

Case C-157/02

Rieser Internationale Transporte GmbH
v
Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag)

(Reference for a preliminary ruling from the Oberster Gerichtshof (Austria))

«(Carriage of goods by road – Tolls – Brenner motorway – Prohibition of discrimination – Discrimination on grounds of the nationality of the haulier or of the origin or destination of the vehicle)»

Opinion of Advocate General Alber delivered on 9 September 2003

Judgment of the Court (Sixth Chamber), 5 February 2004

Summary of the Judgment

1..

Acts of the institutions – Directives – Direct effect – Possibility of relying on a directive against a legal person governed by private law, controlled by the State, and entrusted with the task of levying tolls for the use of public road networks

(Art. 249, third para., EC)

2..

Transport – Road transport – Tax provisions – Harmonisation of laws – Directives 93/89 and 1999/62 – Tolls and charges for the use of certain infrastructures – Direct effect of the prohibition of discrimination on grounds of the haulier's nationality or of the vehicle's origin or destination – Principle of the link between the toll charges and infrastructure costs having no direct effect

(Council Directives 93/89, Arts 7(b) and (h), 8(2)(e) and 9, and 1999/62, Arts 7(4) and 9)

3..

Transport – Road transport – Tax provisions – Harmonisation of laws – Directive 93/89 – Tolls and charges levied for the use of certain infrastructures – Directives 93/89 and 1999/62 – Tolls and charges for the use of certain infrastructures – Prohibition of discrimination on grounds of the haulier's nationality or of the vehicle's origin or destination – Applicable to national hauliers

(Council Directives 93/89, Arts 7(b) and 1999/62, Art. 7(4))

4..

Transport – Road transport – Tax provisions – Harmonisation of laws – Directive 93/89 – Taxes on certain vehicles used for the carriage of goods by road and charges for the use of certain infrastructures – Judgment of the Court of Justice annulling that directive – Effect

(Art. 231, second para., EC; Council Directives 93/89 and 1999/62)

5..
Transport – Road transport – Tax provisions – Harmonisation of laws – Directive 1999/62 – Charging of heavy goods vehicles for the use of certain infrastructures – Effects of the directive before expiry of the period for transposition – Member States required not to adopt measures liable to compromise the result prescribed by the directive – Direct effect – None

(Art. 10, second para., EC and Art. 249, third para., EC; Council Directive 1999/62)

1.

When contracts are concluded with road users, the provisions of a directive capable of having direct effect may be relied upon against a legal person governed by private law where the State has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person. see para. 29, operative part 1

2.

Article 7(b) of Directive 93/89 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 Article 7(4) of Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures which prohibit any discrimination, whether direct or indirect, on the ground of the haulier's nationality or of the vehicle's origin or destination in the imposition of tolls and user charges, may be relied on before the national courts by individuals against State authorities so far as concerns the calculating of tolls for vehicles having a laden weight of at least 12 tonnes used for the carriage of goods when the directives have not been transposed, or have been imperfectly transposed, into domestic law. Article 7(h) of Directive 93/89 and Article 7(9) of Directive 1999/62, in contrast, which provide respectively for toll rates and weighted average tolls to be related to the costs of constructing, operating and developing the infrastructure network concerned, may not be relied upon by individuals against State authorities, for they set the Member States general guidelines for calculating toll dues, but do not provide any specific mode of calculation and leave the Member States very broad discretion in that regard. see paras 35-36, 38, 40-41, 44, operative part 2

3.

Like the hauliers of the other Member States, national hauliers may rely, as against their State, on the prohibition of discrimination, whether direct or indirect, laid down in Articles 7(b) of Directive 93/89 on the application by Member States of taxes on certain vehicles used for the carriage of good by road and tolls and charges for the use of certain infrastructures and Article 7(h) of Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures. It is in order to avoid any form of distortion of competition as between transport undertakings in the Member States that those provisions prohibit, in the application of user charges and tolls, not only discrimination based directly or indirectly on the nationality of hauliers but also that based on the origin or destination of the vehicle. see paras 51-52, 54, operative part 3

4.

Although the literal meaning of the judgment in Case C-21/94 *Parliament v Council* annulling Directive 93/89 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 is that the effects of that directive are preserved until the adoption of new legislation in that sphere, that judgment must, however, be understood

to mean that the effects of Directive 93/89 were to be preserved until the date of entry into force of Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures, which replaced it, that is to say, 20 July 1999. In connection with an action for annulment, the purpose of preserving the effects of a legal act annulled by the Court is not to allow a legal vacuum to subsist until the annulled act has been replaced by a new act. That objective can be attained if the legal act annulled continues to produce legal effects until the new act does so. see paras 59-61, operative part 4

5.

It follows from the application of the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC that, during the period prescribed by a directive for its transposition into national law, the Member State to which it is addressed must refrain from taking any measures liable seriously to compromise the result prescribed by the directive. The fact remains that in proceedings brought by individuals relying on a directive's direct effect, national courts are bound to refrain from applying pre-existing national rules contrary to that directive only after the period prescribed for its transposition has expired. Indeed, since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period. With more particular regard to Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures, during the period from the date of its entry into force until the expiry of the period prescribed for its transposition, that is to say, from 20 July 1999 to 1 July 2000, the Member States were required to refrain from taking any measures liable gravely to jeopardise the attainment of the result prescribed by that directive, but individuals could not rely on that directive against the Member States before national courts in order to have a pre-existing national rule incompatible with the directive disapplied. see paras 66-69, operative part 5

JUDGMENT OF THE COURT (Sixth Chamber)
5 February 2004 [\(1\)](#)

((Carriage of goods by road – Tolls – Brenner motorway – Prohibition of discrimination – Discrimination on grounds of the nationality of the haulier or of the origin or destination of the vehicle))

In Case C-157/02,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Rieser Internationale Transporte GmbH

and

Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag),

on the interpretation 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 (OJ 1993 L 279, p. 32) and 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 (OJ 1999 L 187, p. 42),

THE COURT (Sixth Chamber),,

composed of: V. Skouris, acting for the President of the Sixth Chamber, J.N. Cunha Rodrigues (Rapporteur), J.-P. Puissochet, R. Schintgen and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

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Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag), by P. Csoklich, Rechtsanwalt,

—

the Austrian Government, by C. Pesendorfer, acting as Agent,

—

the Commission of the European Communities, by C. Schmidt and W. Wils, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Rieser Internationale Transporte GmbH, represented by R. Krist, Rechtsanwalt, of Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag), represented by P. Csoklich and R. Bollenberger, Rechtsanwälte, of the Austrian Government, represented by H. Dossi, acting as Agent, and of the Commission, represented by C. Schmidt, at the hearing on 5 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2003,

gives the following

Judgment

1

By order of 22 March 2002, received at the Court on 29 April 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation 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 (OJ 1993 L 279, p. 32) and 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 (OJ 1999 L 187, p. 42).

2

Those questions were raised in the course of a dispute in which an Austrian haulage company, Rieser Internationale Transporte GmbH (Rieser), sought the repayment of tolls which it considered it had overpaid for the use of the Brenner motorway to Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag), the body responsible for the management of that motorway.

The relevant provisions

3

In accordance with Article 2 of Directive 93/89, for the purpose of that Directive, 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), 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 permissible gross laden weight of not less than 12 tonnes.

4

Article 7 of that Directive provides: Member States may maintain or introduce tolls and/or introduce user charges in accordance with the following conditions:

(a)

Tolls and user charges may not both be imposed at the same time for the use of a single road section. However, Member States may also impose tolls on networks where user charges are made, for the use of bridges, tunnels and mountain passes;

(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;

...

(d)

Tolls and user charges shall be imposed only on users of motorways or other multilane roads with characteristics similar to motorways, bridges, tunnels and mountain passes.

...

(h)

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

5

According to Article 13 of Directive 93/89, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January

1995. In accordance with the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), that period allowed for implementation was applicable also to the Republic of Austria.

6

In its judgment in Case C-21/94 *Parliament v Council* [1995] ECR I-1827, the Court annulled Directive 93/89 on the ground that it had been adopted without the European Parliament's having been duly consulted, but preserved its effects until the Council of the European Union should have adopted a new directive.

7

On 17 June 1999 the Parliament and the Council adopted Directive 1999/62 which, as the fourth recital in the preamble thereto makes clear, replaces the annulled Directive 93/89.

8

Article 7(4) and (9) of Directive 1999/62, which corresponds 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.

9

Pursuant to Article 13 of that Directive, the latter entered into force on 20 July 1999.

10

According to Article 12 of that Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that Directive by 1 July 2000.

11

In its judgment in Case C-205/98 *Commission v Austria* [2000] ECR I-7367, the Court declared: [T]hat, 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, and, second, 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 has failed to fulfil its obligations under, respectively,

Article 7(b) and Article 7(h) of Directive [93/89].**The dispute in the main proceedings and the questions referred for a preliminary ruling****12**

By licence (Fruchtgenußvertrag) concluded in June 1997, with retrospective effect from 1 January 1997, between Asfinag and its sole shareholder, the Austrian State, responsibility for the construction, planning, operation, maintenance and financing of Austrian motorways and expressways, including the Brenner motorway, was transferred to Asfinag. It was, in addition, authorised under that contract to levy, in its own name and on its own account, tolls and user charges in order to recoup its expenses.

13

Rieser carries on business in the field of the international carriage of goods by road, using vehicles of at least 12 tonnes having more than 3 axles. In so doing it makes regular use of the Brenner toll motorway. In its view, the payments it has made to Asfinag by way of tolls were too high, especially in the period 1 January 1997 to 31 July 2000. It therefore brought proceedings before the Austrian courts for repayment of part of the tolls paid to Asfinag.

14

Rieser relied on the judgment in *Commission v Austria*, cited above. It claimed that Article 7(b) and (h) of Directive 93/89 is sufficiently precise to have direct effect. Since the period prescribed for implementation of that Directive has expired, the applicant may rely directly upon those provisions. In the applicant's view, the same holds good for Asfinag too. Although the latter is a person governed by private law, it is subject to State control.

15

Asfinag argued to the contrary. So far as Article 7(b) of Directive 93/89 prohibiting all discrimination is concerned, Asfinag's view was that Austrian hauliers cannot have recourse to that provision. In any case, during the period 17 June 1999 to 1 July 2000 the right pleaded by Rieser did not exist, inasmuch as Directive 93/89 applied until 17 June 1999 and as the period prescribed for implementation of Directive 1999/62 ran till 1 July 2000.

16

The court of first instance dismissed Rieser's action on the ground that Article 7(h) of Directive 93/89 was not directly applicable and that the applicant could not rely on Article 7(b) of that Directive.

17

The appeal court considered that although Reiser's appeal was admissible there were no grounds for repayment of toll dues for the period from 17 June 1999, the date on which Directive 1999/62 was adopted, till 1 July 2000, the date on which the period prescribed for transposition of that directive into national law expired. During that period the Member States were obliged only to refrain from adopting any provisions which might gravely have jeopardised the objective set by Directive 1999/62. There is in that court's view no evidence to suggest that that requirement was not complied with.

18

On hearing the appeal, the Oberster Gerichtshof entertained doubts as to the direct effect of the contested provisions of Directives 93/89 and 1999/62. It was also of the opinion that it was necessary to clarify the connection between, on the one hand, Directive 93/89, which has been declared null and void, and, on the other, Directive 1999/62 which replaced the former on 17 June 1999, but the period prescribed for the implementation of which did not expire until 1 July 2000.

19

By order of 22 March 2002 the Oberster Gerichtshof decided therefore to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(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: 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 road users who use only part itineraries of that motorway?

(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 *European Parliament v Council of the European Union*, 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?

Consideration of Question 1

Observations submitted to the Court

20

Rieser and the Commission consider that those provisions of a directive which are capable of having direct effect may be relied upon against a body such as Asfinag by reason of the close links connecting that company to the State in the management of Austrian motorways.

21

Asfinag, on the other hand, is of the opinion that the provisions of a directive cannot be relied upon against it, because it is incorporated in the form of a joint stock company governed by private law, its board is not bound by instructions given by bodies of the Austrian State, it does not perform State duties and it levies tolls on its own account.

Findings of the Court

22

It ought to be borne in mind that the Court has consistently held (Case 8/81 *Becker* [1982] ECR 53, paragraphs 23 to 25, and Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 16) that where the Community authorities have, by means of a directive, placed Member States under an obligation to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

23

The Court has further held (Case 152/84 *Marshall* [1986] ECR 723, paragraph 49, and *Foster and Others*, cited above, paragraph 17) that where a person 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 as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

24

A body, 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 (*Foster and Others*, paragraph 20, and Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23).

25

It is clear from the information contained in the order for reference that the Austrian State is the sole shareholder in Asfinag. It has the right to check all measures taken by that company and its subsidiaries and at any time to demand information about their activities. It is entitled to impose objectives with regard to the organisation of traffic, safety and construction. Every year Asfinag is required to draw up a plan for the maintenance of the motorways and expressways and to submit to the State the calculation of the costs involved. Furthermore, every year within the periods necessary for the drawing-up of the State's budget, it must present to the State calculations with the estimated costs of planning, constructing, maintaining and managing motorways and national expressways.

26

In addition, the order for reference makes it clear that Asfinag is not entitled of its own authority to fix the amount of the tolls to be levied. That amount is fixed by law. Paragraphs 4 and 8 of the law known as the Asfinag Law (BGBl. 1982/591) provide that the amount of the payment must be fixed by the Bundesminister für Wirtschaftliche Angelegenheiten (Federal Minister for Economic Affairs) in concert with the Bundesminister für Finanzen (Federal Minister for Finance), according to certain criteria including, *inter alia*, the type of vehicle.

27

Those facts clearly show that Asfinag is a body to which, pursuant to an act adopted by the public authorities, the performance of a public-interest service (namely: the constructing, planning, operating, maintaining and financing of motorways and expressways in addition to the levying of tolls and user charges), has been entrusted, under the supervision of those public authorities, and which for that purpose possesses special powers beyond those resulting from the normal rules applicable in relations between individuals.

28

According to the decisions cited in paragraph 24 above, such a body, whatever its legal form, is included among those against which the provisions of a directive capable of having direct effect may be relied upon.

29

In consequence, the answer to be given to the first question must be that, when contracts are concluded with road users, the provisions of a directive capable of having direct effect may be relied upon against a legal person governed by private law where the State has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person.

Consideration of Question 2

Observations submitted to the Court

30

Rieser submits that Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 are sufficiently

precise and unconditional to have direct effect and to confer on individuals the right to reimbursement of the overpayment. Those provisions include criteria which make it possible to ascertain whether a system of tolls established by national legislation is lawful. That follows from paragraphs 102 to 115 of *Commission v Austria*, in which the Court held that users were discriminated against on the basis of the destination or origin of the vehicle. Rieser maintains that Articles 7(h) of Directive 93/89 and 7(9) of Directive 1999/62 are also sufficiently precise to have direct effect.

31

According to Asfinag, by contrast, Articles 7(b) and (h) of Directive 93/89 and 7 (4) and (9) of Directive 1999/62, being insufficiently precise in their subject-matter, do not satisfy the conditions for direct effect.

32

Similarly, the Austrian Government submits that the extremely broad discretion enjoyed by each Member State so far as concerns the fixing of toll dues for individual users of the road militates against direct application of Articles 7(h) of Directive 93/89 and 7(9) of Directive 1999/62. Having regard to those provisions' want of precision, toll dues cannot be judged by the yard-stick solely of the Community principle of non-discrimination. As a result, Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 must be held not to have direct effect.

33

The Commission, for its part, submits that Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 can be applied in the calculating of toll dues compatible with the Directives, even if the latter have not been transposed into Austrian law, or have been imperfectly transposed. On the other hand, it argues that Articles 7(h) of Directive 93/89 and 7(9) of Directive 1999/62 cannot be applied in the calculating of toll dues compatible with the Directives, if the latter have not been transposed into Austrian law, or have been imperfectly transposed. In its view, the Court has no power to impose on the Republic of Austria any particular mode of calculating toll dues.

Findings of the Court

34

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 (see, in particular, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25).

35

Article 7(4) of Directive 1999/62 prohibits any discrimination, whether direct or indirect, on the ground of the haulier's nationality or of the vehicle's origin or destination in the imposition of tolls and user charges. That prohibition is subject to no conditions and is expressed without equivocation. That provision is therefore unconditional and sufficiently precise to be relied on by individuals before national courts.

36

Article 7(b) of Directive 93/89 prohibits discrimination in identical terms, but adds [w]ithout prejudice to Article 8(2)(e) and Article 9.

37

Article 8(2)(e) of Directive 93/89 permits Member States to apply a reduction in user charges for vehicles registered in certain disadvantaged Member States where two or more Member States introduce a common system for user charges applicable to their territories as a whole. Article 9 of that Directive provides for special arrangements to be made for border areas. Those two exceptions do not allow Member States unilaterally to alter the scope of the prohibition of discrimination laid down in Article 7(b) of that Directive by making it subject to any condition or restriction whatsoever. They do not therefore affect the unconditional nature of that prohibition. Nor, moreover, has it been suggested that one or other of those exceptions might apply to the case in the main proceedings.

38

It follows that Article 7(b) of Directive 93/89 is unconditional and sufficiently precise to be relied upon by individuals before national courts.

39

The Austrian Government's argument that, in the absence of a mathematically certain method of calculating tolls or user charges, Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 may not be relied upon cannot be accepted. According to the Court's settled case-law, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, *Commission v Austria*, paragraph 70). That criterion is sufficient to establish whether the prohibition of discrimination laid down in those provisions has been infringed in the case in the main proceedings, by making a comparison of the tolls charged for the various journeys under consideration (*Commission v Austria*, paragraphs 79 to 88, 112 and 115).

40

Article 7(h) of Directive 93/89, in contrast, provides for toll rates to be related to the costs of constructing, operating and developing the infrastructure network concerned, but signally does not explain the nature of that relationship. Nor, moreover, does that provision define the three headings of costs concerned, namely, constructing, operating and developing, nor the concept of infrastructure network concerned. While that provision gives the Member States general guidelines for calculating toll dues, it does not provide any specific mode of calculation and leaves the Member States very broad discretion in that regard.

41

That provision cannot therefore be considered to be unconditional or sufficiently precise to be relied upon by individuals against State authorities. The same finding applies all the more to Article 7(9) of Directive 1999/62, inasmuch as the wording of that article is identical to that of Article 7(h) of Directive 93/89, save for the reference to weighted average tolls and not to toll rates. Substituting that notion without defining it means that that provision is even less precise than Article 7(h).

42

It follows that neither Article 7(h) of Directive 93/89 nor Article 7(9) of Directive 1999/62 may be relied upon by individuals against State authorities if those directives have not been transposed, or have been imperfectly transposed, into national law.

43

Finally, it must be noted that the second question refers to vehicles with more than three axles used for the carriage of goods, whereas the two Directives in question refer to vehicles defined in Article 2 of each as a motor vehicle or articulated vehicle combination intended exclusively for the carriage of goods by road and having a maximum permissible gross laden weight of not less than 12 tonnes. If the provisions of those Directives may be relied upon by individuals before national courts, that is therefore in relation to the category of vehicle so defined.

44

The answer to be given to the second question must therefore be that Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 may, but Articles 7(h) of Directive 93/89 and 7(9) of Directive 1999/62 may not, be relied upon by individuals against State authorities so far as concerns the calculating of tolls for vehicles having a laden weight of at least 12 tonnes used for the carriage of goods for the full itinerary of the Austrian Brenner motorway when the Directives have not been transposed, or have been imperfectly transposed, into domestic law. Consideration of Question 3(a)

45

If the answer to the second question should be Yes, the court making the reference asks how and by reference to what parameters the toll for a single journey on the full itinerary must be calculated.

46

In light of the answer given to the second question, there is no need to answer this question. Consideration of Question 3(b)

Observations submitted to the Court

47

Rieser argues that it, as an Austrian haulier, can rely on the provisions of Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 insofar as the purpose of those provisions is not solely to protect foreign hauliers. Those articles provide that tolls and user charges may not lead, directly or indirectly, to any difference in treatment on the ground of the vehicle's origin or destination, regardless of the State in which the haulier has its head office.

48

To the same effect, the Commission considers that those provisions are intended to protect all through traffic against discrimination, whatever the hauliers' nationality. Austrian hauliers may therefore rely on those provisions, just like any other haulier, in order to claim that, because of the (excessive) rate for the full itinerary on the Brenner motorway, they suffer discrimination in comparison with road users using parts only of the itinerary.

49

Asfinag maintains that Austrian hauliers cannot rely on Articles 7(b) of Directive 93/89 or 7(4) of Directive 1999/62, since Austrian nationals are not disadvantaged on account of their nationality

and the Directives in question concern infrastructural costs and are not intended to regulate competition between transport undertakings within a single Member State. In consequence, Austrian hauliers cannot plead any discrimination against users of the complete itinerary on the Brenner motorway in relation to users of part itineraries.

50

To the same effect, the Austrian Government claims that the objective pursued by Directives 93/89 and 1999/62 is to regulate competition between carriers from the various Member States without any intention of conferring rights on individual users to use a particular itinerary at a particular rate. In so far as regulation of competition between the hauliers of a single Member State is not concerned, an Austrian haulier cannot plead the provisions of Directives 93/89 or 1999/62 on non-discrimination.

Findings of the Court

51

It ought to be borne in mind that it is in order to avoid any form of distortion of competition as between transport undertakings in the Member States that Article 7(b) of the Directive prohibits, in the application of user charges and tolls, not only discrimination based directly or indirectly on the nationality of hauliers but also that based on the origin or destination of the vehicle (*Commission v Austria*, paragraph 109).

52

The same reasoning is applicable to Article 7(4) of Directive 1999/62, which is essentially identical.

53

It follows that Austrian transport undertakings which use the whole itinerary on the Brenner motorway in through carriage of goods and which are as a result disadvantaged in comparison with users of certain part itineraries on the grounds of the vehicle's origin or destination may also rely on the prohibition of discrimination laid down in Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62.

54

The answer to be given to Question 3(b) must therefore be that Austrian hauliers, like the hauliers of the other Member States, may rely on Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 in order to claim that because of the (excessive) rate for the full itinerary on the Austrian Brenner motorway they suffer discrimination in comparison with road users using parts only of the itinerary on that motorway. Consideration of Question 4(a)

55

In its judgment in *Parliament v Council*, the Court annulled Directive 93/89 on the ground that it had been adopted without the European Parliament's having been duly consulted. Nevertheless, the Court preserved the effects of that Directive until the Council should have adopted new legislation on the matter (see paragraphs 31 and 32 of the grounds and point 2 of the operative part of that judgment).

56

The national court seeks to ascertain whether that judgment must be interpreted as preserving the effects of Directive 93/89 until such time as the Member States should have implemented the provisions of the new directive or until the end of the period prescribed for its implementation.

Observations submitted to the Court

57

Asfinag and the Austrian Government submit that preservation of the effects of the annulled Directive 93/89, as ordered in the judgment in *Parliament v Council*, applies until the adoption of Directive 1999/62, namely, 17 June 1999.

58

The Commission points out that Directive 1999/62 entered into force on 20 July 1999. It submits that Directive 93/89 lost its binding power on that date.

Findings of the Court

59

It has to be accepted that the literal meaning of the *Parliament v Council* judgment is that the effects of Directive 93/89 are preserved until the date of the adoption of Directive 1999/62 which replaced it.

60

The purpose of preserving the effects of an annulled legal act is, however, not to allow a legal vacuum to subsist until the annulled act has been replaced by a new act. That objective can be attained only if the annulled legal act continues to produce effects until the new act does so. Since Directive 1999/62 had no effect until the date it entered into force, the judgment in *Parliament v Council* must be understood to mean that the effects of Directive 83/89 were to be preserved until the entry into force of Directive 1999/62, that is to say, 20 July 1999 in accordance with its Article 13. Directive 93/89 continued therefore to produce effects until midnight 19 July 1999.

61

The answer to be given to Question 4(a) must therefore be that the judgment in *Parliament v Council* is to be interpreted as preserving the effects of Directive 93/89 until 20 July 1999, the date on which Directive 1999/62 entered into force. Consideration of Question 4(b)

62

Under Article 12 of Directive 1999/62 the period allowed for implementation of that directive came to an end on 1 July 2000. By this question the national court seeks in essence to ascertain whether Directive 1999/62 may be relied upon by Rieser before national courts in respect of the period from 20 July 1999, the date on which that directive entered into force, to 1 July 2000, the date on which the period prescribed for its transposition into national law came to an end.

Observations submitted to the Court

63

Asfinag submits that during the period 17 June 1999 to 1 July 2000 the Member States were bound

to fulfil their obligations under Directive 1999/62 in the form of effects produced in advance, but that the latter do not have direct effect.

64

The Austrian Government considers that the Member States must observe the effects produced in advance by a directive inasmuch as they may not take any measure which might gravely jeopardise the attainment of the objective pursued by the directive. On the other hand, if the period prescribed for implementation of a directive has not come to an end, it is impossible for the directive to have direct effect.

65

In the Commission's opinion, during the period 20 July 1999 to 1 July 2000 the Member States were bound to take account of Directive 1999/62 in that, during the period prescribed for its implementation, they had to refrain from adopting any provisions which might gravely jeopardise the objective pursued by the directive.

Findings of the Court

66

It follows from the application of the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC and from Directive 1999/62 itself that, during the period prescribed by that Directive for its transposition into national law, the Member State to which it is addressed must refrain from taking any measures liable seriously to compromise the result prescribed by that directive (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45).

67

The fact remains that in proceedings brought by individuals relying on a directive's direct effect, national courts are bound to refrain from applying pre-existing national rules contrary to the directive only after the period prescribed for its transposition has expired (see, to that effect, Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, paragraph 20).

68

Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period (*Inter-Environnement Wallonie*, paragraph 43).

69

In consequence, the answer to be given to Question 4(b) must be that, during the period from 20 July 1999 to 1 July 2000, the Member States were required to refrain from taking any measures liable gravely to jeopardise the attainment of the result prescribed by Directive 1999/62 but that individuals could not rely on that Directive against the Member States before national courts in order to have a pre-existing national rule incompatible with the Directive disapplied.

Costs

The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 22 March 2002, hereby rules:

1.

When contracts are concluded with road users, the provisions of a directive capable of having direct effect may be relied upon against a legal person governed by private law where the State has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person.

2.

Articles 7(b) 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 7(4) 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 may, but Articles 7(h) of Directive 93/89 and 7(9) of Directive 1999/62 may not, be relied upon by individuals against State authorities so far as concerns the calculating of tolls for vehicles having a laden weight of at least 12 tonnes used for the carriage of goods for the full itinerary of the Austrian Brenner motorway when the Directives have not been transposed, or have been imperfectly transposed, into domestic law.

3.

Austrian hauliers, like the hauliers of the other Member States, may rely on Articles 7(b) of Directive 93/89 and 7(4) of Directive 1999/62 in order to claim that because of the (excessive) rate for the full itinerary on the Austrian Brenner motorway they suffer discrimination in comparison with road users using parts only of the itinerary on that motorway.

4.

The judgment in Case C-21/94 *Parliament v Council* must be interpreted as preserving the effects of Directive 93/89 until 20 July 1999, the date on which Directive 1999/62 entered into force.

5.

During the period from 20 July 1999 to 1 July 2000, the Member States were required to refrain from taking any measures liable gravely to jeopardise the attainment of the result prescribed by Directive 1999/62 but individuals could not rely on that Directive against the Member States before national courts in order to have a pre-existing national rule incompatible with the Directive disapplied.

Skouris**Cunha Rodrigues****Puissochet****Schintgen****Macken****Delivered in open court in Luxembourg on 5 February 2004.****R. Grass****V. Skouris****Registrar****President**

1 –**Language of the case: German.**