to forests, the applicant does not make it clear whether there is a demonstrable causal link, or whether the alleged damage is indeed irreparable, in view of the forest's capacity for regeneration. With regard to noise, the applicant has not established on which sections of motorway there might be noise damage of a level higher than that permitted elsewhere in Austria. Furthermore, it is not apparent from the Protocol that the system of rules for which it provides must also serve to give protection against noise.

69 With regard to the balancing of interests, the Council replies that, in any event, the interest of retaining the application of the contested Regulation prevails over

the interest of suspending its operation. If the Court were to confirm the validity of the Regulation, the damage caused by the interim measure sought would indeed be irreparable for those companies prevented from making transit journeys. The Council maintains that the applicant's suggestion that the ecopoints could subsequently be increased by way of compensation is absurd and contrary to the Protocol.

70 The German Government, for its part, points out that the applicant's claim that the balance of the reduction made owing to the fact that the threshold was exceeded in 1999 should be applied only in 2001 would cause serious disruption to the internal market. A reduction calculated according to the Commission's proposal COM(2000) 395 final for a regulation would have the effect, in respect of Germany, of reducing the number of journeys by about 80 000, which would affect the flow of goods in the amount of DEM 4 billion. Added to this would be the damage suffered by the many medium-sized German transport companies and those of all the other Member States which would be affected by the reduction. The damage threatening the Community would be between three and six times higher than that shown in the abovementioned calculations for Germany alone.

Findings

71 Under Articles 242 EC and 243 EC, the Court may, if it considers that the circumstances so require, order that application of the contested act be suspended or prescribe, in any cases before it, any necessary interim measures.

72 Article 83(2) of the Rules of Procedure requires applications pursuant to Articles 242 EC or 243 EC to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.

73 It is settled case-law that the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (see, for example, the order of 25 July 2000 in Case C-377/98 R *Netherlands* v *Council* [2000] ECR I-6229, paragraph 41).

74 It is appropriate to consider, first of all, whether the complaints made by the applicant against the contested Regulation are such as to establish a prima facie case for ordering suspension of operation and the interim measures sought.

75 In that regard, the sixth plea, which is essentially a corollary of the fourth and fifth pleas, does not need to be examined separately.

76 In respect, first, of the plea alleging that there has been no collegiate decision of the Commission to amend its proposal for a regulation, the Commission has explained that the Commissioner responsible obtained authorisation to amend the proposal in the event that a compromise suggestion had the support of a qualified majority of the Council, which is what happened.

77 In that regard, it should be pointed out that, under Article 13 of the Rules of Procedure of the Commission, in the version in force at the material time, the Commission 'may ... empower one or more of its Members to take, on its behalf and under its responsibility, clearly defined management or administrative measures' and may also 'instruct one or more of its Members, with the agreement of the President, to adopt the definitive text ... of any proposal to be presented to the other institutions the substance of which has already been determined in discussion.'

78 In the present case, the amendment made to the proposal for a regulation related mainly to one aspect, which was, admittedly, important, but of a technical nature, concerning the application of the calculation method, on which the opinions of the Member States varied. Furthermore, according to the Commission, which has not been contradicted on this point, the proposal was amended in the light of information regarding the interpretation of the statistics supplied by the applicant after the initial proposal for a regulation. In those circumstances, the applicant's argument that the principle of collegiality was not observed cannot be unreservedly endorsed.

79 Second, as regards the question whether the Commission was able subsequently to amend the proposal for a regulation which it had submitted to the Council under the procedure laid down in Article 16 of the Protocol, it should be noted that the Court has previously held that, in a so-called 'Adaptation Committee' procedure such as the one at issue in this case, the Commission has a certain discretion to amend the proposal relating to the measures to be taken which it submits to the Council (see, to that effect, Case C-244/95 *Moskof* [1997] ECR I-6441, paragraph 39; Case C-151/98 P *Pharos* v *Commission* [1999] ECR I-8157, paragraph 23; and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 65).

80 As pointed out in paragraph 78 of this order, in this case the amendments related to the interpretation of the statistics and to the calculation method. In those circumstances, the arguments put forward by the applicant do not seem to establish, prima facie, that the Commission exceeded its discretion in the matter.

81 As regards, third, the plea alleging an inadequate statement of reasons, it should be noted that the contested Regulation was adopted following consultation with the Ecopoints Committee, on which the applicant was represented, and that the statement of reasons for an act of general application cannot cover each of the technical options involved. Moreover, the recitals in the preamble to the contested Regulation do, prima facie, facilitate an understanding of the reasons for its adoption and its objectives.

82 Fourth, as regards the plea alleging infringement of the Protocol, it should be noted as a preliminary point that it is not for the judge hearing an application for interim relief, when assessing whether that application establishes a prima facie case, to give a definitive ruling on the interpretation of the Protocol.

83 Subject to that reservation, it must be acknowledged that in the first part of this plea the applicant raises very serious arguments, to the effect that the measures which needed to be implemented because the threshold established in Article 11(2)(c) of the Protocol had been exceeded in 1999 could be applied only in the following year, that is to say, 2000. The same is true of the alleged illegality of Article 2(1) of the contested Regulation, in so far as it amends the second subparagraph of Article 6(2) of Regulation No 3298/94 by converting the spreading over several years of the reduction in ecopoints made pursuant to Article 11(2)(c) of the Protocol into a general rule for the future.

84 Indeed, it is apparent from the wording of point 3 of Annex 5 to the Protocol that the 'appropriate measures' which, under Article 11(2)(c) of the Protocol, must be adopted if the threshold prescribed by the latter provision is exceeded, are to be applied in the year following the year in which in which the threshold is found to have been exceeded.

85 It should be pointed out, in this respect, that the protocols and annexes to an act of accession constitute provisions of primary law which, unless that act provides otherwise, may not be suspended, amended or repealed otherwise than in accordance with the procedures established for review of the original Treaties (see, to that effect, Joined Cases 31/86 and 35/86 *LAISA* v *Council* [1988] ECR 2285, paragraph 12).

86 Nevertheless, it is necessary to determine whether, as the Council and the interveners maintain, the context and aims of the ecopoint system must result in a different interpretation of the Protocol, particularly of Annex 5.

87 The objective of the ecopoint system introduced by the 1992 Agreement and set out in the Protocol is to bring about a 60% reduction in the total emissions of NO_x from lorries transiting Austria during the period from 1 January 1992 to 31 December 2003.

88 That objective, which is stated in Article 11(2)(a) of the Protocol, had already been established in Article 15(3) of the 1992 Agreement. It is clear from Article 15(1) and (2) of the Agreement that the objective was established in order 'to reduce the emissions and noise generated by heavy goods vehicles crossing Austrian territory in transit' and that this was 'in the interests of environmental protection and public health'. It is also apparent from Article 15(2) of the 1992 Agreement that, when the ecopoint system was implemented, it was considered that the reduction in No_x emissions could be taken as representative for the purposes of evaluating the reduction in pollution and noise.

89 An initial examination of Article 11(4) of the Protocol shows that the objective of reducing NO_x emissions by 60% is crucial. That provision stipulated that if, in the light of the scientific study provided for therein of the degree to which that objective had been achieved, the Commission were to conclude that it had been achieved on a sustainable basis — which was not the case — the provisions of Article 11(2) of the Protocol would cease to apply on 1 January 2001. However, if, on the other hand, the Commission concluded that the objective of reducing NO_x emissions by 60% had not been achieved on a sustainable basis — which was the case — the Council, acting in accordance with Article 75 of the EC Treaty (now, after amendment, Article 71 EC), could adopt measures which ensured equivalent protection of the environment, 'in particular a 60% reduction of pollution'.

90 However, the fact that the essential aim of the ecopoint system is to reduce NO_x emissions does not seem, prima facie, to alter the interpretation of Article 11(2)(c) in conjunction with point 3 of Annex 5 to the Protocol, which emerges from the very wording of those provisions. Indeed, the mechanism which they establish for reducing the ecopoints is set in motion if the threshold number

of journeys provided for in Article 11(2)(c) of the Protocol is exceeded, not a threshold of ecopoints or NO_x emissions. It should be noted in that regard that both the threshold number of journeys and the mechanism set in motion if it is exceeded were taken, without substantial amendment, from Article 15(5)(2) of and point 4 of Annex IX to the 1992 Agreement.

91 By taking as their basis a threshold number of journeys, Article 11(2)(c) and point 3 of Annex 5 to the Protocol appear designed not only to reduce NO_x emissions — an objective which, after all, can only be furthered by a reduction in ecopoints — but also, as an additional objective, to restrict the number of journeys, an increase in which is regarded as a disruption to be avoided.

92 Finally, it does not seem, prima facie, that the apparent divergence between the abovementioned provisions of the Protocol and those of the contested Regulation can be justified by the need to integrate the Republic of Austria into the internal market.

93 The disputed provisions of the Protocol specifically set up a transitional regime which derogates, in so far as is necessary, from the rules governing the functioning of the internal market. It is true that any provision of an act of accession which includes a derogation from the rules of the Treaty concerning the free movement of goods must be interpreted strictly (Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 18), in order to facilitate the achievement of the objectives of the Treaty and the application of all its rules (Joined Cases 194/85 and 241/85 *Commission* v *Greece* [1988] ECR 1037, paragraph 20). Nevertheless, that does not mean that it is possible to obtain an interpretation which conflicts with the clear wording of the provision at issue.

94 On the other hand, as regards the part of the first plea concerning the method of distributing the reduction in ecopoints between the Member States, since the

Protocol gives no indication of the method to be used, it must be accepted, subject always to the assessments to be made in the main proceedings, that the institutions have, prima facie, a certain discretion in that respect, which appears, therefore, to be open only to limited judicial review.

95 The arguments put forward by the applicant do not manage to establish, on an initial examination, that the Council exceeded its discretion in the matter by deciding that the reduction in ecopoints was to be borne by the States which had contributed to exceeding the threshold laid down in Article 11(2)(c) of the Protocol. In particular, the contested Regulation seems to be based on a method which, subject to final assessment of its validity, does not appear to be either manifestly arbitrary or, prima facie, unrealistic.

96 Fifth, with respect to the method laid down by the contested Regulation for calculating the reduction in ecopoints, it should be noted that the Commission stated that its initial proposal for a regulation was based on the premiss that the lorries to which the 1999 ecopoint statistics attributed an NO_x emission value of zero were lorries which caused no pollution. According to the Commission, it subsequently became apparent, however, that the lorries concerned were making 'illegal' journeys, in the sense that they should have paid ecopoints.

97 Moreover, if, as the applicant itself acknowledges, Article 11(2)(c) of the Protocol seeks to take account of the possibility that technical advances in the manufacture of cleaner engines would make it possible to exceed the forecasts on which the annual stages in the reduction of NO_x emission established in Annex 4 to the Protocol are based, it does not seem, on the face of it, either arbitrary or unrealistic to consider that the statistics relating to the journeys covered by the blacklist, which did not reflect the true position with regard to the pollution caused by those journeys, should not be taken into account for the purpose of making the calculation needed to adjust the number of ecopoints to the actual technical advances made in the manufacture of less polluting engines.

98 In those circumstances, and in view of the limited nature of the judicial review which must be carried out when, as in this case, the institutions have, prima facie, a certain discretion, the applicant's argument that the method used for calculating the reduction in the number of ecopoints constituted an infringement of the Protocol cannot be accepted without reservation.

99 It follows that the majority of the complaints raised by the applicant against the contested Regulation do not, on an initial examination, prevail over the reasons and explanations provided by the Council, the Federal Republic of Germany and the Commission.

100 On the other hand, the complaint alleging that the spreading over four years of the reduction made in the number of ecopoints after the threshold laid down in Article 11(2)(c) of the Protocol had been exceeded in 1999, and the conversion of the spreading of such reductions into a general rule for the future, constituted an infringement of the Protocol raises very serious doubts as to the legality of Articles 1 and 2(1) of the contested Regulation, which have not, at this stage, been dispelled by the observations of the other parties.

101 In those circumstances, it is necessary to examine whether the application satisfies the condition of urgency.

102 With a view to assessing whether this is the case, it must first be stated that the damage to forests and to physical and mental public health which the applicant claims would be the result of the application of the contested Regulation, has been evoked in very general terms.

103 Nevertheless, it must be held to have been established that the application of the contested Regulation will lead to an increase in transit journeys through Austria and in the nuisances they generate.

104 It is not disputed that the threshold number of journeys expressly prescribed in Article 11(2)(c) of the Protocol was exceeded in 1999. The resulting reduction in ecopoints, which, as emerges from the examination of the relevant provisions of the Protocol in paragraphs 83 to 93 of this order, ought, prima facie, to have been applied in its entirety in 2000, was spread over several years, up to 2003. The provisional data supplied by the Commission during these proceedings, at the request of the Court, shows that the threshold was almost certainly exceeded again in the year 2000.

105 The Protocol, in particular Article 11(2)(c) and point 3 of Annex 5 — as, also, the 1992 Agreement, — acknowledges, implicitly but unavoidably, that merely increasing the number of journeys gives rise to damage.

106 Furthermore, such damage is irreversible since the nuisance caused by traffic density cannot, by its very nature, be eliminated retroactively. It would be extremely difficult, if not impossible, to compensate adequately for such disruption.

107 It should also be noted that both Article 11(2) of the Protocol and the contested Regulation will cease to apply at the end of the transitional period provided for in Article 11 of the Protocol.

108 Accordingly, it is conceivable that, when judgment is given on the substance of the case, the provisions of the contested Regulation will already have taken almost full effect.

109 In that respect, it must be stated that the positive effect which the reductions in ecopoints, to be implemented under the Protocol if the threshold number of journeys is exceeded, might have in promoting alternative means of transport — an objective of both the Protocol and the 1992 Agreement — is also restricted to the transitional period.

110 Lastly, the urgency which the applicant may consequently invoke must be taken into consideration *a fortiori* by the President of the Court because, as is apparent from paragraphs 83 to 93 of this order, the plea alleging infringement of the Protocol seems particularly serious.

111 In those circumstances, it appears necessary to grant the applicant appropriate interim protection in order to prevent the damage which would result from the application of provisions the legality of which may be very seriously in doubt. Indeed, the general principle of the right to full and effective judicial protection means that individuals must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Court (see, in particular, the order in Case 27/68 R *Renckens* v *Commission* [1969] ECR 274, at 276; the judgments in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21, and in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraphs 16 to 18; and the order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46).

112 In the present case, however, an order cannot be made granting either suspension of operation of Article 1 of the contested Regulation or the additional interim measures sought by the applicant.

113 Such measures could not retroactively eliminate the damage stemming from the failure to apply the reduction in ecopoints — for which provision is made in the Protocol — in the year 2000, after the threshold number of journeys was exceeded in 1999, since that damage is already irreversible and it is not for the President of the Court to order measures designed to make up for it.

114 On the other hand, it seems appropriate to order suspension of operation of Article 2(1) of the contested Regulation in order to prevent the future damage which would very probably occur if future occasions on which the threshold established in Article 11(2)(c) of the Protocol was exceeded — including in the year 2000, which is almost confirmed — were not followed by the full application, in the year following the year in which the threshold was exceeded, of the corresponding reduction in ecopoints and the consequent reduction in traffic.

115 Furthermore, it seems that that provision may be separated from the rest of the contested Regulation and may, therefore, be suspended without the application of the remainder of the Regulation being called in question.

116 That conclusion is unaffected by the balancing of the interests for which the applicant seeks protection and the damage to the internal market which the Council and the interveners claim would result if suspension of operation were granted.

117 Indeed, the ecopoint system specifically constitutes a transitional derogation from the normal rules applicable to the functioning of the internal market. A risk of disruption to the proper functioning of the internal market is therefore an integral part of the rationale for the ecopoint reduction system as provided for in the Protocol.

118 Moreover, the Council and the interveners have not managed to prove that the contested Regulation would make it possible to avoid such risk of disruption or that the disruption would be so extensive as to tip the balance of interests against the applicant.

119 It should be pointed out, first of all, that the only effect of spreading out the reduction in ecopoints is prima facie to postpone the disruption to the internal market which remains the inevitable consequence of any reduction. Furthermore, to spread the reduction automatically over several years hardly seems likely to prevent the threshold established in Article 11(2)(c) of the Protocol from being exceeded again in the year following the year in which it is found to have been exceeded, with the result that during the final years of the transitional period there would be an accumulation of new reductions and reductions made in respect of previous years in which the threshold had been exceeded and already spread over the final years.

120 As regards the extent of the alleged disruption, the parties agree that there are alternative means of transporting the goods involved. Furthermore, the development and promotion of alternative means of transporting goods constitute one of the main objectives of the Protocol. The Council also considers, in the ninth recital in the preamble to the contested Regulation, that more intensive use of rail freight in combined transport 'should be urgently promoted'. This would relieve the pressure on the number of ecopoints available and would be less environmentally damaging.

121 In the light of all the foregoing considerations, the operation of Article 2(1) of the contested Regulation must be suspended and the remainder of the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The operation of Article 2(1) of Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria is suspended pending judgment in the main proceedings.

2. The remainder of the application is dismissed.

3. The costs are reserved.

Luxembourg, 23 February 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President