OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 2 July 1991 *

Mr President,
Members of the Court,

1. Pinaud Wieger GmbH Spedition (hereinafter referred to as 'Pinaud Wieger'), whose registered office is in Cologne (Federal Republic of Germany), is a carrier operating national road haulage services in Germany for which it possesses an authorization issued by the national authorities.

2. Pinaud Wieger wished to enter into an agreement with Transvenlo BV (hereinafter referred to as 'Transvenlo'), a Netherlands carrier, under which that carrier would undertake to carry out the long-distance transport of goods within the Federal Republic of Germany at rates lower than those laid down for that type of transport by the German authorities. Transvenlo is not established in Germany and is not authorized to operate long-distance road haulage services there.

3. According to the order of the Bundesverwaltungsgericht which has referred the matter to the Court by way of a request for a preliminary ruling, the Federal Office for the Long-Distance Carriage of Goods, the defendant in the main proceedings, considered such a scheme to be unlawful and, should it proceed, the Federal Office threatened to institute proceedings pursuant to the German Law on the Carriage of Goods by Road (Güterkraftverkehrsgesetz, hereinafter referred to as 'GüKG') and to impose fines.

4. Pinaud Wieger thereupon brought an action for a declaration that it was entitled to arrange for Transvenlo to carry out the transport of goods and to agree for that purpose on rates lower than those determined in accordance with the legislation in force in Germany. The action was dismissed at first instance and on appeal on the basis of the GüKG, which reserved the carriage of goods in the Federal Republic of Germany to carriers having a place of business in the Federal Republic of Germany and in possession of the necessary authorization under the maximum quota laid down by binding order of the Federal Government, and even then only at the rates laid down pursuant to Paragraph 22 of the GüKG.

5. In the decisions in question it was also held that those statutory conditions were not affected by the EEC Treaty. More particularly, the fact that since 1970 the Council had not, in breach of its obligations, adopted provisions based on Article 75 of the EEC Treaty in respect of international transport and the authorization of non-resident carriers to operate transport services within a Member State (hereinafter referred to as 'cabotage'), even following the judgment of the Court of Justice of the European Communities in *Parliament* v *Council*[1] by which that failure to act was

* Original language: French.

1 — Case 13/83 *Parliament* v *Council* [1985] ECR 1513, Opinion of Advocate General Lenz.

declared did not have the effect of conferring direct effect on Articles 59 and 60 of the EEC Treaty on the freedom to provide services within the Community in the transport sector. The complex conditions in the transport sector and the need for rules restricting total freedom to provide services in that sector, a need recognized in Article 75 of the EEC Treaty, preclude complete liberalization on the basis of Articles 59 and 60.

6. Since its action had thus been dismissed, Pinaud Wieger brought an appeal on a point of law before the Bundesverwaltungsgericht. In substance, it there put forward an argument to the effect that the restrictions imposed by German legislation in the field of cabotage operated by an undertaking established in another Member State had been rendered invalid by the direct effect of Articles 59 and 60. Pinaud Wieger pointed out that it was primarily interested in arranging for Transvenlo to operate transport services on its behalf at rates below those laid down in accordance with Paragraph 22 of the GüKG. But it nevertheless stated that even if, contrary to its argument, it were obliged to respect the rates in force under that legislation, it would continue to be interested in having Transvenlo operate transport services in the Federal Republic of Germany on its behalf.

7. In its decision, the Bundesverwaltungsgericht clearly expressed its opinion with regard to Pinaud Wieger's principal claim for a declaration that it was entitled to arrange for Transvenlo to provide transport services at rates lower than that in force in that State. In that respect, the national court considered, first of all, that the four years following the judgment in *Parliament* v *Council* constituted a reasonable period of time to enable the Council to fulfil its obligations. However, even if it were supposed that the Council's failure to act, consisting in not having adopted provisions under Article 75 of the EEC Treaty, resulted in the direct applicability of Articles 59 and 60, that would not as such entail the simple disappearance of national systems of charges, since no Community 'framework' has been established by the Council.

8. The national court, although also appearing inclined to a negative reply from that point of view, then expressed doubts with regard to the question whether carriers established in another Member State and authorized only within that Member State to operate transport services could operate, by virtue of Articles 59 and 60, services within Germany under the conditions applicable in that State. In any event, the national court refers the following question to the Court of Justice for a preliminary ruling:

'In the light of the continuing failure by the Council of the European Communities to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which carriers may be permitted to engage in transport operations within a Member State in which they are not established, are Articles 59 and 60 of the EEC Treaty at least directly applicable in so far as an undertaking established in the Federal Republic of Germany may not be prohibited from appointing a Netherlands carrier to undertake on its behalf the internal carriage of goods within the Federal Republic of Germany, using vehicles which are licensed in the Netherlands for the carriage of goods and at rates generally in force in the Federal Republic of Germany?'

9. It should first of all be observed that, although that question refers initially to international transport as well as to cabotage, the national court, in the last part of its question, points out specifically the legal question which it seeks to have resolved: whether a non-resident carrier may operate transport services within the national market of a Member State, that is to say, engage in cabotage traffic. It therefore appears to me that the need to give the national court an appropriate answer must lead the Court to consider the question of 'continuing failure to act' on the part of the Council solely in the area of cabotage by road. It should be pointed out that the parties to the main proceedings, who are engaged in a dispute in this matter, have not referred to the international transport situation. [2]

10. The legal aspects of this case are well known to the Court, since it has had to consider on many occasions the difficulties concerning the implementation of the common transport policy. I shall thus restrict myself in that respect to an overview of the basic stages in that area.

11. First of all, the judgment in *Parliament* v *Council*. [3] In that decision, it should be recalled, the Court declared that the Council had failed to act, in breach of the Treaty, in order to ensure freedom to provide services in the area of international transport and to lay down the conditions under which non-resident carriers may operate transport services within a Member State. The Court noted that the obligations imposed on the Council in that respect 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. [4] Furthermore, according to the case-law of the Court, [5] by virtue of Articles 59 and 60, freedom to provide services requires the abolition of any discrimination against the person providing services based on his nationality or on the fact that he is established in a Member State other than that where the service is to be provided. [6]

12. The Court inferred from that that, on the precise point of the freedom to provide services, 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 attained is determined by the combined effect of Articles 59, 60, 61 and 75(1)(a) and (b), and that 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. [7]

13. The Court also declared that the Council had failed to act inasmuch as it had not extended freedom to provide services to the transport sector before the expiry of the transitional period, in conformity with Article 75(1)(a) and (b), an obligation relating to international transport to or from

2 — The Commission, for its part, referred to international transport in its observations, stating that, by adopting Regulation (EEC) No 1841/88 of 21 June 1988, the Council had remedied its failure to act. It should be recalled that that regulation provides for the abolition of Community quotas, bilateral quotas and quotas for transit traffic to and from non-member countries on 1 January 1993, and that from that date access to the market for transfrontier carriage of goods will be governed by a system of Community licences issued on the basis of qualitative criteria.

3 — Cited above, see footnote 1.

4 — Paragraph 64.

5 — Judgment in Case 279/80 *Webb* [1981] ECR 3305.

6 — Cited above, footnote 4.

7 — Paragraph 65.

the territory of a Member State or across the territory of one or more Member States (international transport regime) and the conditions under which non-resident carriers may operate transport services within a Member State (cabotage). [8]

14. However at this point I must refer to two other aspects of the judgment in *Parliament* v *Council*, which are particularly relevant in the context of the question at present before the Court.

15. First of all, the Netherlands Government, intervening in support of the Council, had argued to the effect that on the expiry of the transitional period the provisions of Articles 59 and 60 were directly applicable in the field of transport, a legal situation which rendered pointless any other action by the Council, which was therefore not in the position of having failed to act. The Court rejected that argument, pointing out that Article 61(1) of the Treaty provides that freedom to provide services in the field of transport is governed by the provisions of the title relating to transport and that, consequently, the application of the principles governing freedom to provide services must therefore be achieved by implementing the 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). [9]

16. The European Parliament, the Commission and the Netherlands Government had then referred to the legal situation which would result from the Council's persistent failure to act, following the judgment declaring that it had failed to act. More particularly, the Commission had considered that, in the event of 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, that principle should be considered applicable at the expiry of an 'appropriate period' [10] following a declaration by the Court that the Council had persistently refused to fulfil its obligations. According to the Commission, 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 declaring its failure to act.

17. The Court did not rule on the relevance of that interpretation and pointed to the hypothetical nature of the problem. The Court noted that Article 176, which imposes on the Council the obligation to comply with the Court's declaration of failure to act, does not prescribe a time-limit and that therefore it must be inferred that the Council is allowed a 'reasonable period of time' for that purpose. Nor did the Court think it necessary to consider in its decision the consequences which might result from a prolonged failure to act by the Council.

18. Some four years later the judgment in *Lambregts Transportbedrijf* v *Belgian State* [11] led the Court to consider once more the

8 — Paragraph 67.

9 — Paragraph 62.

10 — See reference to the Report for the Hearing (ECR 1582).

11 — Judgment in Case 4/88 *Lambregts Transportbedrijf* v *Belgian State* [1989] ECR 2583, Opinion of Advocate General Jacobs.

application of the principle of freedom to provide services in the field of transport.

19. The dispute in the main proceedings, which arose in 1982, was between the Belgian State and a Netherlands transport company, which relied on the direct effect of Articles 59 and 60 in challenging rules requiring a carrier to have a 'centre of operations' in Belgium in order to obtain national and international transport licences.

20. The Court replied clearly that at the material time the rules in force did not authorize freedom to provide services in the transport sector and that Articles 59 and 60 did not come to have direct effect as a result of the expiry of the transitional period. I should point out that, on that last point, the judgment of the Court limited itself in my view to confirming the solution in *Parliament* v *Council*, since it had already established that Articles 59 and 60 had no direct effect on 1 January 1970 in the field of transport. As regards a situation falling between that date and delivery of the judgment in *Parliament* v *Council*, it was therefore the inferences from that decision which were drawn by the Court in its judgment in *Lambregts*.

21. However Advocate General Jacobs, who had proposed that conclusion, had, on the other hand, referred subsidiarily to the 'continuing failure' to act on the part of the Council and its possible legal consequences. Commenting, with regard to this point, on the observations which the Netherlands Government had submitted in that case inviting the Court to define when the reasonable period to which it had alluded to in its judgment in *Parliament* v *Council* had expired, the Advocate General observed that that decision

'can properly be regarded as leaving open the possibility that, in the event of continuing failure by the Council to act after the expiry of a reasonable period from the date of that judgment, the Treaty provisions might be regarded as, within certain limits, creating rights on which individuals would be able to rely in the national courts'. [12]

As to the expiry of a reasonable period he considered that:

'it is plainly likely, in my view, now that more than four years have passed since the date of that judgment (and nearly 20 years since the end of the transitional period) that the point will very soon be reached when that period will expire, if indeed it has not already expired'. [13]

It should be pointed out that Mr Jacobs delivered his Opinion on 15 June 1989.

22. On 9 November 1989 the Bundesverwaltungsgericht referred a question to the Court for a preliminary ruling.

23. On 21 December 1989 the Council adopted Regulation (EEC) No 4059/89 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State. [14]

12 — Paragraph 20.

13 — Paragraph 21.

14 — OJ 1989 L 390, p. 3; the European Parliament brought an action, which is still pending, for the annulment of that regulation (OJ 1990 C 110, p. 5) judgment of 16th July 1992 (Case C-65/90, [1992] ECR I-4593).

24. That, in brief, is the chronological sequence of events which now enables us to concentrate on the examination of the question referred by the national court. That question contains a presumption, the 'continuing failure' on the part of the Council to act, in respect of which the Bundesverwaltungsgericht asks the Court to indicate whether it entailed a direct application of Articles 59 and 60 of the Treaty. After that question was referred to the Court, Regulation 4059/89 was adopted. As a result of the adoption of that regulation, the Kingdom of Spain concludes that the question referred to the Court for a preliminary ruling no longer calls for an answer, while the Commission considers it unnecessary to determine whether the reasonable period had already expired.

25. It seems to me that these views cannot be accepted.

26. There is no doubt that the action brought before the national court is an action for a declaration which, as indicated by the national court itself, requires the case to be decided in accordance with the law as it stands at the time of the judgment.

27. Nevertheless, the Court's reply cannot be confined to a mere reference to Regulation No 4059/89, taking it as settled that, at the date on which the regulation was adopted, the reasonable period of time had not expired and that certain legal consequences had therefore not arisen. In that respect, the Court must consider the merits of the arguments of Pinaud Wieger, as put forward at the hearing.

28. According to the plaintiff in the main proceedings, since 22 May 1987,[15] that is, on the expiry of a period of two years from the judgment of the Court in *Parliament* v *Council*, Articles 59 and 60 have applied directly in the field of transport. It follows that the Council could not call in question, by the adoption of a regulation as 'rudimentary' as Regulation No 4059/89, the rights derived by individuals from those articles.

29. For the purpose of the Court's ruling on that view of the matter it seems to me that the following approach should be adopted. The first question to be resolved is whether, when Regulation No 4059/89 was adopted, the 'reasonable period' had expired. If it had not, it is still necessary to decide the question as to the extent to which the regulation may be regarded as constituting compliance with the judgment of the Court in *Parliament* v *Council* in the field of cabotage. On the other hand, if the 'reasonable period' had expired before the adoption of Regulation No 4059/89, it should then be determined whether that situation brought about the direct applicability of Articles 59 and 60, which would then have prevented the Council from adopting the regulation in question.

30. The first stage in my examination is therefore as follows: was Regulation No 4059/89 adopted when the reasonable period for compliance by the Council with the judgment of the Court in Case 13/83 in the field of cabotage had already expired?

31. I have no doubt whatsoever that the judgments of the Court, whether they declare that a State has failed to fulfil its obligations or that an institution has failed to act, must be complied with immediately.

15 — The plaintiff in the main proceedings had referred to 1 July 1987 in its written observations.

32. As regards judgments of the Court declaring that a Member State has failed to fulfil its obligations, it follows from the case-law that

'Article 171 of the EEC Treaty does not lay down a time-limit within which a judgment must be complied with. However, it is well established that the implementation of a judgment must be commenced immediately and must be completed as soon as possible'. [16]

33. Where the Court has given a judgment declaratory of a breach of Community law — and such is the case where a judgment declares that an institution has failed to act — any delay is unacceptable. That is, in my view, the principle of law which must be borne in mind when setting out to consider the period which has elapsed in the present case.

34. However, although the case-law of the Court affirms the necessity for compliance 'as soon as possible', the judgment in *Parliament* v *Council* referred, for its part, to a 'reasonable period'.

35. That, obviously, is not synonymous with 'as soon as possible'. I consider, furthermore, that the passage in question in that judgment cannot be interpreted as meaning generally that Community institutions have a reasonable period available in which to comply with judgments of the Court declaring that they have failed to act. The Court stated that:

'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'. [17]

36. In my view, that time-limit concerns compliance with that particular decision, by which the Court declared that the Council, in breach of the Treaty, had failed to ensure freedom to provide services in the field of transport.

37. Nevertheless, confined though it was to compliance with that particular decision, the concept of a 'reasonable period' was none the less formulated by the Court and clearly reflects the fact that 'the features which are special to transport' were taken into account. Those features, moreover, led the Court to accept that, while being bound by the result to be achieved, the Council nevertheless enjoyed a measure of discretion as to the methods for realizing the freedom to provide services in that sphere.

38. It has first of all to be accepted that the assessment of the reasonable period is undertaken by this Court, albeit in the knowledge that the institution did finally act. There can be no hiding the fact that this inevitably alters the perspectives. In that respect, the very concept of a reasonable period involves a spectrum of considerations as a practical judgment which excludes any abstract, predefined and rigid criterion. The

16 — Judgment in Case 131/84 *Commission* v *Italy* [1985] ECR 3531, paragraph 7; see also the judgment in Case 160/85 *Commission* v *Italy* [1986] ECR 3245; the judgment in Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1; the judgment of 12 February 1987 in Case 69/86 *Commission* v *Italy* [1987] ECR 773; the judgment in Case 225/86 *Commission* v *Italy* [1988] ECR 2271; the judgment in Case 169/87 *Commission* v *France* [1988] ECR 4093; the judgment in Case 375/89 *Commission* v *Belgium* [1991] ECR I-383.

17 — Paragraph 69, my emphasis.

only permissible result is one arrived at by an analysis carried out *in concreto*.

39. In the present case, the Commission submitted on 5 December 1985 [18] a proposal for a regulation laying down the conditions under which non -resident carriers may operate national road haulage services within a Member State. That proposal laid down, first, the principle of allowing non-resident carriers to operate national road haulage services from 1 January 1987 and, secondly, from the same date, the operation on the return journey of two consecutive cabotage services in a Member State other than that of establishment (transport service on the return journey to the country of registration or origin). According to Article 8, that provision was to enter into force on 1 July 1986.

40. The Opinion of the European Parliament was delivered on 12 September 1986. [19] In a 'resolution on liberalization and harmonization in the field of transport' of 12 September 1986, [20] the Parliament stated that it was 'aware of the considerable efforts' which would be required in order to achieve the completion of the internal market by 1992 and of the practical difficulties of implementing a coherent common transport policy. It noted, moreover, that the Commission, one year after the judgment of the Court in *Parliament* v *Council*, had submitted four specific proposals for compliance with the judgment of the Court but had failed to submit to the Council an overall plan of the measures to be taken and a timetable for their entry into force. The Parliament described that situation as constituting negligence which created a climate of uncertainty for undertakings, employees and users in the transport sector and was thus a serious obstacle to the rapid adoption of the proposals for Community legislation submitted by the Commission. As regards cabotage, the Parliament stressed the need to take gradual steps towards liberalization, together with the parallel harmonization of competition, in particular in the field of taxation.

41. However, the Parliament remained convinced that compliance with the judgment of the Court in *Parliament* v *Council* must 'break the deadlock which has held up the establishment of a common policy for more than 25 years'.

42. The Economic and Social Committee for its part, in its Opinion of 11 March 1987 on the proposal for a Council Regulation, [21] called on the Commission to 'place the Council in a position where it can take a decision on (this proposal)'. [22] It observed in that respect that '[t]his is simple political common sense as otherwise, in view of the interests represented in the Council, the Commission proposal could encounter a number of difficulties'. [23]

43. More than two and a half years passed between that statement and the adoption of Regulation No 4059/89.

18 — OJ 1985 C 349, p. 26.

19 — OJ 1986 C 255, p. 234.

20 — Ibid., p. 227.

21 — Opinion on the proposal for a Council Regulation laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1987 C 180, p. 37).

22 — OJ 1987 C 180, p. 38.

23 — Ibid.

44. There is no doubt that cabotage traffic constitutes an 'extremely delicate aspect of a common transport policy' [24] and it is considered that allowing non-resident carriers to operate national road haulage in a Member State is 'the most sensitive' of the measures which the Council must adopt under Article 75 of the Treaty. [25]

45. In that respect, it is no secret that opposing views were held in the Council on the question whether conditions of competition should be harmonized prior to liberalization in that area. 'The eternal argument between the proponents of liberalization and those who advocate harmonization first' [26] became no less sharp after the judgment of the Court in *Parliament* v *Council*. That *political* cleavage, which is clearly a paralysing factor in the absence of a compromise, is an undeniable fact. But, from the *legal* point of view, the judgment of the Court in Case 13/83 had very clearly defined the terms of the obligation imposed on the Council, namely, to bring about freedom to provide services. [27]

46. To take account, for the purposes of determining whether the period of time was reasonable, of the political difficulties encountered by the work of the Council would reintroduce at this juncture consideration of the degree of difficulty entailed by the obligation imposed on the institution, a factor which the Court has expressly held to be incapable of having any bearing on the question whether there has been a failure to act. [28]

47. I shall paraphrase my colleague, Advocate General Jacobs, by pointing out that, when Regulation No 4059/89 was adopted, some 20 years had passed since 1 January 1970 when the Court declared that the Council was in breach of its obligations four years and seven months earlier. The grey area was now very sombre or, in the words of the national court, 'the period of more than four years which ha[d] elapsed since 22 May 1985 (was) one within which the Council ought reasonably to have been able to satisfy its obligations'. When the Court indicated that the Council had in that case a reasonable period of time, it took account of those features special to transport. The Court did not, however, abandon the determining of a reasonable timetable in this matter to the hazards of political negotiations.

48. The temptation that might exist to accept that the reasonable period had not expired in 1989 would contain undercurrents inimical to the authority of the judgments of the Court, the rigour with which they must be implemented and,

24 — *La Politique Commune des Transports de la CEE dans la Perspective du Marché Unique de 1992*, Prométhée, p. 7.

25 — Ibid.

26 — Resolution of the European Parliament, cited above (p. 228).

27 — It should be recalled that the Court considered that the Council was obliged to ensure freedom to provide services. The Court did not, however, make a finding of failure to act with respect to other aspects of the common transport policy, considering that the nature of the failure to act on that point was not sufficiently well-defined to be the subject of an action under Article 175; the Economic and Social Committee comments on that judgment as follows: 'the European Court of Justice stated that the introduction of the freedom to provide transport services could not legally be made subject to the prior harmonization of conditions of competition' (Opinion on the 'proposal for the Council Regulation laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State' (OJ 1987 C 180, p. 37)).

28 — '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', paragraph 48 of the judgment in *Parliament* v *Council*.

finally, the compliance by the institutions with their obligations.

49. These are the reasons for which I consider that it is not possible to accept that Regulation No 4059/89 was adopted prior to the expiry of a reasonable period.

50. If that is to be its conclusion on that point, the Court must then determine whether it follows that Articles 59 and 60 are directly applicable in the field of cabotage.

51. Article 61(1) of the Treaty, following on from those provisions, provides, it will be recalled, that:

'freedom to provide services in the field of transport is to be governed by the provisions of the title relating to transport.'

It is clear from that provision, as the Court indicated in its judgment in *Parliament* v *Council*, that

'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 5(1)(a) and (b) and necessarily affect freedom to provide services'. [29]

29 — Paragraph 62.

Furthermore, the Court inferred from this that the argument to the effect that the expiry of the transitional period had the effect of rendering Articles 59 and 60 directly applicable even in the transport sector cannot be accepted. It still seems impossible to me that Articles 59 and 60 could, as such, be applicable as a result of the expiry of a reasonable period, which cannot have the effect of causing the rules of 'ordinary law' to apply to a field which Article 61 expressly excludes from them.

52. However, the analysis must be taken a little further. The Treaty has undoubtedly clearly excluded Articles 59 and 60 from applying in the field of transport. It has just as clearly provided for the realization of the freedom to provide services in that area.

53. From that viewpoint, the judgment of the Court in *Parliament* v *Council* stated without any ambiguity that the Council was under an obligation to bring about freedom to provide services in the area of transport.

54. That obligation does not, in my view, involve any uncertainty as to the objective which the Council is required to attain as regards cabotage: to ensure finally for non-resident carriers the possibility of having access to national road haulage in other Member States under the same conditions as carriers of that Member State without discrimination. No doubt that is a requirement laid down for the freedom to provide services by Article 60, which provides that 'the person providing a service may . . . temporarily pursue his activity in the State where the service is provided,

under the same conditions as are imposed by that State on its own nationals'.

55. But even if Article 60 does not in any event apply in the area of transport, the obligation to ensure freedom to provide services in that field is, on the other hand, undeniable. Now, there can be no question of freedom to provide services unless the rule of treatment on the same basis as a national, which in the end is merely a specific application of the principle of non-discrimination, is applied. Indeed, without that treatment, there is no real freedom to provide services even though that freedom *must* be brought about in the field of transport.

56. In other words, the authors of the Treaty, by providing for freedom to provide services in the area of transport and in particular as regards cabotage, required the Council *in any case* to bring about the establishment of the rule of treatment on the same basis as nationals in this matter. That is the result which the Council is, in any event, obliged to achieve in the end.

57. And it is precisely the question whether individuals may rely on that result which arises should the Court consider that the reasonable time had expired.

58. There are very serious considerations which militate in favour of such a possibility. If there is no legal consequence attached to the Council's failure to act after the expiry of a specific reasonable period running from the declaration by the Court of a failure to act, individuals would have no guarantee of being able to invoke the freedom to provide services (as regards in this case cabotage), a freedom which nevertheless unquestionably finds express affirmation in the Treaty. Consequently, the Council would be under an obligation the continuing non-compliance with which would leave individuals wholly 'defenceless' and forced to wait indefinitely for some hypothetical action by the Council. In those circumstances, it is the obligatory nature of the achievement of the freedom to provide services which would disappear, since the non-achievement of that freedom would not entail any adverse legal consequence.

59. Article 75(1) does, it is true, confer on the Council the power to lay down the conditions under which non-resident carriers may operate national road haulage in a Member State. Furthermore, the Court has acknowledged in that respect, in its judgment in *Parliament* v *Council*, that

'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'. [30]

Nevertheless the Community legislature is clearly under an obligation as to the result to be achieved, which must, in any event, lead to the realization of the freedom to provide services, that is to say, to the elimination of all discrimination.

60. There is therefore no conflict between the obligation to bring about the freedom to provide services in that area and a discretion as regards the methods to be employed for the purpose. In that respect, the power to lay down conditions includes in particular the possibility of adopting measures gradually, in other words, of providing for the realization of the freedom to provide

30 — Paragraph 65.

services by stages. However, the final result must be in any event to allow non-resident carriers to operate national road haulage in a Member State under a liberalized system of provision of services, that is to say, without discrimination.

61. In plain terms, that result is subject to no qualification. The right of an individual to avail himself of it, after the expiry of the reasonable period following the Court's declaration of the failure to act on the part of the Council, constitutes, therefore, an indispensable guarantee for that individual and the penalty for failure to comply with an obligation, as to the result to be achieved, which unarguably lies on the Council.

62. Advocate General Jacobs, in his Opinion in *Lambregts*, considered that the judgment in *Parliament* v *Council* had left open the possibility that in the event of the continuing failure by the Council to act after the expiry of a reasonable period,

'the Treaty provisions might be regarded as, *within certain limits*, creating rights on which individuals would be able to rely in the national courts'. [31]

63. Without placing too much strain on the terms used by my colleague, I cannot dismiss the possibility that he might have been hinting at a solution similar to the one which I propose here.

64. However the Court will next have to explain how such a result may be brought into line with the provisions of Regulation No 4059/89. From that point of view, Pinaud Wieger considers that the Council could not reverse the direct effect of Articles 59 and 60 which, alone, now govern cabotage. This argument leads to the view, *mutatis mutandis*, that, if the principle of treatment on the same basis as nationals may be relied on by individuals, it follows that the Council could not subsequently establish, as in this case, a cabotage quota open to non-resident carriers, a quota to be divided between States. There is no doubt that the principle of equal access to national transport is violated once a quota is prescribed for non-resident carriers.

65. Is the Council, by allowing the reasonable period to expire, definitively denied the opportunity of phasing in, even to the slightest extent, freedom to provide services and must it, on the contrary, realize that freedom at one stroke?

66. In favour of that solution, it might be thought that it is hardly satisfactory that a measure taken by the Council should have the consequence of establishing a cabotage system which, provisionally, is less liberal that that which might have prevailed after the expiry of the reasonable period.

67. It should however be noted that the case-law of the Court contains at least one case which displays certain similarities to that situation. In the case of *Regina* v *Kirk* [32] the Court held that, on the expiry of the period of 10 years provided for by Articles 100 and 101 of the 1972 Act of Accession authorizing a derogation from the principle

31 — Paragraph 20 of the Opinion, my emphasis.

32 — Case 63/83 *Regina* v *Kirk* [1984] ECR 2689.

of conditions of access to Community waters for the vessels of the Member States, that principle of equality was fully applicable even though, subsequently, the Council was to adopt, on the basis of Article 103 of the Act of Accession, a decision authorizing the retention of the derogating regimes. In other words, the fundamental principle of non-discrimination had been applicable as such during a period of time before measures derogating from it entered into force.

68. In any event, it appears to me that the possibility for an individual to rely on the rule of treatment on the same basis as nationals would here constitute the *ultima ratio* deriving from the Council not having adopted any measure designed to achieve the precise result which it is obliged to obtain.

69. None the less, the Council cannot, if it emerges from its inaction, be deprived of its discretion in prescribing the methods for achieving the result which it is called upon to obtain. However, it is still necessary that the measure then adopted by it should be such that it may properly be considered that it has in fact carried out its obligations in the matter, thereby putting an end to the legal consequences which its failure to act had entailed for individuals. The operative part of Regulation No 4059/89 should be examined in order to determine whether this measure alone should be regarded as governing cabotage.

70. Let us, first of all, recall to mind the recitals, which make it possible to summarize the approach adopted by the legislature in that regulation. The first recital points out that, pursuant to Article 75(1)(b) of the Treaty, the establishment of a common transport policy entails, *inter alia*, laying down the conditions under which non-resident carriers may operate transport services within a Member State, that is to say, 'cabotage'. The second recital states that the freedom to provide national transport services implicit in that provision entails the removal of all restrictions against the person providing the services in question on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is to be provided. None the less, according to the third recital, in order for this freedom to provide services to be implemented smoothly and flexibly, a transitional cabotage system should be adopted before the definitive system is adopted. Finally, the last recital provides that the definitive cabotage system which will be applicable from the date on which that regulation expires should be drawn up in compliance with the Treaty.

71. If one now goes on to consider the legislative provisions of the regulation, it will be noted in the first place that Article 1 provides that, with effect from 1 July 1990, any road haulage carrier for hire and reward who is established in a Member State and is authorized, in that State, to operate international road services, is to be entitled, under the conditions laid down in the regulation, to operate on a temporary basis national road haulage services for hire and reward in another Member State (cabotage), without having a registered office or other establishment therein.

72. In that respect, Article 2 provides that a Community cabotage quota is to consist of 15 000 cabotage authorizations, each valid for two months, and that the quota is to be

allocated amongst the Member States. Furthermore, it is provided that the Commission is to increase the quota each year from 1 July 1991, in line with the average trends in internal road haulage, and it is specified that that increase may not be less than 10%. Moreover, in the event of serious disturbance of the internal transport market in a given geographical area due to cabotage, any Member state may refer the matter to the Commission with a view to the adoption of safeguard measures which may involve the temporary exclusion of the area concerned from the scope of the regulation.

73. Article 3 provides that the cabotage authorizations are to give the recipient free access to the territory of the host Member States to allow him to carry out any carriage of goods by road for hire and reward. It states that a cabotage authorization, to be made out in the name of a carrier, who may not transfer it to a third party, may be used by only one vehicle at a time.

74. Article 5 lays down the principle according to which the performance of cabotage transport operations are to be subject, save as otherwise provided in Community regulations, to the laws, regulations and administrative provisions in force in the host Member State in the areas of rates and conditions governing the transport contract, weights and dimensions of road vehicles, requirements relating to the carriage of certain categories of goods (dangerous goods, perishable foodstuffs, live animals), driving and rest time and VAT on transport services. Furthermore, the technical standards which vehicles used to carry out cabotage operations must meet are to be those laid down for vehicles put into circulation in international transport.

75. According to Article 5, the provisions in force in the abovementioned host Member State must be applied to non-resident transport operators on the same conditions as those which that Member State imposes on its own nationals, so as effectively to prevent any discrimination on grounds of nationality or place of establishment.

76. Finally, Article 9, after providing that the regulation was to enter into force on 1 July 1990 and apply until 31 December 1992, states that '[b]efore 1 July 1992 the Council, acting in accordance with the conditions laid down in the Treaty, shall, acting on a proposal from the Commission submitted by 31 December 1991, adopt a Regulation laying down the definitive cabotage system, which shall enter into force on 1 January 1993'.

77. Those are the essential provisions of the regulation in question.

78. During the hearing, the applicant in the main proceedings, who states that this is at most a first, if very modest, step towards the establishment of Community cabotage, considers that two fundamental criticisms may be made of the regulation. First of all, the system for authorizing cabotage reduces its effectiveness, resulting in a 'rudimentary' form of cabotage. Secondly, Regulation No 4059/89 expires in December 1992 without anyone being certain that at that date a 'cabotage' regulation will be adopted. Pinaud Wieger considers, moreover, that, if

Regulation No 4059/89 should be considered lawful, it would still have lacunae, inasmuch as it would not include provisions relating to the conditions and the cost of transport and that therefore there would be freedom to provide services under the conditions laid down in the 'Cassis de Dijon' case. In the present case, the Netherlands transport system and the German Law would then be in competition with each other.

79. It seems to me that this view should be rejected for the following reasons. First of all, the transitional nature of the system established by the regulation does not seem to me to be legally improper, bearing in mind the discretion which the Court has recognized the Council as enjoying with respect to the methods of implementing freedom to provide services in the area of transport. Although the Council must definitively achieve that result, it retains, nevertheless, a measure of discretion as to the methods to be employed for that purpose. As I have already said, the gradual or progressive nature of the measure which it adopts in the area is due precisely to the exercise of a measure of discretion as regards the means employed to obtain that result, bearing in mind 'those features which are special to transport'.

80. The Community system of quotas allocated amongst Member States, accepted in the context of that transitional system, inevitably entails a restriction for non-resident carriers as regards access to national transport. However, on the one hand it replaces the impossibility for an undertaking 'to carry out transport operations within another Member State in which it [does] not have an establishment',[33] with the right to do so thenceforth within quantitative limits. Although there is still no real freedom to provide services, the actual legal situation has nevertheless changed. On the other hand, in order to establish the opportunities thus created to provide cabotage, the regulation prohibits the application of national provisions giving rise to any direct or indirect discrimination. The regulation therefore establishes an effective, if limited, initial cabotage system which, within its own limits, respects the fundamental principle of non-discrimination. For the rest, the progressive nature of that system is ensured by the minimum threshold of the annual increase of the quota provided for in Article 2.

81. Moreover, the regulation provides a *precise date* and a timetable for the adoption of a definitive system. It should be observed, first of all, that the recitals in the preamble to the regulation are entirely unambiguous as regards the requirements which the definitive system must satisfy: it must remove all restrictions against the person providing the services in question on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is to be provided. Today, as I deliver this Opinion, it seems to me that the Court could take note of those indications without having to rule on the consequences which would attach to failure to adopt the definitive system which must enter into force on the day following 31 December 1992.

82. I would point out finally that I cannot share the view of the applicant in the main proceedings to the effect that, if the regulation 'was to be a legislative measure requiring compliance', the lack of provisions relating to the conditions and cost of transport would constitute lacunae entailing the application of Articles 59 and 60, which would enable the provider of services to carry on his activity under the conditions applicable in the State of origin.

33 — Judgment in *Lambregts*, paragraph 13.

83. In that regard, the Commission and the defendant in the main proceedings maintain, quite rightly, that the areas under consideration do not fall under Article 75(1)(b), but under Article 75(1)(c) ('any other appropriate provisions'). That provision is distinct from the obligation on the Council to introduce freedom to provide services. The judgment of the Court in Case 13/83 declared that the Council had failed to act with respect only to the obligations under Article 75(1)(a) and (b), but, on the other hand, considered that the lack of a common policy 'as such' did not constitute failure to act of a sufficiently well-defined nature to be the subject of an action under Article 175. Consequently, the failure of the Council to act cannot be relied upon with regard to the lack of common rules concerning conditions and costs of transport.

84. In that regard I share the opinion of the Commission to the effect that national *non-discriminatory* conditions in the matter of transport rates — the application of which is provided for in Article 5 of Regulation No 4059 — are compatible with the requirements of the freedom to provide services in that sphere, provided that they are in conformity with the provisions of the Treaty and in particular with its rules on competition.

85. I would furthermore observe that if the Court should consider, contrary to my opinion on that point, that the Council could no longer, as a result of the expiry of a reasonable period, adopt the transitional system laid down in Regulation No 4059/89, it follows, in my view, that it is possible for individuals to rely on the rule of treatment on the same basis as a national, but not on Articles 59 and 60. In other words, assuming that those two articles must be interpreted in accordance with the view of Pinaud Wieger which holds that a provider of services has the right, on the basis of those provisions, to carry on his business on the conditions applicable in his State of origin, no such consequence would result in the field of cabotage, only the possibility of having access to national transport without discrimination in relation to the conditions which the host State imposes on resident carriers.

86. Examination of Regulation No 4059/89 thus shows that there has been real and effective, if limited, progress, towards cabotage. Within the provisional framework thus laid down, observance of the principle of treatment on the same basis as nationals is ensured. Clear provisions provide for the adoption of a definitive system achieving freedom to provide services in that area on a specific date.

87. Consequently, I consider that the Court may hold that, by adopting the regulation in question, the Council has set in motion the process of complying with the judgment in *Parliament* v *Council* in the sphere of cabotage. However, the system in force and the fact that the definitive system, in accordance with the Treaty requirements in the matter, remains to be adopted make it impossible to consider that the failure to act has been completely remedied. None the less, that finding must be viewed in the light of the discretion which the Council enjoys in establishing the methods designed to bring about freedom to provide transport services. That is the reason for which I propose that the Court hold that the adoption of Regulation No 4059/89 constitutes a first step in the performance of the obligations which Article 75 of the Treaty imposes on the Council and that, consequently, the access of non-resident

carriers to national road haulage is governed exclusively by the transitional system provided for in the regulation until 31 December 1992, when the regulation will cease to be applicable and will be replaced by the definitive cabotage system. I will refrain from discussing here the legal situation which would arise from the absence of a definitive cabotage system on 31 December 1992.

88. One final observation. The national court is seised of an action for a declaration on a point of law which, as has been seen, requires it to give judgment in accordance with the law as it stands at the time of its decision.

89. Consequently, even though I am of the opinion that a reasonable period had expired on the date of the adoption of Regulation No 4059/89, it is not necessary to determine as well the exact date on which that period had expired, since the legal situation arising from it — the possibility for individuals to invoke the rule of treatment on the same basis as nationals — no longer constitutes the present state of the law, which alone is of interest to the Bundesverwaltungsgericht in this case.

90. Concluding these observations, I propose that the Court rule as follows:

'(1) By adopting Regulation (EEC) No 4059 of 21 December 1989, the Council has taken a first step in performing its obligations under Article 75(1)(b) of the EEC Treaty as regards road transport.

(2) The transitional system introduced by Regulation (EEC) No 4059/89 of 21 December 1989 governs, until 31 December 1992, the conditions under which non-resident carriers may operate national road haulage services in a Member State other than that in which they are established and will cease to be applicable from that date.

(3) In accordance with Article 5 of the abovementioned regulation, the performance of cabotage transport operations is to be subject to the national legislation relating to rates and conditions governing the transport contract in force in the State where the service is to be provided, and those provisions must be applied to non-resident transport operators on the same conditions as those which that Member State imposes on its own nationals, provided always that the said provisions comply with the rules of the Treaty, and in particular those relating to competition law.'