

basis in the European Communities of 1980 did not deter member States from signing the Rome Convention on the law applicable to contractual obligations. In 1998 the Council has begun work negotiating a Rome II Convention on the law applicable to non-contractual obligations.²⁶ This work is currently under Article K of the Treaty on European Union but when the Treaty of Amsterdam comes into force it will have no place there. The work could be transferred to Article 65 of the EC Treaty and transformed into a regulation or a directive but this would exclude Denmark and force the United Kingdom and Ireland to opt in or out. Alternatively, all the member States could go ahead and conclude a Rome II Convention, using their general powers in international law to agree treaties, and use the same unsatisfactory Community legal basis as was used for the Rome Convention by saying that the Rome II Convention “builds” on the work of the Rome Convention. Suitably worded protocols could extend the jurisdiction of the Court of Justice to interpret the Rome II Convention as was done by the adoption of protocols in 1988 to allow for the Court to give preliminary rulings on the Rome Convention.²⁷

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III. TRANSPORT

Since the last note on this subject,¹ developments have focused on continuing problems: financing new infrastructure; allocation of the true costs of transport among those who generate them; and external relations. In addition, further more detailed legislative measures have been adopted for each mode of transport.

A. Infrastructure: Trans-European Transport Networks (TENs)

In November 1997 the Council emphasised the importance of the TENs as one of the major ways of supporting growth in the European Community and an essential component of the single European market. The Commission reported that the TENs had fallen below initial expectations, due mostly to financing difficulties.² Although the Community has assisted the financing of priority projects set out in Annex III of the Community's Guidelines for the development of the transport TENs,³ more public-private partnerships need to be encouraged. The Commission encourages⁴ the creation of companies for the ownership,

26. See Council Resolution of 18 Dec. 1997 on the justice and home affairs priorities up to the entry into force of the Treaty of Amsterdam (1998) O.J. C11/1, 2. See also JUSTCIV 59, Council of the European Union, 9755/98.

27. Lamentably these protocols are still not in force.

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1. (1997) 46 I.C.L.Q. 716.

2. COM(97)654 final.

3. Decision 169/296 (1996) O.J. L228/1.

4. COM(97)453 final on “Public-Private Partnerships in Trans-European Transport Networks Projects”, which endorsed the recommendation of the High Level Group set up in 1996 to examine the role of public-private partnerships (PPPs). The Group also called for

construction or financing of particular railway projects in order to facilitate the participation of the private sector in the investment effort. Earlier in 1997 the Commission issued a communication setting out a pan-European dimension of transport policy including a proposal to link the Community's transport infrastructure networks to its neighbours.⁵ The policy is aimed at sustainable, environmentally sound and efficient transport systems which not only address the social and economic disparities between the regions but also enhance Europe's competitiveness. The policy promotes economic and social cohesion in Europe.

Two Commission communications are particularly relevant to railways as they enable infrastructure managers responsible for the operation of Freeways to identify potential routes and put the concept into practice. The communication, "Trans European Rail Freight Freeways,"⁶ explains the framework regulation and technical specifications which railway companies have to respect if they intend to set up Rail Freight Freeways as recommended by the Commission in its policy to revitalise rail transport. The Commission sets out the criteria that the Freeways will have to respect to be compatible with European legislation, especially with the competition rules. The concept of trans-European Rail Freight Freeways provides for the Freeways to be run by infrastructure managers from the national railway companies through a "One-Stop Shop", which will identify and allocate capacity on the relevant Freeway (the carrier will thus no longer have to contact the railway companies or authorities responsible in each member State it crosses), monitor and control performance, establish the charging system on behalf of the individual infrastructure managers and deal with complaints. The other communication, "Intermodality and Intermodal Freight Transport in the European Union,"⁷ sets out strategies and actions to enhance efficiency, services and sustainability.

A Commission Green Paper* on maritime structures, published in 1997, emphasises the need for integrating ports fully into multi-modal TENs. It also seeks to ensure links with the peripheral areas so that free and fair competition is guaranteed. It is intended to bring 300 European ports into the TENs, giving priority to the funding of projects for short-sea shipping and combined transport involving railways. Corridors are to be created by upgrading existing road and rail links and by improving sea connections and ports giving access to Asia and North Africa. The initial link with Central and Eastern Europe is based on a network of ten corridors along the main trading routes. The corridors programme will encourage efficient multi-modal transport using rail for long-haul and road for shorter journeys.

clarification of existing EC legislation in the field of public procurement and competition policy. As far as competition legislation is concerned the Commission has responded—(1997) O.J. C289/5.

5. COM(97)172 final entitled "Towards a Cooperative, pan-European Transport Network".

6. COM(97)242 final.

7. COM(97)243.

8. COM(97)678.

B. Infrastructure: Allocation of Costs

Several initiatives to harmonise transport infrastructure charging have been taken by the Commission. In 1997 a proposal for a Council directive was published⁹ which is aimed at establishing a framework for airport charges in the Community based on the principles of cost-relatedness, transparency and non-discrimination. The proposal is linked to another proposal for a directive on access to the ground handling market. The intention is to build on the liberalisation of the European aviation market by means of a third air transport package. The debate focuses on two aspects: the use of charges for cross-subsidy of smaller regional airports and the variability of charges to reflect environmental considerations.

In addition, the Green Paper on ports,¹⁰ which has been mentioned above, considers the possible future financing of ports. It is proposed that those who use ports should bear the real cost of port services and facilities. In July 1998 an infrastructure package on costs and conditions for using rail was proposed,¹¹ which would amend the previous directive¹² on the breakdown of infrastructure capacities and the levying of fees. It would set up a method for calculating fees on the basis of costs directly linked to rail transport but taking into consideration the problems caused by scarcity of capacity; and prior publication of pricing systems would be made compulsory.

These measures complement the existing Eurovignette directive on charging for heavy goods vehicles. Debate on the Eurovignette tax system continued over the last 18 months but progress was suspended in July 1998 to await the elections in Germany. Nevertheless, in May 1998 the Commission initiated legal action against Austria in respect of the 1993 Eurovignette directive.¹³ The European Court of Justice has also condemned France for failing to transpose this directive¹⁴ into domestic law.

The Commission's White Paper, "Fair Payment for Infrastructure Use: A phased approach to transport infrastructure charging in the European Union", was published in 1998.¹⁵ This envisages a framework for the gradual harmonisation (between 1998 and 2008) of transport infrastructure charging. A transparent and fair system based on the "user pays" principle is proposed to replace the different taxes which exist in the member States. Harmonisation would enable distortions between member States to be limited, integrate environmental costs and other marginal costs of transport prices, and facilitate the financing of infrastructures. The modification of the road and rail taxation system is based on two factors: the number of kilometres covered (monitored by means of black boxes in trucks) and vehicle weight.¹⁶

9. COM(97)154.

10. COM(97)678.

11. Europe, No.7272, 29 July 1998.

12. Council Directive 95/9 (1995) O.J. L91/35.

13. Council Directive 93/89 (1993) O.J. L279/32.

14. Case C-175/97 *Commission of the European Communities v. French Republic* (5 Mar. 1998).

15. COM(98)466.

16. Europe, No.7268, 23 July 1998.

The cornerstone of the White Paper is to relate charges more closely to costs and to levy them at the point of use, thereby providing the right incentive to achieve efficiency. It suggests that charges (or at least variable charges) should be based on the marginal costs of access of, for example, one vehicle over a certain distance. Thus the user pays for the additional costs imposed on the system, like road infrastructure damage, but not unavoidable costs like street lighting. The White Paper, in addition, requires payment for additional costs imposed on society by such use, for example congestion, accidents, noise and pollution.

The latest proposals contrast with the proposals for ports and airports which appear to prefer a greater degree of cost recovery. The White Paper signals a move towards a more intermodal approach to charging. It does not propose a centralisation of rules, but the setting into place of a framework and common principles as a means of guaranteeing the efficacy and competitiveness of European transport.

C. External Relations

The negotiations between the Community and Switzerland have not yet ended. At the beginning of 1998 a draft bilateral agreement on land and air transport was negotiated by the Commission on behalf of the Community. The Swiss government agreed to replace gradually the current limit of 28-tonne lorries by progressive quotas providing access to a growing number of Community 40 tonne lorries. It was agreed that as from 2005 access would be unlimited and the Swiss would be authorised to apply a new system of road tolls. The charges to be paid by Swiss and foreign lorries would vary according to the vehicle pollution level (the principle of differentiation). Unfortunately, the final stage of the negotiations has been delayed by a lack of agreement between the member States on the Eurovignette, which is a prerequisite for certain member States to sanction the agreement.

Negotiations with Romania, Hungary and Bulgaria to facilitate transit with Greece are centred on two issues: first, the number of vehicles from the three countries which will be authorised to circulate in Europe in compensation for the right of passage; second, the weight and dimension of European vehicles, which are heavier than those from Eastern Europe (maximum 11.5 tonnes). Bilateral negotiations with Central and Eastern European countries (which have made some progress in the fields of safety, competition, traffic control and environment) continue with the aim of extending the aviation single market.

The Council has adopted several mandates enabling the Commission to start negotiations with non-Community countries. In relation to the establishment of a new European Aviation Safety Authority (EASA) the Commission is authorised on behalf of the European Community and its member States to negotiate with States whose aviation authorities are full members of the Joint Aviation Authority (JAA). Similarly, the Commission has been authorised to open negotiations on the Community's membership of EUROCONTROL, which is responsible for managing air traffic on the entire continent.

Discussions with the United States and other potential partners concerning the establishment of a Global Navigation Satellite System (GNSS) are continuing. The Commission has failed, however, to obtain a mandate from the Council to negotiate on behalf of the Community with the United States on the issue of mar-

ket access in air transport. The original mandate was restricted to certain regulatory aspects only, such as competition issues, operation of code-sharing arrangements and computer reservation systems. However, the Commission continued to seek authorisation for entering the second phase of negotiations, namely on market access and traffic rights, with a view to negotiating an overall agreement creating a "common air zone". Having failed to persuade the Council, the Commission has initiated legal action against eight member States¹⁷ alleging violation of Community law by having concluded aviation agreements with the United States. The Commission alleges that by unilaterally granting US carriers traffic rights to, from and within the European Community while ensuring the right to fly from their territory to the United States, exclusively for their own air carriers, these agreements violate Community law by creating discrimination and distortion of competition.

In 1998 the Council adopted directives authorising the Commission to negotiate maritime agreements with India and China.¹⁸ This was the first time the member States had granted the Commission a mandate to negotiate such agreements with third countries. Transport links to and from these countries are considered necessary for the development of the Community's trade relations with them.

D. Road Transport

Several measures have been adopted (concerning motor vehicles and their trailers) adapting earlier legislation to technical progress. These include measures on the installation of lighting and light-signalling,¹⁹ on retro-reflectors,²⁰ on lamps,²¹ on the reverse and speedometer equipment²² and on breaking devices of certain categories.²³

Other measures relating to this mode of transport include a directive²⁴ setting out the information that appears, in the form of codes, on driving licences; a directive²⁵ on certain components and characteristics of two- and three-wheel motor vehicles; a regulation²⁶ on the recognition of the European model of registration plates; a regulation²⁷ on data concerning goods transported by road which will assist with the analysis of the capacities of vehicles, their routes and the nature of the goods being transported; a regulation²⁸ on common rules for the

17. Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the UK.

18. Bull E.U. 1998 (1-2) 1.3.192-193.

19. Commission Directive 97/28 (1997) O.J. L171/1.

20. Commission Directive 97/29 (1997) O.J. L171/11.

21. Commission Directive 97/30 (1997) O.J. L171/25.

22. Commission Directive 97/39 (1997) O.J. L177/15.

23. Commission Directive 98/12 (1998) O.J. L81/1.

24. Council Directive 97/26 (1997) O.J. L150/41, amending Council Directive 91/439 (1991) O.J. L237/1. This information relates e.g. to compulsory wearing of glasses or on technical adaptations made to vehicles equipped to be driven by disabled drivers.

25. Council Directive 97/24 (1997) O.J. L226/1.

26. The measure requires member States to recognise the distinctive sign (e.g. D, F, GB) placed on the left of the European plates and surrounded by 12 stars.

27. Council Reg.1172/98 (1998) O.J. L163/1.

28. Council Reg.11798 (1998) O.J. L4/1 amending Council Reg.684/92 (1992) O.J. L74/1 by imposing and simplifying the definitions of various categories of services; introducing a Community licence; and liberalising certain services of minor economic importance.

international carriage of passengers by coach and bus; and a regulation²⁹ on recording equipment.

A Council regulation³⁰ has been adopted laying down the conditions under which non-resident carriers may operate national road passenger transport services within a member State (cabotage). This regulation provides, *inter alia*, for the introduction of cabotage for regular international services (urban and suburban services are excluded).

The Commission has also issued reports on the implementation of the Council Directives on rules for certain combined transport of goods between member States,³¹ the implementation of a Council regulation on road haulage cabotage,³² and on reduction of CO2 emissions.³³

In June 1998 the Convention on Driving Disqualifications was signed, imposing an obligation on the member State of residence of the licence holder to give effect to driving disqualifications imposed by another member State. The member State of residence is obliged to take measures entailing the withdrawal, suspension or cancellation of the driving licence.³⁴

E. Rail and Inland Transport

A Commission communication³⁵ on the implementation of the 1991 Council Directive on the development of railways³⁶ acknowledges that the reduction of debts of railway companies and the separation between infrastructure management and the administration of services as set out in the Commission's 1996 White Paper are radical changes to Europe's rail sector. However, the report also recognises that the legislation has not been effective in broadening access rights to rail infrastructure: there is a need to define the framework conditions for the Community's internal railway market more effectively so that efficient services can be developed.

As regards inland waterways, the Commission has reported on the impact of the action taken so far and found that a reduction in vessels has been accompanied by an increase in the average capacity of the inland waterways fleet, and hence an improvement in productivity.³⁷

F. Maritime Transport

During the period under review several safety measures were adopted: a directive³⁸ on minimum requirements for vessels carrying dangerous or polluting

29. Council Reg.1056/97 (1998) O.J. L154/21 amending Council Reg.3821/85 (1985) O.J. L370/8 and Council Directive 88/599 (1988) O.J. L325/55 to improve the enforcement and compliance with social legislation relating to road transport as laid down in Council Reg.3280/85 (1985) O.J. L370/1.

30. Council Reg.12/98 (1998) O.J. L4/10.

31. COM(97)372 final, concerning Council Directive 92/106. (1992) O.J. L368/38.

32. COM(98)47 final, concerning Council Reg.3118/93. (1993) O.J. L279/1.

33. COM(98)204.

34. (1998) O.J. C216/1.

35. COM(98)202.

36. Council Directive 91/440 (1991) O.J. L237/25.

37. COM(97)555.

38. Council Directive 97/26 (1997) O.J. L158/40 amending Council Directive 93/75 (1993) O.J. L247/19.

goods; a directive³⁹ establishing a harmonised system for the safety of fishing vessels of 24 metres or more in length; and a directive⁴⁰ requiring registration of passengers which applies the strict safety rules contained in the SOLAS ("Safety of Life at Sea") Convention to passenger vessels on journeys of over 20 miles using the domestic waters of a member State. Furthermore, the package of legislative measures on the safety of ferries initiated after the Estonia ferry accident in 1994 have been completed with the adoption of a regulation⁴¹ ensuring that the member States comply with the provision of the International Safety Management Code by giving a more precise definition of recognised organisations empowered to issue documents and certificates.

Apart from the Green Paper on ports and maritime infrastructure discussed above, the Commission has published a strategy paper, "A New European Shipbuilding Policy".⁴² In the paper the Commission indicates its intention to defend the industry against anti-competitive behaviour by shipbuilders in non-Community countries. The Commission proposes a new State aid regime providing for a prolongation of the possibility of granting contract-related State aid to shipyards until the end of the year 2000. *Inter alia*, the Commission intends to allow, under certain conditions, aid for innovation to cover some of the risks related to technological challenges. The aim remains to make European shipbuilding a global, competitive industrial sector. New Community guidelines on State aid to maritime transport have also been issued⁴³ in response to the ongoing review of the Community's maritime strategy. As far as the EC competition rules are concerned, the Commission continues to apply them vigorously to this mode of transport.⁴⁴

The Commission has also reported⁴⁵ on the implementation of Council Regulation 3577/92,⁴⁶ which applies the principle of freedom to provide services to maritime cabotage. The report also comments on the economic and social impact of the liberalisation of island cabotage.

G. Air Transport

At long last a regulation has been adopted on air carrier liability in the event of accidents.⁴⁷ It provides better protection than that offered by the Warsaw Convention, which, however, continues to apply between each member State and non-Community countries. The regulation sets out a new liability scheme applicable to Community air carriers.

39. Council Directive 97/70 (1997) O.J. L34/1.

40. Council Directive 98/41 (1998) O.J. L188/35.

41. Council Reg. 179/98 (1998) O.J. L19/35.

42. COM(97)470.

43. (1997) O.J. 205/5.

44. E.g. Commission Decision 97/744 (1997) O.J. L301/17 in respect of the incompatibility with Art.90 EC as regards Italian port legislation relating to employment; Commission Decision 97/745 (1997) O.J. L301/27 regarding the incompatibility of the tariffs for piloting services in the Port of Genoa.

45. COM(97)296 final.

46. (1992) O.J. L364/7. The Commission is obliged to report every two years.

47. Council Regulation 2027/97 (1997) O.J. L285/1. For further details, (1997) 46 I.C.L.Q. 721.

The Council has decided to support action at a global level through the International Civil Aviation Organisation (ICAO) on the limitation of emissions of oxides of nitrogen (NOx) from jet aircraft engines. It agreed that it would be more effective to make progress through the ICAO than to adopt Community legislation. However, if the ICAO fails to accept the package proposed by the Committee on Aviation Environmental Protection Community legislation is likely.

In July 1997 the Commission published a report⁴⁸ on the operation of the Code of Conduct for Computer Reservation Systems (CRSs). It proposes a revision of the Code of Conduct in order to include the direct application of the Code to subscribers (mainly travel agencies) and a provision for rail services to be treated in the same way as air services whenever a system vendor agrees to incorporate these services.

A review of developments in the air transport sector cannot be completed without a brief reference to the application of the EC competition rules to the industry. The Commission issued a memorandum⁴⁹ proposing an amendment to the regulation which applied the competition rules to air transport:⁵⁰ this would extend its scope to air transport services between the Community and non-Community countries. In addition, a number of airline alliances have been cleared by the Commission.⁵¹ A directive has been adopted requiring member States to ensure free competition in the market for ground-handling services at airports,⁵² giving airlines and independent suppliers access to the market by 1998 and 1999 respectively. The Commission has issued a decision that Frankfurter Flughafen AG (an air management company) had abused its dominant position under Article 86 of the EC Treaty by denying without objective justification potential third-party handlers access to the ground handling services.⁵³ The Commission, however, granted the request of the German authorities to exempt Düsseldorf Airport from the implementation of the directive on the liberalisation of ground handling services until the end of 1999, because a fire had in 1996 destroyed part of the airport and severely limited its space. As far as State aids are concerned, subsidies received by airlines from the governments of the member States continue to be of concern.

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48. COM(97)246 final, concerning Council Reg. 2299/89 (1989) O.J. L220/1.

49. COM(97)218 final.

50. Council Reg.3975/87 (1987) O.J. L274/1.

51. E.g. British Airways/American Airlines (1998); Luthansa/United Airlines (1998); Boeing/McDonnell (1997).

52. Council Directive 96/97 (1997) O.J. L335/7.

53. Commission Decision 98/190 (1998) O.J. L72/30.

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