

OPINION OF ADVOCATE GENERAL
TRSTENJAK
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I — Introduction

1. This case is an action for failure to fulfil obligations under Article 226 EC² whereby the Commission seeks a declaration from the Court of Justice that, by prohibiting lorries with a total weight of more than 7.5 tonnes, carrying certain goods, from being driven on a section of the A12 motorway, the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC.

2. These proceedings are characterised by the fact that the Court has already found, in its judgment of 15 November 2005 in *Commission v Austria*,³ that a similar sectoral traffic prohibition on the A12 motorway constituted an infringement of Articles 28 EC and 29 EC and declared that there had been a corresponding failure by the Republic of Austria to fulfil its obligations under the Treaty. Having regard to that judgment, the Republic of Austria sought to structure the sectoral traffic prohibition at issue in the present case in such a way that it was in conformity

with European Union law. On the one hand, the new sectoral traffic prohibition was designed, for that purpose, to form part of a package of measures to improve air quality along the motorway in the Inn valley. On the other, the Republic of Austria made efforts to create transport alternatives for the transports of goods covered by the sectoral traffic prohibition.

3. In this context, the Commission stresses that it largely welcomes and supports the package of measures drawn up by the Republic of Austria to improve air quality along the motorway in the Inn valley. However, in its view the sectoral traffic prohibition is once again disproportionate, and it therefore considered it necessary to initiate fresh proceedings. Since the new sectoral traffic prohibition on the A12 motorway differs both in terms of legal framework and actual structure from the prohibition which was found to be contrary to European Union law in the judgment of 15 November 2005, the present infringement proceedings were correctly initiated pursuant to Article 226 EC.⁴

2 — Under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306 p. 1), treaty infringement proceedings under Article 226 EC are now covered by Articles 258 and 260(3) TFEU. The most significant change is contained in Article 260(3) TFEU, under which the Commission may, in treaty infringement proceedings for failure to implement a directive, request, in proceedings under Article 258 TFEU, the imposition of lump sum or penalty payment on the Member State in breach.

3 — Case C-320/03 *Commission v Austria* [2005] ECR I-9871.

4 — See Case C-526/08 *Commission v Luxembourg* [2010] ECR I-6147, paragraphs 23 and 37, in which the Court points out that the question whether Article 228 EC is applicable arises only if it transpires that the complaints raised in particular treaty infringement proceedings are identical in fact and in law to those put forward in earlier treaty infringement proceedings.

II — Legal framework

A — *European Union law*⁵

1. Directive 96/62

4. According to Article 1 of Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management,⁶ the general aim of that directive is to define the basic principles of a common strategy to:

- define and establish objectives for ambient air quality in the Community designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,

- assess the ambient air quality in Member States on the basis of common methods and criteria,

- obtain adequate information on ambient air quality and ensure that it is made available to the public, inter alia by means of alert thresholds,

- maintain ambient air quality where it is good and improve it in other cases.

5. Article 4 of Directive 96/62 provides that the Council, on a proposal from the Commission, is to lay down the provisions on the setting of limit values and, as appropriate, alert thresholds for the pollutants listed in Annex I to that directive, which include nitrogen dioxide (NO₂).

6. Article 7(1) of Directive 96/62 provides that Member States are to take the necessary measures to ensure compliance with the limit values.

7. Under Article 8(3) of Directive 96/62, in the zones and agglomerations in which the levels of one or more pollutants are higher than the limit value plus the margin of tolerance, Member States must take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit. The minimum details which these – publicly available – plans and programmes must contain are set out in Annex IV to the directive.

⁵ — By analogy with the designations used in the TEU and the TFEU, the term ‘European Union law’ is used as a generic term for Community law and European Union law. Where individual provisions of primary law are concerned below, the provisions in force *ratione temporis* are cited.

⁶ — OJ 1996 L 296, p. 55, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

2. Directive 1999/30

8. The limit values for NO₂ are laid down in Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air.⁷

9. According to the fourth recital in the preamble to that directive, the limit values laid down therein are minimum requirements and, in accordance with Article 176 EC, Member States may maintain or introduce more stringent protective measures.

10. According to Article 4 of that directive:

‘1. Member States shall take the measures necessary to ensure that concentrations of nitrogen dioxide and, where applicable, of oxides of nitrogen, in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex II as from the dates specified therein.

The margins of tolerance laid down in Section I of Annex II shall apply in accordance with Article 8 of Directive 96/62/EC.

2. The alert threshold for concentrations of nitrogen dioxide in ambient air shall be that laid down in Section II of Annex II.’

11. Section I of Annex II to Directive 1999/30 shows that the hourly limit value in relation to NO₂ is fixed at 200 µg/m³, not to be exceeded more than 18 times per calendar year, increased by a margin of tolerance decreasing until 1 January 2010. The annual limit value in relation to NO₂ is fixed at 40 µg/m³, increased by this margin of tolerance decreasing until 1 January 2010. Having regard to these degressive margins of tolerance, this limit value must ultimately be complied with by 1 January 2010.

3. Directive 2008/50

12. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe⁸ replaces a total of four directives, including Directives 96/62 and 1999/30, and a decision. The hourly limit value and the annual limit value in relation to NO₂, and the margins of tolerance, are laid down in Annex XI to that directive. These limit values and margins of tolerance are identical to the limit values laid down in Section I of Annex II to Directive 1999/30. In principle, the time

⁷ — OJ 1999 L 163, p. 41, as amended by Commission Decision of 17 October 2001 amending Annex V to Council Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 2001 L 278, p. 35).

⁸ — OJ 2008, L 152, p. 1.

limit for complying with the limit value is also 1 January 2010.

of tolerance of 30 $\mu\text{g}/\text{m}^3$, which is gradually reduced. Accordingly, the emission limit value in relation to NO_2 is 40 $\mu\text{g}/\text{m}^3$ from 2006 to 2009 and 35 $\mu\text{g}/\text{m}^3$ in 2010.

B — *National law*

1. Law on air pollution

13. Directives 96/62 and 1999/30 were transposed into Austrian law by means of amendments to the Federal Law on the control of air pollutants which amended the 1994 Trade and Commercial Code, the Law on air pollution controls for industrial boilers, the 1975 Mines Law, the Law on waste management, and the Ozone Law ((Immissionsschutzgesetz-Luft; 'the IG-L')).

14. Under Paragraph 3(1) of the IG-L, the emission limit values laid down in Annexes 1 and 2 are to apply to protect human health throughout the Republic of Austria. Annex 1 lays down an annual limit value of 30 $\mu\text{g}/\text{m}^3$ as the emissions limit value in relation to NO_2 . Annex 1 also provides for a margin

15. Under Paragraph 10 of the IG-L, measures are to be imposed by regulation no later than 24 months after the end of the year in which a limit value was found to have been exceeded. Under Paragraph 16(1)(4) of the IG-L, the possible measures that can be imposed include prohibitions on the movement of motor vehicles.

2. Sectoral traffic prohibition

16. Pursuant to Paragraphs 10 and 16(1)(4) of the IG-L, the Landeshauptmann (First Minister) of the Province of Tyrol adopted the regulation of 17 December 2007 prohibiting the long-distance carriage of certain goods on the A12 motorway in the Inn valley (sectoral traffic prohibition). That regulation is worded as follows:

'...

Paragraph 1

maximum authorised weights exceed 7.5 tonnes, for the transport of the following goods:

Aim

(a) from 2 May 2008:

The aim of this regulation is to reduce emissions of pollutants influenced by human activity which have led to an emission limit value being exceeded, and thereby to improve air quality. This improvement serves to ensure the long-term protection of human health, flora and fauna, and their biocoenosis, habitat and interactions, and cultural and material assets from harmful air pollutants and the protection of people from air pollutants causing an intolerable nuisance.

1. all wastes listed in the European Waste Catalogue (in accordance with Commission Decision 2000/532/EC establishing the list of wastes, as amended by Council Decision 2001/573/EC),
2. stones, earth, excavated material.

(b) from 1 January 2009:

...

1. logs and cork,
2. non-ferrous and ferrous ores,
3. motor vehicles and trailers,

Paragraph 3

Prohibition

Driving on the A12 Inn valley motorway in either direction between kilometre 6.350 in the municipality of Langkampfen and kilometre 90.00 in the municipality of Zirl is prohibited with the following vehicles:

4. steel, except reinforcing and construction steel for delivery to building sites,
5. marble and travertine,
6. tiles (ceramic).

Lorries or semi-trailers with a maximum authorised gross weight of over 7.5 tonnes, and lorries with trailers whose combined

Paragraph 4

Exceptions

(1) Without prejudice to the exceptions laid down in Paragraph 16(2) of the IG-L, the following shall be exempt from the prohibition under Paragraph 3:

(a) transports carried out by vehicles which are loaded or unloaded in the core zone (origin or destination in the core zone),

(b) transports carried out by vehicles which are loaded and unloaded in the extended zone (origin and designation in the extended zone),

(c) transports carried out by vehicles heading outward for entrainment to the Hall rail terminal eastbound and to the Wörgl rail terminal westbound, where this can be proved by a relevant document,

(d) transports carried out by vehicles heading inward after detrainment from the Hall rail terminal westbound and from the Wörgl rail terminal eastbound, where this can be proved by a relevant document,

(e) transports carried out by vehicles in respect of whose use, in accordance with an inspection pursuant to Paragraph 14(3) of the IG-L, there is an overriding public interest or important private reason to be examined on a case-by-case basis, and which are identified in accordance with a regulation pursuant to Paragraph 14(4) of the IG-L.

(2) The political districts of Imst, Innsbruck Land, Innsbruck Stadt, Kufstein and Schwaz lie within the core zone.

The following lie within the extended zone in

(a) Austria: the political districts of Kitzbühel, Landeck, Lienz, Reutte and Zell am See,

(b) Germany: the administrative districts of Bad Tölz, Garmisch-Partenkirchen, Miesbach, Rosenheim (including the city) and Traunstein,

(c) Italy: the district municipalities of Valle Isarco, Val Pusteria and Wipptal.

...'

III — Facts

17. For many years instances of limit values for NO₂ concentrations being exceeded have been found along the motorways in the Tyrol (A12 and A13). Consequently, in recent years the Province of Tyrol has adopted several measures to improve air quality along those motorways.

18. Those measures included a regulation adopted by the First Minister of the Province of Tyrol on 27 May 2003 prohibiting the carriage of a number of goods by lorries with a maximum authorised weight of over 7.5 tonnes on an approximately 46 km section of the A12 motorway between the municipalities of Kundl and Ampass. This sectoral traffic prohibition applied in particular to the carriage of waste, cereals, timber and cork, ferrous and non-ferrous ores, stones, soil, excavated material, motor vehicles and trailers and building steel. The prohibition was to apply immediately as from 1 August 2003. However, the carriage of goods originating from or destined for the city of Innsbruck or the districts of Kufstein, Schwaz or Innsbruck-Land was exempt from this prohibition. Various categories of vehicle were also excluded, such as highway maintenance vehicles, refuse collection vehicles and agricultural and forestry vehicles. Finally, authorisation could also be sought for other vehicles in individual cases,

where there was a public interest or important private reason.

19. Since the Commission was convinced that this measure was incompatible with European Union law, it brought proceedings for failure to fulfil obligations pursuant to Article 226 EC. In its judgment of 15 November 2005 the Court ruled that, by restricting transport on the A12 motorway in the Inn valley, the Republic of Austria had failed to fulfil its obligations under Articles 28 EC and 29 EC.⁹

20. After that judgment, the competent Austrian authorities drew up a new package of measures to improve air quality along the motorway in the Inn valley which included four separate measures, namely (1) a speed limit for cars on sections of the A12 motorway, (2) a prohibition on the movement of certain heavily polluting lorries, (3) the geographical extension of an existing night ban on lorries of more than 7.5 tonnes and the gradual withdrawal of the exception from this ban for heavy goods vehicles in Euro classes IV and V, and (4) a new sectoral traffic prohibition for lorries of more than 7.5 tonnes. This

⁹ — *Commission v Austria* (cited in footnote 3).

package has gradually been implemented since the end of 2006.

21. The new sectoral traffic prohibition was imposed by regulation of the First Minister of 17 December 2007, which entered into force on 1 January 2008. Under this regulation, driving lorries of more than 7.5 tonnes is to be prohibited as from 2 May 2008 on the A12 motorway in the Inn valley between Langkampfen (approximately 6 km from the Austrian-German border) and Zirl (approximately 12 km west of Innsbruck), and thus on a stretch of around 90 km of motorway, where they are used to transport waste, stones, earth or excavated material (= Stage 1). As from 1 January 2009 this prohibition is to be extended to the transportation of logs and cork, non-ferrous and ferrous ores, motor vehicles and trailers, steel (other than reinforcing and construction steel for delivery to building sites), marble and travertine, and tiles (= Stage 2). However, lorry transports remain exempt from this prohibition where the lorry concerned is loaded or unloaded in a 'core zone' established in the regulation, where it is loaded and unloaded in an 'extended zone' established in the regulation, or where goods are carried inwards or outwards in connection with entrainment or detrainment at Hall or Wörgl railway station. Furthermore, an exemption from this prohibition can be granted in certain conditions.

22. In parallel with this sectoral traffic prohibition the other three separate measures from the package of measures to improve air quality along the motorway in the Inn valley were also implemented. In respect of the period from 1 November 2006 to 30 April 2007 a general speed limit of 100 km/h for cars was laid down on the A12 motorway in the Inn valley between the Austrian-German border and Zirl.¹⁰ As from November 2007 a year-round variable speed limit of 100 km/h applied to this section, depending on the general emission pollution actually measured and meteorological factors.¹¹ With effect from 1 January 2007 the First Minister of the Tyrol also adopted a prohibition on the movement of semi-trailers and lorries with trailers of more than 7.5 tonnes which do not satisfy the requirements of Euro class II on the A12 Inn valley motorway between Zirl and Kufstein. Since 1 November 2008 a general prohibition on the movement of these lorries not complying with the Euro III standard has applied pursuant to the same regulation. As from 1 November 2009 a general prohibition on the movement of lorries of more than 7.5 tonnes not complying with the

10 — Regulation of the First Minister of 23 October 2006 laying down a speed limit of 100 km/h on the A12 motorway in the Inn valley between Zirl-West and the border with the Federal Republic of Germany (Landesgesetzblatt für Tirol, No 86/2006), submitted by the Commission as Annex A-2 to the application.

11 — Regulation of the First Minister of 6 November 2007 introducing a reduction, based on emissions, of the maximum authorised speed on the A12 motorway in the Inn valley between the municipalities of Unterperfuss and Ebbs (Landesgesetzblatt für Tirol, No 72/2007), submitted by the Commission as Annex A-3 to the application.

Euro II standard applied.¹² Furthermore, as from 1 January 2007 an existing night ban on lorries between Wörgl and Hall was extended by 40 km and thus to the entire section of the A12 motorway between Kufstein and Zirl. An exemption for heavy goods vehicles in classes Euro IV and V was gradually withdrawn by 31 October 2009.¹³

IV — Pre-litigation procedure

23. By letter of 20 July 2006 the Province of Tyrol informed the Commission of its action programme to improve general air quality and the package of measures to improve air quality along the motorway in the Inn valley, which included the introduction of a sectoral traffic prohibition.

24. In its opinion of 20 July 2007 the Commission took the view that the planned introduction of the sectoral traffic prohibition,

as proposed by the Tyrolean authorities, was incompatible with Articles 28 EC and 29 EC. In spite of this unfavourable view, the regulation on the sectoral traffic prohibition was adopted on 17 December 2007.

25. In a letter of formal notice dated 31 January 2008 the Commission confirmed its view and invited the Republic of Austria to submit its observations pursuant to Article 226 EC. By observations of 15 February 2008 the Republic of Austria replied to the letter of formal notice from the Commission. In these observations it took the view that the sectoral traffic prohibition could not be regarded as an infringement of the free movement of goods in view of its structure and Austria's geographical location.

26. By letter of 8 May 2008 the Commission sent the Republic of Austria a reasoned opinion in which it concluded that by adopting the regulation on the sectoral traffic prohibition the Republic of Austria had failed to fulfil its obligations under Articles 28 EC and 29 EC. The Republic of Austria was given one month in which to take the necessary measures.

12 — Regulation of the First Minister of 24 November 2006 adopting a prohibition on the movement of heavily polluting heavy goods vehicles on the A12 motorway in the Inn valley (Landesgesetzblatt für Tirol, No 90/2006), submitted by the Commission as Annex A-5 to the application.

13 — Regulation of the First Minister of 24 November 2006 adopting a night ban on heavy goods vehicles on the A12 motorway in the Inn valley (Landesgesetzblatt für Tirol, No. 91/2006), submitted by the Commission as Annex A-6 to the application.

27. The Republic of Austria replied by a letter of 9 June 2008 in which it abided by its view. In a supplementary letter of 2 December 2008

it informed the Commission that the sectoral traffic prohibition on the A12 motorway in the Inn valley had been re-imposed by regulation of the First Minister of the Tyrol of 13 November 2008. This new regulation confirmed the sectoral traffic prohibition on the A12 between Langkampfen (kilometre 6.35) and Ampass (kilometre 72) and thus in relation to the area east of Innsbruck. In relation to the area west of Innsbruck, the sectoral traffic prohibition on the section between Ampass and Zirl will not be effective until 1 January 2011.

28. Finally, by another supplementary letter of 19 December 2008, the Republic of Austria informed the Commission that the sectoral traffic prohibition had been re-imposed again by regulation of the First Minister of the Tyrol of 23 December 2008. Contrary to the previous provisions, this new regulation provided that the traffic prohibition was now to apply, with effect from 2 January 2009, only to logs and cork and motor vehicles and trailers in addition to the goods already covered. It would not apply to the other goods (ferrous and non-ferrous ores, steel, marble, travertine and ceramic tiles) until 1 July 2009.

V — Procedure before the Court and forms of order sought by the parties

29. Since it considered that the Republic of Austria had not taken the measures necessary to comply with the reasoned opinion, the Commission brought an action pursuant to Article 226 EC on 21 January 2009.

30. The Commission claims that the Court should:

- declare that, by prohibiting lorries with a total weight of more than 7.5 tonnes, carrying certain goods, from being driven on a section of the A12 motorway, the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC;
- order the Republic of Austria to pay the costs.

31. The Republic of Austria contends that the Court should dismiss the application and order the Commission to pay the costs.

32. By order of the President of the Court of 19 June 2009, the Italian Republic and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Commission. The Italian Republic and the Kingdom of the Netherlands contend that the Commission's action should be upheld.

33. At the hearing on 19 October 2010, the representatives of the Commission, the Republic of Austria and the Italian Republic presented their oral arguments.

equivalent effect to a quantitative restriction, which is fundamentally incompatible with Articles 28 EC and 29 EC.

VI — Main arguments of the parties

34. In the view of the *Commission*, the sectoral traffic prohibition of 17 December 2007 obstructs the free movement of goods and, in particular, their free transit, by imposing on lorries of more than 7.5 tonnes, carrying certain goods, a prohibition on using one of the most important transalpine trade routes between southern Germany and northern Italy. In actual fact, the prohibition extends to the entire Brenner corridor and the western link to the Lake Constance area. The sectoral traffic prohibition has far-reaching economic effects on the business producing or processing the goods concerned, on the one hand, and on the transport industry, on the other. It must be presumed that the prohibition will ultimately be reflected in higher prices for the goods being transported and thus directly damage the competitiveness thereof. Therefore, the sectoral prohibition on movement must be regarded as a measure having an

35. The sectoral traffic prohibition is also highly discriminatory. On account of the exceptions made for local and regional transport it primarily affects goods in transit through the area covered by the prohibition. Moreover, a prohibition on movement linked to the transported goods could have discriminatory effects on trade between the Member States.

36. The sectoral traffic prohibition and the restrictions on the movement of goods within the Community caused thereby are not justified either by the grounds referred to in Article 30 EC or by overriding reasons in the public interest recognised in case-law. Although the measures at issue could help attain an environmental objective, they infringe the principle of proportionality. The thinking behind the sectoral traffic prohibition is so incoherent that its capability of improving air quality is doubtful. Furthermore, the restrictive effect of the prohibition and its usefulness are clearly disproportionate. The fact that less restrictive measures, such as a permanent speed limit on the A12, prohibitions on movement based on emissions, toll-related measures or other economic instruments were not adopted or taken sufficiently into consideration is particularly serious in this

context. Furthermore, the Republic of Austria has failed to show that there are adequate transport alternatives for the transports of goods covered by the sectoral traffic prohibition. In the absence of such capacity the planned transition period is also inadequate.

37. In the view of the Commission, there is no evidence of the need for the sectoral traffic prohibition in relation to the area west of Innsbruck, as adequate measured data showing how it is affected specifically are not available. In addition, there is no specific impact assessment to demonstrate the suitability and necessity of a sectoral traffic prohibition.

38. The *Republic of Austria* points out that the sectoral traffic prohibition at issue forms part of a package of measures designed to ensure compliance with the NO₂ limit values which for years have been permanently and significantly exceeded in the area concerned. By adopting this package of measures the Republic of Austria has fulfilled not only its obligations under European Union law arising from the directives on protection of air quality but also its obligations under Community fundamental law relating to protection of

health and the environment and respect for private and family life.

39. The high concentrations of NO₂ emissions along the A12 motorway are largely produced by road traffic. In this respect, road haulage is one of the principal causes of NO₂ emissions and the volume of traffic created by long-distance road haulage is rising steadily. The package of measures to improve air quality, which also includes the sectoral traffic prohibition at issue, was only adopted after extensive inquiries, consultation and preliminary work. In order to ensure the proportionality of the package of measures, a comprehensive examination of the package of measures and the specific structure of the individual measures contained therein was carried out at the preparatory stage in the light of their suitability and necessity.

40. The three main strategies pursued by the package of measures to improve air quality are to reduce vehicle-related emissions, transfer emissions to times that are climatically more favourable, and diminish the overall number of lorry movements by preventing detours and transferring to rail goods with an affinity to rail transport. In this context the sectoral

traffic prohibition must be understood as a measure to transfer road haulage to rail. Rail transport capacity is sufficient to accommodate the transfer that is being sought.

of whether the sectoral traffic prohibition is lawful under European Union law requires an adequate balancing of the free movement of goods, on the one hand, against the requirements relating to the protection of health and the environment as essential Treaty objectives and the requirements relating to protection of fundamental rights, on the other.

41. Having regard to the specific structure and gradual introduction of the sectoral traffic prohibition, and the available rail transport alternatives and alternative routes, the prohibition cannot be regarded as a measure having an equivalent effect to a quantitative restriction for the purposes of Articles 28 EC and 29 EC, particularly since it is not possible to identify any obstacles to the transit of goods through the Tyrol or the exchange of goods between Germany and Italy after Stages 1 and 2 of the sectoral traffic prohibition entered into force. Nor is the sectoral traffic prohibition discriminatory in nature.

43. This balancing exercise confirms that the sectoral traffic prohibition at issue is compatible with European Union law. Overall, the principle of proportionality is also observed. The sectoral traffic prohibition constitutes an appropriate and targeted measure to reduce pollution from emissions in the 'improvement zone', which is necessary to attain this objective and is not unreasonable in terms of its effects. Furthermore, the transitional periods for introducing the sectoral traffic prohibition were adequate.

42. Even if the sectoral traffic prohibition did constitute a measure having equivalent effect which is, in principle, prohibited by Articles 28 EC and 29 EC, this interference with the free movement of goods would have to be regarded as justified. The decisive factor is that the sectoral traffic prohibition is part of a package of measures which the Republic of Austria took as part of an overall policy to fulfil its obligations to act under European Union law to implement essential Treaty objectives (protection of health and the environment) and observe Community fundamental rights. Consequently, the assessment

44. The *Kingdom of the Netherlands* takes the view that a measure such as the sectoral traffic prohibition at issue, which forms part of a package of measures to reduce the discharge of harmful substances, can also be examined individually in relation to its compatibility with the provisions of the EC Treaty. Ultimately, the sectoral traffic prohibition is in principle prohibited under Article 28 EC. Furthermore, this prohibition is indirectly discriminatory. This measure cannot be justified

on grounds of environmental protection as the traffic prohibition is neither appropriate nor reasonable. In addition, the measure was not drawn up with sufficient care and that fact had unnecessary and disproportionately adverse effects on transit traffic.

Union law. Having particular regard to this fact, the regulation on the sectoral traffic prohibition ultimately cannot be regarded as an infringement of the free movement of goods.

45. The *Italian Republic* also takes the view that the sectoral traffic prohibition constitutes an unlawful restriction of the free movement of goods. This measure is illogical, discriminatory and disproportionate, particularly since there are no suitable rail transport alternatives or alternative transport routes to satisfy all the needs created by the sectoral traffic prohibition.

47. In the light of this argument, I will examine below, first of all, whether the regulation on the sectoral traffic prohibition can be regarded as a national measure to implement Directives 96/62 and 1999/30 and, if so, what effect this finding has in the present infringement proceedings.

VII — Legal assessment

A — *The regulation on the sectoral traffic prohibition as a measure to implement Directives 96/62 and 1999/30*

48. Article 8(3) of Directive 96/62 provides that, in the zones and agglomerations in which the levels of one or more pollutants are higher than the relevant limit value plus the margins of tolerance, Member States are to take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time limit. The plan must be available to the public and incorporate at least the information listed in Annex IV to the directive.

46. In the view of the Republic of Austria, the decisive factor in assessing the regulation on the sectoral traffic prohibition is that the Republic of Austria adopted it to implement Directives 96/62 and 1999/30 in due compliance with its obligations under European

49. The limit values and margins of tolerance in relation to NO₂ are laid down in Directive 1999/30. Section I of Annex II to this directive shows that the annual limit value in relation to NO₂ is fixed at 40 µg/m³, increased

by a degressive margin of tolerance until 1 January 2010. Under Article 4(1) of Directive 1999/30, in conjunction with Section I of Annex II thereto, the Member States are to take the measures necessary to ensure that the annual limit value of 40 µg/m³ in relation to NO₂ is not exceeded again from 1 January 2010 onwards.

of Directive 1999/30, in conjunction with Section I of Annex II thereto. According to that provision, Member States are to take the measures necessary to ensure that the NO₂ limit value of 40 µg/m³ is attained as from 1 January 2010. Where a Member State's NO₂ measurements show that this outcome can be assured only by gradually implementing a package of measures, Article 4(1) of Directive 1999/30, in conjunction with Section I of Annex II thereto, imposes on Member States an obligation to take the necessary measures even before 1 January 2010.

50. Although according to the wording of Directive 1999/30 the limit values in relation to NO₂ thus may not be exceeded again from 1 January 2010 onwards, that does not mean that this limit value and the margins of tolerance applicable thereto cannot impose obligations on the Member States before the expiry of that time-limit. On the contrary, in its judgment in *Commission v Austria* the Court pointed out that, having regard to the provisions of Article 8(3) of Directive 96/62, the Republic of Austria was under a duty to act if, in 2002 and 2003, the annual limit value fixed for NO₂, increased by the margin of tolerance, was exceeded at the Vomp/Raststätte measuring point along the A12 motorway in the Inn valley, in order progressively to bring about the result prescribed by Directive 1999/30 and thereby attain the objective it sets within the prescribed period.¹⁴

52. It is clear from the case-file and common ground between the parties to the proceedings that high or too high NO₂ concentrations occurred along the motorway in the Inn valley in the Tyrol in the period from 2005 to 2007. At the Vomp/Raststätte measuring point (east of Innsbruck) the measured NO₂ concentrations exceeded the annual limit values fixed by Directive 1999/30, plus the margins of tolerance, in the whole period from 2002 to 2007. Furthermore, in the Province of Tyrol the annual limit values in relation to NO₂ fixed in the IG-L were exceeded at six out of thirteen measuring points in 2005, at seven out of thirteen measuring points in 2006, and at seven out of fourteen measuring points in 2007.

51. Similarly, an obligation on the Member States to act can be inferred from Article 4(1)

53. Against this background, in 2007 the Republic of Austria drew up for the area concerned a programme to reduce air pollution which was notified to the Commission in

¹⁴ — *Commission v Austria* (cited in footnote 3, paragraph 79 et seq.).

February 2008.¹⁵ This programme satisfies the formal requirements to be regarded as a programme within the meaning of Article 8(3) of Directive 96/62. It contains a catalogue of measures to reduce pollution caused by NO₂ emissions in the lower Inn valley, with a number of measures for the A12 motorway in the Inn valley. These measures also include a proposal for a sectoral prohibition on the movement of lorries on that motorway.¹⁶ The latter measure was implemented by the regulation on the sectoral traffic prohibition of 17 December 2007.

implement Directives 96/62 and 1999/30, and in particular Articles 8(3) and 4(1) thereof respectively.

55. However, the fact that the regulation on the sectoral traffic prohibition of 17 December 2007 was adopted to implement Directives 96/62 and 1999/30 does not mean that it falls outside the scope of Article 28 et seq. EC.

54. In summary, it must therefore be stated that the regulation on the sectoral traffic prohibition was adopted pursuant to a programme within the meaning of Article 8(3) Directive 96/62, which was intended to help attain the annual limit values for NO₂ fixed in Directive 1999/30 in the improvement zone by 1 January 2010. Consequently, the Republic of Austria is correct in so far as it argues that this regulation must be regarded as a national measure which was adopted to

56. Although the Court has held that a national provision by which a Member State discharges its obligations under a directive cannot be regarded as a restriction of fundamental freedoms attributable to the Member States,¹⁷ it should be noted in the present case that Article 8(3) of Directive 96/62 and Article 4(1) of Directive 1999/30 in no way required the Republic of Austria to adopt the regulation on the sectoral traffic prohibition at issue.

57. The fact that Article 8(3) of Directive 96/62 and Article 4(1) Directive 1999/30 require that the Member States adopt 'measures' to attain the NO₂ limit value but do not specify more precisely the content of those measures is of decisive importance. The

15 — Programme under Paragraph 9a of the IG-L for the Province of Tyrol, drawn up by the Federal Environment Office on behalf of the Office of the Provincial Government of the Tyrol, Vienna, 2007, 135 pages ('the programme under Paragraph 9a of the IG-L for the Province of Tyrol') – Annex 2 to the observations of the Republic of Austria of 15 February 2008, submitted by the Commission as Annex A-15 to the application.

16 — *Ibid.*, pp. 65 and 66.

17 — Compare Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraphs 53 and 54.

broad scope which the Member States enjoy to choose the implementing measures is limited only by the aim of attaining the maximum NO₂ levels.¹⁸ More far-reaching substantive conclusions on the Member States' individual transposition measures cannot be inferred from these provisions of the directives. Consequently, the fact that the regulation on the sectoral traffic prohibition was formally adopted to implement Directives 96/62 and 1999/30 does not automatically preclude a possible assessment of that regulation as a measure having an equivalent effect to a quantitative restriction for the purposes of Articles 28 EC and 29 EC.

58. In the light of the foregoing, I conclude that although the Republic of Austria adopted the regulation on the sectoral traffic prohibition to implement Directives 96/62 and 1999/30, this finding does not preclude an examination of that regulation in the light of the requirements laid down by Articles 28 EC to 30 EC.

18 — Compare in this connection Case C-237/07 *Janecek* [2008] ECR I-6221, paragraph 45 et seq., in which the Court first confirmed that the Member States enjoy discretion in satisfying the obligation to draw up an action plan laid down in Article 7(3) of Directive 96/62, but went on to make it clear that that provision of the directive sets limits to the exercise of that discretion, relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests.

B — *Existence of a restriction of free movement of goods*

59. Under Articles 28 EC and 29 EC, quantitative restrictions and measures having equivalent effect between Member States are prohibited with regard to the importation and exportation of goods. It is settled case-law that this prohibition applies not only to the importation and exportation of goods between Member States but also the transit of goods.¹⁹

60. In its judgment in *Commission v Austria* the Court regarded an earlier sectoral prohibition on the movement of lorries on a 46km section of the A12 motorway in the Inn valley as a measure having an equivalent effect to a quantitative restriction, which in principle is incompatible with the obligations under Articles 28 EC and 29 EC.²⁰

61. As grounds, the Court emphasised in this connection, on the one hand the importance of the A12 motorway in the Inn valley which constitutes one of the main routes of land communication between southern Germany and northern Italy. Since the sectoral

19 — See inter alia *Commission v Austria* (cited in footnote 3, paragraph 65). Compare also Case C-173/05 *Commission v Italy* [2007] ECR I-4917, paragraph 31, and Case 266/81 *SIOT* [1983] ECR 731, paragraph 16.

20 — *Commission v Austria* (cited in footnote 3, paragraph 69).

traffic prohibition forced the undertakings concerned, at very short notice, to seek viable alternative solutions for the transport of goods covered by that prohibition, the Court found that it was capable of limiting trading opportunities between northern Europe and the north of Italy.²¹

62. In my view, the regulation on the sectoral traffic prohibition at issue in this case is also capable of limiting trading opportunities between northern Europe and the north of Italy and must consequently be regarded as a measure having an equivalent effect to a quantitative restriction.

63. In this connection, it should first be noted that the fact that the sectoral traffic prohibition was designed as a part of a package of measures to reduce the discharge of pollutants likewise does not preclude a separate examination of this regulation on the sectoral prohibition in the light of the requirements laid down by Articles 28 EC to 30 EC. However, the fact that this traffic prohibition forms part of a larger package of measures is particularly relevant in examining whether there is justification for restricting the free movement of goods.

64. According to the Republic of Austria, the sectoral traffic prohibition will eventually cover approximately 194 000 lorry movements per year on a 90 km section of the motorway in the Inn valley.²² According to an undisputed statement by the Commission, the prohibition will cover approximately 300 kilometres of the Austrian motorway network.²³ Since, pursuant to the regulation on the sectoral traffic prohibition of 17 December 2007, the prohibition was to enter into force fully on 1 January 2009, the economic sectors concerned consequently had, under these plans, one year to find alternative road haulage routes for these 194 000 movements or to transfer transport – at least in part – to rail.

65. It is clear from the arguments put forward by the various parties to the proceedings that this logistical transfer poses for the economic sectors concerned a major challenge fraught with uncertainty.

66. In its analysis of the possibilities of transferring the transports of goods concerned to rail or effecting them via alternative routes, the Republic of Austria draws a distinction between the transports of goods in respect of which a journey via the motorway in the Inn valley represents the shortest route (so-called

21 — *Commission v Austria* (cited in footnote 3, paragraphs 66 and 68).

22 — Defence of the Republic of Austria, paragraph 86.

23 — Application of the Commission, paragraph 31.

'best route transit'), the transports of goods which have at least an equally valid alternative route (so-called 'multi-route transit'), and the transports of goods which have a better alternative route (so-called 'detour transit'). Of the transports covered by the prohibition on movement, 45 % must be regarded as best-route transit, 25 % as multi-route transit, and 30 % as detour transit. It must be assumed that the best-route transit traffic and approximately half of the multi-route transit traffic would have to be transferred to rail, whilst other transports could be effected via alternative routes.²⁴ There are three forms of transport available for transferring the transports of goods concerned of the 'best-route transit' and 'multi-route transit' type to rail, namely conventional wagon-load transport, unaccompanied intermodal transport and accompanied transport on the 'highway on rails' (Rollende Landstrasse). Several alternative routes, some of which pass through the Swiss motorway network, are available for diverting transports by road of the 'multi-route transit' type.

and appropriateness of the transport alternatives set out by the Republic of Austria differ markedly. The main point in dispute in this respect is the capacity and user friendliness of accompanied transport on the highway on rails, where entire lorries are loaded on to rail by means of low-platform wagons. Whilst the Republic of Austria presents this highway on rails as a transport alternative with sufficient capacity that can be used at competitive prices without any logistical transition, the Commission and the Italian Republic emphasise the capacity constraints and practical difficulties from the point of view of transport undertakings.

67. The views expressed by the parties to the proceedings with regard to the capacity

68. The views of the parties to the proceedings also differ on the possibility of road transport of the 'multi-route transit' and 'detour transit' type switching to the alternative routes mentioned by the Republic of Austria. In this regard, the Italian Republic notes, for example, the additional administrative and financial burdens which would arise from transporting goods through Switzerland. In addition, on the important north-south trunk routes of the Swiss motorway network a 'drop-counter system' applies whereby a period of particularly intense heavy traffic can result in a complete road traffic ban on those routes. This is precisely what could occur if

24 — Defence of the Republic of Austria, paragraph 87.

the traffic flows were shifted from the A12 motorway in the Inn valley to the alternative routes through Switzerland.

C — Justification of the restriction of the free movement of goods

69. In brief, it must therefore be concluded that the regulation on the sectoral traffic prohibition at issue prohibits approximately 194 000 lorry transports a year on a 90 km section of the A12 motorway in the Inn valley, and the possibilities of transferring them to rail or diverting them to alternative routes are still fiercely disputed between the parties to the proceedings. Consequently, in my view it cannot reasonably be disputed that in principle the regulation on the sectoral traffic prohibition is capable of limiting trading opportunities between northern Europe and the north of Italy.

71. The Republic of Austria relies on two lines of argument to justify a possible restriction of the free movement of goods by the regulation on the sectoral traffic prohibition. Firstly, it argues that the regulation was issued to protect the fundamental right to respect for private and family life and thus pursuant to its obligations to act under Community fundamental law. Secondly, it relies on the justification of overriding reasons relating to environmental protection.

72. These arguments put forward by the Republic of Austria are not convincing.

70. Having particular regard to the fact that this capacity to hinder trade is sufficient to find that there is an effect restricting the free movement of goods,²⁵ I therefore conclude that the regulation on the sectoral traffic prohibition of 17 December 2007 prohibiting the long-distance carriage of certain goods on the A12 motorway in the Inn valley must be regarded as a measure having an equivalent effect to a quantitative restriction, which in principle is incompatible with the obligations under Articles 28 EC and 29 EC, unless it can be justified on objective grounds.

1. Relationship between the regulation on the sectoral traffic prohibition and Community fundamental rights

73. The Republic of Austria considers that a finding that the regulation on the sectoral prohibition on movement infringed Articles 28 EC and 29 EC would give rise to a conflict of objectives between the requirements relating to the protection of fundamental human rights under Community law, on the one hand, and the requirements relating to

²⁵ — See, for example, *Commission v Austria* (cited in footnote 3, paragraph 66 et seq.).

the free movement of goods, on the other. In view of the instances of the NO₂ limit value being exceeded which had been established for years, the Republic of Austria is required to adopt NO₂ reduction measures, such as the sectoral traffic prohibition, to protect the fundamental right to respect for private and family life.

74. As I have said elsewhere, where there is a conflict between a fundamental freedom and a fundamental right it must be assumed in principle that the realisation of a fundamental right constitutes a legitimate objective which may limit a fundamental freedom, provided that that limitation is proportionate.²⁶ However, such a balance can be struck only if and to the extent that a specific conflict has been proven.

75. In the present case the conflict that the Republic of Austria claims to exist between the fundamental right to respect for private and family life, on the one hand, and the free movement of goods, on the other, has not, in my view, been proven.

76. Whilst it is true that environmental pollution can have a certain relevance in the

context of both the fundamental right to physical and mental integrity²⁷ and the fundamental right to respect for private and family life,²⁸ it should be noted that pollution and nuisance can be regarded as interference with these fundamental rights only in special circumstances which could, where appropriate, establish the right of an individual to protection by the Member States. For example, in order to find that the right to respect for private and family life has been interfered with there must be concrete evidence of a sufficiently serious nuisance from noise or other emissions.²⁹ A finding that there has been interference with the right to integrity of the person requires at least evidence of an effect which is injurious to health.

27 — As regards recognition of the right to integrity of the person as a Community fundamental right, see Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraphs 70 and 78 et seq. This fundamental right is expressly confirmed in Article 3 of the Charter of Fundamental Rights of the European Union.

28 — As regards recognition of the right to respect for private and family life as a Community fundamental right, see Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48 and the case-law cited therein. This fundamental right is expressly confirmed in Article 7 of the Charter of Fundamental Rights of the European Union.

29 — See to that effect the case-law of the European Court of Human Rights on infringements of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') by noise pollution and emissions. Although the European Court of Human Rights accepts that noise pollution can give rise to an infringement of the right to respect for private and family life laid down in Article 8 of the ECHR in relation to residence, it is clear from the relevant judgments that there must always be substantial nuisance which must be specifically proven. See Eur. Court HR, *Tătar v. Romania* judgment of 27 January 2009 (Case No 67021/01 – substantial pollution and nuisance caused by a gold and silver mine with an extraction plant), *Moreno Gómez v. Spain* judgment of 16 November 2004, ECHR 2004-X (Case No 4143/02 – substantial nuisance through noise from bars), and *López Ostra v. Spain* judgment of 9 December 1994, Series A No 303-C (Case No 16798/90 – substantial nuisances through odours from industrial plants belonging to the leather industry). On that point, see also Frohwein, J./Peukert, W, *EMRK-Kommentar*, 2009 (3rd edition), Article 8, paragraph 43 et seq.

26 — See my Opinion in Case C-271/08 *Commission v Germany* [2010] ECR I-7087, paragraph 183 et seq.

77. In the present case the Republic of Austria has not sufficiently substantiated its claim that there is such serious nuisance or pollution through NO₂ emissions. Since no (imminent) interference with the fundamental right to integrity of the person or the right to respect for private and family life has ultimately been proven, the question of a possible conflict between these Community fundamental rights and the provisions on free movement of goods does not arise in the present case.

on the other, can be relied on to justify a restriction of the free movement of goods.

79. Under Article 30 EC, quantitative restrictions and measures having equivalent effect for the purposes of Articles 28 EC and 29 EC can be justified in so far as they are intended to protect certain legal interests expressly referred to in that provision. The environmental protection objective pursued by the regulation on the sectoral traffic prohibition does not constitute one of those ‘written’ reasons.

2. Justification on grounds of environmental protection

80. However, protection of the environment is recognised in settled case-law as an overriding reason in the public interest within the meaning of the *Cassis de Dijon* case-law.³⁰ Under that case-law, national measures capable of obstructing intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued.³¹

(a) Overriding reasons relating to environmental protection

81. According to this case-law, for a measure having equivalent effect to be justified by

78. The ‘written’ reasons set out in Article 30 EC, on the one hand, and the ‘unwritten’ overriding reasons in the public interest within the meaning of the *Cassis de Dijon* case-law,

30 — See, for the leading case, Case C-302/86 *Commission v Denmark* [1988] ECR 4607.

31 — Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 32; *Commission v Austria*, cited in footnote 3, paragraph 70; Case C-463/01 *Commission v Germany* [2004] ECR I-11705, paragraph 75; and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 75.

overriding reasons relating to environmental protection that measure must therefore (1) have been adopted for the purposes of environmental protection and (2) be proportionate. However, it is not absolutely clear whether discriminatory measures having an equivalent effect to a quantitative restriction can be justified by invoking overriding requirements relating to protection of the environment.³²

reason in the public interest to justify discriminatory measures having an equivalent effect to a quantitative restriction, whilst the principle of proportionality must naturally always be observed. This development in case-law is in principle correct.

82. The possibility of also justifying discriminatory measures by reference to the environmental protection objectives pursued thereby is of particular relevance in the present case. With reference to the exemptions for local and regional lorry traffic provided for in the regulation on the sectoral traffic prohibition, the Commission points out that the prohibition primarily affects goods in transit through the prohibited zone. Accordingly, the prohibition is highly discriminatory in nature.

84. This development was started by the judgment in *Commission v Belgium*,³³ in which a directly discriminatory prohibition on the importation of waste into Wallonia was declared justified with reference to overriding requirements relating to protection of the environment.³⁴ In its subsequent case-law the Court ruled inter alia that indirect discrimination arising from the application of national rules governing noise emissions where second-hand aircraft are registered was to be regarded as justified by considerations

83. In the Court's more recent case-law there are clear indications that environmental protection can be relied on as an overriding

33 — Case C-2/90 [1992] ECR I-4431.

34 — However, in its grounds for this judgment the Court avoided expressly confirming the applicability of the unwritten justification of overriding requirements relating to protection of the environment to directly discriminatory interference with fundamental freedoms. Instead, it stuck *pro forma* by the rule that overriding requirements may be taken into account only in the case of measures which apply without distinction to both domestic and imported products. It then worked around this rule by holding that the prohibition on importing waste at issue was non-discriminatory with reference to the principle, laid down by the second sentence of Article 130r(2) of the EC Treaty (second sentence of Article 174(2) EC), that environmental damage should as a matter of priority be remedied at source. For a critical analysis of this workaround solution, which is unconvincing from the point of view of legal doctrine, see the Opinions of Advocate General Jacobs in C-203/96 *Dusseldorp and Others* [1998] I-4075 Case, point 90, and in Case C-379/98 *PreussenElektra* [2001] I-2099, point 222 et seq. See also Nowak, C., 'Die Grundfreiheiten des EG-Vertrags und der Umweltschutz', *VerwArch* 2002, p. 368, 376; Scheuing, D., 'Regulierung und Marktfreiheit im Europäischen Umweltrecht', *EurR* 2001, pp. 1, 5 and 6.

32 — According to traditional case-law, the unwritten justification of overriding reasons in the public interest may be applied to justify discriminatory restrictions on fundamental freedoms. See, for example, Case C-153/08 *Commission v Spain* [2009] ECR I-9735, paragraph 36; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraphs 36 and 37; and Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 19.

of public health *and* environmental protection.³⁵ In its judgment in *PreussenElektra*,³⁶ the Court found that although – directly discriminatory³⁷ – national rules on the purchase of electricity from renewable sources constituted a measure having equivalent effect for the purposes of Article 28 EC, they were nevertheless justified by environmental protection requirements and the particular features of the electricity market.³⁸

85. Also of particular significance is the judgment in *Commission v Germany*³⁹ in which the Court was required to rule *inter alia* on the compatibility with the free movement of goods of a national rule on the avoidance and recovery of packaging waste. This rule provided for the replacement, as regards drinks packaging, of a global packaging-collection system with a deposit and return system. This change made it more difficult or more expensive to distribute natural mineral water from other Member States and therefore constituted a barrier to intra-Community trade. Furthermore, the effects of this change impacted more on foreign producers than national producers and therefore it had to be regarded as indirectly discriminatory. However, the Court examined the possibility of justifying this rule by reasons relating to protection of the environment. In that respect it concluded that although such justification by overriding reasons relating to protection of the environment was in principle possible, it was precluded by the principle of proportionality in that specific case as there was no appropriate transitional period.

35 — Case C-389/96 *Aher-Waggon* [1998] ECR I-4473. This preliminary ruling concerned German rules which provided, where aircraft were registered for the first time, for noise standards that went beyond the standards laid down by the directive applicable *ratione temporis*. The – ultimately justified – indirect discrimination arose from the fact that the purchase of a second-hand aircraft registered in national territory was possible without new authorisation, whilst the purchase of a second-hand aircraft registered abroad necessarily resulted in that aircraft being first registered in Germany. Consequently, second-hand aircraft which had been registered in national territory before the national rules entered into force were, when sold, *de facto* exempt from noise limits, whilst those rules automatically applied to second-hand aircraft purchased in another EU State.

36 — Case C-379/98 [2001] ECR I-2099.

37 — For this aspect, see the Opinion of Advocate General Jacobs in *PreussenElektra* (cited in footnote 34, points 220 and 221) and Gellermann, M., 'Das Stromeinspeisungsgesetz auf dem Prüfstand des Europäischen Gemeinschaftsrechts', DVBl. 2000, p. 509, 515.

38 — It is not clear from the judgment whether or not the Court examined the overriding reasons relating to protection of the environment as an independent justification in this judgment. The predominant view is that ultimately it probably did. See Nowak, C., loc. cit. (footnote 34), pp. 380-1; Ruge, Anmerkung zur Rs. C-379/98, EuZW 2001, p. 247, 248; Kuhn, T., 'Implications of the "Preussen Elektra" Judgement of the European Court of Justice on the Community Rules on State Aid and the Free Movement of Goods', Legal Issues of Economic Integration 2001, pp. 361, 374 and 375.

39 — Cited in footnote 31. See also *Radlberger Getränkegesellschaft and S. Spitz* (cited in footnote 31).

86. This approach, whereby overriding requirements relating to protection of the environment can be relied on also to justify indirectly discriminatory measures having an equivalent effect to a quantitative restriction, was confirmed in the judgment in *Commission v Austria*⁴⁰ on the first regulation on a sectoral traffic prohibition on the A12 motorway in the Inn valley.

transportation of goods and the purpose and structure of the regulation on the traffic prohibition, Advocate General Geelhoed nevertheless concluded that, viewed as a whole and seen in its general context, the contested measure could not be regarded as being (indirectly) discriminatory and therefore a justification invoking overriding reasons relating to protection of the environment was possible in principle.⁴²

87. In analysing this judgment it should be noted in particular that in his Opinion in this case Advocate General Geelhoed first concluded that according to the Court's settled case-law only non-discriminatory measures having equivalent effect can be justified on overriding reasons in the public interest. Against that background, he examined closely whether or not the first sectoral traffic prohibition had indirectly discriminatory effects.⁴¹ This was disputed in particular because road hauliers from other Member States were affected considerably more than Austrian road hauliers on account of the exemptions for transports of the goods having their origin or destination in the improvement zone. Having particular regard to the geographical context of the transalpine

88. In its judgment in that case the Court did not address the question of the discriminatory character of the regulation on the sectoral traffic prohibition at issue. In its examination of the justification of the obstacle to the free movement of goods identified it merely found that national measures capable of obstructing intra-Community trade may be justified by overriding requirements relating to protection of the environment, provided that the measures are proportionate to the aim pursued.⁴³ Nor did the Court subsequently restrict the application of this justification to non-discriminatory measures in its examination thereof.

89. This development in the Court's case-law leads me to conclude that protection of the environment can also be relied on as an

40 — Cited in footnote 3.

41 — Opinion of Advocate General Geelhoed in *Commission v Austria* (cited in footnote 3), point 89 et seq. Advocate General Geelhoed then discussed, in the alternative, the possibility of discriminatory measures being justified on overriding grounds relating to protection of the environment, and concluded that this unwritten justification could be applied also to indirectly discriminatory measures (point 99 et seq.).

42 — *Ibid.*, point 95.

43 — *Commission v Austria* (cited in footnote 3), paragraph 70.

overriding reason in the public interest to justify discriminatory measures having an equivalent effect to a quantitative restriction. Moreover, this approach is also supported by the fact that in its settled case-law the Court emphasises protection of the environment as one of the essential objectives of the Community.⁴⁴ In this context, it would be strange if discriminatory restrictions of the free movement of trade could not, under any circumstances, be justified by overriding reasons relating to protection of the environment.⁴⁵

restricting the free movement of trade can be taken into account in a proportionality test in which the necessity and reasonableness of such measures in particular can be examined more closely.⁴⁶

91. In the light of the foregoing, I conclude that measures having an equivalent effect to a quantitative restriction can be justified by overriding reasons relating to protection of the environment, provided that they are compatible with the principle of proportionality. Discriminatory measures can in principle also be justified by overriding reasons relating to protection of the environment.

90. However, the possibility of justifying even discriminatory restrictions of the free movement of goods by invoking overriding reasons relating to protection of the environment does not mean that justification necessarily has to be examined in identical fashion in relation to discriminatory and non-discriminatory measures. Instead, it must be assumed that the discriminatory character of a measure

(b) Proportionality test

92. It is not disputed in the present proceedings that the regulation on the sectoral traffic prohibition was adopted for the purposes of environmental protection. What is disputed in particular, however, is whether it also observes the principle of proportionality.

44 — See, for example, Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, paragraph 91; Case C-86/03 *Greece v Commission* [2005] ECR I-10979, paragraph 96; *Commission v Austria* (cited in footnote 3, paragraph 72); and Case C-176/03 *Commission v Council* [2005] ECR I-7879, paragraph 41.

45 — See Nowak, C., in: Heselerhaus/Nowak (Ed.), *Handbuch der Europäischen Grundrechte*, Munich, 2006, § 60, paragraph 25, who considers that it follows from the equal ranking in Community constitutional law for environmental protection, market freedom and free competition that both non-discriminatory and directly and/or indirectly discriminatory interferences with fundamental freedoms must be capable of justification on grounds of environmental protection, subject to the principle of proportionality.

46 — See Nowak, C., loc. cit. (footnote 45), paragraph 25, who considers that the proportionality test is sufficiently stringent in this connection and consequently ensures that not every measure motivated by environmental policy necessarily prevails over the free movement of goods within the EC.

93. The decisive factor in determining whether the regulation on the sectoral traffic prohibition is consistent with the principle of proportionality is whether this regulation is (1) *appropriate* and (2) *necessary* to attain the environmental protection objectives referred to therein, and (3) the resulting restriction of the free movement of goods is *reasonable*.⁴⁷

(i) Appropriateness of the regulation on the sectoral traffic prohibition

94. According to the Court's case-law, a measure is *appropriate* to ensuring attainment of the objective pursued if it genuinely reflects a concern to attain it in a consistent and systematic manner.⁴⁸

95. To assess whether the sectoral traffic prohibition is appropriate to attaining the environmental protection objectives it pursues, it is therefore essentially necessary to determine whether this traffic prohibition can contribute in a *consistent* and *systematic* manner to reducing NO₂ concentrations along the A12 motorway in the Inn valley.

96. In view, in particular, of the key role which accompanied transport on the highway on rails plays in the overall scheme of the sectoral traffic prohibition, I have doubts as to the Republic of Austria's argument that this traffic prohibition contributes in a consistent manner to reducing NO₂ concentrations along the A12 motorway in the Inn valley.

97. In terms of its basic structure the sectoral traffic prohibition is aimed at attaining, by reducing the number of lorry movements on the A12 motorway in the Inn valley, a reduction in the NO₂ emissions along this motorway. The Republic of Austria states that the traffic prohibition covers around 194 000 lorry movements a year, most of which are to be transferred to rail. According to the Republic of Austria, three forms of transport are available for this, namely conventional wagon-load transport, unaccompanied intermodal transport and accompanied transport on the highway on rails.⁴⁹

98. Having regard to the objectives and structure of the regulation on the sectoral traffic prohibition, it must be assumed that the transports of goods covered by the prohibition are ultimately to be transferred to 'traditional' rail transport (traditional wagon-load transport or unaccompanied intermodal

47 — As regards this three-part structure of the proportionality test, see my Opinion in *Commission v Germany* (cited in footnote 26, point 189).

48 — See Case C-384/08 *Attanasio Group* [2010] I-2025, paragraph 51, and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 42.

49 — See point 66 of this Opinion.

transport). Consequently, the prohibition on movement is not linked directly to lorry vehicle emissions but rather to the transported goods. The Republic of Austria states that the traffic prohibition only covers the carriage of goods with an affinity to rail, that is to say goods which are particularly suitable for 'traditional' transportation by rail and are therefore already transported by rail on a large scale.⁵⁰ In this context the highway on rails should be regarded as an additional transport alternative by rail which is intended to accompany the logistical process of transferring the road haulage of goods with an affinity to rail transport to rail in the form of conventional wagon-load transport or unaccompanied intermodal transport.⁵¹

(Stage 2),⁵² the sectoral traffic prohibition means that a substantial proportion of the lorry transports covered by it have to switch to the highway on rails within an unspecified transitional period. The Republic of Austria states that the capacity of the highway on rails has also been expanded accordingly for this purpose.⁵³

100. The highway on rails is characterised by the fact that lorries are carried together with their drivers, so that it can also readily be used to transport goods which do not have an affinity to rail transport.⁵⁴ From an environmental protection point of view, highways on rails are consequently particularly appropriate for transporting heavily polluting lorries, regardless of the affinity to rail of the transported goods. However, in its two-stage structure the sectoral traffic prohibition completely overlooks this particular feature of the highway on rails. As stated above, it ultimately results in a large number of transports of goods with an affinity to rail having to switch to the highway on rails for an indefinable period, regardless of the vehicle emissions of the lorries used.

99. However, since this transfer to 'traditional' rail transport in a cross-border context cannot be brought about within the two-stage transitional period, as provided for in the regulation on the sectoral traffic prohibition, of four months (Stage 1) and one year

101. In view of this contradiction in a central element of the regulation on the sectoral traffic prohibition, it would appear to me not

50 — Defence of the Republic of Austria, paragraph 126.

51 — Rejoinder of the Republic of Austria, paragraph 126.

52 — See point 125 of this Opinion.

53 — Before the introduction of Stage 1 of the traffic prohibition the highway on rails was expanded as from 2 May 2008 from 19 trains per day in each direction to 26 trains per day in each direction. See defence of the Republic of Austria, paragraph 294.

54 — See the rejoinder of the Republic of Austria, paragraph 125.

to be entirely consistent in environmental terms. Consequently, it cannot automatically be held that the regulation on the sectoral traffic prohibition is *appropriate* for reducing NO₂ concentrations along the A12 motorway in the Inn valley.

to reduce NO₂ emissions by between 9.9% and 10.7% by 2010. The sectoral traffic prohibition is intended to contribute to that by reducing NO₂ emission pollution by 1.5%.⁵⁶

(ii) Necessity of the regulation on the sectoral traffic prohibition

102. If the Court were to find that the regulation on the sectoral traffic prohibition was appropriate for reducing NO₂ concentrations along the A12 motorway in the Inn valley, it would be necessary to examine whether this traffic prohibition was necessary to attain the environmental protection objective pursued thereby.

103. A measure is *necessary* if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal right in question.⁵⁵

104. The Republic of Austria states that the regulation on the sectoral traffic prohibition forms part of a package of measures designed

105. As proof of the NO₂ reduction potential of 1.5% the Republic of Austria refers to the 'Programme under Paragraph 9a of the IG-L for the Province of Tyrol' which is attached as an annex.⁵⁷ This programme sets out the NO₂ reduction potential of various measures in the transport field. The measures analysed include the sectoral traffic prohibition on the A12 motorway in the Inn valley, which is said to cover 200 000 movements, the equivalent of 7.3% of lorry movements on the A12.⁵⁸ Such a traffic prohibition will lead to a 1.5% reduction in NO₂ emission pollution.⁵⁹ However, in its defence the Republic of Austria at the same time pointed out that, as a departure from the earlier plans, only 194 000 rather than 200 000 movements a year would be affected by the traffic prohibition. That is the equivalent of 6.6% of all heavy goods vehicle movements on the A12 rather than the original 7.3%.⁶⁰

56 — Defence of the Republic of Austria, paragraph 74.

57 — Programme under Paragraph 9a of the IG-L for the Province of Tyrol (cited in footnote 15).

58 — *Ibid.*, p. 65.

59 — *Ibid.*, p. 66.

60 — Defence of the Republic of Austria, paragraph 86. This reduction in the number of transports of goods concerned is attributable to the fact that under the original plans the transportation of cereals was to be covered by the sectoral prohibition but was not included in the list of goods concerned in the final version.

55 — Case 265/87 *Schröder* [1989] ECR 2237, paragraph 21.

106. Although the Republic of Austria thus stated in its defence that only 6.6% of all heavy goods vehicle movements per year and not 7.3% as originally planned were covered by the prohibition on movement, it stuck, without stating grounds, by the 1.5% NO₂ reduction potential mentioned in the original plans. When questioned on the subject at the hearing, the Republic of Austria submitted that a certain margin of error had to be accepted in calculating the NO₂ reduction potential of the sectoral traffic prohibition and that the decrease in the number of movements affected by 6000 lorry movements a year lay within that margin.

107. Although it is possible to infer from this statement that there is a generous margin of error in calculating the NO₂ reduction potential of the sectoral traffic prohibition, the Commission did not contradict the Republic of Austria's submission on this point. Nor is it possible to infer anything else from the documents which could cast doubt on the accuracy of this statement. Therefore, it must be assumed below that the NO₂ reduction potential of the regulation on the sectoral traffic prohibition is 1.5%.

108. As to whether the NO₂ reduction potential of the regulation on the sectoral traffic prohibition could be attained by means of less

intrusive traffic measures, the opinions of the Commission and the Republic of Austria vary enormously.

109. In the view of the Commission, there are a large number of less restrictive measures which were not taken, such as a permanent speed limit on the motorway in the Inn valley, extensions to higher Euro standards of the traffic prohibitions applicable to older lorries, the introduction of a differentiated traffic prohibition based on pollutant categories, enhanced measures in the field of car traffic, toll-related measures in respect of lorries and cars, and other economic instruments. The Republic of Austria provides evidence to counter these suggestions.

110. Although there is no need for the Court itself to give a detailed ruling on whether and, if so, what other measures could have been selected, where necessary, to reduce NO₂,⁶¹ it is necessary, in order to examine the necessity of the sectoral traffic prohibition, to compare this measure with one or more measures with NO₂ reduction potential that were not taken.

⁶¹ — See *Commission v Austria* (cited in footnote 3, paragraph 87).

111. In this connection the Commission's comments on the NO₂ reduction potential of a year-round speed limit of 100 km/h are of particular relevance.

112. On the basis of the calculations of the Institut für Energie- und Umweltforschung Heidelberg (ifeu),⁶² the Commission argues that a year-round speed limit of 100 km/h results in a reduction in annual NO₂ emission pollution of approximately 7.5%, whilst the variable speed limit in force since November 2007 brings about a reduction of no more than 3.6 to 3.8%. Consequently, the additional NO₂ reduction potential of a year-round speed limit amounts to almost 4%. Even if the data submitted by the Austrian Government are taken as a starting point, the additional NO₂ reduction potential of a year-round speed limit of 100 km/h far exceeds the 1.5% NO₂ reduction sought by Republic of Austria though the sectoral traffic prohibition.⁶³

113. The Republic of Austria considers that the Commission's argument regarding the

effects of a year-round speed limit is factually unfounded and flawed in terms of method.⁶⁴ In this respect it relies inter alia on an expert's opinion from Ökoscience AG dated 6 August 2009.⁶⁵ The Republic of Austria points out inter alia that with a 130 km/h limit in force the average speed was just 116 km/h in 2006 and only 111 km/h in 2009, whilst with a limit of 100 km/h the average speed is in fact 103 km/h. Consequently, the introduction of a year-round speed limit would only produce a speed reduction of a further 8 km/h when a 130 km/h limit was in force. This slight reduction in speed explains why the introduction of a year-round 100 km/h speed limit has an additional NO₂ reduction potential of only 1.1%.⁶⁶

114. As I have already explained, in determining whether a measure is necessary consideration must be given to whether it is, from among several measures which are appropriate for meeting the objective pursued, the least onerous for the interest or legal right in question.

115. Having particular regard to the fact that, according to the Republic of Austria, even an 8 km/h reduction in speed when a 130 km/h

62 — Expert's report from the Institut für Energie- und Umweltforschung Heidelberg of 30 November 2007, 'Einfluss verkehrsbeschränkender Maßnahmen auf der Inntalautobahn auf die Luftqualität', Annex A-25 to the Commission's application.

63 — Commission's application, paragraph 70 et seq., and Commission's reply, paragraph 42 et seq.

64 — Defence of the Republic of Austria, paragraph 211 et seq., and the rejoinder of the Republic of Austria, paragraph 84 et seq.

65 — Ökoscience AG, 'Expertise zum Gutachten des ifeu zu Verkehrsmaßnahmen auf der Inntalautobahn A12', of 6 August 2009, Annex D-3 to the rejoinder of the Republic of Austria.

66 — Rejoinder of the Republic of Austria, paragraph 97.

limit is in force has a NO₂ reduction potential of 1.1 %, it is necessary, in my view, to concur with the Commission's argument that general measures to reduce average speed have high NO₂ reduction potential. Furthermore, the unfavourable effects of such a reduction in average speed are somewhat limited arithmetically, as can be calculated by the example of a reduction in the average speed from 111 km/h to 103 km/h on the section of the motorway in the Inn valley covered by the prohibition on movement. Arithmetically, it will take around 48 minutes to cover the entire 90-kilometre stretch at an average speed of 111 km/h. To cover the same stretch at an average speed of 103 km/h will take, arithmetically, about 52 minutes. The time loss in relation to the entire stretch is consequently only around four minutes.

116. In summary, it must be noted, on the one hand, that the sectoral prohibition constitutes a far-reaching interference with the free movement of goods which bans 6.6 % of all heavy goods vehicle movements on the A12, despite the fact that this measure has a NO₂ reduction potential of only 1.5 %. On the other, the information on the year-round speed limit contained in the case file shows that the Republic of Austria could bring about a reduction in NO₂ emissions of over 1 % just by temporarily reducing the average speed by 8 km/h.

117. In the light of these considerations, it is clear from a comparison of the respective NO₂ reduction potential and the effects of the sectoral traffic prohibition and the year-round speed limit that the sectoral traffic prohibition ultimately fails the necessity test.

(iii) Reasonableness of the regulation on the sectoral traffic prohibition

118. If, contrary to the view taken here, the Court concluded that the regulation on the sectoral traffic prohibition passes the necessity test, it would be necessary to examine, in addition, whether this prohibition restricted the free movement of goods in an unreasonable manner. This would be the case if, in spite of its favourable environmental effects, the sectoral traffic prohibition resulted in excessive interference with the free movement of goods.

119. The answer to the question whether there is excessive interference with the free movement of goods in the present case ultimately turns on the availability of adequate transport alternatives to carry the goods covered by the traffic prohibition.

120. It should be stressed in this connection that the section of motorway covered by the sectoral traffic prohibition forms part of a vital trunk route between certain Member States. Accordingly, the sectoral traffic prohibition, viewed in isolation, constitutes a radical interference with the free movement of goods.⁶⁷ The unfavourable effects of the sectoral traffic prohibition on the free movement and free transit of goods could be lessened by ensuring that realistic alternatives were available for the carriage of the goods concerned by other means of transport or via other road routes. That in turn would have a favourable effect on the reasonableness test of the sectoral traffic prohibition.

these alternative means of transport and road routes.

122. In my view, the Republic of Austria has not shown that adequate alternatives for the transalpine carriage of the goods concerned were available at the time the sectoral traffic prohibition was planned to take effect.

121. The question whether realistic alternatives for the carriage of the goods concerned by other means of transport or via other road routes were available at the time the sectoral traffic prohibition came into effect is heavily disputed between the parties to the proceedings. Whilst the Republic of Austria emphasises the possibilities for transferring the transports concerned to rail and the availability of alternative road routes, the Commission, the Italian Republic and the Kingdom of the Netherlands highlight a large number of problems which preclude effective use of

123. It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in that Member State at the time of the deadline set in the reasoned opinion and that the Court cannot take account of any subsequent changes.⁶⁸ Consequently, the question whether adequate alternatives were available must be assessed on the basis of the legislative situation in Austria on 9 June 2008. At that time the regulation on the sectoral traffic prohibition of 17 December 2007, which entered into force on 1 January 2008, provided for a two-stage introduction of the traffic prohibition on a stretch of around 90 km between Langkampfen (approximately 6 km from the Austrian-German border) and Zirl (approximately 12 km west of Innsbruck). In this respect, transit transports of waste, stone, earth, or excavated material were prohibited in an initial stage as of 2 May 2008. As from 1 January 2009 this prohibition

67 — See to that effect the Court's findings in its assessment of the first traffic prohibition on the A12 motorway in the Inn valley in *Commission v Austria* (cited in footnote 3, paragraph 87).

68 — See, for example, Case C-297/08 *Commission v Italy* [2010] ECR I-1749, paragraph 79 and the case-law cited.

applied in addition to the transportation of logs and cork, non-ferrous and ferrous ores, motor vehicles and trailers, steel (other than reinforcing and construction steel for delivery to building sites), marble and travertine, and tiles.

second stage of this prohibition provided for therein⁶⁹ were necessary.⁷⁰

124. The Republic of Austria refers, as transport alternatives, to the carriage of goods by rail (conventional wagon-load transport, unaccompanied intermodal transport, and the highway on rails) and the use of alternative routes for road transport. However, in my view it has not been shown that these transport alternatives were adequate at the time the sectoral traffic prohibition was planned to take effect.

126. The views of the Republic of Austria, on the one hand, and of the Commission and the Italian Republic, on the other, differ greatly on the transport capacity provided by the highway on rails. Whilst the Republic of Austria speaks of overcapacity, the Commission and the Italian Republic complain of a large number of practical problems which mean that the highway on rails is by no means capable of providing the transport capacity needed in connection with the implementation of the regulation on the sectoral traffic prohibition. The Commission and the Italian Republic consider that their view is confirmed *inter alia* by the fact that the Republic of Austria ultimately replaced the two-stage introduction of the sectoral traffic prohibition originally envisaged by a four-stage introduction and thereby *de facto* extended the adjustment periods.

125. As regards carriage of the goods concerned by conventional wagon-load transport or unaccompanied intermodal transport, the Republic of Austria ultimately acknowledged in its reply that the transfer of the goods transports concerned to traditional rail transport could not be effected as planned. That is precisely why the new rules on the sectoral traffic prohibition laid down by the regulation of 23 December 2008 and the division of the

127. Having regard to all the available documents and information, it has not, in my view, been shown that the highway on rails would have been able to provide adequate transport capacity if the two-stage introduction of the sectoral traffic prohibition had been introduced as planned.

⁶⁹ — See point 28 of this Opinion.

⁷⁰ — See defence of the Republic of Austria, paragraphs 300 and 301.

128. It should be noted in this connection that the highway on rails covers only the area east of Innsbruck. There is no highway on rails alternative for the area west of Innsbruck.

that the capacity of the highway on rails could not be expanded before the third stage of the sectoral prohibition on movement took effect.⁷³ Furthermore, this document also emphasised that 100% use of capacity of the highway on rails should be avoided in any event since that would almost certainly give rise to operating problems.⁷⁴ Accordingly, this document gives a very strong indication that, if the sectoral traffic prohibition had been implemented in two stages as originally planned, the capacity of the highway on rails would not, in all probability, have been able to meet, without difficulty, the resultant increase in transport needs.

129. However, also in respect of the area east of Innsbruck there are, in my view, serious doubts as to the Republic of Austria's argument that adequate highway on rails capacity would have been available also for the two-stage introduction of the sectoral traffic prohibition originally planned. Particularly significant in this respect is a 2009 draft regulation of the First Minister of the Tyrol which provided for a fifth stage for the introduction of the sectoral traffic prohibition.⁷¹ Under that draft regulation, the introduction of the third stage provided for in the regulation of 23 December 2008 (traffic prohibition as of 1 July 2009 in respect of non-ferrous and ferrous ores, steel, marble, travertine and ceramic tiles)⁷² was to be divided again. The traffic prohibition in respect of non-ferrous and ferrous ores and marble and travertine was to apply only from 1 July 2010. The explanatory notes to this draft refer, as regards the further division of the third stage, to observations of the Transport Planning Department stating

130. It is also doubtful whether the alternative routes, indicated by the Republic of Austria, over the Resia Pass and through Switzerland could provide a realistic alternative for the transports covered by the sectoral traffic prohibition.

131. As regards the route via the Resia Pass, it should be noted that there is also a lorry ban on this stretch, albeit with exceptions for direct lorry transports to or from regions on the Resia route and between Vorarlberg and a large part of the Lake Constance area, on

71 — Draft regulation of the First Minister prohibiting the long-distance carriage of certain goods on the A12 motorway in the Inn valley, with explanatory notes; Annex C-1 to the Commission's reply.

72 — See point 28 of this Opinion.

73 — Explanatory notes on the draft regulation of the First Minister (cited in footnote 71, p. 4).

74 — *Ibid.*, p. 9.

the one hand, and part of northern Italy, on the other (the Veneto Region, the province of Trento and most of Alto Adige). Accordingly, this alternative route is not available for transports of goods which are loaded or unloaded outside those regions.

road network is available to only a limited extent as an alternative route for the transports of goods covered by the sectoral traffic prohibition.

132. Finally, the Republic of Austria refers to the Swiss road network as an additional alternative route for road transportation. However, the Italian Republic casts doubt on the possibility of diverting via Switzerland some of the transports of goods covered by the sectoral traffic prohibition, referring to the 'drop-counter system' which applies on important north-south trunk routes of the Swiss motorway network. Under this 'drop-counter system,' a period of particularly intense heavy traffic can result in a complete ban on heavy goods traffic on the main north-south routes.⁷⁵ The Republic of Austria does not dispute this contention. On the contrary, it confirms that a restriction on lorry transit movements depending on the volume of traffic, as in the case of the drop-counter system, poses an increased time risk which is difficult for the transport industry to calculate.⁷⁶ Consequently, it is clear that the Swiss

133. These considerations lead me to conclude that insufficient evidence has been adduced to show that, at the time the traffic prohibition took effect pursuant to the regulation on the sectoral traffic prohibition of 17 December 2007, adequate alternatives for the carriage of the goods concerned by other means of transport or via other road routes were available or could have been made available. Consequently, the traffic prohibition on the motorway in the Inn valley imposed by the regulation on the sectoral traffic prohibition of 17 December 2007 must be regarded as a radical interference with the free movement of goods. Since this traffic prohibition seeks to reduce NO₂ emission pollution by only 1.5%, I conclude that the restriction of the free movement of goods arising from the regulation on the sectoral traffic prohibition of 17 December 2007 is unreasonable.

(c) Interim conclusion

134. It follows from my considerations above that the regulation on the sectoral traffic prohibition is not necessary to ensure attainment of the environmental protection objectives pursued thereby and is appropriate for doing so to only a limited extent. In addition,

⁷⁵ — Statement in intervention of the Italian Republic, paragraphs 51 and 52.

⁷⁶ — Observations of the Republic of Austria of 1 March 2010, paragraph 63.

it leads to an unreasonable restriction of the free movement of goods. Consequently, the regulation on the sectoral prohibition on movement is, as a whole, disproportionate.

there is ultimately no such justification, as the regulation on the sectoral traffic prohibition is disproportionate.

IX — Costs

VIII — Summary

135. In view of my considerations above, I conclude that the regulation on the sectoral traffic prohibition of 17 December 2007 must be regarded as a measure having an equivalent effect to a quantitative restriction for the purposes of Articles 28 EC and 29 EC, which could in principle be justified by overriding reasons relating to protection of the environment. In the present proceedings, however,

136. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against the Republic of Austria, and as the latter has been unsuccessful in the essential aspects of its submissions, the Republic of Austria must be ordered to pay the costs. Under Article 69(4) of those rules, the Member States which have intervened in support of the Commission must bear their own costs.

X — Conclusion

137. In the light of the foregoing considerations, I propose that the Court,

‘(1) declare that, by prohibiting lorries with a total weight of more than 7,5 tonnes, carrying certain goods, from being driven on a section of the A12 motorway, by

means of the regulation of the First Minister of the Tyrol of 17 December 2007 prohibiting the long-distance carriage of certain goods on the A12 motorway in the Inn valley, the Republic of Austria has failed to fulfil its obligations under Articles 28 EC and 29 EC;

- (2) order the Republic of Austria to pay the costs;
- (3) order the Italian Republic and the Kingdom of the Netherlands to bear their own costs.'