

ORDER OF THE COURT
23 October 2002 *

In Case C-445/00,

Republic of Austria, represented by H. Dossi, acting as Agent, with an address
for service in Luxembourg,

applicant,

v

Council of the European Union, represented by A. Lopes Sabino and G. Hout-
tuin, acting as Agents,

defendant,

* Language of the case: German.

supported by

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

by

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

and by

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

interveners,

APPLICATION for annulment of Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Commission Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18),

THE COURT,

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

Advocate General: J. Mischo,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

- 1 By an application lodged at the Court Registry on 4 December 2000, the Republic of Austria brought an action under Article 230 EC for annulment of Council Regulation (EC) No 2012/2000 of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Commission Regulation (EC) No 3298/94 with regard to the system of ecopoints for heavy goods vehicles transiting through Austria (OJ 2000 L 241, p. 18, hereinafter ‘the contested Regulation’).

- 2 In Annex 3 to the application, the Republic of Austria produced an Opinion dated 11 April 2000 relating to the contested Regulation, which the Commission's legal service had sent to that institution's Directorate-General 'Energy and Transport' (hereinafter 'the Legal Opinion of 11 April 2000').
- 3 By a separate document lodged at the Court Registry on 4 December 2000, the Republic of Austria lodged an application under Articles 242 EC and 243 EC for suspension of operation of the contested Regulation and for the adoption of interim measures.
- 4 By order of 23 February 2001 ([2001] ECR I-1461), the President of the Court ordered the suspension of the operation of Article 2(1) of the contested Regulation pending judgment in the main proceedings, dismissed the remainder of the application and reserved the costs.
- 5 On 8 March 2001 the Council sent to the Court Registry its defence in the main proceedings.
- 6 By order of the President of the Court of 26 January 2001, the Commission was granted leave to intervene in support of the Council. On 10 May 2001 it lodged its statement in intervention at the Court Registry.

- 7 By document lodged at the Court Registry on 26 June 2002, the Commission raised an objection pursuant to Article 91(1) of the Rules of Procedure seeking an order that the Legal Opinion of 11 April 2000 be not used in this case. In support of that application, the Commission claimed that advice given by its legal service is intended exclusively for internal use and that its external dissemination risks prejudicing the proper working of the Community institutions. The exchange of views within the Commission could suffer because its services thereby come to hesitate in seeking written advice on the part of the legal service.
- 8 In observations sent to the Court Registry on 26 July 2002, the Council adopted those arguments of the Commission.
- 9 By observations lodged at the Court Registry on 1 August 2002, the Republic of Austria contends that it produced the Legal Opinion of 11 April 2000 as an annex to its application because the views expressed by the Commission's legal service in the matter were not only known at the level of the Ecopoints Committee but had even been discussed there. In that context, the Republic of Austria could not accept that such document was confidential.
- 10 Furthermore, the Republic of Austria argues that the objection raised by the Commission is pointless because, at the hearing on 5 February 2001 in the course of the application for interim measures, the President of the Court stated that the Legal Opinion of 11 April 2000 could not be taken into consideration for the purposes of those proceedings.

- 11 It is appropriate to make clear that the oral instruction not to refer to the Legal Opinion of 11 April 2000, given by the President of the Court to the parties at the interlocutory hearing on 5 February 2001, concerned solely the interlocutory proceedings. In the context of the main proceedings, it is still necessary to adopt a formal decision on the Commission's objection.
- 12 It would be contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless such production has been authorised by the institution concerned or ordered by that Court.
- 13 In that regard it must be stated that the Austrian authorities assert only that they were aware, at the level of the Ecopoints Committee, of the views expressed by the Commission's legal service but that they do not claim that the Legal Opinion of 11 April 2000 was disclosed to them by the Commission in the course of that committee's proceedings. The Commission, for its part, maintains that the Austrian authorities are illegally in possession of that advice. It must be concluded therefrom that the Commission has neither disclosed that advice nor authorised its disclosure to the Austrian authorities.
- 14 In those circumstances, the Commission's application must be upheld and the Legal Opinion of 11 April 2000 removed from the case-file.

On those grounds,

THE COURT

hereby orders:

1. The Opinion of the legal service of the Commission of the European Communities of 11 April 2000, produced by the Republic of Austria in Annex 3 to the application, is removed from the case-file.
2. The costs are reserved.

Luxembourg, 23 October 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President