



**Economic and Social
Council**

Distr.
GENERAL

TRANS/SC.3/2003/8
8 July 2003

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Inland Water Transport
(Forty-seventh session, 7-9 October 2003
agenda item 5)

**EXCHANGE OF INFORMATION ON MEASURES AIMED AT
PROMOTING TRANSPORT BY INLAND WATERWAYS**

Transmitted by the Chairman of the Group of Volunteers
on Legislative Obstacles

Note: At its forty-fourth session, the Working Party set up a Group of Volunteers with a view to preparing, as a follow-up to the Rotterdam Conference on Inland Waterway Transportation, an “Inventory of existing legislative obstacles that hamper the establishment of a harmonized and competitive Pan-European inland navigation market together with recommendations as to how to overcome those obstacles” (TRANS/SC.3/155, para. 14(iv)). The following delegations took part in the work of the Group: Hungary, the Netherlands, Romania, Russian Federation, European Commission (EC), European Conference of Ministers of Transport (ECMT), Central Commission for the Navigation of the Rhine (CCNR) and the Danube Commission (DC).

Reproduced below is the draft of the first part of the Inventory containing a succinct analysis of existing legislative obstacles that hamper the establishment of a harmonized and competitive Pan-European inland navigation market, established by the Group of Volunteers as a result of its three meetings (Paris, 31 January 2002; Geneva, 21 October 2002 and Strasbourg, 28 May 2003), finalized by the Chairman of the Group, Mr. C. Hofhuizen (Netherlands).

**Inventory of existing legislative obstacles that hamper the establishment of
a harmonized and competitive pan-European inland navigation market
(Rotterdam declaration, item 13)**

1. Generalities.

Definition of “legislative obstacles”. Normally, an economic system that is based on market principles and that is fully integrated will be characterized by a defined geographical area and, for those who legally belong to the system, by a state of the law which ensures:

- equality of treatment of economic actors, irrespective of their nationality or their place of residence;
- equal access conditions for all those who wish to enter the market (including equal access to infrastructures and services);
- equality of rules governing production processes throughout the geographical area covered by the market in question;
- sanctioning of unfair competition practices (including control of private cartels and of state aid);
- freedom of contracts and pricing;
- freedom of movement of goods, persons, services and capital throughout the geographical area covered by the market system.

Wherever in the case of inland water transport operations on the pan-European inland waterway network these conditions are not, or not completely met, one may speak of ‘legislative obstacles’ as referred to in the Rotterdam Declaration.

Secondary aspects of an open transport market. The functioning of the transport market and the IWT market in particular is embedded in the global framework of rules, mechanisms and to a certain extent also traditions of the geographically defined political entity taken into consideration. This can be a single country or a number of countries, governed by common or comparable rules and principles which all have their own so-called “level playing field”. The question of the harmonization and opening of the markets can, therefore, not be seen separately from the global functioning of the specific market concerned. In particular, the mobile character of the transport and the services provided by its operators oblige in this context to take also into consideration the indirect effects on the existing situation of an opening to third parties. More precisely, due to the absence of an external competition on a specific market, the application of many of the measures in this respect has been limited to the authorized players. As third parties were not entitled to operate on this market, these measures do not apply to these parties and therefore contain real loopholes once the access is granted. Without supplementary arrangements, this would possibly give way to unfair competition between the original players and the newcomers.

The most obvious examples can be found in the area of the working conditions, the social security and the wage levels, including the mechanisms and instruments for their application. These are in most cases of a national nature, i.e. they apply to the nationals of a country (private persons or legally established enterprises) and can only be enforced by the authorities of that country.

In the case that the transport services are carried out in a third country, the authorities of the flag State lack the possibility of a repressive intervention. In addition, the authorities of the country or countries where the services are carried out lack the power to intervene, either on the basis of their own regulations, which might not be fit for application to foreign operators, or on those of the country of origin. As long as the respective national regimes concerned do not deviate much, this evident loophole in the legal regimes does not necessarily lead to unfair competition. All depends on the degree of the differences between the regimes and their effects on the commercial exploitation.

The question of how far integration of markets presupposes the harmonization of conditions of employment, remuneration levels, social security regimes, fiscal regimes and tax levels will not be further explored here. Suffice to note that, within economies like those of the European Union and the United States of America, which are generally considered as integrated common markets, differences in social security and fiscal regimes, labour costs and tax levels continue to exist. Still, it would be realistic to recognize that differences of this kind may play a role in discussions on the mutual opening of markets.

Geographical scope. For the moment, it is proposed to examine in this report the situation of inland water transport on the interconnected waterways of the member States of the Danube Commission (DC), of the member States of the Central Commission for the Navigation of the Rhine (CCNR), and of Poland and the Czech Republic. The inland waterways of those countries form a more or less coherent whole; at present only maritime routes connect them to the waterways of other countries. The exceptions are, of course, the Russian Federation and Ukraine mainland: member States of the DC, but not connected by inland waterways to the other countries just mentioned. The development of transport by sea-river vessels would encourage the integration of these last two countries into a single European transport system.

This choice is made here only for practical reasons and must not be understood to imply that other countries could not, in future, become participants in the establishment of an integrated pan-European inland navigation market. In view of the growing awareness of policymakers that the potentialities of fluvio-maritime transport have to be more fully developed, the number of countries having an interest in inland waterways policy will most probably grow. If the notion "inland navigation market" is broadened to include sea-river transport, all 39 countries connected by inland waterways and/or short-sea routes to the E waterway network as defined in the AGN Agreement have, at least potentially, an interest in the pan-European harmonization of legislation governing this market.

Types of legislative obstacles. Experience suggests that legislative obstacles in European inland waterway transport are, or may be, of a number of kinds:

- restrictions on transport rights of ‘foreign’ vessels;
- restrictions on access to and use of inland waterways and ports;
- the existence of different regimes for technical regulations for vessels (ship’s certificates);
- the existence of different regimes for boatmaster’s licences, the size and composition of crews, and working and rest hours;
- restrictions on the freedom of pricing and contracting;
- restrictions on the freedom of movement of inland water transport workers;
- restrictions on the right of establishment.

Many legal obstacles have their origin in international legal instruments, but in some cases national law is also a source of such obstacles.

2. Restrictions on transport rights of “foreign” vessels.

By “transport right” is meant here the right for vessels flying certain flags to carry out transport operations within or through a given territory or between certain territories, rights such as “cabotage”, “transit” and “third country traffic” (*Drittlandverkehr*). A number of international legal instruments contain restrictions on these rights.

The **Act of Mannheim** (article 4) reserves the right to carry out transport operations between two points situated on the Rhine and its tributaries to vessels belonging to Rhine navigation, i.e. having a so-called “genuine link” with one of the CCNR member States or with a member State of the European Union. Vessels not belonging to Rhine navigation may carry out such transport only under conditions laid down by the CCNR. So far, the CCNR has never specified such conditions in general terms. As a result, vessels from countries other than the EU-countries and Switzerland can only transport goods and persons between ports situated on the Rhine, the Moselle, the Main or the Neckar, if the CCNR authorizes them to do so on a case-by-case basis. Article 4 of the Act of Mannheim further specifies that the conditions for the transport of freight and persons by vessels not belonging to Rhine navigation, between a point situated on the Rhine and its tributaries and a point situated in the territory of a third state shall be laid down in agreements between this third state and the Rhine riparian state concerned. A number of such bilateral agreements exist; for further details, see below. However, not all non-EU countries that are linked by inland waterways to the Rhine have concluded such agreements with all Rhine riparian countries. In cases where no agreement exists it is up to the Rhine riparian state concerned to decide whether it will authorize such transports to and from its Rhine ports or not.

In the **Belgrade Convention (1948)**, the principle of freedom of navigation for vessels of all states applies only to frontier-crossing traffic (article 1). Vessels flying foreign flags may thus be excluded from national transport (“cabotage”) within Danube countries; this seems to be the general practice.

The legal situation on the Danube with respect to transport rights, however, is subject to different interpretations and needs clarification. The differences notably concern the interpretation of the principle of freedom of navigation. Some Parties to the Belgrade Convention hold the view that this principle only grants the right to sail on the river, not the right to carry out transport operations; others contend that it also implies this latter right.

Currently preparations are being made for a diplomatic conference for the revision of the Belgrade Convention. This revision may provide an opportunity to clarify the situation as to transport rights.

EU legislation. Regulations (EEC) 3921/91 and (EC) 1356/96 explicitly authorize EU inland water transport operators, who can prove a “genuine link” with a member State, to carry out national transport operations *within* EU countries other than their country of establishment (“cabotage”), and to carry out transport operations *between* EU countries. Whether individual EU member States are entitled to admit non-EU carriers to their national and intra-Community transport markets (e.g. by issuing permits) remains a moot point. From the standpoint of EU law it could be argued that this does not belong to the competence of individual member States, but to that of the Community.

Bilateral inland water transport agreements. There exist bilateral agreements on inland water transport between Germany on the one hand and Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania and Ukraine on the other. Poland, the Czech Republic, Slovakia, Hungary and Romania also have such agreements with the Netherlands. There are similar agreements between Luxembourg and the Czech Republic, and between Romania and France.

These bilateral agreements generally contain provisions on transport rights, some of which restrict market access.

- Cabotage as a rule is only allowed in exceptional cases, or is not allowed at all.
- Bilateral traffic between both countries concerned is in some cases freely accessible for vessels of both parties, but in other cases subject to a system of cargo sharing on a 50/50 basis; it may also be subject to tariff regulations laying down minimum freight rates. Participation by vessels of third countries in bilateral traffic is generally discouraged.
- Third country traffic (*Drittlandverkehr*) generally is only possible if the authorities of the Contracting Party where the goods are loaded or unloaded grant a permit; a permit of the third country where the goods are to be loaded or unloaded may also be required.

Nearly all bilateral inland water transport agreements are with countries that are candidates for membership of the European Union. As soon as these countries accede to the EU many provisions in the bilateral agreements concerned will automatically cease to be applicable, since application of the restrictions they contain to EU vessels would be contrary to EU law. In the interest of legal certainty these bilateral agreements should then either be revised or denounced.

3. Restrictions on access to and use of inland waterways and ports.

Some states restrict access to and use of their waterway network by subjecting these to authorization. Foreign vessels, whether loaded or unloaded, are not allowed to enter the inland waterways of the Russian Federation without special governmental authorization. Navigation on the federal inland waterways of Germany by foreign vessels is subject to a navigation authorization ("*Erlaubnis zur Fahrt*"). The obligation to have such an authorization does not apply to EU vessels. The authorization is granted to vessels of States, with which Germany has concluded bilateral inland navigation agreements, within the terms of those agreements.

4. The existence of different regimes for technical requirements for vessels (ship's certificates).

With regard to technical requirements for inland navigation vessels, three main regimes can be distinguished at the pan-European level.

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 (French acronym: RVBR) and issued by the competent authorities of one of the member States of the CCNR. This CCNR certificate is recognized by the EU as valid for navigation on all Community waterways (with the exception of some large waterways, mostly river estuaries, where vessels must meet additional technical requirements).

The technical regime on the **EU** waterways outside the Rhine is based on EU Directive 82/714/EEC, which establishes a Community ship's certificate. This Directive is currently under revision to bring its technical rules into line with those of the RVBR. The Community ship's certificate is not recognized as valid for Rhine navigation, as the current wording of the Act of Mannheim makes such a recognition impossible; but the CCNR member States recently signed a 7th Additional Protocol to the Act of Mannheim which, on entering into force, will give the CCNR the competence to recognize the ship's certificates of the EU and of third countries, if the regulations on the basis of which they are issued are equivalent to those established by the CCNR and in accordance with procedures ensuring their effective implementation.

Danube. The DC has issued Recommendations on Technical Requirements for Inland Navigation Vessels, based on resolution No. 17 of the UNECE, but it is as yet not known to what extent the DC member States have actually copied these Recommendations in their national legislation. So,

strictly legally, each riparian State has its own technical rules and ship's certificate. However, as the riparian States recognize each other's ship's certificates, this situation poses no problems to shipping on this river. Certain Danube States also recognize the Rhine ship's certificate, as do Poland and the Czech Republic (who, of course, also have their own national technical regimes and certificates).

The UNECE resolution No. 17 just referred to, which lays down Recommendations on Technical Requirements for Inland Navigation Vessels, is a result of efforts of its member Governments regarding the approximation of their national and international (CCNR) requirements in this field with a view to possible reciprocal recognition of ship's certificates issued on the basis of the Recommendations or their recognition through a simplified inspection procedure. The Recommendations are currently under revision and are supposed to be in line generally with both the draft EU legislation on the matter and CCNR regulations in force, as far as the waterways of navigational zone 3 are concerned. The recommendatory character of this set of requirements makes it necessary for Governments seeking the recognition of their ship's certificates to reflect in them that the vessel has been inspected and found in compliance with the UNECE provisions in question. Otherwise, the Governments will have to prove that their national legislation is in full accordance with the provisions of the UNECE Recommendations.

5. The existence of different regimes for boatmaster's licences.

The situation with respect to boatmaster's licences is comparable to that with respect to vessel's certificates. On the **Rhine**, boatmasters must have a licence based on the Rhine Patent Regulation of the CCNR, which is issued by the competent authorities of one of its member States. This "Rhine Patent" is recognized by the EU as valid for the navigation on all Community waterways (with the exception of some rivers, where the member State concerned may require special knowledge of local navigational conditions and/or special experience in navigating the river in question). It is also recognized by most Danube countries, be it that in many of them the patent holder must meet some additional requirements as to knowledge of local navigational conditions.

The EU has its own legislation on this subject. Directive 91/672/EEC provides for the mutual recognition by the member States of each other's boatmen's licences. Directive 96/50/EC lays down harmonized minimum conditions for the issuing of national licences (essentially an examination programme). An EU boatmaster's licence in the proper sense of the word does not exist to date, but the European Commission is considering further harmonization in this field. Boatmaster's licences based on Directive 96/50/EC currently are not valid for Rhine navigation, but the 7th Additional Protocol to the Act of Mannheim, mentioned in the preceding paragraph, will it make possible for the CCNR to recognize them, as well as the licenses of non-EU countries.

The Rhine Patent Regulation (article 3.05) allows the CCNR to recognize boatmaster's licences of other countries than its member States as "equivalent"; to date it has done so with Austrian,

Czech, Hungarian and Polish licences. Holders of such recognized licences can obtain the Rhine Patent through a simplified examination, the only subjects of which are knowledge of the Regulations in force on the Rhine and of the navigational conditions on that river.

On the **Danube**, the regime concerning boatmaster's licences is similar to that with respect to ship's certificates. The DC has adopted Recommendations on the Establishment of Boatmaster's Licences on the Danube. It is uncertain to what extent the DC member States actually follow those Recommendations, but they recognize each other's national licences.

Within **UNECE** were elaborated and adopted in 1992 the Recommendations on Minimum Requirements for the Issuance of Boatmasters' Licenses in Inland Navigation with a view to their Reciprocal Recognition for International Traffic.

6. Differences in regulations on the size and composition of crews, and on working and rest hours.

For the **Rhine**, Chapter 23 of the RVBR lays down rules on the size and composition of crews. The size and composition of the crews vary with the length of the vessel, its mode of exploitation (14, 18 or 24 hours/day) and the quality of its technical equipment. On the Danube, there is no uniform regime regarding the size and composition of crews; this falls within the competence of the individual Danube States. Everywhere else, this is also a matter of national legislation, so the rules may vary from country to country. The EU so far has no rules on the size and composition of crews, but they are under discussion.

As to working and rest hours, the **EU** has adopted a directive (2000/34/EC) laying down minimum requirements for working and rest hours for mobile workers in the transport sector, which is applicable to inland navigation, and which will become effective in 2003.

UNECE is currently working on a Recommendation containing a pan-European standard for minimum manning requirements and working and rest hours of crews in inland navigation.

7. Restrictions on the freedom of pricing and contracting.

Legally prescribed minimum prices for inland water transport services and restrictions on the freedom of contracting such services formerly existed in some countries, notably in Germany, the Netherlands, Belgium and France. In Germany national transport was subject to a system of fixed minimum freight rates (*Festfrachten*). In the Netherlands, Belgium and France shippers were legally obliged to make their contracts for national transport through the intermediary of a state-run system of chartering by rotation (*tour de rôle*), which assigned cargoes to bargemen on a "first come, first served" basis; for this transport, too, shippers had to pay minimum freight rates fixed by law.

These *tour de rôle* systems and price controls no longer exist. They have been abolished, partly by measures on the national level, as in Germany, partly as a consequence of an EU liberalization directive, so pricing and contracting are now entirely free practically everywhere. The only legal texts where price controls can still be found are some bilateral inland water transport agreements, which prescribe minimum freight rates for bilateral transport.

Restrictions on the freedom of pricing and contracting clearly are not a serious problem nowadays. But given the frequent occurrence of periods in which inland water transport freight rates sink to very low levels, demands for the reintroduction of minimum freight rates tend to crop up from time to time.

8. Lack of rules on competition.

Legal obstacles may not only be caused by existing legal arrangements, but also by the absence or insufficient development of laws which are indispensable for the good functioning of a market system. A case in point may be the lack of legislation which aims at ensuring a workable degree of competition throughout the economy (anti-cartel legislation) in European countries outside the EU. The Treaty establishing the European Community expressly prohibits all agreements between business firms, which have as their object or effect the prevention or restriction of competition^{1/}. EU member States have supplemented these treaty provisions by national legislation on competition. Application of these Community and national rules has led to the elimination of some cartels of small ship-owners, which formerly existed in Dutch and Belgian inland navigation. On the Danube there still exist agreements between the formerly state-controlled national shipping companies, collectively known as the “Bratislava Agreements”. To the extent that these Agreements aim at sharing the Danube shipping market and at fixing transport prices, they would probably have been considered as illegal if they had been practised within the EU.

^{1/} EC Treaty, Article 81:

“1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;

...

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

...”

9. Insufficient harmonisation of the civil and public law framework.

The civil law applicable to inland water transport operations (contract law, liability rules) is still mostly national in character and is not harmonized at the international level. This gives rise to legal uncertainty, may cause undue litigation and may raise the insurance costs of transport operations.

Steps to mend this situation have already been taken or are currently under consideration. The CLNI Convention on the limitation of liability in inland navigation has entered into force, but covers only a limited number of countries and still awaits transformation into, or replacement by, a pan-European legal instrument. The CMNI Convention on the contract of carriage in inland water transport has been signed by a number of countries and is in the process of being ratified. Currently the possibilities are being examined to create a pan-European regime concerning the liability for damages caused during the transport of dangerous goods on inland waterways.

In the field of public (administrative) law subjects like the registration and the measurement of inland navigation vessels are covered by multilateral treaties, but these treaties have been ratified or acceded to by only a limited number of States and cannot be said to represent truly pan-European regimes.

In the Annex a list is given of multilateral treaties concerning inland navigation currently in force.

10. Restrictions on the freedom of movement of inland water transport workers.

The movement of workers is governed by general legislation on employment. Within the EU citizens may freely take jobs in any country they like; nationals of non-EU countries generally have only limited access to the labour markets of EU countries. So far there are no common rules at Community level for the admission of workers from outside the EU; each member State still has its own policy and legislation. In most EU States, the policy applied is based on the criterion of a proven shortage on the national employment market of the personnel requested. There are no specific arrangements known today that apply to the specific market of inland waterway transport. Hence, non-EU nationals who seek a job in the inland navigation industry may only obtain work permits if it is clearly demonstrated that, on the labour market of the EU, no suitable candidates for the vacancies concerned can be found. In spite of the fairly widespread complaints in the EU inland water transport industry about the difficulty of filling vacancies, it is not to be expected, in view of the still rather high level of unemployment in the EU, and of the fact that unemployed youngsters can be relatively quickly trained as sailors, that such permits will be distributed frequently.

For the sake of simplicity, the question of access to the employment market in the CEEC will be left aside. It should also be noted in this context, that the accession of certain CEEC-States to the EU might not immediately open the EU-employment market to the workers of the new member

States concerned. The accession terms agreed upon provide for a transition period of up to a maximum of seven years during which EU member States can decide on the admission of workers from the new member States.

The European Commission, in September 2001, has tabled a proposal for a EU Directive (COM(2001) 386 def.), which aims at creating a common immigration policy for nationals of third countries who want to work in the EU as an employee or want to establish their own businesses there. According to this proposal, jobseekers from third countries are still only admitted if it is proved that no acceptable candidate can be found within the EU labour market, but member States are authorized to drop this requirement for a specific sector for a limited period, if there is a labour shortage in that sector. So it is possible that in future the threshold will be lowered for sectors that face a labour shortage.

11. Restrictions on the right of establishment.

Within the EU, freedom of establishment, at least in the inland navigation sector, exists: any EU citizen may establish an inland water transport business in any EU member State he likes. For nationals of third countries there may be restrictions, laid down by the national laws of member States. The Europe Agreements, concluded between the EU and a number of Central and Eastern European countries, do not change this situation, since these Agreements do not apply to the inland water transport sector.

The proposal for a EU Directive mentioned in the preceding paragraph deals also with the establishment of businesses by third country nationals. According to the proposal, permits for the establishment of such businesses are to be issued only if the intended economic activities will favourably influence employment and/or the economic development of the member State concerned. This reflects current practice in EU member States and, if adopted, will not change the situation greatly.

Anyway, the question remains largely academic, so long as the “genuine link” regime mentioned in paragraph 2 remains in existence. A Swiss or EU inland water transport operator will not establish himself in a third country outside the EU, because by doing so he will lose his “genuine link”. Inversely, few Danube navigation operators will be interested in establishing a business (or a subsidiary) in the EU, because that – under present conditions - will not improve their chances of getting access to Rhine cabotage and intra-Community water transport.

Annex

List of multilateral treaties in the field of inland water transport currently in force

1. Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation, of 15 March 1960

Contracting Parties: Austria, France, Germany, Hungary, Netherlands, Poland, Romania, Russian Federation, Switzerland, Yugoslavia ^{1/}.

2. Convention on the Registration of Inland Navigation Vessels, of 25 January 1965

Contracting Parties: Austria, France, Luxembourg, Netherlands, Switzerland, Yugoslavia ^{1/}.

3. Convention on the Measurement of Inland Navigation Vessels, of 15 February 1966

Contracting Parties: Belgium, Bulgaria, Czech Republic, France, Germany, Hungary, Luxembourg, Netherlands, Republic of Moldova, Romania, Russian Federation, Slovakia, Switzerland.

4. Strasbourg Convention on the Limitation of Liability in Inland Navigation (CLNI), of 4 November 1988

Contracting Parties: Germany, Luxembourg, Netherlands, Switzerland.

5. European Agreement on Main Inland Waterways of International Importance (AGN), of 19 January 1996

Contracting Parties: Bulgaria, Croatia, Czech Republic, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Republic of Moldova, Romania, Russian Federation, Slovakia, Switzerland.

^{1/} As of 4 February 2003, the Federal Republic of Yugoslavia changed its name to Serbia and Montenegro.