

Introductory note accompanying the publication of Prof. De Decker's legal opinion

The observations and opinions presented in this legal opinion are strictly those of its author and do not reflect the position of the Central Commission nor of its Member States.

Context of the handing down of the legal opinion

The CCNR commissioned this legal opinion from Prof. De Decker in September 2021. It was delivered at the end of November 2021. This opinion comprises two parts.

The first part (pp. 1-26) concerns the prohibition on the levying of duties, tolls and taxes under the current Rhine regime and aims in particular to analyse the legal relationship between the proposal for a Council directive restructuring the Union framework for the taxation of energy products and electricity (recast) published in July 2021 and the Rhine regime.¹

The second part (from p. 27 onward) concerns the legal feasibility, having regard to the Rhine regime, of a sector contribution based on fuel consumption and the vessel's emissions reduction performance.

This proposed contribution by the sector was developed in the context of the CCNR's study on the energy transition towards a zero emission IWT sector (research questions G and H)².

To evaluate the proposals developed in this study and their possible implementation, the Central Commission has, in its resolution 2021-I-6, instructed its Economic Committee, River Law Committee, Inspection Regulations Committee and its Committee for Infrastructure and Environment to examine the economic feasibility, technical, legal, and practical issues arising from the study.

As concerns the legal considerations, the relevant Committees decided that the introduction of a sector contribution should at all events be compatible with the relevant international agreements, notably the Mannheim Act, and that it was up to the CCNR to assess the compatibility of a sector contribution with the fundamental principles of the Mannheim Act.

Context of the proposal to introduce a sector contribution

The CCNR study is a wide-ranging consideration of how to finance the energy transition and proposes the creation of a financial mechanism based on public and private sources, including a sector contribution.

The proposal to introduce a sector contribution was prompted by the need to incentivise vessel owners to invest in emissions reduction technologies, while ensuring that such a contribution is reassigned to the inland waterway transport sector to support projects helping to reduce vessel emissions. In anticipation of the expected legislative changes which would require the sector to make a financial contribution to the energy transition (tax, integration with Emission Trading Schemes...), the idea of a sector contribution also aimed to prompt an extensive discussion on the most appropriate way for the sector to contribute to this transition. The sector could play a full part in developing the parameters of such a contribution instead of these parameters being imposed on it. Moreover, in the event of a contribution by the sector, the sector could have greater influence over the level of the contribution and the allocation of resources arising from it. In the event of a tax or other type of contribution, the financial impact for vessel owners could be higher and with no certainty as to how the resources would be allocated.

¹ COM/2021/563 final: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021PC0563>

² Research questions G and H on the potential of 'polluter pays' schemes in inland waterway transport and on requirements and boundaries considering level playing field and modal share: https://www.ccr-zkr.org/files/documents/EtudesTransEner/Deliverable_RQ_G_and_H.pdf

LEGAL OPINION REGARDING THE LEVYING OF A MINIMUM ENERGY TAX RATE OR A CONTRIBUTION TO A GREENING FUND ON WATERWAYS FALLING UNDER THE SCOPE OF THE REVISED CONVENTION FOR THE NAVIGATION OF THE RHINE

Introduction

1. On 14 July 2021, the European Commission launched its “Fit for 55” legislative package, consisting in a package of proposals to make the EU climate, energy, land use, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. As part of this package, a proposal for a revision of the Energy Taxation Directive (ETD) ⁽¹⁾ was published ⁽²⁾, entailing inter alia tax measures with regard to fuel consumed on board of inland vessels and applying on all EU inland waterways, including therefore those falling under the scope of the Rhine regime. The Explanatory Memorandum of the draft proposal endorses the view of priority of secondary Union law over current international river law. The ETD proposal therefore raises legal issues in respect of the existing Rhine regulation as regards the levying of taxes and other dues and the competencies involved of the CCNR. In this paper the legal relationship between the existing Rhine scheme with regard to this special field of action ⁽³⁾ and the planned new secondary Union law will be explored as well as the legal feasibility of a sector contribution as an alternative for a taxation. The observations and opinions put forward in this paper are strictly personal and do not express the position of the CCNR and the Contracting States of the Revised Convention for the Navigation of the Rhine.

§ 1 The prohibition of levying dues, tolls and taxes under the present Rhine Regime

§ 1.1. The provisions of the 1868 Act of Mannheim

2. Pursuant to art. 1 MA ⁽⁴⁾ “(t)he navigation of the Rhine and its estuaries from Basel to the open sea either down or upstream shall be free to the vessels of all nations for the transport of

¹ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, *O.J.*, L 283, 31.10.2003, p. 51–70

² European Commission, Proposal for a Council Directive restructuring the Union framework for the transaction of energy products and electricity (recast), 14.07.2021, COM(2021) 563 final 2021/0213 (CNS).

³ For a general approach of the legal relationship between the Rhine regime and Union law, I refer to my legal opinion regarding the Rhine regime and the competencies of the CCNR in respect of secondary Union IWT law with special regard to the non-paper on the EU position regarding draft regulation for Rhine navigation personnel. The general observations made in that paper are of course also applying with regard to the aforementioned proposal. Some of these observations are resumed in this legal note.

⁴ Mannheimer Akte: Convention of Mannheim, signed on 18 October 1868, between Baden, Bavaria, France, Hessen, the Netherlands and Prussia, entered into force on the 1st July 1869 and amended by: the Convention of 14 December 1922 regarding Rhine boatmasters’ certificates; the Convention of Strasbourg, signed on 20 November 1963; 7 Additional Protocols of which, with regard to the issues dealt with in this paper only the Additional Protocol N°2 of 17 October 1979 and the Additional Protocol N° 7 of 27 November 2002 show relevance. Present state Contracting States are: Belgium, France, Germany, the Netherlands, Switzerland.

merchandise and persons, provided that they conform to the provisions contained in this Convention and to the measures prescribed for the maintenance of general safety. Apart from these regulations no obstacle of any kind shall be offered to free navigation. The Leck and the Waal are considered as being part of the Rhine.” As an integral part of this freedom of navigation, art. 3⁽⁵⁾ provides that “(n)o duty based solely on navigation may be levied on vessels or their cargoes or on rafts navigating on the Rhine or its tributaries⁽⁶⁾, in so far as they are in the territory of the High Contracting Parties or on the navigable waterways mentioned in article 2⁽⁷⁾. The levying of dues for buoyage or marking of the navigable waterways mentioned in the preceding paragraph above Rotterdam and Dordrecht shall also be prohibited.”⁽⁸⁾ The

⁵ Authentic text in French, German and Dutch: “Aucun droit base uniquement sur le fait de la navigation ne pourra être prélevé sur les bateaux ou leurs chargements non plus que sur les radeaux navigant sur le Rhin, sur ses affluents, en tant qu’ils sont situés sur le territoire des hautes parties contractantes, et sur les voies navigables mentionnées à l’article 2. Sera également interdite la perception de droits de bouée et de balisage sur les voies navigables mentionnés dans l’alinéa précédent en amont de Rotterdam et de Dordrecht. » ; « Auf dem Rhein, seinen Nebenflüssen, soweit im Gebiete der vertragenden Staaten liegen, und den in Artikel 2 erwähnten Wasserstrassen darf eine Abgabe, welche sich lediglich auf die Tatsache der Beschiffung gründet, weder von den Schiffen oder deren Ladungen noch von den Flößen erhoben werden. Ebensovienig ist auf diesen Gewässer oberhalb Rotterdam und Dordrecht die Erhebung von Boien- und Baakengeldern gestattet.“; Van de vaartuigen of hunne ladingen en van de vloten, die den Rijn, zijne nevenrivieren, voor zoover die gelegen zijn in het gebied van de Hooge contracteerende Partijen, of de waterwegen in art. 2 genoemd, bevaren, zullen geen rechten geheven worden die uitsluitend op het uitoefenen der scheepvaart gegrond zijn. Het is evenzeer verboden om op de vaarwaters, vermeld in de vorige zinsnede, boven Rotterdam en Dordrecht, boei- en bakengelden te heffen.”

⁶ The Revised Convention for the Navigation of the Rhine only refers to “tributaries”, without defining them. Art. 45, second paragraph of the Act of Mainz mentioned the Main, Meuse, Neckar and Moselle as well as the river Scheldt, which is a confluent. The French authentic text of art. 2 MA uses the word “affluents”, the German text uses the word “Nebenflüssen” and the Dutch text uses the word “nevenrivieren”. In the German text of art 45, second paragraph of the Act of Mainz the word “Nebenströmen” is used, in the French text is spoken of “rivières qui se jettent dans le Rhin”. During the twelve conferences of the Vienna River Commission, none of the plenipotentiaries ever challenged that the Scheldt, mentioned in Article 16 of the Dalberg draft, is a river debouching in the Rhine, and therefore one of its confluents. The Final Protocol of 24 March 1815, as well as the minutes of the twelfth conference of the same date of the Vienna River Commission, establish beyond reasonable doubt that the Scheldt was considered a confluent of the Rhine. The notion “confluens du Rhin” was used referring to “nomenclément du Mein et du Neckar, comme aussi à celle de la Moselle, de la Meuse et de l’Escaut. » (Rhine Documents, vol. I, 148). The mouths of the Rhine, Meuse and Scheldt form part of the common Rhine-Meuse-Scheldt delta. Therefore it may be concluded that the five rivers, Main, Meuse, Moselle, Neckar and Scheldt fall under the scope of art. 3 MA. Pursuant to art. 38 of the 1956 Moselle Convention, concluded between France, Germany and Luxembourg “The provisions of article 3 of the revised Convention for the Navigation of the Rhine and of the final protocol annexed to that Convention shall be valid for those reaches of the Moselle to which the present Convention applies.” Pursuant to art. 22 of the Moselle Convention dues may be levied on goods transported between Koblenz and Thionville.

⁷ According to “point 2 concerning article 3” sub A of the Protocol of Signature “It was unanimously agreed that the stipulations of the First paragraph of this article do not apply to the fees for opening or closing bridges which are charged on navigable waterways other than the Rhine or to duties charged for the use of artificial waterways or engineering structures such as locks, etc.” By Resolutions of the CCNR of 16 December 1921 and 29 April 1925 the use of the locks at Kembs and of the Grand Canal d’Alsace were exempted from the levying of dues (see: CHIESA, P., *Le regime international du Rhin et la participation de la Suisse*, these, Fribourg, Barblan and Saladin, 1952, 24).

⁸ In line with art. 3 of the Act of Mannheim, art. 3, first para of the « Convention entre la Suisse et le Grand-Duché de Bade au sujet de la navigation sur le Rhin, de Neuhausen jusqu'en aval de Bâle, conclue le 10 mai 1879, entrée en vigueur le 1^{er} janvier » provided that « Les personnes qui s'occupent de

waterways mentioned in art. 2 MA are the waterways frequented when traversing the Netherlands on the way to or from the open sea or Belgium ⁽⁹⁾. With regard to all the above-mentioned inland waterways, the same treatment in every respect as for nationals shall be given to vessels belonging to Rhine navigation and their cargoes (art. 4, last paragraph MA) ⁽¹⁰⁾.

3. In addition to art. 3 MA, art. 7 MA ⁽¹¹⁾ provides that “The transit of any merchandise shall be unrestricted on the Rhine from Basel to the open sea unless health measures make exceptions necessary. The riparian States shall not collect any dues on such transit either directly, after transshipment or warehousing.” Also, “(a)ll the facilities which are granted by the High Contracting Parties on other land routes or waterways for the import, export or transit of merchandise shall also be granted to import, export or transit on the Rhine.” (art. 14 MA). Furthermore, pursuant to art. 30 MA “It shall be prohibited to make and charge for opening or closing bridges (on the Rhine).” Fees for pilotage and warning services are allowed and at the discretion of the riparian States (art. 26 MA). Fees for using port facilities with regard to loading, unloading and warehousing of goods are also allowed (art. 27 MA). The fees mentioned in art. 26 en 27 MA are paid in return for services rendered, which is not the case for dues based solely on navigation.

4. Art. 3 MA (and 7.2 MA) give utterance to the idea of free use of international waterways, launched at the end of the 18th Century in response to the many high tolls and other fiscal and non-fiscal dues that from the Middle Ages to that time were levied on cargoes and vessels, loaded or unloaded, hampering a cost-effective exercise of navigation ⁽¹²⁾. Under the 1803 Rhine Octroi

navigation et de flottage ne seront soumises au paiement d'aucun droit reposant uniquement sur le fait de l'usage des eaux du fleuve ou sur le passage sous des ponts, pas même dans le cas où l'on construirait des ponts de bateaux sur cette partie du Rhin, ou dans celui où l'on prescrirait, pour la sécurité d'un pont permanent, que le passage ne peut avoir lieu qu'avec l'aide d'un pilote désigné dans ce but. »

⁹ Art. 2, first sentence: The vessels belonging to Rhine navigation and the timber rafts or floats coming from the Rhine shall have the right to choose the waterway they prefer when traversing the Netherlands on the way to or from the open sea or Belgium.” The Rhine-Scheldt connection, governed by an international agreement of 1963 between Belgium and the Netherlands, forms part of the waterways mentioned in art. 2, first sentence. Therefore, even in the absence of a provision in that sense in the international agreement, art. 3 MA also applies on this connection. Art. 2, first sentence makes no distinction between natural and artificial waterways.

¹⁰ The principle of equal treatment also applies to vessels of all EU Member States (Council Regulation (EEC) No 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Navigation, *O.J.*, L 280, 22.10.1985, p. 4–7)

¹¹ The term “transit” refers not only to transit of goods with a view to entry into service in another State, but also transit to the sea. The term « merchandise » or « goods » refers to all goods that may be subject of a transport agreement (Dutch H.R., 6 June 1999, *S.&S.*, 1991, n° 25)

¹² According to Linguet (1777): « On voit des rivières et de très-belles rivières devenues presque inutiles à la navigation par la tyrannie des péages. La Meuse, le Rhin, l'Elbe et bien d'autres gémissent sous ce despotisme extravagant, reste des traditions de la barbarie et de l'ignorance, autant que l'avidité. Leurs bords sont infestés de corsaires insolents sous le nom des princes dont elles fertilisent les domaines, les malheureux marchands qui s'exposent à ces ruineuses excursions» (Annales de Linguet, XI, 492 quoted by DE RANITZ, H., *De Rijnvaartacte*, Leiden, Somervil, 1889, 10, fn. 3 and ENGELHARDT, E., *Du régime conventionnel des fleuves internationaux. Etudes et projet de règlement international*, Paris, 1879, 22). With regard to the Elbe: VON WISSEL, *Versuch einer Abhandlung de iure vectigali oder von den Zöllen, in Sonderheit auf den schiffbaren Strömen in Deutschland*, Zelle, 1771, 103, noted: “Allein die Vielheit der Zölle auf der Elbe, die sich aus der Menge von Staaten und Landen beurteilen lassen, durch welche dieser Strom fließet, oder an deren Ufern derselbe hinströmet, gereicht den Commercirenden auf diesem Strome zu nicht geringer Beschwerde. Allein zwischen Magdeburg und Hamburg will man deren 19 zählen.

Convention, art. XXIX ⁽¹³⁾, all ancient Rhine tolls and all impositions and retributions, known as licent, transit, excise or others that affected transit navigation on the Rhine were prohibited. Only two tolls were allowed, one levied on the shipped goods and one on the tonnage of the vessel and both destined partly for compensation of loss of territory of the German Princes as a consequence of the 1803 “Recès principal de Députation extraordinaire de l’Empire” and partly for the maintenance of the river and the towing paths. Although advocated at many congresses ⁽¹⁴⁾, the Final Act of the Congress of Vienna did not go so far as to abolish all navigation dues and tolls, but worked out a compromise, allowing the levying of dues and tolls, provided they are moderate, regulated in an uniform and settled manner, and with as little reference as possible to the different quality of the merchandize (art. 111) ⁽¹⁵⁾. Pursuant to the last paragraph of art. 111 “the navigation (shall not) be burthened with any other duties than those fixed in the regulation”. In line with art. 111 all river acts that saw the light in the next two decades – the Elbe Act (1821), the Weser Act (1823), the Rhine Act (1831) ⁽¹⁶⁾ and the Meuse and Scheldt Act (1839) ⁽¹⁷⁾ - provided for the levying of moderate dues. Under the 1831 Act of Mainz (art. 14) a due was levied, based on the tonnage of the vessel, and another based on the cargo transported. Furthermore each riparian State was at liberty to levy custom dues on cargo entering or leaving the State.

5. However, the idea of prohibition of all dues based solely on navigation gradually gained the upper hand in the mid of the 19th century at the emergence of rail transport, with a view to uphold the competitiveness of river transport ⁽¹⁸⁾. The phrase “*No duty based solely on*

Indessen kann man doch nicht sagen, dass die Zölle auf der Elbe so stark und unerträglich sind als auf dem Rhein und die Schifffahrt auf derselben befindet sich in einem blühenden Zustande”.

¹³ « Sont et demeureront supprimés à dater de la fin du 30^e jour qui suivra l’échange des ratifications, non seulement les anciens péages du Rhin, mais aussi toutes les impositions ou rétributions, connues sous les noms de licent, transit, accis ou autres qui affecteraient la navigation de transit de ce fleuve; » Article 39 du Recès principal de Députation extraordinaire de l’Empire of 25 February 1803 already provided that : « Tous les péages du Rhin perçus, soit à la droite, soit à la gauche du fleuve, sont supprimés, sans pouvoir être rétablis sous quelque dénomination que ce soit, sauf les droits de Douane, et un octroi de navigation,... »

¹⁴ VITANYI, B., „La relative gratuité de l’utilisation des voies d’eau internationales est-elle devenue une règle coutumière ? », *G.Y.I.L.*, 1983, (54-85), 56.

¹⁵ Art. CXI: « The duties on navigation shall be regulated in an uniform and settled manner, and with as little reference as possible to the different quality of the merchandize, in order that a minute examination of the cargo may be rendered unnecessary, except with a view to prevent fraud and evasion. The amount of the duties, which shall in no case exceed those now paid, shall be determined by local circumstances, which scarcely allow of a general rule in this respect. The tariff shall however, be prepared in such a manner as to encourage commerce by facilitating navigation; for which purpose the duties established upon the Rhine, and now in force on that river, may serve as an approximating rule for its construction. The tariff once settled, no increase shall take place therein, except by the common consent of the states bordering on the rivers; nor shall the navigation be burthened with any other duties than those fixed in the regulation.” The details for the pricing on the Rhine were laid down in art. 3 of Annex XVI B

¹⁶ Art. 14 Acte de Mayence : « Tout individu exerçant la navigation sur le Rhin, depuis l’endroit où il devient navigable jusqu’à Krimpen ou Gorcum, y compris le Leck et le Waal, et réciproquement, sera tenu de payer sous le titre de droit de navigation : 1^o Un droit de reconnaissance pour chaque embarcation du port de cinquante quintaux et au-dessus ; 2^o Un droit sur le chargement à raison du poids des marchandises. » Art. 33 : « Cependant les Etats riverains ne pourront rehausser ledit tarif en aucune manière, pas même indirectement, en prescrivant l’usage du papier timbré, ou en établissant d’autres droits de ce genre. »

¹⁷ Art. IX § 3 with regard to navigation on the Western Scheldt and its mouths, § 4 with regard to the Eastern Scheldt, § 5 with regard to the Meuse. Pursuant to art. IX § 2 pilotage fees may also be levied.

¹⁸ See the comment of the former Secretary-General of the CCNR, Jean Hostie (« Le statut international du Rhin », *R.C.A.D.I.*, 1929, III, (104-229), 117): “Il existe un lien intime entre le problème des travaux et celui

navigation may be levied” was used for the first time by art. 15 § 2 of the Treaty of Paris 1856 with regard to the Danube navigation ⁽¹⁹⁾. On the river Scheldt the principle of prohibition of dues based solely on navigation was introduced in 1863 ⁽²⁰⁾, on the river Elbe in 1870 ⁽²¹⁾. The principle of (relatively) free use of international waterways was recognized by the International Law Institute in art. 10 of the Heidelberg Resolution of 1887 ⁽²²⁾, be it that the levying of dues

des redevances. Dans le cas d’un chemin de fer, le prix du transport comprend les intérêts et l’amortissement du capital engagé dans la construction de la voie ainsi que les frais d’entretien de la voie. Il n’y aucun principe pour qu’il n’en soit pas de même d’un fleuve et pour que les travaux faits pour son entretien et son amélioration ne soient pas récupérés sur les transports effectués. Il n’est donc pas possible de voir, dans la suppression conventionnelle des péages réalisée en 1868, un progrès absolu. Mais on peut pas prendre de vue le fait que le droit européen des chemins de fer est fortement en retard sur le droit européen de voies d’eau et que les chemins de fer, ainsi que nous l’avons vu, servent encore d’instrument pour orienter le trafic dans des buts exclusivement nationaux. Tant que cette situation demeure, la gratuité de la voie d’eau est une nécessité, puisqu’elle constitue une barrière contre cette politique et partant une sauvegarde de l’intérêt international » In the « Preussische Denkschrift betr. die Revidierte Rheinschiffahrts-Akte vom 17 Oktober 1868 (Rhine Documents, II, 106) art. 3 is commented as follows: „Durch den Artikel 3 wird die bisher nur zwischen den Deutschen Regierungen vereinbarte, in Niederland auf Grund eines einseitigen Aktes des Gesetzgebung bestehende Freiheit der Rheinschiffahrt von Abgaben, welche sich lediglich auf die Thatsache der Beschiffung des Rheins, seiner Nebenflüsse und Ausmündungen gründen, zum internationalen Vertragsrechte zwischen den Uferstaaten erhoben. Die Unzulässigkeit der Erhebung von Boien- und Baakengeldern ist durch Beschluß der Central-Kommission festgestellt.“

¹⁹ « La navigation du Danube ne pourra être assujettie à aucune entrave ni redevance qui ne serait pas expressément prévue par les stipulations contenues dans les articles suivants. En conséquence, il ne sera perçu aucun péage basé uniquement sur le fait de la navigation du fleuve, ni aucun droit sur les marchandises qui se trouvent à bord des navires. » This formula appeared for the first time in a proposal of count Walewski at the session of 6 March 1856 (see : Extrait des protocoles du Congrès de Paris, Protocol nr. 5, recorded in Mémoire sur la liberté du Danube et sur l’Acte de navigation du 7 novembre 1857). Art. 16 § 2 provided for an exception with regard to the works of improvement at the mouths of the Danube and the adjacent parts of the Black Sea, whereas art. 21 allowed the levying for the works of maintenance and improvement, designated by the European Danube Commission. Furthermore, pursuant to art. 20 dues may be levied for the use of port facilities.

²⁰ Treaty of London, 12 May 1863, recorded in DE MARTENS, *Nouveau Recueil Général de traités*, vol. 17.2, 230 et seq.

²¹ Treaty of 22 June 1861, recorded in DE MARTENS, *Nouveau Recueil Général de traités*, vol. 20, 345 et seq.

²² “La navigation des fleuves internationaux est libre des droits d’étapes, d’échelle, de dépôt, de rompre-charge ou de relâche forcée ; aucun péage maritime ou fluvial ne peut être prélevé. » (*A.I.D.I.*, 1887-88, 166 ff.). In the Resolution of 1934 of the International Law Institute, art. 5 and 6, following guidelines for the levying of tolls and dues were laid down: ““No dues or taxes may be levied on the courses or at the mouth of an international waterway other than those in the nature of payment for services rendered to navigation for the maintenance or improvement of the waterway. The schedule of such charges shall be so calculated as to cover exclusively actual expenses, and shall be so established as to render unnecessary a detailed examination of the cargo (art. 5). Each riparian State may, for the use of machinery and equipment of its ports, levy duties and taxes, which shall be equal for all and correspond in amount to the effective expenses of construction, maintenance, and management of the ports (art. 6)”. The provisions of this resolution are in line with the provisions provided for in the 1887 Heidelberg Resolution of the International Law Institute, allowing the levying of dues solely for the recovering of expenses related to works of maintenance or improvement of the fairway (art. 5), or for rendered port services (art. 11) or for some other services such as pilotage services (art. 13) and prohibiting the levying of dues solely based on navigation (art. 10). Also the 1926 Draft on “Navigation on International Rivers” of the American Institute of International Law expressed the same view: “The tolls for navigation collected along international rivers shall be expended exclusively for the maintenance of navigability of these rivers and for their improvement of their navigation in general.”

was not forbidden for covering costs relating to works of maintenance and improvement (art 5), port facilities (art. 11) and port services such as pilotage and towing (art. 6). The principle was reaffirmed by art. 333 of the 1919 Peace Treaty of Versailles, taking in consideration and recognizing the legal situation of a total exemption of navigation dues on some international waterways, such as the waterways falling under the scope of the Rhine regime⁽²³⁾. According to art. 44.5 of the Berlin Rules of the International Law Association “Non-discriminatory fees may be charged by a riparian State to recover the costs of services provided to vessels exercising freedom of navigation”⁽²⁴⁾.

6. Under the scope of the 1948 Danube Convention navigation dues may be levied for the following reasons: (1) in order to cover the expenses for performing special works ensuring the proper state or improvement of navigation (2) in order to cover the expenses to ensure navigation, navigation charges on vessels may be established, the amount of which shall be determined depending on the cost of maintenance of equipment and the cost of hydraulic works specified in Article 34 (art. 35); (2) in order to cover the expenses to ensure navigation and for works carried out by the Administrations (art. 36). Charges shall be based on the ships tonnage (art. 38). For all charges – “the extraordinary, navigation, and special charges recovered by the Commission, the Danubian States, and the Administration” the same general rule applies, i.e. they “should not be a source of profit” (art. 37). Pursuant to art. 42 no charges shall be established for vessels, rafts, passengers and goods for transit as such⁽²⁵⁾. On the Sava, an international tributary of the Danube, article 10 of the Protocol on the Navigation Regime⁽²⁶⁾ allows for the collection of payments covering costs related to maintenance and improvement

²³ Pursuant to art. 333 of the 1919 Peace Treaty of Versailles: “Where such charges are not precluded by any existing convention, charges varying on different sections of a river may be levied on vessels using the navigable channels or their approaches, provided that they are intended solely to cover equitably the cost of maintaining in a navigable condition, or of improving, the river and its approaches, or to meet expenditure incurred in the interests of navigation. The schedule of such charges shall be calculated on the basis of such expenditure and shall be posted up in the ports. These charges shall be levied in such a manner as to render any detailed examination of cargoes unnecessary, except in cases of suspected fraud or contravention”. The phrase “where such charges are not precluded by any existing convention” refers inter alia to art. 3 of the Act of Mannheim.

²⁴ In the comment to this provision the following observation has been made: “Paragraph 5 reflects the fact that States sometimes charges fees to recover the cost of services provided to vessels exercising freedom of navigation. The practice is too widespread to argue that it violates customary international law, but to allow a State to charge a fee higher than necessary to recover the costs of its services would nullify freedom of navigation.”

²⁵ In the 90ths of the last century transit dues were charged by the Federal Republic of Yugoslavia (Serbia and Montenegro), a practice that was considered to be a violation of the Danube regime and was condemned as such by the president of the UN Security Council at the 3290th session of 13 October 1993: “The Council is also concerned that the situation of the Federal Republic of Yugoslavia (Serbia and Montenegro) continue to impose tolls on foreign vessels transiting the section of the Danube which passes through the territory of the Federal Republic. By extracting these payments, the Federal Republic of Yugoslavia (Serbia and Montenegro) violates its international obligations. The Council rejects any attempt to justify, on whatever ground, the imposition of tolls on the Danube. It demands that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) and any others imposing similar tolls cease such action immediately”.

²⁶ “The Sava Commission is authorized to make decisions on collecting fees for the use of the fairway on the rivers referred to in Article 1 of this Protocol as well as on the amounts and the manner of collecting such fees. 2) The funds obtained from the collection of the fees referred to in Paragraph 1 of this Article shall be used exclusively for financing the activities and measures referred to in Article 10 Paragraph 4 of the Agreement and shall not serve as a source of profit.”

of the waterway. No other charges may be levied, with the exception of dues for the disposal of waste and greasy water ⁽²⁷⁾.

§ 1.2. The provisions of the 1952 Strasbourg Agreement

7. Since 1869 the exemption from dues has been an important stimulating factor for the development of Rhine navigation ⁽²⁸⁾. However, the scope of art. 3 MA (and 7, second para MA), and in particular the meaning of the phrase “No duty based solely on navigation”, has given rise to different views in legal doctrine and case law, in general ⁽²⁹⁾ and inter alia with regard to the levying of VAT ⁽³⁰⁾ on transported cargo, on transport services ⁽³¹⁾ and on gasoil

²⁷ Art. 3 Protocol on prevention of water pollution caused by navigational activities

²⁸ Likewise : WOEHLING, J.M., « La Commission Centrale pour la Navigation du Rhin. 200 ans d'histoire », p. 2 advocating that « De ce principe, » - i.e. the principle laid down in art. 3MA – « on a déduit aussi la non taxation du carburant utilisé par la navigation intérieure. »

²⁹ According to the Explanatory Memorandum of the secretariat of the CCNR with regard to Protocol 2003-II-10 regarding the interpretation of the Act of Mannheim, the principle of free navigation, recorded on the CCNR website, entails the prevention or as a minimum the restriction of all kinds of obstructions to navigation, inter alia administrative, tax and custom related barriers, namely the levying of dues solely based on navigation. The freedom of navigation dues thus forms an integral part of the principle of free navigation, but the explanatory memorandum goes not further than bringing to the fore the principle of exemption from the levying of dues solely based on navigation. In legal doctrine it is generally assumed that article 3 prohibits the levying of dues for works of maintenance and improvement of the waterway (see CHIESA, P., *Le régime international du Rhin et la participation de la Suisse*, these, Fribourg, Barblan and Saladin, 1952, 24; DE RANITZ, H., *De Rijnvaartacte*, Leiden, Somervil, 1889, 71 ; HOSTIE, J., “Le statut international du Rhin”, *R.C.A.D.I.*, 1929, vol. III, 111; SENGPIEL, M., *Das Recht der Freiheit der Schifffahrt auf Rhein und Donau: eine regimerechtliche Analyse*, Duisburg, Binnenschifffahrtsverlag, 1998, 63). In a decision of the German Reichsfinanzhof of 21 December 1931 (V A 764/30) the Court held the view that only dues relating to the use of the waterway for purposes of transport of goods or persons, such as transit dues and navigation dues, fall under the scope of the exemption. Furthermore, according to German case-law, art. 3 first para must be interpreted in line with the scope of art. 1 MA concerning freedom of navigation “sous le rapport du commerce”/“im Bezug auf dem Handel” and therefore restricted to navigation for the purpose of transport of goods and persons (BFH, Urteil vom 20. Februar 1979- VII R 16/78 -, juris, Rn. 48, m.w.N; VG Köln, 19 July 2011, 24 K 2757/17, openjur.de/u/2146454.html).

³⁰ See: HAAK, W.E., „De vrijheid van de scheepvaart op de Rijn” in *Offerhauskring, feestbundel ter gelegenheid van het vijftienvig jarig bestaan van de Studie Prof. Mr. J. Offerhaus*, Deventer, 1987, 79-92, 1987, 84; PABST, H.U., “Rheinregime und EWG-Vertrag. Aktuelle Probleme und Lösungsmöglichkeit“, *Internationales Verkehrswesen*, 1981, 408-409; PABST, H.U., „Die steuerrechtliche Bedeutung der „Tatsache der Beschiffung“ nach Art. 3 Abs. 1 der Mannheimer Akte“, *Transp.R.*, 1987, 9-12; PABST, H.U., „Anmerkung zu Art. 3 Abs. 1 MA“, *Z.f.B.*, 1997, vol. 6, 39-41

³¹ The German Bundes Finanzhof held the view that art. 3 MA did not prohibit the levying of taxes on services of transport of persons (BFH, 1 August 1996, *Z.f.B.*, 1997, vol. 6, 35; BFH, 29 August 1996, *Z.f.B.*, 1997, vol. 6, 37; BFH, 19 September 1996, *Z.f.B.*, 1997, 38). In the first decision, points 25 and 26, the Court observed as follows: “25. Nach dem Wortlaut der Bestimmung (“Tatsache der Beschiffung”) und dem Zweck der Rheinschifffahrtsakte (vgl. dazu Ipsen, *Völkerrecht*, 3. Aufl., § 23 Rz. 82, 85) soll die Schifffahrt als solche nicht durch Abgaben (z.B. Durchfahrtgebühren) behindert werden. Die Bestimmung verbietet dagegen nicht die Besteuerung der Personenbeförderung, soweit die Umsätze mit Hilfe von Schiffen auf dem Rhein ausgeführt werden. 26. Die Umsatzsteuer ist bei einer am Wortlaut von Art. 3 MA ausgerichteten Auslegung keine Abgabe, die sich lediglich auf die Beschiffung gründet. Der Steuertatbestand verlangt über die Beschiffung hinaus eine Beförderung gegen Entgelt, der ein Auftrag eines Leistungsempfängers zugrunde liegt. Daß der Besteuerungstatbestand der Umsatzsteuer nicht lediglich an die Tatsache der Beschiffung anknüpft, ergibt sich, wenn er trotz der Tatsache der Beschiffung aus umsatzsteuerrechtlichen Besonderheiten nicht erfüllt wird. Dies ist bei unentgeltlichen

used as fuel a board a vessel, the establishment of a laying-up Fund for inland waterway vessels⁽³²⁾, levying of a German due for the “deepening the Rhine above St. Goar, the upkeep between Strasbourg and Konstanz, and the canalisation of the Main and Neckar”⁽³³⁾, a due on Rhine transport (as part of the 1968 German “Leber-Plan”)⁽³⁴⁾, a (national) due for pollution of surface waters⁽³⁵⁾, the polluter pays principle of art. 9 of the Water Framework Directive (EC) 2000/60

Beförderungen auf dem Rhein und seinen Nebenflüssen (durch die in nicht unerheblichem Umfang ausgeführten Leerfahrten, durch kostenlose Personenbeförderung, durch Beförderung von eigenen Gütern) oder durch Beförderungen im Organverbund (§ 2 Abs. 2 Nr. 2 Satz 1 UStG 1980) der Fall.“ According to the Court, the view expressed was supported by the fact that the so-called Modus Vivendi of 1936, which provided for an exemption from dues and taxes was denounced (before entering into force) by the German Reich and other contracting parties to the Act of Mannheim: “27. Der Wortsinn von Art. 3 MA geht unter Einbeziehung der Entstehungsgeschichte der MA nicht über den Wortlaut der Vorschrift hinaus. Daß eine umsatzsteuerbefreite Personen- und Güterbeförderung auf dem Rhein und seinen Nebenflüssen von den Vertragsstaaten der MA nicht vereinbart worden war, ergibt sich aus den gescheiterten Versuchen, die nach Vertragsschluß geschaffene Umsatzsteuer in den von Art. 3 MA bezeichneten Anwendungsbereich einzubeziehen. Eine insoweit in Aussicht genommene Revision durch Vereinbarung eines “Modus Vivendi” vom 4.5.1936, die eine Befreiung der Rheinschiffahrt von Steuern und Abgaben zum 1.1.1937 vorsah (vgl. Fuhrmann, Die völkerrechtlichen Grundlagen der Rheinschiffahrt, Köln 1954, S.25), ist vom Deutschen Reich - und von anderen Vertragsstaaten - vor Inkrafttreten gekündigt worden (RGBl II 1936, 361). Entsprechenden späteren Entschließungen der Zentralkommission für die Rheinschiffahrt hat die Bundesrepublik Deutschland nicht zugestimmt (vgl. dazu Pabst, Zeitschrift für Binnenschiffahrt und Wasserstraßen 1987, 17, 20), so daß sie keine Bindungswirkung erlangt haben (Art. 46 Abs. 3, 4 MA).“ However, it must be observed that the Modus Vivendi was denounced not because of the clause providing an exemption from dues and taxes, but only for political reasons (see also: PABST, H.U., „Anmerkung zu Art. 3 Abs. 1 MA“, *Z.f.B.*, 1997, vol. 6, 40”. Pursuant to art. 6 Modus Vivendi concernant la Convention révisée pour la navigation du Rhin. Ouverture à la signature à Strasbourg, 4 mai 1936: « La navigation du Rhin, de fait de son exercice, ne peut être soumise à aucun impôt ou droit quelle qu’en sont la dénomination ou l’assiette. Cette disposition ne s’applique pas aux redevances autorisées par les articles 26, 46 et 52 de la présente Convention. » The formulation differed from the formulation of art. 3 MA but the content and the goal is the same: exemption from all kinds of dues, regardless their nomination. Art. 6 of the Modus Vivendi was not intended to create new law, but only to provide a new formulation (likewise MÜLLER, W., “Ist die Mannheimer Rheinschiffahrtsakte noch zeitgemäß ?” in *Schriftenreihe der Niederrheinischen Industrie- und Handelskammer Duisburg-West-Kleve*, 1978, 18).

³² The 1976 Agreement for the establishment of a laying-up Fund for inland waterways provided for the levying of contributions to the fund imposed on all Rhine vessels transporting goods. Such contributions were regarded as having the character of a navigation due. The Contracting States therefore agreed to proceed for the adoption of a Protocol amending art. 3 MA (see VITANYI, B., “La relative gratuité de l’utilisation des voies d’eau internationales”, *G.Y.I.L.*, 1983, 68). With a view to reconciling such retributions with the provisions of the MA, art. 1.1 of Addition Protocol n° 4 of the Revised Convention for the Navigation of the Rhine provided that “Rhine navigation may be subject to temporary measures of structural improvement, notwithstanding the general principles contained in the Revised Convention for Rhine Navigation.” Pursuant to art. 1.2 “These measures may include: (a) Scrapping operations using scrapping funds supplied by mandatory contributions from vessel owners; - 2 - (b) The establishment of conditions concerning the commissioning of additional hold space such as obliging owners who do so simultaneously to scrap an equivalent volume of hold space or to pay a special contribution to the scrapping fund.” Art. 1 of the Additional Protocol n° 5 reaffirmed this exception.

³³ See: VAN EYSINGA, W.J.M., *La Commission centrale pour la navigation du Rhin*, Leiden, Sijthof, 1935, 75 and 94; HOSTIE, J., « Le statut international du Rhin », *R.C.A.D.I.*, 1929, III, 155

³⁴ See: *R.G.I.D.P.*, 1969, 798-799; HAAK, W.E., « De vrijheid van de scheepvaart op de Rijn », in *Offerhauskring, Feestbundel ter gelegenheid van het vijftiwintigjarig bestaan van de Studiekring Prof. Mr. J. Offerhaus*, Deventer, Kluwer, 1987, 84

³⁵ Civ. Arnhem, 18 September 2012

(³⁶), a cultural aid tax levied at the occasion of Rhine cruises (³⁷), and, in respect of the freedom of transit dues, the levying of a Dutch national tax on transport of chemical waste (³⁸). The Dutch Supreme Court hold the view that the fact that some issues, such as environmental ones, were unknown at the time of signing the Act of Mannheim, cannot justify the levying of a national tax at variance with an international agreement (³⁹).

8. With a view to reconciling diverging views in respect of the Act of Mannheim as regards the customs and tax regime for diesel oil consumed fuel (⁴⁰), achieving uniformity of regime and facilitating Rhine navigation (⁴¹), article 3 and 7.2 were supplemented with an additional agreement, adopted on 16 May 1952 (⁴²) between the Rhine contracting States exempting from

³⁶ See: The German Defence in the Case C-52512 Commission v. German Federal Republic („Klagebeantwortung in der Rechtssache C-525/12, Kommission gegen Bundesrepublik Deutschland“), 31 January 2013, point 55: “Neben der Frage nach der steuernden Wirkung muss die nationale Gesetzgeber beim Einsatz ökonomischer Instrumente berücksichtigen, ob diese mit internationalem Recht, das in deutsches Recht umgesetzt wurde, vereinbart sind. So verbietet zum Beispiel Schiffsrecht, nämlich Art. 3 Abs. 1 der Revidierten Rheinschiffsakte – Mannheimer Akte vom 17.10.1868 – alle Abgaben auf dem Rhein, die sich lediglich auf die Tatsache der Beschiffung gründen.” (free translation of author: Beside the issue of the tax effect, by using economic instruments the national legislator must take in account international Law, transposed into German Law, in particular art. 3 first para of the Revised Convention for the Navigation of the Rhine – regarding all dues on the Rhine levied solely on navigation); And point 113: “Darüber hinaus ist die Schifffahrt auf großen internationale Schiffsstraßen – wie dem Rhein – durch ins nationale Recht umgesetzte internationale Abkommen (unter Einbeziehung von Nicht-EU-Staaten) geregelt, die eine Einschränkung der Schifffahrt durch Abgabenerhebung verbieten (vgl. Art. 3 Abs. 1 der revidierten Rheinschiffsakte (Mannheimer Akte) vom 17. Oktober 1868 in der Fassung der Bekanntmachung vom 11 März 1969 (BGBl. II S 597) unter Berücksichtigung der Änderungen durch das Zusatzprotokoll Nr. 2 vom 17.10.1979 (Gesetz vom 22.7.1980, BGBl. II S. 870) und das Zusatzprotokoll Nr. 3 vom 17.10.1979 (Gesetz vom 22.7.1980, BGBl. II S. 875)” (free translation : Furthermore navigation on major international waterways – such as the Rhine – is settled by international river acts transposed into national law (and including non-EU Member States), prohibiting a restriction of navigation by means of dues (art. , first paragraph of the Revised Convention for the Navigation of the Rhine (Act of Mannheim) of 17 October 1868 as officialized on 11 March 1969 (BGBl. II S 597) as amended by the Additional Protocol N° 2 of 17.10.1979 (Law of 22.7.1980, BGBl. II S 870) and Additional Protocol N° 3 of 17.10.1979 (Law of 22.7.1980, BGBl. II S 875)”).

³⁷ VG Köln, 19 July 2017, 24 K 2757/17

³⁸ H.R., 6 June 1999, S.&S., 1991, n° 25

³⁹ H.R., 6 June 1999, S.&S., 1991, n° 25, point 4.7. Likewise the opinion of the attorney-general Van Soest, point 3.28.

⁴⁰ See the first recital of the CCNR Resolution preceding the text of the agreement: “Pour remédier aux divergences de vues relatives au régime douanier et fiscal du gasoil consommé comme avitaillement de bord tel qu’il résulte de la Convention révisée pour la navigation du Rhin du 17 octobre 1868, et afin de rendre ce régime uniforme”

⁴¹ See the second recital of the CCNR Resolution preceding the text of the agreement: “En vue de faciliter l’exploitation de la navigation rhénane, de favoriser son développement technique et économique et de contribuer ainsi à la coopération internationale”

⁴² Accord relative au régime douanier et fiscal du gasoil consommé comme ravitaillement de bord dans la navigation rhénane, conclu à Strasbourg le 16 mai 1952/Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschifffahrt verwendet wird/Overeenkomst betreffende het douane- en belastingregime voor de in de Rijnvaart voor verbruik bestemde, als boordvoorraad aanwezige gasolie; Straatsburg, 16 Mei 1952, French text recorded in *Trb.*, 1952, 104. There is no authentic English version of the agreement. The agreement entered into force on 28 January 1954 after ratifications of Belgium (13.04.1953), France (17.11.1952), Germany (01.12.1953), the Netherlands (29.12.1953) and Switzerland (06.09.1952). For some historical background on the issue of customs exemption of gasoil used by inland

any customs or other taxes diesel oil consumed as fuel by vessels navigating on the Rhine, its confluents and the waterways falling under the scope of art. 2 MA, i.e. the waterways between the Rhine and the sea or Belgium (art. 1). The agreement put a stop to the legal discussion between the Contracting Parties to the Act of Mannheim whether or not diesel oil taken on board of a vessel as ship supplies also falls under the exemption of dues ⁽⁴³⁾.

9. The exemption not only applies to diesel oil bunkered on board of a vessel, but also to diesel, stored in foreign approved warehouses and supplied by import under customs bond, or stored in domestic approved warehouses (art. 1, second para). With regard to the place of origin, departure, destination or direction of the transport, the agreement does not make any, international transport, including transit, as well as cabotage fall under the scope of art. 1. But the exemption is restricted to the consumption of diesel oil as fuel, the use of other mineral oil products ⁽⁴⁴⁾ and the use of alternative fuels do not fall under the scope of the agreement. Also, the exemption only applies in favour of vessels used for the transport of goods or persons. Gasoil for sport craft is not exempted ⁽⁴⁵⁾. Furthermore, the agreement only lays down general rules. Issues, such as supervision and proof of diesel oil used as fuel and the conditions for bunkering diesel oil under the exemption

vessels and other transport modes, see: Deutscher Bundestag, 1/ Wahlperiode 1949, Drucksache Nr. 4342, 11 Mai 1953; Société des Nations – Organisation des Communications et du Transit, « Étude comparative des législations régissant, dans les différents pays d'Europe, la question de franchise douanière pour les carburants utilisés par les véhicules à moteur dans le trafic terrestre, fluvial, maritime et aérien », Série de Publications de la Société des Nations, 1932, VIII, 6, C 805.M.373.

⁴³. More particularly, the agreement put an end to the difference of opinion between Germany and the other Contracting States of the Act of Mannheim with regard to taxation of gasoil used as fuel on board of Rhine vessels. With the exception of Germany, gasoil used as fuel on board of Rhine vessels was exempted from any dues in the other contracting states. See: Entwurf eines Gesetzes betreffend das Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschiffahrt verwendet wird, Deutscher Bundestag, 1. Wahlperiode 1949, Drucksache N° 4342, 11 Mai 1953: Die deutschen Vorschriften über die Zollbehandlung des Mineralöls, das von den Rheinschiffen als Schiffsbedarf aus dem Zollaussland eingebracht wird, sind von den übrigen an der Rheinschiffahrt beteiligten Staaten bekämpft worden, seit das Mineralöl in der Rheinschiffahrt für den Antrieb der Schiffe eine Rolle spielt. Nach der Zollgesetzgebung dieser Staaten ist das für die Rheinschiffahrt als Schiffsbedarf verwendete Mineralöl grundsätzlich abgabenfrei. Dagegen war nach § 6 Abs. 1 Nr. 7 des früheren deutschen Zoll - tarifgesetzes vom 25. Dezember 1902, das bis zum 31. März 1939 galt, für Schiffsbedarf nur insoweit Zollbefreiung vorgesehen, als es sich um Mundvorrat für die Schiffsbesatzung handelte. Die Zollbefreiung war begrenzt auf die Menge, die dem Bedarf für zwei Tage entsprach. Die Betriebsstoffe der Schiffe waren nach dieser Bestimmung an sich nicht zollfrei.“ By resolution of the CCNR of 3 April 1930 a compromise was reached in this sense that gasoil used as fuel on board of vessels traversing the German section of the Rhine in transit was exempted from German taxes as well as, in all other circumstances, a quantity of gasoil normally used as fuel for two days of navigation. However, since 1 September 1951 the German customs legislation was applied again.

⁴⁴ See: Entwurf eines Gesetzes betreffend das Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschiffahrt verwendet wird, Deutscher Bundestag, 1. Wahlperiode 1949, Drucksache N° 4342, 11 Mai 1953: „Das Abkommen wurde nur auf das Gasöl beschränkt und nicht auf sonstige Mineralöle ausgedehnt, weil nur beim Gasöl die Voraussetzungen gegeben waren, um mit Hilfe der Betriebsbeihilfe die Auswirkungen der auf dem Rhein vereinbarten Abgabenfreiheit auf das übrige Wasserstraßennetz aufzufangen.“ However, from the 1st January 1962 in Germany oils for greasy, lubricants and heavy oils for heating, consumed as supplies on board by the Rhine navigation, enjoyed the same customs and excise regime as that proscribed for diesel oil according to the provision of the 1952 Strasbourg Agreement.

⁴⁵ BFH, 6 August 1985, 144, 309, VII R 41/83

scheme of art. 1, are settled by the national provisions of the Contracting States (art. 1, last para)⁽⁴⁶⁾.

10. Pursuant to art. 1 the agreement applies on the Belgian section of the river Scheldt up to Antwerp and on the Canal from Ghent to Terneuzen. This addition rather leads to confusion instead of clarification, given the fact that the Scheldt, upstream as well as downstream Antwerp, is a confluent of the Rhine, whereas obviously the (Belgian part of the) Meuse is also a tributary of the Rhine, falling within the territory of one of the Contracting States of the Act of Mannheim. On the basis of art. 32 of the 1963 Rhine-Scheldt Connection Treaty inter alia the Act of Mannheim applies on this waterway⁽⁴⁷⁾, as a consequence also this waterway falls under the scope of the 1952 Gasoil Agreement. Furthermore, art. 31 of the 1956 Moselle Convention extended the territorial scope of the Agreement to the entire canalized Moselle, falling under the scope of the 1956 convention⁽⁴⁸⁾. Although the territorial scope of the Rhine regime ends above the port of Basel (“Mittlere Rheinbrücke”)⁽⁴⁹⁾, the agreement also applies on the navigable part between the port of Basel and Rheninfelden⁽⁵⁰⁾. Therefore the agreement applies on the entire navigable Rhine,

⁴⁶ For an application of this principle, see e.g.: The Hague, 29 November 2019, ECLI:NL:GHDHA:2019:2986, point 31

⁴⁷ In its decision of 6 May 1991 (*Jur.Anvers*, 1992, 279 ff), the Rhine Court expressly mentioned the Revised Convention for the Navigation of the Rhine as one of the international agreements applying on this waterway: “3.7.6.3. L’article 32 de la Convention belgo-néerlandaise du 13 mai 1963 concernant la liaison entre l’Escaut et le Rhin a étendu explicitement à cette liaison la liberté de navigation proclamée par la Convention Révisée... ».

⁴⁸ Article 31: The Customs regime applicable to navigation on the Moselle shall be governed by the following rules: (1) The following shall be applicable mutatis mutandis: (a) The Customs provisions of the revised Convention relating to the Navigation of the Rhine, signed at Mannheim on 17 October 1868, including the subsequent changes and amendments; (b) The provisions of the regulations relating to the Customs sealing of vessels on the Rhine; (c) The provisions of the agreement between the Rhine river States and Belgium of 15 May 1952, concerning the Customs and fiscal regime for fuel oil consumed as ships' provisions in navigation on the Rhine; the application, mutatis mutandis of the provisions of this agreement with regard to the Moselle may be denounced by any of the Contracting States under the conditions set forth in article 6 of the agreement.

⁴⁹ See: CCNR, Resolution of 22 Mai 1997

⁵⁰ See: *Entscheid der Eidgenössischen Zollrekurskommission vom 27. April 1998*, <https://entscheidsuche.ch/bund/vpb/63-74.html>: „4. ... eit dem Bau des für die internationale Rheinschiffahrt tauglichen Hafens Birsfelden-Au und der Schiffsschleuse Birsfelden ist die Strecke von Basel nach Rheinfelden für die Rheinschiffahrt schiffbar (vgl. BBl 1956 I 526 f.). Für ein ausländisches Rheinschiff ist es daher möglich, mit seinem im Ausland gebunkerten Treibstoff bis nach Rheinfelden zu fahren, ohne auf dem Gasöl Abgaben entrichten zu müssen (vgl. Art. 1 Bst. a Gasölabkommen und Art. 35 Abs. 2 Schiffszollordnung). Bunkert hingegen ein ausländisches Rheinschiff unterhalb der Mittleren Rheinbrücke auf schweizerischem Staatsgebiet und fährt danach bis nach Birsfelden oder Rheinfelden, wäre das auf dem Streckenabschnitt oberhalb der Mittleren Rheinbrücke verbrauchte Gasöl, streng nach dem von der ZKR örtlich festgelegten Geltungsbereich der Rheinschiffahrtsakte betrachtet, abgabepflichtig. In der Praxis ist dem aber nicht so, da auch oberhalb der Mittleren Rheinbrücke in Birsfelden bei verschiedenen Bunkerstellen abgabenfreies Gasöl durch die internationale Rheinschiffahrt bezogen werden kann. Die OZD führt dazu aus, der Geltungsbereich der Rheinschiffahrtsakte sei bis Birsfelden autonom erweitert worden. Damit trägt sie der wirtschaftlichen Bedeutung der Hafenanlage Rechnung, wird mit dieser Betrachtungsweise aber Sinn und Zweck der Rheinschiffahrtsakte nur teilweise gerecht. Eine Erweiterung des Geltungsbereichs der Rheinschiffahrtsakte kann nicht lediglich nach dem Kriterium des Standortes der Bunkerstellen erfolgen, sondern hat sich primär an der Rheinschiffahrtsakte - insbesondere deren Sinn und Zweck - zu orientieren. Dabei sind die Auslegungsregeln für völkerrechtliche Verträge zu berücksichtigen. Insbesondere ist ein Vertrag nach Treu und Glauben in Übereinstimmung mit der gewöhnlichen, seinen

from the open sea until Rheinfelden, including the Lek and the Waal and the Canal d'Alsace as lateral canal, the waterways between the Rhine and the sea and Belgium, including the Scheldt-Rhine connection, the Main, Neckar, Meuse, Moselle and Scheldt, and the canal from Ghent to Terneuzen.

11. Although it has been advocated, in line with the scope of application of art. 1 and 3 of the Act of Mannheim, that the exemption of art. 1 of the agreement only applies to vessels when navigating on the waterways falling under the territorial scope of art.1 of the agreement, in practice no fuel tax is raised in the six States, bound directly or indirectly by the agreement (⁵¹). From a practical point of view, fuel may be bunkered in one of these six States, but used for more than one transport, performed on waterways falling under the scope of the agreement as well as on other waterways. Although the French text of art. 1 of the Agreement refers to “bateaux”, whereas the Dutch and German text use the general term “schepen/Schiffe” (vessels), the qualification of the vessel as a maritime or seagoing vessel or as an inland waterway vessel does not show any legal relevance. The exemption applies to all vessels that transport goods or persons, regardless whether the transport is performed on behalf of third parties or at its own expense (“Werkverkehr”) (⁵²) and regardless the geographical character of transport, national or international.

12. Art. 2 prohibits the Contracting States to take any measures or to allow measures to be taken that would lead to higher or lower prices of gasoil used for Rhine navigation than those agreed upon by independent players subject to normal market rules. The goal of art. 2 is the establishment of a common market for gasoil used as fuel in Rhine Navigation in line with art. 4 of the Treaty

Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung und im Licht seines Zieles und Zwecks auszulegen (Art. 31 Abs. 1 des Wiener Übereinkommens über das Recht der Verträge vom 23. Mai 1969, SR 0.111). Bei Abschluss der ursprünglichen Rheinschiffahrtsakte am 17. Oktober 1868 umfasste deren geographischer Geltungsbereich den gesamten damals schiffbaren Rhein. Will die OZD sich auf eine autonome Erweiterung der der Rheinschiffahrtsakte unterliegenden Strecke berufen, hat diese bis zu jenem Punkt zu erfolgen, an dem der Strom für die heutige Rheinschiffahrt schiffbar ist. Dies ist die Strassenbrücke in Rheinfelden. Eine andere Interpretation würde den Grundprinzipien der Freiheit der Rheinschiffahrt und der Einheit des Rheinregimes widersprechen, die nach Art. CIX und CX der Schlussakte des Wiener Kongresses von 1815 (BB1 1922 II 1014) von dem Punkt des Rheins an gelten, wo er schiffbar wird. Daran vermag nichts zu ändern, dass der Hafen Birsfelden-Au normalerweise als Endziel der stromaufwärts verkehrenden internationalen Güterschiffahrt bezeichnet werden kann. Die Rheinschiffahrt umfasst sowohl die Güter- als auch die Personenschiffahrt (vgl. E. 3b hiavor). Nicht zuletzt aus dem in Art. 4 Rheinschiffahrtsakte statuierten Gleichbehandlungsgrundsatz, demzufolge die ausländischen zur Rheinschiffahrt gehörigen Schiffe und deren Ladungen ebenso zu behandeln sind, wie die eigenen Rheinschiffe, kann e contrario abgeleitet werden, dass die ausländischen gegenüber den inländischen Rheinschiffen nicht bevorzugt behandelt werden dürfen, ungeachtet dessen, ob es sich dabei um Güter- oder Personenschiffe handelt. Es erweist sich somit, dass nur der Verzicht auf die Abgabenerhebung bis zu jenem Punkt, wo der Rhein für die Grossschiffahrt schiffbar wird, den völkerrechtlichen Grundprinzipien der Rheinschiffahrt gerecht wird.“

⁵¹ See: European Commission - Directorate General for Mobility and Transport, *An overview study of economic internationalization measures applied in Europe*, Brussels, 2019, p. 99. In the Danube region it is a bit different. Austria, as mentioned before, and Romania do not raise a fuel tax, but Bulgaria, Hungary and Slovakia do. Also in Italy a tax on fuel consumption by IWT is levied

⁵² See: Entwurf eines Gesetzes betreffend das Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschiffahrt verwendet wird, Deutscher Bundestag, 1. Wahlperiode 1949, Drucksache N° 4342, 11 Mai 1953: „Die Anpassung des Systems der Betriebsbeihilfe an das System der Abgabefreiheit auf dem Rhein soll auch insoweit durchgeführt werden, als es sich um Schiffe handelt, die im Werksverkehr oder zur Durchführung hoheitsrechtlicher Aufgaben verwendet werden. Auch für diese Schiffe, die nach dem Abkommen auf dem Rhein Abgabefreiheit genießen,“

establishing the European Coal and Steel Community (⁵³). Art. 3 lays down a duty of cooperation of the Contracting States with regard to the supply of gasoil for the international Rhine navigation. The CCNR has exclusive competence in respect of the application and interpretation of the agreement (art 4). The agreement is a closed agreement not open to other States than those party to the Act of Mannheim and may be denounced by each Contracting State taken into account a delay of year, starting from the 1st July 1956 (art. 6, first para). Furthermore it may also be denounced in case the CCNR, deciding on the basis of a complaint of one of the Contracting States, reaches, by a majority of votes, the conclusion of a serious infringement (art. 6, second para) or does not come to a conclusion within a delay of one month after the deposit of the complaint (art. 6, third para).

13. Also this agreement has given rise to doubts with regard to the legal scope of this exemption, more particularly whether or not this exemption from all dues and other taxes also applies to contributions for the disposal of oily waste of inland vessels. In the preamble of the Convention on the Collection, Deposit and Reception of Waste generated during Navigation on the Rhine and other waterways, agreed upon between the Rhine Contracting States and Luxembourg on 9 September 1996 the contracting States hold the view that a charge for a service rendered with regard to disposal of such waste is not at odds with the 1952 Gasoil Agreement: “noting in particular that the levying of a uniform international charge for the reception and disposal of the oily and greasy waste produced in the course of operating vessels, based on the amount of gas oil sold to inland navigation vessels, does not infringe the principle of exemption from custom duties and other taxes in the States bordering the Rhine and in Belgium, as stated in the Agreement of 16 May 1952 on the customs and tax regime for gasoil used by vessels navigation the Rhine”. In other words, a charge for a service rendered to navigation, is not a charge based solely on navigation.

§ 2. The Energy Tax Directive and the ETD proposal

14. The ETD, which is the common framework for energy taxation in the EU, provides rules and minimum excise duty rates for the taxation of energy products used as motor fuel and heating fuel, and electricity. It does not make reference to the Revised Convention for the Navigation of the Rhine and the 1952 Gasoil Agreement. Recital 23 of the ETD only refers to “Existing international obligations and the maintaining of the competitive position of Community companies” that “make it advisable to continue the exemptions of energy products supplied for air navigation and sea navigation, other than for private pleasure purposes, while it should be possible for Member States to limit these exemptions.” However, pursuant to art. 15.1 “without prejudice to other Community provisions, Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to: ... (f) energy

⁵³ See: Entwurf eines Gesetzes betreffend das Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschiffahrt verwendet wird, Deutscher Bundestag, 1. Wahlperiode 1949, Drucksache N° 4342, 11 Mai 1953: „Während durch den Fortfall der Abgaben und insbesondere der Grenzeingangsabgaben für Gasöl gemäß Artikel 1 erreicht werden soll, daß in keinem Staate sich ein überhöhtes Preisniveau bilden und halten kann, soll durch Artikel 2 erreicht werden, daß durch keinen Staat die nach dem Fortfall der Grenzeingangsabgaben schutzlos gewordene Wirtschaft der anderen Staaten durch Subventionierung des heimischen Gasöls oder ähnliche begünstigende Maßnahmen beeinträchtigt werden kann. Ebenso sind benachteiligende Maßnahmen verboten, die an Stelle der abgeschafften Grenzeingangsabgaben angewandt werden könnten. Hierdurch soll die Bildung eines gemeinsamen Marktes für das Gasöl in der Rheinschiffahrt mit weitgehend angeglichenen Preisen in ähnlicher Weise erreicht werden, wie es nach Artikel 4 des Vertrages über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl vorgesehen ist.“

products supplied for use as fuel for navigation on inland waterways (including fishing) other than in private pleasure craft, and electricity produced on board a craft;” This provision has preserved the Rhine regime from a collision with secondary Union Law ⁽⁵⁴⁾.

15. In the Proposal for a Council Directive restructuring the Union framework for the transaction of energy products and electricity (recast), recital 23 is superseded by a new one stating that: *“Fuel used for waterborne navigation, including fishing, should also be taxed, and the Member States party to international agreements providing for the exemption of that fuel, have to, by the date of the application of this Directive, ensure they eliminate the incompatibilities. It is necessary to allow for a different level of taxation to be applied to the use of energy products and electricity for intra-EU waterborne regular service navigation, fishing and freight transport and their respective at berth activities. Considering the specificity of those uses, the minimum levels of taxation should be lower than the ones applicable to general motor fuel use. In order to provide an incentive to the use of sustainable alternative fuels and electricity, such fuels and electricity should be exempted from taxation for ten years. Energy products and electricity used for the remaining intra-EU waterborne navigation should be subject to the standard levels of taxation applicable to motor fuels and electricity in the Member States.”*

16. According to the proposal, art. 15.1, first subparagraph will be amended ⁽⁵⁵⁾ in this sense that *“1. Without prejudice to Article 5, Member states shall apply, as a single use, under fiscal control not less than minimum levels of taxation as set out in Tables B and D of Annex I to energy products supplied for use as fuel to vessels, and to electricity used directly for charging electric vessels, for the purposes of intra-EU waterborne regular service navigation, fishing and freight transport. [...]”*. The following subparagraphs clarify the meaning of “intra-EU waterborne navigation”, “regular service navigation” and “freight transport”. Pursuant to art. 15.2 of the proposal *“2. Member States may exempt or apply the same levels of taxation applied for intra-EU waterborne navigation to extra-EU waterborne navigation according to the type of activity”*. Furthermore, according to art. 15.3 *“3. Member States shall subject to taxation laid down in the first paragraph motor fuels and electricity used in the field of the manufacture, development, testing and maintenance of vessels, and motor fuels and electricity used for dredging operations in navigable waterways and in ports.”* Finally, *“4. Electricity produced on board of a vessel shall be exempted from taxation.”*, whereas *“5. Member States may apply under fiscal control total or partial exemptions to electricity directly supplied to vessels berthed in ports.”*

17. The main division with regard to taxation concerns the distinction between intra-EU waterborne navigation (art. 15.1) and extra-EU waterborne navigation (art. 15.2). However the scheme is not entirely clear. Intra-EU waterborne navigation is defined as “navigation between

⁵⁴ The same scheme applied under the scope of Council Directive Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, *O.J.*, L 316, 31.10.1992, 12-15, art. 8.2: 2. “Without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control: ... (b) for navigation on inland waterways other than for private pleasure craft;”

⁵⁵ Under the preceding Proposal for a COUNCIL DIRECTIVE amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM/2011/0169 final - CNS 2011/0092 art. 15 was not amended with regard to waterborne transport. On 20 April 2012 the European Parliament, with a majority of votes including the EU conservatives, has voted against the draft Energy Taxation Directive stating that this is not a good moment to increment energy taxes, since it is a time of economic austerity and high fuel costs. The proposal was finally withdrawn by the EC in March 2015.

two ports located in the Union, including domestic navigation (⁵⁶). The route followed – by sea or inland waterways or both (river-sea traffic)– is of no relevance. Therefore maritime vessels as well as inland vessels, including fluvio-maritime and estuary vessels, are affected by the definition. Conversely, extra-EU waterborne therefore can be defined as transport between a port located in the Union and a port located outside the Union. As such, a major part of navigation by maritime vessels may be exempted, as well as inland navigation between a port situated in the Union and a port situated in Switzerland or in a non-EU Danubian or non-EU Sava State. Furthermore the taxation obligation is restricted to only three types of activities: “intra-EU waterborne regular service transport, fishing and freight transport” (art. 15.1). Therefore, at first sight, fuel consumed on board of vessels used for other commercial activities such as tugging of maritime vessels, salvage and assistance, or hydraulic engineering works, do not seem to fall under the scope of the taxation scheme.

18. ‘Regular service’ refers to a series of ro-ro passenger ship or high-speed passenger craft crossings operated so as to serve traffic between the same two or more ports, or a series of voyages from and to the same port without intermediate calls, either: according to a published timetable or with crossings so regular or frequent that they constitute a recognisable systematic series. Freight transport is understood as “*a scheduled or non-scheduled service performed by vessel carrying revenue loads other than revenue passengers, excluding voyages carrying one or more revenue passengers and voyages listed in published timetables as open to passengers.*” The scope of freight transport therefore seems not to include transport on its own behalf (“Werkverkehr”). Furthermore it is not clear what must be understood exactly by “revenue loads”. Also it is not clear whether or not navigation with empty holds or tanks falls under the scope. In other words, it is not clear whether the scope is related to a particular category of vessels, namely vessels used for or designed to be used for transport of goods, or related to the factual use at a certain moment ? In the first hypothesis all fuel consumed on board of a vessel used or designed to be used for transport of goods falls under the scope, regardless whether or not the vessel is at that moment transporting goods, in the second hypothesis the taxation scheme only applies when the vessel is used for transport of goods.

19. In order to achieve the goals of the draft art. 15 of the proposal, in the Explanatory Memorandum the European Commission advocates that “*Regarding waterborne transport, the revised Mannheim Convention of 17 October 1868 for the Navigation of the Rhine regulates the transport on the Rhine. In addition, the Agreement on customs and tax regime for gas oil applicable to the stores of vessels in Rhine navigation concluded in Strasbourg on 16 May 1952 (“the Strasbourg Agreement”) provides for the exemption of gas oil used on the Rhine and its tributaries and other waterways. Since fuel used for waterborne transport should be equally taxed in the EU, the Member States parties to the Strasbourg Agreement have to take all appropriate steps to effectively eliminate the incompatibilities. According to Article 351, paragraph 2 TFEU, to the extent that treaties concluded by EU Member States with third countries are incompatible with EU law, Member States concerned must take all appropriate steps to eliminate the incompatibilities established.*”

⁵⁶ According to the Eurostat’s Concepts and Definition Base “Domestic navigation covers the quantities delivered to vessels of all flags not engaged in international navigation (see International marine bunkers). The domestic/international split is determined on the basis of port of departure and port of arrival and not by the flag or nationality of the ship. NACE Division 50. It includes consumption in inland navigation and yachting”.

20. In addition, following considerations are given by the European Commission with regard to waterborne navigation:

“

Regarding waterborne navigation, considering the risk of tankering fuel outside the EU, a different level of taxation would be applicable to the use of energy products and electricity for intra-EU (from an EU port to another EU port) maritime and inland waterways regular service navigation, fishing and freight transport. Energy products and electricity used for the remaining intra-EU waterborne navigation (including among others navigation of private pleasure crafts) should be subject to the standard levels of taxation applicable to motor fuels and electricity in the Member States.

The uses for intra-EU maritime and inland waterways regular service navigation, fishing and freight transport, the minimum levels of taxation should be the ones applicable to motor fuel use for specific purposes (therefore lower than the ones applicable to general motor fuel use). In order to provide an incentive to their use, sustainable alternative fuels (including sustainable biofuels and biogas, low-carbon fuels, advanced sustainable biofuels and biogas, and renewable fuels of non-biological origin) and electricity would have a minimum rate of zero for ten years. For extra-EU waterborne navigation, Member States may exempt or apply the same levels of taxation mentioned before, according to the type of activity.

Finally, in some harbours, a cleaner alternative to the production of electricity on board a vessel exists with the use of shore-side electricity (i.e. connection to the on-shore electricity grid). In order to set an incentive for its development and use, shore-side electricity provided to vessels while at berth in ports can be exempt.”

§ 3. The legal relationship between the Rhine regime and the proposal for a Council Directive restructuring the Union framework for the transaction of energy products and electricity

21. The Explanatory Memorandum of the European Commission refers to both the Revised Convention for the Navigation of the Rhine and the 1952 Strasbourg Agreement, but only mentions incompatibilities in respect of the latter one. The Explanatory Memorandum thus stresses the view that a tax levied on fuel used on board of vessels is not at variance with the provisions of the Revised Convention for the Navigation of the Rhine, but only at variance with the 1952 Strasbourg Agreement. In other words the tax is not qualified as “a due solely based on navigation” (art. 3 MA) nor as a transit due (art. 7 A). In legal doctrine and case-law however the 1952 Strasbourg Agreement has been qualified as a subsequent agreement in the sense of art. 31.3(a) of the Vienna Convention on the Law of Treaties ⁽⁵⁷⁾. In interaction with other means of interpretation, a subsequent agreement contributes to the clarification of the meaning of another (older) treaty, which in this case can only be the Revised Convention for the Navigation of the Rhine, in particular art. 3 MA ⁽⁵⁸⁾.

⁵⁷ BERNER, K., *Subsequent Agreement and Subsequent Practice in Domestic Courts*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 268, Berlin, Springer, p. 172; Entscheid der Eidgenössischen Zollrekurskommission vom 27. April 1998, <https://entscheidsuche.ch/bund/vpb/63-74.html>

⁵⁸ Entscheid der Eidgenössischen Zollrekurskommission vom 27. April 1998: „2. Gemäss Art. 3 Rheinschiffahrtsakte darf auf dem Rheine, seinen Nebenflüssen, soweit sie im Gebiet der vertragschliessenden Staaten liegen, und den im Art. 2 erwähnten Wasserstrassen eine Abgabe, welche sich lediglich auf die Tatsache der Beschiffung gründet, weder von den Schiffen oder deren Ladungen noch von den Flössen erhoben werden. Vor die ZKR gehört die Verhandlung über alle Beschwerden und Mängel, welche in Beziehung auf die Ausführung dieses Vertrages und der von den Uferregierungen vereinbarten Verordnungen und Massregeln wahrgenommen werden (Art. 45 Bst. a

22. The interpretative character of the agreement can only refer to the interpretation of the term “dues”. The historical background of the Agreement (⁵⁹) as well as the first recital of the preamble prove evidence that the 1952 Strasbourg Agreement is a subsequent, interpretative agreement and thus forms integral part of the Rhine regime, even though the principles of common consent and the unity of the legal system do not fully apply, given the possibility of denunciation of the agreement by each of the Contracting States and on the basis of a decision of the CCNR, reached by majority of votes (⁶⁰). Therefore, the thesis that the tax is only at variance with the 1952 Strasbourg Agreement cannot be endorsed. The fact that in art. 3 MA the term “Droit/Abgabe/Rechten/Due” is used, whereas in the Directive the term “Taxation/Besteuerung/Belasting” is used, is of no legal relevance. In the German version of the 1952 Strasbourg Agreement the term “Abgabe” is used, in other words the same term as in art. 3 MA, whereas in the French version is spoken of the “régime fiscal” and in the Dutch version of “belastingregime”. A due levied of diesel oil consumed as fuel on board of a vessel under the name of “tax” (belasting/taxation) thus qualifies as an “Abgabe” (due) in the sense of art. 3 MA. (⁶¹).

23. In legal doctrine as well as in case-law it is generally recognised that the term “Droit/Abgabe/Rechten/Due” has a general scope covering all kinds of dues levied, regardless their character, fiscal or non-fiscal, and that the scope of the 1952 Strasbourg Convention is

Rheinschiffahrtsakte). Zur Beschwerdeführung vor der ZKR ist jede natürliche oder juristische Person sowie jedes Gemeinwesen berechtigt, die ein schutzwürdiges Interesse haben (Art. 3 des Reglements betreffend das Beschwerderecht [Anhang zu Protokoll 8; C.C.R.1992-I-8]). Die von der ZKR einstimmig angenommenen Entschliessungen sind bindend, sofern nicht ein Vertragsstaat der ZKR binnen einem Monat mitteilt, dass er seine Genehmigung versagt oder dass er sie erst nach Zustimmung seiner gesetzgebenden Körperschaften erteilen kann (Art. 46 Rheinschiffahrtsakte). ... 3. Im vorliegenden Fall ist grundsätzlich unbestritten, dass das in der Rheinschiffahrt als Schiffsbedarf verwendete Gasöl gestützt auf Art. 3 Rheinschiffahrtsakte und Art. 1 Gasölabkommen grundsätzlich von allen Steuern und Zöllen befreit ist.“

⁵⁹ See: Entwurf eines Gesetzes betreffend das Abkommen zwischen den Rheinuferstaaten und Belgien vom 16. Mai 1952 über die zoll- und abgabenrechtliche Behandlung des Gasöls, das als Schiffsbedarf in der Rheinschiffahrt verwendet wird, Deutscher Bundestag, 1. Wahlperiode 1949, Drucksache N° 4342, 11 Mai 1953: „Abgesehen hiervon wurde die deutsche Zollgesetzgebung über die Zollbehandlung des Schiffsbedarfs sowohl in der Zentralkommission für die Rheinschiffahrt als auch auf diplomatischem Wege wiederum heftig angegriffen, weil sie im Widerspruch mit den völkerrechtlichen Grundsätzen des Binnenschiffahrtsrechts und der Mannheimer Revidierten Rheinschiffahrtsakte stehe.“ And „Die Präambel bringt zum Ausdruck, daß die grundsätzlichen Verschiedenheiten in der Rechtsauslegung der Mannheimer Revidierten Rheinschiffahrtsakte durch Schaffung einer neuen Rechtsbasis in Gestalt des Abkommens behoben werden sollen. Es wird dadurch die Rechtsauffassung keines der beteiligten Staaten präjudiziert.“

⁶⁰ WALTHER, J., « Le Statut international de ma navigation du Rhin », *A.E.*, vol. 2, p. 22 advocating that « cet accord est remarquable par le fait qu'il ouvre une brèche dans le système douanier des États, pour un produit fortement taxé, au profit d'une catégorie déterminée de nationaux et d'étrangers pour lesquels il détaxe complètement le gas-oil, qui, ayant presque totalement détrôné le charbon, est devenu le carburant par excellence de la batellerie. L'unité de régime est assurée en créant des conditions d'exploitation égales pour tous. Dans sa portée juridique, l'accord sur le gas-oil diffère des dispositions de la Convention de Mannheim à deux égards. D'une part, il déroge à la règle des décisions unanimes de la Commission Centrale en prévoyant qu'une décision de celle-ci prise à la majorité des voix, ouvre un droit de dénonciation exceptionnel pour infraction grave à l'accord. Une fonction arbitrale est ainsi donnée à la Commission Centrale. »

⁶¹ Likewise: WOEHLING, J.M., « La Commission Centrale pour la Navigation du Rhin. 200 ans d'histoire », p. 2 advocating that « De ce principe, » - i.e. the principle laid down in art. 3MA – « on a déduit aussi la non taxation du carburant utilisé par la navigation intérieure. »

directly related to art. 3 MA ⁽⁶²⁾. Although the principle of free navigation does not entail the abolition of all shipping dues (see art. 111 Final Act of the Congress of Vienna) -, a clear distinction must be made between duties levied for the simple fact of navigating on a river and those which are intended as a remuneration for specific services rendered, such as piloting, harbour facilities, the opening and closing of bridges, works of maintenance and improvement of waterways, etc. ⁽⁶³⁾. This clear distinction has been reaffirmed in the aforementioned art. 333 Treaty of Versailles : "...charges varying on different sections of a river may be levied on vessels using the navigable channels or their approaches, provided that they are intended solely to cover equitably the cost of maintaining in a navigable condition, or of improving, the river and its approaches, or to meet expenditure incurred in the interests of navigation", and has been reiterated in art. 7, first sentence of the 1921 Barcelona Statute of International Waterways ⁽⁶⁴⁾, art. 3 of the 1921 Barcelona Transit Statute on Transit ⁽⁶⁵⁾.

24. In legal doctrine the so-called principle of the relative gratuity of international waterways – relative in the sense that dues may only be levied for covering costs of maintenance of improvements works executed or services rendered to navigation ⁽⁶⁶⁾ – has been recognised as

⁶² With regard to case-law, see inter alia: *Entscheid der Eidgenössischen Zollrekurskommission vom 27. April 1998*; *BFH, Urteil vom 20. Februar 1979- VII R 16/78 -*, juris, Rn. 48, m.w.N; *VG Köln*, 19 July 2011, 24 K 2757,17, openjur.de/u/2146454.html. Stabenow advocates that „untersagt sind alle Schiffsabgaben für die Benützung des Wasserweges und jenes Steuern, die an de Verkehrsvorgang, das Schiff und die Fracht anknüpfen“ (STABENOW, W., „Die internationale Konventionen über die Binnenschifffahrt im Lichte der wirtschaftlichen Integration Europas“, *Universita degli studii di Trieste, Raccolta delle Lezioni*, Trieste, 1968, p. 554

⁶³ VERZIIL, J.H.W., *International Law in Historical Perspective*, Leyden, 1968-1976, vol. III, 190

⁶⁴ "No dues of any kind may be levied anywhere on the course or at the mouth of a navigable waterway of international concern other than dues in the nature of payment for services rendered and intended solely to cover in an equitable manner the expense of maintaining and improving the navigability of the waterway and its approaches, or to meet expenditure incurred in the interest of navigation. These dues shall be fixed in accordance with such expenses, and the tariff of dues shall be posted in the ports. These dues shall be levied in such a manner as to render unnecessary a detailed examination of the cargo, except in cases of suspected fraud or infringement of regulations, and so as to facilitate international traffic as much as possible, both as regards their rates and the method of their application". See also the commentary to art. 6 of the draft convention: "Charges to be levied are to be exclusively in the nature of payments for services. It was not possible to stipulate that every individual payment must correspond strictly to a specific service rendered, but the total sum of charges levied should not do more than cover equitably the cost of maintaining the waterway in a navigable condition, etc. Further, it is to be understood that charges should be fixed and levied in such a way that one particular class of traffic will not be unduly favoured in comparison with another; the tariff of charges must not become an instrument of economic warfare. Such is the meaning of the expression *equitably* " (Conference on Navigable Waterways, League of Nations, Verbatim Records and Texts relating to the convention on the regime of navigable waterways of international concern and to de declaration recognising the right to a flag of states having no sea-coast, Genève, 1921, 422).

⁶⁵ "Traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover, and the dues must be imposed under the conditions of equality laid down in the preceding Article, except that on certain routes, such dues may be reduced or even abolished on account of differences in the cost of supervision"

⁶⁶ VAN EYSINGA summarized the emergence of the principle as follows: "Est-ce que les droits de navigation, les péages, sont compatibles avec la liberté de navigation ? En thèse générale sans aucun doute : l'Acte Final de Vienne en proclamant la libre navigation ajoute que cette navigation sera soumise à des droits de navigation. Il va de soi que les droits doivent être raisonnables, et le critérium de cette qualité a été de plus en plus cherché dans le caractère de contre-prestation pour des services rendus. Cette idée qui se

rule of customary law ⁽⁶⁷⁾. The principle of the relative gratuity imposes on riparian States not to burden navigation with dues that have the character of a revenue ⁽⁶⁸⁾. A due levied on diesel oil consumed on board of a vessel is clearly a due levied for the simple fact of navigation on a waterway, in other words “based solely on navigation”. The tax is levied on the fuel bunkered with a view to navigate and thus directly related to the fact of navigation. In other words, in the absence of navigation there is no tax levied. The mere fact of navigation is marked as the polluting factor. Therefore such a tax is at variance not only with art 1 of the 1952 Strasbourg Agreement, but also with art. 3 MA, art. 111 of the Final Act of the Congress of Vienna and regional customary law. The fact that at the time the Act of Mannheim and the 1952 Agreement were signed, environmental issues such as they occur today, were unknown, cannot lead to another conclusion. The use of generic terms in art. 1 - no obstacle of any kind shall be offered to free navigation – and 3 – dues solely based on navigation – clearly provides evidence that in the light of its object and purpose (art. 31.1 VCLT) the Act of Mannheim envisages not only obstructions of free navigation anno 1868, and therefore only dues that were levied before 1868 ⁽⁶⁹⁾, but obstructions of all kind, known or unknown at that time ⁽⁷⁰⁾. Nor does the emergence of international environmental law ⁽⁷¹⁾.

retrouve dans plusieurs actes de navigation a été exprimée dans le statut de Barcelone de cette manière que les droits de navigation, les redevances, doivent avoir le caractère de rétributions et doivent être exclusivement destinés à couvrir les frais d’entretien de la navigabilité ou d’amélioration de la voie navigable et de ses accès, ou à subvenir à des dépenses faites dans l’intérêt de la navigation. » (VAN EYSINGA, W.J.M., « Les fleuves et canaux internationaux » *Bibliotheca Visseriana*, vol. 2, 1924, p. 147)

⁶⁷ VITANYI, B., « La relative gratuité de l’utilisation des voies d’eau internationales est-elle devenue une règle coutumière ? », *G.Y.I.L.*, 1983, 85 : « The international practice attests that European States are conscious of their duty to apply the rule of relative gratuitous use of international waterways also, and in particular, in the absence of treaty provisions concerning this matter. On this basis, it seems to be well-founded to state the actual existence of a regional European customary rule”.

⁶⁸ VITANYI, B., « La relative gratuité de l’utilisation des voies d’eau internationales est-elle devenue une règle coutumière ? », *G.Y.I.L.*, 1983, 72

⁶⁹ It may be recalled that already in 1971 the European Commission launched the idea of introducing a general scheme imposing the levying of dues for the use of inland waterways. Well aware of the application of art. 3 MA the Commission argued that the proposed dues have a different character than those which were levied before 1868 and abrogated by the Act of Mannheim. The European Commission therefore interpreted art. 3 MA in a very restrictive way as only referring to previously existing dues.

⁷⁰ MAURER, A., « Die Freiheit der Schifffahrt auf dem Rhein » in *150 Jahre Mannheimer Akte. Festschrift zum 150jährigen Bestehen der Revidierten Rheinschiffahrtsakte vom 17. Oktober 1868*, Baden-Baden, Nomos Verlagsgesellschaft, 2018, p. 14. In the Case concerning the dispute regarding navigational and related rights between Costa Rica and Nicaragua, the ICJ hold the view that “(i)t is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention which is, by definition, contemporaneous with the treaty’s conclusion. That may lead a court seized of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties’ common intention.... This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it ⁽⁷⁰⁾. (W)here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning” (ICJ, 13 July 2009, points 63-66).

⁷¹ In the Gabčíkovo-Nagymaros Case, para 53, the ICJ hold the view that “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment”, but also stated that “It is for the Parties themselves to find an agreed solution that

25. Furthermore, the 1952 Strasbourg agreement reaffirms the competence of the CCNR in respect of the prosperity of Rhine navigation (art. 45 MA) ⁽⁷²⁾, stressing that this competence also entails all issues relating to the customs and tax regime for diesel oil consumed as fuel aboard of vessels. Prevention of environmental damage is part of the goals of the provisions relating to Rhine navigation ⁽⁷³⁾. As regards the exemption of dues levied on diesel oil consumed as fuel on board of a vessel, the competence of the CCNR is exclusive ⁽⁷⁴⁾ and the territorial scope of this competence is not restricted to the Rhine but encompasses all waterways falling under the scope of the agreement. More, whereas pursuant to art. 31 of the Moselle Convention the agreement also applies on the navigable part of the Moselle falling under the scope of the said convention, the territorial competence of the CCNR is extended to the entire navigable Moselle. The competences of the CCNR have not been overruled by the establishment first of the European Communities and later of the European Union. The European Commission recognizes ⁽⁷⁵⁾ that the CCNR is an international organization with regulatory competences for inland navigation transport matters on the Rhine and that the revised Convention for Navigation on the Rhine still defines the legal framework governing the use of the Rhine as an inland waterway for navigation and lays down the attributions of the CCNR.

26. In the 2018 Mannheim Declaration ⁽⁷⁶⁾ the Rhine Contracting States acknowledged the Mannheim Act and the principles enshrined therein and emphasised the fundamental importance of the Act to the prosperity of the economy and of inland navigation in the Rhine river basin. The central role of the Mannheim Act in the fruitful collaboration on Rhine and inland navigation matters between the Riparian states and Belgium within the framework of the Central Commission for the Navigation of the Rhine (CCNR) was affirmed. To further improve

takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses”. Therefore, as Bourne rightly observes, the protection of the environment has no absolute priority over other considerations, particularly the case of the developments involving the utilization of international watercourses (BOURNE, CH., “The Case concerning the Gabčíkovo-Nagymaros Project: an important milestone in international water law”, *Y.I.E.L.*, 1997, 11). An agreed solution, with a view to reconciling economic development with protection of the environment”, may be achieved by different routes, taking account of the objectives of the Treaty and thus by other routes than levying taxes solely based on navigation.

⁷² Art. 45: “The terms of reference for the Central Commission shall be: a. to examine all complaints arising from the application of this Convention as well as the enforcement of regulations drawn up by the riparian Governments and the measures which they have adopted by common agreement; b. to deliberate on the proposals made by riparian Governments concerning the prosperity of Rhine navigation, and in particular those which are designated to add to or to amend this Convention and the regulations jointly drawn up.”

⁷³ See : CCNR Resolution, 25 April 1996 relating to the application of the CDNI convention in the framework of the Rhine regime (*Trb.*, 1997, 97): “déclare que la prévention des dommages à l'environnement fait partie des motifs des prescriptions relatives à la navigation sur le Rhin,

⁷⁴ In the commentary of the CCNR secretariat with regard to Protocol 2003-II-10 relating to the interpretation of the Act of Mannheim the CCNR considers its competence with regard to environmental issues as a concurrent competence with the Rhine Contracting States. However with regard to interpretation and application of the 1952 Strasbourg Agreement the CCNR competence is exclusive.

⁷⁵ See: Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the European Committee for drawing up Standards in the field of Inland Navigation and in the Central Commission for the Navigation on the Rhine on the adoption of standards concerning technical requirements for inland waterways vessels, COM/2020/632 final

⁷⁶ Mannheim Declaration « 150 years of the Mannheim Act – the driving force behind dynamic Rhine and inland navigation”, Congress of the Central Commission for the Navigation of the Rhine on 17 October 2018

the ecological sustainability of inland navigation, the Contracting States tasked the CCNR to develop a roadmap in order to: (1) reduce greenhouse gas emissions by 35% compared with 2015 by 2035; (2) reduce pollutant emissions by at least 35% compared with 2015 by 2035; (3) largely eliminate greenhouse gases and other pollutants by 2050. Already in the 2006 Basel Declaration the Rhine Contracting States instructed the CCNR to review the suitability and need of existing and future regulations on inland shipping while maintaining high security and environmental standards ⁽⁷⁷⁾. The competencies of the CCNR with regard to environmental issues relating to inland navigation in the Rhine river basin are thus recognized by the Contracting States as forming integral part of the Rhine regime. Environmental issues, in so far as they are directly or indirectly related to navigation, do not fall outside the scope of the Rhine regime. Therefore the common consent principle and the principle of the unity of the legal system also apply to environmental issues relating to navigation. The draft proposal crosses the path of the exclusive competence of the CCNR with regard to the exemption from dues for fuel consumed on board of vessels and the tasks entrusted to the CCNR with regard to improving the ecological sustainability of inland navigation. The proposal does not take in consideration the common consent principle and the unity of the legal system.

27. As aforementioned, in legal doctrine the 1952 Gasoil Agreement has been described as the establishment of “une sorte de marché commun, limité à une catégorie de consommateurs, pour l’achat d’un produit importé dans des conditions également déterminées » ⁽⁷⁸⁾, a common market of one type of consumers, those consuming gasoil as fuel aboard a vessel, a common market for which the CCNR has exclusive competence. The articles 2 and 3 provide provisions to set the goal of the establishment of such a common transport market. Therefore, the 1952 Gasoil Agreement not only may be regarded and qualified as an interpretative (subsequent) agreement of the Revised Convention for the Navigation of the Rhine, but at the same time also as a related agreement creating new rights and obligations for the Contracting States, enhancing the Rhine regime ⁽⁷⁹⁾. However, regardless the legal status of the 1952 Strasbourg Agreement as a subsequent, interpretative, agreement of (art. 3 of) the Act of Mannheim and/or as a related agreement, both the Act of Mannheim and the 1952 Strasbourg Agreement are older treaties than the Union Treaties and its predecessors and are concluded between EU Member States and one third State, Switzerland. Both treaties therefore qualify as treaties falling under the scope of art. 351.1 TFEU and the same applies to the river clauses of the Final Act of the Congress of Vienna, in particular art. 111.

28. Although the Explanatory Memorandum not explicitly confirms this legal status of the 1952 Strasbourg Agreement, by referring to art. 351.2 TFEU the memorandum implicitly recognizes this status, but only refers to the second paragraph of art. 351 TFEU, stressing that Member States must take all appropriate steps ⁽⁸⁰⁾ and thus considering the obligations of the EU-

⁷⁷ Basel Declaration of the Ministers of the Member States of the Central Commission for Navigation of the Rhine (CCNR) Germany, Belgium, France, Netherlands and Switzerland, Basel, 16 May 2016

⁷⁸ MISCHLICH, R., „Le régime international de la navigation du Rhin », *R.T.D.C.*, 1957, 269

⁷⁹ See in this sense the recording of the agreement in the Dutch “Tractatenblad” of 1955, n° 161 as one the “aanverwante internationale overeenkomsten” (“related international agreements”)

⁸⁰ It must be observed that, in case of incompatibilities between Union Law and a pre-Union treaty, the Court of Justice holds the view that, in so far as denunciation of an agreement is possible under international law, it is incumbent on the Member State concerned to denounce it (Case C-170/98, *Commission v. Belgium*, 1999, ECR-I-5493, paragraph 42; Case-C-62/98, *Commission v. Portugal*, paragraph 34; Case C-84/98, *Commission v. Portugal*, paragraph 40). Under the 1952 Strasbourg Agreement denunciation is provided for, however this is not the case with regard to the Revised Convention for Navigation of the Rhine. In legal doctrine it is advocated that, if the possibility

Member States party to the Revised Convention for the Navigation of the Rhine and party to the 1952 Strasbourg Agreement as becoming inoperative by the simple fact of new secondary Union Law. The first paragraph of art. 351 TFEU, implying, in the light of the settled case-law of the Court of Justice ⁽⁸¹⁾, a duty on the part of the EU institutions not to impede the performance of the obligations of Member States which stem from a prior agreement. Therefore art. 351, first paragraph TFEU must be interpreted in a sense compatible with the law of treaties ⁽⁸²⁾. The European Union must respect international law in the exercise of its powers, therefore secondary Union law must be interpreted, and its scope limited, in the light of the relevant rules of international law ⁽⁸³⁾.

29. Art. 351.1 TFEU has a general application and applies to each international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty ⁽⁸⁴⁾. Application of the provision assumes that the agreement imposes on a EU Member State obligations whose performance may still be required by third parties to the agreement, irrespective whether or not the third state asserts its rights under the agreement ⁽⁸⁵⁾. Both the

of denunciation is not provided either in the pre-Union agreement or by other means, the denunciation of such an agreement to eliminate the incompatibilities with Union Law appears illegitimate (MANZINI, *The priority of pre-existing treaties of EC Member States within the framework of international law*, *E.J.I.L.*, 2001, vol. 12p; 791). Pursuant to art. 56 of the Vienna Convention on the Law of Treaties, a treaty that not specifically provides for it is not subject to denunciation unless the possibility could be inferred from the character of the treaty or from the intention of the parties. Denunciation of an agreement that cannot be denounced would not only result in international responsibility on the Member State concerned, but also deprive art. 351.1 TFEU of “*effet utile*”, because the respect for Union Law would always prevail on the rights of the third states party to a pre-Union agreement (MANZINI, *o.c.*, 791). As regards art. 1 of the 1952 Strasbourg Agreement, the agreement is a subsequent, interpretative, agreement. Denunciation of the agreement would therefore not eliminate the incompatibility with art. 3 Act of Mannheim.

⁸¹ E.C.J. 14 October 1980, case C-812/79 (Burgoa), *Reports.*, 1980, p. 2787 *et seq.*, paragraph. 9; E.C.J., 4 July 2000, Case C-62/98 (Commission/Portugal), *Reports.*, 2000, I, p. 1571, paragraph 44; E.C.J., 5 November 2002, Case C-466/98, www.curia.eu.int/nl/jurisp, paragraph 24 referring to art. 30, paragraph 4, sub b, Vienna Convention; E.C.J., 21 December 2011, case C-366/10 (Air transport Association of America v. Secretary of State for Energy and Climate Change), ECLI:EU:C:2011:864, para 61 see also e.g.: LEENEN, A.Th.S., *Gemeenschapsrecht en volkenrecht. Een studie naar de draagwijdte van de eigen rechtsorde van de Europese Gemeenschappen*, 's Gravenhage, TMC Asser Instituut, 1984, p. 208; MANZINI, P., “The priority of pre-existing treaties of EC Member States within the framework of international law”, *E.J.I.L.*, 2001, vol. 12, (781), p. 783.

⁸² See also: PESCATORE, “Les relations extérieures des Communautés Européennes”, *R.C.A.D.I.*, 1961, II, p. 160; KAPTEYN and VERLOREN VAN THEMAAT (1995), p. 532

⁸³ E.C.J., 24 November 1992, case C-286/90 (Poulsen-Diva Navigation), ECLI:EU:C:1992:453, paragraph 9: “... it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.”

⁸⁴ E.C.J., 5 November 2002, case C-466/98, paragraph 23 referring to E.C.J., 4 July 2000, case C-62/98 (Commission/Portuguese Republic), *Reports*, 2000, I, 1571, paragraph 43; E.C.J., 14 October 1980, case 812/79 (Burgoa), *Reports*, 1980, p. 2787 *et seq.*, paragraph 6 and E.C.J., 2 August 1993, case C-158/91 (Levy), *Reports*, 1993, I, 4287, paragraph 11

⁸⁵ E.C.J., joined cases C-364/95 and 365/95, Port T GmbH v. Hauptzollamt Hamburg-Jonas, ECLI:EU:C:1998:95, para 60; E.C.J., 2 August 1993, case C-158/91 (Lévy), *Reports*, 1993, I, p. 4287; see also: LENAERTS, K. and DE SMIJTER, E., “Some reflections on the status of international agreements in the Community legal order” in *Mélanges en hommage à Fernand Schockweiler*, Rodriguez Iglesias, G.C., Due, O., Schintgen, R. and Elsen, Ch. (ed.), Baden-Baden, Nomos

Act of Mannheim as the 1952 Strasbourg Agreement impose on the EU-Member States obligations whose performance may still be required by third parties. The same applies to art. 111 of the Final Act of the Congress of Vienna, prohibiting inter alia that navigation shall be burthened with any other duties than those fixed in the regulation. It may be recalled that the Act of Mannheim is an implementing act of the Final Act of the Congress of Vienna and Annex XVI B of the Final Act and that the river clauses of the Final Act were placed under the guarantee of the Great Powers, inter alia Great Britain and Russia.

30. The supremacy of Union law concerns the relationship between national laws and European law, not the relationship among international conventions⁽⁸⁶⁾. European law does not precede international law, inter alia internal river law and in particular Rhine navigation law⁽⁸⁷⁾. As a rule of general customary law, pursuant to art. 30.4 (b) VCLT “(w)hen the parties to the later treaty do not include all the parties to the earlier one: ... as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.” More, it may be recalled that today’s general rules governing navigation on international waterways, especially that granting freedom of navigation of merchant vessels flying the flag of a riparian State, grew out of the Vienna provisions of 1815 which, as part of the “public law of Europe” were more than mere treaty provisions and according to legal doctrine gradually acquired the status of regional (European) customary rules through the application by third States and the emergence of an *opinio juris* on the part of the latter⁽⁸⁸⁾. The articles 108-117 of the Final Act have a permanent and legally binding character⁽⁸⁹⁾. The rules

Verlagsgesellschaft, 1999, p. 366; ROSAS, A., “The Status in EU Law of International Agreements Concluded by EU Member States”, *Fordham International Law Journal*, 2011, vol. 34, 1321-1324).

⁸⁶ MANZINI, P., “The priority of pre-existing treaties of EC Member States within the framework of international law”, *E.J.I.L.*, 2001, vol. 12, 790

⁸⁷ ERBGUTH, W., “FFH-Gebietsmeldung und „Mannheimer Akte“ (Revidierte Rheinschifffahrtsakte): Europarecht und Völkerrecht in Widerstreit?“, *NVWBl.*, 2004, p. 139

⁸⁸ CAFLISH, L., “The Law of International Waterways and Its Sources”, in *Essays in honour of Wang Tieya*, Kluwer, Academic Publishers, 1999, 122. Also in the commentary of art. 43 of the Berlin Rules (Chapter IX Navigation) is spoken of the customary international law relating to shared rivers. The commentary observes that “(t)he chapter reflects the traditional rules developed in the nineteenth century as codified in the original Helsinki Rules, The leading scholarly works on the subject endorse the content of this Chapter”. With regard to dues, art. 45.4 Berlin Rules provides that “Nondiscriminatory fees may be charged by a riparian State to recover the costs of services provided to vessels exercising freedom of navigation.” In the commentary it is said that “Paragraph 5 reflects the fact that States sometimes charge fees to recover the cost of services provided to vessels exercising freedom of navigation. The practice is too widespread to argue that it violates customary international law, but to allow a State to charge a fee higher than necessary to recover the costs of its services would nullify freedom of navigation.” The commentary reflects the view that the relative gratuity of international waterways is a rule of customary law. Dues may not be levied solely based on navigation.

⁸⁹ BÄRMANN, J., *Die Freiheit der europäischen Binnenschifffahrt*, Heft 7 der Schriftenreihe der Deutschen Europaakademie, Mannheim, 1950 p. 12; CAFLISH, L., “Règles générales du droit des cours d’eau internationaux”, *R.C.A.D.I.*, 1989, p. 104 and “The Law of International Waterways and Its Sources”, in *Essays in Honour of Wang Tieya*, Kluwer Academic Publishers, 1993, pp. 121-122; DE MARTENS, F., *Völkerrecht*, 1886, II, p. 57; GÖNNEWEIN, O., *Die Freiheit der Flussschifffahrt*, Stuttgart, 1940, p. 48; GUGGENHEIM, P., *Lehrbuch des Völkerrechts, Berücksichtigung der internationalen und schweizerischen Praxis*, 1948, vol. I, p. 366; JAFFE, F., *Die Rechtsordnung der internationalen Binnenschifffahrt auf den europäischen Wasserstrassen*, Diss., Heidelberg, 1935, p. 19, describes the river clauses of the Final Act as a binding preliminary treaty; HOSTIE, J., “Le statut international du Rhin”, *R.C.A.D.I.*, 1929, III, (1929), p. 138; LAUTERPACHT, *International Law*, 1953, p. 177; LISTZT-FLEISCHMANN, *Völkerrecht*, 12th ed., 1925, p. 177; MALUWA, T., “The origins and development of international fluvial law in Africa: a study of the international legal regimes of

governing navigation on international waterways include freedom of navigation, equal treatment and unity of the legal system.

31. The unity of the legal system implies that provisions with regard to exemptions or impositions of taxes and other dues are laid down in common consent between all the Contracting States (art CVIII, first sentence Final Act of the Congress of Vienna) ⁽⁹⁰⁾. As regards exemption or imposition of taxes and other dues equal treatment implies that flags and goods of all beneficiaries of the right of navigation must be treated on a footing of perfect equality and no distinction is to be made on the basis of the place of origin, departure, destination or direction of the transport ⁽⁹¹⁾. Pursuant to art. II of Annex XVIB of the Final Act of the Congress of Vienna, the system laid down with regard to the levying of dues must be same on the entire Rhine, its mouths and confluents ⁽⁹²⁾. The underlying idea is that the entire navigable Rhine, its mouths and confluents form a unit and therefore must be treated as such. According to the findings of the Permanent Court of Justice in the case relating to the territorial jurisdiction of the international commission of the river Oder the “community of interest” (of riparian States) is the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others”. The PCIJ goes “back to the principles governing international fluvial law in general”.

32. The proposal does not take in consideration these principles governing international fluvial law in general, the community of interests of *all* riparian States is not given any consideration and a distinction is made based on the departure, destination or direction of the transport. Not only the draft art. 15.1 of the proposal is clearly at variance with the Rhine regime and relevant rules of international river law, as recognized by the PCIJ, but also crosses the path of the goal set by the European Green Deal ⁽⁹³⁾, the Sustainable and Smart Mobility Strategy ⁽⁹⁴⁾ and the recently published Naiades III Action Plan ⁽⁹⁵⁾, namely increasing transport by inland waterways and short

the Congo and Niger River from 1885 to 1960”, *N.I.L.R.*, 1982, p. 371; MÜLLER, W., *Die Freiheit der Rheinschifffahrt in Gefahr*, Schriftenreihe der Basler Vereinigung für Schweizerische Schifffahrt, Schrift III, Basel, 1953, 2/*Strom und See*, 1953, 61; (1953), 61 and *Die Rechtsstellung der Schweiz in Bezug auf die revidierte Rheinschifffahrts-akte vom 17.10.1867*, Zürich, 1959, p. 172; PERREZ, F.X./REUTLINGER, P.R., “Die Freiheit der Schifffahrt gemäss der durch das Zusatzprotokoll Nr. 2 geänderten Mannheimer Akte”, *TranspR.*, 1995 p. 229; ROUSSEAU, C., *Droit international public*, 8^o ed., Paris, Dalloz, 1976, p. 389; SMIT, C., *De Conferentie van Londen: het vredesverdrag tussen Nederland en België van 19 april 1839*, Leiden, 1949, E.J. Brill, p. 95; VAN GEETRUYEN, J., “La Meuse et la Moselle”, *La vie économique et sociale*, 1956, p. 66.

⁹⁰ “The Powers whose states are separated or crossed by the same navigable river, engage to regulate, by common consent, all that regards its navigation”

⁹¹ VITANYI, B., « La relative gratuité de l’utilisation des voies d’eau internationales est-elle devenue une règle coutumière ? », *G.Y.I.L.*, 1983, 84

⁹² « Le système qui sera établi, tant pour la perception des droits que pour le maintien de la police, sera le même pour tout le cours de la rivière, et s’étendra, autant que faire se pourra, aussi sur ceux de ses embranchements et confluent, qui, dans leurs cours navigables, séparent ou versent différents états. »

⁹³ COM(2019) 640 final. The Green Deal highlights the following: “Transport accounts for a quarter of the EU’s greenhouse gas emissions, and still growing. To achieve climate neutrality, a 90% reduction in transport emissions is needed by 2050. Road, rail, aviation, and waterborne transport will all have to contribute to the reduction... Multimodal transport needs a strong boost. This will increase the efficiency of the transport system. As a matter of priority, a substantial part of the 75% of inland freight carried today by road should shift onto rail and inland waterways.”

⁹⁴ Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789 final

⁹⁵ Naiades III, Boosting future-proof European inland waterway transport, COM(2021) 324 final

sea shipping⁽⁹⁶⁾. Long recognised as one of the most CO₂-efficient modes of transport (per tonnes of goods carried)⁽⁹⁷⁾ along with rail, inland waterway transport (IWT) is clearly seen as central to the Union's efforts to decarbonise the transport system. The new Naiades action plan will put in place the conditions for the inland waterway transport sector to better seize the opportunities linked to the shift towards a zero-emission and digital economy⁽⁹⁸⁾. The second strand of the action plan will address a gradual shift towards zero-emission vessels, through a coordinated transport and energy policy that pools resources together, requiring action not only on the side of vessels, but also on shore. The proposal therefore precedes the "Inland Waterway Transport Action Plan".

33. The proposal is based on art. 113 TFEU⁽⁹⁹⁾, whereas the Naiades action Plan and the EU common transport policy is based on the Transport Title of the TFEU. Pursuant to art. 91.1 TFEU the distinctive features of transport must be taken into account. Pursuant to art. 94 TFEU "Any measures taken within the framework of the Treaties in respect of transport rates and conditions shall take account of the economic circumstances of carriers". The scope of art. 94 TFEU is not restricted to measures taken within the framework of the Transport Title, but encompasses all measures taken within the framework of the Treaties. Therefore also measures to apply taxation on energy consumed as fuel on board of vessels are measures in respect of transport conditions and transport pricing⁽¹⁰⁰⁾ and thus shall take account of the economic circumstances of carriers.

⁹⁶ The European Green Deal calls for the shifting of a substantial part of 75% of EU freight currently carried by road to inland navigation and rail. It also calls for measures to increase the capacity of inland navigation from 2021.

⁹⁷ See inter alia: CE Delft, Study on Transport Emissions of All Modes (STREAM). Since 1 January 2011 the maximum sulfur content for diesel oil for inland waterway vessels is 0,001% m/m (massa pro massa). In comparison: for maritime vessels in Emission Controlled Areas (ECAS) the maximum sulfur content since 1 January 2020 is 0,50% m/m !

⁹⁸ *"In order to address the challenges faced by the inland waterway transport sector and deliver on the objectives of the European Green Deal and the Sustainable and Smart Mobility Strategy, the Commission is now putting forward an 'Inland Waterway Transport Action Plan 2021-2027', in line with the new multiannual financial framework and focusing on two core objectives: shifting more freight transport to inland waterways, and setting the sector on an irreversible path to zero-emissions, underpinned by a paradigm shift towards further digitalisation, as well as accompanying measures to support the current and future workforce. Meeting these core objectives will require an integrated approach and a basket of measures incorporating transport, environmental, digital, energy and fiscal policies, backed up with financial incentives, as indicated below and further detailed in the Annex – Action Plan. Eight flagships have been identified."*

⁹⁹ „The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

¹⁰⁰ See the Communication on the EU Green Deal on 11 December 2019: "The price of transport must reflect the impact it has on the environment and on health. Fossil-fuel subsidies should end and, in the context of the revision of the Energy Taxation Directive, the Commission will look closely at the current tax exemptions including for aviation and maritime fuels and at how best to close any loopholes." It is not clear how the pricing of transport will reflect the impact it has on the environment and on health. According to the ETD proposal the tax will be levied on the fuel bunkered and thus in practice paid by the carrier, who therefore is earmarked as the polluter. However, if the price of transport must reflect the impact transport has on the environment and on health, at the end the one who benefits from the transport, is the polluter. But the pricing of transport is free (art. 2 Council Directive 96/75/EC of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community, *O.J.*, L 304, 27.11.1996, p. 12–14). In the Directive no tools are provided

Taxation obviously shall involve economic ⁽¹⁰¹⁾ and social costs ⁽¹⁰²⁾. It will consist in an additional financial burden for vessel operators.

34. Also, pursuant to art. 91.1d measures must also be “appropriate”. The proposed taxation measure will not contribute to preventing and control environmental damage ⁽¹⁰³⁾. Pricing mechanisms are meant to give incentives to change users behaviour towards cleaner transport ⁽¹⁰⁴⁾. But, this goal presupposes that alternative energy sources (and cleaner engines) are widely available and that they do not consist in an additional financial burden for vessel owners, two conditions that today are not met. No alternative (near) zero emission energy sources are yet available for wide roll-out as they are not mature enough. Therefore the measure is not appropriate, a fact that is recognized by the European Commission in the draft proposal with regard to aviation. According to the draft recital 21 “The exemption for the fuel used by cargo-only flights is still needed in the absence of more efficient alternatives”. The absence of more efficient alternatives, and in particular (near) zero energy sources, however is not restricted to aviation, but also applies to IWT. Furthermore, the exemption from taxes of fuel used by vessels has not be detrimental to the environmental objectives, IWT being one of the most CO2-

for to guarantee that transport prices reflect external costs and, in other words, are paid by the beneficiary of the transport. The question “who is the polluter” is a very complex one as stressed in the study on “Financing the energy transition towards a zero-emission European IWT sector – Study on a financial instrument for greening the IWT sector” (ECORYS, 2020). In the study, p. 37, it is correctly observed that not every transport company will be able to pass on the costs to the customer equally well, given the varying market power of customers in certain market segments.

¹⁰¹ See: Explanatory Memorandum, p. 3: “In some sectors, mainly in those that may currently benefit from total exemptions such as aviation, or heating fuels for non-vulnerable households, transition periods will apply to mitigate the economic and social costs of introducing taxation”. For aviation a transition period will apply, but not for inland waterway transport, one of the most efficient CO2 efficient modes of transport ! With regard to economic costs, according to the TNO report “Environmental and Economic aspects of using LNG as a fuel for shipping in The Netherlands” the cost for an inland vessel of 110m of an LNG engine and a fuel tank system is estimated to be two times the costs of a conventional diesel engine and a tank (VERBERGHT, E., *Innovative inland navigation*, UA - Department of Transport and Regional Economics, 2018, p. 164). Companies behind the mts. Green Rhine and mts. Green Stream -two LNG mono fuel vessels - went bankrupt with an annual loss of EUR 2,591,432 (Green Rhine) and EUR 2,686,032 (Green Stream) in 2016 (VERBERGHT, E., *ibid.*, p. 172). Most new built inland vessels since 2007 have CCR2 engines, but this is not the case for older vessels. More than 8.000 inland vessels have engines older than 20 years (see: Le transport fluvial à l’heure énergétique, colloque, 18-19 June 2018). For small boats (e.g. 38m - “péniche”) the cost of a stage V engine (NRMM Regulation) will be higher than the purchase value of the vessel.

¹⁰² Social costs are the sum of the so-called “internal” or private costs, those that are borne by the person engaged in the transport activity (e.g. time, vehicle and fuel costs) and the so-called “external costs”, i.e. those that accrue to others (such as environmental, accident and congestion costs) (European Commission, *Towards fair and efficient pricing in transport. Policy options for internalizing the external costs of transport in the European Union*, (COM95)691, p. 4)

¹⁰³ The polluter pays principle is a relatively old environmental principle, adopted by the OECD in 1972 as an economic principle for allocating the costs of pollution control and aims to prevent environmental damage. Some studies claim that an additional fuel reduction or emission decrease can be obtained by right fitting. An engine with a lower power, uses less fuel (see inter alia: Panteia, *Contribution to Impact Assessment of measures for reducing emissions of inland navigation*, European Commission, Zoetermeer, 2013). Also, it must be observed that a kind of taxation already exists by way of differentiation in port dues, in this sense that in many ports a discount is given to cleaner vessels (vessels with CCR2 engines versus vessels with other, older types of engines) and that in the near future in some ports vessels not complying with, at least, CCR2 standards will not be allowed to load and unload goods in these ports.

¹⁰⁴ OGORELC, A., “European Union common transport policy”, *Naše more*, 2003, n° 5-6, 199.

efficient modes of transport ⁽¹⁰⁵⁾. Also, the exemption of taxes based on the 1952 Strasbourg Agreement has not been detrimental to the function of the internal market nor has it resulted in distortions of competition.

§ 4. The legal feasibility of a sector contribution based on fuel used in respect of the Rhine Regime

35. Greening is key to ensure the IWT sector's long-term competitiveness and enable it to play a significant, reliable and credible role in the multimodal shift ⁽¹⁰⁶⁾. The Mannheim Declaration "150 year of the Mannheim Act – the driving force behind dynamic Rhine and inland navigation - tasked the CCNR to develop a roadmap in order to reduce greenhouse gas emissions by 35 per cent compared with 2015 by 2035, reduce pollutant emissions by at least 35 per cent compared with 2015 by 2035, and largely reduce greenhouses gases and other pollutants by 2050 ⁽¹⁰⁷⁾. With a view to a broad reflection on how to finance this green transition and as an alternative for taxation, a recent study on financing the energy transition towards a zero-emission launches the idea of the establishment of a greening fund with earmarked 'contributions' from the sector which are in turn used for the sector, i.e. goal based: reaching (near) zero-emission performance by 2050 ⁽¹⁰⁸⁾. The idea is in line with the Naiades III Action Plan supporting the energy transition of the sector via tailor made funding for the large-scale deployment of green technologies for the fleet, reliable alternative fuels and digitalization, and the recent European Parliament resolution of 14 September 2021 towards future-proof inland waterway transport in Europe ⁽¹⁰⁹⁾.

¹⁰⁵ According to recital 25 "Member States should be permitted to apply certain other exemptions or reduced levels of taxation, where that will not be detrimental to the environmental objectives, to the proper functioning of the internal market and will not result in distortions of competition." The exemption from taxes may also be an incentive to encourage energy transition (see the reply of the French "Ministre de l'État, ministre de la transition écologique et solidaire", *Journal Officiel*, 21 July 2020: "Cette exonération totale de toute la navigation intérieure (hors plaisance) permet d'encourager le secteur de la transition énergétique du secteur qui s'y est résolument engagé. Afin d'agir très concrètement pour la transition énergétique de ce secteur, l'ensemble des acteurs concernés s'investissent depuis fin 2018 pour formaliser des engagements mutuels du secteur public et du secteur privé sous forme d'engagements pour la croissance verte du secteur fluvial. »

¹⁰⁶ E.P. resolution of 14 September 2021 towards future-proof inland waterway transport in Europe (2021/2015 (INI)), recital H

¹⁰⁷ www.ccr-zkr.org/files/documents/dmannheim/Mannheimer_Erklaerung_en.pdf

¹⁰⁸ ECORYS, Rotterdam 7 October 2020, p. 12

¹⁰⁹ (2021/2015 (INI)), point 17: "highlights that this scheme must aim to effectively reduce emissions and assist the sector by providing improved access to funding, loans and guarantees based on its emissions performance" See also Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC, *O.J.*, L 252, 16.9.2016, p. 53–117 (NRMM Regulation), recital 9: The Commission White Paper of 28 March 2011, entitled 'Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system', highlights the particular role to be played by railways and inland waterways in achieving climate targets. Given that the progress of those modes of transport compares unfavourably with that of other sectors in relation to improving air quality, the Commission and Member States' authorities, within their respective remits, should provide different ways of supporting innovation in emission technology so that the continuing increase in the volume of freight shifted to rail and inland waterways goes hand-in-hand with an improvement in air quality in Europe."

36. An IWT Greening Fund may cover the costs of the investment in engines and retrofit of engines as well as vessel design improvement measures, and will therefore facilitate the transition away from fossil fuels towards cleaner energy to deliver on the EU's climate neutrality objective, in line with the commitments under the Paris Agreement. Therefore the goals of a Greening Fund meet the goals of the ETD. Also, as is the case for taxation, a contribution from the sector is based on the polluter pays principle, introduced in IWT by the CDNI⁽¹¹⁰⁾ with regard to three types of waste disposal: oily and greasy waste, cargo hold waste and household waste, identifying for each type of waste the polluter. The costs are thus allocated on the basis of the "polluter pays" principle. With regard to emissions, in some ports the polluter pays principle has already been integrated in the port dues by means of an environmentally differentiation under the form of a discount granted to "cleaner" vessels⁽¹¹¹⁾. Environmentally differentiated fees nowadays are imposed only at local level within the EU⁽¹¹²⁾.

37. As regards emissions, the study recognizes that the inland shipping company is not the sole responsible actor for the pollution in the overall IWT market, but that there is a pollution chain in which multiple involved actors in the logistics chain are together responsible for the pollution: shippers, brokers, shipping companies, cooperatives, inland ship operators, consignees and end-consumers⁽¹¹³⁾. However due to the complex structure in the pollution chains, the scope of responsible actors who can be imposed with earmarked contributions is restricted, advocating that these actors are in turn free to either pass on the environmental costs to the consumer or fully absorb the costs themselves⁽¹¹⁴⁾. Theoretically, because not every company will be able to pass on the costs to the customer equally well, given the varying market power of customers in certain market segments⁽¹¹⁵⁾. Within the IWT logistic chain the vessel operator is not always in a position to pass on the environmental costs to the shipper or broker. As a consequence the IWT sector itself is, with regard to the payment of the earmarked contribution, identified in the study as the polluter.

38. As regards the contribution, two options are proposed, both linked to the fuel used for navigation and thus based on navigation: a contribution based on a flat rate for the bunkered amount of fuel/energy or a contribution based on the emission label⁽¹¹⁶⁾/energy combined with

¹¹⁰ Convention on the collection, deposit and reception of waste generated during navigation on the Rhine and other inland waterways, signed at Strasbourg, 9th September 1996 between Belgium, Germany, France, Luxemburg, the Netherlands and Switzerland. The PPP is recalled in the preamble: "convinced furthermore that the collection, deposit, reception and disposal of shipboard waste should be financed according to the "polluter pays" principle"

¹¹¹ See the study: *Environmentally differentiated port dues. Final Report*, IVL Swedish Environmental Research Institute, 2019. As expressed in the Commission's White Paper on Transport Policy, "the fundamental principle of infrastructure charging is that the charge for using infrastructure must cover not only infrastructure costs, but also external costs, that is, costs connected with accidents, air pollution, noise and congestion".

¹¹² With regard to the ongoing work of the EU Commission (see: European Commission, 2017, Study on differentiated port infrastructure charges to promote environmentally friendly maritime transport activities and sustainable transportation)

¹¹³ ECORYS, 36

¹¹⁴ ECORYS, 36-37

¹¹⁵ ECORYS, 36-37

¹¹⁶ The idea of laying down an EU emissions labeling system is supported by the European Parliament (see: E.P. resolution of 14 September 2021 towards future-proof inland waterway transport in Europe (2021/2015 (INI)), point 17: "Calls on the Commission to assess the possibility of devising an EU emissions labelling scheme for inland waterway transport that provides readily available information on the energy performance of ships"

the bunkered amount of fuel/energy per vessel. According to the study the latter one is the most feasible, because this option gives an additional incentive and promotes cleaner vessels which ultimately results to a bigger score on effectiveness and fairness as compared to the other option⁽¹¹⁷⁾. Whereas in both options the contribution is levied directly at the moment of bunkering, in most cases the contribution will be paid by the vessel operator, who is not always the vessel owner. However not only the vessel operator but also the vessel owner will benefit from financial support under the Greening Fund. Also, in some cases the time-charterer of the vessel pays directly the bunkering price and eventually passes on the environmental costs to the shipper. Furthermore not all types of vessels used for transport have engines and therefore most likely cannot obtain any financial support of a Greening Fund. But at the same time, as part of a convoy they are also partly liable for emissions. Therefore, from a legal point of view, identifying the IWT sector as the polluter, is not enough. Consideration must also be given to identifying the natural or legal person who will have to pay the contribution and the natural or legal person that can benefit from financial support.

39. Establishing a Greening Fund financed with contributions of the sector may be regarded as a measure falling within the scope of the competencies of the CCNR pursuant to art. 45b of the Revised Convention for the Navigation of the Rhine. The measure concerns the prosperity of Rhine navigation furthering environmental improvement and improving the sustainability of the Rhine fleet. The CCNR considers the competence to lay down measures restricting pollution by means of emissions as a concurrent competence with the Rhine Contracting States⁽¹¹⁸⁾. As aforementioned by the 2018 Mannheim Declaration the Rhine Contracting States have tasked the CCNR to develop measures concerning the use of engines, thus recognizing and confirming the competencies of the CCNR in this area. Measures with regard to engines used on board of vessels, such as standards of engine emissions with a view of improving their sustainability may also be regarded as provisions furthering technical progress as regards the environment. Therefore the CCNR may also lay down measures to discourage the use of less environmental friendly engines or even in time to forbid the use of it.

40. Furthermore, as explained above, the competencies of the CCNR have not been curtailed by the Union Treaties⁽¹¹⁹⁾. However, to ensure a level playing field, a European funding and financing instrument must be open on the same terms to vessel owners of Member States of the CCNR, the EU as well as of Danube riparian States (Serbia and Ukraine in particular)⁽¹²⁰⁾. Restricting the scope of applicability of the Greening Fund to Rhine vessels would imply excluding a considerable number of inland vessels. Also it must be recalled that, pursuant to Council Regulation (EEC) 2919/85 Rhine navigation is open to vessels of all EU Member States⁽¹²¹⁾. Also, measures relating to reducing emissions of engines of commercial vessels used for transport and thus contributing to the sustainability of the inland navigation fleet may be regarded as provisions falling under the scope of art. 91.1 d) TFEU and thus part of the common transport policy⁽¹²²⁾. In view of Articles 3 TEU and Articles 6 and 191 TFEU, the environmental

¹¹⁷ ECORYS, 119

¹¹⁸ See the Explanatory Memorandum of the Secretariat of the CCNR with regard to the Protocol 2003-II-10 regarding the interpretation of the Act of Mannheim

¹¹⁹ See my “Legal opinion Legal opinion regarding the Rhine Regime and the competencies of the CCNR in respect of secondary Union IWT Law with special regard to the non-paper on the EU position regarding draft regulation for Rhine Navigation Personnel (RPN)

¹²⁰ See the note of the CCNR Secretariat Proposal for a recast of the Directive on the taxation of energy products and electricity – impact on inland waterway transport

¹²¹ *O.J.*, L 280, 22.10.1985, p. 4–7

¹²² Measures have been recognized as such by Regulation (EU) No 546/2014 of the European Parliament

objectives of the Treaty have to be pursued inter alia through the Common Transport Policy (¹²³). Therefore, as a measure to improve the sustainability of the inland navigation fleet, setting up a Greening Fund shall require cooperation between the EU, the CCNR and the other river commissions (Danube Commission, Sava Commission and Moselle Commission) and thorough considerations with regard to the choice of the most suitable legal instrument: an international convention or a EU Regulation in combination with a CCNR Regulation and eventually agreements with other third States.

41. In this context, it may be recalled that the concept of contributions paid by the sector with a view to improve the position of the sector as well as the concept of the establishment of a fund, based on contributions paid by the sector, are not new. Reference can be made, on the one hand, to the draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels (¹²⁴), based on an international agreement, and on the other hand, based on EU Regulation in combination with CCNR regulation, the scrapping and old for new funds (¹²⁵), granting premiums from the fund to any owner scrapping a vessel forming part of the active fleet, and the so called reserve funds (¹²⁶), financed by the surplus funding from the structural improvement schemes and special old for new contributions, both consisting solely of financial contributions from the industry and financial resources which could be made available in the event of serious disturbance of the market (¹²⁷). This mandatory system of contributions encompassed the entire interconnected EU and Rhine waterways network at the time (¹²⁸) and applied to vessels carrying goods. The scrapping and reserve funds were established as national funds, set up by the Member States concerned and Switzerland, under its national legislation and with its own administrative resources. The funds are administered by the competent authorities of the states concerned, the national organisations representing inland waterway carriers are involved in the administration (¹²⁹).

and of the Council of 15 May 2014 amending Council Regulation (EC) No 718/1999 on a Community-fleet capacity policy to promote inland waterway transport, *O.J.*, L 163, 29.5.2014, p. 15–17.

¹²³ see: E.C. Decision, State Aid SA.50217, Swedish Eco-bonus scheme for short sea shipping and inland waterway transport, Brussels, 09.11.2018, (2018) 7565 final).

¹²⁴ See Opinion 1/76, Opinion of the Court given pursuant to Article 228 para. 1 of the EEC Treaty concerning a draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels, *Common Market Law Review*, 1977, 639-647

¹²⁵ Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, *O.J.*, L 116, 28.04.1989, p. 25–29. The Court of Justice held the view that the scrapping program was appropriate within the meaning of Article 75(1)(c) of the Treaty, as it stood at the time the program was adopted, and that it does not infringe the principles of equal treatment or proportionality, the fundamental right to property or the freedom to pursue a trade or business (ECJ, 17 July 1997, joined Cases C-248/95 and C-249/95, ECLI:EU:C:1997:377.

¹²⁶ Council Regulation (EC) No 718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport, *O.J.*, L 090, 02.04.1999, p. 0001–0005.

¹²⁷ Art. 7 Council Directive 96/75/EC of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community, *O.J.*, L 304, 27.11.1996, p. 12–14. There is a remaining fund of € 26.87 million available.

¹²⁸ However, vessels with a dead weight of less than 450 tonnes could be excluded by the states concerned from the scope of the Regulations if the economic and social situation in the sector of those vessels so required (art. 2.3 Council Regulation (EEC) no. 1101/89 and 3.2 Council Regulation (EEC) no. 718/99)

¹²⁹ Art. 3.2 Council Regulation (EEC) no. 718/99

42. The payment of contributions and the restrictions laid down in the EEC Council Regulations with regard to new capacity, have been regarded by the Rhine Contracting States as a restriction of the principle of free navigation, however reconcilable with the Rhine Regime due to its temporarily character. Therefore, with a view to preventing or eliminating a legal conflict with the Rhine Regime, by the Additional Protocols no. 4 ⁽¹³⁰⁾ and 5 ⁽¹³¹⁾ the Rhine Contracting States agreed upon that Rhine navigation may be subject to temporary measures of structural improvement, notwithstanding the general principles contained in the Revised Convention for Rhine Navigation. In order to ensure that the measures laid down in respect of the contributions of the vessel owners and the scrapping and old for new scheme were applied uniformly in all the Rhine Contracting States, the CCNR has been empowered to take a resolution conforming to the rules adopted in this regard by the EEC ⁽¹³²⁾.

43. Since 2014, under fixed conditions and if unanimously requested by the organisations representing inland waterway transport ⁽¹³³⁾, the Reserve Funds may be used inter alia to encourage innovation in respect of vessels and their adaptation to technical progress as regards the environment, including environmentally-friendly vessels ⁽¹³⁴⁾. The use of the Reserve Fund resources can be combined with other financial instruments (e.g. EIB, CEF). As a legal consequence the use of funds set up by means of contributions from the industry, for the adaptation of vessels to technical and environmental requirements, including their adaptation to the further development of European standards on engine emissions, as well as for the encouragement of engine fuel efficiency, of the use of alternative fuels and of any other measures to improve air quality, and for environmentally-friendly vessels, including river-adapted vessels, is already accepted under Union Law as forming part of the common transport policy and the “acquis Communautaire fluvial” ⁽¹³⁵⁾. The use of the reserve funds for measures to encourage innovation in respect of vessels is however subject to action at Union level ⁽¹³⁶⁾.

¹³⁰ Art. 1 “Rhine navigation may be subject to temporary measures of structural improvement, notwithstanding the general principles contained in the Revised Convention for Rhine Navigation”.

¹³¹ Art. 1 « Nonobstant les principes généraux contenus dans la Convention révisée pour la Navigation du Rhin, la navigation rhénane peut, jusqu’au 29 avril 2003, être soumise à des conditions relatives à la mise en service de cale supplémentaire, telles que l’obligation pour les propriétaires mettant en service de la cale supplémentaire de déchirer simultanément un volume équivalent de cale ou de verser une contribution spéciale au fonds de la navigation intérieure ».

¹³² Art. 3 Additional Protocol no. 4

¹³³ Art. 3.5 Council Regulation (EEC) n° 718/99

¹³⁴ Art. 8 Council Regulation (EEC) 718/99 as amended by Regulation (EU) No 546/2014 (cited above). Part of the Reserve Funds has been used for the IWT (see: Decision by the European Commission (C2017/6663 final). According to the ECORYS study there is still an amount of 26.87 million euro is still available and therefore could be used for measures on greening at community level.

¹³⁵ See: Recital 11 of Regulation (EU) No 546/2014

¹³⁶ Art. 3.5 Council Regulation (EEC) no. 718/99. The Ecorys study (114) therefore holds the view that therefore clear that the Reserve Fund can be utilised to play a direct role in the financial instruments for the greening of the fleet and suggests to leverage the reserve funds by means of those existing funds as well as of possible financing instruments (direct or indirect) from the European Investment Bank (ECORYS, 115). However, from a legal point of view the use of the reserve funds will raise the question to which undertakings aid may be granted, all EU and Swiss undertakings or only undertakings of states that have set up in the past the national funds or even only undertakings that in the past have contributed with regard to dry cargo vessels, pushboats or tanker vessels. This legal question is not dealt with in this legal opinion, however the theorem advocated in the Ecorys study (113) that the question who owns the money is easy to answer and that the contributions to the scrapping and old for new funds qualify as a fine, are not endorsed.

44. The contributions to the scrapping and old for new funds were based on the tonnage of the vessel. Whereas, according to the aforementioned study, the contribution to the “Greening Fund” should be levied on the fuel bunkered, modalities for levying the contribution could therefore be inspired from the CDNI. However, from a legal point of view the contributions to the fund cannot be qualified in the same manner as the CDNI contributions, which are paid for a service rendered to the vessel operator, disposal of oily and greasy waste. According to the preamble of the CDNI therefore the contribution is not a variance with art. 1 of the 1952 Strasbourg Convention (¹³⁷). However, in the case of a contribution to the greening fund, this contribution is not paid for a service rendered (¹³⁸). Linking the contribution to a service rendered could be possible from a theoretical point of view, e.g. if the contribution should be paid for the service rendered to the operator of providing shore-side electricity (walstroorn/raccordement électrique à quai/Landstrom). This service, rendered to reduce emissions in ports, is nowadays already charged by port dues. The goal of the Greening Fund however is, at first sight, not to provide such a service nor any other service, except perhaps the subsidiary service of advice, but to endeavour the reduction of emissions by granting aid in return for the contribution. The main idea is to use the fund for investments in greening techniques which are necessary to realize the energy transition (¹³⁹).

45. Therefore the contribution also does not qualify as a tax, being a compulsory contribution to state revenue, levied by the government on income and business profits, or added to the cost of some goods, services, and transactions with a view to cover public expenses. Nor does it qualify as a fine, the contribution is not paid as punishment for an infringement. As explained, the earmarked contributions from the sector will in turn be used for the sector, and therefore are goal based. In this sense they are comparable with the contributions that were paid to the scrapping and old for new funds, which were also goal based. But the contributions paid to these funds did not create on itself a right to obtain financial support. Only in the case of scrapping tonnage a premium could be obtained. The contributions to the scrapping and old for new funds therefore qualify as a duty (of another kind than a tax or retribution) or charge having equivalent effect. Consequently the obligation to pay the contribution was regarded by the Rhine Contracting States as a (financial) burden on and restriction of (free) navigation (¹⁴⁰), however one that, because of the temporarily character, did not infringe with the general principles of the Rhine regime, laid down in the articles 1 and 3 of the Revised Convention for

¹³⁷ “noting in particular that the levying of a uniform international charge for the reception and disposal of the oily and greasy waste produced in the course of operating the vessel, based on the amount of gas oil sold to inland navigation vessels, does not infringe the principle of exemption from customs duty and other taxes in the States bordering the Rhine and in Belgium, as stated in the Agreement of 16 May 1952 on the customs and tax regime for gas oil used by vessels navigating the Rhine”

¹³⁸ The study mentions the eventuality of greening advice that will be provided, but agrees that this is not enough to qualify the payment of a contribution as a payment for a service rendered and that thus the contribution cannot be qualified as a fee (ECORYS, 60). Aids granted by Member States which are covered by Community rules on competition do not fall under the scope of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *O.J.*, L 376, 27.12.2006, p. 36–68 (see art. 1.3).

¹³⁹ In the ECORYS study, 115, a time span of 25 years (2025–2050) is mentioned, therefore much longer than the time span of the scrapping and old for new funds. The Additional Protocols no. 4 and 5 have not defined the time span.

¹⁴⁰ According to Protocol 10 Headlines for the interpretation of the Act of Mannheim, measures laying down obligations for the users of waterways relating to navigation, are regarded as a restriction of free navigation. The obligation to pay a contribution, with the consequence that participating to Rhine navigation is subject to the payment of this contribution, may be qualified as a restriction, because this obligation is not provided for by the Act of Mannheim.

the Navigation of the Rhine, because of the temporarily character of the scheme. Likewise the payment of contributions to a Greening Fund could also be regarded as a (financial) burden on navigation.

46. Provided the scheme of the Greening Fund also has a temporarily (¹⁴¹) and non-disproportionate character and the contributions are levied on a non-discriminatory basis, it may be advocated that the obligation to contribute also is not at variance with the general principles of the Rhine Regime. With regard to the scrapping and old-for-new funds, an obligation to contribute over a period of 10 years has been regarded as having an temporarily character. With regard to the proportionality of the measure, the measure aims to reduce emissions affecting the environment and at the same time to improve the environmental conditions of navigation and therefore also to contribute to upholding and strengthening the environmental and economic position of IWT at Union level as well as the wellbeing of Rhine navigation. The proportionality of the measure will depend on the period of existence of the measure and the level of the contribution (¹⁴²). Contribution rates should have to be fixed at a level allowing the Funds sufficient financial resources to make an effective contribution to reducing engine emissions, however taking into account the economic position of the sector.

47. Whereas no reference can be made to the Additional Protocols no 4 and 5, because these protocols only have an interpretative character with regard to measures containing structural improvements by way of scrapping capacity or restricting new capacity, a new additional protocol will be needed to prevent or eliminate any discussion with regard to compliance of the scheme with the Rhine Regime. But the legal situation is still more complex than in respect of contributions paid to the scrapping and old for new funds. The latter were based on the tonnage of the vessel, the contributions with regard to the Greening Fund will be based on the fuel used on board of a vessel. As such, the contribution is at variance with art. 1 of the Strasbourg Convention. Therefore, with a view to eliminating or preventing a legal conflict with this convention, the convention needs to be amended or, at least, a CCNR Resolution (¹⁴³) or interpretative declaration will be needed to ascertain that the contribution is not at variance with art. 1. Obviously a new interpretative protocol and an amendment or declaration require the common consent of all Rhine Contracting States. Because the 1952 Strasbourg Convention also forms part of the provisions of the Moselle Convention the consent of the G.D. of Luxembourg will also be required.

48. The preceding legal considerations are based on the assumption of the laying down of the scheme in an international convention or an EU and Rhine regulation, introducing for the polluter (or the undertaking identified as the debtor) a legal obligation to contribute. The preceding legal considerations therefore are based on the assumption that undertakings are not free to participate or not to participate in the Greening Fund. However, the PPP and thus the contribution can also be implemented by means of a voluntary approach – and therefore not as an obligation – for which the Norwegian NOx Agreement (¹⁴⁴) may serve as a model. The NOx

¹⁴¹ ECORYS, 46

¹⁴² According to the Ecorys study, p. 115, the contribution by the sector could consist of € 53 – 106 mln per year, based on the (average) contribution per litre of fuel of 4 – 8 cents. If such a contribution would be made during a time span of 25 years (e.g. 2025 – 2050 period) this can run up to a figure of € 1.325 to 2.65 bln, whereas the 4 cent scenario seems more feasible as compared to the 8 cent scenario.

¹⁴³ Pursuant to art. 4 of the 1952 Strasbourg Convention « Les questions qui se poseraient au sujet de l'interprétation ou de l'application du présent accord seront soumises à la Commission Centrale pour la Navigation du Rhin. »

¹⁴⁴ <https://www.nho.no>

Agreement is an environmental agreement signed between the Norwegian State and a number of business organisations, inter alia vessel owners Associations with a goal to reduce NOx emissions. The first NOx Agreement concerned the period 2008-2010, the second one the period 2011-2017 and the present one the period 2018-2025. The agreement is an alternative for the tax scheme that has been introduced on the 1st January 2007, introducing the payment of a tax per kilogram of emitted nitrogen oxides (NOx) on energy production from inter alia propulsion machinery. Beginning 1 October 2010 the tax also encompasses waste incineration. The Agreements provide for the establishment by the Business Associations of a fund, - the Business Sector's NOx Fund -, whose purpose is to support undertakings in Norway in implementing measures to reduce NOx and to ensure that the fund's members contribute to this endeavour. Emission ceilings are laid down in the agreement for two-year periods, that may not be exceeded.

49. The NOx Fund shall require on behalf of the business organisations payment per kg of NOx emissions from undertakings that affiliate themselves with the Agreement. The fund shall on behalf of the business organisations provide financial support for cost-efficient measures to reduce NOx. Every undertaking that is responsible for NOx emissions, and that is encompassed by the Agreement's scope, may affiliate itself with the Environmental Agreement by sending a Participant Agreement to the NOx Fund. In order to join the fund though, companies must develop long-term plans for reducing their NOx profile. This profile needs to include relevant cost-effective NOx reducing measures which can be taken at first instance without applying to the fund for support. The "Certificate of Participation" gives the right to exemption from the tax for the period that the certificate is not withdrawn and provided that the environmental obligations – reducing NOx emissions in line with the emissions ceilings - are fulfilled. Enterprises pay a small fee to the fund instead of the high fiscal fee of the Government. The NOx agreement includes support for NOx reducing measures, however obtaining support is not a certainty. An application for support may be rejected. In any case the aid is paid in relation to realized reduction in emissions. The final aid amount is determined after the measure has been completed and the NOx reduction is verified by DNV.

50. Whereas the participation of undertakings to the NOx Fund is based on voluntariness, therefore the payment of the contribution is not based on a binding regulation and is not mandatory. Undertakings are free to participate or not to participate and thus free to decide on paying a contribution or not paying a contribution. However if enterprises don't participate to the NOx Fund, they have to pay the tax and even if they participate they might still pay the tax if they do not comply with the obligation laid down in the agreement not to exceed fixed emissions ceilings. The voluntariness of participation to the agreement therefore is rather theoretically and relatively, because not participating leads to payment of an energy tax much higher than the contribution.

51. Art. 3 of the Revised Convention and art 1 of the 1952 Strasbourg Convention only concern measures taken by the CCNR or the Contracting States, or eventually local authorities, which have a binding character for the beneficiaries of the right of free navigation. It may be recalled that the Revised Convention for the Navigation of the Rhine is an agreement between Contracting States, laying down obligations incumbent upon the Contracting States. Pursuant to art. 3 the Contracting States have agreed among themselves not to levy dues based solely on navigation⁽¹⁴⁵⁾. Contributions paid to a fund by vessel operators on a voluntary basis therefore cannot be regarded as duties levied by the Contracting States solely on the fact of navigation.

¹⁴⁵ DE RANITZ, H., *De Rijnvaart-acte*, Leiden, Sommerwil, 1889, 77

As a legal consequence, if the Greening Fund would be based on a voluntarily basis as is the case under the NOx Agreement, no interpretative protocol nor declaration will be required. However, in combination with and as an alternative for a higher energy tax, from a legal point of view laying down a similar system with regard to the Greening Fund shall, either imply recognition of the legality under the Rhine regime of an energy taxation on fuel used on board of a vessel or require, as a minimum, amending the Rhine regime in that sense, or, as an alternative, setting up the system without linking it to a taxation scheme. But in the latter case most likely flanking measures, in line with the Rhine regime, will be needed to endeavour undertakings to participate to the fund.

52. Furthermore, whereas the financial support reduces the costs of the beneficiaries which it would have to bear on its own under normal market conditions (¹⁴⁶), the support will most likely qualify as state aid (¹⁴⁷). It goes without saying that the (state) aid provided for under the fund scheme therefore must comply with EU state aid regulation and that the measures provided for in the regulation of a Greening Fund and their implementation do not distort, or threaten to distort, competition, in particular by favouring certain undertakings to an extent which is contrary to the common interest (¹⁴⁸). Pursuant to Article 107 (1) of the Treaty on the Functioning of the European Union ('TFEU') '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 or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market' (¹⁴⁹). Furthermore, according to a constant Commission decision practice, aid for the coordination of transport is deemed compatible with the internal market under Article 93 TFEU if the following conditions are met: (1) The aid must contribute to a well-defined objective of common interest; (2) The aid must be necessary and provide an incentive effect; (3) The aid must be proportionate; (4) Access to the aid in question must be open to all users on a non-discriminatory basis (¹⁵⁰).

¹⁴⁶ See e.g.: Decision of the Commission, State Aid SA.50217 (2018/N – Sweden – Sweden ECO bonus scheme for short sea shipping and inland waterway transport, point 26

¹⁴⁷ To constitute State aid, the measure at issue must confer a financial advantage on the beneficiary. An advantage comprises not only a positive benefit, but also all the measures which in various forms mitigate the charges which are normally included in the budget of an undertaking (ECJ, 8 November 2001, *Adria-Wien Pipeline*, C-143/99, EU:C:2001:598, paragraph 38).

¹⁴⁸ The Commission has considered aid for investments of up to 50% of the eligible costs compatible with the internal market (see Commission decision of 4 February 2014, SA 37293, *Belgium, Prolongation du regime d'aides en faveur des modes de transport alternative à la route pour la période 2014-2020*, *O.J.*, C 163, 28.05.2014, p. 1).

¹⁴⁹ In accordance with the Court's settled case-law, for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (ECJ, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 76 and case-law cited).

¹⁵⁰ See: Decision of the Commission, State Aid SA.50217 (2018/N – Sweden – Sweden ECO bonus scheme for short sea shipping and inland waterway transport, Brussels, 9.11.2018, C(2018) 7565 final, point 53; Decision of the Commission, Aide d'Etat SA.48332 (2017/N) – France Prolongation du plan d'aide au report modal vers le transport par voies navigables (PARM), Brussels, 29.5.2018, C(2018) 3209 final, 38). The financial support under the scrapping scheme was regarded as falling under the scope of the aid rules of the EEC Treaty, including art. 77 EEC Treaty (= art. 93 TFEU) granting of aids meeting the needs of coordination. See Recitals 10-12 of the preamble of Council Regulation (EEC) no. 1101/89: "whereas, as Article 77 makes clear, this policy may include the granting of aids, in particular if they meet the needs of coordination of transport; whereas the Community's action in this area, including aids, must however take into account the various general objectives of Article 3 of the Treaty and in particular that

53. The concept of "coordination of transport" used in art. 93 TFEU (formerly art. 77 EEC) has a significance which goes beyond the simple fact of facilitating the development of an economic activity⁽¹⁵¹⁾. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest. The development of multimodal transport and of activities that contribute to reduce air pollution and road congestion are, according to the Commission, in the common interest⁽¹⁵²⁾. The Commission already considered a scheme encouraging a modal shift of the carriage of goods from road to sea and inland waterways, in order to reduce the emissions of air pollutants and greenhouse gases, by subsidizing the eligible costs incurred by using inland water routes instead of road transport, as contributing to an objective of common interest⁽¹⁵³⁾. It may be recalled that a European Strategy for Low-Emission Mobility adopted by the Commission on 20 July 2016 re-iterates the necessity of incentivizing a shift towards lower emission transport modes such as inland navigation transport which is energy efficient and contributes to the goals of the low carbon economy, set out in the EU's Transport Policy White Paper.

54. In this context, it may be observed that in the Netherlands an aid scheme for greening of IWT vessels, used for commercial transport, was introduced, into force since 29 January 2021⁽¹⁵⁴⁾. According to the Explanatory Memorandum the aid scheme is an outcome of the so called Green Deal Maritime Navigation, Inland Navigation and Ports of June 2019 setting the goal to achieve a zero emission and climate neutral inland navigation in 2050. The aid scheme is open to all EU and Swiss IWT operators, provided that the vessel for which the support is meant to be, has been operated at least 60 days on Dutch inland waters in a period of 12 months preceding the application and will be likewise in the two years following the execution of the works (art. 1 juncto 7.4 and 8.3). The support concerns measures such as the purchase and installation of engines complying with the NRMM- EU Regulation⁽¹⁵⁵⁾ or electric drive motors, and is limited

of Article 3 (f), concerning competition; whereas, as with all aids subject to the rules of Article 92 et seq of the Treaty, it is desirable to ensure that the measures provided for in this Regulation and their implementation do not distort, or threaten to distort, competition, in particular by favouring certain undertakings to an extent which is contrary to the common interest”.

¹⁵¹ See: Decision of the Commission, State Aid SA.50217 (2018/N – Sweden – Sweden ECO bonus scheme for short sea shipping and inland waterway transport, Brussels, 9.11.2018, C(2018) 7565 final, point 53; Decision of the Commission, Aide d'Etat SA.48332 (2017/N) – France Prolongation du plan d'aide au report modal vers le transport par voies navigables (PARM), Brussels, 29.5.2018, C(2018) 3209 final, 38).

¹⁵² See: Decision of the Commission, State Aid SA.50217 (2018/N – Sweden – Sweden ECO bonus scheme for short sea shipping and inland waterway transport, Brussels, 9.11.2018, C(2018) 7565 final, point 60; Decision of the Commission, Aide d'Etat SA.48332 (2017/N) – France Prolongation du plan d'aide au report modal vers le transport par voies navigables (PARM), Brussels, 29.5.2018, C(2018) 3209 final, point 40).

¹⁵³ See: Decision of the Commission, State Aid SA.50217 (2018/N – Sweden – Sweden ECO bonus scheme for short sea shipping and inland waterway transport, Brussels, 9.11.2018, C(2018) 7565 final, point 61; The goal to achieve a modal shift from road transport to other transport modes, such as IWT is one of the cornerstones of the White Paper-Roadmap to a Single European Transport Area-Towards a competitive and resource efficient transport system, COM (2011) 144 of 28.03.2011, and of the Communication from the Commission on the promotion of inland waterway transport "NAIADES": An integrated European action programme for inland waterway transport, COM (2006) 6 of 17.01.2006.

¹⁵⁴ Regeling van de Minister van Infrastructuur en Waterstaat, van 26 januari 2021, nr. IENW/BSK-2021/10986, houdende vaststelling van de Tijdelijke subsidieregeling verduurzaming binnenvaartschepen (Tijdelijke subsidieregeling verduurzaming binnenvaartschepen 2021-2025), *St.crt.*, 29.01.2021

¹⁵⁵ Art. 36 Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September

to 40% of the investment with the additional restriction of € 200.000 per ship (art. 4.5). The aid scheme is justified on the basis of art. 36 Regulation (EU) 651/2014 of the Commission of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (¹⁵⁶). The aid scheme is not open to vessels that are under a legal obligation to be equipped with Stage V engines, type IWP, IWA or NRE as provided for under the NRMM Regulation, i.e. newbuilt vessels and vessels of which the engine cannot be used anymore and must be replaced.

Final Conclusions

§ 1. Conclusions with regard to art. 15 ETD Proposal in respect of the Rhine Regime

55. Art. 15.1 of the ETD Proposal lays down a taxation scheme for IWT navigation that is not only at variance with the 1952 Strasbourg Agreement relating to the exemption from taxes of diesel oil consumed as fuel on board of vessels, but also with art. 3MA and art. 111 of the Final Act of the Congress of Vienna and the principle of the relative gratuity of the use of waterway, regarded in legal doctrine as a rule of regional customary law, prohibiting the levying of dues solely based on navigation, i.e. not covering costs or expenditure related to services rendered to navigation. The scope of art. 3 MA is not restricted to dues levied before 1868, but applies to all kinds of dues, known and unknown at that time and regardless the terms used, their character and purpose. The proposed tax is not related to a service rendered to navigation, as is e.g. the case for the retribution paid for oily waste disposal, but based on the mere fact of navigation, considering navigation as a polluting factor due to the use of fuel consumed on board of a vessel, that for that reason, must be taxed.

56. The Act of Mannheim as well as the 1952 Strasbourg Agreement, as a subsequent agreement, are older treaties than the Union treaties and its predecessors, entailing rights of third States. The Rhine regime and the principles of international river law, including the principle of the relative gratuity of the uses of waterways, form part of the relevant rules of international law. The principles of common consent and unity of the legal system are laid down 200 years ago and applied since and are recognized in the international legal order as forming part of European public law. The establishment of the EEC and later the EU did not make an end to the application of these rules nor the application of the pre-existing river acts. No

2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC, *O.J.*, L 252, 16.9.2016, p. 53–117. See also: art. 9.01 ES-TRIN (Edition 2019/1)

¹⁵⁶ *O.J.*, L 187, 26.6.2014, p. 1–78. The aid therefore is qualified as “Investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards” (art. 36.1). Whereas aid shall not be granted where investments are undertaken to ensure that undertakings comply with Union standards already adopted and not yet in force (art. 36.3), by way of derogation aid may be granted for (a) the acquisition of new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Union standards, provided that the acquisition occurs before those standards enter into force and that, once mandatory, they do not apply to vehicles already purchased before that date; (b) retrofitting of existing transport vehicles for road, railway, inland waterway and maritime transport, provided that the Union standards were not yet in force at the date of entry into operation of those vehicles and that, once mandatory, they do not apply retroactively to those vehicles (art. 36.4). Pursuant to art. 36.6-7 the aid intensity shall not exceed 40 % of the eligible costs, but may be increased by 10 percentage points for aid granted to medium sized undertakings and by 20 percentage points for aid granted to small undertakings.

provision of the transport title of the TFEU nor any other provision of the EU Treaties provides for the abolition of the pre-existing river acts nor for the transfer of competencies laid down in these river acts. Environmental issues, in so far as they are directly or indirectly related to navigation, do not fall outside the scope of the Rhine regime, the common consent principle and the principle of the unity of the legal system apply. More, the 1952 Strasbourg Agreement provides for the exclusive competence of the CCNR with regard to the application and interpretation of the Agreement.

57. The Explanatory Memorandum does not take in consideration the relevant rules of international law and the application of art. 351.1 TFEU, restricting itself to referring only to the loyalty obligation of the EU Member States. The proposed taxation cannot be seen independent of the common transport policy laid down in the Transport Title of the TFEU providing for specific rules to be taken into account, in particular the distinctive features of transport. In the opinion of the EC the price of transport must reflect the impact it has on the environment and on health. The proposed taxation therefore is a measure taken within the framework of the Treaties in respect of transport rates and conditions, but the measure does not take account of the economic circumstances of IWT carriers. Nor is the measure appropriate to achieve the goal of (near) zero emission energy sources.

§ 2. Conclusions with regard to a sector energy contribution as an alternative for an energy tax scheme

58. The establishment of a Greening Fund may be an appropriate alternative for an energy tax measure to achieving the goal of (near) zero emission energy sources. Supporting energy transmission by reducing engine emissions and furthering technical and environmental innovation of vessels used for Rhine navigation, may contribute to the prosperity of Rhine navigation. Measures taken to achieve these goals therefore, pursuant to art. 45b of the Revised Convention for the Navigation of the Rhine, fall under the scope of the competencies of the CCNR. However, to ensure a level playing field, a European funding and financing instrument must be open on the same terms to vessel owners of Member States of the CCNR, the EU as well as of Danube riparian States. Therefore cooperation will be required between the EC and the river commissions. In view of Articles 3 TEU and Articles 6 and 191 TFEU, the environmental objectives of the Treaty have to be pursued inter alia through the Common Transport Policy⁽¹⁵⁷⁾. Measures such as those intended with the establishment of a Greening Fund therefore qualify as measures falling under the scope of art. 91 (1) TFEU. With a view to preventing a legal conflict between the competencies of both the European Commission and the CCNR collaboration between both commissions will be required.

59. The payment of contributions to the fund may be based on a voluntarily or mandatory bases, but in the first case flanking measures will be needed to ascertain the positive impact of the measures. On a mandatory basis, payment of a contribution, having a temporarily, non-disproportionate and non-discriminatory character, qualifies as a restriction of free navigation under the Rhine Regime, that however may be justified as not being a variance with the art. 1 and 3 of the Revised Convention. With a view to preventing or eliminating an eventual legal conflict, the conformity of a temporarily, non-disproportionate and non-discriminatory contribution scheme with the general principles of the Rhine regime may be laid down in an additional protocol. However, levying the contributions on the basis of the fuel used on board

¹⁵⁷ see: E.C. Decision, State Aid SA.50217, Swedish Eco-bonus scheme for short sea shipping and inland waterway transport, Brussels, 09.11.2018, (2018) 7565 final).

of the vessel, furthermore requires amending art. 1 of the 1952 Strasbourg Convention or, at least, an interpretative Resolution of the CCNR or declaration of all the Contracting States and Luxembourg to align the contribution scheme with art. 1 of the convention.

60. With regard to the payment of the contribution consideration must be given to the definition of the polluter pays principle, the owner of the vessel not always being the operator of the vessel. As regards the financial support granted by the Greening Fund, this support may be considered compatible with the Union aid rules, inter alia meeting the needs of coordination of transport as well as art. 107 TFEU, provided the aid measures do not distort, or threaten to distort, competition, in particular by favouring certain undertakings to an extent which is contrary to the common interest. An aid scheme setting the goal to achieve a zero emission and climate neutral inland navigation in 2050 and open to all EU and Swiss operators on a non-discriminatory basis for vessels that are not under a legal obligation to be equipped with a Stage V engine, i.e. newbuilt vessels and vessels of which the engine can no longer be used and must be replaced, may be considered to be compatible with the Union aid rules.

November, 22, 2021

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