

EUROPEAN PARLIAMENT

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DOCUMENT 1-420/82

REPORT

drawn up on behalf of the Committee on Transport
on the institution of proceedings against the
Council of the European Communities for failure
to act in the field of transport policy

Rapporteur: Mr H. SEEFELD

Or: DE.

On 29 October 1981 Mr Hoffmann and 33 others tabled, on behalf of the European People's Party (Christian-Democratic Group), a motion for a resolution pursuant to Rule 47 of the Rules of Procedure on the institution of proceedings for failure to act in the common transport policy (Doc. 1-672/81).

On 4 November 1981 the motion for a resolution was referred to the Committee on Transport as the committee responsible and to the Legal Affairs Committee for its opinion.

The committee appointed Mr Seefeld rapporteur on 27 November 1981.

The committee considered the motion for a resolution at its meetings of 27 November 1981, 26 February, 30 April, 28 May and 24 June 1982.

On 24 June 1982 the committee adopted the motion for a resolution with 1 vote against and no abstentions.

The following took part in the vote: Mr Seefeld, chairman and rapporteur; Dame Shelagh Roberts, Mr Carossino and Mr Kaloyannis, vice-chairmen; Mr Albers, Mr Buttafuoco, Mr Cardia, Mr Cottrell, Mr Gabert, Mr Janssen van Raay (deputizing for Mr O'Donnell), Lord Harmar-Nicholls, Mr Hoffman, Mr Klinkenborg, Mr Marshall, Mr Moorhouse and Mr Vandewiele.

The opinion of the Legal Affairs Committee is attached.

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The Committee on Transport hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

on the institution of proceedings against the Council of the European Communities for failure to act in the field of transport policy

The European Parliament,

- A having regard to the motion for a resolution tabled by Mr Hoffmann and 33 others on behalf of the European People's Party (Christian-Democratic Group) (Doc. 1-672/81),
- B having regard to the report of the Committee on Transport and the opinion of the Legal Affairs Committee (Doc. 1-420/82),
- C having regard to the earlier reports on the principles of the transport policy: the Carossino report (Doc. 1-996/81), the Seefeld report (Doc. 512/78), the Mursch report (Doc. 215/74), the Müller-Hermann report (Doc. 18/1962-63), the Kapteyn report (Doc. 106/1961-62), the Kapteyn report (Doc. 6/1957-58 of the Common Assembly of the ECSC),
- D having regard to the fact that in the field of transport policy only minimum measures have been adopted which by no means meet the requirements of the common market,
- E having regard to the fact that the provisions of Article 3(e) and Articles 74 to 84 of the EEC Treaty have not been complied with, which constitutes an infringement of the Treaty,
- F having regard to the fact that the Council has not reached a decision on a large number of Commission proposals on which the European Parliament long ago adopted a favourable opinion,
- G having exhausted all other means provided by the Treaty to enforce its claim for the adoption of a common transport policy,

1. Instructs its President to bring an action before the Court of Justice of the European Communities against the Council of the European Communities pursuant to Article 175 of the EEC Treaty;
2. Instructs its President, in this connection, first of all forthwith to call upon the Council to act in the terms of the accompanying draft, in accordance with the second paragraph of Article 175 of the EEC Treaty;
3. Instructs its President, if the Council does not reply within the period of two months laid down in the EEC Treaty, to bring an action before the Court of Justice of the European Communities within the further period of two months laid down by the Treaty for this purpose;
4. Instructs its President, if the Council replies within the two-month period laid down in the Treaty, to reach agreement with the Committee on Transport and the Legal Affairs Committee before making a decision as to whether or not proceedings should be instituted; if it is recommended, in this connection, that no proceedings be instituted, the matter must be brought before Parliament once more;
5. Reserves the right to review the President's decision in the plenary sitting immediately thereafter and in this connection instructs its Committee on Transport to submit a report as the committee responsible and its Legal Affairs Committee to submit an opinion;
6. States expressly that the annex forms an integral part of this resolution;
7. Requests the Commission to intervene in the proceedings;
8. Instructs its President to forward this resolution and report to the Council and Commission of the European Communities, and to the Court of Justice of the European Communities for information.

Annex to the motion for a resolution: Letter to the Council calling upon it to act

1. I have the honour to inform you that the European Parliament resolved on _____ to set in motion the procedure against the Council under Article 175 of the Treaty establishing the European Economic Community, as the Council has, in breach of the Treaty, failed to determine, on the basis of Articles 3(e), 61 and 74, the framework of a common transport policy within which the objectives of the Treaty may be pursued, and has also failed to take the decisions provided for in Articles 75 to 84 for the purpose of implementing Articles 61 and 74.
2. I should like, by this letter, to call upon the Council, in accordance with the second paragraph of Article 175, to act as set out in detail below.
3. I look forward with interest to any opinion which I may receive within two months. This opinion will be examined in great detail. If this examination shows that the opinion is unsatisfactory or if no opinion is forthcoming I shall bring, within the prescribed period, an action before the Court of Justice of the European Communities to have the infringement established; in this connection I reserve the right to make all or only some of the points mentioned below the subject-matter of the action.
4. The European Parliament notes that although the Council has issued a fairly large number of regulations, directives and decisions and adopted other resolutions in the field of transport, all in all they do not, however, comply with Article 3(e) of the EEC Treaty which provides for 'the adoption of a common policy in the sphere of transport'. Nor do they comply with Article 74, which provides that the framework of a common transport policy must be laid down within which the objectives of the Treaty are to be pursued.

5. Through this omission on the part of the Council in breach of the Treaty, a delay has arisen in the development of Community law in the transport sector which has led to an imbalance between the various economic sectors, increasing legal uncertainty, doubts as to the attainment of a common transport policy and difficulties in connection with forward planning in the economic sectors concerned.
6. The delay in relation to transport policy also constitutes an infringement of the Treaty because certain details of the transport policy of the Member States, whether in themselves or because they differ from one country to another, form an obstacle to trade between the Member States, make it impossible to establish conditions similar to those existing in a national market and thus form an obstacle to the functioning of the common market. For this reason, the very existence of the customs union is jeopardized in the long term by the delay in the field of transport policy. If the provisions of the EEC Treaty contained in the title on transport, in other words Articles 74 to 84, are not implemented in accordance with the Treaty, as laid down in Article 61 thereof so as to establish freedom to provide services in the field of transport, trade will be seriously affected.
7. In fact the Treaty is infringed if the free movement of goods is made impossible or hindered by obstacles in connection with transport services.
8. For this reason Parliament calls upon the Council to decide the framework of a common transport policy pursuant to Articles 3(e) and 74, on the basis of the Commission's communication of 24 October 1973.

The Council consulted the European Parliament on this communication by letter of 7 November 1973 and Parliament adopted a detailed opinion in this connection on 25 September 1974 (see OJ N° C 127 of 18 October 1974).
9. In addition, the Council should adopt a binding decision on the Commission proposal 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 (OJ 1980 N° C 294, p. 6 and OJ 1981 N° C 77, p. 82).
10. Along the same lines, the Council should reach a decision on the Commission proposal for a decision setting up an information and consultation procedure for relations and agreements with third countries in the field of transport by rail, road and inland waterway (OJ 1980 N° C 350, p. 23, and opinion of the European Parliament of 19 June 1981).

11. In addition, Parliament requests the Council to establish the freedom to provide services in the field of transport provided for in Article 61 and in this connection, to apply the provisions of Articles 74 to 84.
12. Parliament requests the Council to adopt all appropriate provisions, pursuant to Article 75(1)(c), to pursue the objectives of the Treaty within the framework of a common transport policy.

No time-limits are laid down in the Treaty for these measures. This does not however mean that there is no need to adopt a common transport policy. The time-limits come within the discretion of the Commission and the Council. However, almost 25 years after the Treaty came into force all possible time-limits have expired, so that there has, therefore, been a misuse of powers and thus an infringement of the Treaty.

All measures proposed by the Commission which possibly do not come within the periods laid down in Article 75(1)(a) and (b) come within the scope of the discretion provided for in Article 75(1)(c) as regards time-limits.

13. The Council is called upon in particular forthwith to take the decisions which should already have been adopted during the transitional period, according to the wording of the Treaty, in other words, pursuant to Article 75(1), laying down

- (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
- (b) the conditions under which non-resident carriers may operate transport services within a Member State.

14. All Commission proposals mentioned below may be regarded as being subject to the time-limit laid down in Article 75(1)(a). This article concerns international transport to or from the territory of a Member State and transport passing across the territory of one or more Member States, in other words, pursuant to Article 84(1), transport by rail, road and inland waterway.

The Council should lay down common rules for these forms of transport. According to Article 61, these rules should establish freedom to provide services in the field of transport.

If distortions of competition caused by the transport system preclude freedom to provide services the rules to be adopted may not consist of a restriction on transport but must aim at eliminating the distortions of competition.

15. In this connection the following are necessary in particular: the harmonization of specific social legislation applying to all forms of transport, the harmonization of specific transport taxes, in other words the tax on motor vehicles and the tax on fuel, as well as the harmonization of the technical provisions applying to transport undertakings, including especially those on the maximum permissible size and weight of motor vehicles. Harmonization of state intervention is also necessary.
16. As the aims of the Treaty must be pursued within the framework of a common transport policy the railways must also be included in the abovementioned harmonization measures because of competition, even if the various railway companies each only operate on the territory of one Member State. In addition the harmonization measures should include the setting-up of a common system of charging for infrastructure costs and a common infrastructure policy so as to overcome gaps and bottlenecks in the European transport network.
17. The implementation of Article 75(1)(a) and (b) requires in particular the adoption of a common price and capacity policy for road transport and inland navigation. In this connection it is not sufficient to establish in addition a Community quota with a minimum number of licences but it is necessary to replace the previous bilateral or international agreements on inland navigation and road transport by new Community rules.
18. Parliament specifically calls upon the Council forthwith to take decisions on the following Commission proposals which have been submitted on various transport issues and on which the Parliament has already adopted an opinion:

Harmonization of social legislation

- Proposal for a regulation on the harmonization of certain social legislation relating to road transport (OJ 1976 N° C 103, amended by OJ 1977 N° C 249, opinion of the European Parliament, OJ 1977 N° C 6).
- Proposal for a Council Regulation on the harmonization of certain social provisions relating to goods transport by inland waterway (OJ 1975 N° C 259, amended by OJ 1979 N° C 206, opinion of the European Parliament, OJ 1977 N° C 57).

Tax harmonization

- Proposal for a first directive on the adjustment of the national systems of taxation on commercial motor vehicles (OJ 1968 N° C 95, opinion of the European Parliament, OJ 1969 N° C 63).
- Proposal for a directive amending Directive N° 68/297/EEC on the standardization of provisions regarding the duty-free admission of fuel contained in the fuel tanks of commercial motor vehicles (OJ 1974 N° C 104, opinion of the European Parliament, OJ 1974 N° C 155).

Technical harmonization

- Proposal for a directive on the weights and dimensions of commercial motor vehicles and supplementary provisions relating to construction and operation (OJ 1971 N° C 90, amended by OJ 1979 N° C 16 and COM(81) 510 of 11 September 1981, opinion of the European Parliament, OJ 1971 N° C 124 and resolution of 7 May 1981).
- Proposal for a directive laying down technical requirements for inland waterway vessels (OJ 1979 N° C 255, opinion of the European Parliament OJ 1979 N° C 289).
- Proposal for a directive on the harmonized application of the International Convention for Safe Containers (CSC) in the European Community (OJ 1980 N° C 228, opinion of the European Parliament, OJ 1980 N° C 327).

Harmonization of state intervention

- Proposal for Council regulations completing and amending Regulation (EEC) N° 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 OJ 1981 N° C 268, opinion of the European Parliament, OJ 1973 N° C 37 and OJ 1981 N° C 260).
- Proposal for a regulation amending Regulation (EEC) N° 1192/69 on common rules for the normalization of the accounts of railway undertakings (OJ 1977 N° C 307, opinion of the European Parliament, OJ 1978 N° C 163).
- Proposal for a decision amending Decision 75/327/EEC on the improvement of the situation of railway undertakings and the harmonization of rules governing financial relations between such undertakings and States (OJ 1981 N° C 37, opinion of the European Parliament, OJ 1981 N° C 287).
- Proposal for a regulation setting the time-limit and conditions for the achievement of financial balance by railway undertakings (OJ 1981 N° C 37, opinion of the European Parliament, OJ 1981 N° C 287).

Price policy

- Proposal for a regulation on the fixing of rates for international goods transport by rail (OJ 1976 N° C 1, amended by OJ 1977 N° C 185, opinion of the European Parliament, OJ 1976 N° C 293).
- Proposal for a regulation on a system of reference tariffs for the carriage of goods by inland waterway between the Member States (OJ 1976 N° C 54, amended by OJ 1977 N° C 155, opinion of the European Parliament, OJ 1977 N° C 6).

Capacity policy

- Proposal for a Council regulation on the adjustment of the capacity for the carriage of goods by road for hire or reward between Member States (OJ 1978 N° C 247, opinion of the European Parliament, OJ 1979 N° C 67).

- Proposal for a directive on own-account carriage of goods by road between Member States (OJ 1979 N° C 41, opinion of the European Parliament, OJ 1979 N° C 127).
- Proposal for a 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 65/269/EEC (OJ 1980 N° C 253, opinion of the European Parliament of 21 November 1980).
- Proposal for a directive amending Directive 65/269/EEC on the standardization of certain rules relating to authorizations for the carriage of goods by road between Member States (OJ 1980 N° C 350, opinion of the European Parliament of 7 May 1981).
- Proposal for a regulation amending Regulation (EEC) N° 3164/76 on the Community quota for the carriage of goods by road between Member States (OJ 1980 N° C 350, opinion of the European Parliament of 7 May 1981).
- Proposal for a regulation on access to the market in the carriage of goods by inland waterway (OJ 1968 N° C 95, amended by Doc. COM(69) 311 of 25 April 1969, opinion of the European Parliament, OJ 1968 N° C 108).
- Proposal for a Council directive on certain measures to promote the development of combined transport (Doc. COM(80) 796 of 5 December 1980, opinion of the European Parliament, OJ 1981 N° C 260).
- Proposal for a regulation amending Regulation (EEC) N° 1107/70 with a view to supplementing the system for the granting of aids for transport by road, rail and inland waterway by the addition of provisions on combined transport (Doc. COM(80) 796 of 5 December 1980, opinion of the European Parliament, OJ 1981 N° C 260).
- Proposal for a decision on acceptance by the Community of a draft resolution of the European Conference of Transport Ministers on the introduction of a ECMT licence for international removals (OJ 1980 N° C 299, opinion of the European Parliament of 21 November 1980).

Observance of the market

- Proposal for a regulation concerning a system for observing the markets for the carriage of goods by rail, road and inland waterways between the Member States (OJ 1976 N° C 1, amended by Doc. COM(80) 785 of 5 December 1980, opinion of the European Parliament, OJ 1976 N° C 293).

Infrastructure

- Proposal for a Council regulation on support for projects of Community interest in transport infrastructure (OJ 1976 N° C 207, amended by OJ 1977 N° C 249 and OJ 1980 N° C 89, opinion of the European Parliament, OJ 1976 N° C 293 and OJ 1980 N° C 197).

19. To this list must be added the proposals on which the Parliament has adopted an opinion in the last few months. Any proposals on which the Council may have taken a positive decision by this time should be deleted.

20. In order to place the legal certainty and legitimate expectation of the industry concerned on a firmer footing the Council is particularly requested to issue a binding decision as to the cases in which it will take decisions in the field of transport by a qualified majority under Article 75(1) of the EEC Treaty and the cases in which it considers that principles of the regulatory system for transport are involved which

- 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,

so that it must decide unanimously in accordance with Article 75(3). In addition, the Council should, in the interests of legal certainty and legal development, decide in which cases, in spite of the above-mentioned circumstances, provisions should be adopted by a qualified majority on the principles of the regulatory system for transport because it is necessary to consider that there is a need for corresponding adaptation of the Member States' regulatory system for transport to the economic development resulting from establishing the common market.

It must be assumed that all the abovementioned Commission proposals are such that they can neither have a serious effect on the standard of living and on employment in certain areas nor on the operation of transport facilities.

21. In addition, the Council has failed to decide, pursuant to Article 84(2), that appropriate provisions should be laid down for sea and air transport and by what procedure this should be done. The previous sporadic decisions taken by the Council in this field cannot

be regarded as appropriate to establish freedom to provide services in the field of transport in accordance with Article 61 and to pursue properly the objectives of the Treaty. This must be regarded as a breach of the Treaty, especially since the European Communities are, particularly in the sphere of sea and air transport, assuming more and more responsibility and increasingly urgent problems require common action.

22. For this reason the Council is called upon to decide, pursuant to Article 84(2), to what extent and by what procedure appropriate provision must be laid down for sea and air transport. There is no longer any doubt as to whether this should be done.

23. For this reason the Council is particularly called upon forthwith to reach a decision on the Commission proposals submitted on which the Parliament has adopted an opinion, in other words:

- the proposal for a regulation concerning the authorization of scheduled inter-regional air services of passengers, mail and cargo between Member States (Doc. COM(80) 624 of 19 October 1980, amended by Doc. COM(81) 771 of 10 December 1981, opinion of the European Parliament, OJ No. C 287 of 9 November 1981);
- proposal for a decision rendering mandatory the procedures for ship inspection forming the subject of resolutions of the Inter-Governmental Maritime Consultative Organization (OJ No. C 234 of 28 November 1978, opinion of the European Parliament OJ No. C 39 of 12 February 1979);
- proposal for a Council directive concerning the enforcement, in respect of shipping using Community ports, of international standards for shipping safety and pollution prevention (OJ No. C 192 of 30 July 1980, opinion of the European Parliament OJ No. C 28 of 9 February 1981).

24. To summarize, I should like to record that the Council has, in breach of the Treaty, failed:

- to adopt a common policy in the sphere of transport, pursuant to Article 3(e);

- to establish the freedom to provide services in the field of transport provided for in Article 61;
- to decide a common transport policy within the framework provided for in Article 74;
- to lay down the common rules applicable to international transport provided for in Article 75(1)(a);
- to fix the conditions laid down in Article 75(1)(b) under which non-resident carriers may operate transport services within a Member State;
- to adopt the appropriate provisions for the implementation of the common transport policy pursuant to Article 75(1)(c);
- to decide, pursuant to Article 75(3), in what cases unanimity is essential and in what cases, because of the need for adaptation to the economic development resulting from establishing the common market, unanimity is not required;
- to adopt, pursuant to Article 84(2), appropriate provisions for sea and air transport;
- and, in particular, to decide on the Commission proposals in the field of transport on which the European Parliament has already adopted an opinion.

I await your opinion with interest; in the meanwhile I beg to remain,

Yours sincerely,

(signature)

EXPLANATORY STATEMENTI. The delay in the field of transport policy

1. The delay in adopting Community legislation in the field of transport policy is causing great damage to the Community. A common market cannot exist unless obstacles to the physical accomplishment of trade, in other words transport, are removed. Even a customs union cannot in the long term exist without a minimum common transport policy. For this reason the progressive development of the Community will be jeopardized and even the existing development will be endangered if a common transport policy is not shortly brought into being.
2. The lack of a common transport policy gives rise to disequilibrium between the Member States in terms of advantages and disadvantages, contrary to the provisions laid down in the Treaty, since the Member States' interests as regards regulation of the transport sector are different.
3. The standstill in relation to common transport policy leads to great uncertainty in the plans of transport undertakings and the shipping industry for the future and thus gives rise to material damage by preventing future investments and long-term advance planning.
4. The Treaty establishing the European Economic Community contains binding provisions relating to the adoption of a common transport policy. Although the Treaty provisions are not drafted very precisely there is, however, no doubt that, according to the Treaty, such a transport policy must be adopted. For this reason the Community institutions have a particular responsibility in this field. If for any reason they were to reach the view that no common transport policy were necessary this would constitute a breach of the Treaty. If for any reason a common transport policy were not brought into being this would also constitute an infringement of the Treaty. The institutions cannot decide that no common transport policy should be adopted.
5. Except in a few isolated instances the EEC Treaty does not provide for any time-limits for the adoption of a common transport policy. It has, however, been almost 25 years since the Treaty came into force, so that even without the

stipulation of specific time-limits it must be established that there has been a delay constituting an infringement of the Treaty. The time-limit for the exercise of any possible margin of discretion has long expired.

6. The European Parliament and its Committee on Transport have in the past few years repeatedly pointed out to the Commission, the Council and the general public the untenable situation as regards the common transport policy. The Committee on Transport has, particularly in the basic reports submitted by Mr Kapteyn (Doc. 6/1957-1958 of the Common Assembly, Doc. 106/1961-62), Mr Müller-Hermann (Doc. 18/1962-63), Mr Mursch (Doc. 215/74), Mr Seefeld (Doc. 512/78) and finally Mr Carossino (Doc. 1-996/81), expressed great concern and urged the adoption of a common transport policy.

II. The action for failure to act

7. Nobody can say that the European Parliament and its Committee on Transport have not exhausted all means available to them under the Treaty to enforce their request for the adoption of a common transport policy in relation to the Council and the Commission.

8. The Commission is present at all meetings of the Committee on Transport and has taken part in all the debates on transport issues in the plenary sittings. There is nevertheless no question of a motion of censure under Article 144 because the Treaty provides that such a measure may only be tabled against the whole Commission as a body. For this reason it is impossible to table a motion of censure in relation to a single field such as transport policy.

9. Nor is there any question at present of bringing an action against the Commission for failure to act because it is obviously essential to give the Commission support against the Council in its efforts towards the adoption of a common transport policy.

10. The Commission has however failed to submit all necessary proposals and to that extent has not complied with Parliament's requests. In connection with its policy of gradualism it has a tendency only to submit those proposals which might possibly be adopted by the Council. In so doing it deprives Parliament of part of its supervisory powers, in other words the power of calling the Council to account.

11. The Commission has also failed to prompt the Council to decide the framework of a common transport policy. Constant repetition of the argument put forward time and again that the Council might lapse into too far-ranging 'philosophical' discussions and no longer have time for specific decisions if it had to decide on basic transport rules does not make it any the more justified: after 25 years it is impossible to say that there has been no time for a fundamental discussion. In addition, experience clearly shows that in the absence of a basic decision the fundamental discussion in the Council: which could not be permitted arises time and again with each measure, however trivial, thus wasting more time and energy.

12. In spite of this it is proposed that the action for failure to act should be directed in the first instance only against the Council and not against the Commission because, first, the Council is the real weak point in the development of the Community and if judgment were given against it this would automatically lead to a corresponding improvement in the activities of the Commission, and, secondly, if the Council is reproached for its failure to act in instances in which the Commission has submitted no proposals this declaration by the Court of Justice must have almost as serious consequences for the Commission as if an action had been brought against the Commission itself and judgment given against it.

13. In relation to the Council the Parliament has also exhausted all the means available to it under the Treaties. Numerous reports and resolutions have repeatedly indicated the importance of transport policy for the development of the Community.

14. There is nevertheless justification for fearing that the Council has only taken formal note of Parliament's resolutions in each case and has taken very little or no account of their contents in its deliberations.

15. The Committee on Transport has invited the President of the Council of Ministers at least once during each term of office and has held detailed discussions. The concerns and requests of Parliament have been made clear to the President of the Council on these occasions. These discussions have not had any appreciable effect.

10. For this reason the patience of and the means available to the Committee on Transport have been exhausted and it therefore recommends that the European Parliament should make use of the last means given it by the Treaty, in other words the bringing of an action pursuant to Article 175 of the EEC Treaty for a declaration that the Council has infringed the Treaty by failing to act.

I. I. The procedure

11. Article 175 of the EEC Treaty lays down several special procedural provisions which require special measures to be taken by the European Parliament so as to comply with them.

12. For the action to be admissible it is necessary for the Council first to have been called upon to act. The Council then has two months to define its position. If it has not defined its position the action must be brought within a further period of two months. This second period of two months is clearly also applicable if the Council defines its position within two months but the reply proves unsatisfactory.

13. Since it is hardly possible to carry out within the two-month time-limit the whole normal procedure of the European Parliament for adopting a decision, the Committee on Transport suggests the following procedure in Parliament:

- The call to act which must be sent to the Council of Ministers by the President of Parliament is set out in the resolution upon which this report is based;
- The letter calling upon the Council to act should list as fully as possible all instances of failure to act on the part of the Council since the action cannot relate to anything which is not contained in that letter;
- At the same time Parliament's President is instructed to bring an action if the Council does not reply within two months, as provided in the Treaty, and entrusted with the task of drawing up the corresponding application;
- If the Council replies within the prescribed period, and only if it does so, the President is instructed to consider the Council's reply with the Committee on Transport and the Legal Affairs Committee jointly and, according to the vote of this body, either to bring an action in spite of the Council's reply or to refer the matter back to the plenary sitting of Parliament;

- In any case, the Committee on Transport should, having conferred with the Legal Affairs Committee, submit to the plenary sitting a report on the new situation.

IV. Importance of the action as regards transport policy and legal development

20. The Committee on Transport would like to make an urgent appeal to all Members of the European Parliament, even those who have not dealt in great detail with issues concerning transport policy and do not regularly keep abreast of transport policy, not to underestimate the importance of transport policy. Europe needs a common transport policy as one of the most important components in the building of the Community.

The elected representatives of more than 250 million Europeans who have been entrusted with the task of examining in detail the problems of transport policy have reached the opinion that serious damage will be caused if a common transport policy is not adopted within the foreseeable future. The authors of the Treaty reached the same view more than twenty years ago and for that reason agreed to adopt a common transport policy even if they could not reach agreement on the details. It was the duty of the Ministers of Transport meeting in the Council of Ministers of the European Communities to come to such an agreement. For whatever reasons, they have not performed this duty.

21. Owing to the constitutional structure of the Community the ministers cannot be brought directly to account. They are accountable to their national parliaments but each minister only to one parliament so that the national parliaments can never assess the whole situation but only the conduct of their own minister who can certainly in each instance put forward good reasons why he was unable to overcome the failure of the Council to act, even if he wanted to do so.

22. For this reason the time has come to make use of the last means made available under the Treaty so as to make it clear whether or not the Community will have a common transport policy, in other words an action for failure to act brought before the Court of Justice. This does not mean that Parliament is leaving the political sphere and entering that of the administration of justice, but that in this case the powers made available to the European Parliament under the Treaty to enforce its political influence have been exhausted.

23. The Committee on Transport has, in this report and in its decision to recommend that an action be brought pursuant to Article 175, been exclusively guided by considerations and concerns connected with transport policy. It is however clear that bringing an action under Article 175 may have great significance over and above the field of transport policy. If the Court of Justice holds the action to be admissible further proceedings may follow in other fields. Even if judgment were not finally given against the Council the Parliament would have actually extended its powers and influence because the Council and the Commission would have in the future to take much more account of the possibility of such proceedings. This action might therefore be said to have a secondary result in terms of a further development of the rights and powers of the European Parliament in general.

24. With this aim in view the Committee on Transport requests that this motion for a resolution be adopted.

MOTION FOR A RESOLUTION (Doc. 1-672/81)

tabled by Mr HOFFMANN, Mr TRAVAGLINI,
 Mr DE KEERSMAEKER, Mr JANSSEN van RAAY,
 Mr MULLER-HERMANN, Mr HERMAN, Mr KATZER,
 Mr KLEPSCH, Mr VERGEER, Mrs CASSANMAGNAGO CERRETTI,
 Mr d'ORMESSON, Mr DESCHAMPS, Mr VANDEWIELE, Mr MICHEL,
 Mr HELMS, Mr BEUMER, Mr NOTENBOOM, Mr GONELLA,
 Mr NARDUCCI, Mr ALBER, Mr van AERSSEN, Mr MERTEES,
 Mr LUSTER, Mr DALSASS, Mr GHEMO, Mr COSTANZO,
 Mrs WALZ, Mr MAJONICA, Mr Konrad SCHON,
 Mr BLUMENFELD, Mr WEDEKIND, Mr HABSBURG,
 Mr MALANGRE and Mr WAWRZIK

on behalf of the European People's Party
 (Christian Democratic Group)

pursuant to Rule 47 of the Rules of Procedure
 on the institution of proceedings for failure
 to act in the Common Transport Policy

The European Parliament,

- having regard to the persistent failure by the Council of Transport Ministers to introduce and develop a Common Transport Policy despite the existence of proposals from the Commission and several comprehensive opinions by the European Parliament on this matter,
 - having regard to the express provision in the EEC Treaty for the implementation of a Common Transport Policy within the specified time limits,
1. Instructs its President immediately to institute proceedings for failure to act against the Council in the European Court of Justice;
 2. This action is based on the persistent failure by the Council to act on the European Transport Policy, which is incompatible with the provisions of the Treaty.

OPINION OF THE LEGAL AFFAIRS COMMITTEE

Draftsman: Mr JANSSEN VAN RAAY

On 4 November 1981 the motion for a resolution was referred to the Committee on Transport as the committee responsible and to the Legal Affairs Committee for its opinion.

On 28 January 1982 the Committee appointed Mr Janssen van Raay draftsman.

At its meetings of 25 and 26 February, 18 and 19 May and 23 and 24 June 1982, the Legal Affairs Committee considered the draft opinion, and adopted it at the latter meeting (at which also took part Mr Seefeld, Chairman and Rapporteur of the Committee on Transport) by 9 votes in favour and 4 abstentions.

Present: Mr Luster, vice-chairman and acting chairman; Mr Turner and Mr Chambeiron, vice-chairmen; Mr Janssen van Raay, draftsman; Mr Dalziel, Mr D'Angelosante, Mr De Gucht (deputising for Mr Visentini), Mr Forth (deputising for Mr Tyrrell), Mr Geurtsen, Mr Megahy, Mr Poniridis, Mr Prout and Mr Sieglerschmidt.

1. The Legal Affairs Committee has to date given two opinions on the possibility of Parliament bringing an action against the Council of Ministers before the Court of Justice of the European Communities for failure to act, pursuant to Article 175 of the EEC Treaty.

At its meeting of 19 October 1976, the Legal Affairs Committee adopted an opinion for the enlarged Bureau drafted by Mr JOZEAU-MARIGNÉ (PE 44.639/fin.); the subject matter was the Council's failure to act on the proposal for a 6th Directive on the harmonisation of the Member States' legislation concerning turnover taxes.

On 20 January 1977, the Legal Affairs Committee adopted an opinion for the Committee on Regional Policy, Regional Planning and Transport drafted by Mr RIZ (PE 46.461/fin.); the subject matter then was a motion⁽¹⁾ for a resolution tabled by Mr MURSCH and others, whose aim was exactly identical to that of the motion for a resolution (Doc. 1-672/81) on which we are consulted today.

On both occasions the Legal Affairs Committee expressed the opinion that it was legally possible for the European Parliament to bring an action for failure to act against the Council under Article 175.

2. The Legal Affairs Committee confirms that viewpoint; in fact, to avoid repeating at length the very complete legal considerations contained in the opinion drafted by Mr RIZ, and adopted by the Legal Affairs Committee by a large majority, that opinion will be annexed to the present document. This will allow those interested to check the questions of legal soundness in detail. Moreover, Mr RIZ's opinion was published as an annex to the report drawn up by Mr SEEFELD on behalf of the Committee on Regional Policy, Regional Planning and Transport, on the "present state of progress of the Common Transport Policy" (Doc. 512/78) as late as 1979, which means that it is now in very short supply and difficult to obtain in all languages. That is why it seems very appropriate to re-publish it today.

(1) Doc. 202/76

It will be noted that the reasons why, as a follow up to the motion by Mr MURSCH and others, the European Parliament did not decide in the end to seize the Court did not relate at all to legal difficulties, but rather to political considerations: to quote the letter drafted at the time by Sir Peter KIRK (PE 47.556), which formed the basis of the opinion of the Political Affairs Committee, "... it would not at present be politically expedient for the European Parliament to initiate action against the Council before the Court concerning this matter. But the Political Committee considers that its present opinion should not be interpreted as in any way aimed at preventing or inhibiting the European Parliament from initiating action against the Council before the Court ... at a more opportune time in the future" (1).

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3. To enhance further the considerations according to which the European Parliament has a legal right to bring proceedings against the Council before the Court of Justice under Article 175 of the EEC Treaty, the recent case of the intervention of the European Parliament before the Court of Justice (the "Isoglucose" case) must be mentioned. In that instance, the European Parliament contributed to having a Council Regulation declared null and void on the grounds that it had not been properly consulted under Article 43 of the EEC Treaty: the Parliament had been asked for its opinion, but the regulation had been adopted by the Council before the opinion was given.

4. It is interesting to note that the Council queried then the possibility of the Parliament intervening voluntarily in the proceeding pending before the Court, drawing an analogy with Article 173 of the Treaty (proceedings brought to have a provision declared null and void), and Article 20 of the Statute of the Court (institutions invited to lodge observations pursuant to the procedure under Article 177).

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In the same sense, see para. 10 of Mr SEEFELD's report (Doc. 512/78), adopting which the Parliament reserved the right "to reconsider, immediately after direct elections, the question of instituting proceedings against the Council before the Court ...".

5. The Court held that, as Article 37 of the Statute of the Court gives the right to intervene to "Member States and institutions of the Community", it was not possible "to restrict exercise of that right by one of them without adversely affecting its institutional position as intended by the Treaty, and in particular Article 4(1)".⁽¹⁾

6. It is essential to stress that the formulation contained in the first paragraph of Article 175 in respect of bodies having the right to act is the same as that of Article 37 of the Statute of the Court: '... the Member States and the other institutions of the Community may ...'.

This demonstrates beyond possibility of doubt that Parliament may bring an action under Article 175 against the Council⁽²⁾.

7. The Court further rejected a submission by the Council to the effect that Parliament should only intervene on condition that it demonstrated an interest: 'The right to intervene which the institutions, and thus the Parliament, have ... is not subject to that condition'⁽²⁾.

8. This too has force of precedent with respect to the case to be brought by Parliament under Article 175 against the Council for failure to act in the field of the Common Transport Policy.

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9. For detailed consideration of all questions relating to the 'call to act', the subject of proceedings and the internal procedure within Parliament, your draftsman refers you to paras. 11-23 of the RIZ opinion (see annex).

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(1) See ECR 1980-7, p. 3357

(2) As the Legal Affairs Committee had held

CONCLUSIONS ⁽¹⁾

A. The European Parliament has the right to institute proceedings before the Court of Justice against the Council for the failure of the latter to act, contrary to the Treaties; in doing so, Parliament need not demonstrate any interest to act.

To some people, particularly those coming from a country without a written constitution, it might seem unusual for a parliamentary institution to bring proceedings before a court against the actions - or inaction - of another political institution.

When encouraging the Parliament to intervene before the Court of Justice in the 'isoglucose' case, the Legal Affairs Committee held that "the Community legal system differs in some respects from the State systems; the European Parliament, which is a parliamentary institution in its composition, structure and procedure, does not exercise the full legislative powers which are, in all the Member States, the Parliament's prerogative. It is not therefore surprising that an institution which 'exercises advisory and supervisory powers' (Article 137 of the EEC Treaty) should have the right to institute legal proceedings" against the political institution endowed with legislative power ⁽²⁾.

B. The political importance of the Parliament initiating such proceedings against the Council for its failure to act in the field of the Common Transport Policy (which, in a sense, demonstrates the failure of the latter) necessitates that the decision to call the Council to act should be taken by the Parliament as a whole; the 'call to act' could be contained in the motion for a resolution that the Transport Committee will submit to the House (see para. 11 of the annex).

C. The 'call to act' should specify clearly all those matters which may constitute the subject of the future proceedings as no further submissions would be admitted (see para. 12 of the annex).

(1) Based on the conclusions of the opinion adopted by the Legal Affairs Committee on 20 January 1977, annexed to the present opinion

(2) Doc. 1-478/79, p.15

D. The object of the 'call to act' must be binding provisions of a general nature (regulations or directives), which the Council has not enacted in spite of an obligation imposed upon it by the relevant articles of the Treaty. The definition of such provisions is of the highest importance for the success of the proceedings, and should be determined with great accuracy by the Committee responsible (see annex, paras. 15 and 16, 24-26).

Examples of such provisions are:

- Proposal for a first directive on the adjustment of the national systems of taxation on commercial motor vehicles (OJ 1968 No. C 95, p. 41),
- Proposal for a directive on the weights and dimensions of commercial motor vehicles and supplementary provisions relating to construction and operation (OJ 1971 No. C 90, p. 25, amended by OJ 1979 No. C 16, p. 3),
- Proposal for a Council regulation on support for projects of Community interest in transport infrastructure (OJ 1976 No. C 207, p. 7, amended by OJ 1977 No. C 249, p. 4, and OJ 1980 No. C 89, p. 4).

Should the Council fail to define its position within the two months specified in the Treaty, the President should be duly instructed by the decision of Parliament provided for in paragraph B to institute proceedings.

E. If, however, the Council defines its position within the period of two months specified in the Treaty, care must be taken when determining what further action to take that the procedure adopted takes account of the relatively short period of two further months which is then available for a decision on whether to institute proceedings. It should also be borne in mind that Parliament can discontinue the proceedings at any time, and that this would create no political difficulties, particularly at the beginning of the procedure.

In the light of the above, the Legal Affairs Committee recommends that the President be requested to consider the decision on whether to institute proceedings in conjunction with the Committee on Transport and the Legal Affairs Committee. If proceedings are instituted, Parliament should, however, reserve the right either to confirm this decision or to discontinue the proceedings on the basis of a report which would be drawn up by the Committee on Transport following consultation with the Legal Affairs Committee.

F. In the view of the Legal Affairs Committee, the Council would, following a decision by the Court of Justice establishing an unlawful failure to act, be obliged under Article 176 of the EEC Treaty to vote on the relevant Commission proposals by a qualified majority. Refusal by the Council to do so would constitute a violation of the Treaty, unless it took other measures to remedy without delay its failure to act. This could create a political crisis with unforeseeable consequences for the Community. At all events, court proceedings under Article 175 of the EEC Treaty would clarify the responsibilities of the institutions vis-à-vis the citizens of the Community and would demonstrate that their elected representatives are doing everything in their power to honour their obligations to further the attainment of Community objectives.

The Legal Affairs Committee recommends that the Committee on Transport should consider the action to be taken by Parliament when the Court of Justice of the European Community has delivered its judgment on the matter. Such action could take the form of rejection by Parliament of appropriations in the budget of the European Communities earmarked for transport policy since, if the latter is incomplete, it can serve no purpose and only a comprehensive transport policy can meet the requirements of the Treaty.

OPINION OF THE LEGAL AFFAIRS COMMITTEE OF 1977

Draftsman: Mr Riz

on a possible action brought by the European Parliament before the Court of Justice of the European Communities against the Council for its failure to act in respect of measures in the field of the common transport policy (see the motion for a resolution tabled by Mr Mursch and others (Doc.202/76))

At its meeting of 20 and 21 September 1976 the Legal Affairs Committee appointed Mr Vernaschi draftsman of the opinion.

As Mr Vernaschi subsequently left the Legal Affairs Committee, a new draftsman, Mr Riz, was appointed by the committee at its meeting of 25 and 26 November.

At its meeting of 20 January 1977 the committee considered the draft opinion and adopted it by nine votes to one, with four abstentions.

Present: Sir Derek Walker-Smith, chairman; Mr Jozeau-Marigné, vice-chairman; Mr Riz, vice-chairman and draftsman of the opinion; Lord Ardwick, Mr Berkhouwer (deputizing for Mr Pianta), Mr Bouqueral, Mr Broeksz, Mr De Keersmaeker, Mr Lautenschlager, Lord Murray of Gravesend, Mr Mursch (deputizing for Mr Poher), Mr Scelba, Mr Shaw and Mr Walkhoff.

I. INTRODUCTION

1. The Court of Justice of the European Communities would not be able to discharge fully the task laid upon it by the EEC Treaty of ensuring compliance with Community law if its powers were restricted to the review of the legality of the institutions' acts. By Article 175 of the Treaty it is also called upon to pronounce on instances of failure to act by the Council and the Commission. The Court is thus assigned virtually a function of stimulus, which is moderated by the fact that its judgments are merely declaratory: the Court confines itself to establishing the lack of action on the part of the institution at fault, leaving to the latter the choice of the necessary measures to comply with the judgment of the Court, according to Article 176 of the EEC Treaty.

2.⁵ By the provisions of Article 175, proceedings for failure to act by the Council or the Commission can be brought before the Court by:

- Community institutions or Member States (first and second paragraph of Article 175);
- Any natural or legal person (third paragraph of Article 175).

Whereas the institution of proceedings by natural or legal persons is governed by very strict conditions, neither the institutions nor the Member States are required to prove an interest in order to act: actions by them are, in fact, regarded as being brought in the interest of the development of Community law. This distinction is fundamental in the interpretation of existing jurisprudence on actions against failure to act: actually, no such proceedings have ever been brought by a Community institution or a Member State (first and second paragraphs of Article 175), but only by individuals (third paragraph of Article 175).

3. In fact, on 24 November 1975 the President of the European Parliament completed the preliminary stage to proceedings for failure to act against the Council by calling¹ upon it to act in connection with the proposal from the Commission for a Sixth Directive on the harmonization of the legislations of the Member States concerning turnover taxes. In his reply², the President of the Council stressed the difficulties of the problem, acknowledged its urgency and undertook to include it on the agenda of a forthcoming Council meeting. The enlarged Bureau of the European Parliament took note of the Council's reply and no proceedings were instituted.

¹ See annex to PE 43.221

² PE 43.278/BUR of 19 December 1975

Meanwhile the President of the European Parliament had asked the Legal Affairs Committee to examine certain problems relating to proceeding for failure to act; at its meeting of 19 October 1976 the Legal Affairs Committee adopted a draft opinion for the enlarged Bureau by Mr Jozeau-Marigné (see PE 44.639/fin.).

4. At the origin of the present consultation of the Legal Affairs Committee lies the motion for a resolution¹ tabled by Mr Mursch and others on an action against the Council of the European Communities because of the latter's failure to act on the common transport policy. Pursuant to the provisions of Rule 25 of Parliament's Rules of Procedure, this motion for a resolution was referred to the appropriate committees. It should be noted here that Parliament will not be voting on this motion for a resolution, but on one which will be included in the report from the Committee on Regional Policy, Regional Planning and Transport.

5. Our task here is to assess the possibility, the forms, and, insofar as we are competent, the advisability of Parliament's bringing proceedings against the Council for failure to act. The subject of our opinion must be clearly demarcated, on the one hand, from the work of the Committee on Regional Policy, Regional Planning and Transport and of the Political Affairs Committee and, on the other, from the content of Mr Jozeau-Marigné's opinion.

Nevertheless, in what follows, some of the arguments contained in Mr Jozeau-Marigné's opinion will be quoted and enlarged upon - principally because of the different publicity given to documents addressed to the enlarged Bureau and to those debated by Parliament in plenary sitting.

In any event, we could hardly disregard the conclusions which were un-animously adopted by the Legal Affairs Committee on 19 October 1976² and which must be taken as a starting point for our analysis.

II. OBSERVATIONS OF A LEGAL NATURE

A. Parliament's right to bring an action

6. The first paragraph of Article 175 states:

'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.'

¹ Doc. 202/76

² See PE 44.639/fin. point 26.

It should first be noted that the term 'other institutions' is intended to denote both the Council and the Commission but obviously excludes whichever of the two is bringing the action.

Parliament's right to bring an action unambiguously derives from the combined provisions of Article 175 and of Article 4 of the Treaty which enumerates the Community's institutions: the Assembly, the Council, the Commission and the Court of Justice. Apart from the Court of Justice, which could not bring an action against itself, the Community institutions entitled to bring an action for failure to act are, the Council, the Commission and the European Parliament.

No broad interpretation of Article 175 is therefore needed to assert the European Parliament's right to bring an action.

7. Nevertheless, in doctrinal debate, various arguments have been propounded to deny Parliament this right.

Some of these objections are based on the principle of the separation of powers which is observed more or less strictly in all the Member States.

Obviously, however, the separation of powers in the legal systems of the Member States cannot be such as to deny Parliament a measure of control over the activities of the executive (through votes of confidence, the tabling of questions, etc.).

Secondly, it has been argued that the European Parliament cannot bring an action before the Court of Justice on the analogy of the constitutional systems of the Member States, since these systems do not allow the parliamentary body to institute legal proceedings against the executive by reason of its actions or failure to act.

However, the Community's legal system contains some characteristics not found in the legal systems of the States. In fact, the European Parliament, which is a parliamentary institution in its composition and procedure, exercises powers of an advisory and consultative nature¹.

Since, in the Community system, the decision-making body is not accountable to Parliament, Community legislation has sought to compensate for this weakness in the system by securing for Parliament the right to bring an action against the Council for failure to act.

8. Another objection frequently advanced draws an analogy between proceedings for failure to act (Article 175) and proceedings for annulment (Article 173): from the fact that the European Parliament is not empowered to bring an action for the annulment of an act actually performed by the Council or the Commission, it is argued that it is also incapable of bringing proceedings for failure to act by one of these institutions.

¹ See PE 44.639/fin. point 10.

This objection appears equally unfounded. The European Parliament cannot take proceedings for the annulment of a Community measure, because, in its consultative function, it has taken part in the enactment of the measure. But the right of recourse against failure to act has been instituted as a legal remedy against inaction and its aim is to obtain a declaration by the Court that an institution should have acted and did not do so: clearly, it is therefore correct for Parliament to have been given the right to bring proceedings for failure to act.

9. In our opinion the evidence of the texts is irrefutable¹.

At all events, it seems beyond doubt that only the Court can finally resolve the issue by pronouncing on the admissibility of an action for failure to act brought by the European Parliament. This is why it is important that Parliament should bring such proceedings.

10. The European Parliament's right to bring an action having been established, the question arises whether it may bring such an action only to uphold its own rights or also to obtain a declaration of failure to act contrary to the Treaty in respect of any measure by the Council or the Commission. Referring to what has already been stated above (see point 2) on the difference between proceedings brought by an individual (paragraph 3 of Article 175) who must prove an interest to bring the action, and proceedings brought by institutions or Member States, it must be emphasized that any action brought by the European Parliament would be in the interest of the law²; the object of the proceedings brought by Parliament would in no way be different from that of proceedings brought by another institution or by a Member State.

B. The 'call to act': procedural considerations

11. The preliminary stage to the proceedings proper begins with the call to act (Article 175, second paragraph), which is essentially a formal summons by the institution intending to bring proceedings against the institution which, in the former's opinion, has failed to act. As can be seen from the second paragraph of Article 19 of the Statute of the Court of Justice of the European

¹ The text of Article 175 is perfectly clear; however, a comparison should also be made between the wording of this text and that of Article 173 (proceedings for annulment), which does not provide for an action to be brought by the European Parliament

² See EE 44.639/fin. point 6.

Economic Community¹, this is a necessary condition for the subsequent bringing of a legal action.

In the case of the European Parliament, the question must be settled which of its organs may properly issue a call to act to the Council in respect of the latter's failure to act in the field of common transport policy. Whereas, on the one hand, by Rule 53 of the Rules of Procedure, Parliament is represented by its President in legal matters², consideration must, on the other hand, be given to the nature of a call to act as the expression of a resolve initiating a train of events which may lead to the bringing of proceedings for failure to act. The Legal Affairs Committee is of the opinion that an act of such political importance would have to be an expression of Parliament's will in plenary sitting. Since the normal mode of expression of Parliament's will is the resolution, we must conclude that the call to act would have to be contained in the motion for a resolution included in the report by the Committee on Regional Policy, Regional Planning and Transport and voted by Parliament. This would eliminate a possible cause of inadmissibility on grounds of infringement of an essential procedural requirement³.

12. The subject of the call to act should be formulated with great care and precision, since the Court of Justice has ruled inadmissible an action which puts forward a new claim and is based on a different legal ground⁴.

13. We have also considered the question of whether there may be a time limit on issuing the call to act: can proceedings still be instituted if the infringement of the Treaty has existed for some time?

It is true that the Court has extended the principle of 'a reasonable time limit'⁵, which it regularly applies in proceedings for annulment, to a few cases of failure to act brought by private individuals. It must, however,

¹ The second paragraph of Article 19 of the Statute of the Court of Justice of the European Community states:

'The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 175 of this Treaty, by documentary evidence of the date on which an institution was, in accordance with that Article, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.'

² Rule 53 of the Rules of Procedure of the European Parliament states: 'Parliament shall be represented in international relations, on ceremonial occasions, and in administrative, legal or financial matters by the President, who may delegate his powers'

³ See PE 44.639/fin, point 17

⁴ Joined Cases 41 and 50/59; (1960) ECR (to be published) (Cause riunite 41 e 50/59, Raccolta della Corte, Vol. VI, p.985)

⁵ See PE 44.639/fin, point 19(i)

be assumed that in an action brought by the European Parliament against the Council for its failure to issue rules for the common transport policy, the Court will not apply this principle, giving preference to the consideration of general interest in the development of Community law.

Besides, it would not seem that injunctions such as those contained in Article 75 could be considered as having lapsed.

14. Another question raised in Mr Jozeau-Marigné's opinion for the enlarged Bureau is that of the possible renewal of the call to act¹. The Legal Affairs Committee agrees with Mr Jozeau-Marigné's conclusion that particularly in deference to the principle of legal certainty, it is doubtful whether the Court will admit that a repetition of the call to act extends the time limit laid down in the second paragraph of Article 175.

C. The subject of proceedings : criteria

15. Acts in respect of which an institution can be charged with unlawful failure to act must meet certain criteria.

In the first place, these must be clear and definite acts. The Council could not be, for instance, requested to act to implement the common transport policy as a whole; the legal provisions whose adoption is required must be specified.

Secondly, the obligation under the Treaty to effect the act in question must be unconditional.

Moreover, for the execution of the Treaty provision from which the obligation to act derives, there must be required further implementing measures to be put into effect by the Community institution whose failure to act is contested; were it otherwise, the provision of the Treaty on which the action is based would be one having direct effect². In that case, it would create, in respect of individuals, rights which would be upheld by national courts; the importance of an action for failure to act aiming to elicit Community norms would thus be considerably reduced. It would not seem, however, that the argument of the direct effect of Article 75 of the EEC Treaty could be seriously maintained.

¹ Point 19(ii)

² Direct effect attaches to the provisions of regulations (see Article 189 of the EEC Treaty) and, according to the Court's jurisprudence, the provisions of the Treaty and also those of directives or decisions which:

- are of a clear and unequivocal nature;
- are subject to no conditions;
- require no further implementing measures either on the part of a Member State or of a Community institution;
- involve no discretionary powers in their implementation.

16. In this connection the question arises whether the obligation upon the Council to enact a particular measure need necessarily derive from Treaty provisions, or whether it may also arise from a binding measure adopted on the basis of the Treaty (for instance, a regulation in which the Council may undertake to adopt certain measures within a certain time). On a literal interpretation of the expression 'in infringement of this Treaty', contained in the first paragraph of Article 175, the second hypothesis would seem to be excluded.

Nevertheless, attention should be drawn to the analogy with the first paragraph of Article 169, which states:

'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'.

The Court of Justice has always applied a broad interpretation to this Article, including in the concept of 'this Treaty' measures taken in accordance with the Treaty. The Legal Affairs Committee is therefore of the opinion that the Court would rule admissible an action brought on the basis of a provision of secondary legislation.

However, in view of the uncertainty on this point, and of the nature of certain obligations imposed upon the Council by Article 75 (see footnote to point 24), the Committee on Regional Policy, Regional Planning and Transport should be recommended to base any proposed call to act which it may include in its motion for a resolution mainly on obligations deriving directly from the Treaty.

D. The 'definition of position'

17. The second paragraph of Article 175 lays down certain conditions as to the admissibility of actions for failure to act:

'The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months'.

By arguing 'a contrario' from the wording of the article, it can be deduced that a 'definition of position' by the institution called upon to act precludes proceedings for failure to act. We must therefore now consider the 'definition of position' in greater detail.

18. In a number of cases brought by private individuals, the Court has had to deal with the concept of the definition of position. In particular, in Case 48/65¹ the Court held that a simple statement of position contained in a letter made the action inadmissible. The Advocate-General in his opinion² did not think it was necessary to answer the question whether 'a reply which constitutes a refusal to act as requested defines (the institution's) position', and recommended that the Court reject the plaintiff's suit on other grounds.

In other judgments³, in cases brought, be it noted, on the basis of the ECSC Treaty, whose provisions on recourse against failure to act are different from those of the EEC Treaty⁴, the Court held that an action cannot be made inadmissible by a reply in which the institution concerned merely communicates its intention of examining the problem at issue.

19. Here attention should be drawn to the fundamental distinction (see point 2 above) existing between proceedings instituted by private individuals and those brought by an institution or a Member State. Since no proceedings of the second type have ever been brought before the Court, we cannot know with certainty what would be its interpretation of the concept of 'definition of position' in the case of a possible action brought by the European Parliament. However, - and the doctrine is unanimous on this point - Article 175 would be voided of all useful effect if any reply whatever from the institution requested to act were to be regarded as a 'definition of position'.

But this is a problem which should be dealt with at a later stage, when the 'definition of position' by the Council comes to be considered.

¹ (1966) ECR p.19 et seq.

² (1966) ECR p.32

³ See Joined Cases 42 and 49/59 (1961) ECR to be published (Causa riunite 42 e 49/59. Raccolta della Corte, Vol. VII p. 97 et seq.) Case 42/58 ECR to be published (Causa 42/58, Raccolta della Corte, Vol. V, p.377)

⁴ Article 35 of the ECSC Treaty states:

'Wherever the High Authority is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfil this obligation, it shall be for the States, the Council, undertakings or associations, as the case may be, to raise the matter with the High Authority.

The same shall apply if the High Authority, where empowered by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation, abstains from doing so and such abstention constitutes a misuse of powers.

If at the end of two months, the High Authority has not taken any decision or made any recommendation, proceedings may be instituted before the Court within one month against the implied decision of refusal which is to be inferred from the silence of the High Authority of the matter.'

E. Time limits: a procedural proposal

20. It follows from Article 175 that if Parliament should decide to bring an action before the Court against the Council for failure to act, it should first, in a resolution (see point 11), call upon the Council to act; from the day following the receipt by the Council of the call to act¹ begins the two-month period at the end of which, if the Council has not defined its position, Parliament can, within a further period of two months, start proceedings for failure to act; it is reasonable to assume that the reply from the Council will terminate the first period and open the second.

If, following the call to act, the Council should fail to define its position, or if it should carry out the measures which are the subject of the action, no particular problems would arise: these two extreme cases, however, seem unlikely to occur. What is more likely is that the Council will reply to the call to act, pointing, for instance, to the difficulties it is encountering in putting the measures requested by Parliament into effect. The content of such a reply should be considered and assessed by the European Parliament which will then be able to decide whether to start proceedings for failure to act. Given the political importance of bringing such an action, the decision can only be taken by Parliament in plenary sitting; for the reasons adduced in point 11 we must consider that Parliament, in voting on the motion for a resolution contained in the report from the Committee on Regional Policy, Regional Planning and Transport, must not instruct its President to take all the further requisite measures, thereby delegating wide discretion on such an extremely important decision to one of its internal organs.

21. Consequently, there arises the problem of the observance of the obligatory two month time-limit laid down in the second paragraph of Article 175. In the ordinary way, what should happen is that the European Parliament, on the basis of a report from the Committee on Regional Policy, Regional Planning and Transport, which should have consulted the two committees asked for their opinions, should adopt a resolution. But recourse to this procedure would be extremely risky because any delay would result in the time-limit² elapsing and the impossibility of bringing the action. On the other hand, it is hardly necessary to point out that none of the shortened procedures for which our own Rules of Procedure provide could be used for arriving at a decision of such importance as the one in question.

¹ Article 80(1) of the Rules of Procedure of the Court of Justice

² which, as noted above (see point 14) cannot be extended.

22. The difficulty might conceivably be overcome if only the Committee on Regional Policy, Regional Planning and Transport (or generally speaking the committee responsible) were consulted on the Council's definition of position. However, such a procedure is not felt to be satisfactory because the Council's definition of position could also relate, or relate solely, to matters of a legal and political nature, on which the Committee on Regional Policy, Regional Planning and Transport would not be competent to deliver an opinion.

23. Perhaps the best way of ensuring both speed of proceedings and collegiality of the decision would be to set up a special committee (Rule 37 of the Rules of Procedure of the European Parliament) to examine the Council's reply on the basis of the existing documentary evidence and to submit a report to Parliament in plenary sitting. This special committee could be composed in equal numbers of members of the Committee on Regional Policy, Regional Planning and Transport, the Legal Affairs Committee and the Political Affairs Committee. Its chairman could be the President of the Parliament, since it is he who, if it was decided to start an action for failure to act, would have to represent Parliament before the Court (Rule 53 of the Parliament's Rules of Procedure): it is undoubtedly important that the President should be involved from the start in decisions to be taken as to the possibility of bringing the proceedings.

The proposal to establish the special committee would have to be contained in the motion for a resolution from the Committee on Regional Policy, Regional Planning and Transport and the decision would thus be taken by the European Parliament simultaneously with that on the issuing of the call to act. The special committee would meet immediately after the receipt of the Council's 'definition of position' and would be dissolved once Parliament had voted on the motion for a resolution contained in its report, or at the expiry of the period of two months after which proceedings for failure to act could no longer be brought.

F. Problems relating to Article 75

24. Some general observations on Article 75 are called for at this point.

First, by paragraph 2 of this Article the Council is required to lay down, before the end of the transitional period, the provisions referred to in points (a) and (b) of paragraph 1 of the Article¹; the aim of these provisions is to ensure freedom to provide services in the field of transport, to which the provisions of Articles 59 to 66 of the Treaty do not apply because of the express derogation contained in Article 61(1).

¹ Plainly, this clause is of a prescriptive nature: it imposes a precise obligation to achieve a certain result within a mandatory time-limit

25. The phrase 'taking into account the distinctive features of transport' contained in Article 75(1), cannot, because of its vagueness, justify the Council's inaction.

The applicability of points (a) and (b) of Article 75(1) is limited to transport by rail, road and inland waterway (Article 84(1)). The effects of other limitations, material and territorial, on the applicability of Article 75(1) and (2) should also be borne in mind: see, for instance, the provisions of Article 78¹ and Article 82² of the Treaty.

26. The Legal Affairs Committee is of the opinion nevertheless, that it is for the committee responsible to specify the exact Commission proposals based on Article 75, which the Council's failure to adopt is alleged to infringe the Treaty.

III. CONCLUSIONS

27. The Legal Affairs Committee reaffirms³ its opinion that the European Parliament has the right to take recourse before the Court of Justice against a failure to act by the Council which it considers contrary to the Treaty: such proceedings would be instituted in the interest of the development of Community law, and to bring them, Parliament need not prove its own legitimate interest to act (see points 6 to 10 above).

The judgment of the Court would be of a declaratory nature (see point 1). If the judgment were to establish the Council's unlawful failure to act, this would lay upon the Council an obligation 'to take the necessary measures to comply with the judgment of the Court of Justice' (Article 176 of the Treaty).

28. The issuing of the call to act to the Council, which is the preliminary stage to proceedings for failure to act, should, in the opinion of the Legal Affairs Committee, be made by Parliament in plenary sitting, at the time of voting the motion for a resolution contained in the report from the Committee on Regional Policy, Regional Planning and Transport; the request for action should specify all those matters which are to constitute the subject of any future proceedings for failure to act (see points 11 to 14 above).

¹ Article 78 of the EEC Treaty states:

'Any measures taken within the framework of this Treaty in respect of transport rates and conditions shall take account of the economic circumstances of carriers.'

² Article 82 of the EEC Treaty states:

'The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division.'

³ See PE 44.639/fin.

29. The measure in respect of which the Council is requested to act should be of a clear, precise and unconditional nature; the Treaty provision from which the Council's obligation to act derives should be one not having direct effect.

The Legal Affairs Committee recommends that the Committee on Regional Policy, Regional Planning and Transport base any call to act which it might include in its motion for a resolution mainly on obligations deriving directly from Article 75 (see points 15 and 16).

30. Parliament's decision on its attitude to the 'definition of position' by the Council should be taken in plenary sitting. To ensure this, and also that the two-month time limit laid down in the second paragraph of Article 175 is observed, the Legal Affairs Committee suggests that the Committee on Regional Policy, Regional Planning and Transport should include in its motion for a resolution a proposal for the possible setting up of a special committee with the task of submitting to Parliament a report within an appropriate time.

31. The object of the call to act and of any subsequent proceedings for failure to act should be determined by the committee responsible.

32. In conclusion, the Legal Affairs Committee stresses the great importance which acceptance by the Court of Justice of an action brought by the European Parliament against the Council for failure to act would have from an institutional point of view. Under existing procedures, Parliament exercises effective control only over the Commission. This defect in the institutional balance could be remedied by the action in question, as Parliament would thereby acquire the power of control, albeit indirectly and incompletely, over the Council in cases where it failed to act.

Minority Opinion

Some members were against the draft opinion, contesting Parliament's right to bring an action for failure to act, and denying that the requirements for instituting such an action had been met and that it was politically desirable.

Other members did not see the need to set up a special committee, jointly composed of members of the Committee on Regional Policy, Regional Planning and Transport, the Political Affairs Committee and the Legal Affairs Committee, to examine the Council's definition of position. This task, they felt, should be carried out by the Legal Affairs Committee alone.

