OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 7 February 1985 *

Contents

A. Facts 1517
B. Opinion 1518
I. Admissibility of the application based on Article 175 of the EEC Treaty 1518
1. May the application pursue a political objective? 1518
2. The conditions of admissibility in the first paragraph of Article 175 of the EEC Treaty 1518
2.1. The applicant's right of action 1518
2.1.1. Observations of the parties 1518
2.1.2. Legal assessment 1519
2.1.2.1. Wording 1519
2.1.2.2. Case-law of the Court on Article 37 of the Statute of the Court of Justice 1519
2.1.2.3. Comparison with Article 173 of the EEC Treaty 1519
2.1.2.4. Interference in the division of powers under the Treaty between the institutions? 1520
2.1.2.5. Interference in the legislative powers of the Council? 1521
2.1.2.6. Interference in the powers of the Commission? 1521
2.2. Must there be a special interest requiring protection? 1521
2.3. The criterion of failure 'to act' 1521
2.3.1. Observations of the parties 1522
2.3.2. Legal assessment 1522
2.3.2.1. Interpretation of the application 1522
The wording of the application 1523
Limitation and specification 1523
Specification of the scope 1523
Systematic or pragmatic approach 1524
Minimum standard 1524
The second claim 1525
The application at the end of the oral procedure 1525
2.3.2.2. Questions concerned with the legal nature of the 'act' 1525
2.3.2.3. Relevance of subjective grounds for finding of failure to act? 1526
3. The conditions of admissibility under the second paragraph of Article 175 of the EEC Treaty 1526
3.1. The call to act 1526
3.2. Definition of position 1527
3.2.1. Observations of the parties 1527
3.2.2. Legal assessment 1528
3.2.2.1. Wording 1528

* Translated from the German.

3.2.2.2. The purpose of the remedy ... 1528
3.2.2.3. The two month time-limit ... 1528
3.2.2.4. Definition of position at variance with the request to act ... 1528
3.2.2.5. Deferment notice as a definition of position? ... 1529
3.2.2.6. Case-law of the Court ... 1530

4. Summary ... 1530

II. The applicant's alternative claim ... 1531
1. Who may bring an action under Article 173? ... 1531
2. Legal nature of acts challengeable under Article 173 ... 1531

III. The merits of the application ... 1531
1. Is there a legal obligation to introduce a common transport policy? ... 1531
1.1. Observations of the parties ... 1531
1.2. Legal assessment ... 1533
1.2.1. The provisions of the EEC Treaty ... 1533
Article 3 (e) ... 1533
Article 74 ... 1534
Article 61 ... 1534
1.2.2. The scheme of the Treaty ... 1534
1.2.3. Obligation to introduce a common transport policy also for sea and air transport pursuant to Article 84? ... 1535
1.2.4. Interim conclusion ... 1536
1.2.5. The scope of the general obligation ... 1536
1.2.6. Is the obligation sufficiently well-defined? ... 1536
1.2.7. No time-limits ... 1537
1.2.7.1. No time-limits for Article 75 (1) (c) ... 1538
1.2.7.2. No time-limits for Article 84 ... 1538
1.2.8. Time-limit as a consequence of imperfect integration and the result ... 1538

2. Is there a legal obligation to adopt provisions under Article 75 (1) (a) and (b)? ... 1538
2.1. Observations of the parties ... 1538
2.2. Legal assessment ... 1541
2.2.1. Wording of Article 75 (1) and (2) ... 1541
2.2.2. The time-limit in Article 75 (2) ... 1541
2.2.3. The procedure laid down in Article 75 for taking decisions ... 1542
2.2.4. The reference to Article 75 (1) in Article 76 ... 1542
2.2.5. Interim conclusion ... 1542
2.2.6. Is the legal obligation sufficiently well-defined? ... 1543
2.2.6.1. Definition by the Treaty, and by the Court ... 1543
2.2.6.2. Definition by the Council ... 1544
2.2.6.3. Definition by recognized factors of transport policy ... 1544
2.3. Conclusion ... 1545

3. Is the defendant's failure to act justified by special reasons? 1546
3.1. Objective difficulties of a political and economic nature 1546
3.1.1. Does Article 75 (1) contain a protective clause? 1546
3.1.2. Comparison with the provisions on agricultural policy 1546
3.1.3. Doctrines of administrative law 1547
3.2. Comparison with Article 169 1548
3.2.1. Structural problems in reaching decisions in the Council 1548
3.2.2. Comparison with the provisions on economic and monetary policy 1549
3.2.3. Can the lack of a majority justify the failure to act? 1549
3.3. Observations of the Netherlands Government on direct applicability 1549
3.3.1. Observations of the parties 1550
3.3.2. Legal assessment 1550
4. The complaint that in breach of the Treaty the Council has failed to adopt provisions for a common transport policy in areas referred to in proposals of the Commission, in detail 1551
4.1. Proposals not based on Article 75 (1) (a) and (b) 1551
4.2. The remaining proposals 1551
4.2.1. Proposals submitted during the transitional period 1551
4.2.2. Proposals submitted after the expiry of the transitional period 1552
4.2.2.1. Proposals submitted for the first time for certain areas 1552
4.2.2.2. Proposals to amend or supplement existing legislation 1552
IV. Costs 1554
V. Ancillary considerations 1554
C. Proposal for a decision 1554

Mr President,
Members of the Court,

In the present case the Court is called upon for the first time to decide an application by a Community institution for a declaration that another institution, in breach of the Treaty, has failed to act.

A. On 16 September 1982 the European Parliament resolved to bring an action under Article 175 of the EEC Treaty for a declaration that the Council of the European Communities has failed to act in the field of the common transport policy. In a letter dated 21 September 1982, which I shall subsequently discuss, the President of the Parliament, pursuant to Article 175 (2), called upon the Council to act in that field. The President of the Council answered the letter on 22 November 1982.

The *European Parliament* did not regard the Council's letter as a definition of its position for the purposes of Article 175 (2). Accordingly, on 22 January 1983 it brought an action against the Council of the European Communities for failure to act in the field of the common transport policy and claimed that the Court, pursuant to Article 175 of the EEC Treaty, should:

(1) Declare that the Council of the European Communities has infringed the EEC Treaty, in particular Articles 3 (e), 61, 74, 75 and 84 thereof, by failing

to introduce a common policy for transport and in particular to lay down the framework for such a policy in a binding manner;

(2) Declare that the Council of the European Communities has infringed the EEC Treaty by failing to reach a decision on 16, as originally set out in the application but subsequently reduced to 14, proposals of the Commission of the European Communities.

In the alternative the Parliament asked the Court to declare void the Council's reply of 22 November 1982 pursuant to Article 173 of the EEC Treaty.

The *Council of the European Communities* contended that the application should be dismissed as inadmissible or alternatively as unfounded.

B. My opinion on those claims is as follows.

I. Admissibility of the application based on Article 175 of the EEC Treaty

In the defendant's view the action is inadmissible because it lies in the context of a political dispute between the Council and the Parliament into which the Court is being drawn. The defendant also contends that the Parliament has no power under the first paragraph of Article 175 to bring an action for failure to act, and that the special conditions of admissibility, laid down in the second paragraph of Article 175, have not been satisfied.

1. *May the application pursue a political objective?*

It is not for this Court to decide whether the action has political objectives. An action is being prosecuted before the Court according to the rules of procedure on a question of law, namely the scope of the duties of a Community institution. The action will be decided according to the relevant provisions, namely those of the Treaty establishing the European Economic Community of 25 March 1957. It is prosecuted in the interests of the Community and its legal system which will be given a binding ruling on the scope of the rights and obligations of the parties.

Moreover, I have the impression that both parties when appearing before the Court have avoided giving the impression that the matter before the Court is anything other than a legal dispute.

2. *The conditions of admissibility in the first paragraph of Article 175 of the EEC Treaty*

2.1. The applicant's right of action

The first paragraph of Article 175 of the EEC Treaty reads: 'Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.'

2.1.1. Observations of the parties

The defendant concedes that according to the wording of that provision the Parliament, as an 'other institution', is *prima facie* entitled to bring an action for failure to act. In its view the wording of the provision is not unequivocal, however, because in any event the Court, which is also an institution under the Treaty, cannot be entitled to bring an action. In the view of the defendant, the logical interpretation thus to be preferred indicates that only an express attribution of powers could have given the Parliament capacity to bring an action for failure to act. That is borne out by the fact that in the case of an action under Article 173, which is complementary to Article 175, the right of action is expressly limited to the Council and the Commission. The

defendant also has misgivings on principle, in that recognition of the capacity to bring an action could extend the powers of the Parliament provided for in the Treaty and give it opportunities for review which were not intended. In particular it fears that in the event of a judgment in favour of the application the Parliament would obtain legislative powers not foreseen in the Treaty and the way would be open for further applications.

2.1.2. Legal assessment

The applicant and the Commission, which has intervened at the request of the Parliament, take the view that according to the clear *wording* of the first paragraph of Article 175 the Parliament has the capacity to bring an action for failure to act. I concur.

2.1.2.1. The first paragraph of Article 175 states that 'the Member States and the other institutions of the Community may bring an action' against the Council and the Commission. According to Article 4 and Part Five, Title I, Chapter 1, of the Treaty the Parliament is one of the institutions of the Community and is mentioned first.

Although the Court may not be one of the institutions entitled to bring an action under Article 175 of the EEC Treaty because it is responsible for legal protection and does not itself seek it, that says nothing about the Parliament's right of action. In view of the clear wording there is really no possibility according to the recognized rules of interpretation for any other interpretation or result.

2.1.2.2. In particular, it is not possible to invoke the principle of the so-called 'compétence d'attribution' in Article 4 of the EEC Treaty, according to which each institution is to act within the limits of the powers conferred upon it by the Treaty, in order to restrict the express right of action given by the Treaty. The Court expressly confirmed that view in *Roquette* [1] and *Maizena.* [2] It held *inter alia*: 'The first paragraph of Article 37 [of the Statute of the Court] provides that all the institutions of the Community have the right to intervene. It is not possible to restrict the exercise of that right by one of them without adversely affecting the institutional position as intended by the Treaty and in particular Article 4 (1).' In that case, too, the Council pleaded for a restrictive interpretation of the wording. The Court, consistent with its established case-law to the effect that provisions governing legal remedies should not be interpreted restrictively, did not follow that view, however, because the wording of the first paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC gave no ground for so doing. The status as an institution of the Community which the Treaty, in particular Article 4 (1), intended the Parliament to have would be at least as much affected as by the denial of the right to intervene if the Parliament were denied a right of action which has expressly been given.

2.1.2.3. Furthermore, I fail to see how the right of the Parliament to bring an action for failure to act can be restricted by the different wording in the *first paragraph of Article 173* under which only the Member States, the Council and the Commission, but not the Parliament, have a right of action. The two remedies entail different conditions

1 — Judgment of 29 October 1980 in Case 138/79 *SA Roquette Frères* v *Council of the European Communities* [1980] ECR 3333.

2 — Judgment of 29 October 1980 in Case 139/80 *Maizena GmbH* v *Council of the European Communities* [1980] ECR 3393.

and different legal consequences. Consequently, the absence of a right of action for the Parliament under Article 173 does not justify the inference — *in defiance of the very wording of the Treaty* — that the Parliament similarly has no capacity to bring an action for failure to act.

The judgment in *Chevalley*,[3] cited by the Commission, is no authority for the contrary view. That case, which was based on Article 175 and in the alternative Article 173, concerned *inter alia* the legal nature of a non-binding measure which a *private person* had requested should be taken. The Court held that a non-binding measure could be the subject neither of an action for failure to act under the third paragraph of Article 175 nor of an action to have a measure declared void under Article 173. Only in relation to the legal nature of the measures in question did the Court hold that Articles 173 and 175 were concerned with identical remedies.

The two types of action are to be distinguished inasmuch as an action under Article 173 seeks a declaration that an act of the Council or Commission is void, whereas an action under Article 175 seeks a declaration that an institution of the Community has unlawfully failed to act and is based on the fact that the Treaty frequently imposes duties on the Council and the Commission to act neglect of which represents an infringement of Community law just as does the adoption of an unlawful measure. The omission to authorize the Parliament to bring an action under Article 173 may be explained *inter alia* on the ground that it is called upon to influence 'the acts of the Council and the Commission' by exercising its powers. There is, however, no such possibility if in breach of the Treaty those institutions of the Community fail to act. Accordingly, it is entirely in the interests of the proper functioning of the Community that the Parliament should be given power to bring such an action especially against the Council and the Commission since the others who have such power may not always have an interest in bringing an action for failure to act, particularly if the failure to act is attributable to their own conduct or omission.

If despite the wording of the Treaty the Parliament had no right of action, it would mean excluding the institution which on account of its independence of the Council would be most likely to be in a position to bring it before the Court for failure to act. An interpretation leading to such a result would frustrate the objectives of the Treaty. The latter has as its objective the establishment of 'a common market' (Article 2). However, that objective can be achieved only by legislation by the Council and not by failure to act. Precisely on account of the risks, as the Council rightly observed, entailed by action, there must be a legal sanction for failure to act. If only action by the Council were open to challenge (Article 173) but not failure to act, the latter would be the safer course. That would encourage failure to act and therefore seriously jeopardize the achievement of the objectives of the Treaty. An interpretation leading to that result is not in keeping with the logic of the Treaty.

2.1.2.4. Such a right of action is quite compatible with the *division of powers* between the various institutions as laid down in the Treaty. An action for failure to act seeks not political supervision of the Council but legal review by the Court.

3 — Judgment of 18 November 1970 in Case 15/70 *Amedeo Chevalley* v *Commission of the European Communities* [1970] ECR 975.

According to Article 137 of the EEC Treaty the Parliament has as its task the exercise of supervisory powers which are conferred upon it by the Treaty. The right of the Parliament to bring an action under Article 175 for failure to act is not a slip of drafting, therefore, but the expression of its supervisory powers. It avoids a lacuna in the Community system of legal remedies and thus accords with the logic of the EEC Treaty.

2.1.2.5. I am also unable to see how an action by the Parliament for failure to act can represent *interference in the legislative powers of the Council.* Judgment for the applicant can only be in the form of a declaration that there has been an infringement of the Treaty. Pursuant to the first paragraph of Article 176 it is for the institution whose failure to act has been declared contrary to the Treaty 'to take the necessary measures to comply with the judgment of the Court of Justice'. If the failure to act which is contrary to the Treaty consists of not legislating it is then for the Council in the exercise of the powers and obligations it has under the Treaty to adopt the relevant legal measures. Neither the Parliament nor the Court seeks in that respect to supplant the Council. If such an argument were correct it would have as a consequence, as the Commission rightly points out, that actions brought by the Member States and the Commission against the Council for failure to legislate would also be inadmissible. The action against the Council under the first paragraph of Article 175 for failure to act would then lose all practical effect since the Council's tasks are primarily legislative.

2.1.2.6. At the same time, I am unable to see how a right of action for the Parliament would *adversely affect the Commission's power* under the second paragraph of Article 149 to alter its original proposal as long as the Council has not acted. In any case the defendant has not further substantiated that objection.

2.2. Must there be a special interest requiring protection?

Contrary to the Council's view, the right of action of the Parliament does not require *proof of a special interest requiring protection.*

Comparison of the first and third paragraphs of the article clearly shows that the action for failure to act brought by the Member States and the institutions of the Community, in contrast to the action brought by a private person, does not depend on such a condition. The action brought by the Parliament, just as an action brought by the other institutions or a Member State, is conceived solely to ensure observation and development of the law and thus does not require proof of an interest requiring protection (see *inter alia* Case 167/73 [4] in respect of the Commission's legal interest for the purposes of Article 169 of the EEC Treaty).

The defendant is further of the opinion that the applicant has no lawful interest in bringing an action because it is essentially a *political institution* which, in contrast to the Commission, has not been given the task of ensuring observance of the Treaties. In rebuttal of the validity of that argument there is, at least as regards Article 175, the fact that the Member States and the Council, which are also political institutions, can bring an action to have the Commission's failure to act established by the Court.

2.3. The first paragraph of Article 175 contains a further condition of admissibility to the effect that the applicant must

4 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

cogently show (whether that has in fact been done will be discussed in relation to the merits) that the Council or the Commission, in infringement of the Treaty, has failed '*to act*'.

2.3.1. Observations of the parties

The defendant raises the question whether the words in the Treaty 'to act' can be given such a wide interpretation as to include the introduction of a common transport policy or the laying down of a binding framework for such a policy. It has considerable doubts as to whether the action for failure to act is an appropriate vehicle for a complaint concerning the failure to introduce a complex self-contained system of legal rules (on railways, road transport, inland waterways, infrastructure, prices, conditions of transport, freedom of establishment, services, social problems, questions of competition and so forth) such as transport policy requires. The wording of the first paragraph of Article 175 and the preliminary procedure laid down in the second paragraph of Article 175 seem to support the Council's view, inasmuch as the action for failure to act is contemplated only for such cases in which an institution has a legal obligation to adopt *a particular* legal measure and not for those in which it is to establish a whole system of rules in a complex legislative process.

Moreover, in the defendant's view the applicant's first complaint, namely that the Council has failed to introduce a common transport policy and in particular to lay down the framework for such a policy in a binding manner, must be rejected because the measure desired has not been specified. The failure to act and therefore the claim itself must relate to an obligation to adopt one or more specific measures. Just as an action under Article 173 cannot be directed against a common policy as such, an action for failure to act cannot relate to the common transport policy in general but must be directed to specific measures for implementing such a policy.

With regard to the second complaint of the Parliament, to the effect that the Council has infringed the Treaty by failing to reach a *decision* on particular proposals of the Commission, the defendant contends that in view of the discretion given to it by the Treaty it cannot be bound to *accept* the proposals mentioned.

2.3.2. Legal assessment

In considering this allegation it is necessary to look more closely at the *subject-matter of the action* as it appeared at the conclusion of the oral procedure.

2.3.2.1. The claim expressed in the application gives the impression that a declaration is sought that the Council has failed to introduce a common transport policy and in particular to lay down the framework for such a policy in a binding manner. The Council is right in maintaining that such a claim in the absence of a specific description of the measures demanded would have to be rejected as inadmissible in so far as it is a general claim for the introduction of a common transport policy. Since the concept of a common transport policy cannot clearly be defined in the absence of further explanation, it must be admitted that it would be scarcely possible in proceedings under Article 175 to determine with certainty when the measures adopted by the Council are sufficiently specific for them to warrant the general description of a common transport policy. The inadmissibility of such a claim is also corroborated by the first paragraph of Article 176, which states that the institution

whose failure to act has been declared contrary to the Treaty must take the necessary measures to comply with the judgment of the Court of Justice. Judgment in favour of such an application would achieve nothing, for it would merely result in a declaration that an insufficiently defined legal obligation had not been fulfilled. The judgment could not show what specific measures the Council would have to take.

Such an application would be inadmissible even if it were supplemented by a general *definition* of a transport policy. The Parliament takes 'common transport policy' for the purposes of the Treaty to mean, for example, a coherent system of binding legal measures at Community level to govern the adoption and scheduling of the measures necessary to enable persons, goods and information to overcome the obstacle of distance. Such a system of binding legal measures is intended to provide for the transport industry throughout the whole territory of the Community the conditions of an internal market.

That definition of the common transport policy would scarcely enable the Court to determine whether or not the Council had fulfilled its obligation. Moreover, a judgment in favour of such an application would not clearly show the Council what it was specifically required to do.

If the wording of paragraph I(1) of the claim were taken literally it would therefore have to be dismissed as inadmissible.

In view of the importance of this case, however, I do not consider it proper to reject the application as inadmissible on account of its imprecise wording since what the applicant intended was admissible and that intention was expressed with sufficient clarity in its observations. The Roman legal principle must prevail:

'Scire leges non est verba eorum tenere, sed vim ac potestatem' (Celsus, Libro Digestorum 1, 3, 17).

Moreover, the applicant had to have regard to the fact that the defendant Council had a wide discretion in introducing a common transport policy. It had to avoid wording which risked binding the Council to opt for particular legislation. The applicant had to ensure that its arguments did not founder on either the Scylla of uncertainty or the Charybdis of trespass on the Council's discretion.

In the course of the proceedings the applicant did in fact *refine* its claim. It is already clear from the written observations that the Parliament seeks a declaration by the Court that the Council has infringed its obligation under the Treaty by not laying down the framework for such a policy and failing to reach a decision on specific proposals of the Commission. In the applicant's view those two objectives are not to be regarded separately; they affect one another in that on the one hand the framework of a common transport policy requires individual legal measures to give it substance and on the other hand individual measures have meaning only if objectives have previously been laid down in the transport sector.

The Parliament further explained that in order not to interfere in the Council's legislative discretion its application sought not a declaration that the Council had failed to adopt *specific measures*, but a declaration that the Council had not, or at least not

sufficiently, exercised its discretion in respect of transport policy and accordingly had not fulfilled its duties under the Treaty. For that reason the application, in contrast to the letter of 21 September 1982 in which the Council was called upon 'to determine the framework of a common transport policy . . . on the basis of the Commission's notice of 24 October 1973', was restricted to the general complaint that the Council had failed to determine the framework of a common transport policy in a binding manner.

Such a framework, as the applicant admits, need not be laid down at a simple stroke. It may consist of a bundle of individual measures which may be adopted in stages.

Thus in the applicant's view a three-stage planning and implementation process, which provided for the objectives or principles of a common transport policy, the instruments needed to impose those objectives or principles and the adoption of implementing measures, was needed to achieve the transport policy. In the Parliament's view the Council could have worked out a suitable general concept in particular on the basis of the communications and memoranda submitted by the Commission in 1973, 1977 and 1980 (see: Communication of the Commission to the Council on the further development of the common transport policy of 25 October 1973, *Bulletin of the European Communities* Supplement No 16/73; Communication of the Commission to the Council on a working programme up to 1980 with a proposal for a Council resolution concerning priorities and a timetable for decisions to be adopted by the Council by 1980, *Bulletin of the European Comunities* No 11/1977; proposal for a Council resolution concerning priorities and the timetable for decisions to be taken by the Council in the transport sector during the period up to the end of 1983, Official Journal C 294 of 13 November 1980, p. 6).

The applicant also observed that the Treaty allows the Community institutions the *option between a systematic and a pragmatic approach* in the gradual introduction of a common transport policy, provided that the individual steps to achieve that policy are not completely without any plan and regard for a general concept. For transport by rail, road and inland waterway and also for air and sea transport measures need to be taken especially in relation to the technical harmonization of vehicles, the regulation of access to the market in international and domestic transport, the removal of gaps and bottlenecks, and the harmonization of social provisions specific to transport.

Finally, the applicant explained that its claim was intended simply to show that the Council, in infringement of the Treaty, had not established the *minimum basis* of a common transport policy as required by the Treaty. As far as the content of that minimum basis is concerned, the applicant, agreeing with the Commission, explained that all the proposals submitted by the Commission represented essentially the minimum of what the Treaty mandatorily prescribed in order to achieve the common transport policy in the present circumstances.

The applicant further observed that in its view the provisions to be adopted pursuant to Article 75 (1) (a) and (b), that is the common rules for international transport and cabotage, represented the *essential basic elements of a common transport policy.* They were rounded off and supplemented by the 'appropriate provisions' to be adopted by the Council pursuant to Article 75 (1) (c)

and by the rules for sea and air transport contemplated by Article 84 (2). These necessary provisions should as a whole serve to liberalize economic relations and establish a competitive economy within the Community. In the applicant's view it is therefore sufficient evidence of the absence of a common transport policy to show that the defendant has not adopted the provisions which it was required to adopt during the transitional period pursuant to Article 75 (1) (a) and (b). By not reaching a decision on the proposals of the Commission based on those provisions the Council has failed to establish the basic elements of a common transport policy.

It must be stressed in this connection that the applicant is not alleging that the Council ought to have *accepted* the proposals based on Article 75 (1) (a) and (b), but simply that it ought to have reached a *decision* thereon, which means that it could have accepted or rejected the proposals in question or called for new ones. Ultimately the criticism is thus simply that the Council did not lay down the elements of a common transport policy which are expressed in the proposals of the Commission based on Article 75 (1) (a) and (b).

To summarize, it may be observed that in its application as it appears at the end of the oral procedure the Parliament seeks a *declaration* that in breach of the Treaty the Council has failed to introduce a common transport policy because in particular it has not adopted any provisions for the sectors to which the proposals of the Commission based on Article 75 (1) (a) and (b) relate.

That formula, based on the *concrete minimum requirements* of a common transport policy, avoids the *prima facie* inconsistency in the original application which lay in the fact that on the one hand, in deference to the legislative discretion conferred upon the Council, the desired framework was *not adequately defined*, whilst on the other a declaration was sought that the Council had failed to fulfil its obligations by failing to reach a decision on certain detailed proposals of the Comnmission. It restricts the original application, defines its subject-matter and places it on a firm legal basis.

Moreover, since the applicant does not complain that the Council has not accepted the proposals of the Commission referred to in the application but simply that it reached no decision on them and thus in breach of the Treaty failed to use the discretion conferred upon it, there can be no question in that connection of interference in the Council's legislative power of decision.

2.3.2.2. As the claim stands at the end of the oral procedure, it is no longer necessary to discuss at length the other question raised by the defendant, namely whether by means of an action for failure to act all that may be claimed is a declaration that there has been an unlawful failure to 'act', in other words to make a legally binding commitment. I can confine myself in that respect to the observation that evidence against such a restrictive interpretation of the word 'Beschluß' is provided by the English, French and Italian versions (fail to act, s'abstient de statuer and si astengano dal pronunciarsi), which show that every failure to *act* may be the subject of an action for failure to act in so far as there is an obligation so to act. In support of that

interpretation there is also the evidence of the second paragraph of Article 175 in which the requisite activity is once again defined by the words 'tätig werden, act, agir, agire, handelen, handle, να ενεργήσει'.

In particular, in order to avoid a multiplicity of actions, it must be possible in an action for failure to act to claim not only that the defendant has failed to act in *one* respect but that it has failed to act — when required — in *many* respects.

2.3.2.3. The defendant further takes the view that the applicant must not only show conclusively that the institution which has been called upon to act has not achieved certain objectives of the Treaty; it must also assert that it has *knowingly and intentionally* abstained from acting in order to prevent the achievement of the objectives of the Treaty. No such condition of admissibility based on subjective grounds can, however, as the applicant and intervener rightly emphasize, be read into the provision. The circumstances in which failure to act constitutes a breach of the Treaty is a question to be determined in the light of consideration of the merits of the action. As regards admissibility, on the other hand, the fact that the Council has objectively failed to fulfil a duty to act is conclusive.

3. *The conditions of admissibility under the second paragraph of Article 175 of the EEC Treaty*

3.1. The second paragraph of Article 175 provides that an action for failure to act is admissible only 'if the institution concerned has first been *called upon* to act'.

The defendant first denied that the applicant had effectively called upon it to act within the meaning of that provision. In accordance with its view that the Parliament had no power to bring an action for failure to act it originally regarded the letter from the President of the Parliament of 21 September 1982 simply as a contribution to the political dialogue between the Council and the Parliament.

As the applicant rightly says, the defendant cannot invalidate the preliminary call upon the Council to act, which the Treaty requires, by refusing to regard it as a call for action for the purposes of the second paragraph of Article 175. The purpose of that condition of admissibility is to make the institution concerned aware that its conduct is regarded by the potential applicant as a breach of the Treaty by failure to act. The institution is thus given the opportunity of avoiding an action for failure to act by suitably defining its position. For the purposes of admissibility it is accordingly sufficient that the Council has been called upon to take certain action and warned of the possibility of legal proceedings in the event of failure to act. The said letter, however, contains *inter alia* at points 2 and 3 a clear reference to the second paragraph of Article 175 of the EEC Treaty and a warning that proceedings may be initiated for failure to act.

The defendant contends that the action is inadmissible 'in so far as the letter calls upon it in general terms to establish a common transport policy and without specific reference makes decisions under Article 3 (e), 61, 74, 75 and 84 of the Treaty the subject-matter of its demand'.

In fact the letter does clearly and unambiguously show what action is required of the Council. Contrary to the Council's objection that the letter does not adequately state what decisions are required to be taken, all the requisite measures are adequately described. At point 8 the Council is called upon to determine the framework of a common transport policy; at point 13 it is required without delay to reach the decisions which should have been taken pursuant to Article 75 (1) during the

transitional period. Point 12 calls upon it to lay down all appropriate provisions to implement the common transport policy pursuant to Article 75 (1) (c). At points 21 *et seq.* the Council is called upon to lay down the appropriate provisions for sea and air transport pursuant to Article 84 (2). Finally, at point 18 the letter calls for a decision to be reached on numerous proposals of the Commission, including those listed in the application, on which the European Parliament has already given its opinion.

The applicant's letter calling upon the Council to act must also be considered in the light of the dilemma of avoiding language which is either too narrow or too wide.

It is thus clear that the letter contains a sufficiently clear and effective call for action for the purposes of Article 175. It remains to be said that the letter goes further than the application. The intention and purpose of the procedure prior to the action for failure to act is, just as in the case of Articles 169 and 170, to determine the scope of the subject-matter of the action. Since the application in the present case is narrower than the letter calling upon the Council to act it must in that respect be regarded as admissible.

3.2. In addition, the action for failure to act is admissible only if the defendant institution has not '*defined its position*' within two months of being called upon to act.

3.2.1. Observations of the parties

In the event of the Court's holding that the applicant's call for action is effective the Council contends that its answer of 22 November 1982 satisfies the conditions for 'defining its position' for the purposes of the second paragraph of Article 175, and therefore the action is inadmissible. From the different wording of Article 35 of the ECSC Treaty, which makes the action for failure to act dependent on the fact that the High Authority does not take a decision or make a recommendation within a period of two months, that is, does not adopt a binding measure, and the wording of the first paragraph of Article 175 itself which says that the institution has failed to act, the Council concludes that defining its position for the purposes of Article 175 is not the same as adopting a formal measure or taking action.

In the Council's view, the sole purpose of the action for failure to act is to prevent the institution concerned from not acting, not to prescribe what it must do. Consequently, as the Court has consistently held in the past, whether the definition of position is sufficient to rebut the complaint of failure to act with the result that the action is inadmissible depends on the circumstances. Where the Treaty gives an institution a discretion in taking action an answer showing why the institution concerned has taken no action and how it intends to proceed in future, or indicating that it considers it appropriate not to exercise its powers, is sufficient to make it clear that there is no failure to act for the purposes of Article 175. Those conditions are satisfied in the present case, it maintains. Since the Council has a wide discretion in implementing the transport policy and has made it abundantly clear to the Parliament that it intends to resolve the outstanding problems as far as possible, the answer,

taken as a whole, must be regarded as an adequate reply to the Parliament's complaint for the purposes of Article 175.

The relatively short period of two months, within which it is practically impossible to take a legislative decision, shows that even a definition of position which contains neither a positive nor a negative decision may make the action inadmissible, the Council contends.

The applicant and the intervener agree with the defendant that a positive definition of position, that is, an answer clearly expressing the willingness of the institution concerned to act as required, makes the application inadmissible. They take different views, however, about the legal effects of a negative definition of position, that is, a refusal to take action. The applicant takes the view that such a definition of position would not make the application inadmissible since the failure to act would remain. The Commission on the other hand comes to the conclusion that even an undesirable act or a negative definition of position, i.e. a positive refusal to act as required, may terminate the failure to act. Both parties agree, however, that statements of an institution neither complying with the demand of the potential applicant nor communicating *a decision* to take action other than that requested cannot, for reasons of legal protection, be regarded as a 'definition of position' for the purposes of the second paragraph of Article 175 of the EEC Treaty.

3.2.2. Legal assessment

I agree with the Commission that there must be some 'action in the matter'. The defendant rightly points out that a definition of position is not necessarily the same as the adoption of a formal measure.

3.2.2.1. It is clear, however, from the wording of all the language versions of the second paragraph of Article 175 that only a statement by which the institution concerned positively and unequivocally gives notice of its intention to act or not to act as required (pris position, preso posizione, defined its position, standpunt bepaald, taget stilling, να λάβει θέση), makes the application inadmissible.

3.2.2.2. The same is apparent from consideration of the *purpose* of the action for failure to act as a legal remedy. If a statement from which it does not appear whether, when and how the institution concerned intends to terminate the alleged infringement of the Treaty and which cannot be regarded and challenged as an 'act' for the purposes of Article 173 were to be regarded as a definition of position which makes the action for failure to act inadmissible, the remedy would be robbed of its substance.

3.2.2.3. The defendant's contention that the constitution of the Council laid down by the Treaty and the resulting procedures for reaching a decision make it normally impossible to conclude preparations for a decision within a *period of two months* is not convincing. It would have satisfied the requirement of a definition of position if the defendant, which has already had the Commission's proposals for some considerable time, had stated with sufficient clarity whether and when it intended to reach a decision on the proposals.

3.2.2.4. Whether in this connection a negative answer in which the institution concerned refuses to act at all and which in turn may be challenged under Article 173 can be treated as a definition of position for the purposes of the second paragraph of

Article 175 does not need to be decided in the present case.

Similarly, it is not necessary to deal with the question whether a clear statement to the effect that something other than what is desired will be done may be regarded as a definition of position for the said purpose. The defendant neither refused to act as the applicant requested nor said specifically and clearly whether and how it intended to exercise the discretion conferred upon it. Instead, its letter contains *inter alia*:

— an 'analysis of the actions [already taken] without expressing an opinion on the legal aspects referred to in your letter';

— the statement that 'the Council is . . . aware that . . . further action is called for';

— an announcement of its resolve 'to make further solid progress in the operation of this policy';

— a statement that it intends at its next session 'to examine a number of matters which are of importance for the common transport policy'.

At the end there is the following sentence:

'In spite of the many difficulties encountered, the Council intends *to push forward actively* with *examination* of the proposals pending and of the new proposals which the Commission will be submitting' (my italics).

The defendant's answer to the applicant's letter is, in the defendant's words, 'to be regarded as a contribution to the political dialogue between the Council and the Parliament'; it cannot, however, be regarded either as a refusal to comply with the call for action — that is, a negative definition of position — or as taking action, that is, as a positive definition of its position.

The same is true of the Council's observations on the Commission's proposals mentioned in the application which simply set out the stage reached in their consideration and thus contain no real definition of its position.

The position is no different with regard to the proposal listed in the application as No 15, as to which the Council has observed that it had resolved to take no formal decision with regard to that proposal although it was basically in agreement with the measures proposed by the Commission. At the hearing it explained that its answer meant that it had not accepted the Commission's proposal but had confined itself to taking note of the Commission's intention of collecting certain information. It is not apparent from that ambivalent statement whether or not the Council intended to act in the area referred to in the proposal. Until the hearing the Commission was under the impression that its proposal was still being considered by the Council. Only at the hearing did the defendant explain, when questioned, that the answer meant that the proposal was rejected. Thus at least when the action was brought there had been no effective definition of position.

3.2.2.5. It must therefore be concluded that the Council's answer gave no positive indication of whether and how the Council intended to act in the areas referred to in the Parliament's letter. Such an answer, which amounts to a *deferment* is not an 'act' within the meaning of the first paragraph of Article 173 and cannot therefore be challenged under that article. To regard such a deferment as a definition of position for the purposes of the second paragraph of Article 175 would rob the action for failure

to act of all substantive effect and result in a denial of justice.

3.2.2.6. Contrary to the defendant's belief, the case-law of the Court does not support the opposite view. All the cases cited by it and based on Article 175, which were rejected by the Court as inadmissible, were brought by natural or legal persons pursuant to the third paragraph thereof. That provides that such persons are entitled to bring an action provided that the further condition is satisfied that an institution of the Community has failed to address 'to that person' any act other than a recommendation or an opinion. In all the cases cited by the Council (*Lütticke,* [5] *Nordgetreide,* [6] *GEMA* [7] and *Deutscher Komponistenverband* [8]) and in the other cases considered by the applicant the action was dismissed on the ground that there was no failure to act because the institution concerned had answered the applicant's request (*Lütticke,* [5] *GEMA* [7] and *Deutscher Komponistenverband* [8]) or that no duty to act had been proved or that the applicant had no right of action under the third paragraph of Article 175 because the breach of the Treaty which it sought to have established concerned the failure to address to it an act which did not have to be addressed to it (*Nordgetreide* [6]) In none of those cases, as the applicant rightly stresses, was it necessary to examine the defendant institution's answer to determine whether it constituted a 'definition of position'.

The present case is, however, wholly distinguishable from those cases because the Parliament can base its action on the first paragraph of Article 175 without having to show that the matter is of *direct and individual concern to it* in order to show that it has capacity to bring an action. As I have also shown, the Parliament has further cogently argued that the Council has a duty to exercise its discretion and that failure to exercise that discretion constitutes a breach of the Treaty.

4. *Summary*

The defendant's main objections to the application are based on:

(1) Denial of the European Parliament's right of action;

(2) Its interpretation of the word 'act' in the first paragraph of Article 175, which would exclude legislation from the scope thereof; and

(3) Its interpretation of the words 'definition of position' for the purposes of the second paragraph of Article 175 to mean that an explanation of the reasons for not taking action is sufficient to bar an action for failure to act.

Of those only the first objection challenges the right of action of the Parliament as an institution, since the others can apply just as well to others with a right of action such as the Commission or the Member States. They challenge, as also does the first submission, the Court's power to review the Council's failure to act in respect of legislation, and if successful would make

5 — Judgment of 1 March 1966 in Case 48/65 *Alfons Lütticke GmbH and Others* v *Commission of the European Communities* [1966] ECR 19.

6 — Judgment of 8 March 1972 in Case 42/71 *Nordgetreide GmbH & Co. KG* v *Commission of the European Communities* [1972] ECR 105.

7 — Judgment of 18 October 1979 in Case 125/78 *GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrecht* v *Commission of the European Communities* [1979] ECR 3173.

8 — Judgment of 13 July 1971 in Case 8/71 *Deutscher Komponistenverband e.V.* v *Commission of the European Communities* [1971] ECR 705.

such review impossible. There is no support for that in the wording or objectives of the Treaty. I cannot therefore endorse it.

Since on that view all the conditions of admissibility referred to in the first and second paragraphs of Article 175 are satisfied, the action for failure to act brought by the Parliament must be regarded as admissible.

II. The applicant's alternative claim

In the alternative the Parliament claims that if the action is not admissible pursuant to Article 175, it is admissible pursuant to Article 173 of the EEC Treaty.

In view of what I have said before there is no need to discuss that claim. Alternatively and very briefly I must say simply that I agree with the Council that such a claim is inadmissible basically for two reasons.

1. Unlike Article 175, Article 173 expressly restricts the *right of action* to the Member States, the Council and the Commission. Since the Parliament's objectives can be satisfied under Article 175 there is no cause for extending the class of those with a right of action contrary to the wording of the provision.

2. According to the wording of the first paragraph of Article 173 an action thereunder is admissible only against *acts* of the institution which are intended to *have legal effects.* As I have said, the Council's deferment of a decision, which contains no binding commitment, is not of that nature.

III. The merits of the application

The action is well founded if it is established that 'the Council . . . in infringement of this Treaty [has failed] to act' Accordingly failure to act can be established only if the Treaty reveals *a sufficiently well-defined duty to act* which the Council has not fulfilled.

1. *Is there a legal obligation to introduce a common transport policy?*

1.1. Observations of the parties

All the parties agree that there is no common transport policy for the purpose of Articles 3 (e) and 74, that is, there is no coherent and consistent set of provisions having the object of creating for the transport industry the conditions of an internal market throughout the Community. They differ only as to whether that fact, which the defendant in its own words does not dispute but regrets, is due to a failure by the Council, in infringement of the Treaty, to act.

All the parties, on the basis of paragraph 1 of the claim as originally drafted, submitted extensive observations on the question whether there is a sufficiently well-defined obligation on the Council under the EEC Treaty to introduce a common transport policy and whether the Council's conduct up to now, viewed in the light of that obligation, justifies a finding that it is in breach of the Treaty. Since the claim was refined in the course of the proceedings, so that it is now sought only to have established that the defendant in infringement of the Treaty has failed to introduce a common transport policy, especially in so far as it has not adopted during the transitional period common rules for international transport and cabotage as required by Article 75 (1) (a) and (b), it is not really necessary to discuss the general

question whether there is a right to have a common transport policy introduced and in particular to have the framework of such a policy laid down.

Nevertheless, I think it is as well to make some preliminary observations on the general question how far the EEC Treaty contains a sufficiently well-defined *obligation,* and one which may be vindicated at law, *to introduce a common transport policy* which would permit breach of the Treaty by failure to act to be established. In my view it can scarcely be disputed (and if I understand the position correctly the Council does not seriously dispute it) that the introduction of a common transport policy is one of the tasks of the Community. It also seems to me to be beyond dispute that the introduction of suitable common rules on the basis of the Treaty is in principle the responsibility of all the institutions of the Community, especially the Council. That is apparent from Article 3 (e) according to which, for the purposes set out in Article 2, the activities of the Community include, as provided in the Treaty and in accordance with the timetable set out therein, the adoption of a common policy in the sphere of transport. The parties also appear to be essentially in agreement as to the fact that the defendant's specific obligation to adopt such a policy depends not *only* on that provision but, as it states, on all the provisions of the Treaty which concern transport.

The parties differ only on the question whether those provisions as a whole contain a *sufficiently well-defined legal obligation* to adopt a common transport policy, on the basis of which breach of the Treaty by failure to act on the part of the Council may be established.

The applicant and the intervener take the view that a legal obligation to adopt a common transport policy is to be inferred both from the wording of the relevant provisions and from the purpose and logic of the Treaty. The wording of Article 3 (e) in conjunction with the other relevant provisions of the Treaty, especially Articles 61, 74, 75 and 84 (2), clearly supports the existence of a general legal obligation to adopt a common policy in the sphere of transport which embraces all the five modes of transport listed in Article 84, namely rail, road, inland waterway, sea and air.

In the *applicant's* view the obligation to lay down a binding framework may be based in particular on Article 74, which logically assumes the existence of such a general framework to prevent uncoordinated or inconsistent Community action. According to Article 8 (7) of the Treaty the *basis* of the common policy ought to have been laid down *by the end of the transitional period.*

The *Commission,* on the other hand, takes the view that there is *no* legal *obligation* under the Treaty to lay down the framework for a common transport policy *by the end of the transitional period.* Apart from that, however, it supports the applicant's view that the competent institutions of the Community are legally bound to comply with the general obligation to adopt such a policy *within an appropriate period.* Even if Article 75 (1) (c), in contrast to measures based on Article 75 (1) (a) and (b), provides no specific period for the adoption of other appropriate provisions, *that period* has in the meantime *expired.* The fact that the Treaty itself contains special

rules only for transport by rail, road and inland waterway, whereas the drawing up of an appropriate scheme for sea and air transport pursuant to Article 84 (2) to supplement the general rules of the Treaty is left to the defendant for a later period, may in the Commission's view justify allowing a longer period for the adoption of the essential elements of a common policy for sea and air transport than for the other modes of transport. The expiry of more than 25 years after the entry into force of the Treaty, the accession of new Member States which are dependent primarily on sea transport for intra-Community trade, the fact that sea transport is of considerable importance to several of the Member States and the significance of air transport show that the period during which provisions for sea and air transport ought to have been adopted has likewise in the meantime expired.

After considering the relevant provisions, the *defendant* again comes to the conclusion that the Treaty imposes no legal obligation on it to draw up a binding *framework* for a common transport policy. In its view there is no sufficiently well-defined legal obligation under the Treaty as far as concerns the substance or time-limits to adopt a common transport policy which would allow breach of the Treaty by failure to act to be established. The provisions on transport indicate the way which should be adopted but specify *neither the particular aims* to be achieved *nor the time-limit* within which they should be achieved. Even more than in the area of the common agricultural policy, the adoption of Community rules in relation to transport requires the assessment of complex economic subject-matter which according to the established case-law of the Court requires a wide discretion and consequently does not enable breach of the Treaty by failure to act to be established. In that connection the Council takes the view that it is acting neither unlawfully nor *ultra vires* if on account of objective difficulties it refrains from taking a decision for the adoption of which there is a time-limit. That is true in particular for the provisions of Article 75 (1) (c) and 84 (2), which expressly give the Council a wide discretion.

1.2. Legal assessment

The following must be said with regard to that contention: I agree with the applicant and the Commission that Article 3 (e) in conjunction with the provisions of the Treaty in Title IV on transport imposes an obligation on the Council to adopt a common transport policy.

1.2.1. Already the *wording* of Article 3 (e), according to which the activity of the Community 'shall include' (the English version is particularly clear) the adoption of a common policy in the sphere of transport, shows that the provision does not merely indicate a general programme devoid of legal effect. On the contrary, Article 3, as the Court emphasized in *Continental Can* [9] 'considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks'.

9 — Judgment of 21 February 1973 in Case 6/72 *Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities* [1973] ECR 215.

Moreover, in *Charmasson* [10] the Court confirmed in relation to agricultural policy, which is referred to in Article 3 (d), that the absence of such a policy 'is contrary to the requirements of Article 3 (d) of the Treaty'. Finally, the Court held in *Schumalla* [11] that the harmonization of certain national provisions affecting competition in transport by rail, road and inland waterway 'is one of the objectives of the Community defined in Article 3 of the Treaty'. It is further stated in that judgment that such harmonization requires the adoption of common rules and 'is an essential part of the common transport policy, which is required to be adopted by Article 3 (e) of the Treaty and is one of the foundations of the Community' (p. 2317).

In favour of the defendant it must be admitted that, as shown by the words 'as provided in this Treaty and in accordance with the timetable set out therein' and as the Court has confirmed in *Casati* [12] the scope of that obligation has to be determined in accordance with the special provisions on transport in Title IV.

Article 74 provides that the objects of the Treaty are, in matters governed by that title, to be pursued by Member States within the framework of a common transport policy. That, as the applicant and intervener rightly stress, logically presupposes the existence and necessity for the development of a common transport policy in order to allow the Member States for their part to take action within its framework. The Court confirmed as much in particular in *Trinon* [13] in which it stated that according to Article 75 the Council has an *obligation* to draw up, within the framework of the common transport policy provided for in Article 74, the common rules provided for *inter alia* in Article 75 (1) (a). The fact that that obligation applies not only to the provisions referred to in Article 75 (1) (a) and (b) was emphasized *inter alia* in *Schumalla*, [11] in which it was stated that Article 75 (1) (c) of the Treaty provides 'that for the purpose of implementing the aforesaid Article 74 and taking into account the distinctive features of transport, the Council shall lay down, in addition to the rules and conditions referred to in subparagraphs (a) and (b), "any other appropriate provisions" ' (p. 2317).

Indirect confirmation of the existence of such an obligation may be found, finally, in Article 61 (1) of the EEC Treaty which provides that *freedom* to provide services in the field of transport is to be governed by the provisions of the title relating to transport. That reference would be incomprehensible if the Council were free to determine whether or not it would implement freedom to provide services in the vital economic sector of transport.

1.2.2. Furthermore, as the applicant and the Commission rightly observe, a systematic interpretation of the Treaty and its objectives shows that there is a legal obligation under the Treaty to adopt a common transport policy.

10 — Judgment of 10 December 1974 in Case 48/74 *Charmasson* v *Minister for Economic Affairs and Finance* [1974] ECR 1383.

11 — Judgment of 28 November 1978 in Case 97/78 *Fritz Schumalla* [1978] ECR 2311.

12 — Judgment of 11 November 1981 in Case 203/80 *Guerrino Casati* [1981] ECR 2595.

13 — Judgment of 30 November 1982 in Case 12/82 *Ministère Public* v *Joseph Trinon* [1982] ECR 4089.

The common transport policy is one of two sectoral policies expressly provided for in the Treaty by means of which the fundamental objectives of the Treaty, which are laid down in Article 2, are to be achieved. The reason that the requirement of a transport policy was expressly enshrined in the Treaty was obviously the economic importance of the transport sector, which is closely related to the creation of the common market and in particular with the implementation of the principle of free movement of goods. The interdependence between the objectives of the Treaty contained in Article 2 and transport policy is shown in particular by Article 74, which mentions the objectives of the Treaty. The same is true of Article 75 (3), which states that when it lays down certain principles governing the transport sector the Council must take into account the need for adaptation to the economic development which will result from establishing the common market. The Council acknowledged that requirement in the last recital in the preamble and in Article 15 of its Decision of 13 May 1965 (Official Journal, English Special Edition 1965-1966, p. 67).

Another reason for including transport provisions in the Treaty is obviously that the transport sector, like the agricultural sector, is characterized by a large amount of state intervention in the form of market regulation, public subsidies, public ownership and so on. It is not possible to take adequate account of those peculiarities by measures of liberalization alone; a uniform structure must be imposed in order to avoid in particular distortion of competition. Even overlooking the *special* obligations imposed by Article 75, it would be inconsistent with those objectives of the Treaty for the adoption of a common transport policy to be wholly a matter for the Council's discretion.

1.2.3. I agree with the applicant and the Commission that the obligation to adopt a common transport policy extends not only to transport by rail, road and inland waterway but also, as a matter of principle, to *sea and air transport.* Article 84 (1) provides that Title IV is to apply to transport by rail, road and inland waterway. Article 84 (2) provides that the Council *may,* acting *unanimously,* decide *whether, to what extent* and *by what procedure* appropriate provisions may be laid down for sea and air transport. *Prima facie* it might be thought that such wording did not impose any obligation on the Council to lay down provisions for sea and air transport and that therefore it had complete discretion as to whether, to what extent and by what procedure appropriate provisions should be laid down for sea and air transport. Against that interpretation, however, it may be objected that the previous considerations based on the connection between the systems must apply equally to the sectors of sea and air transport. As the Commission convincingly argued, both kinds of transport, especially after the enlargement of the Community, have considerable economic significance and are closely connected with the other sectors of the common market.

Finally, it was that connection which caused the Court in Case 167/73 [4] (*Commission* v *French Republic*) to observe that Article 84 (2) did not exclude the application of the Treaty to the types of transport referred to therein. The purpose of that provision, according to that judgment, is simply to show that the special provisions adopted in

4 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

the title on transport do not automatically apply to sea and air transport. The Court concluded that under Article 84 (2), sea and air transport, so long as the Council has not decided otherwise, is excluded only from the rules of Title IV on the common transport policy and remain, on the same basis as the other modes of transport, *subject to the general rules of the Treaty*, which includes Article 3 (e).

That means that the general obligation imposed on the defendant by the Treaty to adopt a common transport policy extends to sea and air transport, and it has a discretion only as to whether and how far it wishes to derogate in respect of those two modes of transport from the provisions of Title IV.

The Court also stated that the Member States have not merely a duty, but an obligation to apply the provisions on *free movement of workers* to transport. In the light of that it would in fact be very difficult to determine, if the Council had completely free discretion, whether *freedom to provide services* should be extended to sea and air transport or not.

1.2.4. To summarize, it must therefore be observed that the Treaty places an *obligation* on the institutions (Article 4) to adopt a common transport policy, the scope of which must be determined with due regard to all the provisions of the Treaty, especially those in the title on transport, and with due regard to the logic of the Treaty.

1.2.5. With regard to the *scope* of that general obligation the Parliament originally took the view that the Treaty required the determination of the objectives and principles of a common transport policy in the form of a *framework* which would provide the necessary basis for the adoption of implementing measures. As I have already explained when considering admissibility, the Parliament in the course of the proceedings, I think for good reasons, retreated from that view. However desirable such a framework might be, there is, in contrast to the provisions on the right of establishment (Article 54 (1)), on freedom to provide services (Article 63 (1)) and on agriculture (Article 43), no provision on transport dealing with the adoption of such a framework or even indicating a procedure for its progressive introduction. The reference in Article 74 to the 'framework of a common transport policy' simply means, as the Council and the Commission observe, that the Member States are bound to pursue the objectives of the Treaty within the framework of a common transport policy: in other words, for the purpose of creating a common transport policy they must work together and not pursue independently national and possibly divergent objectives of transport policy. Since no such framework is provided for the area of transport policy, it follows *a contrario* that the Treaty gives the Community institutions the choice between a systematic approach in definite stages or the pragmatic approach of a gradual adoption of a common transport policy, provided that the result meets the requirement in the Treaty of a coherent policy which serves the basic objectives of the Treaty and satisfies the special obligations arising from the provisions on transport.

1.2.6. Apart from that, I share the defendant's view that the obligation to adopt a common transport policy is *not*

sufficiently well-defined for the Court to find that the Council has breached the Treaty by failing to act. As evidence of that there is in the first place the fact that the provisions of Title IV, in contrast to the provisions of Title II, which concern agriculture, do not contain particulars of the objectives to be achieved (Article 39), do not specify the stages for the introduction of such a policy (Articles 40 and 43) and do not provide for or prescribe in a sufficiently specific manner the means to be employed in order to achieve such a result (Articles 40 and 41). Because of the complexity of the material, especially the different transport policies in the individual Member States and the undeniable connection with other policies, the authors of the Treaty obviously quite intentionally did not define the scope of the obligation to adopt a common transport policy and did not make this part of the Treaty, as even the applicant concedes, a *pactum de contrahendo*. Even if, as the applicant and the Commission opine, certain elements may be inferred from the wording, system and object of the Treaty, it cannot be denied that the Council has a very wide discretion in this area. That is corroborated not least by the fact that apart from Article 75 the Treaty provides no specific legal measures, no specific procedure for voting and reaching decisions on, and no specific timetable for the adoption of such a policy. The Council has, pursuant to Article 145, power to take decisions to ensure that the objectives set out in the Treaty are attained but is not bound by the proposals made by the Commission pursuant to Article 149. It follows that the multifarious communications and memoranda emanating from the Commission and the Parliament, which undeniably contain models for a general concept but were nevertheless not intended to be binding proposals for a legally binding decision, may be regarded as an attempt to define the general obligation to adopt a transport policy which is not binding on the Council. The same must apply to the multifarious attempts at a definition of the common transport policy submitted by the applicant and intervener, which, moreover, described the individual aims of such a policy only in a general manner.

1.2.7. Moreover, the absence of specific time-limits in the Treaty, in particular, precludes a finding that the Treaty has been breached by failure to adopt such a policy. Article 8 (7), which provides that save for the exceptions or derogations provided for in the Treaty the expiry of the transitional period is to constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented, is in that respect irrelevant. Article 75 (2) provides expressly that only the provisions referred to in (a) and (b) of paragraph 1, which may be regarded as the essential elements of a common transport policy, are to be laid down during the transitional period. The converse is that there is in principle no specific time-limit for the adoption of the other measures which are part of a common transport policy. In view of the relationship between the development of a common transport policy and the functioning of the common market, however, the applicant and the Commission are correct in arguing that the *period within which* such a policy is to be introduced cannot lie completely in the discretion of the defendant.

1.2.7.1. The same must also be true in principle of the obligation placed by Article 75 (1) (c) on the Council to adopt other appropriate provisions. Even though that provision is more specific than the general obligation in the Treaty to adopt a common transport policy, it nevertheless gives the Council a wide discretion as to the implementing measures it considers appropriate. Unlike the provisions referred to in Article 75 (1) (a) and (b), this obligation does not have to be performed before the expiry of the transitional period.

1.2.7.2. Finally, those considerations must apply *a fortiori* to the obligation to adopt measures on the basis of Article 84 (2). Since according to that provision the establishment of appropriate rules for sea and air transport in addition to the general rules of the Treaty is left entirely to the Council, it is appropriate to allow for the adoption of the essential elements of a common policy for those modes of transport a longer period than for the modes of transport covered by Title IV.

1.2.8. In considering what is the appropriate period within which the defendant must be required to act, regard must be had first to the fact that because economic, technical and social conditions are constantly changing, transport policy must also continually evolve. Regard must also be had to the fact that as a result of the dynamic process of integration the requirements of the common market may alter. Determination of the appropriate period therefore depends *inter alia* on both an assessment of the needs of the common market and the need for adopting implementing measures, including the concomitant risks. Since the Council has a wide discretion in respect of both the substance of the measures to be adopted and the period within which they are to enter into force, I think it has *not been shown with sufficient certainty* that the Council had at the relevant time exceeded the limits of its discretion and in that respect infringed the Treaty.

2. *Is there a legal obligation to adopt provisions under Article 75 (1) (a) and (b)?*

Following those general observations on the obligation arising from the Treaty to adopt a common transport policy, I shall now consider Article 75 (1) (a) and (b) which, according to the application as it appeared at the end of the oral procedure, represents the core of the action for failure to act.

2.1. Observations of the parties

As I have already indicated the applicant claims that the defendant has not adopted the minimum basis of a transport policy as required by those provisions. The decisions adopted so far on the basis of those provisions have been purely sporadic and reveal no coherent concept of a transport policy. In breach of the clear and unambiguous obligation laid down in Article 75 (1) (a) and (b) the Council has neglected, in particular, to reach a decision on the proposals of the Commission based on those provisions, some of which have lain with the Council for several years. Consequently, the common transport policy reveals considerable lacunae especially in the area

of social, tax and technical harmonization which is essential for a genuine common transport market, and in the requisite transport infrastructure. The discretion allowed the Council by those provisions is confined at most to determination of the substance of the measures to be adopted and the time of their entry into force within the period referred to in Article 75 (2). If in defiance of the obligation imposed by the said provision the Council has not exercised its discretion at all, it has abused its power of discretion. In the view of both the applicant and the Commission, difficulties in reaching a decision on complex questions cannot be pleaded as justification for failing to adopt the requisite provisions within the time-limits and by means of the machinery for reaching decisions prescribed by the Treaty.

The Council agrees basically with the Parliament and the Commission that Article 75 (1) defines the legal obligation to act in Article 3 (e) and 74 sufficiently. It further admits that it has not adopted all the possible and necessary rules required by Article 75 (1) (a) and (b). In addition, during the course of the proceedings, it stated more than once that it was endeavouring, as required by the Treaty, to adopt the rules necessary to complement those already adopted in order to bring about a common transport market on which there would as far as possible be free competition in the interests of the transport undertakings. In the Council's view, however, the duty to act under Article 75 (1) is so ill-defined and such a wide discretion is given that it cannot be the subject of an action for breach of the Treaty by failure to act. Even on the broadest interpretation, the provision in question merely gives general guidelines for decisions and creates a power of decision for that purpose.

In support of that argument the Council's main contention is that according to the wording of Article 75 (1) it is simply obliged to take into account 'the distinctive features of transport' in adopting the requisite provisions. It has thus not only been given a particularly wide discretion, but has had the obligation imposed on it to take account of the special aspects of transport, particularly the structural ones. By reason in particular of the various geographical, economic and political factors the transport policies of the individual Member States, as became apparent already in the negotiations for the Treaty, are very different. Moreover, account must be taken of the fact that because of the nature of the services they have to render transport undertakings are particularly sensitive to measures which change the market situation abruptly. In addition, as a result of the different structures of the national transport systems, competing transport undertakings display considerable differences of size and capacity. Not only does the relationship of the state-subsidized railways to road transport undertakings take very different forms, but the capacity of road transport undertakings has developed very differently in the various Member States on account of the different rail policies. Liberalization of road transport between the Member States must take account of that position and, on account of the high investment involved and

the effects on general economic and labour policy, can take place only gradually and in the course of a certain period of time. Liberalization of international road transport further presupposes, especially because of competitive equality between transport undertakings from the various Member States, that the contribution by transport undertakings to road costs is harmonized. As regards railways the Council must also take account of the fact that in almost all Member States they run at a loss and depend on subsidies from public funds which must be provided in the general economic interest.

Finally, the common transport policy cannot be achieved without regard for its effects on other political and economic objectives. The interdependence of the transport sector with other economic sectors, especially regional, social, environmental and energy policy, was expressly recognized by the Commission in its communication of October 1973.

In the circumstances, the Council is of the opinion that it could not reasonably be expected that it would be possible to achieve in the early years of the Community's existence an approximation of the national transport structures which would have allowed a liberalization of international transport and freedom of establishment for transport undertakings. Accordingly, it cannot be assumed that the authors of the Treaty intended to lay down a binding obligation to adopt the provisions referred to in Article 75 (1) (a) and (b) within the transitional period. That period can at most be regarded as a *pro forma* one.

If, as is common ground, almost 14 years after the expiry of the transitional period progress towards a common transport policy appears at first sight unsatisfactory, that is due, in the Council's opinion, to the fact that the problems are related to one another, and not to lack of will on its part to achieve progress. In any event it rejects the allegation that it has wrongly exercised its discretion regarding the appropriateness or inappropriateness of a decision if in accordance with its obligation under Article 75 it has so far failed to reach a decision on the proposals in question because of the special features of transport. On the contrary, it must have a wide discretion to reach decisions or to postpone them until the necessary conditions are satisfied according to the current priorities. In that connection the Council contests the Parliament's allegation that its failure to take decisions was motivated by a desire for unanimity, even when a decision would have been possible with a qualified majority. In its view the Parliament overlooks on the one hand the fact that by way of derogation from the procedure provided for in Article 75 (1), paragraph 3 provides that where the application of some of the provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they are to be laid down by the Council acting unanimously. Furthermore, unanimity is required in all cases in which the Council seeks to depart from the Commission's proposals and the Commission has not yet amended its proposals in accordance with the result of the negotiations in the Council. In general, in judging its conduct it must not be overlooked that the Council, according to the provisions of the Treaty, is made up of representatives of the governments of the Member States who in turn are responsible to their parliaments. The Treaty provides that the views of the governments may legitimately be asserted in

the Council. Therefore the Council must take account of differences between the individual Member States and very carefully consider whether objections might hinder or even make impossible implementation of measures for which there is a qualified majority. The Council is the institution in which the various opinions and needs have to be reconciled. It cannot impose such agreement; it may only attempt to work towards it and that cannot be done by means of decisions taken over the heads, as it were, of individual governments. The list of conditions in Article 75 (1) is therefore intended to ensure that the Council, as the legislative institution, gives compulsory effect to Community measures only when the conditions are satisfied under which the Member States can guarantee compliance with the obligations imposed upon them. In the light of that the Parliament's and Commission's reference to the alleged obligations of the Council under Article 5 of the Treaty, which is directed only to the Member States, is misguided. If the Parliament wishes to criticize the results of the work in the transport sector, it must direct that criticism not against the Council but against the governments of the Member States.

In view of those considerations the Council comes to the conclusion that it has not misused its discretion. In the Council's opinion a breach of the Treaty by failure to act can be established by the Court only if the failure to act is not reasonably justified.

2.2. Legal assessment

2.2.1. With regard to the Council's argument it must first be observed that the *wording* of Article 75 (1) alone is sufficiently clear to rebut the Council's contention that Article 75 (1) contains no obligation to act within a specific period but simply a general programme, implementation of which from the point of view of substance and time is solely in the Council's discretion. The provision sets a clear task for the Council when it says that for the purpose of implementing Article 74 and taking into account the distinctive features of transport, acting unanimously until the end of the second stage and by a qualified majority thereafter, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, the Council *shall* lay down the measures listed in paragraphs (a), (b) and (c) (wird der Rat ... aufstellen ... festlegen ... erlassen, le Conseil ... établit, il Consiglio ... stabilisce, stelt de Raad vast, fastsætter Rådet, το Συμβούλιο ... θεσπίζει).

2.2.2. The fact that Article 75 (2) lays down a time-limit, when it says that the provisions referred to in paragraph 1 (a) and (b) *shall* be laid down (werden ... erlassen, sont arrêtées, sono stabilite, worden vastgesteld, fastsættes, θεσπίζονται) during the transitional period shows that the Treaty imposes a well-defined legal obligation to act. The wording of that provision lends no support to the Council's view that it sets no clear timetable but is simply a *pro forma* provision.

That interpretation is also contradicted by the consideration that if it were in the Council's discretion to determine when it should act, regardless of that time-limit, the clear reference to time would lose its *meaning and purpose*. In that connection it is

worth mentioning the judgment of the Court in *Defrenne II*[14] in which the Court expressly confirmed that even resolutions of the Member States or other measures of the institutions were incapable of altering any time-limit fixed by the Treaty. Although the Court in certain cases (for instance *Kind*[15]) ruled that a regulation which belatedly and then only provisionally established a common organization of the market was lawful without censuring the Council's failure to act as required by the Treaty, that does not mean that the Council is permitted to escape the mandatory provisions of the Treaty.

2.2.3. Apart from the specific timetable Article 75 lays down a certain *procedure for reaching decisions* which is also characteristic of the other sectors where the Council has a duty to act. The Commission's right to make proposals, the right of the Economic and Social Committee and the Parliament to be heard and the mode of voting specifically prescribed would be meaningless if the Council were completely free to decide whether and if necessary when and with what majority it would exercise the discretion given to it.

Evidence that Article 75 (1) (a) and (b) imposes a binding obligation on the Council to exercise its discretion within the period specified is provided not least by the fact that the Treaty gives the possibility of adopting appropriate provisions by a qualified majority after the expiry of the second stage. Unanimous decisions are required by Article 75 (3) on the conditions there mentioned only 'by way of derogation' (in Abweichung, par dérogation, in deroga, in afwijking, under hensyntagen, κατά παρέκκλιση) from that principle, that is to say, only exceptionally. However, since the Court has consistently held that exceptions from the rule are to be interpreted strictly, it is for the Council to show in each particular case that those conditions are satisfied.

2.2.4. *Article 76* is also evidence for the view that Article 75 (1) contains actionable obligations. According to Article 76 Member States are under a duty not to make existing national law 'less favourable' to 'carriers of other Member States as compared with carriers who are nationals of that State' *until the provisions referred to in Article 75 (1) have been laid down.* Such a provision has meaning only if it is enforceable through the courts. Provisions are actionable only if they are sufficiently precise. The criterion for the obligation in Article 76 is Article 75 (1). It follows from that that the authors of the Treaty themselves considered Article 75 (1) sufficiently precise for it to form the basis of an action.

2.2.5. In conclusion, therefore, it remains to be observed that in particular the time-limit provided in the Treaty for reaching a decision, the procedure for reaching decisions and the 'standstill' obligation in Article 76 all show that Article 75 does not merely lay down a general programme but imposes on the Council an obligation to exercise the discretion conferred upon it by the end of the transitional period at the latest. That is the date from which it has failed to comply with its obligations.

14 — Judgment of 8 April 1976 in Case 43/75 *Gabrielle Defrenne* v *Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

15 — Judgment of 15 September 1982 in Case 106/81 *Julius Kind KG* v *European Economic Community* [1982] ECR 2885.

The decisions which Article 75 (2) requires the Council to take during the transitional period may be taken by a qualified majority. That applies *a fortiori*, as the Commission in particular rightly points out, when that period has already expired.

Indeed it must be said that the Council is obliged to avail itself of the easing of the procedure for reaching decisions by taking decisions on a qualified majority if it is already out of time in order to terminate the condition of unlawful failure as soon as possible and to establish lawful conditions.

2.2.6. I also agree with the Parliament and the Commission that the scope of the obligation contained in Article 75 (1) (a) and (b) to take action is *sufficiently well-defined* to enable the Court to establish the existence of a breach of the Treaty by failure to act. That applies especially to the obligation contained in Article 75 (1) (b) to lay down 'the conditions under which non-resident carriers may operate transport services within a Member State' during the transitional period in accordance with the procedure provided for therein. It follows from that provision that transport undertakings which are not established in a Member State are to be allowed to operate in that Member State and that the Council must lay down all the requisite conditions for that purpose and to that end it has a discretion only as to the details of the conditions.

The scope of the duty to act under Article 75 (1) (a) is somewhat less specific. According to that the Council is to lay down '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'. Although that provision is less specific than the obligation under (b), it nevertheless does not give the Council unlimited discretion with regard to the introduction of the prescribed common rules.

2.2.6.1. I agree with the Parliament and Commission that the minimum scope of that obligation may be inferred with sufficient precision from the *Treaty*. As with the Council's general obligation to adopt a common transport policy, the minimum scope must be defined in the light of the general objectives of the Treaty. The Court has already expressly confirmed that in *Commission* v *French Republic* (Case 167/73 [4]). It held *inter alia* that when Article 74, for the implementation of which the Council has to take the measures referred to in Article 75, refers to the objectives of the Treaty, it means the provisions of Articles 2 and 3, the attainment of which the fundamental provisions applicable to the whole complex of economic activities seek to ensure. The Court stressed that 'far from involving a departure from these fundamental rules, the object of the rules relating to the common transport policy is to implement and complement them by means of common action'. Consequently the general rules must be applied in so far as they can achieve those objectives. From that it follows that the general transport policy involves more than mere freedom to provide services.

4 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

Accordingly the Court held in *Trinon* [13] that application of Articles 74 and 75 was 'designed to liberalize trade and to establish a competitive economy within the Community'. It further held that the preamble to the Treaty and the fundamental principle of a common transport policy required that the Community guarantee balanced trade and fair competition, and to achieve those aims the Council might impose duties and restrictions on transport undertakings in the Community.

As I have shown, the adoption of a common transport policy must be accompanied by freedom to provide services. Article 61 refers to *freedom* to provide services. It cannot be the meaning and purpose thereof to exclude transport, alone of the economic sectors, from the principle of freedom to provide services. The grounds for that provision are, as the Court held in *Commission* v *French Republic* (Case 167/73 [4]) that 'since transport is basically a service, it has been found necessary to provide a special system for it, taking into account the special aspects of this branch of activity'. Accordingly freedom to provide services must be applied in the areas covered by Article 75 (1) (a) and (b). It is, as the Court held in *Schumalla,* [11] an essential element of the common transport policy.

2.2.6.2. Finally the Council itself defined the scope of the duty to act imposed by Article 75 (1) in Decision No 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (Official Journal, English Special Edition 1965-1966, p. 67), which was based on Articles 75 and 99 of the EEC Treaty and was addressed to the Member States. In the preamble to that decision, which pursuant to the fourth paragraph of Article 189 is binding on the Member States, it is stated:

'... one of the objectives of the common transport policy must be to eliminate disparities liable to cause substantial distortion in competition in the transport sector; ... it is accordingly necessary to take measures to harmonize or approximate certain laws, regulations and administrative provisions relating specifically to transport; ... such measures must deal at Community level with relations between the different modes of transport and also, depending on the case, with relations within each mode of transport between the transport undertakings of the several Member States.'

For that reason the decision requires the Member States within the time-limits referred to therein, all of which fall within the transitional period, to adopt the following measures:

— as regards taxation: to eliminate double taxation of motor vehicles; to standardize rules on the duty-free admission of fuel in the tanks of vehicles; to standardize the basis on which vehicle tax is calculated; to align the separate taxation systems for carriage of goods on own account and for carriage for hire or reward; and to make the provision of transport services subject to a future common system of turnover tax;

4 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

11 — Judgment of 28 November 1978 in Case 97/78 *Fritz Schumalla* [1978] ECR 2311.

13 — Judgment of 30 November 1982 in Case 12/82 *Ministère Public* v *Joseph Trinon* [1982] ECR 4089.

— as regards State intervention in transport: to reduce public service obligations to a minimum; to provide fair compensation for financial burdens resulting from those obligations which are maintained and from those involving reductions in rates on social grounds; to normalize the accounts of railway undertakings; to make such undertakings financially autonomous; and to lay down rules governing aids for transport, taking account of the distinctive features of that sector;

— as regards social legislation: to approximate provisions relating specifically to working conditions in transport so as to improve such provisions; to standardize manning provisions; to harmonize provisions concerning working and rest periods and overtime arrangements; and to introduce a record book by means of which it will be possible to check on an individual basis compliance with provisions concerning working periods.

Article 14 of the decision further provides that the *Council* should adopt the measures required to give effect to the decision (with the exception of the provisions therein mentioned) on the basis of Articles 75 *and 99* of the Treaty not later than six months and one year respectively before the date when they are to enter into force. All the time-limits fell within the transitional period.

The fact that the time-limits referred to in that decision have long since expired does not mean that they have ceased to be binding; on the contrary, it means that the Council has failed to fulfil its obligations in due time.

Moreover, since the Council itself defined in that decision its duties to act under Article 75 (1) (a) it cannot object that the definition is uncertain or encroaches upon its area of discretion.

2.2.6.3. If I understand the position correctly the Council does not seriously deny that certain measures, in particular measures for technical harmonization, the creation of a uniform price and capacity policy, observation of the market and the establishment of a transport infrastructure, which are several times referred to in the memoranda and communications of the Commission and the resolutions of the Parliament and were described in the proposals of the Commission referred to in the Parliament's letter of 21 September 1982, are to be regarded as necessary components of the transport policy to be drawn up under Article 75 (1).

2.3. Thus the further interim conclusion may be drawn that both as regards time-limits and substance the duty to act under Article 75 (1) (a) and (b) is defined with sufficient clarity. Accordingly, after the expiry of the transitional period the Council no longer has any discretion as to whether it should take action at all in the said areas. It has a discretion solely with regard to the content of the individual rules. If the Council has taken no decisions in those areas to which the Commission's proposals based on Article 75 (1) (a) and (b) relate, therefore, it has not fulfilled its duty to act and to that extent is in breach of the Treaty by failing to act especially where the Commission's proposals were put forward only after expiry of the transitional period the Council's failure to act on them amounts to a breach of the Treaty for, as I said, the Council's duty to reach a decision in the said areas is a continuous one.

3. *Is the defendant's failure to act justified by special reasons?*

In conclusion, therefore, there remains only the question whether the Council's continuing duty to act is subject to the fact that it is required to lay down the rules referred to in (a) and (b) 'taking into account the distinctive features of transport', or whether other relevant factors constitute an effective defence to the allegation of breach of the Treaty by failure to act.

3.1. The Council attributes its failure to adopt the requisite legal measures to *objective difficulties* arising in particular from the divergence of the existing national systems of transport policy, the interdependence of the various individual transport sectors and the effects of a common transport policy on other political and economic objectives. It takes the view that on the basis of the criterion of 'taking into account the distinctive features of transport' its general responsibility makes the exercise of its discretion subject to consideration of those difficulties.

None of the parties denies, however, that the Council must take into account the distinctive features of transport in exercising its discretion and that that fact indicates *that the discretion must be unusually wide.* In the present case, however, the question is whether that discretion is so wide that it can justify not acting even after the expiry of the transitional period when the Commission has put forward specific proposals based on Article 75 (1) (a) and (b).

3.1.1. Against such an interpretation, which seeks to read into that condition a kind of *protective clause,* there is the fact, as the Parliament rightly points out, that the system of the EEC Treaty, apart from the protective measures expressly allowed, knows no protective clauses which could justify a failure to fulfil the obligations of the Treaty. Should economic sectors experience difficulties or risk being adversely affected by Community law, the Treaty provides for special or general protective measures of a different sort. Thus for example Article 75 (3) provides that in such a case, by way of derogation from the general rules, a unanimous decision of the Council may be adopted. Furthermore, pursuant to Article 226, the Member States were permitted during the transitional period to take protective measures by way of derogation from the rules of the Treaty. A similar procedure was possible under Article 135 of the Act of Accession of 1972 and Article 130 of the Act of Accession of Greece. In the event that serious difficulties or obstacles to the adoption of a common transport policy were foreseen as a result of the accession of the new Member States it was intended to provide for suitable amendments in the Acts of Accession or to make transitional rules. Since that did not occur the Council's duty to comply with the existing rules of the Treaty remains undiminished, as indicated by Article 2 of the Act Concerning the Conditions of Accession and the adjustments to the Treaties of 1972 (Official Journal, English Special Edition L 73 of 27 March 1972) and 1979 (Official Journal L 252 of 15 November 1979).

3.1.2. The Council's argument that the special features of transport may justify failure to take action is, as the Commission points out, further disproved by the corresponding provisions relating to the adoption of a common agricultural policy. Article 39 (1) of the EEC Treaty contains a

list of the objectives of that policy. Since those objectives are in competition with one another, the Court has consistently held that the Council's obligation to create common organizations of the market for all agricultural products entails a wide legislative discretion.

Like Article 75, Article 39 (2) provides that in working out the common agricultural policy and the special methods for its application, account is to be taken *inter alia* of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. In spite of that provision, it is generally recognized that there was an obligation to create common organizations of the market during the transitional period, that is, within a specific period. The existence of such an obligation is assumed, moreover, in the judgments of the Court in relation to the agricultural sector, and especially in relation to the common fishing policy, concerning the effects of the Council's failure in infringement of the Treaty to act (see Case 231/78 *Commission* v *United Kingdom*, [16] Case 232/78 *Commission* v *France*, [17] Case 804/79 *Commission* v *United Kingdom* [18] and *Tymen* [19]). Those cases show that the Council's failure to act in accordance with its duties places an obligation on the Member States to cooperate. That duty to cooperate presupposes that during the transitional period or the period provided for in Article 102 of the Act of Accession the Council should have taken action and has not done so, in breach of its *duty*.

3.1.3. The Council's reference to certain doctrines of French and Italian administrative law to the effect that an authority which has to comply with an obligation in certain terms is not guilty of unlawful failure to take action if there are specific technical or political circumstances preventing fulfilment of its obligation, is not convincing in this connection. As the Parliament, and even more so the Commission, rightly say, the present case is concerned not with adminstrative law but constitutional law. The Parliament is bringing an action against the Council, another institution, for a declaration that the Council has breached the Treaty by failing to act. Accordingly analogies may be sought at most in legal systems of the Member States in which, as for example in the Federal Republic of Germany or Italy, there is a constitutional court to decide such cases. However, the Council has not denied that neither the German nor the Italian constitutional courts have recognized that a constitutional body may successfully rely on such difficulties to justify failure

16 — Judgment of 29 March 1979 in Case 231/78 *Commission* v *United Kingdom of Great Britain and Northern Ireland* [1979] ECR 1447.

17 — Judgment of 25 September 1979 in Case 232/78 *Commission* v *French Republic* [1979] ECR 2729.

18 — Judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom of Great Britain and Northern Ireland* [1981] ECR 1045.

19 — Judgment of 16 December 1981 in Case 269/80 *Regina* v *Robert Tymen* [1981] ECR 3079.

to act in fulfilment of a clearly-defined constitutional duty.

The Council's view that in spite of a duty to act within a particular period it does not have to act within that period if 'as a result of difficulties which occur and the existence of which it can prove it does not reach a decision', amounts to a tacit amendment of the Treaty effected by the Council's failure to act. The Council has no such power. The Council takes the view that the well-known difficulties which exist in the sphere of transport policy release it from its duty to observe the time-limit. I think there is more to be said for the view that it was those difficulties, which were well-known to the authors of the Treaty, which caused them to insert the time-limits in order to prevent any postponement of the necessary decisions *sine die*.

3.2. If the Court were to accept the argument of 'insuperable difficulties' it would, as the Parliament and Commission rightly say, be adopting double standards for the Member States and the Community. The Court has stressed in a long line of cases that when the Member States have a clearly-defined obligation to act under Community law they cannot rely on political or economic difficulties to justify their failure to act in accordance with the Treaty. The position can be no different for the Council where an unambiguous and clearly-defined duty to act has been placed upon it by Community law.

3.2.1. From the case-law of the Court on the Member States' failure to act in accordance with the Treaty it is clear that the structural problem in reaching a decision cited by the Council does not release it from the responsibility for fulfilling its obligations under the Treaty. In that respect the Council is not to be regarded as the forum of the governments; it does not have to *wait* until it is certain that a decision will be implemented by the Member States.

Its task is, on the contrary, to *act* to ensure harmonization of the economic policy of the Member States. For that purpose it has a power of decision (Article 145). It is a Community institution (Article 4 (1)), but consists of representatives of the Member States (Article 2 of the Merger Treaty). From the legal point of view, members of the Council must reconcile the fact that they are members of a Community institution with the fact that they represent their Member State of origin. I do not, however, consider it permissible to achieve such reconciliation by regarding the Council either as solely a Community institution or as solely a 'forum of the governments of the Member States', which already, because of the Commission's powers of participation in the Council, is incorrect. In any event, the Council has not fulfilled its duty as a Community institution to implement Article 75 (1) (a) and (b).

The Council's argument seems to amount to saying that because of the different interests of their countries of origin the 'representatives of the Member States' are not in a position to fulfil their Community function.

Article 5, however, requires the Member States, and thus their institutions and governments, to act in the interests of the Community. The members of the Council are thus as 'representatives of the Member States' bound to act in the interests of the Community. In that connection the Court

stated in Case 22/70 *Commission* v *Council*[20] that in creating the common transport policy the Member States had to work together in the interests of the Community (there in the context of external relations). That principle applies *a fortiori* in relations within the Community.

It is also inconsistent for the Council to claim that the action constitutes interference in its political and in particular legislative competence as a *Community institution* whilst refusing to accept responsibility for the failure to fulfil its obligations under the Treaty in relation to transport policy by invoking the political and economic difficulties of the *Member States.*

Moreover, in Case 166/78[21] *Italian Republic* v *Council* the Court clearly distinguished between the rights and duties of the Member States and those of the Council as a Community institution. It expressly recognized the right of a Member State pursuant to the first paragraph of Article 173 to claim that a Council regulation should be declared void even though the Member State concerned had approved the regulation in question in the Council. Just as the rights of the Member States do not depend on the attitude which the Council as a whole has adopted as a Community institution, so the Council cannot rely on the circumstances of the Member States to justify or excuse its failure to fulfil its obligations as a Community institution.

20 — Judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263.

21 — Judgment of 12 July 1979 in Case 166/78 *Government of the Italian Republic* v *Council* [1979] ECR 2575.

3.2.2. Article 75 (1), according to which the Council is required to adopt the measures to which it refers, differs fundamentally from the provisions of the Treaty concerned with a common economic and monetary policy. The latter are mainly addressed to the Member States, which must coordinate their economic policy. In contrast to the transport sector, the Council as a Community institution has only a very limited power of decision in that sphere. As the Parliament rightly claims, it is not possible to apply conclusions based on the adoption of a common economic and monetary policy to the adoption of a common transport policy.

3.2.3. Where the Council as a Community institution has failed to fulfil its obligations under the Treaty, it is irrelevant for the purposes of establishing a failure to act in infringement of the Treaty pursuant to Article 175 whether or not there were the requisite *majorities for a decision*, which the parties dispute. The sole criterion is whether the Council acted, and it is common ground that it did not. Just as the Member States are unable in proceedings under Article 169 for infringement of the Treaty to rely on internal difficulties in reaching a decision, so also in proceedings under Article 175 for a simple declaration of a failure to act in infringement of the Treaty the Council cannot rely on internal difficulties in reaching a decision to justify or excuse its failure to fulfil binding obligations under the Treaty.

3.3. In conclusion it is necessary to deal with the question raised by the *Netherlands Government*, which has intervened in the action in support of the Council, whether the direct application of the provisions of the Treaty on freedom to provide services in the transport sector has not released the

Council from the necessity of adopting a number of measures mentioned in the application.

3.3.1. Observations of the parties

The Netherlands Government's principal argument is that since the Council has not laid down common rules pursuant to Articles 61 and 75 (1) (a) and (b) to establish freedom to provide services in the transport sector, the provisions of Article 59 *et seq.* on freedom to provide services became directly applicable in the transport sector on the expiry of the transitional period. It contends that according to the case-law of the Court on the direct application of the provisions of the Treaty the need for extensive implementing provisions does not exclude the direct application of the Treaty provisions where common rules have not been laid down during the transitional period. As an argument of legal policy in support of that interpretation it adds that any other interpretation of that provision would not be in the interests of a harmonious further development of the common market and that reference to the special aspects of transport does not mean that as a result of the absence of a common transport policy goods transport cannot be completely liberalized. If that interpretation were accepted the Council would to that extent be exculpated for its failure to adopt decisions in due time.

In the *Commission*'s view the provisions on freedom to provide services are *not yet* to be regarded as directly applicable after the expiry of the transitional period. It cites Article 61 (1), which states, without restriction of time, that freedom to provide services in the field of transport is to be governed by the provisions of the title relating to transport, and the fact that Article 75 (1) (a) and (b) gives the Council a broad discretion limited only by the objectives of the Treaty. In its view, however, the possibility in the event of the Council's continued refusal to fulfil its obligation to act, so that the Court might fill the resulting lacuna by declaring that the provisions on freedom to provide services are directly applicable to the transport sector, cannot be excluded.

3.3.2. Legal assessment

In my view the question whether the provisions on freedom to provide services became directly applicable in the transport sector on the expiry of the transitional period, or perhaps after an appropriate period, need not be answered in the present case. Direct application of the provisions on freedom to provide services, if that were the case, would, according to the established case-law of the Court, at most mean that *individuals* could rely on them before the Court. In Case 102/79 [22] (*Commission* v *Belgium*) the Court held in relation to the direct application of directives that the minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of directives under the third paragraph of Article 189 does not entitle *any* Member State to abstain from taking in due time the implementing measures necessary to meet the purpose of each directive. The position can be no different where the Council as a Community institution, contrary to its binding obligation under the Treaty, has failed to act. Here, too, the minimum

22 — Judgment of 6 May 1980 in Case 102/79 *Commission* v *Kingdom of Belgium* [1980] ECR 1473.

guarantee afforded to those engaged in the economic sector that they may avail themselves if necessary of the provisions on freedom to provide services before national courts does not release the Council from its Treaty obligations under Article 75 (1) (a) and (b) which, as I have shown, are sufficiently specific.

4. *The complaint that in breach of the Treaty the Council has failed to adopt provisions for a common transport policy in the areas referred to in the proposals of the Commission, in detail*

4.1. Since according to what I have said so far it is to be assumed that the Council's breach of the Treaty by failure to act can be established with sufficient certainty only in respect of the obligations contained in Article 75 (1) (a) and (b), all other complaints of failure to act which are not based on those provisions are, in my view, to be rejected as unfounded. The Commission's proposals, referred to as Nos 13 and 14 in the claim, for a Council regulation on a system for observing the markets for the carriage of goods by rail, road and inland waterway between the Member States [23] and for a Council regulation on support for projects of Community interest in transport infrastructure [24] are, according to the Commission's own admissions, exclusively based on Article 75 (1) (c). Accordingly, it cannot in those cases be established with sufficient certainty that the Council has *in breach of the Treaty* failed to adopt provisions for those areas.

The proposal referred to as No 15, for a Council decision on the collection of information concerning the activities of road hauliers participating in the carriage of goods to and from certain non-member countries, [25] is likewise based not on Article 75 (1) (a) and (b) but on Article 213. On being questioned by the Court the Council expressly stated at the hearing that it had rejected that proposal. The Commission stated that until now it had assumed that the proposal was still pending before the Council, but it accepted the Council's statement. The Parliament stated that it was prepared 'to note' the Council's rejection of the proposal. The question is whether that statement is to be interpreted as meaning that the action no longer relates to the Council's failure to act in respect of that proposal. In my opinion that question is to be answered in the negative, because both a withdrawal of the action and a statement that the claim has lost its purpose can be made only by a clear statement to that effect in the proceedings. Accordingly, it must be assumed that the action still covers that proposal with the further consequence that it must for that reason be rejected as unfounded.

4.2. The remaining eleven proposals in the transport sector, which relate to social harmonization, tax harmonization, technical harmonization, harmonization of state intervention and common policy in relation to capacity, are all at least equally based on Article 75 (1) (a). Three proposals were submitted during the transitional period.

4.2.1. The oldest proposal, which in its original version was submitted as early as 7 September 1962, is referred to as No 4 and is based on Article 75 (1) (a) and (c). It is a

23 — Official Journal C 1, 5. 1. 1976, p. 44.

24 — Official Journal C 207, 2. 9. 1976, p. 9.

25 — Official Journal C 36, 12. 2. 1982, p. 8.

proposal for a directive on the weights and measures of commercial vehicles and supplementary provisions on their construction and working [26] (last amended on 21 June 1971). The proposal referred to as No 12, for a Council regulation on access to the market in inland navigation [27] (last amended on 28 April 1969), based on Article 75 (1) (a), (b) and (c), has been with the Council since 29 November 1967. On 17 July 1968, still within the transitional period provided for in the Treaty, the proposal referred to as No 2, for a first Council directive on the harmonization of national systems of taxation for commercial vehicles, [28] was submitted to the Council. The fact that that proposal, which was based on Article 75 (1) (a) and (c) and Article 99, could be adopted only unanimously does not, as I have shown, justify the Council's failure to act, for it expressly recognized its obligation to adopt appropriate provisions during the transitional period in the decision of 13 May 1965.

4.2.2. The remaining eight proposals referred to in the application were submitted to the Council only after the expiry of the transitional period. They include proposals which were made for the first time in a particular sector of transport policy and proposals intended to amend and supplement existing measures.

4.2.2.1. Proposal No 1, for a Council regulation on the harmonization of certain social provisions relating to goods transport by inland waterway, [29] based on Article 75 (1) (a) and (c), has been with the Council since 17 September 1975. The Council recognized in its decision of 1965 that it had an obligation to take action in that area. Proposal No 7, which is based exclusively on Article 75 (1) (a), for a regulation on the adjustment of capacity for the carriage of goods by road for hire or reward between Member States, [30] has been with the Council since 5 October 1978. Proposal No 8, also based on Article 75 (1) (a), for a directive on road transport between Member States, [31] was submitted to the Council for a decision on 1 February 1979.

4.2.2.2. The remaining five proposals seek to amend or supplement existing measures. The proposals referred to as Nos 5 and 6 seek to harmonize State intervention and are based on Article 75 (1) (a) and (c) and Article 94. They are proposals for a Council regulation to supplement Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, [32] which were submitted to the Council on 18 December 1972, and

26 — Doc. COM(62) p. 244, latest proposal for an amendment of 21 June 1971, Official Journal C 90, 11. 9. 1971, p. 25.

27 — Official Journal C 95, 21. 9. 1968, p. 41.

28 — Official Journal C 95, 21. 9. 1968, p. 41.

29 — Official Journal C 259, 12. 11. 1975, p. 2, as last amended on 17 July 1979, Official Journal C 206, 16. 8. 1979, p. 3.

30 — Official Journal C 247, 18. 10. 1978, p. 6.

31 — Official Journal C 41, 14. 2. 1979, p. 10, as last amended on 26 May 1983, Official Journal C 155, p. 83.

32 — Doc. COM(72) 1516 of 7 December 1972 and Official Journal C 268, 20. 10. 1981, p. 11.

a proposal for a Council regulation amending Regulation (EEC) No 1192/69 on common rules for the normalization of the accounts of railway undertakings, [33] which was submitted to the Council on 7 December 1977. The proposals referred to as Nos 9 to 11 are based solely on Article 75 (1) (a) and concern further measures to liberalize the carriage of goods between the Member States. The proposal for an amendment to the first Council directive on the establishment of common rules for certain types of carriage of goods by road between Member States and to Directive No 65/629/EEC [34] has been with the Council since 18 September 1980. The proposals for an amendment of Council Directive No 65/269/EEC of 23 July 1962 on the standardization of certain rules relating to authorization for the carriage of goods by road between Member States [35] and for an amendment of Council Regulation (EEC) No 3164/76 of 16 December 1976 on the Community quota for the carriage of goods by road between Member States [36] were both submitted to the Council for a decision on 15 December 1980.

Since the last group of proposals seeks essentially to amend existing provisions, the Council cannot be reproached for failure to act, for, as is apparent from the description of the proposals, it has already adopted measures. The question is only whether it was obliged to go further. That question must be answered in the affirmative. The obligation under Article 75 (1) (a) to lay down common rules continues, as I have shown, after the expiry of the period provided for in Article 75 (2). It follows that rules adopted by the Council have, if necessary, to be adjusted to the requirements of a common transport policy. Accordingly, the Council was required to *reach a decision* within an appropriate period on the Commission's proposals to amend or supplement the existing rules. It could have accepted, rejected or, pursuant to Article 149, unanimously amended them. In no way can the Council escape its obligation under the Treaty to act by not exercising its discretion and simply abstaining from reaching a decision on the proposals submitted by the Commission.

In that connection it might be asked whether a finding that in breach of the Treaty the Council has failed to act is not precluded by the subsequent submission in 1980 of proposals for amendments. I agree, however, with the Parliament and the Commission that the Council is none the less guilty of failure to act.

In that respect account must be taken of the fact that the proposals break no new ground but are simply concerned with an adjustment or extension of law which has existed for several years. The Council has not denied that it was aware of the difficulties which had arisen in connection with the application of that law. There is no indication that the Commission waited unduly long before submitting the proposals for amendment. If the Council had taken a different view, it could in fact have requested the Commission in due time pursuant to Article 152

33 — Official Journal C 307, 21. 12. 1977, p. 5.
34 — Official Journal C 253, 1. 10. 1980, p. 6.
35 — Official Journal C 350, 31. 12. 1980, p. 19.
36 — Official Journal C 350, 31. 12. 1980, p. 18.

'to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals'.

Thus the period which has elapsed since those proposals were made must be regarded as a sufficient and proper time for the Council to have reached a decision on the Commission's proposals for amendments to liberalize the carriage of goods by road based on Article 75 (1) (a).

IV. Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been claimed. Article 69 (3) of the Rules of Procedure provides that where each party succeeds on some and fails on other heads, as is the case here, the Court may order that the parties bear their own costs in whole or in part. Accordingly, each party should bear its own costs.

V. I also considered whether it was expedient or useful to extend the oral procedure to deal more fully with certain questions or to obtain an expert's opinion, as the Council requested. The written procedure and the oral procedure so far provide, however, in my opinion, a sufficient basis for a decision.

C. In conclusion I propose that the Court should:

I. Declare the action admissible.

II. Declare:

1. That in breach of the Treaty the Council has failed to adopt a common transport policy in so far as it has failed to lay down the provisions required by Article 75 (1) (a) and (b):

(a) to harmonize certain social provisions relating to the transport of goods by inland waterway;

(b) to harmonize national systems of taxation for commercial vehicles;

(c) in relation to weights and measures of commercial vehicles and supplementary provisions on their construction and working;

(d) in relation to the carriage of goods by road between Member States; and

(e) in relation to access to the market in inland navigation.

2. That in breach of the Treaty the Council has failed to reach a decision on the following proposals of the Commission for amendment and supplement based on Article 75 (1) (a):

   (a) Proposals to supplement and amend Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (Doc. COM/72/1516 of 7 December 1972 and Official Journal C 268 of 20 October 1981, p. 11);

   (b) Proposal for a Council regulation amending Regulation (EEC) No 1192/69 on common rules for the normalization of the accounts of railway undertakings (Official Journal C 307 of 21 December 1977, p. 5);

   (c) Proposal for a Council directive amending the first Council directive on the establishment of common rules for certain types of carriage of goods by road between Member States, and Council Directive No 65/629/EEC (Official Journal C 253 of 1 October 1980, p. 6);

   (d) Proposal for a Council directive amending Directive No 65/269/EEC on the standardization of certain rules relating to authorization for the carriage of goods by road between Member States (Official Journal C 350 of 31 December 1980, p. 19);

   (e) Proposal for a Council regulation amending Regulation (EEC) No 3164/76 of 16 December 1976 on the Community quota for the carriage of goods by road between Member States (Official Journal C 350 of 31 December 1980, p. 18).

III. Dismiss the remainder of the application.

IV. Order the parties to bear their own costs.