

OPINION OF ADVOCATE GENERAL
MISCHO

delivered on 13 February 2003¹

I — Introduction

1. Crossing the Alps has always presented problems and the transport of passengers and goods by trans-Alpine routes has given rise to technical achievements and questions of an economic, ecological and, finally, political nature.

2. The European Union, of course, faces this challenge. Alongside the relevant agreements concluded with the Swiss Confederation, an agreement² was concluded with Austria, before its accession, accompanied by an administrative arrangement,³ setting up a system for protection against the nuisances caused by trans-Alpine traffic, which in practice takes the form of an ecopoints system.

3. The general principle and the detailed rules were repeated in Protocol No 9 on

transport by road and rail and combined transport in Austria ('the Protocol') of 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,⁴ which established a transitional system. In addition to the gradual reduction of pollution by means of the ecopoints system, this lays down a limit on the number of heavy goods vehicles admitted for trans-Alpine transit journeys through Austria.

4. In 1999 the threshold for the number of vehicles transiting through Austria was exceeded and this led to the adoption of the measure contested by the Republic of Austria, namely 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 ('the contested Regulation').⁵

1 — Original language: French.

2 — Agreement between the European Economic Community and the Republic of Austria on the transit of goods by road and rail — Joint Declarations — Exchanges of Letters (OJ 1992 L 373, p. 6).

3 — Administrative arrangement setting the date of entry into force and the procedures for the introduction of the Eco-point system referred to in the Agreement between the European Economic Community and the Republic of Austria on the transit of goods by road and rail (OJ 1993 L 47, p. 28).

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

5 — OJ 1994 L 241, p. 18.

II — The relevant Community law

5. Protocol No 9 includes the following provisions.

A — *Definitions*

6. The Protocol begins with a number of definitions:

‘Article 1

For the purposes of this Protocol, the following definitions shall apply:

...

(c) “transit traffic through Austria” shall mean traffic through Austrian territory from a departure point to a destination, both of which lie outside Austria;

...

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(e) “transit of goods by road through Austria” shall mean transit through Austria by heavy goods vehicles, regardless of whether they are laden or not;

(f) “combined transport” shall mean the carriage of goods by heavy goods vehicles or loading units which complete part of their journey by rail and either begin or end the journey by road, whereby transit traffic may under no circumstances cross Austrian territory on its way to or from a rail terminal by road alone;

(g) “bilateral journeys” shall mean international carriage on journeys undertaken by a vehicle where the point of departure or arrival is in Austria and the point of arrival or departure, respectively, is in another Member State and unladen journeys undertaken in conjunction with such journeys.’

B — *Rail transport and combined transport*

7. It must also be noted that the Protocol pays particular attention, or even gives priority, to the development of rail trans-

port and combined transport. For this purpose, Article 3 provides that the Community and the Member States concerned are to adopt and closely coordinate measures for the development and promotion of rail and combined transport for the trans-Alpine carriage of goods and, specifically, Annex 2 to the Protocol lists a number of infrastructures measures for rail transport and combined transport involving Austria, Germany, Italy and even the Netherlands.

and combined transport and the priority to be given to the measures set out in the Community's provisions on railways and combined transport.

C — Road transport

8. Article 6 of the Protocol, for its part, states that the Community and the Member States concerned are to use their best endeavours to develop and utilise the additional railway capacity referred to in Annex 3 to the Protocol, which also lists a certain number of measures relating to additional capacity of the Austrian railways for carrying goods in transit through Austria (paragraph 1) and to the potential increase in consignments or tonnage. Certain capacity must be available immediately, that is to say, from 1 January 1995, further capacity in the short term (from the end of 1995), in the medium term (from the end of 1997) and, finally, other capacity in the long term, that is to say, available from the end of 2000 with regard to the Pyrhnschober route and from the end of 2010 with regard to the Brenner route.

10. The essential elements of the special rules for road goods traffic transiting through Austria are set out in Article 11(2) of the Protocol, which is worded as follows:

'Until 1 January 1998, the following provisions shall apply:

9. Article 7 of the Protocol deals with measures to enhance the provision of rail

- (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.*⁶
- (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.'
11. Article 11(4) to (6) of the Protocol provides:
- '4. Before 1 January 2001, the Commission, in cooperation with the European Environment Agency, shall make a scientific study of the degree to which the objective concerning reduction of pollution set out in paragraph 2(a) has been achieved. If the Commission concludes that this objective has been achieved on a sustainable basis, the provisions of paragraph 2 shall cease to apply on 1 January 2001. If the Commission concludes that this objective has not been achieved on a sustainable basis the Council, acting in accordance with Article 75 of the EC Treaty, may adopt measures, within a Community framework, which ensure equivalent protection of the environment, in particular a 60% reduction of pollution. If the Council does not adopt such measures, the transitional period shall be automatically extended for a final period of three years, during which the provisions of paragraph 2 shall apply.
5. At the end of the transitional period, the *acquis communautaire* in its entirety shall be applied.
6. The Commission, acting in accordance with the procedure laid down in Article 16,

⁶ — Emphasis added.

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.

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.⁷

...

12. Article 16 of the Protocol provides that, for adopting the abovementioned measures, the Commission is to be assisted by a committee. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission must without delay submit to the Council a proposal relating to the measures to be taken. The Council is to act by a qualified majority.

14. As the number of transit journeys through Austria for 1991 was 1 490 000, the threshold to which Article 11(2)(c) of the Protocol refers is equivalent to 1 610 172 transit journeys.

13. Point 3 of Annex 5 to the Protocol provides as follows:

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

15. Pursuant to 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.⁸ On the basis of an express power in Annex 4 to the Protocol, and in order to take account of transit traffic in heavy goods vehicles registered in Finland and Sweden, this Regulation amends Annex 4 and fixes the total number of ecopoints as follows:

The quarterly average NO_x emission values for lorries in the current year, calculated in

⁷ — Emphasis added.

⁸ — OJ 1994 L 341, p. 20.

| Year | Percentage of ecopoints | Ecopoints for EU-15 |
|--------------------------|-------------------------|---------------------|
| 1991 (reference year) | 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 |

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

18. 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 approximately 20% (that is, 2 184 552 ecopoints).

III — Origin and content of the contested Regulation

17. According to information from the Austrian Government, the ecopoint statistics showed 1 706 436 journeys during 1999, which represented a 14.57% increase over the figure for 1991.

19. According to the Commission, 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 distribute the reduction in the number of ecopoints over the final four years, from 2000 to 2003, covered by the transitional rules. 30% of the reduction was to take effect in 2000, 30% in 2001, 30% in 2002 and the remaining 10% in 2003.

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

21. 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.

22. 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 of 1 009 501 ecopoints. The Commission then amended its initial proposal in line with the French compromise proposal. This allowed the Council to adopt by a qualified majority the Commission's amended proposal, which became the contested Regulation. The Republic of Austria voted against it.

23. The text adopted in this way became the contested Regulation.

24. Article 1 of the regulation reads as follows:

'Annex 4 to Protocol No 9 to the Act of Accession of Austria, Finland and Sweden shall be amended as follows:

| 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' |

25. Article 2(1) of the regulation provides as follows:

'Regulation (EC) No 3298/94 is hereby amended as follows:

(1) The second subparagraph of Article 6(2) shall be replaced by the following:

"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.*"⁹

...'

9 — Emphasis added.

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

IV — Forms of order sought and pleas by the Republic of Austria

27. 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.

29. By order of the President of the Court of 26 January 2001, the Federal Republic of Germany and the Commission were granted leave to intervene in support of the form of order sought by the Council. By a further order of 30 April 2001, the Italian Republic was granted leave to intervene also in support of the form of order sought by the Council.

28. The Council 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;

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

- 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;

31. By order of 23 February 2001,¹⁰ 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.

- order the applicant to pay the costs.

10 — Case C-445/00 R *Austria v Council* [2001] ECR I-1461.

32. The Republic of Austria bases its action on six pleas in law:

V — Admissibility of heads of complaint raised against the Commission

Principal plea:

1. infringement of essential procedural requirements when the contested Regulation was adopted.

In the alternative:

2. infringement of the EC Treaty or the Protocol in that the Commission's proposal was amended after it had been submitted to the Council;
3. failure to state reasons;
4. infringement of the EC Treaty or the Protocol by the contested Regulation;
5. 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;
6. no legal basis for the contested Regulation.

33. The Council objects that the heads of complaint relating to the Commission's acts are illegal because no action has been brought against the Commission by Austria and the Court's judgment in the present case will not be enforceable against an institution which is not a party to the proceedings. In support of its objection of inadmissibility, the Council cites paragraph 33 of the order of the Court of First Instance of 1 December 1994,¹¹ where it was stated that the court hearing an application for interim relief could not issue directions to individuals who were not parties to the dispute.

34. It must be observed straightaway that the situation in the present case is entirely different because the present action does not seek to obtain an injunction addressed to the Commission. Furthermore, the Commission is an intervener in the present case.

35. In any case, it is sufficient to note that, in support of its application for the annulment of the contested Regulation, the

¹¹ — Case T-353/94 R *Postbank v Commission* [1994] ECR II-1141.

applicant is justified in pleading, in its heads of complaint, all the decisive elements of the decision-making process of which the Commission's proposal forms part.

36. Therefore I propose that the Council's plea of inadmissibility be dismissed.

VI — First and second pleas: infringement of essential procedural requirements when the contested Regulation was adopted and, in the alternative, infringement of the EC Treaty or the Protocol in that the Commission's proposal was amended after it had been submitted to the Council

37. I shall consider these two pleas together as they are closely connected.

38. Article 16 of the Protocol provides as follows:

'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.'

A — *Arguments of the parties*

39. By its first plea, the *Austrian Government* maintains that there has been an infringement of essential procedural requirements in the adoption of the contested Regulation. It asserts, in particular, that the Commission's decision to amend its initial proposal for a regulation in order to endorse the compromise submitted by the Presidency of the Council was not a collegiate decision. The *Austrian Government* adds, in that regard, that to authorise the relevant Commissioner to amend, if necessary, a Commission proposal so as to adopt a new formulation commanding a qualified majority in the Council constituted a failure to observe the Commission's internal rules, which limited authorisations to the adoption of clearly defined management and administration measures.

40. The *Council* and the *German Government* contend that the *Austrian Government* relies on a mere presumption that there was no valid authorisation. The *Commission* asserts that the relevant Commissioner, anticipating the course of the negotiations in the Council, obtained authorisation so that he could amend the proposal if a compromise text obtained the support of a qualified majority of the

Council. The *German Government* and the *Italian Government* consider that the grant of authorisation by the Commission was justified by the fact that the *Austrian authorities* were late in providing the statistical information required by the Commission.

41. 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.

42. The *Council* and the *interveners* consider that the Commission may amend its proposal at any time pursuant to Article 250(2) EC.

B — *Assessment*

43. I shall begin by examining the second plea.

44. Article 250 EC provides as follows: proposal concerning the measures to be taken which it submits to the Council.¹²

'1. Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal, subject to Article 251(4) and (5).

47. This applies particularly in the present case, where the Commission submitted to the Council a proposal which was the same as the one it had submitted to the Management Committee and which had been amended only in the course of the discussions in the said Committee.

2. As 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.'

48. Consequently the question falls within the ambit of Article 250(2) EC, which gives the Commission complete freedom to amend the proposal it submitted to the Council.

45. The question raised by Austria is in reality whether the Commission can still amend a proposal when, in the absence of a favourable opinion in the Committee, it has already transferred the proposal, as it stands, to the Council, whereas a qualified majority in favour might have been obtained in the Committee if the amended proposal had been submitted to it.

49. The remaining question is whether, as Austria maintains, the Commission's decision to amend the proposal ought to have been taken by the full Commission.

50. On this point it must be observed that, under Article 13 of the Commission's internal rules, in the version in force at the material time, the Commission may 'instruct one or more of its members, with

46. The reply to the question is in the affirmative. The Court has in the past held that, in the context of the so-called Management Committee procedure, the Commission has a certain discretion to alter the

¹² — See, to that effect, Case C-244/95 *Moskof* [1997] ECR I-6441, paragraph 39; Case C-151/98 P *Pharos v Commission* [1999] I-8157, paragraph 23, and Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 65.

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’.

51. However, the amendment in question in no way affected the substance of the proposal. As the President of the Court observed, at paragraphs 78 and 80 of his order in the case of *Austria v Council*, cited above, in the present case the amendment to the proposal for a regulation related to one aspect, which was, admittedly, important, but of a technical nature, concerning the application of the calculation method, on which the opinions of the Member States varied. Furthermore, according to the Commission, which has not been contradicted on this point, the proposal was amended in the light of information regarding the interpretation of the statistics supplied by the applicant after the initial proposal for a regulation.

52. Austria also contends that the member of the Commission responsible for transport received authorisation on 20 September 2000, whereas the compromise proposal of the Presidency of the Council was not officially presented until 21 September 2002. In my opinion, this does not alter the conclusion to be reached with regard to this complaint by Austria. On the contrary, the bona fide cooperation which must exist between the institutions and the legitimate aim of furthering the

Council’s work make it desirable for the Commission to be informed unofficially in advance of the compromise proposals which the Presidency of the Council intends to present to the Council so that the commissioner responsible can obtain authorisation, before the Council meets, to announce an amendment to the proposal to that effect if it appears, in the discussion between the ministers, that a qualified majority can be obtained in favour of the compromise. Moreover, it would be acceptable if the said commissioner had a certain latitude in case the compromise text were amended in the course of the discussion, provided that the spirit and the substance of the Commission’s original proposal were not affected.

53. Consequently, in my opinion, the first and second pleas are unfounded.

VII — Third plea (alternative): failure to state reasons

A — Arguments of the parties

54. The *Austrian Government* submits that, as regards the calculation of the extent of the reduction in the number of eco-points, the key for distributing the reduction between the Member States, the

spreading of the reduction at issue in this case over four years, and the introduction of a general rule for spreading the reduction in the number of ecopoints over several years if the threshold number established in Article 11(2)(c) of the Protocol is exceeded, the contested Regulation does not fulfil the obligation to give an adequate statement of reasons.

55. The *Council and the interveners* observe that it is settled case-law that the statement of reasons required by Article 253 EC 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 Court to exercise its power of review. 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.¹³

56. The *German Government* observes that the proposals and memoranda presented in the legislative procedure and produced by the Republic of Austria in Annexes 4 and 5 to its application, fall within that context. According to the

German Government, when the contested Regulation is read in conjunction with those preparatory documents, the recitals of the Regulation enable the Republic of Austria and the Community courts to understand all the factors which led the legislature to adopt the Regulation.

57. The same government observes that the general method of calculation is explained in the third recital of the preamble to the contested Regulation by a reference to the calculation formula, which is itself very detailed, in point 3 of Annex 5 to the Protocol and, more importantly, that the exact calculation with figures was reproduced in the statement of reasons of the Commission's proposal of 20 May 2000.

58. Finally, according to the German Government, the context of the distribution of ecopoints among the Member States which contributed most to exceeding the threshold is described in the seventh recital of the preamble to the contested Regulation and the argument for or against a calculation based on the polluter-pays principle or the principle of solidarity were broadly set out by the Commission in the statement of reasons of its proposal.

59. The *Commission* considers that the fifth and sixth recitals of the preamble to the contested Regulation show clearly that the Commission considered that it should

13 — See the judgments in Case C-478/93 *Netherlands v Commission* [1995] ECR I-3081, paragraphs 48 and 49, and Case C-22/94 *Irish Farmers Association and Others* [1995] ECR I-1809, paragraph 39.

‘interpret’ the method of calculation for 2000 in the light of the free movement of goods guaranteed by the Treaty and refrained from imposing the entire reduction in 2000, in accordance with the Protocol, in order to avoid stopping transit traffic because nine months of that year had already elapsed.

settled case-law, the validity of the statement of reasons of the measure must be assessed taking account of the fact that the Member State concerned was closely associated with the process of drafting the contested measure and is thus aware of the reasons underlying it. The Court adds that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made.¹⁴

B — Assessment

60. It seems unlikely that the applicant was unaware of the aims of and the reasons for the contested Regulation which, I think, are sufficiently clear from the preamble.

61. Moreover, it is hardly conceivable that the Republic of Austria, which from the beginning has been actively involved in the ecopoints system, to a large extent ensures that it is implemented, provides the statistical material and has actively participated in all the meetings of the Ecopoints Committee, where it has heard the observations of the Commission and the other Member States which have contributed to formulating the Committee’s opinion, can claim to have been damaged by an insufficiently detailed statement of the technical rules for applying the system.

62. Therefore the situation here is undoubtedly one where, according to

VIII — Fourth plea (alternative): infringement of the EC Treaty or the Protocol by the contested Regulation. Sixth plea (alternative): no legal basis for the contested Regulation

63. As the fourth and sixth pleas are very closely related, I shall take the liberty of examining them together.

A — First limb of the fourth plea: spreading of the reduction in ecopoints over several years

64. For the *Austrian Government*, the wording of point 3 of Annex 5 to the Protocol is clear. In providing that ‘if

¹⁴ — Case C-301/97 *Netherlands v Council* [2001] ECR I-8853, paragraphs 188 and 190.

Article 11(2)(c) applies, the number of ecopoints *for the following year*¹⁵ shall be established as follows', it leaves no room for interpretation. As the threshold prescribed by Article 11(2)(c) was exceeded in 1999, the number of ecopoints for 2000 had to be reduced in accordance with the method of calculation laid down in the second subparagraph of point 3 of Annex 5 to the Protocol.

65. Consequently, in the opinion of the Austrian Government, the Protocol does not provide a legal basis which would permit the Commission to spread the reduction over four years.

66. Furthermore, Article 2(1) of the contested Regulation, which replaced the second subparagraph of Article 6(2) of Regulation No 3298/94, implicitly aims to amend point 3 of Annex 5 to the Protocol.

67. Article 2(1) provides that 'the reduction of ecopoints... *shall be spread over several years*',¹⁵ without stating whether a single operation was involved. However, according to the Austrian Government, the conversion of the method of spreading the reduction in ecopoints over several years

into a general rule for every case to which Article 11(2)(c) of the Protocol applies has no legal basis at all in the Protocol and is manifestly contrary to the system established by the Protocol.

68. For the Austrian Government, since the Protocol forms part of primary law, its amendment by the contested Regulation, which is a piece of secondary legislation, without the Council having express authorisation under primary law, is manifestly illegal.

69. The parties' submissions show that this complaint by the Austrian Government raises two separate problems.

70. I shall therefore examine the following two questions:

— whether the Council had the right to introduce once and for all the principle of spreading ecopoint reductions over several years (Article 2(1) of the contested Regulation);

— whether, in the particular circumstances of 2000, it was justified in

¹⁵ — Emphasis added.

spreading the reduction, exceptionally, over four years (Article 1 of the contested Regulation).

1. Spreading ecopoint reductions over several years as a permanent principle (Article 2(1) of the contested Regulation)

71. On this point I agree entirely with the Austrian Government. There is no doubt that Article 2(1) of the contested Regulation provides that a reduction in ecopoints as a result of exceeding the stated threshold is to be 'spread over several years'.

72. However, point 3 of Annex 5 to the Protocol states equally clearly that the reduction is to take effect the following year.

73. The Commission submits that the contested Regulation must be understood as referring only to the specific situation in 2000. Article 2(1) could not be interpreted otherwise than as referring to spreading the reduction once only as a result of a situation which arose in 2000.

74. According to the Commission, the purpose of spreading the reduction was to keep transit traffic moving for the remainder of 2000 and such justification can apply only to a rule which relates solely to the situation in 2000 and has as its sole object the resolution of the specific problem which arose in 2000.

75. The Commission cites in support the fifth and sixth recitals of the preamble to the contested Regulation, which read 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.'

76. The Commission adds that the possibility of a similar situation arising in subsequent years was not considered at

the time and 'institutionalisation' of the practice of spreading the reduction was quite unnecessary and would have been entirely out of place in the context of future decisions to be taken in conformity with the committee procedure, as such decisions must take account of current circumstances.

77. It is true that the fifth and sixth recitals rather support the Commission's argument.

78. However, the wording of Article 2(1) is categorical: it mentions no limitation as to time and makes no reference at all to the particular problem which arose in 2000. As the operative part of a legal measure must always override the preamble, it must be found that Article 2(1) is to be read as amending with permanent effect 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.

79. The protocols and annexes to an act of accession constitute provisions of primary law which, unless the act provides other-

wise, may not be suspended, amended or repealed otherwise than in accordance with the procedures established for review of the original Treaties.¹⁶

80. The arguments put forward by the *Italian Government* do not lead to a different reply. The Italian Government contends that the aim of the Protocol is, first, to reduce pollution from heavy goods vehicles and, second, to switch from road to rail the increase in transit traffic which, without adequate rail capacity, would be passed to the roads. Limiting Community goods traffic would be rationally justified only if rail or combined transport were simultaneously encouraged. However, the existing rail capacity in Austria was inadequate and no significant steps had been taken to facilitate the transport of goods by rail. Consequently the plan to limit the transiting of heavy goods vehicles belonging to undertakings in other Member States would have the effect of protecting Austrian road carriers, whose business would increase to the detriment of competitors.

81. The Italian Government also claims that the Protocol has become a source of primary law ('has been constitutionalised') only with regard to its purpose, namely, to

16 — Joined Cases 31/86 and 35/86 *LAISA v Council* [1988] ECR 2285, paragraph 12.

prevent the 108% threshold from being exceeded, but not with regard to the means of achieving that aim.

82. The possible inadequacy of rail capacity in Austria, which is denied by the Austrian authorities, cannot be such as to justify the breach of other provisions of the Protocol. Failure to comply with the provisions of the Protocol concerning the improvement of rail capacity may entail the consequences which Community law attaches to the breach of obligations laid down by it, but those consequences do not include the power for the institutions to adopt measures of secondary law which are contrary to primary law.

83. I also consider that, as the Protocol includes detailed and explicit provisions concerning spreading the reduction in ecopoints, it cannot be concluded that the 108% threshold alone is a matter of primary law and that those provisions are not.

84. It follows that, contrary to the Commission's argument, Article 2(1) of the contested Regulation is invalid in so far as it amends with permanent effect the spreading of the ecopoints reduction provided for by the Protocol.

85. In this connection it should be added that the Commission's and the Council's arguments concerning the inferences to be drawn from the exceptional circumstances of the adoption of the contested Regulation cannot be accepted. Even assuming that such circumstances may affect the validity of special measures for resolving the problems caused by those circumstances, they cannot, by definition, justify the amendment with permanent effect of the rules laid down by the Protocol. A new provision which is intended to apply for an unlimited period necessarily becomes the rule and therefore it cannot purport to be justified by an exceptional situation.

2. The spreading of the ecopoints reduction over the years 2000 to 2003 (Article 1 of the contested Regulation)

86. Now let me consider the position regarding Article 1 of the contested Regulation, which applies for a limited period of time.

(a) Arguments of the parties

87. The *Austrian Government* considers that the reasons given by the Council in the preamble to the contested Regulation

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

88. The *Council* considers that to apply the whole reduction in ecopoints solely in the year 2000 would have had the disproportionate effect of stopping all transit traffic through Austria. The Council claims that the adoption of the contested Regulation was delayed by the late dispatch of reliable statistical information by the Austrian authorities. Consequently the Council had adopted the regulation in a situation of force majeure. The Council points out that the objective of the ecopoint system is to reduce pollution and that objective has already been largely achieved. The possible problem of noise, apart from the fact that it did not actually give rise to the ecopoint system, should yield to the requirements of the proper working of the internal market. Moreover, the Austrian Government's interpretation of the Protocol would have the effect of discouraging the use of lorries which cause less pollution.

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

90. According to the *German Government*, it is apparent from the second sentence of Article 11(3) of the Protocol, which puts 'the proper functioning of the internal market' on an equal footing with 'the protection of the environment in the interest of the Community as a whole', that the Commission and the Council are not entitled, within the framework of the mechanism for reducing the ecopoints established in Article 11(2)(c) of the Protocol, to take measures which would seriously disrupt the proper functioning of the internal market. Furthermore, when the provisions implementing the reduction mechanism were adopted, the Community legislature had a degree of latitude, as was apparent from the words 'appropriate measures' in Article 11(2)(c) of the Protocol. If the Commission or the Council were required, under that provision, to transpose the calculation method contained in point 3

of Annex 5 to the Protocol without being able to take account of the impact on the internal market, the reference to 'appropriate measures' would be superfluous.

91. The *Commission* contends that the Community institutions were prevented by exceptional circumstances from applying the Protocol to the letter. They had found themselves compelled to seek a fair and practical solution for carrying out the reduction in ecopoints.

92. For the Commission, the exceptional circumstances arose from the following events: the Austrian statistics were not presented to the Commission until March 2000 and the fact that they were disputed by the Member States to the point where no agreement could be reached during the procedure of the Ecopoints Committee must be deemed an exceptional circumstance. As that eventuality is never totally excluded, the Commission adds, it could not prevent the procedure from taking that course because it had no reason in principle for doubting the accuracy of the statistics or the method used by Austria and therefore could not amend them on its own authority.

93. The institutions were therefore in a situation of force majeure which was, so to speak, relative and flexible because of the context and the requirement of fairness.

94. Still according to the Commission, it was consequently necessary to choose between three options:

- (a) full reduction at a single stroke: this would have had the undoubted disadvantage for all the parties concerned of stopping all transit traffic until the end of the year. However, in a *de facto* situation which was not provided for by the legislature and was created by a case of force majeure, a legislative measure must not be applied 'blindly' if other equitable solutions which can be defended on a purposive basis exist;
- (b) proportionate reduction (deduction of points for the last quarter): this would not have been in conformity with the wording of the Protocol either, but would have had the additional disadvantage of causing Austria to lose part of the reduction (2/3) to which it was entitled under the Protocol;
- (c) reduction in the number of ecopoints, spread over four years: this solution chosen by the Commission was certainly contrary to the terms of the Protocol, but did not entail a loss of ecopoints for Austria. Its right to the quantity specified by the Protocol remained the same, without transit traffic being blocked. After careful

consideration of all the interests arising, the Commission considered that this was the most balanced solution. The Commission proposed it and was followed down that road by the Council.

(b) Assessment

95. Regarding the submissions by the Council and the interveners based on the context and the purpose of the ecopoints system, I should like to repeat the observations, made after 'an initial examination' by the President of the Court of Justice at paragraphs 87 to 93 of his order in *Austria v Council* which I regard as a definitive statement.

96. The President stated as follows:

'87 The objective of the ecopoint system... is to bring about a 60% reduction in the total emissions of NO_x from lorries transiting through Austria during the period from 1 January 1992 to 31 December 2003.

88 That objective, which is stated in Article 11(2)(a) of the Protocol, had

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

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

- 90 However, the fact that the essential aim of the ecopoint system is to reduce NO_x emissions does not seem, *prima facie*, to alter the interpretation of Article 11(2)(c) in conjunction with point 3 of Annex 5 to the Protocol, which emerges from the very wording of those provisions. Indeed, the mechanism which they establish for reducing the ecopoints is set in motion if the threshold number of journeys provided for in Article 11(2)(c) of the Protocol is exceeded, not a threshold of ecopoints or NO_x emissions....
- 91 By taking as their basis a threshold number of journeys, Article 11(2)(c) and point 3 of Annex 5 to the Protocol appear designed not only to reduce NO_x emissions, an objective which, after all, can only be furthered by a reduction in ecopoints but also, as an additional objective, to restrict the number of journeys, an increase in which is regarded as a disruption to be avoided.
- 92 Finally, it does not seem, *prima facie*, that the apparent divergence between the abovementioned provisions of the Protocol and those of the contested Regulation can be justified by the need to integrate the Republic of Austria into the internal market.
- 93 The disputed provisions of the Protocol specifically set up a transitional regime which derogates, in so far as is necessary, from the rules governing the functioning of the internal market. It is true that any provision of an act of accession which includes a derogation from the rules of the Treaty concerning the free movement of goods must be interpreted strictly (Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 18), in order to facilitate the achievement of the objectives of the Treaty and the application of all its rules (Joined Cases 194/85 and 241/85 *Commission v Greece* [1988] ECR 1037, paragraph 20). Nevertheless, that does not mean that it is possible to obtain an interpretation which conflicts with the clear wording of the provision at issue.⁷
97. Consequently, while I agree with the President of the Court that an interpretation directly contrary to the wording of the provision at issue, such as spreading the reduction in ecopoints over four years, is not admissible, I should nevertheless like to add that to concentrate the whole of the reduction in ecopoints in a single quarter is likewise incompatible with that provision.
98. It cannot be disputed that the legislature wished to have the reduction in ecopoints spread over one year, the aim certainly being to cause as little disruption as possible to the free movement of goods, which is an important objective of the Treaty.

99. It is true that Article 11(2)(c) of the Protocol requires the institution taking the decision to adopt 'appropriate measures *in accordance with paragraph 3 of Annex 5 thereto*'.¹⁷ The said paragraph 3 stipulates that 'the number of ecopoints *for the following year*'¹⁷ shall be established as follows' and it lays down a mathematical formula based on the assumption that the reduction would be spread over the year following that when the threshold was exceeded.

100. However, if three quarters of the following year have already elapsed without a reduction in the number of transit journeys and if, therefore, it is impossible to comply with the provision to the letter, I think it would be compatible with the concept of 'appropriate measure' and more in conformity with the spirit of the system to spread the reduction over a 12-month period beginning on the date of the entry into force of the decision setting the level of the reduction, rather than to apply the entire reduction in a single quarter. In that way the requirement of a 'year' would at least be met, if not that of 'the following year'.

101. The Austrian Government itself admits 'that it would obviously have been possible to apply the Protocol without creating any restriction on the internal market by adopting less constraining measures, for example, spreading the reduction over 2000 and 2001 only'.

102. As point 3 of Annex 5 to the Protocol does not expressly refer to a calendar year and as the effectiveness of the reduction mechanism would have been preserved in this way, I think this interpretation would, as matters stood at the time, have been consistent with the Protocol and with Annex 5. The authors of the Protocol could not have foreseen that the recording of transit journeys might give rise to such considerable difficulties and entail such a long delay in the decision.

103. On the other hand, by spreading the reduction over four years, the Council completely disregarded the wording of the Protocol. The Council seeks to justify the decision on the ground of force majeure, but to no avail. It does not mention any unforeseeable, abnormal difficulty beyond its control would have compelled it to spread the reduction.

104. I conclude, therefore, that Article 1 of the contested Regulation must be annulled.

B — *Second limb of the fourth plea: distribution of ecopoints among the Member States*

105. As the distribution of the reduction over four years is illegal, its distribution among the different Member States is also necessarily illegal.

¹⁷ — Emphasis added.

106. Consequently I shall examine only as an alternative the question whether, as the Austrian Government maintains, such distribution is illegal because it did not affect all the Member States.

107. This question could be relevant if the Commission or the Council had once again to reduce ecopoints as result of the threshold of 108% being exceeded in a subsequent year.

108. It must be observed that the distribution of ecopoints among the Member States was not brought about by the Protocol, but by Regulation No 3298/94, and the seventh recital of the preamble to the contested Regulation is worded as follows:

‘Proportionality of the reduction of ecopoints... 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.’

109. Consequently, Article 2(4) of the contested Regulation replaced the distribution table for ecopoints per Member State in Annex D to Regulation No 3298/94 by a new Annex D which distributes ecopoints on a graduated basis over the period 2000 to 2003.

(a) Arguments of the parties

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

111. First of all, the fact that, under the contested Regulation, the reduction in ecopoints concerns only those Member States which have contributed to the significant increase in traffic transiting through Austria, was, as a matter of principle, fundamentally incompatible with the principle of solidarity.

112. Moreover, the first criterion used by the Council to determine the main pepe-

trators of the increase, that is to say, the extent to which the Member States contributed to the exceeding of the threshold established in Article 11(2)(c) of the Protocol, was also incompatible with the principle of proportionality.

113. It appears disproportionate that a Member State which has barely exceeded that threshold should suffer a reduction in its ecopoints quota, whereas a Member State which was just below the threshold should escape a reduction altogether.

114. Finally, as regards the second criterion, based on a comparison between the volume of transit traffic in 1999 and in the years 1995 to 1997, the applicant maintains that the reference years were arbitrarily chosen.

115. The *Council* contends that, to ensure that the reduction is proportional, the contested Regulation provides that only the Member States which contributed to the threshold being exceeded are to have their allocations of ecopoints reduced. The Council observes that the distribution key of ecopoints among the Member States was not laid down by the Protocol, but by a secondary law measure, namely Regulation No 3298/94. In amending that regulation, the contested Regulation did not breach either the EC Treaty or the Protocol.

116. The *German Government* submits that it is clear from Article 11(6) of the Protocol that the Community legislature has a broad discretion when distributing ecopoints. It was not possible to ascertain from the Protocol which principle, the principle of solidarity or the 'polluter pays' principle, must have priority in that regard.

117. The *Commission* maintains that the Community legislature exercised its discretion in deciding to apportion the reduction in ecopoints among the Member States according to their contribution to exceeding the prescribed threshold. This approach conformed with the 'polluter pays' principle and was not chosen arbitrarily.

(b) Assessment

118. Under Article 11(6) of the Protocol, '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*¹⁸ and technical questions concerning the application of this Article...'

¹⁸ — Emphasis added.

119. The Protocol gives no indication of the method to be used for apportioning the reduction of ecopoints among the Member States.

120. It follows that the institutions have a certain discretion in this respect, which is subject to only a limited review by the Community courts.

121. However, as the objective of the ecopoints system is to reduce pollution of the environment, it is not manifestly arbitrary or unreasonable to require only the Member States which contributed to the exceeding of the 8% threshold to suffer the reduction in ecopoints.

122. I therefore conclude alternatively that the Council did not exceed its discretion and that the second limb of the fourth plea must be dismissed.

IX — Fifth plea (alternative): 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

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

124. The *Council*, the *German Government* and the *Commission* dispute these submissions.

125. To render this problem intelligible, I think it is necessary to summarise the Commission's observations in the note on the ecopoints system which forms Annex 2 to its statement in intervention. The note is not contested in so far as it describes the system and summarises the discussions which have taken place.

126. First, the *Commission* points out that the system has the unusual feature of being based entirely on a single source of information, namely the statistics provided by the Austrian authorities. The computer system records not only the 1.5 million transit journeys annually, but also bilateral

journeys in cases where heavy goods vehicles are fitted with an ecocard, as well as transit journeys for which the carrier did not have ecopoints and which ought therefore not to have taken place. For these reasons it is very difficult for the Commission and the Member States to verify the accuracy of the statistics.

127. Second, it is common ground that the formula in point 3 of Annex 5 to the Protocol has the result that the lower the average NO_x emission, the greater the reduction in ecopoints prescribed for the following year.¹⁹

128. In August 2000 the Italian authorities claimed that their calculations showed that the average number of ecopoints used per transit journey was not 6.74, as stated by the Austrian authorities, but 7.10.

19 — The formula in point 3 of Annex 5 is 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. This gives the following formula: [quarterly average NO_x emission] × 0.0658 × 23 556 220, where the only variable is the quarterly average NO_x emission. Thus, for the year 2000, when the theoretical value for the year is used, namely 7.57 ecopoints per transit journey, the formula gives a figure of 11 730 998 ecopoints, which constitutes the theoretical allocation of ecopoints for that year. However, when the average is reduced by 0.1 to 7.47, the formula gives a total of 11 575 998, a reduction of 155 000 ecopoints. Generally, a reduction of 0.1 in the average NO_x emission corresponds to a reduction of 155 000 ecopoints, that is to say, 1.3% of the annual allocation. Thus the lower the average NO_x emission, the greater the reduction in ecopoints.

129. As a result of this information, a technical meeting was held in Vienna (Austria), in the course of which it appeared that the Austrian authorities had calculated average figures which were regarded as incorrect by the Commission and the other Member States. To calculate the average ecopoints used, the Austrian authorities had taken the total number of ecopoints 'paid' and divided it by the total number of transit journeys recorded.

130. Thus the number found for transit journeys included not only those for which the carriers had 'paid' ecopoints, but also those for which the carriers had not paid. By including the so-called 'black' journeys, the figure for the average number of ecopoints used was reduced because each such journey entailed an average use of ecopoints equal to zero.

131. The *Austrian Government* contends that it was right to include illicit journeys in the calculations.

132. The *Council*, the *German Government* and the *Commission* maintain that this is incorrect. According to them, although illicit journeys count when it is

necessary to decide whether the 108% ceiling has been exceeded, they cannot be taken into account in relation to the reduction of ecopoints.

133. I propose that the Court accept this argument and reject that of the Austrian Government. As the Commission contended, the method of Annex 5 to the Protocol clearly refers to the 'quarterly average NO_x emission values for lorries' and it is not correct to say that, because a lorry paid a number of ecopoints equal to zero, it caused no NO_x emission when it crossed Austria.

134. When this error was discovered, the Commission recalculated the averages, leaving out illicit transit journeys. This led to a new quarterly average NO_x emission of 6.9975 instead of 6.159.

135. When this was incorporated into the formula in point 3 Annex 5 to the Protocol, the new figure resulted in an ecopoint reduction of 1.1 million instead of 2.1 million. Therefore the Commission amended its proposal accordingly and I consider that, in doing so, it acted correctly.

136. Obviously, the Council likewise did not act in an arbitrary or unreasonable manner in accepting this proposal.

137. The Austrian Government also claims that the contested Regulation has a seriously inadequate statement of reasons since it contains no specific information concerning the calculation method which forms the basis of the reduction in ecopoints imposed in Article 1.

138. However, the Court has consistently held that 'it is not necessary for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of the grounds for a decision meets the requirements of Article 190 of the Treaty 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-478/93 *Netherlands v Commission* [1995] ECR I-3081, paragraphs 49 and 50, and Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others II* [1995] ECR I-3799, paragraph 16)'.²⁰

²⁰ — *Netherlands v Council*, paragraph 188.

139. It is common ground that Austria provided the statistics on which the Commission's original proposal was based, that those figures were criticized at the Committee meetings attended by the Austrian authorities, that a special meeting with those authorities was held in Vienna and that the amended proposal was explained by the Commission and discussed with the participation of Austrian delegates on the Ecopoints Committee and in the Council.

140. I therefore propose that this plea be dismissed.

X — Maintenance of the effects of the contested Regulation

141. The conclusions reached from the examination of the six pleas raised by Austria are therefore as follows.

142. *Primarily*, Austria sought the annulment of the whole of the contested Regulation. This application must be dismissed because the Regulation was properly adopted.

143. However, no complaint was made against Article 2(2) of the contested Regulation, which relates to ecopoints which are neither used nor returned.

144. The same applies to Article 2(3) of the contested Regulation, which requires the Commission to set up a system for monitoring the activities undertaken by Austria and other Member States for improving the level of service in combined transport across the Alps.

145. *Alternatively*, Austria seeks the annulment of Articles 1 and 2(1) and (4) of the contested Regulation.

146. For the reasons given above, this application must be granted.

147. However, the Council asks the Court to maintain all the effects of the contested Regulation in the event of its annulment.

148. In the course of the oral argument, the Austrian Government joined in this application.

153. Regarding the distribution of ecopoints among the Member States, the relevant figures are given in Annex D to the same regulation.

149. The Commission did likewise.

154. This has the paradoxical result of increasing the number of ecopoints which ought to have been distributed in the past and of those which are yet to be distributed in 2003.

150. For my part, I also propose that the Court grant this application, save with regard to Article 2(1) of the contested Regulation (permanent establishment of the principle of spreading reductions over several years).

155. Because the 108% threshold was exceeded, Austria was entitled to a reduction in ecopoints. No doubt this ought to have taken place in the course of 2000 or, at least, in the 12 months following the Council's decision. Failing this, however, it is more consistent with the logic of the system to grant Austria the remainder of the reduction in the course of the following years than not to grant it at all.

151. The annulment of Articles 1 and 2(4) of the Regulation (for the whole of the years 2000 to 2003 or, in my submission, for 2002 and 2003) would mean that the corresponding provisions previously in force would be automatically reinstated.

152. These are, regarding the total number of ecopoints, Annex 4 to the Protocol as amended, on the basis of express authorisation, by Article 9 of Regulation No 3298/94.

156. Furthermore, it is also in the interest of legal certainty to maintain the effects of the contested Regulation because it produced all its effects in the course of 2000, 2001 and 2002 and the judgment will not be delivered until 2003.

XI — Conclusion

157. I therefore propose that the Court:

- annul Articles 1 and 2(1) and(4) 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;
- maintain the effects of Articles 1 and 2(4) of the said regulation;
- dismiss the remainder of the application;
- order the Council to pay the costs;
- declare that the German and Italian Governments and also the Commission, the interveners, are to meet their own costs.