JUDGMENT OF THE COURT

11 September 2003 *

In Case C-445/00,

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,

defendant,

* Language of the case: German.

supported by

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by J. Sedemund, Rechtsanwalt,

by

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

and by

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

interveners,

APPLICATION 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 19 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 December 2000, the Republic of Austria brought an action under the first paragraph of 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, 'the contested Regulation').

Facts and legal background

2 Protocol No 9 on road, rail and combined transport in Austria ('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, 'the Act of Accession') establishes in Part III, which concerns road transport, special rules for the traffic of goods by road through Austria.

3 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, approved on behalf of the Community by Council Decision 92/577/EEC of 27 November 1992 (OJ 1992 L 373, p. 4).

4 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.'

5 Article 11(3) to (6) of the Protocol provides:

'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.

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.

...'

6 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.'

7 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.'

8 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 Austria, Finland and Sweden (OJ 1994 L 341, p. 20), which was amended by Commission Regulation (EC) No 1524/96 of 30 July 1996 (OJ 1996 L 190, p. 13) and Commission Regulation (EC) No 609/2000 of 21 March 2000 (OJ 2000 L 73, p. 9), ('Regulation No 3298/94').

9 Article 6(2) of Regulation No 3298/94 provides:

'The printed ecopoints which are intended for affixing to ecocards shall be made available each year to Member States in two instalments, the first before 1 October of the preceding year, and the second before 1 March of the relevant year.

In the circumstances envisaged in Article 11(2)(c) of Protocol No 9, the number of ecopoints shall be reduced for that year using the method laid down in point 3 of Annex 5 to the Protocol.'

10 Regulation No 3298/94 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.

11 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.

12 The ecopoint statistics showed 1 706 436 journeys during 1999, which represented a 14.57% increase over the figure for 1991.

13 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 in Article 16 of the Protocol ('the Ecopoints Committee'). The Commission pointed out that, according to the calculation method laid down in point 3 of Annex 5 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 stated that the consequence of that reduction would be that, during the last quarter of the year 2000, there would be practically no ecopoints available, so that all transit of lorries through Austria would be 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 share 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.

14 Taking the view that the Protocol provided no guidelines concerning the sharing of the reduction between the Member States, the Commission also proposed that the burden of the reduction should be borne by the Member States whose hauliers had contributed to the threshold prescribed in Article 11(2)(c) of the Protocol being exceeded during 1999.

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

16 On 20 September 2000, in the light of the developments in the case within the Council, the Commission authorised the responsible Commissioner, Loyola de Palacio, to take the following initiative: 'should the Council adopt, by qualified majority, a decision in line with the compromise currently proposed by the President, to amend the Commission's proposal accordingly'.

17 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 responsible Commissioner then amended the 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.

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

'(5) 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.

(6) 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.

(7) 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.'

19 Article 1 of the contested Regulation amends Annex 4 to the Protocol as follows so as to fix the new annual ecopoint quotas:

Year	Percentage of ecopoints	Ecopoints for EU-15
2000	48.5%	11 428 150
2001	47.2%	11 121 897
2002	43.5%	10 250 317
2003	39.6%	9 321 531

20 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.'

21 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.

22 On 21 December 2000, the Commission, pursuant to Article 11(4) of the Protocol, adopted a Report to the Council on the Transit of Goods by Road through Austria (COM(2000) 862 final).

23 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 referred to 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.

Procedure

24 The Republic of Austria lodged its application at the Court Registry on 4 December 2000.

25 By orders of the President of the Court of 26 January and 30 April 2001, the Federal Republic of Germany, the Commission of the European Communities and the Italian Republic were granted leave to intervene in support of the form of order sought by the Council.

26 By a separate document lodged at the Court Registry on 4 December 2000, the Republic of Austria filed an application under Articles 242 EC and 243 EC for suspension of operation of the contested Regulation and for adoption of interim measures.

27 By order of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, the President of the Court ordered that operation of Article 2(1) of the contested Regulation be suspended until judgment in the main proceedings, dismissed the remainder of the application and reserved the costs.

28 At the Commission's request, the Court, by order of 23 October 2002 in Case C-445/00 *Austria* v *Council* [2002] ECR I-9151, ordered that the opinion of the Commission's legal service of 11 April 2000, which had been submitted by the Republic of Austria in an annex to its application, be withdrawn from the case-file and reserved the costs.

Forms of order sought

29 The Republic of Austria claims that the Court should:

— annul the contested Regulation;

— in the alternative, annul Article 1 and Article 2(1) and (4) of the contested Regulation;

— order the Council to pay the costs.

30 The Council, supported by the Federal Republic of Germany, the Italian Republic and the Commission, contends that the Court should:

— reject as inadmissible all the heads of complaint raised against the Commission, the applicant not having brought an action against it;

— dismiss the action as unfounded;

— in the alternative, should the Court uphold the action and annul the contested Regulation, order that all of its effects shall be maintained;

— order the applicant to pay the costs.

Admissibility

31 The Council submits that, of the pleas relied on in support of the action, the heads of complaint raised against the Commission are inadmissible because no action has been brought against the Commission and the judgment to be given in the present case will not be enforceable against an institution which is not a party to the proceedings.

32 The Court notes that actions for annulment under Article 230 EC must be brought against the institution which adopted the contested measure and such actions are inadmissible in so far as they are directed against another institution (see, to that effect, Case 150/87 *Nashua Corporation and Others* v *Council and Commission* [1987] ECR 4421).

33 Since annulment of a Council regulation is sought, the present action may therefore be brought only against that institution. Nevertheless, the circumstances affecting the legality of a contested measure may be relied upon in support of such an action even if they relate to the conduct of an institution other than the defendant institution.

34 An institution whose conduct is called into question in that way cannot be involved as a main party to the proceedings but may intervene in them in support of one of the main parties, as the Commission has done in this case.

35 Consequently, the objection of inadmissibility raised by the Council must be rejected.

Substance

36 The Austrian Government bases its action on six pleas in law. The first plea, which is the principal plea, alleges that essential procedural requirements were infringed when the contested Regulation was adopted. The following pleas are raised in the alternative. The second plea alleges infringement of the Treaty or the Protocol, in that the Commission's proposal was amended after it had been

submitted to the Council. The third plea alleges failure to state reasons for the contested Regulation. The fourth plea alleges that the contested Regulation infringes the Treaty or the Protocol. The fifth plea alleges infringement of legal provisions and failure to state reasons when applying the method of calculation referred to in point 3 of Annex 5 to the Protocol. Finally, the sixth plea alleges that there is no legal basis for the contested Regulation.

The first plea: infringement of essential procedural requirements when the contested Regulation was adopted

37 By its first plea, the Austrian Government claims that essential procedural requirements were infringed when the contested Regulation was adopted. 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 Austrian Government adds 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 constitutes a failure to observe the Commission's Rules of Procedure, which limit authorisations to the adoption of clearly defined management and administration measures.

38 The parties are agreed that, on 20 September 2000, that is to say, the day before adoption of the contested Regulation, the Commission authorised the responsible Member of the Commission to amend the proposal for a regulation submitted to the Council if the Council were prepared to adopt by qualified majority a decision in line with the compromise proposed by the French Presidency, which it was.

39 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 responsible Commissioner then amended the initial proposal in line with the French Presidency's compromise proposal. This allowed the Council to adopt by a qualified majority the Commission's amended proposal.

40 Under Article 13 of the Commission's Rules of Procedure, in the version in force at the material time, the Commission may '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'.

41 It is clear from the documents submitted to the Court that the authorisation in question was granted by the Commission acting as a collegiate body after having been informed of the content of the compromise which was to be proposed. It follows that the responsible Commissioner was duly authorised to amend the proposal for a regulation in question to that effect.

42 Therefore, no essential procedural requirements were infringed when the contested Regulation was adopted.

43 It follows that the first plea must be rejected as unfounded.

Second plea: infringement of the Treaty or the Protocol in that the Commission's proposal was amended after it had been submitted to the Council

44 By its second plea, the Austrian Government 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.

45 In that regard, it is sufficient to observe that, under Article 250(2) EC, '[a]s long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act'.

46 It was therefore open to the Commission to amend its proposal as it did in this case.

47 Consequently, the second plea must be rejected as unfounded.

Third plea: failure to state reasons in the contested Regulation

48 By its third plea, the Austrian Government submits that, as regards the calculation of the reduction in the number of ecopoints, the sharing of the reduction between the Member States, the spreading of that reduction over four

years, and the introduction of a general rule to spread 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 fails to satisfy the requirement to state reasons.

49 The Court observes that it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, *inter alia*, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 81).

50 First, the recitals of the contested Regulation indicate with sufficient clarity the principal reasons for the positions adopted as regards the calculation of the reduction in the number of ecopoints, the sharing of the reduction between the Member States and the spreading of that reduction over several years. Second, the parties are agreed that the Republic of Austria was fully informed of the reasons for the contested Regulation, in particular as a result of its participation in the Ecopoints Committee.

51 It follows that, having regard to both its content and its context, the reasons given in the contested Regulation satisfy the requisite legal standard.

52 For those reasons, the third plea must be rejected as unfounded.

First limb of the fourth plea and the sixth plea: spreading of the reduction in ecopoints over several years

53 By the first limb of its fourth plea, which is, essentially, restated in the sixth plea, the Austrian Government maintains that the contested Regulation infringes the EC Treaty and the Protocol in two respects.

54 First, according to the Austrian Government, the wording of the relevant provisions in the Protocol is unequivocal and clear and leaves 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 does not provide for application in 2000 of the whole of the reduction in ecopoints made on account of the threshold number of journeys having been exceeded in 1999 but spreads that reduction over four years 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 an express power of the Council under primary law, is manifestly illegal.

55 The Austrian Government regards as unacceptable the reasons given by the Council in the recitals to the contested Regulation concerning the disproportionate effect of applying the entire reduction in ecopoints solely to 2000 and the claim that the Protocol must be applied in accordance with the fundamental freedoms laid down by the Treaty, the method of interpretation used by the Council being, in its view, contrary to the clear wording of the Protocol.

56 Second, the Austrian Government submits that Article 2(1) of the contested Regulation, 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 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.

57 It is appropriate, first of all, to examine the second of those heads of complaint, namely that there was a definitive introduction of a principle that the reduction in ecopoints be spread over several years.

58 In that connection, the Commission argues that Article 2(1) of the contested Regulation amends the rule on the distribution of ecopoints only in respect of 2000 and does not contain any general rule applying to the future. According to the Commission, if that article were really to contain such a general rule, it would indeed be illegal.

59 The Court finds that, in view of the categoric wording of Article 2(1) of the contested Regulation, this argument cannot be upheld. Article 2(1) does not lay down any temporal limitation or make any reference whatsoever to the special circumstances which prevailed in 2000. That article must be read as being intended to effect a permanent and definitive change in the ecopoints system.

60 However, point 3 of Annex 5 to the Protocol provides that, in the event of a reduction, the number of ecopoints is to be established 'for the following year'.

61 It follows that Article 2(1) of the contested Regulation amends the second subparagraph of Article 6(2) of Regulation No 3298/94 in a way which is inconsistent with point 3 of Annex 5 to the Protocol.

62 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 and CPC España* v *Council* [1988] ECR 2285, paragraph 12).

63 It follows that Article 2(1) of the contested Regulation is invalid in so far as, contrary to the provisions of the Protocol, it introduces definitively a principle that the reduction in ecopoints be spread over several years.

64 Article 2(1) must therefore be annulled.

65 As regards the head of complaint relating to the spreading over the years 2000 to 2003 of the reduction in ecopoints made on account of the transit journey threshold provided for in Article 11(2)(c) of the Protocol having been exceeded in 1999, the Italian Republic and the Council submit essentially that the threshold was exceeded as a result of the conduct of the Republic of Austria itself in so far as it failed to take adequate measures to develop the existing railways in Austria with a view to reducing goods traffic by road, as it was required to do under the Protocol. The Austrian Government disputes those claims and submits that the arrangements for combined rail and road transport in Austria operate adequately.

66 The Court recognises that the Protocol relates not only to the transport of goods by road but also to transport by rail and combined transport. Articles 6 and 7 of and Annex 3 to the Protocol impose obligations on, among others, the Republic of Austria to develop and utilise railway capacity. If that capacity were developed as required, it would be capable of relieving the transalpine routes of the burden of some of the transport of goods by heavy vehicles.

67 However, it should be noted that the Protocol does not provide for any mechanism whereby the provisions on ecopoints in that protocol are to become inapplicable in the event that the Republic of Austria fails to fulfil its obligations to develop railway capacity. In the absence of such mechanisms in the Protocol itself, it is not a matter for the Court, in the present annulment proceedings, to adopt a position on compliance by the Republic of Austria with those obligations.

68 With respect to the fact that the number of journeys by road authorised for 1999 was exceeded, it is clear from the information provided to the Court that, although the Austrian authorities supplied some statistics to the Community authorities in March 2000, they were inaccurate and only in September 2000 was it possible to determine definitive statistics.

69 As a result of the delays inherent in the legislative procedure, which were due, in particular, to the Ecopoints Committee procedure provided for in Article 16 of the Protocol, only the last quarter of 2000 remained within which to make the reductions resulting from the threshold being exceeded in 1999.

70 The Protocol, in particular Article 11(2)(c) and Annex 5, contains no provision specifically governing the situation created by the late transmission of reliable statistics by the Austrian authorities.

71 On the other hand, Articles 11(2)(c) and 16 of the Protocol authorise the Commission and, if necessary, the Council to adopt 'appropriate measures' in accordance with point 3 of Annex 5. Those provisions confer a discretion on the Community institutions to take appropriate measures when faced with a situation in which reliable statistics have been transmitted late by the responsible national authorities.

72 In that context, the Council may take into account the fact that the ecopoints system constitutes a derogation from the general rules of Community law which applies only during a transitional period.

73 First, it is clear from Article 11(3) to (5) of the Protocol that the special rules for the traffic of goods by road through Austria laid down in the Protocol are to be applied in accordance with the fundamental principles of Community law, such as the proper functioning of the internal market, the free movement of goods and the freedom to provide services. Second, those rules were intended to apply initially until 1 January 1998 and could be renewed, after review, for two additional periods ending on 31 December 2003 at the latest. The Protocol provides that, at the end of that transitional period, the 'acquis communautaire' is to be applied in its entirety.

74 The parties, including the Republic of Austria, are agreed that to apply the whole reduction of ecopoints to be made as a result of the threshold having been exceeded in 1999 solely to the remaining months of 2000 would have had the disproportionate effect of stopping practically all transit traffic of goods by road through Austria. Such an effect would have been contrary to the fundamental principles of Community law, in particular the free movement of goods and completion of the internal market.

75 In those circumstances, the Council was justified in spreading the reduction in ecopoints to a date beyond the end of 2000.

76 However, as the Austrian Government observed, spreading the reduction over four years from 2000 to 2003 was incompatible with the Protocol. No provision in the Protocol provides for spreading the reduction over several years. On the other hand, point 3 of Annex 5 to the Protocol, in referring to 'the following year', clearly indicates a time scale of one year. In accordance with that indication, it would have been open to the Council to apply the reduction in ecopoints over a period of one year with a postponed commencement date in order to take account of the delays attributable to the late transmission of reliable statistics. In the present case, it would have been acceptable to spread the reduction over the remaining months of 2000 and the whole of 2001.

77 It follows that Article 1 of the contested Regulation is contrary to the Protocol inasmuch as it spreads over the period 2000 to 2003 the reduction in ecopoints to be made as a result of the finding that the threshold for journeys had been exceeded in 1999.

The second limb of the fourth plea: distribution of ecopoints between the Member States

78 By the second limb of its fourth plea, the Austrian Government submits that the new distribution of ecopoints between the Member States provided for in Article 2(4) of the contested Regulation 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.

79 It should be observed that the distribution of ecopoints between the Member States was not fixed by the Protocol but by an act of secondary legislation, namely Regulation No 3298/94, and, more specifically, Annex D to that regulation, which was amended by Article 2(4) of the contested Regulation.

80 Under Articles 11(6) and 16 of the Protocol, the distribution of ecopoints between the Member States falls within the competence of the Commission and, where necessary, the Council.

81 The Protocol does not, however, give any guidance as to what method is to be used in sharing the reduction of ecopoints between the Member States.

82 The Community institutions thus have a wide discretion in that regard.

83 It is clear from, in particular, the seventh recital to the contested Regulation that the Council exercised its discretion when deciding to share the reduction in ecopoints between the Member States in proportion to their contribution to the overstepping of the prescribed threshold for journeys.

84 In adopting such an approach, the Council did not exceed its margin of discretion.

85 However, inasmuch as Article 2(4) of the contested Regulation seeks to share the reduction in ecopoints provided for in Article 1 of that regulation between the Member States over a period of four years, it is vitiated by the same illegality as Article 1.

Fifth plea: infringement of legal provisions and failure to state adequate reasons when applying the method of calculation provided for in point 3 of Annex 5 to the Protocol

86 According to the Austrian Government, the method used in the contested Regulation to calculate the reduction in ecopoints is incompatible with the general objectives of the Protocol and thus infringes the Protocol and misapplies the calculation method laid down in point 3 of Annex 5. That calculation method resulted in a lesser reduction than that provided for in the Protocol. The Austrian Government states that the ecopoint statistics which it provided in respect of 1999 included not only the journeys made through Austria with deduction of ecopoints but also 'illegal' transit journeys which were made without deduction of ecopoints and for which an NO_x emission value of zero was recorded. For the purposes of calculating the reduction in ecopoints, the Council took into account only the actual average level of NO_x emissions per heavy goods vehicle, thus omitting to take into consideration 'illegal' journeys.

87 The contested Regulation is, the Austrian Government submits, also vitiated by a failure to state reasons since it contains no specific information concerning the calculation method which forms the basis of the reduction in ecopoints imposed in Article 1.

88 The Court observes that, in the event that the threshold for journeys laid down in Article 11(2)(c) of the Protocol is exceeded, the reduction in the number of ecopoints for the following year is to be determined in accordance with the method of calculation laid down in point 3 of Annex 5 to the Protocol, which states:

'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.'

89 In this method of calculation, the only variable is the average NO_x emission value laid down for the year following the current year. This variable is of decisive importance in determining the reduction in the number of ecopoints. It consists of an average extrapolated on the basis of the quarterly average NO_x emission values established in the current year, which, in the present case, is 1999.

90 With respect to establishing the quarterly average NO_x emission values during the current year, point 2 of Annex 5 to the Protocol provides:

'The Commission, acting in accordance with the procedures laid down in Article 16, shall at three month intervals calculate the number of journeys and the average NO_x value of the heavy goods vehicles detailed for each nationality.'

91 According to the information provided by the Commission, which is not challenged by the other parties, the average NO_x emission value is calculated on

the basis of the presumption that the number of ecopoints used for each transit journey is equal to the NO_x emission value of the heavy goods vehicle making that journey; consequently, the average NO_x emission value is replaced in the calculation by the average use of ecopoints. It appears therefore that, in practice, the calculation of the average NO_x emission values of heavy goods vehicles provided for in point 2 of Annex 5 to the Protocol entails the simple division of the total number of ecopoints used by the total number of registered journeys.

92 In this case, it is undisputed that the Republic of Austria provided the Commission with statistics for 1999 which included all of the journeys made in its territory, including those for which the haulier should have used ecopoints but did not ('illegal' journeys). It follows that, in those statistics, the total number of ecopoints used was divided not by the number of journeys made using ecopoints but by a number equal to the sum of those journeys and journeys made without ecopoints being deducted even though they ought to have been.

93 In this calculation, the total number of ecopoints used takes no account of 'illegal' journeys since, by definition, every 'illegal' journey uses zero ecopoints. However, in that same calculation, 'illegal' journeys were included in the total number of journeys made. The inevitable result of including 'illegal' journeys in the divisor (namely the total number of journeys made) without also including them in the dividend (namely the total number of ecopoints used) was to distort the calculation so as to produce a lower result. The 1999 statistics, which were calculated in this way and extrapolated for the following year in accordance with point 3 of Annex 5 to the Protocol, forecast an average NO_x emission value for 2000 of 6.159.

94 However, it would be wrong to claim that, because a heavy goods vehicle did not use any ecopoints while making a journey through Austria, it produced no NO_x emissions during that journey.

95 The calculations provided for in points 2 and 3 of Annex 5 to the Protocol are based on NO_x emissions and not on the use of ecopoints. It is only as a fiction that ecopoints are used in the calculations instead of NO_x emissions.

96 It follows that the calculation method described in paragraphs 92 and 93 of this judgment and favoured by the Austrian authorities is inconsistent with the provisions in force and gives an inaccurate result. According to the information submitted to the Court, that error was detected in August 2000 and, following a technical meeting in Vienna, the Commission revised the statistics concerning the average quarterly NO_x emission values for 1999 and the extrapolation of those values for the following year in accordance with point 3 of Annex 5 to the Protocol. That revision resulted in an average NO_x emission value for 2000 of 6.9975. The result of including that figure in the calculation provided for in point 3 of Annex 5 was a lesser reduction in ecopoints than that initially envisaged and the Council applied that reduction in the contested Regulation.

97 In doing so, the Council acted in conformity with both the letter and the spirit of the Protocol. Points 2 and 3 of Annex 5 refer to the average NO_x emission value of heavy goods vehicles and not to a fictive calculation based on a number of ecopoints.

98 The arguments put forward by the Republic of Austria with regard to the application of the calculation method laid down in point 3 of Annex 5 to the Protocol must therefore be rejected.

99 With respect to the head of complaint concerning failure to state reasons, it is settled case-law that it is not necessary for details of all relevant factual and legal aspects to be given in the statement of reasons, in so far as the question whether

the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. This is *a fortiori* the case where the Member States have been closely associated with the process of drafting the contested measure and are thus aware of the reasons underlying that measure (see Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 188 and the case-law cited there).

100 It is undisputed in this case that it was the Republic of Austria which provided the statistics on which the calculations at issue were based, that those statistics were discussed during a special meeting held in Vienna with the Austrian authorities and that, both within the Ecopoints Committee and within the Council, the Austrian Government was informed at all stages of the amendments which led to the adoption of the figures which it is calling into question.

101 The arguments of the Austrian Government with regard to failure to state reasons are therefore unfounded. Consequently, the fifth plea must be rejected in its entirety.

Maintenance of the effects of the contested Regulation

102 The Council claims that, in the event of annulment of the contested Regulation, the Court should order that all of the legal effects of that regulation be maintained until a new measure is adopted, in particular because of the need for legal certainty. The Austrian Government and the Commission concurred with this claim at the hearing of oral argument.

103 It is clear from paragraph 77 of this judgment that Article 1 of the contested Regulation is contrary to the Protocol inasmuch as it spreads over the years 2000 to 2003 the reduction in ecopoints to be made as a result of the threshold for journeys having been exceeded in 1999.

104 However, in accordance with the second paragraph of Article 231 EC, the effects of Article 1 of the contested Regulation must be declared to be definitive.

105 It is clear from paragraph 85 of this judgment that Article 2(4) of the contested Regulation is vitiated by the same illegality as Article 1 inasmuch as it seeks to share the reduction in ecopoints provided for in Article 1 between the Member States over a period of four years.

106 As was the case with Article 1 of the contested Regulation, the effects of Article 2(4) must be declared to be definitive.

Costs

107 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. However, under Article 69(3) of those Rules, the Court may order that the costs be shared or that the parties bear their own costs where each party

succeeds on some and fails on other heads. In this case, since the parties have each been partially unsuccessful, each must be ordered to bear its own costs, including those of the interlocutory proceedings and of the procedure relating to the withdrawal of a document from the case-file.

108 Under the second subparagraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany, the Italian Republic and the Commission, which intervened in these proceedings, are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls 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;**

2. **Annuls Article 1 and Article 2(4) of that regulation but declares that their effects are to be regarded as definitive;**

3. **Dismisses the remainder of the action;**

4. **Orders each party to bear its own costs, including those of the interlocutory proceedings and of the procedure relating to the withdrawal of a document from the case-file;**

5. **Orders the Federal Republic of Germany, the Italian Republic and the Commission of the European Communities to bear their own costs.**

Rodríguez Iglesias Puissochet

Wathelet Schintgen Gulmann

Edward La Pergola Jann

Skouris Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass G.C. Rodríguez Iglesias

Registrar President