# CURRENT DEVELOPMENTS

## EUROPEAN COMMUNITY LAW

Edited by Joe McMahon

## I. TRANSPORT

The previous contribution on the current developments in Transport focused on problems of financing new infrastructure and on the allocation of the true costs of transport among those who generated them.[1] In 1999 a directive on charging heavy vehicles for the use of certain infrastructures was finally adopted.[2] During the period under review, infrastructure matters and safety and environmental concerns remained high on the agenda of the Common Transport Policy. As far as individual modes of transport are concerned the most significant developments have been in rail transport where a package of measure to open up this market has finally been adopted. The required legislation to liberalise all modes of transport has also now been adopted.

### I. TRANSPORT POLICY FOR THE TWENTY-FIRST CENTURY

Although the objective of establishing a Common Transport Policy was in existence from the moment the Community was established, nothing significant was done until it became absolutely necessary to act in order to achieve the single European market by 1992. The policy of the Community at that stage was to open up the transport market. Recently, a major appraisal of the transport problems of the next decade has been undertaken. A White Paper has been expected since the beginning of 2001 that will set out the priorities[3] but only 'policy guidelines' has been published so far explaining the new policy approach and listing the guidelines.[4]

The White Paper itself will propose sixty measures to 'de-couple' economic growth and growth in transport. The new approach is radical and is aimed primarily at breaking the link between economic growth and transport growth that has contributed to serious problems such as traffic congestion and environmental damage. These problems followed the opening–up of the transport market in the earlier part of the 1990s. In addition, it is hoped that finally the balance of transport will be shifted away from the road. All types of transport need to be better integrated and more use made of environmentally friendly, but under-used options such as inland waterways. This is an integrated proposal where some of the proposed measures will be left to national or regional action in accordance with the subsidiarity principle. In these cases the

[1] (1999) 48 ICLQ 229 covering the period up to Sept 1999.
[2] Directive 1999/62 (1999) OJ L187/42.
[3] Like most Commission policy documents in the field of transport, the publication of the White Paper has been continually delayed and is now expected in the autumn of 2001.
[4] Commission Communication on European Transport Policy leading up to 2010.

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Commission will limit itself to promoting the exchange of good practice. For example, as far as the sensitive issue of road safety is concerned, the Commission's approach is to leave action to the national governments, but if they fail to act by 2005 then Community legislation will be proposed. Quantifiable targets have also been set as, for example, in the reduction of road-related accidents.

The following guidelines have been agreed:

- revitalisation of the railways (the only mode of transport not yet fully opened-up);
- improvement in the quality of roads;
- promotion of transport by sea and inland waterway;
- balance between growth in air transport and the environment;
- turning intermodality into reality;
- building the trans-European transport network;
- improvement in road safety; adoption of a policy of effective charging for transport;
- recognition of the rights and obligations of users;
- development of high-quality urban transport;
- placing of research and technology at the service of clean, efficient transport;
- managing the effects of globalisation; and
- developing medium and long term environmental objectives for a sustainable transport system.

Although a radical approach is welcomed, another White Paper on the Common Transport Policy seems rather a case of '*deja vu.*' There has been no shortage of policy statements from the Commission during the last decade.

## II. INFRASTRUCTURE: PROVISION, ACCESS AND CHARGES

### *A. Trans-European Transport Networks (TETNs)*

Only a few of the fourteen projects initiated in the 1990s have been completed. An in-depth review of these schemes is planned for 2004, before the end of the current term in office of this Commission, and new guidelines to replace the 1996 ones are imminent with the elimination of bottlenecks as the top priority. It is not surprising that so few projects have been completed since the financing of these schemes was not well thought out. Only a limited amount of funding was forthcoming from the Community; the rest was left to public/private partnerships which are difficult to fund. Any additional Community funds earmarked for TETNs have been prioritised for rail transport schemes and interconnection of existing networks. Priorities by 2010 will in addition focus on continued development of the high-speed rail and the promotion of 'intelligent transport systems.' The new approach lays emphasis on increasing investment in interoperability and intermodality and by improving operational and organisational performances.

### *B. Railways*

In the period under review, the major development in infrastructure has been the adoption of the package of measures intended to revitalise the European railway industry. Directive 2001/12 extends access for international freight on the Trans-European Rail

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Freight Networks.[5] Directive 2001/14 provides mechanisms for the setting and charging of railway structure charges as well as (with some exclusions) the allocation of infrastructure capacity for domestic and international rail services.[6] The third measure, Directive 2001/16, concerns the interoperability of the trans-European conventional rail system.[7] The railway market has been the most difficult of all modes of transport to be opened-up. Historically, rail was the mode of transport most linked to the State in terms of financial resources and management. Several attempts at liberalisation have been attempted but the pace of change has been very slow. The Commission hopes that this package will succeed in eliminating the barriers rail service providers face in trying to access the rail infrastructure. The cornerstone of the policy is to impose strict obligations on infrastructure managers and to ensure their independence from all other interested parties. Where the infrastructure manager is not independent of any railway undertaking, a body that is independent will perform these functions.

Directive 2001/14 provides that the infrastructure manager is to publish a network statement clearly setting out the infrastructure available and containing information on the conditions of access. As for infrastructure charges, the primary objective is to have a charging scheme which results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market and that the charges comply with the rules laid down in the network statement.[8] The charges themselves are to be set by the infrastructure manager subject to a charging framework established by the Member States. The manager must be able to justify the charge imposed, to show that the charges comply with the methodology rules and, where applicable, with the scales laid down in the network statement. The charges for the minimum access package and track access to service facilities are to be set at the cost that is directly incurred as a result of operating the train services. The charges may be increased, for example, to reflect the scarcity of capacity on certain routes during periods of congestion or to take account of the cost of the environmental effects caused by the operation of the train. Charges may be levied for capacity use for the purpose of infrastructure maintenance. Discounts may also be offered but only where actual administrative savings are identified or in order to encourage specified traffic flows. Whether this scheme will achieve its objective will have to be seen.

Directive 2001/14 also provides that the infrastructure manager is to allocate the infrastructure capacity. A duty is imposed on infrastructure managers to co-operate in enabling the efficient creation and allocation of infrastructure capacity that crosses more than one network. Trading in infrastructure capacity is expressly prohibited. International train paths, particularly within the framework of Trans-European Rail Freight Network, are to be organised by representatives of infrastructure managers including those from outside the Community. Infrastructure managers may require applicants for infrastructure capacity to provide a financial guarantee and assurance of the capability to prepare compliant bids for infrastructure capacity. Framework agreements, subject to EC competition rules and several

[5] [2001] OJ L75/1.
[6] [2001] OJ L75/29.
[7] [2001] OJ L110/1.
[8] Annexes to the Directive list the minimum service facilities to which undertakings are entitled.

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other conditions, may be concluded between the infrastructure manager and the applicant.

Another challenge for the Commission over the next few years is the huge problem of helping applicant countries to get their transport networks to an acceptable level. The Commission is calling for the creation of autonomous railway safety and licensing authorities, and has urged rail undertakings to develop long-term investment plans.

### *C. Air transport*

Airport congestion remains a key problem for the air transport industry. Proposals to reform the take-off and landing windows (so-called slots) have been adopted by the Commission in order to assist new entrants to the market but meanwhile the current block exemption regulation on the allocation of slots has been extended to the end of June 2004. The new regulation will make it clear that slots are solely a 'right of use' (i.e. not a property right) and clarify the rules for slot allocation in order to make them more transparent and to ensure there is a balance between companies already present in an airport and new entrants. The role of slot co-ordinator needs to be strengthened by conferring a power to impose penalties in the event of abuse.[9]

### *D. Maritime transport*

Some advancement has also been made in opening up market access to sea port services and in the promotion of short-sea shipping. In line with the 1997 Green Paper on port services, a proposal has been published for a directive providing for a common legislative framework for port services of a commercial nature.[10] Thresholds will determine the sea ports that will be subject to the legislation. The main principle is that there must be access to the port services market. The only limitations that will be tolerated are on the grounds of space or capacity restraints or maritime safety. The normal requirements of transparency, non-discrimination and objective criteria apply in the selection of providers for these services. Where the port authority or owner also operates in a specific port service, then another independent authority must exercise the selection process to avoid any conflict of interest. Port authorities will be able to award exclusive rights to port service providers with a public service task such as pilotage, but in cargo-handling services two service providers must be selected.

Promotion of short-sea shipping continues to be an important element in the policy to encourage cooperation between the different modes of transport. The Council confirmed its support[11] for the Commission's approach as set out in its second Communication on the development of short-sea shipping in Europe.

[9] The four-year dispute between the Italian authorities, the Commission and the European airlines concerning the allocation of traffic at Malpensa airport (Milan) was finally settled at the end of 2000, after the Commission approved the national decree, subject to certain undertakings made by Italy.

[10] COM(97)678.

[11] Resolution of 14 Feb 2000, [2000] OJ C56/3.

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## III. TRANSPORT SAFETY AND ENVIRONMENT

For all modes of transport, safety is of the utmost importance and further measures have been promoted or adopted during the relevant period. Such measures adopted in the air and maritime sectors have an impact beyond the Community since they normally apply to non-Community transport services providers operating in Community waters or air space.

### *A. Inland transport*

As far as the railways are concerned Member States are required to issue safety certificates for their respective territories. In order to obtain a safety certificate railway undertakings will have to comply with regulations under national law compatible with Community law and applied in a non-discriminatory manner, laying down the technical and operational requirements specific to rail services and the safety requirements which apply to staff, rolling stock and the undertakings' internal organisation.

The Commission has also adopted a directive on technical roadside inspection of the roadworthiness of commercial vehicles circulating in the Community[12] (in addition to annual road-worthiness test), has strengthened the legislation concerning the transport of dangerous goods by road[13] and has proposed a directive to extend the scope of the 1992 legislation imposing limitations on all lorries and buses of over a certain weight and whose maximum speed is also limited. Other proposed safety measures, such as compulsory use of seat belts[14] and the reduction in alcohol content of drivers,[15] have been more controversial, since several Member States consider these matters to be of national rather than Community concern. In these circumstances the Community is left with non-binding mechanisms to persuade the Member States to agree to Community action or to take action nationally.[16]

### *B. Air transport*

As far as air transport is concerned, a European Aviation Safety Agency (EASA) has been proposed with the power to draw up aircraft safety standards, certify aeronautical products and monitor compliance. Its decisions will be binding and subject to review by the European Court of Justice (ECJ). It is likely that the Agency will also have competence over non-Community aircraft flying in the Community. It is envisaged that EASA's powers will eventually be extended to the security of aviation operations, the

[12] Directive 2000/30, [2000] OJ L203/1.

[13] Directive 2000/61, [2000] OJ L279/40, amending Directive 94/55.

[14] The proposal, based on the 'best practice' in Member States, seeks to amend current directives on the harmonisation of seat belt legislation to require, inter alia, the compulsory use of seat belts in cars, seated passengers in lorries or coaches and for lorry/coach drivers themselves.

[15] Commission Recommendation on the maximum permitted blood alcohol content for drivers of motorised vehicles, [2001] OJ C48/2.

[16] Commission Communication entitled 'Priorities in EU road safety: progress report and ranking of actions', COM (2000) 125 and Council Resolution on the improvement of road safety, [2000] OJ C218/1, emphasised the need for progress on several proposals under discussion.

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granting of licences for crews, airport operations and traffic management. Eurocontrol standards have also been adopted throughout the Community.[17]

Another area of concern in the air transport field is noise pollution. Projections are that air traffic volume will double in the next ten years and will be accompanied by a huge increase in noise pollution. Such growth can only be sustainable if significant progress is made in reducing the noise of each aircraft. The Community has prohibited the registration of hushkit-equipped aircraft in Europe and from April 2002 such aircraft will not be able to operate from Community airports.[18] The United States, however, has opposed the Community ban and taken the dispute to the Council of the International Civil Aviation Organisation. International standards reducing the noise level of aircraft have been agreed but the transition periods are too long for the Community, with no agreement on regional restrictions being imposed on the use of these aircrafts during the transitional period. Negotiations are in place with the US to resolve this dispute.

### *C. Maritime transport*

Every time that there is a sea accident there is a public demand for Community action. Thus when the *Erika* petrol tanker sank off the French coast at the end of 1999, the Commission moved swiftly to propose several maritime safety measures, hoping for a speedy adoption. The Erika I package focused on the control and inspection of ships stopping at European ports, the quality of classification companies and the elimination of single hull ships.[19] Erika II consists of three measures: proposals for regulations creating a maritime safety agency, a European victim compensation fund and a directive strengthening surveillance of ships navigating in European waters. In addition, Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues has been adopted.[20]

## IV. ROAD TRANSPORT

As far as road transport is concerned, difficulties have arisen in getting the 'social package' of measures adopted, some of which are specifically aimed at combating social dumping of drivers from Eastern Europe working for Community undertakings. Although the proposal for a regulation requiring European lorry drivers to have in possession a common certificate has been well received by the Council and the European Parliament, other measures have revealed deep divisions. The common certificate measure will be applicable immediately to non-Community drivers working for Community haulage undertakings and within two years for Community drivers.

Other proposals in the social package concern one directive requiring initial and continuing training of lorry drivers and another extending the Working Time Directive

[17] Commission Regulation 2082/2000, [2000] OJ L254/1.

[18] Regulation 925/1999, [1999] OJ L115/1.

[19] A Common Position was reached by the Transport Council in June 2001. The measure will come into effect on 1 September 2002 making it compulsory for Member States to eliminate single hull oil tankers flying European flags and ban access for ships that not comply with the standards of the International Maritime Organisation (IMO). The IMO agreement provides a timetable for elimination of such ships between 2003 and 2021 leaving the EU the possibility of anticipating the agreement by 2015.

[20] [2000] OJ L332/81.

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to road hauliers. The Working Time Directive excluded the transport industry from its scope.[21] However it has been agreed to extend the provisions of the Directive to the transport industry, but differences of opinion have arisen between the Council and the European Parliament on matters such as whether independent hauliers should come within the scope of the directive.

Difficulty has also been encountered in regulating heavy goods traffic in transit in Austria. The system of 'ecopoints' was devised to deal fairly with the allocation of transit rights. The system encourages carriers to use less polluting lorries since heavy goods vehicles in transit through Austria must pay on each journey a certain number of 'ecopoints' corresponding to the emission of one gram of NOx/kmh produced by the vehicles. Moreover, when traffic exceeds 8% for one year, compared with traffic recorded in 1990, the Commission is obliged to reduce the number of ecopoints available the following year. However, due to pressure from most member States concerned (Germany and Italy in particular) and road hauliers, a measure has been adopted aiming to scale over three years the reduction of transit rights. The decision is being challenged by Austria before the European Court of Justice. As the Austrian Accession Protocol with the EU provides that a Commission decision must be based on Austrian statistics, it is unlikely that Austria will lose the argument. The Commission on the other hand is proposing a regulation to extend to 'ecopoints' system and to revise the clauses in the Protocol.

## V. AIR TRANSPORT

Now that the air transport market is opened-up, there is a need to manage the European air space and to create structures for civil and military co-ordination, that is, to create a single European sky. The aim is to improve air traffic control in Europe and to reduce the considerable delays. However the problem of the status of Gibraltar has once again forced the Commission to shelve its plans. A High Level Group on management of the European sky reported at the end of 2000 with clear recommendations on the need for one European airspace with a strong single regulator and common legislation. The proposal is for Eurocontrol to assume responsibility for technical mandates such as defining air routes strengthening co-ordination between the take-off and flight slots, and harmonisation and development of technical equipment. The EU would then use its decision-making mechanisms to ensure that decisions concerning the regulation of air space and technical equipment are binding. A joint structure for civilian and military aircraft is to be established by using 'second pillar' mechanisms relating to common defence policy. This would enable more flexibility in the management of military airspace. Finally, a common training programme leading to a European air traffic controllers' diploma should be created in order to promote the mobility of air traffic controllers. The Commission Communication that followed the report, setting out how a single European sky would be achieved by 2004, was withdrawn in view of the expected opposition from UK and Spain.

As far as working time hours are concerned, a directive to implement the agreement between the European social partners in the civil aviation sector has been adopted and Member states have until December 2003 to implement its contents. The Directive sets the minimum standards for working time in this sector for mobile workers. Annual limits of working time and block flying time are set out, as well as the minimum days

[21] Directive 93/104, [1993] L307/18.

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off in each month and annually. Annual leave of at least four weeks and entitlement to a regular free health assessment are also provided. As far as flying time for cabin crews and pilots are concerned, these are to be agreed and implemented soon.

Other matters concerning air transport in the relevant period include voluntary commitments by European airlines and European airports in respect of passengers' rights. The airlines have agreed to commitments regarding passenger information and assistance in the event of delays or loss of luggage, a code of conduct on information to be given to passengers on tariffs, as well as commitments on the time limits for reimbursement should problems arise. The airports accepted commitments on passenger information and assistance, aid to disabled persons, infrastructure (availability of check-in counters, luggage trolleys, signs) and information on appeal procedures in case of disputes. The next stage will consist of creating a mechanism to monitor compliance with the commitments.

The Commission remains committed to a common international air transport policy for the EU. It is now awaiting a ruling from the ECJ in the cases it has brought against eight Member States alleging a breach of Community law by them in negotiating and signing bilateral agreements (the so-called open skies agreements) with the US. They are accused of granting discriminatory foreign access to airlines by not giving other Community carriers the same rights as their own airlines. If the Commission wins the argument it will seek a political agreement to start discussions on a Transatlantic Common Aviation Area. This would encourage European airlines to merge and consolidate and thus be in a stronger market position to compete with the three major US-registered carriers operating internationally.

Airlines continue to have difficulty in complying with the EC competition rules. The proposed recapitalisation of Sabena, for example, is under investigation by the Commission. Although State aid to airlines is prohibited, restructuring is very difficult without such aid. The alternative, a merger with another European airline, is out of the question due to the 'open-skies' agreements between certain member states and the US. Such mergers would endanger the 'national' status required to obtain benefit from the bilateral agreements. The Commission has also sent a statement of objections to the International Air Transport Association (IATA) alleging that the tariff consultation for cargo transport is in breach of the EC competition rules as it is no longer indispensable to provide customers with effective interlining services in the European Economic Area. These tariff consultations, according to IATA, facilitate cargo interlining. Interlining selects the transport, during part of the journey, by an undertaking other than that which sold the ticket; the prices set by the consultation are used to calculate the compensation of the carriers concerned. Another statement of objections has been sent to Austrian Airlines and Lufthansa in respect of the notified co-operation agreement they have concluded, which would allegedly eliminate competition on a large number of connections between Austria and Germany.

## VI. MARITIME TRANSPORT

The Community has a shortage of trained seafarers. Several measures, such as better conditions and better salaries have been initiated in order to encourage recruitment. As far as the training of seafarers is concerned, Directive 2001/25 has been adopted[22]

[22] [2001] OJ L136/17.

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repealing earlier legislation.[23] The Directive adapts Community law to minimum international standards agreed at the IMO. These provide for training requirements and certification and quality standards. Two directives have also been adopted in respect of seafarers' hours on board ship.[24] These measures are examples of the Commission's policy to put forward Community proposals which give effect to internationally agreed standards, yet also include additional requirements not found in the international agreement itself but which will be enforced on board ships flying the flag of a Member State.

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[23] Directive 94/58, [1994] OJ L319/28
[24] Directive 1999/63, [1999] OJ L167/33 and Directive 1999/95,[2000] OJ L14/29.

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