



ACT.2 BACKGROUND INFORMATION AND DIAGNOSIS

T2.3 Legal framework

Final	Minor edition issues	Garrigues	12/04/2016		
2	Multiple revisions	Garrigues /PdE		TC	01/04/2016
1	First draft	Garrigues	02/12/2015		
VER.	DESCRIPTION	PREPARED BY		CHECKED BY	
<div><div>MED ATLANTIC</div><div>ECOBONUS</div><div></div></div>		<div><div></div><div><div>Co-financed by the European Union</div><div>Connecting Europe Facility</div></div></div> <div><p>"The sole responsibility of this publication lies with the author. The European Union is not responsible for any use that may be made of the information contained therein."</p></div>			

GARRIGUES

**HANDBOOK ON THE STATE AID LEGAL FRAMEWORK
APPLYING TO INCENTIVES TO MOTORWAYS OF THE SEA**

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Brussels, 11 April 2016

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1. INTRODUCTION

This **handbook** examines the legal framework applying to the incentive schemes designed to promote intermodal maritime transport, with a view to paving the way for the development of an EU-wide demand incentive known as the ‘**ECOBONUS**’.

The first part of the handbook analyses the legal framework applying to the different levels of funding (EU and national) intended to incentivise Motorways of the Sea (‘**MoS**’). It also sets out the different schemes and individual aid permitted in this context and considers the legal problems associated with project implementation.

After this groundwork has been laid, the handbook takes a detailed look at the parameters defining the design of the European demand incentive, ECOBONUS. In this ‘diagnostic phase’, attention will be focused on the different limitations and the identified areas for improvement.

2. CONTEXT AND PURPOSE OF THE HANDBOOK

On 11 September 2014, the Innovation and Networks Executive Agency (‘**INEA**’) launched a Call for proposals under the **Multi-annual Work Programme 2014** under the Connecting Europe Facility Programme (‘**CEF**’).¹

On 31 July 2015, the European Commission adopted a decision listing the projects that had been selected to receive financial assistance, including the Med-Atlantic Ecobonus Study,² awarded to the **Consortium** formed by the Member States of the Kingdom of Spain, France, Italy and Portugal.³

The aim of the Med-Atlantic Ecobonus Study is to design a European demand incentive to encourage maritime freight transport over road transport, using, to that end, shipping routes known as ‘**Motorways of the Sea**’ (‘**MoS**’).

This European incentive, which goes by the name **ECOBONUS**, is intended to cover the MoS connecting the South-West Atlantic and Mediterranean ports, although it may be possible to transfer the model to other regions such as the North Sea and the Baltic regions.

The Member States involved in the Med-Atlantic Ecobonus Study are those which benefit from the initial stage of the European initiative, namely, France, Spain, Portugal and Italy.

Under the agreement signed by INEA and the Consortium, the Med-Atlantic Ecobonus Study comprises **six consecutive phases** over a total period of two years (from September 2015 to September 2017).

¹ Call for Proposals Multiannual-Work Programme 2014. <https://ec.europa.eu/inea/connecting-europe-facility/cef-transport/apply-funding/2014-cef-transport-multi-annual-call-funding>

² Commission Decision of 31 July 2015 C (2015) 5274 (final).

³ The Consortium is led by Puertos del Estado.

The aim of each phase of the Med-Atlantic Ecobonus Study is to:

- (i) establish mechanisms so that the project members can cooperate with each other and communicate between themselves;
- (ii) analyse the incentive schemes hitherto used to promote intermodal transport as well as the difficulties flowing from the implementation of such schemes;
- (iii) outline and draw up an EU-wide incentive scheme, covering any associated technical, environmental, financial, regulatory, administrative and technological aspects;
- (iv) examine the possibilities for extending the incentive scheme to other Member States; promote political discussion at EU and national level; and secure consensus between the relevant players in the sector;
- (v) evaluate the impact of the project and propose an implementation programme;
- (vi) disseminate the results of the Study so that it can be considered by other Member States for the interest of private operators.

This **handbook** forms part of the second phase of the Med-Atlantic Ecobonus Study, known as the *Diagnostic Phase*.

The activities scheduled for this phase include an analysis of EU and national legislation on State aid as well as an evaluation of the relevant schemes permitted at national level.

This phase comes to a close with an illustration of the legal framework of which the future **ECOBONUS** incentive scheme will form part and suggestions on the possible areas for improvement.

3. EUROPEAN FUNDING FOR THE DEVELOPMENT OF INTERMODAL TRANSPORT POLICY

Before examining EU State aid legislation, it is necessary, for the purposes of this handbook, to begin by describing the European funding programmes for the development of intermodal transport.

In this respect, clarification is required as to whether funding from European programmes may supplement future national funding in the context of ECOBONUS incentives, as well as the conditions for compatibility of both.

3.1 The TEN-T Programme

3.1.1 Legislative framework: political guidelines

- **Traditional legal framework**

The Maastricht Treaty entrusted the European Union with the task of contributing to the establishment and development of trans-European networks (hereinafter, ‘**TEN**’) in the areas of transport, telecommunications and energy, with a view to contributing to the development of the internal market and strengthening cohesion.⁴

In the transport field, this initiative was implemented by **Decision No 1692/96/EC** of 23 July 1996 on Community guidelines for the development of the trans-European transport network (TEN-T).⁵

In 2001, the Commission published a White Paper where it proposed the development of ‘MoS’ as a ‘real competitive alternative to land transport’.⁶ In this paper, the Commission did not provide an exact definition on MoS although it specifically promoted ‘Short-distance shipping’ to which European funds should be made available.⁷

Following the publication of the White Paper, the Council amended in 2004 the Decision No 1692/96/EC integrating the new priority MoS among the established 30 priorities of the TEN-T policy.⁸ In particular, a new Article 12 *bis* was included containing the definition of MoS, which stated:

⁴ The Treaty on the Functioning of the European Union (‘**TFEU**’) retains the objective of contributing to trans-European networks in the areas of transport, telecommunications and energy in Articles 170 to 172 and 194(1)(d) thereof.

⁵ 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 (OJ L 228, 9.9.1996, pp. 1-103), last time amended through Decision No 884/2004/EC of 24 April 2004 (OJ L 167, 30.4.2004, pp. 1-38).

⁶ White Paper: European transport policy for 2010: time to decide. 12.9.2001 COM (2001) 370 final.

⁷ In particular, the White Paper considers that certain shipping links, particularly those providing a way around the bottlenecks in the Alps and Pyrenees, should be made part of the ‘Ten-T’. At national level, shipping routes between France and Spain or between France and UK are to be encouraged.

⁸ Decision No 884/2004/EC of 24 April 2004 (OJ L 167, 30.4.2004, pp. 1-38).

‘The trans-European network of motorways of the sea is intended to concentrate flows of freight on sea-based logistical routes in such a way as to improve existing maritime links or to establish new viable, regular and frequent maritime links for the transport of goods between Member States so as to reduce road congestion and/or improve access to peripheral and island regions and States. Motorways of the sea should not exclude the combined transport of persons and goods, provided that freight is predominant.’

‘The trans-European network of motorways of the sea shall consist of facilities and infrastructure concerning at least two ports in two different Member States. The facilities and infrastructure shall include elements, in at least one Member State, such as the port facilities, electronic logistics management systems, safety and security and administrative and customs procedures, as well as infrastructure for direct land and sea access, including ways of ensuring year-round navigability, in particular the availability of facilities for dredging and icebreakers for winter access.’

Article 12 *bis* paragraph 4 of Decision No 1692/96/EC provided that projects for the development of MoS had to be proposed by at least two Member States and should be geared to actual needs. The projects had to involve both the public and private sectors. To supplement national aid with EU funds it was necessary to follow a tendering procedure.

Article 12 *bis* paragraph 5 determined that the projects had to focus on the facilities and infrastructure, although they might also include activities providing wider benefits (e.g. making available facilities for ice-breaking and dredging operations, information systems).

This same paragraph also allowed for the possibility of granting *start-up* aid in support for duly justified capital costs for a period of **two years**, where aid was deemed necessary for the viability of the project. In any case, the aid could not exceed the minimum estimated amount required to start-up the links concerned and could not lead to distortions of competition.

- **Current legal framework**

The described regulatory framework has been subject to various modifications,⁹ the last of which took place in December 2013, through the adoption of Regulation No 1315/2013.¹⁰

The current definition of MoS, contained in Article 21 of Regulation No 1315/2013, which states as follows:

‘Motorways of the sea, representing as they do the maritime dimension of the trans-European transport network, shall contribute towards the achievement of a European maritime transport space without barriers. They shall consist of short-sea routes, ports, associated maritime infrastructure and

⁹ Previously, see Decision No 661/2010/EU of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ L 204, 5.8.2010, pp. 1-129).

¹⁰ Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU Text with EEA relevance (OJ L 348, 20.12.2013, pp. 1-128).

equipment, and facilities as well as simplified administrative formalities enabling short-sea shipping or sea-river services to operate between at least two ports, including hinterland connections’.¹¹

As it can be seen, the current definition does not only encompass short-sea routes, ports, and associated infrastructure but also hinterland connections. Moreover, MoS shall include:

- (i) maritime links between maritime ports of the comprehensive network or between a port of the comprehensive network and a third-country port where such links are of strategic importance to the Union.
- (ii) port facilities, freight terminals, logistics platforms and freight villages located outside the port area but associated with the port operations, information and communication technologies (ICT) such as electronic logistics management systems, and safety and security and administrative and customs procedures in at least one Member State;
- (iii) infrastructure for direct land and sea access.

Article 21 of Regulation No 1315/2013 further provides that that projects of common interest under the MoS priority shall be proposed by at least two Member States and they shall comprise:

- (i) a maritime link and its hinterland connections within the core network between two or more core network ports; or
- (ii) a maritime link and its hinterland connections between a core network port and ports of the comprehensive network, with a special focus on the hinterland connections of the core and comprehensive network ports.
- (iii) activities that provide wider benefits and are not directly linked to specific ports, such as services and actions to support the mobility of persons and goods, activities for improving environmental performance, activities ensuring year-round navigability, as well as the optimization of processes, procedures and the human element.

It is however noticeable that the current legal framework for the MoS priority, does not include any specific rule on State aid, in contrast to its precedent, Article 12 *bis* paragraph 5 of Decision No 1692/96/EC.

The only statement referring to national financial support if of general nature and is contained in Article 7 paragraph 4 of Regulation No 1315/2013. It refers to the obligation of Member States to comply with Union rules on the environment, competition, **State aid** and public procurement when carrying out projects of common interest.

¹¹ This can be contrasted with the notion of ‘Short Sea Shipping’ included under the Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport. These guidelines recall that although there is no legal definition of such concept, the communication from the Commission on the development of Short Sea Shipping in Europe of 29 June 1999 provided a working definition to be understood as ‘*the movement of cargo and passenger by sea between ports situated in geographical Europe or between those ports and ports situated in non-European countries having a coastline on the enclosed seas bordering Europe*’.

3.1.2. Legislative framework: funding of TEN-T Programmes

Trans-European networks are usually co-financed by the European Union and the Member States. In general terms, EU financing acts as a catalyst, while the Member States contribute most of the funds from their national budgets.

This financing may be supplemented by Structural Funds (European Regional Development Fund and Cohesion Fund), assistance from the European Investment Bank ('EIB') or contributions from the private sector.¹²

- **Traditional legal framework**

The main rules relating to EU financing of TENs were first laid down in Council Regulation (EC) No 2236/95 of 18 September 1995.¹³

After a number of amendments, the Regulation was consolidated under Regulation No 680/2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks.¹⁴

Regulation No 680/2007 set out the forms that aid provided by the EU could take, namely:

- (i) Co-financing for studies or works;
- (ii) Grants for works in the framework of availability payment schemes;
- (iii) Interest rate rebates on loans given by the EIB or other public or private institutions;
- (iv) Financial contributions to the provisioning and capital allocation for guarantees to be issued by the EIB on its own resources under the loan guarantee instrument;
- (v) Risk capital participation for investment funds or comparable financial undertakings;
- (vi) Financial contributions to the project-related activities of joint undertakings.

Regulation No 680/2007 also limited European financial aid to 50% of the eligible costs in the case of studies and **20%** in the case of works. However, in the transport field, the Regulation increased this threshold to 30% in cross-border work sections.

During the financial periods **2000-2006** and **2007-2013** the funding of the MoS under TEN-T was limited to the strict minimum (approximately 3% of total) and mainly concerned the improvement of port infrastructures and transshipment facilities.¹⁵

¹² In this regard, recital 47 of Regulation 1315/2013 specifically mentions that the TEN-T funding should aim at “aligning and combining funding from relevant internal and external instruments such as structural and cohesion funds, the Neighbourhood Investment Facility (NIF) and the Instrument for Pre-Accession Assistance (IPA), and from financing from the European Investment Bank, the European Bank for Reconstruction and Development and other financial institutions”.

¹³ Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European networks. Official Journal L 228, 23/09/1995 p. 1 - 7

¹⁴ Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks (OJ L 162, 22.6.2007, pp. 1-10).

- **Connecting Europe Facility**

The **Connecting Europe Facility** (CEF) is the EU funding instrument of the TEN policy within the period 2014-2020. The CEF is contained in Regulation No 1316/2013, of 11 December.¹⁶

The financial envelope for the implementation of the CEF in the transport sector amounts to EUR 26,25 billion for the period 2014-2020 of which EUR 11,30 billion have been transferred from the **Cohesion Fund** to be spent, in line with the CEF Regulation, exclusively by those Member States eligible for funding from the Cohesion Fund.

Articles 3 and 4 of Regulation No 1316/2013 establishing the CEF describe the general and specific objectives to be pursued by the projects of common interest. For the transport sector the following specific objectives are mentioned:

- (i) **Objective 1:** *removing bottlenecks, enhancing rail interoperability, bridging missing links and, in particular, improving cross-border sections.*¹⁷
- (ii) **Objective 2:** *ensuring sustainable and efficient transport systems in the long run, with a view to preparing for expected future transport flows, as well as enabling all modes of transport to be decarbonised through transition to innovative low-carbon and energy-efficient transport technologies, while optimising safety.*¹⁸
- (iii) **Objective 3:** *optimising the integration and interconnection of transport modes and enhancing the interoperability of transport services, while ensuring the accessibility of transport infrastructures.*¹⁹

As regards to the **form of financial assistance**, Articles 6 and 7 of Regulation No 1316/2013²⁰ specify that projects of common interest can benefit from grants, procurement²¹ and financial instruments.²²

¹⁵ A review of Short Sea Shipping policy in the European Union, Marie Douet, Jean François Cappuccilli, Journal of Transport Geography, 19 (2011).

¹⁶ Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, DO L 348 de 20.12.2013, p. 129/171.

¹⁷ The achievement of this objective can be measured, among others, by the number of removed bottlenecks and sections of increased capacity on transport routes for all modes.

¹⁸ The achievement of this objective shall be measured, among others, by the reduction in casualties on the road network in the Union.

¹⁹ The achievement of this objective shall be measured by, among others, the number of improved or new connections between ports through MoS.

²⁰ These forms of financial assistance are provided for by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation OJ L 298, 26.10.2012, p. 1–96.

²¹ Procurement refers to public contracts against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services. See Article 101 of Regulation (EU, Euratom) No 966/2012.

As regards the **maximum intensities**, Article 10 (2) of the Regulation No 1316/2013 limits the EU co-funding rates to:

- (i) **50%** of the eligible costs,²³ with regard to grants for studies,
- (ii) **20%** of the eligible costs, with regard to works related to inland transport, connections and the development of multimodal logistics platforms including connections to inland and maritime ports and airports, as well as the development of ports.
- (iii) **30%** of the eligible costs, with regard to grants for telematic applications systems and services for actions to support the development of MoS.

These funding rates may be increased by up to **10%** over the percentages actions with synergies between at least two of the **sectors** covered by the CEF.²⁴

3.1.3. Grants provided under CEF Programme for the development of MoS

In accordance with Article 17 of the Regulation No 1316/2013, **grants** may be allocated to projects selected on the basis of **Multiannual Work Programmes** or **Annual Work Programmes**.

Multiannual Work Programmes financing shall address any of the pre-identified projects included in Part I Annex I of Regulation No 1316/2013 which concern the **core network**. From their part, **Annual Work Programmes** shall cover projects of common interest which are not included in the Multiannual Work Programmes.²⁵

²² The financial instruments aim at attracting public and private funding to infrastructure projects. These instruments transform EU resources into financial products such as loans, guarantees and other risk-bearing mechanisms, which are then used to support economically viable projects promoting EU policy objectives.

²³ The notion of ‘*eligible cost*’ is defined under Article 126 (2) of Regulation 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 DO L 298 de 26.10.2012, p. 1/96. 2:

Eligible costs are costs actually incurred by the beneficiary of a grant which meet all of the following criteria:

- (a) *they are incurred during the duration of the action or of the work programme, with the exception of costs relating to final reports and audit certificates;*
- (b) *they are indicated in the estimated overall budget of the action or work programme;*
- (c) *they are necessary for the implementation of the action or of the work programme which is the subject of the grant;*
- (d) *they are identifiable and verifiable, in particular being recorded in the accounting records of the beneficiary and determined according to the applicable accounting standards of the country where the beneficiary is established and according to the usual cost accounting practices of the beneficiary;*
- (e) *they comply with the requirements of applicable tax and social legislation;*
- (f) *they are reasonable, justified, and comply with the principle of sound financial management, in particular.*

²⁴ Giving the fact that Article 10 (2) of Regulation No1316/2013 includes different intensities for TEN-T, TEN-E and telecommunications, we consider the Articles provides the possibility of increasing by 10% the financing were the programme concerns more than one of these sectors.

²⁵ In this regard, it shall be observed that the Annual Work Programmes must not be directed to the comprehensive network as opposed to the Multiannual Work Programmes that shall cover projects under the

As it can be observed, MoS actions are included under the **horizontal priorities listed in Annex I as they form part of the core network under the CEF Regulation.**

- **The Multiannual Work Programme 2014**

The **Multiannual Work Programme 2014** for financial assistance to the transport sector for the period 2014-2020 was adopted by the European Commission on 26 March 2013 with a total budget of EUR 11 billion that was apportioned between the objectives mentioned above.²⁶

The priority MoS was integrated in the Objective 3 in the **Annex of the Commission Multiannual Work Programme 2014** (*optimising the integration and interconnection of transport modes*). The financial envelope of the priority was EUR 350 million to be split between the General and the Cohesion envelope.²⁷

Proponents under the MoS priority could apply for financial assistance covering up to **30%** of the eligible costs. The Multiannual Work Programme specifically provides support for actions addressing:

- (i) Infrastructure development in ports, notably including development of infrastructure for direct land and sea access, **hinterland connections**, development in port facilities, freight terminals, logistic platforms and freight villages which are associated to the port operations. Development of ice-breaking capabilities.
- (ii) the promotion of “**wider benefits**” of the MoS development, not linked to specific geographic areas or ports, **such as services or actions** to support the mobility of persons and goods, improvement of environmental performance, icebreaking and year round navigability, surveying and dredging operations, infrastructure development in ports, notably including alternative fueling facilities.
- (iii) the development of **sea-based transport services which are open, regular, frequent, high quality and reliable Short Sea Shipping links**. These actions shall promote **motorways of the sea transport services by focusing on horizontal actions which will contribute to upgrade maritime services in a harmonised and interoperable manner**, duly taking into account the global nature of maritime transport and its role as a link between intra-European trade and international trade.
- (iv) development of enabling elements which will promote a better integration of maritime transport and **increased interoperability**, such as connections to other transport modes **including road** if other hinterland connections are not an option with adequate capacity and efficiency.

core network. Article 17 (4) of Regulation No1316/2013 simply specifies that Annual Work Programmes shall address projects of common interest that are not covered by a Multiannual Work Programme.

²⁶ Commission Decision of 26 March 2014 C (2014) 1921 final. This amount was further increased up to EUR 11,024,990,000 following Commission Decision of 8 April 2015 C(2015) 2192 (final).

²⁷ The Annex of the Multiannual Work Programme 2014 is available at: <https://ec.europa.eu/inea/connecting-europe-facility/cef-transport/apply-funding/2014-cef-transport-multi-annual-call-funding>

As it can be observed, although the Multiannual Work Programme 2014 focused on actions related to infrastructure, it opened the door to support for the development of **maritime services** encouraging a better freight mobility. In particular, priority was given to the development of horizontal actions contributing to the upgrade of the service and an increased interoperability. The Multiannual Work Programme 2014 specifically mentioned the combination of **road-maritime transport** modes as long as combined inland transport is not efficient.

The measures promoted under the MoS priority were further detailed under the **INEA²⁸ Call for Proposals for the Multiannual Work Programme 2014.**²⁹

The mentioned INEA Call for proposals reduced the possible works under the MoS priority to ***wider benefit implementation measures*** at regional or EU level, or ***implementation measures for the purpose of upgrading an existing or setting up a new maritime link with the possibility of its further intermodal extension.***

As it can be seen, the **INEA Call for Proposals for the Multiannual Work Programme 2014** did **not specifically mention the possibility to finance maritime services**. Indeed, the examples of '*wider benefit implementation measures*' clearly referred to actions related to infrastructure (e.g. construction of LNG bunkering infrastructure for ships serving a group of ports, or coordinated enhancement of the security systems among Member States).

Furthermore, the Commission services have openly showed their **reluctance** towards the possibility of directly financing services within informal meetings held with stakeholders active in the sector.

Despite the above, it has to be recalled that the INEA Call for Proposals for the Multiannual Work Programme 2014 did not specifically exclude the possibility to finance services. In this regard, it has to be highlighted that wording of the Call for Proposals for the Multiannual Work Programme 2014 was particularly **vague and open**.

For instance, the Call for Proposals considered that MoS works included **implementation measures** for the purpose of upgrading an existing maritime link with a possibility for its '*further integration with other modes of transport on the TEN-T network*'. Moreover, the text stipulates that MoS maritime links based actions '*may*' consist of '*links between ports and the core network*', thus including MoS services connecting ports and roads forming part of the core network.

As regards to **wider benefit actions**, these '*may*' include, '*but are not limited to*', a group of EU ports, infrastructure managers, shipowners or consortia etc. Indeed, the involvement of the operator '*may*' be **direct** as the beneficiary (thus, receiving EU funding for the provision of its services) or **indirect** as an associated entity participating in a project without receiving a grant (this formulation, as it will be seen later, clearly fits with the ECOBONUS where shipping lines are the indirect beneficiaries of the grant).

²⁸ INEA is the executive agency of the Commission entrusted with the management of the implementation of the TEN-T Programme.

²⁹ The Call for Proposals (General and Cohesion) under the Multi-annual Work Programme 2014 can be found at: <https://ec.europa.eu/inea/connecting-europe-facility/cef-transport/apply-funding/2014-cef-transport-multi-annual-call-funding>

Concerning the **eligible costs**, the EU funding 'may' cover costs borne by the shipowners in order to comply with the provisions of the MARPOL Convention Annex IV and Sulphur Emission control area requirements, or **costs contributing to better environmental performance**.

Finally, the INEA Call for Proposals for the Multiannual Work Programme 2014 clearly mentioned that priority would be given to actions promoting intermodal transport: "*In addition, works actions focusing on upgrading or establishing new MoS links, especially when clearly demonstrating synergies between MoS service and other transport sectors **will be prioritized***".

On the 31st of July 2015, the Commission adopted an Implementing Decision awarding financial assistance to **29** MoS-related projects.³⁰ Nevertheless, any of them was similar to any demand incentive as the one the Consortium plans to model.

- **The Annual Work Programme 2014**

The **Annual Work Programme 2014** for financial assistance to the transport sector was adopted by the European Commission on 26 March 2014.³¹

This Annual Work Programme, included under **Objective 2** (*'ensuring a sustainable and efficient transport in the long run'*) a priority for the development of sustainable '**Freight Transport Services**' with a budget of up to **EUR 25 million**.³²

Following the **Annex** of the **Annual Work Programme 2014**, the general objective of the 'Freight Transport Service' priority was to stimulate and deploy innovative, efficient and sustainable freight transport services that use the infrastructure of the **comprehensive network** and to have a positive impact on the environment. The Annex also specified that support for sustainable freight transport services, **as a follow-up of the Marco Polo II programme**, would focus on **core network corridors**.

Under the **Call for proposals under the Annual Work Programme 2014**,³³ INEA further specified that the 'Freight Transport Service' initiative aimed at stimulating freight transport services which bring freight flows '*in or out*' of the **core network corridors**, using infrastructure of the core and comprehensive network. These in practical terms meant that '*at least part of the supply chain being the subject of the project should be linked to core network corridors*'.

Furthermore, the **Call for proposals under the Annual Work Programme 2014** established that the projects under the 'Freight Transport Service' initiative had to aim at least to two or more of the following goals: (i) achieving better integration between transport modes; (ii) enabling optimal choices for operators and customers to make

³⁰ Commission Implementing Decision of 31 July 2015 C (2015) 5274 (final).

³¹ Commission Implementing Decision of 26 March 2014 C (2014) 1919 (final).

³² See point 3.2.2 of the Annex on the Annual Work Programme 2014.

³³ The Call for Proposals under the Annual Work Programme 2014 is available at: <https://ec.europa.eu/inea/connecting-europe-facility/cef-transport/apply-funding/2014-cef-transport-calls-proposals/2014-cef>

transport system more balanced, (iii) improving efficiency of the process within the supply chains and (iv) addressing inefficiencies within single modes of transport solutions.³⁴

Among the actions to be financed under the ‘Freight Transport Services’, there was specifically included a form of European ECO-BONUS:

‘investments optimising the use of the transport infrastructure by shifting cargo to more sustainable modes. General, sustainable schemes aiming at partly reimbursing the cost of modal shift incurred by trucks (eco-bonus) are also admissible under this type of actions’. (emphasis added).

Proponents of actions under this priority could request for up to **20%** of financing of the costs, referred to the **cost of modal shift incurred by the trucks**. This maximum intensity contrast with the one established under the Marco Polo programme which provided for up to a **35%**.³⁵

Nevertheless, any of the projects presented under the ‘Freight Transport Services’ priority fell into this action which was left vacant.³⁶ Consequently, the ECO-BONUS action clearly **failed**.

- **The Multiannual Work Programme Call for Proposals 2015**

The 30 October 2015, the Commission issued a Decision amending the **Multiannual Work Programme 2014**, increasing its funding to up EUR 20,54 billion.³⁷ This funding will be provided for projects to be selected under the Calls for Proposals for the Multiannual Work Programme in 2015 and most probably 2016.

Annex II of the Decision retakes the measures that were set under the Multiannual Work Programme 2014 as financing priorities under the MoS (EUR 280 million). Nevertheless, some changes in the approach and the wording are remarkable.

Firstly, the Annex of the Multiannual Work Programme 2015 establishes among the specific objectives the ‘*upgrade of sea-transport services integrated in logistics chain*’ on equal footing with the ‘*infrastructure development*’.

Expected actions under the ‘*upgrade of sea transport services*’ may include ‘*development of sea-based transport services which are open, integrated in door-to-door logistics chain and concentrate flows of freight on viable, regular, frequent and high quality reliable Short Shipping links*’ as it was the case under the

³⁴ See Annex 5 of the INEA Proposals under the Annual Work Programme 2014.

³⁵ Nevertheless, as the maximum EU financing is contained within Regulation No 1316/2013 –secondary source of EU law- its modification would require the amendment of this legal act with the complexities that this may entail.

³⁶ Other actions under the Freight Transport Service priority included (i) investments in infrastructure in support of modal shift, (ii) upgrading of multimodal services, (iii) optimization of supply chain management; (iv) better efficiency through collaboration and (v) actions for traffic avoidance.

³⁷ Commission implementing decision of 30 October 2015 C(2015) 7358 (final).

Multiannual Work Programme 2014. As a novelty, this measure is required to serve to connect '**Core Network Corridors**'.

On a separate note, actions concerning the improvement of infrastructure may include This '*improvements in quality and capacity of **ro-pax services***'.

Remarkable is also the fact that the Multiannual Work Programme 2015 does not foresee the finance for measures '*promoting a better integration of maritime transport and increased interoperability including connections with the road mode*' as it was the case under the Multiannual Work Programme 2014.

Although it is true that the Annex and the Call for proposals specifically give priority to implementation measures upgrading MoS with a considerable port investment component (especially when clearly demonstrating synergies between the MoS service and other transport sectors), it also maintains the possibility of promoting works consisting in '*wider implementation measures*' and '*implementation measures for the upgrading of maritime links with a possibility of its further intermodal extension*', in the same manner as the Multiannual Work Programme 2014 did.³⁸

In any case, account should be taken of the latest **INEA presentation** regarding the **Motorways of the Sea priority**, published at the occasion of the "CEF Transport Info Day" that took place on 30 November 2015.³⁹ In this presentation, INEA seems to put the emphasis on **port infrastructure and technology** development projects to be eligible for MoS funding.

For instance, INEA points out as "ideal proposals" under the MoS priority:

- (i) upgrade of MoS link including installation of LNG propulsion on ro-ro ship, construction of new railway access to core port X and extending a ro-ro terminal in comprehensive port Y;
- (ii) upgrade of VTMS systems in the Mediterranean Sea countries;
- (iii) construction of LNG bunkering facilities in the cluster of ports in the North Sea;
- (iv) pilot action on testing innovative systems for ballast water exchange.

On the basis of the previous it is doubtful that INEA would accept projects addressing the finance of maritime services. Such a possibility would need to be discussed in any case with the European Commission Services (DG MOVE).

³⁸ In this regard, it has to be noted that the wording of these measures and their eligible costs are exactly the same as under the Multiannual Work Programme 2014.

³⁹ The INEA Power-Point presentation we refer to can be access on <https://ec.europa.eu/inea/en/news-events/events/2015-cef-transport-info-day>: 2015 CEF Transport Calls Motorwats of the Sea, Jose Anselmo (DG MOVE) & Jarek kotowski (INEA)

The INEA Call for Proposals under the Multiannual Work Programme for 2015 was launched on the 5 November 2015. The deadline for the submission of projects was **16 February 2016**.⁴⁰

Moreover, it is foreseen that a new Call will take place in 2016 under the Annual Work Programme. Presumably, it will include the development of sustainable Freight Transport Services priority. However, it seems that co-financing for operational costs will not be considered, contrary to what happened under the Annual Work Programme 2014 for the *ecobonus* action. Indeed, it is likely that the granting will focus on the purchase/rent of durable assets concerning small scale ancillary infrastructure, superstructures and equipment (including on-board equipment). Both the reluctance to drive incentives into the market with EU budget and the bad results of the eco-bonus formula as specific objective in the Annual Work Programme in 2014 could explain that it is now excluded. This again leads to the fact that further discussion with the Commission is needed in order to have the possibility for modal shift incentives within the framework of CEF in future calls.

3.2 Marco Polo I - II

3.2.1 Marco Polo Programme

The Marco Polo Programme was established as a result of the White Paper on the Common Transport Policy of September 2001, where a more intensive use of Short Sea Shipping, rail and inland waterway was proposed.⁴¹

The **first phase of the Marco Polo Programme** was established for the period 2003-2006 with a budget of EUR 102 million.⁴² The **second phase of the Marco Polo** program covered the period from 2007 to 2013 with a budget of EUR 450 million.⁴³

Marco Polo Programme was implemented through yearly calls for proposals. Actions had to be submitted by a **consortium** of two or more undertakings, established in at least **two different Member States** or in at least one Member State and one close third country. This configuration led the Marco Polo Programme to focus on the **incentives to the offer** of combined transport modes.

Proposals were selected on the basis of their qualitative modal shift traffic avoidance, their credibility and innovative features, their merits in terms of environmental and social

⁴⁰ For further information: <https://ec.europa.eu/inea/en/connecting-europe-facility/cef-transport/apply-funding/2015-cef-transport-calls-proposals>

⁴¹ White Paper - European transport policy for 2010: time to decide, COM(2001) 370 final, 12.09.2001

⁴² Regulation N° 1382/2003 of the European Parliament and of the Council of 22 July 2003 on the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo Programme). OJ L 196 2.8.2003 p 1.

⁴³ Regulation (EC) No 1692/2006 of the European Parliament and of the Council of 24 October 2006 establishing the second Marco Polo programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II) and repealing Regulation (EC) No 1382/2003, OJ L 328, 24.11.2006, p. 1–13.

benefits and their viability. In order to calculate each proposal's merits, **external cost**⁴⁴ coefficients were used for each transport (sub)mode.

The **key feature** of Marco Polo Programme was that it was the only EU funding instrument defined in its legal framework as a fixed contribution per output. The subsidy was usually calculated on the basis of achieved modal shift expressed in millions of tonne-kilometres.

Marco Polo I set out three types of actions:

- (i) modal shift actions aiming at shifting as much freight as possible from road to Short Sea Shipping, rail and/or inland waterways;
- (ii) catalyst actions with the goal of changing the way non-road freight transport operates in the EU and overcoming structural market barriers in European freight transport through a breakthrough or highly innovative concept;
- (iii) common learning actions aiming at enhancing knowledge in the freight logistics sector and fostering advanced methods and procedures of co-operation in the freight market;

Two more actions were added under **Marco Polo II**:

- (iv) Motorways of the Sea: including any innovative, large-volume, high-frequency intermodal action which directly shifts freight from the road to Short Sea Shipping. This includes a combination of Short Sea Shipping and other modes for hinterland transport and integrated door-to-door services;⁴⁵
- (v) traffic avoidance actions: any innovative action integrating transport into production logistics to avoid a large percentage of freight transport by road without adversely affecting production output or workforce.

Under the Marco Polo I Programme, **modal shift action** were limited to a maximum of 30% of the total expenditure necessary to achieve the objectives, and the duration of the assistance was limited to a period of 3 years (non-renewable). The EU financing was established at a level of EUR 1 for each shift of 500 tonne-kilometres of road freight.

Accordingly, the financial assistance provided under the **Motorways of the Sea action** introduced by Marco Polo II, was limited to **35%** of the total expenditure necessary to

⁴⁴ These external costs encompassed costs for air pollution, noise, accidents, congestion, and climate change per ton-kilometer transported with that specific transport (sub) mode. Until 2011, these external costs were calculated on the basis of different sources. After that date the Commission developed a software application automating the estimation of the impact of the external costs for specific Marco Polo projects. See : JRC Scientific and Policy Reports.

⁴⁵ Regulation (EC) No 1692/2006 includes the definition of MoS under is Article 2: '*Motorways of the Sea action*' means any innovative action directly shifting freight from road to short sea shipping or a combination of short sea shipping with other modes of transport in which road journeys are as short as possible; actions of this kind may include the modification or creation of the ancillary infrastructure required in order to implement a very large-volume, high-frequency intermodal maritime transport service, including, preferably, the use of the most environmentally-friendly transport modes, such as inland waterways and rail, for hinterland freight transport and integrated door-to-door services; if possible, the resources of the outermost regions should also be integrated'. To be eligible, the project should shift an average of **200 million t/km** per year from road to sea.

achieve the objectives of the action and incurred as a result of the action and a maximal duration of **5 years**. The MoS action was without prejudice of the modal shift action which was maintained under Marco Polo II.

After Regulation 923/2009 amending the second Marco Polo Programme was adopted, the financial assistance for the development of MoS was raised from EUR 1 for each shift of 500 tonne-kilometres of road freight to **EUR 2**.⁴⁶

According to the Marco Polo Programme rules, the **final subsidy** was calculated as the lowest value of (i) tonne-kilometres shifted; (ii) cumulative losses over the funding period; and (iii) 35% of the eligible costs. Based on evidence from supported projects, the actual funding rate in the programme on average did not exceed 10% of the total eligible costs.⁴⁷

As regards the combination with State aid assistance, Article 7 of both Marco Polo Regulations provided that EU financial assistance under Marco Polo Programme did not prevent the same actions from being granted State aid at national, regional or local level, insofar as such aid is compatible with the State-aid arrangements laid down in the Treaty and within the cumulative limits established for each type of action.

3.2.2 Marco Polo Programme Results

The **Special Report 3/2013** of the European Court of Auditors (hereby, ‘CoA’) considered that the uptake of the Marco Polo Programme was not entirely satisfactory.⁴⁸

In particular, the CoA found that the programmes were **ineffective** in as much as they did not attain their output targets,⁴⁹ they had little impact in shifting freight off the roads⁵⁰ and that there were no data to assess the expected benefits of diminishing the environmental impact of freight transport, easing congestion and improving road safety.

Furthermore, the CoA indicated that there were not enough relevant project **proposals** put forward because the market situation and the entry conditions (high administrative burden) discouraged operators from taking advantage of the scheme. In addition, it was proved that many projects would have started even without EU funding (deadweight).

On a separate note, the CoA criticized the Commission for not having carried out a sufficient **analysis** of market needs to assess the potential to achieve the policy objectives.

⁴⁶ Regulation N° 923/2009 establishing the second ‘Marco Polo’ programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II). OJ L 266 of 09.10.2009, p 1.

⁴⁷ Footnote 8 of the Communication from the Commission on the Marco Polo programme - Results and outlook. COM/2013/0278 final.

⁴⁸ Special Report 3/2013 of the European Court of Auditors: “Have the Marco Polo Programmes been effective in shifting traffic off the road?”

⁴⁹ In this regard, the CoA pointed that Marco Polo I only achieved a 46% of the modal shift target, while Marco Polo II only fulfilled a 23,9% in its first years.

⁵⁰ During the years the programme was implemented, the maritime transport decreased from 38% to 33%.

In its opinion, corrective actions were taken too late, and in spite of them, the weaknesses of the Programme still persisted.

Finally, the CoA noted that the ‘*top-down supply-push*’ design of the Marco Polo Programme was not beneficial and recommended a detailed market analysis of the potential demand and Member State uptake experience and best practices. In this regard, the CoA specifically referred to the Italian experiences concerning the **Ecobonus** and **Ferrobonus** schemes contributing to modal shift.⁵¹

On the basis of all these, the CoA recommended to discontinue the Marco Polo programmes. Shortly thereafter, the Commission issued a Communication on the Results of the Marco Polo Programme where it announced its termination.⁵²

In this Communication the Commission advanced that ‘*a follow-up of Marco Polo will be integrated within the revised TEN-T programme and implemented using funding instruments provided by CEF*’. In particular, the Commission determined that financial assistance would be provided for the cooperation between transport service providers and for the deployment of MoS to a limit of **20%** of the eligible costs.

3.3 Implications of the current CEF Programme for the ECOBONUS project

Following the termination of the Marco Polo Programme, the European funding of the priority MoS fell in its entirety under the Connecting Europe Facility Mechanism (CEF).

Article 10 (2) of Regulation No 1316/2013 determines that the maximum intensity for projects related to development of MoS is **30%** of the eligible costs, while a **20%** is applicable for projects improving the connections to inland and maritime ports.

So far, the only action similar to a demand incentive has been included under the **Annual Work Programme of 2014**, particularly in the priority ‘Freight Transport Services’ (Objective 2). The maximum intensity of the financial assistance was limited to the 20% of the costs of modal shift incurred by the trucks. However this particular action of the priority **fell vacant**.

In our view, there is room to argue the possibility of integrating the ECOBONUS project under the priority MoS contained in the **Objective 3** of the Multiannual Work Programmes.

⁵¹ The Commission replied to this recommendation stating: “*The Commission acknowledges the potential advantages of programmes like Ecobonus but, at the same time, is aware that there could also be disadvantages (e.g. administrative burden and costs, sustainability, efficiency, effects on the competition, etc.), especially if such programmes were to be implemented at the EU level, in all the EU Member States. The EU-based programmes have a different nature in the sense that they need to be justified on grounds of subsidiarity. They need to address problems, which cannot be addressed by the Member States themselves and achieve objectives, which are not possible to achieve at the national level. There are also significant differences between the Member States in terms of geographical location, freight flows, infrastructure availability, modes used, etc.*”.

⁵² Communication from the Commission of 14 May 2013, the Marco Polo programme –Results and Outlook. COM (2013) 278 final.

In this regard, it can be considered that the ECOBONUS fits under the MoS priority to the extent that it **provides wider benefits** to the support of mobility of goods and improvement of environmental performance. Moreover, it could be interpreted that the ECOBONUS project contributes **upgrading an existing or setting up new maritime link with a possibility of its further intermodal extension**, as established under the Call for Proposals for 2014 and 2015.⁵³

The placement of the ECOBONUS project would result in a higher funding intensity of up to 30% of the eligible costs as compared to the 20% of the Freight Transport Service priority under the 2014 Annual Work Programme.⁵⁴

Moreover, the described design would also have an impact on the **financial envelope**. In this regard, the MoS priority under the Multiannual Work Programme 2014 counted on EU financial support of up to EUR 350 million whereas the 'Freight for Transport Services' under the Annual Work Programme 2014 counted on a reduced budget of only EUR 25 million.

As a consequence, even where the Commission concluded that the ECOBONUS project did not fit under the Objective 3 of the Multiannual Work Programme efforts should be made towards the integration of the project under the Multiannual Work Programme, for instance under Objective 2 (*ensuring sustainable and efficient transport in the long run*).

Despite the above, it has to be recalled that the next Call for Proposals under the Multiannual Work Programme will count with a more reduced budget. Indeed, it is not even sure when the next Call for Proposals under the Multiannual Work programme would take place.⁵⁵

In addition, the 'Freight Transport Service' under the Annual Work Programme 2014 set negative precedent for the integration of the ECOBONUS project under a Multiannual Work Programme. In this regard, Article 17 paragraph 4 of CEF Regulation provides that the Annual Work Programmes serve to finance projects of common interest '*that are not included*' in the Multiannual Work Programmes.

In view of the above, it could be advisable to enter into discussions with the European Commission Services in the course of the next phase of the project in order to assess the appropriate framework for the future ECOBONUS incentive.

⁵³ The insertion of the ECOBONUS project within one or the other measure is irrelevant as the maximum financial assistance will be kept at the 30% threshold.

⁵⁴ In this regard, it should be recalled that Annual Work Programmes are not directly linked to projects developing the comprehensive network. In this regard, Article 17 (4) of Regulation No 1316/2013 states that Annual Work Programmes '*shall address projects of common interests that are not covered by the Multiannual Work Programme*'. In the same vein, it shall be recalled that the 'Freight Transport Service' required the project to be linked to the **core network**.

⁵⁵ Nevertheless, in the Annex of the Multiannual Work Programme 2015, the Commission reserves the possibility to launch a call in 2016 in case the total budget has not been fully used under the 2015 call (page 61). Moreover, it is foreseeable that INEA will publish a call for proposals in 2018 for the purposes of assigning the remaining/not implemented budget.

3.4 Limitations of the ECO-BONUS provided under Annual Work Programme 2014

As mentioned above, the action concerning the ECO-BONUS under the 'Freight Transport Service' priority did not receive any project proposals.

Shortly after the Annual Work Programme was released, **Short Sea Shipping**, the Shortsea Promotion Centre of Norway, published an article pointing out the limitations of the European Eco-bonus.⁵⁶

These limitations are outlined below:

(i) *Only truck operators could get support*

- Small truck operators had to make a joint proposal through a joint organization or another accepted entity to minimize the administrative work for the EU in distributing the grant and to comply with the recommended minimum grant size (EUR 1 million).
- Unaccompanied trailers on ships were not supported, neither the shift from truck to containers by sea.
- For shipping lines, only investments were covered.

(ii) *The grant could not have the purpose or effect of producing a profit within the framework of the action*

As a consequence, sea transport had to be more expensive than driving. Otherwise, the Commission was entitled to recover the profit.

(iii) *The shift had to be viable*

That is to say, the shifting had to continue after the grant period.

(iv) *Administrative burden*

The non-profit rule and the viability requirement were difficult to document for possible applicants.

(v) *Grant size*

The recommended minimum grant size was 'no less than EUR 1 million'.

(vi) *Market distortion*

The incentive favored ferry and Ro-Ro operators⁵⁷ and not container lines. At the same time, Ro-Ro ships are older than container ships on average and have higher emission per tonne-km.

⁵⁶ <http://www.shiptonorway.no/News/192/EU%20offers%20eco%20bonus>

⁵⁷ Roll-on/roll-off (RORO or ro-ro) ships are vessels designed to carry wheeled cargo, that are driven on and off the ship on their own wheels or using a platform vehicle, such as a self-propelled modular transporter. This is in contrast to lift-on/lift-off (LoLo) vessels, which use a crane to load and unload cargo.

As regards this last point, Short Sea Shipping recalled that ferries, container lines, shippers, forwarders and Logistics Service Providers could also benefit from financial support for other actions included under the same priority ‘**Freight Transport Service**’.

4. STATE AID

Independently of whether the ECOBONUS project is co-financed with EU funds or exclusively from national budgets, Member States need to take all necessary measures to ensure that projects are carried out in compliance with relevant Union and national law, and in particular, with State aid rules.

State aid to the transport sector is covered by the general State aid rules set in Articles 107-109, alongside Article 106 (2) of the Treaty of the Functioning of the European Union (hereinafter, ‘**TFEU**’)⁵⁸.

Moreover, the TFEU foresees sectorial rules applying in the case of inland (road, rail and inland water transport modes) and combined transport modes. This *lex specialis* has been channeled through Articles 93 and 96 TFEU and by the secondary legislation that implements it.

By contrast, no such specific Treaty rules apply to aviation and **maritime transport**. Therefore, the general rules under Articles 106-109 TFEU apply to aviation and maritime transport sectors.

Finally, account should be taken of the applicable **Commission Guidelines**, which compile the Commission’s interpretation of the Treaty rules. These Guidelines constitute a piece of *soft law*, meaning that they have no legally binding force but still have practical effects, as it will be explained below.

4.1 Article 107 (1) TFEU: The notion of State aid

As a general rule, Article 107 (1) TFEU prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods. This shall, in so far as it affects trade between Member States, be **incompatible** with the internal market.

The constitutive elements of State aid, which are discussed in this section, are:

- (i) the existence of a recipient undertaking;
- (ii) financing through State resources and imputability of the measure to the State;
- (iii) the grant of an advantage;
- (iv) selectivity; and
- (v) an effect on trade and competition.

⁵⁸ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

4.1.1 A recipient undertaking

The State aid rules apply only where the recipient is an ‘*undertaking*’. The Court of Justice has consistently defined this notion as ‘*entities engaged in economic activity, regardless of their legal status and the way in which they are financed*’.⁵⁹

As regards the notion of ‘*economic activity*’ the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity.⁶⁰ It follows from the case law that Article 107 TFEU does not apply where the State acts by ‘*exercising public power*’⁶¹ or where public entities act ‘*in their capacity as public authorities*’.⁶²

Particular issues have arisen in the State aid context in respect of financing of infrastructure projects, where the infrastructure may be exploited commercially. In this regard, prior to 2000 the Commission worked on the assumption that the construction and operation of infrastructure would constitute a general measure of public policy and not an economic activity.⁶³

However, the *Aéroport de Paris* judgment of 12 December 2000 invalidated this interpretation, clarifying that the commercial exploitation and operation of infrastructure (e.g. ports) constitutes an economic activity.⁶⁴

In the case of a European ECOBONUS incentive project, the recipient undertakings might not only be the road hauliers directly benefiting from the incentives (direct beneficiaries) but also the shipping companies, which are exposed to a higher demand (indirect beneficiaries). Both road hauliers and shipping companies should be considered to undertake an economic activity in the sense of Article 107 (1) TFEU.

4.1.2 Financing through State resources and imputability of the measure to the State

The granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State are two separate and cumulative conditions for State aid to exist.

However, they are often considered together when assessing a measure under Article 107(1) TFEU, as they both relate to the public origin of the measure in question.

⁵⁹ See for example Case C-41/90, *Höfner v Macrotron* [1991] ECR I-1979.

⁶⁰ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7.

⁶¹ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8.

⁶² Case C-30/87 *Bodson* [1988] ECR I-2479, paragraph 18.

⁶³ For instance: Commission’s Guidelines on State aid in the aviation sector [1994] OJ C 350/5, para. 88.

⁶⁴ Case T-128/98, *Aéroports de Paris v. Commission* [2000] ECR II-3929, para.125, followed by the CJ.

- **Imputability**

In cases where a public authority grants aid to a beneficiary or designates a private or public body to administer the measure, this transfer is imputable to the State, even if the public authority enjoys autonomy.⁶⁵

When the advantage is granted through **one or more intermediate bodies**, be they public or private, imputability is deemed to exist when the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.⁶⁶

To assess this, the Commission uses a set of indicators, including the following:⁶⁷

- (i) The body in question could not take the contested decision without taking account of the requirements of the public authorities.
- (ii) Besides factors of an organic nature with the State, the undertaking has to take account of directives issued by governmental bodies.
- (iii) The integration of the undertaking into the structures of the public administration.
- (iv) The nature of the undertaking's activities and its activity on the market in normal conditions of competition with private operators.
- (v) The legal status of the undertaking (whether it is subject to public law or ordinary company law).
- (vi) The degree of supervision that the public authorities exercise over the management of the undertaking.
- (vii) Any other indicators showing the involvement of public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

In view of the above, should the ECOBONUS incentive be administered through a public or private body established or appointed by the State, the measure would be attributable to the State.

- **State resources**

A measure entails State resources where there is a burden on the public finances either in the form of spending or reduction of revenues.⁶⁸ The form in which the aid is granted is irrelevant, as Article 107 (1) TFEU specifically refers to aid in any form whatsoever.

Therefore, the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking

⁶⁵ Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraph 62.

⁶⁶ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 52.

⁶⁷ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraphs 55 and 56.

⁶⁸ Conclusions of the Advocate General Capotorti, 13 December 1997, in the case *Van Tiggele*, 82-77.

(*e.g.* interest rebates, tax reductions, exemptions) or impose a risk of additional burden on the State in the future (*e.g.* loan guarantees, guarantees on preferential terms).

However, despite the reference in Article 107 (1) TFEU to aid granted in any form, only advantages granted directly or indirectly through the financial resources of the State are to be considered as State aid. Therefore, State aid must entail a burden on Member State funds.

In contrast with the above, resources coming from the European Union (*e.g.* from structural funds) should also be considered as State resources if national authorities keep the control/discretion as to the use of those resources (in particular the selection of beneficiaries). Therefore, applicable EU funding would normally be cumulated with State aid for the purposes of determining the allowable aid intensities in any given case.⁶⁹

In conclusion, the ECOBONUS incentive project would benefit from ‘State resources’, within the meaning of Article 107 (1) TFEU as long as it is financed through grants directly provided by State resources and/or by EU funds which remain under the control of national authorities.

4.1.3 Advantage

An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions (*e.g.* in the absence of State intervention).⁷⁰

Therefore, whenever the financial situation of an undertaking is improved as a result of State intervention, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been introduced.⁷¹

Only the effect of the measure on the undertaking is relevant, rather than the cause or the objective of the State intervention. This is the case even where the advantage is compulsory for the undertaking in that it cannot avoid or refuse it.⁷²

In the same vein, the precise form of the measure is irrelevant to establishing whether it confers an economic advantage for the recipient. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities.⁷³ The same applies to relief for costs that the undertaking would not have incurred had there

⁶⁹ To the contrary, where Union funding is centrally managed by the Institutions or its agencies/bodies and is not directly or indirectly under the control of the Member States, only the State aid shall be considered for determining the maximum intensities.

⁷⁰ Case C-39/94, SFEI and Others [1996] ECR I-3547, paragraph 60.

⁷¹ Case 173/73, Italy v Commission [1974] ECR 709, paragraph 13.

⁷² Opinion of Advocate General Fennelly, Case C-251/97 France v Commission [1999] ECR I-6639, paragraph 26.

⁷³ Case C-126/01 GEMO SA [2003] ECR I-13769, paragraphs 28 to 31 on the free collection and disposal of waste.

been no incentive, because without the incentive the undertaking would have structured its activities differently.⁷⁴

The existence of advantage can only be ruled out (i) where the economic transactions are carried out in line with normal market conditions ('**Market Economic Operator**' test), or (ii) where the measure consists of the compensation of costs incurred to provide a **service of general economic interest** and certain cumulative conditions are met.⁷⁵

Nevertheless, the ECOBONUS project does not seem to fit under any of the two scenarios.

As regards the first, it does not seem natural that a private investor of a comparable size to the State would undertake a similar decision for investing in an economic incentive that is not accompanied by any economic return or profitability. Concerning the second, it has to be noted that maritime freight transport does not fall within the category of '*service of general economic interest*' as it can only be offered to certain undertakings and does not address the general public interest.⁷⁶

It stems from the above that any public measure promoting demand for MoS by means of public funding would be considered to provide an advantage in the sense of Article 107 (1) TFEU. In particular, road hauliers would be relieved of part of the costs normally arising from the use of maritime transport services, while shipping companies would receive increased revenue as a result of the incentive of the service.

4.1.4 Selectivity

It can be seen from the wording of Article 107(1) TFEU that the provision only catches aid that favors '*certain undertakings*' or the '*production of certain goods*'. The advantage must therefore entail an element of '*selectivity*' for Article 107(1) TFEU to apply.

A measure can be of very wide application and still come within Article 107(1) TFEU. Neither '*the high number of benefiting undertakings nor the diversity and importance of the industrial sectors to which those undertakings belong*' preclude a measure from being State aid.⁷⁷ Rather, selectivity is a question of whether the measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation.⁷⁸

⁷⁴ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, paragraph 71.

⁷⁵ These cumulative conditions were specified in Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 87 to 95, namely: (i) the recipient undertaking has to be entrusted with public service obligation that was previously defined; (ii) the compensation has to be established in advance in an objective and transparent manner; (iii) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations and a reasonable profit, (iv) if the undertaking was not selected in a tender, the level of compensation needs to be determined on the basis of the costs incurred by a typical undertaking, well-run and adequately provided would have incurred.

⁷⁶ Case 127/73, *BRT v SABAM* [1974] ECR 00313, para 23.

⁷⁷ Case 75/97, *Belgium v. Commission* [1999] ECR I-3671, para. 38.

⁷⁸ Case C-487/06 P, *British Aggregates v. Commission* [2008] ECR I-10505, para. 82.

Selectivity may be ‘material’ or ‘regional’ (or ‘territorial’). Material selectivity arises when the measures apply only to certain undertakings or sectors of the economy. Regional selectivity is considered to exist where the measure applies only to certain geographic areas of a Member State.

Furthermore, material selectivity may be *de jure* or *de facto*. *De jure* selectivity is found in cases where the measure contains legal criteria for singling out the undertakings which receive the advantage. *De facto* selectivity arises when the measure appears neutral on its face as between comparable undertakings but in practice the criteria work to exclude certain undertakings from the advantages and to benefit others.

It follows from the above that an economic incentive directed towards road hauliers and indirectly benefiting shipping companies would be materially selective, despite its broad coverage. This would be even truer where the incentive only benefited certain road transport (*e.g.* Ro-Ro) or shipping companies (*e.g.* ferries, shipping liners etc.).

4.1.5 An effect on trade and competition.

The issue of the distortion of trade and the effect on inter-Member State trade are closely connected and the Commission and the EU Courts usually deal with them together.

- **Distortion of competition**

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.

However, the burden on the Commission to prove that the measure distorts competition is not onerous. In this regard, a distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector.⁷⁹

Therefore, public support is liable to distort competition even if does not help the recipient undertaking to expand and gain market share. In this context, the Court of Justice considers it sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.⁸⁰

The fact that the amount of aid is low or the recipient undertaking is small will not in itself rule out a distortion of competition or the threat thereof, provided however that the likelihood of such a distortion is not merely hypothetical.⁸¹

⁷⁹ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, paragraph 188.

⁸⁰ Case C-172/03 Heiser [2005] ECR I-1627, paragraph 55.

⁸¹ Case C-280/00 Altmark Trans [2003] ECR I-7747, paragraph 79.

- **Effect on trade**

An advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to distort competition and also be liable to affect trade between Member States.⁸²

Public support can be considered capable of affecting intra-EU trade even if the recipient is not directly involved in cross-border trade. Moreover, it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors.⁸³

In view of the low threshold used by the Court of Justice to conclude on the existence of a distortion in competition and effect on trade, it should be deemed that an incentive addressing the demand of intermodal transport service applicable at a European-wide scale would immediately have an effect on trade in the sense of Article 107 (1) TFEU.

4.1.6 Conclusions on the existence of State aid as regards a future ‘ECOBONUS’ incentive

The above analysis illustrates that a future incentive in the form of a grant to road hauliers promoting a shift of freight transport from road to sea can qualify as State aid in the sense of Article 107 (1) TFEU.

- (i) Firstly, the scheme would be imputable to the State which will be entrusted with the management of the resources, independently of their origin (European/national).
- (ii) Secondly, the measure would presumably provide a selective advantage to both road hauliers and ship companies that they would not have obtained under normal market conditions.
- (iii) Thirdly, owing to the very nature of the incentive, the scheme would ostensibly be deemed to affect competition and trade, as it is directly connected with the exchange of goods between Member States.

4.2 Conditions for excluding the existence of State aid: *de minimis*

The notion of *de minimis* aid, refers to aid granted to a single undertaking over a given period of time that does not exceed a certain fixed amount. This kind of aid is excused from meeting all the criteria laid down in Article 107 (1) TFEU.

Regulation No 1407/2013 of 18 December establishes that the *de minimis* aid threshold granted per Member State to a single undertaking shall not exceed the level of **EUR 200,000 over any period of three fiscal years**.⁸⁴ A special rule applies for undertakings

⁸² Case T-288/07 Friulia Venezia Giulia, [2001] ECR II-1619, paragraph 41.

⁸³ Case T-211/2005 Italy v Commission [2009] ECR II- 2777 paragraphs 157 to 160.

⁸⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1–8.

performing road freight transport for hire or reward where the total amount of *de minimis* aid shall not exceed **EUR 100,000 over a period of three fiscal years**.

For the purpose of the calculation of the ceilings, aid shall be expressed as a cash grant. All figures being gross, that is, before any deduction of tax or other charges.⁸⁵

Regulation No 1407/2013 considers that aid is granted from the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime, irrespective of the date of the payment of *de minimis* aid to the undertaking.⁸⁶

The monitoring system of *de minimis* measures gives Member States the choice between a declaration of the aid to the beneficiaries⁸⁷ or the establishment of a central register containing complete information on all *de minimis* aid granted by any authority within the Member State. In any case, Member States shall record and compile all information regarding the application of the *de minimis* Regulation for **10** fiscal years from the date on which the aid was granted.

In light of the foregoing, it could be assessed whether a future ECOBONUS could be designed in a way where individual beneficiaries do not surpass the *de minimis* limit of EUR 100,000. Nevertheless, this possibility seems quite difficult as *de minimis* rule will not only apply to road hauliers (direct beneficiaries), but also to ship liners (indirect beneficiaries) in a limit of EUR 200,000.

Moreover, the limit of EUR 100,000 applying to road hauliers will most probably be surpassed where the road hauliers receiving the incentive form part of the same road freight transport company pursuing different economic activities than the simple management of the incentive.

4.3 Compatibility

Although Article 107 (1) TFEU sets a broad prohibition, if State aid fulfills the conditions set out in Article 107 (2) or Article 107 (3) TFEU,⁸⁸ it may qualify for Commission authorization. Moreover, State aid falling within the Commission Regulation (EC) No 651/2014, the General Block Exemption Regulation is exempted from the general obligation of notification.⁸⁹

⁸⁵ Article 3 (6) Commission Regulation (EU) No 1407/2013 of 18 December 2013

⁸⁶ Article 3 (4) Commission Regulation (EU) No 1407/2013 of 18 December 2013

⁸⁷ Following Article 6 of the above mentioned Regulation, where *de minimis* aid is granted to various undertakings under a scheme, the Member State may inform all undertakings of a fixed sum corresponding to the maximum aid amount to be granted under the scheme.

⁸⁸ Following Article 108 (2) (iii) the Council of Ministers can also issue a decision by unanimity declaring aid compatible on application by a Member State.

⁸⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78.

Nevertheless, as a point of departure, it needs to be considered that the Commission interprets the abovementioned compatibility basis narrowly with a view to maintaining a fair system of competition within the internal market.

4.3.1 Article 107 (2) TFEU

Article 107 (2) TFEU provides that the following aid *shall automatically* be deemed compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

It is clear from the foregoing that the ECOBONUS project does not fall within the scope of Article 107 (2) TFEU.

4.3.2 Article 107 (3) TFEU

Article 107 (3) TFEU covers categories of aid which *may* be compatible with the internal market, including:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

The word ‘*may*’ in Article 107 (3) TFEU gives the Commission a significant degree of discretion in relation to the first four categories of aid set out in the provision. Indeed, in its compatibility assessment the Commission must not merely take into account economic goals but also technical and social policy considerations in the interest of the Union.

The most important and frequently used basis for authorizing State aid is **Article 107 (3) c) TFEU** which covers either aid granted to facilitate the development of regions or industries (sectorial aid).

Any aid to be approved under the heading of **sectorial aid** must *‘facilitate the development of certain economic activities’* and must not adversely affect trade to an extent contrary to the common interest. If the development would have taken place without the aid, it cannot be said that the State aid *‘facilitated it’*. Consequently, the Commission cannot approve aid where market forces would have led to the same outcome.

Moreover, the requirement that the aid should not be contrary to the common interest requires the Commission to balance the benefits created by the aid against its adverse effects on trading conditions and the maintenance of undistorted competition.

4.3.3 Application of Article 107 (3) c) TFEU to the maritime sector

State aid measures provided to the maritime sector are governed by the compatibility rules set out in Article 107 (3) c) TFEU.

This provision has further been interpreted by the Commission through three different instruments of soft law: the 2004 Maritime Guidelines,⁹⁰ the 2008 Guidelines on Motorways of the Sea,⁹¹ and the 2009 Guidelines on Ship Management companies.⁹²

Since the Ship Management Guidelines deal with the reduction of corporate tax and the application of tonnage tax to crew and ship’s technical managers, we will only focus on the two first for the purposes of our analysis.

- **2004 Maritime Guidelines**

The 2004 Community Guidelines for State aid for maritime transport set out the conditions under which the Commission may authorize State aid for maritime transport.

The main objectives of said Guidelines are:

- improving a safe, efficient, secure and environment friendly maritime transport,
- encouraging the flagging or re-flagging to Member States' registers,
- contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets,
- maintaining and improving maritime know-how and protecting and promoting employment for European seafarers, and
- contributing to the promotion of new services in the field of Short Sea Shipping following the White Paper on Community transport policy⁹³

⁹⁰ Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport, OJ C 13, 17.1.2004, p. 3–12.

⁹¹ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea, OJ C 317, 12.12.2008, p. 10–12.

⁹² Communication from the Commission providing guidance on State aid to ship management companies, OJ C 132, 11.6.2009, p. 6–9.

⁹³ White Paper on National Transport Policy of 1996.

In total, the Maritime Guidelines comprises **10 chapters** authorizing different types of aid, excluding shipbuilding and infrastructure aid. Only the chapter on ‘**Short Sea Shipping**’ is relevant for the purposes of the handbook.

The Maritime Guidelines define ‘*Short Sea Shipping*’ as ‘*the movement of cargo and passengers by sea between ports situated in the geographical Europe or between those ports and ports situated in non-European countries having coastline on the enclosed seas bordering Europe*’.

The Commission recognizes the importance of the Short Sea Shipping to promote more sustainable and safe mobility, to strengthen cohesion within the Union and to improve transport efficiency as part of an intermodal approach.

In view of the financial difficulties for launching Short Sea Shipping services, the Commission admits the possibility of approving *start-up* aid on condition that it is intended for ship owners within the meaning of Article 1 of Regulation (EEC) No 4055/86.⁹⁴

In any case, aid of this kind will have to be notified and fulfil the following conditions:

- (i) the aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member States;
- (ii) the service must be of such a kind as to permit transport by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest;
- (iii) the aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several ship owners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question;
- (iv) the purpose of the aid must be to cover, either up to 30 % of the operational costs of the service in question, or to finance the purchase of trans-shipment equipment to supply the planned service, up to a level of 10 % in such investment;
- (v) the aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way to ship owners established in the Community. The aid should normally be granted for a project selected by the authorities of the Member State through a tender procedure in compliance with applicable Community rules;
- (vi) the service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding;

⁹⁴ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378, 31.12.1986, p. 1–3.

- (vii) such aid must not be cumulated with public service compensation (obligations or contracts).

In case of EU financing or eligibility under different aid schemes, the Guidelines clarify that the ceiling of **30%** applies to the combined total of aid/financial support of EU financing and national support.⁹⁵

In its final remarks, the Commission further specifies that all new proposals must include a calendar indicating, for the next six years, the expected quantified effects for each of the objectives included in the Guidelines.

The Guidelines also provide for a control mechanism in accordance with which Member States have to communicate to the Commission an assessment of the effects of the measures during their sixth year of implementation.

Finally, reference is made to the need of reviewing the Guidelines within seven years of their date of application. Although the Commission launched a public consultation in 2012, a formal revision of the Guidelines has not taken place yet.⁹⁶ Therefore, the Guidelines seem to be extended *sine die*.

- **2008 Guidelines on Motorways of the Sea**

The Commission published in 2008 a Communication providing further guidance on State aid complementary to EU funding for the development of Motorways of the Sea.⁹⁷

The Guidelines are divided in **two chapters**; the first of them refers to complementary aid for **Marco Polo II** Motorways of the Sea projects, while the second refers to complementary aid for **TEN-T** Motorways of the Sea projects.

In the first chapter, the Commission notes that under the **Marco Polo II programme** Motorways of the Sea actions were eligible for EU financial assistance with a maximum intensity of **35%** of the total expenditure for establishing and operating the transport services and a maximum duration of **5 years**.

By contrast, Chapter 10 of the **2004 Guidelines on State aid to maritime transport** provide for a maximum intensity of **30 %** for the operational cost and a maximum duration of **3 years**.

These differences proved to cause confusion among the potential bidders of the Marco Polo programme, since they lacked of certainty as regards to the pre-identified amount of public funding available.

⁹⁵ See footnote nr. 4 of the 2004 Maritime Guidelines.

⁹⁶ See press release IP/12/116.

⁹⁷ Communication from the Commission providing guidance on State aid complementary to Community funding for the launching of the motorways of the sea, OJ C 317, 12.12.2008, p. 10–12.

Against this background, the Commission considered that, the sake of clarity, the maximum intensity and duration of State aid complementary to EU funding for projects under Marco Polo II Regulation shall be raised at the level of **35% of the operational costs for a period of 5 years**.

In the second chapter, relating to State aid complementary to **TEN-T** financing, the Commission points out that Article 12 *bis* (5) of **Decision 1692/96/EC** provided the possibility of granting *start-up* aid to a project, without prejudice to Articles 107 and 108 of the TFEU. This support could only be granted to '*duly justified capital costs*' to be understood as '*investment support*', and to the extent that it is deemed necessary for the financial viability of the project.

In any case, the State aid under Article 12 *bis* (5) **Decision 1692/96/EC** had to be limited to a maximum intensity of **30% and a period of two years**. Moreover, under TEN-T Member States could provide complementary aid only to the extent that the EU funding was not available.

On the contrary, the 2004 **Guidelines on State aid to maritime** transport allowed for aid to **investment** with a **maximum intensity of 10% over 3 years**.

Therefore, the Commission considered that, for the sake of coherence, State aid complementary to projects under **Decision 1692/96/EC** should be allowed with a maximum intensity of **30% and a maximum duration of 2 years**.

In any circumstances, '*start-up*' to investment could not exceed the duration and intensity **irrespective of the source of funding** (EU or national). Aid could not be cumulated in any case with public service compensation.

- **Application of the 2004 Maritime Guidelines to the ECOBONUS project**

The analysis of compatibility of a future ECOBONUS project cannot take place before the scheme is clearly defined. Nevertheless, it is important to advance some preliminary observations at the present phase of the analysis.

Firstly, it has to be noted that the 2004 Maritime Guidelines were originally conceived for '*start-up*' aid addressed to ship linnners (incentives to offer). Therefore, the lecture of the Guidelines needs to be done in a flexible way in order to permit their adaptation to **incentives to demand** such as the ECOBONUS.

This being said, for the ECOBONUS incentive to be declared compatible under the 2004 Maritime Guidelines, it would be important to adjust to the requirements set on this basis to the maximum extent possible.

In this regard, even if the 2004 Maritime Guidelines were originally addressed to ship owners, it could be argued that under an incentive to demand the ultimate beneficiaries are the shipping companies (material beneficiaries) and not the road hauliers.

Moreover, the aid under the 2004 Maritime Guidelines was conceived as ‘start-up aid’. In this sense, it could be argued that the demand scheme allows for the development of new routes or for upgrading the services of an existing one.

Concerning the other criteria it is to be consider that:

- (i) *The 2004 Maritime Guidelines limit the duration of the national financial support to a period of 3 years that cannot be extended.*
- (ii) *The 2004 Maritime Guidelines require that the incentive do not divert maritime transport in a way which is contrary to the common interest*
- (iii) *The 2004 Maritime Guidelines require an environmental impact analysis of the project:* In the case of an incentive to demand, this requirement could be translated into the environmental impact of the transfer from road to sea.
- (iv) *The 2004 Maritime Guidelines provide for a maximum aid intensity of up to 30 % of the operational costs of the service in question:* In an incentive to demand, this 30% may be understood as the operative costs of road hauliers for using the maritime transport service.
- (v) *The 2004 Maritime Guidelines ensures aid is granted on the basis of transparent criteria applied in a non-discriminatory way to ship owners:* In an incentive to demand, this requirement seems to be satisfied as long as road hauliers remain free on deciding on the shipping company for the maritime transport.
- (vi) *The 2004 Maritime Guidelines require viability of the Short Sea Shipping Service:* In relation to the ECOBONUS incentive, this requirement would presumably extend to the different Short Sea Shipping services covered by the scheme.
- (vii) *The 2004 Maritime Guidelines require the non-cumulation with costs covering public service obligations.* As the incentive would apply to freight transport, it is difficult to think about a ship liner entrusted which public service obligations.

- **Application of the 2008 Guidelines on Motorways of the Sea**

If the ECOBONUS scheme was to be financed by both the EU and the Member States, it could be questioned to what extent the 2008 Guidelines on Motorways of the Sea are still applicable.

In this regard, the text of the **2008 Guidelines on Motorways of the Sea is clearly outdated:**

- (i) **The first chapter** of the 2008 Guidelines on Motorways of the Sea refers to the Marco Polo programme which was discontinued after 2013.
- (ii) **The second chapter** of the 2008 Guidelines refers to Decision 1692/96/EC as the legal framework of the TEN-T policy. However, this Decision is **no longer in force**

as it was repealed by Decision 661/2010, repealed in turn by Regulation No 1315/2013.

- (iii) Moreover, the current **Regulation No 1315/2013** does not contain a provision similar to Article 12 (5) *bis* of **Decision 1692/96/EC**.

As a consequence, the **2008 Guidelines on Motorways of the Sea** can only be applied – where appropriate- through analogy.

In this regard the general principles stemming from the **2008 Guidelines on Motorways of the Sea** can be summarized as follows:

- (i) Where the maximum intensity threshold set under the EU financial instruments and the 2004 Maritime Guidelines differ, the more generous applies.
- (ii) Where the maximum duration established under the EU financial instrument is lower than the one established under the 2004 Maritime Guidelines, the first prevails.

In light of all the foregoing, it would be sensible to enter into discussions with the Commission as regards the conditions for the application of the 2008 Guidelines on Motorways of the Sea.

4.3.4 Other rules on compatibility under Article 107 (3) c) TFEU

The compatibility of an incentive to the use of maritime services will primary be scrutinized under the specific sectorial Guidelines described above (*lex specialis*).

However, if a given scheme could not entirely fit under the said framework, it could still rely on various horizontal rules, such as the Guidelines on State aid for environmental protection 2014-2020.⁹⁸

This being said, account should be taken of the fact that these horizontal rules were not originally conceived for their application to incentives as the one under assessment ('ECOBONUS'). For these reasons, any argument advanced on these bases might be presented in a subsidiary manner.

- **Guidelines on State aid for environmental protection and energy 2014-2020**

The Guidelines on State aid for environmental protection at energy aim at improving the EU environment standards as their own name indicate.

Among the measures covered by the scope of these Guidelines, the Commission includes those for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards (including aid for the acquisition of new transport vehicles).

⁹⁸ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55.

In order to decide on the compatibility of these measures, the Commission adjusts the common assessment principles used under Article 107 (3) c) in the following manner:

- (i) *Contribution to a well-defined objective of common interest in accordance with Article 107(3) TFEU of the Treaty:* The measure shall aim at increasing environmental protection by achieving the Europe 2020 strategy targets. Member States intending to grant aid have to define the objective pursued and explain the expected contribution of the measure towards the objective.
- (ii) *Need for State intervention:* Member States should identify the market failures hampering an increased level of environmental protection. These market failures may relate to negative externalities that arise when pollution is not adequately priced. Moreover, Member States have to show why the negative externalities remain unaddressed by other policies or measures.
- (iii) *Appropriateness of the aid measure:* An aid measure will not be considered compatible with the internal market if the same positive contribution to common objectives is achievable through other less distortive types of aid instruments. For operating aid, the Member State must calculate the aid amount *ex ante* as a fixed sum covering the expected additional costs over a given period.
- (iv) *Incentive effect:* The aid changes the behavior of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner.
- (v) *Proportionality of the aid (aid kept to the minimum):* As a general principle, aid is considered to be limited to the minimum necessary if the aid corresponds to the extra cost necessary to meet the objective, compared to the counterfactual scenario in the absence of aid.⁹⁹ The eligible costs are considered as the extra investment costs established by comparing the aided investment with the counterfactual scenario in the absence of aid. With regards to maximum intensities, the Commission applies a range between 40-60% depending on the size of the company for measures increasing the level of environmental protection.
- (vi) *Avoidance of undue negative effects on competition and trade between Member States:* The Commission identifies two main potential distortions caused by aid, namely product market distortions and location effects. The second type of distortion can arise across Member States where firms compete across borders.
- (vii) *Transparency of aid:* Member States, the Commission, economic operators, and the public have easy access to all relevant acts and to pertinent information about the aid awarded thereunder.

⁹⁹ The net extra costs are determined by the difference between the economic benefits and costs of the aided project and those of the alternative investment project which the company would carry out in the absence of aid, which is the counterfactual scenario.

In view of the foregoing, it could be discussed to what extent the Guidelines on environmental protection would be applicable, should the Commission reject compatibility on another more specific basis.

Nevertheless, the adaptation of the Guidelines on environmental protection to the ECOBONUS scheme may entail difficulties. Indeed, it is not clear whether the incentive could be deemed as ‘extra investment costs’ within the meaning of the Guidelines. Furthermore, the analysis of a counterfactual scenario would be even more complex than usual taken into account the multiple number of beneficiaries if the scheme.

4.3.5 Compatibility under different Treaty rules

- **Article 93 TFEU**

Article 93 TFEU applies as *lex specialis* for assessing the compatibility of State aid granted for inland transport (road, rail and inland water transport modes) and combined transport modes. In particular, Article 93 TFEU states:

‘Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service’.

The above mentioned provision does **not apply to the maritime** and aviation sectors. Although in theory, based on a proposal by the Commission, the Council and the Parliament could extend its application, the Commission has never made such a proposal. Consequently, the application of Article 93 TFEU to combined transport involving the maritime sector has **never been tested**, although the provision may be relevant by analogy.

Even if Article 93 TFEU applies as *lex specialis* to the inland transport sector, the Court has confirmed that the effect of this provision is not to exclude these modes of transport from the general regime of State aid contained in Articles 107-108 TFEU.¹⁰⁰

Until 31 December 1997, Article 93 TFEU was implemented through **Regulation No 1107/70**, whose Article 3 (1) e) specifically allowed for temporary aid infrastructure and fixed and movable facilities which were designed to facilitate the development of combined transport.¹⁰¹

The position is now that Article 93 TFEU is partially implemented by **Regulation No 1370/2007**, as regards compensation for the operation of public passenger services.¹⁰²

¹⁰⁰ Case C-156/77 Commission v. Belgium [1978] ECR 1881, para. 10.

¹⁰¹ 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. OJ L 84, 26 March 1977.

¹⁰² Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315 p.1-13.

Consequently, Article 93 TFEU can result of **direct application** as a residual legal basis for establishing the compatibility of aid not covered by Regulation No 1370/2007.

In this sense, it is accepted that the following kinds of aid can be authorized directly on the basis of Article 93 TFEU insofar they are not covered by Regulation No 1370/2007: (i) aid for infrastructure use; (ii) aid for the compensation of unpaid external costs in terms of environmental damage, accidents and congestion, (iii) aid to promote interoperability and (iv) aid for research and development.

However, for an aid measure to be considered to ‘meet the transport needs’ of coordination under Article 93 TFEU a number of general principles must be satisfied:¹⁰³

- (i) the aid must pursue a common interest objective;
- (ii) the measure must be necessary and provide an incentive effect;
- (iii) the aid must be proportionate;
- (iv) access to infrastructure must be open to all users on a non-discriminatory basis;
- (v) the distortion of competition must not jeopardize the general interests of the EU;

This test is, to a large extent, the language of Article 107 (3) c) TFEU in disguise. This should not come as a surprise, as it helps to ensure consistency of assessment between State aid to the land modes on the one hand, and the maritime and aviation modes on the other, despite different regulatory frameworks.

Moreover, in its decisional practice under Article 93 TFEU, the Commission has taken the opportunity to reduce the unnecessary leeway for Member States for giving open-ended operating aid to transport. Schemes are normally applicable to the *start-up* phase of the new intermodal operations, and funding is limited to 30% of the eligible cost. Moreover the subsidy period may not last for more than 3 years.¹⁰⁴

In the case of rail intermodal transport, these conditions have further been detailed under Chapter 6 of the **Guidelines on State aid for railway undertakings (‘Railway Guidelines’)**.¹⁰⁵

In particular, section 6 of the Railway Guidelines is devoted to aid for the **coordination of transport**. This kind of aid can take the form of **aid for reducing external costs**, designed to encourage a modal shift to rail because it generates lower external costs than other modes of transport.

¹⁰³ See for instance Commission Decision of 5 October 2011 on State aid No SA. 31981– Netherlands – start up aid to new combined transport services based on Twin hub railway network.

¹⁰⁴ See Commission Decision of 30 April 2010 in Case N678/2009 *Mesure de soutien au transport intermodal par la navigation intérieure dans la région Bruxelles Capitale*. This can be compared with the requirements established under the 2004 Maritime Guidelines.

¹⁰⁵ Communication from the Commission Community guidelines on State aid for railway undertakings, OJ C184, p.13-31.

The eligible costs of aid for reducing **external costs** are the part of the external costs which rail transport makes possible to avoid compared with competing transport modes. In this regard, the Guidelines recall that Member States can put in place a compensation scheme for the demonstrably unpaid environmental, accident-related and infrastructure costs of competing transport modes in so far as these costs exceed the equivalent cost of rail.

Therefore, Member States need to provide a transparent, reasoned and quantified **comparative cost analysis** between the rail transport and the alternative options based on other modes of transport. The methodology used must be made publicly available.

Paragraph 107 of the Guidelines stipulates that the Commission considers there is a presumption of necessity and proportionality of the aid when the aid intensity complies with two conditions:

- (i) aid shall not cover more than 30% of the total cost of rail transport.
- (ii) aid shall not exceed 50% of the eligible costs, i.e. the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes.

Moreover, paragraph 110 provides that where the aid recipient is a railway undertaking, it must be proved that the aid really does have the effect of encouraging the modal shift to rail. In principle, this means that the aid has to be reflected in the price demanded from the passenger or from the shippers since it is they who make the choice between rail and the more polluting transport mode such as road.

Specifically as regards aid for reducing external costs, there must be realistic prospects of keeping the traffic transferred to rail so that the aid leads to a sustainable transfer of traffic.

By contrast to the 2004 Maritime Guidelines, the maximum duration of aid for the coordination of transport under the Railway Guidelines is **of 5 years**. Moreover, the Guidelines provide for the possibility of re-examining an aid scheme in the light of the results obtained and where necessary, to authorize the **renewal**.

With regards to the future ECOBONUS project, it shall be borne in mind that although Article 93 TFEU is only applicable to inland transport, there are some general principles that may be used by the Commission by way of analogy for analyzing a scheme for the development of combined transport modes involving the maritime sector.

- **Article 106 (2) TFEU: Services of General Economic Interest**

Article 106 (2) TFEU allows aid to be approved where it is necessary for the performance of a service of general economic interest. This Article is not directly applicable in the field of road/rail freight transport services, as these modes of transport are covered by Regulation No 1370/2007 implementing Article 93 TFEU.

As regards to the application of Article 106 (2) TFEU in the maritime sector, it must be noted that this compatibility basis can only be used where companies have been officially entrusted with a public service obligation that pursues the general economic interest.

Since neither the road hauliers nor the ship liners have been entrusted by the public authorities with a service of general economic interest, this legal basis will not be further considered for the purposes of assessing the future ECOBONUS incentive.¹⁰⁶

4.4 Procedural rules

Article 108 TFEU provides a procedural framework within which the Commission and the Member States are to operate. This provision is further developed through the Council Regulation (EU) 2015/1589, known as the ‘Procedural Regulation’.¹⁰⁷

- **Preliminary investigation**

Under Article 108 (3) TFEU **new aid** must be notified to the Commission in sufficient time to enable it to communicate its comments to the aid provider. Each notification triggers a preliminary investigation by the Commission. During this period, Member States are under a ‘*standstill obligation*’, what means that they are prohibited from putting the aid into effect.

Although the Commission must be given sufficient time to form a view on the proposed aid, it is also required to act with some expedition. Therefore, the Commission is bound to complete its preliminary investigation within **two months** of the notification.

Nevertheless, the Commission has constantly taken the view that the two month period only begins to run when it is in a position to comment on the compatibility with the internal market. As a result, the Commission considers that where it sends supplementary inquiries to the notifying State, it does not affect the time limits within which it should act.¹⁰⁸

At the end of the preliminary examination, the Commission has three options: (i) it can determine that there is no aid, or (ii) that the aid is compatible with the internal market, or (iii) that it should launch the formal investigation procedure set out in Article 108 (2) TFEU.

Normally, the latter will happen if the Commission encounters serious difficulties in its assessment of the State aid compatibility with the Treaty, or if it faces procedural difficulties in obtaining the necessary information. In any case, the decision adopted by the Commission can be subject to review before the General Court under Article 263 TFEU.

¹⁰⁶ In this regard, it has already been noted that both the road hauliers and the ship liners offer economic services which are limited to certain undertakings and do not address the general public interest. These activities have been excluded by the Court of Justice from the notion of public service obligation. See for instance, case 127/73, BRT v SABAM [1974] ECR 00313, para 23.

¹⁰⁷ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9–29; This Regulation repeals the traditional Procedural Regulation 659/1999.

¹⁰⁸ Case 301/97 France v. Commission (Boussac) [1990] ECR I-307.

- **Formal investigation procedure under Article 108 (2) TFEU**

The decision to initiate a formal investigation procedure is sent to the relevant Member State. The decision summarizes the factual and legal bases for the investigation and includes the Commission's preliminary assessment, outlining any doubts as to the measure's compatibility with the EU state aid rules.

The decision is published in the EU's Official Journal. Member States and interested third parties have one month from the date of publication to submit comments. This is the key difference between the formal investigation procedures and the preliminary investigation where interested parties do not have such an entitlement, as the matter concerns the Member State proposing the alleged aid and the Commission alone.

The Commission adopts a final decision at the end of the formal investigation. Although Article 108 (2) TFEU is silent on the question of the time limits, the Commission is bound by the rules of good administration and must act within a reasonable time. Length depends on many factors, including the particularity of the case, the quality of the information provided and the level of cooperation from the Member State.

There are mainly three possible outcomes from this formal investigation:

- (i) Positive decision: where the measure is deemed not to be aid, or that it is deemed to be aid, but is compatible with the internal market.
- (ii) Conditional decision: the measure is found to be compatible, but its implementation is subject to the conditions stated in the decision.
- (iii) Negative decision: The measure is incompatible and cannot be implemented. The Commission in principle orders the Member State to recover aid that has already been paid out to the beneficiaries.

In any case, the recipient undertaking(s) and Member States would be able to challenge the final decision adopted by the Commission under Article 263 TFEU.

- **Unlawful State aid**

Where the standstill obligation is not respected, aid is deemed unlawful. In these cases, the Commission and the Member States may order the recovery of the aid, as well as the suspension of the grant of further aid, following the direct effect of Article 108 (3) TFEU.

It should be borne in mind that non-notification does not in itself make aid incompatible with the internal market. In this regard, even if an aid measure is not notified, the Commission remains under the obligation to investigate the aid and determine its status under Article 107 TFEU.

- **Recovery**

Recovery can take place both where the Commission has taken a negative decision in the course of a formal investigation procedure and where aid has been granted unlawfully as

seen above.¹⁰⁹ Where the Member States do not complain, the Commission may refer the issue to the Court of Justice (Article 267 TFEU) without the need of initiating an infringement procedure under Article 258 TFEU.

5. AUTHORIZATION OF STATE AID TO PROMOTE INTERMODAL TRANSPORT

After having examined the State aid rules and the EU funding programme that have boosted intermodal transport, we will now provide an analysis of some of the Commission Decisions that have authorized incentive schemes under the legal framework explained above.

As already advanced above, the Commission used for its compatibility assessment Article 93 TFEU for aid measures directed to inland transport and Article 107 (3) c) TFEU for incentives to the maritime sector.

The analysis below focuses on the decisions addressing demand incentives. Decisions related to offer incentives are dealt with thereafter.

For methodological reasons, the current section only covers the most recent and relevant decisions for the purposes of the present **handbook**. In the same vein, a greater level of detail is provided for decisions (*Ecobonus*, *Ferrobonus*, *Fres Mos* and *Atlantica*, etc.) that are pertinent for the design of the future ECOBONUS.

5.1 State aid addressing the demand of maritime transport services

The current heading discusses on the ECOBONUS experiences already implemented in Europe both at national and regional level. Special account is taken of the compatibility assessment developed by the Commission.

5.1.1 The Sicilian Environmental Bonus

Before the Italian Ecobonus was implemented, the Commission authorized a regional measure to encourage combined road-transport of freight in Sicily, known as the ‘*environmental ecobonus*’.¹¹⁰

The scheme was conceived as a **pilot project** with an experimental character: it aimed at achieving a structural modification of the current freight system in Sicily, encouraging road hauliers, in particular smaller companies, to form organization groups to make a better use of combined road-sea transport.

¹⁰⁹ However, Article 16 of the Procedural Regulation provides that the Commission shall not require recovery of the aid if it would be contrary to a general principle of EU law.

¹¹⁰ Commission Decision of 6 October 2004 in Case N 551/2003 *Measure to encourage combined road-sea transport of freight in Sicily*.

The economic incentive was granted to heavy road hauliers of a weight superior to 12 tonnes and semi-trailers using maritime service provided by Sicily's ports, suitable for combined road-sea transport.

The aid was provided in form of an environment bonus providing direct reimbursement of the additional costs stemming from the use of the maritime service instead of the road mode transport. Moreover, the aid could be granted indirectly through the issuance of deduction vouchers that could be used as mode of payment of the maritime services.

The bonus was configured in two parts: A fixed one corresponding to the 25% of the total amount of aid to be granted immediately following the boarding of the vehicle and the remaining 75% of premium which would be provided following the increase of maritime transport. The maximum aid intensity was limited to **30% of the total cost of transport**.

The subsidy amount took account of the differential between the external cost of road and maritime transport services (**current or potential**). The external costs were calculated on the basis of a Study that took into account greenhouse gases, air pollution, noise, accidents and congestion arose in Italy in the year 2000.¹¹¹

Following the results of the said study, for a 14-metre-long heavy vehicle loaded with 20 tons of merchandise, the external costs of travel by road and by sea were as follows:

- (i) For a route of 100 km by road, the external cost produced by a typical heavy vehicle in Italy amounted to EUR 212.58. This amount raised to EUR 258.3 in the case of road transport in Sicily.
- (ii) For a route of 100 km by sea, the external cost produced by a typical heavy vehicle loaded on a ship (national navigation) in Italy amounted to EUR 79.37.

However, if these external cost parameters would have been taken directly to calculate the subsidy, the final amount would have surpassed the 'minimum necessary' and would have exceeded the budget available for the scheme.

Accordingly, it was decided to apply as external cost parameter, a rather small amount of the overall external costs estimate. Such amount was fixed to 6.5%, in order to obtain, on average, subsidies compatible with the criteria of the minimum necessary.

In order to avoid any sort of discrimination, the measure diversified the bonus system on a geographical basis taking eight different 'arches' of the Italian coast. Therefore, the maximum amount of the environmental bonus by heavy vehicle expressed in EUR/linear meter was different depending on the **geographical criteria**.

For obtaining the environmental bonus, interested parties had to apply to the Regional Department of Transport which provided for an electronic card. The Regional Department of Transport kept a register divided for individual companies applying for the measure and aggregated entities.

¹¹¹ Lombard, P.L., Molocchi, A. (2001), *Navigazione e Ambiente – un confronto con i costi esterni delle altre modalità di trasporto*, Milano, Franco Angeli.

In order to obtain the financial aid, beneficiaries registered in the programme had to submit a request providing the bill of landing and the invoice stamped by the maritime company to the regional offices.

In case of indirect payment, the regional authority had to produce a document on behalf of the aid beneficiary. The emission of this document concerned both the fixed amount and the premium. The maritime carriers could also provide deduction vouchers covering the fixed amount of the environmental bonus.

It is important to note that in its decision the Commission assessed the compatibility of the scheme directly on the basis of **Article 107 (3) c) TFEU**, considering that it contributed to the development of the combined transport. This was the case even if the 2004 Maritime Guidelines were already published at the time.

In the application of Article 107 (3) c) TFEU the Commission seemed to take into consideration its previous practice under Article 93 TFEU for assessing aid for combined inland transport.

In this regard, the Commission considers that the aid was necessary as there were not enough incentives for the development of combined modes of transport due to existing market failures. Moreover, the Commission considers that aid is proportionate as it did not surpass the limit of **30% of the operational costs of transport**. Following the regional law, the level of the grant corresponds to **30% of the tariff** applied by the ship liners for the maritime transport.

Moreover, the aid was considered not to cause a distortion in the competition as regards to (i) other Italian ports: given the fact that the measure was excluded for trips between Sicily and Calabria (ii) European ports: as there were no connections between Sicilian ports and other European ports besides continental Italy, (iii) rail transport sector due to the lack of competition between the two modes of transport and (iv) the ship liners: as there were multiple Ro-Ro operators.

5.1.2 The Italian Ecobonus

Taking into account the success of the Sicilian aid scheme, the Italian government decided to adopt a similar system of incentives to the demand side at the national level to promote the use of the MoS network.¹¹²

- **Description of the aid**

The Ecobonus was directed towards **all EU road haulage companies** which load their vehicles (accompanied or not) and trailers onto freight ships in an Italian sea port with the destination set to any Member State, including temporal or permanent consortia as well as associations of operators of transport.

¹¹² Commission Decision of 20 August 2005 in case N 496/ 2003 *Aiuto per lo sviluppo delle catene logistiche e il potenziamento dell'intermodalità*.

The Italian Ministry of Transport defined **32 acceptable sea routes** included in the Ecobonus system by a ministerial decree, on the basis of the following criteria:¹¹³

- (i) Suitability of the maritime route for fostering the shift of substantial amounts of traffic from road to sea;
- (ii) Suitability of the maritime route for reducing congestion on the Italian road network;
- (iii) Foreseeable environmental improvement obtained through the use of the maritime route compared to the corresponding road route.

The aid took the form of a **non-reimbursable grant** whose level corresponded to the difference between the external costs generated by maritime and road transport. This difference was to be calculated on the basis of an **updated Study completed by Friends of the Earth**¹¹⁴, taking into account greenhouse gases, atmospheric pollution, noise, congestion and accidents as the main factors for the calculations.

This average forms the **basis of the discounts** applicable to road hauliers when using the selected shipping routes. The amount is adapted to the specific market conditions on the different identified routes. Therefore, the percentages to be applied to each rate paid to the maritime carrier were fixed for each maritime route.¹¹⁵

Beneficiaries had to achieve a certain number of journeys to be fixed every year for a selected line. Applicants companies must have executed at least **80 journeys** per year on an individual route. An '**extra bonus**' was granted in addition to the basic aid to those companies that achieved more than **1,600 journeys** a year on a shipping line. Nevertheless the maximum aid intensity of **30%** of the costs of the maritime service could not be exceeded.

Furthermore, the beneficiaries agreed to maintain the same number of journeys or the same quantity of goods transported during the subsidized period for **an additional three years after the expiry of the scheme**. Moreover, aid was only granted on condition that tariffs were maintained at the same level, in line with the rate of inflation.

Aid was to be granted **retrospectively**, after examination of the relevant documents, within the limits of the funding made available and allocated for this particular purpose. In order to be included in the project and gain the right to be refunded part of the financial expenditure invested in shipping lines, companies were required to make an application to the Italian Ministry of Transport by the 31st of January asking for reimbursement corresponding to the previous year.

¹¹³ Of these routes, 23 were national and 12 European. See Rete Autostrade Mediterranee "The Italian ECOBONUS-Concluding findings", Francesvo Benevolo, 18.12.2013
http://www.shortsea.fr/Presentation_ecobonus-italien_12-2013.html, on page 17.

¹¹⁴ Friends of the Earth is a non-governmental environmental organization, founded in 1969, with a presence in 75 countries around the world.

¹¹⁵ See "El reequilibrio modal y el Ecobono", Juan José Usabiaga Santamaría (2009)", [http://upcommons.upc.edu/bitstream/handle/2099.1/12758/PFC%20\(final\)%20v2.pdf;jsessionid=D499F8C2FB11B3ACE7B9F5FD74623D09?sequence=1](http://upcommons.upc.edu/bitstream/handle/2099.1/12758/PFC%20(final)%20v2.pdf;jsessionid=D499F8C2FB11B3ACE7B9F5FD74623D09?sequence=1) on page 46.

The Ecobonus system was originally conceived to operate **over three years** (from 2007 to 2009) and it was authorized by the Commission in 2005. However, due to the negative impact of the economic crisis in the shipping sector, Italy decided to extend the scheme for two more years (2010-2011). In July 2013 the Commission authorized the extension only for 2010.

A specific analysis of the two Commission Decisions concerning the Italian Ecobonus is featured below.

- **The 2005 Commission Decision authorizing State aid to the Italian Ecobonus scheme**

The first aid scheme was authorized by the Commission on 26 April 2005 for the period between 1 January 2007 and 31 December 2009.¹¹⁶ The budget devoted to the scheme was EUR 240 million.

In its 2005 Decision, the Commission characterized the support given by the Italian ministry as State aid within the meaning of Article 107 (1) TFEU, as it conferred an **advantage** on road hauliers through **state resources** that was susceptible to **distort competition** within the internal market.

It is to be noted that the Commission undertook the compatibility assessment directly under the basis of Article 107 (3) c) TFEU.¹¹⁷

As in the case of the Sicilian environmental bonus, the Commission considered that the aid was necessary due to the existing market failures for promoting combined transport involving the maritime sector. Furthermore, the Commission considered that the aid was proportionate as it addressed the differences between the costs of the maritime services and the costs of road transport taking into consideration the negative externalities.

On a separate note, the Commission considered that the scheme provided freedom to the road hauliers for deciding on the most convenient ship liner and maritime route and was therefore not discriminatory.

Finally, the Commission concluded that the scheme did not have a competitive impact either in (i) the rail transport sector (due to the lack of competition between both transport modes or (ii) between the maritime service providers.

- **The 2012 Commission Decision opening a formal investigation procedure for the modification of the Italian Ecobonus scheme**

¹¹⁶ Commission Decision of 20 August 2005 in case N 496/ 2003 *Aiuto per lo sviluppo delle catene logistiche e il potenziamento dell'intermodalità*.

¹¹⁷ In 2005 the Commission did not apply the 2004 Maritime Guidelines, as it did not consider ship owners as beneficiaries. This view changed in its 2012 Decision, in which the EC noted that shippers providing maritime services were the real beneficiaries of the scheme.

The objective of the initial scheme as authorized by the 2005 Decision was to achieve a significant shift of heavy traffic from road to combined road-sea transport. The stabilization of this intermodal shift was expected once maritime traffic, in terms of journeys and tonnage, had increased by **one third** in 2011 as compared to 2007.

However, from the second half of 2008 the economic downturn hit the haulage companies benefitting from the scheme halfway through its implementation, making it difficult to obtain stabilization of the shift in transport.

Taking this into account, the Italian ministry decided to extend the scheme over two years (2010 and 2011). The intended modification was notified to the Commission in order to obtain favorable approval.

Although the initial scheme was compatible with the internal market, the Commission noted in its opening decision, that the modification of the scheme appeared to **contravene a condition of the 2005 decision**, by which road hauliers benefitting from the scheme undertook to maintain the same number of journeys or transport the same quantity of goods in the three years following the expiration of the scheme, *without receiving aid*.¹¹⁸

Furthermore, the Commission noted that the shippers providing maritime service to road hauliers could be considered as ‘indirect beneficiaries’ of the scheme. Consequently the Commission considered the need to assess the extension under the compatibility rules set under the **2004 Maritime Guidelines**.

- **The Commission 2013 decision approving the extension of the Italian ecobonus scheme.**

In its 2013 decision, the Commission concluded that the extension of the Italian ecobonus scheme constituted State aid within the meaning of Article 107 (1) TFEU.¹¹⁹

Under the compatibility assessment, the Commission noted that the 2004 Maritime Guidelines set out several criteria for assessing the compatibility of a measure designed to improve intermodal chain and to decongest roads. Nevertheless the Commission considered the need of **adapting such circumstances in the light of the case** (modification of an existing scheme already directly approved under Article 107 (3) c) TFEU) and the specific circumstances that significantly altered the market conditions.

In particular, the Commission reviewed the different requirements set in the 2004 Maritime Guidelines as follows:

- (i) *The aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member States.*

¹¹⁸ Commission decision of 25 July 2012 on State aid SA. 33412 (2011/N) Italy, *prolongation of the aid scheme for the development of logistics chains and the upgrading of intermodality (Ecobonus)*.

¹¹⁹ Commission Decision of 17 July 2013 in Case C/2012 ex N/2011 *by which Italy is planning to implement for the development of logistics chains and the upgrading of intermodality*.

This was indeed the condition which brought the most concern to the Commission, given that the original aid scheme approved in 2005 provided for three years of incentives followed by three years of operation without aid.

In order to alleviate the Commission concerns on compatibility, Italy undertook to amend the notified measure, shortening the extension from two to only one year. Consequently, the **overall duration of the incentives was established for four years.**

To justify the prolongation of the measure over the time limit of three years, Italy had to demonstrate that the economic crisis affected the operation of transport services from the second half of 2008, with the result that the beneficiaries could not fulfil their commitment to continue the commercial operation of the services in question after the initial funding period of three years.

Further, the Commission noted the discrepancy existing between the 2004 Maritime Guidelines and the Railway Guidelines as regards to the maximum time limitation (3 years as opposed to 5 years) and on the prohibition of renewal of the scheme (which was not foreseen under the Railway Guidelines).

On this point, the Commission advanced that in a future revision of the Maritime Guidelines, a possibility would be provided for declaring aid compatible for a supplementary period to the three years, provided that certain circumstances are complied with.

Therefore, even if the overall duration of the scheme as amended was four years, the Commission considered that, *in the particular circumstances of the case* it was justified, deeming as compliant the one year extension of the original scheme with the above condition.

- (ii) *The service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest.*

The Commission took into account that the new budget devoted to the one year of extension of the original scheme was relatively modest (EUR 30 million) and the purpose of the subsidized scheme was to support an intermodal shift from road to maritime transport.

- (iii) *The aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several ship-owners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question.*

Regarding this third condition, it was noted that the aid granted to road hauliers by journey corresponded to the difference of the external costs generated by maritime and road transport, calculated on the basis of an updated study completed by Friends of the Earth. Moreover, the aid was limited to the amount necessary to encourage the switch to maritime services

With regard to the condition that projects should concern only new routes or upgrading existing services, the scheme as amended would apply to routes that have already been financed by the initial scheme. Therefore, the Commission considered that the assessment of the notified extension of the scheme in the light of this condition **was not relevant**, as the amendment necessary applied to routes that had been financed under the existing scheme.

It is relevant to highlight that this condition was not assessed in the 2005 Decision, as the Maritime Guidelines did not applied in that occasion for the reasons we have already explained. In this regard, it is not clear whether or not the original scheme would had been authorized if this condition had applied since the beginning, since the maritime services included under the 2005 Ecobonus did not concern a new route or the upgrading of the services of an existing one.

As originally, the beneficiaries will be free to choose the most convenient maritime line among those included in the ministerial decree and the most competitive operator.

(iv) *The purpose of the aid must be to cover up to 30% of the operational costs of the service in question.*

The subsidy granted to selected projects was limited to 30% of the operational shipping costs, so this condition was fulfilled.

(v) *The aid must be granted on the basis of transparent criteria applied in a non-discriminatory way to ship-owners established in the Community. The aid should normally be granted for a project selected by the authorities of the Member State through a tender procedure in compliance with applicable Community rules.*

The Commission did not analyze this condition in detail, taking the view that the criteria applied for awarding the aid were indeed transparent, and that ship-owners in the Union were treated in a non-discriminatory way.

(vi) *The service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding.*

Under the modified scheme proposed by Italy the overall aid was to be granted during a total period of four years. Accordingly, the Italian proposal also extended up to four years the beneficiaries' obligation to operate services commercially after the end of the subsidy. Therefore, the Commission considered that this condition was met.

(vii) *The aim must not be cumulated with public service compensation (obligations or contracts).*

This condition did not raise any Commission concerns.

After examining the above mentioned conditions, the Commission concluded that the modification of the scheme through a one-year extension was compatible with the internal market under Article 107 (3) c) TFEU.

5.1.3 The Italian Ferrobonus

The Italian Ferrobonus was an incentive for the development of combined transport involving the road and rail modes.¹²⁰

The Commission decision authorizing the aid used different legal basis than the one used to assess the compatibility of measures for the development of Short Sea Shipping. However, the analysis of this decision is relevant for the purposes of the present **handbook** by reason of the insights that can be gained from the Commission legal reasoning.

- **Description of the aid**

The Ferrobonus aimed at reducing the cost of combined electrified rail transport. It consisted of a partial payment of the **operating costs to logistics companies or to final users of transport services** (in the case of a direct contract between the railway undertaking and the final customer).

This partial payment was disbursed under the form of a **direct grant** corresponding to **part of the external costs which rail transport makes possible to avoid** when compared to road.

The Italian administration opted, for reasons of administrative simplification, for a subsidy system **based on train-kilometres** (EUR 2 per train-kilometre), which according to the Italian authorities meant, on average, of EUR 5 per 1000 tonne-kilometres.¹²¹

The measure was adopted for **one year** and its overall allocated fund corresponded to **EUR 25,7 million**. Similar to the Ecobonus, the aid was to be paid at the end of the financial year. However, the Italian legal basis foresaw the possibility of advancing the payment by 20%, provided that a surety policy was issued for the same amount.

- **The 2011 Commission Decision authorizing the State aid granted to the Ferrobonus scheme**

The Commission considered the financial support granted under the Ferrobonus scheme qualified as State aid pursuant to Article 107 (1) TFEU.

The Commission analyzed the compatibility of this State aid regime under **Article 93 TFEU**, which applies as *lex specialis* to measures addressing inland transport (rail, road and inland waterways). In particular, the Commission made use of **Section 6** of the **Railway Guidelines** for its compatibility assessment, as it considered railways undertakings as the indirect beneficiaries of the measures.

¹²⁰ Commission Decision of 16 December 2011 in State aid No SA.32603- *Italy- Subsidy scheme “Ferrobonus” for combined transport*.

¹²¹ This was based on the estimation by the Commission’s Joint Research Centre - load per train at the level of 400 tonnes for Italy. This value was in line with the data of the Ex-tremis database, based itself on International Union Railways data. For more information see <http://www.ex-tremis.eu>.

The Commission made its assessment on the following basis:

(i) *Existence of external cost savings:*

In line with points 103 to 105 of the Guidelines, the Commission concluded that the eligible costs of the scheme corresponded to the part of the external costs which rail transport makes possible to avoid compared with road transport.¹²²

(ii) *Necessity and proportionality of the aid measure*

According to paragraphs 107 (b) and 109 of the Guidelines, there is a presumption of necessity, proportionality and absence of overcompensation when the intensity of the aid stays below the following values: **30% of the total cost** of rail transport, up to **50% of the eligible costs**:

- *Aid not exceeding 50% of the eligible costs: comparison of aid per 1000 tonne-kilometres with external cost savings per 1000 tonne-kilometres*

A grant of EUR 2 per train-kilometre corresponded to EUR 0,005 per tonne-kilometre, given that the average load train under the scheme was assumed at the level of 400 tonnes for Italy. Per 1000 tonne-kilometres the aid therefore amounted to an average of EUR 5. This represented 37% of the external avoided costs and it's therefore clearly less than 50%.

- *Aid not exceeding 30% of the total cost of the cleaner transport mode*

Based on the available information the Commission estimated that the average cost of rail freight in Italy was 10 EUR per train kilometer. With an average trainload of 400 tonnes per train aid intensity up to 30% would correspond to 21% of the total transport cost.

(iii) *Realistic prospects of keeping the traffic transferred to rail*

In this regard, the Commission observed that the scheme was indeed designed in order to generate a sustainable trend of modal shift. In particular, beneficiaries should undertake to maintain the traffic for a certain period of time.

(iv) *The aid scheme is granted on non-discriminatory terms, the aid scheme is transparent and time-limited*

Firstly, the Commission observed that aid was granted on non-discriminatory basis at it addressed the largest number of entities in the logistics chain and was not provided on the basis of nationality of the undertaking. Secondly, the Commission considered the scheme to be transparent, as the conditions for benefitting the Ferrobonus as well as the excise duty exemption were clearly stipulated in the relevant legal basis. Finally, the Commission considered that the scheme that was limited to a year complied with the time limit of 5 years set in paragraph 97 of the Guidelines.

¹²² The Italian authorities provided several studies regarding the calculation of external costs relating to road and rail freight transport (FoEI, INFRAS/IWW, ASTRA-Italy, ASTRAS/IWW, Marco Polo). See Table 1 of the Ferrobonus Decision.

(v) *No effect on competition and trade contrary to the common interest*

The Commission concluded that the scheme in question did not give rise to a distortion of competition according to point 96 of the Railway Guidelines as it was limited to reducing imbalances between railway and road transport.

In the view of all the above, the Commission considered that the notified aid scheme was compatible under Article 93 TFEU.

5.1.4 The Basque Ekobonus

- **The context and description of the aid**

The Basque Department of Transport adopted in September 2008 an official call to grant incentives to intermodal road-sea transport.¹²³

The aid scheme aimed to enhance transfer of heavy freight vehicles from road to sea, to decongest Basque roads. Particularly, the Government had in mind the crossing point at Biriattou, the most congested part of the Basque road network.

With this regional initiative the Transport Department wanted to rebalance the use of the various means of transport, supporting the most sustainable and environmentally friendly ones. The Government allocated EUR 500,000, the project from the General Budget of the Region for the 2008 fiscal year.

The Ekobonus granted a percentage of the maritime tariff of journeys between a Basque seaport and any seaport situated in the territory of a Member State. The beneficiaries of the aid must be transport companies domiciled in the Basque Country.

The system provided aid only for non-accompanied transport ('Roll on-Roll off' or 'Ro-Ro'). The aid was granted in the form of direct subsidies calculated on the basis of the number of "Ro-Ro" units embarked per year:

- (i) 20-50 Ro-Ro units per year: 15% of the shipping tariff.
- (ii) 50-100 Ro-Ro units per year: 20% of the shipping tariff.
- (iii) More than 100 Ro-Ro units per year: 30% of the shipping tariff.

- **The Basque Ekobonus as *de minimis* aid**

The Basque Ekobonus was conceived to fall within the scope of the *De minimis* Regulation in force at the time, which set a threshold at the level of **EUR 100,000 over three fiscal years** for companies active in the road transport sector.¹²⁴

¹²³ Orden de 30 de septiembre de 2008, Consejería de Transportes y Obras Públicas del País Vasco

¹²⁴ Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5–10

Since the Basque authorities considered that each road haulier did not benefit from an incentive above this limit, they did not notify the scheme to the Commission. However, the assessment of the Basque authorities did duly take into account the aid indirectly received by ship liners, who might have overcome the said threshold. In any case, the Commission has never taken the occasion to express its views on this scheme.

The Basque Ekobonus was finished in 2013 due to the economic turmoil.

5.1.5 Other 'Ecobonus' initiatives in Europe

- **France- ECOMER by BP2S**

The French Bureau de Promotion du Shortsea Shipping ('**BP2S**') prepared a study about the possibility of introducing an incentive to demand to shift freight traffic to sea known as the '**ÉCOMER**' initiative.¹²⁵

The French model was not aimed exclusively at road hauliers, but also to shippers and freight forwarders. Moreover, the Ecomer was meant to be applied in the case of transporting containers or swap bodies and not only for trucks and trailers.

The BP2S proposed two calculation methods for the incentive:

- (i) The first concerned the difference of **external costs** between sea and road transport. The cost for road transport was set at the level of EUR 0,035 per tonne-km, while the costs by maritime transport were established at EUR 0,009 per tonne-km. In this case the incentive was proposed at a level **40%** of the difference of the external costs.
- (ii) The second concerned the **number of km avoided by road** (EUR 2 per 500 tonnes-kilometers). In this second case, the incentive covered the amount in its integrity.

- **Norway**

The *Norwegian National Transport Plan* (NTP) in April 2013 proposed to strengthen the competitiveness of shortsea shipping by '*establishing an incentive scheme that encouraged the choice of shortsea shipping*'.¹²⁶

The introduction of the Ecobonus system in Norway was proposed by the Shortsea Promotion Center Norway in 2012. The Government agreed to allocate EUR 40 million per year for this purpose in its 10 year NTP.¹²⁷

¹²⁵ See: http://www.shortsea.fr/2010-03-10_notebp2s_ecobonus.html

¹²⁶ See: <http://www.shiptonorway.no/News/96/Eco%20bonus%20is%20planned%20in%20Norway>

¹²⁷ Norwegian State aid schemes shall be notified to the European Free Trade Association (EFTA).

5.2 State aid Decisions addressing the offer of Maritime transport services

The current heading focuses on the aid schemes addressing the **offer** of combined transport modes (from road to inland waterways, railways and short-sea-shipping). Although the functioning of these schemes differs from the ones described before, their analysis shed light on the Commission practice regarding State aid to intermodal transport.

We will first present the Decisions concerning short-sea shipping, providing a further examination regarding the *Fres MoS* (Gijón-Nantes) and *Atlantica MoS* (Vigo-Nantes) Decisions. Second, we will examine some Decisions concerning intermodal transport by train. Finally, an example is provided of aid supporting the shift from road to inland waterways.

5.2.1 State aid for intermodal transport by Short-Sea Shipping

The Decisions examined below authorized State aid to promote Short Sea Shipping within the Member States with the aim of promoting intermodal transport within the EU.

- **Commission Decision authorizing regional aid to promote combined transport in the region of the Friulia-Venezia Giulia**

In March 2006 the Commission approved an Italian aid scheme for logistics undertakings organizing combined transport services departing or arriving from a railway station or intermodal center located in the Friulia-Venezia Giulia region.¹²⁸ The scheme aimed at promoting combined transport operations **by rail and by Short-Sea Shipping services**.

The scheme was designed to offset the various additional external and specific infrastructure costs of combined transport and sea transport compared to purely road transport.

The Commission considered the scheme to be compatible with the Treaty. In this case, the Commission had to apply two different legal bases, as the scheme involved both rail and short-sea shipping.

For the authorization of intermodal transport by train, the Commission applied Article 93 TFEU and Article 3(b) of Council Regulation (EEC) 1170/70 of 4 June 1970 on the granting of aid for transport by rail, road and inland waterways.

As regards the compatibility of the Short Sea Shipping aid, the scheme was assessed under Article 103.3 (b) and Chapter 10 of the 2004 Maritime Guidelines.

- **Commission Decision authorizing the Waterborne Freight Grant (WFG) Scheme**

In April 2009 the authorities of the United Kingdom notified the Commission of an aid scheme aiming to encourage the modal shift of freight from road **to water by means of**

¹²⁸ Commission Decision of 2 March 2006 in Case N 436/2004 *Measures to develop intermodality*.

providing support for coastal or Short Sea services.¹²⁹ The notified scheme replaced a previous WFG scheme, authorized in 2005.¹³⁰

The aid scheme granted aid to **any company** within the EU or third countries within the European Economic Area.

The aid was limited for a period of five years, **from 1 April 2010 to 31 March 2015**. This scheme has recently been extended for five years until **31 March 2020**.¹³¹

Nevertheless, aid for any successful project would be available for a maximum of three years, in compliance with the time limit set by the Maritime Guidelines. Moreover, an absolute ceiling of EUR 2 million was set per project.

Grants were restricted to the lowest of (i) the value of the benefits of the modal shift; (ii) the financial need; (iii) 30% of the operating costs.

The eligible costs included:

- (i) costs of hiring, leasing or the amortization of combination of vehicles;
- (ii) costs of hiring, leasing or amortization of sea going vessels;
- (iii) costs of hiring, leasing or amortization of installations permitting transshipment between shipping routes, railways and roads;
- (iv) cost of using maritime infrastructure;
- (v) the expenditure relating to the commercial operation of techniques, technologies or equipment previously tested and approved, in particular transport information technology;
- (vi) the costs of measures related to staff training and the dissemination of project results as well as expenses for information and communication activities to make new transport services known;
- (vii) The costs associated with separate accounting and feasibility studies.

The estimated annual budget amounted to GBP 2 million in England. For Scotland, there was an annual budget of GBP 8 million shared between this scheme and the MSRS scheme (explained in the next section).

The Commission assessed the compatibility of the scheme **under Article 107 (3) c) TFEU following the criteria set in the 2004 Maritime Guidelines:**

- (i) *The aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member State*

¹²⁹ Commission Decision of 3 July 2009 in case N 249/2009 *UK Waterborne Freight Grant Scheme*.

¹³⁰ Commission Decision of 30 September 2005 in case N 206/2003 *UK Waterborne Freight Grant*.

¹³¹ Commission Decision of 7 January of 2015 in case SA.39355 (2014/N) *UK Prolongation of the Waterborne Freight Grant Scheme*.

Although the scheme was in force during a period of five years, the aid selected for each project was available for a maximum of three years.

- (ii) *The service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest.*

The Commission noted that projects would only be financed following verification that they would not serve to divert traffic flows between existing services or between alternative modes of transport.

The Commission also took into consideration the relatively modest budget of the scheme (GDP 50 million for the period 2010-2015) and the limited ceiling imposed on any grant award.

- (iii) *The aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several ship-owners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question.*

For each specific project, the environmental benefit associated with the transfer of one lorries mile of freight from road to water was calculated on the basis of Mode Shift Benefits values.

The obligation for beneficiaries to move a certain annual freight tonnage by water ensured that the subsidized projects would contribute to a real reduction in road traffic and thus provide for quantifiable environmental benefits within the UK. Moreover, no more than one project could be financed per line, and no renewal, extension or repetition of the project in question was permitted.

Grants could only be awarded to existing routes in exceptional circumstances. Aid could only be granted if the service in question had not received previous support. Clear evidence that such services would not cease operation in the absence of financial support needed to be provided.

- (iv) *The purpose of the aid must be to cover up to 30% of the operational costs of the service in question*

The subsidy granted to selected projects was limited to the lowest between: (i) the amount necessary to compensate for the higher costs of the maritime transport, (ii) the value of the benefits of mode shift and (iii) the 30% of the operating costs.

Moreover, an overall ceiling of 30% for the total water freight project cost would apply where an applicant applied for both WFG and Freight Facilities Grant Scheme (FFG).¹³²

¹³² Authorized by the Commission in its Decision of 19 December 2002 in case N 649/2001 *Freight Facility Grant (United Kingdom)*.

- (v) *The aid to implement the project must be granted on the basis of transparent criteria applied in a non-discriminatory way to ship owners established in the Community.*

The Commission noted that the criteria applied for awarding the aid were transparent and that ship-owners in the Community were treated in a non-discriminatory way. The details of the procedure as well as information on the grants were published on an annual basis in the Official Journal of the European Union.

- (vi) *The service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding.*

Under the notified scheme, the viability of the projects after a maximum of three years of receiving subsidy was mandatory.

- (vii) *The aid was not cumulated with public service compensation (obligations or contracts)*

In view of the foregoing, the Commission concluded that the abovementioned compatibility criteria were satisfied in the present case.

- **Authorized State aid to the *Fres MoS* project, Gijón (Spain) and Nantes-Saint Nazaire (France)**¹³³

In 2007 Spain and France entered into an international agreement aimed to agree on the best maritime routes to fulfil the proposed objectives.

In February 2009 both transport Ministers announced that two MoS had been chosen: one between the ports of Nantes and Gijón run by the French company GLD Atlantique (MoS ‘Fres MoS’) and the other between Nantes-Vigo extended to Algeciras and Le Havre, run by a Spanish company called Autopista del Mar Atlántica (‘MoS Atlantic’).

‘Fres MoS’ aimed at reducing road congestion in the Pyrenees, decreasing pollution, traffic accidents and other externalities associated with heavy freight circulation. It connected the seaports of **Gijón and Nantes** using a system of **accompanied transport** (drivers accompany vehicles while transported).

The ‘Fres MoS’ project fell within ‘Motorways of the Sea’ priority of the **Marco Polo II program**, under which it was granted **EUR 4,1 million** of financial support.

Description of the State aid

Spain and France supported the service during the first **four years** of its implementation. Financial support was progressively reduced during the relevant period. As designed, the project ensured the continuation of the service over seven years in order to assure the definitive introduction of system.

¹³³ Commission Decision of 27 January 2009, in State aid N 573/09 France and State aid N 647/09- Spain for the *launch and exploitation of the MoS between the points of Nantes-Saint Nazaire (France) and the port of Gijon (Spain)*.

The total funding received from both Member States amounted to EUR 30 million, where France and Spain gave EUR 15 million each. The aid was granted in the form of direct subsidies to the service provider, the French company GLD Atlantique.

The 2010 Commission Decision regarding State aid to the Fres Mos project

The Commission considered the financial contribution of Spain and France to fall under the terms of Article 107 (1) TFEU: both Member States granted direct subsidies (economic advantage) from state resources to a particular company to the detriment of other competitors (selectivity), which could potentially distort competition within the internal market.

The Commission conducted its analysis on compatibility following **Article 107 (3) c) TFEU** and Chapter 10 of the **Maritime Guidelines** (“*Aid to short sea shipping*”), given that the recipient was a maritime company registered in one Member State.

However, as the notified measure concerned a project selected under the Marco Polo II programme, the 2008 Guidelines on the Motorways of the Sea applied. This Guidelines increased the maximum intensity and duration of the State aid granted to a project to **35% of the operational costs for a period of five years**.

In the case at issue the aid was granted for a period of 4 years, which was in line with the Guidelines. Moreover, the Community funding, together with the national aid, did not exceed the 35% of eligible costs.

The Commission also took into consideration that the selection procedure to choose a service provider was conducted on an open, transparent and non-discriminatory basis. Moreover, the Member States had established a surveillance mechanism to verify the proper use of the funding *a posteriori*.

Following the Commission analysis, the State aid was not accumulated with other public service compensation and did not have a negative impact in the functioning of other Mos (particularly the existing Bilbao Zeebrugge and Nantes-Vigo services) what could have negatively affected the common interest.

Finally, the Gijón-Nantes MoS was considered to be capable of being commercially viable after the end of the subsidized period.

On these bases, the Commission concluded that State aid granted by France and Spain to the Fres MoS project was compatible with the internal market under Article 107 (3) c) TFEU as it complied with the thresholds and criteria set in the 2004 Maritime Guidelines and the 2008 Guidelines on the Motorways of the Sea.

- **Authorized State aid to the *Atlantic* MoS project Vigo/Algeciras (Spain) – Nantes/Le Havre (France)**

The ‘*Atlantic* MoS’ between Nantes-Algeciras and Vigo-Le Havre was the other leg of the joint Hispanic-French initiative that launched the Fres MoS project.¹³⁴

The ‘Atlantic’ project had the objective of increasing the freight capacity of the maritime route Nantes-Vigo, introducing **a third weekly round journey** between both seaports with a **possible extension** to Algeciras and Le Havre. On this occasion, the chosen system was one of **non-accompanied traffic** (drivers bring the trailers to the port of departure and other drivers collecting them at the destination).

The geographic market affected by this proposal was intended to comprise the north of Portugal, Galicia, the northwestern French region, the Benelux region and the south of Germany.

‘Atlantic MoS’ was operated by the Spanish Company “Suardiaz Atlántica S.L.”, which received EU funding under the 2013 **Marco Polo II** call for proposals amounting to EUR **3 million**.

Description of the State aid

Spain and France decided to give support **during the first 5 years**, after which the project was expected to be economically feasible without public support. National aid was to be reduced during the course of the reference period.

Regarding the intensity of the aid, the exact amount was not set *a priori* but according to the plan presented by France and Spain it would not exceed **35% of the operational costs**. In this regard, the project established that the *start-up* aid would be **limited to EUR 26,7 million (including the EUR 3 million from the Marco Polo II programme)**. The aid was granted through direct subsidies to the company “Suardiaz Atlántica S.L.”

The 2015 Commission Decision authorizing State aid to the “Atlantic MoS” project

The Commission characterized the financial support given by Spain and France as State aid under Article 107 (1) TFEU, as it granted an economic advantage in a selective manner and was liable to distort competition within the internal market.

The Commission used the 2004 Maritime Guidelines and the 2008 Guidelines on Motorways of the Sea as the appropriate instruments to assess the compatibility of the State aid regime with the internal market under Article 107 (3) c) TFEU:

- (i) *The aid must not exceed five years in duration and its purpose must be to finance a shipping service connecting ports situated in the territory of the Member States.*

¹³⁴ Commission Decision of 17 September in State aid SA.41620 (2015/N)- Spain and SA.41651 (2015/N) France *Aid for the exploitation of the MoS between the ports Vigo/Algeciras (Spain) and Nantes/Le Havre (France)*.

The duration of the public financial support to the project was five years, so this condition did not pose any obstacle regarding the compatibility of the scheme with the Treaty.

- (ii) *The service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest.*

The Commission accepted that the implementation of the aid scheme to the Vigo-Nantes route did not pose competition concerns with other maritime transport services.

Particularly, they pointed out that the ‘Atlantic’ project would not prejudice the **existing** Gijón-Nantes route, because the Vigo-Nantes Motorway affects a **different geographic market**, given that the distance between Gijón and Vigo is 405 Km. Therefore the routes would attract different transport companies.

Moreover, Gijón-Nantes used an accompanied transport system while Vigo-Nantes used a non-accompanied one, which made them structurally different.

- (iii) *The aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several ship-owners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question.*

The Commission noted that the project included a social and environmental impact analysis, using the Marco Polo II methodology. Moreover, the Member States committed to not financing any other project for the same route or to extend the financing period.

- (iv) *The purpose of the aid must be to cover up to 35% of the operational costs of the service in question.*

The agreement entered into by both Member States in 2009 regarding the implementation of *Atlantica* and *Fres Mos* MoS established a 35% threshold of eligible costs. Moreover, an annual surveillance mechanism was established between the operator “Suardiaz Atlántica S.L.” and the Member States.

- (v) *The aid to implement the project must be granted on the basis of transparent criteria applied in a non-discriminatory way to shipowners established in the Community.*

Both Member States selected the service providers through a public tender that was published in the Official Journal of the European Union and national official journals. The selection criteria and objectives of the initiative were made public.

- (vi) *The service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding.*

The Commission noted that the service was capable of becoming commercially feasible in its **sixth year** of operation when the public funding ceased.

- (vii) *Such aid must not be accumulated with public service compensation (obligations or contracts).*

Accordingly, the aid was not accumulated with any public service compensation.

On this basis, the Commission concluded that the aid scheme proposed by Spain and France was compatible with the internal market under Article 107 (3) c) TFEU.

As we have seen, in both the *Fres Mos* and *Atlantic* Projects the Commission allowed State aid up to 35% of the operational costs for a maximum period of five years. This threshold is included in the 2008 Guidelines on Motorways of the Sea, which are only applicable if the aid granted by the State is complementary to EU funding under the framework of the Marco Polo II programme. Therefore, EU funds were needed for the application of the 2008 Guidelines. Otherwise, the 2004 Maritime Guidelines apply in its entirety.

5.2.2 Decisions authorizing State aid for intermodal transport by train

The Commission has perceived the high infrastructure costs related to the rail transport sector as disproportionate to similar costs attributable to other modes of transport.

To compensate for the handicap suffered by railways in relation to road transport and to create a more level playing field between the two modes, measures that encourage the transfer of goods traffic from road to rail have received a positive reaction in relation to their compatibility with State aid *acquis* and the principles of the internal market. Such measures aimed at neutralizing the external costs and infrastructure costs that are not borne by road transport.

A more detailed analysis is included here below of two initiatives authorized by the Commission to support modal shift to railways.

- **Commission Decisions authorizing the Rail Environmental Benefit Procurement Scheme**

The “**Rail Environmental Benefit Procurement Scheme**” (REPS) was introduced in the United Kingdom in 2007,¹³⁵ replacing two previous incentive schemes: the “**Company Neutral Revenue Scheme**” (CNRS)¹³⁶ and the “**Track Access Grant Scheme**” (TAG). The grants were designed to provide continuity in the support for the deep-sea, short-sea and domestic intermodal container business that moves by rail.

The objective of the REPS scheme was to incentivize shipping lines, ports, logistics providers and train operators to take demand risk and increase intermodality with rail.

Any company, regardless of the nationality of ownership or control could apply for REPS if it was acting as the operator or contractor of an eligible rail service.

¹³⁵ Commission Decision of 12 October 2006, N 427/2006 *UK Rail Environmental Benefit Procurement Scheme (REPS)*.

¹³⁶ Commission Decision of 16 December 2003 in case N 464/2003, *UK Company Neutral Revenue Scheme*.

The contractor/operator was therefore the person **taking the commercial risk to secure cargo for the rail service**.¹³⁷

The new scheme provided fixed **grant rates** which were payable in arrears for each container moved. The grant rates were based on the principle that traffic flow was eligible for grant if a) the environmental benefits justified it and b) the cost of using rail were greater than the cost of using roads. For the purposes of the scheme, Great Britain was divided into 18 regions, each of which had its own region-to-region fixed rate grant.

The grant was limited to the lower of the environmental benefits or the financial need of the grant.

- (i) Environmental benefits were defined as the net unpaid external costs of road. The appropriate values, Sensitive Lorry Mile (SLMs) for the unpaid external costs of road and rail had been last amended in 2003.
- (ii) Financial need was defined as the difference between the door-to-door cost of road (road cost) and the door-to-door cost of a rail based solution. The financial need was calculated by research institutes after having consulted a wide range of sources.

As a general rule, the grant could not exceed 30% of the total door-to-door rail-based costs. Moreover, the notified scheme was limited for a period of three years (**1st April 2007 to 3rd March 2010**). Before the end of the period, an evaluation report had to be submitted to the Commission in order to assess the prolongation of the scheme.

The allocated budget was GBP 20 million (EUR 29 million) by year, while the total amount of the budget was fixed at the level of GBP 60 million (EUR 87 million).

The Commission authorized the **REPS** on the basis of Article 93 TFEU as it promoted the transfer of traffic flows from road to rail and encouraged the development of environmentally friendly modes of transport as competitive alternatives to road haulage.

In particular, the Commission analyzed the regime under **Article 3 (1) (b) of Council Regulation No 1107/70** which stipulated that Member States could provide aid to undertakings that had to bear expenditure related to the infrastructure that was going to be used by other undertakings as well who were not subject to the same financial burden.¹³⁸

¹³⁷ According to the Decision N 427/2006, an operator or contractor in this context was any company taking commercial responsibility directly or indirectly (through a subcontracted agreement) to pay track access charges to Network Rail for an eligible rail service. UK legislation (The Railways Act 2005) provides that any person may contract with Network Rail for infrastructure capacity. It was therefore expected that the grant would be paid to (a) rail operators (b) Shipping Lines, Freight Forwarders and Terminal Operators, where they take the risk on a rail service and (c) end customers such as supermarkets or manufacturers, where they take the commercial risk on a rail service, contracting with a rail operator for haulage only.

¹³⁸ Regulation No 1107/70 was repealed by Regulation No 1370/07 as explained under Section 4.

The Commission noted that the aid scheme fulfilled the **criterion of necessity**, since the subsidies were limited to what was necessary to achieve the purpose of a shift from road to rail in promoting the movement of intermodal containers by rail.

Moreover, the aid was limited to the lowest of the environmental benefits -external costs generated by road transport- or the **real financial need** for the shift of transport (the amount of grant required to make rail and road costs equal).

The Commission also considered that the UK had provided evidence to demonstrate that the process used to estimate the value of external costs of transport was transparent and reasonable. The level of subsidy was based on a sound comparative cost analysis and was limited to an amount justified in terms of differences in unpaid external and infrastructure costs between rail and road transport.

Finally, the scheme fulfilled the requirements of EU legislation and was therefore compatible with the smooth functioning of the internal market.

- **Commission Decision authorizing the British Mode Shift Revenue Support (MSRS) Scheme**

The Mode Shift Revenue Support Scheme (MSRSS) encouraged modal shift of freight from road **to rail and inland waterways** within the United Kingdom.¹³⁹ The MSRS granted financial support through state resources provided that they generate environmental benefits within the UK.

The MSRS was a direct replacement for both the REPS and the WFG for inland waterways.¹⁴⁰ The WFG, examined above, continued assisting companies with the operating costs associated with short shipping and coastal shipping. The intermodal British aid support was completed with the **Freight Facilities Grant (FFG)**, which helped offset the capital cost of providing rail and water freight handling facilities.

Applicants could seek grant support through the MSRS scheme, as well as the Freight Facilities Grant. In assessing the application, the administrative body leading on the FFG application had to assess the total grant requirement and total environmental benefit of the proposal.

The notified aid was limited for a period of five years (**from 1 April 2010 to 31 March 2015**) with a yearly budget of GBP 19 million for England. For Scotland, an annual budget of GBP 8 million was allocated between this scheme and the Waterborne Freight Grant scheme (analyzed below). The 3 December 2014, the European Commission approved the prolongation of the scheme for five additional years (until **31st March 2020**).¹⁴¹

¹³⁹ Commission Decision of 29 September 2009 in case N247/2009 UK *Mode Shift Revenue Support (MSRS) scheme*.

¹⁴⁰ Commission Press Release IP/04/498, 20 April 2004. Available at http://europa.eu/rapid/press-release_IP-04-498_en.htm

¹⁴¹ Commission Decision of 3 December 2014 in State aid SA.39354 UK *Prolongation of the Mode Shift Revenue Support Scheme*.

The MSRSS had two sub modalities with different forms of calculation of the aid:

- (i) **MSRS Bulk and Waterway**, for all inland waterway freight and non-container traffic by rail. A full assessment was undertaken on a case by case basis to establish the maximum level of grant.
- (ii) **MSRS Intermodal**, for which a set of grant rates for each container moved was provided. For calculating these maximum grant rates 18 zones across Great Britain were been defined.

The grant rates for both MSRS (Bulk and Waterway and Intermodal) were based on the principle that a traffic flow was eligible for grant if justified by the environmental benefits and the financial need. Any grant was limited to whichever was lower of these two factors. In addition, as regards the Intermodal modality, the grant was always limited to the maximum grant rate.

For the purpose of the benefit:

- (i) Environmental benefits were defined as the **net unpaid external costs of road**. The values of the external costs were based on the latest evidence available, to reflect more accurately the environmental costs and benefits generated by the modal shift of freight movements from road to rail or water.
- (ii) The financial need was defined as the difference between the **total cost** of a rail based solution or a water-based solution and the total cost of road.

Grants did not exceed 30% of the total cost of rail transport or the total cost of inland waterway transport, up to 50% of the avoided external costs compared with road transport. The aid could not be accumulated with aid received from other local, regional, national or European schemes to cover the same eligible costs.

The European Commission decided **on 2 July 2009** not to raise any objections to this aid scheme.

The legal basis used to declare the compatibility of the aid was Article 93 TFEU and Article 3(1) (b) of Regulation (EEC) No 1107/70. This provision was interpreted at the light of Section 6 of the Railway Guidelines.

- (i) *Eligible costs:*

The eligible costs are the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes. In the case at stake, the grants were limited by the environmental benefits, which will be based on revised, up to date, values of the external costs of road and rail. These benefits were to be measured by the recently published Mode Shift Benefit values.

The methodology for calculating grant rates, the maximum support rates for MSRS Intermodal rates, as well as the procedure used for the assessment of applications was going to be made publicly available beforehand.

(ii) Necessity and proportionality of the aid:

The benefits were limited to both the environmental benefits and the financial need. Moreover, the scheme was also going to be monitored on a continuous basis to ensure that the intensity of the aid stayed below 50% of the avoided external costs compared with road transport.

(iii) The inherent distortion of competition does not jeopardise the general interest of the Community

The Commission noted that rather than diverting traffic between different modes of transport, the public financing provided under the notified aid scheme would allow them to compete equally against road freight transport.

(iv) Time-limitation

The notified scheme was limited for a period of five years. Therefore, it complied with the limitation period established under the Railways Guidelines.

In the view of the above, the Commission concluded that the planned scheme was in the Community's interest and was compatible under Article 3(1) (b) of Regulation (EEC) No 1107/70 (Article 93 TFEU for the extension) and the Railway Guidelines.

- **Commission Decision authorizing State aid for the promotion of rail freight transport in the region of Emilia Romagna, Italy**

On **January 2014** the Italian authorities notified an aid scheme in favor of rail freight transport in the Emilia Romagna region that **replaced a previous scheme** to encourage intermodality in the region.¹⁴²

Under the notified scheme, **logistics companies and railway undertakings (including consortia and cooperatives)** were granted a subsidy to compensate the difference in additional external costs of road transport to the benefit of their customers. The grant was provided under the condition of being lawfully constituted and having a registered office in an EU Member State.

This support scheme provided aid only to new rail transport services, which were specified in the call for applications.

¹⁴² Commission Decision of 30 September 2009 in case N 483/2009 *Aiuti a favore del trasporto ferroviario delle merci*.

Commission Decision

The Commission declared the scheme to be State aid within the meaning of Article 107(1) TFEU, and assessed its compatibility within Article 93 TFEU and the Railway Guidelines.¹⁴³

The Decision pointed out that, as the previous aid scheme had demonstrated, in most instances the direct beneficiaries of the scheme were logistics companies. However, even in those cases, the indirect beneficiaries of the scheme were railway undertakings since the subsidies granted to logistics companies increased the demand for railway services. Therefore, the Commission considered that the appropriate frame for assessing compatibility were the Railway Guidelines, either directly or by analogy.

(i) *Existence of external cost savings*

The Decision points out that rail freight transportation produces lower externalities in terms of accident and pollution costs, when compared to road transport. This mode of transport also had considerable spare capacity and could therefore play a role in diverting traffic away from the congested parts of the road networks.

For the purposes of the assessment of external cost savings, the Commission deemed it appropriate to use the calculation of its own Joint Research Centre which had calculated external costs for different transport modes in Italy based on the methodology presented in the Handbook on estimation of external costs in the transport sector, published by the Commission and based on the data from the TREMOVE model¹⁴⁴.

The subsidised services were, in the case at issue, almost exclusively electric rail services, based on the experience of the previous support programme and on the fact that electric traction is clearly more economically advantageous.

The Commission concluded that the eligible costs of the scheme corresponded to the external costs which rail transport made possible to avoid compared with road transport, in line with points 103 and 105 of the Railway Guidelines.

(ii) *Necessity and proportionality of the aid measure*

According to point 107 of the Guidelines, the Commission considered there to be a presumption of necessity and proportionality of the aid when the aid intensity complies with the two conditions laid down in point b)

The aid shall not cover more than 30% of the total cost of rail transport: According to the data provided by the Italian authorities, the aid amount would be always be under 30% of the

¹⁴³ Decision of the Commission of 13 June 2013 in State aid SA.38152 (2014/N) *in favor of rail freight transport in the region of Emilia Romagna*

¹⁴⁴ TREMOVE is an EU-wide transport model used as a policy assessment model, designed to study the effects of different transport and environment policies on the transport sector.

cost of the cleaner transport mode, based on the experience obtained with the previous aid scheme.

The aid shall not exceed 50% of the eligible costs: As regards the notified scheme, the calculation of the aid intensity was made taking into account the fact that the minimum distance at which rail transport becomes economically feasible, and is therefore used, is 200 Km. At the same time, the subsidy per tonne-km was limited to the first 120 Km. Thus the maximum subsidy for transporting 1 tonne of cargo was EUR 0,96 (120 Km*EUR 0.0008/tkm), while the corresponding minimum external cost economy would be EUR 2.3 (EUR 11.5/1000*200). Thus, the subsidy would represent up to 42% of the external avoided costs which were below the 50% threshold.

The Commission also noted that the award criteria of the scheme were designed in order to generate a sustainable trend of modal shift. In particular, the beneficiaries were obliged to maintain the traffic for a period of at least two years after the end of the subsidy scheme.

(iii) *The aid scheme is granted on non-discriminatory terms, is transparent and time-limited*

The Commission noted that the scheme was non-discriminatory as it was designed in such a way to include the largest number of entities in the logistics chain.

The scheme was considered transparent, as the conditions for its granting were stipulated in publicly available legal acts. Finally, the duration of the scheme was limited to three years. This was in line with the 5-year period laid down in the Railway Guidelines.

(iv) *No effect on competition and trade contrary to the common interest*

As regards competition between different modes of transport, the measure was limited to reducing imbalances between railway transport and road transport. On this basis, the Commission concluded that the aid scheme in question did not give rise to a distortion of competition.

After having analyzed all criteria set in the Railway Guidelines, the Commission concluded that aid was compatible with the internal market on the basis of Article 93 TFEU.

5.2.3 Decisions authorizing intermodal transport by inland waterways

State aid to promote shifts to inland waterway transport has been authorized, together with railway transport, under Article 93 TFEU.

- **Commission Decision authorizing a State aid scheme for inland waterway transport in Czech Republic**

In May 2008, the European Commission authorized a Czech State aid scheme to operators of inland waterway freight transport vessels.¹⁴⁵ The aid had a total budget of CZK 433.5

¹⁴⁵ Commission Decision of 20 May 2008 in case N 358/2007 Czech Republic *Modernisation de la flotte (navigation intérieure)*.

million (EUR 17.33) and was co-financed through the European Regional Development Fund.

The objective of this vessel modernization programme was to promote a more effective use of vessels, to raise the transport safety level and to reduce the impact on the environment.

The scheme included three specific sub-programmes:

- (i) Aid for the purchase of low-emission engines;
- (ii) Aid for investment in transshipment equipment, which would make vessels more competitive and operationally flexible, so as to support intermodality;
- (iii) Aid for investments into appliances to increase navigation safety and improve maneuverability.

The Commission considered that the EU transport policy encouraged the use of inland waterway and other environmentally friendly modes of transport to become competitive alternatives to road haulage.

In line with this general policy approach and the applicable legislative instruments, the Commission concluded that any distortion of competition through the notified aid was outweighed by its contribution to objectives of common EU interest.

5.3 State aid decisions authorizing State aid for intermodal transport in various transport sectors

In this section we analyze two State aid schemes that cover all categories of intermodal transport. Contrary to the incentives analyzed above, they affect all possible combinations to achieve intermodality from roads towards rail, inland waterways and Short Sea Shipping. The purpose of these incentives is **to encourage modal shift, without preference for any transport sector in particular**.

The Commission considered that these incentives fell within the notion of “**coordination of transports**” and consequently authorized both incentives under **Article 93 TFEU**. Nevertheless, with regard to Short-Sea-Shipping, **Article 107.3 c)** applies, as transport by sea is not listed in Article 100 TFEU.¹⁴⁶

These incentives have been declared compatible with the Treaty rules following different legal reasoning than for incentives to the actual service (for which the Maritime Guidelines apply in respect to Short Sea Shipping). However, for reasons of completeness of our analysis, we include a brief summary of the Commission Decisions authorizing both schemes.

¹⁴⁶ Article 100 TFEU, first paragraph: “The provisions of this Title shall apply to transport by rail, road and inland waterway”.

- **Commission Decision authorizing State aid for intermodal transshipment in France**

In 2014 the European Commission authorized the extension¹⁴⁷ of a State aid regime that had been in force since 2003.¹⁴⁸ The objective of this scheme is to develop combined transport so that it constitutes an attractive alternative to road haulage.

The aid regime consists of the partial compensation of the **additional costs induced by transshipments** related to combined transport chains and operations. The modes of intermodal transport covered are: a) road to rail; b) road to inland water; c) rail to inland water; and d) road to Short-Sea Shipping.

The scheme grants a **flat rate payment per intermodal transport unit (UTI) transshipped**, covering all categories of intermodal transport. In any case, the aid shall remain below 30% of the total cost of transport (eligible costs).

The beneficiaries are the combined transport operators or freight forwarders from the EU and Switzerland who operate one or more regular combined transport services (rail, inland water and Short Sea Shipping, except feedering) between two locations of the French territory for domestic services or from/to the French territory for import/export services.

The Commission took the view that the scheme described above served the purposes of coordination of transport and applied the criteria of compatibility stated in its **consistent decisional practice**¹⁴⁹ under Article 93 TFEU (see Section 4.3.5), which are:

- The aid contributes to an objective of common interest;
- The aid is necessary, and provides an incentive effect;
- The aid is proportionate;
- Access to the infrastructure in question is open to all users on a non-discriminatory basis;
- The aid does not lead to distortions of competition contrary to the common interest.

¹⁴⁷ Commission Decision of 19 June 2014 SA.37881 France *Aides à l'exploitation de services réguliers de transport combiné de marchandises alternatif au mode tout routier pour la période 2013-2017*

¹⁴⁸ Commission Decision of 30 April 2003 N 623/2002 France *Aides d'État à l'exploitation de services réguliers de transport combiné de marchandises alternatif au mode tout routier*, extended by Commission Decision of 17 June 2008 N 159/2008 France *Aides d'État au démarrage et à l'exploitation de services réguliers de transport combiné de marchandises alternatif au mode routier*

¹⁴⁹ Commission Decision of 05.06.2013 in case SA. 35139 France *Prolongation et actualization du Plan d'Aides à la Modernisation et à l'Innovation de la flotte fluviale* (N 651/2007) pour la période 2013-2017 ; Commission Decision of 04.02.2014 in case SA.37293 Belgium *Prolongation du régime d'aides en faveur des modes de transport alternatif à la route pour la période 2014-2010* ; Decision of 23.11.2011 in case SA.33486 Germany *Richtlinie zur Förderung von Umschlaganlagen des Kombinierten Verkehrs nichtbundeseigener Unternehmen*

However, the Commission acknowledged that **Article 93 TFEU does not apply to Short Sea Shipping**. Indeed, the appropriate legal basis to assess the compatibility of State aid to the maritime transport sector is Article 107.3 c) TFEU. Nevertheless, **the Maritime Guidelines are not applicable** to the case at issue, as the aid concerns the transshipment of UTI and not the maritime service itself. Therefore, the Treaty basis applies directly.

Moreover, the scheme described in this Section does not favor one transport sector in particular. On the contrary, it applies equal criteria for all intermodal combinations, which does not distort competition between transport sectors.

Taking this into consideration, the Commission adopted a more generous view, especially **regarding the duration of the scheme** that has been successively renewed since 2002 for periods of three years, which is in line with the decisional practice of the Commission under Article 93 TFEU.

By applying its consistent practice, the Commission authorized a maximum intensity of 30% of the total costs of the transport. However, for the period 2008-2012 the aid granted by France represented between **3,5 to 8,7 %** of the total cost of the transport, which represents a small proportion of the overall cost of the service.

In short, we can conclude that:

- (i) This scheme aims to promote **intermodal transport in general** and not intermodal transport by sea in particular.
- (ii) Moreover, the aid granted by France aims to compensate **transshipment costs** and not transport services themselves. Consequently, the 2004 Maritime Guidelines do not apply to the maritime transport sector, as they focus on aid granted to the maritime service.
- (iii) Indeed, the scheme was authorized by the Commission directly under Article 107.3 c) TFEU for Short Sea Shipping and under Article 93 TFEU for rail and inland waterways.

- **Commission Decision authorizing State aid to foster private investments in technology and equipment to intermodal transport**

In August 2015 the Commission authorized the prolongation of an existing Austrian aid scheme,¹⁵⁰ in place since 1999 and approved by the Commission for the periods 1999-2002,¹⁵¹ 2003-2008¹⁵² and 2009-2014.

¹⁵⁰ Commission Decision of 11.08.2015 SA.41100 Austria *Special Guidelines for the Programme of Aid for Innovative Combined Transport for 2015-2020*

¹⁵¹ Commission Decision of 07.07.1999 N 121/1999 Austria *Guidelines for the Programme for the Promotion of Combined Transport Road-Rail-Ship*

¹⁵² Commission Decision of 08.09.2004 N 140/2004 Austria *Special Guidelines for the Programme of Aid for Combined Transport Road-Rail-Ship*

The scheme was put in place to achieve a modal shift of freight traffic from road to environmentally less harmful modes of transport. More specifically, the Guidelines provide financial support to foster private investment in the field of combined transport, in particular by supporting investment in new technologies and concepts intended to improve the quality of services offered.

The beneficiaries are transport undertakings: transshipment and logistic companies, forwarding agents, port operators, shipping and railway companies. All EU companies having registered offices, agencies, branches or subsidiaries in Austria are eligible for aid under the scheme.

The notified programme provides financial support to **foster private investment in the field of combined transport** by supporting investments in new technologies and concepts intended to improve the quality of intermodal services.

The aid is granted for **three types of measures**:

1. **Acquisition of innovative technologies and systems to improve combined transport systems**: this category includes innovative transshipment/loading technologies, logistic systems and systems of communication for users of combined transport.
2. **Acquisition of equipment for combined/intermodal transport**: inland and land containers, swap bodies, special vehicles and containers for combined transport, adaptations of semitrailers to facilitate loading, adaptations for initial and subsequent road transport equipment, etc.
3. **Feasibility studies**: this category includes feasibility studies for specific implementing measures, including preparations for international cooperation, in the area of combined transport.

The aid takes the form of non-reimbursable subsidies. For all the subsidies, the minimum amount to be granted is EUR 8.000 and the maximum is limited to EUR 800.000 per project or per beneficiary and year. A project may only receive aid once.

The **projects are selected** taking into account: a) the degree of innovation of the measure; b) the achievable modal shift with the avoidance of carbon dioxide and c) the type of goods to be modally shifted.

The Commission analyzed the scheme under **Article 93 TFEU** as regards the compatibility of the aid to land transport operators. The Decision remarks that *“the concept of **coordination of transport** used in that provision has a significance which goes beyond the simple fact of facilitating the development of an economic interest. It implies an intervention by public authorities which is aimed at guiding the development of the transport sector in the common interest”* (paragraph 37).

Nevertheless, as regards companies involved in **maritime transport**, the Commission considered **Article 107.3 c) TFEU** to be the legal basis for the compatibility assessment. However, as was the case in the Commission Decision examined above, the Maritime

Guidelines do not apply. Consequently, Commission practice under the Treaty basis directly applied in this case.

Regarding the **proportionality of the measure**, the Commission noticed that the scheme complied with the maximum aid intensities required by its decisional practice under Article 93 and 107.3 c) TFEU. For the first two measures (acquisition of technology and equipment), the maximum aid intensity allowed was 30% of eligible costs. For the last one (feasibility studies), the intensity increased to 50%.

The Commission also concluded that aid for such investments does not distort competition in a way contrary to the common interest and it is granted on the basis of objective, transparent and non-discriminatory criteria. More importantly, investments may benefit all transport sectors, with the only condition of contributing to develop intermodality.

In conclusion, this aid regime seeks **to promote private investments for the acquisition and improvement of intermodal equipment**. It does not financially support the transport service, so the Maritime Guidelines do not apply in respect of Short Sea Shipping. On the contrary, it was authorized and successively renewed following the generous decisional practice under Article 93 TFEU for rail and inland waterways and Article 107.3 c) TFEU for sea transport.

5.4 Conclusions on the authorization of State aid regimes

The conclusions of this chapter are summarized here below:

- *Legal basis*

Regarding the **legal basis** to authorize State aid to intermodal transport: Incentives to **intermodal road-sea transport** have been mostly considered by the Commission as compatible with Treaty rules under **Article 107 (3) c) TFEU**, as they facilitate the development of this economic activity while not adversely affecting trading conditions contrary to the common interest.

Intermodal transport combinations that used **inland transport**, such as intermodal transport by road and rail have been authorized by the Commission under **Article 93 TFEU** that provides for the compatibility with the Treaties of aid that meets the needs of coordination of transport. (e.g. Ferrobonus or French aid to transshipment operations)

- *Relevant Guidelines: intensities and time limits*

The relevant Commission Guidelines and the reasoning applied in its Decisions about **incentives to intermodal transport (both to the offer and to the demand sides)** take into consideration a set of criteria in order to authorize these aid schemes:

- (i) Carrying out of impact studies that demonstrate the positive environmental effects and the decongestion of the roads that the aid will allow.

- (ii) The aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way¹⁵³.
- (iii) The financed service must not come into conflict with existing profitable routes or services.
- (iv) The service which is the subject of the Project must be **commercially viable after the period** in which it is eligible for public funding.
- (v) The aid must not be accumulated with public service compensation.

In the case of incentives to the demand that promote the shift of freight transport from road to sea (e.g. *Ecobonus* scheme), the Commission has considered in its Ecobonus decision that Chapter 10 of the **2004 Maritime Guidelines** shall apply as transport maritime companies are considered as **indirect beneficiaries** of the scheme.

The 2004 Maritime Guidelines set as the maximum intensity of the aid 30% of the operational costs of the service in question or up to a level of 10% on investment costs (not cumulative).

Where projects receive EU funding from Marco Polo or TEN-T programmes, the maximum intensities and durations are established under the **2008 Guidelines on Motorways of the Sea**. Nevertheless, the requirements sent in the 2004 Maritime Guidelines still apply.

- (i) For the **Marco Polo II** projects, the maximum intensity of aid allowed under the 2008 Guidelines on Motorways of the Sea was **35% of operational costs for a period of five years**.

This threshold was the one taken into account by the Commission in the Decision that authorized French and Spanish State aid to support the projects of the Motorways of the **Sea Gijón-Nantes and Vigo/Algeciras-Nantes/Le Havre**, both selected by the Marco Polo II Programme.

It has to be noted that the Marco Polo II Programme expired in 2013, so this threshold no longer applies.

- (ii) For the projects receiving TEN-T financing, a maximum aid intensity of **30% of investments costs is allowed over two years**.

If the incentive scheme to promote intermodal road-sea transport does not receive EU funding, as happened with the Italian Ecobonus, the 2008 Guidelines on Motorways of the Sea do not apply. In this instance the Commission will fully apply the criteria set out in Chapter 10 of the Maritime Guidelines, including the maximum thresholds and duration established in it.

¹⁵³ The maritime lines that would benefit from the scheme shall be selected by the public authorities on the basis of transparent and reasonable criteria (such as the frequency of the connexions, the environmental benefits that the route might bring or the potential competition conflicts with other existing lines).

The **percentages** established in these Guidelines refer to the maximum aid intensity that a project can receive, regardless of its national or European origin. That means that the **overall amount of EU funding and State aid** cannot exceed the established percentages.

- *Baske Ecobonus: de minimis*

The **Baske Ekobonus** constitutes a particular case. It was authorized under the **De Minimis Regulation**, which establishes a maximum aid threshold of EUR 100,000 over three years for undertakings active in the road sector, under which State aid will be declared compatible with the Treaty.

- *Procedural considerations*

Member States cannot implement the ECOBONUS incentive before its **notification** and **authorization** by the European Commission, even where it is exclusively funded through European funds. If the Commission has no doubts as regards to the compatibility of the scheme, it may take a Phase I positive decision in a 2 month period.

However, if some points remain unclear, the Commission may enter into exchanges with the Member States that notified the measure with the possibility that it will open a formal investigation procedure. This second phase investigation can have a longer duration, although the Commission is still required to act within a reasonable period.

The implementation of the ECOBONUS incentive without notification may entail the issuance of a suspension or even a recovery injunction from the European Commission or also from the national courts.

6. FRAMING THE MED-ATLANTIC ECOBONUS UNDER THE STATE AID RULES

In this Chapter we will analyse how to frame the “Med-Atlantic Ecobonus” Scheme under the State Aid legal framework. This analysis will be conditional on the final shape that this incentive will take in the coming months, after further study and debate among the four countries involved in this initiative.

6.1 Our working hypothesis

For the purposes of this analysis we will first present our understanding of this scheme.

The proposed action aims at creating an incentive scheme (Ecobonus) to support demand for Motorways of the Sea (MoS) and a modal shift in favour of sea-based routes. It will focus, at least in the first stage of implementation, on the Atlantic and West Mediterranean markets.

Namely, the “Med-Atlantic Ecobonus” is an **incentive to road haulage companies** to make use of maritime routes instead of roads. The aid would normally be granted in the form of direct subsidies corresponding to a **percentage of the price of the maritime**

services. This amount would be granted in order to compensate the higher costs that road hauliers have to bear when using a short-sea shipping solution

The justification of the Scheme relies on the lower externalities that maritime transport brings to society in comparison to road transport.

6.2 The qualification of the ‘Med-Atlantic ECOBONUS’ incentive as State aid

As explained in detail above, to be considered State aid in the sense of Article 107 TFEU, a measure needs to have the following features:

- (i) An **intervention by the State or through State resources** which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees etc.);
- (ii) the intervention gives **the recipient an advantage on a selective basis**, for example to specific companies or industry sectors, or to companies located in specific regions;
- (iii) **competition has been or may be distorted**;
- (iv) the intervention is likely to **affect trade between Member States**.

The “Med-Atlantic Ecobonus” Scheme would be probably considered as State Aid, given that it would meet the above mentioned conditions. Indeed, the position taken by the Commission in previous Ecobonus schemes, such as the Sicilian Environmental Bonus, the Italian Ecobonus and, in the railway sector, the Italian Ferrobbonus, coherently established that these schemes constituted State aid in the sense of Article 107 TFEU.

Hereinafter we will review how these conditions would apply to the “Med-Atlantic Ecobonus”.

1. Aid granted by a Member State or through State resources

The “Med Atlantic Ecobonus” will be financed through State resources and probably at least in part with EU funds. The financial resources received from the EU will be also considered State aid as long as their use and destination remain under control of the national authorities.

2. By favouring certain undertakings

Further, the Ecobonus favours only certain undertakings of the transport sector complying with the requirements established by the scheme. Therefore the aid can be regarded as being **selective**.

3. Conferring an economic advantage on recipient undertakings

The Med-Atlantic Ecobonus scheme will confer an economic advantage on road hauliers engaged in transport operations eligible for the scheme, by relieving them of part of their operational costs.

The European Commission has considered when analysing previous Ecobonus Schemes that **shippers providing sea transport** to road hauliers are **also beneficiaries** of the scheme¹⁵⁴, as the Ecobonus leads to an increase in market demand for maritime companies operating the routes elected by the scheme.

Therefore, under the Ecobonus scheme there will be **formal recipients** of the aid, which are road haulage companies, and **material or real recipients**, which are mainly the **maritime services providers**. In other words, the economic incentives given to the road hauliers would be indirectly received by the shippers, who are the ones who receive an increase in profits.¹⁵⁵

One of the practical consequences of considering shippers as beneficiaries of the incentive is the predictable application of the legal instruments regarding **State aid to maritime companies**, namely the Maritime Guidelines¹⁵⁶ and the Motorways of the Sea Guidelines.¹⁵⁷

4. Distort or threaten to distort competition and affect trade between Member States

In line with the decisions adopted so far by the European Commission, the scheme will also constitute a potential threat to competition within the European Union, as the potential beneficiaries of the measure operate in competition with other undertakings in the European Union. Therefore, the scheme would be considered liable to distort competition and affect trade within the internal market.

In conclusion, the Med-Atlantic Ecobonus will be considered to be State aid in the sense of Article 107 TFEU. Nevertheless, as detailed above, measures qualified as State aid under Article 107 TFEU **might be declared compatible with the Treaty rules** under certain conditions. In section 6.5 of this chapter we will discuss how the Med-Atlantic Ecobonus may fulfil these conditions.

6.3 De minimis aid

Before entering into the compatibility conditions, it should be noted that State aid below the thresholds established by **Regulation No 1407/2013** would be considered **de minimis aid**. In other words, it would be deemed to have a negligible impact on trade and competition, and therefore would not require notification.

For undertakings carrying out road freight transport services the total amount of aid, in order to be categorised as *de Minimis* aid, shall not exceed EUR 100.000 over a period of

¹⁵⁴ Commission Decision in Case C/2012 ex N/2011 by which Italy is planning to implement for the development of logistics chains and the upgrading of intermodality (17 July 2013), in recital 57, considered the shippers providing maritime services to road hauliers as “indirect beneficiaries of the scheme”

¹⁵⁵ Nevertheless this is a theoretical construction to facilitate the understanding of the Scheme. As a matter of principle, road haulage should also be considered beneficiaries of the aid.

¹⁵⁶ See recital 64 of the Commission Decision in Case C/2012 ex N/2011, cited above.

¹⁵⁷ The Motorways of the Sea Guidelines apply in the Fres MoS and Atlantic Mos Decisions, both financed under the Marco Polo II programme

three fiscal years. However, as we have explained above, **shippers have also been considered by the Commission as beneficiaries** of the scheme and therefore the economic advantage they receive should also be taken into account to assess the application of this Regulation. For companies operating in sectors other than road freight transport, the threshold is set at EUR 200,000 over a period of three years.

Consequently, to fall under the scope of the *de minimis* Regulation, any road haulage company should receive less than EUR 100.000 over a three years period, but more importantly, any maritime company should indirectly receive less than EUR 200.000 in the same timeframe. As an indeterminate number of road hauliers could make use of the services of the same maritime companies, it would be difficult to determine *a priori* the accurate amount received by them under the scheme.

Therefore, although the possibility of granting the incentives under the *de minimis* Regulation is still a theoretical possibility, **it does not seem appropriate to rely on it in the case of our working hypothesis**. As explained, given that the economic advantage is transferred under the scheme to the ship-owners it is very likely that these companies will at a certain point receive amounts above the *de minimis* threshold.¹⁵⁸

6.4 Procedural consequences qualifying as State aid: notification

According to **Article 108 (3) TFEU and Article 2 of the Procedural Regulation**, new aid must be notified to the Commission in sufficient time to enable it to communicate its comments to the aid provider.

Each Member State should provide detailed information to the Commission regarding the State aid measure and the amounts that they are planning to allocate for its implementation. In doing so, national authorities should provide the Directorate-General for Competition with all the information needed to make the assessment of the scheme under the State aid rules.

The normal practise is that each Member State finances its own national projects, whether with or without additional EU funding. However, the ‘Med-Atlantic Ecobonus’ can expect **financial support from four Member States**. In this scenario, each Member State should **notify separately but simultaneously** the aid they will allocate to the project. Nevertheless, the Commission will presumably adopt a joint Decision regarding the four notifications, as they concern the same scheme.¹⁵⁹

¹⁵⁸ The Basque Ekobonus was granted under *de minimis* aid, limiting the amount granted to the same beneficiary to EUR 100,000 for a period of three years. However, it did not take into account the benefits perceived by the maritime companies. As the scheme was not notified, the Commission did not have the chance to express its views in this regard.

¹⁵⁹ For example, in the Fres MoS Gijón-Nantes Project, Spain and France notified their corresponding aid contributions, but both notifications were considered under the same Decision.

6.5 Compatibility analysis

As we have already explained, State aid under **Article 107(1)** might be declared **compatible** with the Treaty rules by Commission Decision.

Through the Sections of this Handbook, we have detailed how the Commission has declared as compatible previous “Ecobonus” Schemes under the conditions established in Article 107(3)(c) TFEU. This provision establishes the compatibility of aid that facilitates the **development of a certain economic activities**.

The Commission has provided for **specific guidance** to interpret the compatibility of aid schemes to encourage intermodal shift to Short-Sea shipping through two soft law instruments: **the 2004 Maritime Guidelines and the 2008 Motorways of the Sea Guidelines**.

Hereinafter we will discuss the red lines that incentives schemes should respect in this regard. The purpose of this exercise will be to estimate the margin of manoeuvre for national public authorities when designing the incentive.

(i) Calculation of the aid, maximum intensity and maximum duration of the scheme

- *Justification of the scheme: calculation of the external costs*

First of all, the aid granted has to be justified on the basis of environmental and social benefits. The Commission reasoning that the positive externalities of intermodal transport by sea makes subsidization of part of the maritime services costs attractive, as it prevents society suffering from the negative externalities of heavy road transport.

In the case of the Italian Ecobonus scheme, the amount of aid to compensate maritime services **for the unpaid external costs** of road services (external costs by road – external costs by sea) had to be calculated on the basis of an environmental study.¹⁶⁰ The factors taken into account in these calculations **for each of the selected routes** were greenhouse gases, atmospheric pollution, noise, and congestion and road accidents.

If the result of this calculation showed that external costs by sea were lower than external costs by road, **the rationale of the scheme would be justified**, as it would reduce the negative externalities produced by road transport.

The environmental benefits and other positive externalities pursued by the scheme should be determined by the granting authorities in a **pre-established environmental impact study**, which should determine the savings on external costs for each of the selected maritime routes.

- *Calculation of the aid: compensation of the maritime costs and extra incentive to ensure an effective switch*

¹⁶⁰ In the case of the Italian Ecobonus, this updated study was elaborated by Friends of the Earth.

In the Italian Ecobonus experience, the amount of the subsidy granted corresponded to a **percentage of the rate paid by the road haulier to the maritime service provider**. The percentages used for these calculations were different for each of the maritime routes elected under the scheme.

In practice, the amount of subsidy granted to the road haulier after applying the applicable percentage should correspond to the **difference between the economic costs of the maritime service and the economic costs of a total road solution** which the road haulier may incur.

Therefore, **two economic appraisals** should be made for each of the selected maritime routes: the cost of the total road solution and the cost of the maritime route for each of the elected routes.

However, by solely granting compensation of the economic costs of maritime transport, the road hauliers might continue opting for the traditional road routes, given that in economic terms both systems would be equally costly. This would be contrary to the objective of the scheme which is to **achieve an effective switch** from road to sea transport.

Therefore, the amount granted to road hauliers should compensate the **additional costs in which the road haulage company would incur by taking the sea route and grant an extra incentive to persuade road hauliers to take the route by sea**. Under the logic of the State aid rules, this extra incentive should be close to **the minimum amount** that could ensure a real shift from road to sea. In other words, the extra incentive should stick to the minimum necessary to promote intermodality.

Regarding the calculation of this extra incentive, it should be noted that the final amount granted to the road haulier should not exceed the 30% of the costs of the maritime service, which is the maximum threshold permitted by the Maritime Guidelines. Therefore, the overall quantity should be between the amount which compensates the costs incurred by the road haulier (costs by sea – costs by road) and the 30% of the total costs of the maritime service.

It should be noted that this extra amount given to effectively persuade road haulage companies to embrace intermodality has not been analysed by the Commission in its decisions. However we consider that its inclusion in the overall calculation of the final amount is necessary to make the incentive work.

- *Maximum intensity and duration*

The Commission Guidelines applicable to the scheme at issue provide with different levels of aid intensity and time limits under which the aid would be considered in line with the State aid rules:

- a) Chapter 10 of the **Maritime Guidelines** sets a maximum aid intensity of 30% of the operational costs of the maritime service for a maximum period of three years.

- b) The **Motorways of the Sea Guidelines** establish a maximum intensity of 35% of operational costs for five years for the Marco Polo II programme and 30% over two years for projects receiving TEN-T financing.

It should be noted that these percentages refer to the **overall amount of aid** granted by the Member States, including the EU funding received to implement the project.

As regards the time limits, the Maritime Guidelines explicitly **exclude the possibility of renewal, extension or repetition** of the project in question. The Italian Ecobonus Scheme was prolonged two years but this was an exception authorized by the Commission which took into account the exceptional circumstances of **economic crisis**, which significantly affected the operation of transport services.

However, as we will discuss in the last section of this chapter, the time limit and the prohibition of extension or repetition of the project could be discussed with the Commission, given the lack of coherence between the time limits established in the Railway Guidelines¹⁶¹ from 2008 and the 2004 Maritime Guidelines.

- *Maximum intensity and duration of the aid in relation to the limits of EU funding*

The maximum intensities and time limits for State aid should be put in relation to the **maximum EU funding allowed under the EU financial instruments.**

In fact, the **Motorways of the Sea Guidelines** were adopted by the Commission in order to adapt the State aid intensities established in the **Maritime Guidelines** to the different intensities and time limits established by the Marco Polo II Regulation¹⁶² and the Decision 1692/96/EC for TEN-T Programmes.

The Commission has interpreted the interaction between both guidelines as **complementary**. In practice, this means that the conditions set in Chapter 10 of the Maritime Guidelines will apply in all cases, and the aid intensity and maximum period would change in cases where the measure benefits from EU financing under the Marco Polo II or the TEN-T programmes.

However, the **Motorways of the Sea Guidelines referred** to aid intensities established in EU programmes no longer in force. Therefore, even if the “Med-Atlantic Ecobonus” counts on EU funding, these Guidelines could only apply by analogy, but no certainty can be provided on this point.

The current EU financing instrument is the **Connecting Europe Facility (“CEF”) Regulation**.¹⁶³ As we have mentioned before, the EU funds managed by Member States fall under the State aid thresholds together with the national resources.

¹⁶¹ In the Railways Guidelines, point 97 sets a limit of five years for the granting of subsidies to intermodal aid by train. Nevertheless, the same scheme can be notified again to the Commission that will authorize it for a new timeframe.

¹⁶² Regulation (EC) No 1692/2006

¹⁶³ Regulation 1316/2013

Article 10(2) of the CEF Regulation establishes the maximum financing that a project can receive from EU funds:

- a) For the development of multimodal connections between inland and maritime ports up to a **20%**.¹⁶⁴
- b) For actions to support the development of MoS up to **30%** of the eligible costs.¹⁶⁵

These thresholds refer to the maximum funding that a certain project can receive from the EU. The amounts granted through EU Programmes have to be added to the national resources effectively granted by each Member State, so **the total amount cannot exceed the State aid intensity thresholds** that are mentioned above.

In relation to the ‘Med-Atlantic Ecobonus’ it is not certain how the Commission would qualify the incentive, either as a measure directed to the development of freight transport services or to support the development of Motorways of the Sea. Certainly, the project fits both priorities but its inclusion in one or in the other will have consequences regarding the threshold of EU funding to which it will benefit (20 or 30 %).

In this turn, it should be taken into account that the CEF Transport Annual Call 2014 published by INEA included an Ecobonus action under the “Freight Transport Services” priority. Although this action remained vacant it gives an idea on where the Commission will allocate a similar initiative in the future. Nevertheless, if the project were to be considered under the ‘Motorways of Sea’ priority, the amount of aid granted through EU funds would increase by 10% so it would be beneficial to obtain funding via this path.

Regarding the **maximum duration** of the EU funding, Article 17 of the CEF points out that grants may be allocated to projects selected on the basis of Multiannual Work Programmes or Annual Work Programmes. Moreover, Article 19 of the CEF provides that the Commission may divide budgetary commitments into annual instalments.

- Conclusions as regards maximum intensities and maximum duration

Consequently, we consider that the most **consistent interpretation** would be to apply a maximum aid intensity of **30% of the operational costs over a maximum period of three years** as set out in the 2004 Maritime Guidelines.

The Motorways of the Sea Guidelines, although more generous, are less suitable in this case as it refers to EU instruments no longer in force.

The State aid threshold will be taken into account to determine the maximum total amount of national resources **and** EU funds that could be allocated to the project:

¹⁶⁴ Under Annual Work Programme 2014 the costs included those incurred by trucks for the modal shift.

¹⁶⁵ Under the Calls for the Multiannual Work Programme 2014 and 2015, it is not sure the operative costs of the shipping line can be covered. As mentioned above, the drafting is vague and open.

- If the Commission includes the Ecobonus under the **Freight Transport Services priority**, EU funding could be up to 20% of the eligible costs and Member States could give funding to reach the 30%.¹⁶⁶
- If the Ecobonus is qualified as a **Motorway of the Sea priority**, the maximum threshold of intensity would be 30%. Nevertheless, it is unlikely that the EU would decide to grant the total 30% by itself. A possible scenario would be co-financing to reach the common 30% State aid threshold set in the Maritime Guidelines.

The EU financing under Multiannual and Annual Work Programmes can be provided within different annual instalments (Article 19 CEF Regulation). Moreover, under Article 20 of Regulation No1316/2013, it is possible to carry over expenses that are not used at the end of a given year.

(ii) Other conditions for the compatibility of the aid

In the design process of the “Med-Atlantic Ecobonus”, the national authorities in charge of the project will face several decisions regarding the beneficiaries, the selection of the maritime routes and the characteristics of the incentive in general. In doing so, they should ensure that the final measure will be compatible with the State aid rules.

Chapter 10 of the Maritime Guidelines establishes the **criteria** to assess the different elements of the scheme.

It should be noted that the Maritime Guidelines refer to aid directed to the offer side (ship-owners). Consequently, some inconsistencies might appear when applying this instrument to the Ecobonus Scheme, which is directed to the demand side (road hauliers). The Ecobonus Decisions analysed in this Handbook shed light on how to interpret the application of these Guidelines to demand-side incentives.

This State aid framework allows for **a certain margin of discretion** to establish the characteristics of the Med-Atlantic Ecobonus. For this purpose, it should be taken into account that the more open the scheme is, the lower the possibility for competition concerns on the side of the Commission.

- *Selection of the beneficiaries.*

In designing the scope of the Med-Atlantic Ecobonus scheme, the granting authorities should take into account that the potential circle of beneficiaries of the aid should be as open as possible. Nevertheless, it is admissible to make access to the benefit conditional on the fulfilment of some requirements or characteristics of the transport itself.

The Italian Ecobonus was granted to all Union road haulage companies, which embarked their vehicles and trailers whether or not accompanied by drivers on freight ships in order

¹⁶⁶ This 30% corresponds to the State aid intensity allowed under the Maritime Guidelines.

to make use of the indicated maritime routes. The Sicilian environmental bonus was also aimed at transport companies established within the EU.

The *Fres MoS* project Gijón-Nantes allowed only accompanied transport, whereas the *Atlantic MoS* Vigo-Nantes project was mainly oriented towards non-accompanied transport.

Therefore, the Commission has admitted incentive schemes for **accompanied or non-accompanied** transport, regarding **heavy vehicles and/or trailers**.

However, the scheme should not be restricted to companies established in one or various Member States, as this limitation would lead to **discrimination among EU companies** that would be contrary to the Internal Market rules. Indeed, the Maritime Guidelines specify that **any company established in the EU** should have access to the scheme.

Another possibility to explore regarding the design of the scheme would be to include (or not) **logistics companies** which organize intermodal transport involving Short-Sea shipping. However, it is not clear whether it is possible to allocate logistics companies on the demand or the offer side. In the Commission Decision¹⁶⁷ authorizing State aid for the promotion of rail freight transport in the Italian region of Emilia Romagna, the Commission authorized the incentives granted to logistics companies and railway undertakings.

The **association of companies** for the purposes of the scheme is also allowed in the Commission Decisions¹⁶⁸. The Maritime Guidelines refer to the association of ship-owners for the purposes of State aid implementation but we have to take into account that these Guidelines are demand-side oriented. Following an interpretation by analogy we can conclude that an association of road transport hauliers for the purposes of meeting the conditions to receive the subsidy could also be admitted.

As regards the **process for selecting the beneficiaries** of the incentives, the Maritime Guidelines specify that the aid must be granted on the basis of transparent criteria. However the Commission has not provided further guidance on this point.

- Definition of the maritime routes.

For the selection of the maritime routes, different options have been also admitted by the Commission. In the Italian Ecobonus, the maritime routes were established by ministerial decree and they were national or European lines with point of origin or destination being an Italian seaport. However, the Sicilian Environmental Bonus did not set specific lines beforehand but it could apply to any route that connected a Sicilian Port with other national ports.

Therefore, it seems that **two options** could be allowed by the Commission: either the establishment of certain maritime routes by agreement among the four countries involved in the project or the establishment of any route that connects a seaport located in any of

¹⁶⁷ Commission Decision of 30 September 2009 in case N 483/2009 Aiuta a favore del trasporto ferroviario delle merci.

¹⁶⁸ See recital 23 of the Italian Ecobonus Decision 2013.

the four countries with another EU seaport. The road hauliers will be free to choose the most convenient maritime line among them and the most competitive operator for each of the selected routes.

- *Pre-established environmental impact*

To comply with the Commission Maritime Guidelines, Member States involved in the project should provide a detailed project with a **pre-established environmental impact** concerning the new route or the upgrading of services of an existing route.

This study should specify the environmental benefits that will stem from the implementation of the project and constitutes a very important element **for assessing the justification** of the aid scheme.

- *Minimum number of journeys by sea*

Under the Italian Ecobonus scheme, beneficiaries had to carry out **at least 80 journeys** a year on an individual route. Otherwise, the Italian authorities were entitled to recover the State aid granted to the company. The reasoning behind this requirement was to ensure a real commitment of the road haulage companies to maritime transport and to prevent mere occasional uses.

The European Commission welcomed the inclusion of this specific requirement in the design of the scheme. However, this condition is not specified in the Maritime Guidelines and is therefore susceptible to further discussion with the Commission.

- *The service must be commercially viable after the public funding period*

The Maritime Guidelines also require that the service remains **commercially viable** after the period in which it is eligible for public funding.

In practice, the implemented Ecobonus schemes have required beneficiaries to commit to operate the same number of routes or transport the same amount of goods after the end of the incentive scheme. Indeed, the Italian Ecobonus scheme required beneficiaries to commit to maintain the same number of journeys or transport the same quantity of goods as during the subsidised period **over the three years following the expiration of the scheme**.

However, the Maritime Guidelines merely refer to the requirement of providing the Commission with sufficient proof that the project will be commercially viable, without specifying the concrete method to comply with this condition.

Therefore, **another means** to prove the viability of the Med-Atlantic Ecobonus or even a shorter period of time for the abovementioned commitments could be proposed to the Commission. This point should be raised in future contacts with the Commission on the occasion of discussing the design of the incentive.

6.6 Conclusions

Regardless the inadequacy of the Maritime Guidelines to demand-side incentives and the unresolved questions that the Commission should clarify regarding the legal construction of these schemes, we can conclude that the 'Med-Atlantic Ecobonus' scheme would foreseeably be declared compatible with the State aid rules.

For this purpose, account should be taken of the compatibility thresholds and substantive criteria established in the 2004 Maritime Guidelines and the interpretation of other substantive elements made by the Commission Decision authorizing incentives with similar characteristics.

If the final design of the Med-Atlantic Ecobonus respects the abovementioned limits, the European Commission will likely authorise the scheme.

7. LIMITATIONS AND PROPOSALS FOR THE IMPROVEMENT OF THE EXISTING LEGAL FRAMEWORK

Although the Med Atlantic Ecobonus would probably be authorized by the Commission Decision under the current State aid framework, some amendments of the applicable Guidelines could be recommended for the sake of clarity.

Indeed, the Guidelines that the Commission has applied in its Decisions authorizing Ecobonus schemes do not take into consideration the possibility of creating demand-side incentives, which creates interpretative difficulties.

This legal *vacuum* is due to the novelty of these incentives, which are not subject to a specific legal instrument yet. The Commission solved the problem by applying the Maritime Guidelines in a flexible way. However, it would be advisable to accommodate these new demand incentives for Short-sea shipping into the EU legal framework regarding its compatibility with State aid rules.

Therefore we consider that the following modifications could ideally be proposed:

- 1) Chapter 10 of the **Maritime Guidelines** should be adapted to the new *Ecobonus* schemes.

As we have seen, these Guidelines are applicable to Ecobonus schemes because they benefit ship-owners indirectly. However, it is difficult to adapt some aspects of the Guidelines to this new scheme, in which the direct beneficiaries are the users of the service: the road hauliers.

The Guidelines, launched in 2004, included the obligation for the Commission to review the instrument after seven years since its entry into force. Although a public consultation was launched in 2012, the revision of these Guidelines has not taken place.

As we have already mentioned, the Maritime Guidelines set a **three year time limit** for the granting of the aid and **do not allow for renewal, extension or repetition** of the project in question.¹⁶⁹

However, the 2008 Railway Guidelines authorize incentive schemes for a period of **five years**¹⁷⁰ and do not impede the repetition of the State aid scheme after the measure expires if it is notified and authorized by the Commission.

In the 2013 Italian Ecobonus Decision, the Commission pointed out that one of the points that should be considered when revisiting the Maritime Guidelines would be to **remove the impediment of renewal** of the project¹⁷¹. Indeed, the Commission stated that *‘for similar schemes promoting an intermodal shift from road transport, no corresponding three-year limit is prescribed’*.

It would be recommendable to ensure consistency between both time limits, as both kinds of schemes (intermodality by train and by short-sea shipping) pursue the same objective, which is to achieve more environmentally friendly transport chains.

Therefore, when revisiting the Maritime Guidelines, the Commission could admit the compatibility of State aid for short sea shipping for a period of more than three years and even cater for the possibility of renewal.

Furthermore, the Commission should shed light on some other substantive aspects related to the Ecobonus initiatives.

For instance, some guidance should be provided to the managing authority to make a previous assessment of the **distortion of competition** that the implementation of the new scheme could imply in nearby ports and maritime routes.¹⁷² Nevertheless, the Commission should take into account that in the case of incentives to the demand side the distortion of competition is lower, as it is the user who chooses the maritime service which better fits its needs.

Finally, and more importantly, it would be advisable to discuss with the Commission a more convenient **method of calculation** of the overall amount granted to each road

¹⁶⁹ Note that the extension of the Italian Ecobonus Scheme in 2013 was an exception authorized by the Commission due to the special circumstances of the economic crisis.

¹⁷⁰ Paragraph 97 of the 2008 Railway Guidelines

¹⁷¹ The footnote on page 11 of the 2013 Italian Ecobonus Decision states as follows: *On this point, the Commission notes a discrepancy between the Maritime Guidelines and the Community guidelines on State aid for railway undertakings (OJ 2008 C 184 of 22.7.2008, p. 13) in which, for similar schemes promoting an intermodal shift from road transport to rail transport, no corresponding three-year limit is prescribed. Thus, when revising the Maritime Guidelines, the Commission will specify that under certain circumstances, State aid for short sea shipping may be declared compatible for a period of more than three years.*

¹⁷² Moreover, clarification should be made as regards to the distortion of competition with other transport modes (particularly, inland). This question was addressed under the Sicilian Environmental bonus and the 2005 Italian ecobonus where the article 107 (3) c) TFEU was applied directly.

haulier for each maritime route. Indeed, the existing Guidelines do not mention how the aid shall be calculated. In our analysis, we have identified three economic appraisals:

1. External costs caused by road and sea transport (justification of the scheme).
2. Compensation of the economic costs of the maritime service used by road hauliers by (max. of the maritime service 30%).
3. Extra incentive to persuade the road haulier to switch to sea transport (it must respect the above mentioned 30% threshold)

Although we consider that these calculations are necessary to put the scheme into functioning, the Commission has not analysed this process in deep, neither in its Decisions nor in its Guidelines. Therefore it would be clarifying and would provide legal certainty that the Commission addresses this issue in the future.

This being said, we consider that the modification of the 2004 Maritime Guidelines will prove to be difficult as the Short Sea Shipping support is only one of the measures the Guidelines envisage. A modification of the said Guidelines would entail a time consuming public consultation as well as the involvement of a broad number of stakeholders.

2) The **Motorways of the Sea Guidelines** are obsolete at present.

They refer to EU Programmes and Financial Instruments that are no longer in force and therefore currently useless under EU law.

Therefore the Motorways of the Sea Guidelines require an adjustment to set the maximum State aid intensities and duration in line with the CEF Regulation in force.

For Marco Polo Programmes falling under the scope of the Motorways of the Sea Guidelines, the threshold was 35% of the eligible costs for a maximum period of five years. Nevertheless, given that under the current CEF Regulation the maximum intensity is 30% this would be the applicable one in case of combined financing.

3) Consistency should be ensured between the **State aid and EU funding intensities and maximum durations**

First of all, the Commission should clarify **under which priority the ‘Med Atlantic Ecobonus’ would fall under the CEF Regulation.**

As we have already explained, the scheme at issue can potentially fit under the Freight Transport Service or the Motorways of the Sea priorities if it is accepted that the latter covers operational costs for maritime services.

The inclusion of the **‘Med Atlantic Ecobonus’** under one or the other priority has consequences on the maximum EU funding intensity to which the scheme would be subjected: 20% of the eligible costs in the case of freight transport services and 30% for Motorways of the Sea priorities (10% less).

We note that the Commission included a similar Ecobonus action under the Freight Transport Services priority in the CEF Transport Annual Call 2014 and therefore this point should be further discussed via future contacts.

The CEF 30% maximum intensity is in line with the thresholds already established in the 2004 Maritime Guidelines. Therefore, this maximum threshold is expected to apply in case of combined funding.

On the other hand, the maximum duration of the EU financing for the 'Med Atlantic ECOBONUS' would differ depending on whether it is provided under a Multiannual or Annual Work Programmes. For Annual Work Programmes the aid may be divided up to three annual instalments.

It would be advisable to make the maximum durations in the State aid Guidelines and the EU financing instruments the same, so that managing authorities can foresee the financial means that will become available to them during the implementation of the project

8. CONCLUSION

In view of all the considerations examined above, we consider that the **strategy** to follow in the coming stages of the Med-Atlantic Ecobonus project by the Consortium **is twofold**:

- (i) the possibilities of obtaining EU funding should be explored and discussed with the Commission. Particularly with the Directorate General for Mobility and Transport, in charge of CEF and TEN-t developments;
- (ii) the final scheme should be notified to the Directorate General for Competition in order to seek State aid authorization.

With regards to the possibility of obtaining **EU funding**, we note that the European Marco Polo programme, which addressed the shift of freight from the road to Short Sea Shipping, is no longer in force.

As a consequence, the only possibility to obtain EU funding is to integrate the 'Med-Atlantic Ecobonus' initiative within the revised TEN-T programme funded by the new CEF Mechanism.

Although the European Commission announced in its Communication of 14 May 2013 that it would integrate a *follow-up* to the Marco Polo programme within the revised TEN-T, this has not been the case so far.

In this regard, the only action from the EU funding addressing demand incentives to partially support the costs of modal shift incurred by road transport has been included in the Annual Work Programme 2014, under the priority 'Freight Transport Services', which counts on a limited budget of EUR 25 million and a funding intensity of 20%, in contrast

to the 35% allowed under Marco Polo. Indeed, this marginal action fell vacant as no *eco-bonus* projects applied for this funding.

Although the Multiannual Work Programmes 2014 and 2015 include a priority called Motorways of the Sea, providing for an intensity of up to 30% of the eligible costs, the letter of the INEA Call for Proposals focuses on projects that encompass a considerable port investment. In the same vein, the Commission has publicly expressed its reluctance towards funding maritime services under the MoS priority on the occasion of “CEF Transport Info Day” that took place on 30 November 2015. As a consequence, there is no clear or direct support from the EU programmes to the specific objective of financing operational costs under this priority, as it used to be the case under the Marco Polo II.

This being said, it has to be stated that the drafting of both the Multiannual Work programme and INEA Call for Proposals 2014 and 2015 remain vague and therefore leave room for interpretation on the suitability of the ‘Med-Atlantic Ecobonus’ project under such actions as “*providing wider benefits to the support of mobility of goods*” or “*upgrading a maritime link with a possibility of its further intermodal extension*”. Moreover, it makes sense that the objective of modal shift, which is a pillar of the Common Transport Policy, has specific support actions within EU funding. In any case, this possibility needs to be approached with caution and would require entering into discussions with the Commission in order to find/agree the specific terms in which *eco-bonus* schemes could be considered under CEF calls. Being the Med-Atlantic Ecobonus Project an inter-institutional common action among four Member States as well as a CEF project itself, it seems a good opportunity to enter into further discussions with the Commission regarding the direct funding of operational costs.

In view of the above, it is necessary to explore the possibilities of integrating any MoS demand incentive within the structure of the future Annual or Multiannual Work programmes. The suitability within one or the other would have important implications in terms of maximum intensity, duration of the funding and size of the financial envelope.

Secondly, if there are State resources supporting the “Med-Atlantic Ecobonus” scheme, it would most probably be considered by the **Directorate-General for Competition** to be **State aid within the meaning of Article 107 TFEU**, given that it provides an economic advantage to certain undertakings by public authorities.

State aid schemes should be reported to the Commission before their implementation in order to obtain approval. As a result, the four Member States involved in the project **should notify** DG COMP of the State aid granted by each of them. It should be borne in mind that the funding received from the European Union also qualifies as ‘State resources’ and should be notified if it remains under the control of the Member State.

The Treaty leaves considerable room for policy objectives for which State aid can be declared compatible. In the case of the Med-Atlantic Ecobonus scheme, we expect that the Commission will give the green light to the project under the current State aid legal

framework. Indeed, the Commission has **declared compatible** previous “Ecobonus” schemes under Article 107(3)(c) TFEU, which establishes the compatibility of aid that facilitates the development of certain economic activities.

However, with the purpose of obtaining a positive Decision by DG COMP, account should be taken of the **compatibility thresholds** and **substantive criteria** established in the **2004 Maritime Guidelines** and the interpretation of other elements made by the Commission.¹⁷³

In particular, the Med-Atlantic Ecobonus incentive should be designed taking into consideration the following aspects, among others:

- (i) The scheme must be justified on an **environmental study** of the external costs caused by all-road transport in comparison to sea-road transport (external costs by all-road minus external costs by sea-road should be favourable environmentally speaking).
- (ii) The amount of aid granted to the road haulier should **compensate** the extra costs of the maritime service and be sufficient to persuade the road haulier to take the route by sea (**incentive effect**).
- (iii) The aid granted must respect the maximum State aid intensity, which constitutes a **30% of the operational costs** of the transport service according to the 2004 Maritime Guidelines. However, under the 2008 Motorways of the Sea Guidelines the Commission allowed up to 35% of the operational costs when the State aids were complementary to EU funding under the Marco Polo II programme.
- (iv) The incentive must also be limited on its duration. Indeed, under the 2004 Maritime Guidelines, the duration of the incentive is restricted in time to a **maximum period of three years**. The 2008 Motorways of the Sea Guidelines used to be more permissive for aid complementary to the Marco Polo II funding, allowing a maximum period of five years.
- (v) It is doubtful whether the Commission will accept the possibility of renewal of this particular type of incentive. The 2004 Maritime Guidelines do not allow for renewal after the period of three years has passed. On the contrary, the Commission has recognized the possibility of renewal in the Railway sector.
- (vi) The service must remain **commercially viable** after the period in which it is eligible for public funding.
- (vii) The circle of potential **beneficiaries** should be as open as possible. Nevertheless, it is admissible to make access to the benefit conditional on the fulfilment of some

¹⁷³ In this regard, see the analysis of the Italian Ecobonus 2013 Decision in Section 5.1.2.

requirements or characteristics of the transport itself, both on the road and the sea legs

- (viii) The financed maritime service(s) must **not come into conflict** with existing profitable routes or services.
- (ix) According to the 2004 Maritime Guidelines, only new maritime routes or the upgrading of existing ones could be included under the scheme. Nevertheless, the Italian Ecobonus was approved without meeting this concrete condition, as the 2004 Guidelines were not applied in the 2005 Decision for the reasons already explained (see Section 5.1.2).

The above mentioned aspects refer to the current legal framework regarding State aid to the maritime transport sector and previous experiences that present similarities with the Med-Atlantic Ecobonus that have been authorized by DG Comp.

Although the authorization of the Med-Atlantic Ecobonus scheme is highly probable under the present state of the Maritime Guidelines, an update of this instrument would be positive for the future development of this type of demand-side incentives in the maritime sector.

In this regard we have observed that the Railway Guidelines are more flexible than the Maritime Guidelines in respect to the maximum duration and intensity of the incentives. Therefore, a forthcoming update of the Maritime Guidelines should be consistent with this approach taken by the Commission in the railway sector.

For that reason, it would be advisable to draw the attention of DG COMP to the obsolescence of **the Guidelines** applicable to maritime services. Indeed, some improvements might be introduced to achieve legal certainty regarding the State aid intensities with respect to the maximum EU funds available for the project, which differs at present. Moreover, the development of new aid schemes that put the weight on the demand-side have not yet been reflected by the Commission in its Guidelines, although it has recognized that these new configurations distort competition less than traditional incentives to the service provider.

Nevertheless, it should be noted that reforming the **2004 Maritime Guidelines** could prove relatively complex due to the wide variety of legal issues covered by this instrument. These Guidelines deal with incentives to Short Sea Shipping (Chapter 10), but also with other topics such as fiscal treatment of ship owning companies and labor law in the maritime sector. Therefore, in order to revise them, the Commission would go through all the sections of the Guidelines, which would probably raise debate among the different stakeholders that will delay the process.

On the contrary, the **2008 Motorways of the Sea Guidelines** were conceived with the only purpose of adapting the State aid intensities to maritime services to the Marco Polo II and TEN-T programs. Therefore, its scope is much narrower and it would be easier to propose its revision or to approve a similar instrument to adapt the Commission's interpretation on State aid intensities to the CEF Regulation and the EU funding programs currently in force.

In any case, **the revision of the Guidelines constitutes a parallel effort that is positive, although not necessary to obtain the State aid authorization** of the Med-Atlantic Ecobonus from DG COMP under the current state of the legal framework.

Brussels, 11 April 2016