

## **C-28/09 Commission v Austria, judgment of 21 December 2011**

The traffic prohibition for certain lorries from using the motorway in the Inn Valley, in the Tyrol, when there were less restrictive alternatives to protect the ambient air quality, infringes the principle of the free movement of goods.

The A12 motorway in the Inn Valley, in the Tyrol, is one of the principal land transport routes between southern Germany and northern Italy. It is therefore in heavy use by lorries. In 2003, after having found that the annual limit value for nitrogen dioxide established by Directives 96/62/EC and 1999/30/EC had been exceeded on this motorway, and in particular at the Vomp/Raststätte monitoring point, the Austrian authorities decided to limit the road traffic density. To do so, they finally adopted a regulation prohibiting lorries of over 7.5 tonnes carrying certain goods from using a 46 km section of the motorway.

In a first judgment delivered on 15 November 2005 (C-320/03 Commission v Austria), the Court of Justice, in response to a referral by the Commission, ruled that this prohibition was incompatible with the principle of the free movement of goods in that it was disproportionate in the light of the objective sought, i.e. the protection of air quality. The Court stressed in particular that before adopting a measure so radical as a sectoral traffic ban, the Austrian authorities were under a duty to examine carefully the possibility of using less restrictive measures, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established.

Following this judgment, the Austrian authorities gradually introduced new measures, and in particular a 100 km/h speed limit on a section of motorway, replaced by a variable speed limit, and the traffic prohibition of lorries according to their emissions (established by European emission standards known as 'Euro standards'). After having found that the air quality had not improved sufficiently, they decided to adopt a new sectoral restriction similar to that of 2003, this time on an even longer section (86 km).

Once again referred an action for failure to fulfil obligations by the Commission, the Court confirms the existence of a restriction to the fundamental principle of the free movement of goods. The fact that the contested regulation forms part

of a plan to ensure compliance with the limit values for nitrogen dioxide and therefore of Austria's obligations regarding the Directives referred to above, on the one hand, and that an alternative mode of transport for the goods concerned was provided for (by rail), on the other, has no bearing on the existence of such a restriction.

The Court then holds that the sectoral traffic prohibition constitutes an appropriate measure to achieve objectives of environmental protection and health. In this respect, it points out in particular that this prohibition allows nitrogen dioxide emissions to be reduced by about 1.5% a year in the zone concerned.

It also stresses the consistency between the desire to develop the transport of appropriate goods by rail and the fact that the prohibition measure is aimed precisely at these goods, even though it consequently permits the use of lorries producing more pollution if they do not carry these goods.

The Court considers, on the other hand, that the prohibition at issue goes beyond what is necessary to attain the objective sought. It considers that the Commission presented two alternative, less restrictive measures which the Austrian authorities have not proved to be inappropriate. The first of these measures is to extend the traffic prohibition for lorries in certain Euro classes to lorries in other classes, which it has not been shown would not have been able to contribute to the objective sought as effectively as the sectoral traffic prohibition. The second consists of replacing the variable speed limit by a permanent 100 km/h speed limit. The fact that this limit would not be respected in practice by users cannot reasonably be relied on by the Austrian authorities, which are responsible for adopting compulsory measures with penalties if need be. This solution offers a potential for reducing nitrogen dioxide emissions which, in the opinion of the Court, was not sufficiently taken into account by Austria.

The Court consequently allows the Commission's action for failure to fulfil obligations.