

7(b) of the Directive does not list exhaustively all grounds for derogation. She adds that in other cases, the Court generally accepted the possibility to justify indirect discriminations¹³⁶. The future will show in which direction jurisprudence will develop.

The second breach of Community law consists, according to the Court, in the fact that the new Austrian toll system did not respect the obligation laid down in Article 7(h) of the Directive 93/89/EEC, that "toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned." Under the new Austrian toll system, the money raised could also be used for the financing of other parts of the motorway network, not only the Brenner motorway.

Regarding this topic, it has to be clearly pointed out that the Directive in question was not environmentally motivated. The rule that tolls may only be used for the construction and operation of the motorway where they are levied implies, that a huge frequentation is paired with low toll. The more trucks will use the motorway, the more the toll will decrease. This is a clear incentive in favour of road transport, because the more goods are shipped by road, the cheaper each single shipment will become. It is beyond doubts that, when "adopting this Directive, the Community simply had not forged Directive 93/89 as a tool for environmental protection."¹³⁷ Another author goes even further by declaring the provision of the Directive in question as contrary to primary Community law, concretely to the polluter-pays principle enshrined in Article 174(2) EC¹³⁸.

Directive 1999/62 tried to take into account some of the environmental considerations mentioned above. Under Article 7(10), Member States are allowed to vary the toll according to vehicle emission classes. Additionally, Article 9(2) of the Directive opens up for the possibility to attribute a certain percentage of the toll to "environmental protection and the balanced development of transport networks". This gives Member States "a great deal of room to decide where to spend revenue from pricing; including subsidising railways."¹³⁹ It is a first step in the direction of the policy presented in the Commission's White Paper on a "European transport policy for 2010: time to decide" of 2001.

¹³⁶ See *supra*, note 115, p.109.

¹³⁷ See *supra*, note 134, p.108.

¹³⁸ See *supra*, note 115, p.110.

¹³⁹ "How long can de Palacio remain in office?", (2003) 117 T&E Bulletin 1.