

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 [Union], 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 [Union], 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,

APPLICATION for a declaration under [Article 265 TFEU] 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. Ruhl, Principal Administrator

gives the following

JUDGMENT

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 265 TFEU] for a declaration that the Council has infringed the [TFEU], in particular [Article 3 TEU], [Articles 58, 90, 91 and 100 TFEU] 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 [Union] must engage according to [Article 3 TEU] in order to establish a common market and progressively approximate the economic policies of the Member States. It is the subject of Title [VI] of Part [Three] of the Treaty, namely the part concerned with the 'Policies and Internal Actions of the Union'. The first article under that title, [Article 90 TFEU], 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 91(1) TFEU] provides that for the purpose of implementing [Article 90 TFEU] 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.¹

Article 75(2) [repealed] 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 [Union] 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 TEU] and [Articles 90 to 100 TFEU] 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 265 TFEU] 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 [Article 3 TEU], [Articles 58 and 90 TFEU] 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 91 to 100 TFEU] in order to implement [Articles 58 and 90 TFEU].

- 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 [Article 3 TEU] and [Article 90 TFEU];

 - to introduce freedom to provide services in the field of transport as provided for in [Article 58 TFEU] and for that purpose to apply the provisions of [Articles 90 to 100 TFEU]

 - 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 91(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 91(1)(d) TFEU];
 - 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 265 TFEU]. 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 265 TFEU] 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 [Union]. Those efforts, although legitimate, should not seek to exploit the action for failure to act provided for by [Article 265 TFEU] since collaboration between the [Union] 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 265 TFEU] gives a right of action in respect of omissions of the Council and Commission to Member States and 'the other institutions of the [Union]', enquires whether the right of review conferred on the Parliament by the Treaty is not exhausted by the powers provided for in [Article 14(1) and the first sentence of (2) TEU], [Articles 233 and 234 TFEU], 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 263 TFEU], 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 265 TFEU], 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 265 TFEU], 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 [Union]'. It thus gives the same right of action to all the [Union] 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 13(1) TEU].
 - 18 The fact that the European Parliament is at the same time the [Union] 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 265 TFEU] have not been complied with. In the first place the Council was not 'called upon to act', within the meaning of [Article 265 TFEU], 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 265 TFEU] 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 265 TFEU]. 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 265 TFEU] 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 265 TFEU] 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 265 TFEU] 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 265 TFEU] 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 265 TFEU] 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 265 TFEU].
- 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 265 TFEU] 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 265 TFEU] 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 265 TFEU] 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 266 TFEU] '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 90 and 91 TFEU], as well as by [Article 3 TEU], 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 265 TFEU].

- 32 The Parliament and the Commission add that in any event [Article 91 TFEU] 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 inter-national 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 58 TFEU], 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 265 TFEU], 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 265 TFEU], 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 265 TFEU] 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 266 TFEU], 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 263 TFEU], which allows unlawful measures of the Council and Commission to be declared void, and that based on [Article 265 TFEU], 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 266 TFEU]. 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) [repealed]; 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 overcapacity 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 [Union] and the lack of coordination of the national measures relating to infrastructure, and, finally, the almost total absence of [Union] 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 265 TFEU]. 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 58 TFEU] 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 90 and 91 TFEU]. 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 265 TFEU].
- 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 265 TFEU] 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 265 TFEU] 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 265 TFEU]. That observation applies in the present case notwithstanding the fact that progress towards the achievement of a common transport policy in accordance with [Article 91 TFEU] must continue, or the fact that a substantial part of that

work ought, according to Article 75 (2) [repealed], 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 91(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 265 TFEU]. 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 [Union].
- 55 The Council contests that argument on the basis that even in the area covered by [Article 91(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 56 and 57 TFEU], 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 56 and 57 TFEU] to be directly applicable since the expiry of the transitional period. They both contend that the fact that [Article 58 TFEU] 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 [repealed] 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 56 and 57 TFEU] 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 56 and 57 TFEU] are not directly applicable in the transport sector. Pursuant to [Article 58 TFEU] freedom to provide services in relation to transport must be achieved within the framework of the rules provided for by [Article 91(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 58 TFEU].

- 62 It should first be borne in mind that [Article 58(1) TFEU] 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 56 and 57 TFEU], 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 91(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 56 and 57 TFEU] 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 91(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 56 and 57 TFEU] 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 56, 57, 58 and 91(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 91 TFEU], those features which are special to transport.

- 66 In so far as the obligations laid down in [Article 91(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 265 TFEU].
- 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 91(1)(a) and (b)], 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 91(1)(b)] and Article 75(2) [repealed], 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 266 TFEU] 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 90 and 91 TFEU] 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 91(1)(a) and (b)] can come into consideration.

- 76 Only one of the proposals referred to is based on [Article 91(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 91(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 91(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
Stuart

A. J. Mackenzie

Registrar

President