

The Swiss Approach to Mountain protection and its relation to European law: complementarities or conflict?

Astrid Epiney/Jennifer Heuck

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Abstract: The present article addresses the mountain protection in Switzerland *in toto* and its relation to European law in the area of overland transport. Switzerland chose instruments to limit road traffic for the transport of goods that are rather unique in the European context. The performance-related heavy goods vehicle toll (leistungsabhängige Schwerverkehrsabgabe), which is in existence, and the Alpine Transit Bourse (Alpentransitbörse), which is at the stage of planning.

The disciplines imposed by EU law constitute the framework for the analysis of these two instruments as far as they influence Swiss law. Special attention will also be given to the Bilateral Agreement on overland transport (Overland Transport Agreement – OTA) between Switzerland and the EU. The contribution finishes with some reflections on the transport of goods as a challenge of mountain protection.

Key notes: Alpine Transit Bourse, Bilateral Agreements EU-Switzerland, Directive 1999/62, External Costs, Heavy Weights Vehicles, Overland Transport Agreement, Performance Related Toll for Heavy Goods Vehicles, Rail-Traffic, Road-Traffic, Switzerland, Transport.

Authors:

Astrid Epiney –

Kommentar [hj1]: Von Astrid noch auszufüllen.

Jennifer Heuck – Master en Droit de la Montagne (Grenoble); Research Assistant at the Institute of European Law University of Fribourg; Research interests: International and European Environmental Law focusing on Mountain Areas.

I. Introduction

The present article addresses two areas of concern: a) mountain protection in Switzerland *in toto* and b) its relation to European law. Certain delimitations can be made concerning the second part of the subject since European law – meant here as European Union law (EU law) – does not interfere in all aspects of the Swiss law on mountain protection. We choose to focus on the area of overland transport, where Switzerland is bound to large parts to European law. The relevant bilateral agreement between Switzerland and the European Union includes obligations already set out in EU law as well as autonomous obligations. In this respect, Switzerland chose instruments to limit road traffic for the transport of goods that are rather unique in the European context. Switzerland also develops a new instrument, the “Alpine Transit Bourse” (“Alpentransitbörse”, ATB). In order to be effective, the ATB should also be adopted by the other Alpine countries which are Member States of the EU. The question we

would like to discuss addresses the dimension of the instrument and the compatibility of the ATB with EU law.

In the following contribution we shall deal with two instruments, whereas the first one is in existence and the second at the stage of planning in Swiss law: The performance-related toll for heavy goods vehicles toll (PRTHV) (leistungsabhängige Schwerverkehrsabgabe, LSVA) (III.) and the mentioned Alpine Transit Bourse (IV.), the emphasis being put on the latter. Both mechanisms aim at reducing road traffic as far as the transport of goods is concerned. The disciplines imposed by EU law constitute the framework for the analysis of these instruments as far as they influence Swiss law (II.). Special attention will also be given to the Bilateral Agreement on overland transport (Overland Transport Agreement – OTA). The contribution finishes with some reflections on the transport of goods as a challenge of mountain protection (V.).

It is interesting to note that there are no particular legal instruments for environmental protection in Switzerland, although the general Swiss legislation equally applies to mountain areas. The sufficiency of such legislative management for the protection of mountain areas with regard to land planning (limitation or regulation of new constructions) may be doubted. However, the law on nature protection¹ and the regulations derived from this legislative act provide for the protection of certain areas determined by a decision of the Federal Government, a concept similar to that of the European Directive on Habitats².

Furthermore, Swiss legislation is compatible with the prerogatives of EU law, except for certain aspects of public participation. The ratification of the protocols of the Alpine Convention should – from a legal point of view – not affect existing Swiss law because of the large margin of appreciation which the texts leave to Member States.

II. Forms of Europeanisation of Swiss law, in particular the Bilateral Agreement on Overland Transport

1. General aspects³

Swiss Law is influenced in various ways by EU law – the legal effects are different in every scenario. There are four forms of ‘inspiration’ of the Swiss law by EU law:

- **‘Autonomous adaptation’:** Since Switzerland and the European Union and its Member States maintain a close cooperation in economic relations,⁴ the Swiss legislator often finds inspiration in EU legislation and approximates its domestic legislation to EU law and in particular to EU directives, without being, however, obliged to do so. In this sense, the decision to ‘copy’ EU Law is an ‘autonomous’ decision. For this reason the technique is often referred to as ‘autonomous adaptation’ (‘autonomer Nachvollzug’).⁵

¹ Cf. Bundesgesetz über den Natur- und Heimatschutz, SR 451.

² Dir. 79/409 on the conservation of wild birds, OJ L 103 of 24.4.1979, 1, last modified by Dir. 2006/105, OJ L 363 of 20.12.2006, 368; Dir. 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, 7, last modified by Dir. 2006/105, OJ L 363 of 20.12.2006, 368.

³ This chapter is mainly based on: Astrid Epiney, *How does European Union Law Influence Swiss Law and Policies?*, in: Stéphane Nahrath/Frédéric Varone (eds.), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: a Tribute to Peter Knoepfel*, Contributions à l’action publique, Lausanne, 2009, 179 et seq.

⁴ Cf. to this issue Rolf Weder, *Swiss international economic relations: assessing a small and open economy*, in: Clive H. Church (ed.), *Switzerland and the European Union: a close, contradictory and misunderstood relationship*, Routledge, London/New York, 2007, 99 et seq.; Clive H. Church/Christina Severin/Bettina Hurni, *Sectors, structures and suspicions: financial and other aspects of Swiss economic relations with the EU*, in: Clive H. Church (ed.), *Switzerland and the European Union: a close, contradictory and misunderstood relationship*, Routledge, London/New York, 2007, 126 et seq.

⁵ Cf. Matthias Amgwerd, *Autonomer Nachvollzug von EU-Recht durch die Schweiz: Unter spezieller Berücksichtigung des Kartellrechts*, Europainstitut an der Universität Basel, 1998; Bruno Spinner/Daniel Maritz, *EG-Kompatibilität des schweizerischen Wirtschaftsrechts: Vom autonomen zum systematischen Nachvollzug*, in: Peter Forstmoser (ed.), *Der Einfluss des europäischen Rechts auf die Schweiz*,

The voluntary approximation to EU Law is most often based on economic motives: the aim is to avoid economic problems resulting from differences in the legislation between the EU and Switzerland.⁶ The technique is mainly used in areas where transnational economic relations are important. However, it raises questions of interpretation, e.g. whether the act should be construed by the national judiciary in conformity with EU law and the rulings of the European Court of Justice. Moreover, it is unclear to what extent legislative developments or developments in the case-law ought to be taken into account if the answer is affirmative.⁷

An 'autonomous adaptation' raises a number of questions about the true autonomous character of this technique: in situations where it is deemed necessary to adapt Swiss legislation to EU standards, Switzerland reproduces EU legislation, although it was not involved in its adoption.⁸ The situation is – from a political point of view – only defensible if the process applies to technical matters and/or is restricted to a narrow field of application. In many areas of technical character, Swiss legislation includes delegations that allow the government to adopt legislative acts that reproduce developments in EU law.⁹

- **International treaties:** International agreements may include obligations for Switzerland to ensure equivalent legislation with respect to a part of the *acquis*. Switzerland concluded over a hundred treaties with the EU. Apart from the Agreement on Free Trade from 1972 the most important treaties are the so-called Bilateral Agreements from 1999 and 2004¹⁰. An international agreement is – from a Swiss point

Festschrift für Roger Zäch, Schulthess, Zürich, 1999, 127 et seq.; Astrid Epiney/Annekathrin Meier/Robert Mosters, *Die Kantone zwischen EU-Beitritt und ‚Bilateralem Weg‘. Bewertung ausgewählter europapolitischer Optionen aus rechtlicher Sicht*, in: Konferenz der Kantonsregierungen (ed.), *Zwischen EU-Beitritt und bilateralem Weg: Überlegungen und Reformbedarf aus kantonaler Sicht. Expertenberichte im Auftrag der Arbeitsgruppe ‚Europa – Reformen der Kantone‘*, Zürich, 2006, 77 (85 et seq.).

⁶ The inspiration of Swiss law by EU legislation has been explicitly pointed out in a report of the Swiss government in 1988. The report insisted that the economic future of Switzerland is largely dependant on a domestic legislation that is as 'eurocompatible' as possible., cf. Bericht des Bundesrates über die Stellung der Schweiz im europäischen Integrationsprozess vom 24.8.1988, BBl 1988 III 249 (380). This is the background for the fact that each 'message' (a sort of preparatory document elaborated by the Swiss Government in the legislation process) includes a chapter assessing the compatibility of the envisaged act with the EU law and sometimes also with the national law of important Member States, especially the neighbouring countries (Germany, France, Italy, Austria).

⁷ Cf. Marc Amstutz, *Interpretation multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335*, in: Heinrich Honsell (ed.), *Privatrecht und Methode: Festschrift für Ernst A. Kramer*, Helbing & Lichtenhahn, Basel, 2004, 67 et seq.

⁸ Cf. Karine Siegwart, "Das Europa-Fenster in URP", *URP/DEP* 2004, 266 et seq.; Oliver Diggelmann, *Der liberale Verfassungsstaat und die Internationalisierung der Politik: Veränderungen von Staat und Demokratie in der Schweiz*, Stämpfli, Bern, 2005, 114 et seq.

⁹ Cf. Astrid Epiney/Nathalie Schneider, "Zu den Implikationen des gemeinschaftlichen Umweltrechts in der Schweiz", *EurUP* 2004, 308 et seq.)

¹⁰ Cf. the text of these agreements in OJ 2002 L 114, 1 et seq. = BBl 1999 6489 et seq.; BBl 2004 5965 et seq. Cf. to these agreements Daniel Felder/Christine Kaddous (eds.), *Accords bilatéraux Suisse – UE (Commentaires)/Bilaterale Abkommen Schweiz – EU (Erste Analysen)*, Helbing & Lichtenhahn, Bâle/Genève/Munich, 2001; Christine Kaddous/Monique Jametti Greiner (eds.), *Accords bilatéraux II Suisse – UE et autres Accords récents/Bilaterale Abkommen II Schweiz – EU und andere neue Abkommen*, Helbing & Lichtenhahn, Genève/Bâle/Munich, 2006; Thomas Cottier/Matthias Oesch (eds.), *Die sektoriellen Abkommen Schweiz – EG: Ausgewählte Fragen zur Rezeption und Umsetzung der Verträge vom 21. Juni 1999 im schweizerischen Recht*, Stämpfli, Bern, 2002; Daniel Thürer/Rolf H. Weber/Roger Zäch (eds.), *Bilaterale Verträge Schweiz – EG – ein Handbuch*, Schulthess, Zürich, 2002; Daniel Thürer/Rolf H. Weber/Wolfgang Portmann/Andreas Kellerhals (eds.), *Bilaterale Verträge I & II Schweiz – EU – ein Handbuch*, Schulthess, Zürich/Basel/Genf, 2007; Stephan Breitenmoser, "Sectoral agreements between the EC and Switzerland: Contents and Context", *CMLRev* 2003, 1137 et seq.; Christine Kaddous, *The relations between the EU and Switzerland*, in: Alan Dashwood/Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge University Press, 2008, 227 et seq. (230 et seq.).

of view – necessary in situations where the autonomous way does not lead to the desired results. Several scenarios can be distinguished:

- Switzerland wishes to participate in an EU agency. For instance, the participation of Switzerland in the European Environmental Agency was only possible after the conclusion of a bilateral agreement (in 2004).
- Recognition of Swiss decisions by the EU or its Member States is desired. An international agreement is, thus, necessary to establish an obligation of recognition. The participation in a EU-system such as the CO₂-emission trading scheme needs for instance to be regulated in an international treaty. Otherwise the EU would not recognise Swiss CO₂-emission rights. Similarly, in cases where EU Law lays down an obligation for Member States to introduce a system of administrative control – for example before a product will be admitted to the single market – only an agreement can ensure that Swiss controls are recognised as equivalent to those in EU Member States.
- Finally, an international agreement can be indispensable to guarantee a right to market access. There are agreements e.g. in the areas of free movement of persons or of air transport. We will discuss the Overland Transport Agreement in more detail below.¹¹

In all cases, Switzerland as a third country will never be allowed to participate in the decision-making process at EU-level; there are good reasons supporting the argument that Swiss participation would not even be compatible with the EC Treaty, even if it were only participation in the decision-making of an agency (if the agency has governmental authority).¹²

- **Comparative law method:** Swiss legislation and Swiss decisions are often influenced by legal processes in other countries and the EU. In this context, EU law can be considered as a source of inspiration. Before adopting a legislative act the legislator evaluates the corresponding legal developments in the EU (and often in other countries, preferably in important Member States of the EU) to be inspired by certain aspects of that legislation.

The Swiss Federal Court ('Bundesgericht') sometimes refers to the EU case law when interpreting Swiss law. The method is applied to economic areas of law and generally in cases where the legal problems and solutions in Swiss and EU law seem to be similar. The Federal Court applied the principle of equal treatment between men and women as far as affirmative action is concerned in the same way as the European Court of Justice.¹³ The referral sometimes creates problems from a methodical point of view: the Federal Court seems to adopt a more pragmatic interpretative strategy, without really analysing if the conditions and situations are given where a solution applied by the European Court of Justice could equally be useful with regard to a problem in the Swiss law. In our view, such a reference is only acceptable in conditions where the context, the systematic and the aim of the legal provision are truly the 'same' in Swiss and in EU law. It is definitely not adequate to refer to a ruling of the ECJ and continue with a remark that there is no reason not to apply the same principles.

- **'Harmonisation' by multilateral international treaties:** It is worth remembering that Switzerland and the EU (and its Member States) are parties of a number of multilateral agreements such as the Alpine Convention. These treaties include a certain number of

¹¹ II.2.

¹² ECJ, opinion 1/91 (EEA), ECR 1991, I-6079; cf. to this issue Astrid Epiney/Silvana Schnider, "Die Europäische Umweltagentur: Eine neue „Einrichtung“ der EG und ihre Bedeutung für die Schweiz", *URP/DEP* 1995, 39 et seq.

¹³ ECJ, C-450/93 (Kalanke), ECR 1995, I-3051 and BGE 123 I 152; ECJ, C-409/95 (Marschall), ECR 1997, I-6363 and BGE 125 I 21.

obligations that must be transformed into national (or supranational) law. As parties of the same agreements, the EU and Switzerland are bound to the same obligations. In this sense, international law contributes to ‘harmonise’ Swiss law with EU law. Examples in the area of environmental protection demonstrate such a legislative coordination.¹⁴

The agreement on the participation of Switzerland at the European Environmental Agency from 2004 is the only agreement between the EU and Switzerland which touches at least theoretically upon environmental law in general and mountain protection in particular.

There are suggestions that Switzerland should participate in the CO₂-emissions trading scheme. In other areas of environmental law Switzerland is not yet bound to EU legislation. The situation may change with the conclusion of other bilateral agreements, e.g. in the area of electricity or free trade in agricultural products.¹⁵ However, there exists a bilateral agreement on rail and road transport that integrates Switzerland into the relevant *acquis*. The Agreement also includes certain autonomous articles. Their legal implications for environmental protection are often limited.

2. *The Overland Transport Agreement*

The Overland Transport Agreement (Landverkehrsabkommen – LVA) and the Free Trade Agreement constitute the most difficult Bilateral I treaties since the difference of interests between the EU¹⁶ and Switzerland¹⁷ is very strong in these areas: Whereas Switzerland was aiming and continues to aim at a reduction of the transport volume in the Alps, the EU’s main interest is the undisturbed transit through Switzerland including the free movement of goods and the free provision of services.

After the rejection of the agreement on the European Economic Area (EEA) in the 1992 referendum, Switzerland concluded two ‘packages’ of bilateral and sectoral¹⁸ agreements with the European Union and (in some cases) with certain Member States. Since the EEA could not enter into force for Switzerland, the aim of the agreements was to ensure the participation of Switzerland in parts of the integration process within the framework of the European Union.

The so-called ‘Bilateral I’ agreements entered into force in 2002. They include seven agreements in public procurement, technical barriers to trade, research, road and rail transport, air transport, agriculture and free movement of persons. The seven agreements form a ‘package’ insofar as they are interconnected by a so-called ‘guillotine clause’: They can only collectively enter into force. The non-prolongation or cancellation of a single agreement would result into the abrogation of all other agreements. From an institutional point of view, however,

¹⁴ As example, one can refer to the Convention of Aarhus on environmental information, participation and access to justice (which Switzerland has not yet ratified) or the Convention on environmental impact assessment with the protocole of Kiev. Cf. in detail with some (more) examples and references Epiney/Schneider, *EurUP* 2004 (note 9), 308 (314 et seq.).

¹⁵ Cf. Astrid Epiney/David Furger/Jennifer Heuck, *Zur Berücksichtigung umweltpolitischer Belange bei der landwirtschaftlichen Produktion in der EU und in der Schweiz: ein Vergleich unter besonderer Berücksichtigung der Implikationen eines Freihandelsabkommens im Agrar- und Lebensmittelbereich*, Schulthess, Zürich, 2009.

¹⁶ Individual interests of the Member States were playing a decisive role: France and Austria wanted to reshift the traffic, that was diverted to France and Austria because of the 28 ton limit introduced by Switzerland; Germany and Italy were interested in finding a solution providing a minimum of costs.

¹⁷ Cf. Karine Siegwart/Reto Gruber/Michael Beusch, “Stand und Perspektiven der Umsetzung des Alpenschutz-Artikels (Art. 36^{sexies} BV) unter besonderer Berücksichtigung der Raum- und Umweltplanung“, *Aktuelle Juristische Praxis (AJP)* 1998, 1033 (1034-1035); Astrid Epiney, *Die Beziehungen der Schweiz zur Europäischen Union, dargestellt am Beispiel des Alpentransits*, Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte, Bonn, 1996, 12 et seq.

¹⁸ The notion of ‘bilateral agreements’ contrasts the multilateral approach of the agreements. From a legal point of view, the term ‘bilateral’ is imprecise because the agreements are partially multilateral (when the Member States are parties of the agreement). The term ‘sectoral agreement’ describes the legal position more precisely. It refers to the fact that each agreement addresses a specific area. We use the term ‘bilateral agreements’ as it has become the notion most commonly used.

each agreement is an autonomous agreement, relating to different matters and including its own institutional provisions. No framework agreement exists.

The main aspects of the Overland Transport Agreement are summarised as follows:¹⁹

- **General Provisions:** Part I of the treaty includes a number of general principles. Apart from the principle of free choice of mode of transport which shall be discussed later,²⁰ the **principle of non discrimination** stated in Art. 1 (3) OTA counts among the most important: According to Art. 1 OTA the Agreement ensures free access to each other's transport market for the carriage of passengers and goods by road and rail and an efficient management of the traffic. Within the scope of the agreement, direct and indirect discrimination on grounds of nationality are prohibited.
- **Harmonisation of weight limits and technical standards:** The second part of the Agreement (Art. 5 ff. OTA) refers to weight limits and technical standards. The provisions deal with the admission to the occupation of professional road hauliers, with social standards (notably driving time and rest period) and certain technical regulations (such as vehicle control and vehicle dimensions). The stepwise increase of the weight limit from 28 t to 40 t in 2005, and the adoption of allowed taxes and contingents (for a transition period) for 40 t vehicles are of particular importance. To coordinate transport policy the Agreement defines a (maximum) level for taxes and the contingents for a transition period in Part IV. The level is mandatory; therefore it is neither possible to digress to the top (as far as taxes are concerned) nor to the bottom (as far as contingents are concerned).
- **Free access to railway and transit rights and the standards for railway companies** are object of Part III of the Agreement (Art. 23 ff. OTA).
- **Coordinated Transport Policy:** Part IV of the Agreement (Art. 30 ff. OTA) deals with the following aspects:
 - The (maximum) level of taxes for a transit through Switzerland has been determined for the reference travelling distance Basel-Chiasso.²¹ The level is binding for Switzerland (Art. 40 OTA). In turn, the European Union is obliged to develop a system for charges on its territory, reflecting the costs arising from the use of infrastructure and the "user-pays" principle (Art. 41 OTA). The imprecise wording of the provision, however, may lead to the conclusion that it does not provide a precise and enforceable obligation for the EU.
 - Switzerland is obliged to build the NEAT (a new alpine transversal, including also the new rail tunnels Gotthard and Lötschberg); vice versa the EU obliges itself to ensure the North- and South-access to the NEAT.
 - The number and the costs of empty drives (that do not pay a PRTHV) are scrutinized.
 - The contracting parties oblige themselves to supporting measures such as the custom clearance.

¹⁹ Cf. Astrid Epiney/Reto Gruber, "Das Landverkehrsabkommen Schweiz – EU. Überblick und erste Bewertung", *URP/DEP* 1999, 597 et seq.; Kaspar Sollberger/Astrid Epiney, *Verkehrspolitische Gestaltungsspielräume der Schweiz auf der Grundlage des Landverkehrsabkommens*, Stämpfli, Bern, 2001; Kaspar Sollberger, *Konvergenzen und Divergenzen im Landverkehrsrecht der EG und der Schweiz. Unter besonderer Berücksichtigung des bilateralen Landverkehrsabkommens*, Universitätsverlag Freiburg Schweiz, 2003, 177 et seq.

²⁰ Cf. IV.4.a).

²¹ And therefore indirectly the PRTHV-rate (leistungsabhängige Schwerverkehrsabgabe). See below III.

- Safeguard precautions shall aim at a more effective handling in crisis situations.
- The final provisions (Art. 49 ff. OTA) are explained in Part V of the Agreement. They regulate the procedure for dispute settlement, the period of validity of the agreement, further development of laws and the implementation of the agreement.

It is noteworthy that the Agreement explicitly mentions the „**Principle of free choice of mode of transport**“ twice. It is the first time that the principle was integrated into a legally binding agreement, although its legal consequences seem rather limited:

- Art. 1 (2) OTA defines the principle **in relation to the general principles and objectives of the Agreement** as follows: „The provisions of the Agreement and their application are based on the principles of reciprocity and free choice of mode of transport.“ The principle as such is not legally binding. Art. 1 (2) OTA highlights that the provisions of the Agreement and their application should be governed by that principle. Therefore, the principle may be considered as having an interpretative character at most.
- According to Art. 32 OTA the measures to reach the objectives for the **coordinated transport policy**²² of the contracting parties, mentioned in Art. 30 OTA²³ should comply in particular²⁴ with the “principle of free choice of mode of transport”. Due to the merely interpretive character of the principle²⁵ and its potential to create a conflict with Art. 6 TCE (now Art. 11 TFEU) its legal consequence seems to be limited to the respect for the principle of proportionality – which must be respected anyway – and to the impossibility to prohibit a certain mode of transport altogether.²⁶

III. The performance related toll on heavy goods vehicles – PRTHV (leistungsabhängige Schwerverkehrsabgabe - LSVA) and its compatibility with EU law

Since January 1st 2001 Switzerland charges a performance-related toll on heavy goods vehicles (PRTHV).²⁷ The toll is a combination of a fiscal and a steering-tax. The PRTHV is supposed to cover the costs of road use and other external costs²⁸ caused by heavy weight traffic. The toll is also supposed to contribute to the improvement of rail-traffic in relation to road traffic. With a few exceptions all transport vehicles of a total weight of more than 3,5 t are charged on the entire Swiss road network. The charges depend on the maximum

²² Art. 31 (1) OTA: „To this end, the Contracting Parties shall take measures designed to ensure healthy competition between and within the various modes of transport and to facilitate the use of more environmentally sound means of transporting passengers and goods.“

²³ Art. 30 (1) OTA: „The Contracting parties have agreed to develop, as and where necessary, a coordinated transport policy covering passengers and goods. The aim of this policy is to combine transport systems efficiency with environmental protection so as to ensure sustainable mobility.“

²⁴ Other principles are also mentioned. Concerning the legal reach of Art. 32 OTA see Astrid Epiney/Kaspar Sollberger, *Zum Gestaltungsspielraum der Vertragsparteien: die rechtliche Tragweite des Art. 32 des Abkommens über den Güter- und Personenverkehr auf Schiene und Straße*, in: Daniel Felder/Christine Kaddous (eds.), *Accords bilatéraux Suisse – UE (Commentaires) / Bilaterale Abkommen Schweiz – EU (Erste Analysen)*, Helbing & Lichtenhahn, Bâle/Genève/Munich, 2001, 521 et seq.

²⁵ Astrid Epiney, “Der „Grundsatz der freien Wahl des Verkehrsträgers“ in der EU: rechtliches Prinzip oder politische Maxime?“, *ZUR* 2000, 239 et seq. (239-240).

²⁶ Epiney, *ZUR* 2000 (note 25), 244-245; Epiney/Sollberger (note 24), 530 et seq.

²⁷ Cf. Bundesgesetz vom 19.12.1997 über eine leistungsabhängige Schwerverkehrsabgabe, SR 641.81.

²⁸ The definition of external costs is disputed. As to the question whether “traffic jam costs” are part of external costs cf. Jennifer Heuck, “Zur Internalisierung von Staukosten“, *AJP* 2010 (forthcoming).

permissible weight of the vehicle and the driven kilometres. The toll may also be calculated according to the emission and the consumption rate of the vehicle.²⁹

The introduction of the PRTHV should be seen in relation with Art. 84 of the Swiss Federal Constitution (so called “Alpine Initiative”) and with reference to the fiscal management of the Overland Transport Agreement³⁰:

- On February 20, 1994, the Swiss population and parliament adopted the Alpine Initiative. Art. 84 (3) of the Federal Constitution prohibits the increment of the transit capacities in the alpine region. Exceptions are only permitted for bypass-roads to reduce transit traffic. The provisions are substantiated by national law.³¹ According to this law four road sections in Switzerland are classified as „Transit roads“³². Only these roads are affected by the target-ceiling of the transit-road capacities. The law also enumerates the measures for increases in capacity. The reconstruction of a road shall be permitted, if it is in the primary interest of preserving and improving traffic security. Therefore, the obligation of Art. 11 of the Transport Protocol of the Alpine Convention to ban the construction of new large-capacity roads for transalpine traffic is adequately taken into account.

In addition to the prohibition of capacity-increment, Art. 84 (2) of the Federal Constitution provides that the border-to-border road traffic shall be relocated to the rail within 10 years. The provision may be considered as the core element of the article. It contributes to reduce environmental problems caused by road traffic. At first glance, the legal consequences of the regulation were unclear. The EU argued that the article breaches the OTA. The legal implication to use the rail is in contradiction with the principle of non-discrimination and the principle of free choice of mode of transport. The obligation predominantly concerns the freight transport crossing the Alps and therefore foreign protractors. Therefore, an indirect discrimination on the grounds of nationality might exist. However, in view of international law, the provision does not indicate an absolute ban on driving.³³ On the contrary, the provision does not retain a conditional behavioural norm, but should be understood in an ultimate way. The obligation clearly points to a result-oriented obligation within a certain timeframe. The choice of appropriate means to reach the result is left to the discretion of the legislator. Art. 84 (2) of the Federal Constitution should therefore be interpreted as an intention to relocate the freight traffic from the road to the rail, at least to the extent of border-to-border transport. The year 1994 with 650'000 freight journeys through Switzerland per year is referred to as baseline.

In combination with other instruments including the capacity increase of the rail and its subsidisation, the PRTHV shall attain this objective by means of steering the carriers' behaviour into a certain direction. However, the goal of a maximum of 650'000 alpine crossing journeys per year still seems to be a distant prospect.³⁴

²⁹ Cf. to the PRTHV e.g. Giovanni Danielli/Markus Maibach, *Schweizerische Verkehrspolitik*, Rüegger Verlag, Zürich, 2007, 58 et seq.; Alain Griffel, in: Georg Müller (ed.), *Schweizerisches Bundesverwaltungsrecht, vol. IV, Verkehrsrecht*, Helbing Lichtenhahn Verlag, Basel, 2003, A, para. 46-47; Sollberger, *Konvergenzen und Divergenzen* (note 19), 59 et seq.

³⁰ II.2.

³¹ Cf. Bundesgesetz über den Strassentransitverkehr im Alpengebiet vom 17.6.1994, SR 725.14.

³² San Bernardino, Gotthard, Simplon and Grosse Sankt Bernhard.

³³ Cf. Astrid Epiney/Reto Gruber, *Verkehrspolitik und Umweltschutz in der Europäischen Union*, Universitätsverlag Freiburg Schweiz, 1997, 187 et seq., cf. also Bundesamt für Justiz, VPB 1995 II 217 et seq.

³⁴ With further references, Rolf H. Weber, “Alpentransitbörse im europarechtlichen Fadenkreuz“, *AJP* 2008, 1213 et seq. (1213-1214).

- The fiscal management of the Overland Transport Agreement provides for a „compensation“ for the permitted maximal vehicle weight from 28 t to 40 t. Switzerland is allowed to charge a distance-dependant toll (as well as an alpine transit tax which, however, has so far not been charged). The maximum level of the toll is determined by the OTA. Switzerland is not allowed to increase the toll unilaterally.

A toll such as the PRTHV is in accordance with the polluter-pays principle. It can also be considered compatible with the requirements of EU law that are legally binding for Switzerland: The PRTHV is charged on all vehicles on Swiss roads and does not penalise in fact foreign vehicles and companies. Therefore it can be considered compatible with the principle of non-discrimination on grounds of nationality.³⁵

It may however be questioned, whether or not the PRTHV complies with EU secondary legislation, and Directive 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures³⁶ in particular. Dir. 1999/62 – which in 2006 was subject to important modifications especially in relation to the admissibility of tolls and user charges for the use of certain infrastructure³⁷ – intends to eliminate or reduce distortions of competition between transport hauliers of different Member States that have different levy systems.³⁸ The directive regulates – next to the harmonisation of the vehicle taxes in the Member States³⁹ – the conditions under which Member States can charge tolls and user taxes in road traffic (the scope of the directive is, however, limited to freight transport vehicles of 3,5 t⁴⁰). Art. 2 lit. b and lit. c Dir. 1999/62 defines a „toll“ as a specified amount of fee payable for a vehicle travelling a given distance. The amount shall be calculated from the distance travelled and the type of vehicle used. In contrast, a „user charge“ specifies the payment that confers the right for a vehicle to use an infrastructure for a given period. Therefore, a “user-charge” is time-related.

After revision of Dir. 1999/62 the PRTHV should beyond any doubt⁴¹ be in conformity with the „space-based“ toll: According to Art. 7 (1) Dir. 1999/62 the directive is limited to tolls and user charges on the trans-European network, or on parts of that network. Member States may, however, introduce other tolls and user charges on other roads, provided that they respect the principles of the Treaty, and the principle of non-discrimination in particular. It is worth mentioning, that according to Art. 7 (9) Dir. 1999/62 tolls are based on the „principle of the recovery of infrastructure costs“. This means that the weighted average tolls are related to the construction costs and operating costs, maintaining and developing the infrastructure network concerned. Manifestly (other) external costs shall not be included in the calculation. Art. 7 (10) Dir. 1999/62 indicates certain exceptions from this principle. As a result, Member States are to a large extent permitted to include other external costs in the calculation of the toll in

³⁵ It is questionable whether the obligation to install a tachograph necessary for charging the toll can be considered as a discrimination of foreign vehicles. It seems that foreign vehicles are more concerned by this obligation. Therefore we may assume an indirect discrimination of foreign transport hauliers based on their nationality. They would have to carry the costs even for a journey of a very short distance, whereas Swiss transport hauliers would profit from a long term investment. The obligation to install a tachograph may, however, be justified with a legitimate public interest. There is no evidence for a breach of the principle of proportionality.

³⁶ Dir. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructure, OJ 1999 L 187, 42 last modified by Dir. 2006/103, OJ 2006 L 363, 344.

³⁷ Cf. Dir. 2006/38, OJ 2006 L 157, 8. Concerning these changes see Walter Obwexer, “Die „neue“ Wegekosten-Richtlinie“, *ecolex* 2005, 663-664.

³⁸ Cf. Recital 1 of Dir. 1999/62.

³⁹ An item to be settled that is not indicated in the title of the directive. In our context this aspect of the directive is not important.

⁴⁰ Art. 1 in conjunction with Art. 2 lit. d Dir. 1999/62.

⁴¹ Concerning the situation before the revision cf. Astrid Epiney, *Straßenbenutzungsgebühren und europäisches Gemeinschaftsrecht*, Liber Amicorum Gerd Winter, Groningen/Amsterdam, 2003, 87 et seq.

the trans-European network. Art. 7 (11) Dir. 1999/62 also offers the possibility to add a mark-up on infrastructure in mountain regions.

IV. The Alpine Transit Bourse (ATB)⁴²

In Switzerland there is an intensive debate about the introduction of the „Alpine Transit Bourse“ (ATB). Its idea is to limit the number of freight alpine transits by introducing a trading scheme of certificates for transalpine freight traffic on the road.⁴³ In December 2008, the Swiss parliament adopted a federal law on the relocation of the transalpine traffic of heavy goods vehicles from the road to the rail (Bundesgesetz über die Verlagerung des alpenquerenden Güterschwerverkehrs von der Straße auf die Schiene [GVVG])⁴⁴. By 2019 transalpine transports of heavy goods vehicles on the road shall be gradually reduced to 650'000 journeys per year.⁴⁵ The objective shall be accomplished with the introduction of the ATB. The ATB, however, will require implementing legislation which may be subject to a referendum. The Federal Council is requested to hold negotiations with the EU and the neighbouring countries on this matter.⁴⁶ The negotiations seem to be necessary, because the introduction of an ATB can only be successfully implemented after conciliation with the other alpine states and the EU. From a legal point of view, an ATB would – as will be shown later⁴⁷ – not comply with the OTA: in regards to the OTA an additional agreement between the EU and the alpine states is therefore required. The question arises if the ATB can and should be introduced as a market-based instrument to (partly) solve the problems linked to the transalpine freight transport on the road.

In the following we discuss the question to what extent the ATB – as currently planned by Switzerland – is compatible with legal disciplines of EU law. A distinction shall be drawn between EU primary and secondary legislation (2. and 3.) and the OTA (4.). The analysis departs from the delineation of the system of the ATB (1.).

1. The mechanism of the Alpine Transit Bourse

The idea of the ATB⁴⁸ consists in limiting the number of alpine transits of heavy goods vehicles by introducing a quantitative ceiling and a principle of „cap and trade“. Heavy goods vehicles with a weight above 3,5 t shall be in possession of an alpine transit-right (ATR) on road-passes for which an ATR is foreseen with compulsory force.⁴⁹ A certain amount of alpine transit entities (ATE) shall allow the acquisition of an ATR, for which the exchange rate⁵⁰ needs to be fixed in advance. The ATR shall be granted for a specific vehicle to give

⁴² This chapter is in most parts based on Astrid Epiney/Jennifer Heuck, „Zur Verlagerung des alpenquerenden Straßengüterverkehrs auf die Schiene: die „Alpentransitbörse“ auf dem Prüfstand des europäischen Gemeinschaftsrechts“, *ZUR* 2009, 178 et seq.

⁴³ Cf. in detail IV.1.

⁴⁴ Cf. the ‚message‘ of the Federal Council in BBl. 2007, 4377, 4509.

⁴⁵ Cf. *Neue Zürcher Zeitung*, 4/12/2008.

⁴⁶ Cf. *NZZ*, 4/12/2008.

⁴⁷ Cf. IV.4.

⁴⁸ The system of the ATB has been delineated from a description of an expertise enquired from various Federal Offices. The expertise analysed the technical and practical feasibility of the ATB, Cf. Bundesamt für Raumentwicklung (ed.), *Alpentransitbörse. Untersuchung der Praxistauglichkeit*, 2007, René Neuenschwander, Urs Springer (Project-team Ecoplan), Matthias Rapp, Stefan Loewenguth, Andrea Felix (Project-team RAPP Trans AG) and Kurt Moll, the expertise can be downloaded at: www.are.admin.ch.

⁴⁹ In Switzerland they shall be according to Art. 2 STVG (Bundesgesetz über den Straßentransitverkehr im Alpengebiet/Federal Law on the road transit traffic in the alpine region, SR 725.14): San Bernardino, Gotthard, Simplon, Großer St. Bernhard.

⁵⁰ The exchange rate may be calculated considering various conditions. It can be fixed while taking into account various circumstances. The number of ATEs for an ATR can, for instance, differ from one vehicle type to another (e.g. emission categorie).

right to cross the road-pass in one direction within a certain timeframe, unless unpredictable incidents of the system such as accidents and natural catastrophes occur.

The allocation of the ATEs can be free of charge or proceed by sale for a fixed charge or in the framework of an auction on a regular basis. Currently, preference is given to the auction based system.⁵¹ After the first purchase the ATE may be freely exchanged on the market, as long as it is allocated to a vehicle as ATR. However, the possibility may be given to change the ATR into ATE at any time.

The local and short distance traffic – defined by distance⁵²– is subject to specific rules. If one would apply the same market costs for the alpine transits, the costs for short distant trips would be significantly above those of long-distance trips. For the implementation of the special treatment it has been suggested to reduce the number of ATEs for an ATR, whereby a different exchange rate would be applied.

2. Primary EU Law

The ATB could be in conflict with Art. 34 TFEU and Art. 18 TFEU. We shall not analyse subsidiary law, which may primarily be relevant in the context of the use of revenue of an ATE-auction.⁵³

a) Art. 34 TFEU

According to Art. 34 TFEU quantitative restrictions on imports and all measures having equivalent effect are principally prohibited⁵⁴ – unless they are legally justified⁵⁵. Quantitative restrictions are all measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.⁵⁶ Measures having an equivalent effect to quantitative restrictions are those (state) measures „which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade“⁵⁷ (*Dassonville*-Formula). As such, all measures that have a negative impact on the trade of goods between Member States fall under the scope of Art. 34 TFEU. This implies a free circulation of all goods that are legally produced and sold in one Member State.⁵⁸ Art. 34 TFEU is, however, not applicable according to the *Keck*-jurisdiction⁵⁹, if the national provision is restricting or prohibiting certain “selling arrangements”, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The details of a factual limitation of Art. 34 TFEU are disputed, even though the ECJ provided certain indications in its latter case-law.⁶⁰

Kommentar [hj2]: Fussnote inhaltlich überprüfen. EuGH hat das an dieser Stelle so nicht « ausdrücklich » gesagt.

⁵¹ See Weber, *AJP* 2008 (note 34), 1213.

⁵² The maximum distance of the local traffic is 40 km on both sides of the road-pass. For the short-distance traffic the maximum distance is 150 km, see Bundesamt für Raumentwicklung, ATB (note 48), 91.

⁵³ As to the missing relevance of the application of Art. 110 TFEU see Epiney/Heuck, *ZUR* 2009 (note 42), 178, 180.

⁵⁴ Cf. with further references, Astrid Epiney, in: Roland Bieber/Astrid Epiney/Marcel Haag, *Die Europäische Union. Europarecht und Politik*, Nomos, Baden-Baden, 8. Aufl., 2009, § 11, no. 34 et seq.

⁵⁵ Cf. further below in the text.

⁵⁶ Cf. ECJ, 2/73 (*Geddo*), ECR 1973, I-865, para. 7; see also ECJ, 124/85 (*Commission/Greece*), ECR 1986, I-3935, para. 3 et seq.

⁵⁷ ECJ, 8/74 (*Dassonville*), ECR 1974, I-837, para 5.

⁵⁸ **Explicitly** in ECJ 120/78 (*Rewe-Zentral AG*), ECR 1979, I-649, para. 8 (*Cassis de Dijon*).

⁵⁹ ECJ, comb. C-267/91 and C-268/91 (*Keck*), ECR 1993, I-6097.

⁶⁰ With reference to other case-law Epiney, in: *Die Europäische Union* (note 54), § 11, para. 40 et seq.

The Alpine Transit Bourse seems to have an effect equivalent to a quantitative restriction. It would render the movement of products more expensive and more difficult, thereby fulfilling the conditions of the *Dassonville*-formula.⁶¹

It may, however, be questioned whether the conditions of the *Keck*-jurisdiction are fulfilled. If they are, the ATB must be qualified as a measure concerning selling-arrangements, so that Art. 34 TFEU would not apply.⁶² It may be argued that the ATB is not product-related because it is meant to regulate the transport of goods, in particular the limitation and the increase in costs of freight road transport in specific regions, rather than the product mobility and therefore the traffic of goods. As such the ATB is comparable with traffic regulations (speed limits, single traffic lane a.o.), that cannot be assessed under the scope of Art. 34 TFEU.⁶³

More convincing arguments, however, suggest the application of Art. 34 TFEU: The objective of the ATB is to limit quantitatively a mode of transport (road-traffic) on certain roads. From a technical point of view, the roads concerned are of utmost importance and can hardly be bypassed. A limitation of the traffic of goods will go along with this objective, since the transport cannot be carried out if the haulier is not in possession of an ATR. Therefore the ATB is not only setting out the traffic-rules but is traffic-regulating. It has a direct effect on the attitude of trade partners to deliver their goods using a certain system of transportation. Thus, Art. 34 TFEU is applicable.⁶⁴

This raises the critical question about the justification of the ATB. According to the case law of the ECJ quantitative restrictions and measures having equivalent effect – as far as indiscriminative measures are concerned⁶⁵ – can be justified to ensure the protection of the environment.⁶⁶ The ATB pursues the objective to reduce heavy goods vehicles on alpine transit routes and to contribute to relocate (partly) the transalpine freight traffic from the road to the rail, which is more protective of the environment. However, the measure also needs to be proportionate.⁶⁷ The proportionality of the measure should be assessed in relation to the level of protection as defined by the Member States unless the European Union defines the level of protection.⁶⁸ There can hardly be any doubt that a quantitative limitation of the

⁶¹ Same conclusion Weber, *AJP* 2008 (note 34), 1213 (1216).

⁶² On the *Keck*-jurisdiction in relation to transport policy measures Astrid Epiney/Reto Gruber, *Verkehrsrecht in der EU. Zu den Gestaltungsspielräumen der EU-Mitgliedstaaten im Bereich des Landverkehrs*, Nomos, Baden-Baden, 2001, 80 et seq.

⁶³ Epiney/Gruber, *Verkehrsrecht* (note 62), 82. Considering the *Keck*-Formula in the area of transport cf. Karl Weber, *Der Transitverkehr in der Judikatur des EuGH: Spannungsfeld zwischen Warenverkehrsfreiheit und Umweltschutz*, in: Günter H. Roth/Peter Hilpold (eds.), *Der EuGH und die Souveränität der Mitgliedstaaten. Eine kritische Analyse richterlicher Rechtsschöpfung auf ausgewählten Rechtsgebieten*, Stämpfli, Bern, 2008, 395 (420 et seq.).

⁶⁴ With the same point of view Weber, *AJP* 2008 (note 34), 1213 (1216). Also ECJ, C-112/00 (Schmidberger), ECR 2003, I-5659; ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871; see also the illustration and analysis of the ECJ case law on the matter of transit traffic and user charges Weber, in: *EuGH und Souveränität* (note 63), 395 et seq.

⁶⁵ Whether measures with direct discriminating effect can be justified with reasons of public interest cf. Epiney, in: *Die Europäische Union* (note 54), § 11, para. 58-59.

⁶⁶ ECJ, 302/86 (Commission/Denemark), ECR 1988, I-4607; see also ECJ, C-2/90 (Commission/Belgium), ECR 1992, I-4431; ECJ, C-379/98 (Preussen Elektra), ECR 2001, I-2099; ECJ, C-18/93 (Corsica Ferries), ECR 1994, I-1783, para. 36.

⁶⁷ In regards to the transport sector Epiney/Gruber, *Verkehrsrecht* (note 62), 89 et seq.; Weber, in: *EuGH und Souveränität* (note 63), 395 (416-417). From the ECJ case law see ECJ, C-463/01 (Commission/Germany), ECR 2004, I-11705; ECJ, C-309/02 (Radlberger Getränkegesellschaft), ECR 2004, I-11763; ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, para. 70.

⁶⁸ ECJ, C-394/97 (Heinonen), ECR 1999, I-3599; ECJ, C-388/95 (Belgium/Spain), ECR 2000, I-3123.

transalpine freight traffic on the road contributes to a reduction of negative impacts on the environment. As such, the ATB may be considered suitable to protect the environment.⁶⁹

The need of the ATB can be substantiated: Its objective is to quantitatively limit the transalpine freight transport on the road to benefit environmental protection⁷⁰. In addition, less restrictive measures are not apparent. The ATB limits rather than prohibits freight transport. Every haulier who paid the toll can transport his goods on the roads that are part of the ATB-scheme.⁷¹ However, it is worth mentioning, that according to the ECJ, hauliers who cannot or do not wish to purchase an ATR, need to be offered realistic alternatives of transporting their goods.⁷² One alternative could be the offer of sufficient, attractive and competitive rail capacities – especially in regards to the costs; in other words, the introduction of an ATB in all alpine countries call for coordinated rail offers. In Switzerland they already exist.⁷³

It can be concluded that the introduction of an ATB does fall under the scope of Art. 34 TFEU but that the measure is justified on the grounds of environmental protection.⁷⁴

b) Art. 18 TFEU

Art. 18 TFEU prohibits direct or indirect⁷⁵ discrimination on the grounds of nationality. The article could be relevant for local and short distance traffic without prejudice to other provisions of the treaty. Indirect discrimination could exist in the case of preferential treatment of transport near the alpine transit road passes. Domestic hauliers, who are established near the ridge of the Alps could benefit from the criteria.⁷⁶

Indirect discrimination can be justified on grounds of objective reasons. The justification cannot be made from the point of view of environmental protection, because the different treatment – other than the introduction of an ATB – does not pursue an environmental objective. The special treatment rather aims at reducing negative impacts for smaller economic and peripheral regions caused by a disproportionate increase of costs for the local and short distance traffic. It is questionable, whether this concern should be taken as an „economic reason“ according to ECJ jurisdiction. It does not justify an unequal treatment on the grounds of nationality. According to the ECJ economic reasons aim at steering the economy or pursue concerns on politico-economical grounds (especially those of a protectionist nature).⁷⁷ Protectionist measures for economic branches in the regions do not qualify as a reason of justification. However, the objective of the preferential treatment of the

Kommentar [hj3]: Ich konnte diese Definition in den Urteilen nicht (wörtlich) finden

⁶⁹ ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, para 73 et seq. where the ECJ states that the sectoral prohibition on the movement of lorries is adopted in order to ensure the quality of ambient air in the zone concerned and is therefore justified on environmental protection grounds; the ECJ however stresses that the Austrian authorities were under a duty to examine carefully the possibility of using less restrictive measures and whether there are genuine alternative means of transporting the goods in question.

⁷⁰ It is up to the Member States to define the level of protection, see note 68. The assessment of the proportionality of the measure thus is (only) a “means-ends analysis“.

⁷¹ Weber, *AJP* 2008 (note 34), 1213 (1217), states that the necessity is related to the problem of “fiscality” (transalpine freight transport on the road getting more expensive) rather than to the problem of contingency.

⁷² ECJ, C-320/03 (Commission, Germany a.o./Austria), ECR 2005, I-9871, in relation to a sectoral prohibition on the movement of lorries.

⁷³ Weber, *AJP* 2008 (note 34), 1213 (1217).

⁷⁴ On the privilege of the local and shortdistance traffic see below IV.2.b).

⁷⁵ On the different notions Epiney, in: *Die Europäische Union* (note 54), § 10, para. 6.

⁷⁶ Cf. also ECJ, C-205/98 (Commission/Austria), ECR 2000, I-7367, para. 72 et seq., referring to Dir. 99/62 the ECJ affirms an indirect discrimination because of a different toll for short distance and long distance journeys at the Brennerautobahn.

⁷⁷ ECJ, C-324/93 (Evans), ECR 1995, I-563, para. 36; ECJ, C-398/95 (Syndesmos ton Elladi Touristikon), ECR 1997, I-3091, para. 23.

local and short distance traffic is not intended to strengthen the competitiveness of enterprises in the region concerned. The objective is rather of a nature of regional policy: peripheral regions on both sides of the alpine main ridge are economically closely connected. They need to maintain a vital link in order to safeguard the economic development of the region. The pursuit of a local and regional economic policy rather than the competitiveness of certain economic branches must be scrutinized. This is also evident from the distinguishing feature, which is the travelled distance rather than the place of residence or the business location of a haulier company. The ECJ affirmed in several cases, that measures, which on first sight seem to pursue an economic aim, can be justified by other (non-economic) reasons, such as to ensure a financial balance of the social security systems⁷⁸ or to safeguard the supply of goods at short distance of isolated areas of Member States⁷⁹. The question addresses the privilege of the local and short distance traffics aiming at the economic survival of peripheral regions. As such the pursuit of a regional economic policy can constitute a reason for justification. This is also shown by Art. 96 (2) TFEU that obliges the Commission to pursue an appropriate regional economic policy and to take into account the needs of underdeveloped areas when approving financial support.

As to the proportionality of the measure the appropriateness seems undisputed: the price-reduction for the local and short distance traffic contributes to the improvement and the sustainment of the regional economic development and the provisioning of the local population. As regards necessity, there do not appear to exist less restrictive measures.⁸⁰ Therefore, the privileged treatment of the local and short distance traffic complies with Art. 18 TFEU. In quantitative terms the local traffic will hardly have an important impact.⁸¹

3. Secondary EU Law: Directive 1999/62

The incompatibility of the ATB with secondary EU law – and Dir. 1999/62⁸² in particular – does not prevent its introduction, because the secondary EU law can be modified. We shall now evaluate the need for amendment.

The introduction of the ATB may be qualified as a toll.⁸³ It precludes that the level of the toll is calculated from the travelled distance using a certain vehicle type. The toll is introduced in or in parts of the trans-European network (Art. 2 lit. b in compliance with Art. 7 (1) Dir. 1999/62). It is also assumed that the alpine road-passes in the Member States are principally part of the trans-European Network. Art. 7 (2-12) Dir. 1999/62 provides the details on the admissibility of a toll and the calculation of its amount. In contrast, the ATB was developed from another principle that completely differs from the usual toll system: The maximum amount for the toll is not fixed in advance but the costs are defined by the market. Member states have no influence on the costs once the maximum number of transits across the road-passes has been defined and the ATEs have been allocated or sold. The principle favours the

⁷⁸ ECJ, C-158/96 (Kohll), ECR 1998, I-1931, para. 41.

⁷⁹ ECJ, C-254/98 (TK Heimdienst), ECR 2000, I-151, para. 34.

⁸⁰ Coming to the same result, but with different dogmatic arguments, Weber, *AJP* 2008 (note 34), 1213 (1222). See also ECJ, C-157/02 (Rieser Internationale Transporte), ECR 2004, I-1477, para. 37, where the ECJ confirms in regards to Dir. 1999/62 that specific regulations apply for border regions. In ECJ, C-205/98 (Commission/Austria), ECR 2000, I-7367, the ECJ denied a justification of different tolls for the long and shortdistance traffic by interpreting the directive (in the version of the decisions' date) as having an exhaustive harmonizing effect. On the directive see IV.3.

⁸¹ Weber, *AJP* 2008 (note 34), 1213 (1222).

⁸² Dir. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ 1999 L 187, 42, last modified by Dir. 2006/103, OJ 2006 L 363, 344. Cf. to this directive already III.

⁸³ The qualification as a user charge does not seem to be adapted. The system would give only one right to travel the road-pass and in one direction only. This may be valid for a certain period of time, but it is not time-dependent as in the sense of Art. 2 lit. c Dir. 1999/62; it does not allow an unspecified number of road-pass transits within a given timeframe.

argument that the introduction of the ATB may not be considered as introducing a toll in the sense of Dir. 1999/62. This is why Dir. 1999/62, which regulates – next to the vehicle taxes that are not relevant here – only the toll and user charges (Art. 1 Dir. 1999/62), does not apply for the ATB.

It is questionable whether Dir. 1999/62 harmonises the rules on „infrastructure costs“. In the affirmative only systems specified in the directive are permitted under defined prerequisites; whereas systems of different structure – such as the ATB – would constitute a breach from the beginning. It may be argued that the introduction of other systems would undermine the harmonising effect of the directive. Last but not least the directive aims at an elimination of distortions of competition between transport companies because of different levy systems in the Member States.

However, important arguments can be put forward against such a broad interpretation of the directive: Member States would be prohibited to introduce individual transport policy instruments that were generated from an approach and a basic idea different from the “usual” tolls and user charges. The fact that the fundamental approach for charging infrastructure costs has never been addressed at the European level leaves leeway to the Member States to develop their own concepts and instruments, as long as they respect EU primary law. It therefore does not appear reasonable to interpret a directive as being exhaustive and therefore prohibiting the introduction of other systems including those that do not fall within its scope, if that directive only sets out rules for a certain type of taxes with the only aim to minimize the distortion of competition. Any other interpretation would lead to the unjustified outcome that the discretion of a Member State to pursue a policy – which according to the European principles is part of the Member States’ competence – would be extensively restrained or even outright abolished. Declaring a directive as having an exhaustive effect would compromise the competence of the Member States.

In sum there are good arguments that the introduction of the ATB does not fall under the scope of Dir. 1999/62; the ATB is not in conflict with the „ordinary“ toll and user charge systems because the directive does not have an exhaustive harmonising effect.

4. *Overland Transport Agreement*

The following provisions of the OTA could be primarily important to the ATB: the principle of „free choice of mode of transport“ (a), the prohibition of quantitative restrictions (b), the principle of non-discrimination (c), the principle of proportionality of the charged costs (d) as well as the fiscal provisions of the agreement (e).

a) Legal consequences of the principle of „free choice of mode of transport“

According to Art. 1 (2) OTA the agreement is based on the principle of free choice of mode of transport. According to Art. 32 indent 2 OTA transport policy measures must comply with this principle. The legal consequences of the principle are, however, not further described by the OTA. Furthermore such a principle is unknown to EU law.⁸⁴ Even when admitting a certain legal effect of the principle – which for itself is already more than doubtful – it could only be understood as a right to choose between the use of different, already existing traffic infrastructures. The choice could, however, be restricted under the premise that the principle of proportionality is duly respected.⁸⁵ It is apparent that the principle has no individual legal

⁸⁴ The term is used in certain statements of the Commission Astrid Epiney, “Der „Grundsatz der freien Wahl des Verkehrsträgers“ in der EU: rechtliches Prinzip oder politische Maxime?“, *ZUR* 2000, 239 et seq.

⁸⁵ Also Weber, *AJP* 2008 (note 34), 1213 (1215).

relevance that would go beyond the principle of proportionality.⁸⁶ Therefore, the principle is not in conflict to the introduction of the ATB.⁸⁷

b) The prohibition of unilateral quantitative restrictions

The aim of the prohibition of unilateral quantitative restrictions (Art. 32 indent 3 OTA) seems to be the durable opening of the transport market.⁸⁸ In connection with the scope of the Agreement (Art. 2 OTA) Switzerland and the EU are obliged to renounce to undertake measures that could quantitatively limit the access to the transport market.

As in Art. 34 TFEU⁸⁹, measures that would normally fall within the scope of the provision can, however, be justified on grounds of general public interest.⁹⁰ Since an incompatibility of the ATB with Art. 32 indent 3 OTA cannot be assumed one can refer to the reflections developed under Art. 34 TFEU above.⁹¹

c) Principle of non discrimination

Art. 1 (3) OTA prohibits any discrimination on the grounds of the nationality. Art. 32 OTA refers to this principle in the context of traffic related measures, explicitly enumerating the prohibited discrimination criteria. The legal consequences of the principle stated in the OTA can be considered the same as in EU law⁹², since Art. 18 TFEU also prohibits the discrimination on the grounds of nationality. Therefore it can again be referred to the discussion above.⁹³

d) Principle of proportionality in the imposition of charges relating to transport costs

With the introduction of the ATB, charges will be imposed to the transalpine freight traffic on the road, provided the principle of proportionality (Art. 32 OTA) is respected. For the application of the principle three aspects should be distinguished:⁹⁴

- Intramodal aspect: in accordance with the polluter-pays principle the costs imposed to different vehicle types of the same mode of transport have to be in proportion to the actual costs caused by a given vehicle type. There seems to be *a priori* no indication why the costs imposed on an ATR should not be in accordance with the polluter-pays principle and why one does not make a differentiation on the grounds of objective criteria. A market mechanism seems to be an appropriate and efficient instrument for charging costs, because the ATEs necessary to purchase an ATR may vary according to the type of vehicle.
- Intermodal aspect: all traffic carriers should be charged the costs they cause. Again there seems to be no indication why the ATB should lead to a non-respect of the principle of proportionality.⁹⁵

⁸⁶ Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (530 et seq.); also Weber, *AJP* 2008 (note 34), 1213 (1215); Sollberger, *Konvergenzen und Divergenzen* (note 19), 55-56.

⁸⁷ Also Weber, *AJP* 2008 (note 34), 1213 (1215).

⁸⁸ Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (534); as well as Weber, *AJP* 2008 (note 34), 1213 (1220-1221).

⁸⁹ Cf. Sollberger, *Konvergenzen und Divergenzen* (note 19), 338-339; Weber, *AJP* 2008 (note 34), 1213 (1214).

⁹⁰ Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (535 et seq.); as well as Weber, *AJP* 2008 (note 34), 1213 (1221).

⁹¹ Cf. IV.2.a).

⁹² Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (528).

⁹³ Cf. IV.2.b).

⁹⁴ Cf. in general Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (538 et seq.).

⁹⁵ Also Weber, *AJP* 2008 (note 34), 1213 (1221), who mentions that the OTA envisages the subsidisation of the rail and that the contracting parties therefore wish to privilege the rail.

- Finally there seems to be no indication that the introduction of an ATB breaches the principle of proportionality between the costs that were caused and the imposed charges, since Art. 37 OTA seems to allow taking into account all external costs.⁹⁶

As a conclusion, the principle of proportionality does not provide for a quantifiable criteria with regards to the extent of costs caused by the traffic. It must, however, be made sure that the charges introduced by the ATB for the transit of an Alpine pass are in accordance with the polluter-pays principle. All external costs can be included to calculate the actual costs that are created by the road user. The cost recovery must also be considered for rail traffic. Admittedly difficult questions may come up about the origin of different emerging costs. Nevertheless, it should be possible to provide some kind of proof or plausibility calculation within the discretion conceded by the provision.

e) Fiscal regulations of the OTA and the prohibition of quota limitation

The question whether Switzerland is allowed to take a charge on transalpine freight transports on roads was pivotal in the negotiations of the Agreement. The Agreement provides for a maximum charge for the „reference distance“ between Basel and Chiasso (300 km). The final treaty regime (40 t limit, no quota limitations of alpine transits and a maximum user charge on the road) came into effect on January 1st, 2005 (see Art. 40 (4) OTA).⁹⁷ The Agreement does not only define a maximum tax rate but also the composition of the tax: The charges differentiate on the one hand according to categories of emission standards and the travelling distance; on the other hand they are partly made up by toll fees for the use of specialised Alpine infrastructure (Art. 40 (5) OTA). This part can constitute up to 15 % of the maximum amount of the charges.

The maximum charge for an alpine transit as determined by the OTA is compulsory.⁹⁸ Switzerland is not allowed to charge higher fees for the transalpine traffic than defined by the OTA.⁹⁹

The compelling conclusion is that the ATB will only be compatible with the OTA, if the charges correspond to the (reasonable) amount as defined by the OTA. The assessment is not affected by the procedure (either free of charge for the first allocation or by the means of an auction).¹⁰⁰ In an auction, the state sells the ATE for the best bid, which would be coherent with a tax for the alpine transit road. In case of an allocation free of charge the first customer will not be charged. However, all other partners on the market would have to pay the market price for an ATE to the first customer. This is why we can still talk about a charge imposed by the state – even though the first customer has been privileged.¹⁰¹ It cannot be argued that the state does not impose charges because the first allocation is issued without tax and that the trade with CO₂-certificates is equally not qualified as a “tax”.¹⁰² The system of the ATB automatically leads to the situation that costs will be charged for the transalpine traffic and that their amount can and most certainly will not correspond to the upper level as defined by

⁹⁶ Cf. Epiney/Sollberger, in: *Bilaterale Abkommen* (note 24), 521 (539-540).

⁹⁷ On tax charges see in detail Sollberger, *Konvergenzen und Divergenzen* (note 19), 304 et seq.; Epiney/Gruber, *URP/DEP* 1999 (note 19), 597 (609 et seq.); Sollberger/Epiney, *Verkehrspolitische Gestaltungsspielräume* (note 19), 36 et seq.

⁹⁸ On protection clauses that are not relevant as regards the ATB see Epiney/Gruber, *URP/DEP* 1999 (note 19), 597 (612 et seq.).

⁹⁹ Cf. Sollberger/Epiney, *Verkehrspolitische Gestaltungsspielräume* (note 19), 62-63.

¹⁰⁰ A free allocation would however lead to a certain amount of practical and economic problems (the demand would be much higher than the offer); see also Bundesamt für Raumentwicklung, *ATB* (note 48), 96-97.

¹⁰¹ Coming to the same result Weber, *AJP* 2008 (note 34), 1213 (1217 et seq.). Other point of view Bundesamt für Raumentwicklung, *ATB* (note 48), 223-224.

¹⁰² Representing this point of view Bundesamt für Raumentwicklung, *ATB* (note 48), 223.

Art. 40 (4) OTA. This would, however, undermine the objective and contents of that article: A system that exceeds the maximum limits of road toll is in contradiction with the OTA.

As the ATB is derived from the market principle, the costs of an ATE may fluctuate according to the demand. The introduction of maximum costs for an ATE will put the whole system into question. It can be assumed that the costs of an ATE will very often be above rather than below the (low) maximum level defined by Art. 40 (4) OTA.

Moreover, the OTA does not justify a deviation from the maximum road toll for the reference distance for reasons of the protection of the environment. Such an interpretation would be in contradiction with the evolutionary history of the Agreement – otherwise the definition of a maximum fee would no longer make sense. This is why the introduction of an ATB should be considered as contrary to a road tax regime as provided for by the OTA.

In addition to this, Art. 8 (6) OTA on the transitional arrangement governing the weight of vehicles provides that all vehicles having the technical standards laid down in the second paragraph of Article 7 (3) OTA shall be exempt from any quota or authorisation agreements with effect from January 1st, 2005. This provision together with the additional paragraphs of Art. 8 OTA (that define the maximum number of alpine transits), the general context of the Agreement and the principle of prohibition of quota restrictions in particular can only be interpreted as stating that a quota for alpine transits is prohibited. Since it is the intention of the ATB to introduce a quota it would equally constitute a breach of the OTA.

V. Conclusion

A major problem of the European Transport Law seems to be the inability of the EU and its Member States to agree on effective instruments that are able to reduce road traffic. One reason for this is certainly that many Member States have not created or do not apply instruments with a sufficiently promising impact such as road taxation. This situation causes problems in the Alpine region because of its specific geographical and ecological features.

Instruments to improve the protection of the Alpine region seem, however, achievable. The question arises whether the Alpine Convention may provide a platform for the development and the promotion of these instruments and for the assessment of their legal implications in order to ensure an effective protection of the Alpine region from continuously increasing traffic. Instruments which deal with individual traffic and not only transport of goods could also be considered.