

case may be taken as an example of the growth of Community rules which regulate while achieving gradual integration, rather than leaving such matters to national rules. So, although *Meyhui* represents a noticeably less rigorous application of the proportionality principle than has been the norm in reviewing national laws, perhaps a milder approach to the review of Community rules against the standards of Article 30 can be supported in order to allow the Community legislature a discretion in its evolving harmonisation programme that is more flexible than that conceded to national authorities.

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II. TRANSPORT

THE arrival of Neil Kinnock, in January 1995, as the new Commissioner in charge of the transport portfolio, has led to particular emphasis on three objectives: improvement of the quality of the European transport system; integration of the transport policy into the single market; and negotiations with non-Community countries.¹ During the last 18 months, the main legal developments continue to be concerned primarily with infrastructure, safety, negotiations with non-Community countries and improving the competitiveness of the industry by adopting liberalising measures and enforcing the EC competition rules.

A. *Trans-European Networks (TENs)*

Following the recommendations of a special group set up to report on the progress towards the creation of TENs, the Council adopted a common position on a regulation laying down general rules for the granting of Community financial aid to TENs in June 1995.² In addition, agreement on a Council decision³ setting out Community guidelines for the development of trans-European *transport* networks has almost been reached. The guidelines are aimed at *all* transport infrastructures, thus replacing the former separate guidelines for roads, inland waterways, the TGV and combined transport. The master plan for TENs is based on a combination of all modes of transport, unlike the earlier guidelines which were based on single modes of transport.

B. *Safety Measures*

A number of measures have been adopted in all sectors. As far as road safety is concerned a Council directive has been adopted on the approximation of laws concerned with the international and national transportation of dangerous goods by road.⁴ The Council is also considering another directive which seeks to harmon-

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1. COM(95)302. In June 1995 the Commission adopted a communication setting out an action programme for transport policy from 1995 to the year 2000.

2. (1994) O.J. C89/8.

3. Amended proposal COM(95)298 Final.

4. Council Directive 94/55 (1994) O.J. L319/7. A similar proposal for carriage by rail is under consideration.

ise national procedures for carrying out checks on the transport of dangerous goods by road.⁵

In the maritime sector directives on the minimum standard of training for seafarers,⁶ on establishing common rules and quality standards for ship inspections and classification societies⁷ and a regulation on the implementation of IMO (International Maritime Organisation) rules on the application of tonnage measurement of ballast spaces in the more environmentally friendly segregated ballast oil tankers (SBTs)⁸ were all adopted at the end of 1994.

The Port State Control Directive has finally been adopted.⁹ The Directive is aimed at ships stopping in Community ports and navigating in member States' waters and imposes strict respect for international norms relating to maritime safety, pollution prevention and living and working conditions aboard.

A common position has been reached on a draft regulation on the managing of the safety of roll-on roll-off ("RO-RO") ferries.¹⁰ All shipowners operating in the Community will be obliged to respect and apply to ferries the IMO Code on International Safety Management (ISM).

In July 1995 the Commission proposed a Council directive harmonising the testing and certification of maritime equipment¹¹ with the objective of reducing the risk of accidents and environmental pollution. In addition, a new draft for a directive implementing the SOLAS (Safety of Life at Sea) Convention of 1974 is expected in autumn 1995. The measure will make compliance with the rules of the Convention compulsory for all vessels sailing in Community waters. A directive has been proposed for the harmonisation of Community statistics on carriage of goods and passengers by sea.¹²

In the air transport sector a directive has been adopted¹³ establishing fundamental principles governing the investigation of civil aviation accidents and incidents. The measure provides for investigations to be carried out according to international norms under the control of the State where the accident occurred. However, if that State fails to initiate such an investigation the State of the aircraft's registration may do so.

C. Negotiations with Non-Community Countries

The main area of controversy concerns the "open sky" bilateral agreements entered into by six member States¹⁴ with the United States. The Commission, although no longer claiming exclusive competence, sought to persuade the Coun-

5. (1994) O.J. C238/4 (amended proposal). See further COM(95)289 Final.

6. Council Directive 94/58 (1994) O.J. L319/28.

7. Council Directive 94/57 (1994) O.J. L319/20.

8. Council Reg.2978/94 (1994) O.J. L319/1.

9. Council Directive 95/21 (1995) O.J. L157/1.

10. *Agence Europe* No.6505, Wednesday 21 June 1995. See further COM(95)286 Final.

11. *Agence Europe* No.6511, Thursday 29 June 1995. Maritime equipment includes all fixed equipment and facilities on board vessels, from radar to navigation instruments.

12. COM(94)275 Final, (1994) O.J. C214/12. Member States will be obliged from July 1997 onwards to keep statistics of all ships calling at Community ports.

13. Council Directive 94/56 (1994) O.J. L319/14.

14. In spring 1995 letters were sent by the Commission to Belgium, Denmark, Luxembourg, Austria, Sweden and Finland with a view to initiating Art.169 proceedings.

cil that it would be more fruitful for the Community to negotiate with the United States *en bloc* rather than for each member State to negotiate and sign a separate bilateral agreement.

In June 1995 the Council agreed to examine the approach to negotiations recommended by the Commission. The Commission had presented the Council with a draft mandate to negotiate with the United States. They proposed that member States should relinquish all negotiating rights on civil aviation matters to Brussels. The Council asked the Commission to present a report by the end of 1995 defining "common interest" and explaining why and to what extent the Community's approach would be economically more advantageous than the "open sky" bilateral agreements negotiated by the six member States. The report must describe point by point what a Community agreement could offer the member States compared with the text that the member States have negotiated bilaterally.

In March 1995 mandates were agreed for the Commission to negotiate with six associate countries in Central and Eastern Europe¹⁵ and with Switzerland.¹⁶ The mandates are based on the Third Civil Aviation Package (excluding cabotage).¹⁷

The negotiations with Switzerland also concern road transport. The mandate for negotiation excludes cabotage but provides for the gradual adoption of Community standards on weight and dimensions of lorries and tax provisions in force in the Community. Switzerland will also adopt equivalent legislation on access to the profession of road transport haulier (for goods and passengers) and on the technical, social and tax conditions governing road transport. With regard to transit through Switzerland the current agreement will continue, but more transport operators will be exempted from the 28-tonne lorry limitation and the prohibition of night traffic.

As far as maritime transport is concerned, in March 1995 the Commission was requested to submit to the Council a communication on external relations in the maritime sector which would define general guidelines on the steps to be given priority in the relations between the Community and third countries and on action to be taken within international bodies.

D. Road Transport

Following the "Wisemen's" report on road transport,¹⁸ the Council adopted a Resolution¹⁹ on freight transport by road. The Commission was requested to carry out a comparative study of market conditions and regulations in the different member States and to examine ways to improve co-operation between governments, particularly to prevent breaches of social provisions. The Commission has also been asked to produce a report on national provisions dealing with the training of driv-

15. Bulgaria, the Czech Republic, Slovakia, Poland, Hungary and Romania.

16. The negotiations with Switzerland had been delayed because of a Swiss/UK "open sky" agreement having been initialled.

17. The third package consisted of a number of liberalising legislative measures adopted in 1992, following earlier enactments in 1987 and 1990.

18. "The Transport of Goods by Road in the Heart of the Single European Market", July 1994. It was recommended that the Commission should adopt measures to ensure road transport develops in a competitive framework without barriers or distortions. It is necessary to have identical conditions of access to the profession in a single market.

19. (1994) O.J. C309/4.

ers of heavy vehicles and to present proposals concerning hire purchase and the hire of utility vehicles.

The European Court of Justice has annulled two liberalising measures²⁰—Council Regulation 2454/92²¹ (laying down conditions under which non-resident carriers may operate national road passenger transport services within a member State) and Council Directive 93/89²² (providing for a common tax system for lorries using Community roads)—on the ground that the Council had not adequately complied with the obligation to consult the European Parliament. In both cases the Court ruled that the measures should remain effective until the Council, after consulting the European Parliament, adopted new legislation on the matter.

E. Rail Transport (Including Combined Transport)

As regards access to the market, in July 1995 the Commission proposed an amendment to Council Directive 91/440. This Directive has initiated the liberalisation of rail transport by granting *groupings of freight transporters full rights of access to rail infrastructures in other member States by 1998*.²³ The amendment would extend this right of access to *individual operators* and extend the scope of the Directive to domestic and international *freight* transport and international *passenger* transport. The liberalisation of international passenger services will not, however, affect transport within the member States since these services are generally provided at a purely national, regional or local level.

In June 1995 the Council reached common positions on the following proposals. Two of them—the draft directives on the licensing of railways undertakings²⁴ and the allocation of infrastructure capacity and the charging of infrastructure fees²⁵—pursue the objectives of an earlier directive.²⁶ Another draft directive relates to the regulation of the technical interoperability (TIS) of the trans-European high-speed railways system.²⁷ The purpose of this latter measure is to determine the technical specifications for both railway lines and rolling stock so that high-speed trains may travel without fear of obstacles on the future trans-European high-speed network.

As regards the application of the EC competition rules to the railway sector, the opening of the Channel Tunnel has created a number of problems, since a single transport facility creates a degree of monopoly or exclusivity. Operation of the tunnel has called for the creation of special entities enjoying special facilities. The Commission, in accordance with Article 85(3) of the EC Treaty and Article 5 of Regulation 1017/68,²⁸ has granted a number of exemptions from the competition

20. Case C-388/92 *European Parliament v. Council* [1994] E.C.R. I-6, 2067; Case C-21/94 *European Parliament v. Council* judgment delivered 5 July 1995, summarised (1995) O.J. C229/8.

21. (1992) O.J. L251/1.

22. (1993) O.J. L279/32.

23. (1991) O.J. L237/25 on the development of the Community's railways.

24. (1994) O.J. C24/2.

25. (1994) O.J. C24/6.

26. Council Directive 91/440; see *supra* n.23.

27. (1994) O.J. C134/6, amended proposal COM(95)271 Final.

28. (1968) O.J. L175/1 (on the application of the competition rules to transport). In 1995 a judgment of the Court of First Instance invalidated a 1992 Commission decision fining the International Union of Railways for infringement of the competition rules. The CFI ruled

rules, subject, however, to a number of conditions. The Commission renewed, for 30 years, the exemption granted in 1987 to the agreement between the Channel Tunnel Group Ltd and France Manche on the one hand and British Rail and Société Nationale des Chemins de Fer Français on the other.²⁹ A ten-year exemption was also granted to a joint venture created by several railway companies to provide and operate overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel.³⁰

Similarly, the Commission exempted the combined transport agreement between British Rail, Société Nationale des Chemins de Fer Français and Intercontainer, creating a joint subsidiary called Allied Continental Intermodal Service (ACI).³¹ The purpose of ACI is to provide combined transport operations through the Channel Tunnel.

Fines have been imposed for the first time on railway undertakings for breaches of the competition rules. The Commission fined Deutsche Bahn 11 million ECUs³² for abuse of a dominant position on the ground transport market for rail transport maritime containers (combined transport). Another agreement, concluded by Dutch railways, known as the "Maritime Container Network", which aimed to market combined transport services on the basis of a joint tariff grid, was held to have infringed Article 85 of the EC Treaty; but as the agreement had been terminated in March 1994, after the Commission sent its statement of objections to the parties, no fine was imposed.

F. Maritime Transport

Efforts to improve maritime transport focus on improving the quality and efficiency of short sea shipping services with the view of shifting some of the traffic from the congested land modes of transport to the sea. In July 1995 a Communication on Short Sea Shipping was published.³³ The Commission has also promised to publish a Strategy Document on Maritime Policy by the end of 1995.

There has been substantial activity in the application of the EC competition rules to the operation of ports. Interim measures were taken by the Commission against the Chambre de Commerce et d'Industrie de Morlais, Brittany, France. The Chambre is the operator of the port of Roscoff and violated the rules by refusing the Irish Continental Group access to port facilities, which was needed in order to commence a ferry service between Ireland and Brittany. After negotiations failed the Commission decided that the behaviour of Chambre amounted to a *prima facie* infringement.

In July 1995 the Italian government, which had, since January 1994, been trying to comply with Community law by amending its national law, notified the Com-

that the Commission had committed a legal error by basing its decision on Reg.17 and not on Reg.1017/68.

29. Commission Decision 94/894 (1994) O.J. L354/66. Appeals against the Decision are before the CFI in Cases T-79/95 *SNCF v. Commission* (1995) O.J. C119/28 and T-80/95 *British Railways Board v. Commission* (1995) O.J. C119/29.

30. Commission Decision 94/663 (1994) O.J. L259/20 (the European Night Services Decision).

31. Commission Decision 94/594 (1994) O.J. L224/28.

32. Commission Decision 94/210 (1994) O.J. L104/34, appealed to the CFI in Aug. 1994.

33. COM(95)317 Final.

mission that it would cease practices concerning the operation of services in Italian ports (such as pilotage services) which have been found to be anti-competitive by the European Court.³⁴

In the context of shipping agreements, the Commission adopted in October 1994 the long awaited decision relating to the Trans-Atlantic Agreement (TAA)³⁵ and in December 1994 a decision relating to the Far Eastern Freight Conference (FEFC),³⁶ finding in both cases that the behaviour of the parties was anti-competitive. The TAA was prohibited in so far as it related to price fixing and capacity regulation. The FEFC was found to be in breach of the rules for fixing prices for the inland transportation of containerised cargo. In June 1995 the Commission sent a statement of objections to members of the Trans-Atlantic Conference Agreement (TACA), formerly the Trans-Atlantic Agreement (TAA), telling shippers that if they did not substantially change their practices, as set out in their new notified agreement, the Commission would lift their immunity from fines.

Finally, the Commission has adopted the long awaited consortia block exemption regulation³⁷ applying primarily to container shipping services.

G. Air Transport

In February 1994 the "Wisemen's" Committee's report was submitted to the Commission.³⁸ The report covered such matters as State aids, infrastructure, harmonisation of measures which will reduce costs, levelling out taxes, external policy and deregulation of ground-handling services. Lack of productivity and excessive overcapacity were highlighted as the main problems and as calling for tougher curbs on State aids. The report was, however, lenient on State aids, accepting that a final round of aid was necessary to put airlines on a normal commercial footing. As part of a wider cost cutting exercise the report identified a need for harmonisation in the fields of air traffic control, taxation, aircraft certification and pilot licences.

The Commission responded with a communication entitled "The Way Forward—Civil Aviation in Europe".³⁹ It identified the obstacles to achieving a single market and outlined the Commission's strategy for the future. Fifteen policies are set out which the Commission will follow in trying to achieve the objective of a single aviation market by the end of 1997.

34. Case C18/93 *Corsica Ferries* [1994] E.C.R. I-1783. The ECJ ruled that the application of different tariffs for identical piloting services was prohibited. Italy by approving the different tariff levels proposed by the Corporation of Pilot Services had induced the Corporation to abuse its dominant position, *inter alia*, by applying dissimilar conditions to equivalent transactions with its trading partners. This is prohibited by Arts.90(1) and 86 of the EC Treaty.

35. Commission Decision 94/980 (1994) O.J. L376/1. In July 1995 the ECJ confirmed an order of the President of the CFI earlier in the same year authorising the 15 members of the TAA to charge their rates until the handing down of the ruling, because if these rates were modified overnight it would risk causing serious and irreparable injury and would jeopardise the market's stability.

36. Commission Decision 94/985 (1994) O.J. L378/17.

37. Commission Reg.870/95 (1995) O.J. L89/7. For more particulars see Section F of "Competition": *infra* Note III.

38. "Expanding Horizons—Civil Aviation in Europe, an Action Programme for the Future".

39. COM(94)218 Final.

In the autumn of 1994 the Council adopted a resolution⁴⁰ welcoming the Commission Communication and proposals to strengthen the sector's competitiveness. The Resolution stated that particular attention will be given to the improvement of the system of management of air traffic, standardisation of provisions on air transport safety, a better use of air infrastructures and elimination of State aid which could harm competition.

Action has already been taken in some of these areas. As far as control of the management of air traffic is concerned, in July 1995 the Commission issued a Communication on Air Traffic Control (ATC), promising a White Paper by the end of 1995.⁴¹ The White Paper will detail solutions to various problems caused by air traffic control.

The Commission had a busy year in 1994 examining a number of State aid packages to airlines. State aids were authorised for the following airlines: Olympic,⁴² Air France,⁴³ TAP⁴⁴ and Aer Lingus.⁴⁵ The Air France decisions, in particular, led to appeals to the European Court.⁴⁶ The Commission has issued a communication setting out guidelines on the criteria which must be met before State aid can be authorised in the aviation sector.⁴⁷ The guidelines do not deal with aids given to aircraft manufacturing or to third countries, or with State financing of airports.

As far as the competitiveness of the sector is concerned, the Commission has published a proposal for a Council directive aimed at opening up the market for ground handling services to competition.⁴⁸ However, access to some airports continues to cause controversy, as, for example, the French-British disagreement over access to Orly Airport in France. To date the Commission has issued two decisions.⁴⁹ The later confirms that the French authorities may continue to apply the 1994 Traffic Distribution Rules to intra-Community traffic within the airport system of Paris on condition that the minimum aircraft size is determined by reference to the annual traffic between Orly Airport and every other individual airport within the European Economic Area.

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40. (1994) O.J. C309/2.

41. *Agence Europe* No.6517, Friday 7 July 1995.

42. Commission Decision 94/696 (1994) O.J. L273/22.

43. Commission Decisions 94/653 (1994) O.J. L254/73 (capital increase) and 94/662 (1994) O.J. L258/26 (subscription by CDC-participation to bonds issued by Air France).

44. Commission Decision 94/666 (1994) O.J. L260/27.

45. Commission Decision 94/118 (1994) O.J. L54/30.

46. Case C-274/94 *UK v. Commission* (1994) O.J. C351/4, Case T-371/94 *BA, SAS, etc. v. Commission* (1994) O.J. C386/21 and Case T-394/94 *BM v. Commission* (1994) O.J. C392/14, all against the decision authorising the capital increase. Case T-358/94 *Air France v. Commission* (1994) O.J. C370/16 against the refusal to authorise subscription to bonds issued by Air France.

47. (1994) O.J. C350/5.

48. (1995) O.J. C142/7.

49. Commission Decisions 94/290 (1994) O.J. L127/22 and 95/259 (1995) O.J. L162/25 based on Council Reg.2408/92 (1992) O.J. L240/8.

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