

REVISITING THE FORMATIVE YEARS OF EUROPEAN TRANSPORT POLICY

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This paper studies first thirty years in the development of European common transport policy. Problem of vague EEC Treaty provisions on transport is analysed through the important judgments of the European Court of Justice. The author points out opposing political and economic interests of Member States and communication between Community bodies as a crucial problem in progressive creation of transport policy. Changes in political climate and dominance of the liberal market approach have favoured liberalization of European transport policy.

Key words: EEC Treaty, common transport policy, European Court of Justice, French seamen case, Parliament v Council, Nouvelles Frontières case, single market programme, liberalization of transport policy

1 PREFACE

In 1950's, while six European countries were making large steps towards the European integration, creating the Treaty establishing the European Economic Community (the EEC Treaty), the question of common transport policy was raised for the first time. No one could have known it would take more than twenty years to start developing that idea and establish grounds for European transport policy.

The importance of an effective transport system for economy and welfare of every country is unquestionable. It is determined by good transport policy

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and all kinds of factors related to history, geography, wealth, technology and culture of the country. Since the transport policy, which includes policies on overall modes of transport and transport infrastructure, involves many divergent interests - those of the government, organizations, private sector (manufacturers, operators), associations, customers et al., unification efforts ?? often raise a lot of issues. The issues become even more sensitive when talking about one common transport policy for six (or more) countries, when each of those has its own interests and approach to policymaking, to say nothing of the differences resulting from their nature, history, geography and culture. One should not forget complications related to procedure of policy making and institutional organization in case of such a complex organization as the European Community.

Concerning everything said above, the main objectives of this paper are: first, to analyze the position of the provisions on transport set by the EEC Treaty; and second, to explain the first phase in the development of common transport policy towards the creation of a single market in transport services, through the role of relevant bodies of the European Community and in the light of the most important transport judgments set by the European Court of Justice.

2 THE LEGAL BASIS OF THE EUROPEAN TRANSPORT POLICY

According to Article 3 (1) (f) of the EC Treaty,¹ one of the activities placed in the competence of the Community is implementation of “a common policy in the sphere of transport”. Strictly speaking, it would mean that it is wrong to talk about EU transport policy, since the European Community presents only one of three separate “pillars” of the European Union,² but since it is a wide-spread term and it refers to transport policy created for all member states forming the EU, in this paper we will use the term “European transport policy” or “common transport policy”.

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Consolidated version of the Treaty establishing the European Community (2002), Official Journal of the European Communities, 2002. Available at: http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf. (25.10.2008.)

² Craig, P.; De Burca, G., *EU Law*, 3rd ed., Oxford, 2003, p. 3-5.

It is significant that the transport policy was one of only three “common policies” which were initially introduced with the EC Treaty.³ Those spheres were regulated with the special provisions set down with the separate Treaty Titles. The provisions on transport were given under the Title IV (now Title V) of the EC Treaty. The same as today, the Title consisted of eleven, often referred to as “vague”,⁴ provisions (Articles 74-84; now Articles 70-80), which set down the frame for the Community when establishing the common transport policy. Concerning the fact that at the time the EC Treaty was created, “member states had too many vested interests to protect and the conditions under which the industry operated varied greatly from member state to member state”,⁵ no other solution than settling the separate title with a few basic principles in the Treaty was possible. Moreover, it was actually the intention of member states to exclude the transport from the application of other general rules of the Treaty. In spite of that fact, the question of applicability of general Treaty provisions to transport was raised in no time.⁶

Among provisions on transport, there are two articles which need to be mentioned when observing the formation of the common transport policy in its early beginnings. The first is Article 75 of the EEC Treaty (now Article 71). This article sets down the rules for the development of the common transport policy, giving the Council power and obligation to lay 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; and (c) any other appropriate provisions, for the purpose of implementing Article 74, and taking into account the distinctive features of transport.⁷ The provisions referred to in (a) and (b) should have been laid down during the transitional period.⁸ In accomplishing these tasks, the Council had

³ The others were a common policy in the sphere of agriculture and fisheries, and common commercial policy (Article 3 of the Treaty establishing the European Economic Community (EEC Treaty), 1957; available at: <http://eur-lex.europa.eu/en/treaties/index.htm> (29.10.2008.)

⁴ See Greaves, R., *EC Transport Law*, London, 2000, p. 18.

⁵ *Ibid.*, p. 17.

⁶ More on this subject see *infra* 2.1.

⁷ With the Treaty on European Union (1992), another task was introduced - implementing measures to improve transport safety (now Article 71 (1) (c) of the EC Treaty).

⁸ Paragraph 2 of Article 75. The transitional period ended in 1969.

to act unanimously (until the end of the second stage and by a qualified majority thereafter), on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly.⁹ There was an exemption made for the case of possible serious impact of the principles of the regulatory transport system on the standard of living, employment in certain areas and operation of the transport facilities, when the Council alone had to lay down the principles, acting unanimously.¹⁰

Second important observation is concerned with Article 84 (now Article 80) of the Treaty. Paragraph (1) of that Article prescribed that “*the provisions of this Title shall apply to transport by rail, road and inland waterway*”. Clearly, other modes of transport were left out from this rule. Those were subject to the special governing rule under paragraph (2) of the mentioned Article. It prescribed, in relation to sea and air transport, that “*the Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down*”¹¹ for those modes of transport. The rationale of this kind of separate regulation was in the international character of sea and air transport. But the wording of the provision of paragraph (1), which made it clear that provisions under Title V are automatically applicable to inland modes of transport (rail, road and inland waterway), left the question of whether those provisions are applicable to sea and air transport at all?

⁹ Paragraph 1 of Article 75. This procedure was changed with the introduction of co-decision procedure under the Treaty on European Union (1992), when the European Parliament received more powers and became an equal partner in the legislation process of making transport policy. The co-decision procedure was introduced in all transport legislation with the Amsterdam Amendments in 1997. For more see: Stevens, H., *Transport policy in the European Union*, New York, 2004, p.78-79.

¹⁰ Paragraph 3 of the Article 75. This was also changed with the Treaty on European Union (1992), when it was imposed to the Council to act “on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee”. Treaty on European Union (1992), available at: http://eur-lex.europa.eu/en/treaties/dat/11992M/tif/JOC_1992_191__1_EN_0001.pdf (3.11.2008.)

¹¹ With the Article 16 (5) of the Single European Act (1986), Council’s “unanimity” was replaced by “qualified majority”. Whole text of the SEA available at: <http://eur-lex.europa.eu/en/treaties/index.htm> (3.11.2008.)

2.1 French Seamen case (167/73) -

Applicability of the general Treaty provisions to all modes of transport

The French seamen case¹² is of a huge importance for the development of the common transport policy. At a time of absence of any progress in establishing a common transport policy, mostly because of the reluctance of the Council, the judgment of the European Court of Justice in this case is considered to be the first significant step for the future development of European transport policy.

Namely, in this case, the Commission brought an action before the Court of Justice against the French Republic, claiming that the French Republic had not complied with its obligations under the provisions of the EEC Treaty as regards freedom of movement for workers (seamen) within the Community.¹³ The question was: Do the Treaty provisions on freedom of movement of workers apply to sea transport.¹⁴ It was actually the question of applicability of general Treaty provisions to sea transport. Since the question of legislation regulating the conditions of employment for seamen was in connection with sea transport, the Court's ruling gave two important answers - first, on the position of the sea (and air) transport in Treaty provisions in relation to other transport modes, and second, on the applicability of the general Treaty provisions to transport.

The French Government argued that it was not obliged to comply with the rules of the Treaty regarding freedom of movement for workers. The main argument was that according to Articles 3 (e) and 74 of the Treaty, the rules of the Treaty relating to the complex economic activities covered by it (and in particular Articles 48 to 51) apply to transport only within the framework of a common policy, the implementation of which was for the Council alone to decide (in accordance with the prescribed procedure).¹⁵ Furthermore, they

¹² Case 167/73, *Commission of the European Communities v French Republic (French seamen case)*, [1974] ECR 359; available at: www.eur-lex.europa.eu (3.11.2008.)

¹³ Some of the provisions of the French *Code du travail maritime* were incompatible with the Treaty provisions and the Regulation No. 1612/68, which forbid any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment.

¹⁴ Wyatt, D., The freedom principle in the transport sector, *European Law Review*, 1975, p. 61.

¹⁵ *French seamen case* (n. 12), paras 7-10.

excluded the application of those provisions to sea transport, basing their argument on the wording of Article 84 (2) of the Treaty, which, in their understanding, excludes sea transport from the application of provisions on transport (Articles 74 to 84).¹⁶

In the answer to this argument, concerning the positions of the sea transport, ECJ precisely stated that “*far from excluding the application of the Treaty to these matters, it (meaning Article 84 (2)) provides only that the special provisions of the Title relating to transport shall not automatically apply to them*”¹⁷. So, it meant that provisions under Title IV (now Title V) could be applicable also to sea and air transport, but it was on the Council to make such a decision.

The other great dilemma regarding the position of the transport provisions in Title IV in relation to the general rules of the Treaty, was solved by the ECJ in an unexpected way. It started with the observation that “*the establishment of the common market thus refers to the whole of the economic activities in the Community*” and while “*conceived as being applicable to the whole complex of economic activities, these basic rules can be rendered inapplicable only as a result of express provision in the Treaty*”.¹⁸ Furthermore, regarding the existence of such reservation, it did not neglect the fact that Article 61 (1) (now Article 51 (1)) prescribes that freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport, but it concluded that such provision is a consequence of the fact that transport is basically a service and that it has been necessary to provide a special system for it, taking into account the special aspects of that branch of activity. That is why the mentioned provision does not mean the exemption of the general rules of the Treaty, but confirms “*that the general rules of the Treaty must be applied insofar as they are not excluded*”.¹⁹ It is important to note that the Court concluded this Treaty interpretation adding that sea and air transport “*...remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty*”²⁰ and that “*the application of Articles 48 to 51 to the sphere of sea transport is not optional but obligatory for member states*”.²¹

Taking into account that by this judgment the ECJ made it clear that the general provisions of the Treaty apply to all modes of transport and that it is

¹⁶ *French seamen* case (n. 12), para 11. Also see *supra* 2.

¹⁷ *French seamen* case (n. 12), para 31.

¹⁸ *French seamen* case (n. 12) paras 19 and 21.

¹⁹ *French seamen* case (n. 12) para 28.

²⁰ *French seamen* case (n. 12), para 32.

²¹ *French seamen* case (n. 12), para 33.

up to the Council to decide whether the provisions on transport would apply on the sea and air transport in the same way as to the rail, road and inland waterways transport, we must observe that Council was given all needed explanations and could have finally started creating the common transport policy. But not only that - this judgment had a big impact on member states as well. They were placed within the frames set by the general Treaty provisions, which were considered to be applicable to all modes of transport. It meant that the possibilities of the member states in adopting new laws were reduced and the "special treatment" which transport sector had in their beliefs was no longer so special. Its development was now limited by the obligatory applicability of general Treaty rules.

2.2 Application of general Treaty provisions in the absence of special regulation

Only two months later, in June 1974, the ECJ passed another noteworthy judgment.²² It was not directly related to transport provisions, but its outcome was important for the transport policy as well. The case concerned the interpretation of Articles 52 and 55 (now Articles 43 and 45), the questions that had been raised in the context of an action brought up by J. Reyners, a Dutch national, against the Belgian State, on the question of freedom of establishment.²³

Article 52 of the EEC Treaty prohibited restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, which also included the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms (...), under the conditions laid down for its own nationals by the law of the country where such establishment is effected (...). By further provisions it was prescribed that it should be the Council to issue directives in order to lay down that freedom of establishment as regards a particular activity and

²² Case 2/74, *Jean Reyners v Belgian State*, [1974] ECR 631; available at: www.eur-lex.europa.eu (31.10.2008.)

²³ J. Reyners had been excluded from the profession of advocate by reason of his nationality as a result of the Belgium Royal Decree relating to the title and exercise of the profession of Avocat (1972).

to make it easier for persons to take up and pursue activities as self-employed persons (Articles 54 and 57).

Considering the question of direct applicability of the provision set out in the Article 52, in relation to Articles 54 and 57, the Court ruled that “(...) *since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by Articles 54 (2) and 57 (1) of the Treaty*”.²⁴ It meant that the terms of the Treaty applied as they were regardless of the absence of special regulations which should have been brought up by the Council before the end of 1969 (when the transitional period ended). Moreover, the general Treaty provisions had direct effect. That meant that individuals in European Community were given the right to enjoy freedom of establishment which they could enforce in their own name through national courts.²⁵

In the sphere of transport, this judgment had an important meaning for the people working in transport services. In broad terms, it implied that all general rules of the EC Treaty must be applied to transport, except in case when Treaty provides a specific exemption for it. In Stevens' words, “(...) *the special status of transport, with its own title in the Treaty permitting the Transport Council to determine how the Treaty should be applied to transport, applied only when specifically provided for in the text of the Treaty (...)*” and “*in the absence of such specific exemptions on transport, all the other general rules of the Treaty, on competition and state aids for example, as well as on the freedom of establishment, must be held to apply*”.^{26, 27} The result of this interpretation was the obligation imposed to the Council when making the transport policy. The Council's regulations must be in accordance with general Treaty provisions concerning questions in particular case, because their inconsistency with the general Treaty provisions would make them invalid.

²⁴ *Jean Reyners v Belgian State* (n. 22), para 32.

²⁵ For more on „direct effect“ of Treaty provisions see: Craig, De Burca, op.cit. (n. 2), p. 182-185.

²⁶ Stevens, op.cit. (n. 9), p. 52.

²⁷ This was actually a confirmation of what the Court said in *French seamen* case, regarding the application of general Treaty provisions on free movement of workers (see *supra* 2.1) The same, but regarding competition rules, the ECJ will confirm again in its later judgment in the Joined Cases 209 to 213/84 (*Nouvelles Frontières* case), [1986] ECR 1425. See *infra* 3.3.

3. LONG AWAITED CHANGES IN THE DEVELOPMENT OF THE COMMON TRANSPORT POLICY

During the 1960's and 1970's there was some progress made in the development of road freight transport policy (while the progress in road passengers transport policy was minimal),²⁸ but in all other modes of transport no major steps towards common transport policy and creation of a single market for transport services were taken. All the measures were more or less governed by the idea of harmonization of regulations concerned.

Twenty years had passed since the EEC Treaty was signed and the idea of common transport policy was still very far from its realisation. At that time, transport policy was governed by member states, or, to be more precise, it was primarily national transport policy.²⁹

The Commission was active with its proposals to the Council, but those two bodies could not agree about the creation of transport policy. The main problems were the opposing political interests of member states in almost every mode of transport. But in the late 1970s, the Commission, recognizing that the overall approach to creation of European transport policy represented in its earlier programmes was not the best solution, had changed it wisely and started with a special approach to every mode of transport, taking into account all the particularities in each of the modes.³⁰ In spite of that, the political and economic interests were stronger and the Council could not accept yet proposals coming from the Commission.

At the same time, the ECJ was making some effective moves in the development of common transport policy, establishing some principles for its creation. As already mentioned, most important was the application of general provisions of the Treaty on all modes of transport, including sea and air transport. But in the mid-1980's, the Parliament, which at that time only had a consultative role in making transport policy, recognized its opportunity and decided to bring the inactive Council before the Court.

²⁸ See Stevens, *op.cit.* (n. 9), p. 102-116.

²⁹ Giorgi, L., Schmidt, M., *European Transport Policy - a Historical and Forward Looking Perspective*, German Policy Studies, 2006, Vol. 3, p. 3; available at: <http://web.ebscohost.com> (3.11.2008.)

³⁰ Known as "monomodal approach"; Stevens, *op.cit.* (n. 9), p. 121.

3.1 European Parliament v Council of the European Communities (Case 13/83)³¹

After adopting three Resolutions on the principles of the common transport policy, in 1974, 1979 and 1982, in which it constantly repeated its demand that the Council should introduce without delay a coherent common policy in the transport sector,³² Parliament, realizing that there was no change in Council's conduct, adopted another Resolution. With this Resolution the Parliament informed the Council on its intention to bring an action against it "*for failing to lay down pursuant to articles 3(E), 61 and 74 the framework of a common transport policy within the objectives of the Treaty might be pursued and to take the decisions provided for in articles 75 to 84 in order to implement articles 61 and 74*".³³ Since the Parliament's charges were not answered, in 1983 it finally decided to bring action against the Council before the Court of Justice, stating that the Council had failed to fulfil its obligations in respect of the common transport policy.

Parliament's action included two separate claims: (1.) concerning the failure to introduce a common transport policy, and (2.) concerning the Council's failure to act on sixteen proposals relating to transport which the Commission had submitted to it.³⁴ As a support, the Commission appeared on the Parliament's side, bringing out explicitly all of its complaints to the Council's work on common transport policy in last twenty years.³⁵

³¹ Case 13/83, *European Parliament v Council of the European Communities (Parliament v Council)*, [1985] ECR 1513. Available at: www.eur-lex.europa.eu, Judgment no. 61983J0013. (31.10.2008.)

³² *Parliament v Council* (n. 31), para 4.

³³ *Parliament v Council* (n. 31), para 6.

³⁴ *Parliament v Council* (n. 31), para 33. It was for the first time in history of European Integration that the Parliament raised a claim against the Council on the basis of Art 175 for failing to exercise its competence. Erdmenger, J., *Die EG-Verkehrspolitik vor Gericht - Das EuGH-Urteil Rs. 13/83 vom 22.5.1985 und seine Folgen*, *Europarecht*, 1985, p. 375.

³⁵ „The Commission points out that there are serious lacunae in all areas of transport policy (...). It refers in particular to the inadequacy of the measures adopted on the carriage of goods by road (...) In that connection the Commission refers to the unsatisfactory situation of the accounts of railways and their relations with the state, the large infrastructural overcapacity in transport by inland waterway (...), the lack of progress in implementing measures relating to infrastructure of interest to the Community and the lack of coordination of the national measures relating to infrastructure, and finally, the almost total absence of Community action in relation to sea and air transport.“ (*Parliament v Council* (n. 31), paras 40-41)

The Court agreed that there was a lack of consistent set of rules which may be regarded as a common transport policy in the meaning of Articles 74 and 75 of the Treaty. Even more, it confirmed that “*under the system laid down by the Treaty it is for the Council to determine...the aims of and means for implementing a common transport policy...*” and that “*...the Council is required to make all the decisions necessary for the gradual introduction of such a policy*”,³⁶ but still it partly dismissed the application regarding the Council’s failure to introduce a common transport policy. The reason came from the fact that the Treaty does not determine the substance of the decisions which should be made by the Council and which should introduce a common transport policy, and from the Parliament’s impreciseness in its charges. Namely, the Parliament had not stated *which* measures the Council ought to adopt and in what sequence they ought to be adopted.

Nevertheless, the Court found that the Council was in breach of the Treaty, but for failing to ensure freedom to provide services in the sphere of international transport and for failing to lay down the conditions under which non-resident carriers may operate transport services in a member state. Those two were in fact the obligations imposed to the Council by Articles 75 (1) (a) and (b) (now Article 71), which should have been laid down during the transitional period (Article 75 (2)), in order to achieve the introduction of freedom to provide services in transport sector. Since those obligations were “*sufficiently well-defined for disregard of them to be the subject of a finding of failure to act pursuant to Article 175*” (unlike the Parliaments claim on obligation to “make all the necessary decisions”), and since it was common ground that the necessary measures for introducing the freedom to provide services in relation to transport had not yet been adopted, the Court believed that the Council has failed to act.

In spite of Parliament’s and Commission’s concern for consequences in case that Council still failed to act, the ECJ did not want to consider that situation since it was only a hypothetical one. It only observed that the Council had a reasonable period for taking measures in order to comply with its judgment, since the Treaty does not specify any time-limit. However, the practical and political effect of this judgment undeniably remained great.

³⁶ *Parliament v Council* (n. 31), paras 49 and 50.

3.2 Single Market Programme

In the early 1980's, Commission continued its new approach towards European transport policy making. John Steel, Director General for Transport at the time, prepared three papers between 1982 and 1985 (for inland, sea and air transport). They had only one purpose - to launch an irreversible liberalization process in transport policy and to establish a single market.³⁷ His good sense for tactics in policymaking and the change of political climate within the Transport Council, especially since the ECJ made it clear that the Council should act in order to establish freedom in providing transport services, started giving good results.

At the same time, Commission published a new communication: *White Paper on Completing the Internal Market*.³⁸ It was "designed to spell out the programme and timetable"³⁹ for achieving the integration of the Member States' economies by introducing measures which would remove physical, technical and fiscal barriers between them and evolve in the creation of the internal market.⁴⁰ In the Annex to the Paper,⁴¹ 279 measures were listed, together with a timetable for the promulgation of each measure. Legislative process was to be completed by 31 December 1992.⁴²

Although the White paper did not cover all areas of Community action, regarding the transport it actually specified a list of measures which needed to be adopted in the transport field in order to complete the internal market,⁴³

³⁷ Stevens, op. cit. (n. 9), p. 56-57.

³⁸ COM (85) 310, from 14 June 1985. Whole text available at: http://europa.eu/documents/comm/white_papers/pdf/com_1985_0310_f_en.pdf (11.11.2008.)

³⁹ Introduction of the White Paper, *ibid.*, para 3.

⁴⁰ *Ibid.*, para 10.

⁴¹ Text available at: http://europa.eu/documents/comm/white_papers/pdf/com_1985_0310_f_en.annexe_pdf.pdf (11.11.2008.)

⁴² Craig, De Burca, op.cit. (n. 2), p. 1174.

⁴³ Greaves, op. cit. (n. 4), p. 13. Measures listed in para 109 of the White Paper are: "(...) *-for the transport of goods by road between Member States, the phasing out of quantitative restrictions (quotas) and the establishment of conditions under which non-resident carriers may operate transport services in another Member State (cabotage) will be completed by 1988 at the latest. -for the transport of passengers by road, freedom to provide services will be introduced by 1989; -for the international transport of goods by inland waterway, freedom to provide services where this is not yet the case will be introduced. Where necessary, conditions will be established under which non-resident carriers may operate inland navigation services in another Member State (cabotage).*

but it also made it clear that those measures were only part of the common transport policy, because it “*extends to other measures (e.g. state aid policy, improvement of railway financing, harmonization in the road sector, infrastructure planning and investment) which are not of direct relevance to the internal market but which are an essential element of this policy*”.⁴⁴

This time the Commission’s initiative and changes in political climate were good enough to move European Community forward and to make some changes in the integration. White Paper provided excellent foundations for that - for the passage of the Single European Act (SEA).⁴⁵ SEA modified the original EEC Treaty from 1957 and one of its main objectives was to facilitate the completion of the single market, to establish the internal market.⁴⁶ Besides that, the SEA made a number of institutional and substantive reforms,⁴⁷ some of which had important influence on transport policy as well. One of them was the introduction of a qualified majority voting in Council for measures in the fields of sea and air transport.⁴⁸

Adoption of such a programme which brought a radical change in the Community’s policy after many years was not a coincidence. The breakthrough of the idea of liberalization of services, as well as transport services, based on market-led approach, which appeared in national policies, started spilling over the Community policy.⁴⁹ All this pressure for establishing a single market

Both measures should come into effect by 1989.

-the freedom to provide sea transport services between Member States shall be established by the end of 1986 at the latest, though with the possibility of a limited period phasing out certain types of restrictions.

-in the air transport sector, it is necessary to provide by 1987 for greater freedom in air transport services between Member States. This will involve in particular changing the system for the setting and approval of tariffs, and limiting the rights of Governments to restrict capacity access to the market.“

⁴⁴ White Paper (n. 38), para 112.

⁴⁵ Craig, De Burca, op.cit. (n. 2), p. 1171. For SEA see *supra*, n. 13.

⁴⁶ Defined in Article 7a (now Article 14 (2) of the Treaty), „*the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty*“.

⁴⁷ See Craig, De Burca, op.cit. (n. 2), p. 19-20.

⁴⁸ Article 16 (5) of the SEA which amended Article 84 (2) of the EEC Treaty (now Article 80 (2)).

⁴⁹ So-called „liberal turn“ in European politics. Stevens, op.cit. (n. 9), p. 204, according to Jobert, 1994. For more on how liberalization, based on market-led approach, won over state-led approach see Stevens, p. 202-205.

in transport services, which was coming from the Commission, the Court of Justice and the Parliament, definitely had a good effect on transport policy. But before we see the real benefit of it, we should mention one more question that emerged at that time and that was also important for the development of transport policy: the question of correlation between rules on competition policy and transport provisions.

3.3 *Nouvelles Frontières* case (Judgment in joined cases 209-213/84)

Although the question of applicability of general rules of the Treaty to transport was answered in the judgment brought in the *French seamen* case,⁵⁰ which set it out clearly that all modes of transport are subject to the general rules of the Treaty, the question of what Treaty provisions the “general rules” include remained unanswered.⁵¹ In this case, where the French local criminal court applied for a preliminary ruling on the interpretation of the Treaty, the question concerning competition rules was contained in Part III of the Treaty.⁵²

Examining the question of applicability of the competition rules in the Treaty to air transport, the Court laid down a few interesting and important observations. First, it pointed out that no other provision except Article 61 (now Article 51) of the Treaty, which provides that freedom to provide services in the field of transport is governed by the provisions of the title relating to the common transport policy, makes its application to the transport sector subject to the realization of a common transport policy, and therefore, the Treaty competition rules are applicable to the transport sector whether or not a common transport policy has been established.^{53, 54} Second, it added that if the Treaty intended to remove transport from the scope of the competition rules, it would have made an express derogation to that effect, as it was done in the case of Article 42 concerning the agriculture. Therefore it concluded that

⁵⁰ See *supra* 2.1.

⁵¹ For different opinions on that question see Blanco, L. O., Van Houtte, B., *EC Competition Law in the Transport Sector*, Clarendon Press, Oxford, 1996, p. 41-42.

⁵² Joined cases 209-213/84, *Ministere public v Lucas Asjes* (and others) (*Nouvelles Frontières* case) [1986] ECR I 425; available at: <http://eur-lex.europa.eu> (31.10.2008.)

⁵³ *Nouvelles Frontières* case (n. 52), paras 37-39.

⁵⁴ With this judgment ECJ actually confirmed its opinion from the *J. Reyners v Belgian State* case. See *supra* 2.2.

“the rules in the Treaty on competition, in particular Articles 85 to 90, are applicable to transport”.⁵⁵ And, considering air transport in particular, the Court confirmed its opinion from the judgment in French seamen case, declaring once again that “air transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty”, now “including the competition rules”.⁵⁶ Accordingly to that, the Treaty rules on competition and Article 85 in particular, were directly applicable to air transport, regardless of any measures brought within the air common transport policy.

3.4 Liberalization of all transport modes

Substantive changes in political climate and common language that were found between the Commission and the Transport Council resulted in positive-liberalization of transport policy, which soon started to extend to all modes of transport.

The first liberalizing policy paper, dating from 1983, was on inland transport.⁵⁷ First steps were taken in road freight transport, which had a great economic significance within the context of a common transport policy.⁵⁸ During the following years, the liberalization of all parameters governing the market for international road freight transport within the Community - licensing, quotas and tariffs - had been negotiated and created.⁵⁹ In road passenger transport policy things were different since it was not of such a political importance, so progress was minimal.⁶⁰ In the light of the single market programme, not much was done in the inland waterway either, because of another reason. It was for the fact that the inland waterway has the longest history of an essentially liberal regime, and the largest part of the market was already liberal.⁶¹ Railways were another story. Since they were mostly in the public sector and therefore had

⁵⁵ *Nouvelles Frontières* case (n. 52), para 42.

⁵⁶ *Nouvelles Frontières* case (n. 52), para 45.

⁵⁷ *Progress Towards a Common Transport Policy: Inland Transport* (CEC, 1983a), COM (83)58, Brussels. See *supra* 3.2.

⁵⁸ Stevens, *op. cit.* (n. 9), p. 102-103.

⁵⁹ For more see Greaves, *op. cit.* (n. 4), p. 29-32, 54-56 and 59-62; and Stevens, *op. cit.* (n. 9), p. 107-109.

⁶⁰ See Stevens, p. 114-116.

⁶¹ The Rhine regime; *Ibid.*, p. 116-117.

no such relevance for internal market, but were nevertheless politically a very sensitive issue, no changes towards liberalization of rail transport policy were made until 1990s.⁶² At the time, this first wave of liberalization was coming to an end in other modes of transport, so it was necessary to finalize it and start with rail services as well.

More progress was done in sea transport policy. When talking about creating a single market in sea transport one must not forget different nature of this transport mode, which was also recognized in the EC Treaty.⁶³ But still, international character of shipping was not an obstacle to creation of common shipping policy. Soon after the policy paper on shipping was published (1985),⁶⁴ in 1986 the Council adopted its first maritime policy package, which was concerned with creating and regulating competition within the internal market and with countering protection originating outside.⁶⁵

In air transport, 1980s were crucial as well. Together with other political and institutional pressures, the ECJ had, with its judgment in the *Nouvelles Frontières* case, pushed the Council forward to implement the measures for the establishment of a single-market in air transport.⁶⁶ The first package of measures was adopted in 1987 and it historically changed the market in air transport services.⁶⁷

4 CONCLUSION

Setting down the legal basis for European transport policy with the EEC Treaty in 1957 was merely a starting point for European Community to establish “common transport policy” for six founding member states. Each country had its own interests in transport services and its own approach to development of transport policy. They were mostly governed by various political and economic

⁶² For more see Greaves, op. cit. (n. 4), p. 37-40 and Stevens, op. cit. (n. 9), p. 91-102.

⁶³ See *supra* 2.1.

⁶⁴ *Progress Towards a Common Transport Policy: Maritime Transport* (CEC, 1985b), COM (85)90, Brussels.

⁶⁵ Stevens, op. cit. (n. 9.), p. 128-129. For more see Greaves, op. cit. (n. 4), p. 68-75 and 80-82.

⁶⁶ For the judgment see *supra* 3.3.

⁶⁷ For more on the internal market in air services see Greaves, op. cit. (n. 4), p. 76-80 and 84-85; and Stevens, op. cit. (n. 9), p. 147-161.

interests coming from all layers of society. That is why it was an illusion to expect from six member states to easily bring out results which would be in their common interest. But that was the idea and the goal which the European integration wanted to achieve. Therefore, it was needed much more than to divide powers between institutions and lay down few Treaty provisions to come closer to that point.

Contribution which the ECJ gave with its judgments in *French seamen case* (167/73), *Parliament v Council* (13/83) and some other important cases, was immense. It brought the meaning of the Treaty rules on transport to light, showed the right path to Community and pushed the empowered bodies forward to create legislation which would establish common transport policy. But it would not have been enough if the Commission and the Parliament had not made their moves at the right time as well.

Not impairing the importance of all mentioned factors, it must be acknowledged that the turning point in development of European transport policy was a change which happened in political interests towards single market programme and liberalization of transport services. At that moment the idea of creating European transport policy became a reality which still lasts.

Sažetak

Iva Kocijan *

PREISPITIVANJE POČETAKA RAZVOJA ZAJEDNIČKE PROMETNE POLITIKE EUROPSKE UNIJE

Stvaranje zajedničke prometne politike Europske unije po prvi put se spominje u Ugovoru o osnivanju Europske ekonomske zajednice iz 1957. godine (Ugovor). Nadležnost za donošenje temeljnih propisa za oblikovanje Europske prometne politike dana je Vijeću ministara. Prvi problem koji se pojavio u začetima razvoja bilo je tumačenje odredaba Ugovora koje se odnose na promet. Glavnu ulogu imao je Europski sud pravde koji je razjasnio neprecizne odredbe o prometu i jasno ih stavio u kontekst općevažćih načela Ugovora. Međutim, suprotstavljeni politički interesi država članica i različiti pristupi

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prometnoj politici ostali su najveća prepreka za stvaranje zajedničke prometne politike. Europska komisija, nadležna za predlaganje prometnih propisa Vijeću ministara, dugo nije mogla učiniti ništa da Vijeće prihvati mjere prometne politike koje je predlagala. Međutim, u pravom trenutku drugo je europsko tijelo odigralo ključni potez. Naime, Europski parlament doveo je Vijeće ministara pred Sud, tužeći ga za neispunjavanje obveza propisanih Ugovorom. Presuda Europskog suda potvrdila je da je Vijeće prekršilo odredbe Ugovora, odnosno da nije osiguralo slobodu pružanja usluga u međunarodnom prijevozu te da nije propisalo uvjete pod kojima nerezidentni prijevoznici mogu obavljati prijevoznicičke usluge u državi članici (kabotaža). Potaknuto ovom presudom, Vijeće je odlučilo bolje surađivati u stvaranju prometne politike. U isto vrijeme je u državama zavladao značajna promjena političkih svjetonazora, a ideja jedinstvenog tržišta donijela je cjelokupnu liberalizaciju Europske zajednice. Te okolnosti nisu mimoišle ni prometnu politiku, nego su, tim više, bile odlučujuće za njezin razvoj - zajednička prometna politika napokon je postala europska realnost.

Ključne riječi: Ugovor o osnivanju Europske ekonomske zajednice, zajednička prometna politika, Europski sud pravde, slučaj French seamen, slučaj Nouvelles Frontières, jedinstveno tržište, liberalizacija prometne politike.

Zusammenfassung

Iva Kocijan **

DIE ANFÄNGE DER ENTWICKLUNG DER GEMEINSCHAFTLICHEN VERKEHRSPOLITIK DER EUROPÄISCHEN UNION - EIN PRÜFENDER RÜCKBLICK

Die Einführung einer gemeinschaftlichen Verkehrspolitik der Europäischen Union wird erstmals im Vertrag über die Gründung der Europäischen Wirtschaftsgemeinschaft aus dem Jahr 1957 erwähnt (EWGV). Die Zuständigkeit für die Verabschiedung der zentralen Vorschriften zur Gestaltung der Europäischen Verkehrspolitik wurde dem Ministerrat anvertraut. Das erste Problem, das an den Anfängen dieser Entwicklung auftauchte, war die Auslegung der Bestimmungen des EWGV zum Verkehr. Die

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Hauptrolle fiel dem Europäischen Gerichtshof zu, der die unpräzisen Bestimmungen zum Verkehr klarstellte und sie eindeutig in den Kontext der allgemeingültigen Vertragsprinzipien stellte. Die gegensätzlichen politischen Interessen der Mitgliedstaaten und ihre unterschiedlichen Herangehensweisen an die Verkehrspolitik erwiesen sich als größtes Hindernis für die Schaffung einer gemeinschaftlichen Verkehrspolitik. Die für verkehrspolitische Rechtsinitiativen gegenüber dem Ministerrat zuständige Europäische Kommission konnte mit ihren Rechtsetzungsvorschlägen aus diesem Bereich beim Ministerrat lange Zeit nichts erreichen. Doch zum rechten Zeitpunkt ergriff ein anderes europäisches Organ die Initiative. Das Europäische Parlament nämlich verklagte den Ministerrat vor dem Europäischen Gerichtshof wegen Nichterfüllung seiner Verpflichtungen aus dem EWGV. Das EuGH-Urteil bestätigte die Vertragsverletzung seitens des Ministerrates, beziehungsweise dass der Ministerrat die Dienstleistungsfreiheit im internationalen Transport nicht gesichert sowie nicht die Bedingungen festgelegt habe, unter denen nicht niedergelassene Spediteure Transportdienstleistungen in einem Mitgliedstaat erbringen können (Cabotage). Auf dieses Urteil hin entschloss sich der Ministerrat, stärker an der Entstehung einer Verkehrspolitik mitzuwirken. Zur gleichen Zeit erfolgte in den Mitgliedstaaten eine bedeutsame Veränderung der politischen Anschauungen, und die Idee des Binnenmarktes führte zu einer umfassenden Liberalisierung der Europäischen Gemeinschaft. Diese Umstände ließen auch die Verkehrspolitik nicht unberührt, sondern prägten entscheidend ihre Entwicklung. Die gemeinschaftliche Verkehrspolitik wurde endlich zu europäischer Realität.

Schlüsselwörter: Vertrag über die Gründung der Europäischen Wirtschaftsgemeinschaft, gemeinschaftliche Verkehrspolitik, Europäischer Gerichtshof, Rechtsachen French seamen, Nouvelles Frontières, Binnenmarkt, Liberalisierung der Verkehrspolitik

