ECLI:EU:C:2019:504

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

18 June 2019(*)

(Failure of a Member State to fulfil obligations — Articles 18, 34, 56 and 92 TFEU — Legislation of a Member State prescribing an infrastructure use charge for passenger vehicles — Situation in which owners of vehicles registered in that Member State qualify for relief from motor vehicle tax in an amount corresponding to that charge)

In Case C-591/17,

ACTION for failure to fulfil obligations under Article 259 TFEU, brought on 12 October 2017,

Republic of Austria, represented by G. Hesse, J. Schmoll and C. Drexel, acting as Agents,

applicant,

supported by:

Kingdom of the Netherlands, represented by J. Langer, J.M. Hoogveld and M.K. Bulterman, acting as Agents,

intervener,

v

Federal Republic of Germany, represented by T. Henze and S. Eisenberg, acting as Agents, and by C. Hillgruber, Rechtsanwalt,

defendant,

supported by:

Kingdom of Denmark, represented by J. Nymann-Lindegren and M. Wolff, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta (Rapporteur), Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, C.G. Fernlund, P.G. Xuereb, N. Piçarra and L.S. Rossi, Judges,

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2018,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2019,

gives the following

Judgment

1 By its application, the Republic of Austria asks the Court to declare that the Federal Republic of Germany has infringed Articles 18, 34, 56 and 92 TFEU by introducing the infrastructure use charge for passenger vehicles by means of the Infrastrukturabgabegesetz (the law on infrastructure charges) of 8 June 2015 (BGBl. I, p. 904), in the version resulting from Article 1 of the Law of 18 May 2017 (BGBl. I, p. 1218) ('the InfrAG'), and by providing relief from motor vehicle tax corresponding, at the least, to the amount of that charge for the owners of vehicles registered in Germany, introduced in the Kraftfahrzeugsteuergesetz (the law on motor vehicle tax) of 26 September 2002 (BGBl. I, p. 3818; 'the KraftStG') by means of the Zweites Verkehrsteueränderungsgesetz (the second law amending the road traffic tax) of 8 June 2015 (BGBl. I, p. 901), and latterly amended by the Gesetz zur Änderung des Zweiten Verkehrsteueränderungsgesetzes (the law amending the second law amending the road traffic tax) of 6 June 2017 (BGBl. I, p. 1493) (together, 'the national measures at issue').

Legal context

European Union law

2 The first subparagraph of Article 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 (OJ 1999 L 187, p. 42), as amended by Directive 2011/76/EC of the European Parliament and of the Council of 27 September 2011 (OJ 2011 L 269, p. 1) ('the Eurovignette Directive'), provides that that directive applies to vehicle taxes, tolls and user charges imposed on vehicles as defined in Article 2 thereof. Article 2(d) of that directive defines a 'vehicle' for the purposes of the Eurovignette Directive as 'a motor vehicle or articulated vehicle combination intended or used for the carriage by road of goods and having a maximum permissible laden weight of over 3.5 tonnes'.

3 Article 7 of the Eurovignette Directive provides:

'1. 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.

...

3. Tolls and user charges shall not discriminate, directly or indirectly, on the grounds of nationality of the haulier, the Member State or the third country of establishment of the haulier or of registration of the vehicle, or the origin or destination of the transport operation.

...'

4 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.'

German law

The InfrAG

5 Paragraph 1 of the InfrAG prescribes the payment of a charge ('the infrastructure use charge') for the use by passenger vehicles of federal roads, within the meaning of Paragraph 1 of the Bundesfernstraßengesetz (the law on federal roads), in the version published on 28 June 2007 (BGBl. I, p. 1206), including motorways.

6 In accordance with Paragraphs 3 and 7 of the InfrAG, for vehicles registered in Germany, the infrastructure use 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 charge is determined by a decision of the responsible authority. The vignette is deemed to have been acquired at the time of registration.

7 For vehicles registered abroad, the obligation to pay the charge, which is payable only on use of the motorways, falls on either the owner or the driver of the vehicle during that use, and arises, in accordance with Paragraph 5(4) of the InfrAG, on the first use of a road that is subject to the charge after the crossing of a border. The charge must be paid by means of purchasing a vignette. In that respect, there is a choice between a 10-day vignette, a 2-month vignette or an annual vignette.

8 The amount of the charge to be paid, as set out in subparagraph 1 of the Annex to Paragraph 8 of the InfrAG, is calculated on the basis of cylinder capacity, the type of engine (positive ignition or compression ignition) and the emission standard. That subparagraph is worded as follows:

'The amount of the infrastructure use charge:

1. as regards the 10-day vignette for vehicles, with respect to which, for an annual vignette under point 3, an infrastructure use charge of

(a) less than EUR 20 must be paid, shall be EUR 2.50

(b) less than EUR 40 must be paid, shall be EUR 4

(c) less than EUR 70 must be paid, shall be EUR 8

(d) less than EUR 100 must be paid, shall be EUR 14

(e) less than EUR 130 must be paid, shall be EUR 20 and

(f) EUR 130 must be paid, shall be EUR 25.

2. as regards the two-month vignette for vehicles, with respect to which, for an annual vignette under point 3, an infrastructure use charge of

(a) less than EUR 20 must be paid, shall be EUR 7

(b) less than EUR 40 must be paid, shall be EUR 11

(c) less than EUR 70 must be paid, shall be EUR 18

(d) less than EUR 100 must be paid, shall be EUR 30

(e) less than EUR 130 must be paid, shall be EUR 40 and

(f) EUR 130 must be paid, shall be EUR 50.

3. as regards the annual vignette for

(a) vehicles within the meaning of Paragraph 1(1), points 1 and 3 with reciprocating piston and rotary piston engines for every 100 cm^3 of cylinder capacity or part thereof when they

(aa) are propelled by positive ignition engines and

(aaa) do not meet the requirements of the emission standards in points (bbb) and (ccc) or compliance with which is not correctly demonstrated, shall be EUR 6.50

(bbb) meet the requirements of the Euro 4 or Euro 5 emission standards, shall be EUR 2

(ccc) meet the requirements of the Euro 6 emission standard, shall be EUR 1.80

(bb) are propelled by compression ignition engines and

(aaa) do not meet the requirements of the emission standards in points (bbb) and (ccc) or compliance with which is not correctly demonstrated, shall be EUR 9.50

(bbb) meet the requirements of the Euro 4 or Euro 5 emission standards, shall be EUR 5

(ccc) meet the requirements of the Euro 6 emission standard, shall be EUR 4.80

(b) vehicles within the meaning of Paragraph 1(1), point 2, for every 200 kg of maximum laden weight or part thereof, shall be EUR 16

provided that the total amount shall not exceed EUR 130.’

9 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 by decision, in accordance with Paragraph 12 of the 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.

10 Paragraph 11 of the InfrAG provides for random inspections to verify compliance with the obligation to pay the charge. In accordance with Paragraph 11(7) of the InfrAG, the authorities may, at the place of inspection, require payment of the cost of the annual vignette 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 a request to do so and if there are reasonable doubts whether it will be paid later, or if the documents necessary for the inspection are not presented, if the information requested is not provided or if a security imposed is not paid, wholly or in part.

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

The KraftStG

12 Paragraph 9(6) of the KraftStG states the following:

‘With respect to national vehicles, the annual tax [on motor vehicles] shall be reduced (relief) for

(1) passenger vehicles, for every 100 cm^3 of cylinder capacity or part of that volume,

(a) when they comply with the obligatory limit values of Table 2 of Annex I to Regulation (EC) No 715/2007 [of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1),] and are propelled by:

(aa) positive-ignition engines, by EUR 2.32,

(bb) compression-ignition engines, by EUR 5.32,

(b) when they comply with the obligatory limit values of Table 1 of Annex I to [Regulation 715/2007] or line B of vehicle category M of the tables in point 5.3.1.4 of Annex I to [Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles (OJ 1970 L 76, p. 1),] in the version in force until 1 January 2013 and are propelled by

(aa) positive ignition engines, by EUR 2,

(bb) compression ignition engines, by EUR 5,

(c) when they do not comply with the requirements under points (a) and (b) and are propelled by

(aa) positive ignition engines, by EUR 6.50,

(bb) compression ignition engines, by EUR 9.50

provided that the total does not exceed EUR 130;

(2) motor homes for every 200 kg of maximum laden weight or part of that weight, by EUR 16, provided that the total does not exceed EUR 130;

(3) passenger vehicles and motor homes with

(a) a registration number issued with respect to vintage cars, by EUR 130,

(b) a seasonal registration number issued with respect to each day of the period of use, by the proportion of the corresponding annual amount under points 1 to 3(a).

The amount of the relief due under the first sentence shall be limited to the annual tax due under subparagraph 1, points 2 and 2a, and under subparagraph 4, point 2, in the case of seasonal registrations to the proportion of the annual amount corresponding to the period of use.'

13 In accordance with Paragraph 3(2) of the law amending the second law amending the road traffic tax, the entry into force of that legislation is dependent on commencement of the collection of the infrastructure use charge, in accordance with the InfrAG.

Pre-litigation procedure and proceedings before the Court

14 By letter of formal notice dated 18 June 2015, the European Commission initiated infringement proceedings against the Federal Republic of Germany, challenging, first, the combined effects of the national measures at issue and, second, the cost of short-term vignettes. That letter of formal notice, supplemented by a second letter of formal notice dated 10 December 2015, drew the attention of the German authorities to a possible infringement by those measures of Articles 18, 34, 45, 56 and 92 TFEU. Following correspondence with the German authorities and having issued a reasoned opinion on 28 April 2016, the Commission decided, on 29 September 2016, to bring proceedings before the Court in accordance with Article 258 TFEU.

15 However, after amendments were made to the provisions of the German legislation criticised by it, the Commission decided, on 17 May 2017, to terminate the infringement procedure.

16 By a letter dated 7 July 2017, the Republic of Austria brought before the Commission, under Article 259 TFEU, the possibility of an infringement by the Federal Republic of Germany of Articles 18, 34, 45, 56 and 92 TFEU resulting from the combined effects of the infrastructure use charge and the relief from motor vehicle tax for the proprietors of vehicles registered in Germany.

17 By letter dated 14 July 2017, the Commission acknowledged receipt of the letter from the Republic of Austria.

18 By letter dated 11 August 2017, the Federal Republic of Germany rejected the arguments of the Republic of Austria and justified the national measures at issue essentially by reference to a change in system, moving from financing by means of taxation to financing by users, and to the

contention that the measures providing compensation are lawful on the basis of the Eurovignette Directive.

19 On 31 August 2017 a hearing was held at the offices of the Commission, at which the Republic of Austria and the Federal Republic of Germany each submitted their arguments.

20 The Commission did not issue a reasoned opinion within the three-month period provided for in Article 259 TFEU.

21 On 12 October 2017 the Republic of Austria therefore brought the present action.

22 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.

The action

23 In support of its action, the Republic of Austria relies on four grounds of complaint with respect to the national legislation at issue, on the understanding that the legislation, although adopted, has not yet entered into force. The first and second grounds of complaint concern an infringement of Article 18 TFEU resulting, on the one hand, from the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany, and, on the other, the structuring and application of the infrastructure use charge. The third ground of complaint concerns an infringement of Articles 34 and 56 TFEU by the measures criticised within the first and second grounds of complaint, taken as a whole. The fourth ground of complaint concerns an infringement of Article 92 TFEU arising from the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany.

The first ground of complaint: the infringement of Article 18 TFEU resulting from the combined effect of the national measures at issue

Arguments of the parties

24 The Republic of Austria claims that the combined effect of the infrastructure use charge and the concomitant relief from motor vehicle tax, in an amount at least equivalent to the amount of that charge, for which owners of vehicles registered in Germany qualify, has the consequence, de facto, that the burden of that charge falls only on the owners and drivers of vehicles registered in Member States other than Germany, the vast majority of whom are nationals of those States. That fact therefore entails indirect discrimination on the grounds of nationality, contrary to Article 18 TFEU.

25 That discrimination is a consequence of the absolute and inseverable link, both in terms of their substance and their temporal application, between the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany, a link which entails that the national measures at issue must be considered and assessed together from the perspective of EU law.

26 The Republic of Austria states, further, that the aim of the national measures at issue is to implement an electoral promise made during the Bundestag election campaign in 2013 in Germany, concerning the foreign drivers of motor vehicles being required to participate in the costs of financing the German infrastructure without imposing an additional burden on German owners of vehicles.

27 Last, the Republic of Austria refers to paragraph 23 of the judgment of 19 May 1992, *Commission* v *Germany* (C-195/90, EU:C:1992:219), as support for the existence of the indirect discrimination claimed.

28 The Federal Republic of Germany, while accepting that the national measures at issue form a unit both in terms of their subjective aims and of their objective content, disputes the existence of any discrimination resulting from the introduction of the infrastructure use charge, even considered in combination with the relief from motor vehicle tax.

29 In that regard, the Federal Republic of Germany observes, first, that, while the introduction of the infrastructure use charge alters the status quo to the disadvantage of owners and drivers of vehicles registered abroad, it does not entail treatment that is to the disadvantage of or that penalises those owners and drivers in comparison with owners of vehicles registered in Germany. On the contrary, the owners and drivers of vehicles registered in Member States other than Germany are placed, with respect to the contribution to the financing of the federal transport infrastructure, in a situation that is more favourable than that of owners of vehicles registered in Germany, since the former must pay the infrastructure use charge only when they use the German motorways, whereas the latter are, in any event, subject to that charge and must, in addition, bear the motor vehicle tax, even if the latter tax may be reduced. Further, the burden on the owners and drivers of vehicles registered in Member States other than Germany, with respect to the infrastructure use charge, corresponds at its maximum to the burden which falls in that respect, in any event, on the owners of vehicles registered in Germany.

30 Second, the Federal Republic of Germany states that the fact that the relief from motor vehicle tax is to the benefit only of owners of vehicles registered in Germany is based on EU law, in particular Council Directive 83/182/EEC 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), which itself establishes the distribution of rights to tax vehicles in accordance with the place of registration and, thereby, in accordance with the place of habitual residence. The restriction on the national powers to tax motor vehicles brought about by that directive, which is intended to prevent double taxation of market participants and EU citizens, given the absence of harmonisation in that area, means that, for each vehicle, the only tax of importance is the vehicle tax of the Member State where that vehicle is registered. The amount of the German motor vehicle tax, which affects only the owners of vehicles registered in Germany, is therefore, for the owners of vehicles registered in the other Member States, of no relevance.

31 Third, the Federal Republic of Germany argues that the introduction of an infrastructure use charge the proceeds of which are transferred to the transport budget and are wholly used for its earmarked purpose, namely the improvement of the federal transport infrastructure, meets the objective of increasing the extent to which that infrastructure is financed by its users. That objective led that Member State to a change of system, the aim being to move from financing by means of taxation to financing by users. Against that background, the Federal Republic of Germany, in exercising its competence to determine direct taxes, decided to adjust the motor vehicle tax, by introducing a relief from part of that tax, in order to maintain the overall financial burden on the owners of vehicles registered in that Member State at the previous level and to prevent disproportionate double taxation.

32 Fourth, the possibility of offsetting the infrastructure use charge by reducing the motor vehicle tax emerges from the history of Article 7(3) and Article 7k of the Eurovignette Directive, which serves as a template for rules on charges for the use of the road network by passenger vehicles. The recent practice of some Member States, such as the United Kingdom or the Kingdom

of Belgium, which, with respect to heavy goods vehicles, make use of that possibility, confirms that the national measures at issue are compatible with EU law.

33 Fifth and last, the Federal Republic of Germany argues that statements made during an election campaign are of no relevance to the issue of whether there is any difference in treatment that constitutes discrimination.

34 In the alternative, the Federal Republic of Germany refers, as grounds justifying any indirect discrimination that may result from the combination of the national measures at issue, to considerations linked to the protection of the environment, the distribution of the burden between the national and foreign users of the infrastructure and to the change in the system of financing the federal transport infrastructure.

35 The Kingdom of the Netherlands essentially concurs with the arguments put forward by the Republic of Austria and emphasises that, in this case, the situation of owners of vehicles registered in Germany is comparable with that of owners and drivers of vehicles registered in a Member State other than Germany, who make use of German motorways.

36 The Kingdom of Denmark, on the other hand, endorses the position of the Federal Republic of Germany that the national measures at issue are not discriminatory and emphasises, in particular, the competence of the Member States to establish, amend and remove direct taxes and national charges that are not harmonised at the EU level.

Findings of the Court

37 The Republic of Austria claims in essence, in its first ground of complaint, that the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany, although not formally based on a distinction on grounds of nationality, result, through their combined effect, in German nationals being accorded more favourable treatment than that accorded to nationals of other Member States, and are, therefore, in breach of the first paragraph of Article 18 TFEU.

38 The first paragraph of Article 18 TFEU provides that, within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited.

39 In that regard, first, it must be observed that, in accordance with settled case-law, Article 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty lays down no specific rules on non-discrimination (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 25 and the case-law cited).

40 The principle of non-discrimination on the grounds of nationality has been given effect, in particular, in the area of the free movement of goods, in Article 34 TFEU, read together with Article 36 TFEU (see, to that effect, judgment of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 65), in the area of free movement of workers, in Article 45 TFEU (see, to that effect, judgment of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 32 and the case-law cited) and, in the area of freedom to provide services, in Articles 56 TFEU and 62 TFEU (see, to that effect, judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 32 and the case-law cited).

41 It follows that, in the present case, the national measures at issue can be examined having regard to the first paragraph of Article 18 TFEU only to the extent that they apply to situations which do not fall within the scope of such specific rules on non-discrimination laid down by the FEU Treaty.

42 Second, it must be recalled that the general principle of non-discrimination on the grounds of nationality, as enshrined in the first paragraph of Article 18 TFEU, prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 40 and the case-law cited).

43 In order to determine whether the first ground of complaint of the Republic of Austria is well founded, it is necessary, in the first place, to ascertain whether the national measures at issue are sufficiently connected with one another that they can be the subject of a joint assessment with regard to EU law.

44 In that regard, first, it must be observed that, as is apparent from the documents submitted to the Court, the infrastructure use charge and the relief from motor vehicle tax were introduced on the same date, namely 8 June 2015, then amended on dates that were very close, namely 18 May 2017 and 6 June 2017 respectively, and that the application of that relief was dependent on the commencement of collection of that charge. Further, the amount of the relief enjoyed by the owners of vehicles registered in Germany corresponds to the amount of the infrastructure use charge that those owners were first required to pay, except as regards Euro 6 emissions standard vehicles, the owners of which qualify for relief from the motor vehicle tax in an amount that is greater than that of the charge which they were required to pay. It follows that the effect of the relief from motor vehicle tax is, in all circumstances, to provide, at the very least, compensation, to the owners of vehicles registered in Germany, for the new charge constituted by the infrastructure use charge.

45 Further, with respect to the collection of the infrastructure use charge from the owners of vehicles registered in Germany, the Federal Republic of Germany has provided that that charge is to be payable, in the same way as the motor vehicle tax, by virtue of the fact that the vehicle is registered.

46 It is therefore clear that, both in terms of their substance and their temporal application, there is such a sufficiently close connection between the national measures at issue that it is justifiable to undertake a joint assessment of them with regard to EU law, in particular Article 18 TFEU. The existence of such a connection is, moreover, recognised by the Federal Republic of Germany, as is apparent from paragraph 28 of the present judgment.

47 In the second place, it is necessary to ascertain whether the national measures at issue, assessed jointly, establish a difference in treatment on the ground of nationality.

48 In that regard, it is undisputed that, pursuant to those measures, all the users of German motorways are subject to the infrastructure use charge, irrespective of where their vehicles are registered. However, the owners of vehicles registered in Germany qualify for the relief from motor vehicle tax in an amount that is at least equivalent to the amount of the charge that they have had to pay, so that the economic burden of that charge rests, de facto, only on the owners and drivers of vehicles registered in a Member State other than Germany.

49 It is accordingly apparent that, because of the combination of the national measures at issue, the treatment of owners and drivers of vehicles registered in a Member State other than Germany, who make use of German motorways, is less favourable than that of the owners of vehicles registered in Germany, with regard to the use of those motorways, notwithstanding that they are in comparable situations with respect to that use.

50 Such unequal treatment is particularly plain with respect to Euro 6 emissions standard vehicles. Whereas the owners of that type of vehicle registered in Germany receive overcompensation for the infrastructure use charge, the owners and drivers of Euro 6 emissions standard vehicles registered in a Member State other than Germany, who make use of German motorways, must, in any event, bear that charge. Accordingly, the latter are treated less favourably not only in comparison with the owners of Euro 6 emissions standard vehicles registered in Germany but also in comparison with the owners of vehicles registered in Germany that are more polluting.

51 Last, while the difference in treatment that has been identified is not directly based on nationality, the fact remains that the vast majority of owners and drivers of vehicles registered in Member States other than Germany are not German nationals, whereas the vast majority of owners of vehicles registered in Germany are German nationals, so that such a difference has in fact the same outcome as a difference in treatment based on nationality.

52 The fact that, on the one hand, the owners of vehicles registered in Germany are liable to pay the infrastructure use charge and are, in addition, subject to motor vehicle tax, and that, on the other, the amount which has to be paid by the owners and drivers of vehicles registered in Member States other than Germany, with respect to that charge, corresponds, at its maximum, to the amount which has to be paid by the owners of vehicles registered in Germany, with respect to the same charge, in no way affects, contrary to what is argued by the Federal Republic of Germany, the finding made in paragraph 49 of the present judgment. Accordingly, the unequal treatment that has been identified, which is to the disadvantage of owners and drivers of vehicles registered in Member States other than Germany, is due to the fact that, because of the relief for which the owners of vehicles registered in Germany qualify, those persons are not, de facto, subject to the economic burden represented by the infrastructure use charge.

53 Nor can that finding be invalidated by the arguments put forward by the Federal Republic of Germany, summarised in paragraphs 30 to 32 of the present judgment.

54 First, as regards the argument that it is compatible with EU law that the relief from motor vehicle tax benefits solely owners of vehicles registered in Germany, the Court has indeed held that, since the taxation of motor vehicles has not been harmonised, the Member States are free to exercise their powers of taxation in that area, registration being the natural corollary of the exercise of those powers of taxation (see, to that effect, judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraphs 40 and 41). That explains why the motor vehicle tax affects only the owners of vehicles registered in Germany, with the consequence that only they can qualify for the tax relief concerned.

55 However, that fact does not mean that the amount of that tax is of no relevance to the assessment of whether there is discrimination affecting the owners and drivers of vehicles registered in Member States other than Germany.

56 It must be recalled that, according to settled case-law, the Member States must exercise their competence in the area of direct taxation in a way that is compatible with EU law and, in particular,

with the fundamental freedoms guaranteed by the FEU Treaty (judgments of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraph 40, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 44 and the case-law cited).

57 It follows that, when they establish taxes on motor vehicles, the Member States must have due regard for, inter alia, the principle of equal treatment, so that the arrangements made for the imposition of those taxes do not constitute a means of discrimination.

58 In this case, the effect of the relief from motor vehicle tax which is to the benefit of owners of vehicles registered in Germany is to offset entirely the infrastructure use charge paid by those persons, with the result that, as stated in paragraph 48 of the present judgment, the economic burden of that charge falls, de facto, solely on the owners and drivers of vehicles registered in Member States other than Germany, which constitutes a discriminatory measure which is to the disadvantage of the latter.

59 Accordingly, the amount of the motor vehicle tax is relevant with respect to owners and drivers of vehicles registered in Member States other than Germany in so far as the rules applicable for its determination give rise, in reality, to a difference in treatment that is to their disadvantage.

60 Second, as maintained by the Federal Republic of Germany, it is open to the Member States to alter the system for the financing of their road infrastructure by replacing a system of financing by means of taxation with a system of financing by all users, including the owners and drivers of vehicles registered in other Member States who use that infrastructure, so that all those users contribute in an equitable and proportionate way to that financing, provided that any such alteration complies with EU law, including the principle of non-discrimination enshrined in the first paragraph of Article 18 TFEU. Such an alteration is consistent with the freedom of each Member State to choose how to define the means of financing its public infrastructure, in a way that is compatible with EU law.

61 In this case, it is apparent from the written pleadings of the Federal Republic of Germany that that Member State decided, with respect to its federal transport infrastructure, to move in part from a system of financing by means of taxation to a system of financing based on the ‘user pays’ and ‘polluter pays’ principles.

62 That change in system rests on the introduction of the infrastructure use charge, to which all users of German motorways are subject, whether or not their vehicle is registered in Germany, and the revenue from which is entirely allocated to financing the road infrastructure, the Federal Republic of Germany having structured the rates of that charge to correspond to the emissions standard of the vehicles concerned.

63 It has, however, to be said that the national measures at issue do not appear to be consistent with the objective pursued by the Federal Republic of Germany when it introduced the infrastructure use charge, as stated in paragraph 61 of the present judgment.

64 In that regard, the Federal Republic of Germany, in parallel with the introduction of that charge, designed a mechanism to provide individual compensation for that charge, to benefit the owners of vehicles registered in Germany, by means of a relief from motor vehicle tax in an amount that is at least equivalent to the amount paid in respect of that charge.

65 It is not, however, possible to agree with the argument of the Federal Republic of Germany that that relief is a reflection of movement to a system of financing of road infrastructure by all users, pursuant to the ‘user pays’ and ‘polluter pays’ principles.

66 The Federal Republic of Germany has itself accepted in its written pleadings that, because of the relief from motor vehicle tax for which they qualify, the owners of vehicles registered in Germany, notwithstanding the fact that they are subject to payment of the infrastructure use charge, have not in reality incurred any additional financial burden since the introduction of that charge.

67 Admittedly, that Member State argues that those owners were already contributing to the financing of the road infrastructure before the introduction of that charge, through the motor vehicle tax, and that the mechanism for providing compensation is intended to avoid a disproportionate tax burden. However, other than the Federal Republic of Germany itself stating, in general terms, that the federal infrastructure is financed from taxation, it has produced no details of the extent of that contribution and has therefore in no way established that the compensation granted to those owners, in the form of a relief from that tax in an amount at least equivalent to the amount of the infrastructure use charge, does not exceed that contribution and is therefore appropriate.

68 Further, with respect to owners of vehicles registered in Germany, it must be observed that the infrastructure use charge is designed in such a way that it is not at all dependent on those owners actually using federal roads. Accordingly, first, that charge is payable even by such an owner who never makes use of those roads. Second, an owner of a vehicle registered in Germany is automatically subject to the annual charge and therefore has no opportunity to choose a vignette for a shorter period if that better corresponds to the frequency of his use of those roads. Those factors, coupled with the fact that those owners qualify moreover for a relief from the motor vehicle tax in an amount that is at least equivalent to the amount paid with respect to that charge, demonstrate that movement to a system of financing based on the ‘user pays’ and ‘polluter pays’ principles in reality affects exclusively the owners and drivers of vehicles registered in Member States other than Germany, whereas the principle of financing by means of taxation continues to apply with respect to owners of vehicles registered in Germany.

69 In those circumstances, it must be concluded that the mechanism for providing compensation at issue in this case is discriminatory with respect to owners and drivers of vehicles registered in Member States other than Germany, since the Federal Republic of Germany has been unable to establish that that mechanism corresponds to the objective, declared by that Member State, of moving from a system of financing of infrastructure by means of taxation to a system of financing by all users, the consequence of the reduction in motor vehicle tax introduced by that Member State being, in fact, that the owners of vehicles registered in Germany obtain relief from the infrastructure use charge.

70 Third, the combination of the national measures at issue cannot in any event find any justification, even by analogy, in the Eurovignette Directive.

71 Suffice it to state, in that regard, that there is no provision of that directive which permits, in connection with the taxation of heavy good vehicles for the use of infrastructure, a mechanism for providing compensation for the infrastructure use charge such as that at issue in this case. Apart from the fact that Article 7k of that directive concerns only ‘appropriate compensation’, that compensation must, in any event, comply with EU law.

72 Further, nor can the supposed existence, in the context of the Eurovignette Directive, of templates for offsetting the motor vehicle tax in other Member States that resemble the template at

issue in this case support the argument that the combination of the national measures at issue is compatible with Article 18 TFEU.

73 Third and last, it must be recalled that, according to settled case-law, indirect discrimination on grounds of nationality can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions (judgment of 4 October 2012, *Commission* v *Austria*, C-75/11, EU:C:2012:605, paragraph 52 and the case-law cited).

74 In that context, the Federal Republic of Germany, in order to justify any indirect discrimination resulting from the combination of the national measures at issue, relies on considerations linked to the protection of the environment, the distribution of the burden between German users and foreign users in order to preserve the coherence of the national tax system, and the change in the system for financing infrastructure.

75 With respect to, first, environmental considerations, while, in accordance with the Court's case-law, the protection of the environment constitutes a legitimate objective for the purposes of justifying a difference in treatment on ground of nationality (see, by analogy, with respect to the justification of restrictions on fundamental freedoms, judgment of 3 April 2014, *Commission* v *Spain*, C-428/12, not published, EU:C:2014:218, paragraph 36 and the case-law cited), the Federal Republic of Germany fails however to establish in what way the introduction of an infrastructure use charge that affects, de facto, only the owners and drivers of vehicles registered in Member States other than Germany would be appropriate to the achievement of that objective.

76 As regards, second, the objective of moving from a system of financing infrastructure by means of taxation to a system of financing by users, even if that objective were capable of justifying a difference in treatment, it is clear from paragraphs 64 to 69 of the present judgment that the combination of the national measures at issue is not, however, appropriate to the attainment of that objective.

77 With respect to, last, the argument of the Federal Republic of Germany that it is necessary to ensure the coherence of the national tax system by means of an equitable distribution of the burden represented by the infrastructure use charge, that argument cannot be accepted. As stated in paragraph 69 of the present judgment, the effect of the combination of the national measures at issue is, de facto, to exempt from that charge the owners of vehicles registered in Germany and, therefore, to confine the burden represented by that charge solely to the owners and drivers of vehicles which are not registered in that Member State.

78 In the light of the foregoing, the first ground of complaint must be upheld and the Court must declare that the Federal Republic of Germany, by introducing the infrastructure use charge and by providing, simultaneously, for a relief from motor vehicle tax in an amount that is at least equivalent to the amount of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfil its obligations under Article 18 TFEU.

The second ground of complaint: infringement of Article 18 TFEU resulting from the structuring and application of the infrastructure use charge

Arguments of the parties

79 The Republic of Austria claims that the structuring of the infrastructure use charge is in itself discriminatory and, therefore, contrary to the first paragraph of Article 18 TFEU. In that regard, the

Republic of Austria states that the InfrAG makes in a number of respects a distinction between vehicles registered in Germany and vehicles registered abroad.

80 In particular, the powers to intervene provided for in Paragraphs 11, 12 and 14 of the InfrAG, namely random inspections, the collection of a security and the prohibition on continuing the journey, and the recovery a posteriori of the infrastructure use charge to the amount of the annual vignette or the difference between the amount already paid and the amount of the annual vignette, under Article 12 of the InfrAG, are applicable only to vehicles registered abroad.

81 The vast majority of those affected by the imposition of fines in accordance with Paragraph 14 of the InfrAG are also, according to the Republic of Austria, the owners and drivers of vehicles registered in Member States other than Germany. The fact that the constitutive elements of certain offences, such as 'incomplete payment of the charge', can be imputed only to those owners and drivers supports that assertion.

82 The judgment of 19 March 2002, *Commission* v *Italy* (C-224/00, EU:C:2002:185, paragraphs 16 to 19), confirms the existence of the difference in treatment that the Federal Republic of Germany has established.

83 The Republic of Austria recognises that the objective of ensuring payment of the infrastructure use charge payable by the owners and drivers of vehicles registered in Member States other than Germany could possibly justify the difference in treatment at issue, with respect to the powers to intervene and the imposition of fines. Such an objective could not, however, justify such a difference with respect to the recovery a posteriori of the infrastructure use charge, under Article 12 of the InfrAG. In relation to the latter, the Republic of Austria again refers to the judgment of 19 March 2002, *Commission* v *Italy* (C-224/00, EU:C:2002:185, paragraph 26).

84 In any event, the specific arrangements for the payment of the infrastructure use charge are disproportionate.

85 As regards, in particular, the payment of a fine, the Republic of Austria states that, as the Court held in paragraph 43 of the judgment of 26 January 2006, *Commission* v *Spain* (C-514/03, EU:C:2006:63), provided that there is the possibility of enforcing fines on the basis of the provisions of EU law or international treaties, the lodging of a security goes beyond what is necessary to ensure the payment of the fine. In that regard, the Republic of Austria refers to the treaty on judicial cooperation in administrative matters between the Republic of Austria and the Federal Republic of Germany.

86 The Federal Republic of Germany states that the rules relating to enforcement and monitoring of payment of the infrastructure use charge are applicable without distinction to the owners of vehicles registered in Germany and to the owners and drivers of vehicles registered in Member States other than Germany.

87 While it is true that the collection of a security, provided for in Paragraph 11(7) of the InfrAG, concerns only the owners and drivers of vehicles registered in Member States other than Germany, such a collection is justified since a foreign national who is liable to pay the infrastructure use charge is beyond the reach of both the administrative authority responsible for that charge and the administrative inspection authority, when he leaves German territory. Further, the collection of a security is not obligatory and its amount is not, moreover, disproportionate.

88 As regards the judgment of 26 January 2006, *Commission* v *Spain* (C-514/03, EU:C:2006:63), referred to by the Republic of Austria, the Federal Republic of Germany states that, in that judgment, the Court did not hold in general that the requirement of a security is disproportionate in the light of the current state of development of cross-border cooperation in the area of justice, but rather insisted, on grounds of proportionality, that account should be taken of the constitution of a security already paid in the Member State of origin, which has not taken place in this case.

89 The Federal Republic of Germany contends that the recovery a posteriori of the infrastructure use charge to the amount of the annual vignette or the difference between the amount already paid and the amount of the annual vignette is intended to ensure that the charge payable will in fact be paid, and is proportionate with respect to that objective. In that context, the Federal Republic of Germany observes that the owners and drivers of vehicles registered in Member States other than Germany are not treated differently from the owners of vehicles registered in Germany who, in any event, must pay the price of an annual vignette.

90 Last, as regards the fine prescribed in the event of non-compliance with obligations concerning the infrastructure use charge, such a fine, in the view of the Federal Republic of Germany, is neither discriminatory nor disproportionate. In that regard, the Federal Republic of Germany states that the imposition of such a fine is not automatic and that it is subject to the principle that the adoption of excessive measures is prohibited.

Findings of the Court

91 It must be ascertained whether the provisions of the InfrAG relating to random inspections, the prohibition on continuing the journey using the vehicle concerned, the recovery a posteriori of the infrastructure use charge, the possible imposition of a fine and the payment of a security give rise to discrimination that is to the disadvantage of owners and drivers of vehicles registered in Member States other than Germany and, if so, whether that discrimination can be justified.

92 In that regard, as far as concerns, in the first place, the provisions of the InfrAG relating to random inspections, the prohibition on continuing the journey and the possible imposition of a fine in the event of an infringement of the obligation to pay the infrastructure use charge that is due, it must be stated, as the Advocate General observed in points 80 and 81 of his Opinion, that there is nothing in the documents submitted to the Court from which it can be concluded that those provisions are applicable solely to the owners and drivers of vehicles registered in Member States other than Germany.

93 On the contrary, it is clear from the wording of those provisions that both the owners of vehicles registered in Germany and the owners and drivers of vehicles registered in Member States other than Germany are liable to be the subjects of random inspections, with a view to verifying that they have complied with the obligation to pay the infrastructure use charge that is due and, if not, liable to be prohibited from continuing their journey using the vehicle concerned and required to pay a fine, as the Federal Republic of Germany argued in its observations.

94 Moreover, the Republic of Austria has failed to establish that the provisions of the InfrAG in that respect, although drafted in neutral terms, place at a particular disadvantage the owners and drivers of vehicles registered in Member States other than Germany.

95 On the latter point, with respect to the provisions relating to the imposition of fines, it must be observed, first, that, contrary to what is claimed by the Republic of Austria, the circumstance that

only owners and drivers of vehicles registered in Member States other than Germany can be found to satisfy the constituent elements of certain offences, such as incomplete payment of the charge or failure to provide correct information, does not support the assertion that those provisions principally affect those owners and drivers.

96 That circumstance is an inevitable consequence of the objective differences between the owners of vehicles registered in Germany and the owners and drivers of vehicles registered in Member States other than Germany with respect to both the determination of the amount of the infrastructure use charge and its payment. In that regard, whereas the owners of vehicles registered in Germany are obliged to pay the charge in advance, in the form of an annual vignette purchased when the vehicles are registered, in an amount determined automatically by the competent authority, the owners and drivers of vehicles registered in Member States other than Germany have to pay that charge only when they use the German motorways, after the crossing of a border, in the form of a vignette of variable duration, as chosen by the user concerned, and in an amount determined according to the information supplied by the user himself.

97 Second, the Republic of Austria has provided no information as to the amount of the possible fines that might be imposed for offences that can be committed only by the owners and drivers of vehicles registered in Member States other than Germany, so that there is nothing in the documents submitted to the Court to permit a finding that such an amount is disproportionate in comparison with the seriousness of the offences.

98 As regards, in the second place, recovery a posteriori, provided for in Paragraph 12 of the InfrAG, of the unpaid infrastructure use charge, to the amount of the annual vignette, in the event of use of the German motorways without a valid vignette, or the difference between the amount already paid and the amount of the annual vignette, in the event of use of German motorways with a vignette the period of validity of which is too short, such a provision does not appear to be discriminatory, since the owners of vehicles registered in Germany must also pay the amount corresponding to the cost of an annual vignette.

99 Moreover, even if that provision were to establish a difference in treatment that places owners and drivers of vehicles registered in Member States other than Germany at a disadvantage, the difference would be justified by the objective of ensuring actual payment of the infrastructure use charge payable. Apart from the fact that such a provision ensures that that objective can be achieved, the obligation imposed on the owners and drivers of vehicles registered in Member States other than Germany to pay, in the event of an offence, the infrastructure use charge to the amount of the annual vignette or the difference between the amount of the annual vignette and the amount already paid does not appear disproportionate, taking into consideration the fact that the German authorities who find, in the course of a random inspection, that the obligation to purchase a vignette in order to use the German motorways has been infringed cannot in general know for how long the offender has driven on those roads without having the requisite vignette.

100 As regards, third, the possibility, provided for in Paragraph 11(7) of the InfrAG, that those authorities which find, in the course of a random inspection, that the obligation to pay the infrastructure use charge that is due has been infringed, may collect a sum of money by way of security in an amount equivalent to the fine imposed and the costs of the administrative procedure, it is true, as the Federal Republic of Germany confirmed in its observations, that that possibility is available only with respect to offenders using a vehicle registered in a Member State other than Germany. Consequently, that provision establishes a difference in treatment that places the latter at a disadvantage.

101 The Federal Republic of Germany argues however that such a difference is justified by the need to ensure payment of the fines imposed on offenders using a vehicle registered in a Member State other than Germany, taking account of the difficulty in recovering such debts when those offenders have left German territory.

102 In that regard, it must be recalled that the Court has previously held that the absence of any treaty instruments to secure the enforcement of a court decision in a Member State other than that in which it was delivered objectively justifies a difference in treatment between resident and non-resident offenders and that the obligation to pay a sum of money by way of security, imposed solely on non-resident offenders, is appropriate to prevent them from avoiding an effective penalty simply by declaring that they do not consent to the immediate collection of the fine (judgment of 19 March 2002, *Commission* v *Italy*, C-224/00, EU:C:2002:185, paragraph 21).

103 Having regard to that case-law, it is clear that the objective of ensuring the payment of the fines imposed on offenders using a vehicle registered in a Member State other than Germany, pursued by the possibility of requiring them to provide a security, justifies the consequent difference in treatment that arises between those offenders and offenders using a vehicle registered in Germany.

104 The existence of a bilateral agreement on judicial and administrative cooperation between the Republic of Austria and the Federal Republic of Germany is of no significance in that regard, since, as the Advocate General stated in point 97 of his Opinion, the Federal Republic of Germany has not concluded similar agreements with all the other Member States.

105 Given that the possibility of requiring payment of a sum of money by way of security makes it possible to achieve the objective pursued, it remains to be determined whether such a requirement goes beyond what is necessary to attain that objective.

106 In that regard, it must be noted that, on the one hand, as is apparent from the wording of Paragraph 11(7) of the InfrAG, and as the Federal Republic of Germany has stated in its observations, in the event that, during a random inspection, the provisions of national law concerning the infrastructure use charge have been infringed, the German authorities may, but are not obliged to, require offenders using a vehicle registered in a Member State other than Germany and refusing to pay immediately the fine imposed to pay a sum as security in order to guarantee payment of that fine.

107 Since the payment of a sum as security is not required automatically of all offenders, it is reasonable to presume that the competent authorities will impose that requirement only when, having regard to the individual circumstances, there is a risk that the fine imposed may not be collected or may be collected only with great difficulty. In any event, the Republic of Austria has provided no reason to call into question that presumption.

108 On the other hand, it must be noted that the amount fixed for that sum as security is limited to the fine imposed and to the costs of the administrative procedure.

109 In those circumstances, it is not apparent that the difference in treatment resulting from the possibility of requiring offenders using a vehicle registered in a Member State other than Germany to pay a sum as security in order to ensure payment of the fine imposed is disproportionate to the objective pursued.

110 In the light of the foregoing, the second ground of complaint must be rejected.

The third ground of complaint: infringement of Articles 34 and 56 TFEU

Arguments of the parties

111 The Republic of Austria argues that the national measures at issue are liable to have effects on cross-border supplies of goods made using passenger vehicles weighing up to 3.5 tonnes which are subject to the infrastructure use charge and on the supplies of services made by non-residents as well as supplies of services made to non-residents, and consequently those measures are in breach of the principles of the free movement of goods and the freedom to provide services.

112 Referring to its arguments developed in the context of the first and second grounds of complaint, the Republic of Austria claims that the national measures at issue are discriminatory and also constitute unlawful restrictions on the fundamental freedoms mentioned in the preceding paragraph.

113 The Federal Republic of Germany contends that the infrastructure use charge affects the sales distribution channel of products and constitutes, accordingly, a selling arrangement, within the meaning of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), which does not fall within the scope of Article 34 TFEU, provided that it is not overtly or covertly discriminatory.

114 The relief from motor vehicle tax cannot, moreover, according to the Federal Republic of Germany, be characterised as ‘cross-border’ since it affects only national citizens and is therefore not a measure having equivalent effect to quantitative restrictions on imports.

115 In any event, the link between the introduction of an infrastructure use charge for passenger vehicles and any restrictions on access to the market of goods carried in those vehicles is, in accordance with the case-law of the Court, in particular the judgment of 13 October 1993, *CMC Motorradcenter* (C-93/92, EU:C:1993:838), too uncertain and indirect to warrant the conclusion that there is a restriction on the free movement of goods, within the meaning of Article 34 TFEU.

116 In addition, the Federal Republic of Germany contends that nor does the infrastructure use charge impinge on the freedom to provide services, within the meaning of Article 56 TFEU. There is no actual restriction on the access to the German market of service providers and service recipients from other Member States of the Union, since the impact of the measures at issue on the cost of the services concerned is marginal.

117 The Federal Republic of Germany states that measures whose only effect 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 that within one Member State are not covered by Article 56 TFEU (judgment of 8 September 2005, *Mobistar and Belgacom Mobile*, C-544/03 and C-545/03, EU:C:2005:518, paragraph 31). In that regard, the Federal Republic of Germany states that service providers and service recipients from other Member States do not suffer, because of the introduction of the infrastructure use charge and the simultaneous relief from motor vehicle tax, any indirect discrimination in comparison with German providers and recipients of the same services.

118 Last, the Kingdom of Denmark states that Article 7k of the Eurovignette Directive necessarily presupposes that the introduction of user charges for heavy goods vehicles, with concomitant compensation for national transport undertakings liable to have an indirect effect on the free movement of goods and the freedom to provide services, is not in breach of Articles 34 and 56

TFEU. It would be fundamentally in breach of the principles underpinning Article 7k that any system of compensation of that kind could be established outside its area of application.

Findings of the Court

– *Whether there is a restriction on the free movement of goods*

119 It must be recalled that the free movement of goods between Member States is a fundamental principle of the FEU Treaty which is expressed in the prohibition, set out in Article 34 TFEU, of quantitative restrictions on imports between Member States and all measures having equivalent effect (judgment of 27 April 2017, *Noria Distribution*, C-672/15, EU:C:2017:310, paragraph 17 and the case-law cited).

120 In accordance with settled case-law, the prohibition of measures having equivalent effect to quantitative restrictions on imports laid down in Article 34 TFEU covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Union trade (judgment of 3 April 2014, *Commission* v *Spain*, C-428/12, not published, EU:C:2014:218, paragraph 26 and the case-law cited).

121 Further, a measure, even if it has neither the object nor the effect of treating goods coming from other Member States less favourably, also falls within the scope of the concept of a 'measure having equivalent effect to quantitative restrictions', within the meaning of Article 34 TFEU, if it hinders access to the market of a Member State of products originating in other Member States (judgment of 3 April 2014, *Commission* v *Spain*, C-428/12, not published, EU:C:2014:218, paragraph 29 and the case-law cited).

122 Last, it is clear from settled case-law that national legislation which constitutes a measure having equivalent effect to quantitative restrictions can be justified on one of the grounds of public interest laid down in Article 36 TFEU or by imperative requirements. In either case, the provision of national law must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (judgments of 6 September 2012, *Commission* v *Belgium*, C-150/11, EU:C:2012:539, paragraph 53 and the case-law cited, and of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, paragraph 110).

123 That case-law must guide the Court in determining whether the national measures at issue adversely affect the free movement of goods.

124 For the purposes of that determination, it must be recalled that, as was stated in paragraph 46 of the present judgment, the link between those measures justifies their being assessed jointly with regard to EU law and, consequently, Article 34 TFEU.

125 In that regard, it must, first, be stated that, even though the infrastructure use charge is not levied on goods carried as such, it is nonetheless capable of affecting goods that are delivered using passenger vehicles weighing up to 3.5 tonnes registered in a Member State other than Germany, on the crossing of the border, and it must therefore be examined, in combination with the relief from motor vehicle tax, in the light of the applicable provisions concerning the free movement of goods.

126 Second, the considerations mentioned in paragraphs 48 and 49 of the present judgment permit the finding that, although the infrastructure use charge is formally applicable both with respect to goods delivered using vehicles registered in Germany and with respect to goods delivered using vehicles registered in a Member State other than Germany, it turns out that, because of the relief

from motor vehicle tax, applicable with respect to the former category of goods, that charge is capable of affecting, in fact, only the latter category of goods. Consequently, because of the combined application of the national measures at issue, the latter goods are treated less favourably than goods delivered using vehicles registered in Germany.

127 It follows from the foregoing that the national measures at issue are liable to restrict the access to the German market of goods from other Member States. The infrastructure use charge to which, in reality, only the vehicles that carry those goods are subject is liable to increase the costs of transport and, as a consequence, the price of those goods, thereby affecting their competitiveness.

128 The argument of the Federal Republic of Germany that the infrastructure use charge constitutes merely a selling arrangement, within the meaning of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), cannot be accepted.

129 Since, as the Advocate General stated in point 118 of his Opinion, the concept of 'selling arrangements' covers only provisions of national law that regulate the manner in which goods may be marketed, rules concerning the manner in which goods may be transported are not within the scope of that concept.

130 Nor is it possible to accept the argument of the Federal Republic of Germany that any restrictive effects of the infrastructure use charge are too uncertain and indirect to infringe Article 34 TFEU, in accordance with the Court's case-law, in particular the judgment of 13 October 1993, *CMC Motorradcenter* (C-93/92, EU:C:1993:838).

131 In that regard, suffice it to state that, having regard to the consequences of the national measures at issue described in paragraph 127 of the present judgment, it cannot reasonably be maintained that the restrictive effects of those measures are too uncertain and indirect to infringe Article 34 TFEU.

132 In those circumstances, it must be concluded that the national measures at issue constitute a restriction on the free movement of goods, contrary to Article 34 TFEU, unless the restriction is objectively justified.

133 In that regard, the Federal Republic of Germany has not sought to rely on any ground capable of justifying such a restriction. In any event, the considerations relied on by that Member State, in response to the first ground of complaint, in order to justify the difference in treatment between the owners of vehicles registered in Germany and the owners and drivers of vehicles registered in Member States other than Germany, cannot serve as appropriate justification for that restriction, for the same reasons as are stated in paragraphs 75 to 77 of the present judgment.

134 Consequently, the national measures at issue constitute a restriction on the free movement of goods, contrary to Article 34 TFEU.

– *Whether there is a restriction on the freedom to provide services*

135 It must be recalled that, in accordance with the Court's case-law, Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (judgment of 28 April 1998, *Kohll*, C-158/96, EU:C:1998:171, paragraph 33 and the case-law cited).

136 National measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom (judgment of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 46 and the case-law cited).

137 On the other hand, 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 that within one Member State do not fall within the scope of Article 56 TFEU (judgment of 8 September 2005, *Mobistar and Belgacom Mobile*, C-544/03 and C-545/03, EU:C:2005:518, paragraph 31 and the case-law cited).

138 It must also be recalled that, in accordance with settled case-law, the freedom to provide services includes not only the active aspect of the freedom to provide services, where the service provider travels to the recipient of the services, but also the passive aspect of the freedom to provide services, that is, the freedom of the recipients of services to travel to another Member State where the service provider is located in order to receive the services there (see, to that effect, judgments of 2 February 1989, *Cowan*, 186/87, EU:C:1989:47, paragraph 15, and of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 36 and the case-law cited).

139 Last, it follows from the Court's case-law that a restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the FEU Treaty and is justified by overriding reasons in the public interest; if that is the case, it must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective (judgment of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 52 and the case-law cited).

140 That case-law must guide the Court in determining whether the national measures at issue, assessed jointly, are in breach of the freedom to provide services.

141 In that regard, it is undisputed that the service providers who travel to Germany in order to supply their services there, using a vehicle weighing up to 3.5 tonnes registered in a Member State other than Germany, are subject to the infrastructure use charge, and that the majority of those service providers are established in a Member State other than Germany, whereas the majority of providers of services in Germany, who, in order to supply the service, travel using a vehicle registered in that Member State, are established in Germany.

142 Nor is it disputed that the recipients of services who, using a vehicle registered in a Member State other than Germany, travel into Germany in order to receive there the services concerned are subject to that charge and that the majority of those recipients come from a Member State other than Germany, whereas the recipients of services supplied in Germany, who, in order to receive those services, travel in a vehicle registered in Germany, normally come from that Member State.

143 Further, on the basis of the considerations mentioned in paragraphs 48 and 49 of the present judgment, it can be concluded that, because of the relief from motor vehicle tax to which service providers and service recipients established in Germany are entitled, the infrastructure use charge affects, in reality, only the service providers and service recipients coming from another Member State.

144 It follows from the foregoing that the national measures at issue are liable to restrict the access to the German market of service providers and service recipients from a Member State other than Germany. The infrastructure use charge is liable, because of the relief from motor vehicle tax that is part of the national measures at issue, either to increase the cost of services supplied in

Germany by those service providers, or to increase the cost for those service recipients inherent in travelling into Germany in order to be supplied with a service there.

145 The Federal Republic of Germany cannot validly rely on the case-law cited in paragraph 117 of the present judgment in order to deny the existence of a restriction in this case.

146 That case-law is applicable only where the national measures at issue affect in the same way the provision of services between Member States and that within one Member State, which is not the position in this case.

147 In those circumstances, it must be concluded that the national measures at issue constitute a restriction on the freedom to provide services, contrary to Article 56 TFEU, unless the restriction is objectively justified.

148 In that regard, the Federal Republic of Germany has not sought to rely on any ground capable of justifying such a restriction. In any event, the considerations relied on by that Member State, in response to the first ground of complaint, in order to justify the difference in treatment between the owners of vehicles registered in Germany and the owners and drivers of vehicles registered in Member States other than Germany, cannot serve as appropriate justifications for that restriction, for the same reasons as are stated in paragraphs 75 to 77 of the present judgment.

149 Consequently, the national measures at issue constitute a restriction on the freedom to provide services, contrary to Article 56 TFEU.

150 In the light of the foregoing, the third ground of complaint must be upheld and it must be declared that the Federal Republic of Germany, by introducing the infrastructure use charge, and by providing, simultaneously, for relief from motor vehicle tax in an amount at least equivalent to that of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfil its obligations under Articles 34 and 56 TFEU.

The fourth ground of complaint: infringement of Article 92 TFEU

Arguments of the parties

151 The Republic of Austria claims that the German legislation infringes Article 92 TFEU, which prohibits any discrimination in the area of transport, which excludes any possibility of justification and the scope of which covers commercial bus transportation or the transportation of goods by passenger vehicles weighing up to 3.5 tonnes.

152 The Republic of Austria states that the prerequisite of Article 92 TFEU not being applicable is the adoption of provisions of secondary law. There are, however, no binding rules of secondary law with respect to passenger vehicles weighing up to 3.5 tonnes.

153 The Republic of Austria considers, consequently, that the legal principle which stems from paragraph 23 of the judgment of 19 May 1992, *Commission* v *Germany* (C-195/90, EU:C:1992:219), can be transposed to the present case.

154 The Federal Republic of Germany contends, in the first place, that the scope of Article 92 TFEU does not extend to the infrastructure use charge, even considered in combination with the relief from motor vehicle tax, since, having regard to the fact that the charge is limited to certain

categories of vehicles, commercial transport is largely exempted from the obligation to pay the charge.

155 In the second place, contrary to the interpretation of Article 92 TFEU as a standstill clause, adopted by the Court in the judgment of 19 May 1992, *Commission* v *Germany* (C-195/90, EU:C:1992:219), the Federal Republic of Germany considers that the prohibition on altering existing rules laid down in Article 92 TFEU does not prescribe the protection of the status quo with respect to the competitive situation, but prohibits solely direct or indirect discrimination against foreign transport undertakings, a prohibition that has not been infringed in this case.

156 In the third place, even if Article 92 TFEU must be interpreted as being a guarantee of the status quo, the Federal Republic of Germany considers that that provision is no longer applicable since the Eurovignette Directive contains criteria with respect to national legislation which may also be applied to vehicles weighing up to 3.5 tonnes when road use charges are levied. In particular, Article 7(1) and Article 7k of that directive permit national measures such as those at issue in this case.

157 The Kingdom of Denmark states that the subject matter of the judgment of 19 May 1992, *Commission* v *Germany* (C-195/90, EU:C:1992:219), on which the Republic of Austria relies, was exclusively and specifically the standstill clause now to be found in Article 92 TFEU, taking account of the state of the law preceding the adoption of the specific EU legislation on the imposition of charges on heavy good vehicles, now to be found in the Eurovignette Directive, a directive from which it is clear that the national measures at issue, established at the same time, are compatible with Article 92 TFEU.

Findings of the Court

158 According to Article 92 TFEU, until the provisions referred to in Article 91(1) TFEU 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, on 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.

159 In this case, it is, first, undisputed that the transport activity subject to the infrastructure use charge can be carried out using vehicles weighing up to 3.5 tonnes. That being the case, the activity is commonly known as ‘light transport’.

160 Second, while the road transport sector is to a great extent covered by EU legislation, it remains the case that light transport is not the subject of any legislation at the EU law level. In particular, no legislation on charging for the use of roads by vehicles weighing up to 3.5 tonnes has been enacted, in accordance with Article 91 TFEU. It follows accordingly from Article 1 of the Eurovignette Directive, read together with Article 2(d) of that directive, that the harmonisation of the legislation of Member States effected by that directive concerns solely vehicles weighing more than 3.5 tonnes.

161 Last, taking account of the considerations set out in paragraphs 141 and 143 of the present judgment, it is clear that, because of the combination of the national measures at issue, only those carriers who use a vehicle weighing up to 3.5 tonnes registered in a Member State other than Germany (‘the foreign carriers’) are, in fact, affected by the infrastructure use charge, since carriers who use a vehicle weighing less than 3.5 tonnes registered in Germany (‘the German carriers’) are eligible for compensation for that charge.

162 It is therefore clear that, by offsetting in its entirety the new tax burden constituted by the infrastructure use charge, payable by all carriers, by means of a relief from motor vehicle tax in an amount at least equivalent to the charge paid, a relief to the benefit of the German carriers from which the foreign carriers are excluded, the effect of the national measures at issue is to alter, unfavourably, the situation of the foreign carriers in relation to that of the German carriers (see, to that effect, judgment of 19 May 1992, *Commission* v *Germany*, C-195/90, EU:C:1992:219, paragraph 23).

163 The fourth ground of complaint must therefore be upheld and it must be declared that the Federal Republic of Germany, by introducing the infrastructure use charge and by providing, simultaneously, a relief from motor vehicle tax in an amount at least equivalent to that of the charge paid, to the benefit of the owners of vehicles registered in Germany, failed to fulfil its obligations under Article 92 TFEU.

164 It follows from all the foregoing that the Federal Republic of Germany, by introducing the infrastructure use charge for passenger vehicles and by providing, simultaneously, a relief from motor vehicle tax in an amount at least equivalent to the amount of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfil its obligations under Articles 18, 34, 56 and 92 TFEU.

Costs

165 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of those Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

166 In this case, both the Republic of Austria and the Federal Republic of Germany applied for costs against the other party. Further, the Federal Republic of Germany failed on the first, third and fourth grounds of complaint relied on by the Republic of Austria, and the latter failed in its second ground of complaint.

167 In the light of the foregoing, the Federal Republic of Germany must be ordered to pay three quarters of the costs incurred by the Republic of Austria and it must be decided that, for the remainder, each party is to bear its own costs.

168 In accordance with Article 140(1) of those Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of the Netherlands and Kingdom of Denmark shall bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that the Federal Republic of Germany, by introducing the infrastructure use charge for passenger vehicles and by providing, simultaneously, a relief from motor vehicle tax in an amount at least equivalent to the amount of the charge paid, to the benefit of owners of vehicles registered in Germany, failed to fulfil its obligations under Articles 18, 34, 56 and 92 TFEU.**

2. **Dismisses the action as to the remainder.**

3. **Orders the Federal Republic of Germany to pay three quarters of the costs incurred by the Republic of Austria and to bear its own costs.**

4. **Orders the Republic of Austria to bear one quarter of its own costs.**

5. **Orders the Kingdom of the Netherlands and the Kingdom of Denmark to bear their own costs.**

[Signatures]

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* Language of the case: German.