

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
EXECUTIVE SUMMARY**

(1)

Art. 3MA and art. 111 of the Final Act of the Congress of Vienna lay down the principle of the relative gratuity of the use of waterways, prohibiting the levying of dues solely based on navigation, i.e. not covering costs of works of maintenance or improvement of the waterway or expenditure related to services rendered to navigation.

The principle of the relative gratuity of the use of waterways is regarded in legal doctrine as a rule of regional customary law.

(2)

The scope of art. 3 MA is not restricted to dues levied before 1868, but applies to all kinds of dues, known or unknown at that time and regardless the terms used, as well as the character and purpose of the charge.

Environmental issues relating to navigation therefore are not outside the scope of the Act of Mannheim and art. 3 MA.

(3)

The 1952 Strasbourg Agreement providing for an exemption from dues for diesel oil consumed as fuel on board of vessels, is a subsequent agreement of the Act of Mannheim, interpreting art. 3 MA.

The 1952 Strasbourg Agreement, forming integral part of the Rhine regime, provides for the exclusive competence of the CCNR with regard to the application and interpretation of the Agreement.

(4)

Both the Act of Mannheim and the 1952 Strasbourg Agreement are older treaties in the sense of art. 351.2 TFEU, entailing rights of third States, in particular Switzerland.

Also, 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.

These rules, laid down 200 years ago and applied since, are recognized in the international legal order as forming part of European public law.

(5)

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, 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 waterways.

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.

(6)

The Explanatory Memorandum does not take in consideration the relevant rules of international river law and the application of art. 351.1 TFEU, restricting itself to referring only to the loyalty obligation of the EU Member States.

The establishment of the EEC and later the EU did not make an end to the application of these rules of international river law nor the application of the pre-existing river acts. No 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.

(7)

Furthermore, 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.

The proposed taxation is a measure taken within the framework of the Treaties in respect of transport rates and conditions, but does not take account of the economic circumstances of carriers. Nor is the measure appropriate to achieve the goal of (near) zero emission energy sources, a goal which may be achieved by other ways.

(8)

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.

The measures may contribute to the prosperity of Rhine navigation, improving the environmental conditions of navigation, furthering innovations and strengthening inland waterway transport.

Pursuant to art. 45b of the Revised Convention for the Navigation of the Rhine, these measures fall under the scope of the competencies of the CCNR.

(9)

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. 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 and with a view to encompass the entire interconnected waterways network collaboration between both commissions and other river commissions will be required.

(9)

A sector mandatory obligation to pay contribution which are in turn used for the sector, having a temporarily, non-disproportionate and non-discriminatory character, paid with a view to achieve improvement of the environmental conditions of navigation and furthering technical innovation, may be justified as not being a variance with the art. 1 and 3 of the Revised Convention for the Navigation of the Rhine.

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.

(10)

Levying the contributions on the basis of the fuel used on board of the vessel, will require amending art. 1 of the 1952 Strasbourg Convention or, at least, an interpretative Resolution of the CCNR or a declaration of all the Contracting States and Luxembourg to align the contribution scheme with art. 1 of the convention.

(11)

The payment of contributions to the fund may be based also on a voluntarily bases, but in that case flanking measures will be needed to ascertain the positive impact of the measures.

(12)

The financial support granted by the Greening Fund 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.

(13)

Defining the polluter requires special attention, given the fact that the vessel owner is not always the vessel operator and thus not always the polluter.

November, 22, 2021

Marc De Decker,