

# JUDGMENT OF THE COURT

22 May 1985 \*

In Case 13/83

**European Parliament**, represented by F. Pasetti-Bombardella, Director-General in its General Secretariat, by its Legal Adviser, R. Bieber, and by J. Schoo, an administrator in its General Secretariat, acting as Agents, assisted by J. Schwarze, Professor at the University of Hamburg, and F. Jacobs, Barrister in London and Professor at the University of London, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

applicant,

supported by

**Commission of the European Communities**, represented by C.-D. Ehlermann, Director-General of its Legal Department, by its Legal Adviser, G. Close, and by C. Bail, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of M. Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

intervener,

v

**Council of the European Communities**, represented by its Legal Adviser, H.-J. Glaesner, acting as Agent, assisted by A. Sacchetti and J. Aussant, members of its Legal Department, acting as Joint Agents, and by R.M. Chevallier, Professor at the University of Strasbourg, W. von Simson, Professor at the University of Freiburg, and B. Laloux, a member of its Legal Department, with an address for service in Luxembourg at the office of H.J. Pabbruwe, Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

supported by

**The Kingdom of the Netherlands**, represented by A. Bos, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, assisted by L.H. Klaassen, Professor at the Erasmus University, Rotterdam, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands, 5 Rue C.-M.-Spoo,

intervener,

\* Language of the Case: German.

APPLICATION for a declaration under Article 175 of the Treaty that the Council has failed to fulfil its obligations in respect of the common transport policy,

## THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz

Registrar: H. A. Rühl, Principal Administrator

gives the following

## JUDGMENT

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## Facts and issues

The facts of the case, the course of the procedure, and the conclusions, submissions and arguments of the parties may be summarized as follows:

### I — Facts and procedure

#### A. Preliminary procedure

On 16 September 1982 the European Parliament, at a plenary sitting, adopted a resolution on the institution of proceedings against the Council of the European Communities for failure to act in the field

of transport policy (Official Journal C 267, p. 62).

The operative part of that resolution is as follows:

‘The European Parliament,

...

D. having regard to the fact that in the field of transport policy only minimum measures have been adopted which by no means meet the requirements of the common market,

E. having regard to the fact that the provisions of Article 3 (e) and Articles 74 to 84 of the EEC Treaty have not been complied with, which constitutes an infringement of the Treaty,

F. having regard to the fact that the Council has not reached a decision on a large number of Commission proposals on which the European Parliament long ago adopted a favourable opinion,

G. having exhausted all other means provided by the Treaty to enforce its claim for the adoption of a common transport policy,

(1) Instructs its President to bring an action before the Court of Justice of the European Communities against the Council of the European Communities pursuant to Article 175 of the EEC Treaty,

(2) Instructs its President, in this connection, first of all forthwith to call upon the Council to act in the terms of the accompanying draft, in accordance with the second paragraph of Article 175 of the EEC Treaty;

(3) Instructs its President, if the Council does not reply within the period of two months laid down in the EEC Treaty, to bring an action before the Court of Justice of the European Communities within the further period of two months laid down by the Treaty for this purpose;

(4) Instructs its President, if the Council replies within the two-month period laid down in the Treaty, to consult with the Committee on Transport and the Legal Affairs Committee, and in the light of such consultation to decide whether proceedings should be instituted; if such consultation is not completed within the

time-limits for proceedings to be started, to take all necessary steps to keep Parliament's rights alive; if, following such consultation, it is decided not to bring proceedings, to bring the matter back before Parliament as soon as possible;

(5) Reserves the right to review the President's decision in the plenary sitting immediately thereafter and in this connection instructs its Committee on Transport to submit a report as the committee responsible and its Legal Affairs Committee to submit an opinion;

(6) States expressly that the annex forms an integral part of this resolution;

(7) Requests the Commission to take part in this action;

(8) Instructs its President to forward this resolution and the report of its committee to the Council and Commission.'

Pursuant to the mandate given to him by that resolution the President of the European Parliament sent the President of the Council of the European Communities on 21 September 1982 a letter, the first paragraphs of which read as follows:

'(1) I have the honour to inform you that the European Parliament resolved on 16 September 1982 to set in motion the procedure against the Council under Article 175 of the Treaty establishing the European Economic Community, as the Council has, in breach of the Treaty, failed to determine, on the basis of Articles 3 (e), 61 and 74, the framework of a common transport policy within which the objectives of the Treaty may be pursued, and has also failed to take the decisions provided for in Articles 75 to 84 for the purpose of implementing Articles 61 and 74.

(2) I should like, by this letter, to call upon the Council, in accordance with the second paragraph of Article 175, to act as set out in detail below.

(3) I look forward with interest to any opinion which I may receive within two months. This opinion will be examined in great detail. If this examination shows that the opinion is unsatisfactory or if no opinion is forthcoming I shall bring, within the prescribed period, an action before the Court of Justice of the European Communities to have the infringement established; in this connection I reserve the right to make all or only some of the points mentioned below the subject-matter of the action.'

The letter goes on to say that taken as a whole the measures adopted by the Council in relation to transport do not satisfy either Article 3 (e) of the Treaty, which requires the adoption of a common policy in the sphere of transport, or Article 74, which states that the objectives of the Treaty are to be pursued in relation to transport within the framework of a common transport policy.

In the letter the Parliament calls upon the Council *inter alia*:

- '...to decide the framework of a common transport policy pursuant to Articles 3 (e) and 74, on the basis of the Commission's communication of 24 October 1973;
- to establish the freedom to provide services in the field of transport provided for in Article 61 and in this connection to apply the provisions of Articles 74 to 84;
- to adopt all appropriate provisions, pursuant to Article 75 (1) (c), to pursue the objectives of the Treaty within the framework of a common transport policy'

and

— '...forthwith to take the decisions which should already have been adopted during the transitional period, according to the wording of the Treaty, in other words, pursuant to Article 75 (1), laying down:

- (a) 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;
- (b) the conditions under which non-resident carriers may operate transport services within a Member State.'

More precisely, the Parliament invites the Council to act without delay on a series of 24 proposals of the Commission on which the Parliament has already given its opinion. According to the Parliament's letter, the proposals relate to international transport by rail, road and inland waterway. They concern in particular price policy, policy in relation to transport capacity, observation of the market, infrastructures and the harmonization of social provisions, taxes, technical provisions and intervention by public authorities. Each of those proposals may be regarded as subject to the time-limit applicable pursuant to Article 75 (2).

The Council is then invited to determine the matters of principle in relation to the transport rules on which, pursuant to Article 75 (3), it considers that it must decide unanimously on the ground that the application of the provisions in question is liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities. In that connection the Council should also decide pursuant to Article 75 (3) in which cases, in spite of the

forementioned circumstances, the provisions in question must nevertheless be adopted on a qualified majority on the ground that they relate to the necessary adaptation of Member States' transport rules to the economic changes brought about by the establishment of the common market.

Finally, the Council is called upon to decide, pursuant to Article 84 (2) of the Treaty, to what extent and by what procedure appropriate provisions must be laid down for sea and air transport and in particular to act without delay on three specific proposals with regard thereto which were submitted to it by the Commission and in respect of which the Parliament has given its opinion.

By a letter dated 22 November 1982 to the President of the European Parliament the President of the Council answered in the following terms:

'Without expressing an opinion at this stage on the legal aspects referred to in your letter, but in keeping with the spirit of its good relations with the European Parliament, the Council is sending you the enclosed analysis of the Council's actions. This analysis contains all the facts necessary to acquaint the Parliament with the Council's assessment, at the present stage, of the development of the common transport policy.

The Council shares the European Parliament's political concern to see this policy implemented. Over the years, the Council has adopted a series of decisions in the various transport sectors, which represent important steps in the implementation of a common transport policy.

The Council is nevertheless aware that despite the progress made the common transport policy calls for further action.'

According to the letter from its President, the Council has the firm intention of achieving further substantial progress in spite of the very complex nature of the subject and the difficult economic and social context of the debates.

In a note attached to its reply the Council summarizes the action it has taken in relation to the common transport policy. The summary is accompanied by a list of 71 measures of the Council in force in the transport sector and a commentary on the progress made on each of the proposals cited in the letter from the President of the Parliament. It shows that the Council has in the meantime acted on a number of the proposals in question and that certain proposals are likely to be amended or replaced by the Commission.

#### *B. The provisions of the Treaty*

In the first part of the Treaty, headed 'Principles', Article 3 lists the activities of the Community for the purposes set out in Article 2. They include under Article 3 (e) the adoption of a common policy in the sphere of transport.

Transport is the subject of Title IV of Part Two of the Treaty, which is concerned with the foundations of the Community. According to the first provision of Title IV, namely Article 74, the objectives of the Treaty are, in relation to transport, to be pursued by Member States within the framework of a common policy.

Article 75 (1) and (2) reads as follows:

- '(1) For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter, lay down,

on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly:

- (a) 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;
  - (b) the conditions under which non-resident carriers may operate transport services within a Member State;
  - (c) any other appropriate provisions.
- (2) The provisions referred to in (a) and (b) of paragraph 1 shall be laid down during the transitional period.'

#### *C. The action*

When the Council's reply had been examined by the competent parliamentary committees as provided for by the resolution of 16 September 1982, the President of the European Parliament took the view that the reply did not constitute a definition of position for the purposes of the second paragraph of Article 175 in response to the call for action which it had sent the Council on 21 September 1982, and decided to bring the present action under the first paragraph of Article 175.

In general the action seeks a declaration that by failing to establish a common transport policy the Council has failed to fulfil its obligations under the Treaty. The action may, however, be divided into two distinct claims.

In the first place the action seeks a declaration that the Council has failed to lay down the principles of the common transport policy which should form the framework for the implementation of Articles 74 to 84 of the Treaty.

It is then alleged that the Council failed to act in the specific cases mentioned in the letter calling for action which the President of the European Parliament sent to the President of the Council. As regards the specific complaints in the originating application it appears from the applicant's reply that the complaint relating to the Council's failure to act on two of the Commission's proposals is not being pursued since the Council has in the meantime acted thereon by adopting:

- Council Directive No 83/127 of 28 March 1983 amending Directive No 68/297 on the standardization of provisions regarding the duty-free admission of fuel contained in the fuel tanks of commercial motor vehicles (Official Journal L 91, p. 28) and
- Council Directive No 83/416 of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (Official Journal L 237, p. 19).

Consequently, the action seeks in the second place a declaration that the Council has failed to fulfil its obligations under the Treaty by failing to act on 14 of the 16 proposals which the Parliament mentioned specifically in its application (see II — Conclusions of the parties); the Commission had submitted the proposals to the Parliament which had already given its opinion thereon.

In the alternative the action seeks a declaration pursuant to Article 173 that the Council's reply of 22 November 1982 is void.

#### *D. The written procedure*

The originating application of the European Parliament was received at the Court Registry on 24 January 1983.

By orders of 23 March and 22 June 1983 the Court, pursuant to Article 93 of the Rules of Procedure, allowed the Commission of the European Communities to intervene in support of the claims of the European Parliament, and the Kingdom of the Netherlands to intervene in support of the Council's conclusions.

By an application lodged on 2 March 1983 the Council, pursuant to Article 91 of the Rules of Procedure, asked the Court to decide the admissibility of the action as a preliminary issue. By an order of 22 June 1983 the Court reserved the decision on the objection for the final judgment.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It put several questions to the parties, however, to which they replied in due time.

## II — Conclusions of the parties

The *European Parliament* (the *applicant*) claims that the Court should, pursuant to Article 175 of the Treaty:

- Declare that the Council of the European Communities has infringed the EEC Treaty, in particular Articles 3 (e), 61, 74, 75 and 84 thereof, by failing to introduce a common policy for transport and in particular to lay down the framework for such a policy in a binding manner;
- Declare that the Council of the European Communities has infringed the EEC Treaty by failing to reach a decision on the following proposals of the Commission of the European Communities:

- (1) Proposal for a Council regulation on the harmonization of certain social provisions relating to the transport of goods by inland waterway (Official Journal 1975,

C 259, p. 2, amended by Official Journal 1979, C 206, p. 3; Opinion of the European Parliament: Official Journal 1977, C 57).

- (2) Proposal for a first directive on the harmonization of national systems of taxation for commercial vehicles (Official Journal 1968, C 95, p. 41; Opinion of the European Parliament: Official Journal 1969, C 63).
- (3) (Proposal in the meantime adopted.)
- (4) Proposal for a directive on the weights and measures of commercial vehicles and supplementary provisions on their construction and working (Official Journal 1971, C 90, p. 25, amended by Official Journal 1979, C 16, p. 3 and Doc. COM/81/510 of 11 September 1981; Opinion of the European Parliament: Official Journal 1971, C 124 and Resolution of 7 May 1981: Official Journal 1981, C 144).
- (5) Proposals to supplement and amend Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (Doc. COM/72/1516 and Official Journal 1981, C 268, p. 11; Opinion of the European Parliament: Official Journal 1973, C 37 and 1981, C 260).
- (6) Proposal for a regulation amending Regulation (EEC) No 1192/69 on common rules for the normalization of the accounts of railway undertakings (Official Journal 1977, C 307, p. 5; Opinion of the European Parliament: Official Journal 1978, C 163).



- (7) Proposal for a resolution on the adjustment of capacity for the carriage of goods by road for hire or reward between Member States (Official Journal 1978, C 247, p. 6; Opinion of the European Parliament: Official Journal 1979, C 67).
- (8) Proposal for a directive on own-account carriage of goods by road between Member States (Official Journal 1979, C 41, p. 10; Opinion of the European Parliament: Official Journal 1979, C 127).
- (9) Proposal for a directive amending the first Council directive on the establishment of common rules for certain types of carriage of goods by road between Member States, and Council Directive No 65/629/EEC (Official Journal 1980, C 253, p. 6; Opinion of the European Parliament: Official Journal 1980, C 327).
- (10) Proposal for a directive amending Directive No 65/269/EEC on the standardization of certain rules relating to authorization for the carriage of goods by road between Member States (Official Journal 1980, C 350, p. 19; Opinion of the European Parliament: Official Journal 1981, C 144).
- (11) Proposal for a regulation amending Regulation (EEC) No 3164/76 on the Community quota for the carriage of goods by road between Member States (Official Journal 1980, C 350, p. 18; Opinion of the European Parliament: Official Journal 1981, C 144).
- (12) Proposal for a regulation on access to the market in inland navigation (Official Journal 1968, C 95, p. 1 amended by Doc. COM/69/311 of 25 April 1969; Opinion of the European Parliament: Official Journal 1968, C 108, in relation to the cabotage system).
- (13) Proposal for a regulation on a system for observing the markets for the carriage of goods by rail, road and inland waterways between the Member States (Official Journal 1976, C 1, p. 44, amended by Doc. COM/80/785 of 5 December 1980; Opinion of the European Parliament: Official Journal 1976, C 293).
- (14) Proposal for a Council regulation on support for projects of Community interest in transport infrastructure (Official Journal 1976, C 207, p. 9; amended by Official Journal 1977, C 249, p. 5 and 1980, C 89, p. 4; Opinion of the European Parliament: Official Journal 1976, C 293 and Official Journal 1980, C 197).
- (15) Proposal for a Council decision on the collection of information concerning the activities of road hauliers participating in the carriage of goods to and from certain non-member countries (Official Journal 1982, C 36, p. 8; Opinion of the European Parliament: Official Journal 1982, C 238).
- (16) (Proposal in the meantime adopted.)
- In the alternative declare void the Council's reply pursuant to Article 173 of the EEC Treaty;
- Order the Council of the European Communities to pay the costs.

The *Council of the European Communities* (the *defendant*) contends that the Court should:

- Dismiss the action as inadmissible;
- In the alternative dismiss it as unfounded;
- Order the applicant to pay the costs.

### III — Submissions and arguments of the parties

#### A. Admissibility

In the view of the *Council of the European Communities* (the *defendant*) the question of the admissibility of the action is of fundamental importance to the subsequent development of relations between the Community institutions. It observes that the action is inspired by the efforts of the Parliament (which are legitimate) to increase its influence in the process for reaching decisions in the Community. Cooperation between the Community institutions cannot, however, be governed by means of Article 175 of the Treaty and the Parliament is not entitled to have recourse to the action afforded by that article in order to achieve its political aims.

The Council substantiates its objection of inadmissibility in two ways. First it challenges the capacity of the European Parliament to bring an action under Article 175, and secondly it contends that the conditions of admissibility laid down in the second paragraph of Article 175 are not satisfied. It claims that the Parliament's alternative claim under Article 173 is also inadmissible.

#### 1. The capacity of the European Parliament to bring an action under Article 175

The *Council* admits that Article 175, in referring to 'other institutions' of the

Community, *prima facie* appears to include the European Parliament among the institutions which may bring an action thereunder. In its opinion, however, the general structure of the Treaty precludes the Parliament from having such a right of action.

In that respect it observes that Article 173 expressly restricts the right of action by the institutions to the Council and the Commission. Inasmuch as the Treaty thus excludes the Parliament from reviewing the lawfulness of measures adopted by the Council or the Commission, it would be illogical for it to be able to bring an action before the Court for unlawful failure of one of those two institutions to act. The legal remedies afforded by Articles 173 and 175 must be regarded as complementary to one another.

Next, the Council raises the question whether the effect of recognizing the Parliament as having a right to bring an action under Article 175 would not be to extend the powers conferred on it by the Treaty and to invest it with powers of review which the Treaty did not contemplate. In that respect it refers to the principle of conferred powers mentioned in Article 4 of the Treaty.

Article 137 of the Treaty provides that the Parliament may exercise the advisory and supervisory powers which are conferred upon it by the Treaty. Under the division of powers provided for by the Treaty the Parliament's influence lies in the exercise of a right of supervision of the Commission and a right to give its opinion to the Council. Although consultation of the Parliament in the transport sector as provided for *inter alia* by Article 75 constitutes an essential procedural requirement for the adoption of a decision, legislative power lies exclusively within the province of the Council. Under that method of collaboration between the institutions the Parliament cannot have *vis-à-vis* the Council, as the legislator, a right

of supervision exercisable by means of an action for failure to act. If the Court were to give a judgment under Article 175 which would have to be enforced pursuant to Article 176, the Parliament would obtain legislative powers not given to it by the Treaty.

Those considerations lead the Council to conclude that only an express conferment of powers would allow the Parliament to be recognized as having a right to bring an action for failure to act. The fact that according to the judgment of 29 October 1980 (Case 138/79 *Roquette v Council* [1980] ECR 3333) the Parliament is included among the 'institutions' referred to in Article 37 of the Statute of the Court which may intervene in proceedings before the Court does not support a different view. On that issue the Council observes that the function of the right to intervene is different from that of the right of action and accordingly Article 37 of the Statute was not interpreted in the light of Article 173 of the Treaty. Conversely, the interpretation of Article 175 does not depend on the existence of a right to intervene.

The *European Parliament* (the *applicant*) and the *Commission of the European Communities* (the *intervener*) refer to the wording of Article 175 in support of their contention that there is no doubt about the Parliament's capacity to bring an action for failure to act. The clear wording of Article 175 allows no other interpretation.

The *Parliament* contends that the right of action expressly provided for in Article 175 cannot be restricted by reference to the different wording of Article 173. Since the provisions of the Treaty on rights of action cannot be interpreted restrictively there would be, at most, ground for giving Article 173 an interpretation corresponding to

Article 175. All the institutions of the Community referred to in Article 4 are responsible for ensuring that the Treaty is observed.

It was on that basis that the aforementioned judgment of 29 October 1980 confirmed the right of any institution, including the Parliament, to intervene in proceedings before the Court pursuant to Article 37 of the Statute of the Court on the ground that it is not possible to restrict the exercise of that right by any one of them without adversely affecting its status as an institution under the Treaty, in particular Article 4 (1). *A fortiori* that consideration applies to a right of action given to all the institutions.

The *two institutions* deny that a right of action for the Parliament under Article 175 would be incompatible with the division of powers provided for by the Treaty.

The *Parliament* submits that its restricted powers at the legislative level cannot be pleaded to deny it access to the Court for the purposes of review by the Court of the exercise by the Council of its legislative powers. The Parliament's right of action must not be confused with its political right to participate in the legislative process. The present action is brought not for the purpose of exercising its right of political control but to exercise its right of action under the Treaty in order to obtain a declaration that there have been specific omissions which it considers to be contrary to the Treaty.

The Parliament is not usurping any legislative power by such an action for should a judgment given under Article 175 find a failure to initiate legislation, contrary to the Treaty, the Council would be the institution required to take the measures

necessary to comply with the judgment, pursuant to Article 176.

The *Commission* states that if the Council's argument based on the exclusive nature of its legislative powers were valid, an action against the Council for failure to act brought by others who have a right of action under Article 175, such as a Member State or the Commission, would also be inadmissible. Such an interpretation, however, which would in fact exclude altogether any action for failure to act against the Council in its capacity as legislature, would be incompatible with the broad terms in which Article 175 is drafted.

## 2. The conditions in the second paragraph of Article 175 of the Treaty

The *Council* considers, first of all, that the letter from the President of the Parliament of 21 September 1982 cannot be regarded as calling upon the Council to act for the purposes of the second paragraph of Article 175. A failure to act constitutes a breach of the Treaty only where the institution in question has knowingly refrained from acting in order to prevent the achievement of the objectives laid down by the Treaty. The letter from the President of the Parliament contains no formal allegation of a failure in that sense. Moreover, it requests in general terms that a common transport policy should be established, but does not indicate with sufficient precision what decisions should be taken.

In spite of the way in which the President of the Parliament described his letter the Council treated it as a contribution to the political dialogue between the Parliament and the Council. It was for that purpose that the Council in its letter of 22 November forwarded to the Parliament an analysis of its action in the transport sector to enable the Parliament to form a view of the way in which the Council contemplated future developments in that sector.

Should the Court regard the letter from the President of the Parliament as calling upon the Council to act pursuant to Article 175, the Council contends that its reply of 22 November 1982 satisfies the requirements of a definition of its position within the meaning of that article, and that the action is therefore inadmissible.

In that respect it observes that Article 175, as distinct from Article 35 of the ECSC Treaty, does not require the adoption of any formal measure. Article 175 clearly distinguishes between the word 'act' in the first paragraph and the notion of a 'definition of its position' in the second paragraph, which concerns the admissibility of the action.

In the Council's view, the action for failure to act is not intended to make the institution in question take a specific measure but rather to ensure that it fulfils its obligation to act. Consequently it is not possible to establish a general criterion for the notion of definition of position in Article 175. In each particular case what constitutes a definition of position must be determined on the basis of the specific obligation which the institution in question has with regard to the party which calls upon it to act.

Thus an institution which has no discretion in taking a particular decision does not escape an action for failure to act by defining its position otherwise than in accordance with the measure to be adopted. On the other hand, where the Treaty or secondary law imposes no obligation on the institution in question to adopt the measure requested or gives it a discretion, a reasoned answer confined to stating that it does not consider it appropriate to exercise its power would already be sufficient. The effect of a definition of position in particular is to exclude an action before the Court in so far

as by indicating the state of work and giving an assessment of its progress it establishes that there has been no misuse of discretion.

The Council considers that the Parliament's first claim is inadmissible *ab initio* because it does not specify the measure it seeks to obtain. Failure to act, and consequently the action before the Court, should refer to an obligation to adopt one or more specifically defined measures. The Council explains that an action for annulment under Article 173 cannot be directed against a common policy as such but must refer to specific measures implementing such a policy. Similarly, an action for failure to act cannot relate to a common transport policy in general without specifying the particular measures necessary to establish it. The Council considers, moreover, that there is no obligation to act, that is, to adopt a measure with legal effects, in relation to laying down a framework for the implementation of such a policy.

As to the second claim in the action, the Council states that it cannot be required to adopt the specific proposals referred to by the Parliament. The existence and substance of its obligation to act must be determined not by the Commission's proposals but by the provision of the Treaty on which they are based. In that respect it refers to the wide discretion which it has under the general terms of Article 75 (1) (a) and (b). That is not restricted by Article 75 (2), which is intended only to fix a timetable.

In the light of those considerations the analysis of the Council's action set out in its letter of 22 November 1982 and accompanied by particulars of each of the proposals referred to by the Parliament constitutes a sufficiently clear definition of its position to exculpate it from any failure to act on which an action might be based.

The *Parliament* and the *Commission* consider that the letter from the President of the Parliament of 21 September 1982 clearly states the measures required by reference to Article 175 and therefore meets the purpose of the call to act for the purposes of the second paragraph of Article 175, namely to allow the institution at fault to have notice of the action expected of it under the Treaty and to give it an opportunity to avoid legal proceedings. In their opinion the call to act can also relate to complex measures of a general nature such as the introduction of a common transport policy or the laying down of a framework for it; the word 'act' in the first paragraph of Article 175 should not be interpreted restrictively. A fuller explanation of the submissions and arguments in respect of such a general claim belongs to consideration of the merits of the case.

On the other hand, the Council's reply of 22 November 1982 cannot be regarded as a definition of position within the meaning of Article 175.

In the *Parliament's* view, to make an action inadmissible, a definition of position must express a definite undertaking by the institution called upon to act to do what is required.

A refusal to act, even an express refusal, cannot constitute a definition of position for the purposes of Article 175. In the system of legal protection afforded by the EEC Treaty the action for failure to act constitutes a legal remedy independent of the action for annulment. The action under Article 175 differs from the action provided for in

Article 35 of the ECSC Treaty inasmuch as under Article 175 a refusal to act is not to be treated as a decision which may be the subject of an action for annulment. The failure to act thus continues in the event of a refusal and that failure remains open to challenge in an action to have the failure established.

The Parliament states that the notion of a definition of position has not yet been the subject of consideration by the Court since actions for failure brought so far have been dismissed either because of lack of interest in bringing an action or because there was no obligation on the institution concerned *vis-à-vis* the applicant to adopt the measure requested. In the present case there is no doubt that there is an obligation to act, in particular under Articles 74 and 75 of the Treaty. The fact that the Council has a discretion does not dispense it from the obligation to exercise it within the time-limits prescribed.

In that respect the Parliament emphasizes that its action is claiming not a declaration that the Council has failed to adopt specific legislative measures, but a declaration that it has not exercised its discretion and has thus failed to fulfil its obligations under the Treaty. The Council's reply contains no specific undertakings as to the manner in which it proposes to fulfil its obligation to introduce a common transport policy.

On the basis of the wording of Article 175 and the purpose of the action for failure to act the *Commission* puts forward an interpretation of the notion of definition of position which differs slightly from that put

forward by the Parliament. It alleges that under the first paragraph of Article 175 an allegation of failure to act refers to the fact that the institution in question 'fails to act' when it is required to act by the Treaty. The action for failure to act is intended to force the institution out of its indecision and to 'act'. If the institution acts and within two months informs the person calling upon it to act thereof there is no longer any failure contrary to the Treaty. However, the *Commission* considers that not only a positive definition of position but also a negative definition by the institution, in other words a definite refusal to act as requested, is capable of terminating the failure. According to this view the action would also be inadmissible in the case of a definition of position which is partly positive but which rejects the call to act.

If the institution does not necessarily have to adopt a position which accords with the specific requests of the author of the call, it must, to escape an action for failure to act, specify its position definitely. The procedure under Article 175 would not satisfy the requirements of adequate legal protection if a reply describing the current state of deliberations made the action for failure to act inadmissible.

As regards the specific claims of failure the *Parliament* and the *Commission* consider that the Council's comments in relation to the *Commission's* proposals referred to in the action are confined to setting out the state of the preliminary work and consequently do not amount to a true definition of position. The *Commission* points out, however, that in relation to the proposal referred to in No 15 of the *Parliament's* claims the Council states that it has been agreed not to take a formal decision. It suggests that that statement may

be regarded as a definition of position in the negative.

### 3. The alternative claim based on Article 173 of the Treaty

In the *Council's* view the claim in the alternative for a declaration pursuant to Article 173 that its reply is void is inadmissible at the outset because on the clear wording of Article 173 the Parliament has no right of action thereunder. It considers that an interpretation based on the need for legal protection but going beyond the wording of Article 173 cannot be contemplated since the Council's action is already subject to legal review by means of the right of action enjoyed by the Commission, which is the institution entrusted with the role of guardian of the Treaty.

Furthermore, the Council's reply cannot be the subject of an application for a declaration that it is void since it is not a measure which has legal effects.

The *Parliament* maintains that a reply in the negative allows the failure to continue and is not a definition of position which makes the action inadmissible. If a definition of position which did not remedy the failure nevertheless excluded an action under Article 175 the only possible alternative would be to recognize the Parliament as having an alternative right of action under Article 173 and to treat such a definition of position as a measure open to challenge under that provision. Any other solution would leave a lacuna in the system of legal protection.

## B. Substance

### 1. General observations

The *European Parliament* (the *applicant*) and the *Commission* (the *intervener*) give an

outline first of the general scheme and the aims of the Treaty in relation to transport.

The *Parliament* argues that a common transport policy for the purposes of the Treaty means a coherent system of binding measures providing at Community level guidelines and planning of the measures needed to remove distance as an obstacle to the movement of persons, goods and information. The aim of such a system of binding measures is to create in the transport sector throughout the territory of the Community conditions similar to that of a domestic market.

The common transport policy is part of the general process of integration contemplated by the Treaty. Among the activities of the Community referred to in Article 3 of the Treaty the common transport policy has the same rank as the common agricultural policy or the institution of a system ensuring that competition in the common market is not distorted. It must be achieved in step with the development in the other areas governed by the Treaty, since inadequate progress in the transport sector risks compromising the achievement of the objectives of the Treaty in other areas, in particular with regard to the free movement of goods.

In the Parliament's view the introduction of the common transport policy on the basis of Articles 74 to 84 of the Treaty requires a three-stage planning and implementing procedure which is typical of the Community Treaties. It requires first of all determination of the aims or principles which make up the framework in which, according to Article 74, the Member States have, in the transport sector, to pursue the objectives referred to in Article 2 of the Treaty. Next, it requires the drafting of instruments to achieve those objectives or principles and the adoption of implementing decisions. The general terms employed in Article 75 (1) and Article 84 (2), namely 'common rules', 'conditions' and 'appro-

appropriate provisions', relate to those three kinds of measures.

The *Commission* explains why the common transport policy is one of the two sectoral policies expressly provided for in the Treaty. Transport and agriculture are sectors of comparable economic importance. The transport sector employs more than six million people. The commercial transport sector represents directly and indirectly some 6.5% of the gross social product of the Community and 15 to 20% if own account and private transport are included. This branch of economic activity also plays an essential role in the achievement and operation of the common market.

Moreover, a feature of the transport sector is the high degree of public intervention in different forms which explains the political sensitivity associated with the tasks it has to perform in the public interest and the special problems arising from the competition between the various transport means. In particular, the railways provide important services in the public interest and tend to incur large deficits which have to be borne by the national budgets. In the view of certain Member States that is incompatible with a policy confined to the liberalization of the transport of goods within the Community and the application of the general rules of the Treaty. Finally, even before the Treaty was concluded transport was the subject of numerous bilateral and multilateral agreements by the Member States both *inter se* and with non-member countries.

The *Commission* concludes from those observations that the organization of the transport sector is closely connected with

the creation and development of the common market and the special features of the sector require that it has its own policy in the form of a coherent set of measures to supplement the implementation of the general rules of the Treaty. That is what Article 3 (e) of the Treaty contemplates when it provides for the adoption of a common policy. That view is confirmed by Article 74, which formulates a principle which presupposes the existence of a common policy in order to enable the Member States to pursue the aims of the Treaty in the transport sector within the framework of such a policy. Article 75 prescribes the implementing measures to be taken in relation to transport by rail, road and inland waterway. Article 3 (e), however, makes no distinction between the various means of transport and the common policy thus includes sea and air transport, which are referred to in Article 84 (2).

As regards the method for the introduction of the common policy the *Commission* observes that the title on transport does not clearly state the sequence and level of the decisions which have to be taken. It considers that the Treaty leaves the Community institutions to decide whether to adopt a systematic approach, or the more pragmatic approach consisting of a gradual introduction of the common policy according to the circumstances, provided that the result amounts to a coherent policy which furthers the aims of the Treaty.

The *Parliament* then gives a general outline of the activities which the Community institutions have undertaken over the years in respect of transport. On many occasions, notably in 1962, 1973, 1977 and 1980, the *Commission* has sent the Council communications and memoranda encouraging it to draw up the guidelines of a common policy and a programme of urgent action. The



Parliament, for its part, has continually stressed the need to lay down the principles of a common policy. The Parliament refers in particular to:

- its Resolution of 25 September 1974 on the principles of the transport policy (Official Journal C 127, p. 24), adopted on the basis of the Mursch Report (EP Doc. 215/74);
- its Resolution of 16 January 1979 on the present state and progress of the transport policy (Official Journal C 39, p. 16), adopted on the basis of the Seefeld Report (EP Doc. 512/78); and
- its Resolution of 9 March 1982 on the common transport policy (Official Journal C 87, p. 42), adopted on the basis of the Carossino Report (EP Doc. 1-996/81).

All that was produced by the Council in response to that preparatory work was a handful of planning decisions adopted in the 1960s. Those decisions, in particular the Council decision of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (Official Journal, English Special Edition 1965-1966, p. 67), have remained a dead letter.

The other legal measures adopted so far by the Council have been of a sporadic nature without any coherent underlying policy. On 31 December 1982 some 30 proposals of the Commission were pending before the Council (some had been pending for several years) whilst a similar number of proposals had been withdrawn by the Commission as being no longer up to date. In consequence the Community legislation on transport has serious gaps in it, especially in relation to social, fiscal and technical harmonization,

which is essential for the establishment of a truly common transport market, and in relation to railways and transport infrastructure.

In answer to a question put by the Court the Parliament stated that in its opinion a common transport policy must comprise at least measures on the following matters:

- the harmonization of technical requirements for vehicles, including in particular those relating to weight and size of commercial road vehicles and to pollution caused by traffic;
- access to the international and national transport markets;
- the technical harmonization of railway networks and the elimination of bottlenecks; and
- the harmonization of social provisions relating to transport.

The *Council* (the *defendant*) observes that Title IV of Part Two of the Treaty, on transport, posed special difficulties to the authors of the Treaty owing to the broad differences of opinion which obtained among the future Member States in relation to transport policy. The provisions of this title reflect agreement on rather vague compromises which elude substantive decisions. None of these provisions provides for the fixing of the main guidelines of a common policy in a manner comparable to that referred to in Article 43 (1) for the common agricultural policy. Furthermore, Title IV does not give a timetable for the achievement of the common policy and, contrary to Titles II and III, does not fix the objectives to be achieved at the end of the transitional period.

The transport sector is extremely complex and varied and a common policy can be worked out for it only progressively by means of specific regulations for the various branches. Accordingly, the Council has adopted various measures which may be regarded as the beginnings of a common policy. Since the purpose and the content of a common policy are not laid down in the Treaty, it is not really possible to determine with certainty when the measures which the Council must adopt pursuant thereto are sufficiently specific to be regarded, when taken together, as a common transport policy.

The Council does not deny that other measures remain to be adopted. It relies, however, on a communication from the Commission of 9 February 1983 headed 'Progress towards a common transport policy' (Official Journal 154, p. 1) as evidence that the preparation of a common policy encountered objective difficulties, notably as a result of the diversity of national policies in the matter. National policies are determined by the geographical, economic and social conditions of the Member States, which have led to different strategies in relation to transport. The differences in the Community of Six were accentuated on the subsequent enlargement of the Community. Thus the geographically peripheral States depend more on road transport than the central States, which rely more on rail.

To illustrate the problems arising from that situation the Council refers to a memorandum from the group of the 10 community railways on the Community quota for the carriage of goods by road. The memorandum clearly shows the interdependence of the various transport sectors which has the result that progress achieved

in one sector may create serious problems for other sectors and have negative effects on transport as a whole. Solving the problem of competition between rail, road and, to a certain extent, inland waterway is crucial to progress in achieving a common policy. Nevertheless the Commission's proposals, especially as regards the position of railways, relate only to certain partial aspects and have not permitted a general solution of the problem to be found.

The Council states, moreover, that the common transport policy cannot be separated from the other Community policies. As the Commission stated in its most recent communication, the creation of a single transport market must accompany, rather than precede, a further approximation of national economic policies.

2. The first claim: failure to introduce a common transport policy

The *European Parliament*, supported by the *Commission*, contends that, taken as a whole, the measures adopted so far by the Council in regard to transport in no way meet the requirements of the Treaty for a common policy.

The two institutions maintain that a legal obligation to introduce a common transport policy is to be inferred both from the wording of the relevant provisions and from the general scheme and aims of the Treaty as set out above. The general obligation is founded on the principle contained in Article 3 (e) of the Treaty. That it is an imperative one is confirmed by the interrelation of the various parts of the Treaty.

The pursuit of the objectives listed in Article 3 is indispensable for carrying out the tasks entrusted to the Community.

In the *Parliament's* view a general obligation is also to be inferred from Article 74, which assumes that there is a binding framework of a common policy as a logical and necessary condition for the implementation of individual measures. The establishment of a binding framework is necessary to provide general guidelines and to prevent Community action from leading to uncoordinated and even contradictory results by way of reaction to circumstances of the moment. According to Article 8 (7) of the Treaty the basis of the common policy ought to have been laid down by the end of the transitional period.

The Parliament then claims that Article 75 imposes unconditional obligations on the Council to lay down common rules for international transport, the conditions under which non-resident carriers may operate transport services within a Member State and any other appropriate provisions. Article 75 (2) stipulates that the provisions referred to in (a) and (b) of paragraph 1 were to be laid down during the transitional period. The Parliament nevertheless considers that even in the case of Article 75 (1) (c), in respect of which no express time-limit was laid down, the Council ought to adopt the necessary measures within a reasonable period, that is to say within a period which satisfies the expectations of the public with regard to the implementation of a common policy.

The Parliament considers that the discretion which the Council enjoys in respect of transport is confined to determining the substance of the measures to be taken and fixing, within the period prescribed, the date

of their entry into force. That discretion does not affect the existence of an obligation to act and in any event does not allow the Council to remain inactive in defiance of the requirements of the Treaty.

In the *Commission's* view there is no legal obligation in the Treaty to establish before the end of the transitional period a framework for a common transport policy. Nevertheless, it supports the Parliament's argument that the competent institutions of the Community are legally bound to fulfil the general obligation to introduce such a policy within an appropriate period. The precise content of that obligation must be determined in accordance with the individual provisions of the title on transport.

In that respect it adds that the 'standstill' obligation in Article 76 which applies until the adoption of the provisions referred to in Article 75 (1) indirectly confirms the existence of special obligations under Article 75. Furthermore, Article 61, according to which freedom to provide services in the field of transport is governed by the provisions of the title relating to transport, indicates that there is an obligation to achieve freedom to provide services in relation to transport by appropriate measures on the basis not only of Article 75 but also of Article 84 (2) of the Treaty.

The Commission considers that the general obligation in Article 3 (e) extends not only to transport by road, rail and inland waterway but also to sea and air transport. In its opinion the discretion which the Council enjoys under Article 84 (2) to decide whether, to what extent and by what procedure appropriate provisions may be laid down for those sectors relates mainly to the choice of such measures. The obligation to act within an appropriate period arises

from the fact that the conditions of competition in sea and air transport make it impossible to integrate those markets solely by applying the general rules of the Treaty. If the wide discretion given to the Council under Article 84 (2) justifies more time being allowed for the adoption of appropriate measures in those areas than for the other means of transport, that time has already expired.

As regards the general complaint that the Council has failed to act the *Parliament* refers to its analysis of the activities of the institutions. First of all, the Council has failed to fulfil its duty to lay down the principles which may form the framework of a common policy, for the few planning decisions taken in the 1960s did not allow the introduction of coherent legislation comparable to that governing, for example, the customs union, competition in the common market or the agricultural sector. Even in areas where the Treaty does not require any fixed framework the Council has adopted programmes of action serving as a basis for its activities. Since 1970, however, it has not developed any specific guidelines of policy in relation to transport.

In that respect the Parliament, referring to the judgment in Case 12/82, emphasizes that although the provisions of the Treaty in relation to transport are designed to liberalize trade and to establish a competitive economy within the Community, the very notion of a common policy requires that the Community should also guarantee balanced trade and fair competition (*Ministère Public v Trinon* [1982] ECR 4089). The absence of a common transport policy has caused serious

disturbances in competition and has had adverse repercussions on trade.

The general complaint of omission is corroborated by the fact that the Council, in breach of the Treaty, has failed to act on the proposals submitted to it by the Commission. The Parliament refers to the 24 proposals it listed when it called upon the Council to act and in respect of which there is an obligation to act under Article 75 of the Treaty.

In support of the Parliament's argument the *Commission* submits a list of decisions relating to programmes adopted by the Council, accompanied by a detailed review of the results. It states that only 40% of the traffic in carriage of goods between Member States by road transport has been liberalized, whilst transport within the Member States is still reserved for national carriers. As regards harmonization of the conditions of competition there are still no provisions on the taxation, weights or sizes of commercial vehicles. Furthermore, international transport is still impeded by numerous border checks.

In the railway sector measures remain to be taken to improve competitive capacity, intensify cooperation between railways and improve their profitability in general.

Transport by inland waterway lacks rules on access to the business and on harmonization of social provisions. Moreover, the Council has failed to adopt common rules to eliminate distortion of competition in

respect of freight rates resulting from national policies on structural surplus capacity in the sector.

The Commission also points out that there is no control of the distribution of the costs of the infrastructure between the various methods of transport and that no legal basis has been adopted for the joint financing of proposed infrastructures with a Community interest or for coordinating national measures with regard thereto.

Finally, it points out that insufficient progress has been achieved in relation to sea and air transport and that there is keen resistance by the Council to the exercise by the Community of its powers in external relations regarding transport. Thus the Community is still not a party to the European Agreement on Road Transport nor a member of the Central Commission for the Navigation of the Rhine.

The *Parliament* and the *Commission* consider that the difficulties which the Council encounters in seeking a solution to complex questions on which there are divergent interests cannot be pleaded to justify the failure to adopt the necessary provisions under the Treaty within the time-limits laid down thereunder. The Treaty gives the Council certain machinery for the resolution of such problems. Under Article 5 of the Treaty and the special provisions of the Treaty relating to the procedure for reaching decisions the Member States are required to facilitate the work of the Council and to endeavour to collaborate as far as possible in order to fulfil the legal obligations imposed by the Treaty. That obligation includes the application of the voting procedures provided for by the

Treaty in cases where a consensus cannot be achieved and unanimity is not required.

In answer to a question put by the Court the *Commission* stated that in the exercise of its power to initiate it has from the outset had to take account of the economic, political and legal difficulties which the Member States have pleaded to justify their hesitation. It considers in consequence that the proposals which it has made to the Council under Article 75 (1) (a) and (b) constituted, when they were made, the minimum necessary to ensure an appropriate development of the common transport policy in parallel with developments in the other areas of the common market.

The *Council* (the *defendant*) denies first of all that the Treaty imposes on it a legal obligation to draw up a binding framework for a common transport policy. Although Article 75 provides that certain measures must be taken to implement Article 74 it does not provide that it is necessary to lay down a binding framework for that policy. The Council considers, moreover, that such a binding framework is not essential in order to achieve the objectives of the Treaty. In view of the changing nature of transport problems there is even a risk, in adopting a general binding plan, of compromising the measures which subsequently have to be taken and placing obstacles in the way of the necessary adjustment to the technical and economic requirements.

The Council contends that as regards the introduction of a common transport policy as such the Treaty imposes no legal obligation on the Council sufficiently clear and specific as to its terms and the time within which it is to be done for it to be possible to obtain by means of an action

brought under Article 175 a declaration that the Council has infringed the Treaty. It repeats that there is no definition in the Treaty of the notion of a common transport policy.

The Council challenges the systematic interpretation put forward by the Parliament and the Commission based on the combined effect of Articles 3 and 74 *et seq.* of the Treaty. Article 3 does not create an independent obligation to act or a legal basis for specific measures by the Council. Although the provisions of the Treaty governing the various sectors must be interpreted in the light of the aims laid down in Article 3, it is the specific provisions for each sector which determine the institutions' powers of action and their obligations to act. On the basis of that distinction the Court, in its judgment of 11 November 1981 for example, established a connection between Article 67 and Article 3 (c) but then considered solely on the basis of Article 67 *et seq.* to what extent free movement of capital is effectively prescribed by the Treaty and to what extent the Council has a discretion with regard thereto (Case 203/80 *Casati* [1981] ECR 2595 at p. 2613). Adopting such an approach, there is nothing in Article 61, which relates to freedom to provide services in the field of transport, which helps to establish the existence of a general obligation to introduce a common transport policy.

The Council then contends that Article 74 neither obliges nor empowers the Council to act. In addition, the title on transport indicates a course to be pursued but it gives neither particulars of the aim to be achieved

nor the period within which it should be achieved. A comparison with the provisions of the Treaty relating to the introduction of the common agricultural policy shows clearly the imprecise nature of the provisions on the common transport policy. Moreover, the aforesaid provisions on movement of capital provide an example of an obligation to act accompanied by such a wide discretion that the competent institution, namely the Council, may refrain from adopting measures of liberalization if in its opinion they are not necessary for the functioning of the common market.

The Council admits that the provisions of Article 75 (1) (a) and (b) impose an obligation on it to act and that Article 75 (2) stipulates a time-limit, but the obligation is so ill-defined that it leaves the Council a wide discretion which in its opinion precludes an action under Article 175. That observation applies *a fortiori* in the case of Article 75 (1) (c), for the Treaty does not specify what scope the rules should have or the area to which they should apply. As in the case of the common agricultural policy, the preparation of Community rules on transport requires the assessment of complex economic situations which, according to the established case-law of the Court, demands a wide discretion.

The Council denies, moreover, that there is any obligation to act under Article 84 (2) in the fields of sea and air transport. The very wording of the article shows that the Council has a discretion not only to decide how far and by what procedure measures should be adopted, but also to decide whether measures should be adopted at all.

As regards the examples of measures whose lack is pleaded in support of the general complaint of failure to act, the Council considers that Article 175 of the Treaty does not enable the Court to determine the scope and particulars of rules which ought to have been adopted by the Council under Article 75 (1) (a) and (b). Just as the Court in an action under Article 173 cannot review the way in which a discretion is actually exercised it cannot in an action for failure to act require that a discretion be exercised.

The Council also refers to the difficulties already mentioned which prevent progress in the preparation of a common policy. It refers to certain principles of national administrative law according to which an authority which has a specific obligation is not guilty of any unlawful omission if special circumstances of a technical or political nature, such as a conflict of different political or social interests likely to have serious consequences, prevent fulfilment of the obligation. In the case of an obligation to act which leaves a certain discretion with regard to substance, failure to act is unlawful only if it constitutes a misuse of powers or is *ultra vires*. The Council adds that the discretion which it has in the exercise of its legislative power has limits even less strict than those which circumscribe the action of a public authority in the administrative field.

In its role as mediator between the Community obligations and national interests — the role emphasized by Articles 74 and 75 — the Council must take account of any circumstances likely to hinder or even prevent the implementation of the provisions laid down in Article 75 (1) (a) and (b) and capable of having unforeseeable consequences for the Community. In that respect the Council raises the question how

far it is answerable as a Community institution for the political situations in Member States which influence the Council's decisions. As for the argument put forward by the Parliament and Commission regarding the procedure for reaching decisions, it considers that Article 5, which imposes obligations solely on the Member States, is not addressed to the Council.

### 3. Second claim: Failure to act on 14 proposals of the Commission

The *European Parliament*, supported by the *Commission*, alleges in the second place that the Council has failed to fulfil its obligations under the Treaty by failing to act on the 14 proposals of the Commission set out in its claim.

For each of the proposals the Commission has set out the legal basis and the stage they have reached and the three institutions have submitted observations which may be summarized as follows:

The proposals relating to the *road transport* sector are eight in number. They include five proposals, listed in the applicant's claims under Nos 7 to 11, which are exclusively based on Article 75 (1) (a) and concern measures for liberalizing the carriage of goods by road between Member States. In the *Parliament's* view the proposal relating to the adjustment of capacity (No 7), in particular, represents an important step in replacing bilateral quotas with a Community quota. It considers that there is a qualified majority in the Council in favour of the proposals relating to the issue of

authorizations for coupled vehicles (Nos 10 and 11), so that those proposals may be adopted without further ado. The *Commission* observes that the adjustment of capacity in road transport (No 7) scarcely affects rail transport. The *Council* considers on the other hand that such an adjustment cannot be contemplated without taking into account the general rules on capacity for the various means of transport. Moreover, the *Commission* has submitted two new proposals relating to the same questions as proposals Nos 7 and 8.

Proposals Nos 2 and 4, which contemplate the harmonization of fiscal and technical provisions in the road transport sector, are based on Article 75 (1) (a) and (c), the harmonization of taxation being also based on Article 99. The *Parliament* claims that the two measures are important for the harmonization of the conditions of competition in the transport market. In failing to act on the adjustment of the national systems of taxation (No 2) the *Council* has infringed its own decision of 13 May 1965. The adoption of that proposal cannot depend on a decision on weights and measures (No 4) which, moreover, ought also to have been taken before the end of the transitional period. The *Commission* states that proposal No 2 represents the first step towards a common system of liability for infrastructure costs. The lack of a decision prevents any progress in that direction. The *Council* contends that the proposal relating to the harmonization of taxation (No 2) requires unanimity and that the harmonization of weights and measures (No 4) is a subject on which there are serious differences of view between the Member States.

Proposal No 15, based on Article 213 of the Treaty, relates to the collection of information on road haulage with certain State-

trading countries. The *Commission* explains that it needs precise information in order to be able to protect the interests of Community carriers against the unfair practices of such countries. Since the *Council* has reached no decision on the proposal the *Commission* itself has begun to collect information. The proposal has not been withdrawn, however, because a formal decision of the *Council* is necessary. The *Council* states that it has rejected the proposal and regards it as dealt with.

Proposals Nos 5 and 6, relating to the position of the *railways*, have their legal basis in Article 75 (1) (a) and (c) and Article 94 of the Treaty.

Proposal No 5 seeks an amendment of Regulation No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service. The *Parliament* stresses its importance for the conditions of competition between rail, road and inland waterway. The *Council* says that it is awaiting the results of information the *Commission* is obtaining from national administrations.

Proposal No 6 concerns amendment of Regulation No 1192/69 on common rules for the normalization of the accounts of railway undertakings. The *Parliament* states that that proposal can be adopted on a qualified majority since only one Member State is against it. The *Council* is no longer considering the proposal because it has no practical importance.

As regards *inland navigation*, proposal No 12, based on Article 75 (1) (a) and (b) and (c), and submitted to the *Council* in 1967, is intended *inter alia* to regulate access to the



market in the transport of goods and to bring about a reduction of excess structural capacity. The *Parliament* and the *Commission* stress that in failing to reach a decision on Article 38, which defines the conditions under which non-resident carriers may operate transport services within a Member State, the Council has failed to fulfil its obligations under Article 75 (1) (b) of the Treaty. According to the *Commission* a laying-up system is no longer needed. The *Council* states that it awaits accordingly a fresh proposal based on the former Article 38.

Proposal No 1, which is based on Article 75 (1) (a) and (c), seeks the harmonization of social provisions relating to the transport of goods by *inland waterway*. According to the *Council* and the *Commission*, consideration of that proposal was suspended pending the results of the work of the Central Commission for the Navigation of the Rhine on the same matter. In the *Parliament's* view the Council's failure lies in the fact that it did not define the Community's position by adopting the proposal before entering into negotiations under the Convention of Mannheim.

Two proposals concern *several means of transport*. Proposal No 13, based on Article 75 (1) (c), provides for the establishment at Community level of a permanent system for observing the markets in the carriage of goods by rail, road and inland waterway between the Member States, collecting all available information and forecasting short and medium-term trends in supply and demand. The *Commission* considers that such a system constitutes an essential element in the development of its policy. The *Parliament* observes that in view of the Council's inability to reach a definite decision the Commission has created an

experimental system which is, however, inadequate. The *Council*, in view of the initial results of the experiment and costs, has preferred to await further information.

Proposal No 14, also based on Article 75 (1) (c), is for a basic regulation on financial support for projects of Community interest in transport infrastructure. The *Commission* observes that it has cooperated in the adoption of certain transitional measures relating to limited action for the purpose, in particular, of not losing the budgetary appropriations for infrastructures. However, its report in 1981 on bottlenecks in infrastructures shows the importance of the basic proposal. The *Parliament* refers to its resolution of 15 October 1982 to the effect that the adoption of a regulation on limited action cannot replace the adoption of a basic regulation. The *Council* considers that the experience gained with transitional measures can only facilitate the adoption of more general rules.

#### 4. The legal consequences of the absence of a common transport policy

The *Government of the Netherlands, intervening in support of the Council*, observes that the absence of a common transport policy does not necessarily prevent the functioning of the common market in transport. In its opinion the Parliament's argument overlooks an interpretation of the Treaty according to which on the expiry of the transitional period provided for in the Treaty certain provisions relating to transport, read in combination with the general rules of the Treaty, may impose direct obligations on the Member States.

As the Court has confirmed in a judgment of 4 April 1974 (Case 167/73 *Commission v French Republic* [1974] ECR 359), the general rules of the Treaty are applicable to transport. Although as regards freedom to provide services in the field of transport Article 61 refers to the provisions of the title relating to transport, it is not to be inferred therefrom that the expiry of the transitional period can have no legal effect on freedom to provide services. Pursuant to Article 8 (7) of the Treaty the rules relating to the establishment of the common market, including the common market in transport, must have been adopted before the expiry of the transitional period.

As regards the legal consequences of the expiry of the transitional period, the case-law of the Court shows that the absence of implementing rules expressly provided for by the Treaty does not prevent the application of the general rules of the Treaty or the principles on which they are based, such as the principle of non-discrimination, which by their nature can have direct effect. Article 61 in conjunction with Article 75 (1) (a) and (b) thus does not exclude the possibility that after the expiry of the transitional period the obligation to achieve a result in relation to liberalization, recognized by the Court on the basis of Article 59, may also apply to the areas referred to in Article 75 (1) (a) and (b):

The Netherlands Government stresses that such an interpretation is consonant with the harmonious development of the common market. It considers that the special features of transport should not prevent the basic principles of the common market from applying in that sector.

The Netherlands Government concludes that even where the Council has not laid down common rules it may be accepted that under Article 75 there is the same obligation to achieve a result as in the other areas referred to by Article 59. In that case the Council may take the view that it is no longer bound to take some of the measures listed in the application and that in that respect it is exonerated from the charges of failure to act which the Parliament makes against it.

The *Commission* concedes that the argument of the Netherlands Government is not without a certain attraction. It points out that the judgment of 10 December 1974 in Case 48/74 (*Charmasson v Minister for Economic Affairs and Finance* [1974] ECR 1383) seems to confirm that interpretation. In that judgment the Court held that derogations which a national market organization might effect from the general rules of the Treaty were permissible only until the end of the transitional period and to the extent necessary to ensure the functioning of the market, without, however, impeding the adjustments which were necessary for the establishment of the common agricultural policy. At the expiry of the transitional period the general rules of the Treaty (in that case Article 33) must be fully effective.

The Commission considers, however, that that reasoning cannot apply by analogy to Articles 61 and 75. There is nothing to show that the application of Article 61 is confined to the transitional period. Article 61 is really an exception designed to take account of certain special features of transport which do not disappear at the end of the transitional period. The implicit object of Article 61 is to require the Council to adopt, for the provision of services in the transport sector, rules which take account of those

special features and which may perhaps depart from a simple application of the principle contained in Article 59. Furthermore, Article 75 (1) (a) and (b) gives the Council a broad discretion limited only by the general objectives of the Treaty. It is therefore difficult to maintain that Article 75 (1) (a) and (b) imposes an obligation on the Member States to achieve a result within a specific period.

Nevertheless, the Commission considers that persistent failure by the Council, in breach of the Treaty, to adopt the provisions needed to apply the principle of freedom to provide services in the transport sector should not be without legal consequences. It suggests that the principle of freedom to provide services may be regarded as applicable to those transport sectors for which at the expiry of an appropriate period the Council has adopted no rules. Rather than state a precise date it prefers to link the application of that principle to a finding by the Court that the Council has persistently refused to fulfil its obligations. Evidence of such a negative attitude may, for example, be provided by a failure by the Council to adopt the measures needed under Article 176 to comply with a judgment establishing that it has so failed to act.

Finally, the Commission draws attention to the case-law of the Court on the common policy on fisheries. Although that case-law may not be directly applicable to the transport sector the reasoning to be found therein is also valid for other sectors in which the Community legislature was required to adopt provisions before the expiry of a particular period and failed to do so. In essence, it states that the Member States are allowed to adopt provisional measures in that case but only in the common interest and subject to review by

the Commission. The expiry of the period thus reinforces the obligations of the Member States to cooperate pursuant to Article 5, and the powers of the Commission under Article 155, to ensure that the measures which the Member States may take are in the common interest. In the transport sector the application of that principle is related to the obligation of the Member States contained in Article 74 to pursue the objectives of the Treaty within the framework of a common transport policy.

From that point of view the Member States may not adopt unilateral measures in relation to transport which are likely to affect the preparation of the common policy save in so far as they are necessary and after consulting the Commission, which may object if necessary. In that respect the Commission mentions that there are procedures for notification with regard to domestic transport and for sea and air navigation. Those procedures, however, need to be strengthened.

#### IV — Oral procedure

At the sitting on 17 and 18 September 1984 the parties presented oral argument.

At the hearing the *Parliament* explained in relation to the precise object of its first claim that it had not presented a detailed version of a common transport policy because it did not wish to assume the role of Community legislator, a role which the Treaty had not conferred on it. The first

claim in the action must be understood as meaning that in the Parliament's view the Council had not established the minimum elements of a common transport policy as required by the Treaty. According to the case-law of the Court free trade and the establishment of a competitive economy in the transport sector are such minimum elements. Moreover, the essential elements are to be found in particular in Article 75 (1) (a) and (b) of the Treaty.

The *Commission* stated on that issue that although the common transport policy is wider than freedom to provide services, it must in any event include achievement of that freedom. In that respect Article 61 constitutes something of a constitutional provision. It is inconceivable that transport should be the sole economic sector excluded from freedom to provide services. In the Commission's view freedom to provide services in the areas covered by Articles 75 (1) (a) and (b) does not follow directly from Article 59 at the end of the transitional period. Nevertheless, it considers that the Council was required to set up the

machinery needed to establish progressively freedom to provide services with regard to the five means of transport. On a systematic interpretation of the relevant provisions in the light of their purpose, the minimum substance of the common transport policy is thus sufficiently precise for it to be possible to find that the Council is required progressively to achieve freedom to provide services in the transport sector even if the process is not restricted by the end of the transitional period.

The *Commission* emphasized further the constitutional nature of the proceedings and, referring to German constitutional law, stated that it is for the Court to find whether and when the period available to the Council to introduce the minimum elements of a transport policy has elapsed. That is the moment at which the result referred to by the Netherlands Government, namely the direct effect of the relevant provisions, occurs.

The Advocate General delivered his opinion at the sitting on 7 February 1985.

## Decision

- 1 By an application lodged at the Court Registry on 24 January 1983 the European Parliament brought an action under the first paragraph of Article 175 of the EEC Treaty for a declaration that the Council has infringed the EEC Treaty, in particular Articles 3 (e), 61, 74, 75 and 84 thereof, by failing to introduce a common policy for transport and in particular to lay down the framework of such a policy in a binding manner and further by failing to reach a decision on 16 specified proposals submitted by the Commission in relation to transport.

2 The common transport policy is included among the activities in which the Community must engage according to Article 3 of the EEC Treaty in order to establish a common market and progressively approximate the economic policies of the Member States. It is the subject of Title IV of Part Two of the Treaty, namely the part concerned with the 'foundations of the Community'. The first article under that title, Article 74, lays down that the objectives of the Treaty are to be pursued in the transport sector 'within the framework of a common transport policy'. Article 75 (1) provides that for the purpose of implementing Article 74 the Council must lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the European Parliament:

- (a) 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;
- (b) the conditions under which non-resident carriers may operate transport services within a Member State;
- (c) any other appropriate provisions.'

Article 75 (2) states that the provisions referred to in (a) and (b) of paragraph 1 are to be laid down during the transitional period.

#### *A. Background to the proceedings*

3 The applicant observes that as early as 1968, at the approach of the end of the transitional period laid down in the EEC Treaty, it adopted a resolution on the state of the common transport policy (*Journal Officiel* C 10, p. 8), in which after referring to a previous resolution on the delay which had occurred in the implementation of the common transport policy it emphasized 'its express intention of having a transport policy defined and implemented without delay since it is a vital factor in the common market'. Two years later, in 1970, it adopted a similar resolution (*Journal Officiel* C 40, p. 27) in which it again drew attention to the delay in the matter and called upon the Council to fix a working programme containing a precise timetable of the decisions to be taken.

4 When its opinion on a communication from the Commission to the Council in October 1973 on the development of the common transport policy was sought, the Parliament adopted a Resolution on 25 September 1974 on the principles of the common transport policy (Official Journal C 127, p. 24). In the Resolutions of

16 January 1979 (Official Journal C 39, p. 16) and 3 March 1982 (Official Journal C 87, p. 42) the Parliament repeated its demand that the Council should introduce without delay a coherent common policy in the transport sector.

- 5 After observing that there was still no common policy as required by the Treaty, the European Parliament finally adopted on 16 September 1982 a resolution on the institution of proceedings against the Council of the European Communities for failure to act in the field of transport policy (Official Journal C 267, p. 62). The resolution noted that only minimal measures of transport policy which failed entirely to meet the requirements of the common market had been adopted, so that the provisions of Article 3 (e) and 74 to 84 of the EEC Treaty had not been complied with. The resolution also noted that 'the Council has not reached a decision on a large number of Commission proposals on which the European Parliament long ago adopted a favourable opinion'.
- 6 In the same Resolution of 16 September 1982 the Parliament instructed its President to bring an action against the Council pursuant to the first paragraph of Article 175 of the Treaty after calling upon the Council to act pursuant to the second paragraph of that article. In a letter dated 21 September 1982 the President of the Parliament informed the Council of the Parliament's intention to bring an action against the Council for failing to lay down pursuant to Articles 3 (e), 61 and 74 the framework of a common transport policy within which the objectives of the Treaty might be pursued and to take the decisions provided for in Articles 75 to 84 in order to implement Articles 61 and 74.
- 7 The letter of 21 September 1982 called upon the Council to take a number of steps, in particular:
  - to fix the framework of a common transport policy pursuant to Articles 3 (e) and 74 of the Treaty;
  - to introduce freedom to provide services in the field of transport as provided for in Article 61 and for that purpose to apply the provisions of Articles 74 to 84;
  - to take without delay the decisions which ought to have been taken before the end of the transitional period and in particular those provided for in Article 75 (1) (a) and (b);

- to adopt all necessary provisions for the pursuit of the objectives of the Treaty within the framework of a common transport policy pursuant to Article 75 (1) (c);
- to deal without delay with a number of specified proposals of the Commission on which the Parliament had already given its opinion.

- 8 The President of the Council replied by letter dated 22 November 1982. In the letter the Council, 'without expressing an opinion at this stage on the legal aspects' referred to by the President of the Parliament but 'in keeping with the spirit of its good relations with the European Parliament', submitted a report to enable the Parliament to acquaint itself with 'the Council's assessment, at the present stage, of the development of the common transport policy'. The Council added that it shared the Parliament's concern to see that policy implemented, that it had already adopted in various transport sectors a series of decisions representing significant steps towards the implementation of a common transport policy, but that it was nevertheless aware that in spite of the progress achieved the common transport policy required further action.
- 9 In a note enclosed with that letter the Council supplied a list of 71 Council measures adopted in the field of transport and a commentary on the stage reached in the consideration of each of the Commission's proposals referred to in the letter from the President of the Parliament.
- 10 After the Council's reply had been considered by the competent Parliamentary committees as provided for in the Resolution of 16 September 1982 the President of the European Parliament took the view that the reply did not constitute a 'definition of position' for the purposes of the second paragraph of Article 175 of the Treaty. He therefore decided to bring the present action.
- 11 The Commission intervened in the proceedings in support of the European Parliament and the Kingdom of the Netherlands intervened in support of the Council.

*B. Admissibility of the action*

- 12 The Council objects that the action is inadmissible on two grounds: the first is based on the applicant's alleged lack of capacity to bring proceedings and the second is that the conditions laid down in Article 175 relating to steps to be taken prior to bringing an action have not been complied with.

1. Capacity to bring proceedings

- 13 The Council explains first of all that in its opinion the present action is to be seen as part of the Parliament's efforts to increase its influence in the decision-making process within the Community. Those efforts, although legitimate, should not seek to exploit the action for failure to act provided for by Article 175 since collaboration between the Community institutions is not governed by that provision. The political aims of the Parliament must be pursued by other means.

- 14 In the light of that the Council, while recognizing that Article 175 gives a right of action in respect of omissions of the Council and Commission to Member States and 'the other institutions of the Community', enquires whether the right of review conferred on the Parliament by the Treaty is not exhausted by the powers provided for in Articles 137, 143 and 144 of the Treaty, which govern the ways in which the Parliament may exercise influence on the activities of the Commission and the Council. If so, the Parliament can have no right of review over the Council which may be exercised by means of an action for failure to act.

- 15 The Council adds that upon a systematic interpretation of the Treaty the Parliament has no capacity to bring proceedings. The Parliament has no right of action under Article 173, which enables a review of the legality of measures of the Council and Commission to be obtained by means of an action for annulment. In so far as the Treaty deprives the Parliament of the right to review the legality of measures of the two institutions it would be illogical to allow it a right of action in the case of unlawful failure by one of those institutions to act. Accordingly, only



through an express attribution of powers would it have been possible to confer on the Parliament a right to bring an action for failure to act.

- 16 The European Parliament and the Commission contest that argument on the basis of the actual wording of Article 175, which in their view does not lend itself to any interpretation which would prevent the Parliament from bringing an action for failure to act. Both institutions also consider that recognition of such a power is in no way incompatible with the division of powers provided for by the Treaty.
- 17 The Court would emphasize that the first paragraph of Article 175, as the Council has recognized, expressly gives a right of action for failure to act against the Council and Commission *inter alia* to 'the other institutions of the Community'. It thus gives the same right of action to all the Community institutions. It is not possible to restrict the exercise of that right by one of them without adversely affecting its status as an institution under the Treaty, in particular Article 4 (1).
- 18 The fact that the European Parliament is at the same time the Community institution whose task is to exercise a political review of the activities of the Commission, and to a certain extent those of the Council, is not capable of affecting the interpretation of the provisions of the Treaty on the rights of action of the institutions.
- 19 Accordingly the first objection of inadmissibility must be rejected.

## 2. The conditions governing the procedure prior to the action

- 20 The Council considers that the conditions governing the procedure prior to an action which are laid down in Article 175 have not been complied with. In the first place the Council was not 'called upon to act', within the meaning of Article 175, by the letter from the President of the European Parliament of 21 September 1982, and in the second place the Council 'defined its position' with regard to that letter for the purposes of Article 175 by supplying the Parliament with a full report on its activities with regard to the common transport policy referred to in the aforementioned letter of 21 September 1982.

- 21 On the first issue the Council maintains that the letter from the President of the Parliament was not regarded at the time as calling upon it to act within the meaning of Article 175. The Council's reply shows that the correspondence between the two institutions represented in the Council's view a contribution to the political dialogue and not the first step in proceedings. It is for that reason that the Council gave the Parliament all the information necessary to show how the Council envisaged the future development of the common transport policy.
- 22 On the second issue the Council points out that what constitutes a 'definition of position' for the purposes of Article 175 depends upon the nature of the omission with which the institution in question is charged. Where the institution is required to take a decision without having the least discretion it is difficult to imagine that a definition of position which differed from the measure required could make an action inadmissible. If, on the other hand, the Treaty gives the institution a wide discretion, as in the present case, the situation is different: a reply from the institution in question setting out the state of progress and showing why the institution has not yet acted and the way in which it intends to proceed suffices in such a situation to establish that there is no failure for the purposes of Article 175 and that consequently the action is inadmissible.
- 23 The Parliament and the Commission take the view that the letter from the President of the Parliament of 21 September 1982 set out with sufficient clarity the measures called for by the Parliament pursuant to the second paragraph of Article 175 and that the reply from the President of the Council of 22 November 1982 did not define the Council's position on any of those measures, so that the Parliament's charge that the Council had failed to act was left unanswered.
- 24 The Court is of the opinion that the conditions laid down by the second paragraph of Article 175 were satisfied in the present case. After expressly referring to that provision the Parliament clearly stated in the letter from its President that it was calling upon the Council to act pursuant to Article 175 and appended a list of actions which in its opinion ought to be undertaken by the Council to remedy its failure.

- 25 The Council's reply, on the other hand, was confined to setting out what action it had already taken in relation to transport without commenting 'on the legal aspects' of the correspondence initiated by the Parliament. The reply neither denied nor confirmed the alleged failure to act nor gave any indication of the Council's views as to the measures which, according to the Parliament, remained to be taken. Such a reply cannot be regarded as a definition of position within the meaning of the second paragraph of Article 175.
- 26 Moreover, the Court considers that in the present case the Council's observations in relation to its discretion in implementing the common transport policy are not germane to the question whether the specific conditions in Article 175 were complied with. They relate to the more general issue of whether the absence of a common transport policy can amount to a failure to act for the purposes of that provision, an issue which will be considered subsequently in this judgment.
- 27 It follows that the second objection of inadmissibility must also be rejected.

### *C. The subject-matter of the action*

- 28 In its defence the Council criticizes the Parliament for having failed to address the key issue in the case, namely whether the word 'act' in Article 175 may be interpreted as including the introduction of a common transport policy. The Council explains that the policy concerns an extremely complex subject with numerous aspects, such as infrastructure, prices, conditions of transport, freedom of establishment and freedom to provide services, social problems, competition and so forth. Accordingly a common policy in this sector, which must cover not only road traffic but also inland navigation and railways, cannot be introduced by a single decision: it must be built up progressively by means of specific rules.
- 29 The Council submits that the procedure provided for in Article 175 was designed for cases where the institution in question has a legal obligation to adopt a specific legal measure and that it is an inappropriate instrument for resolving cases involving the introduction of a whole system of measures within the framework of a complex legislative process. Should the Court find that an institution has, in

breach of the Treaty, failed 'to act', the institution is required under Article 176 'to take the ... measures' necessary to comply with the judgment of the Court. The applicant, however, has failed to specify the precise measures which it complains the Council has not adopted.

- 30 The European Parliament concedes that a common transport policy will probably not be adopted at a stroke but must be achieved by means of successive measures which will have to be harmonized *inter se* within a single coherent system. It is obvious, however, that it is necessary 'to act' one way or another to bring the requisite set of measures into being in accordance with a pre-determined plan.
- 31 In the view of the Commission, which supports the Parliament on this issue, the Treaty imposes a general obligation to introduce a common transport policy requiring first of all a definition, in accordance with the general aims of the Treaty, of the principles of a common transport policy, which will serve as the essential basis for the adoption of implementing measures. The adoption of sporadic measures not covering essential areas of a common policy is not sufficient to meet that requirement. The Commission considers that whatever latitude is given by the Treaty to the Council for determining the nature of the measures to be taken in the framework which it chooses and the order in which those measures are taken, the obligation to act imposed by Articles 74 and 75 of the Treaty, as well as by Article 3 (e), is sufficiently precise to be the subject, in the event of failure to comply with it, of an action for failure to act under Article 175.
- 32 The Parliament and the Commission add that in any event Article 75 prescribes a very precise time-limit for the measures to be taken in areas which the Treaty obviously considers to be essential, since the common rules applicable to international transport and the conditions under which non-resident carriers may operate transport services within a Member State were to be adopted during the transitional period, that is to say, before the end of 1969. Both institutions point out that the two areas in question are closely connected with the freedom to provide services, which the Treaty requires, in principle, to be established before the end of the transitional period, although in the case of transport that freedom is subject, according to Article 61, to the establishment of a common policy.

- 33 The Court notes that the Parliament has made two separate claims: one concerning the failure to introduce a common transport policy and in particular to lay down its framework, and the other concerning the Council's failure to act on 16 proposals relating to transport which the Commission had submitted to it. Only the first claim raises the question whether the terms of Article 175, and its place in the system of legal remedies provided by the Treaty, permit the Court to find that there has been a breach of the Treaty in the form of a failure to act.
- 34 Although the wording of Article 175, especially in the German and Dutch versions, seems to call for an interpretation which presupposes the existence of a failure to adopt the specific measure, that argument is not conclusive. In the first place, the other language versions are so worded as to allow the inclusion of a less clearly circumscribed failure; in the second place the purpose of Article 175 would be frustrated if an applicant were not able to refer to the Court an institution's failure to adopt several decisions, or a series of decisions, where the adoption of such decisions is an obligation which the Treaty imposes on that institution.
- 35 In those circumstances the issue raised by the Council is, in essence, whether in the present case the European Parliament, in describing in its first claim the measures which it complains the Council has failed to take, has done so with a degree of precision which would make it possible for the Council to comply, pursuant to Article 176, with a judgment of the Court allowing that claim.
- 36 Such a degree of precision is particularly required in view of the fact that in the system of legal remedies provided for by the Treaty there is a close relationship between the right of action given in Article 173, which allows unlawful measures of the Council and Commission to be declared void, and that based on Article 175, which may lead to a finding that the failure by the Council or Commission to adopt certain measures is contrary to the Treaty. In view of that relationship it must be concluded that in both cases the measures which are the subject of the action must be sufficiently defined to allow the Court to determine whether their adoption, or the failure to adopt them, is lawful.

37 It follows that the Parliament's first claim, even if it is substantiated, can be upheld only in so far as the absence of a common transport policy with which the Council is charged is due to failure to take measures the scope of which can be sufficiently defined for them to be identified individually and adopted in compliance with the Court's judgment pursuant to Article 176. It is therefore necessary to consider the arguments of the parties as to whether there is or is not a common transport policy.

*D. The first claim: the failure to introduce a common transport policy*

1. The common transport policy in general

38 The European Parliament recognizes that the Treaty leaves the Council a wide discretion with regard to the substance of the common transport policy. That discretion is, however, restricted in two respects: in the first place it does not permit the Council to remain inactive beyond the expiry of the periods laid down by the Treaty, in particular that in Article 75 (2); in the second place the Council is required to fix a common framework consisting of a coherent set of principles capable of embracing all the complex economic factors inherent in the transport sector. Those principles must govern the various specific measures which are needed to give effect to the general principles of the Treaty in this sector.

39 Given that situation, the basic principles which the Council ought to have adopted, according to the Parliament, should at least pursue certain aims and cover certain areas. The very nature of a common transport policy implies the need to ensure that certain aims are pursued, especially with a view to bringing about liberalization of transport and facilitating international traffic. The relevant principles must also indicate the areas to be covered by the system of rules which is to be established; in view of the economic situation in the transport sector the areas of action should above all cover competition between rail and road transport and restrictions on capacity in transport by inland waterway and road transport.

40 The Commission points out that there are serious lacunae in all areas of transport policy notwithstanding the numerous proposals which it has submitted to the Council over a period of more than twenty years. It refers in particular to the inadequacy of the measures adopted on the carriage of goods by road, where restrictions on capacity are generally fixed by means of bilateral agreements

between Member States on the basis of very diverse criteria which often prevent the best use being made of existing capacity because so many return journeys are made unladen, and where, moreover, transport within each of the Member States is restricted to undertakings established in the territory of that Member State. Finally, the considerable number of border checks continues to impede international transport.

- 41 In that connection the Commission refers to the unsatisfactory situation of the accounts of railways and their relations with the State, the large structural over-capacity in transport by inland waterway which is aggravated by the absence of coordinated measures for laying up vessels, the lack of progress in implementing measures relating to infrastructure of interest to the Community and the lack of coordination of the national measures relating to infrastructure, and, finally, the almost total absence of Community action in relation to sea and air transport.
- 42 The Council does not deny the existence of the lacunae described by the Commission. However, it adduces a number of arguments seeking to show that those lacunae cannot be regarded as a failure to act for the purposes of Article 175 of the Treaty. It refers in particular to the discretion which it enjoys with regard to the implementation of the common transport policy, and the objective difficulties of a geographical, economic and social nature which prevent more rapid progress. In addition the Council refers to the problem posed by the special position of the railways in transport and the special role played by the Member States in the Council's decision-making process in the field of transport.
- 43 The Council refers to the action which it has already undertaken on the subject, particulars of which it supplied to the Parliament in a letter from the President of the Council of 22 November 1982, and to its Decisions of 13 May 1965 fixing the objectives to be achieved in relation to taxation and social harmonization in the transport sector (Official Journal, English Special Edition 1965-1966, p. 67) and 14 December 1967 laying down a programme of measures likely to ensure the subsequent development of the common transport policy (Official Journal, English Special Edition, Second Series IV, p. 23). Those decisions show, moreover, that the inter-dependence of the various transport sectors, and the problems to be resolved, which the Commission has frequently acknowledged, has proved an obstacle to the Council's action.

- 44 The Council states that in its view liberalizing the carriage of goods by road is scarcely conceivable without a substantial approximation of the conditions of competition, which is, however, impossible to achieve unless the problem of the railways and their relationship with the public authorities is resolved. However, the Council has never received a proposal from the Commission which would enable that fundamental problem to be resolved.
- 45 The Netherlands Government supports the Council on this issue, although it does not fully agree with its argument. It considers that the absence of a common transport policy does not mean that the general rules of the Treaty and the freedoms which they guarantee do not apply to transport. Although it is true that according to Article 61 freedom to provide services in the field of transport is governed by the provisions of the Treaty relating to the common transport policy, it cannot be inferred from that that the expiry of the transitional period has had no effect upon freedom to provide services in this sector. The Netherlands Government points out that in other areas, such as the organization of the agricultural markets and the conservation of the resources of the sea, the Court has held that the expiry of the transitional period may itself give rise to rights and obligations based on the general rules of the Treaty.
- 46 One conclusion may easily be drawn from the contentions of those four parties: it is common ground that there is not yet a coherent set of rules which may be regarded as a common transport policy for the purposes of Articles 74 and 75 of the Treaty. That conclusion may be based on the lack of a coherent framework for implementing such a policy, which is the case put forward by the Parliament, the fact, stressed by the Commission, that the main problems in the field of transport have not been resolved, the failure, to which the Council refers, to abide by its decisions of 1965 and 1967 laying down a timetable for relevant action, or finally on the fact, emphasized by the Netherlands Government, that obstacles to freedom to provide services in relation to transport continue to exist.
- 47 Accordingly it is necessary to determine whether, in the absence of a set of measures capable of constituting a common transport policy, the Council's repeated failure to act may be the subject of an action under Article 175.



- 48 In that respect it must first of all be observed that objective difficulties which, according to the Council, stand in the way of the necessary progress towards a common transport policy are irrelevant for the purposes of the present action. Under Article 175 the Court must find that there has been an infringement of the Treaty if the Council or the Commission fails to act when under an obligation to do so. Article 175 takes no account of how difficult it may be for the institution in question to comply with the obligation.
- 49 Nevertheless, the Council's argument that it has a discretion must, in principle, be accepted. Although it is true that the discretion is limited by the requirements which stem from the establishment of the common market and by certain precise provisions in the Treaty such as those laying down time-limits, the fact remains that under the system laid down by the Treaty it is for the Council to determine, in accordance with the rules of procedure provided for in the Treaty, the aims of and means for implementing a common transport policy.
- 50 As part of its obligation to introduce a common transport policy the Council is required to make all the decisions necessary for the gradual introduction of such a policy, but the substance of those decisions is not determined by the Treaty. Thus, for example, the Treaty leaves it to the Council to decide whether action in the transport sector must deal first with relations between the railways and the public authorities or with competition between road and rail. It is also for the Council to determine what priorities are to be observed in harmonizing the laws and administrative practices in the sector and to decide what matters such harmonization must cover. In that respect the Treaty gives the Council a discretion.
- 51 That is confirmed by the information supplied during the proceedings by the three institutions in question and the Netherlands Government, which shows that since the aforementioned Council Decision of 1965 opinions on the substance of a common transport policy have undergone an evolution, and in particular the importance attached to the various aspects of such a policy has varied in the course of time.

52 That information provides the basis for a second observation. It appears in fact that the Parliament, as applicant in the proceedings and in spite of being called upon to do so, has not stated which measures the Council ought to adopt on the basis of the Treaty and in what sequence they ought to be adopted. The Parliament has simply stated that the measures should form a coherent system, should apply in all the Member States and should realize the aims of the Treaty in relation to transport.

53 As already stated, the absence of a common policy which the Treaty requires to be brought into being does not in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175. That observation applies in the present case notwithstanding the fact that progress towards the achievement of a common transport policy in accordance with Article 75 must continue, or the fact that a substantial part of that work ought, according to Article 75 (2), to have been completed before the expiry of the transitional period.

## 2. Freedom to provide services in relation to transport

54 The Parliament and the Commission claim in this respect that not only do the provisions of Article 75 (1)(a) and (b) require common rules applicable to international transport and the conditions under which non-resident carriers may operate transport services to be adopted within a certain period, but they also impose on the Council obligations sufficiently specific to be capable of being the subject of a finding of failure to act under Article 175 of the Treaty. Both institutions stress the close relationship between those provisions and freedom to provide services, the achievement of which is one of the main tasks entrusted to the Community.

55 The Council contests that argument on the basis that even in the area covered by Article 75 (1)(a) and (b) the substance and aim of the rules to be adopted are not sufficiently defined.

56 The Commission points out that in any event the common transport policy called for by the Treaty contains one element, the substance of which is sufficiently well-defined to be classified as a specific obligation, namely freedom to provide services. The scope of that obligation can be determined on the basis of the

provisions of the Treaty relating to the provision of services, in particular Articles 59 and 60, and the relevant directives and case-law.

- 57 The Netherlands Government also stress the importance of freedom to provide services.
- 58 Consequently, it is necessary to examine more closely the arguments of the parties relating to freedom to provide services in the transport sector and its relationship with the introduction of a common transport policy.
- 59 The Commission and the Netherlands Government point out that the Court has held the provisions of Articles 59 and 60 to be directly applicable since the expiry of the transitional period. They both contend that the fact that Article 61 requires the provision of services in relation to transport to be liberalized within the framework of a common transport policy does not in itself constitute a sufficient ground for suspending indefinitely the effect of the provisions relating to services when the Council has for years failed to introduce a common policy.
- 60 The Netherlands Government states that according to Article 8 (7) of the Treaty the expiry of the transitional period is to constitute the latest date by which all the measures required for establishing the common market must be implemented; there is no ground for making the transport market an exception thereto. It also points out that the absence of express implementing provisions in the Treaty has never prevented the application of the general rules of the Treaty or its basic principles. From this it concludes that since the end of the transitional period freedom to provide services must apply even in the transport sector. Since the direct application of the provisions of Articles 59 and 60 is sufficient to achieve the aims of a common transport policy without any further intervention by the Council, that institution cannot be said to have failed to act.
- 61 The Commission, on the other hand, considers that Articles 59 and 60 are not directly applicable in the transport sector. Pursuant to Article 61 freedom to provide services in relation to transport must be achieved within the framework of the rules provided for by Article 75 (1) (a) and (b). The aim of that provision is to allow the Council an appropriate period, extending if necessary beyond the expiry

of the transitional period, within which to achieve freedom to provide services in relation to transport within the framework of a common policy. That appropriate period cannot, however, extend indefinitely, and now that more than 15 years have elapsed since the end of the transitional period it must almost have reached its end; if it were otherwise freedom to provide services, although guaranteed by the Treaty, would apply in all but one sector of activity, a situation which in the long term would be likely to cause distortion of competition. In those circumstances the Court should indicate by way of a warning in the present judgment what is a reasonable period for the purposes of Article 61.

62 It should first be borne in mind that Article 61 (1) provides that freedom to provide services in the field of transport is to be governed by the provisions of the Title relating to transport. Application of the principles governing freedom to provide services, as established in particular by Articles 59 and 60 of the Treaty, must therefore be achieved, according to the Treaty, by introducing a common transport policy and, more particularly, by laying down common rules applicable to international transport and the conditions under which non-resident carriers may operate transport services, the rules and conditions of which are referred to in Article 75 (1) (a) and (b) and necessarily affect freedom to provide services.

63 Accordingly, the argument of the Netherlands Government to the effect that on the expiry of the transitional period the provisions of Articles 59 and 60 are of direct application even in the transport sector cannot be accepted.

64 However, the Parliament, the Commission and the Netherlands Government have rightly contended that the obligations imposed on the Council by Article 75 (1)(a) and (b) include the introduction of freedom to provide services in relation to transport, and that the scope of that obligation is clearly defined by the Treaty. Pursuant to Articles 59 and 60 the requirements of freedom to provide services include, as the Court held in its judgment of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), the removal of any discrimination against the person providing services based on his nationality or the fact that he is established in a Member State other than that where the services are to be provided.

- 65 It follows that in that respect the Council does not have the discretion on which it may rely in other areas of the common transport policy. Since the result to be achieved is determined by the combined effect of Articles 59, 60, 61 and 75 (1)(a) and (b), the exercise of a certain measure of discretion is allowed only as regards the means employed to obtain that result, bearing in mind, as required by Article 75, those features which are special to transport.
- 66 In so far as the obligations laid down in Article 75 (1)(a) and (b) relate to freedom to provide services, therefore, they are sufficiently well-defined for disregard of them to be the subject of a finding of failure to act pursuant to Article 175.
- 67 The Council was required to extend freedom to provide services to the transport sector before the expiry of the transitional period, pursuant to Article 75 (1)(a) and (2), in so far as the extension related to international transport to or from the territory of a Member State or across the territory of one or more Member States and, within the framework of freedom to provide services in the transport sector, to lay down, pursuant to Article 75 (1)(b) and (2), the conditions under which non-resident carriers may operate transport services within a Member State. It is common ground that the necessary measures for that purpose have not yet been adopted.
- 68 On that point the Court must therefore hold that the Council has failed to act since it has failed to adopt measures which ought to have been adopted before the expiry of the transitional period and whose subject-matter and nature may be determined with a sufficient degree of precision.
- 69 The Parliament, the Commission and the Netherlands Government also refer to the legal situation which would arise if, after judgment against it, the Council still failed to act. That problem is, however, hypothetical. Article 176 requires the Council to take the measures necessary to comply with this judgment; since that provision does not prescribe a time-limit for such compliance it must be inferred that the Council has a reasonable period for that purpose. It is not necessary in the present judgment to consider what would be the consequences if the Council still fails to act.

70 Accordingly, the Court must find that in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State.

71 The Council is at liberty to adopt, in addition to the requisite measures of liberalization, such accompanying measures as it considers necessary and to do so in the order it holds to be appropriate.

*E. The second claim: the failure to take a decision on the 16 proposals of the Commission*

72 The Parliament's second claim relates to the Council's failure to deal with the 16 proposals of the Commission set out in the application. The Parliament had already given its opinion on all those proposals.

73 Two of the proposals were adopted by the Council before the oral procedure; the Parliament stated that in the circumstances it withdrew those two proposals from the list which it had submitted. The Parliament was unable to withdraw a third proposal which was adopted after amendment by the Council after the oral procedure and became the directive on weights, dimensions and certain other technical characteristics of certain road vehicles (Directive No 85/3 of 19 December 1984, Official Journal 1985, L 2, p. 14). It is common ground that a fourth proposal in the Parliament's list was rejected by the Council and that a fifth lost its purpose since its substance was incorporated by the Council in another directive.

74 The Parliament considers that Articles 74 and 75 of the Treaty require the Council to come to a decision within a reasonable period on proposals which the Commission submits to it in relation to transport. The Council is not obliged to adopt a proposal as submitted to it by the Commission, but is required to decide on it in one way or another.

75 That view implies that the obligation of the Council to which the Parliament refers forms part of its general obligation to introduce a common transport policy, in so

far as that policy must be determined within a certain period. In those circumstances only the proposals concerning matters covered by Article 75 (1)(a) and (b) can come into consideration.

- 76 Only one of the proposals referred to is based on Article 75 (1)(b), namely the proposal for a regulation on access to the market in transport by inland waterway, submitted to the Council in 1967. It appears from the observations of the Council and the Commission that that proposal is no longer applicable in its original form. The Commission has informed the Council that it is maintaining only Article 38 of the proposal, since the other provisions are the subject of discussion on the mandate to be given to the Commission for negotiations with Switzerland through the Central Commission for the Navigation of the Rhine.
- 77 The majority of the proposals based on Article 75 (1)(a) concern road traffic. That is so in the case of the two proposals relating to the requisite authorizations for coupled vehicles and the proposal for the liberalization of the transport of live animals and works of art by special vehicles.
- 78 In so far as the proposals based on Article 75 (1)(a) and (b) are intended to contribute towards the achievement of freedom to provide services in the transport sector, the Council's obligation to reach a decision thereon is apparent from the above finding of the Court that the Council has failed to act. In so far as the proposals do not fall within that category they belong to the class of accompanying measures which may be adopted in addition to the requisite measures for liberalization and their adoption lies within the discretion of the Council.
- 79 Accordingly, it is no longer necessary to consider separately the Council's obligations in relation to each of the proposals in question.

### Costs

- 80 Article 69 (3) of the Rules of Procedure provides that where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. In the present case it is appropriate to order the parties and the interveners to bear their own costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State;
- (2) For the rest, dismisses the application;
- (3) Orders the parties and interveners to bear their own costs.

Mackenzie Stuart

Bosco

Due

Kakouris

Koopmans

Everling

Bahlmann

Galmot

Joliet

Delivered in open court in Luxembourg on 22 May 1985.

P. Heim

Registrar

A. J. Mackenzie Stuart

President