SINGLE MARKET GENERAL

INTRODUCTION

The European Community's single market programme, officially launched with the publication of a comprehensive white paper by the Commission in 1985, has proved to be a hugely important theme in the development of Europe's history. The willingness of the Member States to transfer legislative powers to Brussels has been crucial in the overall development of the single market. A milestone in this respect was the Single European Act, which introduced qualified majority decision-making in the Council for legislative measures having "as their object the establishment and functioning of the internal market". This process was taken a step further in 1992, when the Member States approved the Maastricht Treaty, which gave the European Parliament real powers to influence legislation in those same areas, under the 'codecision procedure'.

The 1992 deadline set by the Commission for the completion of the internal market now seems somewhat distant, and although a large number of the original targets were met, many new legislative measures have been introduced since, either in response to fresh problems or to address deficiencies in earlier laws. Most of the Community's basic objectives for the single market - the free movement of people and goods across borders, tax harmonisation, procurement laws and social policies - have all had a marked bearing on the form and function of the EU's transport markets.

Although the basic legislation underpinning the single market in transport had also been laid down by 1992, ensuring in particular the right to provide services without discrimination based on nationality or place of establishment, there were still significant gaps. The Commission noted, in its 1992 white paper on the Common Transport Policy (CTP), that the completion, reinforcement and proper functioning of the single market for transport services would undoubtedly continue to constitute one of the main components of the CTP. The Commission's subsequent action plan for the development of the CTP from 1995-2000, published in July 1995, remained true to this theme, and set out similar priorities in terms of market access and structure.

In 1996, the Commission published a first comprehensive analysis of the single market as a whole. It claimed that the initiatives set out in its 1985 white paper "constituted the most ambitious and comprehensive supply-side programme ever launched", and had "begun to remove the market rigidities and barriers to mobility which in the mid-1980s gave rise to persistent economic under-performance, reflected in rising unemployment and poor competitiveness".

The benefits of the single market

The Commission also listed the following benefits:
- growing competition between companies in both manufacturing and services;
- an accelerated pace of industrial restructuring;
- a wider range of products and services, particularly in the liberalised sectors;
- faster and cheaper cross-frontier deliveries;
- greater mobility of workers between Member States;
- 300,000-900,000 more jobs;
- an increase of 1.1-1.5% in EU income between 1987 and 1993;
- inflation rates 1.0-1.5% lower than without the programme;
- economic convergence and cohesion between different regions.

However, the report also criticised the Member States: "*Delays in applying and enforcing single market rules at national level continue to limit the single market's positive contribution to growth, competitiveness and more employment. The Community must build on its successes and iron out the remaining political and practical difficulties which inhibit the single market's full potential from being achieved.*"

Subsequently, in June 1997, the Commission published its single market action plan with four strategic targets: making single market rules more effective (e.g. through implementation of the Customs 2000 agenda, and eliminating delays to the transposal of single market Directives); dealing with market distortions (including the introduction of simpler antitrust rules and new guidelines on regional state aid); removing sectoral obstacles to market integration (such as by encouraging rail freeways and altering airport slot allocation); and delivering a single market for

all citizens. The 1997 Amsterdam European Council reconfirmed the importance of the internal market and endorsed the four strategic targets.

The single market scoreboard

According to the June 1999 edition of the single market scoreboard, through which the Commission monitors the progress of the action plan, almost 13% of single market Directives had yet to be fully implemented in the Member States (down from 35% in 1997), including over half of the relevant transport sector Directives. While numerous individual initiatives called for in the plan had been brought forward, others, such as promised rules on airport slot allocation, had not.

This first chapter on the single market looks at the broad thrust of the Community's liberalisation programme for transport, and, secondly, at general and horizontal policy issues - such as state aid, antitrust law, taxation, customs and border issues, and procurement - which have an impact on the transport sector. The more specific policies for particular transport modes, as developed through the CTP, are covered in the subsequent single market chapters on the aviation, maritime, road, rail and inland waterway sectors.

THE GENERAL APPROACH TO SINGLE MARKET POLICY

Throughout the late 1980s and 1990s, the single market has been a cornerstone of Community policy, both in terms of general Community policy and in terms of transport. The first theme identified in the CTP white paper of 1992 was "the continued reinforcement and proper functioning of the internal market facilitating the free movement of goods and persons throughout the Community". In 1995, the Commission defined the single market (along with quality improvement and the external dimension) as one of three "fundamental areas" for the 1995-2000 Common Transport Policy action programme. Policies and initiatives should be developed, it said, for "improving the functioning of the single market in order to promote efficiency, choice and a user-friendly provision of transport services while safeguarding social standards". The single market section of the action programme was divided into three parts: "market access and structure", "costs, charges and pricing", and "social dimension".

The "market access and structure" area was further subdivided into four:
"*1) Supervision of the implementation of the rules creating the single market in transport services will remain an important priority. In addition, in a liberalised market, the firm enforcement of the competition and state aid rules, while taking into account the particular characteristics of transport activities, assumes particular importance.*

Market access and structure aims of the CTP action programme

2) The further development of policy in this area will involve an evaluation of the functioning in practice of the 1992 legislation, as specifically required by a number of legislative acts. This is important for all transport sectors, but particularly for shipping, where a more fundamental strategic assessment is required to identify the future framework necessary for a healthy and competitive maritime sector in Europe. Experience gathered so far indicates that new legislative initiatives are needed in a number of other areas, including a further liberalisation of the railways sector, slot allocation in airports, the phasing out of the 'taxi rank' system for certain inland waterways markets, and conditions for access to the road haulage market and improvements in the enforcement and responsibility regime in that sector.

3) In a number of areas the structural adaptation necessitated by the transition from a national regulatory system to a single market is a painful process. Although this process should normally be carried forward by market forces, accompanying measures at a national level are sometimes needed to avoid unacceptable disruptions. The Commission will continue to apply the guidelines already adopted to any state aid involved in such accompanying measures.

4) In addition, in some cases, Community action may be called for to assist in the elimination of structural overcapacity such as prevailing in the inland waterway sector."

In terms of costs and pricing, the Commission suggested that action needed to be taken with regard to the significant differences in the levying of infrastructure and external costs, and that additional steps would aim to converge charging regimes applicable to different transport modes (Chapter Eight). The Commission also pointed to the fact that harmonisation of social policy - particularly working time - was also a priority for the action programme (Chapter Eight).

By 1998, in its short paper on "Sustainable mobility: perspectives for the future", the Commission said its priorities for "market access and functioning" were just two: the rail sector and ports. In

other transport sectors, it said, "markets have for the most part been liberalised". However, it did also identify a need for further measures in civil aviation.

Loyola de Palacio's first statement on the internal transport market

In late August 1999, the incoming Transport Commissioner, Loyola de Palacio, in her written submission to the European Parliament, gave a broad answer to the following question: "In which areas of European transport policy has the single market not yet been completed, and what measures would you take in order to complete the single market?" She replied:

"*The internal transport market constitutes the basis of the Common Transport Policy. To enable European transport systems to exploit their capacity to the full, to promote the competitiveness of European transport enterprises and to maximise growth, employment and sustainable development, an open and integrated European transport market which operates properly will be required. At present the single market is largely complete in the land, air and sea transport sectors. However, much remains to be done with regard to rail. To complete the internal market and ensure that it functions well, I intend to concentrate on the following six fields:*

Liberalisation of rail transport and ports

1) Opening up markets. My two priorities will be, firstly, rail transport, where I shall seek gradual liberalisation, starting with freight, accompanied by all necessary measures to render access rights effective and, secondly, ports, where liberalisation measures should make it possible to ensure by objective, transparent and non-discriminatory means free access to the market for port services at the main international ports.

2) Development of the trans-European transport network. My aim is to contribute actively to the establishment of this network between now and 2010, integrating land, sea and air transport infrastructure, including traffic management systems and positioning and navigation systems.

Application of telematics and information technologies

3) Better integration of the various transport and logistic chains, particularly by applying telematics and information technologies. The establishment of a uniform European air traffic control system should make it possible to resolve the problem of the congestion of air space, which limits the beneficial effects of the competition which has existed in the sector since it was liberalised.

4) Promoting intermodality. My aim is to create a framework which will ensure optimum integration of the various modes so as to provide continuous services from door to door which meet demand and hence make it possible for efficient and viable use to be made of the system while promoting competition among operators.

5) Infrastructure charging, which is one step towards the creation of a common framework for charging for infrastructure to eliminate divergences which distort competition between and within modes, will be one of my major priorities, taking account of the specific situation in the various Member States of the European Union.

6) Reducing the deficit in the transposition of transport legislation. While this is due primarily to the fact that the legislation is recent, I would establish the necessary contact with my colleagues in the Member States to reduce it. If such contact proved insufficient, I would not hesitate to propose to the Commission that infringement proceedings be brought, and penalties imposed if necessary."

THE CATALOGUE OF RULES TO CONTROL STATE AID

Community state aid policy is underpinned by Articles 87 and 88 of the EC Treaty. Article 87 states that "save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings shall, insofar as it affects trade between Member States, be incompatible with the common market". It goes on, however, to set out the circumstances under which mandatory or discretionary exemptions can be granted for different forms of subsidies, such as "aid having a social character" and "aid to promote the economic development of areas where the standard of living is abnormally low". Article 88 sets out broad requirements for the Commission to investigate aid that might be illegal, and gives the Council the power to approve aid at its discretion under "exceptional circumstances".

The role of Articles 87 and 88

To enable these principles to be put into practice, the Council and the Commission have developed a catalogue of secondary laws and guidelines establishing precise procedural rules for aid investigations, and defining under what conditions the provisions for exemption under Article 87 are deemed to be fulfilled. Such guidelines set out, for example, the parameters under which aid for

research and development, for environmental protection or for rescuing/restructuring firms may be allowed. This framework was the subject of a concerted modernisation effort in the late 1990s. It resulted in the Council approving, in May 1998, a new Regulation allowing the Commission to adopt powerful horizontal block exemptions for state aid in four categories - SMEs, employment/training, environmental protection, and R&D. (The Parliament, in its Opinion, had called for a fifth category called "local public services" to be included.) In time, this will allow the Commission to concentrate its effort on the most important significant aid cases. In March 1999, the Council approved an important Regulation updating and consolidating existing procedures for state aid investigations while extending the Commission's powers to order the recovery of illegal aid. In October 1999, the Commission issued new aid guidelines for the rescuing of firms in difficulty.

Powerful block exemptions for state aid

State aid for inland transport is treated differently from subsidies for the aviation and maritime sectors (Chapters Three and Four) due to specific provisions laid down in the Transport Title of the EC Treaty. Although in principle state aid for all transport (including inland) is subject to the general rules laid down in Articles 87 and 88 of the EC Treaty, inland transport, in particular, is also covered by Article 73, which states: "*Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*" In order to interpret this provision, the Council adopted two major Regulations in 1969 and 1970.

Article 73 on state aid and public service obligations

The 1969 Regulation on public service obligations

Under the 1969 Regulation, based on Article 71 (Article 75 at the time), Member States are only allowed to introduce or maintain public service obligations on transport operators (to ensure the continued operation of uneconomic services) "in so far as they are essential in order to ensure the adequate provision of adequate services". It insists that the level of compensation provided by the state should be directly linked to the "economic disadvantage" suffered by the transport operator in carrying out the service. It also clarifies the criteria to be taken into account when deciding on the need for public service obligations, and establishes common principles for imposing, ending or maintaining them.

Under an amendment agreed in 1991 and in force since July 1992, the Regulation also allows for "public service contracts". These are contracts concluded between the competent authorities of a Member State and a transport undertaking with a view to providing the public with adequate transport services. They can cover, according to the Regulation, transport services satisfying fixed standards of continuity, regularity, capacity and quality; additional transport services; transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes; and adaptation of services to actual requirements.

By the mid-1990s, the Commission had begun to look at how the rules could be modified in the light of changes to the transport market. In its 1995 Communication on the "Citizens' Network" (Chapter Thirteen), for example, it noted the following: "*Regulating public transport services by means of imposing obligations upon undertakings without directly related financial compensation has serious side-effects because of the lack of financial and managerial incentives to improve services and to render them more efficient. Therefore, the Commission intends to review the scope of this general derogation with a view to ensuring that it meets its objectives more effectively.*" Elsewhere, the Commission has also expressed dissatisfaction with the fact that public service obligations can be imposed on regional and local passenger transport with far more ease and far less transparency than elsewhere.

Framework system for public service contracts under consideration

The Commission, therefore, has been studying the possibility of abolishing public service obligations altogether, and introducing a framework system for public service contracts which would be negotiated between the public authority and the operator. Such contracts would be awarded on a competitive basis, with open tendering procedures. Authorities would retain the right to award operators exclusive rights to operate certain services, but only in strictly defined circumstances. In August 1999, de Palacio told MEPs that she intended to submit a proposal shortly to replace the public service obligations imposed on transport operators with negotiated public service contracts which would have to be "balanced, transparent and limited in time". She signalled a wish to introduce elements of competition for contracts for bus services, but said this would take longer. She concluded: "*It is not a matter of pursuing a purely ideological objective but of securing the best possible service in relation to the public funds spent.*"

The 1970 Regulation on aid for coordination of transport

The Regulation adopted in 1970, on the basis of Articles 71 and 73 (Articles 75 and 77 at the time), concerns state aid in general, and focuses largely on the subsidies permitted for the

"coordination of transport". The bulk of its contents cover all three inland modes (road, rail and inland waterways). Without prejudice to other laws, such as the 1969 Regulation on public service obligations, Article 3 says aid for coordination is not permitted except:

"*(a) Where aids granted to railway undertakings not covered by Regulation (EEC) No 1192/69 are intended as compensation for additional financial burdens which those undertakings bear by comparison with other transport undertakings and which fall under one of the heads of normalisation listed in that Regulation;*

(b) until the entry into force of common rules on the allocation of infrastructure costs, where aid is granted to undertakings which have to bear expenditure relating to the infrastructure used by them, while other undertakings are not subject to a like burden. In determining the amount of aid thus granted account shall be taken of the infrastructure costs which competing modes of transport do not have to bear;

(c) where the purpose of the aid is to promote either: research into transport systems and technologies more economic for the Community in general; or the development of transport systems and technologies more economic for the Community in general. Such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies;

(d) until the entry into force of Community rules on access to the transport market, where aid is granted as an exceptional and temporary measure in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems, and thus to contribute towards meeting more effectively the needs of the transport market."

Article 3 of the 1970 Regulation on coordination of transport

The Regulation also states that aid can be approved where payments are made to rail, road or inland waterway transport undertakings as "compensation for public service obligations imposed on them by the state" in circumstances not falling within the scope of the existing dedicated Regulation. However, a further clause exempts, from the Article 3 conditions, payments by States and public authorities to railway undertakings "made by reason of any failure to achieve harmonisation . . . of the rules governing the financial relations between railway undertakings and States" (Chapter Six).

Various amendments to Article 3

Article 3 of the Regulation was amended in 1982 to include a fifth category (e) for allowing aid to combined transport infrastructure and facilities necessary for trans-shipment. In 1992, this category was revised to allow aid for various combined transport investments, and for the costs of running such services across Austria, Switzerland and the states of the former Yugoslavia, until the end of 1995; and, by a further amendment, to the end of 1997. Finally, the Regulation was also amended in 1996 with the addition of a sixth category (f) allowing aid until the end of 1999 for investment in inland waterways.

Guidelines on aid for infrastructure development?

By autumn 1999, a number of new ideas for revising the Regulation were under serious discussion. There was, for example, support for the development of guidelines on aid for infrastructure development. This had been unnecessary in the past, as public funding for infrastructure had largely fallen outside the scope of the Treaty rules on aid. However, with public-private partnerships increasingly being viewed as a means of promoting development (Chapter Twelve), concerns were growing that new rules would be needed to prevent distortions of competition. A further possibility was that aid could be permitted for the purpose of compensating transport services with low external and environmental costs, or which paid those costs in full, thus helping them to compete more efficiently with modes which failed to cover their external costs fully, and which held an unfair market advantage as a result. A new mechanism, when proposed, is likely to replace the existing system so as to allow aid to cover the infrastructure costs of undertakings. It would then remain in force until common infrastructure charging principles are in place for all modes.

INSTRUMENTS FOR APPLICATION OF ANTITRUST POLICY

Since the start of the single market, the Commission has been aware that it would need to draw increasingly on the Community's competition policies to regulate the transport sector. It said, in the 1992 CTP white paper: "*The proper functioning of the internal market in the transport sector is guaranteed not only by the provision of the transport chapter of the Treaty but also by its generally applicable rules, particularly those on competition. The transport sector is indeed likely to pose particular problems in this regard in the years immediately ahead.*" It argued that the economic and technical characteristics of the sector itself and its progressive liberalisation would mean that application of competition rules were bound to arise. The Community must ensure, it said, that the process of adaptation to the single market takes place under conditions which "avoid market distortions, allow participants a fair opportunity to compete and afford users the benefit of competitive industrial organisations".

The principles of Community competition law are laid down in Articles 81 and 82 of the EC Treaty, the former generally prohibiting cartel behaviour between undertakings while providing scope for exemptions under certain circumstances (Article 81-3), the latter banning abuses of a dominant position. To interpret and apply these principles, however, the Commission requires more specific procedural rules. The main legal instrument established for the purpose is Regulation 17, adopted in 1962, while a related Regulation (19/65) allows the Commission to adopt general block exemptions. The Community merger Regulation, adopted in 1989, enables the Commission to vet mergers and joint ventures to ensure they will not result in the creation or reinforcement of a dominant market position.

Non application of Regulation 17 to the transport sector

Within the transport sector, Regulation 17 does not apply (as decided by Regulation 141, adopted in November 1962). Instead, a separate body of competition rules has been developed in response to the specific features of the transport industries. The framework competition rules which apply to air and sea transport were both adopted in the late 1980s. These rules (described in two subsequent chapters) have the same basic objectives as Regulation 17, i.e. attempting to define the conditions under which a balance can be drawn between preventing cartel behaviour and permitting a level of cooperation between operators considered necessary to bring about improved services. They set out procedural rules for the investigation, by the Commission, of suspected competition abuses, and for the implementation of specific block exemptions for various types of concerted practices.

The long-serving 1968 inland transport Regulation

A broad-ranging Regulation (1017/68) applying the competition rules to rail, road and inland waterway transport, however, was adopted as early as 1968. This inland transport Regulation gives effect to the Treaty ban on abuses of a dominant position, and forbids "all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the Common Market". Such practices, it specifies, include the fixing of transport rates or conditions; limiting or controlling "the supply of transport, markets, technical development or investment"; the sharing of transport markets; the application of different conditions in equivalent transactions between trading parties; and the imposition of contract conditions with no connection to the provision of transport services.

Exemptions to the inland transport Regulation

This general prohibition is, however, subject to a wide range of exemptions, allowing conditional derogations for agreements, decisions and concerted actions aimed at applying technical improvements or achieving technical cooperation between firms, improving the quality of transport services, promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand were subject to considerable temporal fluctuation, and increasing productivity or economic progress. Scope is also provided for "agreements intended to reduce disturbances resulting from the structure of the transport market". Furthermore, the Regulation lays down rules on the notification of proposed agreements and time limits and procedural rules for Commission investigations. It details the Commission's powers to react to complaints, launch investigations into suspect agreements, and, if necessary, impose fines or penalty payments on offending firms.

Modernisation and decentralisation of competition law

By the mid-1990s, as the realities of the single market became increasingly apparent, so the need for a reform of the competition rules became more urgent. In June 1997, the Council revised the merger Regulation. It streamlined the procedural rules and reduced the need for the parties in large cross-border ventures to file multiple merger notifications. In September 1998, following a wide consultation exercise, the Commission put forward proposals aimed at simplifying its approach to vertical restraints and block exemptions for vertical agreements between producers and distributors. As a result, two Regulations were formally adopted by the Council in June 1999 and will come into force in 2000.

The most significant developments for the transport sector, however, were signalled in a white paper put forward by the Commission in April 1999. It concerned specifically the procedural rules laid down in Regulation 17 and in the dedicated transport Regulations. Under the terms of the existing rules, the Commission alone has the right to permit concerted practices under Article 81-3 (unless they are covered by an existing block exemption). Companies and undertakings must therefore notify the Commission of restrictive agreements and request exemptions (although Regulation 1017/68 on inland transport does provide for possible exemption without notification). The white paper suggested that this system was becoming unwieldy and impractical, as a result of the sheer volume of notifications.

The Commission proposed decentralising the application of Community competition law. The prior notification system, it said, should be abolished. The Treaty competition rules should become directly applicable in their entirety, giving national courts and authorities the right to decide whether a given measure fulfilled the conditions for exemption under Article 81-3. The Commission would then be able to focus on the most serious competition infringements with a Community interest. It suggested, moreover, that its powers of enquiry should be strengthened, as should procedures for handling and responding to complaints, which would themselves play a more important role in the identification of problems. Under the new system, the Commission would retain overall control over competition policy, and would create a framework of block exemptions, guidelines and notices in order to assist the Member States' competition authorities in implementing EC rules. The national authorities themselves would be expected to act as a 'network' in close collaboration with one another. They would be able to refer cases to the Commission, which would also be able to send dossiers back to them where appropriate.

Reform of Regulation 17 and inland transport rules needed

The white paper also noted that, quite apart from offering scope for specific targeted block exemptions (for example for computer reservation systems operators in air transport and for liner conferences in the maritime sector), the specific transport Regulations contained variations on the procedural rules laid down in Regulation 17 which largely reflected, it said, "the political concerns that presided at the time of their adoption". However, due to the liberalisation process which had taken place in the transport sector, the concerns specific to the different modes had "largely disappeared", and the Commission saw "no reason why the transport Regulations should not undergo the same reform as Regulation 17".

The new procedures for competition investigation to be introduced under the amended Regulation 17, the Commission suggested, should therefore apply also to transport. This would eliminate most, but not all, existing procedural differences (for example, clauses on crisis cartels, opposition procedures and exemptions conferred without notification) between the general competition rules and the specific transport measures. The Commission specified, however, that any new regime should "make it quite clear that it does not apply to tramp vessel services and international air services between the EU and non-member countries", neither of which is subject to any of the existing specific competition rules.

THE TRICKY PROCESS OF HARMONISING TAXATION

The importance of taxation policies in the transport sector should not be underestimated. The presence or absence of taxation can significantly affect the competitiveness of different modes, as well as competition between operators within a given mode. While fiscal harmonisation is in the interests of the single market as a means of preventing unfair competition between operators, this must be balanced against Member States' use of tax measures to support domestic policy objectives. Consequently harmonisation proposals at EC level have generally provoked lengthy discussions in the Council, and legislation has tended to be diluted by derogations and exemptions to reduce its impact.

Prevailing minimum excise taxes

Petrol (leaded)	Ecu337/1,000 litres
(unleaded)	Ecu287/1,000 litres
Gasoil (propellant)	Ecu245/1,000 litres
LPG/methane (propellant)	Ecu100/1,000kg
Kerosene (propellant)	Ecu245/1,000 litres

Source: Directive 92/82/EEC

The excise taxation of mineral oils has a substantial impact on the transport sectors, due to their heavy reliance on fossil fuels and the fact that fuel costs will inevitably feed through to affect transport prices. Two Directives, adopted in 1992, harmonised excise duty structures, and set minimum rates (zero in some cases) for a range of oil products, including gasoline, liquid petroleum gas and kerosene. The impact of the legislation, however, was limited by the need to arrange the minimum rates to accommodate each Member State's existing tax regimes. Equally significantly, the Directives allowed considerable scope for derogations (specific for a particular use in a particular Member State) including many related to transport uses. States were allowed a variety of exemptions, for example, for fuels used in commercial waterway transport, for public transport uses, and for both private and commercial aviation.

Attempts to control the large number of excise tax derogations

Under the terms of the two Directives, the Commission was bound to review the majority of exemptions by the end of 1996, and, in the case of those benefiting commercial aviation and waterway transport, by the end of 1997. However, in response to a request from the Member

States, it chose to fulfil both obligations in a report published in November 1996. The report was accompanied by proposals to rationalise all the individual tax exemptions, not least by removing 28 existing concessions, and, in doing so, to take modest account of environmental factors. It said kerosene for commercial aviation should become taxable as soon as the international legal situation permitted, and it proposed the abolition of all exemptions for fuel used in private flying. It accepted, though, that tax exemptions for fuel used in commercial waterway transport should be made compulsory.

The Commission's policy on taxing kerosene

The Commission was less certain about its approach for public transport. Lowering fuel costs, it said, could help to reduce traffic growth. However, it noted, if transport modes are not priced at their full cost, "serious misallocations in the transport sector and substantial welfare losses can be the consequence". It concluded that existing exemptions should remain until a common framework for energy taxation was in place.

The Member States acting within the Council did not agree with most of the proposed abolitions - where the Commission had proposed the removal of 28 exemptions, the final Decision, in June 1997, disposed of only 11. Moreover, it approved over 50 exceptions not, as the Commission had suggested, until December 1998 but for a further year, until December 1999. It also allowed the Member States to continue to apply the derogations automatically for subsequent periods of two years. This was despite a declaration from the Commission, attached to the Decision, which warned that open-ended derogations would be contrary to EC law.

Decision of the Member States to keep many excise tax exemptions

Among the derogations extended by the arguably self-serving Council were several relating to fuel used for private air navigation, and a large number of concessions for fuels, particularly liquid petroleum gas and methane, for use by public transport vehicles. Other derogations approved included some for environmental incentives such as differentiated taxation of unleaded petrol. Subsequently, further exemptions were requested by Member States, which led to Commission proposals and Council Decisions; but, in each case, the derogation was only granted until the end of 1999. On the basis of a new Commission proposal examining all the derogations, the Council will have to take a fresh Decision for the derogations in 2000 and the following years.

Italian scheme to support road hauliers rejected

In one notable case, the Commission refused to put forward a draft Council Decision for an Italian scheme to reimburse professional road hauliers for an environmentally-driven increase in diesel excise tax. In a Communication, presented in October 1999, the Commission explained that the scheme would have discriminated against companies which operated their own in-house haulage services, and would have raised unacceptable complications for foreign hauliers. In its analysis, the Commission drew attention to attempts by Italy to support Italian haulage companies through other means, one of which led to a Court case which Italy lost (Chapter Five).

The radical energy tax restructuring proposal

In March 1997, the Commission put forward a proposal for a far more radical shake-up of fuel and energy taxation in the EU. This was partly in response to the requirement, under the original excise duty legislation (as above), to review the tax mechanism, and partly as a result of the failure by the Council of Ministers to make headway towards the adoption of a previously proposed CO_2/energy tax (Chapter Eight).

The new draft energy tax Directive, which was designed to replace the two existing Directives applying to mineral oils, aimed to include within the Community framework not only mineral oils but all other energy products, such as natural gas and solid fuels. Furthermore, new harmonised tax levels set by the Directive were to take account not only of traditional excise duties, but also of all indirect taxes, excluding VAT, such as energy taxes, indirect taxes on emissions (although

Proposed minimum taxation levels for motor fuels

	January 1998	January 2000	January 2002
Petrol (Ecu per 1,000 litres)	417	450	500
Gasoil (Ecu per 1,000 litres)	310	343	393
Kerosene (Ecu per 1,000 litres)	310	343	393
LPG (Ecu per 1,000kg)	141	174	224
Natural gas (Ecu per GJ)	2.9	3.5	4.5

Source: COM/97/30

direct emissions taxes would be excluded), and parafiscal charges. Minimum taxation levels were proposed for three categories of usage: motor fuels (including petrol, gasoil, kerosene, LPG and natural gas); fuels for certain industrial and commercial purposes; and energy products used for heating or electricity. For each category, minimum taxation levels were proposed in three phases, for 1998, 2000 and 2002.

The Commission incorporated some derogations for certain modes of transport in the draft Directive: an obligatory exemption for fuels for inland waterway craft (with the exception of pleasure vessels); exemptions or lower rates for the transport of goods and passengers by rail; and lower rates for the use of natural gas and LPG in passenger transport. It also confirmed the existing exemption for aviation kerosene used in international flights, but allowed for removal of the exemption as soon as the international situation should allow (Chapter Eight).

Trenchant opposition from Spain to energy tax proposal

Negotiations on this, most controversial of dossiers, have been slow, largely because it requires a unanimous vote in the Council. Although there is strong support from a large group of Member States, there is trenchant opposition from a small group of others, led by Spain. In December 1998, however, there was a consensus that discussion should focus on five key issues: special provisions for energy-intensive industries; exemptions and reduced rates for certain products on social grounds; temporary zero rates and flexible transposal deadlines for products not covered by existing EU legislation; special provisions for those Member States obliged to implement necessary increases in minimum rates; and the economic effects of the proposal.

Spain remained dissatisfied and, in spring 1999, went so far as to present the Council with a paper setting out its detailed objections concerning, among other things, the Directive's negative impact on inflation and competitiveness. The paper also claimed that the Commission's analysis of the draft Directive barely mentioned any impact on the transport sector. Spain's fleet of commercial vehicles represented 14.6% of the EU total, it argued, and the impact of the proposal on the transport sector was, in fact, "an extremely sensitive political aspect" deserving further study.

13 Member States in favour of energy taxation Directive

Germany, which for years has promoted the idea of energy taxation at the EU level, used its Presidency in the first half of 1999 to seek a compromise. It proposed the Directive should have generous scope for transition periods, allowing Member States time to adjust to the new regime, as well as for a wide range of derogations from the proposed minimum rates. Following a meeting of finance ministers in May 1999, the German President-in-Office, Hans Eichel, claimed that 13 of the 15 Member States could agree with the basic contents of the proposal "on the understanding that further work had to be carried out on specific questions before reaching agreement on a final draft". He hinted that the Irish opposition could be overcome, and laid the blame for the failure to make progress squarely at Spain's door, hinting that the Spanish attitude was inconsistent with the need for compromise.

Energy taxation dossier stalled

During the Finnish Presidency in the second half of 1999, and after the installation of the new Commission, it looked as though a consensus might emerge to use the flexibility clauses, introduced by the Amsterdam Treaty, which allow a group of Member States to establish closer cooperation among themselves. The conditions for this, in Article 43 of the EU Treaty (as opposed to the main EC Treaty), state clearly that the mechanism can only be used "as a last resort, where the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein". However, Finland, like the Presidencies before it, failed to make any significant progress.

The extended struggle to abolish duty free sales

Historically, duty and VAT free sales to travellers were a major source of revenue to companies operating in the transport sector, notably ferry companies, airlines and airports. However, they were also widely seen as an anachronism in the single market: the tax concession enabled transport operators to subsidise their activities, thus distorting competition both between modes and between domestic and international transport. The decision, in principle, to abolish them was taken unanimously by the Ecofin Council in June 1991, as part of a series of single market tax measures. However, in adopting the two laws on VAT and excise duties enacting that political agreement, the Council took account of possible adverse economic effects and of pressure from industry by allowing a seven year transitional period, with a deadline of 30 June 1999, before the introduction of the new rules.

As the deadline drew closer, however, a powerful coalition of duty free interests - including airports, ferry companies, and various retailers - lobbied strongly for the decision to be overturned, claiming it would result in heavy job losses and company failures in the transport and tourism sectors. Indeed,

by October 1997, the then Internal Market Commissioner, Mario Monti, was led to remark that "seldom in the history of the EU has so much money and time been spent by such a wide coalition of interests on trying to reverse a Council decision".

The lobby succeeded in winning some sympathy from a large number of Member States, and the matter was raised at successive European Councils. The Commission attempted to regain the initiative with a working paper illustrating how the Member States could use instruments such as the Structural Funds to support regions harmed by the loss of tax free sales. The pressure group continued to gain public and political attention, and, in December 1998, the Vienna summit called on the Commission to carry out a study into the employment effects of removing the tax free concessions, a move the Commission had resisted. The study, when published in February 1999, suggested that any job losses would be "of a specific and local nature", and that there would be no impact on employment levels overall.

Study on employment effects of duty free abolition

Nevertheless, the campaign continued, and even the UK, Germany and France began to waver. However, any decision to delay or amend the original decision required the unanimous support of all 15 States. A compromise proposal, extending the deadline for imposing excise duties (but not VAT) by two years, was prepared under the Germany Presidency for the extraordinary summit in Berlin in March 1999. That meeting was overshadowed by both the Kosovo situation and the resignation of the Santer Commission, so a last ditch attempt was made, at the June Cologne summit, to postpone the deadline, then only days away. Denmark, alone, held out against any delay, and, thus, abolition of duty and tax free sales for intra-EU travellers went ahead as scheduled at the end of June 1999.

VAT arrangements for passenger transport

The question of how VAT should be levied on passenger transport services in the single market is another question entirely. At present, within the framework established by the Sixth VAT Directive, international transport is taxed on the basis of the distance covered in each Member State, and VAT can be collected at internal frontiers. But, because the Member States can establish VAT rates independently on their own territory, the tax applied to the different modes can vary substantially. This can distort modal demand and competition between transport operators. Moreover, the abolition of internal frontier checks within the Community has made the collection of the tax difficult and effective enforcement impossible.

As part of the general move to dismantle tax frontiers in the single market, the Commission proposed, in September 1992, new VAT arrangements for passenger transport. The draft Directive provided for transport services to be taxed in the country of departure but, because air and sea transport qualified for zero-rating in all Member States, and rail and road did so in many of them, it also permitted zero-rating in all Member States wishing to apply it, until at least 1997. The Commission had hoped the Directive would be adopted rapidly, allowing the new rules to be in place by January 1993. However, the Council proved unable to reach agreement on them.

In 1995, the Commission ordered a study, from KPMG consultants, to look at VAT on passenger transport in the EU. The study, completed in October 1997, confirmed that the existing tax regime could distort intermodal competition, mainly between air transport (which remains zero-rated) and rail or coach transport over medium to long-distance international routes (which now attracts high rates of VAT in some areas). Harmonisation of VAT rates, it suggested, would create a modal shift away from air and sea markets; and, in those countries where high rates applied, it would considerably increase the competitiveness of rail. The overall impact of such a move would depend on the harmonised rate chosen, it suggested, with an 8% rate, for example, leading to an overall 2% reduction in passengers using air, coach or rail transport. The introduction of a harmonised rate solely in urban transport, it added, would produce both a change in demand and a cost increase, and would probably accentuate congestion by prompting greater use of private cars.

KPMG study on passenger transport VAT

The study also looked at the possibility of maintaining the existing VAT rates, but using alternative taxation options, such as ensuring the collection of revenue at the point of departure or arrival, or collecting it from the operator or the customer. In general, it suggested, these systems would have only minor economic impacts in terms of demand reduction and modal shifts. It warned, however, that the operator collection option could encourage businesses to make deliberate attempts to exploit differences in VAT rates between Member States, and to set up operations in countries with low rates to compete against firms in higher cost regions. Following the publication of the study, the Commission said it would bring forward a consultation paper, taking account of the study conclusions, to look at possible reform measures.

BORDER CHECKS, CUSTOMS AND ADMINISTRATIVE FORMALITIES

Although the six-Member Community achieved a tariff union by 1968, and made significant progress towards a customs union in the 1980s, especially with the introduction of the Single Administrative Document in 1988, the free circulation of goods was a long way from reality prior to the single market. Numerous customs border formalities existed, and all hauliers were stopped at the internal Community borders for customs and tax clearance, and sometimes for inspection. Chronic queues of trucks at customs posts, thus, hindered intra-Community trade, and resulted in significant company costs.

With the introduction of the single market in 1992, however, the Community did away with all routine customs formalities (replacing them with new fiscal, statistical and other control systems requiring no physical controls at the point of border crossing). The legal base for this - the Community Customs Code - was agreed by the Council in 1992. Since then, it has been subject to numerous implementing Commission Regulations. One of these, for example, was to tighten up the customs regime for goods carried by sea as of July 1998, while introducing more flexible procedures for short sea shipping; and another, in March 1999, was aimed at establishing the basis for computerisation of the transit system.

The Community Customs Code

In a June 1998 assessment of this policy area, the Commission reported that the Code had met its objectives well, and that it had been used as a model by a number of European third countries. However, it also concluded that the Code should be updated "in the light of experience", particularly to provide for more flexibility in applying rules on customs debt; to simplify customs procedures, principally in order to make computerisation easier; and to improve procedures for customs debt recovery in order to combat fraud. These changes were still under discussion in autumn 1999.

The vulnerability of the Community's common transit system

Customs transit was described in a 1997 Commission policy paper as "one of the cornerstones of European integration and an issue of vital interest to European businesses". The Community's own transit system was extended to the EFTA states and the Visegrad Treaty countries (Poland, the Czech Republic, Slovakia and Hungary) under the 1987 Common Transit Convention. Transit transactions, though, also take place within the Community under the provisions of the 1975 TIR Convention, a UN-ECE instrument which covers a larger geographical area and which has more than 60 contracting parties. Under each of the systems, the quantity and description of the goods transported are recorded on a uniform document allowing them to be monitored from the point of departure to their destination. Some 18m Community and common transit documents (T1 documents) are issued in Europe every year, along with 1m TIR 'Carnets' (the documents used under the TIR Convention), together covering vast quantities of goods and accounting for huge sums in terms of duty and tax revenues.

The Common Transit Convention

With the dramatic reduction in frontier formalities achieved as a result of the Community's single market, the transit system has become increasingly open to abuse. The Commission produced Communications on the subject in 1995 and 1996, but it was the involvement of the European Parliament which brought widespread attention to the issue. Using new powers granted to it under the Maastricht Treaty, the Parliament opened a committee of inquiry in December 1995 to assess the nature and scale of fraud in the transit system, to assess the responsibility of the authorities concerned, and to suggest measures to stem the flow of associated financial losses. Having held numerous hearings and invited evidence from a range of interested parties, the committee adopted its final report in early 1997.

The EU transit system was in chaos, the EP report stated baldly, and fraud losses were possibly even higher than the figure of Ecu2bn for 1990-96 previously estimated by the Commission. The system, it said, "is an archaic, paper-based system which is simply unable to cope with the 18m transit operations that take place every year" and is "highly vulnerable to fraud". Blame for the crisis was evenly spread, although the Commission was censured for failing to foresee or deal with major problems resulting from the beginning of the single market. The situation, the report suggested, had been aggravated by authorities in the Member States acting according to purely national perspectives. It recommended numerous changes, including computerisation of the system, the extension of the existing guarantee mechanism to cover maritime transport as well as road, and the introduction of a new system of physical checks on consignments, based on a joint system of risk analysis.

EU transit highly vulnerable to fraud

The Commission reacted rapidly. In April 1997, it published a Communication and action plan aimed at "restoring order to the Community's collapsing procedures for transit". It referred to the

Customs 2000 programme (see below), and outlined a schedule for the introduction, in late 2000, of a "New Computerised Transit System", to embrace the Community, EFTA and Visegrad countries. The exchange of paper documents would, in time, be entirely supplanted by computerised transactions, it said. The final section of the Communication described six basic areas for action, together with a large number of specific initiatives, each with a precise timetable, aimed at managing the transit system more effectively (see box).

The Community's Customs 2000 action programme

The Community's Customs 2000 action programme, introduced by a Decision of the Council and the Parliament in December 1996, has been another important element in the Community's attempts to improve customs procedures, with consequent benefits for the free movement of goods and the reduction of fraud. The programme, which was allocated a budget of Ecu50m for the period 1996-2000, is aimed at modernisation and development of customs and administrative procedures at the Community's external frontiers. It consists of a wide range of activities including joint monitoring actions (involving Member States' experts and Commission officials), training, seminars and technical assistance for third countries. In September 1999, the Council adopted a Common Position on a proposal to extend the programme until 2002 and to bring within its scope a range of Community activities, relating to the computerisation of transit procedures. It also increased the programme budget for the seven year period to Eur135m, with Eur84m for the computerisation of the transit system. Formal adoption of the extended programme was expected in 2000, after a second reading approval by the Parliament.

Dismantling border controls through the Schengen initiative

The abolition of restrictions on the free movement of people is as much an objective of the single market as the removal of obstructions to the free movement of goods. Moreover, the removal of

Selected actions for restoring transit procedures

Management of the transit procedure
- Tailoring customs formalities to individual traders' trustworthiness
- Ensuring customs and traders conclude memoranda of understanding setting out their mutual responsibilities and commitments
- Amending Community rules on maritime transit procedures with a proposal likely to ensure that only regular shipping lines are allowed to use the transit system itself, while a compulsory guarantee system will be introduced for the transit of non-Community goods by the regular shipping lines
- Evaluating the effectiveness and security of transit procedures for air and rail transport, and checking whether guarantee waivers should be retained in these sectors

Supervision of transit operations
- Drafting national management plans for transit procedures with a view to ensuring that return copies of transit documents are sent back and procedures discharged promptly
- Making full use of existing administrative cooperation arrangements such as the prior information system for sensitive goods
- Setting up a European network of national transit coordinators and local transit contacts in every large customs office
- Clearly laying down the principal's responsibility for inspection and front-line supervision of the goods entrusted to him or her, assessing the risks entailed and monitoring any transit operations he or she undertakes

Fraud prevention and law enforcement
- Sealing vehicles (approved for the purpose) and fitting them with 'T plates', requiring the haulier to state the planned route, and coordinating surveillance of the vehicle with the trader, all with a view to improving security of goods in transit
- Developing a joint, Europe-wide policy for managing risks and targeting inspections/checks, with the aid of a Community risk analysis unit
- Stepping up fraud detection and law enforcement, in particular by setting up a joint investigation body and a Community unit to combat crime
- Coordinating national administrations' resource management and drafting a plan to equip customs offices on the EU's external borders
- Harmonising customs officials' powers, so as to ensure high standards of security throughout the customs territory

Sound financial management
- Tailoring the amount and type of guarantee required to the risk entailed; reviewing guarantee waivers for transit operations by sea, air and rail
- Reorganising recovery procedures to ensure fair treatment of persons liable for customs debt and easing the problems caused by different fiscal jurisdictions within the customs territory

Uniform application of the transit rules
- Improving training of customs officials in all 23 countries by distributing a transit manual for practical use, backed up by training courses;
- Improving the information given to traders and formalising dialogue by setting up a "transit contact group" bringing together customs and traders in the 23 countries, nationally and at European level

Effective monitoring, continuous evaluation
- Establishing national timetables for implementing reforms, and regular monitoring of national action plans
- Drawing up an overall report on the progress of reform Community/Europe-wide

Source: COM/97/188

frontier passport checks has obvious potential benefits, for example in terms of reduced delays for passengers at airports, ports and border posts. However, while the EU has been the driving force in the dismantling of border controls on the movement of goods, the resistance of some Member States to the removal of controls for passengers led a number of other States to act on their own.

On the day in 1985 when the Commission published its single market white paper, five Member States (Germany, France, Belgium, Luxembourg and the Netherlands) signed the so-called Schengen Agreement, in which they agreed in principle to the gradual abolition of checks at their common borders, with the overall aim of eventually ending internal border checks at Community level. Due to the political sensitivity and complexity of the issue, however, the Schengen Convention (which would put the Agreement into effect and which contained the necessary accompanying measures), was not signed until June 1990.

13 Member States involved in the Schengen initiative

Although the Schengen group had initially intended to legislate for the abolition of checks on goods as well as on people, the Convention contained no provisions on goods, as the signatories considered that the issue fell unquestionably within the Community's sphere of competence, and that satisfactory progress was being made at EC level. Subsequently, the five original signatories were joined by eight further Member States, bringing the eventual total to 13 by 1997, with only the UK and Ireland remaining outside. The Convention itself was not actually implemented until March 1995.

The Commission, throughout this period, welcomed the Schengen initiative as a test-bed for abolishing checks on individuals at Community borders. It adopted a pragmatic approach, accepting that measures accompanying the removal of checks on individuals would be drawn up on an intergovernmental basis, and not within the EU institutions. Eventually, however, during the Intergovernmental Conference which preceded the adoption of the Amsterdam Treaty in mid-1997, the Member States agreed that the effects of the various Schengen instruments, known as the Schengen acquis, should be formally incorporated into EU law.

Schengen acquis incorporated into the Amsterdam Treaty

The Amsterdam Treaty itself effectively marked a new phase in the long-term process of transforming the EU into a border-free area. It established that, within five years of its entry into force, the Council would adopt measures "with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders". It also introduced a new protocol to the EC Treaty specifically dealing with the Schengen issue. This provided for the decision-making duties of the Schengen executive committee to be absorbed by the Council of Ministers, and for the activities of the Schengen secretariat to be taken over by the general secretariat of the Council. The protocol also stipulated that the Schengen acquis should continue to apply to the thirteen Schengen States, while the UK and Ireland could ask to take part in some or all of its provisions at any time.

The legislation needed to apply the protocol was adopted shortly after the entry into force of the Amsterdam Treaty, in May 1999: a Council Decision set out which parts of the Schengen acquis remained relevant and fell within the Community's sphere of competence, while a second Decision determined which of those provisions should have a legal basis within the Communities themselves (under the so-called 'first pillar' of the EU's constitution), and which should be considered under provisions for cooperation between Member States on justice and home affairs (the 'third pillar'). Despite criticism from the Parliament, which considered it had been inadequately consulted, the Council also signed an agreement with Iceland and Norway on their participation in the Schengen system.

OBSTACLES TO THE FREE MOVEMENT OF GOODS, AND A SOLUTION

During the mid-1990s, the Commission became increasingly concerned about what it called "grave breaches of the principle of free movement of goods" and the lack of any rapid means to deal with such breaches. In late 1997, for example, the Commission finally won a case against France for failing to take adequate action to prevent farmers attacking lorries carrying agricultural produce from other Member States and damaging shops stocking the produce. But such cases take a minimum of two years and, in the interim, affected businesses are unable to obtain redress for their losses.

At the request of the 1997 Amsterdam European Council for measures "to examine ways and means of guaranteeing in an effective manner the free movement of goods", the Commission, therefore, put forward a proposal to create what it called "a Commission intervention mechanism in order to eliminate certain obstacles to trade". In justifying the scheme, the Commission argued

that the Treaty requires Member States to make every effort to remove hindrances to trade in the single market. It stated: "*Infringements may take a variety of forms, but the most spectacular are certainly the abrupt and unjustified prohibition on imports of products from other Member States, or the prevention of such products from moving or even their destruction. Infringements may seriously disrupt the proper functioning of the internal market and inflict indisputable damage on businesses, which must be rectified as soon as possible.*" The timing of the proposal's adoption, in November 1997, shortly after strikes by French and Spanish lorry drivers had made roads at the heart of Europe impassable, looked no coincidence; however, the Commission emphasised that in both these cases the new rules would not have been applicable because the State governments had done all they could to protect trade.

Member States obliged to remove obstacles to the single market

The Internal Market Council reached political agreement on the proposed Regulation in May 1998, and it was formally adopted the following November. It stipulates that Member States should take "all the necessary and proportionate actions to remove serious obstacles to the free movement of goods in the Community". If the Commission believes an obstacle to trade has been created, the Regulation authorises it to notify the Member State concerned with a request to take "all necessary and proportionate measures" to remedy the problem within a given period. If the State should fail to do so, the Regulation allows the Commission to take a formal Decision requiring the State to take action. It also provides for an accelerated procedure for instituting legal action should such a Decision be ignored.

At the same time as reaching political consensus on the intervention mechanism, i.e. in May 1998, the Council agreed a Resolution stating that the Member States would undertake to do all within their powers, "taking into account the protection of fundamental rights including the right or freedom to strike", to maintain the free movement of goods and to deal rapidly with actions which seriously disrupt the free movement of goods. They also agreed to ensure "rapid and effective review procedures are available for any person who has been harmed as a result of a breach of the Treaty caused by an obstacle within the meaning of the Regulation". The Resolution invited the Court of Justice to consider whether cases within the scope of the Regulation could be expedited, and promised to examine any proposals to amend the Court of Justice's rules of procedure urgently and "in an open spirit".

RULES FOR FAIR PROCUREMENT PRACTICES IN THE TRANSPORT SECTOR

Community rules setting non-discriminatory conditions for public procurement are considered fundamental to the fair operation of the Community's single market. According to figures regularly put forward by the European Commission, the EU's public authorities spend some Ecu720bn buying goods and services, representing 11% of Community GDP. Procurement law has a profound effect on transport-related markets, especially where the development of transport infrastructure is concerned. The application of procurement legislation, indeed, has become a key question in the development of public-private partnerships (PPP) to promote infrastructure investment.

The Utilities Directive

Over the past decade, the Community has established a comprehensive legal framework for public procurement. At the core of this framework are Directives on the procurement of services, supplies and works by public authorities. Specific rules apply to the transport sector (along with the telecommunication, energy and water sectors) through the so-called Utilities Directive, adopted in 1993. The Directive requires open tenders for works contracts worth over Ecu5m, and for supplies and services contracts worth Ecu400,000 and above. The legal framework, however, has proved less effective than the Commission had hoped, due to problems with transposal of the Directives as well as with the application of the legislation itself.

With the publication of a green paper in November 1996, the Commission launched a debate on the state of public procurement policy, and then, having received comments from over 300 interested parties, it published a follow-up Communication in March 1998. It concluded that the EU should act to maximise the economic benefits of the procurement regime, and should adapt existing instruments to the changing economic environment. It proposed, therefore, a wide ranging programme of action aimed at simplifying and consolidating existing legislation, making procurement mechanisms more flexible, speeding up infringement procedures and promoting electronic procurement transactions. It also said the Utilities Directive should be amended to exclude services which operated "under conditions of real competition".

SINGLE MARKET GENERAL

The problems posed by the emergence of PPPs, as a means of financing services and infrastructure development, are of particular relevance to transport. The Commission explained, in

the Communication, that the role played by the public authorities in such partnerships varied greatly according to the situation concerned. Although the Commission had "no intention of intervening in Member States' decisions as to whether these infrastructures and services are to be financed by the private or the public sector", it had a duty to devise a legal framework allowing the development of such partnerships, "while guaranteeing compliance with the competition rules and fundamental Treaty principles". It noted, moreover, that, at present, only works concessions are subject to specific rules laid down in a Directive - "service concessions, public service contracts or other partnerships involving the provision of services are not covered".

Draft interpretative Communication on PPPs and the single market

In order to clarify the situation, and as a prelude to possible further legislation, the Commission brought forward a "draft interpretative Communication" on the subject in March 1999. The Treaty makes no specific reference to concessions, public contracts or other forms of PPPs, it argued, but, nevertheless, a number of its provisions are relevant, notably the rules instituting and guaranteeing the proper operation of the single market. Particularly important in this respect are the provisions covering the principles of freedom of establishment and freedom to provide services, of transparency and proportionality, and of non-discrimination on grounds of nationality. Moreover, it said, public authorities are free to establish contracting procedures and establish criteria for candidates to meet, based on these principles. It also drew attention to the relevance of other Community legislation, outside the procurement framework, such as the rules on public services in inland transport laid down in Regulation 1191/69 (see above). The Commission invited interested parties to respond to the paper and said it would be revised and published as a definitive interpretative document at a later stage.

Community efforts to open third country markets

The Government Procurement Agreement

In approving the 1993 Utilities Directive, the Council insisted on including a provision (Article 36) allowing public buyers to give preferential treatment to Community suppliers, in part to act as a lever for opening up third country procurement markets. The strategy produced quick results. In April 1994, the EU's 12 Member States signed, within the WTO framework, a new Government Procurement Agreement (GPA) with the five EFTA states (three of which subsequently joined the EC), Japan, Canada, Hong Kong, Israel, and the US. The new Agreement, more ambitious than its predecessor, covered procurement of goods, services and construction at both central and local government levels, as well as within a number of utilities sectors.

The Council approved the new GPA in 1994, and it came into force at multilateral level in January 1996. Two years later, in April 1998, the Commission published a report on the state of negotiations regarding access to third country public procurement markets in the fields covered by the Utilities Directive. It listed by sector the rights of EC suppliers, contractors and service

Threshold values above which EU suppliers have access rights (SDR*)

	Aruba	China	Israel	Japan	Korea	Sing.	Switz.	US
Ports								
Supplies	0.4	0.13	0.355	0.13	0.13	0.4	0.4	0.4 [3]
Works	5.0	5.0	8.5	15.0	5.0	5.0	5.0	5.0
Services	0.4	0.13	0.355	0.13 [1]	0.13	0.4	0.4	0.4 [4]
Airports								
Supplies	0.4	0.4	0.355	0.13	a	0.4	0.4	a
Works	5.0	5.0	8.5	15.0	a	5.0	5.0	a
Services	0.4	0.4	0.355	0.13 [1]	a	0.4	0.4	a
Urban transport networks								
Supplies	0.4	0.13	0.355	0.13 [2]	a	0.4	0.4	a
Works	5.0	5.0	8.5	15.0 [2]	a	5.0	5.0	a
Services	0.4	0.13	0.355	0.13 [1,2]	a	0.4	0.4	a
Non-urban transport networks								
Supplies	0.4	0.13	0.355	0.13 [2]	a	b	b	b
Works	5.0	5.0	8.5	15.0 [2]	a	b	b	b
Services	0.4	0.13	0.355	0.13 [1,2]	a	b	b	b

* SDR - Standard Drawing Rights
a - Excluded or mostly excluded; b - no entry in the table; [1] 0.45m for architectural, engineering and other technical services ; [2] some rail entities ; [3] $0.25m for certain contracting entities; [4] naval construction excluded

Source: COM/98/230

providers in third countries, as well as cataloguing existing multilateral and bilateral agreements with a bearing on procurement. Its principal conclusion was that, despite numerous accords, barriers to EC industry in third country markets still existed.

The report demonstrated that little had changed since 1994 as far as market access rights for the transport sector negotiated under the GPA were concerned. However, offers made by Hong Kong, Singapore and Aruba on accession to the Agreement had all included commitments on port, airport, and urban transport services, it said, and a separate bilateral agreement with Israel included provisions on urban transport. At a European level (outside the EEA), procurement issues were covered under the major bilateral agreement with Switzerland, it noted, while the Europe Agreements with the countries of Central and Eastern Europe all contained procurement provisions aimed at providing national treatment for EU suppliers, albeit subject to transitional periods of varying length.

Furthermore, the Commission identified the access rights which EU businesses already had to third country markets under existing agreements (see table) and said it would look to extend these rights for EU firms, both through bilateral agreements and an early review of the GPA, as well as through other international frameworks.

Controversy over amendments to the Utilities Directive

Although the GPA did not, in itself, require any changes to EC legislation, the Commission nevertheless brought forward proposals, in March 1995, to amend the procurement framework, including the Utilities Directive. The aim of the proposal was to insert various provisions of the GPA into the Community framework in order to ensure coherence between the two legal regimes. The Commission was also concerned to prevent Community firms from being discriminated against, by guaranteeing them the same advantages which third country firms would enjoy under the terms of the GPA.

The legislative process, however, was certainly not smooth. The proposed amendments to the Utilities Directive were rejected by the Parliament at its first reading, amidst heavy lobbying from industry interests concerned that the proposal would allow a wholesale opening up of EC procurement markets in the sectors covered. Although the Commission was adamant that this was not the case, it heavily modified the proposal to take account of a range of concerns put forward by MEPs. Subsequently, following further debate between the Council and the Parliament (under the codecision procedure), the amending Directive was formally adopted in February 1998.