

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 9 September 2003¹

I — Introduction

1. The request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court) of the Republic of Austria concerns the interpretation of provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (hereinafter ‘Directive 93/89’)² and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (hereinafter ‘Directive 1999/62’).³ By judgment of 5 July 1995⁴ the Court of Justice annulled the former directive on the grounds that it was adopted without due consultation of the Parliament. However, the Court preserved the effects of the directive until the adoption of a new directive. As is clear from the fourth recital in the preamble thereto, Directive 1999/62 replaces Directive 93/89 annulled by the Court.

2. This case concerns whether, and if so to what extent, the provisions of the two directives — whose content is largely identical — have direct effect in proceedings involving an Austrian transport undertaking which considers that it is subject to discrimination in breach of Community law as a result of the rates imposed for use of the full itinerary of the Brenner motorway and is therefore claiming from the motorway operator, before the court hearing the main proceedings, repayment of the toll amounts paid in the period from 1 January 1997 to 31 July 2000.

II — Legal background

3. Under Article 2 of Directive 93/89, ‘toll’ means payment of a specified amount for a vehicle travelling the distance between two points on the infrastructure referred to in Article 7(d); the amount is to be based on the distance travelled and on the category of the vehicle and ‘vehicle’ means a motor vehicle or articulated vehicle combination intended exclusively for the carriage of goods by road and with a maximum

1 — Original language: German.

2 — OJ 1993 L 279, p. 32.

3 — OJ 1999 L 187, p. 42.

4 — Case C-21/94 *Parliament v Council* [1995] ECR I-1827.

permissible gross laden weight of not less than 12 tonnes.

4. Article 7 of Directive 93/89 provides:

‘Member States may maintain or introduce tolls and/or introduce user charges in accordance with the following conditions:

...

(b) Without prejudice to Article 8(2)(e) and Article 9, tolls and user charges may not discriminate, directly or indirectly, on the grounds of the nationality of the haulier or of origin or destination of the vehicle;

...

(h) Toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned.’

5. Directive 1999/62, which replaces Directive 93/89 annulled by the Court, was adopted by the Council on 17 June 1999 and, pursuant to Article 13 thereof, entered into force on 20 July 1999. Under Article 12 thereof, it was to be implemented by 1 July 2000. Article 7(4), (9) and (10) of Directive 1999/62 — the content of paragraphs 4 and 9 being identical to Article 7(b) and (h) of Directive 93/89 — provides:

‘4. Tolls and user charges may not discriminate, directly or indirectly, on the grounds of the nationality of the haulier or the origin or destination of the vehicle.

...

9. The weighted average tolls shall be related to the costs of constructing, operating and developing the infrastructure network concerned.

10. Without prejudice to the weighted average tolls referred to in paragraph 9, Member States may vary the rates at which tolls are charged according to:

(a) vehicle emission classes, provided that no toll is more than 50% above the toll

charged for equivalent vehicles meeting the strictest emission standards;

Directive 93/89. The Court also declared that, ‘by not applying the abovementioned tolls only in order to cover the costs linked with the construction, operation and development of the Brenner motorway’, the Republic of Austria had failed to fulfil its obligations under Article 7(h) of the Directive.

- (b) time of day, provided that no toll is more than 100% above the toll charged during the cheapest period of the day.

Any variation in tolls charged with respect to vehicle emission classes or the time of day shall be proportionate to the objective pursued.’

6. In its judgment of 26 September 2000⁵ the Court declared that, ‘by raising, on 1 July 1995 and 1 February 1996, the tolls for the full itinerary on the Brenner motorway, a transit route through Austria used predominantly by goods vehicles of a maximum permissible gross laden weight of not less than 12 tonnes registered in other Member States, but not for part itineraries on that motorway, the great majority of the users of which are vehicles of a maximum permissible gross laden weight of not less than 12 tonnes used for the same type of transport and registered in Austria’, the Republic of Austria had failed to fulfil its obligations under Article 7(b) of

III — Facts and questions referred for a preliminary ruling

7. The plaintiff in the main proceedings is Rieser Internationale Transporte GmbH (hereinafter ‘Rieser’), a transport undertaking established in Austria. It operates heavy goods vehicles with a maximum permissible gross laden weight of not less than 12 tonnes and with more than three axles in international road haulage and in doing so makes regular use inter alia of the Brenner motorway which is subject to tolls.

8. In the light of the judgment which the Court gave in the infringement proceedings in *Commission v Austria*,⁶ Rieser is seeking from the operator of the Brenner motor-

⁵ — Case C-205/98 *Commission v Austria* [2000] ECR I-7367.

⁶ — Cited in footnote 5 above.

way, the Autobahnen- und Schnellstraßen Finanzierungs-AG (hereinafter ‘Asfinag’), partial repayment of the tolls for the use of the full itinerary of the Brenner motorway which were paid during the period between 1 January 1997 and 31 July 2000, in its view in breach of Community law.

Directive 1999/62. Secondly, the Oberster Gerichtshof also considers — contrary to the view of the lower courts — that the direct effect of the prohibition on discrimination laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is also doubtful. Thirdly, it considers that clarification is necessary regarding the connection between annulled Directive 93/89 and the effects thereof, on the one hand, and Directive 1999/62, which it replaced on 17 June 1999 but which did not have to be implemented until 1 July 2000, on the other.

9. By a licence (Fruchtgenussvertrag) concluded in June 1997 with its sole shareholder, the Republic of Austria, Asfinag was given responsibility for the construction, planning, operation, maintenance and financing of Austria’s motorways and expressways, including the A 13 (Brenner motorway), with retrospective effect from 1 January 1997. Asfinag was also authorised by that licence to levy tolls and charges, in its own name and on its own account, in order thus to cover its costs.

11. Accordingly, the Oberster Gerichtshof submitted the following questions for a preliminary ruling:

10. Firstly, the Oberster Gerichtshof, before which the case was brought by means of an appeal on a point of law, has doubts as to the direct effect of Article 7(h) of Directive 93/89 and Article 7(9) of

‘(1) When concluding contracts with road users, is the defendant also required, in accordance with the Court of Justice’s case-law on the functional concept of the State, to observe the directly applicable (“self-executing”) provisions of Directive [93/89] and Directive [1999/62], with the result that the defendant cannot charge tolls higher than if those provisions had been complied with?’

- (2) If the answer to Question 1 should be “Yes”:

road users who use only part itineraries of that motorway?

Are Article 7(b) and (h) of Directive 93/89 and Article 7(4) and (9) of Directive 1999/62 directly applicable, in accordance with the Court of Justice’s case-law, so that they may be relied on in the calculating of a toll consistent with those Directives in respect of vehicles, with more than three axles, used for the carriage of goods for the full itinerary of the Austrian Brenner motorway, even if the Directives have not been transposed, or have been transposed imperfectly, into Austrian law?

- (3) If the answer to Question 2 should be “Yes”:

(a) How and by reference to what parameters is the authorised toll for a single journey on the full itinerary to be calculated?

(b) May Austrian hauliers too rely on the fact that the (excessive) rate for the full itinerary discriminates against them in comparison with

- (4) If the answer to both Questions 1 and 2 should be “Yes”:

(a) Is the judgment of the Court of Justice in Case C-21/94 *Parliament v Council*, cited above, in which it was held that the effects of Directive 93/89, which it annulled, were to be preserved until the Council should have adopted a new directive, to be interpreted as meaning that the effects are to be preserved until the Member States have transposed the new directive or until the period prescribed for transposition has expired?

(b) If the answer to Question 4(a) should be “No”: are the Member States under an obligation during the period from 17 June 1999 to 1 July 2000 to have regard to the new Directive: must they for example observe any effects in advance?’

IV — Submissions of the parties and legal assessment

no need to examiner further the infringement of these provisions alleged by Rieser alone.

A — Preliminary remarks on the infringement, alleged by Rieser, of Article 82 EC, read in conjunction with Article 86 EC

B — The first question

12. At the hearing Rieser stated that Asfinag had abused its dominant market position by levying excessive tolls and had thereby infringed Article 82 EC, read in conjunction with Article 86 EC.

15. By the first question the national court asks whether Rieser can rely directly on the abovementioned provisions of the two directives against a body such as Asfinag even though Asfinag is a legal person governed by private law which is nevertheless under State control.

13. In this connection, it must be stated that, according to established case-law, it is for the national court, not the parties to the main action, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor or add further questions.⁷

1. Submissions of the parties

16. Rieser considers that Asfinag satisfies the criteria relating to the functional concept of the State since it is under the decisive influence of its sole shareholder, the Republic of Austria, and a task previously performed under State control has been transferred to it.

14. Since the national court has not submitted a question concerning the interpretation of Articles 82 EC and 86 EC, there is

17. By contrast, Asfinag takes the view that, according to the Court's case-law, it is not required, when concluding contracts, to observe the directly effective provisions of

⁷ — Case 44/65 *Singer* [1965] ECR 965, at 970 and 971; Case C-412/96 *Kainuun Liikenne Oy and Others* [1998] ECR I-5141, paragraph 23; and Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29.

directives since, as a joint stock company governed by private law, it levies the toll on the Brenner motorway on its own account, has legal personality of its own, does not exercise powers of a public authority, and its bodies are not bound by directions from bodies of the Republic of Austria.

invoices necessary for drawing up the federal budget, together with cost forecasts for the planning, construction, maintenance and administration of the federal motorways and federal expressways. Finally, Asfinag is not entitled to fix the relevant toll rate without authorisation. This is laid down by law in such a way that the rate of the remuneration must be fixed by the Federal Minister for Economic Affairs after consultation with the Federal Minister for Finance, by reference to the type of vehicle. Therefore, Asfinag is, whatever its legal form, included among the bodies against which the provisions of a directive capable of having direct effect may be relied on.

18. In the view of the Commission, Asfinag must be ascribed, in functional terms, to the Austrian State and thus be regarded as a person to which Directive 93/89 and Directive 1999/62 are addressed. It is true that Asfinag is a joint stock company governed by private law which is bound to the Republic of Austria only contractually in such a way that its board is not subject to direction and that it levies the toll in its own name and on its own account and does not pass it on to the Republic of Austria. However, Asfinag is covered by the relevant provisions of the directives. The Republic of Austria is the defendant's sole shareholder and is entitled under the licence concluded with Asfinag to control all measures taken by Asfinag and its subsidiaries and to require at any time information on its activities. It has the right to set objectives. Asfinag has an obligation to it to draw up an annual maintenance plan and submit the relevant costs account to the federal government. Furthermore, it must each year and in good time submit to the federal government the planning

2. Legal assessment

19. As regards the first question referred for a preliminary ruling, it should first be noted that under the division of functions provided for by Article 234 EC, it is, according to established case-law, for the national court to apply the rules of Community law to an individual case.⁸ Consequently, the Court cannot consider whether — as is set out in the question — ‘the defendant’, that is to say Asfinag, is required to observe the directly applicable provisions of directives in the light of the Court's case-law concerning the so-called ‘functional concept of the State’.

⁸ — Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11, and Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 45.

20. However, it is for the Court to interpret the measures adopted by Community institutions and in particular to consider what effects they have and in particular whether those measures may be relied on against certain natural or legal persons or categories of persons. It is for the national court, on the other hand, to decide whether a party to proceedings before it falls within one of the categories so defined.⁹

21. Consequently, it is necessary to examine whether a body such as Asfinag may — regardless of its legal personality as a legal person governed by private law — be categorised, in functional terms, as a public authority against which the provisions of the abovementioned directives may be relied on directly.

22. In accordance with the Court's broad definition of the State, the direct effect of a directive can be relied on against any organs of public administration, including decentralised authorities such as municipalities.¹⁰ The broad definition of the State also means that a directly effective provision of a directive can apply to the State even where it operates not as a public

authority but in another form such as, for example, the owner of a public undertaking or as a majority or sole shareholder in a private undertaking.

23. According to established case-law, the starting point for this extension of the functional concept of the State is that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.¹¹ However, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).¹²

24. In the light of the foregoing, where an individual is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.¹³

9 — See Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 15 et seq.

10 — Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 31.

11 — See, inter alia, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20, and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 15.

12 — See *Faccini Dori*, cited in footnote 11 above, paragraph 26, and Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22.

13 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 49.

25. Accordingly, the Court has also ruled that a body or a State undertaking, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.¹⁴

26. The problem could now be whether such (vertical) direct effect of a directive can exist also vis-à-vis a legal person governed by private law, which has been established by the State and operated by it as sole shareholder and which has had transferred to it — without complete State supervision — tasks to be performed on its own responsibility and on its own account which were previously carried out by the State itself as public tasks.

27. As regards this assessment, I would like to recall my Opinion in *Collino and Chiappero*, according to which the sanction of direct effect vis-à-vis the Member States only exercises its full impact if it affects the State in all instances, regardless of the specific legal form in which the State is

acting. Whenever in fact the State, directly or indirectly, stands behind an institution or undertaking and controls it, then it is no longer a private individual.¹⁵

28. In this context it is necessary to assess below, on the one hand, the State's direct management, control and supervisory powers vis-à-vis an undertaking governed by private law and, on the other, the possibilities for indirectly intervening and exercising influence which arise from the structural link between the undertaking and the body governed by public law which stands behind it economically.

29. According to the principles set out above, the important factor as regards the State's direct management, control and supervisory powers is not necessarily whether an undertaking or other private body is formally subject to complete State supervision. Objectives laid down by law or individual powers of the State granted by agreement can also restrict the legal scope for manoeuvre available to the undertaking to the extent that they are, in terms of their effects, equivalent to complete supervision. Where, for example, the State is entitled to inspect any measures, including planning measures, taken by the undertaking and its subsidiaries, to set objectives and to require at any time information on its activities and its subsidiaries, the legal

14 — *Foster and Others*, cited in footnote 9 above, paragraph 20.

15 — Opinion in Case C-343/98 [2000] ECR I-6659, at I-6661, paragraph 23. See also the judgment in that case.

scope for manoeuvre of an undertaking is limited from the outset. This effect is reinforced where an undertaking is, within the economic field of activity transferred to it, bound absolutely to State objectives which are laid down by law and form part of the shareholders' agreement and has to comply with statutory framework conditions, which, for example — as in the case of Asfinag — also cover fixing the rate of the tolls and charges to be levied by it, and the undertaking is limited, for its part, to putting forward proposals on their future structure.

30. As regards the possibilities of exercising indirect influence, account should be taken of whether the State, which stands behind the undertaking economically, is able, inside the company, to guide in accordance with its own will the areas of freedom which, in law, outwardly formally exist, as is probably the case where there is a sole shareholder.

31. All the possibilities for controlling and exercising influence directly and indirectly, as can be put into effect in respect of an undertaking such as Asfinag, justify regarding it as belonging, in practical terms, to the State.

32. Finally, the protective purpose of the directive also indicates that in a situation such as the present an undertaking which is, in terms of its form, governed by private law, must be regarded as a person to which one of its directly effective provisions is addressed. It is necessary not only to prevent the State from taking advantage of its own failure to comply with Community law,¹⁶ but also from evading the effects of Community law by transferring the provision of public services to companies governed by private law.

33. The objective of the directives at issue in this case is to harmonise the levying of charges for the use of certain infrastructures in the Member States. This objective would be jeopardised if a Member State were able to evade the effects of the directives by organising under private law the relevant areas of responsibility conventionally assigned to the public administration. Accordingly, an undertaking governed by private law to which these tasks have been transferred — through State act of organisation or legal agreement —, and which satisfies the criteria of the broad definition of the State laid down by the Court, cannot be exempt from the direct effects of these directives.

16 — See, to this effect, the cases cited in footnotes 13 and 14 above.

34. Finally, it should be noted that, for the purposes of Article 1(b) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts,¹⁷ Asfinag must be regarded as a contracting authority.¹⁸ Under this provision, a contracting authority is, in addition to the State itself, any body governed by public law,

trative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.’

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

35. It is true that the term ‘contracting authority’ does not necessarily have the same meaning as the term ‘State’ in the functional sense against which an individual can rely on the direct effect of a directive. However, since in both cases the objective is to prevent the State evading the obligations upon it by transferring its tasks to a formally independent body, the fact that Asfinag satisfies the requirements for classification as a contracting authority provides an indication for the question to be answered in this case.

— having legal personality, and

36. Therefore, I propose that the answer to the first question referred for a preliminary ruling should be that when concluding contracts with road users a legal person governed by private law is also required to observe the directly effective provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, where the State has transferred to that legal person the task of levying tolls for the use of public infrastructures and it has direct or indirect control of that legal person.

— financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an adminis-

17 — OJ 1993 L 199, p. 54.

18 — See Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, and my Opinion in Case C-421/01 *Traunfellner* [2003] ECR I-11941 and I-11944.

C — *The second and third questions*

37. The second and third questions concern the same problem, that is to say the direct effect of the abovementioned provisions of Directives 93/89 and 1999/62 on the application by Member States of tolls and charges for the use of certain infrastructures. It is therefore appropriate to examine the two questions together.

1. Submissions of the parties

38. Rieser takes the view that the provisions of the directives include the necessary criteria to be directly effective and grant an individual the right to reimbursement of sums paid in excess. The toll for the full itinerary per kilometre amounts on average to EUR 3.41. By contrast, use of comparable part itineraries costs only around EUR 1.25 per kilometre. Thus, the sums to be reimbursed can be determined precisely. Rieser claims that it can rely on these directives even as an Austrian undertaking since they prohibit variations on the basis of origin or destination.

39. By contrast, Asfinag takes the view that Article 7(b) and (h) of Directive 93/89 and Articles 7(4) and (9) of Directive 1999/62 do not satisfy the requirements for direct effect.

40. The provisions of Article 7(b) of Directive 93/89 and of Article 7(4) of Directive 1999/62 cannot have direct effect because their content is not sufficiently precise. They do not make it clear how, that is to say by comparing which part itineraries, the possibility of users of the full itinerary being placed at a disadvantage is to be assessed. The uncertainty in the choice made by the Court in *Commission v Austria*¹⁹ of the part itineraries to be used for the comparison also demonstrates that the prohibition on discrimination on grounds of the origin or destination of the vehicle is not sufficiently clear and provides no ‘minimum guarantee’. If the national courts were compelled to implement Directive 93/89, they would have to exercise a degree of latitude in laying down the criteria for choosing the itineraries to be compared and in fixing the correct rate of the toll tariffs. That, however, is a matter for the legislature alone.

41. Even if it is assumed that Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are sufficiently precise, Austrian hauliers at least cannot rely on them since they are not placed at a disadvantage

¹⁹ — Cited in footnote 5 above.

on grounds of their nationality and the directives on transport infrastructure costs are not intended to lay down provisions on competition between hauliers within the same Member State.

42. Nor does Article 7(h) of Directive 93/89 have direct effect. It provides merely that toll rates are to be related to the costs of constructing, operating and developing the infrastructure network concerned but contains no provisions regarding the calculation of such costs and the division thereof into individual vehicle categories, itineraries and periods. It is impossible, on the basis of these rules laying down only a vague objective, to put even an approximate figure on the permissible toll. Nor did the Court specify the method of calculating the costs of the infrastructure network in *Commission v Austria*. Finally, there are clearly several methods of calculation that are compatible with Article 7(h) of Directive 93/89. However, since there is a great degree of latitude in this case, Directive 93/89 cannot be directly effective.

43. These comments must also apply mutatis mutandis to Directive 1999/62 since the relevant provisions thereof (in particular Article 7(9)) have not been amended substantively in that respect and in particular are worded not in more precise but rather less clear terms than the rules contained in

Directive 93/89. Article 7(9) of Directive 1999/62 takes as a basis 'weighted average tolls' and not merely 'tolls'. Article 7(10) of Directive 1999/62 provides for variations according to vehicle emission classes and time of day and Article 9(2) of Directive 1999/62 provides for the attribution of an (unspecified) percentage to environmental protection and the balanced development of transport networks. The calculation of the permissible rate of the toll for certain vehicles is thereby rendered even more difficult.

44. Directive 93/89 grants no individual rights even in accordance with its protective purpose. Its objective of eliminating distortions of competition is not adversely affected by the setting of different tariffs for the full itinerary and part itineraries. Neither Directive 93/89 itself nor the legal bases therefor in the EC Treaty reveal any legislative objective justifying the annulment of the toll contracts which it has concluded with the users of the Brenner motorway.

45. As regards Question 3(b), Asfinag takes the view that in any event Austrian hauliers cannot rely on the possible direct effects of the provisions of the directives since they are not placed at a disadvantage on grounds of their nationality and the directives on transport infrastructure costs are not intended to lay down provisions on competition between hauliers within the same Member State.

46. The Austrian Government also contends that the contested provisions of the directives do not have direct effect and argues — in a manner similar to *Asfinag* — that there is as little definition of the three cost items referred to therein — constructing, operating and developing — as there is of the term ‘infrastructure network concerned’. Consequently, it is completely unclear which costs are to be subsumed under these undefined terms and thus how they could enter into the corresponding calculation of the costs. Nor can the Member States’ already broad degree of latitude be restricted since the toll rate for the individual motorway user to be calculated pursuant to Article 7(h) of Directive 93/89 must merely be ‘related’ to these cost items and does not have to correspond to them precisely. Furthermore, no provisions are laid down concerning the division of the costs into individual user categories. Finally, Article 7(h) contains no information on a method of calculation which is to be applied to produce a toll for the individual road user which is consistent with Directive 93/89.

47. On account of its largely identical wording, these uncertainties also exist in respect of Article 7(9) of Directive 1999/62. In the case of the new directive there are even additional elements which prevent the toll rate for the individual road user from being calculated directly. It makes it possible to organise different toll rates within a certain band according to vehicle emission classes and time of day (see Article 7(10)(a)

and (b) of Directive 1999/62). According to the wording of the final sentence of Article 7(10) of Directive 1999/62, such variation in tolls charged with respect to vehicle emission classes or time of day must be proportionate to the objective pursued. However, Article 7(9) of Directive 1999/62 fails to provide any definition or detailed information on the possible variations.

48. In the absence of a mathematical result in accordance with Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62, a toll rate calculated accordingly cannot be examined in the light of the prohibition on discrimination laid down in Community law. The direct effect of Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 must be rejected on account of the lack of preciseness of Article 7(h) of Directive 93/89 and of Article 7(9) of Directive 1999/62.

49. The fact that the Member States also have a very large degree of latitude in fixing a non-discriminatory toll, for example as regards the choice of the part itineraries to be used in this regard, also militates against direct effect.

50. As regards Question 3(a), the Republic of Austria submits, in the alternative, that Article 7(h) of Directive 93/89 merely names three parameters which are not specified in detail, that is to say the costs of constructing, operating and developing the infrastructure network concerned, which are to be used as criteria for establishing the toll rate. However, there are no indications as to how these costs are to be calculated and which cost components the three abovementioned items actually include. In its judgment in *Commission v Austria* the Court itself also made no pronouncement, based on a calculation of infrastructure costs, as to the rate of the Brenner toll consistent with the Treaty.

51. As regards Question 3(b), the Republic of Austria — like Asfinag — takes the view that Directives 93/89 and 1999/62 pursue, in the light of their preambles, the objective of laying down rules on competition between the hauliers of various Member States without intending thereby to establish a subjective right of individual road users to use a particular itinerary at a particular tariff. In any event, an Austrian haulier cannot rely on the provisions relating to discrimination on grounds of nationality under Directives 93/89 and 1999/62 since the rules on competition between hauliers of the same Member State are not covered by the legislative objective of the relevant enabling provision of primary law.

52. By contrast, the Commission takes the view that the prohibition on discrimination laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 requires no further indications for it to be directly effective. The Court has already classified a prohibition on discrimination as unconditional and sufficiently precise in the case of *HI*.²⁰

53. The objective of the provisions at issue lies in protecting traffic in transit via the Brenner motorway from a toll that is excessive in comparison with that charged to users of part itineraries. However, transit traffic naturally does not include any purely national operation. Furthermore, the wording both of Article 7(b) of Directive 93/89 and of Article 7(4) of Directive 1999/62 expresses the need to protect all transit traffic from discrimination, regardless of the nationality of the haulier. This is also consistent with the Court's conclusion in *Commission v Austria*.²¹ If Rieser transits the full itinerary of the Brenner motorway, it can rely on Article 7(b) of Directive 93/89 or Article 7(4) of Directive 1999/62 in the same way as any other foreign or Austrian haulier.

20 — Case C-258/97 [1999] ECR I-1405, paragraphs 33 to 36.

21 — Cited in footnote 5 above, paragraph 16.

54. On the other hand, Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 cannot be said to have direct effect. Although the requirement that the toll be related to costs laid down therein gives the Member States some guidance for calculating tolls, they have, provided that they comply with this requirement, such a broad degree of latitude that the specific means of calculation does not have the unconditional or sufficiently precise character necessary for direct effect. Consequently, there is likewise no need to answer Question 3(a).

2. Legal assessment

(a) Preliminary remarks on the class of vehicles covered by the directive

55. In the second question referred for a preliminary ruling the national court takes as a basis vehicles with more than three axles. Under the fourth indent of Article 2 of Directive 93/89 and Article 2(b) of Directive 1999/62, for the purpose of the directive ‘vehicle’ means a motor vehicle with a maximum permissible gross laden weight of not less than 12 tonnes. Accordingly, the number of axles is unimportant. Even though the two parameters will generally apply to the same class of vehicles, the following interpretation relates only to the vehicles defined in the directive. It is for the national court to determine whether the vehicles used by Rieser fall within that definition.

(b) The prohibition on discrimination under Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62

(i) Direct effect

56. As the Court has consistently held, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.²²

57. In *Commission v Austria*²³ the Court ruled that the obligations arising from Article 7(b) and (h) of Directive 93/89 had not been fulfilled correctly.

58. There has been no such Court ruling regarding the implementation of the provisions of Article 7(4) and (9) of Directive

22 — See, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; *Fratelli Costanzo*, cited in footnote 10 above, paragraph 29; Case C-319/97 *Kortas* [1999] ECR I-3143, paragraph 21; Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25; and Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 38.

23 — Cited in footnote 5 above. See, to that effect, point 6 above.

1999/62 in domestic law. However, since their content is largely identical to those of the abovementioned provisions of previous Directive 93/89, the same should apply to them, at least as regards the period relevant in this case, namely that up until 1 July 2000,²⁴ within which the directive had to be implemented.

ation concentrates on whether Rieser can rely directly on the prohibition on discrimination based on the origin or destination of the vehicle. For it to be able to do so, this rule must be unconditional and sufficiently precise.

59. It must be examined whether the other conditions for the direct effect of the prohibition on direct or indirect discrimination based on the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are satisfied. The prohibition on discrimination based on nationality, which is also laid down in these provisions, is not relevant in the present case. It is true that in *Commission v Austria*²⁵ the Court held that the structure of the charges involves discrimination based on nationality contrary to Article 7(b) of Directive 93/89. However, as an Austrian undertaking, Rieser does not belong to the category of persons placed in a less favourable position. Therefore, the following examin-

60. In this regard it should be noted that in various fields of Community law the Court has regarded prohibitions on discrimination contained in directives as directly effective. Accordingly, it has consistently held that the prohibition on (direct or indirect) discrimination based on sex as regards access to employment and working conditions and social security is sufficiently precise and unconditional to allow individuals to rely upon it before the national courts in order to preclude the application of any national provision inconsistent with it.²⁶

61. As regards the award of public service contracts, the Court has ruled that a service provider can rely on the provisions of a directive laying down a general prohibition on discrimination if it is clear from an individual examination of their wording

24 — Asfinag pointed out that the relevant national provisions relating to tolls were amended to the effect that discrimination on grounds of nationality or of the origin or destination of the vehicle no longer existed, as the Commission had also confirmed by letter of 17 April 2001. However, this amendment did not take effect until 1 February 2001.

25 — Cited in footnote 5 above, paragraph 101.

26 — See *Marshall*, cited in footnote 13 above, paragraph 52; Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 21; Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraph 14; Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraph 19; *Foster and Others*, cited in footnote 9 above, paragraph 21; Case C-154/92 *van Cant* [1993] ECR I-3811, paragraph 17; Case C-337/91 *van Gemert-Derks* [1993] ECR I-5435, paragraph 31 et seq.; and Case C-139/95 *Balestra* [1997] ECR I-549, paragraph 32.

that they are unconditional and sufficiently clear and precise.²⁷

62. Finally, the Court recently held that the prohibition laid down in Article 9(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services²⁸ is directly effective.²⁹

63. In these circumstances there is in principle nothing to prevent direct effect being attributed also to the provisions of directives which prohibit discrimination based on the origin or destination of the vehicle, provided that they satisfy the minimum requirements of unconditionality and preciseness.

64. As regards whether or not Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are sufficiently precise,

it must be observed that these provisions preclude, generally and unequivocally, any discrimination based on the origin or destination of the vehicle. The supposed difficulties in establishing the itineraries to be compared, cited by the national court, Asfinag and the Austrian Government, do not prevent the prohibition on discrimination from being precise.

65. There can be discrimination if different rules are applied to comparable situations or the same rule is applied to different situations. In any event, the application of a prohibition on discrimination therefore requires a comparison of different factual situations and the rules which govern them. It is primarily for the body applying the law and not the legislature to make this comparison.

66. It is possible to lay down in rules the criteria to be taken into account, such as, for example, nationality or the origin or destination of the vehicle in the present case. However, in view of the variety of possible factual situations, it is impossible for the legislature to set out all the factors that may be relevant to the comparison. However, this in no way alters the clear statement of the prohibition on discrimination, namely that similar situations cannot be treated differently and different situations cannot be treated the same.

27 — Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 42 et seq., and *HI*, cited in footnote 20 above, paragraph 34 et seq.

28 — OJ 1997 L 117, p. 15.

29 — Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 114.

67. In *Commission v Austria*³⁰ the Court compared the toll per kilometre for following the full itinerary and the toll per kilometre for following certain part itineraries. In doing so it took account only of those part itineraries that link localities which are of economic significance and thus took into consideration a further criterion for the comparability of the itineraries in addition to the origin and destination of the vehicle. It is only on the part itineraries selected by the Court that there is heavy goods traffic similar to that on the full itinerary. This criterion is consistent with the spirit and purpose of the directive, namely to eliminate distortions of competition between transport undertakings.³¹

68. It must also be considered whether the prohibition on discrimination can be regarded as unconditional in the light of the exceptions and reservations laid down in Article 7(b) of Directive 93/89 ('... Without prejudice to Article 8(2)(e) and Article 9...').³²

69. The answer to this must also be in the affirmative. The reservation in favour of Article 8(2)(e) is a transitional provision which restricts the validity of the directive for a certain period but does not make the abovementioned principle subject to any

condition as regards the scope thereof. The rule contained in Article 9 is also intended merely to leave open to the Member States the possibility of excluding border areas from the scope of the directive in accordance with the procedure laid down in the Council decision of 21 March 1962. However, it is clearly not intended to limit or make conditional the application of the principle of equal treatment within its scope *ratione materiae* and therefore it likewise does not prevent the conclusion being drawn that the prohibition on discrimination has direct effect.³³

70. Therefore, if the criteria for the direct effect of Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 are satisfied where the provision is viewed in isolation, the question arises as to whether, in the light of the systematic link with the other provisions of the directive, the prohibition on discrimination can be regarded as sufficiently precise and unconditional to allow individuals to rely upon it against the State (in the broadest sense). Asfinag and the Austrian Government cast doubt on this, arguing that in view of the scope for differentiation and the latitude granted to the Member States by Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 as regards the structuring of toll rates it must be held that Article 7(b) of Directive 93/89 and Article 7(4) likewise have no direct effect.

30 — Cited in footnote 5 above, paragraphs 72 to 75.

31 — See first recital in the preamble to Directive 93/89 and to Directive 1999/62.

32 — See also *Foster and Others*, cited in footnote 9 above, paragraph 53 et seq.

33 — See also *Federatie Nederlandse Vakbeweging*, cited in footnote 26 above, paragraph 19.

71. However, this argument cannot be accepted. In this respect it should be noted that the granting of a margin of latitude and discretion and a power of assessment in transposing a directive does not preclude the direct effect thereof if the objective of the directive is set out in sufficiently precise terms. Even where a provision of a directive leaves the Member States a degree of latitude as regards the form and methods for achieving the result, it can still prescribe unconditionally the result to be achieved, for example the abolition of any provisions contrary to the principle of equal treatment.³⁴

72. Accordingly, it can be argued in the present case that the fact that the Member States are left a considerable degree of discretion and variation in fixing a toll rate that complies with the directive — a point on which all the parties concerned agree — cannot deny direct effect to the sufficiently precise and unconditionally worded prohibition on discrimination.

73. Therefore, it is clear that the provisions of Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 have direct effect as regards the objective set out therein which is to be attained when fixing a toll that complies with the directive.

(ii) May Austrian undertakings also rely on the prohibition on discrimination? (Question 3(b))

74. According to the wording of the provision in question, discrimination on the grounds of the nationality of the haulier or of origin or destination of the vehicle is not permitted. Whereas the first alternative — no discrimination on the grounds of nationality — clearly has in mind the protection of foreign hauliers, the second — no discrimination on the grounds of origin or destination of the vehicle — reveals no such (limited) protective purpose.

75. In *Commission v Austria*³⁵ the Court accordingly based its finding that there had been a failure to fulfil Treaty obligations on infringements of both alternatives of the prohibition on discrimination and stated that Article 7(b) of Directive 93/89 prohibits not only any discrimination based on the nationality of hauliers but also any based on the origin or destination of the vehicle in order to avoid any form of distortion of competition as between transport undertakings in the Member States.³⁶

³⁴ — *Federatie Nederlandse Vakbeweging*, cited in footnote 26 above, paragraph 20 et seq.; see also *Becker*, cited in footnote 22 above, paragraph 28 et seq.

³⁵ — See footnote 5. See, to that effect, also the Opinion of Advocate General Saggio in *Commission v Austria*, cited in footnote 5 above, paragraph 47.

³⁶ — Cited in footnote 5 above, paragraph 109.

76. The Court based the infringement of the second alternative, irrespective of the nationality of the haulier, solely on the fact that vehicles carrying goods are subject to a tariff difference, depending on whether those vehicles follow the full itinerary on the Brenner motorway or certain part itineraries, which operates to the detriment of vehicles engaged in transit traffic.³⁷

77. It therefore follows that Austrian hauliers who transit the full itinerary of the Brenner motorway and are thereby placed at a disadvantage compared with certain users of part itineraries can rely on the second alternative of the prohibition on discrimination laid down in Article 7(b) of Directive 93/89.

78. This subjective protective purpose of the provision of the directive is in no way altered by the fact that, according to the Court's findings, the great majority of the vehicles engaged in transit traffic are not registered in Austria³⁸ and therefore in actual fact discrimination based on nationality coincides with discrimination based on the origin and destination of the vehicle.

(iii) Consequences of the direct effect of the prohibition on discrimination

79. In so far as an individual can rely on directly effective provisions of the directive, contrary national provisions are ineffective. The absence of any further need to pay the excessive toll is not the only consequence. In order to ensure the practical effect of the prohibition on discrimination, the amounts already paid must also be reimbursed in so far as they exceed the amounts paid by the favoured group, that is to say in this case the users of comparable itineraries.

80. According to the Court's well-established case-law, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court.³⁹ Furthermore, only by reimbursing the discriminatory charges is the distortion of competition caused by them eliminated again.⁴⁰

37 — Cited in footnote 5 above, paragraph 111 et seq.

38 — *Commission v Austria*, cited in footnote 5 above, paragraph 107 et seq.

39 — Case 309/85 *Barra* [1988] ECR 355, paragraph 17; Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 40; Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 23; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84; and *Marks & Spencer*, cited in footnote 22 above, paragraph 30.

40 — See Opinion of Advocate General Geelhoed in Case C-129/00 *Commission v Italy* [2003] ECR I-14637, paragraph 70.

81. The Court has already ruled to this effect on several occasions in connection with charges that have been levied in breach of the prohibition on discrimination.⁴¹ However, each of those cases concerned breaches of prohibitions on discrimination arising directly from the provisions of the Treaty. It is not possible to see any reason why a breach of a directly effective prohibition on discrimination laid down in a directive should be treated any differently in terms of its others consequences. Furthermore, the Court has recognised an entitlement to compensation also in the case of breaches against different kinds of directly effective provisions of directives.⁴²

82. An entitlement to reimbursement of payments made but not due exists also where they have been levied in breach of Community law by a formally private, but State-controlled undertaking.⁴³ In particular, it is not possible to raise against an entitlement the argument that the amounts are levied not by public authorities as charges but as remuneration pursuant to an agreement of private law and that the Court's case-law concerning the reimbursement of charges in breach of Community law cannot therefore be applied.⁴⁴

83. In that respect it should be noted that it is the settled case-law of the Court that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law.⁴⁵

84. The same must apply where the consideration for the use of a State service is levied in the form of a contractual user remuneration as a result of the privatisation of the area of administration concerned but must be classified as a public (toll) fee in terms of its function or replaces such a fee. The view set out in the answer to the first question referred for a preliminary ruling, namely that a Member State may not evade its obligations under Community law by privatising or farming out particular areas of public administration, must also apply to the reimbursement of charges.

85. According to the Court's case-law, where the Member States or the legal persons and bodies covered by the broad concept of the State are in principle required to reimburse charges levied in breach of directly effective Community law, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to lay down the detailed procedural rules govern-

41 — See, for example, *Barra*, cited in footnote 39 above. See also Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 58.

42 — See, for example, *BP Supergas*, cited in footnote 39 above.

43 — See, similarly, *GT-Link*, cited in footnote 41 above, paragraph 59, in respect of the duty of a public undertaking to reimburse charges.

44 — See, to this effect, the submissions of the Republic of Austria in parallel case C-257/02 *Stuij en de Man*, reproduced in the order for reference made by the Oberster Gerichtshof (p. 10).

45 — See, inter alia, Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 39, and Case C-294/99 *Athinaiki Zythopoiia* [2001] ECR I-6797, paragraph 27.

ing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions and do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law, in accordance with the principle of equivalence and effectiveness.⁴⁶

86. It is also for the national court to establish the level of the amount to be reimbursed but in this regard it must be guided by the objective of offsetting discrimination between the users of the full itinerary and the users of the three part itineraries (Innsbruck—Schönberg, Innsbruck—Matrei/Steinach and Matrei/Steinach—frontier post) which the Court regarded as comparable in *Commission v Austria*.⁴⁷

87. In that respect the question arises as to how account is to be taken of the possibility of the person paying the charge passing the costs on to a third party. This problem arises in the present case because according to the order for reference, Rieser claims that it was unable to pass the increase in the

tolls on to its customers — a claim that is disputed by Asfinag.⁴⁸

88. According to the Court's case-law, a person cannot demand repayment of taxes, charges and duties paid in breach of Community law where it is established that he has actually passed them on to other persons.⁴⁹

89. In such circumstances, the burden of the charge levied but not due has been borne not by the payer of the charge, but by the customer to whom the cost has been passed on. Therefore, to repay the payer of the charge the amount of the charge already received from the customer would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the customer of the illegality of the charge.⁵⁰

90. However, the question whether an indirect charge has or has not been passed on in each case is a question of fact to be determined by the national court. The actual passing-on of such taxes, either in whole or in part, depends on various factors in each commercial transaction

48 — See pages 9 and 13 of the order for reference.

46 — Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraph 16; and Joined Cases C-216/99 and C-222/99 *Prisco and CASER* [2002] ECR I-6761, paragraph 69 et seq.

47 — Cited in footnote 5 above, paragraphs 72 to 75.

49 — Case 68/79 *Just* [1980] ECR 501; Case 61/79 *Denkavit italiana* [1980] ECR 1205; *San Giorgio*, cited in footnote 41 above, paragraph 13; Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 21; and *GT-Link*, cited in footnote 41 above, paragraph 58.

50 — *Comateb and Others*, cited in footnote 49 above, paragraph 22.

which distinguish it from other transactions in other contexts.⁵¹ According to the Court's case-law, in any event it may not be assumed that they have been passed on. In particular, it is not for the payer of the charge to prove the contrary. Accordingly, a Member State may resist repayment to the person who paid of a charge levied in breach of Community law only where *it is established* that the charge has been borne in its entirety by someone other than that person and that reimbursement of the latter would constitute unjust enrichment.⁵²

91. In addition, it should be borne in mind that even where it is established that the burden of the charge has been passed on in whole or in part to the customer, repayment to the payer of the charge of the amount thus passed on does not necessarily entail his unjust enrichment. The payer of the charge may also have suffered damage as a result of the very fact that he has passed on the charge levied in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales.⁵³

51 — Advocate General Geelhoed examines in detail the complex economic issues involved in his Opinion in *Commission v Italy*, cited in footnote 40 above, points 72 to 79.

52 — Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 17.

53 — As the Court stated in *Comateb and Others*, cited in footnote 49 above, paragraph 31, with reference to point 23 of the Opinion of Advocate General Tesaro in that case.

(c) The requirement that the toll be related to costs in accordance with Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62

92. As regards the direct effect of Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62, Asfinag, the Republic of Austria and the Commission essentially agree in their observations that these provisions do not have the unconditional or sufficiently precise character necessary for direct effect.

93. I concur with this view. The provisions merely give the Member States certain parameters (construction, operation and development of the road network or infrastructure network concerned) by which to establish the toll rate without defining these terms or otherwise limiting the degree of latitude left to the Member States in establishing the means of calculating the toll rate. The absence of preciseness in the rules is evident not least from the fact that the provisions of both directives require only that the toll rates be 'related to' the abovementioned cost parameters and not that they strictly observe them or the like. Therefore — apart from the abovementioned benchmarks — Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 leave the Member States a choice as regards the organisation of the method of calculation used to calculate a toll that complies with the directive.

(d) Intermediate conclusion

permissible gross laden weight of not less than 12 tonnes used for the carriage of goods on the full itinerary of the Austrian Brenner motorway.

94. Therefore, the second and third questions referred for a preliminary ruling should be answered as follows:

D — *The fourth question*

— The prohibition on discrimination on grounds of the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is directly effective. Undertakings which have paid for following the full itinerary using vehicles with a maximum permissible gross laden weight of not less than 12 tonnes a higher tariff per kilometre than users of economically comparable part itineraries can rely on the prohibition on discrimination and demand reimbursement of the toll levied in excess.

1. Submissions of the parties

95. Asfinag points out that although the Court annulled Directive 93/89 in *Parliament v Council* it preserved the effects of the annulled directive ‘until the Council has adopted a new directive’.⁵⁴

— Austrian hauliers too can rely on Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62.

96. Directive 1999/62 was adopted on 17 June 1999 and therefore, according to the clear wording of the abovementioned judgment, Directive 93/89 ceased to have effect on that date and consequently the rules on tolls could not have infringed this directive as from 17 June 1999. Directive 1999/62 could have effects in advance before the period prescribed for transposition had expired. However, in the period from 17 June 1999 to 1 July 2000 (the end

— Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 are not directly effective as regards calculating a toll that complies with the directives for vehicles with a maximum

⁵⁴ — Cited in footnote 4 above, paragraph 32.

of the period prescribed for transposition) the Republic of Austria took no measures which ran counter to the objectives of the new directive. Therefore, no legal void existed. However, Directive 1999/62 could not have direct effect before the period prescribed for transposition had expired.

97. The Austrian Government also refers to *Parliament v Council* and states that if, in connection with the continued effect of Directive 93/89, the Court had intended to take as a basis a date other than the date of the adoption of the directive, it would have expressed such intention clearly. Consequently, the continued effect of annulled Directive 93/89 pronounced in *Parliament v Council* could have existed only until the adoption of the new directive.

98. However, directives do not have binding effect merely when the period prescribed for transposition has expired. Since it recognised the effect of Directive 1999/62 in advance, the Republic of Austria adopted no measures at all that would have undermined the regulatory purpose of this directive.

99. On the other hand, it could not be concluded that there was direct effect before the period prescribed for transposition expired. Such an interpretation of the advance effect of a directive would ultimately lead to a circumvention of the fundamental notion underlying the two-tier nature of the directive, that is to say the need for a legislative measure of Community law and national law.

100. The Commission recalls that according to the fourth recital in the preamble to Directive 1999/62, which entered into force on 20 July 1999, it replaces Directive 93/89. Consequently, old Directive 93/89 ceased to have effect on that date. However, in the period from 20 July 1999 to 1 July 2000, the Member States were required to take account of Directive 1999/62 in so far as according to case-law they must, during the period for transposition allowed therein, refrain from taking any measures liable seriously to compromise achievement of the result prescribed by this directive. This follows directly from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC and from Directive 1999/62 itself.

2. Legal assessment

101. In the main proceedings Rieser asserts claims for reimbursement of tolls levied in excess in the period from 1 January 1997 to 31 July 2000. For there to be such claims during the entire period, there must have been a rule of Community law which the toll tariffs infringed and on which Rieser can rely.

102. In this context, the two parts of the fourth question referred for a preliminary ruling essentially seek to ascertain the time until which Directive 93/89 had direct effect in favour of Rieser and the time from which, if appropriate, Directive 1999/62 had similar effects.

(a) Preservation of the effects of Directive 93/89

103. All the parties correctly conclude — in so far as they have submitted observations on the fourth question referred for a preliminary ruling — that the direct effect of Directive 93/89 ceased at the time successor Directive 1999/62 was adopted and did not continue in force until the period prescribed for transposing the new directive had expired. In *Parliament v Council* the Court ordered that the effects of Directive 93/89 be preserved ‘until the Council has adopted new legislation in the matter’.⁵⁵

104. An order that the effects of Directive 93/89 be preserved until Directive 1999/62 had been transposed appears to be entirely impossible for various reasons. In that case both the directives would be in force during the period prescribed for transposing Directive 1999/62. Where the directives differed from one another, it would be unclear as to which requirements the Member States were to satisfy during this period. Furthermore, the end of the effect of Directive 93/89 would depend on action by the Member States and would occur on a different date depending on the Member State concerned.

⁵⁵ — Cited in footnote 4 above, paragraph 2 of the operative part.

105. However, the parties disagree as regards the exact time at which the direct effects of the old directive cease — the adoption or the entry into force of the new directive. Directive 1999/62 was adopted by the Council on 17 June 1999 but under Article 13 thereof did not enter into force until it was published in the *Official Journal of the European Communities* on 20 July 1999. The wording of the order that the effects be preserved points more towards the first date.⁵⁶ The national court also takes this date as a basis in Question 4(b).

106. However, the spirit and purpose of maintaining the effects of an annulled act is to prevent a legal void arising before a new act has replaced the annulled act. This is ensured only where the annulled act continues to have effect until the new act can produce effects. Since Directive 1999/62 did not have effect until it entered into force, this order by the Court must be construed as meaning that Directive 93/89 continued in force until this time, that is to say until 24.00 hours on 19 July 1999.⁵⁷ If ‘adoption’ of the new act within the meaning of *Parliament v Council* were to

⁵⁶ — See *Parliament v Council*, cited in footnote 4 above, paragraph 2 of the operative part.

⁵⁷ — Under Article 4(2) of Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits, entry into force of acts fixed at a given date is to occur at the beginning of the first hour of the day falling on that date. Consequently, Directive 1999/62 entered into force at 0.01 hours on 20 July 1999.

be construed as the approval thereof by the Council, there would be no effective rules between 17 June and 20 July 1999.

107. Therefore, in respect of the period up to and including 19 July 1999, Rieser can plead that the toll was levied in breach of Article 7(b) of Directive 93/89.

(b) The effects of Directive 1999/62 before the expiry of the period prescribed for transposition

108. It must be examined whether Directive 1999/62 produced effects in favour of Rieser in the period between 20 July 1999 — the date on which it entered into force — and 30 June 2000 — the end of the period prescribed for transposition.⁵⁸

109. During this period the Member States are required to transpose the directive into national law and also to refrain from taking any measures liable seriously to

compromise the result prescribed.⁵⁹ However, the requirement that no measures jeopardising the achievement of the result sought by a directive be taken, which is based on Article 10 EC and the third paragraph of Article 249 EC and laid down in particular in the judgment in *Inter-Environnement Wallonie*,⁶⁰ is not so extensive that national rules incompatible with the directive must be adjusted before the prescribed period expires.

110. At most in exceptional cases can the advance effects of the directive preclude the introduction of national provisions, that is to say where they run completely counter to the spirit and letter of the directive and thereby compromise the adjustment of the national legal order within the prescribed period.⁶¹

111. There is no such exceptional case here since the tariff at issue, which was in breach of the prohibition on discrimination laid down in Directive 1999/62, was introduced before the adoption of Directive 1999/62. Furthermore, the structure of the charges

58 — Under Article 12(1), the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1 July 2000.

59 — Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 18, and Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45. See also Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 32 et seq., and Opinion of Advocate General Geelhoed in that case, ECR I-11461, point 43.

60 — Cited in footnote 59 above. See also Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58 et seq.

61 — See the Opinion of Advocate General Jacobs in *Inter-Environnement Wallonie*, cited in footnote 59 above, point 40 et seq. The Court found that such a case existed in *ATRAL*, cited in footnote 60 above.

does not render the subsequent transposition of the directive considerably more difficult since the tariff could have been changed again in the short term. A particular transitional rule may have been necessary only in respect of multiple-trip cards.

112. It is settled case-law that the public authorities in the Member States are furthermore required to interpret national law, whether adopted before or after the directive, in the light of the directive.⁶² Since a directive produces its effects in respect of the persons to which it is addressed even before it enters into force, there are certain factors indicating that the duty to interpret national law in conformity with the directive exists even before the period for transposing the directive expires.⁶³

113. However, the Austrian provisions on the tariffs for the Brenner toll leave no scope for an interpretation which precludes any discrimination.

62 — Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20, *Faccini Dori*, cited in footnote 11 above, paragraph 26, and Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30.

63 — Opinion of Advocate General Jacobs in Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, at I-5578, points 23 and 24.

114. Nevertheless, it is not clear to what extent an individual can rely on a directive during the period prescribed for transposition where a Member State has already transposed it into national law but has done so incorrectly.

115. Firstly, Directive 93/89 had to be transposed into national law. If it is accepted that the rules on tolls at issue constituted, in the view of the Republic of Austria, correct transposition of Directive 93/89, there was hardly any further need for rules to be laid down after the adoption of Directive 1999/62 since the rules of the two directives are largely identical. In any event — as is evident from the file — Austria did not adjust the rules on tolls until after the judgment in the infringement proceedings and with effect from 1 February 2001. The replacement of Directive 93/89 by Directive 1999/62 did not, however, prompt the Austrian legislature to take any action.

116. In his Opinion in *Hansa Fleisch Ernst Mundt*⁶⁴ Advocate General Jacobs considered in detail the question whether or not an individual may, where a decision addressed to a Member State has already been implemented but implemented incorrectly, rely directly on that decision during the period prescribed for implementation laid down therein. Although that case

64 — Cited in footnote 63 above, point 19 et seq.

relates to a decision, his observations on direct effect are also applicable to directives.

(c) Infringement of the directly effective provisions of the Treaty

117. He rightly concludes that reliance on an act before the expiry of the period prescribed for the transposition thereof is not possible since otherwise the Member States that had made an attempt — albeit incorrectly — to effect transposition would be placed in a less favourable position than those which had remained completely inactive. Furthermore, the doctrine of direct effect is based on the idea that the Member State cannot rely, as against an individual, on the fact that it has failed to fulfil an obligation under Community law. However, the obligation to implement provisions of Community law does not become effective until the end of the period prescribed for implementation. In its judgment in that case the Court also held that the individual cannot rely directly on the decision during the period prescribed for transposition.⁶⁵

118. Consequently, Rieser cannot demand partial reimbursement of the toll in respect of the period from 20 July 1999 to 30 June 2000 by pleading that the toll tariff breached the prohibition on discrimination laid down in Directive 1999/62.

119. However, the question arises as to whether Rieser can base its claim in respect of this period on an infringement by the rules on tolls of a directly effective provision of the Treaty. It is true that the national court has referred no question to the Court in this regard. However, since it is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it,⁶⁶ this matter should be examined.

120. Firstly, the rules on tolls might infringe Article 72 EC which requires the Member States not to alter existing provisions governing transport to the detriment of undertakings of other Member States. However, since this is a mere prohibition on discrimination on grounds of nationality or place of establishment, Rieser cannot, as a domestic undertaking, rely on this provision.

⁶⁵ — *Hansa Fleisch Ernst Mundt*, cited in footnote 63 above, paragraph 20.

⁶⁶ — See, inter alia, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22, and Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18.

121. Secondly, there may have been a breach of the freedom to provide services. Under Article 51(1) EC, freedom to provide services in the field of transport is governed by the provisions of the title relating to transport. That restriction means that the objective laid down in Article 49 EC of abolishing during the transitional period restrictions on freedom to provide services is to be attained in the framework of the common transport policy provided for in Articles 70 EC and 71 EC. The Court has held⁶⁷ that, even on expiry of the transitional period, Articles 49 EC and 50 EC are not of direct application in the transport sector.⁶⁸ However, this does not prevent these provisions from serving as a reference point when it is a question of the Council's implementing freedom to supply services in that sector.

122. Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States⁶⁹ introduced the freedom to provide services in the international carriage of goods by road.⁷⁰ Since Rieser followed the full

itinerary of the Brenner motorway up to the Italian border, it must be concluded that it provided services in international carriage.

123. It is settled case-law that freedom to provide services within the meaning of Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services.⁷¹ That freedom likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.⁷²

67 — Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 63; see also Case 4/88 *Lambrechts Transport-bedrijf* [1989] ECR 2583, paragraph 14.

68 — See also my Opinion in Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, at I-4847, paragraph 27.

69 — OJ 1992 L 95, p. 1.

70 — See the second recital in the preamble to Regulation No 881/92.

71 — See, inter alia, Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; Case C-205/99 *Anafir and Others* [2001] ECR I-1271, paragraph 21; and Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 32.

72 — Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 17.

124. In accordance with this principle, the freedom to provide services may be relied on also by an undertaking against the State in which it is established where the services are provided to recipients established in another Member State.⁷³

125. Application of the freedom to provide services in connection with rules on the motorway toll is not precluded by the adoption of Directives 93/89 and 1999/62 which lay down special rules in this regard. The effects of the former directive ceased on 20 July 1999 and the provisions of Directive 1999/62 had no direct effect before the end of the period prescribed for transposition, as stated above.

126. In the present case the discriminatory motorway toll does not prevent hauliers transporting goods in transit from following the full itinerary of the Brenner motorway. However, since the charges for using the full itinerary are disproportionately high in relation to those for using individual part itineraries, they are liable to affect the economic attractiveness of using the full itinerary. Consequently, they constitute a restriction on the freedom to provide services to the detriment of hauliers trans-

porting goods in transit, regardless of where they are established.

127. Since the discriminatory rules on tolls cannot be justified either by overriding reasons relating to the public interest or by other reasons,⁷⁴ they probably constitute an unlawful restriction on the freedom to provide services under Article 49 EC.

128. An Austrian road haulier such as Rieser may, in compensation proceedings, rely on this provision of primary Community law which is directly effective — in the period between 20 July 1999 and 30 June 2000.

129. As regards the final period in respect of which Rieser demands reimbursement of the toll, that is to say from 1 to 31 July 2000, it should be mentioned, merely for the sake of completeness — in particular since the national court submitted no question in this regard — that the prohibition on discrimination laid down in Directive 1999/62 has been directly effective since the expiry of the period prescribed for transposition on 1 July 2000.

73 — See *Commission v France*, cited in footnote 72 above, paragraph 14; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 11; and *Sea-Land Service and Nedlloyd Lijnen*, cited in footnote 71 above, paragraph 32.

74 — As regards justification for discriminatory measures based on nationality, see Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 15, and, more recently, Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 19.

V — Conclusion

130. On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions submitted:

- (1) When concluding contracts with road users a legal person governed by private law is required to observe the directly effective provisions of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures and of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, where the State has transferred to that legal person the task of levying tolls for the use of public infrastructures and it has direct or indirect control of that legal person.
- (2) The prohibition on discrimination on grounds of the origin or destination of the vehicle laid down in Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62 is directly effective. Undertakings which have paid for following the full itinerary using vehicles with a maximum permissible gross laden weight of not less than 12 tonnes a higher tariff per kilometre than users of economically comparable part itineraries can rely on the prohibition on discrimination and demand reimbursement of the toll levied in excess.
- (3) Austrian hauliers too can rely on Article 7(b) of Directive 93/89 and Article 7(4) of Directive 1999/62.

- (4) Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62 are not directly effective as regards calculating a toll that complies with the directives for vehicles with a maximum permissible gross laden weight of not less than 12 tonnes used for the carriage of goods on the full itinerary of the Austrian Brenner motorway.
- (5) Directive 93/89 ceased to have effect upon the entry into force of Directive 1999/62 on 20 July 1999.
- (6) In the period from 20 July 1999 to 30 June 2000 Directive 1999/62 had no direct effects on which a haulier could rely in respect of a partial reimbursement of the toll for using the Brenner motorway (full itinerary). However, during this period a haulier can rely on the provisions of the Treaty on the freedom to provide services which apply in the field of the international carriage of goods by road under Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States.