OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 26 January 2006 [1]

I — Introduction

1. By this action, brought under Article 230 EC, the Republic of Austria seeks the annulment of Regulation (EC) No 2327/2003 of the European Parliament and of the Council of 22 December 2003 establishing a transitional points system applicable to heavy goods vehicles travelling through Austria for 2004 within the framework of a sustainable transport policy [2] (hereinafter: Regulation No 2327/2003). This regulation, which was opposed by Austria, was adopted on the basis of Article 71(1) EC following the expiry of the ecopoint system laid down in Article 11 of 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. [3] The regulation entered into force on the day of its publication in the Official Journal, i.e. 31 December 2003.

2. It may be pointed out that this case is the fifth action brought before the Court by the Republic of Austria in respect of various aspects of the ecopoint system since the year 2000. In the first case, [4] it successfully challenged the method employed for spreading a reduction in the number of available ecopoints over the final years of the applicability of the ecopoint system. The other cases concerned refusals by the Commission to reduce the number of ecopoints for the years 2001, 2002 and 2003. [5] After the Court had dismissed the action in the case concerning the year 2001, [6] Austria withdrew its action in the other two cases, whereafter they were removed from the Court's register. [7]

3. It should also be noted that yet a further action brought by Austria against the eco-

1 — Original language: English.

2 — OJ 2003 L 345, p. 30.

3 — OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1.

4 — Case C-445/00 *Austria* v *Council* [2003] ECR I-8549. This judgment was preceded by an Order of the President of the Court suspending the operation of the contested regulation, Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461.

5 — Cases C-356/01, C-296/02 and C-393/03. In the latter two cases Austria applied for the suspension of the operation of the Commission's decisions. Both applications were dismissed: C-296/02 R *Austria* v *Commission* [2002] ECR I-9159 and C-393/03 R *Austria* v *Commission* [2003] ECR I-13593.

6 — Case C-356/01 *Austria* v *Commission* [2003] ECR I-14061.

7 — OJ 2004 C 106, pp. 53 and 54.

point system is currently pending before the Court of First Instance.[8] In this case, which is related to the present action, Austria, acting on the presumption that it will be successful in obtaining the annulment of Regulation No 2327/2003, seeks the annulment of a decision of the Commission refusing to submit a proposal for a successor regulation which would establish a stricter system than that laid down in Regulation No 2327/2003. The proceedings in the case before the Court of First Instance have been suspended pending the outcome of the present proceedings before the Court.

4. This brief overview of the litigation generated by the ecopoints system is illustrative of the sensitivity of the problem of reconciling the need, from the point of view of the operation of the internal market, of ensuring transit traffic through Austria with the need to protect the environment, particularly in the Alpine region, from the detrimental effects of emissions from heavy goods vehicles used in that context. The Court was emphatically confronted with this problem in a recent case concerning a sectoral ban issued by the regional authorities in Tyrol on the transportation of certain goods on a section of the A 12 motorway in the Inn Valley.[9]

8 — Case T-361/04 *Austria* v *Commission*, OJ 2004 C 300, p. 44.

9 — Case C-320/03 *Commission* v *Austria* ECR I-9781.

II — Relevant provisions

5. In order to appreciate the legal issue raised by the Austrian Government in this case, it is necessary to reproduce the key elements of the (eco)point systems laid down in both the Protocol and Regulation No 2327/2003.

6. The basic elements of the ecopoint system established by the Protocol are laid down in Article 11(2) of that instrument:

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

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

7. The applicability ratione temporis of the ecopoint system is regulated in Article 11(3) to (5) of the Protocol:

'3. Before 1 January 1998, the Council, on the basis of a report by the Commission, shall review the operation of provisions concerning transit of goods by road through Austria. The review shall take place in conformity with basic principles of Community law, such as the proper functioning of the internal market, in particular the free movement of goods and freedom to provide services, protection of the environment in the interest of the Community as a whole, and traffic safety. Unless the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, decides otherwise, the transitional period shall be extended to 1 January 2001, during which the provisions of paragraph 2 shall apply.

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.'

8. Regulation No 2327/2003 is based on Article 71(1) EC which provides:

'For the purpose of implementing Article 70 ["The objectives of this Treaty shall, in matters governed by this title, be pursued by Member States within the framework of a common transport policy"], and taking into account the distinctive features of transport, the Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.'

9. The core of the points system established by Regulation No 2327/2003 is laid down in Article 3(2) of the regulation:

'From 1 January 2004 to 31 December 2004, in order to encourage the use of environment-friendly heavy goods vehicles for transit traffic through Austria the following provisions shall apply:

(a) the transit of heavy goods vehicles which, otherwise, would use five points or less shall not be subject to the transitional points system;

(b) the transit of heavy goods vehicles using six, seven or eight points shall be subject to the transitional points system;

(c) the transit of heavy goods vehicles using more than eight points shall be prohib-

ited, with the exception of the transit of such heavy goods vehicles registered in Greece and of the transit of certain highly specialised vehicles of high cost and with a long economic lifespan;

(d) the total NO_x emissions from heavy goods vehicles crossing Austria in transit shall be set according to the values given for the year concerned in Annex I;

(e) the value of the total NO_x emissions attributable to heavy goods vehicles shall be determined on the basis of the former ecopoint system as laid down in Protocol 9 to the 1994 Act of Accession. Under that system, any heavy goods vehicle crossing Austria in transit shall require a number of points 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 II;

(f) Austria shall issue and make available in good time the points required for the administration of the transitional points system, pursuant to Annex II, for heavy goods vehicles crossing Austria in transit;

(g) the annual total quota for NO_x emissions is given in Annex I and shall be managed and distributed among Member States by the Commission in accordance with the same principles as those applicable to the ecopoint system in 2003, pursuant to the provisions of Commission Regulation (EC) No 3298/94;

(h) the reallocation of points of the Community reserve shall be weighted according to the criteria set out in Article 8(2) of Regulation (EC) No 3298/94 and, more particularly, according to the actual use made of the points allocated to Member States as well as to the specific needs of hauliers transiting through Austria on the route Lindau-Bregenz-St. Margrethen (Hörbranz-Transit).'

10. Article 3(3) of Regulation No 2327/2003 determines the modalities of the applicability ratione temporis of the regulation.

'If the "Eurovignette" proposal on charging for the use of infrastructure is not adopted by 31 December 2004, all terms of paragraph 2 shall be extended for one further year, and, if that proposal is not adopted by 31 December 2005, for a second year at the most. After 2006, no transitional points system shall be applied.'

III — Background

11. As was already indicated in the introduction, Regulation No 2327/2003 was adopted following the expiry of the ecopoint regime laid down in the Protocol. The preamble to the regulation specifies that it was adopted pursuant to requests, first, of the Laeken European Council of 14 and 15 December 2001 to extend the ecopoint system as a temporary solution and, next, of the Copenhagen European Council of 12 and 13 December 2002 to adopt a regulation on the interim solution for the transit of heavy goods vehicles through Austria from 2004 to 2006. [10]

12. The temporary character of the points system established by the regulation is explained by the fact that, ultimately, it is to be replaced by the amended Eurovignette directive on the charging of heavy goods vehicles for the use of infrastructure. [11] It appears from Article 3(3) of Regulation No 2327/2003 that the extension of the points system depends on whether or not this proposal is adopted by the Community legislature. In fact the common position adopted by the Council on 6 September 2005 was adopted by the European Parliament at its plenary session of 15 December 2005, so that the points system will not be extended further.

13. The points system established by Regulation No 2327/2003 differs in a number of respects from that laid down in the Protocol and indeed may be regarded as being more liberal.

14. First, it does not contain any targets for reducing emissions of NO_x by a certain percentage, as does the Protocol in Article 11(2)(a).

15. Second, it does not provide for any restriction of the number of transit journeys, as does the Protocol in Article 11(2)(c). On the contrary, it explicitly states in Article 2 that the system implies no direct limitation in the number of transits through Austria.

16. Third, the points system of Regulation No 2327/2003 applies only to heavy goods vehicles using six, seven or eight points (Article 3(2)(b) of the regulation). Those using more than eight points are prohibited, with a number of exceptions, whereas those

10 — Recital 2 of the preamble to the regulation.

11 — COM(2003) 448 final of 23 July 2003, Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures.

using five points or less are not subject to the points system (Article 3(2)(a) and (c) of the regulation). By contrast, the ecopoints system of the Protocol applied to all heavy goods vehicles (Article 11(2)(b) of the Protocol).

17. The number of points available continue to decrease, albeit that under the regulation they apply to a limited category of heavy goods vehicles. Where the number of points available in the final year of the applicability of the system of the Protocol (2003) amounted to 9 322 632 for the 15 Member States, the regulation provided the following numbers for the 15 Member States: for 2004: 6 593 487; for 2005: 6 246 462 and for 2006: 5 899 436. [12]

18. These differences between the two systems are the basic reason why the Republic of Austria brought its action under Article 230 EC for the annulment of Regulation No 2327/2003. The legal arguments underpinning its action will be set out below. In the meantime, the Republic of Austria has refused to implement the regulation, which has incited the Commission to open the administrative phase of the infringement procedure under Article 226 EC.

12 — Annex 4 to the Protocol and Annex 1 to Regulation No 2327/2003.

IV — Procedure before the Court

19. The Republic of Austria lodged its application by fax on 24 March 2004. The original was received on 30 March 2004.

20. By Order of the President of 22 July 2004, the Commission was granted leave to intervene in support of the form of order sought by the European Parliament and the Council.

21. A hearing was held on 17 November 2005 at which the applicant, the defending parties and the Commission made oral submissions.

V — Forms of order sought

22. The Republic of Austria concludes that the Court should:

— annul Regulation No 2327/2003;

— order the defending parties to pay the costs.

23. The European Parliament concludes that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

24. The Council concludes that the Court should:

— primarily, declare the action inadmissible;

— in the alternative, should the Court find the action to be admissible, dismiss the action as unfounded;

— order the applicant to pay the costs.

VI — Admissibility

25. The Council claims that the action is inadmissible in view of the fact that the subject-matter of the proceedings and the pleas in law on which the application is based are not sufficiently clear as required by Article 38(1) of the Rules of Procedure of the Court of Justice. More specifically, the Council asserts that the form of order sought by the Republic of Austria and the arguments it advances in its support are incoherent. In this regard it observes that where the logical consequence of the annulment of the regulation would be that the Treaty provisions on the freedom to provide services and the free movement of goods would be fully applicable to transit traffic through Austria, the Austrian Government nevertheless argues its case on the basis of the presumed continuation of the transitional regime laid down in the Protocol beyond the date set for its expiry.

26. Without raising the issue of admissibility, the European Parliament, too, considers that the applicant's objective to establish a points system which would restrict the fundamental freedoms more is difficult to reconcile with the subject-matter of its request, namely the annulment of Regulation No 2327/2003.

27. Austria replies that there is no contradiction between its ultimate objective and its action aimed at the annulment of Regulation No 2327/2003. It points out that, in parallel to the present proceedings, by letter of 31 March 2004, it requested the Commission under Article 232 EC to submit a new proposal for a transitional points system which would be compatible with Community law and in line with the requirements of the Protocol which, it asserts, have remained binding. In the meantime, it has instigated proceedings against the Commission's refu-

sal, by letter of 22 June 2004, to comply with this request. [13]

28. Article 38(1) of the Rules of Procedure, as interpreted by the Court, requires that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary, as the Court has stated, for the basic legal and factual particulars on which a case is based to be indicated coherently and intelligibly in the application itself. [14]

29. In the present case there can be no doubt that the Republic of Austria's application complies with these criteria, given that it is clearly challenges the compatibility with primary Community law of Regulation No 2327/2003, establishing a new transitional points system for transit traffic through its territory, and the arguments advanced by the applicant in support of its claim are fully comprehensible. [15] Whether or not these arguments are sound or sufficiently coherent is a matter to be considered in deciding on the merits of the application.

30. To the extent that the Council is implying that the Republic of Austria seeks an outcome which is contrary to its stated interest and is therefore inherently paradoxical, it should be pointed out that Article 230 EC does not require Member States to demonstrate that they have an interest in bringing an action for the annulment of a Community act. At any rate, as Austria points out, it has also instigated proceedings under Article 232 EC in parallel with the present action to incite the Community institutions to adopt a regulation which would be more in line with its perceived interests.

31. In these circumstances, it must be accepted that the application brought by the Republic of Austria satisfies the requirements of Article 38(1) of the Rules of Procedure. As it also complies with the time-limits laid down in Article 230 EC, there are no grounds for declaring it inadmissible.

13 — Case T-361/04; see paragraph 3 above.

14 — See, e.g. Case C-55/03 *Commission* v *Spain*, not published in the ECR, paragraph 23, and Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 53.

15 — Cf. Case C-178/00 *Italy* v *Commission* [2003] ECR I-303, paragraph 6, and Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraph 20.

VII — Substance

32. In support of its application for the annulment of Regulation No 2327/2003, the Republic of Austria puts forward four grounds of illegality. It claims that the regulation violates:

— the principle of proportionality;

— the objectives of the horizontal environment protection provision, Article 6 EC;

— the objectives underlying Article 11 of the Protocol;

— the principle of 'precision' (Bestimmtheitsgrundsatz).

A — *Violation of the principle of proportionality*

1. Submissions of parties

33. The Republic of Austria asserts first that Regulation No 2327/2003 violates the principle of proportionality, which requires that measures must be both adequate and necessary for attaining the objective concerned. In its view, the points system established by the regulation is not adequate for achieving the objective set out in its preamble, which is to reduce emissions from heavy goods vehicles with a view to the sustainable protection of the environment. It refers to a report of 1 March 2004 commissioned by the Austrian Federal Ministry of Transport, Innovation and Technology, 'LKW-Transitverkehr durch Österreich: Bilanz und Ausblick', which concludes that the entry into force of Regulation No 2327/2003 will lead to a significant increase in the volume of emissions. On the one hand 80% of the transit traffic would be liberalised as from 1 January 2004. On the other hand, the number of points available for vehicles still requiring points under the regulation is greater than needed. The increase in emissions could amount to 133% or even 260% by the year 2006.

34. In addition, according to estimates of Kapsch TraffiCom Ag, the company which managed the former ecopoint system, the application of the regulation would impose a financial burden of approximately EUR 9 million, which is completely disproportionate to the means used to achieve the objectives of the regulation.

35. The European Parliament and the Council, by contrast, point out that the regulation is an instrument of the common transport

policy, based on Article 71(1) EC and not on the Protocol. Although the regulation is aimed at protecting the environment in the Alpine region, the Austrian Government does not take sufficiently into account that, as such, it constitutes a derogation from the freedom to provide services and the free movement of goods. Where it is necessary to strike a balance between these interests, the regulation does not go beyond the limits of its legal base. According to the Council, the validity of the regulation should be reviewed in the light of the EC Treaty and the general principles of Community law and not in the light of provisions derogating from the Treaty regime which explicitly have ceased to be effective.

36. The defending institutions assert that, in adopting the contested regulation, the Community legislature properly exercised its powers in the field of transport policy and respected the principle of proportionality. Given the fact that the legislature enjoys a large measure of discretion, only a permanent derogation from the basic freedoms could be considered to be disproportionate. Furthermore, they observe that the regulation applies to the whole of Austrian territory, and not just the Alps, so that it is not right to allege that the protective effect on the environment is unsatisfactory. Faced with two options, the Community legislature chose the solution which protects the environment in Austria above that which would have allowed the fundamental freedoms guaranteed by the EC Treaty to prevail.

37. The Commission observes that the calculation of the number of points made available under the contested regulation was based on figures relating to transit traffic in the year 2002 (and not 2003), as at the date of the adoption of the regulation, the Austrian authorities had only produced statistics for that year. The sole fact that Article 3(2)(c) of Regulation No 2327/2003 prohibits the use of strongly polluting vehicles demonstrates that the measure respects the principle of proportionality.

38. In its response to the Commission's observations, the Austrian Government retorts that it was not up to Austria to produce final statistics on ecopoints for 2003 even before the end of that year. Anyhow, the relevant figures could not be used as a basis for determining the number of points available for the period from 2004 to 2006. As to the second point, it states that the regulation de facto liberalises transit transport through Austria and that this does not serve the objective of the protection of the environment.

2. Assessment

39. It is well established that the principle of proportionality is one of the general principles of Community law, recognised in Article 5, third paragraph, EC as a standard

to be observed by the Community institutions in taking any kind of (legislative) action. The principle requires that measures implemented through Community provisions are appropriate for attaining the objective pursued and that they must not go beyond what is necessary to achieve it. [16] However, in applying this principle as a standard for the substantive judicial review of legislative acts, it must be taken into account that in policy areas, such as the field of the common transport policy, [17] the Community legislature necessarily enjoys a broad discretion in view of the fact that it must make complex assessments resulting in choices of a political, economic and social nature. The Court has inferred from this that the legality of a measure adopted in such a policy area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. [18]

40. As I have had occasion to observe before, it also follows from the principle of institutional equilibrium and the separation of powers that the Court should exercise restraint in reviewing the legality of the content of legislative acts. This is particularly the case where the act concerned, like the contested regulation, was adopted jointly by the European Parliament and the Council in the context of the co-decision procedure. [19]

41. Bearing in mind that the scope for finding a legislative act, adopted under the co-decision procedure, to be disproportionate is limited, applying the proportionality test involves an assessment of three different aspects of the contested measure. First it is necessary to identify the objectives of the measure, next it must be considered whether the measure is appropriate for achieving these objectives and finally it must be examined whether the measure does not go beyond what is necessary to achieve its objectives. [20]

42. The Republic of Austria and the defending institutions disagree as to the precise aim of Regulation No 2327/2003 which is not surprising, as this provides the point of reference for examining the two other aspects of the proportionality test.

43. The purpose of Regulation No 2327/2003 should be seen against the background of the change in the legal regime applicable to transit traffic through Austria. Where Article 11(5) of the Protocol determined that, at the expiry of the transitional

16 — See, inter alia, Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 45, and Case C-491/01 *BAT* [2002] ECR I-11453, paragraph 122.

17 — *Spain and Finland* v *Parliament and Council*, cited in footnote 15, paragraph 56.

18 — See, inter alia, *Arnold André* and *BAT*, both cited in footnote 16, at respectively paragraphs 46 and 123 of the judgments.

19 — See my Opinion in Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, points 91 and 92.

20 — Cf., again, my Opinion in *France* v *Parliament and Council*, cited in the previous footnote, points 95 to 99.

ecopoint system, the acquis communautaire would be fully applicable, this implied that the rules in the EC Treaty and in secondary legislation governing transport services in the Community as a whole would also apply to transport crossing Austrian territory.

44. The regulation was adopted on the basis of Article 71(1) EC, thus indicating that it is primarily an instrument of the common transport policy. As such, it is designed to lay down common rules for international transport passing across the territory of a Member State, within the meaning of subsection (a) of that provision. In legislating in this context, the Community is empowered, and indeed even obliged under Article 6 EC, to take into account environmental protection requirements.[21] The preamble to the regulation accordingly refers to the need to adopt measures following the expiry of the ecopoint system of the Protocol, particularly in view of the expected increase in the volume of transit traffic following the enlargement of the Community on 1 May 2004. However, the preamble also emphasises, in its eighth consideration, that 'it is essential to find non-discriminatory solutions to reconcile the obligations deriving from the Treaty (including Article 6, 51(1) and 71), for instance as regards free movement of services and goods and protection of the environment.'

21 — Cf. Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 42, and Case C-320/03, cited in footnote 9, paragraph 73 of the judgment.

45. It is thus clear from the regulation's legal base, on the one hand, and the considerations in the preamble, on the other hand, that the Community legislature intended to restrict the negative impact on the environment in Austria of the acquis communautaire in the field of transport services becoming fully effective, but that it also sought to bring about a greater degree of liberalisation of transit traffic than existed under the Protocol. It cannot therefore be maintained that Regulation No 2327/2003 only pursues environmental objectives. The Community legislature clearly struck a balance between both interests. In this light, the position taken by the Republic of Austria that the regulation was intended to extend the environmental aims of the Protocol is untenable.

46. The next step in reviewing the proportionality of the regulation is to consider whether the points system it introduces constitutes an appropriate measure for achieving these objectives. As was explained in paragraph 16 the points system basically only applies to heavy goods vehicles using six to eight points. Vehicles which produce high levels of NO_x emissions and therefore require more than eight points are banned, with the exception of two categories of vehicles, from transit through Austria. Vehicles producing low levels of NO_x which would otherwise use five points or less are wholly exonerated from the points system.

47. By prohibiting the use of the most polluting vehicles, the regulation eliminates one important source of environmental pollution, so that it can be said that this has an immediate beneficial effect on the environment. This effect may be (partially) neutralised by the possible increase in the volume of transport carried out by vehicles in the other two categories, one of which is not subject to any quantitative restriction. Nevertheless, it is clear that the system is tilted towards encouraging the use of cleaner vehicles for transit traffic through Austria. This may be regarded as an appropriate method for reconciling the interests of the internal market with that of reducing the burden on the environment resulting from increased motorised traffic.

48. That being said, it must also be recognised that the level of environmental protection attained in this system depends ultimately on the number of points made available for the middle class of vehicles. As was indicated in paragraph 17, this number decreases during the transitional period. The Austrian Government complains that the number of points has been set at such a high level that there are more points available than are needed in practice for the vehicles concerned. The regulation, it asserts, therefore has the effect of completely liberalising transit traffic through its territory. Here, it must be pointed out that the number of available (eco)points decreased steadily under the system established by the Protocol and that the regulation continues this trend specifically for heavy goods vehicles using six, seven or eight points. If it appears that the Community legislature, in striking a balance between free movement and the protection of the environment, set the number of available points at a level which exceeds what is required in practice, this does not necessarily mean that the measure is disproportionate. It simply indicates that the system has been more successful in encouraging the use of cleaner heavy goods vehicles than was presumed at the time of adopting the measure. This argument, put forward by the Austrian Government, does not, therefore, affect the finding that the points system laid down in Regulation No 2327/2003 is as such an appropriate method for pursuing not only the aim of environmental protection, but in parallel to that, also the aim of ensuring the free provision of transport services and the free movement of goods.

49. Finally, on proportionality, it must be considered whether the measure goes beyond what is necessary to achieve its objectives. Given the fact that Regulation No 2327/2003 seeks to reconcile two conflicting interests this aspect of the proportionality test works in two directions. As regards the aim of environmental protection, the question is whether the restriction on transport services imposed by the points system is not excessive. As to the aim of liberalising transit traffic through Austria to a greater extent, the question would be whether the regulation affords sufficient weight to the protection of the environment.

50. In such a situation of two conflicting interests, a variety of measures are envisagable which could give either more or less weight to one objective over the other. Finding a balance between the two is solely a matter of political consideration by the Community legislature, and it is not for the Court to rule on the propriety of the outcome of this process, unless it is manifestly clear that the legislature has exceeded the limits of its discretion. As indicated above, this is particularly so where the choices made were taken in the context of the co-decision procedure involving the European Parliament and the Council.

51. At any rate, it is clear that the regulation in prohibiting the use of the most polluting class of heavy goods vehicles for transit through Austria and in providing for a degressive system of ecopoints has contributed to a greater protection of the environment than would have been the case if the acquis communautaire had become fully applicable. At the same time it has created a greater, though not unrestricted, degree of freedom to provide transport services for a transitional period of three years. It cannot, therefore, be regarded either as being excessively restrictive, from the point of view of the internal market, or manifestly deficient, from the point of view of the protection of the environment.

52. The Republic of Austria also claims, on the basis of estimates provided by the company which previously managed the ecopoints system, that the cost of applying the points system would be excessively high. However, given the fact that the points system under the regulation is more limited in scope than the ecopoints system under the Protocol, applying only to vehicles using six to eight points, and there is already a system in place for managing the ecopoints scheme, this cannot be regarded as a credible argument.

53. In view of the foregoing considerations, Regulation No 2327/2003 cannot be regarded as infringing the principle of proportionality so that the first plea of illegality put forward by the Republic of Austria must fail.

B — *Violation of the objectives of the horizontal environment protection provision, Article 6 EC*

1. Submissions of the parties

54. As the Austrian Government maintains that Regulation No 2327/2003 results in an increase of emissions, it concludes that it

violates the objective of promoting sustainable development laid down in Article 6 EC, which it considers to be a binding rule, and the objective of achieving the highest possible level of environmental protection.

55. The European Parliament and the Council assert that the regulation contributes to the protection of the environment in the Alps and that it encourages the use of less polluting heavy vehicles in transit traffic crossing Austria. They underline that the legal base is Article 71 EC on the common transport policy which does not neglect economic, social and ecological issues. The fundamental freedoms are restricted as far as possible for the benefit of Austria.

56. The Commission points out that it is incorrect to allege that the regulation contributes to an increase in emissions of NO_x given the fact that if it were not to exist, as from the date of the expiry of the derogations in the Protocol, the general Treaty regime would apply and no specific restriction of traffic through Austria would apply. The regulation strikes a balance between different interests and, though the Republic of Austria would have favoured a different outcome, this balance will be reevalued after expiry of the regime laid down in the regulation.

2. Assessment

57. Article 6 EC requires environmental protection requirements to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 EC, which includes the common transport policy, in particular with a view to promoting sustainable development.

58. The Court has described the function of this provision by indicating that it emphasises the fundamental nature of the objective of environmental protection and its extension across the range of those policies and activities. [22]

59. Although this provision is drafted in imperative terms, contrary to what the Republic of Austria asserts, it cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest. Such an interpretation would unacceptably restrict the discretionary powers of the Community institutions and the Community legislature. At most it is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in

22 — *Commission* v *Council*, cited in the previous footnote, paragraph 42.

policy areas outside that of environmental protection stricto sensu. It is only where ecological interests manifestly have not been taken into account or where they have been completely disregarded that Article 6 EC may serve as the standard for reviewing the validity of Community legislation.

60. In addition, given the broad horizontal character of Article 6 EC, in considering whether a given measure contributes sufficiently to environmental protection, it should not be regarded in isolation from other Community measures adopted for this purpose in relation to the activity concerned. It is the totality of measures adopted by the Community in this field which provides the proper framework for assessment. Thus, in the present case, account should also be taken of the directives on air quality and the scope they provide to the Member States for adopting measures in the framework of plans and programmes. [23]

61. Regulation No 2327/2003 therefore cannot be declared invalid on the ground that it infringes Article 6 EC, so that the Republic of Austria's second plea of illegality also fails.

23 — Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ 1996 L 296 p. 55, and Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ 1999 L 163, p. 41.

C — Violation of the objectives underlying Article 11 of the Protocol

1. Submissions of parties

62. Under this heading the Republic of Austria submits that Regulation No 2327/2003 is invalid as the transit regime it establishes does not achieve the primary Community law objectives of protecting the environment and public health. It argues that although the ecopoint system laid down in the Protocol may have expired on 31 December 2003, the aim pursued by Article 11 of the Protocol to ensure the reduction of pollution caused by transit traffic on a sustainable basis [24] continues to apply as an integral part of Community law. In its view the anticipated expiry of the transit regime only applies to the provisions of Article 11(2) of the Protocol. It would be inconceivable that these rules be replaced by a compulsory Community system which provides for a lower level of protection. Not only would this go against the will of the Member States at the time of concluding the Protocol, it would also undermine the useful effect of the transitional arrangements. As both the general and specific objectives of the transitional regime remain unaffected by the date of expiry, the Community is obliged to respect it in adopting rules to replace it. The Republic of Austria adds that the regulation

24 — In the German version of Article 11(4) of the Protocol, 'on a sustainable basis' is expressed by the more elaborate term 'dauerhaften und umweltgerechten Grundlage'.

is incapable of achieving its objective as the method used by the Commission to calculate the ecopoint quota is based on incorrect presumptions which led to a distorted representation of reality and an arbitrary increase in the number of ecopoints for the years 2004 to 2006.

63. The European Parliament and the Council refer to the explicit and clear wording of Article 11(4) and (5) of the Protocol on the expiry of the transitional regime, which was also emphasised by the Court in its judgment in *Austria* v *Council*[25] According to them Article 11 of the Protocol does not constitute the correct point of reference for assessing the validity of Regulation No 2327/2003. Its validity, rather, should be assessed in light of the provisions of primary Community law which were applicable when it entered into force. At that point in time the regime laid down in the Protocol had expired. The regulation establishes a new transit regime based on Article 71(1) EC.

64. The Commission agrees with the defendant institutions and points out that the objectives of a legal instrument which has expired can have no legal effect on an act adopted subsequently. The contested measure, moreover, explicitly sets out its own objectives and the reasons for its adoption which are in conformity with Community law. The Commission also observes that the method employed by it for calculating the number of ecopoints was not contested by the Austrian Government during the preparation of the regulation.

65. In its response to the Commission's observations, the Austrian Government retorts that it is legitimate to review the validity of the regulation in the light of the former regime given the fact that the regulation itself refers to that regime. It states further that it did indeed object to the calculation method used by the Commission during the Coreper meeting of 19 November 2003, during the conciliation procedure and in the context of numerous direct contacts with the Commission at expert level.

2. Assessment

66. By this plea of illegality, the Republic of Austria seeks to derive a standard for assessing the validity of Regulation No 2327/2003 from the objective of the Protocol to reduce emissions of NO_x from heavy goods vehicles by 60%, thereby extending the effects of the Protocol beyond the expiry of the ecopoints system on 31 December 2003. It attempts to enhance

25 — Cited in footnote 4, paragraph 72.

the status of this standard by emphasising the fact that it is laid down in an instrument of primary Community law.

67. This argument cannot be upheld for the following reasons.

68. First, the objective of reducing emissions of NO_x from heavy goods vehicles passing through Austria by 60% ultimately by the end of the year 2003 is part of a transitional arrangement which derogates from the general rules of Community law on the carriage of goods by road. [26] As such it is appropriate to adopt a restrictive approach in determining its scope ratione temporis. It may be pointed out in this respect that the Protocol itself demonstrates the need to limit the operation of the derogation in time where, initially applicable until 1 January 1998 (Article 11(2)), it provides for two moments of assessment, 1 January 1998 and 1 January 2001, prior to its extension for two further periods of three years each (Article 11(3) and (4) of the Protocol).

69. Second, Article 11(5) of the Protocol provides explicitly that 'at the end of the transitional period the acquis communautaire in its entirety shall be applied'. Not only is this provision emphatic in its substantive scope ('in its entirety'), it also applies unconditionally, no prior decision being required for it to take effect, nor there being any possibility for any further extension of the transitional regime for whatever reason. The full application of the acquis communautaire to transit traffic crossing Austrian territory as from 31 December 2003 implies that this traffic shall be subject to the general rules of primary and secondary Community law governing transport services by road. Goals of environmental protection in relation to this traffic must be pursued through Community measures adopted for that purpose, such as the directives on air quality, [27] and national measures compatible with the Treaty provisions on the free movement of goods and the freedom to provide services, save where the Community legislature provides otherwise.

70. Third, on a more general note, it would appear that although the reduction of NO_x emissions by 60% is the stated explicit objective of the Protocol, it more implicitly was intended, through the steady decrease in the number of available ecopoints per annum, to encourage the gradual transition towards using more environmentally friendly

26 — In particular, the First Council Directive of 23 July 1962 on the establishment of certain common rules for international transport (carrying of goods by road for hire or reward) OJ, English Special Edition 1959-1962(I), p. 267, and 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.

27 — See the directives referred to in footnote 23 above.

heavy goods vehicles for transit journeys through Austria. In addition, as was observed by the Commission, seen in the context of the Protocol as a whole, which incites the Community and the Member States to take measures for the improvement of rail facilities, the transitional period was also intended to create sufficient time to take measures enabling transport of goods to be transferred from road to rail. It may be presumed that such developments would contribute to a more structural solution of the environmental problems arising from transit traffic through Austria and pave the way for the full application of the acquis communautaire. At any rate, it is unrealistic to presume that such a concrete target can be maintained at all times given the fact that not all contributory factors can be controlled.

71. Fourth, and more importantly, it must be emphasised that the target of reducing pollution from emissions of NO_x from heavy goods vehicles by 60% is a policy objective which was pursued in the context of the Protocol by making transit traffic through Austria with heavy goods vehicles conditional on the possession of a number of ecopoints equivalent to the emission of NO_x by those vehicles. In this system, it was the instrument of the ecopoints which was the legally binding element and not the objective as such. At most, such an objective can only have an effect in a legal sense where it is used as an interpretative guideline in determining the scope and content of the instrument selected for pursuing it. To hold that an objective can continue to apply beyond the date set for its realisation in such a way as to constitute a standard for assessing the validity of measures adopted subsequent to the expiry of the measures employed to achieve it, would amount to an unacceptable interference with the prerogatives of the Community legislative bodies in determining whether or not, and if so which, subsequent measures should be adopted in that situation. As the Commission correctly observes, the political desirability of an objective should not be confused with the possibility of it being legally binding.

72. The Austrian Government submits that where Article 11(4) of the Protocol, providing for a scientific study of the degree to which the objective of reducing pollution by 60% has been achieved, refers to this reduction being achieved 'on a sustainable basis', it must be presumed that the objective is intended to be lasting and continues to have effect after 31 December 2003. However, although accepting, again, that this objective may be desirable from a policy point of view, it is not a legal standard which can be imposed on the appointed legislative bodies in weighing interests and setting priorities. In the context of this provision

'the reduction of pollution on a sustainable basis' served as a criterion for determining whether or not the ecopoint system needed to be extended for a final period of three years.

D — *Violation of the principle of 'precision'*

1. Submissions of the parties

73. The Austrian Government's further submission, that the fact that Regulation No 2327/2003 refers to the Protocol implies that it intends to pursue the same objective as the Protocol cannot be accepted either. The reference in the first point of the preamble to the regulation merely states that the ecopoint system lapsed on 31 December 2003, thereby indicating the context for the adoption of the regulation. The second reference, in Article 3(2)(e) of the regulation is technical in character, where it provides that the value of the total NO_x emissions shall be determined on the basis of the former ecopoint system. Indeed, the use of the word 'former' in this context only serves to emphasise discontinuity rather than continuity.

75. Austria claims that Regulation No 2327/2003 violates the principle of precision (Bestimmtheitsgrundssatz), which on the basis of Article 6(1) EU is binding on the Community institutions. It asserts that various provisions in the regulation lack sufficient clarity and precision so that they infringe the principle of legal certainty. More particularly, it refers to the fact that in the German language version of Article 3(2) of the regulation it is unclear whether vehicles using eight points are or are not subject to the transitional points system. It complains further that the concept of 'highly specialised vehicles of high cost and with a long economic life span' is not defined in the regulation. In addition, monitoring compliance with the regulation is impossible in the absence of an obligation for transporters to carry appropriate documents. Finally, Article 3(4) of the regulation permits the Commission to extend the scope ratione materiae of the regulation, contrary to Articles 202, third indent, and 211, fourth indent, EC.

74. In the light of these considerations, I conclude that the objective pursued by the Protocol cannot be applied as a standard for assessing the validity of Regulation No 2327/2003. The third plea of illegality must, therefore, also fail.

76. The European Parliament and the Council recognise that there is an imprecision in the German version of Article 3(2) concern-

ing vehicles using eight points. However, as this provision is clear in the other language versions and according to the Court's case-law Community law provisions must be interpreted and applied in the light of the versions existing in the other official languages, [28] this circumstance cannot affect the validity of the regulation. Moreover, as the Austrian Government participated in the negotiations in the conciliation committee, it must have been perfectly aware of this imprecision. At any rate, this difference in the language versions was eliminated by a corrigendum published on 6 July 2004. [29] As it is perfectly clear to which categories of vehicles the points system applied, the requirement of legal certainty is satisfied.

77. The Commission says as to alleged imprecisions that as the Republic of Austria has not yet adopted measures for the implementation of Regulation No 2327/2003, it has not been possible to adopt the measures provided for in Article 3(4) of the regulation.

78. The Republic of Austria objects to this reasoning of the Commission on the ground that the difficulties of the practical application of the regulation are due to the absence of detailed provisions to be adopted by the Commission, and not vice versa.

2. Assessment

79. The Bestimmtheitsgrundsatz or principle of precision which is invoked by the Republic of Austria is one expression of the principle of legal certainty. Article 6(1) EU, which declares that the European Union is founded on, inter alia, the rule of law, may indeed be considered as the formal Treaty basis of this principle. As the Court has ruled on various occasions the principle of legal certainty is a fundamental principle of Community law which requires that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly. [30] This principle is also specifically laid down in the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 22 December 1998 on common guidelines for the quality of drafting of Community legislation. According to the first paragraph of these legally non-binding guidelines Com-

28 — Case C-296/95 *EMU Tabac* [1998] ECR I-1605, paragraph 36.

29 — OJ 2004 L 235, p. 23.

30 — See Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30, Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931 and Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27.

munity legislative acts shall be drafted clearly, simply and precisely. [31]

80. However, the Court has also recognised that a degree of uncertainty regarding the meaning and scope of a provision of Community law may be inherent in that rule. In assessing the compatibility of that provision with the principle of legal certainty, it is then necessary for that examination to be confined to the question whether the legal measure at issue displays such ambiguity as to make it difficult for the addressees of the measure to resolve with sufficient certainty any doubts as to the scope or meaning of the contested regulation. [32]

81. The Republic of Austria's first complaint relates to the fact that in the original German version of Article 3(2) of Regulation No 2327/2003 it was not entirely clear whether heavy goods vehicles using eight points were subject to the points system or were precluded from being used for transporting goods through Austria. Although that language version did indeed display some ambiguity, as was recognised by the defending institutions, the other language versions were absolutely clear on this point. They correctly invoke the Court's case-law according to which the necessity for uniform application and interpretation makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all languages. [33] In addition, the German language version was corrected by a formal corrigendum, so for that reason alone there is no doubt about the fact that vehicles using eight points may be used for transit traffic through Austria and are subject to the transitional points scheme.

82. The second point raised by the Republic of Austria concerns the lack of a definition of the concept of 'highly specialised vehicles of high cost and with a long economic life span' used in Article 3(2)(c) of the regulation. Here, reference may be made to the observation by the Court that a degree of uncertainty may be inherent to any legislative provision. Indeed, as it is impossible to foresee all possible factual situations in which a rule may apply and in order to ensure sufficient flexibility in its application, a legislative body necessarily must employ terminology which is not too exclusive. Be that as it may, the term at issue, to my mind, is on the contrary rather precise in view of the fact that it

31 — OJ 1999 C 73, p. 1.

32 — Cf. *Commission* v *Belgium*, cited in footnote 30, at paragraph 31 of the judgment.

33 — Case 29/69 *Stauder* v *Ulm* [1969] ECR 419, paragraph 3, Case 55/87 *Moksel* [1988] ECR 3845, paragraph 15, and *EMU Tabac*, cited in footnote 28, paragraph 36.

contains three criteria to distinguish the envisaged category from other vehicles.

83. The third problem raised by the Republic of Austria under this heading is that in the absence of an obligation to carry documents, it is impossible to monitor compliance with the points system. In the system of Regulation No 2327/2003, Article 3(4) empowers the Commission, acting in accordance with the procedure referred to in Article 5(2) of the regulation, to adopt further measures concerning the procedures relating to the transitional points system, the distribution of points and technical issues concerning the application of Article 3. Where the Commission states that it could not adopt additional measures as long as the Republic of Austria refused to implement the regulation and the latter indicates that it could not implement it in the absence of these measures, the question as to the monitoring compliance appears to be largely theoretical. At any rate, given the fact that the regulation itself makes provision for the necessary measures being adopted, the fact that this did not occur, for whatever reason, cannot constitute a ground for invalidating the regulation.

84. The fourth point of imprecision indicated by the Republic of Austria is that the delegation of legislative powers to the Commission in Article 3(4) of the regulation permits it to extend the scope ratione materiae of the regulation. However, according to the wording of this provision, which was paraphrased in the previous paragraph, this power is restricted to procedures, the distribution of points and technical issues. Thus, the extent of the legislative power delegated to the Commission is adequately delimited and there is no reason to presume that provisions relating to these matters could extend the scope ratione materiae of the regulation.

85. Consequently, the fourth plea of illegality is also unfounded.

VIII — Costs

86. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the European Parliament and the Council asked that the Republic of Austria be ordered to pay the costs and the latter has been unsuccessful in its application, it must be ordered to pay the costs. In accordance with Article 69(4), the Commission which intervened in support of the European Parliament and the Council must bear its own costs.

IX — Conclusion

87. On the basis of these considerations, I conclude that the Court should:

— declare the application brought by the Republic of Austria admissible;

— reject the application as unfounded;

— order the Republic of Austria to pay the costs;

— order the Commission to pay its own costs.