OPINION OF ADVOCATE GENERAL JACOBS

delivered on 11 July 2002 [1]

1. The present request for a preliminary ruling, made by the Oberlandesgericht (Higher Regional Court), Innsbruck, Austria, concerns essentially the extent of a Member State's duty to keep major transit routes open in order to ensure free movement of goods within the Community, in particular whether it must prohibit if necessary for that purpose a political demonstration with environmental aims whose organisers assert their fundamental right to freedom of expression and assembly, and the circumstances in which it may incur civil liability in respect of any failure to comply with Community law in that regard.

Factual and procedural background

2. The primary transit routes between northern Italy and southern Germany — which also carry much of the traffic between Italy and northern Europe as a whole — pass through the Alps. The mountainous nature of that region both limits the number of routes available and greatly exacerbates the various polluting effects of transport. The main, if not the only, intra-Community route available for heavy goods vehicles without a considerable detour uses the motorway along the Brenner corridor, which is an important part of the trans-European transport network, in the Austrian Alps. Pollution along that route, which has always been a source of great concern in Austria, has reached alarming proportions. [2]

3. The conflicting interests of transport and environmental protection in the area are recognised in the Alpine Convention, approved by the Community in 1996. [3] The preamble to that instrument acknowledges the environmental and economic

1 — Original language: English.

2 — See, *inter alia*: Protocol No 9 to the Act concerning the conditions of accession of the Kingdom of Norway, 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. 361; Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network, in particular sections 2.3, 2.8 and 2.10 of Annex I; Case C-205/98 *Commission* v *Austria* [2000] ECR I-7367, in particular at paragraph 5 et seq. of the Opinion of Advocate General Saggio; and the Report from the Commission to the Council on the Transit of Goods by Road through Austria (COM(2000) 862 final).

3 — See Council Decision of 26 February 1996 concerning the conclusion of the Convention on the protection of the Alps (Alpine Convention), OJ 1996 L 61, p. 31. The convention was signed in Salzburg on 7 November 1991 and entered into force on 6 March 1995. It has been signed by the Community and by a number of Member States and non-member countries in the Alpine region, including Austria, Germany and Italy.

importance of the Alps for local inhabitants and their importance for other regions as support for essential communication routes; it recognises the need to reverse ecological damage through intense, costly and long-term efforts and aims to harmonise economic interests and ecological exigencies. Article 2(1) requires the contracting parties to respect the principles of prevention, payment by the polluter and cooperation in maintaining a comprehensive policy of protection and preservation. Article 2(2)(j) in particular requires them to take appropriate measures to attain that objective. In the area of transport,

'the objective is to reduce the volume and dangers of inter-Alpine and trans-Alpine traffic to a level which is not harmful to humans, animals and plants and their habitats, by switching more traffic, in particular freight traffic, to the railways in particular by providing appropriate infrastructure and incentives complying [with] market principles, without discrimination on grounds of nationality'. [4]

4. Measures taken by the Austrian authorities to combat pollution from road transport include a general ban on heavy goods traffic from 3 pm to midnight on Saturdays, from midnight to 10 pm on Sundays and public holidays [5] and, for vehicles exceeding certain noise limits, from 10 pm to 5 am every night. There are however various exceptions, in particular for animals, perishable goods and urgent deliveries.

5. In addition, there is a system of 'ecopoints' [6] controlling and limiting road use and NOx (nitrogen oxide) emissions by heavy goods vehicles transiting through the country, and it appears that tolls on the Brenner motorway are considerably higher at night. Vehicles over 7.5 tonnes may not at any time use the national highway which runs parallel to that motorway, but a rail

4 — A more detailed Protocol on the Implementation of the the Alpine Convention in the field of Transport was adopted in May 2000, and on 16 January 2001 the Commission presented a proposal for a Council Decision to the effect that it should be signed on behalf of the Community (COM(2001)18 final).

5 — Similar bans exist in six other Member States, although those in Austria appear to be the most severe (see Proposal for a Council Directive on a transparent system of harmonised rules for driving restrictions on heavy goods vehicles involved in international transport on designated roads, COM(1998) 115 final, OJ 1998 C 198, p. 17, and the Commission's explanatory memorandum thereto).

6 — Originally agreed upon between the Community and Austria in 1992 and now governed by Commission Regulation (EC) No 3298/94 of 21 December 1994 laying down detailed measures concerning the system of Rights of Transit (Ecopoints) for heavy goods vehicles transiting through Austria, established by Article 11 of Protocol No 9 to the Act of Accession of Norway, Austria, Finland and Sweden, OJ 1994 L 341, p. 20, as amended by Commission Regulation (EC) No 1524/96 of 30 July 1996 amending Regulation (EC) No 3298/94, with regard to the system of ecopoints for heavy goods vehicles transiting through Austria, OJ 1996 L 190, p. 13; see also Proposal for a Regulation of the European Parliament and of the Council establishing an ecopoint system applicable to heavy goods vehicles travelling through Austria for the year 2004, COM(2001) 807 final, OJ 2002 C 103 E, p. 230.

route, also parallel, is available for 'piggy back' or 'rolling road' transport of road vehicles through the corridor.

6. Eugen Schmidberger Internationale Transporte Planzüge ('Schmidberger') is a transport undertaking of modest size, based at Rot an der Rot in southern Germany, whose lorries apparently carry essentially steel and timber between that area and northern Italy, using the Brenner motorway. It seems that they meet the noise emission standards which exempt them from the night-time ban in Austria.

7. On 15 May 1998, Transitforum Austria Tirol, an environmental protection association, gave notice to the competent Austrian authorities in accordance with the applicable Austrian legislation of its intention to hold a demonstration on a stretch of the Brenner motorway adjacent to the Italian border, which would block the route between 11 am on Friday 12 June and 3 pm on Saturday 13 June 1998. It has been pointed out that in addition Thursday 11 June was a public holiday in Austria that year, and normal weekend restrictions were of course in force on Saturday 13 and Sunday 14 June.

8. The stated aims of the demonstration, it appears from the national court's file, were essentially to demand from national and Community authorities a strengthening of the various measures designed to limit and reduce heavy goods traffic on the Brenner motorway and the pollution thereby caused.

9. The relevant local authorities found no legal reason to ban the proposed demonstration — although they do not appear to have examined in depth the possible Community-law dimension to the question — and thus allowed it to go ahead. It appears that there was cooperation between those authorities, the police, the organisers of the demonstration and motoring organisations with a view to limiting the disruption caused. The demonstration was widely publicised and it appears that alternative (but longer) routes [7] were suggested and extra trains were provided to allow transport undertakings to use 'rolling road' facilities along the Brenner axis, although the details of those measures have not been made entirely clear to the Court.

10. In the event, the motorway was closed to all traffic from 9 am on 12 June until 3.30 pm on 13 June, and reopened to heavy goods traffic (provided that it met night-

7 — One alternative route mentioned during the proceedings, via the Tauern motorway, would appear to add about 240 km (some 55-60%) to a journey between Munich and Verona; the difference in each case would of course depend on the actual starting-point and destination.

time noise emission standards) at 10 pm on 14 June. In practice, the blockage presumably affected principally vehicles over 7.5 tonnes, since others could use the parallel main road along the Brenner corridor (although that route may have been more congested as a result of the blockage and in any event less suited to long-distance traffic).

11. Schmidberger brought proceedings against the Austrian State in the Austrian courts, alleging essentially that the authorities had failed in their duty to guarantee free movement of goods in accordance with the EC Treaty, thereby incurring liability towards the firm inasmuch as it was prevented from operating its vehicles on their normal transit route. It claimed damages in respect of standstill periods, loss of earnings and additional related expenses.

12. In defence, the Austrian State argued essentially that the authorities took a reasonable decision after weighing up the various interests involved. They had concluded correctly that the demonstrators' inalienable democratic right to freedom of assembly could be allowed expression in this case without any serious or permanent obstruction of long-distance traffic.

13. Schmidberger's case was dismissed at first instance on the ground that the burden of proof of loss had not been discharged in accordance with the applicable Austrian law. The Landesgericht (Regional Court) Innsbruck found no evidence that any planned journey had been prevented by the demonstration and therefore did not consider it necessary to examine whether the State might have incurred liability under Community law if the existence of damage had been established.

14. On appeal, however, the Oberlandesgericht takes the view that the case cannot be dismissed thus without first examining a number of important aspects of Community law, on which it has asked the Court to give a ruling:

'1. Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC), or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, *inter alia*, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at

least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?

2. Where, on account of the failure by a Member State to indicate in its national provisions on freedom of assembly and the right to exercise it that, in the weighing of freedom of assembly against the public interest, the principles of Community law, primarily the fundamental freedoms and, in this particular case, the provisions on the free movement of goods, are also to be observed, a political demonstration of 28 hours' duration is authorised and held which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that failure constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

3. Where a national authority decides that there is nothing in the provisions of Community law, in particular those concerning the free movement of goods and the general duty of cooperation and solidarity under Article 5 of the EC Treaty (now Article 10 EC), to preclude, and thus no ground on which to ban, a political demonstration of 28 hours' duration which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that decision constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State liable under the principles of Community law, provided that the other requirements for such liability are met?

4. Is the objective of an officially authorised political demonstration, namely that of working for a healthy environment and of drawing attention to the danger to public health caused by the constant increase in the transit traffic of heavy-goods vehicles, to be deemed to be of a higher order than the provisions of Community law on the free movement of goods under Article 28 EC?

5. Is there loss giving rise to a claim founded on State liability where the person incurring the loss can prove that he was in a position to earn income, in the present case from the international

transport of goods by means of the heavy-goods vehicles operated by him but rendered idle by the 28-hour demonstration, yet is unable to prove the loss of a specific transport journey?

6. If the reply to Question 4 is in the negative:

In order to comply with the obligation of cooperation and solidarity incumbent under Article 5 of the EC Treaty (now Article 10 EC) on national authorities, in particular the courts, and with the principle of effectiveness, must application of national rules of substantive or procedural law curtailing the ability to assert claims which are well founded under Community law, such as in the present case a claim founded on State liability, be deferred pending full elucidation of the substance of the claim at Community law, if necessary following a reference to the Court of Justice for a preliminary ruling?'

15. Written and oral observations have been submitted to the Court on behalf of Schmidberger, the Austrian Government both in its capacity as defendant in the main proceedings and, in accordance with Article 20 of the Statute of the Court of Justice, in its capacity as Member State, the Greek, Italian and Netherlands Governments, and the Commission. Oral observations were also submitted at the hearing on behalf of the Finnish Government.

Admissibility — National rules concerning proof of damage — Questions 5 and 6

16. In the main proceedings, Schmidberger is seeking reparation from the Austrian State for damage allegedly caused by the State's failure in its duty to ensure free movement of goods in accordance with Article 28 EC. Although much of the argument presented to the Court has focused on the extent of that duty and the way in which it is to be reconciled with the exercise of certain fundamental human rights, a possibly more basic problem in the case, concerned with proof of damage as a condition for obtaining reparation, has been raised by the Austrian Government as casting doubt on the admissibility of the request for a preliminary ruling, and that question should be dealt with first.

17. Essentially, the Austrian Government submits that, since Schmidberger has been unable to establish the existence of any particular damage, there is no justification for asking whether the conditions for State liability are otherwise satisfied.

18. There are two aspects to the issue or bundle of issues raised here: there is, on the one hand, the question of the admissibility of the request for a preliminary ruling and, on the other, that of the compatibility with Community law of a national rule or rules which might entail the dismissal of a claim for damages without a full examination of the substance of the claim. The point is raised by the Austrian Government in the context of the national court's question 5, and it also seems relevant to question 6. I shall therefore examine questions 5 and 6 immediately after considering the admissibility of the order for reference itself, since the issues are closely intertwined.

19. Before examining those issues, however, it will be helpful to recall briefly the Court's relevant case-law.

Liability of Member States for breach of Community law: right to reparation

20. It has been clear since the Court's judgment in *Francovich* [8] that Member States may be liable in damages to an injured party for breach of Community law. The rules governing that liability have been further explained in a number of cases — perhaps most comprehensively in *Brasserie du Pêcheur* [9] — as being analogous to those governing the non-contractual liability of the Community under Article 288 EC as elaborated in the Court's case-law. [10]

21. Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss sustained by the injured party. [11]

22. Those three conditions are necessary and sufficient to found a right in individuals to obtain redress, which flows directly from Community law, although the State may also incur liability under less strict conditions on the basis of national law. The State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on

8 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

9 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame and Others* [1996] ECR I-1029.

10 — Paragraphs 41 to 43 of the judgment.

11 — Ibid., paragraphs 47 and 51 of the judgment.

liability, subject to the proviso that the conditions for reparation laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. [12]

23. It is for each Member State's legal system to set the criteria for determining the extent of reparation, which must however be commensurate with the loss or damage sustained to ensure effective protection for the rights of the injured party. The criteria must not be less favourable than those applying to similar claims based on domestic law and must not in practice make it impossible or excessively difficult to obtain reparation. The national court may inquire whether the injured party showed reasonable diligence to avoid or limit the loss or damage, but loss of an opportunity to make a profit may not be totally excluded as a head of damage for which reparation may be awarded since, especially in the context of economic or commercial litigation, that would make reparation practically impossible. [13]

24. Thus, a right to reparation is conferred by Community law where three conditions are fulfilled. The enforcement of that right is however a matter largely for the national courts and national procedural rules, provided that certain conditions are met. In particular, the national system must respect the principles of equivalence (the criteria applied must not be less favourable than those applying to similar claims based on domestic law) and effectiveness (it must not in practice be impossible or excessively difficult to obtain reparation).

The order for reference and submissions

25. Question 5 in the order for reference asks essentially whether, in that context, an operator in Schmidberger's position must be able to claim reparation if he can prove that he would have been in a position to earn income in the absence of the alleged breach of Community law (provided of course that the breach itself can be established) but cannot prove that the breach in fact prevented him from earning specific income. In its reasoning the referring court further makes clear its uncertainty as to the rules of Community law which govern the assessment of quantum of damages: is it permissible for national law to limit reparation to specific damage which can be identified and quantified or may relief be granted also, say, at a fixed rate for standstill periods during which no profit could have been earned, even if no specific opportunity to make a profit can be shown to have been lost?

12 — Ibid., paragraphs 66 and 67 of the judgment.

13 — Ibid., paragraphs 82 to 87 of the judgment; see also Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 91.

26. Question 6 asks essentially whether a national court hearing a claim for reparation alleging damage attributable to a breach of Community law by the State may dismiss that claim, without first examining the Community-law aspects, if national legal requirements governing entitlement to reparation are not satisfied. It is prompted by consideration of the duty of national authorities, including the courts, to ensure fulfilment of Treaty obligations under Article 10 EC and by the need to respect the principle of effectiveness in the field of such claims. The referring court seems particularly concerned that the Austrian rules governing the substantiation of a claim for damages, on the sole basis of which the first-instance court dismissed Schmidberger's claim, might be too stringent to comply with the principle of effectiveness and might unjustifiably preclude claims which are well founded under Community law.

27. Austria stresses that it is for national law to set the criteria for determining the extent of reparation, provided that the principles of equivalence and efficiency are respected. Austrian law requires the existence of real, not hypothetical, damage to be established before a right to reparation can arise. Schmidberger's case was dismissed at first instance because it had not established such real damage. That criterion is applied in the same way to claims under domestic law and under Community law, so there is no question of a failure to comply with the principle of equivalence. Nor can it be said to render the assertion of a right to reparation impossible or excessively difficult, since it has consistently been applied in Austria without giving rise to any problem or criticism. Failure to establish the existence of the necessary damage is an absolute bar to proceeding with a claim for reparation, so the referring court's questions are irrelevant to the determination of the case or, at the most, premature if the case is sent back to the Landesgericht for further findings of fact.

28. Schmidberger asserts that it is in a position to prove that seven specific journeys were prevented by the blockage but that, in any event, it must be possible to compensate loss of earnings in an action against the State founded on a breach of Community law. In order to ensure effective protection for the rights of the injured person, such compensation may be based on fixed rates depending on the length of standstill periods during which earnings were impossible. By dismissing the claim in the present case on the basis of national rules alone, without examining whether it was justified in Community law, the first-instance court was circumventing Community law entirely. Such circumvention by national courts is a failure in their duty to cooperate under Article 10 EC, which requires them to examine Community-law aspects in full, if necessary with reference to the Court of Justice, before they can dismiss such a claim.

Analysis

(a) Admissibility of the request for a preliminary ruling

29. I do not share the Austrian Government's doubts on this score.

30. The Court has consistently held that it is for the national court alone to determine the need for a preliminary ruling and the relevance of the questions submitted; where those questions concern the interpretation of Community law, the Court is in principle bound to give a ruling. Exceptionally, it may examine the conditions in which the case was referred, in order to assess whether it has jurisdiction, but may not refuse to rule on a question referred unless it is quite obvious that the interpretation sought bears no relation to the real nature or purpose of the main action, where the problem is hypothetical, or where the Court does not have before it the factual or legal background necessary to give a useful answer. [14] Here the Austrian Government is alleging, essentially, that the problem is hypothetical.

31. Yet it has itself pointed out the possibility that the case will finally be dealt with only after further findings of fact. Consequently, since such findings might be superfluous if it were to transpire that no claim could possibly lie under Community law, it is not unreasonable for the referring court to seek guidance on all possibly relevant aspects of Community law before it decides whether further evidence must be examined. The answers given by the Court may be relevant when taking that decision, or may become decisive at a later stage in the proceedings. There is nothing hypothetical about the questions in the context of the case, even though in the final event not all of them may prove helpful in reaching a solution. Moreover, it is for the national court to decide at which stage in the proceedings a preliminary ruling should be sought. [15]

(b) Questions 5 and 6

32. These questions relate to the application of national rules concerning the substantiation of damage suffered, particularly in so far as they may have the effect of precluding further examination of a claim for reparation under Community law.

14 — See, for a recent ruling to that effect, the judgment of 19 February 2002 in Case C-35/99 *Manuele Arduino*, not yet published in the ECR, paragraphs 24 and 25, together with the case-law cited there.

15 — See for example Case C-236/98 *JämO* [2000] ECR I-2189, paragraphs 28 to 34, in particular at paragraphs 30 and 32, together with the case-law cited there.

33. As pointed out above, such claims are governed by national law, subject only to the principles of equivalence and effectiveness. Since there is no suggestion of discrimination in connection with either the remedies available or the procedure involved, the principle of equivalence is not in issue. It will be sufficient to consider whether the principle of effectiveness is observed. The following points may assist the national court in its examination.

34. Community law requires reparation when three conditions are met: (i) there has been a sufficiently serious breach by the State of (ii) a rule of law intended to confer rights on individuals and (iii) there is a direct causal link between that breach and the damage suffered. Inherent in the third condition is the existence of damage; [16] if there is no damage, or if no damage can be proved, then any claim for reparation must fail. It is thus important that, in order to comply with the principle of effectiveness, national rules do not make it impossible or excessively difficult to obtain reparation for, or to prove the existence of, a particular kind of damage. If they do so, they may not be applied, either before or after the other Community-law aspects are considered.

35. In that context, there is no need for the three conditions for State liability to be examined in any particular order. Since they are cumulative, the absence of any one of them will suffice for the claim to fail. If no damage (and/or no causal link) can be established, it is not necessary to consider whether a rule of Community law intended to confer rights on individuals was infringed and whether the breach was sufficiently serious. On the contrary, the requirements of procedural economy would seem to militate against such an approach.

36. The referring court seeks guidance on whether, even though unable to prove that any specific journey was prevented, Schmidberger must be allowed to pursue a claim for loss of earnings if it can establish simply that it would have been in a position to earn but for the alleged breach of Community law. It is difficult however to give the most appropriate guidance in the absence of precise details of the content and

16 — In principle, it may be assumed that the damage will be material damage having some economic value which may be ascertained or calculated at least approximately. Whether a claim for reparation might also lie in the event of non-material damage such as distress or damage to reputation does not yet appear to have been examined; in practice, it may be unlikely that such damage will arise from a breach by the State of a rule of Community law intended to confer rights on individuals.

effect of the national rule or rules which may hinder the pursuit of that claim. [17]

37. None the less, it is clear that any trader prevented from carrying on his business suffers economic loss and must in principle be able to obtain reparation therefor. If Schmidberger was prevented from carrying on its business as a result of a breach of Community law of the requisite kind by the Austrian authorities, it is not permissible for Austrian law to preclude reparation.

38. Schmidberger's assertions that it was prevented from making a number of identifiable journeys were, it seems, dismissed by the Landesgericht essentially on the ground that its allegations of fact were amended during the course of the proceedings and that the dates on a number of supporting documents produced appeared to have been changed after they were drawn up, compromising the credibility of the claims.

39. The Oberlandesgericht's fears that enforcement of the obligation under Austrian law to state fully and correctly all the requisite facts which substantiate a claim and to present full and correct argument might preclude examination of the Community-law aspect do not seem to me relevant where such specific allegations are concerned. If a plaintiff bases a claim on the cancellation of identifiable contracts, it is difficult to see how a requirement that he plead his case and present evidence fully and correctly can in any way make it excessively difficult to assert that claim.

40. Assessment of credibility moreover must remain a matter for the competent national court. Here there is no indication that any criteria were applied which might make it excessively difficult to assert a claim or indeed that any criteria at all were applied other than the court's independent and objective assessment.

41. The fact that specific cancellations cannot be proved does not however mean that Schmidberger cannot have suffered any loss. The referring court suggests that such loss might be proved by an auditor's report or by evidence from the plaintiff's accountant. Such evidence might also be relevant to ascertaining the extent of any loss.

42. It appears that the Landesgericht rejected Schmidberger's offer to produce a

17 — It seems that Paragraph 1293 of the Austrian General Civil Code (ABGB) distinguishes between actual damage and loss of profit (*damnum emergens* and *lucrum cessans*) and that the distinction may be of significance in matters of proof. See U. Magnus (ed.) *Unification of Tort Law: Damages* (2001), Kluwer/European Centre of Tort and Insurance Law, pp. 10 and 11.

written statement from its tax adviser, on the ground both that such a statement would not be an expert report but an account of the adviser's knowledge and belief, unconfirmable without supporting evidence, and that it should in any event be made directly and orally to the court in accordance with the principles of Austrian civil procedure.

43. A requirement that evidence be given directly and orally to the court would not appear to make the assertion of a claim unduly difficult — indeed it would seem the most normal way of proceeding in many jurisdictions. However, the impossibility of submitting evidence of a certain type might be viewed as an impediment in certain circumstances. If the only way of establishing loss of business at a particular time is by the evidence of an accountant, then a rule preventing the submission of such evidence would appear to preclude any pursuit of the claim. That would only be the case, however, if there were no other admissible way of establishing the same facts which was not excessively burdensome.

44. In this context, it must also be borne in mind that as a general rule, the burden of proof falls on the plaintiff. It is however unacceptable for procedural rules to make that burden so heavy that claims justified under Community law may be frustrated, as for example in *San Giorgio*, [18] in which the Court held that where a charge had been levied contrary to Community law a presumption or rule of evidence requiring the taxpayer to prove, in order to obtain repayment, that the charge had not been passed on to other persons, or excluding evidence of certain kinds, was not permissible.

45. Another point specifically raised by the referring court is whether, if loss of opportunity to make a profit can be established but the precise amount of loss cannot be reliably determined, an award may be made on the basis, say, of a flat rate for each hour during which lorries were kept idle.

46. It is not for this Court to impose on national legal systems any particular method of calculating compensation. Suffice it to recall that the reparation must be commensurate with the loss or damage sustained. The general principle guiding the calculation of pecuniary damage is a comparison between the situation of the injured party in the presence and (hypothetically) in the absence of the damage in question. [19] Where an accurate calculation of that kind is in practice impossible, it would seem reasonable to substitute some form of abstract, flat-rate compensation, provided that it remains 'commensurate with the loss or damage'.

18 — Case 199/82 *San Giorgio* [1983] ECR 3595, especially at paragraph 14 of the judgment.

19 — See Magnus, op. cit., p. 195 et seq. and the internal references cited there.

47. In the context of questions of proof, it may also be noted that a plaintiff in Schmidberger's position must establish a causal link between the breach in issue and the damage suffered, and considerations comparable to those I have outlined above will apply when assessing the acceptability of any relevant national rules.

48. Finally, if all the conditions for an award of damages are met, it clearly would not be contrary to the principle of effectiveness for the national court to take Schmidberger's own conduct into account by inquiring whether it showed reasonable diligence in order to avoid the damage or limit its extent, [20] with particular regard to the possibility of taking such alternative routes or modes of transport as may have been available.

49. To sum up with regard to questions 5 and 6:

— Community law requires an action for reparation to be available against the State when a plaintiff can establish that he has suffered loss or damage attributable, by a direct causal link, to a sufficiently serious breach of a rule of Community law intended to confer rights on the individual;

— such loss or damage includes loss of the opportunity to make a profit where all the other conditions for reparation are met;

— national rules which preclude a claim for reparation on the basis of such loss or damage, or which make it impossible or excessively difficult for a plaintiff to establish the existence or extent of such damage, may not be applied, either before or after examining the other Community-law aspects;

— however, where in the absence of such rules the plaintiff is unable to establish the existence of such loss or damage, it is not necessary for the national court hearing the claim to consider the other Community-law aspects;

— reparation must be commensurate with the loss or damage sustained but may, if the pecuniary equivalent cannot be determined with accuracy, be calculated on an appropriate flat-rate basis.

20 — Indeed, the possibility of doing so is expressly recognised in *Brasserie du Pêcheur*, at paragraph 84 of the judgment.

Free movement of goods and political demonstrations — 'sufficiently serious breach' of Community law — questions 1 to 4

50. In its first four questions, the referring court seeks guidance on a number of interlinked points which will be relevant if damage and a direct causal link can be established and it has to determine whether the Austrian authorities committed a sufficiently serious breach of Community law to incur liability towards Schmidberger.

51. First (question 1), it wishes to know whether a Member State is obliged under Article 28 EC to keep major transit routes open to ensure free movement of goods and to what extent it may be required to prohibit political demonstrations blocking those routes; then it asks whether, in the factual context of the main proceedings, either (question 2) the absence of a legislative provision requiring the principle of free movement of goods to be taken into account when weighing the right of freedom of assembly against the public interest or (question 3) the fact that an authority decides that there is nothing in Community law to preclude the holding of such a demonstration can constitute a sufficiently serious breach of Community law for a Member State to incur liability; finally (question 4), it asks whether the environmental-protection aim of a demonstration may be of a higher order than the Community rules on free movement of goods.

52. Two initial points, which answer to a large extent questions 2 and 4, may be made fairly briefly.

53. First, as has been pointed out in particular by the Greek Government and the Commission and as the referring court itself notes, national authorities are in any event required to act in accordance with the rules of the EC Treaty. Treaty provisions having direct effect do not have to be specifically enacted in national law. Moreover, by virtue of the primacy or supremacy of Community law, they prevail over any conflicting national law.[21] Thus in this case any breach of such provisions which may have been committed by the national authorities can arise only out of the fact that the demonstration was allowed to go ahead and not out of any failure by the legislature to specify the need to take the Treaty into account.

54. Second, although protection of health and the environment in the Alpine region is

21 — See, for example, Case C-118/00 *Larsy* [2001] ECR I-5063, paragraphs 50 to 53 of the judgment.

clearly a major concern, the issue to be decided here is not a direct conflict between that concern and the free movement of goods. In my view, the aim of the demonstration is of no significance when assessing the possible liability of the Member State. It will become apparent below that, whilst a Member State can be guilty of a breach of Community law when obstacles to free movement of goods are created by private individuals, [22] that is as a result of its own conduct in failing to prevent those acts. Thus, to the extent that questions of intention may be relevant, it is only the objective pursued by the authorities in allowing the demonstration to go ahead that falls to be taken into account, and it seems that the authorities were motivated by considerations related to the demonstrators' constitutional rights of freedom of expression and assembly. The specific aim pursued by the exercise of those freedoms cannot be material.

55. There is thus no need to answer the national court's fourth question in the form in which it is put. However, the possibility for national authorities to rely on considerations related to the demonstrators' constitutional rights, a matter also raised by the referring court and discussed at some length in the submissions to this Court, does call for examination.

56. The issues to be addressed therefore are:

(i) whether a temporary closure of a major transit route caused by a private demonstration which the authorities of a Member State allowed to go ahead may be regarded as a restriction of the free movement of goods attributable to that Member State and thus as falling under Article 28 et seq. EC;

(ii) whether such a restriction of the free movement of goods may none the less be justified on the basis of the demonstrators' constitutional rights, and

(iii) if a breach of Article 28 et seq. EC can be established, whether that breach would be sufficiently serious for the Member State concerned to incur liability for any damages caused thereby.

22 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, in particular at paragraphs 31 and 32 of the judgment; see also, in a different context, Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 22 to 28; see for fuller discussion below paragraph 68 et seq.

Restriction of the free movement of goods

57. Under Article 3(1)(c) EC, the Community comprises 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods...'.

58. Article 14(2) EC defines that internal market as 'an area without internal frontiers in which the free movement of goods... is ensured...'.

59. Under the title 'Free Movement of Goods', Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States and Article 29 prohibits quantitative restrictions on exports and all measures having equivalent effect.

60. Article 10 EC provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

61. Two issues are relatively straightforward.

62. First, the principle of free movement of goods enshrined in Articles 3(1)(c), 14(2) and 28 et seq. EC applies equally to imports, exports and goods in transit. As regards goods in transit that is implicit in Article 30 EC and confirmed by the Court's case-law. [23] For the present case it is therefore not relevant whether the closure of the Brenner motorway affected goods to be imported to or exported from Austria or goods merely transiting through Austria.

63. Second, the temporary blockage by a Member State of a major transit route may constitute a restriction of free movement of goods. The Court has held that Article 28 is

23 — See, for example, Case C-23/99 *Commission* v *France* [2000] ECR I-7653.

intended to eliminate all barriers, whether direct or indirect, actual or potential, to flows of imports in intra-Community trade.[24] It has also held that measures which delay the movement of goods between Member States have the effect of restricting the free movement of goods.[25] I tend to agree with the Austrian Government that there cannot be an absolute duty to ensure that, even on major transit routes, goods can pass without hindrance at all times and at all costs, failure to comply with which always constitutes a breach of Community law. Delays caused for example by necessary road repair works are inherent in road transport, and their causes may be unavoidable. The causes of the temporary blockage of the Brenner motorway in issue were however not inherent in road transport, and that blockage was not unavoidable. It follows that the blockage in issue was in principle capable of constituting a restriction of the free movement of goods.

64. Two further points perhaps deserve closer scrutiny, namely whether the effects of the blockage in issue were of a sufficient magnitude to trigger the applicability of the prohibitions in the Treaty and whether the blockage in issue is attributable to the Austrian authorities.

— *De minimis*

65. It is generally said that there is no *de minimis* rule in relation to Article 28 EC. But, as I have had occasion to note,[26] the Court has accepted that some restrictions may be so uncertain and indirect in their effects as not to be regarded as capable of hindering trade. I would suggest that they may also be so slight and so ephemeral as to fall into the same category. It would seem for example out of the question that a brief delay to traffic on a road occasionally used for intra -Community transport could in any way fall within the scope of Article 28. A longer interruption on a major transit route may none the less call for a different assessment.

66. In the present case we do not know exactly to what extent the flow of transalpine trade was in fact impeded by delays or extra costs; as far as is known, only Schmidberger has complained of the blockage, though without having been able so far to establish any actual damage. However, it appears that some 33 million tonnes of goods, mainly in intra-Community trade,

24 — Case C-265/95 *Commission* v *France*, cited above in note 22, paragraph 29 of the judgment.

25 — Case C-23/99 *Commission* v *France*, cited in note 23, paragraph 22 of the judgment.

26 — In my Opinion in Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, at paragraph 204; see Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 31 of the judgment, Case C-44/98 *BASF* [1999] ECR I-6269, paragraph 16, and Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 30.

pass through the Brenner corridor each year.[27] Particularly when weekend and night-time restrictions are taken into account, that represents a non-negligible flow of trade over even a 28-hour period during which the route would normally have been open. In addition, it must be borne in mind that practically all of Italy's terrestrial trade with the rest of the Community must pass through one of the very limited number of Alpine routes.

67. In that light, if a *de minimis* rule exists, a blockage such as that in issue constitutes in my view an obstacle to the free movement of goods too substantial to fall within it.

— Attributability of the blockage to the Austrian authorities

68. The restriction in issue is primarily the result of the autonomous and voluntary behaviour of private individuals, and only secondarily to the fact that the Austrian authorities allowed the demonstration to go ahead. Is the blockage of the Brenner motorway attributable (also) to those authorities?

69. In *Commission* v *France*[28] the Court assessed the passivity of the French authorities in the face of violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States and consisting, *inter alia*, in the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and damage to such goods displayed in French shops.[29]

70. The Court noted that Article 28 EC not only prohibits measures emanating from the State but also applies, in particular in conjunction with Article 10 EC, where a Member State does not adopt adequate measures to prevent obstacles to free movement created by private individuals on its territory. In the light of their exclusive competence as regards the maintenance of public order and the safeguarding of internal security, Member States unquestionably enjoy a margin of discretion in determining the most appropriate measures in a given situation but it is for the Court, taking account of that discre-

27 — 1999 figures given in *Lack of coherence in forecasting traffic growth — The case of Alpine Traffic* (CEMT/CM(2001)21), presented to the Council of Ministers of the European Conference of Ministers of Transport in Lisbon on 29 and 30 May 2001, pp. 59 and 72.

28 — Cited above in note 22.

29 — Paragraph 2 of the judgment.

tion, to verify whether the measures adopted are appropriate. [30]

71. The Court noted that the incidents in question involved serious criminal offences which had taken place regularly over more than 10 years, that the French authorities had been repeatedly reminded of their duty to ensure free movement of goods and that very little preventive or punitive action had been taken even though the authorities often had foreknowledge of the incidents and the perpetrators could often be identified. [31]

72. It rejected a defence alleging a fear that more determined action by the authorities would provoke even more serious and violent reactions, stating that it 'is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators'. [32]

73. The Court held, therefore, that 'by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals', the French Government had failed to fulfil its obligations under Article 28 EC, in conjunction with Article 10 EC (and under the common organisations of the markets in agricultural products).

74. It may be added that, following *Commission* v *France* — and also some months after the material time in the present case — the Council adopted Regulation No 2679/98, [33] which clarifies the duties of Member States where the free movement of goods is obstructed by private individuals.

75. That regulation covers obstacles to the free movement of goods which are attributable to a Member State, whether through action or inaction on its part, which may constitute a breach of Article 28 et seq. EC and which (a) lead to serious disruption of the free movement of goods by physically or otherwise preventing, delaying or diverting their import into, export from or transport across a Member State, (b) cause serious loss to the individuals affected, and (c) require immediate action in order to

30 — Paragraphs 30 to 35 of the judgment. (The last point is clearly relevant in infringement proceedings, but in the context of a national action for damages the Court's role is rather different; see paragraph 113 below.)

31 — Paragraphs 40 to 53 of the judgment.

32 — Paragraph 56 of the judgment.

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

prevent any continuation, increase or intensification of the disruption or loss in question. 'Inaction' covers cases when the competent authorities of a Member State, in the presence of an obstacle caused by actions taken by private individuals, fail to take all necessary and proportionate measures within their powers with a view to removing the obstacle and ensuring the free movement of goods in their territory. [34]

76. When such an obstacle occurs, the Member State concerned must take all necessary and proportionate measures to assure the free movement of goods within its territory in accordance with the Treaty, and must keep the Commission informed. [35] However, the regulation 'may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike'. [36]

77. In its observations, Schmidberger relies strongly on the judgment in *Commission* v *France*, which it considers a closely comparable precedent. In the present case, a major transit route was paralysed for four days (taking the public-holiday and weekend restrictions into account), creating an obvious impediment to intra-Community trade. Schmidberger stresses that heavy goods vehicles were prevented from using the Brenner motorway for that period, and considers it irrelevant that, in contrast to the French case, no violence was used. Such incidents are liable to be repeated with the approval of the government, as was the case for the same holiday in 2000.

78. The other observations submitted to the Court distinguish the two cases. Whilst the blockage of a major transit route does in principle hinder the free movement of goods, the circumstances of the present case are very different from those of *Commission* v *France*: only a single route was blocked, on a single occasion and for a comparatively short period; neither the intention nor the effect was to prevent imports of a particular kind or origin; no criminal conduct was involved.

79. It is true that there are several important differences between both cases: in the present case no violent acts or criminal offences were committed, the protests were not directed against products from other Member States but against the transport of products in general and the Brenner motorway has not been blocked regularly over a period of more than 10 years.

80. On the other hand, Article 28 et seq. EC contain objective prohibitions of

34 — Article 1.
35 — Articles 3 and 4.
36 — Article 2.

restrictions of trade in goods. The intentions of those responsible for a restriction or the classification of a restriction within categories of national law are in principle not relevant. The restrictive effects on intra-Community trade may be the same where a blockage of a major transit route is not specifically directed against foreign products or where it is caused by acts which are allowed by national law. It must moreover be recalled that Article 28 EC applies also to measures which hinder Community trade in goods only potentially. It is clear that similar blockages of the Brenner motorway may be organised in the future. Furthermore, I have explained above why in my view the effects of the restriction in issue were not insignificant.

81. I consider therefore that the differences between *Commission* v *France* and the present case should be taken into account mainly at the level of the justification of the blockage in issue (see the analysis below) and have no direct bearing on the attributability of the restriction to the Austrian authorities.

82. As regards attributability the Court stated in *Commission* v *France* that Article 28 EC does not prohibit solely measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.

83. None of those submitting observations deny that the Member States have a general duty to keep major transit routes open for the free movement of goods. That duty takes on particular significance in the case of a Member State straddling the main intra-Community transit routes between two other Member States, forming part of the trans-European network. In the present case the Austrian authorities did not prevent an obstacle to the free movement of goods caused by private individuals.

84. It follows that, even if the authorities' behaviour were not to fall directly under Article 28, it would fall at least under Article 28 et seq. read in conjunction with Article 10 EC.

Justification

85. For a breach of the Treaty to be established it is not sufficient that there is in principle a restriction falling within

Article 28 et seq. for which the Member State is responsible. Such a restriction might be justified on the basis of Article 30 EC or in accordance with the Court's *Cassis de Dijon* line of case-law. [37]

86. Under Article 30 EC, Article 28 does not preclude 'restrictions on... goods in transit justified on grounds of public morality, public policy or public security...' provided that they do not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'. Under the *Cassis de Dijon* line of case-law, restrictions which are not inherently discriminatory must be accepted if they are necessary to satisfy mandatory requirements in the public interest.

87. Certain restrictions, for example the widespread weekend and night-time restrictions of road transport which exist in several Member States (and for which the Commission seeks to lay down certain harmonising rules), might be justified on environmental or health protection grounds. On the other hand, it is clear that there was no legitimate public interest objective to justify the passivity of the French authorities in *Commission* v *France*.

88. In the present case the Austrian authorities considered that they had to allow the demonstration to go ahead because the demonstrators were exercising their fundamental rights of freedom of expression and freedom of assembly under the Austrian constitution.

89. This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms [38] of the Treaty. Such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however conceivable that such cases may become more frequent in the future: many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations. [39]

90. It is important first to draw a clear distinction between the issue raised by the present case and those raised by previous cases.

37 — Case 120/78 *Rewe* [1979] ECR 649, paragraph 8 of the judgment.

38 — Although this term should not be confused with that used in the European Convention on Human Rights whose full title is 'Convention for the Protection of Human Rights and Fundamental Freedoms'.

39 — See Case C-36/02 *Omega*, currently pending before the Court.

91. In *ERT*[40] the Court referred to *Cinéthèque*[41] and *Demirel*[42] and held:

'where [national] rules.... fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.'

92. On the basis of that general formula the Court established in *ERT* that a Member State which relies on one of the accepted justifications (such as grounds of public policy, public security or public health) for restricting a fundamental freedom enshrined in the Treaty (for example freedom to provide services) must comply with the fundamental rights recognised in Community law.

93. Prior to *ERT* the Court had already established that Member States have to comply with such fundamental rights when they implement Community law.[43]

94. The present case is different in that here a Member State invokes the necessity to respect fundamental rights under its constitution and does so as a justification for a restriction of a fundamental freedom of the Treaty.

95. In such a case the Court in my view should follow the same two-step approach as the analysis of the traditional grounds of justification such as public policy or public security which are also based on the specific situation in the Member State concerned. It must therefore be established

(a) whether in relying on the particular fundamental rights recognised in Austrian law in issue, Austria is, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom;

and

40 — Case C-260/89 *ERT* [1991] ECR I-2925.

41 — Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605.

42 — Case 12/86 *Demirel* [1987] ECR 3719.

43 — Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19 of the judgment.

(b) if so, whether the restriction in issue is proportionate to the objective pursued.

— The objective pursued

96. At first sight it might seem excessive and unduly intrusive to question whether a Member State which relies on a particular fundamental right recognised in its national legal order pursues a legitimate public interest objective.

97. Let us suppose however for a moment a (purely hypothetical) legal order of a Member State which expressly recognises the fundamental right to be protected against unfair competition from other firms and in particular from firms established abroad; or national case-law under which a similar right is recognised as a facet of the fundamental right of free economic activity or the fundamental right of property. It must moreover be borne in mind that despite a basic consensus reflected in the European Convention on Human Rights about a core of rights which must be regarded as fundamental, there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State.

98. It cannot therefore be automatically ruled out that a Member State which invokes the necessity to protect a right recognised by national law as fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate.

99. The present case however is more straightforward.

100. It will be recalled that the Austrian authorities invoke the fundamental rights of freedom of expression and freedom of assembly as they are recognised in the Austrian legal order.

101. In the Community legal order the Court protects the same or very similar rights as general principles of law. According to well established case-law '... fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories... The European Convention on Human Rights has special

significance in that respect.'[44] Article 6(2) EU confirms that the Union must respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States. Article 10 of the European Convention on Human Rights guarantees freedom of expression, including 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Article 11 of the Convention similarly guarantees freedom of peaceful assembly and association. More recently, the rights of freedom of expression and assembly have been reaffirmed in Articles 11 and 12 of the Charter of Fundamental Rights of the European Union.[45]

102. In my view where a Member State seeks to protect fundamental rights recognised in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue.

103. It follows that Austria pursued a legitimate public interest objective capable of justifying a restriction of a fundamental freedom when it sought to protect the fundamental rights of freedom of assembly and expression of the demonstrators.

— Proportionality

104. The next question is whether the fact that the demonstration was permitted can be justified in the light of the principle of proportionality.

105. In my view, where a Member State invokes the necessity to protect a given fundamental right the normal proportionality test should be applied. The situation is comparable with cases involving national public policy or national public security. In both situations the uniform application and the effectiveness of the fundamental freedoms laid down by the Treaty are at stake.

106. Where however as in the present case the restriction is primarily attributable to private individuals it is perhaps less justifiable to apply too strict a proportionality test. The issue is not so much what the Austrian authorities did, but whether they failed to prevent action by others and what action they should have taken to do so. Where it is for a Member State actively to

44 — *ERT*, cited above in note 40, paragraph 41 of the judgment. In addition to such general statements, reference may be made, with regard to freedom of expression and assembly, to, for example, Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 137 of the judgment, or Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37 et seq.

45 — Solemnly proclaimed by the European Parliament, the Council and the Commission at Nice on 7 December 2000; OJ 2000 C 364, p. 1.

protect a fundamental Treaty freedom from interference from private individuals the Member State concerned unquestionably enjoys a margin of discretion in determining when to take action and which measures are most appropriate to eliminate or limit that interference. [46]

107. In the present case, a number of factors suggest that the Austrian authorities did not overstep the bounds of their margin of discretion and that the authorisation of the demonstration did not create a restriction on free movement of goods which was disproportionate to the objective pursued. [47]

108. First, the disruption caused was of relatively short duration on an isolated occasion and the only allegation of a similar disruption concerns another isolated occasion some two years later. The blockage in the present case concerned a period of 28 hours during which the motorway would otherwise have been open. The close proximity of that period to other periods during which it was in any event closed to certain types of transport of goods may well have been a deliberate choice on the part of the demonstrators, but the blockage caused cannot be artificially extended to include those periods. (And it may be pointed out that the weekend, public-holiday and night-time restrictions themselves seem fully in line with Austria's — and the Community's — undertakings in the context of the Alpine Convention.)

109. Second, measures were taken to limit the disruption caused. Those measures appear to have been taken in earnest and to have involved not inconsiderable deployment of resources, although the details have not been made entirely clear to the Court, and Schmidberger disputes the Austrian Government's assertions as to the availability of 'rolling-road' facilities.

110. Third, excessive restrictions on the demonstration itself would have been liable to deprive the demonstrators of the rights which the authorities sought to protect. Schmidberger and the national court suggest that the demonstration might have been held in proximity to the motorway or limited in time so as not to cause any appreciable holdup. But the demonstrators could not have made their point nearly as forcefully if they had not blocked the motorway long enough for the demonstration to 'bite'. Their demands for action

46 — As is clear from *Commission* v *France*, cited above in note 22. In the United Kingdom, the House of Lords has expressed the same view in *R* v *Chief Constable of Sussex* ex parte *International Traders Ferry Ltd* [1999] 2 AC 418.

47 — It should be remembered here that the aim of the demonstration is not itself relevant when considering the protection of freedom of expression and assembly; see paragraph 54 above.

by the national and Community authorities might well have been heard only faintly, if at all, had they been required to demonstrate in a field beside the motorway, or allowed to cause only a brief, token stoppage of traffic.

111. Such restrictions might even conceivably have caused reactions leading to greater disruption than was the case for a planned demonstration controlled in cooperation with the authorities. Allowing that demonstration to go ahead, on the other hand, caused only a temporary obstacle to the free movement of goods; the permanent flow of trade through the Brenner corridor was not compromised in the same way as would have been the case for the protesters' freedoms if they had never been allowed to demonstrate.

112. In the light of those factors, it is clearly arguable that there was no breach of Article 28 EC in the circumstances of the present case.

Sufficiently serious breach

113. However, it must be remembered that this is not a declaratory action seeking a ruling that the Member State in question has failed to comply with the Treaty. The main proceedings concern a claim for damages, for which it is not enough to establish a breach of Community law; that breach must also be 'sufficiently serious'.

114. The decisive test for finding that a breach of Community law is sufficiently serious is whether, in particular in its exercise of rule-making powers, the Member State concerned manifestly and gravely disregarded the limits on its discretion — a matter which is in principle for the national courts to decide. However, the Court has indicated criteria which may be applied. Factors which may be taken into consideration include, *inter alia*, the clarity and precision of the rule breached, the measure of discretion left to the national authorities, whether the infringement and the damage caused was intentional or involuntary, and whether any error of law was excusable or inexcusable. A breach persisting after a Court judgment finding its existence, or one which is clear from the Court's case-law, will always be sufficiently serious and, where there is no discretion left to the national authorities, a breach of Community law will always give rise to liability. [48]

48 — *Brasserie du Pêcheur*, paragraphs 55 to 57 of the judgment; see also, for example, Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 42, and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25.

115. This is a domain in which the case-law has been concerned primarily with the adoption, retention or enforcement of rules, or failure to adopt them, rather than individual administrative acts as in the present case. However, two relevant points are clear: the question arises only where a Member State has overstepped the bounds of its discretion under Community law, and the concept of 'seriousness' relates to the way in which it did so.

116. The pertinent question is therefore: in allowing the demonstration to go ahead, were the Austrian authorities overstepping the bounds of their margin of discretion so manifestly and so gravely as to constitute a sufficiently serious breach of Community law within the meaning of the *Brasserie du Pêcheur* case-law?

117. In my view it follows from the considerations on proportionality outlined above, according to which it is highly doubtful whether in the circumstances of the present case the Austrian authorities committed any breach of Community law at all, that any such breach would in any event not be sufficiently serious to trigger Austria's liability. In particular the relatively short duration of the interruption of traffic, its isolated occurrence and the measures taken by the authorities to limit the disruption caused by the demonstration show that the Austrian authorities did not manifestly and gravely overstep their margin of discretion.

118. To sum up, on the basis of the facts as they have been presented, I am of the view that the national court would be entitled to find that the authorisation

— for the purpose of allowing citizens to exercise their rights to freedom of expression and assembly,

— of a demonstration which would block one of a number of major transit routes through the Alps for a period of 28 hours on a single occasion,

— when adequate steps were taken in advance to ensure that disruption of the flow of goods traffic, whilst sufficient to ensure that the demonstration was not deprived of its intended effect, was not excessive for that purpose,

did not constitute a sufficiently serious breach of Community law for the State to incur liability towards any persons sustaining loss or damage directly caused by the demonstration.

Conclusion

119. In the light of all the foregoing considerations, I am of the opinion that the Court should give the following answers to the questions raised by the Oberlandesgericht Innsbruck:

— Community law requires an action for reparation to be available against the State when a plaintiff can establish that he has suffered loss or damage attributable, by a direct causal link, to a sufficiently serious breach of a rule of Community law intended to confer rights on the individual;

— such loss or damage includes loss of the opportunity to make a profit where all the other conditions for reparation are met;

— national rules which preclude a claim for reparation on the basis of such loss or damage, or which make it impossible or excessively difficult for a plaintiff to establish the existence or extent of such loss or damage, may not be applied;

— however, where in the absence of such rules the plaintiff is unable to establish the existence of such loss or damage, it is not necessary for the national court hearing the claim to consider the other Community-law aspects;

— reparation must be commensurate with the loss or damage sustained but may, if the pecuniary equivalent cannot be determined with accuracy, be calculated on an appropriate flat-rate basis;

— a failure by a Member State to indicate in national legislation that Treaty provisions having direct effect must be observed cannot constitute a breach of Community law;

— the specific aim pursued by an authorised political demonstration is of no relevance when determining whether the fact that a Member State's authorities permitted it to go ahead constitutes a sufficiently serious breach of Community law for the Member State to incur liability;

— in the light of the facts of the present case as made available to the Court, the national court would be entitled to find that the authorisation,

— for the purpose of allowing citizens to exercise their rights to freedom of expression and assembly,

— of a demonstration which would block one of a number of major transit routes through the Alps for a period of 28 hours on a single occasion,

— when adequate steps were taken in advance to ensure that disruption of the flow of goods traffic, whilst sufficient to ensure that the demonstration was not deprived of its intended effect, was not excessive for that purpose,

did not constitute a sufficiently serious breach of Community law for the State to incur liability towards any persons sustaining loss or damage directly caused by the demonstration.