

National report: Switzerland

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Preliminary remarks:

- *Following the instruction for the national reports, this report will focus on the most important new development in Swiss environmental law, the legislation on CO₂-emissions, and on access to a national court by citizens.*
- *Furthermore, the following report consists merely in different affirmations and a summary of the relevant topics often not including detailed references.*
- *Finally, the english used is not perfect; the text has not been reviewed by an english speaking person.*

I. The CO₂ legislation

As a result of the Convention on Climate Change achievements in Rio de Janeiro in 1992 and the Kyoto protocol,¹ the Federal Law on the reduction of CO₂ entered in force on May 2000.

CO₂ reduction targets are to be reached by the year 2010 in two stages. The first stage appeals to economy's responsibility by the use of mainly voluntary measures, but also other environmental policies, the second stage, only subsidiary, foresees the implementation of a tax.

1. The purpose and the area of application of the CO₂ Law

The CO₂ Law wants to reduce CO₂ emissions attributable to the use of fossil fuels for energy generation (heating oils and motor fuels),² which means the combustion of substances in order to generate energy, so that CO₂ emissions due to other purposes than the use of energy (e.g. for the manufacturing of cement, burning of the garbage etc.) are excluded from the area of application of the law.³ Furthermore, the legislation applies only to CO₂; other greenhouse gases like methane and laughing gas are excluded.⁴

¹ Bruno Gasser, in: Pricewaterhouse Coopers, Klimapolitik in der Schweiz, Hausaufgaben erfüllt? www.pwcglobal.com/ch/ger/ins-sol/publ./abas/klimapolitik.html, p. 4, visited the 11.12.2001.

² Article 1 CO₂ Law.

³ Bally, p. 505.

⁴ Bally, p. 505.

Due to international obligations, the aviation fuel for international air traffic is not included in the general area of application of the CO₂ Law,⁵ but article 2 paragraph 3 engages the Federal Council to limit the emissions from aviation fuel and to regulate them through international agreements.

The legislation should contribute to the reduction of other harmful effects to the environment, to the economic and efficient use of energy and to the increased use of renewable energy sources.⁶

By 2010, emissions have to be decreased by 10 percent in relation to the starting point in 1990

The emissions arising from the use of heating oils shall be reduced by 15 percent overall and the emissions from motor fuels (not including the already mentioned aviation fuel for international flights) by 8 percent overall.⁷

If this targets have been realized or not will be decided by the average of the emissions from 2008 to 2012.⁸ The total quantity of emissions is calculated on the basis of the quantity of fossil fuels brought into circulation for energy generation in Switzerland,⁹ in accordance to the sales principle as the opposite of the territorial principle which is based on the fuels used in Switzerland.¹⁰

In addition to the targets fixed by the law, the Federal Council is allowed to establish individual reduction targets for other sectors of the economy.¹¹

2. *The measures during the first instance*

There are two phases, until 2010, to achieve the reduction targets for heating fuel and for motor fuel: During the first period, the reduction target is to be attained mainly through voluntary measures¹² but also through other existing or planned federal measures, especially concerning the energy, transport, environment and financial policies.

The voluntary measures during the first instance are meant to be of great significance to reach the reduction targets. They appeal to the companies and individuals to

⁵ Botschaft, p. 452.

⁶ Article 1 CO₂ Law

⁷ Article 2 paragraph 2 CO₂ Law.

⁸ Article 2 paragraph 1 CO₂ Law.

⁹ Article 2 paragraph 4 CO₂ Law

¹⁰ Bally, p. 506.

¹¹ Article 2 paragraph 5 CO₂ Law.

¹² Roch Philippe, in: BUWAL, Umsetzung CO₂-Gesetz: hoher Stellenwert für freiwillige Massnahmen der Wirtschaft, www.umwelt-schweiz/imperia/md/content/buwalcontent/klima020701/5.pdf, p. 1, visited the 11.12.2001.

reduce CO₂ emissions on their own initiative by self-chosen measures, free in form and content and - in this first period - without getting any direct compensation. The voluntary measures specifically include declarations whereby consumers of heating oils and motor fuels undertake to limit their emissions.¹³ Such declarations can later lead up to a formal undertaking required in the second instance to be exempted from the tax.¹⁴

3. *The measures during the second instance*

a) The implementation of the tax

If it becomes evident that the targets are not achievable by the measures described above, the Federal Council will incite the CO₂ tax.¹⁵

Subject to the CO₂ tax are the manufacture or the mining and import of coal and heating oils and motor fuels as defined by the Mineral Oil Tax Law of 1996,¹⁶ where these are brought into the circulation for the generation of energy¹⁷ and, therefore, contribute to the CO₂ emissions. Consequently, heating oil, natural gas, coal, petrol, diesel as well as aviation fuel for internal flights have to be taxed, even in the case when used in public interest, such as for public transport or for national defence.¹⁸

b) The level of the tax

The provided CO₂ tax is a "Lenkungsabgabe" imposed to guide companies and individuals to the requested behaviour. Undesired behaviour is not illegal, but only made unattractive by the market instrument of the price.¹⁹

To fix the level of the tax, the Federal Council has to consider, in particular²⁰

1. the effect of further energy taxes;
2. the measures taken by other countries;
3. the price of heating oil and fuels in neighbouring countries;
4. the competitiveness of the economy and individual branches within it.

¹³ Article 4 paragraph 1 CO₂ Law.

¹⁴ Bally, p. 519.

¹⁵ Article 6 paragraph 1 CO₂ Law.

¹⁶ SR 641.61.

¹⁷ Article 7 paragraph 1 CO₂ Law.

¹⁸ Bally, p. 512.

¹⁹ Bally, p. 512.

²⁰ Article 6 paragraph 2 CO₂ Law.

The relative level of the tax is being measured by the CO₂ emissions emitted during the combustion process which are indicated in internationally established statistics.²¹ That way, the tax on natural gas, which doesn't cause very much CO₂ emission, but uses methane to be extracted and to be distributed, is below the taxes on mineral oil products because of their higher CO₂ emissions.²²

The tax per ton CO₂ has to be fixed by the Federal Council in order to compensate for the part of the targets lacking (difference between the prognosticated reduction and the given reduction targets)²³. So, the effectiveness of the voluntary measures and the other measures decides not only about the necessity to implement the tax, but also about the level of the future tax.

In any case, the tax level has to be high enough to insure the desired reducing effects. Furthermore, the Council has to respect the constitutional principles when fixing the level of the tax: The legal principle requires that the level of the tax or, at least, its upper limit, has to be determined in a formal law (formellen Gesetz).²⁴ Consequently, article 7 paragraph 2 CO₂ Law sets the maximum rate of the tax on 210 CHF per tonne of CO₂.²⁵

Also, the principle of equivalence has to be respected.²⁶

The Council may introduce the tax in stages which have to be defined in advance.²⁷ The later the tax is established, the less amount of scope remains to introduce it by stages to achieve the targets in time by the year 2010.²⁸

The Council may specify different tax rates for heating oil and motor fuels depending on the achievement of the reduction targets. It may also introduce the CO₂ tax on heating oils only or on motor fuels only.²⁹ In accordance to the predictions, the tax on heating fuel seems unlikely to be introduced or at least only at a low level.

The tax introduced by the Council (by means of a „Verordnung“) has to be approved by the parliament.³⁰ This solution is a compromise between the position of the majority in the upper chamber which was in favour for a full competence of the

²¹ Botschaft, p. 460.

²² Botschaft, p. 460.

²³ Bally, p. 512.

²⁴ Bally, p. 512; Seiler, Kommentar USG, N 25 zu Art. 35a (1999)

²⁵ In combination with the relative level, this maximum rate would arise e.g. the benzin price for about 0.50 CHF/liter. For other exemples see Botschaft, p. 452, tabelle 22-1.

²⁶ Bally, p. 512; Seiler, Kommentar USG, N 25 zu Art. 35 a (1999).

²⁷ Article 6 paragraph 4 CO₂ Law.

²⁸ Botschaft, p. 460.

²⁹ Article 7 paragraph 3 CO₂ Law.

³⁰ Article 7 paragraph 4 CO₂ Law.

Government within its executive competence,³¹ and the national councils position which wanted to keep this task in the parliaments competence because of its highly political character.³²

c) Tax liability

Concerning the tax on the importation of coal, the CO₂ Law referres to the person liable under the Customs Law³³ for making payment on imports as well as to the domestic manufacturers and producers.³⁴ As far as other fossil fuels are in question, those responsible is the one already liable to pay the mineral oil tax in accordance with the Mineral Oil Tax Law.³⁵

d) Tax exemption

Because of the neutral trade policy pursued in Switzerland, fossil energy sources provided for exports or in transit through Switzerland do not fall in the field of application of the CO₂ Law.³⁶

But as described in article 9 paragraph 1 CO₂ Law, also consumers of large quantities of heating oils and motor fuels or persons whose international competitiveness would be adversely affected by the introduction of the CO₂ tax may be granted exemption from the tax if they give a formal undertaking to the Federal Government to limit their CO₂ emissions. Companies or consumer groups which have already given declarations during the first instance may then transmit them into undertakings.³⁷

The following may give a formal undertaking to limit their CO₂ emissions:³⁸

- a) large companies;
- b) groups of consumers of heating oils and motor fuels;
- c) energy-intensive companies if their CO₂ tax liability exceeds 1 percent of the value of their gross production.

Companies or groups of consumers do need an emission volume of more than 250'000 tonnes CO₂ per annum for giving the formal undertaking,³⁹ smaller

³¹ Amtl. Bulletin 1998, 467.

³² Amtl. Bulletin 1999 N, 539.

³³ SR 631.0

³⁴ Article 8 litera a CO₂ Law.

³⁵ Article 8 litera b CO₂ Law.

³⁶ Bally, p. 514 f.; Article 2 paragraph 4 CO₂ Law e contrario.

³⁷ Bally, p. 519.

³⁸ Article 9 paragraph 2 CO₂ Law.

companies have to found or to join a consumer group (e.g. of companies from the same industry, from the same region etc.), because their direct formal undertaking by the government would impede the execution of the law.⁴⁰

As described in article 9 paragraph 3 CO₂ Law, the commitment to get exempted from the tax includes at least, additionally to the CO₂ limitation by the year 2010 fixed in absolute numbers, a drafting of an action plan, the monitoring of the effect of the action plan measures, furthermore the regular drafting of reports.

The extend of the emission limitation in any undertaking to the government is based on⁴¹

- a) the targets described in article 2 of the CO₂ Law, which means 10 percents overall reduction, emissions from the use of heating oils 15 percents, from motor fuels 8 percents;
- b) the reduction measures already implemented;
- c) the position of the companies with respect to international competition;
- d) the expected growth rate of production.

The growing extend of CO₂ emissions is not only a local but a global problem. To reduce the emissions, it doesn't make any difference where exactly this occurs.⁴² That's why the CO₂ Law as well as the directive based on the law provides certain flexible mechanisms for the companies and group of consumers to reach their targets. The Federal Council may take appropriate account of CO₂ reductions achieved in other countries but financed in Switzerland, or by companies domiciled in Switzerland. To aim that, the requirements should be regulated and internationally recognized criteria (especially the UNFCCC-directive) should be taken into account.⁴³ Climate protection projects with planned CO₂ reductions in industry states (joint implementation) as well as in developing countries (clean development mechanism) are, even before further regulations are set, accepted as a part of the undertakings and taken into account.⁴⁴

Another mechanism of flexibility is the trade with emission rights (Emissionshandel), either within the same consumer group (intra trade) or with other companies or consumer groups (inter trade). Only emission rights which are likely not to be exhausted are tradeable, which is regrettable. The US certificate system on sulphur dioxide indicates the need of a free trade certificate system to be succesful. The trade

³⁹ Article 38 directive on voluntary measures to reduce the use of energy and the CO₂ emissions.

⁴⁰ Botschaft, p. 456.

⁴¹ Article 9 paragraph 4 CO₂ Law.

⁴² Bally, p. 507.

⁴³ Article 2 paragraph 7 CO₂ Law, article 80 directive on voluntary measures to reduce the use of energy and the CO₂ emissions.

⁴⁴ Article 55 directive on voluntary measures to reduce the use of energy and the CO₂ emissions.

has imperatively to be transparent, liquid and predictable so that the companies and consumer groups are able to react in a flexible manner.⁴⁵

In any case, by fixing the requirements for individual commitments, the principle of equivalence as well as the principle of competition neutrality have to be respected in a strict way.⁴⁶

If the conditions of article 9 paragraph 3 CO₂ Law as well as the targets fixed in the undertaking are satisfied, the tax is refunded,⁴⁷ persons giving the formal undertaking who are failing shall pay the tax from which they had been exempt, plus interest.⁴⁸

e) Procedure and implementation

The Federal Council shall implement the law and issue the administrative regulations. Before issuing the administrative regulations, the cantons and interested parties are to be consulted.⁴⁹ If the tax has to be introduced, regulations on the level of the tax, on the exemption of the tax and on the use of the tax revenue will be needed.

For certain tasks, the Council is allowed to call on the services of the cantons and private organisations.⁵⁰ Their service is provided especially for implementing tasks relating to the tax exemption procedure⁵¹ as well as for undertaking the distribution of the tax revenue.⁵² Although the cantons support to organize the tax exemption would not be appropriate because of the often national character of the consumer groups or companies, their aid is required in order to guarantee a certain cooperation.⁵³

f) Use of the tax revenue

The tax revenue which consists in all the income accruing from the CO₂ tax, including interest, less a deduction for all implementation costs is redistributed to the

⁴⁵ Josef Janssen/Urs Springer, in: NZZ, Klarer Rahmen - keine Erfolgsgarantie, Eine Evaluation der Richtlinie zum CO₂ -Gesetz, www.nzz.ch/2001/08/02/wi/page-article7J03Q.html, p. 2, visited the 11.12.2001.

⁴⁶ Bally, p. 515.

⁴⁷ Article 9 paragraph 5 CO₂ Law.

⁴⁸ Article 9 paragraph 6 CO₂ Law.

⁴⁹ Article 15 paragraph 1 CO₂ Law.

⁵⁰ Article 15 paragraph 2 CO₂ Law.

⁵¹ Article 11 paragraph 3 CO₂ Law.

⁵² Article 10 paragraph 3 CO₂ Law.

⁵³ Botschaft, p. 457.

general population and the business community in proportion to their original payments.⁵⁴ Actually, this sum can only be vaguely prognosticated.

The proportion returned to the general population will be distributed uniformly to all natural persons. The Council shall regulate this distribution procedure. It may commission the cantons, public corporations or private individuals for this undertaking,⁵⁵ especially the health insurances seem to have good opportunities to organize this process.⁵⁶ The proportion returned to the business community will be distributed to employers via the compensation funds of the Federal Old Age and Survivors' Insurance Fund on the basis of the determining salary of the employees. These compensation will be reimbursed accordingly. Persons who are exempt from the CO₂ tax based on a formal undertaking may not receive any refunds.⁵⁷

II. Access to a national court

The following second part of this report is dedicated to the legal situation of access to a national court by individuals and organizations. I'll limit in this presentation to a rapid summary of the law at present and renounce to references; they can be found in a report I presented last October and which will be published soonly⁵⁸.

1. In general

In Switzerland, access to national courts in administrative affairs is granted by the „Verwaltungsgerichtsbeschwerde“, a procedure which permits citizens or organizations to take action against an administrative act („Verfügung“) which is based on federal law. The function of the „Verwaltungsgerichtsbeschwerde“ is first to protect individual rights, but over and above this, objective control plays also a certain role, which can be illustrated in the possibility of NGOs to have access to justice.

In Swiss administrative law, you need an administrative act in order to be entitled to go to court. So, there is in principle no possibility for citizens or organizations to take action when the administration is passive. But, in general, you can „provoke“ such an administrative act in formulating demands. Therefore, in practice, judicial protection does not really suffer of this limitation of actions to administrative acts.

⁵⁴ Article 10 paragraph 1 and 2 CO₂ Law.

⁵⁵ Article 10 paragraph 3 CO₂ Law.

⁵⁶ Bally, p. 517.

⁵⁷ Article 10 paragraph 5 CO₂ Law.

⁵⁸ *Epiney*, Primär- und Sekundärrechtsschutz im öffentlichen Recht, in: Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVStRL) 61, 2002.

2. Access to justice

This double role of the “Verwaltungsgerichtsbeschwerde” has some consequences for the access to justice: while the access to justice of individuals (a) is dominated by the “subjective function”, the access to justice of organizations (b) has to be seen in the context of the “objective function”.

a) Individuals

Only persons who have a sufficient interest (“schutzwürdiges Interesse”) and who are personally touched by the decision have access to justice. According to the jurisprudence, this requirement can be divided in three elements:

- The interest has to be practical and of a certain actuality. It can be of a legal or a factual character. So the interest must be really present. This means, for example, that in the case of dangerous installations or measures potentially dangerous for the health of people, the danger must be probable and the individual must be probably concerned. The federal court applies in this context the requirement of a particular high potential danger (“besonders hohes Gefährdungspotential”). The interest is still present if the legal or factual situation of the plaintiff is influenced by the procedure. So, no interest can be admitted if a danger (for example a part of naturehood is already destroyed) has already been realized.
- Second, the plaintiff must be in a special situation; his disadvantage or advantage is a special one in comparison with the situation of other persons (“Sondernachteil”). So, general risks cannot be examined by the judge. The addressee has always such a special interest but third persons do not. The jurisprudence is relatively restrictive and asks for a sort of personal and objective disadvantage. Only ideal interests, as the maintain of a landscape or the protection from further traffic, are not sufficient. Risks for the whole population cannot be an object of the “Verwaltungsgerichtsbeschwerde”.
- Finally, there must be a special intense relation to the contested matter. In general, this requirement is fulfilled when there is already a special disadvantage, but in some special situations, it can be questioned.

In summary, the citizen cannot take action against a polluting activity when he is not damaged in his own. So it is impossible to take action against a polluting activity, too much noise or an unauthorized landfill when the plaintiff is not damaged. Neither, there is a possibility for the citizen to take action only if the law is not respected.

From a conceptual point of view, the right to take action depends on an interest and not on a accorded right in a legislative act. But the concept of interest is a very narrow one. So, the legal situation in Switzerland is situated „between“ the situation in France (where a large notion of interest is determinating) and Germany (where the right accorded in a legislative act is decisive).

b) Organizations

In Swiss administrative law, organizations have access to justice according to special legislation in different areas, so in environmental matters. Three areas can be distinguished: the protection of landscape (“Natur- und Heimatschutz”), the protection of trekking areas (“Fuss- und Wanderwege”) and environmental protection in general. The latter aspect is the most important; so we will limit to this topic.

According to art. 55 USG (“Umweltschutzgesetz”), organizations have access to justice if the following conditions are fulfilled:

- The aim of the organization has to be the protection of the environment and need not to be of a merely commercial character.
- The organization must be active in the whole Country.
- The organization must be older than 10 years.

The access to justice is limited to actions concerning big installations and certain planning activities.

c) Other aspects of effective judicial protection

Very often, it is difficult to prove the link of causation between damage and pollutant activity. In Swiss administrative law, the court has in principle to find out the facts so that the plaintiff is not obliged to prove this link of causality. It is evident that the chances of success are higher if the plaintiff tries to point out proves.

The costs have to be supported by the party who loses; the winner gets back his costs.

2. *Judicial control*

Three aspects are important in our context:

- The interest of the individuals need not to be the same as the aim of the relevant legislation. In other words: if access to justice is open, in principle every illegality can and must be examined by the court. So, individuals can demand the respect of legislation which is in the interest of everybody.

- Organizations can only ask the exam of the legislation which is in the interest of environmental protection.
- The judicial control in Swiss administrative law is not very high, when technical questions are concerned; here, courts apply a certain discretion.

III. Perspectives: Implications of EC law and the Aarhus Convention

1. EC law

Summarized, EC law demands that citizens can take action if the legislative act protects also their interests and if they are personally touched by the situation. The notion of interest is defined in a large way so that also interests of the community have a personal character (each citizen is regarded as a part of this Community)⁵⁹.

In Switzerland, the conditions of access to justice are flexible, as explained above, so that it is not necessary to change the legal basis. But the practice in Switzerland would have to be larger than til now.

2. Aarhus Convention

In view of the ratification of the Aarhus-Convention, the following changes will be necessary⁶⁰:

- a subjective right to access to information has to be created (cf. art. 4 Aarhus-convention); the relevant aspects of the protection of data have to be ruled in a legislative act; the judicial protection related to this right can be granted on the basis of present administrative law since the decision to grant access to information or not has to be taken as an administrative act.
- Swiss law has to be completed with specific dispositions relating to the information of the public. Concerning the duty of the administration to ressemble information, the Swiss law is conform with the dispositions of the Aarhus Convention.
- Participation of the public related to „environmental procedures“ has to be adapted; in particular, participation has to be ruled for projects which figure in annexe I of the Convention.

The right to take action of environmental organizations already included in Swiss law satisfies the conditions of the Aarhus Convention.

⁵⁹ Cf. in detail references in note 1.

⁶⁰ Cf. in detail *Epiney/Scheyli*, Die Aarhus-Konvention. Rechtliche Tragweite und Implikationen für das schweizerische Recht, 2000.

IV. EC level

On the EC level, I held the following modifications for useful:

- introduction of an obligation for member states to introduce standing of environmental organizations at least for the enforcement of EC environmental law and of national environmental law which transposes or applies EC law⁶¹; for a general standing of environmental organization, EC has probably not the competence; nevertheless, it would be desirable to treat all comparable issues the same way.
- Improvement of standing of environmental organizations in art. 230 EC Treaty. This renovation could also improve the control of EC administrative decisions.
- At EC level, a sort of Environmental impact assessment of legislative acts should be introduced.

⁶¹ Cf. for this question in detail *Epiney*, *Gemeinschaftsrecht und Verbandsklage*, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 1999, 485 ff.

Literaturverzeichnis CO2-Gesetz

- Bally Jürg Das CO₂-Gesetz: Instrument der Zusammenarbeit und Selbstregulierung, in: Umweltrecht in der Praxis 2000, S. 501 ff.
- BUWAL Klimapolitik der Schweiz,
www.buwal.ch/nachh/co2/faq_d.htm, besucht am 11.12.01
- BUWAL Das CO₂-Gesetz und seine Umsetzung, www.umwelt-schweiz.ch/imperia/md/content/buwalcontent/klima020701/6.pdf, besucht am 11.12.01
- BUWAL Treibhausgasinventar in der Schweiz, Übersicht 1990 - 1999,
www.buwal.ch/klima/d/dokumente/inventare/progas-new.pdf, besucht am 11.12.01
- BUWAL Richtlinie über freiwillige Massnahmen zur Reduktion von Energieverbrauch und CO₂-Emissionen, www.energieschweiz.ch/imperia/md/content/indusriegewerbegerte/3.pdf
- IPCC Summary for Policymakers, A report of Working Group I of the Intergovernmental Panel on Climate Change,
www.ipcc.ch/pub/spm22-01.pdf, besucht am 19.12.2001.
- International Energy Agency Energy Policies of IEA Countries, Switzerland 1999 Review,
www.iea.org/pubs/review/files/switz99/switz.htm,
besucht am 11.12.01.
- Janssen Josef,
Springer Urs Klarer Rahmen, keine Erfolgsgarantie, Eine Evaluation der Richtlinie zum CO₂-Gesetz,
www.nzz.ch/2001/08/02/wi/page-article7J03Q.html,
besucht am 11.12.01.
- Pricewaterhouse
Coopers Klimapolitik in der Schweiz - Hausaufgaben erfüllt?
www.pwcglobal.com/ch/ger/ins-

solpubl./abas/klimapolitik.html, besucht am 11.12.01.

Pricewaterhouse
Coopers

CO2-Management schafft Wert, word-Dokument, ger/insol/spec-int/ceo/special01_2/download/pwc_co2management.pdf, falls da nicht auffindbar www.pwcglobal.com/ghg .besucht am 11.12.01.

Roch Philippe,
Direktor BUWAL

Umsetzung CO2-Gesetz: hoher Stellenwert für freiwillige Massnahmen der Wirtschaft, www.umwelt--schweiz.ch/imperia/md/content/buwalcontent/klima020701/5.pdf, besucht am 11.12.01.

Seiler Jürg

Kommentar USG, N 25 zu Art. 35 a (1999).

Swiss Confederation

Third National Communication of Switzerland 2001, Bern 2001.