

# COMMISSION OF THE EUROPEAN COMMUNITIES

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## Commission report

**on the organization of the inland waterways transport market  
and systems of chartering by rotation**

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### **on the organization of the inland waterways transport market and systems of chartering by rotation**

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When the Council adopted Regulation (EEC) No 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,<sup>1</sup> it asked the Commission to study the position, from the point of view of Community law, of the system of rotation in force in Belgium, France and the Netherlands and the system of compulsory tariffs applied to domestic traffic in Germany.<sup>2</sup> As regards the question of tariff fixing by the State, which is an essential part of rotation systems, the Commission awaited the decisions of the Court of Justice of the European Communities for its interpretation of Articles (52) and 85 of the EEC Treaty, particularly in Case C-185/91 REIFF. This report takes account of the judgments of the Court of 17 November 1993 in REIFF, OHRA (C245/91) and MENG (C2/91).

#### **Chapter I: The facts and general aspects**

1. Rotation is a system of chartering. It consists of allocating requests for transport operations from customers on the basis of the order in which boats become available after unloading and are registered by their owners in a charter exchange. Carriers entered on the rota are invited, in the order of their registration, to choose in turn a load from those on offer for which they meet the conditions. Those who do not choose a load nonetheless keep their position in the order. In rotation systems, prices are fixed either by the public authority or by a multisector organization (see Section 2). The conditions attaching to the loads on offer (destination, type of good, price...) are published. For carriers, this system guarantees a minimum profit, i.e. a minimum income. For shippers rotation limits competition and prevents them from choosing the carrier. They are, however, able to stipulate the conditions governing transport and the quality of the vessel.

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<sup>1</sup> OJ No L 373, 31.12.1991.

<sup>2</sup> These compulsory tariffs were abolished on 1 January 1994 (see point 5).

2. There are two sorts of rotation :

- (a) regulated rotation;
- (b) rotation organized by small businesses in the sector.

(a) Regulated rotation was introduced by the Belgian, French and Dutch Governments during the economic crisis in the 1930s<sup>3</sup> in order to ensure that small waterway transport undertakings (with one or two vessels) enjoyed a degree of profitability, tariffs being fixed by the public authority.

This system of rotation is currently applied for some national transport operations in Belgium, France and the Netherlands for operations from France to Belgium and the Netherlands and for those from Belgium to France.

(b) The economic situation in inland waterway transport worsened in the 70s and in 1975, following demonstrations by small waterway transport operators against a proposal to abolish rotation and introduce a free market in the Netherlands, such carriers organized and have since operated rotation systems. The details of such systems are similar to those regulated by the States and are applied in North-South traffic on routes which had hitherto been free (NL to B and F; B to NL). The minimum tariffs are fixed by inland waterway transport operators organizations in cooperation with shippers representatives.

Comments: In regulated rotation systems, shippers are obliged by law to conclude their transport contracts in a chartering exchange if they wish to use inland waterways transport on behalf of others (public transport). In rotation systems organized by the sector itself, there is no such obligation although for transport operations from B to NL a Belgian law requires shippers to notify, but not necessarily conclude, their transport contracts in the exchanges. This non-compulsory character explains why a number of transport operations, particularly from NL to B, are not caught by the North-South rotation.

3. A sizeable proportion of small operators considers that this system is still necessary because of :

- the weak structure of supply (many operators own only one vessel) and the imbalance in negotiating positions between the many small carriers and the few large shippers, as well as in relation to certain shipping and forwarding agents;
- the sharp fluctuations in demand and the need to keep sufficient hold space to meet "peak time" demand ("reserve capacity"); outside peak times, however, this reserve capacity becomes overcapacity and depresses prices;
- the fact that mainly small operators are engaged in the sector and in particular because those living on board their vessel with their family have no alternative other than to continue their activity since there is little prospect of leaving it, even if their income from transport operations is inadequate (social aspect);

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<sup>3</sup> In Germany, compulsory tariffs were introduced - see point 5.

- the guarantee that it gives a minimum income which is vital to carriers.

For these reasons many carriers consider that a complete liberalization of the market cannot operate satisfactorily and that a degree of market organization has remained and will remain necessary to compensate for the weaknesses mentioned above.

For shippers, the rotation system presents major inconveniences because of:

- the lack of commercial flexibility and particularly the fact that it is impossible to choose one's carrier;
- the fixed price which they often consider too high;
- the lack of competition between inland waterway transport undertakings;
- the lack of competitiveness of the service on offer as compared with other forms of transport.

4. The totality of regulated systems covers only a small part of the total inland waterway transport market in the Community. The Rhine market, which represents two-thirds of inland waterway transport in the Community, is free. Similarly, some Member States have exempted from rotation rules the transport of goods such as sand, gravel and aggregates for the building industry, own account operations (or private transport) or the transport of liquids.

Although the total volume of goods transport by inland waterway in Community countries (B, D, F, L and NL) amounted to some 420 million tonnes in 1990, regulated rotation accounted for only 35 million tonnes, or 8% of the total inland waterways market.

In Belgium, domestic transport operations on inland waterway account for 20 million tonnes, 10 million of which, or 50%, were subject to the rotation system.

In France, 8.5 million tonnes were covered by the rotation system which represents 31% of domestic inland waterway transport tonnage.

Finally, in the Netherlands, rotation in domestic transport operations accounts for 16.6 million tonnes, or around 18%.

As regards rotation systems organized by the sector itself, these account for 13 million tonnes, or around 3% of the total inland waterways transport market.

One should therefore note the limited significance of chartering by rotation systems as compared with total inland waterways traffic in the transport of goods but not overlook the fact that these systems are compulsory in certain sections of the market, for certain goods (e.g. cereals) or on certain waterways. Accordingly, a shipper who finds himself in an area where the rotation system is applied has no choice other than to go along with the said system or use another form of transport.

Moreover, it should be pointed out that most cases of chartering by rotation concern small vessels. For example in 1991, 40 649 transport contracts were chartered in the Netherlands by means of regulated rotation ("Evenredige Vrachtverdeling"), 52% of which involved contracts of less than 650 tonnes and 79% less than 1000 tonnes. In Belgium, the ORNI (Office Regulating Inland Waterways Transport) was involved in 17 042 contracts in 1992, 68% of which were less than 650 tonnes and 81% less than 1000 tonnes. In France almost all activities governed by rotation involve vessels of less than 650 tonnes.

This explains why it is mainly owners of small vessels who consider the system of rotation to be vital to their specific activities.

5. The system of compulsory tariffs ("Festfrachten") applied to domestic transport in Germany also went back to the economic crisis in the 30s. However, with the entry into force of a new law, the "Tarifaufhebungsgesetz", it was recently abolished on 1 January 1994. The tariffs between two ports situated within Germany were negotiated by joint committees on freight rates (made up of representatives of carriers and shippers) and endorsed by the public authorities.

One of the objectives which was to maintain a minimum level of freight rates was therefore comparable to that of the rotation system. Freight rates were monitored by the inland waterways authorities.

In 1991, 61.3 million tonnes or around 70% of domestic transport operations, including 4.8 million tonnes accounted for by foreign vessels, were transported on the basis of this system of tariff fixing.

6. The inland waterways transport market is currently stagnating; the parties involved (carriers, shippers and public authorities) are convinced of the need to improve the competitiveness of waterways in order to make better use of the advantages that they present. One of the measures under consideration is to make rotation systems more flexible in order to improve marketing. To this end, efforts have been made by the Member States the results of which may be summed up as follows:

France: A draft law on the commercial exploitation of waterways which recommends a system of free trading between shippers and carriers, after a transitional period of at most six years, is currently before Parliament.

Germany: As of 1 January 1994 the compulsory tariffs applied throughout the inland waterways and road transport sectors within Germany have been abolished.

Belgium and the Netherlands: In order not to lose certain transport operations by inland waterways or better still to win some from other forms of transport, the authorities responsible for supervising rotation agree increasingly to exempt certain transport operations from the traditional rotation rules (contracts for specific trips) by agreeing to special arrangements which are more attractive to shippers. These special arrangements may concern the type of contract (e.g. fixed period contracts, i.e. a vessel is made available to a shipper for a period of several months, or contracts for a number of consecutive trips), the transport rates, loading and unloading times and other transport conditions.

7. The difficulties encountered in North-South traffic in the Netherlands and Belgium since June 1993

In June 1993, a major consignment of phosphates from NL to B which hitherto went by the North-South system was offered to inland waterway carriers without being subject to rotation. This resulted in a general strike in the chartering exchanges in the Netherlands. Belgian organizations of vessel operators expressed their solidarity and insisted that the system of rotation operated by small undertakings be maintained.

Dutch and Belgian small carriers then called for the legalization of voluntary rotation (NL to B and to F; B to NL), i.e. the replacement of the North-South system by a system administered by the public authority.

Committees were set up to examine this problem but so far neither of the two governments has submitted a proposal to the Commission for changes to the current situation.

**Chapter II :   Rotation systems and compulsory tariffs from the point of view of Community law**

A legal distinction should be made between rotation and fixed prices introduced by the public authorities and the same practices organized by the operators themselves.

**A. Systems of rotation regulated by the States**

1. The rotation systems organized and administered by the public authorities constitute a method of allocating contracts, with fixed tariffs, and restricted competition between carriers.
2. Legally, an examination should be made as to whether national laws or regulations introducing non-discriminatory systems of rotation and fixed prices are compatible with the obligations on the Member States under Article 5 of the EEC Treaty in conjunction with Articles 3(f) and 85 of that Treaty.
3. It should be pointed out in this connection that Articles 85 and 86 of the Treaty *per se* are concerned only with the conduct of undertakings and not with rules or regulations adopted by Member States. The Court has consistently ruled, however, that Articles 85 and 86, in conjunction with Article 5 of the Treaty, require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which might render ineffective the competition rules applicable to undertakings.
4. The conditions under which competition rules would be rendered ineffective were spelled out by the Court of Justice *inter alia* in the Ohra, Meng and Reiff judgments of 17 November 1993. Pursuant to these judgments, Community law precludes in particular the adoption of laws or regulations in three cases:

**4.1 Where the State requires or encourages the adoption of agreements contrary to Article 85.**

In this connection, the Court ruled that the fact that the public authorities appointed persons proposed by the trade organizations directly concerned as members of a body called upon to fix prices did not exclude the existence of an agreement within the meaning of Article 85 of the Treaty where such persons negotiated or concluded an agreement on prices as representatives of the organizations which proposed them.

However, in its abovementioned Reiff judgment, the Court held that tariff boards could fix tariffs without infringing Article 85 of the Treaty where three conditions are met:

- the experts making up those boards must act in a personal capacity, without being bound by orders or instructions from undertakings or associations;
- tariffs must not be fixed on the basis solely of the interests of undertakings in the sector in question but must take account of public interest;
- user representatives must be consulted.

4.2 Moreover, a State may not adopt legislation whose effect is to consolidate an agreement restricting competition.

It is clear from the Meng judgment of 17 November 1993 that laws or regulations applicable to a sector of the economy consolidate the effects of a previous agreement and therefore contravene Community law if they adopt the elements of an agreement previously concluded by the economic operators in the sector.

4.3 Finally, a Member State may not deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

5. In the light of the decisions of the Court, the Commission considers that Member States may adopt laws or regulations on arrangements for allocating loads and fixing tariffs in the inland waterways transport sector without rendering Articles 3(f), 5(2) and 85 of the Treaty ineffective, provided that they do not:

- require or encourage the conclusion of agreements;
- adopt legislation whose effect is to consolidate previous agreements restricting competition;
- delegate to private traders responsibility for taking decisions affecting the economic sphere.

**B. Rotation systems and tariff agreements organized by inland waterway transport undertakings**

6. These practices are judged to be agreements between undertakings or decisions by associations of undertakings whose object or effect is to restrict competition between carriers.

These practices are covered by Article 85(1) of the Treaty.

7. The undertakings in question may, in accordance with Article 12 of Council Regulation (EEC) No 1017/68, apply to the Commission for a ruling that their agreement satisfies the conditions laid down in Article 5 of that Regulation for granting an exemption.



8. To do this, undertakings must provide proof that their agreement helps to:

- improve the quality of transport services; or
- promote greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or
- increase the productivity of undertakings; or
- further economic progress.

and at the same time takes fair account of the interests of transport users.

However, all the restrictions on competition must be essential to the attainment of the objectives, and competition must not be eliminated in respect of a substantial part of the transport market concerned.

9. The Dutch Association for North-South Rotation notified to the Commission, in accordance with Article 12 of Regulation (EEC) No 1017/68, the agreement on the establishment of a system of rotation and tariff fixing for transport operations between the Netherlands, Belgium and France.

This notification is being examined in accordance with the rules of procedure laid down by the abovementioned regulation.

10. It should also be pointed out that carriers already benefit from an exemption to the prohibition of agreements provided for in Article 4 of the abovementioned regulation which lays down that agreements between undertakings and concerted practices are exempt from the prohibition of agreements where their purpose is the constitution and operation of groupings of inland waterway transport undertakings with a view to carrying on transport activities, provided that the total carrying capacity of the grouping does not exceed 500 000 tonnes and that the individual capacity of each undertaking belonging to the grouping does not exceed 50 000 tonnes.

11. In the absence of any notification, undertakings may therefore make use of the provisions of Article 4 if they satisfy the conditions.

### Chapter III: Economic assessment of rotation systems and proposal for a common approach

#### A. Introduction

The problem of rotation should not be examined solely from a legal point of view. It is first and foremost a socio-economic problem which requires a global solution, i.e. a solution covering the various rotation systems.

The completion of the single market requires greater harmonization of the various systems operating in the different sections of the inland waterway transport market in the Union. In the long term, such harmonization should lead to the introduction of common rules for the entire inland waterways transport market. It is difficult to understand, particularly for shippers, why some of them should be obliged to accept the rotation system because of their location while others benefit from a free market.

From the point of view of promoting waterways as a means of transport, existing regulations which could be an obstacle to their development should be abolished. Such measures are all the more necessary because they will help to ease congestion on roads and railways which are now saturated.

The following points analyse in greater detail the economic situation of rotation systems and propose a Community approach to the problem.

#### B. Economic assessment

1. The first observation is that as regards chartering by rotation systems regulated by States, the economic disadvantages associated with strict regulations represent an ever heavier burden on the sector, which cannot easily meet the changing logistical needs of shippers.
2. Moreover, certain factors which led to the setting up of chartering by rotation systems, such as the small size of undertakings in the sector, its heterogeneity and the inflexibility of what it can offer are still topical questions. On the other hand these factors have to some extent been perpetuated by these regulations and accordingly the need to establish economic cooperation structures (allowing at least some of the abovementioned weaknesses to be overcome) has disappeared since the authorities require shippers to deliver their goods to central points (compulsory recourse to the exchange) where they are allocated to carriers registered on the rota at predetermined rates and under predetermined conditions.
3. Traditional "trip chartering", which is still the most widely used form of contract under the rotation system, scarcely meets any longer the current logistical requirements of shippers. Accordingly it is not uncommon that:

- the shipper wishes to have use of the same vessel over an extended period, particularly so as not to have to clean out the holds on each trip;
- the shipper wishes to know at any time where his load is (just in time);
- the shipper wishes to entrust the transport of all his goods to a single contractor, instead of having to deal with a number of small carriers allocated to him on a trip basis;
- the shipper also wishes to entrust unloading and reloading of vessels to the carrier.

This list of examples is non-exhaustive.

4. As a result, the possibilities offered by inland waterways transport are not exploited to the full and therefore shippers sometimes turn to other forms of transport because they disapprove of existing regulations. In order to verify this principle, the research institutes NEA and PLACNO<sup>4</sup> have attempted, on behalf of the Commission, to evaluate the additional freight that the inland waterways transport industry could count on in the event of the complete liberalization of the market. According to these institutes, the additional freight could be around 6-7 million tonnes annually, or some 10% of the total volume of freight currently handled by the various chartering by rotation systems.

### C. Proposal for a common approach

The Commission considers that, for the reasons mentioned above, the inland waterways market must gradually be opened up. In doing so, of course, the specific socio-economic structure of the sector will have to be taken into account. This liberalization process will therefore have to be accompanied by a programme of measures to mitigate the structural weaknesses in the sector.

#### 1. Gradual opening up of the inland waterways market

Action 1: In order to meet the logistical requirements of shippers more effectively, the laws on rotation, while not incompatible with Community law, should be made more flexible. This action is underway and must be pursued by the Member States. For example, trips offered twice under the rotation system which do not find any takers must be allocated freely or possibilities of chartering on a time basis and for several consecutive trips must be offered. Similarly, in the long term, chartering by on-board computer should no longer compel the shipper to be physically present at the exchange.

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<sup>4</sup> Report: Towards a European policy for the inland waterway transport industry, 28.10.1991.

Accordingly, under the French draft law referred to above, other types of contract are possible in addition to the traditional trip chartering agreement. In Belgium and the Netherlands as well, the authorities supervising rotation are increasingly allowing derogations, for certain consignments, from the standard rates and conditions and are offering arrangements specifically adapted to the needs of shippers.

Action 2: As an accompanying measure, the scope of rotation must gradually be restricted. Such action in the various Member States must be carried out in a coordinated manner and on the basis of a timetable drawn up at Community level. The following stages can be identified:

- a. new types of transport operation, exceptional operations (transport of bulky goods, etc.) and all operations which cannot be dealt with effectively by means of rotation, such as containers, are exempt;
  - b. the possibilities of contracts open to shippers and carriers are extended to contracts negotiated freely for large consignments (tonnage contract) or for the leasing of vessels and crews for lengthy periods;
  - c. the obligation on shippers to use the rotation system is abolished, which does not however exclude the possibility of keeping exchanges as a means of matching supply and demand.
2. Structural improvement measures accompanying the opening up of the inland waterways market

### 2.1 Further measures to combat structural overcapacity

Many inland waterways carriers, and not just small undertakings, fear that an increasingly open market will engage them in ultimately ruinous competition because of existing overcapacity which, by the same token, explains their reluctance regarding liberalization. In this connection, the Council adopted in April 1989 a series of measures<sup>5</sup> aimed at combating structural overcapacity in this sector. These provide for the granting of premiums to undertakings for scrapping old capacity.

The regulation also introduces the so-called "old for new" mechanism which requires an undertaking bringing new capacity into service to scrap an equivalent amount of old capacity or - if it does not scrap capacity - to pay a special contribution to a special fund which has been used since 1 January 1993<sup>6</sup> to meet new applications for scrapping premiums.

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<sup>5</sup> Council Regulation (EEC) No 1101/89 of 28 April 1989, OJ No L 116.

<sup>6</sup> Commission Regulation (EEC) No 3690/92 of 21 December 1992, OJ No L 374, p. 22.

Having regard to both the recent economic recession in the market and the planned objective of liberalization, the Commission has already begun to act by proposing,<sup>7</sup> with a reasoned report, an extension of the system. Accordingly, the "old for new" mechanism introduced by Council Regulation (EEC) No 1101/89, which was temporary and expired on 28 April 1984, has been extended until 28 April 1999 (Council Regulation (EEC) No 844/94 of 12 April 1994) in order to step up measures against structural overcapacity in inland waterways transport.

Action 3: Following this extension, the Commission is to reexamine certain aspects of the way this rule operates, in cooperation with the Member States, representatives of the sector and users, in order to make the improvement programme as effective as possible. For example, the ratio between "old" and "new" which is currently 1:1, i.e. one tonne has to be scrapped for each tonne put into service, could be changed given the adverse market situation. Similarly, the scrapping premium rates for the various types and categories of vessels might be revised on the basis of their current value.

Action 4: At present, many scrapping applications have been received by the national scrapping funds and placed on waiting lists (around 300) because of a shortage of available resources. Consideration must therefore once again be given to additional scrapping measures which would then require new sources of funding. In the present economic situation, it is scarcely possible to increase the level of contributions from the sector itself - which amounts to +/- ECU 13 million per year - and additional financing has to be found on a temporary basis from public funds. For 1994, a contribution by the Member States to the scrapping funds appears to be the only possibility. For the years 1995-96-97, the Commission will examine the possibility of Community co-funding. Any Community contribution will have to be a "one-off" event. Subsequently, a decision will have to be taken in the light of the situation as to whether or not to consider new actions, which will then be carried out once again on the basis of self-funding by the sector.

## 2.2 Positive measures to promote inland waterways

Action 5: A closer examination of the factors hindering the growth of inland waterways transport shows that the high cost of unloading and reloading, and in particular the fact that a shipper wishing to use inland waterways transport has first to invest heavily (quays, handling equipment, skilled staff, etc.) is a particular disincentive.

The Commission will examine this question in greater detail and is planning to present a proposal to the Council on investment aids for inland waterways terminals based on the existing arrangements for combined transport.<sup>8</sup>

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<sup>7</sup> Commission report and proposal for a Council Regulation - COM(93)553 final - SYN 475 of 16 November 1993.

<sup>8</sup> Council Regulation (EEC) No 3578/92 of 12.12.1992.

**Action 6:** Finally, Member States should encourage carriers to set up structures for commercial cooperation, which groupings would, naturally, act in compliance with Treaty competition rules.

**Action 7:** In order to be able to follow future trends more closely, the Commission should have a more sophisticated system for monitoring the market. The existing system currently collects data only on price fluctuations and costs and on the number of days of waiting in exchanges. This could be extended to the registration of new vessels at either the building or planning stage and to data on changes in the productivity of vessels.

### 3. Conclusions

At the Council meeting on 29 and 30 November 1993, it became clear that Member States had differing views on the situation in the inland waterways transport sector. However, the implementation of an action programme such as that described above requires a common and coordinated approach by Member States and the Community institutions.

It is therefore necessary to arrive at a common position on the broadlines of this overall plan before being able to undertake specific measures.

The Commission, for its part, will present the Council with suitable proposals covering Action 2 as described above and review certain aspects of the functioning of the "old for new" mechanism as well as other aspects of the improvements (Actions 3 and 4) in accordance with the procedure laid down by Council Regulation (EEC) No 1101/89. As part of this overall approach, the Commission will also study and, where appropriate, present proposals for investment aids for inland waterways terminals (Action 5) and a more effective system for monitoring the market (Action 7).

The process of opening up the inland waterways market requires Member States to take the necessary measures to relax rules on the operation of chartering by rotation systems (Action 1) with a view to its final liberalisation, study the question of funding a new scrapping scheme (Action 4) and encourage carriers to set up structures for commercial cooperation (Action 6).

**4. The Council is requested to take note of this report and endorse the common approach described in point C.**