

The Commission challenged this increase of the Brenner toll on the basis of an alleged discrimination of the haulier's nationality and on non-respect of the obligation to use the income from the toll exclusively for the maintenance of the section of the infrastructure for the use of which the toll is paid. The Court of Justice declared both claims for well-founded<sup>132</sup>.

According to the Court, the first breach of Community law consists in a discrimination against hauliers from other Member States. By the new toll system for the Brenner pass, Austria had introduced three different levels of toll, for full, partial and short journeys on the motorway. At each level, this increase was of different importance. The toll for the full itinerary has been raised the most compared to the previous situation, while the toll for the other two categories had not been touched significantly. Since non-Austrian hauliers mostly used the full itinerary, they were more concerned by the increase of the toll than their Austrian competitors. This indirect discrimination of foreign hauliers infringed Article 7(b) of the former Directive 93/98/EEC then in force. According to the Court, derogations from the principle of non-discrimination may only be granted when expressly foreseen by the Directive and "neither the recitals in the preamble to the Directive nor the provisions of the Directive contemplate the possibility of relying on grounds relating to policies on national transport or environmental protection in order to justify tariff arrangements which give rise to indirect discrimination within the meaning of Article 7(b) of the Directive."<sup>133</sup>

At first sight, this argument seems convincing, the principle of non-discrimination based on nationality being one of the basic principles of Community law and exceptions being subject to restrictive interpretation<sup>134</sup>. Nevertheless, some authors do not share the Court's assessment. Advocate General Saggio stated in his opinion, that this "discrimination, being indirect, may in principle be justified on objective and impartial grounds connected inter alia with the requirements of national transport policy and protection of the environment."<sup>135</sup> EPINEY makes a similar argument, saying that Article

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<sup>132</sup> Judgment of 26 September 2000, in case C-205/98, *Commission v. Austria ("Brenner toll")*, [2000] ECR I-7367.

<sup>133</sup> See *supra*, note 132, para 95.

<sup>134</sup> See L. KRÄMER, *Casebook on EU Environmental Law*, Hart Publishing, Oxford and Portland/Oregon 2002, p.105.

<sup>135</sup> Opinion of Advocate General Saggio, delivered on 24 February 2000, in case C-205/98, *Commission v. Austria*, [2000] ECR I 7367, para 43.