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THE INTEGRATION OF EUROPEAN WATERWAYS

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PREFACE

1. More than 30.000 km. of rivers and canals, connecting hundreds of important cities and industrial areas, traverse Europe ([1]). However, only part of this waterway network is used intensively for fluvial transport, that despite all the environmental benefits of it, represents but a minor share of the total national inland transport of goods within the European Union ([2]). In Western Europe fluvial transport is mainly concentrated in 7 countries: Austria, Belgium, France, Germany, Luxemburg, the Netherlands and Switzerland. In other West European countries fluvial transport, as far as it already exists (e.g. on the river Po in Italy, the Douro in Spain and the Thames in England), has until now but a minor economic and regional importance ([3]). Undoubtedly the most important waterway in the West European area is the river Rhine, along the whole course navigable for vessels of 1.350 tons and higher from Rheinfelden (Switzerland) into the sea. Other important waterways in this area are the rivers Meuse, Scheldt and Moselle and the network of rivers and canals that link these waterways to each other, such as the Rhine-Scheldt connection. Although most waterways in this area are linked to each other, there still exist some missing links, of which the most important is undoubtedly the Rhine-Rhone connection ([4]). In Central Europe fluvial transport is concentrated mainly on three rivers: the Danube, Elbe and Oder. The Danube and the Rhine are linked to each other by the Main-Danube canal that was opened to fluvial transport in 1992 ([5]). Probably the most important missing link in order to increase the possibilities of fluvial transport in Central Europe is the Oder-Danube-Elbe connection ([6]).

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[1] See: Proposal of 25.05.2004 of the Commission for a Directive of the European Parliament and the Council in regard of harmonized River Traffic Information Services on inland waterways in the Community, COM(2004) 392.

[2] Only 7% in the EU-15 and 12% in the States of the EU-15 that are provided of waterways. In the new Member States fluvial transport represents 9% in Rumania and Slovakia, 6% in Hungary, 3% in Bulgaria and 2% in the Czech Republic (see: Proposal …, fn. 1, 2-3).

[3] According to our information in Greece there even does not exist a specific word for an inland vessel

[4] SCHREIBER, M., "Rhein-Rhône-Verbindung gleichzeitig mit Rhein-Main-Donau", *Schiffahrt und Strom*, april/mei 1978, 5-6; SCHREIBER, M., "Le projet de liaison Rhin-Rhône et la Communauté Economique Européenne", *N.P.I.*, 1979, 341-344. This project has been already for more than 40 years considered to be of European interest by the E.C. (see for the E.C.: Report, *E.P*, session 1961-62, 11.12.1961, doc. 106, 142 (report "Kapteyn"); Memorandum of the Commission, *Bull.E.C.*, 1979, supplement 8/79; Proposal of the Commission in regard of the development of a European network of waterways, COM(92) 231 and *Bull.E.C.*, 6, 1992, 55; written questions no. 659/81 (Muntingh), *O.J.*, C 267/50 of 19.10.1981 and no. 1994/82 (Cousté)) as by the CEMT (see: WANNER, H., "Binnenschiffahrt an der Schwelle einer neuer Zeit", *Strom und See*, 1991, 62-66). Other important missing links that have been considered in the past to be of European interest, are among others: the Meuse-Rhine connection, the Adria-Langenmeer connection, the connection Dunkerque-Scheldt (see: Report in regard of the common transport policy in the European Economic Community (Report Kapteyn 1961), *E.P.*, Documents, 1961-62, 11 December 1961; Resolution of the E.P. of 9 December 1982 on inland waterways in the Community, *O.J.*, C 238/102).

[5] For a review on the realization of this canal, see e.g.: AVENTIN, M., "Officiële opening Rijn-Main-Donauverbinding", *De Lloyd*, 24 september 1992; PISECKI, F., "Die historischen Grundlagen der Situation Österreichs im europäischen Wasserstrassensystem", *Schiffahrt und Strom*, June/July 1979, (17-18), 17; PISECKI, F., "Organisation und Bedeutung einer gesamteuropäischen Binnenschiffahrtspolitik für die Hauptwasserstrassen zwischen Ost- und Westeuropa", *Z.f.B.*, 1988, (84-91), 84; PISECKI, F., "Im Schnittpunkt der Transitverkehre. Die Position Österreichs im europäischen Wasserstrassensystem", *Strom und See*, 1992, (142-143 and 146), 142; ROEHLE, W., "Die Donau als Wasserstrasse", *Z.f.B.*, 1992, (170-179), 170; TRAVERSIER, R., "Het kanaal van Karel", Knack, 23 september 1992. For a review of the economic

2. The major part of this West and East European inland waterways network, approximately 22.000 km., is nowadays navigable for vessels of 1.000 tons and higher, the so called E-waterways ([7]), and forms part of the TEN waterways network under Community Law ([8]). Despite some missing links and bottlenecks ([9]), this network opens possibilities for ensuring the sustainable mobility of goods under the best possible social, environmental and safety conditions. Also, the opening of the Main-Danube canal has created new chances and perspectives for an increased cooperation between the European Union (at that moment approximately 320 million inhabitants and 1/3 of the world trade) and the former Comecon (at that moment approximately 360 million inhabitants and 1/10 of the world trade). In the last two decades the latter has been strengthened first by the fall of the Iron Curtain and the social and economic changes in the Danubian countries with a gradual transition from planned economy to free economy, and more recently by the accession on May first 2004 of 10 new States to the European Union, of which five - Czech Republic, Hungary, Poland, Slovenia, Slovakia – play an important role in fluvial transport in East Europe. These political and economic changes have sustained the increasing idea of the necessity and advantages of the realization of one common pan-European fluvial transport policy with a harmonization of public and private European fluvial law ([10]). In this paper we will question the possible

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importance of this canal, see e.g.: CONTZEN, H., "Die Main-Donau-Verbindung als Element der deutschen Verkehrsplanung. Eine richtige Entscheidung für die Zukunft", *Strom und See*, 1992, 130-137; KLEIN MOLENKAMP, J.H., "De economische betekenis van het Rijn-Main-Donaukanaal", *T.v.Vw.*, 1975, 418-428; Report ECE "De economische betekenis van de Rijn-Main-Donauverbinding", 130-137; Report IFO, "Die internationale Bedeutung der fertiggestellten Rhein-Main-Donau-Grossschiffahrtsstrasse".

[6] See: SCHWANZER, J., "Realistisch ist nur noch Donau-Oder-Elbe", *Schiffahrt und Strom*, 1988, 7-10

[7] Class IV of the 1992 CEMT Classification of Waterways (see on this issue: FILIARSKI, R. and BROLSMA, J.U., "Neue Möglichkeiten für die europäische Binnenschiffahrt", *Z.f.B.*, 1990, 227-233; KÜPER, M., "Europäische Wasserstrassen und Europäische Binnenschiffahrt", *Internationales Archiv für Verkehrswesen*, 1992, no 9; MESTER, D. and PATZELT, H., "Das neue Klassifizierungssystem für die europäischen Binnenschiffahrtsstrassen und seinen Anwendung auf das deutsche Wasserstrassennetz", *Z.f.B.*, 1993, no. 18, 20-26). In order to improve the navigational use of this European network of waterways by introducing uniform infrastructural and operational parameters the European States have signed in 1997 the "European Agreement on Main Inland Waterways of International Importance (AGN)", done at Geneva on 19 January 1996. Signatory States are: Austria (29.09.1997), Croatia (23.06.1997), Czech Republic (23.06.1997), Finland (23.06.1997), France (24.09.1997°, Germany (23.06.1997), Greece (24.09.1997), Hungary (23.06.1997), Italy (24.09.1997), Lithuania (25.06.1997), Luxemburg (20.01.1997), Netherlands (23.06.1997), Republic of Moldova (23.06.1997), Roumania (23.06.1997), Russian Federation (26.09.1997), Slovakia (23.06.1997) and Switzerland. Following countries have ratified the Agreement: Bulgaria (28.04.1999), Croatia (27.04.1999), Czech Republic (08.08.1997), Hungary (22.10.1997), Italy (04.04.2000), Lithuania (28.04.2000), Luxemburg (29.06.1999), Netherlands 21.04.1998), Republic Moldova (23.04.1998), Roumania (24.02.1999), the Russian Federation (31.02.2002), Slovakia (02.02.1998) and Switzerland (21.08.19977), whereas five others – Germany, Finland, France, Greece and Austria have announced to ratify (see UNECE press-report 05.07.2002 – www.unece.org/trans/news/ 20020705e.htlm).

[8] See Annex I of Decision No. 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network, *O.J.*, L 228 of 9 September 1996

[9] One of the most important bottlenecks is the section of the Danube between Straubing and Vilshofen (see: White Paper 2001 "European transport policy for 2010: time to decide"; Council Decision of 17 July 2000 concerning the Community contribution to the International Fund 'Clearance of the Fairway of the Danube', *O.J.*, L 187, 26.07.2000; CONTZEN, H., "Anmerkungen zum Donauausbau Straubing-Vilshofen", *Z.f.B.*, 1993, nr. 18, 36-40). For a more detailed approach in regard of bottlenecks, see: VALKAR, I., "Investment in Inland Waterways? Infrastructure Needs", *CEMT Seminar. The inland waterways of tomorrow on the European continent*, Paris, 2002 6p.

[10] See: BARG, F., "Frei Schiffahrt – Fairer Wettbewerb", *Z.f.B.*, 2001, nr. 10, 11-12; HACKSTEINER, T.K., "Uniforme regels voor de Europese binnenvaart", *A.A.*, 1999, nr. 5, 86; NEDIALKOV, D., "Auf Donau und Rhein. Harmonisierung von Rhein- und Donauschiffahrt", *Die Internationale Wochenzeitung für Verkehrs-wissenschaft*, 27.06.2003, 6; PABST, H.U., "Eine Europäische Stromakte", anzustrebendes Ziel oder nur Illusion", *Z.f.B.*, 1998, nr. 14, 33-37; STRASSER, H., "Vordringliche Harmonisierung auf allen Ebenen,.

legislative obstacles that could hamper the establishment of a harmonized and competitive pan-European inland navigation market and therefore the realization of harmonization of public and private fluvial law. In the first part we will give a review of the substantive and formal public law relating to fluvial transport. In the second part we will briefly deal with the essential features of private law relating to fluvial transport. Finally, we will come to some conclusions and recommendations. We would like to emphasize that these conclusions and recommendations as well as the opionions expressed in this paper are strictly personal.

Europäische Binnenschiffahrtspolitik als Hauptziel", *Strom und See*, 1992, 135-137; STRASSER, H., "Die Donaukommission und eine gesamteuropäisches Binnenschiffahrtssystem", March-April 1995, 15; WOEHRLING, J.L., "Donau und Rhein arbeiten zusammen", *Schiffahrt und Strom*, 2002, no. 11, serial number. 180, 3-8; WOEHRLING, J.L., "Schiffahrt vereinheitlichen. Zentralkommission für den Rhein und Donaukommission proben die Annäherung", *Die Internationale Wochenzeitung für Verkehrswissenschaft*, 13.06.2003, 10. See also the Declaration adopted by the Rotterdam Pan-European Conference on inland Waterway Transport, 5 & 6 September 2001 "Accelerating Pan-European Co-Operation towards a free and strong inland Waterway Transport".

PART I. REVIEW OF THE SUBSTANTIVE AND FORMAL PUBLIC INTERNATIONAL LAW RELATING TO FLUVIAL TRANSPORT

1. The legal regime of international rivers.

1.1. The Final Act of the Congress of Vienna

3. Modern European public fluvial law starts with the proclamation, at the end of the 18th and the beginning of the 19th century, of freedom of navigation on European international rivers. Among the many conventions, treaties and documents that saw the light in this period, one can mention: the 1792 Scheldt Decree ([11]), the 1804 Rhine Patent Convention ([12]), art. 5 of the Peace Treaty of Paris (1814) ([13]) and especially the Final Act of the Congress of Vienna (1815) (art. 108-117) ([14]) with the annexes XVI A (in fact a reproduction of the artt.108-117), XVI B (special clauses concerning the navigation on the Rhine) and XVI C (special clauses concerning the navigation on the Neckar, the Main, the Moselle, the Meuse and the Scheldt) ([15]), having the same value as if they had been included verbatim in the Final Act (art. 117) and further three other provisions of the Final Act concerning freedom of navigation on named rivers, namely art. 14 (rivers and canals in the whole of the former Poland), art. 30 (Ems river), and 96 (Po river). In regard of the river Elbe the same principles were adopted in a separate Treaty of 14 may 1815 between Prussia and Saxon, also concluded at Vienna and attached to the Final Act of the Congress of Vienna as Annex IV.

4. In particular the articles 108-117 of the Final Act of the Congress of Vienna, being a result of the so called "Concert Européen" and a first attempt of codification of the law in the field of river navigation, can be from many different angles be considered as the turning point in the history of public fluvial law and the start of the modern law of international rivers. First of all the Final Act puts a final and conclusive end to the economic and natural impediments of fluvial transport during the Middle Ages and the Modern Times, such as high (and many times exorbitant) tolls, staple rights and other privileges of cities bordering the banks of international rivers, and the monopoly of boatmen's associations with regard to fluvial transport on some parts of the rivers. Secondly it considers the freedom of fluvial navigation no longer as a right derived from the law of nature, but as a right deriving from public law and of which the essential features must be settled in conventions – special river acts - concluded between the riparian States. This latter concept of free navigation creates the sound basis for a reconcilement between on the one hand the principle of sovereignty of each

[11] LE FUR, L. and CHKLAVER, G., *Recueil des textes de droit international*, 2° Ed., Paris, Dalloz, 1934, 67
[12] DE MARTENS, G.F., *Recueil*, VIII, 261; Rheinurkunden, I, 1918, 6.
[13] DE MARTENS, G.F., *Recueil*, suppl., VI, 6; STRUPP, K., *Documents pour servir à l'histoire des gens*, Berlin, 1923, I, 153 ; *British and Foreign State Papers*, I, 1038
[14] See: DE MARTENS, G.F., *Recueil*, suppl., VI, 429; STRUPP, K., *o.c.* (supra fn 10), I, 183-184 ; *British and Foreign States Papers*, 2, 52 et seq.; PARRY, C. (ed.), *Consolidated Treaty Series*, vol. 64, 1815, 453; HERTSLET, A., *Collection of treaties and conventions between Great-Britain and Foreign Powers*, vol. 1, 3
[15] STRUPP, K., *o.c.*, 153, 184

riparian State regarding the section of an international river that traverses or borders his territory and on the other hand the common interests of all riparian States with regard to these international rivers.

5. The principles of the Final Act of the Congress of Vienna later have been confirmed in other multilateral Treaties, such as the Dutch-Belgian Separation Treaty (1839) ([16]), the Peace Treaty of Paris ([17]) and the General Act of the Conference of Berlin (1885) ([18]). Attempts in the past century, such as the 1921 Convention and Statute of Barcelona on the Regime of Navigable Waterways of International Concern ([19]), to enlarge on a worldwide scale the scope of applicability of the principle of free navigation, and such as the 1919 Treaty of Versailles (art. 331) ([20]), to come to an internationalization of rivers ([21]), however failed. Although some consider the provisions of the Final Act only as a "pactum de contrahendo" ([22]), others have

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[16] See: DE BUSSCHERE, A., *Code des traités et arrangements internationaux intéressant la Belgique*, 1896, I, 44 ; DE MARTENS, G.F., *Nouveau recueil de traités,* Nouvelle Série, VII, 1830-1839, II, Göttingen, Dieterich, 1842, 773.

[17] See: DE MARTENS, G.F., *Nouveau recueil de traités*, XV, 770

[18] See: DE CLERCQ, *Recueil des traités de la* France, XIV, 448-450 ; DE MARTENS, G.F., *Nouveau recueil de traités,* Nouvelle Série, X, 264 ; HERTSLET'S, *Commercial Treaties*, XVII, 62.

[19] *League of Nations Treaty Series*, vol. VII, 37; STRUPP, K., *o.c.*, 1923, V, 464; HUDSON, M., *International legislation*, 1931, I, 638. The Convention and Statute were adopted by the First General Conference on Communications and Transit by 29 votes to 1, with 2 abstentions (see League of Nations, Barcelona Conference 1921, Verbatim Records and Texts relating to the Convention on the regime of navigable waterways of international concern, 1921, 373). The Convention came into force on 31 October 1922, According to our information only 22 States have ratified the Convention and the Statute (see: X, "Les problèmes juridiques posés par l'exploitation et l'utilisation des fleuves internationaux", U.N., Document A-5409, 1963, 182). Most of the riparian States of the Rhine and Danube did not ratify and therefore the Statute and Convention create no rights or obligations relating to these international rivers. For some comments on the provisions of the Statute, see: BERBER, F., *Rivers in International Law*, Stevens, 1959, 122; CORTHESY, F., *Etude de la convention de Barcelone sur le régime des voies navigables d'intérêt international*, Paris, Rousseau, 1927; DUPUIS, Ch., "Liberté des voies de communications - relations internationales", *R.C.A.D.I.,* 1924, 248-262; FAHMI A.M., "The Degree of Effectiveness of International Law as Regards International Rivers", *Ö.Z.ö.R.V.*, 1977, 291; FRANCOIS, J., *o.c.*, 1039; FORTUIN, H., " The regime of navigable waterways of international concern and the statute of Barcelona ", *N.T.I.R.*, 1960, 127; GIESECKE, G., *Die Völkerrechtliche Stellung der internationalen Wasserläufe des deutschen Stromgebiets in Geschichte und Gegenwart dargestellt mit besonderer Berücksichtigung des Statuts von Barcelona*, Breslau, 1936, 136p.; HOSTIE, J., "Notes sur le statut relatif au régime des voies navigables d'intérêt international", *R.D.I.L.C.*, 1921, 532-567; PATRY, A., "Le régime des cours d'eau internationaux", *C.Y.I.L.*, 1963, 183; REITER, K.F., *Die Verkehrsbestimmungen des Versailler Vertrages und ihre Weiterbildung auf den allgemeinen Verkehrskonferenzen von Barcelon und Genf*, Würzburg, 1929, 67p.; STUYT, A., *The General Principles of Law*, 1946, 45; VAN EYSINGA, W.J.M., *Les fleuves et canaux internationaux*, Bibliotheca Visseraina, 1924, II, 123; VITANYI, B., *o.c.*, 102-106; WHITEMANN, M., *Digest of international law*, 1963-1968, III, 880.

[20] PARRY, C., *o.c.*, vol. 225, 1919, 188. See for some comments: JACOMONI, F., "Il regime dei fiumi dichiarati internazionali del trattato di Versailles", *R.d.I.*, 1921-22, 542-556; LEDERLE, A. en VALLOTON, J., "Die Rechtsverhältnisse der internationalen Ströme auf Grund der Friedesverträge", Z.f.V.V., 1924, nr. 1; REITER, K., *Der Rhein und der Versailler Vertrag*, Diss., Würzburg, 1922; SZANA, A., *Die Internationalisieurung der Donau: die Friedensverträge und die Wasserstrassen*, Wenen, 1920; VAN EYSINGA, W.J.M., *L'évolution du droit fluvial international du Congrès de Vienne au Traité de Versailles*, 1919; WEHBERG, *Die Fortbildung des Flussschiffahrtrechts im Versailler Friedensvertrage*, Heft 7 Schriftenfolge und Weltfriede, 1-12.

[21] See with regard to this question: HENNIG, R., "Die Unklarheit des Begriffes 'Internationalisierung", *R.N.I.R.*, 1929, 255-256; RAUX, J., "La régionalisation et l'internationalisation. Deux tendances complémentaires de l'administration internationale", *R.G.D.I.P.*, 1969, 650 ; WHEELE, L.B., "International administration of European Waterways", *A.J.I.L.*, 1946, 100-120; ZICCARDI, P., "L'internazionalizzazione delle vie d'acque interne", *Communità internaz.*, 1946, 227-248.

[22] E.g.. ACCIOLI, H., *Traité de droit international public, Paris*, 1940-41, t. II, 37; BACON, R., "British policy and the Regulation of European Rivers of International Concern", *B.Y.I.L.*, 1929, 158; BERBER, F., *Rivers in international law*, 1959, 11 ff.; CARATHEODORY, E., *Le droit international concernant les grands cours d'eau*, 1861, 77 ff.; CAVAGLIERI, A., "Règles générales du droit de la paix", *R.C.A.D.I.*, 1929, (115-583), 431-432; CAVARE, L. en QUENEUDEC, J.-P., *Le droit international public positif*, Paris, Ed. A Pédone, 1969, 2v., t. II, 880;

advocated that these provisions (and the Annexes) create permanent and directly binding law and that the special river acts are only executive regulations that therefore must be in conformity with the former provisions ([23]). We will not in this paper enter in this theoretical discussion, however, in our opinion the Final Act of the Congress of Vienna indeed creates with regard to European international rivers falling within the scope of the Final Act a permanently binding obligation ([24]) for the riparian states to guarantee on a conventional basis at least to the benefit of all the riparian States freedom of navigation "in respect of commerce" and at least in accordance with the articles of the Final Act, being a minimum ([25]) below which no one riparian State can go without prejudicing the acquired rights of other states. In a wider sense these articles can be considered as "standstill clauses", on the one hand

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DUPUIS, Ch., "Liberté des voies de communication, relations internationales", *R.C.A.D.I.*, 1924, 129; ENGELHARDT, E., *Du régime conventionnel des fleuves internationaux*, 1879, 9 et seq.; FLESKES, G., *Der internationale Rechtsstatus der Mosel*, Bonn, 1969, 11; GUGENHEIM, P., *Traité de droit international*, vol. I, 1953, 406; KUHL, S., *o.c.*, 11; KRUGER, H., "Internationalisierte Flüsse", in *Wörterbuch des Völkerrechts*, ed. SCHLOCHAUER, H.J., vol. 2, 1961, 137; LEDERLE, A., *Das Recht der internationalen Gewässer*, 1920, 83; ORBAN, P., *Etude du droit fluvial international*, 1895, 15 ff.; RIVIER, A., *Principes du droit des gens*, Paris, 1896, t. I, 225; SCHEUNER, U., *Questions juridiques relatives à la navigation du Rhin*, 1956, 92-94; STABENOW, W., "Die internationalen Konventionen über die Binnenschiffahrt im Lichte der wirtschaftlichen Integration Europas", in *Raccolte delle lezioni 1967*, Universita degli studi di Tieste, Trieste, 1968, 534; TELDERS, B.M., "Ordening van zuiver binnenlandsch vervoer op de Maas", in *Verzamelde Geschriften*, IV, 's Gravenhage, Sijthoff, 1947, 72; VAN BOGAERT, E., *Volkenrecht*, Antwerpen, Kluwer, 1982, 403; VERDROSS, A., *Völkerrecht*, 4° ed., 1959, 505.

[23] See e.g.: VITANYI, B., *The international regime of river navigation*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, 67 et seq. See also in this sense: C.C.N.R., Protocol of 1951, Documents, 1951, I, 14 : "L'acte final du Congrès de Vienne de 1815 dont la Convention de Mayence puis la Convention de Mannheim de 1868 sont des réglements d'application" ; art. 233 Code français des Voies Navigables (see infra footnote 21)

[24] BÄRMANN, J., *Die Freiheit der Europaïschen Schiffahrt*, Mannheim, Schriftenreihe der Deutschen Europaakademie, VII, 1950, 12; CAFLISH, L., "The Law of International Waterways and Its Sources" in *Essays in Honour of Wang Tieya*, Kluwer Academic Publishers, 1993, 121-122 and "Régles générales des cours d'eau internationaux", *R.C.A.D.I.*, 1989, 104; DE MARTENS, F., *Völkerrecht*, 1886, II, 57; GÖNNEWEIN, O., *Die Freiheit der Flusschiffahrt*, 1940, 48; GUGGENHEIM, P., *Lehrbuch des Völkerrechts*, Bd. I, Basel, 1948, 366; JAFFE, F., *Die Rechtsordnung der internationalen Binnenschiffahrt auf den europäischen Wasserstrassen*, Diss., Heidelberg, 1935, 19; LAUTERPACHT, *International Law*, 1953, 177; LISTZT-FLEISCHMANN, *Völkerrecht*, 12th ed., 1925, 177; MALUWA, T., « The origins and development of international fluvial law in Africa : a study of the international legal regimes of the Congo and Niger River from 1885 to 1960 »., *N.I.L.R.*, 371; MÜLLER, W., *Die Freiheit der Rheinschiffahrt in Gefahr*, Schriftenreihe der Basler Vereinigung für Schweizerische Schiffart, Schrift III, Basel, 1953, 2 and *Strom und See*, 1953, 61 and *Die Rechtsstellung der Schweiz im Bezug auf die revidierte Rheinschiffahrts-akte vom 17.10.1867*, Zürich, 1959, 172; PERREZ, F.X. and REUTLINGER, P.R., "Die Freiheit der Schiffahrt gemäss der durch das Zusatzprotokoll Nr. 2 geänderten Mannheimer Akte", *Transp.R.*, 1995, 229; ROUSSEAU, Ch., *Droit international public*, Paris, 1953, 389; SMIT, C., *De Conferentie van Londen*, Leiden, 1949, 95; VAN GEETRUYEN, J., « La Meuse et la Moselle », *La vie économique et sociale*, 1956, 66. This leads to the conclusion, as clearly explained before by Vitanyi (*o.c.*, 68), that the obligations directly ensuing from the Treaty of Vienna continue to bind the riparian States even in the absence of a special river act or in the case that the special river act has ceased to be in force or fell into disuse. Art. 233 of the French Code des Voies Navigbles refers for the reglementation of navigation on the Rhine in first order to art. V of the 1814 Paris Treaty and art. 108-109, 113-118 of the Final Act of the Congres of Vienna and annex 16B: « La navigation sur le Rhin est soumise aux dispositions continues dans: a) L'artcile V du traité de Paris du 30 mai 1814; b) Les articles CVIII, CIX, CXIII à CXVIII de l'acte de clôture du congrès de Vienne du 9 juin 1815, y compris son annexe 16 B; c) La Convention internationale signée à Mannheim le 17 octobre 1868 pour la navigation du Rhin, modifié par les clauses du traité de Versailles du 28 juin 1919 relatives à la navigation du Rhin ». In a decision of 19 juli 1985 the Court of Antwerp when dealing with a question of the right of free, unhampered, navigation on the river Scheldt directly refered to the Final Act of the Congres of Vienna (Antwerp, 19 July 1985, *Rechtspr.Antw.*, 1987, (195), 201

[25] CARATHEODORY, E., *Das Stromgebietsrecht und die internationale Flussschiffahrt* in VON HOLTZENDORFF, F., *Handbuch des Völkerrechts*, 1887, vol. 2, 298; GÖNNERWEIN, O., *Die Freiheit der Flussschiffahrt*, Stuttgart, 1940, 48; VALLOTON D'ERLACH in *Conference on Navigable* Waterways, 81; WURM, C.F., *Fünf Briefe über die Freiheit der Flussschiffahrt*, 1858, 12-13

preventing new restrictions on free navigation in the future, and on the other hand leading to the gradual abolition of the existing ones ([26]).

6. On many political or diplomatic occasions States have expressly considered the articles of the Final Act of the Congress of Vienna as forming part nowadays of European Public Law ([27]). The idea lying behind the establishment of a regime of free navigation must be found in the community of interests of the riparian States ([28]). The P.C.I.J. in his famous "Oder Case" judgment considered "*this community of interests in a navigable river (…) 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*" ([29]). Recently the I.C.J. in his famous Gabcikovo-Nagymaros judgment reaffirmed the idea of a community of interests, stating that "*modern development of international law has strengthened this principle for non-navigational use of international waterways as well*" ([30]).

7. Art. 109, being the core of these clauses, provides that the rivers in question, throughout their navigable courses, "*shall be entirely free, and shall not in respect of commerce be denied to anyone, provided that they conform to the regulations regarding the police of this navigation, which shall be drawn up in a manner uniform for all and as favourable as possible to the commerce of all nations*". Although the wordings "shall … not be denied to anyone" tend in favour of free navigation for riparians as well as for non riparians, according to a predominant view in literature ([31]), the insertion of the words "in respect of commerce" in

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[26] SUY, E. and WELLENS, K., "Is het water tussen België en Nederland niet diep genoeg?", *R.W.*, 1999, 553

[27] See e.g. with regard to the river Scheldt: the opinion of the five Great Powers during the Conference of London 1832 with regard to the fluvial disputes between Belgium and the Netherlands (DE MARTENS, G.F., *N.R.G.*, vol. 12, 312-313); the Protocol of 22 May 1926 between Belgium, France, the Netherlands and the United Kingdom; with regard to the Danube: Art. 15 of the 1856 Peace Treaty relating to navigation on the Danube: "*L'Acte du Congrès de Vienne ayant établi les principes destines à régler la navigation des fleuves qui séparent ou traversent plusieurs Etats, les Puissances contractantes stipulent entre elles qu'à l'avenir ces principes seront également appliqué au Danube et à ses embouchures. Elles déclarent que cette disposition fait désormais partie du droit public de l' Europe et la prennent sous leur* garantie ». See also: P.C.I.J., Opinion of 8 December 1927, Series B, 1927, nr. 13, 38. This opinion is also shared by part of the literature, see e.g. CAFLISH, L., "The Law of International Waterways and Its Sources", *Essays in honour of Wang Tieya*, Kluwer, Academic Publishers, 1994, (115-130), 122.

[28] See e.g.: BOUCHEZ, L., "The Netherlands and the Law of International Rivers" in *International Law in the Netherlands*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1978, 221; COLLIARD, C.A., "Evolution et aspects actuels du regime juridique des fleuves internationaux", *R.C.A.D.I.*, 1968, 356; DIENA, G., *Prinicipi di diritto internazionale*, 1908, 196; FRANCOIS, F., *Grondlijnen van het Volkenrecht*, Zwolle, Tjeenk Willing, 3de ed., 1967, Zwolle, 487 and *Handboek van het Volkenrecht*, Zwolle, Tjeenk Willink, vol. I, 1931, 487-488; HYDE, C.C., *International Law*, vol. I, 2de ed., 1945, Boston, 563, par. 182; OPPENHEIM-LAUTERPACHT, *International Law*, vol. I, 8ste ed., 1955, London-New York-Toronto, 467, noot 2; TAMMES, A.J.P., *Internationaal Publiekrecht*, Haarlem, 1966, 71; TELDERS, B.M., *Verzamelde Geschriften*, vol. IV, Den Haag, 1947, 49; VERZIJL, J.H.W., *The jurisprudence of the World Court*, vol. I, Leyden, 1965, 196-197; WINIARSKI, B., "Principes généraux du droit fluvial international, *R.C.A.D.I.*, 1933, 163-164.

[29] P.C.I.J., Oder Commission Case. For comments, see: UECKER, E., Die rechtliche Stellung der Oder mit besonderer Berücksichtigung des Streites über die räumliche Zuständigkeit der internationalen Oderkommission, Greifswald, 1931, 59p.

[30] I.C.J., 25 September 1997, I.C.J. Reports, 1997, 56, n° 85

[31] In this sense e.g. BAXTER, R.R., *The law of international waterways*, Cambridge, Massaschussets, Harvard University Press, 1964, 111; BOVARD, P.A., *La liberté de la navigation sur l'Escaut*, Thesis, Lausanne, 1950, 23-24; CAFLISH, L., "Règles générales du droit des cours d'eau internationaux", *R.C.A.D.I.*, 1989, 39; DE LOUTER, H., *Het stellig volkenrecht*, Den Haag, Nijhoff, 1910, vol. I, 445; DE VISSCHER, Ch., *Le droit international des communications*, Paris, Inst. Hautes Etudes Int., 1921-23, 33; ENGELHARDT, E., *Du régime conventionel des fleuves internationaux*, 30 et seq. and 77 et seq.; ERKENS, N., "Le statut international de l'Escaut", *B.T.I.R.*, 1967, 354-355; FAUCHILLE, P., *Traité de droit international public*, Paris, Rousseau, 1921-

art. 109 leads to the restriction that equality of treatment for riparians and non riparians was only confined to the free passage of goods and uniform rates for the levying of navigation dues on goods, however not including the right to carry goods by river, the latter being reserved only to the riparians. Neither this article neither any other provision of the Final Act clearly demonstrates wether this freedom of navigation for the riparians applies only to international transport or also to national transport, the so-called cabotage ([32]).

8. Furthermore, art. 110 provides that tolls and police regulations shall be, as much as possible, be the same on the whole course of the river and shall also apply on the affluents, traversing or separating more than one State. According to art. 111 dues on navigation shall be regulated in a uniform and settled manner, and with as little reference as possible to the different nature of the merchandise, in order that a minute examination of the cargo may be rendered unnecessary. Art. 112 provides for a reduction of the toll offices, whilst art. 115 tends to ascertain that the activities of toll services will not hamper navigation. Art. 113 provides that each State bordering on the rivers is bound to keep in good repair the towing paths which pass through its territory and to execute the necesseray works to navigation in order that no obstacles may be expierenced by the navigation ([33]). Art. 114 deals with the

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26, 2v., t. II, 472; FORTUIN, H., "Two questions concerning freedom of navigation on international rivers", *N.T.I.R.*, 1969, 263; FRANCOIS, J.P.A., *Grondlijnen van het Volkenrecht*, 3de ed., Zwolle, 1967, 487; HYDE, C.C., *International Law*, vol. I, 2de ed., Boston, 1945, 563, par. 182; ORBAN, P., *o.c.*, nrs. 82 e.v.; OP DEN HOOFF, J., *Observations sur l'écrit allemand de la navigation du Rhin considérée dans ses rapports avec le Royaume des Pays-Bas*, 1828, 97; PRADIER-FODERE, F., *Traité de droit public européen et américain*, t. II, nr. 742; ROUSSEAU, Ch., *Droit international public*, t. IV, Paris, Sirey, 1980; 495; SCHEUNER, U., "Rhein" in *Wörterbuch des Völkerrechts*, ed. Schlochauer, H.J., vol. 3, 1962, 118; TAMMES, A.J.P., *Internationaal Publiek Recht*, Haarlem, 1966, 71; TELDERS, B.M., "De invloed van den internationalen handel op de ontwikkeling van het internationale recht" in *Verzamelde Geschriften*, IV, 's Gravenhage, Martinus Nijhoff, 1947, 49; VAN EYSINGA, W.J.M., *L'évolution du droit fluvial international du Congrès de Vienne au Traité de Versailles*, 1919, 138 et seq.; VAN BOGAERT, E., "De verdragsregelen betreffende de Schelde", *Studia Diplomatica*, 1978, 578; VAN DER MENSBRUGGHE, Y., "Gevaarlijke ladingen en vrijheid van scheepvaart in de Westerschelde", in *Liber Amicorum Elie Van Bogaert*, Antwerp, Kluwer, 1985, 28; VERZIJL, H.J.W., *The Jurisprudence of the World Court*, vol. I, Leyden, 1965, 196-197; VITANYI, B., "The Regime of Navigation on International Waterways, the Beneficiaries of the Right of Navigation", *N.Y.I.L.*, 1974, 111; VITANYI, B., *The International Regime of River Navigation*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, 76-77; WESTLAKE, H., *International Law*, t. I, 146 et seq..; WÜRM, C., *Fünf Briefe über die Freiheit der Flussschiffahrt*, 1858, 31 et seq.. Otherwise e.g.: BLUNTSCHLI, J.G., *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 3th ed., 1878, art. 314; CARATHEODORY, Ed., "Das Stromrechtsgebiet und die internationale Flussschiffahrt" in *Handbuch des Völkerrechts*, ed. VON HOLTZENDORFF, F., vol. 2, 1887, 299 and 328; COLOMBOS, C.J., *The international law of the Sea*, 6e ed., London, Longman, 1967, 287; DE MARTENS, F., *A.I.D.I.*, 1885-86, 277; HAAK, W.E., "De vrijheid van scheepvaart op de Rijn" in *Offerhauskring, feestbundel ter gelegenheid van het vijfentwintig jarig bestaan van de studiekring Prof. Mr. J. Offerhaus*, Deventer Kluwer, 1987, 81; JENNINGS, J.R. en WATTS, A., *Oppenheim's international law*, 9e ed., Longman, Harlow, 1992, 576; NGUYEN QUOC DINH, DALLIER, P. en PELLET, A, *Droit international public*, Paris, 1980, 643; SCHERMERS, H.G. and VAN HOUTTE, H., *Internationaal en Europees recht, Compendium voor de rechtspractici*, Antwerpen, Kluwer, 1987, 131; VALLOTON, J., "Du régime juridique des cours d'eau internationaux de l'Europe centrale", *R.D.I.L.C.*, 1913, 273-274.

[32] In international river law the word “cabotage” sometimes is used for transport between two points situated on the same river, be it in the same State (so called ‘petit cabotage’) or in two different States (so called ‘grand’ cabotage). However, we like to emphasize that the word “cabotage” in this paper is only used in his more usual sense, meaning the transport of goods between to points situated in one State.

[33] This text is reproduced in art. 7 of Annex XVI B relating to the Rhine, while Annex XVI C concerning the navigation of the Neckar, Main, Moselle, Meuse and Scheldt refers, for the maintenance of the conditions of navigability, to art. 7 of the Annex XVI B. With regard to the maintenance of the navigation conditions there exists no unanimity wether this obligation is restricted only to works intended to preserve the existing navigability conditions, i.e. preserving the status quo ante, or als works required both by developments in shipbuilding and by the increasing needs of traffic on the waterways concerned. In particular with regard to the river Scheldt this question is still of present interest. In favour of a restricted interpretation, e.g.: VAN

staple and other rights that hampered free navigation at that moment. Finally, art. 116 states that the special rivers act that have to be concluded, cannot be changed without the common consent of all riparian States.

9. In consideration of the fact that the principle of free navigation, in times of peace and, in so far as is reasonably possible, in times of war, has been construed to facilitate the transport of goods on international rivers and therefore to serve the commercial goals of the riparian States, under international case law ([34]) free navigation therefore does not only include the freedom of movement on the entire navigable course of the river, but also the freedom to enter ports and to make use of plants and docks ([35]), and the freedom to transport and to load and unload goods ([36]), all this on the basis of a perfect equality between the beneficiaries and with

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EYSINGA, W., " L'entretien de l' Escaut suivant les traités ", *R.D.I.L.C.,* 1928, 732-752; BOUCHEZ, L., *o.c.*, 266; VITANYI, B., *o.c.*, 351. In favour of an extensive interpretation, see e.g.: BOURQUIN, M., " Le nouveau régime de l' Escaut après le projet de traité Hollando-Belge ", *R.G.D.I.P.*, 1920, 5; PINTOR, S., " Le régime international de l' Escaut ", *R.C.A.D.I.*., 1928, I, 285-367; ERKENS, N., " Le statut international de l' Escaut ", *B.T.I.R.*, 1967, 371; VAN BOGAERT, E., *o.c.*, 1978, 575-596; SUY, E. en WELLENS, K., "Is het water tussen België en Nederland niet diep genoeg ?", *R.W.*, 1999, 554 ; ROLIN-JACQUEMYNS, " L' entretien de l' Escaut suivant les traités ", *R.D.I.L.C.*, 1928, 377-399; SOMERS, E., "Enkele volkenrechtelijke bedenkingen over het onderhoud van de Schelde", in *Liber Amicorum Elie van Bogaert*, Antwerpen, 1985. 239-251; SOMERS, E., "Juridische aspecten inzake het onderhoud van de Schelde", in *De Belgisch-Nederlandse verkeersverbindingen. De Schelde in de XXIste eeuw*, Van Hooydonk, E. (ed.), Antwerpen/Apeldoorn, Maklu, 2001, 461-468.

[34] P.C.I.J., Oscar Chinn Case, *P.C.I.J. Reports*, Series A/B, 1934, nr. 63: "*According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels … freedom to transport goods …freedom to enter ports, and to make use of plants and docks*"; P.C.I.J., European Commission for the Danube Case, *P.C.I.J. Reports*, Series B, 1927, n° 14: "*The concept of navigation includes, primarily and essentially, the conception of the movement of vessels with a view to the accomplishment of voyages…The second idea which the conception of navigation comprises is that of contact with the economic organization and with the means of communication of the country reached by navigation; the freedom of navigation therefore covers not only shipping passing through a sector of a river corresponding to a port, but also shipping arriving and leaving a port*"; see also art. 14 of the Helsinki Rules; for literature, see e.g.: STABENOW, W., "Die internationalen Konventionen über die Binnenschiffahrt im Lichte der wirtschaftliche Integration Europas", *Raccolta delle lezioni*, 1967, 550; VITANYI, B., *o.c.* (fn. 18), 233-234; WENGLER, W., *Völkerrecht*, 1964, 2, 1119

[35] In East European literature in the past it has been argued that a right of acces to ports of riparian States of international rivers in favour of foreign vessels on a footing of equality does not form an integral part of freedom of navigation and that therefore, unless agreed otherwise, the acces to a foreign port depends on the discretionary competence of the riparian State, who has the right to deny this acces to foreign vessels (ANDRONE, N., "Navigatia pe fluviile internationale", in *Drept international fluvial*, Bucuresti, Editura Academiei Republici Socialiste România, 1973, 101-102). A majority in the doctrine however rightly states that the principle of free navigation includes the right of acces to the ports and the use of port facilities (CARATHEODORY, E., *o.c.*, 59; CALVO, *Le droit international*, 4° ed., 1887, t. I, 339; CAFLISH, L., *o.c.*, *R.C.A.D.I.*, 1989, 111; HAAK, W., *o.c.*, (supra vn. 442), 80; LAMMERS, J.G., *o.c.*, (supra vn. 442), 440 ; MALLINCKRODT, M., *o.c.*, 28; MISCHLICH, R., *o.c.*, (supra vn. 442), 267, nr. 45; MÜLLER, M., *o.c.*, 67-68; (implicet) TELDERS, B.M., « De vrijheid … », *o.c.*, (supra vn. 4); VITANYI, B., *The international regime …o.c.*, (supra vn. 4), 246; FORTUIN, H., "The regime of navigable waterways of international concern and the Statute of Barcelona", *o.c.*, 133; HOSTIE, J., *o.c.*, (supra vn. 442), 184 ; HOSTIE, J., « Examen … », *o.c.*, (supra vn. 4), 427; SOMERS, E., *o.c.*, (supra vn. 504), 32-33, nr. 23; TELDERS, B.M., "De vrijheid van scheepvaart op internationale rivieren", *o.c.*, 32; VAN EYSINGA, W.J.M. in his dissenting opinion of the Oscar Chinn case, 142; WINIARSKI, B., *o.c.*, 197). See also in particular in regard of Rhine navigation: H.R., 17 December 1934 (2 Judgments), *N.J.*, 1935, 5 and 11 and Concl. Attorney General Berger and Attorney General Van Lier under two decisions; B.V.A.R., note under H.R., 28 March 1950, *N.J.*, 1950, no. 623; X, "Nota werkgroep Rijn-Main-Donau", *T.v.Vw.*, 1975, 372; KRAUS, H. en SCHEUNER, U., *Rechtsfragen der Rheinschiffahrt/ Questions relatives à la navigation du Rhin*, Frankfurt am Main, V. Klostermann, 1956, 131; SENGPIEL, M., *Das Recht der Freiheirt der Schiffahrt auf Rhein und Donau – Eine regimerechtliche Analyse* -, Duisburg, Binnenschiffahrts-verlag GmbH, 1998, 10; SISCHKA, N., *Betriebs-verfassungsrecht in der Binnenschiffahrt. Organisation und Funktionsbedingungen*, Mannheimer Beiträge zum Binnenschiffahrtsrecht, t. 2, Duisburg, 1996, 87

[36] Besides the case law and authors mentioned under footnote 23, see in this sense also: CARATHEODORY, E.,

the prohibition of the collection of dues based solely on the fact of navigation. However, according to a predominant view ([37]), the concept of free navigation does not include an absolute freedom of trade, prohibiting riparian States of taking economic measures ([38]). Furthermore, one of the particularities of international river law exists in the fact that the provisions only have been elaborated with regard to the international rivers on itself, not, unless agreed otherwise, to other waterways, such as national or international affluents and confluents and other waterways connecting international rivers with each other, such as the Main-Danube canal, that is considered to be a strictly national waterway on which no claim of freedom of fluvial navigation can be made under international law ([39]).

Du droit international concernant les grands cours d'eau, Leipzig, 1816, 59; CALVO, *Le droit international*, 4° ed., 1887, t. I, 339; CAFLISH, L., *o.c.*, *R.C.A.D.I.*, 1989, 111; VITANYI, B., *o.c.*, 246; FORTUIN, H., "The regime of navigable waterways of international concern and the Statute of Barcelona", *o.c.*, 133; HOSTIE, J., "Examen de quelques règles du droit international dans le domaine des communications et du transit", *R.C.A.D.I.*, 1932, 427; MALLINCKRODT, M., *o.c.*, 28; MÜLLER, M., *o.c.*, 67-68; TELDERS, B.M., "De vrijheid van scheepvaart op internationale rivieren", *o.c.*, 32; VAN EYSINGA, W.J.M. in zijn dissenting opinion bij het Oscar Chinn arrest (P.C.I.J., *Series A/B*, n° 63, 142; WINIARSKI, B., *o.c.*, 197; Otherwise: ANDRONE, N., "Navigatia pe fluviile internationale", *Drept international fluvial*, 1973, 101-102.

[37] Otherwise: CHIESA, P., *Le regime international du Rhin*, 1952, 154-155 ; FERRIER, C.A., *La liberté de la navigation sur le Rhin de Bâle à la mer*, Winterthur, 1935, 40 ; MÜLLER, W., "Die Freiheit der Rheinschiffahrt im Gefahr", *Strom und* See, 1953, Annex, 11 et seq..; TELDERS, B.M. « De vrijheid van scheepvaart op internationale rivieren », *Verzamelde werken*, 1947, IV, 37; VAN EYSINGA, W.J.M., Dissentin opinion Oscar Chin Case, *P.C.I.J.*, Series A/B, no. 63, 79.

[38] P.C.I.J., Oscar Chinn Case, *P.C.I.J. Reports*, Series A/B, 1934, nr. 63. See also the case law of the Dutch High Court: H.R., 28 March 1950, *N.J.*, 1950, n° 633; H.R., 25 January 1952, *N.J.*, 1952, n° 125. In the east Europe socialistic view freedom of fluvial trade has never been considered as an integral part of free navigation (see the declaration of the soviet diplomat Wyschinski during the fifth session of the conference of Belgrade 1948);

[39] With regard to the legal regime of the Main-Danube canal and the arguments pro and contra internationalisation of this waterway, see: BASKIN, Y. en TARASOVA, I., "Kanal Rein-Main-Dunai. Problemui mezh-dunarodno-pravavogo rezhima", *S.G.P.*, 1977, 118-122; BAZEX, M., "Les problèmes juridiques soulevés par la liaison fluviale Rhin-Main-Danube", *A.D.M.A.*, 1979, 179-189; BAZEX, M., "Les problèmes juridiques soulevés par la réalisation de la voie de communication fluviale Rhin-Danube", *A.D.M.A.*, 1982, 299-356; BELA, H., "A Duna-Majna-Rajna viziuthalozat egyes nemzetközi jogi problémai", *Jog.Közlöny*, 1975, 663-670; DUTEMEYER, K., "Les problèmes économiques et juridiques posés par la liaison Rhin-Main-Danube", *Transports*, jan. 1979; FASTENRATH, U. en SIMMA, B., "Die Rhein-Main-Donau-Verträge, Rechtliche Würdigung des vertraglichen Grundlagen des Rhein-Main-Donau-Kanals", *Deutscher Verwaltungsblatt*, 1983, 8 e.v.; FIRSCHING, K., "Schiffahrt auf dem Rhein-Main-Donau-Kanal : ein rechtliches und/ oder politisches Problem" in *Festschrift Murad ferid*, Frankfurt-am-Main, 1988, 79-88; GILAS, J., "Prawne problemy Statusu Kanalu Rajna-Dunaj", *Prezgl.Zachodni*, 1977, 14-25; GRULOIS, Ph., *Juridische problematiek in verband met de totstandkoming van de Rijn-Main-Donauverbinding*, Gent, 1976, 15p; GREIF, W., "Juristische Aspekte der Rhein-Main-Donau-Schiffahrtstrasse", *Mitteilungsblätter D.K.S. Rhein-Main-Donau e.V.*, 1983, nr. 44, 15 e.v.; HAHN, H.J., "Der Rhein-Main-Donau-Schiffahrtsweg und das Völkerrecht", *Schiffahrt und Strom*, 1972, nr. 31/32, 11 e.v.; HAHN, W., MÜLLER, J., WEITZEL, G., "Der Main-Donau-Kanal. Argumentationsstudie zu einer kontroversen Diskussion", *IFO-Studien zur Verkehrswirtschaft*, München, 1982, nr. 14; JAENICKE, G., *Die neue Grossschiffahrt-strasse Rhein-Main-Donau : eine völkerrechtliche Untersuchung über den rechtlichen Status der künstigen Rhein-Main-Donau Grossschiffahrtstrasse*, Frankfurt am Main, 1973, 120p; KIPPELS, K.W., *Der Völkerrechtliche Status der zukünftigen Europakanals und seine Auswirkungen auf das Rhein-Donauregime,* Schriften zum Völkerrecht, Bd. 62, 1978; KUNZ, J.L., "The Danube regime and the Belgrade Conference", *A.J.I.L.*, 1949, 104-113; KRIZIZANOWSKI, P., "Die Rechtslage des Rhein-Main-Donau Verbindungsweges", *Archiv des Völkerrechts*, 1969-70, 343-374; MILOSAVLEVIC, B., "Moguca resenja pravnog rezima plovidbe na Kanalu Rajna-Majna-Dunav", *Jugosl.Rev.za Medunar*, Pravo 31, 1984, 1-3, 16-40; SENGPIEL, J., "Der Main-Donau-Kanal. Prüfstein und Garant für einen fairen Wettbewerb zwischen Donau und Rheinschiffahrt", *Z.f.B.*, 1988, 120-128; SEIDL-HOHENVELDERN, I., "Rhine-Main-Danube Waterway", *Encyclopedia of public international law*, Amsterdam, North-Holland, 2° ed., 2000, vol. 4, 235-237; SOMERS, R., Het Europakanaal Rijn-Main-Donau, Antwerpen, 1973, 87p.; SCHLOCHAUER, H.-J., "Rechtsfragen grenz-überschreitender Wasserstrassen am Beispiel des Rhein-Main-Donau-Schiffahrtsweges", in *Völkerrecht als Rechtsordnung, Internationale Gerichtbarkeit, Menschenrechte, Festschrift für Hermann Mosler,* Berlin, 1983, (839-847); VAN GUNSTEREN, W.F., "Fragen der Rhein-Main-Donauverbindung", *Eur.Vervoerr.*, 1972, 469-477; VITANYI,

10. Finally, the fact that the Final Act of the Congress of Vienna deals with minimum provisions creates the possibility of differences between the various special river acts, in respect of the beneficiaries, the transport rights, the administration etcetera, differences that often were the consequence of specific political, geographic and/or economic circumstances and/or the different way in which the riparian States have approached their right of sovereignty. The legal and political history of each of the river regimes supplies for more than convincing proof to support this thesis. Special river acts were elaborated on the European continent for inter alia the Elbe (1821, 1922) ([40]), the Weser (1823) ([41]), the Rhine (1831, 1868), Meuse and Scheldt (1839), the Douro (1835, 1840) ([42]), Neckar (1842) ([43]), Ems (1843) ([44]), Danube (1856, 1922, 1948), Po (1849) ([45]), Pruth (1866) ([46]), Boyana (1878) ([47]), Moselle (1956). Some of these conventions have no further application and/or became in disuse and/or do not form part of the pan-European integrated waterways network and therefore further will be left aside. Attention will be focused on the special river acts relating to the Rhine, Danube, Scheldt and Meuse, and the Moselle. However, in regard of the other rivers, we like to remind that in so far as they are international and navigable, in our opinion they still fall under the scope of applicability of the Final Act of the Congress of Vienna, creating a permantly binding obligation to guarantee freedom of navigation on a conventional basis.

1.2. <u>The special Rivers Acts</u>

11. The freedom of navigation on the Rhine is actually governed by the 1868 (revised ([48]) and amended) Act of Mannheim ([49]), that replaced the 1831 Act of Mainz. Contracting States are

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B., "Le statut juridique de la nouvelle voie navigable Rhin-Danube", in *Aspects du droit international des transports*, Pedone, 1981, 183-221; VITANYI, B., "Legal Problems in Connection with the Deep-Draught Rhine-Main-Danube Navigable Waterway after the Additional Protocol to the Act of Mannheim", *Z.a.ö.R.V.*, 1981, 731-807; VITANYI, B., "Problèmes juridiques concernant le canal Main-Danube", *Annuaire de l'AAA*, 1981-83, 26-41; VERBEECK, L., De Rijn-Main-Donauverbinding : juridische en economische beschouwingen, Antwerpen, Handelshogeschool, 1984, 93p. (Thesis); ZEMANEK, K., *Die Schiffahrtsfreiheit auf der Donau und das künftige Regime der Rhein-Main-Donau-Grossschiffahrtstrasse*, Wien, Springer, 1976, 73p;

[40] Treaty of 23 June 1821, *B.F.S.P.*, VIII, 953; DE MARTENS, G.F., *N.R.G.*, I, 382; Treaty of 22 February 1922 (see with regard to the evolution and contemporary legal situation of the navigation regime of the Elbe: BÖHME, H., *Die völkerrechtliche Stellung der Elbe unter besonderer Berücksichtigung der Situation nach dem zweiten Weltkrieg*, 1959, 179p.; DÜERKOP, K., *Die Internationalisierung der Elbe*, Magdeburg. E. Baernsch, 1931; HOSTIE, J., "Les Actes du Danube et de l'Elbe", *R.D.I.L.C.*, 1923, 247-271; NEMEC, M., "Die Elbe als Wasserstrassenverbindung zwischen der CSSR und Hamburg", *Z.f.B.*, 1990, 57-59; SENGPIEL, J., "Entwicklung und Zukunftperspektiven der internationalen Elbschiffahrt", *Z.f.B.*, 1989, 41_45).

[41] Treaty of 10 September 1823 (DE MARTENS, G.F., *N.R.G.*, vol. VI, deel I, 301)

[42] Treaty of 31 August 1835 (DE MARTENS, G.F., *N.R.G.*, XIV, 97); Treaty of 23 May 1840 (DE MARTENS, G.F., *N.R.G.*, I, 98)

[43] Neckar Schiffahrtsordnung of 1 July 1842 (DE MARTENS, G.F., *N.R.G.*, IV, 530)

[44] Treaty of 13 May 1843 (DE MARTENS, G.F., *N.R.G.*, vol V, 125)

[45] Treaty of 3 July 1849 (*B.S.F.P.*, vol. 38, I, 130; DE MARTENS, G.F., *N.R.G.*, vol. XIV, 525)

[46] Treaty of 15 December 1866 (DE MARTENS, G.F., *N.R.G.*, XX, 296), amended by the Treaty of 2 March 1895 (DE MARTENS, G.F., *N.R.G.*, XXXIV, 350)

[47] Art. 29 of the Treaty of Berlin of 13 July 1878 (DE MARTENS, G.F., *N.R.G.*, III, 449)

[48] By the Convention of Strassburg of 20 November 1963 (see e.g.: ROUSSEAU, CH., "Chronique des faits internationaux", *R.G.D.I.P.*, 1963, 478-479; SAUVEPLANNE, J.G., "De Akte van Mannheim in historisch perspectief", *T.v.Vw.*, 1969, 105-106; SENGPIEL, M., *Das Recht der Freiheit der Schiffahrt auf Rhein und Donau – Eine regimerechtliche Analyse* -, Duisburg, Binnenschiffahrts-verlag GmbH, 1998, 44-47).

[49] *B.F..S.P,*, 1868, 59, 470. See e.g.: ALOY, J., " Belgische aanwezigheid op de Rijn ", in *Liber Amicorum Lionel Tricot*, Antwerpen, Kluwer 1988, 1-6. BAEYENS, R., « Le régime international des fleuves internationaux à travers l'exmple du Rhin », *Transports*, 1973, 103-108; BEERMAN, A.C.W. en SCHAEPMAN, C.J.M., *Report on the Regime applicable to navigation on the river Rhine*, Nederlandse Vereniging voor Internationaal Recht, 1950, Proceedings, no. 28; BLIEFERT, G., « 100 Jahre Mannheimer Akte – ihre Geschichte und ihr Recht »,

Belgium, France, Germany, the Netherlands and Switzerland. The whole Convention is based on the idea that the treaty provisions concerning the Rhine are divided into two categories, the first dealing with the course of the Rhine from Basle into the open sea, and the second only concerned with the section between Basle and Krimpen and Gorcum ([50]). Art. 1 of the Act of Mannheim confirms the guarantee of freedom of navigation, from Basle ([51]) into the open sea

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Z.f.B., 1968, 394-398; BOREL, E., "Freedom of the navigation on the Rhine", *B.Y.I.L.* 1922-23, 75-89; CHIESA, P., *Le régime international du Rhin et la participation de la Suisse*, thèse, Fribourg, Barblan en Saladin, 1952, 198p.; DE JONGE, A.J., « Aangepaste Akte van Mannheim zal vrije Rijnvaartmarkt beschermen », *N.J.B.*, 1980, 750-752 ; DE PANGE, J., *Les libertés rhénanes*, Paris, Perrin, 1922, 369p.; DE RANITZ, H., *De Rijnvaartacte*, Leiden, Somervil, 1889, 221p. ; DE VISSCHER, Ch., « Le nouveau régime international du Rhin », *R.D.I.L.C.*, 1920, 80-85; FERRIER, C.A., *La liberté de la navigation sur le Rhin de Bâle à la mer*, Winterthur, Keller, 1955, 115p.; FUHRMANN, *Die völkerrechtlichen Grundlagen der Rheinschiffahrt*, 1954; GOY, R., "Fleuves internationaux: régime de la navigation du Rhin. Application de la convention du Mannheim du 17 octobre 1968", *R.G.D.I.P.*, 1980, 932-941; FORTUIN, H., "Het internationale regime over de Rijn", *R.M.T.*, 1947, 188-202; GAANLANDT, H., "De Akte van Mannheim", *Internationale Spectator*, 1955, 435-450; HAAK, W.E., « De vrijheid van de scheepvaart op de Rijn », in *Offerhauskring, feestbundel ter gelegenheid van het vijfentwintig jarig bestaan van de Studie Prof. Mr. J. Offerhaus*, Deventer, 1987, 79-92; HALDIMANN, U., "Die Mannheimer Akte im Strom der Zeit", in *Internationales Recht auf See und Binnengewässern, Festschrift für Walter Müller*, Zürich, Schulthess Polygraphischer Verlag, 1993, 75-84; HERTOGHE, Ph., *Les origines du statut international du Rhin*, Brussel, Fonds de la Batellerie rhénane belge, 1956, 60p.; HOEDERATH, R., *Grossbritannien und das internationale Rheinregime. Die Rolle Grossbritanniens bei der Ausgestaltung der internationalen Rechtsordnung für den Rhein und die Entwicklung der britischen Rechtsstellung im Rahmen dieser Ordnung*, Schriften zum Völkerrecht, Berlin, Duncker & Humblot, 1981; HOSTIE, J., "Le statut international du Rhin", *R.C.A.D.I.*, 1929, III, 104-129; KRAUS, H., *Völkerrechtliche Grundlage und Umfang der Freiheit der Binnenschiffahrt auf dem Rhein*, Göttingen, 1953; KRAUS, H. and SCHEUNER, U., *Rechtsfragen der Rheinschiffahrt/ Questions relatives à la navigation du Rhin*, Frankfurt am Main, V. Klostermann, 1956, 188p.; LAMMERS, J.G., "Het rechtsregime voor de scheepvaart op de Rijn en de Donau", *T.v.Vw.*, 1975, 431; LUPI, G., "La liberté de la navigation sur le Rhin", *J.D.I.*, 1958, 328-371; MEISSNER, F., "Rhine River", *Encyclopedia of public international law*, Amsterdam, North-Holland, 2000, vol. 4, 237-244; MISCHLICH, R., "Le régime international de la navigation du Rhin", *R.T.D.C.*, 1957, 243-287; MOTELLI, C., "The freedom of naviagtion on the Rhine", *Swiss Review of world* affairs, 1954 (May), 11 ff.; MÜLLER, W., "Bemerkungen zu den deutschen Gutachten über die Freiheit der Rheinschiffahrt", *Strom und See*, 1955, 90-100; MÜLLER, W., "150 Jahre Mainzer Rheinschiffahrtsakte", *Strom und See*, 1981, 38; ORLOVIUS, V., "Die Mannheimer Akte. 125 Jahre Garant einer freien Rheinschiffahrt", *Z.f.B.*, 1993, nr. 23/24, 8 e.v.; PABST, H.U., "Die steuerrechtliche Bedeutung der "Tatsache der Beschiffung" nach Art. 3 Abs. 1 der Mannheimer Akte », *Transp.R* ., 1987, 321-326 ; PABST, H.U., "Raümlicher Anwendungsbereich der Mannheimer Akte. Kabotage und Zwanghaftsverpflichtung », *Z.f.B.*, 1988, 9-12; SAUVEPLANNE, J. G., « Vrije vaart op de Rijn », *E.S.B.*, 1950, 522-523; SCHEUNER, U., "Rhein", in STRUPP, K. and SCHLOCHHAUER, H., *Wörterbuch des Völkerrechts*, 1962, III, 122; SCHILLING, K., "Die Freiheit der Rheinschiffahrt", in *Festschrift für Herbert Kraus*, 1954, 207-210; SENGPIEL , M., *o.c.*, 229p. ; STRUYCKEN, A.J.N.M., *Veranderingen in het Rijnregiem na den Wereldoorlog*, Den Haag, 1929, 115p.; THIERRY, A., "Le régime international de la navigation du Rhin", *Revue des travaux de l'Académie des sciences politiques et morales*, 1960, 106-121; VAN GUNSTEREN, W.F., "Die Rheinschiffahrt, ihr Regime und ihre aktuellen Probleme", in *Les chemins de fer et* l'Europe, Brugge, De Tempel, 1969, 211-234; WALTHER, H., "Le statut international de la navigation du Rhin", *A.E.*, WALTHER, H., « La révision de la Convention de Mannheim pour la navigation du Rhin », *A.F.D.I.*, 1965, 810-822 ; WALTHER, H., "Le Statut international du Rhin et la Commission Centrale pour la Navigation du Rhin", *Rev. des Transports et Communications*, vol. II, nr. 4, oct.-dec. 1949, 8 e.v.; X, « De Rijn en België », *Echo's van Verkeerswezen*, 1958, 5-27; ZIMMERMAN, J., "Die Mannheimer Akte von 1868. Garantin der Schiffahrtsfreiheit auf dem Rhein", *Strom und See*, 1991, 18-19.

[50] The wording of Articles 1 and 2 and the other Articles on this question leaves no doubt about that. Therefore where the words "in the whole course", "from Basle into the open sea" or "and its mouths" are used, the drafters undoubtedly mean to say that the provision in question applies to the whole Rhine, as regarded geographically, on the other hand provisions only referring to "the Rhine" apply exclusively to the section from Basle to Krimpen and Gorcum (See: Protocol No. 2 of 17 October 1868 of the Revision Commission, *Révision de l'Acte de navigation du Rhin de 1831*, 120.

[51] The Act of Mannheim and the competences of the CCNR do not apply on the navigable section of the Rhine between the middle bridge of Basle and Rheinfelden (see: VOGEL, A., "Anwendung des internationalen Rechts auf dem Rhein", *Strom und See*, 1991, (19-21), 19; ZIMMERMAN, J., *o.c.* (fn. 26), 18. Navigation on this section of the Rhine is treated in separated bilateral treaties (see HISS, E., "Le droit suisse en matière de navigation intérieure",

and vice versa, and on the Dutch rivers Lek and Waal, both considered as forming part of the Rhine, for the transport of goods and persons, however without clarifying whether or not this freedom includes international as well as cabotage ([52]). Until the entrance in force of the Second Additional Protocol of 17 October 1979 navigation on the Rhine between to points situated on the Rhine was open to vessels of all nations. Since then only the riparian States and, on the basis of European community law ([53]), the E.C. member States have the right to transport goods between two points situated on the Rhine and/or the assimilated waterways ([54]) with vessels belonging to the Rhine (art. 4) ([55]). However, this Second Additional Protocol does not affect the freedom of transit of art. 1 for vessels of all States on the Rhine from Basle into the sea and vice versa ([56]). Art. 2 creates, but only in favour of Rhine vessels, a right of freedom of transit from the Rhine to the open sea or Belgium and vice versa ([57]). Art. 4 provides for equality of treatment of all Rhine vessels on the foot of the own vessels not

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Navigation du Rhin, 1924, (136-139), 137). Being a navigable part of the Rhine one could advocate that the same international regime should have to aplly on this part of the river as on the other parts of the river.

[52] See in favour of cabotage: GAANLANDT, H., "De Akte van Mannheim", *Internationale Spectator*, 1955, 435 et seq.; MÜLLER, W., "Der Begriff der Freiheit der Rheinschiffahrt", *Strom und See*, 1951, 156 et seq..; MÜLLER, W., *Die Freiheit der Rheinschiffahrt in gefahr*, Schriftenreihe der Basler Vereinigung für Schweizerische Schiffahrt, III en *Strom und See*, 1953, 60 e.v.; MÜLLER, W., "Bemerkungen zu den deutschen Gutachten über die Freiheit der Rheinschiffahrt", *Strom und See*, 1955, 90-100; MÜLLER, W., "Zur Auslegung der Mannheimer-Akte von 1868", *Strom und See*, 1955, 521 et seq.; TELDERS, B.M., *Vrije vaart op den Nederlandsen Rijn*, 1937, 57-59; UDINK, S.J., "De ontwikkeling van het Duitse en van het Nederlandse standpunt inzake de vrije vaart op de Duitse Rijn sedert 1945", *Internationale Spectator*, 1951, 348-376; VAN EYSINGA, W.J.M., " Offener Brief in beantwortung einer Anfrage der Rotterdammer Handelskammer", *Sparsa Collecta*, Leiden, Sijthoff, 1958, 430-434; VANNER, H., in *Neu Zürcher Zeitung*, 17 April 1953 and 7 November 1953; VITANYI, B., *o.c.*, 269. Otherwise, e.g.: BÄRMANN, J., *Die Freiheit der europäischen Binnenschiffahrt*, Heft 7 der Schriftenreihe der Deutschen Europaakademie, Mannheim, 1950; BAUR, H., "Deutschland und die kleine Cabotage auf dem Rhein", *Deutsche Verkehrs-Zeitung*, 4 February 1954; DUPUIS, Ch., "La liberté des voies de communications", *R.C.A.D.I.*, 1924, 251; HAUSTEIN, W., *Die Freiheit im internationalen Verkehr*, Köln, 1955, 72-78; HOLZ, M., "Freiheit der Rheinschiffahrt", *Z.f.B.*, 1949; SCHILLING, K., "Die Freiheit der Rheinschiffahrt" in *Festschrift für Herbert Kraus*, 1954, 270 e.v.; KÄHLITZ, G., *Das Recht der Binnenschiffahrt*, Bd. 1, *Das Gesetz über den gewerblichen Binnenschiffsverkehr*, Köln, 1953, 151; JAENICKE, G., *o.c.*, 33-39; KRAUS, H., *Völkerrechtliche Grundlage und Umfang der Freiheit der Binnenschiffahrt auf dem Rhein*, Göttingen, 1953; KRAUS, H., *Rechtsfragen der Rheinschiffahrt*, Frankfurt, Rechtsgutachten, 1955; LUPI, G., *o.c.*, 350-357; OEDING, H.-H., *Der Rechtsbegriff der cabotage in Schiffahrtsrechts*, Hamburg, 1951; SCHAEFFER, H.U., "Deutsche Rheinschiffahrt und Mannheimer Rheinschiffahrtsakte unter besonderer Berücksichtigung des Begriffes der Kabotage", *International Archiv für Verkehrswesen*, 1950, 104-109; SCHEUNER, U., *Das internationale Recht der Rheinschiffahrt und der nationale Binnenverkehr (Cabotage)*, Rechtsgutachten, Duisburg, 1954 en Frankfurt, 1955; SCHEUNER, U., *Questions juridiques relatives à la navigation du Rhin*, 1956, 142; SCHILLING, "Zur Frage der Freiheit der Rheinschiffahrt", *Z.f.B.*, 1953, nr. 3; SCHMITT, A., *Die Liberalisierung des innerdeutschen Wasserstrassenverkehrs*, Freiburg, 1954. The Dutch Hoge Raad holds the view that transport within one country by own residents does not fall under the principle of free navigation on the Rhine (H.R., 4 May 1954, *N.J.*, 1954, no 382, note B.V.A.R. and *A.A.*, 1954, 23, note DUYNSTEE, F.J.M.; H.R., 27 Januari 1987, *N.J.*, 1987, no 313 and *S. & S.*, 1987, no. 72.

[53] See infra no. 35 with regard to the Community legislation. Also under the terms of the Protocol of Signatureof the Additional Protocol the same treatlent must be accorded to vessels which have a genuine link with any Member State.

[54] I.e. the affluents of the Rhine (art. 3) and the waterways mentioned in art. 2 (waterways used for traversing the Netherland for navigating from the Rhine to the open sea or Belgium and vice versa. Although art. 3 does not mention the affluents, in our opinion these are the rivers Main, Neckar, Moselle and Meuse, rivers that are mentioned as affluents in art. 45 of the Act of Mainz and in the Final Protocol 2 B of the Act of Mannheim.

[55] See on this issue: MÜLLER, W., "Die Ausführungsvorschriften zum Zusatzprotokoll Nr. 2 zu der Revidierten Rheinschiffahrtsakte von 17. Oktober 1979", *Z.f.B.*, 1983, 310-313.

[56] See: SENGPIEL, M., *o.c.*, 56-57; VITANYI, B., "Legal Problems …", *o.c.*, 749-750

[57] However it is not clear wether or not this transit right also applies on the connecting Belgian waterways. For an etxensif interpretation, see: PABST, H.U., "Räumlicher Anwendungsbereich der Mannheimer Akte, Kabotage und Zwanghaftsverpflichtversicherung", *Z.f.B.*, 1988, (9-12), 9.

only on the waterways mentioned in art. 1, but also those mentioned in art. 2 and on the affluents of the Rhine, situated on the territory of the contracting States. Moreover, art. 7 guarantees that the transit of all goods on the Rhine, from Basle into the sea, is free, unless sanitary measures justifie exceptions. Furthermore art. 14 guarantees that all privileges granted by the contracting States to other waterways or to roads also apply on the Rhine. Although not expressed in the Revised Act of Mannheim, beside the principles of free navigation and equal treatment also the unity of the Rhine regime and his legal system ([58]) is considered to be a basic principle forming integral part of the Rhine regime.

12. Except for police regulations and measures prescribed for the maintenance of public safety, which have to be taken in common consent, it is unlawful to put any obstacle whatsoever in the way of this free navigation ([59]). The levying of staplerights (art. 5) as well as of tolls or duties on vessels and cargoes solely based on the fact of navigation is prohibited (art. 3 para 1 and art. 7, al. 2), this not only on the Rhine, Lek and Waal, but also on the affluents, situated in the territory of the contracting States, and the waterways from the Rhine to the open sea or Belgium and vice versa. According to the Final Protocol these clauses however do not prevent the levying of duties for the use of artificial navigable waters or engineering works, such as sluices. Dredging and buoying duties above Rotterdam and Dordrecht also were prohibited (art. 3 para 2). Finally, art. 30 contains a prohibition on demanding a fee for the opening and closing of bridges, however according to the Final Protocol the latter does not apply to fees for the opening and closing of bridges which are levied on other navigables waterways than the Rhine. In an Agreement of 16 May 1952 the Rhine riparian States have explicitly confirmed the principle of freedom of customs and tolls with regard to the fuel used on board of vessels for the purpose of navigation.

13. Furthermore, under art. 11 the right to embark, load and unload, and to make use of the ports designated by the authorities of the riparian States is guaranteed. Art. 27 para 1 imposes on the riparian States an obligation to see to it that, in the Rhine ports, all measures be taken which are necessary to facilitate loading, unloading and warehousing of goods, and ensure the upkeep of equipment. Art. 27 para 2 allows riparian States to charge, for the use of equipment and machinery of any kinds in ports, a fee to cover the expenses necessary for maintenance and supervision, but this fee can only be charged insofar as equipment and machinery have actually been used. Finally, although not expressly provided for, in the opinion of many authors the freedom of Rhine navigation includes the freedom of affreightment ([60]), which

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[58] See in this sense e.g.: HAAK, W.E., "De vrijheid van scheepvaart op de Rijn", *o.c.*, 80; HALDIMANN, U., "Verkehrsrechte auf dem Rhein-Main-Donau-Kanal. Was dürfen die Schiffe unter Schweizer Flagge ?", *Strom und See*, 1992, 204; MISCHLICH, R., *o.c.*, 259; PABST, H.U., "Rheinregime und EWG-Vertrag", *Internationales Verkehrswesen*, 1981, 406 en *Z.f.B.*, 1982, 38; PABST, H.U., "Räumlicher Anwendungsbereich der Mannheimer Akte, Kabotage und Zwangshaftpflichtversicherung", *Z.f.B.*, 1988, nr. 2, 11; SCHMITT, V., *o.c.*, 176; VAN DER WERF, H.A.F., *o.c.*, 58; WALTHER, H., "Le statut international de la navigation du Rhin", *A.E.*, vol. II, 16; CCNR, www.ccr-zkr.org. Differently: STABENOW, W., *Het vervoer in de Europese Gemeenschappen*, Europese Monografieën, nr. 13, 51

[59] However, observe that according to the present case-law of the Dutch High Court ("Hoge Raad") the Revised Act of Mannheim does not form a legal impediment for restrictions on free navigation for transport by the own residents within the borders of their own territory (H.R., 4 May 1954, *N.J.*, 1954, n° 382; H.R., 27 January 1987, *N.J.*, 1987, n° 813). Otherwise: H.R., 17 December 1934, *N.J.*, 1935, 5 and *N.J.*, 1935, 11).

[60] See in this sense e.g.: WALTHER, H., "La C.E.E. et l'Acte de Mannheim", *Strom und See*, 1964, 250; TELDERS, B.M., "De vrijheid van scheepvaart op den Rijn", *Verzamelde Geschriften*, IV, 19; VAN DER HOEVEN, H., *Die Rheinschiffahrtsverträge und die Cabotage*, The Hague, 1957, 69; Opinion of the CCNR published in *Navigation du Rhin*, January 1936. In the so-called Petersberger Abkommen (*O.J.*, *E.C.C.S.*, no. 4 of 1 February 1958, 49) the freedom of pricing in international transport on the waterways falling under the scope of art. 1 of the Act of Mannheim has been expressly confirmed by the Contracting States (see: JÄGER, R.,

means the freedom to chose the carrier you like and the freedom of tariffs ([61]), as well as the freedom of manning the vessel, bunkerage and other similar activities indirectly relating to the shipping business ([62]).

14. In order to deal with all kinds of problems involved with navigation on the Rhine and to safeguard and promote the economic prosperity of the Rhine navigation, the stream is administered by the Central Commission for the Navigation on the Rhine (CCNR), having its seat at Strassburg ([63]). All contracting States are represented in the CCNR, the EC Commission participates with the status of an observer in the sessions of the CCNR ([64]). The latter has constituent and judicial powers, the latter not directly but by way of the Chamber of Appeal. Furthermore the CCNR fulfils tasks that are not provided for in the Revised Act of Mannheim. In particular on a social level, the CCNR administers the Agreement concerning social security of boatmen on the Rhine, the European Agreement upon social security of boatmen in inland and Rhine navigation and the Agreement concerning working conditions in

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Die Binnenschiffahrt im gemeinsamen Markt, Duisburg-Ruhrort, s.d., 89 et seq.; VON KÖPPEN, U., "Das Abkommen über Frachten und Beförderungsbedingungen im Verkehr mit Kohle und Stahl auf dem Rhein", *Z.f.B.*, 1958, 183 et seq.; X, "De economische organisatie van de Rijnvaart", *Echo's van Verkeerswezen*, 1961, 47-48).

[61] *O.J.*, *E.C.C.S.*, no. 4 of 1 February 1958, 49 (see: JÄGER, R., *Die Binnenschiffahrt im gemeinsamen Markt*, Duisburg-Ruhrort, s.d., 89 et seq.; VON KÖPPEN, U., "Das Abkommen über Frachten und Beförderungsbedingungen im Verkehr mit Kohle und Stahl auf dem Rhein", *Z.f.B.*, 1958, 183 et seq.; X, "De economische organisatie van de Rijnvaart", *Echo's van Verkeerswezen*, 1961, 47-48).

[62] KRAUS, H. und SCHEUNER, U., *o.c.*, 131; SENGPIEL, M., *o.c.*, 10; SCHEUNER, U., "Fragen des internationalen Verkehrs in der Europäischen Gemeinschaft" in *Festschrift für Hermann Jahrreiss zum 80. Geburtstag*, *Köln*, 1974, 219; SISCHKA, N., "Betriebsverfassungsrecht in der Binnenschif-fahrt – Organisation und Funktionsbedingungen", *Mannheimer Beiträge zum Binnenschiffahrtsrecht*, II, Duisburg, 1996, 1987,

[63] For a more detailed approach on the history, the competences and force of the regulations of the CCNR, see: BIAYS, Ph., « La Commission Centrale du Rhin », *R.G.D.I.P.*, 1952, 223-278; BOUR A., "Die Zentralkommission für die Rheinschiffahrt und ihre Beziehungen zu Einzelpersonen und nichtstaatlichen Organisationen", *Z.f.B.* 1979, 318 ff; GARNON, R. en A., "Réflexions sur les résolutions de la Commission Centrale du Rhin et leur réception en droit français", *N.P.I.*, 1992, 159-162; HOSTIE, J., "Le statut international du Rhin", *R.C.A.D.I.*, 1929, III, 182-184; NIBOYET, J.P., "Les tribunaux pour la navigation du Rhin et le pouvoir judiciaire de la Commission Centrale du Rhin", *R.G.D.I.P.*, 1923, 1 ff; ORLOVIUS, V., "155 Jahre internationale Vorschriften der Zentralkommission für die Rheinschiffahrt", *Z.f.B.*, 1993, no. 20, 10-15; SAUVEPLANNE, J.G., "De gebondenheid der regeringen aan besluiten van de Rijnvaartcommissie", *E.S.B.*, 1951, 70-72; SAUVEPLANNE, J.G., "L'autorité centrale en droit Rhénan", *N.T.I.R.*, 1953, 140-155; SIMONS, J.G.W., "De Europese vervoersintegratie, in het bijzonder : De Centrale Commissie voor de Rijnvaart", *T.v.Vw.*, 1995, 119-125 ; TORLEY DUWELL, I.G., "The way in which the regulations of the Central Commission for the navigation on the Rhine are brought into effect", *N.I.L.R.*, 1987, 91-98 ; VAN EYSINGA, W.J.M. and WALTHER, H., *Geschichte der Zentralkommission für die Rheinschiffahrt 1816-1969,* Strasburg, 1994 ; VAN EYSINGA, W.J.M., *La Commission centrale pour la navigation du Rhin*, Leiden, Sijthof, 1935, 181p.; VON KÖPPEN, U., "Die Geschichte der Zentralkommission und die Rechtsordnung der Rheinschiffahrt", *Z.f.B.*, 1966, 331-337 ; WALTHER, H., "Le Statut international du Rhin et la Commission Centrale pour la Navigation du Rhin", *Rev. des Transports et Communications*, vol. II, nr. 4, oct.-dec. 1949, 8 ff; X, "150 Jahre Rheinzentralkommission. Vorbild erfolgreicher Verkehrsintegration", *Strom und See*, 1966, no. 7-8 ; X, « A la Commission Centralde de la Navigation du Rhin. La Convention de Strassbourg du 20 novembre 1963 est en vigueur », *R.N.I.R.*, 1967, 270-271 ; X, « The Central Commission Rhine navigation » in *Experiences in development and management of international rivers and lakes*, New York, 1983, 266-269.

[64] Although advocated in the past (see: TAMMES, A.J.P., "De bronnen van het Gemeenschapsrecht" in *Europese monografieën*, nr. 6, *De rechtsorde der Gemeenschappen tussen het nationale en het internationale recht*, 112), the EC is obviously not bound by the decisions of the CCNR (MEISSNER, F., *Das recht der Europäischen Wirtschaftsgemeinschaft im Verhältnis zur Rheinschiffahrtsakte von Mannheim*, Berlin, 1973, 123; HAMEL, "Artikel 234 van het EEG-Verdrag en de vrijheid van scheepvaart op de Rijn", *S.E.W.* 1964, 590; LEENEN, A.Th.S., *Gemeenschapsrecht en volkenrecht, Een studie naar de draagwijdte van de eigen rechtsorde van de Europese Gemeenschappen*, 's Gravenhage, T.M.C. Asser Instituut, 1984, 236). On the relationship between the CCNR and the EC see also infra, no. 30.

Rhine navigation. Police and Shipping Regulations are made up by the CCNR and do not only include solely navigational provisions (RPR – Rhine Police Regulation 1995 ([65]), based on the ECE Recommendations CEVNI ([66]) and SIGNI ([67])), but inter alia also provisions relating to the skills of boatmen, the size and composition of the crew, including working and rest hours, the transport of dangerous goods (ADNR – Agreement on the Carriage of Dangerous Goods on the Rhine) ([68]), the safety and technical requirements of the vessels and measures to safeguard the integrity of the waterway. The competence of the CCNR to lay down regulations which restrict the freedom of navigation is considered to be exclusive ([69]). The authorities of the riparian States therefore have no power to adopt national safety regulations, if these impose restrictions on the freedom of navigation.

15. The freedom of navigation on the Danube is actually governed by the 1948 Convention of Belgrade (BDC) ([70]), that replaced the 1921 Convention of Paris ([71]). Signatory States were

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[65] see: ORLOVIUS, V., "Die neue Rheinschiffahrtspolizieverordnung", *Z.f.B.*, 1994, no. 23, 5-6).

[66] Code Européen des Voies de Navigation Intérieure

[67] Signalisation des voies de navigation intérieure

[68] See: HÖNNEMAN, W., "Europäische Gefahrgutpolitik aus Sicht der Binnenschiffahrt", *Z.f.B.*, 1994, no. 15, 6-9; RIDDER, K., "Gefährliche Güter in der Binnenschiffahrt", *Z.f.B.*, 1993, no. 5, 12-16; X, "Das neue ADNR ist endlich fertig", *Z.f.B.*, 1994, no. 5, 30.

[69] HOFHUIZEN, C.F.J.M., "The norms applicable on the Rhine: Regulations concerning safety and environmental protection", in *Challenges of a free and strong inland waterway transport in the pan-european field*, 4Th IVR Colloquium, Bucharest, 21-22 March 2002, 52

[70] *U.N.T.S.*, no. 518, vol. 33, 181 et seq. See: BERNARDI, G., « La libertà di navigazione sul Danubio », *Riv.maritt.*, 1948, 385-406 ; BOKOR-SZEGO, H., "La Convention de Belgrade et le régime du Danube", *A.F.D.I.*, 1962, 192-205; BRUHACS, J., "Le régime internationale de la navigation du Danube", *Pésci Tudomany-egyetem,* Pécs*,* 1986, 28p; BRUHACS, J., "Le régime international du Danube en cette fin de siècle", in X, *Les hommes et l'environnement. Quels droits pour le vingt-et-unième siècle ? Etudes en hommage à Alexandre Kiss*, 541-547; BUTLER, W.E., « Danube » in *Encyclopedia of soviet law*, 2nd ed., FELDBRUGGE, F.J.M.,VAN DEN BERG, G.P. en SIMONS, W.B. (ed.), Dordrecht/Boston/Lancaster, 1985, (963p), 251 ; CIRKOVIC , S.T., *Le nouveau statut juridique international du Danube et le régime du secteur des cataractes et des Portes-de-fer : cours de droit international danubien*, Paris, Association des Etudes Internationales, 1956; CONETTI, G., *Il regime internazionale della navigazione danubiana*, Milan, A. Giuffré, 1970; FEKETE, G., "Eine Grundlage für die Freiheit der Schiffahrt. Entstehung und Bedeutung der Donau-Konvention", *Strom und See*, 1992, 146 and 149-151; GOROVE, S., *Law and politics of the Danube*, The Hague, 1964, 32 et seq. and 78 et seq., particularly 95. HADSEL, F.L., "Freedom of navigation on the Danube", *Department of State Bulletin*, 1948, nr. 468, 787-793; IMBERT, I., "Le régime juridique actuel du Danube", *R.G.D.I.P.*, 1951, 72 ff.; JOHNSON, R.W., "The Danube since 1948", *Yearbook of World Affairs*, 1963, 236-253; KÖVER, J.F., « La lutte pour le Danube », *Etudes internationales*, 1948, 385-406 ; KUNZ, J.L., « The Danube Régime and the Belgrade Conference », *A.J.I.L.*, 1949, 104-113 ; MARCANTONATOS, L.G., "L'évolution du statut international du Danube maritime", *Revue hellénique de droit international*, 1948, 49-69 and 140-156; MARINKOVIC, M., "Cerdeset godina primene Dunavske konvencije", *J.R.M.P.*, 1988, 464-474 (40 years application of the Danube Convention); MARTIUS, G., « Die Entwicklung des zwischenstaatlichen Donauschiffahrtsrechts », *A.d.V.*, 1948-49, 233 ff. ; MEHSLER, H., « Die Donau in Völkerrecht », *Der* Donauraum, 1957, 176 ff. ; MÜLLER, R. en REINTANZ, G., "Zum 30. Jubiläum der Donaukonvention", *Dt.Aussenpolit*, 1978, 85-91; PAUNOVIC, J., "Uredenje na Danavu i Derdapu" *J.R.M.P.*, 1988, 475-485 (The regime of the Danube); PICHLER, F., *Die Donaukommission und die Donaustaaten : Kooperation und Integration*, Wien, 1973 ; SEIDL-HOHENVELDERN, I., "Die Belgrader Donaukonvention von 1948", *A.V.R.*, 1958-59, 253 ff.; SEIDL-HOHENVELDERN, I., "Donau" in *Wörterbuch des Völkerrechts*, ed. SCHLOCHAUER, H.J., vol. 3, 1962; SEIDL-HOHENVELDERN, I., "Danube River", *Encyclopedia of public international law*, Amsterdam, North-Holland, 2° ed., 1992, vol. 1, 934-937; SEIF, A., "30 Jahre Belgrader Schiffahrtsakte", *Z.f.B.*, 1978, 179 ff.; SENGPIEL, M., *o.c.*, 98-133; SINCLAIR, I.M., "The Danube Convention of 1948", *B.Y.I.L.*, 1948, 398-404; VISINSKI, A.J., « Dunavska i nekatori voprosi mezdunarodnogo prava », *Sovetskoe gosudarstvi i pravo*, 1948; WEGENER, W., *Die internationale Donau, Völkerrechtliche Bemerkungen zum Belgrader Donau-Schiffahrtsabkommen von 1948*, Göttingen, Schwartz, 1951, 82p.;

[71] *L.N.T.S.*, no. 647, vol. XXVI, 173 et seq. Although the Paris Convention intended to establish the "statut definitive du Danube", however the Supplementary protocol to the Belgrade Convention provided that the Paris

Bulgaria, Yugoslavia, Romania, the Soviet Union, Czechoslovakia, Ukraine and Hungary. In 1960 Austria adhered to the Convention, in 1998 thanks to a modification of art. 1 Moldavia and Croatia were accepted as Member States, and finally in 2001 Germany adhered. Actually, taking in consideration the separation of Czechoslovakia and the split of the Soviet Union nowadays at least ([72]) the following States can be regarded as having the statute of Danubian States: Austria, Bulgaria, Croatia, Germany, Hungary, Moldavia, Rest-Yugoslavia, Romania, Russia, Slovakia and Ukraine ([73]). The convention contains an article on revision (art. 46), but makes the convention to a closed treaty.

16. The régime is applicable from Ulm to the Black Sea through the Sulina arm, with outlet to the sea through the Sulina channel (art. 2) ([74]). Navigation on the Danube is free and open for the citizens, merchant vessels and goods of all States on the basis of equality in regard of port and navigation charges and conditions for merchant shipping, but this freedom does not extend to carriages between ports of the same state (art. 1) ([75]). Art. 25 explicitly states that vessels under a foreign flag may not engage in local carriage of passengers and freight or carriages ports of the same Danubian state, other than in accordance with the national rules of the respective state. Furthermore, the BDC does not prohibit the levying of tolls and duties by the Danubian States in order to cover the expenses to ensure navigation (art. 35) or by the Administrations in order to cover the expenses to ensure navigation and for works carried out by the latter (art. 36) ([76]), all of this under the condition that these charges may not be a source of profit ([77]). No charges shall be levied on vessels, passengers and goods in respect of transit only. Under art. 24 vessels navigating of the Danube have the right to enter ports, to load and discharge, to embark and disembark passengers, to refuel, and to take on supplies. Art. 41 entitles vessels to make use of loading and unloading machinery, equipment, warehouses

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Convention of July 23, 1921, as well as all former acts providing for the establishment of the regime of the Danube, is null and void.

[72] By saying "at least" we wish to make some reserve taken in consideration that also Russia claims the status of contracting State and member of the Danube Commission, whilst the Czech Republic has clearly expressed his interest in further participation in the Danube Convention (see: BOKOR-SZEGO, *Les problèmes de la succession d'Etats et la convention relative à la navigation sur le Danube*, 1-4; SENGPIEL, M., *Das Recht der Freiheit der Schiffahrt auf Rhein und Donau – eine regimerechtliche Analyse*, Duisburg, Binnenschiffahrts-Verlag, 1998, 125-133),

[73] According to the website of the Danube Commission (www.danubecom-intern.org). In the same sense: HACKSTEINER, T.K., *Uniform binnenvaartrecht binnen handbereik*, Paper, 2004, 3, fn. 5.

[74] The territorial scope of the principle of free navigation therefore is less wide than under the 1921 Convention of Paris. Art. 2 of the latter included the Morava and Thaya insofar as they form the boundary between Austria and Czechoslovakia, as well as the Drave, Tisza and Maros.

[75] This implies a regression in respect of the situation under the 1921 Paris Convention. Under art. 21 of the latter cabotage fell under the scope of applicability of the principle of free navigation, with the exception that "a regular local service for passengers or for national or nationalized goods between the ports of one and the same State may only be carried out by a vessel under a foreign flag in accordance with the national laws and in agreement with the authorities of the riparian State concerned." According to the authentic interpretation of the Final Protocol this reservation applied only to "any public service for the transport of passengers and goods organized under a foreign flag between the ports of one and the same State, when that service is carried on sufficiently regularly, uninterruptedly, and in volume sufficient to influence unfavourably, to the same extent as regular lines properly so called, the national interests of the State within which it is carried on". In practice however cabotage was reserved. The Peace Treaties of 10 February 1947 with Bulgaria (art. 34), Roumania (art. 36) and Hungary (art. 38) explicitly excluded cabotage from the principle of free navigation in almost the same wordings as art. 1 of the Belgrade Danube Convention.

[76] See: ZEILEISEN, C., "Die Schiffahrtsabgaben der Belgrader Donaukonvention", *Ost-europarecht*, 1970, 253-281

[77] According to Zeileisen (*o.c.*, 255) this principle must be considered as a rule of customary international law. See also on this issue: 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.

storage space, etc., however without any guarantee of equal treatment ([78]). Also, art. 26 only provides for a general declaration to the effect that customs, sanitary and police regulations shall be such as not to impede navigation.

17. On the Danube there does not exist the same freedom of affreightment as on the Rhine, due to the so called 1955/1992 "Bratislava Agreements" ([79]) concluded between the former East-European state-controlled national shipping companies, and that provided for a partition of the transport volume between the different member States and fixed tariffs ([80]). In the past these Agreements, that were supervised by the authorities of the riparian States and were considered by them as having the same legal status as an international treaty ([81]), made it practically impossible for West-European shipping companies to transport goods in international transport between the Danubian countries ([82]) and made the freedom of

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[78] In literature this conclusion has been deduced from the final paragraph of art. 41, "on the basis of agreements with the appropriate transport and forwarding institutions" and is considered to create the possibility to exclude vessels and carriers of non riparian states, due to the fact that agreements can only be made between the transport and forwarding institutions of the riparian states (see: PICHLER, F., "Die Donaukomission und die Donaustaaten : Kooperation und Integration", *Schriftenreihe der Österreichischen Gesellschaft für Aussenpolitik und internationale Beziehungen*, Wenen, 1973, 24; KIPPELS, K.W., *o.c.*, 97; TIMMERMAN, B.H., *Der Rhein-Main-Donaukanal und seine Auswirkungen auf die europäischen Binnenschiffahrt*, München, Diss., 1994, 125 WEGENER, W., *o.c* (fn. 37)., 41; ZEMANEK, K., *o.c.*, 2 ; see also : *Conférence Danubienne, Béograd, 1948, Recueil des Documents*, Edition du Ministère des Affaires étrangères de la République Populaire Fédérative de Yougoslavie, Béograd, 1949, 145). Many authors also have made a link between the agreements of art. 41 and the Bratislava Agreements (in this sense: GÖTZER, W., *Der völkerrechtliche Status der Donau zwischen Regensburg und Kelheim*, Frankfurt a.M./Bern/New York/Paris, 1988, 72; KIPPELS, K.W., *o.c.*, 97; PICHLER, F., *o.c.*, 48; SENGPIEL, M., *o.c.*, 105-106; otherwise TROST, J., *Die Haftung des Frachtführers in der Donauschiffahrt*, Duisburg, Binnenschiffahrts-Verlag, 1999, 18-19).

[79] The authentic text is in Russian. English text in: ECE, Trans/WP33/SC.3/R.157. TROST, J., *o.c*, (fn. 40), 54; see also: MAHR, L., "Das Bratislavaer Abkommen – die Gemeinschaft der Donauschiffahrts-gesellschaften", *Verkehr*, 1969, 1537; WERTHEIMER, L., *Die wirtschaftlichen Grundlagen der Donauschiffahrt*, Wenen, 1930, 43; WIRTH, H., *Das Donaufrachtgeschäft*, Diss., Wenen, 1947, 13; GNACEK, L., "View on the actual situation and demands on the future development. The "Bratislava Agreements"", *in 4th IVR-Colloquium. Challenges of a free and strong inland waterway transport in the pan-European field*, Rotterdam, IVR, 2002, 32-36. The Bratislava Agreements are in fact a whole of agrreements, originally three multilateral agreements, one on general transport conditions, one on tariffs, and one on general average, assistance and agency. Later multilateral agreements on the mutual forwarding of the vessels in the Danube Ports and on the carriage of the large-scale containers in international Danube transport. Also, bilateral agreements were added on (1) the reception, delivering, servicing and protection of the unmanned vessels in Danube ports of Loading and Discharging, (2) the reciprocal bunkerage of the Danube shipping companies vessels in Danube ports, (3) the Stevedoring Services (See GNACEK, L., "View on the actual situation and demands of the future development "The BRATISLAVA AGREEMENTS", in *Challenges of a free and strong Inland Waterway Transport in the Pan-European Field*", 4th IVR Colloquium, Bucharest, 21-22 March 2002, 32-36).

[80] The agreement on tariffs and the partition of transport of the Bratislava Agreements was substituted in 1979 by the IDGT Agreement (See: MAHR, L., "Der internationale Donau-Gutertarif (IDGT) in Kraft", *Schiffahrt und Strom*, January/FEbruari 1980, 10-12; WATERMANN, H.R., "Die wirtschaftlichen und rechtlichen Bedeutung für den Wettbewerb zwischen der Rheinschiffahrt und der Donauschiffahrt", *Z.f.V.W.*, 1982, 205-206). In 1997 the Agreement was updated

[81] See: KOVACS, Z., "Some legal aspects of general business conditions", in *IVR-Kolloquium 1997 – Europäische Binnenschiffahrt. Rechtliche Harmonisierung in Ost-West*, Rotterdam, IVR, 1998, 83. See also on this question: AUCHTER, G., "L'indispensable réforme du droit international du transport de marchandises en navigation intérieure, *E.T.L.*, 1994, 714; WATERMANN, H.-R., "Die wirtschaftlichen und rechtlichen Bedingungen für den Wettbewerb zwischen der Rheinschiffahrt und die Donauschiffahrt", *Z.f.V.W.*, 1982, nr. 3, 206; ZEMANEK, K., *Die Schiffahrtsfreiheit auf der Donau und das künftige Regime der Rhein-Main-Donau-Grosschiffahrtsstrasse*, Wien, Springer, 1976, 4. See also infra, footnote 144.

[82] With regard to the difficulties for West-European shipping companies to participate in Danubian transport in the past, see: LAMMERS, J.G., "Het rechtsregime voor de scheepvaart op de Rijn en de Donau",*T.v.Vw.*, 1975, 441; X, "Nota Werkgroep Rijn-Main-Donau", *T.v.Vw.*, 1975, 383; MÜLLER, W., "Das Rhein-Regime und der Europaverkehr", *Schiffahrt und Strom*, december/januari 1980/81, (4-10), 6; CONDRAU, G., "Probleme und

navigation in international transport garantueed under the Danube Convention to all Nations somewhat illusive. However the intent and goals of the Bratislava Agreements perfectly match with the idea on which the Belgrade Danube Convention was based, namely the Danube for the Danubians ([83]). Furthermore one must not forget that the latter concept of free navigation is on itself not in contradiction with the concept of free navigation under the Final Act of the Congress of Vienna and that also on the Rhine with the Additional Protocol no 2 the freedom of navigation has been restricted to riparians and EC residents.

18. As on the Rhine the river is administered by a commission, the Danube Commission ([84]), seated at Budapest ([85]) and consisting of one representative of each Danubian country (art. 4). The Belgrade Convention does not provide for the possibility for non riparian states to participate in the Commission. The competences of the Danube Commission, as described in art. 8, include inter alia supervision over the execution of the provisions of the Convention (art. 8 a), the elaboration of general plans, the carrying out of public works in the interest of navigation, provision of advice in regard of the execution of works, and the establishment of a uniform system of navigation regulations on the entire navigable portion of the Danube and also the basic provisions governing navigation on the Danube, including the basic provisions of the pilot service, taking into account the specific conditions of individual sections (art. 8 f). However, the Danube Commission has no decision making powers nor executive and judicial powers, the resolutions of the Danube Commission only have the value of recommendations ([86]). Each riparian State remains his power to make police and shipping regulations (art. 23, first paragraph) ([87]), albeit that in establishing navigation rules, the Danubian Sates have to take into account the basic provisions on navigation on the Danube established by the Commission. There are no common regulations regarding the skills of boatmen, the size and composition of the crew, and the technical requirements for the vessels. For the transport of dangerous goods exists the so called A.D.N. Recommendation (Recommendation concerning the International Carriage of Dangerous Goods by Inland Waterways), wich is in line with the ADNR Regulation, but this Recommendation does not yet apply in all Danubian States. As on the Rhine the navigational provisions are based on CEVNI and SIGNI ([88]).

Chancen einer Intensivierung des Wareautausches zwischen Staaten Ost-und Westeuropas", *Z.f.B.*, 1988, 87-91; WURMBÖCK, "DDSG. Tariffrage ist Angelpunckt", *Schiffahrt und Strom*, 1973, 5-6

[83] This is clearly expressed in the preamble of the Danube Convention: "Wishing to ensure free navigation on the Danube in accordance with the interests and sovereign rights of the Danubian countries …"

[84] On the Danube Commission, see : MALESEV, E., "La Commission Danubienne", *Revue de la politique internationale*, 1958, 8 et seq.; MANLIK, K.H., "Die internationale Donau. Die Geschichte der Donaukommission", *Schriftenreihe des Arbeitskreises Schiffahrtsmuseum Regensburg e.V.*, Regensburg, 1992, 6, 85 et seq.; PFUSTENSCHMIDT-HARTENSTEIN, H., "Die Donaukommission als ein Instrument der Zusammenarbeit im Donauraum", *Mbl. DKS e.V.*, 1970, no. 5, 20; PSCHORR, R., "25 Jahre Donaukommission", *Z.f.B.*, 1974, 259 et seq. According to art. 14 BDC the Commission shall be granted the right of a legal person in accordance with the legislation of the state at the place of its seat and according to art. 16 BDC members of the Commission and officials authorized by it shall enjoy diplomatic immunity and its official premises, archives, and documents of all kinds shall be inviolable. The privileges and immunities of the Commission have been settled by Agreement of 15 May 1963, in force since 28 January 1964.

[85] Since 1964, before at Galatz (see art. 16 BDC).

[86] BAXTER, R.R., *The law of international* waterways, Cambridge, Massachussets, Harvard University Press, 1964, 136; BOKOR-SZEGO, H., *o.c.*, 202

[87] Except for navigation on the lower part of the Danube and in the Iron Gates area, where navigation must be carried out in accordance with the navigation rules established by the Administrations of the respective areas, created on the basis of art. 20. However also these Adminsitrations have to take into account the basic provisions on navigation on the Danube established by the Commission.

[88] Donauschiffahrtspolizeiverordnung 27 May 1993 (see: CHRISTLMEIER, H., "Die DonauSchPv – einmal kritisch betrachtet", *Z.f.B.*, 1994, no. 20, 27-30).

19. The freedom of navigation on the Moselle is governed by the Moselle Treaty 1956 ([89]). Signatory States are Luxemburg, France and Germany. The regime is practically the same as on the Rhine, but the levying of duties is allowed. International transport is open to vessels of all Nations (art. 29 § 1). Art. 29 § 2 guarantees that public ports and installations subject to public easements, on the course of the Moselle shall be available to boatmen on identical conditions. Tolls or dues may be levied for the upkeep of the waterway. The freedom of navigation does not include the right of cabotage. There exists a Moselle Commission and a separate commission for the upkeep of the stream, the "Internationale Moselgesellschaft". Both have their seat at Trier (Lux.). The Moselle Commission has executive and administrative powers, but no direct judicial powers. In particular, the Moselle Commission has competences in regard of the levying of tolls between Thionville and Koblenz, supervision of the execution of works needed for the canalisation of the Moselle and the safeguard and promotion of the prosperity of the Moselle (art. 40). Art. 34, 1° provides for the establishment of special navigation courts and creates the possibility to appeal to the Chamber of Appeal of the Moselle Commission, which is a separate legal body. Police and Shipping Regulations on the Moselle are practically the same as on the Rhine. The transport of dangerous goods is based on the ADNR ([90]) and the purely navigational provisions are based on CEVNI and SIGNI.

20. The freedom of navigation on the Meuse and Scheldt ([91]) is governed by art. IX of the 1839 Separation Treaty concluded between Belgium and the Netherlands, which expressly

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[89] See: FLESKES, G., *Die internationale Rechtsstatus der Mosel*, München., Dissertationsdrück Schön, 1969, 141p.; RUZIE, D., "Le régime juridique de la Moselle", *A.F.D.I.*, 1964, 765-774 ; SHOLTENS, N., *Het regime voor de scheepvaart op de Moezel*, 2th ed., Rotterdam, Stichting Vervoerswetenschappelijk Centrum, 1960, 64p.; SCHOLTENS, N., "De kanalisatie van de Moezel : "test-case" voor een Europees waterwegennet", *Verkeer*, 1960, 200-212; STENGLEIN, J., "30 Jahre Grossschiffahrtstrasse Mosel", *Z.f.B.*, 1994, 13 et seq.; VAN GEETRUYEN, J., "La Meuse et la Moselle", *La vie économique et sociale*, 1956, 65-72, 129-155 and 245-276.

[90] Verordnung über die Beförderung gefährlicher Güter auf der Mosel

[91] See e.g.: ADANYA, S., *Le régime international de l'Escaut*, Paris, 1929; BARENTS, J., *Het internationaal statuut van de Maas*, Amsterdam, H.J. Paris, 1940, 154p ; BINDOFF, S.T., *The Scheldt Question to* 1839, London, George Allen & Unwin, 1945, 238p.; BOVARD, P.A., *La liberté de navigation sur l'Escaut*, Thesis, Lausanne, Imprémerie Vaudoise, 1950, 195p.; BRIGODE, G. en DUCARNE, M., *L'Escaut, le droit international et les traités*, Brussel, Larcier, 1911, 63p.; d'ARGENT, P., "L'évolution du statut juridique de la Meuse et de l'Escaut: une mise en perspective des accords de Charleville-Mézières du 26 avril 1994", *B.T.I.R.*, 1997, 134-150; DEHOUSSE, M., "Le statut international de la Meuse. Relevé des accords en vigueur", *Liège, la Meuse et le Bassin mosan*, 1939, 183-205; ERKENS, N., "Le statut international de l'Escaut", *B.T.I.R.*, 1967, 353-378; GUILLAUME, *L'Escaut depuis 1830*, Brussel, Alfred Castaigne, 1903, 2 vol.; MARQUET, F., *Le statut juridique de 'Escaut*, Antwerpen, Burton, 1937, 27p.; NYS, E., « Les fleuves internationaux traversant plusieurs territoires. L'Escaut en droit des gens", *R.D.I.L.C.*, 1903, 517-537; PLANCHAR R., "Le droit international fluvial conventionnel particulier dans les eaux intermédiaires Escaut-Meuse-Rhin", in *Mélanges Fernand Dehousse* 1979, T. I, 83-89; SIOTTO PINTOR, M., *Le régime international de l'Escaut*, Parijs, Hachette, 1929, 87p. ; SMIT, C., *De* Scheldekwestie, Rotterdam, Stichting Nederlands Vervoerswetenschappelijk Instituut, 1966, 182p.; VAN BOGAERT, E., "De evolutie van de verdragsregelingen betreffende de Schelde", *Studia* Diplomatica, 1978, 585-595; VAN DE WOUWER, J., *Belang van Rijn-, Schelde- en Maasrecht voor België*, Antwerpen, De Standaard, 1958, 64p ; VAN GEETRUYEN, J., *o.c.*, fn 19; VAN HOOYDONK, E., "Het juridisch statuut van de Belgisch-Nederlandse verkeersver-bindingen in actueel en Europees perspectief" in *De Belgisch-Nederlandse verkeersverbindingen. De Schelde in de XXIste eeuw*, Van Hooydonk, E. (ed.), Antwerpen/Apeldoorn, Maklu, 2001, 91-368; VERHOEVEN, J., "La Meuse et l'évolution du droit des fleuves internationaux" in *Mélanges Fernand Dehousse*, 1979, T. I, 139-140; VITANYI, B., « Scheldt River », *Encyclopedia of public international law*, Amsterdam, North)Holland, 2° ed., 1995, vol. II, 1364-1368; VRIJ, M.P., *Recht en politiek inzake Maas en Schelde: herziening van het tractaat van 1839*, Haarlem, Bohn, 1919, 64p.; WITLOX, F., "Historiek van het totstandkomen van de Belgisch-Nederlandse Waterverdragen en de Problematiek van de verdieping van de Westerschelde", in *Kluwer Transportgids*, Kluwer, Diegem, 2002, 2.1.3.2/1-56;

provides for the application of the art. 108-117 of the Final Act of the Congress of Vienna and by two Guarantee Treaties concluded at the same day, one by Belgium and the other by the Netherlands, with the so called five Great European Powers of that time (Austria, France, Prussia, Russia and the U.K). On the river Scheldt this freedom of navigation applies to vessels of all Nations. The Separation Treaty does not only provide for freedom of navigation on the above mentioned rivers. Furthermore, art. IX § 5 guarantees on the basis of reciprocity free navigation on the waterways between the rivers Scheldt and Rhine for the purpose of navigation from Antwerp to the Rhine, or vice versa, the so-called intermediary waterways ([92]). Finally, art. X of the Separation Treaty widens the scope of applicability of the principle of free navigation for the residents of Belgium and the Netherlands to all international canals that border or traverse Belgium and the Netherlands ([93]). Later, by the Belgian-Dutch Treaty of 13 May 1963 freedom of navigation is also guaranteed on the Scheldt-Rhine connection ([94]).

21. The freedom of navigation on the rivers Scheldt and Meuse only applies to international transport, not to cabotage ([95]). On the river Scheldt navigation for the purpose of transport of goods and passengers is open to vessels of all countries, with exclusion, since 1863 ([96]), of the possibility of levying of tolls or any other dues solely based on the fact of navigation. Police and Shipping Regulations for the part of the river Scheldt from the sea to Antwerp (the Westerscheldt) are made up in common agreement between Belgium and the Netherlands, but

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[92] See: DE BOCK, R., *De tusschenwateren in hun functie als Schelde-Rijnverbinding*, Antwerpen, De Sikkel, 1950; GERRETSON, F.C., *De tusschenwateren 1839-1967*, Haarlem, Tjeenk Willink, 1943; VAN DER MENSBRUGGHE, Y., "Les eaux intermédiaires, la liaison Escaut-Rhin et le plan Delta devant le droit international", *Jur.Anvers*, 1956, 99-113; VAN GEETRUYEN, J., *Het deltaplan : zijn weerslag op het internationaal tusenwater- en rivierenrecht*, Antwerpen, 1957, 88p.; VAN GEETRUYEN, J., "Het deltaplan : zijn weerslag op het internationaal tusenwater- en rivierenrecht", *E.S.T.*, 1956, nos. 4 and 5 and 1957, nos. 1 and 2; VAN GEETRUYEN, J., "La liaison Escaut-Rhin. Historique et état actuel de la question", *Jur. Anvers*, 1957, 99-116; WERY, L.W., *De Rijn- en Schelde verbindende wateren*, Thesis, Leiden, 1929.

[93] This is the case for the Canal from Ghent to Terneuzen, the Zuid-Willemsvaart and the Canal from Liege to Maastricht. In the doctrine, art. 10 is considered to have the same legal value as art. 9 and to contain a general clause on the free use of all frontier-crossing canals by the inhabitants of both countries (see e.g.: FRANCOIS, J.P.A., *Handboek van het* volkerenrecht, Zwolle, Tjeenk Willink, 1949, 1043; SOMERS, E., *Handboek Internationaal Zeerecht*, Ghent, 2° ed., 1990, 331; VERZIJL, J.H.W., *International Law in Historical Perspective*, Sijthof, 1970, III, 226; VITANYI, B., *o.c.*, 187). See with regard to the regime of Dutch-Belgian canals also: STRUYCKEN, A.J.N.M., *Het volkenrechtelijke statuut der Nederland-Belgische kanalen: het kanaal Luik-Maastricht, de Zuid-Willemsvaart, het kanaal van Terneuzen, het kanaal Brugge-Sluis*, Arnhem, Gouda Quint, 1933, 32p.; VAN HOOREBEKE, K., "Het statuut van het kanaal Gent-Terneuzen", *R.W.*, 1981-82, 2711-2740;

[94] For the text of the treaty, see : *Les Actes du Rhin et du Moselle*, Strassbourg, 1966, 47-53. For comments, see: BELMANS, H., "De Schelde-Rijnverbinding", *Het Tijdschrift van het Gemeentekrediet*, 1993/3, nr. 185, 63-68; DE GRUBEN, H., "Les aspects juridiques du traité entre la Belgique et les Pays-Bas au sujet de la liaison entre l'Escaut et le Rhin", *C.P.E.*, 1965, 259; DELWAIDE, L., "La liaison Escaut-Rhin", *Jur.Anvers*, 1964, 3-12; FAYAT, H., "De historiek van de nieuwe Schelde-Rijnverbinding", *Stud.Dipl.*., 1976, 567; FERRATON, Y., "Accord belgo-néerlandaise sur une liasion fluviale moderne entre Anvers et le Rhin", *R.N.I.R.*, 1963, 346-348; OLDEMAN, R.G.C., "La liaison Escaut-Rhin. Historique et état actuel de la question", *Jur.Anvers*, 1957, 99-116; VAN BOGAERT, E., "De evolutie van de verdragsregelingen betreffende de Schelde", *Stud.Dipl.*., 1978, 575.

[95] See: H.R., 1 February 1937, *N.J.*, 1937, nr. 716 (Scheldt); H.R., 21 March 1938, *N.J.*, 1938, nr. 654 (Meuse)

[96] Treaty of 12 May 1863 (DE BUSSCHERE, A., *o.c.*, II, 354). See : BOON, E., De verdragen van 1863 betreffende de afkoop van de Scheldetol en de verhoging der Antwerpse haventarieven, Antwerpen, 1956, 16p.; CRAEYBECKX, L., "Scheldetol afgeschaft", *Tijdschrift der Stad Antwerpen*, 1963, 121-125; DELWAIDE, L., "De vrijkoping van de Scheldetol en de haven van Antwerpen", *Tijdschrift der stad Antwerpen*, 1963, 41-50; DEPOORTERE, R., *Le rachat du péage de l'Escaut*, Gembloux, Académie Royale de Belgique, Classe des Lettres, 1991, 415p.; GRANDGAIGNAGE, E., *Histoire du péage de l'Escaut*, Brussel, C. Murquardt, 1868, 176p.; HIMLER, A., "125 jaar Schelde vrij", *Tijdschrift der stad Antwerpen*, 1988, 186-192; SCHOONHOVEN, E., "Le rachat du péage de l'Escaut", *Revue générale belge*, August 1963, 53-66.

only concern purely navigational rules. Although there exists a Scheldt Commission, it does not have the same powers and duties as is the case on the Rhine, or even on the Danube and Moselle. In fact this Commission can only give advices to the Governments of the riparian States with regard to purely technical aspects concerning the upkeep and navigability of the stream and therefore cannot be considered as a real river commission ([97]). Some of the Police and Shipping regulations for the Rhine apply indirectly on the river Scheldt, in particular those relating to the rules for transport of dangerous goods ([98]).

2. Other bilateral and multilateral treaties

2.1. Bilateral treaties relating to transport rights

22. Beside the multilateral treaties there exists on the European continent an old tradition of bilateral treaties that in the 19th century extended on the basis of reciprocity for the residents of both countries the right to navigate all or some rivers and canals, wether national or international, of both States ([99]). Also, in the 20th century, some bilateral agreements have been concluded with regard to all waterways of the contracting States ([100]) or to some international rivers, that are no longer governed by a special multilateral river act or for which the latter is considered to be in disuse, such as the rivers Elb ([101]) and Oder ([102]). Also, before its accession to the Belgrade Danube Convention in 1960, bilateral agreements have been concluded by Austria with the different East European Danubian States, agreements that in literature are considered to continue to apply even after the accession of Austria to the Belgrade Danube Convention as far as they are not in contradiction with the latter ([103]). In the same period (1954) a similar agreement was concluded between the Federal Republic of Germany and Yugoslavia ([104]).

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[97] BOVARD, P., *o.c.*, 128; ERKENS, N., *o.c.*, 376; SIBERT, M., *Traité de drot international* public, 1952, I, 814, no. 539; SIOTTO-PINTOR, M., *o.c.*, 530.

[98] Belgium has not yet ratified the ADNR. Transport of dangerous goods is still governed by a decree (Regentsbesluit) of 1 August 1948 approving the regulation on the transport of combustibile liquids on inland waterways (*B.S.*, 25 September 1948), as amended by Decree of 4 May 1964 (*B.S.*, 9 June 1964) and implementing the international Convention of the Hague of 1 Februari 1939. However based on the police regulations for the river Scheldt and for the other waterways inland vessels are allowed to transport goods when holding an ADNR certificate (see: DE DECKER, M., *Beginselen van Belgisch Binnenvaartrecht*, 1991, Antwerp, De Schroef, 31-32).

[99] See e.g.: Art. 15 of the Treaty of 2 December 1851 between Austria and Bavaria concerning the navigation on the Danube (DE MARTENS, G.F., *Nouveau Recueil Général*, vol. 12, part. 2, 63 et seq.); Art. 10 of the Treaty of Commerce and Navigation, concluded on 31 December 1851 between the Netherlands and the German Customs Union (Zollverein) (DE MARTENS, G.F., *Nouveau Recueil Général*, vol. 12, part. 2, 216 et seq.). Both treaties extended their field of application to artificial waterways.

[100] See the Agreement conluded on 26 May 1972 between the Federal Republic of Germany and the German Democratic Republic (*B.G.Bl.*, 1972, II, 1449 et seq.), which provided for the admission of vessels of the other Contracting Party to navigation on the natural and artificial internal navigable waterways, for carrying out exchange traffic between the two countries and transit to third countries.

[101] Treaty of 26 January 1988 between Germany and Czecho-Slovakia. However the right for Czech vessels to navigate on the river Elb also has been founded on the basis of international customary law (see: RAIBLE, K., "Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1998, www.virtual-institute.de/en/prax1998/epr98). In regard of the legal status of the river Elb under international law, see: BÖHME, H., *Die völkerrechtliche Stellung der Elbe unter besonderer Berücksichtigung der Situation nach dem zweiten Weltkrieg*, 1959, 179p.

[102] Treaty of 6 Februari 1952 between Poland and the former Democratic Republic of Germany (see GILAS, J., "Konstrukcja rzecnych przywilejow zeglugowych a zegluga na Odzre", *Przegl.Stosunkow Miedzynar*, 1985, 7-17).

[103] See: PFUSTENSCHMIDT-HARDTENSTEIN, H., *o.c.*, 15; ZEMANEK, K., *o.c.*, 2.

[104] See: GÖTZER, W., *o.c.*, 71; JAENICKE, G., *o.c.*, 45. SENGPIEL, M., *o.c.*, 121-122; TROST, J., *o.c.*, 26-28

23. More recently in connection with the opening of the Main-Danube canal some West-European Rhine or Moselle riparian states have concluded bilateral agreements with some of the East European states providing for provisions relating to bilateral traffic, traffic in transit, "third countries traffic" ("Drittlandverkehr") and cabotage. In particular, agreements have been concluded by Germany ([105]), with the Soviet Union (27.10.1986), Hungary (12.12.1986), the Czech Republic and Slovakia (14.12.1987), the former Yugoslavia, Ukraine and Poland, by the Netherlands ([106]) with Hungary, the Czech Republic, Slovakia and Poland, by Luxemburg with the Czech Republic, Yugoslavia and Ukraine and by France with Romania. Among these agreements, those concluded between old and new Member States have ceased to be applicable since 1 May 2004, at least for these matters that have been settled by community law, the other ones continue to exist. Because of the incompleteness and differences between the bilateral treaties the use has been criticized in the past ([107]) and a plea has been made to come to a multilateral agreement on European Community level ([108]).

2.2. Multilateral treaties relating to other, specific topics

24. Above we already mentioned the Agreements relating to social security schemes and the UN Recommendations CEVNI and SIGNI. Furthermore, in order to safeguard the integrity of the waterways and to prevent pollution, after important preliminary work begun in 1991 in the framework of the CCNR, by Convention on the Collection, Depositing and Reception of Waste produced by Rhine and Inland Shipping, signed at Strassburg on 9 September 1996, inland navigation vessels (and seagoing vessels) are in principle forbidden to dump liquid and other waste into inland waterways. Signatory States are the Rhine and Moselle riparian States ([109]). This Convention, the scope of which will extend to all the inland waterways of Western Europe

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[105] For some comments, see: SENGPIEL, J., "Prüfstein und Garant für einen fairen Wettbewerb zwischen Donau und Rheinschiffahrt – Der Main-Donau-Kanal", *Z.f.B.*, 1988, 120-128; CONTZEN, H., "Der Anschluss des Donau-Raumes an das wetseuropäische Wasserstrassenner – Fakten, Folgen und Entwocklungen", *Z.f.B.*, 1989, 166-168; KRAUSE, G., "Die Rolle der Binnenschiffahrt im wachsenden Verkehrsmarkt Europas", *Z.f.B.*, 1992, 725-730; PISECKI, F., "Organisation und Bedeutung einer gesamteuropäischen Binnenschiffahrtspolitik für die Hauptwasserstrassen zwischen Ost- und West-Europa", *Z.f.B.*, 1988, 84-86.

[106] For some comments, see: FERNHOUT, M., "Bilaterale verdragen", *Schippersweekblad*, 1991, nr. 12, 133-134

[107] See e.g.: VON DÄNIKEN, F., "Fragen zum künftigen Verhalten von ZKR und EG. Binnenschiffahrt zwischen Ost und West – auf welcher vertraglichen Grundlage", *Strom und See*, 140-141; See also the resolution of the European Parliament of 13 March 1992.

[108] This has been the point of view of the Dutch Government, see the parliamentary Documents ("Memorie van Antwoord") of the "Wet Vervoer Binnenwateren" (Transport by Waterways Law); see also: DUTEMEYER, K., *Probleme der Rhein-Main-Donau Verbindung in ökonomischer und rechtlicher Sicht*, Conference held in December 1977 at the German Association of Transport Sciences, multiplied, 17-18; FERNHOUT, M., *o.c.*, fn 32; GRULOIS, PH., Lecture delivered at Ghent on 3 April 1976 on the occasion of the General Meeting of the Belgian Study Centre for Inland Navigation, multiplied, 9-10; VITANYI, B., *o.c.*, fn. 3, 806-807. On the other hand in the past Germany has always advocated the use of bilateral agreements (see e.g. KRAUSE, G., "Die Rolle der Binnenschiffahrt in wachsenden Verkehrsmarkt Europas", *Z.f.B.*, 1992, 729; SENGPIEL, J., "Prüfstein und Garant für einen fairen Wettbewerb zwischen Donau und Rheinschiffahrt. Der Main-Donau-Kanal", *Z.f.B.*, 1988, 121; TOMCZAK, W., "Rhin-Main-Danube: un nouveau pas a été fait vers son achievement", *R.N.I.R.*, 1978, 317-318 ; X, « Négociations austro-allemandes en prévision de l'ouverture de la liaison Rhin-Main-Danube », *R.N.I.R.*, 1975, 460)

[109] *Trb.*, 1996, 293. GONSAELES, G., "Het CCR-Verdrag inzake de verzameling, afgifte en inname van afval in de Rijn- en binnenvaart", *T.V.R.*, 2002, 193-199; GONSAELES, G., Het CCR-Verdrag inzake de verzameling, afgifte en inname van afval in de Rijn- en binnenvaart, in VAN HOOYDONCK, E. (ed.), *Zeeverontreiniging: preventie, bestrijding en aansprakelijkheid*, Antwerpen, Maklu, 2003; GONSAELES, G., "Afvalstromen afkomstig van de zee- en binnenvaart - Over de tewaterlating van Richtlijn 2000/59/EG in Vlaamse wateren en het op stapel staande Scheepsafvalstoffenverdrag, *T.M.R*, 2003; SPIER, J.L., "Scheepsafvalstoffenverdrag Rijn- en Binnenvaart", *T.V.R.*, 1997, nr. 4, 10.

belonging to the contracting States and, for France, the canalised part of the Moselle as well as the waterways in the north of the country, however is not yet in force ([110]). The CCNR has decided to also apply the Convention to the territory covered by the Act of Mannheim. However, even in case of ratification by the contracting States the Convention will not apply on the whole integrated fluvial transport network.

3. Community Law

3.1. Public fluvial transport law and the EC Treaty

25. The E.C. Treaty does not provide for a special provision aiming to guarantee freedom of navigation on international rivers or other waterways nor even any special provision with regard to fluvial navigation, but only contents in the art. 70-80 EC a set of general rules based on the goal of the establishment of a common transport policy (art. 3.1 f and 70) ([111]), being described as a coherent set of rules ([112]), in principle applying to each mode of inland transport (art. 80) and needing further elaboration in regulations, directives or decisions. Although the EC Treaty does not explicitly mention the establishment of a common transport market, this is considered to form part of the goals to achieve ([113]). Furthermore, it is understood that the general provisions of the EC Treaty also apply to the transportation sector, however with exception of the external competence with regard to the common commercial policy ([114]) and the general provisions relating to the freedom to provide services. The latter must be assured by the provisions of the transport title (art. 70-80) ([115]). In order to carry out the tasks entrusted to it, by Council Directive 80/119/EEC ([116]) a market observation system has been introduced, providing for consistent, synchronized and regular statistical data on the scale and development of the carriage of goods by inland waterway in the Member States.

26. The establishment of a common transport policy involves, inter alia, laying down common rules applicable to access to the market in the international and national transport of goods by inland waterway (art. 71.1 a and b EC), measures to improve the safety of transport by inland waterway (art. 71.1 c EC) ([117]) and any other appropriate measures (art. 71.1 d EC). On this

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[110] The Convention will come into force as soon as it has been ratified by the signatory states. Switzerland has ratified the Convention in November 1998. The preamble of the Convention states that the levying of a fee for the depositing and reception of waste does not affect the principle of freedom of customs and tolls as provided for in the Agreement of 16 May 1952.

[111] Subject of these provisions are only transport undertakings, not intermediaries or shippers (see Memorandum of the Commission of 10 April 1961 concerning the direction of the common transport policy, VII/COM (61) 50 def., 38).

[112] E.C.J., case 13/83 European Parliament vs. Council, *E.C.R.*, 1985, 1513 and *C.M.L.R.*, 1986, 1, 138. For comments, see: ERDMENGER, J., "Die EG-Verkehrspolitik vor Gericht. Das EUGH-Urteil Rs. 13/83 vom 22.5.1985 und seine Folgen", note under judgment 13/83, *Eur.*, 1985, 375-392; FENNEL, Ph., note under judgment 13/83, *E.L.R.*, 1985, 264-276; MAURY, B., "La politique commune des transports, un nouveau janus juridique ?", *C.D.E.*, 1986, 62-91; SCHERMERS, H.G. and SLOT, P.J., note under decision 13/83, *S.E.W.*, 1985, 786-806; SIMONS, J.G.W., "Liberalisatie in het vervoer moet", *E.S.B.*, 1985, 579 et seq. and 702 et seq.; SIMONS, J.G.W., "Bij een noot ! – over het Europees vervoerrecht", *T.v.Vw.*, 1987, 11-15; WILDBERG, H.J., note under judgment 13/83, *N.J.W.*, 1985, 1261-1263.

[113] E.C.J., case 167/73 French Seamen, *E.C.R.*, 1974, 359; C.J., case 13/83, *E.C.R.*, 1985, 1513

[114] Art. 133 EC. See: Opinion 1/94 Re Creation of W.T.O., *E.C.R.* , 1994, I, 5267, (5402-5404), nos. 48-53

[115] E.C.J., case 167/73 French Seamen, *E.C.R.*, 1974, 359; E.C.J., 30 April 1986, cases 209-213/84 Asjes, *E.C.R.*, 1425; E.C.R., 11 April 1989, case 66/86 Ahmed Saeed Flugreisen, *E.C.R.*, 1989, 803

[116] Council Directive 80/1119/EEC of 17 November 1980 on statistical returns in respect of carriage of goods by inland waterways, *O.J.*, L 339 of 15 December 1980

[117] Art. 71.1 c EC was inserted by the Treaty of Maastricht in order to avoid discussions with regard to the competence of the Community in this field (see for such a discussion: C.J., 28 November 1978, case Schumalla,

point the Council has a wide margin of discretion ([118]). The latter can be used inter alia as the legal basis for provisions relating to the abolition of border controls ([119]), the structural coordination or harmonization of tax and social condtions, the restriction of the supply of capacity, the promotion of combined transport, etcetera. Article 72, considered to be directly effective ([120]), contains a so called "standstill" clause, intending to prevent the introduction by the Council of a common transport policy from being rendered more difficult, or from being obstructed, by the adoption, without the Council's agreement, of national measures the direct or indirect effect of which is to alter unfavourably the situation in a Member State of carriers from other Member States in relational to national carriers ([121]). The latter can also consist in an administrative practice ([122]). This provision ceases to have effect when the measures specified in article 71.1 EC, and is thus for the moment still effective. Also, this standstill clause may still be relevant for new accessions, even after the achievement of a common transport policy ([123]).

27. Article 73 prohibits aid measures, unless they meet with the needs of coordination of transport or the compensation of public transport services ([124]). Article 74 provides that measures in respect of freight rates and transport conditions must take account of the economic circumstances of the transport companies. Articles 75 required abolition at the latest before the end of the second stage of the transitional period of discriminatory carriage rates and conditions. Article 76 EC contains a prohibition on Member States imposing, in respect of transport operations carried out within the Community, rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries, unless authorized by the Commission. Article 77 prohibits the carriers from imposing charges or dues in respect of the crossing of frontiers. Article 78 has lost its significance since the unification of Germany. Article 79 establishes an Advisory commitee for Transport, attached to the Commission. Whereas none of the new Member States has requested a transitional period for issues in the inland navigation chapter, the "acquis

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E.C.R., 1978, 2311)

[118] KAPTEYN, P.J.G. and VERLOREN VAN THEMAAT, P., *o.c.*, 1182; Case C-17/90, Pinaud Wieger GmbH Spedition v. Bundesanstalt für den Güternverkehr, *E.C.R.*, 1994, 5253-5283

[119] LENAERTS, K. en VAN NUFFEL, P., *Europees recht in hoofdlijnen*, Antwerp-Apeldoorn, Maklu, 1995, 187, no. 213. See also: Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of carriage of goods between Member States, *O.J.*, L 359 of 22 December 1983 – no longer in force). The EC Council expressed the view that waiting times at frontier crossing-points affect the flow of transport between Member States, lead to an increase in transport costs, which is passed on in the end price of the goods carried, and thus have a negative effect on intra-Community trade and may have a negative effect on the working conditions of those employed in the transport sector, in particular in road transport and inland waterway transport.

[120] E.C.J., 31 March 1993, cases C-184/91 and C-221/91, *E.C.R.*, 1993, I, 1633 at 16660-1661 and *E.T.L.*, 1993, 587

[121] WÄGENBAUER, R., "Rechtsfragen der stillhalteverpflichtung des EWG-Vertrags auf dem Gebiet des Verkehrs", *S.E.W.*, 1964, 170; E.C.J., case 195/90, Commission v. Germany, 1992, *E.C.R.*, 1992, I, 3141.

[122] See with regard to fluvial transport: E.C.J., 31 March 1993, cases C-184/91 and C-221/91, Christof Oorburg and Serge van Messem v. Wasser- und Schiffahrtsdirektion Nordwest, *E.C.R.*, 1993, I, 1633 at 1660-1661 and *E.T.L.*, 1993, 587

[123] KAPTEYN, P.J.G. and VERLOREN VAN THEMAAT, *o.c.*, 1183

[124] See: Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway, *O.J.*, L 130 of 15 June 1970. Aids are possible e.g. in regard of community provisions relating to access of the market, in order to eliminate structural overcapacity. De de minimis aid rule, as established by Commission Regulation (EC) no. 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, *O.J.*, L010 of 13.01.2001, however does not apply to the transport sector (see art. 1 Regulation (EC) no. 69/2001). See furthermore also: Regulation (EEC) No 1108/70 of the Council of 4 June 1970 introducing an accounting system for expenditure on infrastructure in respect of transport by rail, road and inland waterway, *O.J.*, L 130 of 4 June 1970

communautaire fluvial" will immediately apply from the moment of becoming member of the E.U.

28. Although the EC Treaty does not exclude from the territorial scope of applicability (see art. 80 EC) the waterways for which a régime of free navigation has been established by a multilateral or bilateral convention and that therefore prima facie fall under primary and secondary Community law ([125]), one has to admit that the legal relationship between on the one hand primary and secondary European community law, and one the other hand the régime of international rivers, has not only been the fount of a rich literature ([126]), in particular in regard of Rhine navigation, but also one, and probably the most important, cause of failure in the past of EC proposals with regard to fluvial transport ([127]) and the regression in the

[125] See the Schaus Memorandum of 10 april 1961, Doc. VII/COM (61)50 def. 1, 40.

[126] ALOY, J., "De Europese integratie van de Rijnscheepvaart voor en na het Verdrag van Rome", *Mededelingen Marine Academie*, 1964, 44-45; BOUR, A., *o.c.*; BRAAKMAN, A., "Das völkerrechtliche Verhältnis des EWGV zu älteren Verträgen aus sicht der EG" in WIESE, G. (ed.), *Probleme des Binnenschiffahrtsrechts*, VII, Mannheimer rechtswissenschaftliche Abhandlungen, Heidelberg, 1994, 115 ff.; DEPENHEUER, O., *Europäische Gemeinschaft und Mannheimer Akte*, in Probleme des Binnenschiffahrtsrechts VII, Wiese (ed.), Heidelberg, Mannheimer rechtswissenschaftliche Abhandlungen, 1994, 107 ff.; DOLFER, *Das Verhältnis der Mannheimer Akte zu den Römischen Verträgen, Probleme des Binnenschiffahrtsrechts*, VI, 1991; DONI, W., *Die Binnenschiffahrt in der Europäischen Integration*, in *Vorträge und Beiträge aus dem Institut für Verkehrswissenschaft an der Universität Münster*, Deel 34, Göttingen, 1965; ERDMENGER, J., in *Kommentar zum EWG-Vertrag*, Von der groeben, H, Thiesing, J. en Ehlermann, G-D, vol I, Baden-Baden, Nomos Verlaggeselschaft, 1991, no. 32-36; FLESKES, G., *o.c.*, 86-94; GEILE, W., "Die Binnenschiffahrt in der EWG", *Z.f.B.*, 1969, 237-240; HAMEL, W.A., "Art. 234 van het E.E.G.-Verdrag en de vrijheid van scheepvaart op de Rijn", *S.E.W.*, 1964, 590-598; HOEDERATH, R., "Die Rechtsstellung der Schweiz zu der Mannheimer Rheinschiffahrtsakte und den Verträgen über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl sowie der Europäischen Wirtschaftsgemeinschaft", *A.V.R.*, 1963, 167 ff..; HULSMANN, G., "Europäische Verkehrspolitik aus der Sicht der deutschen Binnenschiffahrt", *Z.f.B.*, 1994; LEBER, G., "Neue Aufgabe zur Ordnung des Rheinschiffahrtsmarktes", *Z.f.B.*, 1968, 465-469; MATSCHL, G., *Die Europäischen Gemeinschaften und die Freiheit der Rheinschiffahrt*, München, 1965; MEISSNER, F., *Das recht der Europäischen Wirtschafts-gemeinschaft im Verhältnis zur Rheinschiffahrtsakte von Mannheim*, Berlin, 1973; MÜLLER-HERMANN, E., *Die Grundlagen der gemeinsamen Verkehrspolitik in der Europäische Wirtschaftsgemeinschaft*, Bad Godesberg, 1963; MÜLLER, W, "Die Geltung der verkehrsrechtlichen Verordnungen der EWG in der Rheinschiffahrt", *Strom und See*, 1963, 119 ff.; MÜLLER, W., "Unité du régime rhénan et politique européenne des transports vues du point de vue suisse", *N.P.I.*, 1982, 545-547; PABST, H.U., "Rheinregime und EWG-Vertrag, *Z.f.B.*, 1982, 38 e.v.; PABST, H.U., "Eine "Europäische Stromakte", anzustrebendes Ziel oder nur eine Illusion", *Z.f.B.*, 1998, 33-37; RABEN, H., "Die Bedeutung der Rheinschiffahrtsregime für die Zukunft", *Z.f.B.*, 1968, 472-474; RIPHAGEN, *Europese Monografieën*, 1966, no. 6, 81-90; RITTSTIEG, H., *Rheinschiffahrt im gemeinsamen Markt*, Baden-Baden, 1971; SENGPIEL, M., *Das Recht der Freiheit der Schiffahrt auf Rhein und Donau: eine regimerechtliche Analyse.*, Duisburg, Binnenschiffahrtsverlag, 1998, 147-204; SCHOLTENS, N., "De kanalisatie van de Moezel: "testcase" voor een Europees waterwegenrecht"., *Verkeer*, 208 ff.; TAMMES, A.J.P., "De bronnen van het Gemeenschapsrecht" in *Europese Monografieën*, nr. 6, *De rechtsorde der Gemeenschappen tussen het nationale en het internationale recht*, 112; TROMM, J.J.M., *Juridische aspecten van het communautair* vervoerbeleid, 's Gravenhage, Asser Instituut, 1990., 42; VAN HOOYDONK, E., *De Belgisch-Nederlandse verkeersverbindingen. De Schelde in de XXIste eeuw*" Maklu, Antwerp-Apeldoorn, 2002, 256-349; VON DÄNIKEN, F., "Die Binnenschiffahrt im Europäische Wirtschaftsraum: Standortbestimmung aus völkerrechtlicher Sicht", in *Internationales Recht auf See und Binnengewässern*, *Festschrift für Walter Müller*, Zürich, 1993, 49 ff.; VONK, K., "De Rijnvaart : enkele historische en structurele kanttekeningen", *T.v.Vw.*, 1969, 147-157; VON KÖPPEN, U., Das Schiffahrtsregime auf Mosel, Rhein und Donau", *Z.f.B.*, 1963, 239-245; VON KÖPPEN, U., "Das Rheinregime in seiner internationalen Stellung, insbesondere im Verhältnis der Revidierten Rheinschiffahrtsakte von 1868 zum EWG-Vertrag", *Z.f.B.*, 1966, 350-357; VON KÖPPEN, U., "Deutsche und europäische Aspekte der Rheinschiffahrt", 1968, 386-389; WALTHER, H., "La CEE et l'Acte de Mannheim", *Strom und See*, 1964, nr. 7/8, 248-250; X, "Darf sich die EWG über die Mannheimer Rheinschiffahrtsakte hinwegsetzen", *Strom und See*, 1963, nr. 7/8; ZULEEG, "EWG-Vertrag und Rheinregime", *Verkehr und Gemeinschaftsrecht*, KSE, Bd. 18, 1972, 229 ff.

[127] See e.g. : Proposal for a Council Regulation on the harmonisation of certain social provisions relating to goods transport by inland waterway, *O.J.*, C 259 of 12 November 1975 and the Amendments to this Proposal

development of EC fluvial transport law.

29. Without deepening here and now this issue in detail, we like to emphasize the following. The special rivers acts as well as the Final Act of the Congress of Vienna with Annexes are elder treaties than the EC Treaty concluded, with exception of the Moselle Act, with third parties and therefore can, except prima facie for the Moselle Act ([128]), appeal to the "pacta sunt servanda" priority rule of art. 307, first paragraph EC ([129]). Furthermore they can be considered as being territorial or real treaties ([130]) binding "erga omnes". Also,

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(*O.J.*, C 206 of 16 August 1979, although both were based on the provisions for the manning of Rhine vessels; Proposal of a Regulation in regard of bracket tariffs for the transport of goods by railway, road and inland waterway, *O.J.*, 168 of 27 October 1964 (see on this issue: BAKKEREN, J.P.A., *Prijsregelingen voor het vervoer*, Europese Monografieën, 13, 105 et seq.; RIPHAGEN, W., *De vervoerswetgeving, zijn verhouding tot internationale verdragen en zijn werking in de lidstaten*, Europese Monografieën, 6, 87; X, "Darf sich die EWG über die Mannheimer Rheinschiffahrtsakte hinwegsetzen?", *Strom und See*, no. 7/8). See also the controversy in regard of the applicability of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws in the Member States relating to turnover taxes – Common system on value added tax: uniform basis of assessment, *O.J.*, 13 June 1977 and compatibility of VAT with art. 3 of the Revised Act of Mannheim (see on this issue: BOUR, A., "Umsatzsteuer für Leistungen der Rheinschiffahrt: Eine Seeschlange?", *Z.f.B.*, 1987, 15 et seq.; SENGPIEL, M., *o.c.*, 175-177). On the other hand also initiatives of the CCNR failed due to a conflict of competence between the EC and the CCNR, e.g. the U.I.R. plan for the foundation of the "Union der Internationalen Rheinschiffahrt" with compulsed membership for Rhine carriers in order to prevent structural overcapacity (see: EEC Document, SEC (66° of 22 June 1966 and *Bull.*EEC, 1966, Supplement, no. 11; BLONK, W.A.G., *Enige aspecten en problemen van het goederenvervoer tussen de lid-staten van de europese economische gemeenschap, met name ten aanzien van de kwantitatieve beperkingen en kwalitatieve belemmeringen*, Rotterdam Stichting Nederlands Vervoerswetenschappelijk Instituut, 1968, 98-110; MÜLLER, W., "Die Pläne zur Kapazitätsregelungen in der Rheinschiffahrt im Spannungsfeld EWG-Zentralkommission", *Z.f.B.*, 1967, 74 et seq.; WATERMANN, H R., "Die wirtschaftlichen und rechtlichen Bedingungen für den Wettbewerb zwischen der Rheinschiffahrt und die Donauschiffahrt, *Z.f.V.W.*, 1982, (179-215), 209-210.

[128] DEGLI ABATI, C., *Transport and European integration*, Luxemburg, Officie for official publications of the European Communities, 1987, 218; SCHAUS, L., *Les transports dans le cadre de l'intégration européenne*, Brussels, Bruylant, 1979, 123 ; SEIERMANN, L., "La Moselle dans le context européen", *R.N.I.R.*, 1960, 346 ; RUZIE, D., *o.c.*, 812 ; Answer of the Commission.in regard of written question no. 12 Lichtenauer, M., *O.J.*, 1960, 853. However, the Court of Justice, in his Opinion 1/76 Re Draft Agreement establishing a laying-up fund for inland waterway vessels (*E.C.R.*, 1977, 741-762) referred to art. 307 EC in regard of the participation of this Agreement of six Member States, either being contracting party of the Act of Mannheim or the Moselle Convention in consideration of its attachments with the Rhine Convention: "6. A special problem arises because the draft agreement provides for the participation as contracting parties not only of the Community and Switzerland but also of certain of the Member States. These are the six States which are party either to te Revised Convention of Mannheim for the Navigation of the Rhine of 17 October 1868 or the Convention of Luxembourg of 27 October 1956 of the canalization of the Moselle, *having regard the relationship of the latter to the Rhine.* Under article 3 of this agreement, these States undertake to make the amendments of the two abovementioned conventions necessitated by the implementation of the statute annexed to the agreement. 7. This particular undertaking, *given in view of the second paragraph of article 234 of the Treaty*, …3.

[129] See: E.C.J., 16 June 1998, C-162/96, A. Racke GmbH & Co/Hauptzollamt Mainz, *E.C.R.*, 1998, I/3705, paragraph 49: "the pacta sunt servanda principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention)". Furthermore, it is even irrelevant wether or not those third countries appeal on their rights or not (see C.J., 2 August 1993, case C-158/91 (Lévy), *Jur.*, 1993, I-4287; 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 Verlaggesellschaft, 1999, 366).

[130] I.C.J., 25 September 1997, Gabcikovo-Nagymaros, *I.C.J. Reports*, 1997, no. 123: "…. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector on an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a

notwithstanding the priority of EC Law in the relations between Member States, the E.C. competences have to be exercised and consequently interpreted ([131]) in conformity with international law and therefore the European Community has to respect the relevant rules of international law ([132]) and one can say that the latter applies to the principle of free navigation on a basis of perfect equality, this principle being considered to form part of European Public Law ([133]). Finally, it has been argued that the existence of a Rhine regime and the competences of the CCNR are to be considered as distinctives features, in the sense of art. 70

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situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligation under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube. … Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Artcile 12 of 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 Januari 1993." See also: VAN HOOYDONK, E., *o.c.*, Maklu, Antwerp-Apeldoorn, 2002, 268-269, nr. 91. Many authors also consider the navigation rights on international rivers as international servitudes, see e.g.: CRUSEN, G., "Les servitudes internationales", *R.C.A.D.I.*, 1928, 1-79; BRIGODE, G. en DUCARNE, M., *L'Escaut, le droit international et les traités*, Brussel, Larcier, 1911, 48; DE RYCKERE, "L'Escaut Hollandais et les navires de guerre", *Le droit maritime*, 1914, 36-54; FABRE, P.-P., *Des servitudes en droit international public*, Paris, Rousseau, 1901, 29; FASTENRATH, U., "Servitudes" in *Encyclopedia of Public International Law*, d. 10, Amsterdam, North-Holland, 1987, 389; FITZMAURICE, G., "The Juridical Clauses of the Peace Treaties", *R.C.A.D.I.*, 1948, 293-294; LABROUSSE, P., *Des servitudes en droit international public*, Bordeaux, Imprimerie Commerciale et Industrielle, 1911, 249-253; Mc NAIR, A.D., "So-called State Servitudes", *B.Y.I.L.*, 1925, 111; Mc NAIR; A.D., "Treaties producing Effects "erga omnes" in *Scritti di Diritto internazionale in Onore di Tomaso Perassi*, vol. II, Milan, Giuffrè, 1975, 23; O'CONNELL, D., "A reconsideration of the Doctrine of International Servitude", *Canadian Bar Review*, 1952, 807; POTTER, P.B., "The Doctrine of Servitudes in International Law", *A.J.I.L.*, 1915, 627; REID, H.D., "Les servitudes internationales", *R.C.A.D.I.*, 1933, 1; VALI, F.A., *Servitudes of international law*, 2de ed., London, Stevens & Sons, 1958, 145-147, 156-157 en 161-164; VAN HOOYDONK, E., *o.c.*, 137; WOOLSEY, *Introduction to the study of international law*, 81. Otherwise, e.g.: FASTENRATH, U., "Servitudes" in *Encyclopedia of Public International Law*, vol. 10, Amsterdam, North-Holland, 1987, 389; FRANCOIS, J.P.A., *Handboek van het Volkenrecht*, Zwolle, Tjeenk Willink, 1949, 128; WINIARSKI, B., *o.c.*, 130. The P.C.I.J. in his Wimbledon case (17 August 1923, *P.C.I.J.*, Serie A, 1923, no. 1, 24) and the I.C.J. in his Gabcikovo-Nagymaros case have side-stepped this question.

[131] Affirmatively: LENAERTS, K. en VAN NUFFEL, P., *Europees recht in hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 1999, no. 695-696; VANHAMME, J., "Inroepbaarheid van verdragen en volkenrechtelijke beginselen", 248; MEISSNER, F., *o.c.*, 82; SENGPIEL, M., *o.c.*, 174; see also the Case Law mentioned in footnote 55.

[132] E.C.J., 24 November 1992, C-286/90, Poulsen and Diva Navigation, *E.C.R.*, 1992, 6048, paragraph 9 with regard to the relevant rules of the Law of the Sea. In particular the customary right to innocent passage and the freedom of navigation of third country ships. For comments, see: BRANDTNER, B. and FOLZ, H.-P, note under Poulsen, *E.J.I.L.*, 1993, 442 et seq. See also on this issue: E.C.J., 2 August 1993, C-158/91, Ministère Public, Direction du travail et de l'emploi. Levy, *E.C.R.*, 1993, I-4287, paragraph 22 ; E.C.J., 16 June 1998, C-162/96, A. Racke GmbH & Co/Hauptzollamt Mainz, *E.C.R.*, 1998, I/3705, paragraph 45 where the Court, referring to its ruling in Poulsen/Diva Navigation, ruled that the European Community must comply with the rules of customary international law.

[133] See supra, no. 5. Besides these arguments, in literature also has been refered to the principle of subsidiarity of art. 3B of the Treaty of Maastricht (BOUR, A., *o.c.* (fn. 38), 72-73; JUNG, C., "Subsidiarität in der europäischen Verkehrspolitik", *Transp.R.*, 1999, no. 4, 129-138). In regard of fluvial transport Jung (136) defends the opinion that the aspects of acces to the market, pricing and the safety of vessels are definitely determinated by European Community Law and that for all other aspects the Member States are competent and that the E.C. can only intervene with due observance of the principle of subsidiarity. In the opinion of Erdmenger measures that have to be taken in order to realize the freedom to provide transport services, as defined in art. 71.1 a) and b), fall under the exclusive competence of the EC, whereas measures in regard of improvement of the safety of the transport (art. 75.1 c) and any other appropriate measures (art. 71.1. d) fall under a competitive competence of the EC and the Member States. Only for the latter the priniplce of subsidiarity therefore can play (ERDMENGER, J., *Kommentar zum EWG-Vertrag. Titel IV Verkehr*, VON DER GROEBEN, H. THIESING, J. and EHLERMANN, C-D, vol 1, Baden-Baden, Nomos Verlaggesellschaft, 1991, 1704).

EC and therefore must be taken into account ([134]). The same can be said for all the special river acts ([135]) and the river clauses of the Final Act of the Congress of Vienna.

30. On the other hand the fact that the Member States are bound to respect, apply and execute under good faith primary and secondary Community Law leads to the conclusion that Member States, that are also contracting States with regard to treaties relating to international rivers, must choose among the different possible interpretations of provisions of these treaties, this interpretation that gives the best result in order to realize the goals of the EC-Treaty, in particular the realization of a common fluvial transport policy and a common fluvial transport market ([136]). In order to avoid conflicts and incompatibilities ([137]) between the EC Treaty and the Act of Mannheim the above mentioned Additional Protocol no. 2 has created the possibility for accession of the EC to the Revised Act of Mannheim ([138]). Although the Commission announced in the White Paper to propose that the Community become a full member of the CCNR as well as of the Danube Commission, until now this is not the case ([139]). In the meanwhile in the last two decades conflicts and incompatibilities between the EC

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[134] GREAVES, R., *Transport law of the European Community*, London, Athlone Press, 1997, 4; AUSSANT, J., FORNASIER, R., LOUIS, J.V., SECHE, J.C. and VAN RAEPENBUSCH, S., "Transport" in *Commentaire Mégret. Le droit de la CEE*, vol 3, *Libre circulation des personnes, des services et des capitaux. Transports*, 2nd ed., 1990, Brussels, ED. U.L.B., 260

[135] In the White Paper (p. 92-93) the Commission stated that "when the six candidate countries connected to the Community's international network of inland waterways have adopted the acquis there will be one system in force on the Rhine and a Community system in force on the other inland waterways such as the upper Danube, the Oder and the Elbe". This declaration could gives the impression that the EC when elaborating secondary community law in regard of fluvial transport should only have to take into account the Revised Convention of Mannheim. However, as explained infra, the E.C. already has taken into account in his Directive relating to international transport with the Belgrade Convention. Also, the responsability of the Danube Commission for navigation on the Danube has been recognized in Council Decision 2000/474/EC of 17 July 2000 concerning the Community contribution to the International Fund "Clearance of the Fairway of the Danube", *O.J.*, L 187 of 26 July 2000: "Whereas (2) The Danube Commission, as an inter-governmental institutional established by the 1948 Belgrade Convention, is responsible for navigation on the Danube; Member States of the Danube Commission, …, adopted a project proposal "Clearance of the Fairway of the Danube" which the Danube Commission the presented to the Commission for consideration".

[136] Memorandum of the Commission in regard of application of Community Law on the Rhine, Doc. VII, Com 64/140, I, 6. In an unpublished decision of 19 December 1978 (*Bull. E.C.*, 1978, 11, point 2.1.93 and *Bull. E.C.*, 1978, point 2.1.135) the EC Council took steps to ensure that the Member States concerned acted unanimously in the Central Commission for the Rhine.

[137] For a plea in favour of accession of the EC, see: ERDMENGER, J., *Kommentar zum EWG-Vertrag, Titel IV Verkehr*, VON DER GROEBEN, H., THIESING, J. en EHLERMANN, C-D, (4v.), I., Baden-Baden, Nomos Verlaggesellschaft, 1991, 1196; IPSEN, K., *Völkerrecht*, München, Ch. Beck'sche Verlagsbuchhandlung, 1999, § 48, no. 19;

[138] In the Protocol of Signature of the Additional Protocol no 2 the Contracting States in the interest of development of a common transport policy and the Rhine regime have declared to be willing to take measures to start negotiations on modifications of the Revised Convention of the Rhine that should be necessary in case of the accession of the EC to the international regime of the Rhine. As a consequence of the accession of the EC to the Rhine Convention, this Convention and the principle of free navigation would form an integral part of the legal order of the Community (see E.C.J., 30 September 1987, case 12/86, Demirel, *E.C.R.*, 1986, 3719; E.C.J., 14 November 1989, case 30/88, Greece/Commission, *E.C.R.*, 1989, 3711; E.C.J., 20 September 1990, case C-132/89, S.Z. Sevince/Staatssecretaris van Justitie, *E.C.R.*, 1990, I, 3461).

[139] It in unclear what the legal consequences will be of an accession of the Community in regard of the individual riparian States that are also EC Member States. In particular, one can question wether or not the accession of the EC would put an end to the participation of the Member States itself. Even in the case of an extensive interpretation of the competences of the EC on the Rhine (and the Danube), the latter cannot affect inter alia the competences of the Members States relating to obligations deriving out of the Act of Mannheim or Belgrade Danube Convention (and even out of the Final Act of the Congress and annex XVI B) that are anyhow only incumbent on the riparian States, such as the general, permanently binding, obligation to establish and guarantee at least in accordance with the minimum provisions of the Final Act of the Congress of Vienna a regime of free

Treaty and the Act of Mannheim (and also the Belgrade Convention) have been carefully avoided either by excluding the Rhine or Danube area out of the scope of applicability of secondary Community Law or by adoption of similar measures by the CCNR for the Rhine area (see infra). Furthermore, with a view to the development of a genuine Community policy with regard to inland waterway transport, and in view of the accession to the EU of several States with major inland waterway sectors, the European Commission and the CCNR have signed on 3 March 2003 an agreement designed to strengthen the pragmatic cooperation between the two organisations, thereby both contributing towards the establishment of a framework for promoting and developing inland waterway ([140]).

3.2. Secondary Community Law in regard of fluvial transport – the "Acquis communautaire fluvial" ([141])

3.2.1. The different EC transport rights and their beneficiaries

31. Within the EU freedom of establishment any EU citizen may establish an inland water transport business in any EU Member State he likes ([142]). From the moment of their accession this right as well as the freedom to provide transport services ([143]), is, without any period of transition, equally guaranteed to the citizens of the new Member States. In order to encourage the achievement of freedom to provide services and the effective exercise of the right of establishement, by Council Regulation 87/540 ([144]) measures have been adopted designed to coordinate the conditions for acces to the occupation of carrier, in particular common rules governing acces to the occupation of carrier in order to improve the level of qualifications of carriers, and by doing so likely to help towards putting the market on a sounder footing, eliminating structural excess capacities and improving the quality of the services provided, in the interests of users, carriers and the economy as a whole. Therefore natural persons or undertakings wishing to pursue the occupation of carrier of goods by waterway must satisfy

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navigation with equal treatment on European international rivers, and the obligations relating to the navigability of the waterway. Decisions relating to these obligations therefore can only fall within the competence of the Member States.

[140] This agreement replaces the exchanges of letters which have governed between the CCNR and the Commission since 1961 (see *O.J.*, 1961, C 1027; VON KÖPPEN, U., "Das Schiffahrtsregime auf Mosel, Rhein und Donau, *Z.f.B.*, 1963, 244; VON KÖPPEN, U., "Das Rheinregime in seiner internationalen Stellung, insbesondere im Verhältnis der Revidierten Rheinschiffahrtsakte", *Z.f.B.*, 1966, 352), and was strengthened in 1987 (SIMONS, J.G.W.., "De Europese vervoersintegratie, in het bijzonder: de Centrale Commissie voor de Rijnvaart", *T.v.Vw.*, 123. For a detailed review of the relationship between the CCNR and the EC in the past, see also: BOUR, A., "Les relations entre la Communauté Economique Européenne et la Commission Centrale pour la Navigation du Rhin", in *Internationales Recht auf See und Binnengewässern, Festschrift für Walter Müller*, Zürich, Schültness, polygraphischer Verlag, 1993, 61-74). The new agreement provides for an information exchange procedure. Representatives of each of the organisations will be present at meetings of mutual interest concerning inland waterway transport organised by one or other of the parties. In the White Paper, in order to safeguard Europe's interests at world level, the Commission has emphasized its plan to propose reinforcing the position of the Community in international organisations, inter alia the Danube Commission.

[141] For a review on secondary community law in the field of fluvial transport until 1992, see: DE DECKER, M., "De marktreglementering van de Europese binnenvaartmarkt", *T.B.H.*, 1993, 396-466. General works on European Transport Policy hardly pay any attention to secondary community law in the field of fluvial transport. Briefly: KAPTEYN, P.J.G. and VERLOREN VAN THEMAAT, P., *o.c.*, 1194-1196

[142] Unequal treatment of nationals and foreigners as regards establishment is not compatible with the provisions guaranteeing freedom of establishment, that have direct applicability (see E.C.J., 21 July 1974, case 2/74 - Reyners, *E.C.R.*, 1974, 631)

[143] Sse E.C.J., 3 December 1977, case 33/77 – Van Binsbergen, *E.C.R.*, 1977, 1299

[144] Council Directive 87/540/EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway in national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualification for this occupation, *O.J.*, L 322 of 12 November 1987

the condition of professional competence (art. 3.1) ([145]), consisting in the possession of the standard of competence accepted by the authority or body appointed by each Member State in the subjects listed in the Annex of this Directive (art. 3.2). The Member States shall recognize the certificates issued by another Member State as sufficient proof of professional competence (art. 7).

32. Furthermore, under Community law the freedom to provide transport services in national transport – cabotage - is established by Regulation 3921/91 ([146]) in favour of those carriers that can prove a "genuine link" with one of the Member States (art. 1 and 2). This "genuine link" requires proof on the one hand that the carrier is established in a Member State and that he is entitled there to carry out international transport of goods by inland waterway (art. 1) and on the other hand that he only makes use of vessels whose owners are natural persons domiciled in a Member State or legal persons having their registered place of business in a Member State and the majority holding in which or majority of which belongs to Member State nationals (art. 2). The latter must be proved by a document certifying that the vessel belongs to Rhine Navigation or a certificate issued by the Member State in which the vessel is registered or, if it is not registered, by the Member State in which the owner is established. It must be beard in mind that, differently from seagoing vessels, inland vessels have no nationality ([147]). The registration of a inland vessel in a ship's register therefore does not create a nationality, but only serves the purpose of safeguarding some rights and privileges of

[145] Unlike in the equivalent directives in other transport sectors, professional competence is the sole Community criterion for acces to the occupation. Member States are free to impose on their own nationals certain requirements as to good repute or absence of bankruptcy (art. 8), however without any obligation.

[146] Regulation (EEC) n° 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State, *O.J.*, L 373 of 31.12.1991. One of the consequences of this Regulation is that carriers that cannot proof a genuine link with one of the Member States are not allowed to cabotage, this therefore also applies to Swiss carriers, whereas before as a Rhine riparian state this was possible also outside the Rhine area. This factual consequence has been criticized from a Swiss point of view (see: HALDIMANN, U., "Was dürfen die Schiffe unter Schweizer Flagge ?", *Strom und See*, 1992, 204). The Dutch and Belgian governments have declared that Swiss Rhine vessels are allowed to cabotage outside the Rhine area (see VON DÄNIKEN, F, note in *Strom und See*, 1992, 205).

[147] In order to prevent possible conflicts of laws that, in the opinion of some doctrine, could rise as a consequence of the opening of the Rhine for vessels of all Nations, as provided for in the Treaty of Versailles, the idea was suggested to grant a nationality to inland navigation vessels (see: CALEB, M., *R.N.I.R.*, 1925, no. 9; CHARGUERAUD-HARTMANN, M., "Nationalité des bâtiments de navigation", *R.G.D.I.P.*, 1925, 321; CHARGERAUD-HARTMANN, M., "L'internationalisation du droit de la navigation intérieure", *R.N.I.R.*, 1925, (114-118), 117; HISS, E., in *Rheinquellen*, 1925, 132 et seq.; IWENS D'EECKHOUTTE, P., "Le droit de pavillon en matière de navigation intérieure", *R.B.D.M.*, 1925, 2-6; "Deux réformes désirables. L'obligation de l'immatriculation et l'obligation de l'incorporation en matière fluviale", *R.B.D.M.*, 1924, 75-80; NIBOYET, J.P., "Les conflits de lois relatifs à la batellerie rhénane", *R.N.I.R.*, 1922-23, 48-53 ; NIBOYET, J.P., "Etude de droit international privé", *R.D.I.L.C.*, 1924, 332-376; NIBOYET, J.P., "A propos de la nationalité (droit de pavillon) des bateaux rhénans et du régime international du Rhin", *R.N.I.R.*, 1929, 255-258; RÜHLAND, C., "Nationalität der Binnenschiffe: das Grundproblem der Arbeiten des Völkerbundes für ein internationales Binnenschiffahrtsrecht", in *Festschrift für Max Pappenheim*, 1931). This idea however was rejected by Germany and the Netherlands. In the German view, as a consequence of the fact that inland vessels are navigating on waterways falling under the territorial sovereignty of a riparian state, conflicts of laws could not rise (see: HENNIG, R. in *Z.f.B.*, 1926, 172 et seq.; MITTELSTEIN, M., "Flaggenrecht der Rheinschiffahrt", *Der Rhein*, 1925, 329 et seq. and Z.f.B., 1924, 267; OPPERMANN in *Z.f.B.*, 224 e.v., 269 e.v. en 310 et seq..; ZSCHOKKE, P. in *Rheinquellen*, 1925, nos. 7 and 9). In the Dutch view, possible conflicts of laws could be solved without the necessity of a nationality. The nationality issue has been dealt with in the Commission of Navigable Waterways of the Barcelona Conferente of 1921 (*o.c.*, 331) and during the first International Conference for the Unification of fluvial law at Geneva in 1930, however without any succes (see: NIBOYET, J.P., "La première conférence pour l'unification du droit fluvial", *R.D.I.L.C.*, 1931, (303-324) and (546-547); VAN SLOOTEN Az., G., "De binnenvaartconferentie van Genève 1930", *Themis*, 1931, 241).

natural and legal persons on inlands vessels. Furthermore, until now there are no uniform provisions relating to registration of inland vessels ([148]).

33. According to art. 3 the carrying out of cabotage is subject to the laws, regulations and administrative provisions in force in the host Member State in the fields mentioned in art. 3, subject to the application of Community rules, i.e.: (a) rates and conditions governing transport contracts, and chartering and operating procedures; (b) technical specifications for vessels; (c) navigation and police regulations; (d) navigation time and rest periods; (e) VAT on transport services. Furthermore Member States are not allowed to introduce any new restrictions applicable to Community carriers on the freedom to provide services which has in fact been attained at the date of entry in force of this Regulation (art. 5). Art. 6 expressly states that the Regulation does not affect the rights existing under the Revised Convention for the Rhine. This statement presupposes that cabotage forms an integral part of the Rhine regime. Whereas the other special rivers acts do not provide for the freedom of cabotage, not only Regulation 3921/91 does not affect any rights deriving from these river acts ([149]), it also establishes freedom of cabotage under Community Law on these waterways, including the section of the Danube falling within the Community. As a consequence the new Member States cannot forbid cabotage by vessels of other Member States and vice versa and can only subject it to the laws, regulations and administrative provisions in force in the host Member State in the fields mentioned in art. 3, subject to the application of Community rules.

34. Furthermore, the freedom to provide transport services in international transport within the Community between Member States and in transit through them is established by

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[148] See infra for references footnotes 219-220. As far as some of the national legislations still require for the owner of the vessel as a condition for registration the nationality and/or residence in the country of registration, one can conclude the incompatibility with E.C. law. Indeed, according to the ruling of the Court of Justice in the case "Regina v. Secretary of State for Transport ex parte Factorame Ltd and others", conditions with regard to registration of seagoing vessels that require that the property of the vessel is owned by persons having the nationality of a particular Member State and that the directors have their residence in that Member State, are at variance with the freedom of establishment under the E.C. Treaty (C.J., 25 July 1991, *E.C.R.*, 1991, I, 3905; *2 Lloyd'sRep.*, 1991, 648). See for comments: CHAUMETTE, P., "L'essor du droit communautaire maritime", *D.M.F.*, 1992, 340-341; CHURCHILL, R.R., "European Community Law and the Nationality of Ships and Crews", *Eur.Vervoerr.*, 1991, 591-617; DELWAIDE, L. and BLOCKX, J., "Kroniek van zeerecht, Overzicht van rechtsleer en rechtspraak 1976-1989", *T.B.H.*, 1991, 980; EECKMAN, P. and VANHEES, H., "Overzicht van de Rechtspraak van het Hof van Justitie en van het Gerecht van eerste aanleg van de Europese Gemeenschappen (september 1990-juli 1991", *R.W.*, 1991-92, 1316.

[149] However, with regard to the Belgrade Convention, we wish to make the following observation. Although as explained above the principle of free navigation clearly does not apply to cabotage and therefore at first sight there cannot be any conflict between Regulation 3921/91 and the Danube Convention, however one could ask himself if not art. 25 could be interpreted in this sense that it creates in favour of the contracting states the right to reserve cabotage, including the right to authorize or not authorize in accordance with their national regulations one or more co-riparians of the Danube, either on the basis of reciprocity or for any other reason, to carry on transport between ports situated within its territory. (in the sense of a right: HOFHUIZEN, "The inland waterways of tomorrow on the European continent", CEMT/CM(2002)6, 22.04.2002, 7). This interpretation obviously would lead to the conclusion that art. 25 of the Danube Convention is contrary to the provisions of Regulation 3921/91.However another interpretation could be that art. 25 does not create a right for the contracting states, but only confirms that the question of reservation of cabotage on the Danube is a strictly national matter. As a consequence of the priority of Community Law above national law, in the relationship between the old and new Member States Regulation 3921/91 prevails. Furthermore, as explained above (see no. 30), Member States, that are also contracting States with regard to treaties relating to international rivers, must choose among the different possible interpretations of provisions of these treaties, this interpretation that gives the best result in order to realize the goals of the EC-Treaty. This can only be that the Belgrade Convention does not settle the right of cabotage, only confirms thath this is a national matter. Nevertheless, it would be recommandable by revising the Belgrade Convention to avoid the possibility of a conflict.

Regulation 1356/96 ([150]), once again in favour of carriers having the same "genuine link" with one of the Member States as mentioned in Regulation 3921/91 (art. 1 and 2). Art. 3 states that this Regulation shall not affect the rights of third-country operators under the Revised Convention for the Navigation of the Rhine, the Convention on Navigation on the Danube or the rights arising from the European Community's international obligations ([151]). Furthermore, whereas Regulation 1356/96 has the goal to exclude from transport within the Community other carriers than those who have a genuine link with one of the Member States, art. 4, second paragraph of the Act of Mannheim, as revised by the Additional Protocol n° 2, leaves open, under the conditions laid down by the CCNR, the possibility for other vessels to transport goods between to points on the Rhine and/or the assimilated waterways. However, the CCNR has never specified such conditions.

35. Above we already mentioned the fact that under Community law ([152]) E.C. residents have the right to transport goods between two points situated on the Rhine and/or the assimilated waterways with vessels belonging to the Rhine. This leads to the conclusion that the conditions of acces to fluvial transport within a Member State as well as between Member States can be performed, have been established under Community law. The latter is not the case with regard to transport between a Member State and a third State. Although already in 1992 the Commission has been given mandate by the EC Council ([153]) to start negotiations with Poland and the Danubian Countries in regard of the rules applying to transport by the inland waterways of the parties concerned ([154]), until now there is no secondary Community

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[150] Regulation (EEC) n° 1356/96 of 8 July 1995 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services, *O.J.*., L 175 of 13.07.1996.

[151] Although this article only mentions the rights of third States, one can doubt wwether this EC Regulation can affect the right of the other Contracting States that are at the same time EC Member States. As we explained above the Danube Convention can be considered to be a territorial treaty, binding erga omnes, including inter alia equal treatment in regard of the transport conditions and falling under the relevant rules of international law. Also one will observe that art. 3 does not mention the navigation rights of third nations that are guaranteed by the special river acts with regard to the rivers Scheldt and Moselle and therefore puts serious question-marks whether or not this Regulation is not in defiance with these conventions.

[152] 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. Art. 1 of the Annex provides for the following: "*For the purpose of this Regulation the States referred to in the first sentence of paragraph 3 of the Protocol of Signature of Additional Protocol 2 of 17 October 1979 to the Revised Convention for the navigation of the Rhine shall be accorded equal status with the Contracting States of the said Convention.The expression 'Contracting State' in this Regulation shall always include each of those States as accorded equal status.*"

[153] *Bull.E.C.*, 1992, nr. 12, 88; See also: SENGPIEL, J., "Grundsätzliche Probleme des Ost-Verkehrs in der Binnenschiffahrt", *Z.f.B.*, 1993, (4-9), 8; SIEGL, V., "Die rechtlichen Rahmenbedingungen der österreichischen Schiffahrtspolitik", *Donau- Lebensader und Wirt-schaftsache*, 1994, 6 a.f.; TIMMERMANN, B.H., *o.c.*, 242; TROST, J., *o.c.*, 31.

[154] In regard of the external competence of the Community in the field of transport, see e.g.: C.J., 31 March 1971, Case 22/70 (ERTA), Commission/Council, *E.C.R.*, 1971, 263; C.J., 14 July 1976, Cases 3, 4 and 6/76, Cornelis Kramer and others (Biological resources of the sea), *E.C.R.*, 1976, 1729; Opinion 1/76 Re Draft Agreement establishing a European laying-up fund for inland waterway vessels, *E.C.R.*, 1977, 741-762; Opinion 1/94 Re Creation of W.T.O., *E.C.R.* , 1994, I, 5267, (5402-5404), nos. 48-53; C.J., 5 November 2002, Open Sky cases C-466/98 (Commission/United Kingdom), C-467/98 (Commission/Denmark), C-468/98 (Commission/Sweden), C-469/98 (Commission/Finland), C-471/98 (Commission/Belgium), C-475/98 (Commission/Austria), C-476/98 (Commision/Germany), www.curia.eu.int/nl/jurisp.; Resolution European Parliament of 13 March 1992; Draft Visegrad Treaty); see also for some comments on Opinion 1/76: BOUR, A., "L'avis rendu par la Cour de Justice des Communautés Européennes sur l'Accord relatif à l'institution d'un Fonds européen d'immobilisation de la navigation intérieure (1/76) d'un point de vue rhénan", *Eur.Vervoerr.*, 1992, 746-758; HARDY, M., "Opinion 1/76 of the Court of Justice: the Rhine Case and the Treaty Making Powers of the Community", *C.M.L.R.*, 1977, 561-600; GROUX, J., "Le parallelisme des compétences internes et

law relating to transport between a Member State and a third State and in transit through a Member State and a third State ([155]). Council Regulation EC No 1356/96 only applies to the transport of goods by inland waterways "between Member States and in transit through them". As a consequence the remaining bilateral agreements between Member States and third States therefore remain in force ([156]). This leaves open the possibility of different treatment between EC residents.

36. Finally, Protocol 20.1 on the acces to inland waterways of the Agreement on the European Economic Area signed in Opporto on 2 May 1992 with (actually) three of the EFTA States (Iceland, Norway and Liechtenstein) ([157]) provides that mutual right of acces shall be granted by each of the Contracting Parties to each other's inland waterways. Secondary legislation stemming from the European Union, and listed in Annex XIII to the EEA Agreement, applies to the transport sector. As regards inland waterway transport this legislation includes rules on acces to the market, technical harmonization rules and rules on acces to the occupation. However, since there are no inland waterways in any of the three EFTA States, they are not, for the time being, obliged to implement measures in this sector ([158]), also the Agreement has no legal consequences for the acquis communautaire fluvial with regard to the European interconnected waterway network nor with regard to the acquis rhénan and the CCNR competences nor with regard to the Belgrade Danube Convention ([159]).

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externes de la communauté européenne. à propos de l'avis 1/76 de la Cour de justice du 26 avril 1977", *C.D.E.*, 1978, 3-22; KAPTEYN, P.J.G., "Het advies 1/76 van het Europese Hof van Justitie, de externe bevoegdheid van de Gemeenschap en haar deelneming aan een Europees oplegfonds voor de binnenscheepvaart", *S.E.W.*, 1978, 276-288 en 360-369; WEIS, H., "Anmerkung zum Gutachten des Gerichshofes der Europäischen Gemeinschaften vom 26.04.1977", *Eur.*, 1977, 278 e.v. However note that art. 4, third paragraph of the Act of Mannheim, as revised by the Additional Protocol n° 2, authorises the contracting States to make agreements with third States relating to transport between a point situated on the Rhine and a point situated on the territory of a third State.

[155] On 28.03.1996 a draft agreement was completed with the so called Visegrad States (Czech Republic, Hungary, Poland, and Slovakia). The basic idea was that vessels of the Contracting States should be allowed on the basis of reciprocity, equality of treatment and within the framework of the Agreement to participate freely in bilateral transport and transport in transit (art. 2 and 4), whereas for the exercise of other transport rights, such as "Drittlandverkehr" a permit was required (art. 6 and 8). Furthermore, art. 3 provided expressly that the Agreement did not affect the rights and obligations deriving out of the Act of Mannheim and the Danube Convention of Belgrade. This draft agreement was criticized by the E.S.O., U.I.N.F. and the Internationaler Arbeitsgemeinschaft der Rheinschiffahrt. See also: HULSMAN, G., "Europäische Verkehrspolitik aus Sicht der deutschen Binnenschiffahrt", *Z.f.B.*, 1993, nr. 14, 9. SENGPIEL, M., *o.c.*, 218; KESSLER, V., "Europäische Schiffahrtsregime – Sind wir ihm nähergekommen ?", *Donau – Lebensader und Wirtschaftsache*, 1994, 13). As a consequence of the accession of the Visegrad States to the E.U., this draft agreement only has historical value.

[156] This is the case for the Agreements that have been concluded by Germany, the Netherlands and France with Rumania and by Germany with Bulgaria and Ukraine.

[157] *O.J.*, L 1 of 3 January 1994, adjusted by the Protocol adjusting the Agreement on the European Economic Area of 17 March 1993, *O.J.*, L 1 of 3 January 1994 and amended by the EEA Enlargement Agreement, *O.J.*, L 130 of 29 April 2004 and EEA Supplement N° 23 of 29 April 2004. Switzerland, although EFTA State is (no longer) a Contracting State of this Agreement. Therefore the European Economic Area includes the fuifteen old and the ten new member States of the European Union and three of the four states of the European Free Trade Association.

[158] Protocol 20.3 provides that "All relevant acquis in inland waterways shall apply as of the entry into force of the Agreement to those EFTA States which have, at that time, acces to Community inland waterways, and to the other EFTA States as soon as they obtain the right of equal acces".

[159] Protocol 20.1, second sentence provides that "In the case of the Rhine and the Danube, the Contracting Parties will take all necessary steps to reach simultaneously the objective of equall acces and freedom of establishment in the area of inland waterways." Whereas Switzerland is not a Contracting State this obligation does not apply to this country, nor does it for the same reason to the Danubian states that are not Member States of the European Union. Neither the Revised Convention of the Rhine neither the Belgrade Danube Convention can be altered without the common consent of all the Contracting States of it. Wit regard to the Rhine, see VON

3.2.2. Provisions relating to market regulation mechanisms in order to safeguard a fair and workable competition

37. Council Regulation 11 of 27 June 1960 ([160]) forbids every discrimination in transport rates and conditions if the place of expedition or destination is situated in a Member State. For the purpose of supervision on the observance of the prohibition a transport document which fulfils at least the requirements of art. 6 must be drawn up. The fact that the Rhine is not excluded from the scope of applicability has given rise to criticism in literature ([161]), however in fact the Regulation has not sorted any effect on the economic organization of the Rhine market and rather can be considered to be a refinement of the principle of free navigation ([162]). Furthermore one cannot ignore that in practice fluvial transport, wether on the Rhine or outside the Rhine, frequently is done without a particular transport document.

38. Furthermore Council Regulation (EEC) No. 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway ([163]) prohibits as incompatible with the common market in principle ([164]) all agreements between undertakings, decisions of

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DÄNIKEN, F., "Die Binnenschiffahrt in Europäischen Wirtschaftsraum: Standortbestimmmung aus Völkerrechtlicher Sicht", in *Festschrift für Walter Müller*, Zürich, Schulthess Polygraphischer Verlag, 1993, 49-60.

[160] *O.J.*, L 335 of 22 December 1960.

[161] See on this issue: BAYENS, R. and GAUDET, M., "Aperçu de quelques problèmes juridiques concernant les transport dans la CECA et dans la CEE", *Droit européen des transports*, 1969, 236; CAMPBELL, A., *o.c.*, 317-319; DOUSSET, J., in *Commentaire Mégret*, 1° ed., *o.c.*, 292-293; DÜTEMEYER, K., *100 Jahre Verein zur Währung der Rheinschiffahrtsinteressen e.V.*, Duisburg, Ruhrort, 1977, 58 KLIMMECK, R.D., "Zur Rechtmässigkeit der Verordnung Nr. 11 insbesondere im Hinblick auf das Rheinschiffahrtsregime", *DVbl.*, 1964, 94; MÜLLER, W., "Die Geltung der verkehrsrechtlichen Verordnungen der EWG in der Rheinschiffahrt", *Strom und See*, 1963, 119; MÜLLER, W., "Die EWG-Verordnung Nr. 11 über die Beseitigung von Diskriminierungen auf dem Gebiet der Frachten und Beförderungsbedingungen und die Stellung der Schweizerischen Binnenschiffahrt", *Strom und See*, 1961, 200-208; PABST,H.U., "Rheinregime und EWG-Vertrag, *Internationales Verkehrswesen*, 1981, 406; REHBAN, A., *Die Beseitigung und Verhinderung von Diskriminierungen sowie Subventionen in der Verkehrstarifen Westeuropas*, Bad Godesberg, 1963; SENGPIEL, M., *o.c.*, 154-156; SCHEUNER, U., "Fragen des internationalen Verkehrs in der Europäischen Gemeinschaft" in *Festschrift für Hermann Jahrreis zum 80. Geburtstag*, Köln, 1974, 219; STABENOW, W., "Opportunities for an external policy of the EEC in the field of transport", *C.M.L.R.*, 1966, 46-49; ; VONK, K., "De discriminatie-verordening vervoer in de E.E.G.", *S.E.W.* (Europa), 1960, 170-180; WÄGENBAUER, R., "Zur Rechtmässigkeit der Verordnung Nr. 11 des Rates der Europäischen Gemeinschaft", *DVBl*, 1964, 429. See also for the position of the CCNR, *Annual Report*, 1970, 7).

[162] See in this sense SCHEUNER, U., "Das Rechtsstatut des Rheins im Rahmen der europäischen Zusammenarbeit", lecture for the German Association of International Law, 16 June 1967 quoted by STABENOW, W., "Die internationalen Konventionen über die Binnenschiffahrt im Lichte der wirtschaftlichen integration Europas", *Selection of Papers*, Università degli Studi di Trieste", 1967, 552

[163] *O.J.*, L. 175 of 23 July 1968. For some comments, see: DE DECKER, M., *Beginselen van Belgisch Binnenvaartrecht*, Antwerpen, De Schroef, 1991,299-311; DE DECKER, M., "De reglementering van de Europese binnenvaartmarkt", *T.B.H.*, 1993, 414-420; HORSTING, H.H. en GERBERS, O.D., "De E.E.G.-mededingingsregels en het vervoer", *T.v.Vw.*, 1968, 230; LAUWAARS, R.H., "De toepassing van de mededingsregels op het gebied van het vervoer", *S.E.W.*, 1969, 342; TORLEY DUWEL, I.G., "Verordening no. 1017/E.E.G. van de Raad van 19 juli 1968, houdende toepassing van mededingingsregels op het vervoer per spoor, over de weg en over de binnenwateren", *N.J.B.*, 1968, 987-995; WATERMANN, H., "Kartellregelung und gemeinsamen Verkehrspolitik", *Z.f.V.*, 1968, nr. 3; WÄGENBAUER, R., "Wettbewerbsregeln für den Verkehr in der EWG", *A.W.D.*, 1968, nr. 1; WOOD, D., *Transport* in FAULL, J. en NIKPAY, A., *The EC Law of Competition*, Oxford, Oxford University Press, 1999, 888-895.

[164] Art. 3 provides for an exception for technical agreements, decisions and concerted practices, whilst art. 4 provides for an exemption for groups of small and medium-sized undertakings always provided in the case of transport by inland waterway that the total carrying capacity of any grouping does not exceed 500.000 metric tons and the individual capacity of each undertaking belonging to a grouping shall not exceed 50.000 metric tons. Finally, art. 5 provides for the non-applicability, after a declaration in that sense with retroactive effect, of

associations of undertakings and concerted practices between undertakings that can lead to affecting trade between Member States or distortions of competition within the common transport market (art. 2) as well as all instances of abuse of a dominant position within the common market which could have such effects (art. 8) ([165]). Although the Rhine is not explicitly excluded from the scope of applicability of this Regulation ([166]), application of the latter on the Rhine has not affected any obligations with regard to third parties deriving out of the Rhine regime nor has it in fact caused any difficulties with regard to the economic organization on the Rhine ([167]). The pools and conventions at that moment used in Rhine navigation were considered not to be at variance with the provisions of Regulation 1017/68 ([168]). Outside the Rhine, until now the organization of the market of fluvial transport has only given rise to one judicial dispute concerning the so-called French EATE construction ([169]). A new possible conflict with this Regulation however could rise with the pricing and contracting conditions of the above mentioned Bratislava Agreements, although the possible impact has been diminished after the change of the former state-controlled national shipping companies into private companies and the fact that the observance of this Agreement is no longer supervised by the Danubian authorities. However, they still exist and must be considered, at least nowadays, as being private agreements between private companies ([170]) and therefore can fall under the scope of applicability of art. 2 of Regulation n° 1017/68 ([171]).

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the prohibition of art. 2 to any agreement, decision or concerted practice which contributes towards improving the quality of transport services or promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or increasing the productivity of undertakings or furthering technical or economic progress, and at the same time takes fair account of the interests of transport users and neither (a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives, nor (b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

[165] According to art. 8 such abuse may consist in (a) directly or indirectly imposing unfair transport rates or conditions; (b) limiting the supply of transport, markets or technical development to the prejudice of consumers, (c) applying dissimalr conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties or supplementary obligations which, by their nature or according to commercial usage, have no connection with the provision of transport services.

[166] For some comments and critics on this issue: HORSTING, H.H. en GERBERS, O.D., *o.c.*, 244; LEENEN, A.TH.S., *Gemeenschapsrecht en volkenrecht. Een studie naar de draagwijdte van de eigen rechtsorde van de Europese gemeenschappen*, 's Gravenhage, T.M.C. Asser Instituut, 1984, 236; LAUWAARS, R.H., *o.c.*, 355.

[167] Art. 30.1 provided that within six months of the conclusion of discussions with the third countries' signatories to the Revised Convention for the Navigation on the Rhine, the Council, on a proposal of the Commission, should make any amendments to this Regulation which may prove necessary in the light of the obligations arising out of the Revised Convention for the Navigation on the Rhine. No amendments have been made.

[168] See art. 5.5 of the Regulation and the explanations made in two statements inserted in the records of the session of the Council of 18/19 July 1968. With regard to pools and conventions, see: JOLMES, L., *Geschichte der Unternehmungen in der deutschen Rheinschiffahrt, Köln*, Buchenreihe des Instituts für Verkehrswissenschaft an der Universität Köln, 1960; PREDÖHL, A., *Verkehrspolitik*, 222; SEIDENFUS, H.St., *Organisationstendenzen auf dem Rheinschiffahrt*, Göttingen, Vandenhoeck & Rupprecht, s.d., 8-9 en 14 e.v.; MÜLLER, J.H. en WILLEKE, R., *Die Freibildungsorgane in der Rheinschiffahrt*, 1963, 19; WATERMANN, H.-R., "Kartellregelung und gemeinsame Verkehrspolitik", *Z.f.VW.*, 1968, 131-150, i.h.b. 134-140).

[169] E.C.J., 20 May 1987, Case 272/85, Association nationale des travaileurs independents de la batellerie (ANTIB) v. Commission of the European Communities, *E.C.R.*, 1987, 2201 and *E.T.L.*, 1987. The Court decided that this inter-association agreement imposing a levy of 10% on freights for export traffic on inland waterways, whether cargoes are carried by boatmen who are nationals of that state or by boatmen from other Member States, the proceeds of which are to be used for the promotion of both domestic and export traffic is discriminatory and anti-competitive in relation to boatmen from other Member States in so far as their acces to domestic traffic is very limited and they therefore cannot derive from the intented promotion benefits corresponding to their financial contribution. See for some comments and critics: MÜLLER, M..H., *Het recht van de* toerbeurt, Amsterdam, Luna Negra, 1989, 161; TROMM, J.J.M., *o.c.*, 228 and fn. 136-137

[170] In the same sense: HACKSTEINER, T.K., *o.c.* fn. 59, 5; KÜHL, S., "Die Nutzung deutscher Gewässer durch ausländische Schiffe", *Trans.R.*, 1993, 12; MANLIK, K.-H., "Die internationale Donau. Die Geschichte der

39. One of the distinctive features of transport is that it is impossible to stock-pile transport services and, therefore, transport capacity has to be adapted to peak demands, which leads to overcapacity during the other periods ([172]). Due to the fact that the fluvial transport sector for many years has been characterized by problems of structural overcapacity ([173]) and that the results of the national vessel-scrapping schemes organized by certain Member States in the sixties and seventies of the last century ([174]), while positive, have been insufficient, in particular for want of international coordination of these schemes, in 1989 the EC initiated action intented to reduce structural overcapacity on the inland waterway market by coordinating the scrapping of vessels at Community level ([175]), and introducing the so-called 'old for new' rule which attached conditions on the placing in service of new capacity, wether newly constructed or imported from a third country or due to leave the waterways excluded from the scope of applicability of Regulation 1101/89. In order to attain these objectives

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Donaukommission", *Schriftenreihe des Arbeitskreises Schiffahrtsmuseum Regensburg*, 1992, nr. 6, 93; TROST, J., *o.c.*, 54; PLANK, K., "Ausservertragliche Haftung in der Binnenschiffahrt auf der Donau" in WIESE, G., *Probleme des Binnenschiffahrtsrechts*, bd. 7, Heidelberg, 1994, 30 en 58; WIESBAUER, B. en ZETTER, P., *Transporthaftung – nationales und internationales Recht unter Berücksichtigung der Rechtslager des deutschen Sprachraums*, Wenen, 1984, 836, vn. 1

[171] It is quite unlikely that these agreements could fall under the scope of art. 3, 4 or 5.

[172] KAPTEYN, P.J.G. and VERLOREN VAN THEMAAT, P., *Introduction in the Law of the European Communities*, 3° ed., revised by L.W. GROMLEY,London-The Hague-Boston, KLuwer Law International, 1998, 1173.

[173] See: OLEY, W., *Organisierte Verringerung des Angebotes in der Binnenschiffahrt*, Freiburg i. Br. 1978, 66 et seq.; POSTHUMUS, S.A., "Binnenvaart op drift", *E.S.B.*, 1971, 124-126; WESTEROP, A.J.M., "Goederenvervoer. Wat doet de Overheid eraan ?", *T.v.Vw.*, 1983, 152; WULF, D., "Das Kapazitätsproblem der Binnenschiffahrt", *Z.f.V.*, 1979, 139-172;

[174] See: Belgium: K.B. 18 mei 1976 houdende vaststelling van de voorwaarden en de toekenning van sloopremies voor binnenvaartuigen, *B.S.*, 16 juni 1976; K.B. 8 februari 1980 houdende vaststelling van de voorwaarden tot toekenning van sloopremies voor binnenvaartuigen, *B.S.,* 29 maart 1980; France: 1984; Germany: §§ 32 a and b Binnenschiffsverkehrsgesetz juncto Gesetz 28 December 1968*, B.G.Bl.*, 1969, I, 65 et seq. and Verordnung 8 Januar 1969, *B.G.Bl.*, I, 17 et seq.; Netherlands: Wet 30 juni 1976 houdende regelen ter bevordering van het slopen van binnenschepen, *S.*, 1976, 411.

[175] Council Regulation (EC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, *O.J.*., 28 April 1989 (Complemented by Regulation 1102/89 (*O.J.*, 28 April 1989)). See: AUSSANT, J., FORNASIER, R., LOUIS, J.V., SECHE, J.C. en VAN RAEPENBUSCH, S., *Transports* in *Commentaire Mégret. Le droit de la CEE*, III, *Libre Circulation des personnes, des services et des capitaux. Transports*, 2nd ed., 1990, Brussel, Ed. U.L.B., 262-263; DE DECKER, M., *Beginselen van Belgisch Binnenvaartrecht*, *o.c.*, 321-329; DE DECKER, M., "De reglementering van de Europese binnenvaartmarkt", *o.c.*, 439-446; HORNUNG, A., "Europäische Abwrackaction in der Binnenschiffahrt", *Rpfleger*, 1990, 445 ff.; NICOLAYSEN,G., *Europarecht II, Das Wirtschaftsrecht im Binnenmarkt*, 1° ed., Baden-Baden, 1996, 449; SCHERNER, K.O., "Die Entwicklung des Rheinschiffahrtsrechts in der Zweiten Hälfte des 20. Jahrhunderts" in *Probleme des Binnenschiffahrtsrechts*, VII, Wiese (ed.), Heidelberg, 1994, 84; SCHMITT, V., "Rascher Abbau der überkaâzität in der Binnenschiffahrt", *Z.f.B.*, 1988, 174-176; SCHWEITZER, M. en HUMMER, W., *Europarecht*, 5th ed.., Berlin, 1996, 430; SENGPIEL, M., *o.c.*, 196-201; SIMONS, J.G.W., "De Europese vervoerintegratie, in het bijzonder: Europese saneringsregeling", *T.v.Vw.*, 1989, 328-337; VAN DER WERF, H.A.F., "Capaciteitsbeleid in de binnenvaart: van directe naar indirecte marktordening", *T.V.R.*, 1998, no. 3, 55-61; X, "Start zur Abwrackaction", *Strom und See*, 1989, 184-188. For case-law, see: C.J., cases 248-249/95 SAM Schiffahrt GmbH and others vs Germany, *Jur.*, 1997, I, 4475. In order to prevent on the one hand institutional conflicts with the competences of the CCNR and the principle of unity of the Rhine regime and on the other hand to prevent distorsion of competition on the markets in question and to render the proposed system more effective by extending the structural overcapacity instruments to the Swiss fleet, and by doing so to assure that the same measures apply to all inland vessels operating at that time on the integrated EC-Rhine waterway network, similar measures have been adopted at the same time by the CCNR by the Additional Protocol no. 4 of the Act of Mannheim. See also for case-law: E.C.J., 30 January 1997, Case C-178/95, Wiljo NV v. Belgische Staat, *E.C.R.*, 1997, I, 585; Court of First Instance, 1 October 1998, case T-155/97, Natural van Dam AG and Danser Container Line BV v. Commission of the European Communities, *E.C.R.*, 1998, II, 3921; Court of First Instance, 1 February 2000, case T-63/98, Transpo Maastricht BV and Marco Ooms v. Commission of the European Communities, *E.C.R.*, 2000, II, 135

scrapping (and 'old for new') funds were introduced in the Member States particularly concerned by inland waterway transport and administered by those Member States, however the cost of the srapping and 'old for new' system was borne by the inland waterway undertakings (art. 3), basically by annual contributions to the national funds for each vessel ([176]).

40. These arrangements for structural improvements in the inland waterway sector were limited to the fleets operating on the linked inland waterway networks of Belgium, Gemany, France, Luxembourg, Netherlands and, after its accession, Austria. In order to avoid on the one hand institutional conflicts with the competences of the CCNR and the principle of unity of the Rhine regime and on the other hand to prevent distortions of competition on the markets in question and to render the proposed system more effective by extending the structural overcapacity instruments to the Swiss fleet, and by doing so to assure that the same measures apply to all inland vessels operating at that time on the integrated EC-Rhine waterway network, similar measures have been adopted at the same time by the CCNR by the Additional Protocol no. 4 of the Act of Mannheim ([177]) and also by Switzerland on the section of the Rhine between Bazel and Rheinfelden, section that does not fall under the territorial scope of the Act of Mannheim.

41. Since Regulation 1101/89 expired on 28 April 1999, Regulation 718/99 ([178]) established a four-year transitional arrangement by retaining the market regulation mechanism 'old for new' until 29 April 2003. Among others, vessels operating exclusively on the Danube (and its tributaries) up to Kelheim without leaving it, were exempted from this Regulation (art. 2 (c)). Although this transitional period already has come to an end, the 'old for new' mechanism has been maintained for regulating the capacity of the Community fleets beyond these four years, but only as a standby mechanism set at zero which could be reactivated only in the event of serious market disturbance of the kind referred to in article 7 of Directive 96/75/EC (art. 6). The national reserve funds, set up according to art. 3 of Directive 718/99 and financed by the surplus funding from the structural improvement schemes conducted up until 28 April 1999, consisting solely of financial contributions from the industry, the special "old for new" contributions under Directive 718/99 and the financial resources which could be made available in the event of serious disturbance of the market, may be used in connection with the suitable measures referred to in art. 7 of Directive 96/75/EC and/or in the course of measures ([179]) referred to in art. 8 if unanimously requested by the organisations representing inland waterway transport ([180]). Unclear is wether or not these national reserve funds can also be used in the event of serious disturbance of the market of the new Member States, undertakings

[176] Some authors however have considered Regulation 1101/89 as a Community aids regime in the sense of art. 73 EC (KAPTEYN, P.J.G. and VERLOREN VAN THEMAAT, P., *o.c.*, 1187).

[177] Additional Protocol no. 4 of 25 April 1989. The Protocol clearly states that, notwithstanding the general principles of the Revised Act of Mannheim, Rhine navigation can temporary be submitted to these measures (see also: SENGPIEL, M., *o.c.*, 197; SCHMITT, V., *o.c.*, 176; VAN DER WERF, H., *o.c.*, 58).

[178] Council Regulation (EC) no. 718/99 of 29 March 1999, *O.J.*, L 90 of 2 April 1999. See: DE DECKER, M., "Aangepaste capaciteitsregeling voor de binnenvaart", *Vrachtinfo*, 1999, no. 29, 1-2. As for Regulation 1101/89, in regard of Regulation 718/99 for the Rhine the same procedure has been followed by the Additional Protcol no. 5

[179] I.e. measures (1) to make it easier for inland waterway carriers leaving the industry to obtain an early retirement pension or transfer to another economic activity or (2) to organise vocational training or re-training schemes for workers leaving the industry, or (3) to encourage private owner-operators to join trade associations, or (4) to encourage adaptation of vessels to technical progress in order to improve working conditions and promote technical safety requirements, or (5) to improve operator'skills in order to safeguard the development and future of the trade.

[180] In this case, the measures must be the subject of an action at Community level.

of which have not contributed to these funds.

42. Finally, whereas art. 3 Regulation 3921/91 mentions among the competences of the Member States regulations relating to rates and conditions governing transport contracts, and chartering and operating procedures, the competence of the Member States in this fields in the meanwhile has come to an end since the entrance in force of 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 ([181]). Art. 2 of this Directive states that in the field of national and international inland waterway transport in the Community, contracts shall be freely concluded between the parties concerned and prices freely negotiated. Therefore, after a transitional period up to 1 January 2000, the former "tour-de-rôle" systems in France, Belgium and the Netherlands ([182]) and the system of "Festfrachten" in Germany no longer apply.

43. The abolition of national 'tour-de-rôle" systems and national compulsory tariffs has not been justified by any alleged incompatibility of these measures with EC law ([183]), but by the idea that the smooth functioning of the internal market system calls for an adjustment in inland waterway systems transport to the organization of chartering by rotation, so as to move towards greater commercial flexibility and a system of freedom of chartering and pricing. In the event of a serious disturbance in the inland waterway transport market, the Commission may, at the request of a Member State, take suitable measures, and in particular measures designed to prevent any new increase in the transport capacity on offer on the market in question (art. 7). The above mentioned transportation conditions under the Bratislava Agreements, as far as they can or should hamper the possibilities to conclude contracts freely and to negotiate prices freely for other undertakings than those concerned by the agreements, can fall under the scope of art. 2 of this Directive.

3.2.3. Provisions relating to the safety of the transport

a) <u>technical requirements for the vessels</u>

44. With the adoption of Council Directive 82/714 common provisions establishing technical

[181] *O.J.*, L. 304 of 27 November 1996.

[182] These "tour-de-role systems" were introduced between 1933 and 1940 as an answer to the economic crisis in fluvial transport at that moment (For more details, see: DE DECKER, M., "De reglementering van de Europese binnenvaartmarkt", *T.B.H.*, 1993, 420-421). They provided for a compulsory order between carriers in obtaining transport and therefore restricted the possibilities of the charterers to choose the carrier they liked. Those tour-de-rôle systems, that only existed outside the Rhine are, were accompanied by compulsory tarrifs.

[183] In regard of compulsory tariffs, see: C.J., 17 November 1993, case C-185/91 – Bundesanstalt für den Güterfernverkehr, *Transp.R.*, 1994, 385. In regard of 'tour-de-rôle' systems and the compatibilty with E.C. law, see: DE DECKER, M., "De reglementering van de Europese Binnenvaartmarkt", *o.c.*, 1993, 425-426; DE DECKER, M., *Is de marktordening van de Europese binnenvaart strijdig met de Europese regelgeving ?*", thesis, Antwerp, U.F.S.I.A., 1995, 72p.; DE DECKER, M., "Toerbeurtstelsels en een eengemaakte Europese binnenvaartmarkt", *T.V.R.*, 1996, nr. 1, 2-5; EWERS, H.-J and VON STACKLENBERG, F., "Der Einfluss von EG-Mandat und Tour de Rôle auf die Deutschen Binnenschiffahrt" in *Beiträge und Studien aus der Institut für Verkehrswissenschaft an der Universität Münster*, Heft 28, Göttingen, Van den Hoeck and Rupprecht, 1994; GEELHOED, L.A., "Deregulering in de vervoersector", *T.v.Vw.*, 1986, (345-361), 353-354; MÜLLER, M., *Het recht van de toerbeurt*, Europa Instituut, Universiteit Amsterdam, 1989, 184p.; SIMON, H., "Binnenvaart en E.E.G.", *N.J.B.*, 1989, (362-365), 365; SIMONS, J.G.W., *Recht en onrecht in het Europees vervoerbeleid*, Zwolle, Tjeenk Willink, 1986, 59; SIMONS, W.J.G., "Europa, op koers in het vervoer ?", *T.v.Vw.*, 1991, 14, footnote 30; VAN DER HORST, H.J., "Schipper mag ik overvaren – Wetsvoorstel Vervoer Binnenvaart", *S.E.W.*, 1992, 644; VAN HOUTTE, H. en BROUWER, D.W., *Memorandum over de vrijwillige toerbeurt*, Brussel, ESO, 52p.

requirements for inland waterway vessels were laid down ([184]). In the opinion of the Council the objectives and implementation of a common policy for transport require, inter alia, in the field of inland navigation, that the movement of vessels on the Community network take place under the best conditions as far as safety and competition are concerned ([185]). In order to do so a Community inland navigation certificate was introduced, valid on all Community waterways, however except those where the Revised Convention for the Navigation of the Rhine applies, attesting the compliance of vessels with the common technical requirements. Not only the Rhine was excluded, more, all vessels carrying a valid certificate issued pursuant to Article 22 of the Convention of Mannheim may navigate on Community waterways carrying only that certificate (art.4.1). This leads to the somewhat strange conclusion that on the Rhine vessels are only admitted when they carry a Rhine ship's certificate, based on the CCNR Regulation on the Survey of Rhine Vessels, whereas on the other waterways of the Community vessels are admitted when they carry either a Community inland navigation certificate or a Rhine certificate.

b) <u>requirements for the transport of dangerous goods</u>

45. Regarding the transport, loading and unloading of dangerous goods by inland waterway, in the context of completion of the single market in transport, Directive 96/35/EC ([186]) provides for common measures to improve the prevention of the risks inherent to such activities with regard to persons, property and the environment. To that end Directive 96/35/EC provides measures for the appointment and vocational qualification of safety advisers for such transport. The main task of these advisers is, under the responsibility of the head of the undertaking, to seek by all appropriate means and by all appropriate action, within the limits of the relevant activities of that undertaking, to facilitate the conduct of those activities in accordance with the rules applicable and in the safest possible way (art. 4.1). One has to observe that under this Directive the obligation to appoint at least one safety adviser is not restricted to transport undertakings but also applies to undertakings the activities of which include the related loading or unloading.

46. Until now regarding Community Law there are no common provisions for the transport of dangerous substances on inland waterways of the Community. Article 6 Council Directive 82/714 provides that any vessel carrying a certificate issued pursuant to the Regulation for the transport of dangerous substances on the Rhine (ADNR) may carry dangerous goods throughout the territory of the Community under the Conditions stated in that certificate. However, there is no obligation to do so and the (old and new) Member States therefore remain free to adopt or not adopt these provisions to other international traffic as well as to

[184] Council Directive 82/714/EEC of 4 October 1982 laying down technical requirements for inland waterway vessels, *O.J.*, L 301 of 28 October 1982, amended by Act Concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on wich the European Union is founded, ANNEX 1 – List referred to in Artcile 29 of the Act of Accession – VI. TRANSPORT – C. TRANSPORT BY INLAND WATERWAY, *O.J.*, C 241 of 29 August 1994 and Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Annex II: List referred to in Article 20 of the Act of Accession – 8. Transport policy – E. Transport by inland waterway, *O.J.*, L 236 of 23 September 2003

[185] A first step towards this goal was accomplished with the adoption of Council Directive 76/135/EEC of 20 Januari 1976 on reciprocal recognition of navigability licences for inland waterway vessels, *O.J.*, L 21 of 29 Januari 1976

[186] Council Directive 96/35/EC of 3 June 1996 on the appointment and vocational qualification of safety advisers for the transport of dangerous goods by road, rail and inland waterway, *O.J.*, L 145 of 19 June 1996

national trafic. Whereas some of the riparian Rhine Sates in the past have extended ADNR to other carriage of dangerous goods, this is not the case regarding other (old and new) Member States and other Danubian States. As mentioned above beside ADNR the ADN Recommendation concerning the international carriage of dangerous goods by inland waterway also sets down uniform rules for the safe international transport of dangerous goods by vessels of inland waterways, but as explained above this is only a Recommendation, leaving states free to apply or not to apply these rules. Furthermore, both regulations only concern international carriage of goods. Whereas in recent years the carriage of dangerous goods by vessels on inland waterways has considerably expanded, thus increasing the risks of accidents occurring, all of this supports the conclusion of the necessity of coming to uniform rules or at least an alignment of rules applying not only to international but also national carriage on all interconnected waterways.

47. In order to achieve this goal, in 1997 the Commission has laid down a Proposal for a Council Directive on the approximation of the Member States with regard to the transport of goods by vessels on inland waterways ([187]). The Commission considers this as a further harmonization measure to improve transport safety, to harmonize competition conditions and to facilitate transport operations. Under the provisions of this Proposal carriage of dangerous goods on inland waterways within or between the Member States will be allowed to inland waterway vessels that have a genuine link with one of the Member States and under the condition of a Community certificate carried on board of the vessel and issued by the authority of a Member State attesting that the vessel has been inspected and that its construction and equipment comply with the applicable provisions of the Annexes B1 and B2 of the ADN Recommendation (art. 4.1 juncto art. 1.1). However, notwithstanding art. 4.1 all vessels carrying a certificate granted according to the ADNR Regulation, as in force at 1 January 1997, may carry dangerous goods over the entire Community territory under the conditions specified in this certificate. However, one has to observe that the Rhine area is not excluded from the possibility of carrying dangerous goods under a Community certificate, provision that therefore could come in conflict with the competence of the CCNR and the principle of unity of the Rhine regime.

48. Under this proposal the Member States retain the right to regulate or prohibit, strictly for reasons other than safety, the national transport of certain dangerous goods by inland waterways. Article 7 of this Proposal provides that subject to national or Community provisions on market access, the transport of dangerous goods by vessels of inland waterways between Community territory and third countries shall, in the absence of agreements between the Community and third countries, be authorized in so far as it complies with the requirements of the Annexes ([188]). So far there are no such agreements and therefore one can question the effectiveness of such a clause, whereas third countries obviously are not bound by Community law and therefore, in the absence of agreements, are free to decide the conditions under which Community vessels will be or not be allowed to transport dangerous goods on their territory.

c) <u>nautical skils relating to the boatmaster and other members of the crew</u>

49. Until now there does not exist uniform Community legislation relating to boatmasters' certificates on all waterways of the E.U., be it that under Community Law – art. 2 Directive

[187] Proposal for a Council Directive on the approximation of the laws of the Member States with regard to the transport of dangerous goods by vessels on inland waterways, *O.J.*, C 267 of 3 September 1997
[188] I.e. complies with ADN or ADNR

91/672 EEC and art. 1.5 Directive 96/50/EC ([189]) - the Rhine navigation licence issued in accordance with the revised Act of Mannheim is valid for all the Community's waterways. However under Community Law the use of a Rhine navigation licence is not obligatory outside the Rhine area (Rhine, Lek, Waal). Outside the Rhine area carriers are allowed to transport goods on waterways of a maritime character under the condition of a boatmasters' certificate listed in group A of Annex I of Directive 91/672/EEC and on the other waterways in the Community under the condition of a boatmasters' certificate listed in group B of Annex I. Directive 96/50/EC provides for minimum requirements, set out in articles 5 to 8, to obtain a boatmasters' certificate. In order to be authorized to navigate with the aid of radar, the boatmaster must hold a special attestation delivered by the competent authority as proof that he has passed the examination covering professional knowledge of the subjects referred to in Chapter B of Annex II of the Directive. However, the Member States shall recognize the qualification issued under the regulation of the issuing of qualifications to sail a vessel with the aid of radar on the Rhine (art. 9.1). Furthermore none of the Directives prevents a Member State requiring additional knowledge on the part of boatmasters sailing vessels transporting dangerous substances on its territory. Member States shall recognize the certificate issued in accordance with the number 10 170 of the ADNR as proof of this knowledge.

50. On the Rhine both Directives do not apply and therefore this matter continues to be governed by the Rhine Patent Regulation. This Regulation gives a mandate to the CCNR to recognize boatmaster's licences of other countries than the contracting States and the CCNR has done so with Austrian, Czech, Hungarian and Polish licences. On the Danube their does not exist a similar regulation as on the Rhine. The Danube Commission has adopted Recommendations on the Establishment of Boatmaster's Licences on the Danube, but the Danubian States are free to follow those Recommendations or not to follow them and actually the Danubian States recognize each other's national licences ([190]). Most Danubian States recognize the Rhine Patent, although many Danubian States additionally require the patent holder has proven sufficient knowledge of local navigational conditions. In consideration of the fact that the Danube is not excluded from the scope of applicability of the Directives, these shall apply in the new Member States.

51. Until now there does not exist a uniform or harmonized regulation on all waterways of the European Union with regard to the nautical and physical skills of the crew of inland vessels. Only on the Rhine there exists an elaborated regulation on the nautical (art. 23.02 R.S.O.R.) and physical skills (art. 23.03). The nautical skills differ according to the function of the crew members (sailor, sailor-engineer, steersman, engine driver). The composition of the crew is depending on the exploitation system of the vessel (art. 23.05): A1 = navigation by day (max.

[189] Council Directive 91/672/EEC of 16 December 1991 on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway, *O.J.*, 1991, L 373 of 31.12.1991; Council Directive 96/50/EC of 23 July 1996 on the harmonization of the conditions for obtaining national boatmaster's certificates for the carriage of goods and passengers by inland waterway in the Community, *O.J.*, L 235 of 17.09.1996 amended by Act Concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on wich the European Union is founded, ANNEX 1 – List referred to in Artcile 29 of the Act of Accession – VI. TRANSPORT – C. TRANSPORT BY INLAND WATERWAY, *O.J.*, C 241 of 29 August 1994 and Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Annex II: List referred to in Article 20 of the Act of Accession – 8. Transport policy – E. Transport by inland waterway, *O.J.*, L 236 of 23 September 2003

[190] For the boatmasters' certificates of the new Member States that are recognized in accordance with Council Directive 91/672 see the Accession Treaties, *O.J.*, L 236 of 23.09.2003, 467

14 hours per period of 24 hours), A2 = semi-continuous navigation (max. 18 hours per period of 24 hours) and B = continuous navigation (max. 24 hours per period of 24 hours). The exploitation system and the composition of the crew must be proved on the basis of a navigation times book (art. 23.08). Some countries, such as the Netherlands and Germany, have extended the territorial scope of this regulation to waterways outside the Rhine area, but most countries, and among them not only Danubian countries but also e.g. Belgium ([191]) and France, have provided for their own regulation. Attempts in the past to come to uniform community provisions, mainly based on the Rhine regulation, failed. In the EC White Paper once again harmonizing the rules on crew members and the composition of crews is mentioned as one of the main objects for the next years.

3.2.4. Provisions relating to labour and social security conditions

52. From the early start of European Community Law the EC has considered the harmonization of social conditions relating to fluvial transport as an integral part of the realization of the common policy ([192]), however as already mentioned ([193]), the implementation of legislation in this field in the past has been inter alia hampered by the conflict of competence between the EC and the CCNR in regard of Rhine navigation ([194]). In the EC White Paper harmonizing the rules on rest times, crew members, composition of crews and sailing times on inland waterway vessels once again is mentioned as one of the main objects for the next years. In the same sense, in his Final Draft dated 3 July 2003 "Inventory of existing legislative obstacles that hamper the establishment of a harmonized and competitive pan-European inland navigation market" the UNECE Group of Volunteers "Legislative Obstacles" (page 6) has emphasized that for the moment being there still are differences in regulations on the size and composition of crews and on working and rest hours ([195]). As is common knowledge until now there only exists a harmonized regulation, not only

[191] Recently plans have been made to extend the rules applying on the Rhine to all waterways of Belgium, including the international rivers and canals.

[192] See e.g.: the Proposal of the Commission of 17.09.1975 and the Amended Proposal of 1979 (see supra footnote 104); Resolution of the E.P. of 21 May 1984 on Community measures to improve the situation in the inland waterway sector, *O.J.*, C 172 of 2 July 1984 (suggesting measures relating to shortening of working hours and minimum wages).

[193] See paragraph 26

[194] Art. 2.3 of the Proposal of 17.09.1975 (see supra footnote 104) provided that the Members States would enter into negotiations in order to revise the provisions of the CCNR Regulation on the Survey of Rhine Vessels (RVBR) of 18 November 1947 and of the Agreement on Social Security of Rhine boatmen of 21 May 1954 that would seem to be incompatible with the provisions of the proposed Council Regulation and, if necessary, to denounce the Agreement. With a view to application of the Regulation, art. 3 opened the possibility for the E.C. to start the necessary negotiations with third countries, in particular, Switzerland. Art. 7 of the Amended proposal of 1979 (see supra footnote 104) provided again that with regard to the crew a derogating regulation on the Rhine was not acceptable and furthermore confirmed the obligation of the Member States to enter into negotiations in order to remove all inconsistencies between those regulations and community law.

[195] However, one can question wether or not the fact that prescriptions relating to the size and composition of the crew are not the same in each country of the integrated waterway network, consists on itself a legislative obstacle that hampers the establishment of a harmonized and competitive pan-European inland navigation market, whereas those prescriptions, being regarded as police and navigational prescriptions, in anyway aplly to all vessels navigating on the same waterways, regardless the flag they are flying. This means that either in cabotage or international transport the conditions relating to the manning of the crew are equal for all undertakings. These differences therefore in our opinion on itself do not lead to differences in operating costs and distorsions of competition. What can cause these consequences is the disrespect of manning prescriptions as well as the difference in the costs involved with the manning of the vessel. Also, it has been argued that it is probable that the ongoing progress in nautical and information technologies will make it possible in future to diminish crew sizes (HOFHUIZEN, C.F.J.M., "The norms applicable on the Rhine: Regulations concerning safety and environmental protection", in *Challenges of a free and strong inland waterway transport in the pan-european*

with regard to the size and composition of the crew (see supra) but also with regard to working and rest hours, on the Rhine (art. 23 R.V.B.R.), be it that some countries, such as the Netherlands and Germany, have extended the territorial scope of this regulation to waterways outside the Rhine area and other countries such as Belgium consider to do so.

53. Directive 2000/34 ([196]), amending Directive 93/104 ([197]), provides for minimum requirements for working and rest hours in the transport sector, by extending the scope of applicability of Directive 93/104 inter alia to fluvial transport, except for the articles 3 (daily rest), 4 (breaks), 5 (weekly rest period) and 8 (length of night work) ([198]). Taken in consideration the ruling of the E.C.J. in the Simap ([199]) and Jaegar ([200]) cases with regard to the notion of "working hours" one could question, at least as far as the vessel is considered to be the workplace, wether this Directive would not make the organization of labour aboard a vessel unworkable and cause a negative effect on the labour related costs. In particular, in the Jaegar case the Court decided that the whole of the period of time during which a worker is required to be on-call at the workplace is working time, even that part during which a worker is able to rest or sleep when his services are not required. Furthermore, although Rhine navigation, as defined in the Act of Mannheim, is not expressly excluded from the scope of application of Directive 93/104 as amended by Directive 2000/34, nevertheless one must ask himself whether application of this Directive on the Rhine is not in conflict with the competence of the CCNR., the principle that police and navigational regulations with regard to the Rhine must be made in common consent between the contracting States (among them Switzerland) and the principle of unity of the legal regime on the Rhine. Provisions relating to working and rest hours have always been considered to be an aspect of the police and navigational regulations that must be made in common consent by the riparian States of the Rhine (see actually art. 23.06 R.V.B.R. and annex K). More, in general, conditions for the employment on board of a Rhine vessel have, already before the Act of Mannheim, been considered to fall under the competence of the CCNR. Since 1845, employment aboard a Rhine vessel is submitted to the condition of obtaining, prior to employment, a so called "Dienstbuch" ([201]), delivered by the Rhine authorities. Under the new R.V.B.R. the possibility has been created to recognize "Dienstbücher" delivered by other authorities.

54. Furthermore, only in some European countries, such as Belgium, Germany and the Netherlands, their exist collective labour agreements, which set the requirements for labour conditions (working and rest hours, wages, etc.), but these requirements differ. Until now, there does not exist a European collective labour agreement for inland navigation. Also,

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field", 4th IVR Colloquium, Bucharest, 21-22 March 2002, (52-57), 53). Already nowadays, if certain types of technical equipment are installed a board a vessel, this vessel is allowed on certain waterways to operate with fewer crew members that the standard minimum.

[196] Directive 2000/34/EC of the European Parliament and of the Council Directive 93/104/EC amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, *O.J.*, L 195/41 of 01.08.2000

[197] Directive 2000/34/EC of the European Parliament and of the Council Directive 93/104/EC amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, *O.J.*, L 195/41 of 01.08.2000

[198] Member States shall, however, take the necessary measures to ensure that such mobile workers are entitled to adequate rest.

[199] E.C.J., C-303/98, Simap, *E.C.R.*, 2000, I, 7963

[200] E.C.J., 9 September 2003, www.europa.eu.int

[201] For an argument in favour of this thesis, see art. 4 B a) of the Final Protocol of the Act of Mannheim (Rhine Documents, II, 102: "*Wer auf einem Rheinschiffe … in ein festes Dienstverhältnisz tritt, musz mit einem Dienstbuche versehen sein*". The requirement of a "Dienstbuch" was decided by the CCNR in his session of 29 Augusts 1845 and further elaborated in the following Agreement between the riparian States.

differencies exist between the Member States in the possibility of appealing on temporary employment ([202]), possibility which is in some countries admitted, in other however forbidden ([203]), distinction that opens the way for criticism and questions in regard of the freedom to provide services ([204]).

55. Finally, when considering questions with regard to the manning of the vessel, one cannot leave aside the present and acute problem of finding sufficient and qualified personnel and the possibilities for employing workers from new member States of the E.U. This issue already has given rise to legal uncertainty and disputes, concerning the fact whether or not a working permit is required, and whether or not such a working permit can be considered as being an impediment of free navigation, in particular on the Rhine. The Dutch High Court recently, in his judgment of 9 december 2003, considered the requirement of a working permit not as an impediment of free navigation ([205]). However, the High Court had to deal with this issue in a situation before the accession of the new Member States. One could ask himself if the legal outcome would be the same when dealt with under the new situation, whereas under Community law ([206]) as well as under the Convention of Mannheim (art. 4) on the Rhine equal treatment must be guaranteed to all the beneficiaries of the right of Rhine navigation, and these beneficiaries are no longer only vessels having an genuine link with the old member States ([207]). Also, one could also ask himself if the legal outcome would be the same when

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[202] As defined in art. 1.2 Council Directive 91/383/EEC of 25 June 1991 suplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary relationship, *O.J.*, L 206 of 29 July 1991

[203] The latter is e.g. the case in Belgium where this prohibition is based on a decision of the "Comité Paritaire", however without any (known) justification

[204] See X, "Ook in grotere EU nog voetangels en klemmen", *Binnenvaartmagazine*, July/August 2004, 4

[205] www.rechtspraak.nl/uitspraak, Case no. 00287/02 E). However, we would like to add the following observations. Art. 356, second paragraph of the Treaty of Versailles relating to Rhine navigation stipulates as follows: "*None of the provisions contained in articles 15 to 20 and 26 of the above-mentioned Convention of Mannheim, in article 4 of the Final Protocol thereof, or in later Conventions, shall impede the free navigation of vessels and crews of all nations on the Rhine and on waterways to which such conventions apply, subject to compliance with the regulations concerning pilotage and other police measures drawn up by the Central Commission*". By the Additional Protocol n° 2 the Revised Act of Mannheim has been amended in this sense that freedom of Rhine navigation is restricted again to vessels belonging to the Rhine, but no restrictions were made relating to the nationality of the crew, and therefore the Additional Protocol n° 2 did not affect the prohibition of any impediment of the free navigation of crews of all nations, as established by art. 356, second paragraph of the Treaty of Versailles. Therefore one can ask himself if indeed, as seems to be the view of the attorney-general of the Hoge Raad, art. 356 became in disuse as a consequence of the Additional Protocol n°2 (see otherwise:DÜTEMEYER, K., "Les problèmes économiques et juridiques posées par la liaison Rhin-Main-Danube", *Transports*, 1979, 6). Furthermore, one can ask himself whether or not a "Dienstbuch" cannot be considered on itself to be a working permit. In this context it must be said that "Dienstbücher" are according to our knowledge delivered by Rhine authorities to citizens of non (or new) EU Member States and this already for some years. In the past, the so called "Drei Sprachenstempel" guaranteed non EU nationals from the States mentioned in the Annex that they were free to navigate as a member of the crew of a Rhine vessel on the waterways of the contracting States. Finally, we would like to mention that in a judgment of 1948 (Basler Rheinschiffahrt A.G. v. Bundesamt für Socialversicherung, *Ann.Dig.*, 1948, case no. 25) it has been argued that when a State undertakes by treaty to allow freedom of river transit this may limit its jurisdiction over river traffic, even to the extent of not being able to extend thereto its accident insurance legislation.

[206] Council Regulation No 2919/85 and art. 1 of the Annex cited above fn 150

[207] Therefore, with regard to equal treatment, one could ask himself wether or not a working permit can be asked from a vessel owned by a resident of a new Member State and manned with personnel of a new member State, whilst obviously no working permit can be asked from a vessel from an old member State manned with personnel of and old Member State, and if not, would it than still be possible to require from a vessel of an old member State a working permit when manned with personnel out of a new member State ? One can have its doubts. Obviously, if one should accept the possibility of a working permit, in respect of equal treatment, as a

dealt with international transport on the Danube, whereas art. 1 of the Belgrade Danube Convention explicitly provides for a guarantee of freedom of navigation for "the citizens … of all States" ([208]) and therefore the Contracting States cannot deny this freedom to, inter alia, residents of the new Member States ([209]).

56. Although, based on the fact that the new Member States have agreed to a transitional arrangement in respect of the free movement of workers, leaving open for the old Member States to restrict the admission of workers from the new Member States during a transitional period of up to a maximum of seven years, the EC and old Member States with regard to fluvial transport accept the possibility of restricting the employment of workers of old member States, nevertheless the question seems to be not that clear. The issue also can be considered from another angle, namely art. 3 of Council Regulation 3921/91 (cabotage), that expressly states that "*the carrying out of cabotage operations shall be subject to the laws, regulations and administrative provisions in force in the host Member State in the following fields*". No mention is made of working permits as one of the applying fields of the host State and one could therefore ask himself for example what would be the legal outcome when e.g. a vessel the owner of which is a pyhiscal person, having his domicile in one of the new Member States or a company having its bussines seat in a new Member State, is used in cabotage in an old Member States with a crew existing out of personnel from the new Member States. If a working permit would be required this would make the freedom of cabotage in practice illusory ([210]). All of this calls for clarification, the more so as, even in the assumption that a working permit is required, the differences, not only in legislation but also in the practice of granting working permits between the different States, can open the door for unequal treatment between the undertakings operating in the same market ([211]). Until now there is no E.C. immigration policy for nationals of third countries who want to work in the EU as an employee ([212]).

57. Art. 14 of Regulation 1408/71 ([213]) on the application of social security schemes to employed persons and their families moving within the community, provides for the rule that

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consequence this rule should have to apply the manning of all vessels belonging to the Rhine, regardless the genuine link with and old or a new member State.

[208] The same also applies to the rivers Scheldt and Moselle.

[209] An argument can be found also in art. 3 of Regulation 1356/96 stating that it shall not affect the rights of third-country operators under the Convention on navigation on the Danube. One of these rights is the right of freedom of navigation for citizens of all States.

[210] The consequence would be the same in regard of international transport.

[211] The issue has drawn the attention of the Commission, see: Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final of 11.07.01. The directive will establish a uniform application procedure and a common legal status for migrants admitted. The decision on how many migrants to be admitted, if and when they are needed, for identifying the sectors where there are shortages and for the selection of qualified people remain the responsibility of the Member States. However progress on this (proposal of) directive has been slow.

[212] A practical example can be given by comparison the Dutch and Belgian regulation. In the Netherlands a working permit is still required (during the transitional period until 1 January 2006), but for the fluvial transport sector no test of the labour market is needed. In practice this means that the applicant must no longer first file a vacancy at the CWI and in a newspaper, with a compulsory watch of 5 weeks (see Kantoor Binnenvaart, "Nieuwe regels voor tewerkstellingsvergunning", www.kantoorbinnenvaart.org/actueel/ twver-gunning.php., 10.09.2004). In Belgium also a working permit is required, but first a vacancy must be filed at the VDAB (in Flanders) and only after confirmation that this vacancy cannot be filled up, a working permit can be applied for, however, despite the shortage of personnel, there is no guarantee that it will be given.

[213] Council Regulation (EEC) no. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the community, *O.C.*, L 149 of 05.07.191

a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or own account, operates transport services for passengers or goods by rail, road air or inland waterway and has its registered office or place of business in the territory of a Member State shall be subject to the legislation of the latter State. Considering the fact that the social (and fiscal) costs that go along with the manning of a vessel differ form country to country, and this not only between eastern and western European countries, but also between the latter, not only this can hamper fair competition in a market that is by nature international, but also, the decision of a carrier to establish his principle seat of business in one or another Member State therefore can be influenced by differences between conditions of employment, remuneration levels and social security schemes in order to compete with the same weapons as other competitors in the same market. Although the following provisions of article 14 can lead to the application of the legislation of another Member State, in practice this will be difficult to establish, and even so this possibility leads to even more legal uncertainty. Also, Regulation 1408/71 and article 14 only concern the application of social security schemes to workers moving "within" the Community. However, international fluvial transport will not always be restricted to transport within the community, fact that nowadays is even strengthened after the accession of new member States that in the past merely have concentrated their transport business in international transport on the Danube, i.e. also with Danubian States, still being third States. Therefore one can ask himself e.g. which legislation will apply to vessels that are transporting frequently or occasionally goods between the territory of one Member State and the territory of a third State. Also, art. 14 of Regulation 1408/71 does not apply to vessels of third countries that under the Belgrade Danube Convention have the right to navigate and transport goods on the whole course of the Danube.

58. Furthermore, art.7 provides that notwithstanding the Regulation the Agreement of 27 July 1950 concerning social security for Rhine boatmen, revised on 13 February 1961 ([214]), shall continue to apply. The latter has been revised again by the Agreement on Social Security of Rhine boatmen of 30 September 1979, that became in force on 01.12.1987. This Agreement enounces as a principle with regard to social security the application of the legislation of only one country, namely the legislation of the contracting state on which territory the company to which the Rhine vessel belongs, has its seat (art. 11). This agreement does apply to Rhine boatmen, independent or not and without any requirement of nationality. However, in our opinion the convention does not exclude the possibility of application of the social security system of different States, when e.g. Rhine boatmen, in the sense of the Convention, are operating not only within the territory of one or more of the contracting states, but also,

[214] For the text, see: *Les actes du Rhin et de la Moselle*, Strassburg, 1966, 56. The first attempts to come to an international regulation in the field of social legislation go back to two conventions of 15 December 1924, one relating to the river Elbe and the other to the river Oder. Both provided for conditions of labour and social assurance in favour of the crews of Czech vessels on these rivers in Germany (DE MARTENS, G.F., *Nouveau recueil general*, XXII, 455 (Oder) and 458 (Elbe)). The imposition of legal obligations in the field of social legislation upon owners of vessels on the Rhine was held by the Netherlands Supreme Court not to be at variance with the freedom of navigation (H.R., 28 March 1950, *N.J.*, 1950, No. 633). A german tribunal had in a decision of 25 September 1927 (*A.D.*, 1927-28, Case No. 84) held in the same sense as regards "social legislation", decision that related to the application of the German Federal Insurance Code to the crews of foreign (in casu Swiss) ships employed in navigating German navigable waterways, including the Rhine. On the other hand, the Swiss Federal Tribunal, in a judgment of 25 June 1948 (*A.D.*, 1948, Case No. 25), held that, although the principle of free navigation on the Rhine did not prevent Switzerland from subjecting the crews of Swiss vessels to its compulsory accident insurance, "it may be argued that a riparian State cannot extend its legislation relating to accident insurance to the crews of foreign vessels passing through its territory or anchoring in its ports", because the obligations and formalities resulting from such legislation would interfere with the freedom of navigation.

occasionally or frequently, on other waterways as e.g. the Danube outside Germany. All this leads to the conclusion that actually there is no harmonized regulation in the field of social security and the existing international regulations can lead to legal uncertainties with regard to the application of the social security schemes. Therefore a harmonization is most desirable. An attempt to come to such a harmonization of the social security conditions has been made recently by the Convention of Strassburg of 26.03.1993 regarding the social security of inland waterway carriers ([215]), but this Convention has not yet become in force, also, has not been concluded by all Member States of the enlarged E.U. ([216]) and finally only deals with some fields of social security and leaves many of the topics, explained above, unanswered.

[215] See: X, "Übereinkommen über die soziale Sicherheit von Binnenschiffen", *Z.f.B.*, 1993, nr. 9, 15

[216] The Convention was elaborated between Austria, Belgium, Bulgaria, Croatia, France, Germany, Hungary, Luxemburg, Moldavia, the Netherlands, Poland, Romania, Slovakia, Slovenia, Switzerland and Ukraine. The Czech Republic has only been present as an observer.

PART II. BRIEF REVIEW OF ELEMENTS OF ADMINISTRATIVE AND PRIVATE LAW RELATING TO FLUVIAL TRANSPORT

59. In the past century ([217]) many efforts have been made to come to a harmonization of different aspects of private and administrative fluvial law and the establishment of uniform rules, either by way of international conventions, in particular in regard of measurement of inland navigation vessels (1966 Convention ([218])), registration (1930 ([219]) and 1965 Geneva Conventions ([220])), rights in rem, mortgages and privileges (Protocol No. 1 of the 1965 Geneva Convention) ([221]), arrest of vessels (Protocol No. 2 of the 1965 Geneva Convention) ([222]), collisions (1966 Convention ([223])), limitation of shipowner's liability (1973 CLN ([224])

[217] One of the first attempts to come to a harmonization was undertaken by the International Conference for the Unification of fluvial transport law at Geneva in 1930 (see: NIBOYET, J.P., "La première conférence pour l'unification du droit fluvial", *R.D.I.L.C.*, 1931, 303-324 en 546-547; VAN SLOOTEN Az., G., "De binnenvaartconferentie van Genève 1930", *Themis*, 1931, 241).

[218] Geneva Convention on the Measurement of Inland Navigation Vessels of 15 February 1966 (*U.N.T.S.*, vol. 964, 177). Signatory States are: Belgium (02.11.1966), Bulgaria (1411.1966), France (17.05.1966), Germany (14.11.1966), Luxemburg (29.07.1966), Netherlands (14.11.1966) and Switzerland (14.111966°. Following States have ratified the Convention: Belgium (09.03.1972), Bulgaria (04.03.1980), Czech Republic (02.06.1993), France (08.06.1970), Germany (19.04.1974), Hungary (05.01.1978), Luxemburg (26.03.1982), Netherlands (14.08.1978), Roumania (24.05.1976), Russian Federation (19.02.1981), Slovakia (28.05.1993), Switzerland (07.02.1975) and Yugoslavia (08.12.1969). In order to create the possibility of control of the capacity of the vessels navigating on their territory already the Final Protocol (sub 5°) of the Act of Mannheim provided for the measurement of vessels. Later on special prescriptions have been established by an International Convention of 4 February 1898 signed between Belgium, France, Germany and Netherlands. In order to broaden the scope of territorial applicability this Convention has been replaced by the Convention of Paris of 27 November 1925, signed and ratified by the same States and Switzerland.

[219] Geneva Convention on the Registration of Inland Navigation Vessels of 9 December 1930. This Convention however did not receive any international recognition (see: HOSTIE, J., "Die Vereinheitlichung von Fragen des Binnenschiffahrtsrechts", *Z.f.B.*, 1951, nr. 4, 77 e.v.). Only France and the Netherlands ratified the Convention and implemented it in their internal legislation (France: artt. 89-99 Code du domaine public fluvial et de la navigation intérieure; Netherlands: Decree of 24 juni 1939; see FLACH, R.J.C., *Scheepsvoorrechten*, Kluwer, Deventer, 2001, 11, fn. 8, and 206).

[220] Geneva Convention on the Registration of Inland Navigation Vessels of 25 January 1965 (*U.N.T.S.*, vol. 1281, 111). Signatory States are: Austria (18.06.1995), Belgium (31.12.1965), France (31.12.1965), Luxemburg (14.12.1965), Netherlands (30.12.1965), Switzerland (28.12.1965) and Yugoslavia (17.05.1965). Following States have ratified the Convention: Austria (26.08.1977), France (13.06.1972), Luxemburg (26.03.1982), Netherlands (14.11.1974), Switzerland (14.01.1976) and Yugoslavia (11.10.1985).

[221] All States that have ratified the Geneva Convention on the Registration of Inland Vessels (see supra fn. 220) have accepted the Protocol No 1. According to art. 10 Protocol no. 1 in principle questions relating to rights in rem, mortgages and privileges are governed by the law of the country of registration of the vessels, if registrated. The same rule was already provided for in the Geneva Convention of 1930 (art. 20 as regards property and usufruct) and is also inserted in the Belgian-Dutch bilateral agreement of 28 March 1925 wirh regard to privileges and mortgages (art. 23). See also: the Dutch Law of 18 March 1993 containing certain provisions on private international law with regard to maritime law and inland navigation law. According to art. 11 of the Protocol No. 1 privileges go before mortgages. In the East-European countries questions of rights in rem, mortgages and privileges are governed by national provisions. Due to the fact that the Protocol No 1 is accepted only by six States, this leaves the door open for differences in rights in rem, mortgages and privileges and legal uncertainty. In east-European countries e.g. public claims of the State go before mortgages (see TROST, J., *o.c.*, 39)

[222] Austria, France, Luxemburg and the former Yugolsavia have accepted this Protocol. The Netherlands and

and 1988 CLNI Convention ([225])), transport conditions (CMNI Convention ([226])) and civil liability caused during transport of dangerous goods (1989 CRTD Convention ([227])), or by

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Switzerland have not accepted it. Protocol no. 2 does not deal with so-called "special legislative rights", i.e. special rights conferred upon governments or their agencies with respect to e.g. harbour and dock dues, wreck removal and pollution, offering the possibility of a detention and sale of the vessel, often coupled with a right of priority on the sale proceeds. Furthermore, beside arrest of a vessel, in some countries, e.g. the Netherlands, a retainer of the vessel is also possible for some claims.

[223] Geneva Convention relating to the Unification of Certain Rules concerning Collissions in Inland Navigation of 15 March 1960 (*U.N.T.S.*, vol. 572, 133; EVANS, M. and STANFORD, M., *o.c.*, INLW I/D/2; SCHADEE, H. and CLARINGBOULD, M.H., *Transport – International Transport Treaties*, loose-leaf, Deventer/ Antwerp/ London, 1996, 273 et seq.) Signatory States are: Austria (14.06.1960), Belgium (15.06.1960), France (15.06.1960), Germany (14.06.1960) and Netherlands (14.06.1960). Following States have ratified the Convention: Austria (27.09.1962), France (15.03.1962), Germany (29.05.1973), Hungary (24.07.1973), Netherlands (15.06.1966), Poland (08.05.1972), Roumania (04.08.1969), Russian Federation (26.01.1962), Switzerland (26.04.1972). For some comments, see: CLETON, R., "Zee- en vervoerrecht" in X, *Hoofdstukken Handelsrecht*, 3° druk, Deventer, Kluwer, 1996, 445); MULDER, S.J.A. and VAN DER SMIT, E.J.R., "Schuld van het schip naar aanleiding van het Geneefs aanvaringstractaat van 1960" in *Gratia commercii*, Zwolle, Tjeenk Willink, 1981, 179-194; WASSERMEYER, H., *Der Kollissionsprozess in der Binnenschiffahrt*, 4th ed., Köln/Berlin/Bonn/München, 1971, 48 et seq.

[224] Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973. Text in: EVANS, M. en STANFORD, M., *Transport Laws of the World, Inland Waterways Conventions and Agreements*, New York, 1985, I/D/5 ; SCHADEE, H. en CLARINGBOULD, Transport – International Transport Treaties, Deventer/Antwerpen/ London, 1996, loose-leaf, 140 The Convention has been signed by Germany (01.03.1974) and Switzerland (01.03.1974) and has been ratified by the Russian Federation (19.02.1981) but never entered into force. According to art. 12 the Convention shall enter into force on the ninethieth day after three States have deposited their instrument of ratification or accession. See for some comments on this Convention:. KORIOTH, W., *Die Neuregelung der Haftungsbeschränkung in der Binnenschiffahrt – unter besonderer Berücksichtigung des gerichtlichen Verteilungsverfahrens*, thesis, Duisburg, 1984, 326 e.v.; VAN RAEPENBUSCH, S., "Vers une nouvelle limitation de la responsabilité des propriétaires de bateaux de la navigation intérieure", *R.G.A.R.*, 1982, nr. 10532, nr. 25.

[225] Geneva Convention on the Limitation of Liability in Inland Navigation (CLNI) of 4 November 1988. See: BEMM, W., "Das Strassburger Übereinkommen (CLNI). Fortschritt oder neue Belastung ?", *Wasserspiegel*, 1996, nr. 2, 6; CZERWENKA, B., "Neuregelung der Haftungsbeschränkung in der Binnenschiffahrt", in *Probleme des Binnenschiffahrtsrechts*, Bd. VIII, Riedel, E. en Wiese, G. (ed.), Heidelberg, 1997, 69 et seq.; DE DECKER, M., "De beperking van aansprakelijkheid in de binnenvaart. I.h.b. het Verdrag van Straatsburg van 4.11.1988 (CLNI)"; HERBER, R., "Deutsches Binnenschiffahrtsrecht", in *Internationales Recht auf See und Binnengewässern, Festschrift für Walter Müller*, Zürich, Schulthes Polygraphischer Verlag, 1993, 104-107; KORIOTH, W., "Binnenschiffahrtstransportrecht" in *Das deutsche Transportrecht an der Schwelle zum Europäischen Binnenmarkt*, Berlin, Neuwied/Kriffel, 1993, 124 et seq.; KORIOTH, W., "Harmonisierung des europäischen Binnenschiffahrtsrechts und die Auswirkungen auf die Schiffahrtpraxis (Teil 1)", *Z.f.B.*, 2001, 57-60; MÜLLER, W., "Die internationale Vereinheitlichung des Rechts der Haftungsbeschränkung in der Rhein- und Binnenschiffahrt" in *Probleme des Binnenschiffahrtsrechts*, V, Heidelberg, 1988, 99 et seq.; MÜLLER, W., "Das Binnenschiffahrtsrecht als eigenständiges Recht im Spannungsfeld zwischen Seerecht und Landrecht" in *Festschrift für Günther Wiese zum 70. Geburtstag*, Berlin, Neuwied/Kriffel, 1998, 328; TROST, J., *o.c.*, 42-45; WUST, G., "Gegenwärtige und künftige Haftungsregeln für die Binnenschiffhart", in *Probleme des Binnenschiffahrtsrechts*, VI, Heidelberg, C.F. Müller Juristischer Verlag, 1991, 1-38. Contracting parties are: Germany, Luxembourg, the Netherlands and Switzerland. For the legal situation in the Danube area, see: PLANK, K., "Ausservertragliche Haftung in der Binnenschiffahrt auf der Donau", in *Probleme des Binnenschiffahrtsrechts*, VII, Wiese, G. (ed.), Heidelberg, 1994, 40

[226] See: ALLARY, P, "De regelen van Boedapest", *T.V.R.*, 2001, No. 2, 44-52; AUCHTER, G., "La Convention de Budapest (CMNI)", *E.T.L.*, 2002, 545-602; CZERWENKA, B., "Das Budapester Übereinkommen über den Vertrag über die Güterbeförderung in der Binnenschiffahrt (CMNI)", *Transp.*, 2001; HAAK, K., "Comparison CMNI and CMR (Convention international carriage by road)", *T.V.R.*, 2000, 13-24; HACKSTEINER, T.K., "Het ontwerp-verdrag inzake het internationaal goederenvervoer in de binnenvaart (CMNI)", *T.V.R.*, 1998, nr. 2, 39-45 HACKSTEINER, T., "Uniforme regels voor de binnenvaart ?", *A.A.*, Themanummer "water", 1999, 79-86. For some historicall background on this issue, see : AUCHTER, G., "L'indispensable réforme du droit international du transport de marchandises en navigation intérieure", *E.T.L.*, 1994, 695-772; DE DECKER, M., Binnenvaart. 5.4. Vervoerscontract in *Transportgids*, Kluwer, Diegem, 1998; GRAFF, P., "Le contrat de transports de marchandises en navigation fluviale et des possibilités qui existent en ce domaine", *R.N.I.R.*, 1961, 860-864; KOUTIKOV, V., "Les

way of private international agreements, in particular in regard of general average (1979 Rhine Rules Antwerp-Rotterdam([228]) and the Bratislava Agreement ([229])) and pushing conditions ([230]).

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problèmes de droit international privé", *R.C.A.D.I.*, 1969, 247-354; MALCOLM EVANS, M., "The role of Unidroit in the unification of European river law", in *Inland Waterways Transport in Europe*, The London Press Center, 1977; MÜLLER, W., "Die internationale Vereinheitlichung des Fracht- und Konnossementsrechts in der Binnenschiffahrt", *Z.f.B.*, 1956, 1 e.v.; NIBOYET, J.P., "Etude de droit international privé fluvial", *R.D.I.L.C.*, 1924, 332-376; SMEESTERS, P., "Préavis au sujet de l' opportunité d'unifier les règles touchant la responsabilité du transporteur de marchandises en navigation fluviale et des possibilités qui existent en ce domaine", *Eur.Vervoerr.*, 1968, 98-148; VREEDE, P., "Combined transport, inland navigation", *Eur.Vervoerr.*, 1975, 663-699; VREEDE, P., "The law relating to inland waterways traffic - a comparative analysis (private regime)", in *Inland Waterways Transport in Europe*, The London Press Center, 1977. Only Hungary has ratified the Convention until yet.

[227] Text in *Transp.R.*, 1990, 83 et seq. This Convention never came into force, inter alia because of the discussion wether or not a compulsory insurance obligation would be at variance with the freedom of navigation on the Rhine (In confirmative sense, see: BASEDOW, R., "Fahrverbote auf dem Rhein und die Mannheimer Akte", *Transp.R.*, 1986, 94-96; WUST, G., *o.c.*, 22. Otherwise: KORIOTH, W., "Harmonisierung des europäischen Binnenschiffahrtsrechts und die Auswirkungen auf die Schiffahrtpraxis (Teil 2)", *Z.f.B.*, 2002, nr. 1, 55-56; MÜLLER, W., "Freiheit der Rheinschiffahrt und Versicherungsobligatorium", *Strom und See*, 1983, 118 e.v.; PABST, H.E., "Transport gefährlicher Güter mit Binnenschiffen", *Z.f.B.*, 1985, 7 et seq; PABST, H.U., "Räumlicher Anwendungsbereich der Mannheimer Acte, Kabotage und Zwanghaftsverpflichtung", *Z.f.B.*, 1988, 9-12. For some general comments on the issue of civil liability caused during transport of dangerous goods, see: GANTEN, "ECE beginnt Beratungen über die Haftung bei Gefahrguttransport", *Transp.R.*, 1987, 277 et seq.; LORENZ, E., "Versicherungsprobleme beim Transport gefährlicher Güter", in *Probleme des Binnenschiffahrtsrechtes*, IV, 21; HERBER, R., "Haftung beim Transport gefährlicher Güter, ein noch ungelöstes Problem", *Transp.R.*, 1987, 253 et seq..; HERBER, R., "Das Übereinkommen vom 10. Oktober 1989 über die Haftung bei der Beförderung Gefährlicher Güter auf der Strasse, auf der Schiene und auf Binnengewässern (CRTD)", *Eur.Vervoerr.*, 1991, 161-172; MÜLLER, W., "Über die Notwendigkeit und die Möglichkeiten einer internationalen Regelung der Haftung für Schäden, die bei der Beförderung gefährlicher oder schädliger Güter auf europäischen Binnenwasserstrassen verursacht werden", *Transpr.R.*, 1998, 269 et seq.; PABST, H.U., "Gefahrguttransport mit Binnenschiffen und Haftung", *Transp.R.*, 1988, 129 et seq.; SCHMIDT, M., *Haftung beim Transport gefährlicher Güter zu Lande und mit Binnenschiffen nach deutschem Recht und nach dem Übereinkommen vom 10. Oktober 1989*, Thesis, Hamburg, 1995, 111 et seq). A new attempt to come to international unification recently in 2001 has been made by the German Verein für Europäische Binnenschiffahrt and the Dutch Internationale Vereniging het Rijnschepenregister with the draft CRDNI Convention ("Convention européenne sur la responsabilité et l'indemnisation pour les dommages liés au transport en navigation intérieure de substances novices et dangereuses"). See on this issue: HÜBNER, C., "Le projet de Convention Européenne (CRDNI) sur la responsabilité et l'indemnisation pour les dommages liés au transport en navigation intérieure de substances nocives et potentiellement dangereuses", *D.M.F.*, 2003, 421-431 ; KORIOTH, W., *o.c.*, *Z.f.B.*, 2002, nr. 1, 55-56.

[228] See: DE DECKER, M., "De Rijnregelen Antwerpen-Rotterdam" in *Handboek Transportverzekering*, De Decker, M (ed.), Kluwer, Diegem, 1996, 1.7.4/1-19; OESAU, M., "Die Rheinregeln Antwerpen-Rotterdam 1979 zur Grossen Havarei", *DDR-Verkehr*, 1980, 305-306; SCHADEE, H., "Rijn-Regels Antwerpen-Rotterdam, 1956", *N.J.B.*, 1956, 471-473; SCHADEE, H., BILAT, J.L., SCHWOB, R. and GERRITZEN, J.H.J., *Regels en commentaar bij de Rijnregels IVR 1979*, Edition 1991, Rotterdam, IVR, 1990, 304p.; VOET, H.F., "De Rijn-regelen Antwerpen-Rotterdam" in *Recht door Zee, Liber Amicorum H. Schadee*, Zwolle, Tjeenk Willink, 1980, 201-206). For some historical background and/or information on the issue of general average in fluvial transport in the different States, see e.g. BERNARDIN, F. AND BERARD, G., *Traité de droit fluvial français*, Paris, Sirey, 1934, 109; DE DECKER, M., *o.c.*, *Handboek Transportverzekering*, 1.7.2/4-8; OESAU, M., "Die Rheinregeln Antwerpen-Rotterdam 1979 zur Grossen Havarei", *DDR-Verkehr*; De Smet, R., *Droit maritime et droit fluvial belge*, t. II, Brussel, Larcier, 1971, nos. 612-617 ; GARNON, R., "La contribution du navire lorsque le dispache est établie en France", *R.N.I.R.*, 1949, 252; JACOBS, V., *Le droit maritime belge*, t. I, 1879, 437, nr. 412; KIEWIT DE JONGE, J.H., "Het nieuwe binnenvaartrecht", *N.J.B.*, 1935, 272; LICHTENAUER, W.F., "De avarij-grosse in de binnenvaart", *N.J.B.*, 1941, 369 et seq.; LINDECK, A., *Das Binnenschiffahrtsrecht*, Mannheim, Die Rheinschiffahrt, 1954, 112-122; LYON-CAEN, G. and RENAULT, G., *Traité de droit commercial*, t. VI, Paris, Pichon, no. 871 ; REPERTOIRE DE DROIT COMMERCIAL, Dalloz, vis Navigation Rhénane et mosellane; RODIERE, R., *Droit des transports, Transports terrestres et aériens*, Sirey, Paris, 1st ed., II, 1955, no. 929 en 2nd ed., 1977, no 547; Stouflet, J., "Les assurances fluviales" in Rodière, R., *Etudes de droit fluvial*, 1957, 337, nr. 41; TASSY, H., "Maritime et fluvial, examen de quelques situations similaires", *D.M.F.*, 1991, 704; VAN BLADEL, G., *Le contrat de transport par bateaux intérieur*, Brussel, Larcier, 1920, no. 1394 ; VAN DAM, W.A.C., *Avarij-grosse in de binnenvaart. Prae-advies voor het Vierde Binnenscheepvaartcongres 1923*; VAN EMPEL, A., *De rechtsgrond van*

60. Despite all this efforts, little harmonization has been achieved ([231]). An explanation possibly can be found in the fact that in some countries fluvial transport law is assimilated with maritime law, whilst in other countries fluvial transport law is rather assimilated with land transport. In France e.g. private fluvial transport law has always been considered to be an annex of the "droit terrestre", whilst in the other Rhine riparian States, at least in the past, private fluvial transport law has been inspired by maritime law. As one of the consequences France always opposed to a possible exemption of liability for navigation faults. Although the particularism of the French system has been frequently criticized in the doctrine ([232]), later this view has been shared by other countries ([233]). However, this explanation hardly can be considered nowadays as a justification for the maintenance of different regulations in these fields of private fluvial law, as a consequence of which prescriptions relating to fluvial transport are not only far less harmonized as those relating to maritime transport ([234]) but also as those relating to transport by road. This lack of harmonization can not only cause legal uncertainty but can also affect the insurance costs of transport operations ([235]) and/or lead to unequal treatment and/or distortions in competition ([236]).

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den omslag der avarij-grosse, Middelburg, 1838; VERHOEVE, J., *Het nieuwe binnenvaartrecht*, Zwolle, Tjeenk Willink, 1954; WACHTER, B., *De beurtvaart*, Zwolle, Tjeenk Willink, 1954, 359-367. Although the Rhine Rules are frequently applied and some even have suggested that they may have obtained the status of private customary law (see PRISSE, TH., *Conflictenrecht met betrekking tot het zee- en binnenvaartrecht*, Zwolle, Tjeenk Willink, 1995, 57), they cannot be considered as having established uniform rules. In inland navigation sometimes reference is made to the York-Antwerp Rules (see e.g. Rotterdam, 5 August 1983, *S.&S.*, 1986, 135). Also, general average does not exist in France outside the Rhine area.

[229] Since 1990 - Annex 6 of the revised transport conditions. In the original version of the Bratislava Agreement reference was made to the rules on general average of the State in which the carrier has its residence (see TROST, J., *o.c.*, 61-62; GNACEK, L., "View on the actual situation and demands on the future development – The Bratislava Agreements, in *Challenges of a free and strong inland waterway transport in the pan-european field*)", 4th IVR-Colloquium, Bucharest, 21-22 March 2002, 34-35).

[230] "Allgemeine europäische Bedingungen für Verträge über die Mitnahme von Schubleichtern durch Schubboote 1997" (German text in *Z.f.B.*, 1997, No. 12, 31-36). The object is to come to a substitution of the Dutch "Algemene Duwconditiën", frequently applied in the Netherlands and Belgium, and "Allgemeine Bedingungen für Verträge über die Mitnahme fremder Schubleichter durch Schubboote", frequently applied in Germany.

[231] We will not enter here in the discussion wether or not the EC has competence with regard to matters of private fluvial law. In his Memorandum of 10 April 1961 relating to the common transport policy the Commission considered the establishment of uniform transport conditions as falling under his competences in respect of art. 71 E.C. In the same sense Regulation (EEC) No. 1174/68 of the Council of 30 July 1968 on the introduction of a system of bracket tariffs for the carriage of goods by road between Member States, *O.J.*, L 194 of 6 August 1968. The alleged competence of the E.C. in this field has been critized (see ROYER, S., "Openingsrede", *E.T.L.*, 1968, 28) and, until now, no civil law aspects are incorporated within the "acquis communautaire".

[232] See e.g. BOULOY, "Les problèmes actuels du Droit Fluvial", *Transports*, 1973, 77; RODIERE, R., *Droit des Transports*, 1955, t. II, no. 374. See also the authors mentioned in foornote 234

[233] The laws governing inalnd navigation in Austria, Croatia and the Federal Republic of Yugoslavia consider the perils typical to shipping in particularly standardized exemption clauses. These are also particularly revealed in the general shipping conditions of the Bratislava Convention. On the contrary, those laws in Germany, Slovakia, Hungary and Bulgaria governing by land carriage law only provide for liability exemptions known in all types of transport. They can be attributed to the general contractual liability in the allocation of risk (TROS, J., *o.c.*, 371).

[234] On this issue, see: FENET, A., "Droit de la mer, droit des cours d'eau internationaux: similitudes et convergences", *A.D.M.A.*, 1991, 89-107 ; MÜLLER, W., "De la nécessité d'adapter le droit fluvial Rhénan en France", *Annuaire de droit maritime et océanique*, 1997, 63-70;

[235] UNECE Group of volunteers, *o.c.*, 9

[236] In this Memorandum on the application of the EC Treaty on the Rhine the Commission stated that the existence of a uniform and unalterable legal base for the conclusion and performance of transport agreements – to begin with international transport – will guarantee in particular the smaller undertaking a reliable starting-point for their economic organization and calculation and will protect them against unnecessary and extravagant demands of shippers. In the opinion of the Commission uniform transport conditions in the sense of a code of

CONCLUSIONS AND RECOMMENDATIONS

61. The more one digs in the distinctive features and characteristics of European fluvial transport law, the more one tends to come to the surprising and somewhat disenchanting conclusion that, despite many important and well-intended efforts, little harmonization has yet been achieved. When dealing with public fluvial transport law it has been correctly stated that freedom of navigation serves as a "rock" on which the Act of Mannheim of 1868 for the Rhine and the Belgrade Convention of 1948 for the Danube have been built ([237]). One can add that not only those two international river acts are built on this rock, the latter also applies to the rivers Scheldt, Meuse and the international canals traversing or separating Belgium and the Netherlands (Separation and Guarantee Treaties of 1839 and Rhine-Scheldt Connection Treaty of 1963) and the Moselle (Convention of 1956), whilst for other European international rivers there exists a permanently binding obligation to set up a navigation régime based on the principle of freedom of navigation. However, whereas this principle, as an offshoot of the 1815 Vienna ideology, laid down in the articles 108-117 of the Final Act of the Congress of Vienna and the Annexes, in the past two centuries as well as nowadays is considered to form part of European public fluvial law, the distinctive features remain unclear and can, and do, differ from international river to international river, due to the fact that in the past each international river has been dealt with individually as a separated entity from the geo-political standpoint.

62. This individual and separated treatment of each international river has inter alia resulted in different conditions in respect of the administration of the river, the transport rights (international transport and/or cabotage), the territorial scope (the river, ports, tributaries and/or other waterways) and the scope of beneficiaries (riparians and/or non riparians), the substantive elements of free navigation (equality of treatment, freedom of traffic, dues, affreightment, etc.) and not at the least in respect of the police and shipping regulations relating to vessel safety conditions and nautical skills as well as labour and tax conditions, etc. All of this makes the whole to a very complex situation, not only for the users of these waterways and their customers, but also for the decision making bodies. This complexity has been strengthened by the fact that the concept of free navigation has been construed only in regard of international rivers, leaving out of the scope of applicability national rivers as well as national and international canals, even if they form part of the same river basin. Indeed, unless agreed otherwise in the special river acts or in other agreements, the principle of free navigation does not apply to national waterways or international canals. As mentioned above, with regard to these or some of these waterways in the past different riparian States have settled on a basis of reciprocity in favour of residents of both states the different transport rights in bilateral agreements.

63. Already the French Minister Talleyrand in 1814 expressed the idea of an extension of the principle of free navigation to all rivers that, in their navigable course, separate or traverse

commerce for fluvial navigation can also be of use for the customers, and contribute to the abolition of distorsions of competition.

[237] VALKAR, I., *o.c.* (fn 6), 6.

different states and even to all navigable streams and rivers of the Christian Europe ([238]). The distinction in approach between international and national waterways often has been considered as artificial ([239]) and in the last decades of the 20th century a plea has been made to come to one European river act and even one common fluvial transport policy for all interconnected pan-European waterways based on the principle of free navigation ([240]). One can indeed ask himself if not the establishment of the same principles as the fundaments of a common fluvial transport policy is a logic consequence of the goal of such a common policy and if not the principle of free navigation must be one of these fundaments, not only in regard of international rivers but also in regard of all interconnected pan-European waterways, to begin with those laying within the European Community ([241]). This calls for the creation of an institutional background for inland navigation in Europe as a rock on which all other prescriptions are built. The recognition of the principle of free navigation not only as the core and institutional background of international rivers but also as part of the "acquis communautaire fluvial" would not only, with regard to transport situated entirely within the community, serve this goal ([242]), also it can be a workable formula in order to achieve an efficient symbiosis between community law and international (river) law in the intrest of all parties forming part of these different entities.

64. However, this on itself will not do. The principle of freedom of navigation indeed would be a purely theoretical concept if first of all the content of this principle is not clarified and applied and interpreted in the same way. In our opinion, as expressed above, this means that this freedom cannot be regarded as being solely the right to sail on the river, but that it must also include the right to enter ports and make use of port facilities and the right to carry out transport operations. Although not forming integral part of the principle of free navigation as provided for in the Final Act of the Congress of Vienna, in respect of the "acquis communautaire fluvial" and the "acquis rhénan" this should also have to imply the freedom of cabotage ([243]), the freedom of contracting and pricing and the prohibition of all agreements between business firms, which have as their object or effect the prevention or restriction of competition. The harmonization of the Rhine and Danube regime, inspired by the wish of a continuous and unimpeded Rhine-Danube traffic, udoubtedly is a step forward in obtaining the goal of a common fluvial transport market based on the thus defined principle of free navigation, but in our opinion cannot be the final aim. The latter should have to be the

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[238] DEPUIS, CH., *Le Ministère de Talleyrand en 1814*, I, 377

[239] See e.g.: HOSTIE, J., « Les fleuves internationaux », *Navigation du Rhin*, 1930, 317 ; VAN EYSINGA, W.J.M., « Les fleuves et canaux internationaux », *Bibliotheca Visseriana*, 1924, 133. Art. 1 of the Statute of Barcelona provided for an extension of the principle of free navigation not only to international canals but also to national waterways that are the completion of international waterways.

[240] AVENTIN, M., « Scheepvaart op Donau door technische en juridische problemen belemmerd », *De LLoyd*, 25 September 1992; SCHOLTENS, N., *Het regime voor de scheepvaart op de Moezel*, Rotterdam, Stichting Vervoerswetenschappelijk Centrum, 1960, 211-212: SIMONS, J.G.W., "Europa op koers in het vervoer", *T.v.Vw.*, 1991, 12-13

[241] The idea of an enlargement of the principle of free navigation, as applied and interpreted on the Rhine, already has been advocated in the Report Kapteyn (E.P., documents 1961-62, 11 December 1961, document 106, 95, nr. 266) and later in the Report Seefeld (E.P., documents 1979, 5 January 1979, document 512/78) and implicit in the Rhine Memorandum and in Council Directive 96/75/EC. Nowadays with the enlargement of the E.U. and the territorial scope of the principle of free navigation, this idea seems more of present interest than ever.

[242] On itself this does not affect the legal regime of the Danube, Meuse and Scheldt, Moselle and Rhine, nor does it affect the competences of the CCNR and the other River Commissions.

[243] Wether or not freedom of cabotage already existed on the Rhine based on the principles of the Revised Convention of Mannheim, under contemporary law as a consequence of EC Regulation 3921/91 it exists anyhow on all waterways of the E.C., not only those of the old Member States but also of the new Member States and therefore also on a large part of the Danube.

establishment of one river act applying to all integrated, linked waterways of the E.C., the Rhine and Danube basin.

65. But even clarified, interpreted and applied in the same way, freedom of navigation would mean little if not all the beneficiaries of this freedom are treated equally, not only in law but also in fact, in all matters that can affect fair competition on the integrated fluvial transport market. This involves not only the prohibition of all agreements between business firms, which have as their object or effect the prevention or restriction of competition, but also equal treatment, not only in transport rights, nautical skills and technical requirements, waterway and port facilities and navigation and harbour dues. The notorious Oscar Chinn Case of the P.C.I.J. in this context should be borne in mind ([244]). Equal treatment therefore calls inter alia also for – at least – harmonization of social and tax conditions ([245]). In this context, as explained above nowadays differences still exist in social and labour conditions, different renumeration levels and labour costs, different social security schemes, different or absence of collective labour agreements, different proceedings and treatment in regard of the entrance of workers from the new member States, etc. The core of this harmonization should have to be the prevention of social dumping, under the guarantee of equal treatment in all aspects involved between all undertakings operating on the same integrated waterway market, regardless their nationality and/or their place of residence or business seat, thus preventing distortions and unfair competion on this market between all players on it. The best and preferential way to achieve this goal consists in a standardization of the labour and social conditions and the costs involved. In order to achieve this goal gradually as a first step a plea can be made for minimum wages and minimum labour and social security conditions.

66. The legal situation with regard to employment of workers of the new Member States and of third countries calls for reconsideration ([246]), whilst a harmonization of the size and composition of crews and working and rest hours should have to take into account the distinctive features of fluvial transport in Europe ([247]) and the actual different position of

[244] For the reference, see above footnote 34. The Court in this judgment by confirming the legitimacy of the measures taken by the Belgian government leading to a de facto monopoly one, state controlled, company, came to an rather narrow interpretation of free navigation based on equal treatment and therefore has not without reason been criticized in literature not only for reason of the restrictive interpretation of the notion "freedom of navigation", but also for the interpretation of the notion "equality of treatment", interpretation thas has been considered to be purely technical, restrictive and arbitrary (see DELBEZ, L., *Les principes généraux du droit international public*, Paris, L.G.D.J., 3° ed., .1964, 325; KOPELMANAS, L., "La notion de liberté économique devant la justice internationale", *Clunet*, 1954; REUTER, P., *Droit international public*, Paris, P.U.F., 2nd ed., 1963, 213; SCHWARZENBERGER, G., "The Principles and Standards of Economic Law", *R.C.A.D.I.*, 1966, I, 51; YAKEMTCHOUK, R., "Le régime international des voies d'eau africaines", *R.B.D.I.*, 1969, 492).

[245] In the same sense: MEISTERMAN, C., "Demandes et développements du marché de la navigation intérieure", in *Challenges of a free and strong inland waterway transport in the pan-european field*", 4th IVR Colloquium, Bucharest, 21-22 March 2002, 38: "Il n'en reste moins … que des legislations nationals s'appliquent, notamment en matière sociale et fiscale, qui peuvent être des sources d'inégalité de chances et de distorsion de concurrence. Cette remarque vaut d'ailleurs pour l'ensemble des voies d'eau de l'Union Européenne. WOEHRLING, J.M. (*o.c.*, (supra fn. 10), 7), secretary-general of the C.C.N.R. also mentions social and tax conditions, as well as state aid. Although not explicitly dealt with in this paper, we agree that tax conditions also should have to be harmonized in order to prevent distorsions in competition.

[246] Beside the arguments already mentioned above, in a decision of the OLG Nürnberg of 8 February 2001 (*Transp.R.*, 2002, no. 4, 170) the fact that according to the Danube Convention the Danube is open to all flags has been recalled to mind, with the result that this freedom could not be hampered or restricted by way of a so-called "Erlaubnispflicht zum Befahren der Donau".

[247] Inter alia the competence of the CCNR on the Rhine, as far as these provisions can be considered as navigation rules, or at least basic provisions on navigation, the competence of the Danube Commission (art. 8f) and the Special River Administrations (art. 23). Furthermore one can mention the ongoing progress in nautical and information technologies, the different types of the vessels, the fact that in most cases the personnel has to

undertakings as a consequence of the existing differences between the Member States with regard to the costs involved with it. Furthermore, harmonization of the size and composition of crews and working and rest hours calls inter alia for common rules with regard to the qualifications and equality of training of the crew and the proof of it, and a set of legal instruments in order to supervise efficiently the observance of the common provisions, regardless the flag the vessel is flying. In this context special attention must be payed to the fact that international transport does not necessarily start or end within the Community ([248]) and the fact that the Danube is open for vessels of all States ([249]).

67. Differences in technical requirements for the vessels in our opinion can only be justified by reason of the particularities of the waterways and therefore, as is already the case under E.C. Law, should have to be elaborated for zones of navigation, regardless of their geographical position ([250]), be it understood that this can only be done without affecting the compentences of the CCNR as regards the Rhine and of the Danube Commission as regards the Danube ([251]). Under the same restriction, the same basic idea should have to apply to requirements in nautical skills, where only local navigational conditions in our opnion can justify different requirements. The conditions relating to transport of dangerous goods should by nature be the same. All of this at the end should have to lead to one set of regulations with regard to safety conditions. The reciprocal recognition of documents can be considered to be a first step, but therefore cannot be the last one.

68. The achievement of freedom of navigation, equal treatment and fair competition in an integrated pan-European fluvial transport market, will not only be served by harmonzation of social (and tax) conditions and the establishment of harmonized or unified navigation conditions, but also by the creation of a common private and administrative law for inland navigation in Europe, preferably through the continuation and grouping of the existing endeavours ([252]). Inter alia this implies the enlargement of the territorial scope of applicability of the CLNI Convention ([253]), the implementation of the CMNI Convention in the different riparian States ([254]), the establishment of uniform conditions relating to civil liability caused during transport of dangerous goods and relating to the registration of inland vessels ([255]), rights in rem, mortgages, privileges, arrests of vessels and measurement.

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stay aboard a vessel, etc.

[248] Notwithstanding the EC external competence as regards international transport in our opinion EC law cannot establish provisions relating to the composition and size of the crew and working and rest hours outside the Community area nor enforce outside the Community area the observance of Community provisions. Therefore EC undertakings are free to apply or not apply the same provisions outside the Community, as far as there are no special provisions applying on the territory that is passed.

[249] It cannot be excluded that vessels of third countries, wether Danubian States or others, would contest the legality of EC provisions in the light of art. 8f of the Danube Convention. Notwitstanding the fact that the resolutions of the Danube Commission only have the value of recommendations, this does not affect the fact that the establishment of a uniform system of navigation regulations falls under the competence of the Danube Commission.

[250] In the same sense: VALKAR, I., *o.c.*, (supra fn. 9), 4. This must be done without affecting the competence of the CCNR (and the Danube Commission in so far as those provisions are falling under the scope of art. 8f of the Danube Convention)..

[251] Once again, according to art. 8f of the Danube Convention, whereas these provisions can be considered to be navigation regulations or basic provisions goverbing navigation on the Danube.

[252] TROST, J., *o.c.*, 372

[253] However we would like to draw the attention on the fact that art. 18 of this Convention leaves open the door for different regulations in the Contracting States inter alia in regard of claims for water pollution.

[254] Well understood under the condition that all clauses of it are applied everywhere the same, if not differences can still continue to exist and lead to legal uncertainty.

[255] Not only the conditions for registration are different, also the costs involved with it. We like to emphasize that

69. All of this calls for a close cooperation between all parties having competences in these fields in order to achieve these goals. In the meanwhile, international transport between Member States and third countries should be best settled on a basis of reciprocity with equal conditions for all the beneficiairies. One can question wether or not the bilateral agreements, in so far as they still remain in force ([256]), provide for a sufficient base to do so ([257]). The most important advantage of a multilateral agreement consists in the fact that the field of application can extend to the whole pan-European integrated waterway network or parts thereof, whilst bilateral agreements concluded by particular riparian States can only apply to the navigable waterways, or to parts thereof, which are subject to their sovereignty. Furthermore a multilateral agreement has the benefit to ascertain equal conditions and treatment of all the beneficiaries, and therefore of all fluvial transport undertakings of the E.C. Member States, and to safeguard the "acquis communautaire fluvial". Obviously, this multilateral agreement also must take into account, and therefore cannot affect, at least not without the common consent of all the contracting States, the relevant rules of international law, in particular the rights deriving from the existence of special river acts such as the Revised Act of Mannheim ([258]) and the Belgrade Danube Convention ([259]).

70. Without any pretension of completeness, in the preceding pages we have made an attempt to summarize those issues and topics that can put a burden on the future development of fluvial transport in Europe under conditions of freedom of navigation, equality of treatment, fair competition and reciprocity and to propose some recommendations and/or solutions. Although we are well aware of the fact that not all of the solutions and recommendations will be welcomed with the same enthousiasm by everyone and that not all of the legal opinions will be shared, nevertheless one can hope that the ideas and thoughts expressed in it can contribute to a better understanding of the legal problems fluvial transport in Europe has to deal with and the urgent need for international solutions.

Dr. M. De Decker,
22.09.2004

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a Community flag and/or a Community register is not a necessity in order to achieve these goals. nor is their "prima facie" a need for Council Regulation on the transfer of ships from one register to another within the Community. Obviously the transfer of a vessel between the registers of Member States may not be impeded by technical or administrative barriers, provided that the vessel is complying with the provisions of Community law and/or international regulations. Special attention shoud be drawn to the possibility of registration of bareboatcharters, contracts of leasing or hire of a vessel.

[256] Beside the arguments we already mentioned above, the bilateral agreements concluded by Germany or Austria cannot affect the freedom of navigation of vessels and persons of all States on the Danube. The so called German "Erlaubnispflicht zum Befahren der Donau" (based on § 2 Abs. 1 Binn.Sch.AufG) has been considered incompatible with this freedom of navigation (See: OLG Nürnberg, 8 February 2001, *Transp.R.*, 2002, no. 4, 170-172).

[257] I like to observe that the German Bundesverkehrsministerium has confirmed to hold on to the bilateral agreements, be it that the provisions will only apply when not at variance with EC Law (see Bonapartner, Aktuelles von und für die Binnnenschiffahrt 03/2004, 2, www.bonapart.be).

[258] In particular the Additional Protocol No 2

[259] As we explained above (see nrs. 32 and 34) with regard to fluvial transport the E.C. has recognized the existence of relevant rules by mentioning the Convention of Mannheim in Regulations 3921/91 and 1356/96 and the Belgrad Convention in Regulation 1356/96. The relevance here consists in the fact that no multilateral neither bilateral agreement can affect the right of Danubian States, not Members of the E.U., of freedom of navigation in international transport as guaranteed by the Belgrade Convention.