

Provisional text

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 6 February 2019⁽¹⁾

Case C-591/17

Republic of Austria
v
Federal Republic of Germany

(Failure of a Member State to fulfil obligations — Article 259 TFEU — Articles 18, 34, 56 and 92 TFEU — Directive 1999/62/EC — Use of motorways — Infrastructure charge for vehicles of less than 3.5 tonnes — Tax relief on the motor vehicle tax — Indirect discrimination — Measures having equivalent effect — Restrictions to the freedom to provide services — Common transport policy — Standstill clause)

1. Thou shalt not discriminate.
2. If it were possible to condense the entire body of EU law into a few commandments, the prohibition of discrimination, in particular discrimination based on *nationality*, would probably be one of the first.
3. The prohibition of discrimination based on nationality is enshrined in Article 18 TFEU and Article 21(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), whereas the broader non-discrimination principle of which it is an expression is among the fundamental values of the Union (Article 2 TEU), and among the rights protected by the Charter (Article 21 thereof).
4. That principle is at the heart of the present case, one of the very rare cases in which, in accordance with Article 259 TFEU, a Member State has started an infringement procedure against another Member State.
5. In its submissions, the Republic of Austria alleges, in essence, that the Federal Republic of Germany has infringed a number of provisions of EU law by establishing: (i) an infrastructure charge upon all users of the motorway network ('the infrastructure charge'), and (ii) a tax relief on the motor vehicle tax, payable by the owners of vehicles registered in Germany ('domestic vehicles'), of an amount at least equal to the amount of the infrastructure charge payable by those owners ('the tax relief'). ⁽²⁾ In particular, according to the Republic of Austria, the combined effect of the measures at issue is that, in practice, only drivers of vehicles registered in other Member States ('foreign vehicles') are subject to the infrastructure charge, thereby giving rise to indirect discrimination on grounds of nationality.

6. In this Opinion, I shall set out the reasons why I take the view that the action brought by the Austrian Government ought to be dismissed. In particular, I shall explain why the arguments based on an alleged discrimination on grounds of nationality are premised on a fundamental misunderstanding of the concept of ‘discrimination’.

I. Legal framework

A. European Union law

7. Article 7(1) 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 (also referred to as ‘the Eurovignette Directive’), (3) as amended, provides:

‘Without prejudice to Article 9 paragraph 1a, Member States may maintain or introduce tolls and/or user charges on the trans-European road network or on certain sections of that network, and on any other additional sections of their network of motorways which are not part of the trans-European road network under the conditions laid down in paragraphs 2, 3, 4 and 5 of this Article and in Articles 7a to 7k. This shall be without prejudice to the right of Member States, in compliance with the Treaty on the Functioning of the European Union, to apply tolls and/or user charges on other roads, provided that the imposition of tolls and/or user charges on such other roads does not discriminate against international traffic and does not result in the distortion of competition between operators.’

8. Article 7k of that directive provides:

‘Without prejudice to Articles 107 and 108 of the Treaty on the Functioning of the European Union, this Directive does not affect the freedom of Member States which introduce a system of tolls and/or user charges for infrastructure to provide appropriate compensation for those charges.’

B. German law

9. The most relevant provisions of national law, which will be collectively referred to as ‘the national legislation at issue’, are as follows.

1. The Infrastructure Charges Act

10. The infrastructure charge was introduced by the Infrastrukturabgabengesetz (the Infrastructure Charges Act) of 8 June 2015 (‘the InfrAG’), (4) in the version resulting from Paragraph 1 of the Law of 18 May 2017. (5) Paragraph 1 of the InfrAG provides for the payment of a charge for the use of federal roads within the meaning of Article 1 of the Bundesfernstraßengesetz (Federal Roads Act). (6)

11. In accordance with Paragraphs 3 and 7 of the InfrAG, for domestic vehicles, the infrastructure charge must be paid, in the form of an annual vignette, by the vehicle owner. Under Paragraph 5(1) of the InfrAG, the amount of the infrastructure charge is fixed by decision of the responsible authority. The charge is deemed to have been paid at the time of vehicle registration.

12. For vehicles registered abroad, the obligation to pay the infrastructure charge is imposed either on the owner or on the driver of the vehicle during use on roads subject to the infrastructure charge, and arises, in accordance with Paragraph 5(4) of the InfrAG, on the first use of such roads after the crossing of a national border. The infrastructure charge must be paid in the form of a vignette. In that respect, there is a choice between a ten-day vignette, a two-month vignette and an annual vignette.

13. The amount of the charge to be paid is set out in subparagraph 1 of the Annex to Paragraph 8 of the InfrAG. It is calculated on the basis of cylinder capacity of the engine, the type of engine (positive ignition or compression ignition) and the class of emission. The price of a ten-day vignette varies between a minimum of EUR 2.50 to a maximum of EUR 25. The price of the two-month vignette varies between a

minimum of EUR 7 to a maximum of EUR 55. Finally, the annual vignette has a maximum price of EUR 130.

14. If the roads subject to the charge are used without a valid vignette or if the vignette has been calculated at a level that is too low, the charge is collected a posteriori, in accordance with Paragraph 12 of InfrAG. In that case, the charge to be paid corresponds to the amount of the annual vignette or the difference between the amount already paid and the amount of the annual vignette.

15. Paragraph 11 of the InfrAG provides for random inspections to verify compliance with the obligation to pay the infrastructure charge. In accordance with Paragraph 11(7) of the InfrAG, the authorities may, at the place of inspection, impose on the person responsible for a breach the payment of the charge and of a security of an amount equivalent to the fine to be imposed under Paragraph 14 of the InfrAG, as well as the procedural costs. In addition, the driver may be prohibited from continuing his journey if the charge is not paid at the place of inspection despite the request to do so and there are reasonable doubts whether it will be paid later or if the documents necessary for the inspection are not presented, the information requested is not provided or a security imposed is not paid.

16. Paragraph 14 of the InfrAG states that non-payment or incomplete payment of the infrastructure charge, failure to provide or incorrect provision of information and failure to comply with an order to stop the vehicle in the context of an inspection are administrative offences punishable by a fine.

2. *The Law on motor vehicle tax*

17. Paragraph 9(6) of the Kraftfahrzeugsteuergesetz (the law on motor vehicle tax) of 26 September 2002 (7) ('the KraftStG'), as amended by the Zweite Verkehrsteueränderungsgesetz (the second law amending the motor vehicle tax) of 8 June 2015 (8) ('the second VerkehrStÄndG') and by the Gesetz zur Änderung des Zweiten Verkehrsteueränderungsgesetz (the law amending the second law amending the motor vehicle tax) of 6 June 2017, provides for a tax relief that, in essence, corresponds to the amount to be paid for the infrastructure charge, except for the owners of 'Euro 6' vehicles, for whom the amount of the relief is higher. (9)

18. The entry into force of those provisions depends, pursuant to Paragraph 3(2) of the second VerkehrStÄndG, on the start of the collection of the infrastructure charge in accordance with the InfrAG.

II. Background to the case and the pre-litigation procedure

A. *The procedure under Article 258 TFEU*

19. By letters of formal notice dated 18 June 2015 and 10 December 2015, the European Commission initiated infringement proceedings against the Federal Republic of Germany. The Commission contested, on the one hand, the combined effects of the measures at issue and, on the other hand, the prices of short-term vignettes. The letters of formal notice drew the attention of the German authorities to a possible infringement of Articles 18, 34, 45 and 56 TFEU, as well as of Article 92 TFEU. After an exchange of views with the German authorities and having issued a reasoned opinion on 28 April 2016, the Commission decided, on 29 September 2016, to refer the matter to the Court in accordance with Article 258 TFEU.

20. However, following the adoption, on 24 March 2017, of certain amendments to the national legislation at issue by the German Parliament, the Commission decided, on 17 May 2017, to terminate the infringement procedure.

B. *The current procedure under Article 259 TFEU*

21. By letter dated 7 July 2017, the Republic of Austria referred the matter to the Commission, in accordance with Article 259 TFEU, arguing that the Federal Republic of Germany had, through the introduction of the measures at issue, breached Articles 18, 34, 56 and 92 TFEU. By letter dated 14 July 2017, the Commission acknowledged receipt of the letter from the Republic of Austria.

22. By letter of 11 August 2017, the Federal Republic of Germany rejected the arguments raised by the Republic of Austria. On 31 August 2017, a hearing was held at which the Republic of Austria and the Federal Republic of Germany presented their arguments to the Commission. The Commission did not issue a reasoned opinion within the three-month period provided for in Article 259 TFEU.

III. Procedure before the Court and forms of order sought

23. By its application, submitted on 12 October 2017, the Republic of Austria claims that the Court should:

- declare that, by introducing the infrastructure charge in conjunction with the tax relief, the Federal Republic of Germany has infringed Articles 18, 34, 56 and 92 TFEU; and
- order the Federal Republic of Germany to pay the costs.

24. The Federal Republic of Germany contends that the Court should:

- dismiss the action; and
- order the Republic of Austria to pay the costs.

25. By decisions of the President of the Court of 15 January and 14 February 2018, the Kingdom of the Netherlands and the Kingdom of Denmark were granted leave to intervene in support of the Republic of Austria and of the Federal Republic of Germany respectively.

26. On 12 November 2018, the Court requested certain clarifications from the Commission regarding the reasons for which it decided to terminate the procedure under Article 258 TFEU mentioned in points 21 and 22 above. The Commission responded to the request for clarification on 26 November 2018. In its letter to the Court, the Commission explained that the laws approved by the German Parliament on 24 March 2017 had amended the national legislation at issue with regard to the price for short-term vignettes and to the tax relief. In the light of those changes and the need to obtain broad political support for the establishment of a single European legal framework for a common European road pricing system, the Commission considered that the procedure should be closed.

27. The Danish, German, Netherlands and Austrian Governments presented oral argument at the hearing on 11 December 2018.

IV. Analysis

28. In its application, the Austrian Government puts forward four grounds of complaint against the measures at issue.

29. In the following, I shall examine those grounds in the same order as they were presented by the Austrian Government in its submissions.

A. First ground of complaint: indirect discrimination on grounds of nationality through the combination of the measures at issue

1. Arguments of the parties

30. The Austrian Government's first ground of complaint concerns an alleged breach of Article 18 TFEU because of indirect discrimination on grounds of nationality.

31. The Austrian Government emphasises, from the outset, that the measures at issue ought to be considered and assessed together under EU law. In its view, there is an indissoluble link, both in terms of substance and time, between the infrastructure charge and the tax relief. The former introduces a fee, and the latter introduces a de facto exemption from that fee. Moreover, the entry into force of the latter is, under Paragraph 3(2) of the second *VerkehrStÄndG*, expressly associated with the implementation of the former.

32. The alleged discrimination stems, in that government's view, from the combined effect of the two measures. The infrastructure charge is, in principle, payable by all users of German motorways. However, the tax relief, of an amount corresponding to at least the amount of the infrastructure charge, is only granted to owners of domestic vehicles. That means, in the Austrian Government's view, that owners of domestic vehicles pay the infrastructure charge only in theory: the amount paid for that charge is in fact deducted from the motor vehicle tax that is payable by them. Therefore, in practice, only drivers of foreign vehicles, who tend to be nationals of other Member States, have to pay the infrastructure charge.

33. The Austrian Government further points out that the national legislation at issue is intended to execute a promise made by some German politicians made during the campaign for the German federal election of 2013. The stated objective of this measure was to link foreign motor vehicle drivers to the costs of financing German infrastructure without creating any additional burden for German vehicle owners.

34. Finally, the Republic of Austria contests the grounds invoked by the Federal Republic of Germany to justify any indirect discrimination. In its view, none of those grounds is valid.

35. For its part, the Federal Republic of Germany, after acknowledging that the measures at issue form a coherent unit from the point of view of EU law, maintains that those measures do not give rise to any discrimination on the ground of nationality. Indeed, foreign users of German motorways are not, as regards the payment of sums for the financing of German transport infrastructure, in a less favourable situation than vehicle owners residing in Germany, since the latter are subject not only to the infrastructure charge but also to a motor vehicle tax, albeit of a reduced rate.

36. It may be argued that the tax relief can only benefit German residents insofar as, in conformity with the provisions of Council Directive 83/182/EEC, (10) the motor vehicle tax is applicable only to domestic vehicles. According to the German Government, the decision to amend the amount of the motor vehicle tax in order to maintain the overall financial burden on owners of vehicles at the previous level, thereby preventing disproportionate taxation, constituted a lawful exercise of that Member State's competence in the field of direct taxation.

37. At the same time, the German Government considers that it must have the power to introduce an infrastructure charge, the proceeds of which are destined for the maintenance and the improvement of transport infrastructure. In its view, it is a legitimate choice to change the system for the funding of transport infrastructure from being completely financed by the State's general budget to that of being funded by the users of that infrastructure.

38. In the alternative, the Federal Republic of Germany invokes considerations of environmental protection, burden sharing and the change in the system of financing transport infrastructure to justify any indirect discrimination that might result from the combination of the measures at issue.

39. The Netherlands' Government essentially shares the argument put forward by the Austrian Government and emphasises the comparability, for the purposes of this case, of owners of domestic vehicles and drivers of foreign vehicles. Conversely, the Danish Government concurs with the German Government that the measures at issue are not discriminatory and, in particular, it stresses the competence of Member States to establish, amend or repeal taxes and other charges that are not harmonised.

2. *Assessment*

40. Before examining in detail the arguments put forward by the parties, I find it useful to give a brief introduction on the concept of discrimination under EU law.

(a) *Preliminary remarks on the concept of ‘discrimination’*

41. The principle of non-discrimination is a manifestation of the principle of equality of individuals before the law, a principle that exists in all the legal systems of the Member States and constitutes a general principle of EU law. (11) In a nutshell, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Distinctive treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued. (12)

42. As is well known, discrimination can be direct or indirect: *direct* discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on account of one identifiable (or forbidden) characteristic; whereas there is *indirect* discrimination where an apparently neutral provision, criterion or practice would put persons having that identifiable characteristic at a particular disadvantage compared with other persons. (13) In other words, in cases of direct discrimination the differential treatment is explicitly linked to the forbidden characteristic, whereas in cases of indirect discrimination the differential treatment is due to another characteristic but that characteristic is strictly related to a forbidden characteristic.

43. To establish a case of discrimination, it is necessary, first of all, to find a suitable ‘comparator’: a person that is in a comparable situation and that is treated more favourably because of the identifiable characteristic. In that regard, it is not necessary that either the victim of discrimination or, arguably, the beneficiary of the more favourable treatment must, at a given moment, be identifiable as ‘flesh and blood’ people: it is enough that, because of the allegedly discriminatory measure, it is evident that those persons exist. (14) Furthermore, according to settled case-law, on the one hand, it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. (15)

44. That step of identifying a comparator is thus of utmost importance: in the absence of a valid comparator there cannot be any meaningful comparison and, as a consequence, no unjustified difference of treatment can be established.

45. It is against that background that I shall examine the issues raised by the first ground of complaint put forward by the Republic of Austria.

(b) *The alleged discriminatory nature of the measures at issue*

46. In its submissions, the Austrian Government emphasises the importance of assessing the combined effects of the two measures at issue. In its view, with respect to those measures, drivers of foreign vehicles are in a less favourable situation than owners of domestic vehicles.

47. I agree with the Austrian Government that the owners of domestic vehicles are, for the vast majority, of German nationality, whereas drivers of foreign vehicles are mostly of the nationality of other Member States. Thus, although the German legislation in question does not establish any express discrimination based on nationality, if the arguments put forward by the Austrian Government were to be held well founded, there would be indirect discrimination on the ground of nationality and, consequently, a breach of Article 18 TFEU.

48. However, the arguments raised by the Austrian Government concerning an unjustified difference of treatment are inherently flawed when it comes to methodology.

49. In the first place, the *comparator* chosen by the Austrian Government is not suitable. Owners of domestic vehicles are both users of German roads (and thus subject to the infrastructure charge) and German taxpayers (since they are subject to the motor vehicle tax). Conversely, drivers of foreign vehicles are taxpayers of other Member States: they may, as such, be subject to other taxes or charges in their respective country of residence but they will never be required to pay the German motor vehicle tax.

50. Therefore, owners of domestic vehicles and drivers of foreign vehicles are comparable with respect to the use of German motorways, but they are not comparable when examined in the light of both measures, which entails considering them as both users of German motorways and taxpayers. That is why there is a mismatch in the arguments of the Austrian Government: on the one hand, it insists that the two measures are to be examined jointly but, on the other hand, when identifying the comparator, it merely looks at the comparability of the two groups in relation to their use of German motorways.

51. In that regard, the Austrian Government relies on the judgment of the Court in *Commission v Germany*, (16) from which it concludes that the two groups are comparable for the purpose of the present proceedings.

52. Nevertheless, I do not read that judgment in that way. That case concerned an alleged violation of (what is now) Article 92 TFEU. (17) That provision is a standstill clause of a scope wider than that of Article 18 TFEU. Article 92 TFEU does not merely prohibit discriminatory measures but also any other measure liable to affect the competitive relationship between national carriers and foreign carriers. In other words, that provision also prevents Member States from eliminating any advantage that their legislation may grant to foreign carriers. (18) For that reason, the Court was right in taking a broader perspective under Article 92 TFEU. However, the same approach cannot be used under Article 18 TFEU: since only measures which directly or indirectly discriminate on the ground of nationality are caught by the latter provision, the two groups that are allegedly subject to distinct treatment must be comparable within the strict sense of the term.

53. In the second place, and regardless of the above, when examined in the light of both measures, drivers of foreign vehicles are not, and can never be, in a situation that is *less favourable* than that in which owners of domestic vehicles find themselves. In order to be allowed to drive on German motorways, the former are to pay only the infrastructure charge and are not obliged to pay for the yearly rate: they can opt for a vignette of shorter duration, depending on their actual need. Conversely, in order to be allowed to drive on German motorways, owners of domestic vehicles are required by law to pay both an infrastructure charge and a motor vehicle tax. Moreover, irrespective of their actual use of local motorways, owners of vehicles registered in Germany are obliged to pay the infrastructure charge in the amount due for the annual vignette.

54. Consequently, when both measures are considered together — as the Austrian Government asks the Court to do — there is manifestly no less favourable treatment for foreign drivers: any vehicle registered in another Member State that will be used on German motorways will always pay to the German authorities, to be permitted to use them, a lower amount than that paid by the owner of the same vehicle model registered in Germany.

55. True, the amount of the motor vehicle tax to be paid by owners of domestic vehicles will be lower than in the past thanks to the tax relief. However, even if the tax relief had the effect of ‘zeroing’ the motor vehicle tax (which is not the case) any foreign driver would be required to pay, for using German motorways, an amount that is, at maximum, that which would be payable by owners of domestic vehicles. (19)

56. It is hardly necessary to point out that there is no unfavourable treatment even when the measures are assessed separately. First, the amount of the infrastructure charge is applicable without distinction to any driver. If anything, drivers of foreign vehicles are treated more favourably: as mentioned in point 53 above, unlike owners of domestic vehicles, they have three options with regard to the duration — and hence the cost — of the vignette to be purchased.

57. Second, it is paradoxical to argue that the tax relief only benefits owners of domestic vehicles. Clearly, there can be no tax relief without a tax in the first place. In addition, it may be worth stressing again, drivers of foreign vehicles are by definition not subject to the motor vehicle tax in Germany. Foreign vehicles may be subject to a similar tax in the Member State where they are registered, and the amount due may be higher or lower than that paid by owners of comparable domestic vehicles. However, that is the inevitable consequence of the fact that motor vehicle taxes are not harmonised at the EU level.

58. In conclusion, the Austrian Government has failed to make its case in relation to two basic tenets of discrimination: on the one hand, the two groups of persons that it has compared are not, with respect to the measures criticised by that government, in a comparable situation. On the other hand, the Austrian Government could not point to any less favourable treatment that the measures at issue grant to drivers of foreign vehicles.

(c) Additional remarks

59. The erroneous nature of the arguments put forward by the Austrian Government becomes even clearer if one were to consider the legal consequences that would derive from a finding that the measures at issue give rise to indirect discrimination based on nationality. In particular, how would the Federal Republic of Germany have to restore compliance with Article 18 TFEU?

60. To begin with, the Austrian Government has not argued that the German authorities would be obliged to repeal the infrastructure charge so that both domestic and foreign users of German motorways can continue using them free of charge. Indeed, that would have been a rather odd argument: Article 18 TFEU may not be read as prohibiting Member States from introducing or maintaining a system that requires all users of motorways (regardless of their nationality or place of residence) to pay a charge based on the duration of the use, or a toll based on the length of the itinerary. Several Member States in fact have such a system in place both for commercial vehicles and for passenger cars, including neighbouring countries such as France, Poland, and — ironically — Austria itself.

61. I fail to see any valid legal argument justifying the view that the Member States that have, up to now, decided to let all drivers use their motorways free of charge are forever ‘trapped’ by their initial choice, and are thus not allowed to introduce a system of fees similar to that which other Member States have had for many years. That would be an unreasonable (and possibly even perverse) interpretation of Article 18 TFEU: rather than avoiding discrimination against non-nationals, it would de facto impose reverse discrimination against nationals. Indeed, in the present case, it would mean that German taxpayers would have to continue funding the motorway network alone.

62. It seems to me clear that Member States’ authorities are, in principle, free to decide whether the use of certain infrastructure must be free of charge or, conversely, subject to a users’ fee. That is fundamentally a policy choice and, as such, it is for the competent Member State authorities. That is why the European Union is dotted with infrastructure that is, to some extent, similar or equivalent but which in some cases is subject to a users’ fee whereas in other cases it is not. Apart from motorways, other transport-related infrastructures (such as road bridges and road tunnels (20)) give us many examples of those two co-existent approaches. Yet, mutatis mutandis, that logic applies to any other kind of public infrastructure, which persons may visit or make use of for other purposes, related for instance to culture, tourism or religion. (21)

63. In the absence of specific EU rules on the matter, and provided no principle or provision of EU law is breached, it is not for the European Union to review the national authorities’ choice as to whether national infrastructure should be funded by taxpayers or by actual users. The EU rules offer no guarantee to the citizens of the Union that, when exercising their freedoms of movement, the carrying out of an economic activity in the Member State of destination will be neutral as regards taxation or the application of other charges. It follows that, in principle, any disadvantage, by comparison with the situation in which that citizen carried out the economic activity in his Member State of origin, is not contrary to

Article 18 TFEU, provided that the legislation concerned does not place that citizen at a disadvantage as compared to the citizens residing in the Member State of destination. (22)

64. Nor is it easy to see why the German authorities would be obliged to repeal the tax relief, in order to ensure that owners of domestic vehicles continue paying that tax at the previous (and higher) rates. The motor vehicle tax is, essentially, a property tax. Thus it is a direct tax the regulation of which falls, in principle, within the competence of the Member States. Only few provisions of EU law concern that type of tax, as shown by the very limited scope of Directive 83/182. (23)

65. It is unclear to me why Article 18 TFEU would prevent the German authorities from setting the motor vehicle tax at the level they deem most appropriate in the light of the circumstances prevailing in their country at a given moment. As the Austrian Government conceded at the hearing, the German authorities would be entitled to repeal that tax altogether, were they to consider it appropriate to do so, without giving rise to discrimination. However, does that not mean that those authorities are a fortiori entitled to simply lower the rates of the motor vehicle tax, if they take the view that the overall taxation on certain individuals is disproportionate?

66. The Austrian Government stated at the hearing that it did not contest that the establishment of an infrastructure charge could be ‘compensated’ by a lowering of the motor vehicle tax. (24) However, asked by the Court to clarify the kinds of tax reduction that are, in its view, acceptable, that government struggled to give a clear answer: with certain hesitation, it stated that a decrease of the tax equal for all taxpayers (in percentage, or of a fixed amount) should, in principle, be lawful.

67. In fact, at the hearing the Austrian Government went as far as admitting that, had the German authorities introduced a tax relief similar to the one at issue in the present proceedings at a different time and without explicitly linking it to the establishment of the infrastructure charge, there may not have been an issue of discrimination. By the same token, the Austrian Government stated that no discrimination would have arisen had German authorities decided to reduce another tax, unrelated to the use of motor vehicles, provided they did so in a coherent manner.

68. Against that backdrop, however, I fail to see any meaningful difference, from a legal standpoint, between the tax relief at issue and those considered acceptable by the Austrian Government. In addition, from an economic standpoint, the result produced by all those measures would be *grosso modo* equivalent. Some owners of domestic vehicles would pay more than under the current measure, and others would pay less. Nevertheless, nothing would change for drivers of foreign vehicles or, for that matter, for the budget of the Federal Republic of Germany.

69. In that regard, the German Government was very explicit in stating its intention to maintain the overall contribution to be paid by owners of domestic vehicles at an acceptable level. I have to agree with those arguments: Article 18 TFEU cannot be interpreted as requiring the German authorities to impose a potentially disproportionate taxation on owners of domestic vehicles, for the simple reason that they decide to change the system of financing of domestic motorways.

70. In this context, it is immaterial that some German politicians openly stated, during an electoral campaign, that they intended to introduce a charge for foreign travellers on German motorways. Those statements are arguably a manifestation of — paraphrasing a famous quote — a spectre that is haunting Europe in the last years: the spectre of populism and souverainism. (25)

71. Yet, the legal analysis that this Court is required to carry out with respect to national measures such as those at issue cannot be based on declarations of politicians. The (real or alleged) intent of single members of the national legislature or of the government has no role to play in that context. On the one hand, there is no need to prove discriminatory intent on the part of the author of a measure for that measure to be held in breach of the principle of non-discrimination. (26) On the other hand, statements by public officials that go as far as acknowledging or implying a breach of EU law do not suffice to establish an

infringement: (27) mere declarations cannot have the effect of rendering EU law applicable to situations to which it objectively does not apply. (28)

72. It cannot be emphasised enough that the assessment of the compatibility of a national measure with the EU Treaties, in the context of infringement proceedings, is an *objective* one. (29) That is true also with regard to alleged breaches of the principle of non-discrimination: the focus of the analysis must be on the effects of the perpetrator's action and not his subjective intention. (30)

73. In conclusion, the arguments put forward by the Austrian Government on these issues are unpersuasive. Put simply, the German authorities were fully entitled to take the view that, first, the cost of the motorway network, until now borne mainly by its taxpayers, (31) had to be equally shared among all users, including drivers of foreign vehicles. Second, owners of domestic vehicles would have been subject to a disproportionate amount of taxation had they been subject to both the infrastructure charge and the motor vehicle tax.

74. In the light of the above, and without any need to examine the possible grounds for justification invoked by the Federal Republic of Germany, I propose that the Court dismiss the first ground of complaint put forward by the Republic of Austria.

B. Second ground of complaint: indirect discrimination on grounds of nationality through the design of the infrastructure charge

1. Arguments of the parties

75. By its second ground of complaint, the Republic of Austria claims that the manner in which the infrastructure charge is designed in relation to the measures of control and enforcement is discriminatory.

76. In that respect, the Austrian Government points out that the national rules at issue distinguish in many respects between domestic vehicles and those registered abroad. In particular, the specific powers of intervention (random checks, collection of a security, prohibition of further travel) provided for in Paragraphs 11, 12 and 14 of the InfrAG, and the collection a posteriori of the infrastructure charge in the amount of the annual vignette or the difference between the amount already paid and that of the annual vignette apply only or mainly to vehicles registered abroad. In addition, the threat of fines being imposed in accordance with Paragraph 14 of the InfrAG would, in the Austrian Government's view, also overwhelmingly target foreign drivers. In support of its arguments on this point, the Austrian Government refers specifically to the judgment of the Court in *Commission v Italy*. (32)

77. For its part, the German Government points out that, first, most of the rules on the execution and control of the payment of the infrastructure charge provided for in Paragraphs 11, 12 and 14 of the InfrAG apply to all drivers without distinction. Only the collection of a security, pursuant to Paragraph 11(7) of the InfrAG, applies solely to drivers of foreign vehicles. However, such a measure is — in that government's view — justified as the collection of the amounts due for the vignette and for the possible fine are more difficult to execute abroad. At any rate, the German Government emphasises that Paragraph 11(7) of the InfrAG enables, but does not require, the authorities to request a security. Finally, the German Government takes the view that the collection a posteriori of the infrastructure charge in the amount of the annual vignette or the difference between the amount already paid and that of the annual vignette does not give rise to any discrimination insofar as the owners of domestic vehicles always pay the annual vignette.

2. Assessment

78. From the outset, I should call to mind that, in proceedings for failure to fulfil obligations, it is incumbent upon the applicant to prove the alleged failure by providing the Court with the information necessary for it to determine whether the infringement is made out. For that purpose, the applicant may not rely on any presumption. (33)

79. In the light of that principle, and for the reasons explained in the following, I take the view that the Republic of Austria has not discharged its burden of proving that the design of the infrastructure charge gives rise, with respect to the measures of control and enforcement, to indirect discrimination on grounds of nationality. (34)

(a) Checks, prohibition of further travel and administrative sanction

80. In the first place, I see no element in the file that may call into question the fact that, as maintained by the German Government, the random checks to be carried out *in loco*, as well as the prohibition of further travel and the administrative sanction that may be imposed in case of breach of the obligation to pay the infrastructure charge, apply without distinction to all vehicles circulating on the German motorway network. The wording of the relevant provisions of the InfraAG is neutral in that respect and I cannot find any other textual basis in support of the allegations made by the Austrian Government.

81. The German Government has further explained that most of the measures of control and enforcement (including the sanctions) may very well apply to owners of domestic vehicles. The fact that, with regard to those vehicles, the infrastructure charge is payable upfront does not a priori exclude possible infringements. By way of example, Paragraph 2 of the InfrAG provides for some exceptions to the obligation to pay the infrastructure charge. There will thus be controls to ensure that those exceptions are not erroneously or abusively invoked by owners of domestic vehicles: in case of a breach, the prohibition of further travel and the administrative sanction might also be applied to them.

82. The Austrian Government did not dispute those statements. In addition, given that the majority of vehicles using the German motorways is registered in Germany, I doubt that the assumption made by the Austrian Government that, albeit neutrally worded, the provisions on controls and sanctions are in practice targeting mainly drivers of foreign vehicles can be lightly accepted by the Court. The Austrian Government did not produce any evidence that may corroborate its claims on the point (such as, for example, decisions or internal guidelines issued by the administrative authorities, studies or statistical data).

83. At any rate, even if it were to be true that, in the light of the design of the infrastructure charge, the measures of control and enforcement will, as a proportion, concern foreign drivers more than domestic drivers, that would not, by itself, necessarily imply discrimination on ground of nationality. That would simply be an inevitable consequence of the fact that all owners of domestic vehicles are required to pay the charge upfront, whereas drivers of foreign vehicles are required to pay it only when entering the German motorway network.

84. On this issue too, the logic behind the arguments put forward by the Austrian Government is hard to follow. It is almost as if that government is implying that, because an infringement of the national legislation at issue is arguably more difficult for owners of domestic vehicles than for drivers of foreign vehicles, German authorities would have, with regard to the latter, to avoid carrying out random checks or imposing measures of enforcement. That argument would be untenable.

85. Nor has the Austrian Government argued, for example, that the measures of enforcement provided for in the national legislation at issue are not proportionate and, consequently, they might dissuade nationals of other Member States from exercising their rights of free movement. (35)

86. The Austrian Government has also not indicated the amount of the possible administrative sanctions provided for a breach of the obligation to pay the infrastructure charge. Therefore, it seems to me that the Court would in any event lack the information required to carry out a fully-fledged proportionality analysis on this point.

(b) Collection a posteriori of the amount required for an annual vignette

87. The Austrian Government has, however, argued that the collection a posteriori of the amount required to purchase an annual vignette is disproportionate, given that Paragraph 14 of the InfrAG provides for an administrative sanction.

88. I do not find this argument persuasive.

89. First, those two measures are of a different nature and, in principle, the fact that they are applied cumulatively does not per se give rise to a disproportionate penalty. The obligation to pay for a vignette is not a penalty, but merely the recovery of an unpaid charge. In turn, the administrative sanction is the penalty that the authorities may legitimately impose for the infraction committed by the driver. It seems to me obvious that, in presence of a breach, the German authorities may at the same time collect what was due and impose a penalty. (36)

90. True, it cannot be excluded that, were the administrative sanction to be particularly harsh, the combination of the two measures might, notwithstanding the infraction, give rise to an intolerable financial burden for the driver. Yet, as mentioned in point 86 above, the Austrian Government has provided no information on the amount of the administrative sanction.

91. Second, the fact that the offender is required to purchase an annual vignette does not seem to me to be either discriminatory or disproportionate. On the one hand, the owners of domestic vehicles are always required to pay the amount corresponding to the annual vignette. There is, therefore, no less favourable treatment with regard to drivers of foreign vehicles. At most, a foreign driver that fails to comply with the obligation to pay the infrastructure charge is forfeiting a privilege that is normally granted to drivers of foreign vehicles (and only to them): the possibility to opt for a vignette of shorter duration at a lower price. On the other hand, I do not find that measure disproportionate. Given the aleatory nature of checks, the authorities that detect an infringement of the obligation to purchase a vignette have generally no means of knowing for how long the offender has been using the motorway network illicitly. I thus find it reasonable that that driver is required to pay the highest amount possible in relation to the vehicle driven. (37)

(c) Lodging of a security

92. Finally, with regard to the obligation by the offender to provide a security, it must be observed that, admittedly, that measure might appear prima facie discriminatory insofar as Paragraph 11(7) of the InfrAG, is only applicable with regard to drivers of foreign vehicles.

93. However, the distinct treatment provided for in that provision does not, in my view, contravene the principle enshrined in Article 18 TFEU. Indeed, the case-law of the Court, including the decisions referred to by the Austrian Government, does not support the arguments put forward by that government on this point.

94. In its judgment in *Commission v Italy*, the Court acknowledged that, in case of infractions committed by foreign drivers, a Member State is not a priori barred from applying to them distinctive treatment, provided that such treatment is justified by objective circumstances and proportionate to the objective pursued. (38) In the light of that principle, the Court found that the absence of any conventions to secure the enforcement of a court decision in a Member State other than that in which it was pronounced objectively justifies a difference in treatment between resident and non-resident offenders. The obligation imposed on the latter to pay a sum by way of security was found appropriate to prevent them from avoiding an effective penalty simply by declaring that they do not consent to the immediate levying of the fine. The Court found, nonetheless, that the amount of the security was not proportionate as it amounted to double the sanction provided for in case of immediate payment. That amount had the effect of inciting foreign drivers to waive their right under the law to a period of time in which to decide whether to pay or to contest the alleged infringement before the administrative authorities. (39)

95. That judgment is, I would emphasise, consistent with a number of other decisions of the Court. For example, in its judgment in *Commission v Spain*, (40) the Court found that a provision requiring foreign

companies to provide a security to carry out a given economic activity in Spain was incompatible with the Treaty rules on free movement. The Court found that rule disproportionate for the reason that it did not take into account any security that may have been lodged by the companies in question in their Member State of origin. That ruling, however, implied that, under the current state of development of the systems for cross-border debt recovery and execution of foreign judgments within the European Union, a less stringent measure might have been compatible with EU law. (41)

96. More recently, in *Čepelnik*, (42) the Court did not declare a national rule which imposed the lodging of a security in case of a suspected breach of the national labour laws by a foreign service provider to be incompatible with Article 56 TFEU per se, but only because of its specific characteristics. Despite the fact that the security had to be provided by the commissioner of the services, the actual amount of the security could exceed, even substantially, the amount that that party would in principle have to pay to the service provider. The security was also automatically and unconditionally applied, regardless of the individual circumstances of each service provider, despite the obvious fact that not all providers registered abroad were in a similar situation. The penalty whose payment the security in question was meant to ensure was, moreover, particularly severe, including for small-scale infringements. (43)

97. In the light of that case-law, I take the view that the possibility of requiring the lodging of a security, as set out in Paragraph 11(7) of the InfrAG, is not per se incompatible with EU law. It is true that the Federal Republic of Germany and the Republic of Austria are parties to a bilateral agreement on judicial and administrative cooperation. Nevertheless, as the German Government has pointed out, the Federal Republic of Germany does not have similar conventions in place with each and every other Member State of the European Union.

98. However, for such a measure to be in line with the principle of proportionality, and thus compatible with Article 18 TFEU, two conditions must in my view be fulfilled.

99. First, the requirement to provide a security must not be applied automatically to each offender but only in those cases where there are objective reasons to believe that, if the amount due for the vignette and the sanction are not paid immediately, the authority may find it impossible or excessively difficult to collect it in the future. Indeed, the Court has consistently recognised that prosecution of offences committed using vehicles registered abroad may involve more complex and costly procedures, and thus justify legislation which provides for distinctive treatment. (44)

100. However, the authority cannot presume bad faith in each foreign driver that may be incapable of paying the amount due on the spot. It cannot be assumed that all drivers of foreign vehicles who commit an infringement might try to profit from the administrative hurdles stemming from the cross-border enforcement of the measures of execution in order to escape their liability. (45)

101. Moreover, the cross-border enforcement of penalties and other administrative decisions has, in the last years, become far less onerous and complex for Member State authorities, thanks to the adoption of a number of EU instruments such as, inter alia, Council Framework Decision 2005/214/JHA (46) and Directive 2015/413/EU. (47) In addition, as pointed out by the Austrian Government, in some cases the provisions of bilateral cooperation agreements to which the Federal Republic of Germany is party may also be of application.

102. Accordingly, Member State authorities cannot take the view that, in all circumstances, cross-border measures of enforcement will be necessary, nor that those measures, if necessary, would always give rise to an intolerable administrative or financial burden.

103. On this issue, the German Government emphasises that the wording of Paragraph 11(7) of the InfrAG is clear in that the lodging of a security, in case an infringement is detected and the amount due by the offender is not paid immediately, *may* be required, but there is no *obligation* to impose it. In that connection, that government points out that the authorities in charge of applying that provision are

obviously obliged to interpret it in the light of EU law, in order to avoid any possible breach of the Treaty rules.

104. In that respect, it must be borne in mind that the Court is to assess the scope of national laws, regulations or administrative provisions as applied in practice, (48) in the light of the interpretation given to them by national courts. (49) There is nothing in the material produced before the Court by the applicant to suggest that the administrative and judicial authorities in the Federal Republic of Germany, when called upon to interpret and apply Paragraph 11(7) of the InfrAG, would not do so in the light of the relevant EU rules, in order to ensure compliance with EU law. (50)

105. Second, it is in my view necessary that the amount of the security is not set at such a level that it bears no reasonable relation to the infringement committed, or that it may have the effect of dissuading drivers of foreign vehicles from exercising their rights to free movement in Germany. In that regard, I observe that the amount of the security is limited to the amounts possibly due (the fee due for the vignette and the penalty that may be imposed) plus the costs of the administrative procedure.

106. With regard to this point, the file does not contain any indication as to the likely amounts of the penalty and of the costs of the procedure. In the absence of any concrete element, the Court cannot merely assume that the overall amount will be necessarily disproportionate, as the Austrian Government implies.

107. In conclusion, it is my view that the second ground of complaint should be dismissed too.

C. *Third ground of complaint: infringement of Articles 34 and 56 TFEU*

1. *Arguments of the parties*

108. The Republic of Austria claims that the contested measures constitute restrictions on the free movement of goods and the freedom to provide services, in that such measures may have effects on the cross-border supply of goods by vehicles of less than 3.5 tonnes total weight and on the provision of services by non-residents or even the provision of services to non-residents. The Austrian Government further argues that such restrictions cannot be justified.

109. The Federal Republic of Germany argues, first, that the infrastructure charge does not constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 34 TFEU. To that end, it refers in particular to the judgment in *Keck and Mithouard*. (51) In addition, the tax relief tax does not — in the German Government's view — have a cross-border aspect since it only affects nationals. Second, the German Government contests that the infrastructure charge might give rise to an infringement of the freedom to provide services. It refers, in that connection, to the judgment, *Mobistar and Belgacom Mobile*. (52)

2. *Assessment*

110. Essentially, the arguments put forward by the Austrian Government relate exclusively to the infrastructure charge. Indeed, it is by no means evident what the cross-border effects of the tax relief could be. The latter measure merely lowers the tax that owners of domestic vehicles have to pay. However, no such tax is, or may be, imposed on owners of vehicles registered in other Member States, nor is there any allegation that the motor vehicle tax is de facto discriminatory and thus contravenes Article 110 TFEU. (53)

111. Accordingly, my analysis shall, in this context, focus mainly on whether the infrastructure charge breaches Articles 34 and 56 TFEU.

112. Before that, however, a preliminary observation is in order. It is often argued that when a national measure may be prima facie capable of affecting two or more internal market freedoms, the Court may

examine the compatibility of the measure in question only with regard to the freedom mainly affected, thereby not pronouncing on the compatibility with the other freedom(s) that appear purely secondary. (54)

113. To my mind, such an approach — which is justified primarily by reasons of judicial economy — may be legitimate in the context of a preliminary ruling procedure. I am more dubious that it should be followed in the context of a direct action, where the Court is in principle required to answer each and every ground of complaint put forward by the applicant. In particular, it seems to me that, in the context of infringement proceedings, a ground of complaint may only be disregarded where the alleged breach is an inevitable consequence of a breach already ascertained by the Court, or where that ground was put forward in the alternative to a ground that has been held well founded. (55)

114. At any rate, in the light of the arguments put forward by the Republic of Austria, it seems to me that in the present case the Court should examine the alleged breach from the angle of both freedoms invoked.

(a) *Free movement of goods*

115. In substance, the Austrian Government contends that the infrastructure charge is a measure having equivalent effect that cannot be justified, in breach of Article 34 TFEU.

116. At the outset, it must be borne in mind that, in accordance with settled case-law, all measures which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an equivalent effect within the meaning of Article 34 TFEU. (56) Hence, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike. (57) By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, on condition that those provisions apply to all relevant traders and that they are in law and in fact non-discriminatory. (58)

117. Against that backdrop, I do not agree with the German Government that the infrastructure charge, insofar as it might have an effect on the distribution of goods in Germany, should be regarded as a ‘selling arrangement’ within the meaning of the *Keck* case-law.

118. The concept of selling arrangements covers only national rules that concern the ‘arrangements under which products may be sold’. (59) In other words, it encompasses measures regulating the manner in which (for example, when, where, how and by whom) products may be marketed. (60) That concept should not be extended to cover rules which concern the manner in which goods may be *transported*. Experience shows that selling arrangements, provided that they are not discriminatory, generally do not hinder access of imported goods into a Member State’s market. Conversely, limiting the manner in which goods may be transported may have a more direct effect on the cross-border trade of goods by making imports and exports technically, economically or practically more difficult or even impossible. To my mind, national rules on transport are, in certain regards, not unlike domestic rules on use, for which the Court refused to extend the *Keck* principle. (61) That is confirmed by a number of cases in which the Court examined the compatibility of national measures restraining the transport of goods with Article 34 TFEU under the traditional *Dassonville* and *Cassis de Dijon* case-law. (62)

119. However, that does not mean that the infrastructure charge should be considered a measure having equivalent effect.

120. It must be borne in mind, first, that the Federal Republic of Germany already has in place a system of motorway tolls that applies to vehicles with a weight of 3.5 tonnes and above. The infrastructure charge which is the object of the current proceedings thus only concerns vehicles with a weight of less than 3.5 tonnes. That charge is thus mainly concerned with passenger cars, buses and small vans and — it may be worth stressing again — is indistinctly applicable to both domestic and foreign vehicles.

121. Nevertheless, the Austrian Government argues that certain products originating from other Member States may be exported to Germany by means of passenger cars or small vans and, consequently, cross-border trade may be affected.

122. True, it cannot be excluded that certain goods may, at times, be transported from their place of production, import, storage or merely from another place in which they are marketed abroad, into Germany by means of passenger cars or small vans. However, that is not enough to consider the infrastructure charge to be a measure having equivalent effect.

123. In that regard, I would call to mind that, in a consistent line of cases, the Court has ruled that national measures whose restrictive effects were ‘too uncertain and indirect’, ‘purely speculative’ or ‘too insignificant and uncertain’ do not infringe Article 34 TFEU. (63) That is true especially with regard to measures that ‘make no distinction according to the origin of goods transported’ and ‘the purpose [of which] is not to regulate trade in goods with other Member States’. (64)

124. That seems to be the case with regard to the infrastructure charge at issue in the present proceedings, which is a measure by no means aimed at regulating trade: it is indistinctly applicable to any vehicle in transit on the German motorway network, regardless of the private or commercial purpose of the trip, and independently of the origin of the vehicle and of the goods possibly transported. The number of imported products which may be affected is probably modest and the possible price increase of those products even more limited, considering that the infrastructure charge is likely to constitute a particularly small fraction of the overall transport costs.

125. The case file does not permit, in my opinion, any different conclusion, especially given that the Republic of Austria has not provided evidence of any kind (estimates, studies, examples etc.) with regard to the possible impact that the infrastructure charge may have on cross-border trade. In reality, the Austrian Government is asking the Court to rule in this case on the basis of a mere assumption, notwithstanding the fact that, as applicant, it bears the burden of proof.

(b) *Freedom to provide services*

126. The Austrian Government is of the view that the infrastructure charge also falls foul of Article 56 TFEU insofar as it makes it more costly for both foreign service providers and domestic customers to circulate in Germany.

127. At the outset, it must be recalled that, according to settled case-law, all measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions of that freedom. Moreover, Article 56 TFEU confers rights not only on the provider of services himself but also on the recipient of those services. (65)

128. However, the Court has consistently held that national measures, the only effect of which is to create *additional costs* in respect of the service in question and which affect in the same way the provision of services between Member States and the provision of services within one Member State, do not fall within the scope of Article 56 TFEU. (66)

129. That may be the case, in particular, of taxes and other types of charges that national authorities may introduce in the exercise of their competences in the field of taxation or economic policy. Provided that those taxes and charges are not directly or indirectly discriminatory, and their amount is modest in relation to the services concerned, it cannot be taken for granted that they are likely to hamper access to the market of the Member State in question. (67)

130. It is true that, in the past, drivers of passenger cars, buses or small vans registered abroad could access the German motorway network free of charge. However, the Court has consistently stated that the EU provisions on free movement do not entitle traders to rely on there being no legislative amendment. (68) Simple amendments to national laws, provided that they are non-discriminatory, or mere disparities

between the national laws of various Member States, provided that they do not hamper access to the market of a Member State, are not sufficient to trigger the application of the Treaty rules on free movement, even where they might have a negative bearing on the decision of EU traders on whether to exercise their rights to freedom of movement. (69)

131. Against that background, and absent any concrete information or evidence from the applicant, the Court should not simply assume that the introduction of a charge of the type and in the amount of the infrastructure charge at issue will inevitably dissuade service providers established abroad from providing services in Germany, or discourage individuals resident in Germany from moving abroad for a similar purpose.

132. As mentioned in point 124 above, the infrastructure charge is indistinctly applicable to any vehicle in transit on the German motorway network, regardless of the private or commercial purpose of the trip, and independently of the origin of the vehicle. On the basis of the information available to the Court, the cost of the vignette appears to be in line with those applicable in other Member States of the European Union (including the Republic of Austria) and can hardly be considered disproportionate in relation to the service received (the unlimited access to the German motorway network). Any effect on the free movement of services appears, therefore, uncertain, or indirect at best. There is no element, in other words, that may point towards a hindrance to market access.

133. In the light of the above, there is no reason to examine the possible grounds of justification invoked by the German Government.

D. Fourth ground of complaint: infringement of Article 92 TFEU

1. Arguments of the parties

134. By its fourth and last ground of complaint, the Republic of Austria argues that the measures at issue infringe Article 92 TFEU, in so far as they apply to commercial bus transportation or the transportation of goods with motor vehicles below 3.5 tonnes. The Austrian Government emphasises that Article 92 TFEU does not provide for a possibility of justification, with the result that the discriminatory nature of the measures at issue makes them incompatible with that provision. That government refers, in that connection, to the judgment in *Commission v Germany*.

135. For its part, the Federal Republic of Germany considers this ground of complaint unfounded. The German Government submits that Article 92 TFEU cannot be interpreted as a far-reaching provision that precludes any amendment of the national legislation which may affect road transport. The German Government also points to the adoption, after the delivery of the judgment in *Commission v Germany*, of substantial legislation and in particular of the Eurovignette Directive. Articles 7(1) and 7k of that directive would expressly permit measures such as the ones at issue.

2. Assessment

136. According to Article 92 TFEU, '[u]ntil the provisions referred to in Article 91(1) have been laid down, no Member State may, unless the Council has unanimously adopted a measure granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State'.

137. In turn, Article 91(1) TFEU provides the basis for the adoption of the measures to implement the common transport policy, and in particular provisions laying down 'common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States', 'conditions under which non-resident carriers may operate transport services within a Member State', and 'measures to improve transport safety'.

138. Article 92 TFEU (or its predecessors, first Article 76 EEC and then Article 72 EC) is a provision that has hardly been interpreted by the Court, and has very rarely been applied by the Council. The present case thus offers an opportunity to the Court to clarify the scope and meaning of that provision.

139. Transport is the subject of a common policy, which implies the existence of specific rules that may, at times, derogate or at any rate differ from those governing other activities. There were a number of reasons why the Member States took the view, when the then Communities Treaties were being drafted, that transport had certain peculiarities which required a specific set of rules. (70) It was considered, inter alia, that significant divergences existed in the manner transport services were regulated at the level of the Member States, a factor which, in the light of the sensitivity of the subject matter, called for a cautious and gradual approach in the establishment of the common policy. (71)

140. That is why it was important, as a first step, to prevent Member States from undermining that process by introducing new rules favouring national carriers over foreign carriers. That would, indeed, have widened the gap between the various Member States' bodies of rules and go against the very spirit of the future policy. Then Article 76 EEC (now Article 92 TFEU) was thus conceived for that very purpose: it imposed a standstill obligation on Member States until the Community (now, the European Union) adopted common rules. In that connection, it must not be overlooked that, today as then, the general prohibition of restrictions on freedom to provide services within the European Union, set out in Article 56 TFEU (then Article 59 EEC), is not applicable in the field of transport, by virtue of Article 58(1) TFEU (then Article 61(1) EEC).

141. Bearing that history in mind, the arguments adduced by the Austrian Government in support of a breach of Article 92 TFEU are unconvincing.

142. To begin with, Article 92 TFEU is, arguably, no longer applicable with regard to measures such as those at issue. It is no surprise that that provision has been very rarely applied in the past, and has been for a very long time not applied at all: Article 76 EEC was from the beginning conceived as a rule of a transitory nature whose scope of application would progressively diminish. (72) Indeed, the wording of the provision expressly states that it applies only 'until the provisions referred to in Article 91(1) [TFEU] have been laid down'. In fact, after the establishment of common rules which cover all modes of transport (air, road, rail, sea and inland waterway), certain commentators have questioned whether that provision has not become largely obsolete. (73)

143. That is especially the case, to my mind, of road transport. Indeed, several EU measures aiming at establishing a common policy in that sector have seen the light of day, especially at the end of the 1980s and early 1990s. (74) Over those years, the EU legislature has, with a view to implement (what is now) Article 91(1) TFEU, inter alia: provided for freely negotiated tariffs between the contracting parties to be introduced from January 1990; abolished quotas from January 1993; introduced a Community-wide authorisation for road haulage operators also from January 1993; established common rules for the international carriage of passengers by coach and bus; and introduced cabotage to be realised in different phases. (75)

144. Nowadays, as Opinion 2/15 recently confirmed, the sector of road transport is largely covered by EU legislation. (76) In particular, EU legislation includes common rules on access to professions and to the market, sets minimal standards for working time, driving time and rest periods for professional road transport, and sets minimum annual vehicle taxes as well as common rules for tolls and user charges for heavy goods vehicles. (77)

145. The last of those aspects is particularly relevant in the present proceedings. Indeed, the Eurovignette Directive sets common rules on distance-related tolls and time-based user charges (vignettes) for heavy goods vehicles for the use of certain infrastructures. These rules stipulate that the cost of constructing, operating and developing infrastructure can be financed through tolls and vignettes to road users.

146. However, the EU legislature has decided, for the time being, to limit the approximation of the laws of the Member States in this field to only vehicles above 3.5 tonnes. (78) Article 7(1) of the Eurovignette Directive makes it clear that, under certain conditions, ‘Member States may maintain or introduce tolls and/or user charges on the trans-European road network or on certain sections of that network, and on any other additional sections of their network of motorways which are not part of the trans-European road network’. Member States have, in principle, the right ‘to apply tolls and/or user charges on other roads, provided that the imposition of tolls and/or user charges on such other roads does not discriminate against international traffic and does not result in the distortion of competition between operators’. That provision should be read against recital 9 of Directive 2011/76/EU, (79) according to which that directive ‘does not prevent Member States from applying national rules for charging other road users outside the scope of this Directive’. Moreover, Article 7k of the Eurovignette Directive expressly permits Member States which introduce a system of user charges for infrastructure to provide appropriate compensation for those charges.

147. It cannot possibly be argued — as it is implied in the submissions of the Austrian Government — that, notwithstanding the rich legislation adopted by the European Union under Article 91 TFEU in the field of road transport, and despite the specific rules laid down in the Eurovignette Directive, no Member State is allowed to introduce a system of tolls or user charges for the use of its motorway network for the vehicles not covered by the Eurovignette Directive as long as the EU legislature does not regulate the matter. Nor that, when a Member State does that, it cannot lower motor vehicle-related taxation in order to compensate for the new charges.

148. That conclusion, apart from being difficult to reconcile with the very wording of the Eurovignette Directive, would also go against two widely accepted dogmas of the EU transport policy: costs relating to the use of transport infrastructures should be based on the ‘user-pay’ and the ‘polluter-pay’ principles. (80) It would also be an illogical conclusion as it would mean that all the Member States that have established such systems after 1 January 1958 (or after the date of their accession to the Community/Union) have infringed, and continue to infringe, Article 92 TFEU.

149. To substantiate its claim, the Austrian Government refers to the judgment in *Commission v Germany*.

150. Yet, I believe that the conclusion reached by the Court in that case cannot be readily transposed to the present proceedings. Indeed, the case was brought in 1990, at a time when most of the measures required to implement a common policy in the field of road transport either had not been adopted or had yet to be transposed at national level, including — and that is particularly important — the Eurovignette Directive. However, the ‘provisions referred to in Article 91(1) [TFEU]’ have now finally been adopted, including specific rules on the allocation of costs for transport infrastructures.

151. At any rate, even if Article 92 TFEU were still to be applicable, the Austrian Government has fallen short of explaining, let alone providing any evidence of, how a measure that concerns only vehicles of less than 3.5 tonnes could have a real impact on foreign carriers. On this issue too, that government is essentially asking the Court to base its decision on an assumption. However, as mentioned in point 78 above, in the context of proceedings under Article 259 TFEU the applicant is obliged to prove the alleged failures without relying on any presumption.

152. For all those reasons, I take the view that the fourth ground of complaint is also to be dismissed.

V. Costs

153. In conformity with Articles 138(1) and 140(1) of the Rules of Procedure, I consider that the Republic of Austria is to bear its own costs and to pay those incurred by the Federal Republic of Germany, whereas the Kingdom of Denmark and the Kingdom of the Netherlands are to bear their own costs.

VI. Conclusion

154. In the light of the above, I propose that the Court should:

- Dismiss the action;
- Order the Republic of Austria to bear its own costs and pay those incurred by the Federal Republic of Germany;
- Order the Kingdom of Denmark and the Kingdom of the Netherlands to bear their own costs.

[1](#) Original language: English.

[2](#) Both measures will be referred to as ‘the measures at issue’.

[3](#) OJ 1999 L 187, p. 42.

[4](#) BGBl. I, p. 904.

[5](#) BGBl. I, p. 1218.

[6](#) BGBl. I, p. 1206.

[7](#) BGBl. I, p. 3818.

[8](#) BGBl. I, p. 901.

[9](#) BGBl. I, p. 1493.

[10](#) Directive of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59).

[11](#) See, to that effect, judgment of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7. See also Article 20 of the Charter.

[12](#) See judgment of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 31 and the case-law cited.

[13](#) Cf. Article 2(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

[14](#) See, to that effect, judgments of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 23 to 25, and of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 36.

[15](#) See judgment of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited.

[16](#) Judgment of 19 May 1992, *Commission v Germany*, C-195/90, EU:C:1992:219 ('the judgment in *Commission v Germany*').

[17](#) As regards Article 92 TFEU more generally, see *infra* points 134 to 152 of this Opinion.

[18](#) On this point, see the discussion in the Opinion of Advocate General Jacobs in *Commission v Germany*, C-195/90, EU:C:1992:123, points 14 to 21.

[19](#) A fortiori, the fact that owners of Euro 6 vehicles receive a tax relief of an amount that is higher than the amount they pay for the annual vignette has no bearing in this context.

[20](#) For example, the use of Portugal's Vasco da Gama Bridge, and of the Øresund Bridge between Sweden and Denmark is subject to a toll, but the use of Budapest's Széchenyi chain bridge is not. Likewise, the use of Austria's Arlberg road tunnel and the Fréjus road tunnel between Italy and France is subject to a toll, but the use of Italy's Gran Sasso tunnel is not.

[21](#) For example, Berlin's Reichstag dome, London's British Museum, Paris' Notre-Dame Cathedral, Rome's Pantheon and Vienna's Schönbrunn gardens may be visited free of charge, whereas a visit to Amsterdam's Van Gogh Museum, Athen's Acropolis, Madrid's del Prado Museum, or Venice's Saint Mark's Basilica is normally subject to a fee.

[22](#) See, to that effect, judgment of 15 July 2004, *Lindfors*, C-365/02, EU:C:2004:449 paragraph 34 and the case-law cited. More generally, see also judgment of 16 January 2003, *Commission v Italy*, C-388/01, EU:C:2003:30.

[23](#) See *supra*, point 36 of this Opinion.

[24](#) I observe that such compensation is expressly permitted by Article 7k of the Eurovignette Directive. Although not directly applicable in the case at hand, that provision may be taken as an expression of a principle that must also be valid in the situation at issue in the present proceedings.

[25](#) Attentive readers will have recognised a paraphrase of the opening of the 1848 work 'Manifesto of the Communist Party' by philosophers Karl Marx and Friedrich Engels. The original reference was, obviously, to communism. I am, however, by no means implying that the two phenomena should be regarded as similar.

[26](#) See, to that effect, Opinion of Advocate General Van Gerven in Joined Cases *Jackson and Cresswell*, C-63/91 and C-64/91, EU:C:1992:212, points 15 et seq.

[27](#) See, to that effect, judgment of 4 May 2017, *Commission v United Kingdom*, C-502/15, not published, EU:C:2017:334, paragraph 25 and the case-law cited.

[28](#) See, to that effect, judgment of 16 October 2012, *Hungary v Slovakia*, C-364/10, EU:C:2012:630, paragraphs 56 to 61.

[29](#) See, among many, judgment of 16 September 2004, *Commission v Spain*, C-227/01, EU:C:2004:528, paragraph 58.

[30](#) In legal scholarship, with further references, see Sanchez-Graells, A., ‘Assessing the Public Administration’s Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?’, *Cambridge Yearbook of European Legal Studies*, 2016, pp. 111 and 112.

[31](#) A toll system for heavy goods vehicles is already in place.

[32](#) Judgment of 19 March 2002, C-224/00, EU:C:2002:185 (‘the judgment in *Commission v Italy*’).

[33](#) See, to that effect, judgment of 26 April 2018, *Commission v Bulgaria*, C-97/17, EU:C:2018:285, paragraph 69 and the case-law cited.

[34](#) At the hearing, the Austrian Government also contended that there is another reason why the infrastructure charge is, because of its design, discriminatory. That government argued that, in the light of the different manners in which it is to be paid, the infrastructure charge should be regarded as giving rise, in practice, to two distinct measures: a tax for the owners of domestic vehicles, and a users’ charge for the drivers of foreign vehicles. However, that argument has not been clearly explained, nor expressly included in its application. I thus consider it manifestly inadmissible.

[35](#) In the absence of common rules governing a specific matter, the Member States remain competent to impose penalties for breach of obligations stemming from domestic legislation. However, the Member States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the freedoms enshrined in the Treaties. See, to that effect, judgments of 7 July 1976, *Watson and Belmann*, 118/75, EU:C:1976:106, paragraph 21, and of 29 February 1996, *Skanavi and Chryssanthakopoulos*, C-193/94, EU:C:1996:70, paragraph 36.

[36](#) See, by analogy, my Opinion in *Vámos*, C-566/16, EU:C:2017:895, points 57 and 58 (confirmed in the judgment of 17 May 2018, EU:C:2018:321, paragraph 42).

[37](#) The case is, to my mind, similar to that of a driver that loses the ticket received at the entrance of a motorway. In that case, the driver is normally required to pay the toll corresponding to the longest itinerary possible on that motorway.

[38](#) See paragraph 20 of the judgment.

[39](#) See paragraphs 21 to 29 of the judgment.

[40](#) Judgment of 26 January 2006, C-514/03, EU:C:2006:63.

[41](#) See paragraphs 41 to 44 of the judgment.

[42](#) Judgment of 13 November 2018, C-33/17, EU:C:2018:896.

[43](#) See paragraphs 46 to 48 of the judgment. See also my Opinion in the same case, EU:C:2018:311, points 100, 101 and 107.

[44](#) See Opinion of Advocate General Stix-Hackl in *Commission v Italy*, C-224/00, EU:C:2001:671, points 31 et seq. and the case-law cited.

[45](#) See, to that effect, judgments of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraphs 51 and 52; of 9 November 2006, *Commission v Belgium*, C-433/04, EU:C:2006:702, paragraphs 35 to 38; of 7 September 2017, *Egiom and Enka*, C-6/16, EU:C:2017:641, paragraph 31; and of 20 December 2017, *Deister Holding and Juhler Holding*, C-504/16 and C-613/16, EU:C:2017:1009, paragraph 61.

[46](#) Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16).

[47](#) Directive of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences (OJ 2015 L 68, p. 9).

[48](#) See, among many, judgment of 27 November 2003, *Commission v Finland*, C-185/00, EU:C:2003:639, paragraph 109.

[49](#) See, among others, judgment of 10 July 1986, *Commission v Italy*, 235/84, EU:C:1986:303, paragraph 14.

[50](#) See, by analogy, judgment of 29 May 1997, *Commission v United Kingdom*, C-300/95, EU:C:1997:255, paragraph 38.

[51](#) Judgment of 24 November 1993, C-267/91 and C-268/91, EU:C:1993:905 (*Keck*).

[52](#) Judgment of 8 September 2005, C-544/03 and C-545/03, EU:C:2005:518.

[53](#) The Court has repeatedly held that Articles 34 and 110 TFEU are mutually exclusive in their scope. It is settled case-law that the scope of Article 34 TFEU does not extend to the obstacles to trade covered by other specific provisions and that the obstacles of a fiscal nature referred to in Article 110 TFEU are not covered by the

prohibition laid down in Article 34 TFEU (see, inter alia, judgment of 7 April 2011, *Tatu*, C-402/09, EU:C:2011:219, paragraph 33).

[54](#) See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Commission v Hungary (Rights of usufruct over agricultural land)*, C-235/17, EU:C:2018:971, points 43 to 50.

[55](#) See, for example, judgments of 30 May 2006, *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 168 to 173; and of 20 October 2011, *Commission v France*, C-549/09, not published, EU:C:2011:672, paragraph 48.

[56](#) See, inter alia, judgments of 11 July 1974, *Dassonville*, 8/74, EU:C:1974:82 (*'Dassonville'*), paragraph 5, and of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 31.

[57](#) See, to that effect, judgments of 20 February 1979, *Rewe-Zentral*, 120/78, EU:C:1979:42 (*'Cassis de Dijon'*), paragraphs 6, 14 and 15; and of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66 (*'Trailers'*), paragraph 35.

[58](#) See *Keck*, paragraphs 16 and 17, and *Trailers*, paragraph 36.

[59](#) See judgment of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft*, C-531/07, EU:C:2009:276, paragraph 20.

[60](#) See judgments of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, and of 21 September 2016, *Etablissements Fr. Colruyt*, C-221/15, EU:C:2016:704. Cf. also Opinion of Advocate General Szpunar in *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:394, point 20 et seq.

[61](#) Cf. *Trailers*, paragraphs 37 and 56 et seq.

[62](#) See, inter alia, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333; of 15 November 2005, *Commission v Austria*, C-320/03, EU:C:2005:684; and of 21 December 2011, *Commission v Austria*, C-28/09, EU:C:2011:854.

[63](#) See, among many, judgments of 7 March 1990, *Krantz*, C-69/88, EU:C:1990:97, paragraph 11; of 5 October 1994, *Centre d'insémination de la Crespelle*, C-323/93, EU:C:1994:368, paragraph 36; of 3 December 1998, *Bluhme*, C-67/97, EU:C:1998:584, paragraph 22; and of 26 May 2005, *Burmanjer and Others*, C-20/03, EU:C:2005:307, paragraph 31.

[64](#) See judgments of 18 June 1998, *Corsica Ferries France*, C-266/96, EU:C:1998:306, paragraph 31; of 14 July 1994, *Peralta*, C-379/92, EU:C:1994:296, paragraph 24; and of 5 October 1995, *Centro Servizi Spediporto*, C-96/94, EU:C:1995:308, paragraph 41.

[65](#) Judgment of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraphs 37 and 38 and the case-law cited.

[66](#) See, for example, judgments of 8 September 2005, *Mobistar and Belgacom Mobile*, C-544/03 and C-545/03, EU:C:2005:518, paragraph 31; of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 36; and of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 32.

[67](#) See, to that effect, judgments of 17 February 2005, *Viacom Outdoor*, C-134/03, EU:C:2005:94, paragraphs 37 to 39, and, by analogy, of 1 June 2006, *innoventif*, C-453/04, EU:C:2006:361, paragraphs 37 to 40. See also Opinion of Advocate General Kokott in *Viacom Outdoor*, C-134/03, EU:C:2004:676, points 58 to 67; and my Opinion in *Global Starnet*, C-322/16, EU:C:2017:442, points 26 to 29.

[68](#) See judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 78 and the case-law cited.

[69](#) See, to that effect, judgment of 29 April 2004, *Weigel*, C-387/01, EU:C:2004:256, paragraph 55. See also Opinion of Advocate General Tizzano in *CaixaBank France*, C-442/02, EU:C:2004:187, point 58.

[70](#) See Aussant, J., Fornasier, R., ‘La Politique Commune des Transports’, in *Commentaire Megret – Le Droit de la CEE*, Vol. 3, 2nd ed., 1990, pp. 195-197.

[71](#) See, generally, Robert, J., ‘Doubts on a Common Transport Policy’, 1967, *Common Market Law Review*, vol. 5, p. 193 et seq.

[72](#) See Aussant, J., Fornasier, R., *supra* footnote 69, p. 216.

[73](#) See, for example, Grand, L., ‘Comment to Article 72 EC’, in Pingel, I. (ed.), *Commentaire article par article des traités UE et CE*, 2nd edition, Dalloz, Paris, 2010, pp. 667 and 668. Similarly, Balducci Romano, F., ‘Comment to Article 92 TFEU’, in Curti Gialdino, C., *Codice dell’Unione Europea Operativo*, Simone, Napoli, 2012, pp. 962 and 963.

[74](#) The reason for that lies in the fact that, in the mid-1980s, the Parliament successfully brought proceedings against the Council for failure to introduce a common policy for transport (see judgment of 22 May 1985, *Parliament v Council*, 13/83, EU:C:1985:220).

[75](#) Respectively, Council Regulation (EEC) No 4058/89 of 21 December 1989 on the fixing of rates for the carriage of goods by road between Member States (OJ 1989 L 390, p. 1); Council Regulation (EEC) No 1841/88 of 21 June 1988 amending Regulation (EEC) No 3164/76 on the Community quota for the carriage of goods by road between Member States (OJ 1988 L 163, p. 1); 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 (OJ 1992 L 95, p. 1); Council Regulation (EEC) No 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (OJ 1992 L 74, p. 1); and Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the

conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

[76](#) Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017, EU:C:2017:376, paragraphs 204 to 212. See also Opinion of Advocate General Sharpston in the same proceedings, EU:C:2016:992, points 260 to 267.

[77](#) For a relatively recent overview of the existing legislation with references to the various legal instruments currently in force, see Report from the Commission to the European Parliament and the Council on the State of the Union Road Transport Market of 14 April 2014 (COM(2014) 222 final).

[78](#) See recital 5 of the Eurovignette Directive.

[79](#) Directive of the European Parliament and of the Council of 27 September 2011 amending Directive 1999/62 (OJ 2011 L 269, p. 1).

[80](#) See, for example, recital 3 of Directive 2011/76; and European Commission, White Paper, Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system (COM(2011) 144 final), point 58.