ORDER OF THE PRESIDENT OF THE COURT
30 July 2003 *

In Case C-320/03 R,

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

applicant,

v

Republic of Austria

defendant,

APPLICATION for the suspension of operation of the sectoral ban on driving provided for in the Verordnung des Landeshauptmanns von Tirol

* Language of the case: German.

of 27 May 2003, limiting transport on the A 12 motorway in the Inn valley,

THE PRESIDENT OF THE COURT

makes the following

Order

1 By application lodged at the Court Registry on 24 July 2003, the Commission brought an action under Article 226 EC for a declaration that, by imposing the ban on the driving of lorries carrying certain types of goods provided for in the Verordnung des Landeshauptmanns von Tirol (Regulation of the First Minister of the *Land* of Tyrol) of 27 May 2003 limiting use of the A 12 motorway in the Inn valley (BGB1. II, 2003/279, 'the Regulation'), the Republic of Austria has failed to fulfil its obligations under Articles 1 and 3 of 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), Articles 1

and 6 of Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1), and Articles 28 EC to 30 EC.

2 By a separate document lodged at the Court Registry on 25 July 2003, the Commission made an application for interim relief pursuant to Articles 242 EC and 243 EC, seeking an order requiring the Republic of Austria to adopt the measures necessary to suspend operation of the national regulation in question until the Court has given a ruling in the main action.

3 The Commission also asked the President of the Court, pursuant to Article 84(2) of the Rules of Procedure, to grant its application for interim relief before the other party had submitted its observations, pending the order terminating the interlocutory proceedings.

4 The Commission summarises as follows the facts in its application for interim relief. On 27 May 2003, the Landeshauptmann von Tirol (First Minister of the *Land* of Tyrol) adopted the Regulation in question, pursuant to the Austrian Immissionsschutzgesetz-Luft (Emission Control Act-Air), prohibiting the use of a section, approximately 46 kilometres long, of the A 12 motorway in the Inn valley by heavy goods vehicles carrying certain types of goods. This absolute ban on driving comes into force with direct effect on 1 August 2003 for an indefinite period in respect of the vehicles concerned.

5 The Regulation in issue, which is based on the Austrian Immissionsschutzgesetz-Luft, is designed to reduce emissions linked to human activity and thus to improve air quality so as to ensure lasting protection for human health and for fauna and flora (Paragraph 1 of the Regulation).

6 Paragraph 2 of the Regulation delimits a 'clean zone' consisting of a 46-kilometre long section of the A 12 motorway in the Inn valley between the communes of Kundl and Ampass. Paragraph 3 of the Regulation prohibits use of this section by heavy goods vehicles or articulated lorries with a maximum authorised weight of over 7.5 tonnes and heavy goods vehicles with trailers with a combined maximum authorised weight exceeding 7.5 tonnes carrying the following goods: all of the waste products listed in the European Waste Catalogue (corresponding to Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (OJ 2000 L 226, p. 3), as amended by Council Decision 2001/573/EC of 23 July 2001 amending Decision 2000/532/EC as regards the list of wastes (OJ 2001 L 203, p. 18)), cereals, logs, bark and cork, ferrous and non-ferrous ores, stones, soil, rubble, motor vehicles and trailers, or structural steel. It is not necessary for any authority to intervene by adopting a decision; the ban takes direct effect.

7 Paragraph 4 exempts from the ban laid down in Paragraph 3 of the Regulation heavy goods vehicles whose journeys start from or terminate in the territory of the City of Innsbruck or in the districts of Kufstein, Schwaz or Innsbruck-Land. The Immissionsschutzgesetz-Luft contains other exemptions. It excludes various categories of vehicle from the ban on driving, including motorway maintenance vehicles, refuse vehicles and agricultural and forestry vehicles. These vehicles are directly excluded. An individual exemption may be requested for other vehicles on grounds of public interest or significant individual interest.

8 The Commission takes the view that the ban on driving manifestly hinders the freedom to provide services in the sector of carriage of goods by road, guaranteed by the EC Treaty and confirmed by secondary legislation in Regulations No 881/92 and No 3118/93, and the free movement of goods within the meaning of Article 28 EC.

9 The measure de facto affects, if not exclusively at least predominantly, the transit of the goods in question. It operates what amounts to at least indirect discrimination. According to the Commission, that is incompatible with the aforementioned regulations on the market in the carriage of goods within the Community and on cabotage, and with Article 28 EC et seq., inasmuch as there is no conceivable justification for it. Such a measure cannot be justified on grounds of environmental protection and is in any event disproportionate.

10 As for urgency, the Commission argues *inter alia* that the Regulation in question impacts directly and significantly on the activity of transport undertakings operating on the market concerned and, more generally, on the proper working of the internal market.

11 According to the Commission, the case serves as an example with regard to public policy, inasmuch as other Austrian *Länder* which have heavy transit traffic have already indicated that they wish to follow the Tyrol's example and consider adopting bans on driving. It is also conceivable that other Member States may contemplate similar measures.

12 Furthermore, the ban on driving directly affects the logistical network of the economic operators handling the goods concerned, which is strictly dictated by market requirements. An internal measure adopted unilaterally without notice causes a sudden and fundamental change in the existing conditions of the Community market in the carriage of goods which, according to the Commission, cannot be fully restored. It submits that the first to suffer would be the weakest links in the chain, namely, the road transport undertakings, particularly the small undertakings which, owing to the size of their fleets of vehicles, specialise in the transportation of a single type of goods. The Commission states that more than half of the transport undertakings concerned have only between one and three lorries and 31% have between four and ten lorries. Only about 15% of the undertakings have more than ten vehicles.

13 For undertakings specialising in the transport of certain goods and using special vehicles for that purpose (for example, the transport of new cars or waste), the sectoral ban on driving is tantamount to a general ban because they cannot simply switch to transporting other types of goods.

14 In most Member States, in particular Germany, the road transport sector suffers from overcapacity, which explains the keen competition between undertakings and the low profit margins. According to the Commission, only an undertaking whose vehicles are in permanent use can compete on that market. It is therefore essential for transport undertakings not to lose orders in progress and existing customers. A few days of inactivity might even mean financial ruin for undertakings with few vehicles.

15 In that critical situation, the transport undertakings concerned would, in theory, have only two possible ways of avoiding the ban on driving: they could choose a route which avoids the ban or switch to rail transport.

16 After examining these possibilities, the Commission maintains that, whatever approach they take, the undertakings concerned would face additional costs and lose time if they were not to be forced to cease their activities altogether. In view of the keen competition in the road transport sector, these additional costs could not be passed directly on to those placing orders or customers but would have to be borne by the carriers, at least for the time being. However, the Commission maintains that only large undertakings would be able to offset additional costs on a route (in this case, the Brenner route through Austria). Small undertakings specialising in the transport of the goods covered by the ban on driving would not be able to bear those additional costs in the short term and would lose their

orders and customers. The Commission submits that since, as has already been stated, most small undertakings specialise, it is to be feared that many of them will not be able to receive replacement orders at short notice and will have to leave their vehicles stationary.

17 The Commission concludes that, in the light of the small profit margins of road transport undertakings, it is to be feared that the small and medium-sized undertakings concerned will be forced to cease operating. The resultant damage will impact significantly on the European economy and is unlikely to be repaired.

18 It appears from the information which the Republic of Austria provided in the pre-litigation procedure and in particular from its statement in response to the Commission's reasoned opinion that it considers that the Regulation in question is compatible with Community law. It contends that the ban on driving at issue was adopted in accordance with the rules of national law and the Community directives on the protection of air quality. It is a necessary, proportionate and non-discriminatory measure. The Commission's concerns regarding the catastrophic effects of those measures are groundless because, it maintains, rail transport is an alternative manner — feasible from both a technical and a financial point of view — of transporting the goods covered by the sectoral ban on driving.

19 Under Article 84(2) of the Rules of Procedure, the President of the Court may grant an application for interim relief even before the other party has submitted its observations. That measure may subsequently be varied or cancelled, even of the Court's own motion.

20 At the present stage of the proceedings, the Republic of Austria has not yet been able to submit its observations on the application for interim relief brought by the Commission, with the result that it is not yet possible to decide whether the Commission has made out a satisfactory case, both in law and in fact, for the measure which it seeks.

21 Nevertheless, the pleas put forward by the Commission do not appear prima facie to be entirely unfounded and the possibility remains that the facts stated by the Commission may establish the urgency required for immediately laying down the measure sought.

22 On the other hand, it is not prima facie apparent that the suspension for a few weeks of the enforcement of the national Regulation in question would seriously jeopardise the objective set out in Paragraph 1 of that regulation.

23 In those circumstances, and particularly in view of the imminent entry into force of the Regulation in question, it appears necessary, in the interests of the proper administration of justice, that the status quo should be maintained pending a decision on the application for interim measures (see, to this effect, the order in Case C-195/90 R *Commission* v *Germany* [1990] ECR I-2715).

24 It is for those reasons appropriate to order, as a protective measure, that the Republic of Austria suspend the sectoral ban on driving provided for in the Regulation in question pending delivery of the order terminating the present proceedings for interim relief.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The Republic of Austria shall suspend the sectoral ban on driving provided for in the Verordnung des Landeshauptmanns von Tirol of 27 May 2003 limiting use of the A 12 motorway in the Inn valley pending delivery of the order terminating the present proceedings for interim relief.**

2. **Costs are reserved.**

Luxembourg, 30 July 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President