AVOSETTA MEETING, FRIBOURG, 23RD-24TH OF NOVEMBER 2012

"ENVIRONMENT AND LAND TRANSPORTATION LAW"

SWITZERLAND[1]

Astrid Epiney/Jennifer Heuck

A. TRANSPORTATION LAW

I. EUROPEAN UNION LAW

- What are the legal effects of the integration principle as far as transport law is concerned? Can the meaning of the principle be defined more precisely for this area?

According to the integration principle of Art. 11 TFEU the environmental objectives have to be integrated in other policy sectors and therefore also the transport sector. More precisely this means that the objectives and principles of Art. 191 TFEU have to be implemented.

Consequently *"the question as to the legal enforceability of the integration principle is in fact a question as to the legal significance of the objectives, principles and other aspects referred to in Art. 191 TFEU".*[2]

As far as the transport sector is concerned, the integration principle can be defined more precisely as follows:[3]

The source principle:
Transport modes that have more important negative impacts on the environment should be avoided. As such certain environmentally friendlier modes of transport should be promoted. This would not be in contradiction with the principle of "free choice of mode of transports". Such a principle is unknown to EU law.[4] 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

[1] The answers of the subsequent questionnaire are partially based on *Epiney/Heuck*, The Swiss Approach to Mountain Protection and its Relation to European Law: Complementarities or Conflict?, in: Quillacq/Onida (Ed.), Environmental Protection and Mountains: Is Environmental Law Adapted to the Challenges Faced by Mountain Areas, 2011, 44-59.
[2] *Jans/Vedder*, European Environmental Law, 2012, 26.
[3] See *Epiney*, in Dauses, Rn. 148 ff.
[4] The term is used in certain statements of the Commission; cf. *Epiney*, ZUR 2000, 239 et seq.

respected.[5] It is apparent that the principle has no individual legal relevance that would go beyond the principle of proportionality.[6]
Also the source principle will allow measures in order to reduce (and not only to maintain, in the sense that it does not increase further) the traffic volume and the transport-distance.
➔ Concerning the reduction of the traffic volume, see also below.

Polluter pays Principle:
Internalisation of external costs.
➔ See also below.

Precautionary and Prevention Principle:
Measures have to be taken if there is strong suspicion that a certain activity may have environmentally harmful consequences, full scientific evidence that shows the causal connection is not necessary.[7]
Also the interests of the future generations have to be taken into account (sustainable development).

Situations in the various regions:
In so far it needs to be pointed out, that Art. 191 para. 2 TFEU requires that the diversity of situations in the various regions have to be taken into account. This means that the very high environmental impacts in the so-called "transit-regions" have also to be considered.[8]

- Especially: Is it – from a legal point of view – possible to restrict the traffic volume as such? By which measures?

One of the most important measures is a quantitative limitation of the traffic volume. These limitations are, according to Art. 34 TFEU, principally prohibited[9] – unless they are legally justified. However, the measure also needs to be proportionate.[10]

---

[5] Also *Weber*, *AJP* 2008, 1213 (1215).
[6] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (530 et seq.); also *Weber*, *AJP* 2008, 1213 (1215); *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz, 2003, 55-56.
[7] *Jans/Vedder*, European Environmental Law, 2012, 43.
[8] *Epiney*, in Dauses, Rn. 139.
[9] Cf. with further references, *Epiney*, in: Bieber/Epiney/Haag (Hrsg.), *Die Europäische Union. Europarecht und Politik*, 10. Aufl., 2013, § 11.
[10] In regards to the transport sector *Epiney/Gruber*, Verkehrsrecht in der EU, 2001, 89 et seq.; *Weber*, in: Roth/Hilpold (Hrsg.), EuGH und Souveränität, 2008, 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.

The criteria for proportionality set out by the ECJ may vary, according to whether the measures are taken on national or EU-level.
The court is rather strict as far as measures on national level is concerned, however we can observe a certain evolution, according a larger margin of appreciation to the Member States, depending on the pursued objective (as can be observed in the recent judgement C-28/09 (Commission/Austria)).
However, if the measure is taken on EU-level the ECJ allows a much larger margin of appreciation → see C-294/95 (Safety Hi-Tech); C-127/07 (Société Arcelor Atlantique et Lorraine).

Quantitative restrictions are not unknown on EU-level, e.g. emission-trading system, Dir. 2003/87.

- Can the integration principle be interpreted in a way that such measures have to be taken at EU level?

According to the integration principle of Art. 11 TFEU the environmental objectives have to be integrated in other policy sectors. More precisely this means that the objectives and principles of Art. 191 TFEU have to be implemented.
Consequently *"the question as to the legal enforceability of the integration principle is in fact a question as to the legal significance of the objectives, principles and other aspects referred to in Art. 191 TFEU".*[11]

Siehe in Bezug auf die Querschnittsklausel auch *Kahl: "Nur in engen Grenzen (da die notwendige hinreichend konkrete Handlungspflicht regelmäßig fehlen wird) ist bei einem Nichtstun der EU-Organe eine Untätigkeitsklage statthaft."*[12]

→see also next question.

- How can the polluter-pays principle be defined more precisely?

"The costs of measures to deal with pollution should be borne by the polluter who causes the pollution"[13]
The polluter pays principle is binding. Thus a violation of this principle can be assessed. Nevertheless the EU-legislator has a large margin of appreciation.
However, as far as European Law is concerned, the subsidiarity principle also has to be taken into account. This means that the EU-legislator is not in any case obliged to implement the polluter-pays principle. But if he does take measures, he will have to respect the principle.

[11] *Jans/Vedder*, European Environmental Law, 2012, 26.
[12] *Kahl*, in : Streinz, EUV/AEUV, Art. 11 AEUV, Rn. 14.
[13] *Jans/Vedder*, European Environmental Law, 2012, 49.

Consequently "only in very exceptional cases will a measure be susceptible to annulment (or being declared invalid) because certain environmental objectives seem not have been taken sufficiently into account".[14]

- In which way does secondary law take environmental concerns into consideration? Is the integration principle implemented sufficiently in secondary law?

  As far as transport law is concerned, it seems as if the integration principle and especially the polluter pays principle is not yet sufficiently implemented:
  Example: Dir. 1999/62, levying road charges is not obligatory; the fixed maximum external costs are rather low. And numerous exceptions are possible.
  As far as external costs in the rail sector are concerned Dir. 2001/14 provides for a possibility to leavy external costs, however this is not obligatory (Art. 7 para. 5).

- What is the legal framework in European Union law for national measures trying to limit negative environmental effects especially of road and air traffic? In particular:
  - What is the exact scope and objective of Directive 1999/62 in relation to vehicle taxation, tolls and user charges?

    See Jennifer's notes/PPT on Dir. 1999/62, which will be presented individually.

  - What limits have to be drawn from the fundamental freedoms, in particular free movement of goods in view of the case law of the ECJ (C-195/90, C-205/98, C-320/02, C-28/09)? What is the discretion Member States have in implementing such measures?

    According to Art. 34 TFEU ***quantitative restrictions on imports and all measures having equivalent effect are principally prohibited***[15] ***– unless they are legally justified***[16]**.** Quantitative restrictions are all measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.[17] 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"[18] (*Dassonville*-Formula). As such, all measures that have a negative impact on the trade of goods between Member States fall under the scope

[14] *Jans/Vedder*, European Environmental Law, 2012, 26 f.
[15] Cf. with further references *Epiney*, in: Bieber/Epiney/Haag (Hrsg.), *Die Europäische Union. Europarecht und Politik*, 10. Aufl., 2013, § 11.
[16] Cf. further below in the text.
[17] 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.
[18] ECJ, 8/74 (Dassonville), ECR 1974, I-837, para 5.

of Art. 34 TFEU. This implies a free circulation of all goods that are legally produced and sold in one Member State.[19] Art. 34 TFEU is, however, not applicable according to the *Keck*-jurisdiction[20], 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.[21]

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.[22]

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.[23] 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 could be considered as comparable with traffic regulations (speed limits, single traffic lane a.o.), that cannot be assessed under the scope of Art. 34 TFEU.[24]

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 Alpine Transit Right (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.[25]

---

[19] See in this context ECJ 120/78 (Rewe-Zentral AG), ECR 1979, I-649, para. 8 (Cassis de Dijon).
[20] ECJ, comb. C-267/91 and C-268/91 (Keck), ECR 1993, I-6097.
[21] With reference to other case-law Epiney, in: Bieber/Epiney/Haag (Hrsg.), *Die Europäische Union. Europarecht und Politik*, 10. Aufl., 2013, § 11, para. 40 et seq.
[22] Same conclusion *Weber*, AJP 2008, 1213 (1216).
[23] On the *Keck*-jurisdiction in relation to transport policy measures *Epiney/Gruber*, Verkehrsrecht in der EU, 2001, 80 et seq.
[24] *Epiney/Gruber*, Verkehrsrecht in der EU, 2001, 82. Considering the Keck-Formula in the area of transport cf. *Weber*, in: Roth/Hilpold (Hrsg.), Der EuGH und die Souveränität der Mitgliedstaaten, 2008, 395 (420 et seq.).
[25] With the same point of view *Weber*, AJP 2008, 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

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 concerned[26] – can be justified to ensure the protection of the environment.[27] 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.[28] 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.[29] There can hardly be any doubt that a quantitative limitation of the 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.[30]

→see above for the margin of appreciation as far as the proportionality is concerned.

- As the Alps are concerned: which measures could be taken on European, International and/or National level in order to limit the transalpine freight transports by road?

ATE
AETS
Toll+
Investments in the rail sector

---

analysis of the ECJ case law on the matter of transit traffic and user charges *Weber*, in: Roth/Hilpold (Hrsg.), EuGH und Souveränität der Mitgliedstaaten, 395 et seq.

[26] Whether measures with direct discriminating effect can be justified with reasons of public interest cf. *Epiney*, in: Bieber/Epiney/Haag (Hrsg.), Die Europäische Union, 10. Aufl., 2013, § 11, para. 58-59.

[27] ECJ, 302/86 (Commission/Denmark), 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.

[28] In regards to the transport sector *Epiney/Gruber*, Verkehrsrecht in der EU, 2001, 89 et seq.; *Weber*, in: Roth/Hilpold (Hrsg.), EuGH und Souveränität der Mitgliedstaaten, 2008, 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.

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

[30] 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.

- What EU measures have an impact on the construction of roads, and how could they be made more environmentally friendly?

Dir. 2011/92 on environmental impact assessment;
Dir. 2001/42 on strategic environmental impact assessment;
Dir. 92/43 Flora-Fauna-Habitat
Dir. 2009/147 Protection of Birds

The Directives could be more environmentally friendly, by implementing some of the measures foreseen by the Transport Protocol of the Alpine Convention.

Example:
Art. 11 Road transport
"1. The Contracting Parties shall *refrain from constructing any new, large-capacity roads for transalpine transport*.
2. Large-capacity road projects *for intra-Alpine transport* may be carried out only if:
(a) the objectives set out in Article 2(2)(j) of the Alpine Convention can be attained by means of appropriate precautionary and compensatory measures as determined by the environmental impact assessment;
(b) the *transport requirements cannot be met by making better use of existing road and railway capacity, by extending or constructing new railway transport and shipping infrastructures, by improving combined transport, or by any other transport organisation measures*;"

➔ This means that specific alternatives have in any case to be considered. In the end, this does also mean that", as far as the road is concerned, the "zero-option has to be taken into account.

"(c) the results of the advisability study have shown that the project is economically viable, the risks are contained and the result of the *environmental impact assessment is positive*;"

→ thus the results of the consultations would not only have to be taken into consideration (see Art. 8 Dir. 2011/92), but are binding to a certain point.

"(d) regional planning and/or programmes and sustainable development are taken into consideration."

- What EU measures provide for product labelling concerning the transportation of a product?

Reg. 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS).

According to its Art. 1 "the objective of EMAS, as an important instrument of the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, is to promote continuous improvements in the environmental performance of organisations by the establishment and implementation of environmental management systems by organisations, the systematic, objective and periodic evaluation of the performance of such systems, the provision of information on environmental performance, an open dialogue with the public and other interested parties and the active involvement of employees in organisations and appropriate training".

Organisations wishing to be registered for the first time have to carry out an environmental review of all direct and indirect environmental aspects of the organisation in accordance with the requirements set out in Annex I (Art. 4 Reg. 1221/2009).

Direct environmental impacts may relate to transport issues (both for goods and services) (Annex I.2.a.ix), indirect environmental impacts may relate to product life cycle related issues (design, development, packaging, transportation, use and waste recovery/disposal) (Annex I.2.b.i).

Once the environmental review has been undertaken the organisation installs an eco-management system that fixes detailed environmental goals, that has to be validated and that is periodically controlled. Once the system is validated, the organisation is allowed to use the EMAS-Logo.

However it has to be taken into account, that the product itself is not being labelled (Art. 10 para. 4 Reg. 1221/2009). The reason is that the EMAS is referring to the production-process of an organisation, but does not establish an ecological quality of a product.[31]

Reg. 66/2010 on EU-Ecolabel

Ecolabels are placed on certain products to enable consumers to choose those which have been recognised as less harmful to the environment. They are voluntary public schemes based on specific scientific environmental criteria, open to all businesses in a transparent and non-discriminatory manner. Since 1992, the EU-Ecolabel regulation has set the legal framework, while Commission Decisions establish the requirements that the products have to meet in order to be awarded with the EU Ecolabel.

[31] *Epiney*, Umweltrecht EU, 2005, 233.

Problem: No specific provision concerning the transport aspects; large differences in environmental impacts exist for the same type of products, especially as far as transport distances are concerned.

Dir. 2010/30 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products.
Art. 1 Scope: "This Directive establishes a framework for the harmonisation of national measures on end-user information, particularly by means of labelling and standard product information, on the consumption of energy and where relevant of other essential resources during use, and supplementary information concerning energy-related products, thereby allowing end-users to choose more efficient products".
However, "this Directive shall not apply to *any means of transport for persons or goods*".

Directive 2009/33 on the promotion of clean and energy-efficient road transport vehicles.
The Directive requires that energy and environmental impacts linked to the operation of vehicles over their whole lifetime are taken into account in all purchases of road transport vehicles. Two options are offered for public authorities to meet the requirements: setting technical specifications for energy and environmental performance, or including energy and environmental impacts as award criteria.

II. NATIONAL LEGISLATION

1. GENERAL QUESTIONS ON NATIONAL TRANSPORT POLICIES AND LAWS

Describe the key national legislation to promote a sustainable transport policy.

a. To what extent, environmental issues are taken into account in national transport policy? Does national transport policy set specific goals in order to reduce especially negative impacts from road traffic, e.g. emission goals, road traffic relocation on rail etc.?
b. What are important constitutional law provisions?

Federal Constitution
Art. 82: Road transport

"1 The Confederation shall legislate on road transport.
2 It shall exercise supervisory control over roads of national importance; it may decide which transit roads must remain open to traffic.

3 Public roads may be used free of charge. The Federal Assembly may authorise exceptions"

Art. 83: National roads

"1 The Confederation shall ensure the construction of a network of motorways and shall guarantee that they remain useable.
2 The Confederation shall construct, operate and maintain the national roads. It shall bear the costs thereof. It may assign this task wholly or partly to public or private bodies or combined public-private bodies.36
3 ..."

Art. 84: Alpine transit traffic

On February 20, 1994, the Swiss population adopted the Alpine Initiative. Art. 84 para. 3 of the Federal Constitution prohibits the increment of road transit capacities in the alpine region. Exceptions are only permitted for bypass-roads to reduce transit traffic. Art. 84 para. 3 Federal Constitution is not only to be understood as an ambition, but as a binding mandate for the Confederation.[32] The provisions are substantiated by national law.[33] According to this law, four road sections in Switzerland are classified as „transit roads"[34]. 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.[35]

In addition to the prohibition of capacity-increment, Art. 84 para. 2 of the Federal Constitution provides that the border-to-border road traffic (as far as freight is concerned) shall be relocated to the rail within 10 years. The year 1994 with 650'000 freight journeys through Switzerland per year is referred to as baseline. Meantime the dead-line has been postponed to the opening of the Gotthard base-tunnel, planned for the year 2018 (Art. 3 para. 2 GVVG).[36] 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 transit agreement of 1992 (and now the OTA). The legal implication to use the rail was considered to be 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

[32] *Griffel*, in:Müller (Hrsg.), Verkehrsrecht, 2008, 5 (31).
[33] Cf. Bundesgesetz über den Strassentransitverkehr im Alpengebiet vom 17.6.1994, SR 725.14.
[34] San Bernardino, Gotthard, Simplon and Grosser Sankt Bernhard.
[35] 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.
[36] As an intermediate goal it was envisaged to reduce the traffic to 1 million freight journeys through Switzerland per year until the year 2011. However this goal has not been achieved.

grounds of nationality might exist. However, in view of international law, the provision does not indicate an absolute ban on driving.[37] 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.

Art. 85: Heavy vehicle charge

➔ See below for details

Art. 86: Consumption tax on motor fuels and other traffic taxes

➔ See below for details

Art. 87: Railways and other modes of transport

"The legislation on rail transport, cableways, shipping, aviation and space travel shall be the responsibility of the Confederation."

Transitional provisions:

Art. 196, 1 FC: Transitional provision to Art. 84 (Transalpine transit traffic)

"The transfer of freight transit traffic from road to rail must be completed ten years after the adoption of the popular initiative for the protection of the alpine regions from transit traffic".

Art. 196, 2 FC: Transitional provision to Art. 85 (Flat-rate heavy vehicle charge)

Art. 196, 3 FC: Transitional provision to Art. 87 (Railways and other carriers)

c. What are the most important legislative acts in the field of road and rail transportation?

Güterverkehrsverlagerungsgesetz (GVVG)
Strassentransitverkehrsgesetz (STVG)
Alpentransitgesetz (ATG)
Schwerverkehrsabgabengesetz (SVAG)
Nationalstrassenabgabengesetz (NSAG)
Verordnung über die Förderung des Bahngüterverkehrs (BGFV)[38]
Eisenbahngesetz (EBG)[39]

2. INSTRUMENTS TO MANAGE AND REDUCE ROAD TRAFFIC

[37] Cf. *Epiney/Gruber*, Verkehrspolitik und Umweltschutz in der Europäischen Union, 1997, 187 et seq., cf. also Bundesamt für Justiz, VPB 1995 II 217 et seq.
[38] SR 740.12.
[39] SR 742.101.

Is there a national debate on the sense and nonsense of traffic tolls and other instruments to manage and reduce road traffic, and if so, has this led to changes or corrections of the regulatory framework?

a. Tolls and user charges

aa) To what extent is the Directive 1999/62 being implemented in the national legal systems?

- Are user charges and/or tolls being levied for the use of infrastructure?
- If so, on which roads are they levied?
- On which vehicles are user charges/tolls being levied (minimum weight etc.)?
- In case of a toll, which costs, infrastructure costs and/or external costs are taken into account?
- Does national law fix a maximum amount for user charges/tolls (infrastructure costs/external costs)?
- Is there a possibility for a mark-up for special infrastructure/regions?

Art. 85 Federal Constitution provides the conditions for the charging of a performance-related heavy vehicle tax (HVT; leistungsabhängige Schwerverkehrsabgabe (LSVA)) in Switzerland. Art. 85 Federal Constitution therefore is *lex specialis* to the constitutional principle, that the use of public roads is free of charges (Art. 82 para. 3 Federal Constitution).
According to Art. 85 para. 1 the Confederation may levy a capacity or milage-related charge on heavy vehicle traffic where such traffic creates public costs that are not covered by other charges or taxes. This HVT aims at implementing the polluter-pays principle and thus to contribute to shift the heavy good traffic from road to rail (see Art. 1 SVAG).[40]

The HVT consists of the infrastructure costs and the general public costs (Art. 1 para. 1 SVAG[41]). The general public costs are being defined as the external costs of the heavy vehicle traffic (Art. 7 para. 2 SVAG); that have to correspond actual scientific evidences (Art. 7 para. 3 SVAG).
Undisputedly, accident-costs, healthcosts, traffic-based air pollution and noise pollution costs as well as costs due to damages at buildings are being considered as external costs.[42] The Federal Court recently

[40] BGE 2A.71/2003 vom 6. Feb. 2004 E. 8; *Beusch*, Lenkungsabgaben im Strassenverkehr- Eine rechtliche Beurteilung der Möglichkeit zur Internalisierung externer Umweltkosten, 1999, 210 et seq.; siehe auch *Härner*, Strassenrecht, in: Georg Müller (Hrsg.), Verkehrsrecht, 2008, 173 ff., Rn. 80.
[41] Schwerverkehrsabgabengesetz (*Heavy Vehicle Tax Law*) vom 19. Dezember 1997, Stand am 1. April 2008, SR 641.81.
[42] BVGer Urteil vom 21. Oktober 2009, A-5550/2008, E. 9.1.3., mit Verweis auf die Botschaft zum SVAG in BBl. 1996 V 521, S. 523 f.

pronounced in a judgment[43] that traffic-jam costs[44] are also to be understood as external costs of the heavy weight traffic in the sense of Art. 7 para. 2 SVAG. External costs have to be defined from the perspective of the polluter.[45] This means that costs have to be regarded as external, whenever they are *not* carried by the polluter.[46] The polluter is the road user. However the road user is not to be understood as the individual road user, but it has to be differentiated between the different vehicle categories.[47] Thus the perspective of the category "heavy vehicle" is pivotal.

The HVT is levied for the use of all public roads (Art. 2 SVAG) and is being calculated on the basis of the admitted gross load weight and the travelled kilometres (Art. 6 para. 1 SVAG). The exact rate per ton kilometre is fixed by the federal council (Art. 8 SVAG). According to the SVAG the tariff per ton kilometre can be of a maximum of 0,03 CHF (Art. 8 para. 1 lit. b SVAG).

Also, it can be differentiated according to the emission or the consumption of the vehicle (Art. 6 para. 3 SVAG). In that case, the tariff can vary to a maximum of 15%[48], the amount of the tariff named in the law being considered as average (Art. 6 para. 3 SVAG).

However when fixing the amount, the federal council is also bound to the provisions of the Bilateral Agreement on Overland Transport (OTA) between Switzerland and the European Union (Landverkehrsabkommen (LVA)).

The Overland Transport Agreement (Landverkehrsabkommen – LVA) (together with the Agreement of Free Movement of persons) constituted the most difficult Bilateral I treaty since the difference of interests between the EU[49] and Switzerland[50] was very strong in these areas:

---

[43] BGer Urteil vom 19. April 2010, 2C_800/2009.
[44] Traffic-jam costs are the costs due to time-loss.
[45] This was controversial because traffic-jam and therefore the costs are not only created by the heavy vehicle traffic but also the private passenger traffic. However, it has to noted, that even though heavy vehicle traffic corresponds to only 3% of the traffic on the road, it is responsible of 20% of the generated costs (CE Delft, Are trucks taking their toll? Delft 2009, S. 41 (http://www.ce.nl/publicatie/are_trucks_taking_their_toll/873, last visited on Oct. 11th 2012).
[46] The question of who in the end carries the costs, the community or the person directly concerned, is not relevant.
[47] BGer Urteil vom 19. April 2010, 2C_800/2009.E. 5.4.
[48] *Balmer*, Alpenquerender Gütertransport : Zur rechtlichen Lage in der Schweiz unter besonderer Berücksichtigung der LSVA, in: Epiney/Heuck, Der alpenquerende Gütertranport, 2012, 79 (82).
[49] 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.
[50] Cf. Siegwart/Gruber/Beusch, AJP 1998, 1033 (1034-1035); *Epiney*, Die Beziehungen der Schweiz zur Europäischen Union, dargestellt am Beispiel des Alpentransits, Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte, 1996, 12 et seq.

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.

The main aspects of the Overland Transport Agreement are summarised as follows:[51]

- **General Provisions:** Part I of the treaty includes a number of general principles. Apart from the principle of free choice of mode of transport, the **principle of non-discrimination** stated in Art. 1 para. 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.[52] 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,

[51] Cf. *Epiney/Gruber*, "Das Landverkehrsabkommen Schweiz – EU. Überblick und erste Bewertung", URP/DEP 1999, 597 et seq.; *Sollberger/Epiney*, *Verkehrspolitische Gestaltungsspielräume der Schweiz auf der Grundlage des Landverkehrsabkommens*, 2001; *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der EG und der Schweiz, 2003, 177 et seq.

[52] And therefore indirectly the PRTHV-rate (leistungsabhängige Schwerverkehrsabgabe).

reflecting the costs arising from the use of infrastructure and the "polluter-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.
- 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.

Contrary to the SVAG the maximum level of the tax is not based on the travelled *ton kilometre*; according to Art. 40 OTA a maximum level of taxes for a transit through Switzerland has been determined for a *reference travelling distance*, namely Basel-Chiasso, which corresponds to approximately 300 km. The conversion of this maximal level for the reference travelling distance corresponds to 0,027 CHF per ton kilometre.[53] As such, the maximum level foreseen in the OTA is lower, than the one foreseen in the SVAG.

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 may partly be made up by toll fees for the use of specialised Alpine infrastructure (Art. 40 para. 5 OTA). This part can constitute up to 15 % of the maximum amount of the charges.
As such, the part of the tax levied for the use of specialised infrastructure is not to be understood as a mark-up, as the maximum charge for an alpine transit as determined by the OTA is compulsory.[54]

[53] *Balmer*, Alpenquerender Gütertransport : Zur rechtlichen Lage in der Schweiz unter besonderer Berücksichtigung der LSVA, in: Epiney/Heuck (Hrsg.), Der alpenquerende Gütertranport, 2012, 79 (82).
[54] On protection clauses that are not relevant as regards the ATE see *Epiney/Gruber*, URP/DEP 1999, 597 (612 et seq.).

Switzerland is not allowed to charge higher fees for the transalpine traffic than defined by the OTA.[55]

Finally it needs to be mentioned that of all tunnels in Switzerland only the tunnel of the Great Saint Bernhard Route is subject to a fee and thus falls within the exception of Art. 82 para. 3 BV. The tunnel crosses the border to Italy, where a fee in order to finance the infrastructure is normal. Legal basis for charging this fee is a bilateral treaty with Italy.[56]

bb) Do you have a road toll system "other" than the one foreseen by Directive 1999/62, e.g. on other roads, transport of persons etc.?

According to Art. 86 para. 2 Federal Constitution, the Confederation may levy a consumption tax on motor fuels. Additionally it shall levy a charge for the use of the motorways by motor vehicles and trailers that are not liable to pay the heavy vehicle charge. Therefore, Art. 86 Federal Constitution is also *lex specialis* to the constitutional principle, that the use of public roads is free of charges (Art. 82 para. 3 Federal Constitution).
The conditions for levying this tax can be found in the Nationalstrassenabgabengesetz (NSAG)[57]/*National roads tax law*. As the heavy vehicle charge is being levied on all vehicles (independent of the vehicle owner's origin) of a minimum weight of 3,5 t, the traffic tax affects vehicles, trailers and motorbikes of a weight less than 3,5 t, and therefore also those, that use their car for private purposes.

Contrary to the HVT the tax is only levied for the use of national roads of the first and second category (Art. 3 para. 2 NSAG), namely motorhighways,[58] and not all public roads (Art. 2 SVAG). Today the charge is of 40 CHF (Art. 6 NSAG) and has to be paid by the purchase of a Vignette (Art. 7 NSAG), which is valid for a calendar year (Art. 8 NSAG). In the future the price will be augmented to 70 CHF (instead of 100 CHF as initially planned by the Federal Council).

cc) To what extent external costs are being charged in the rail-sector?

According to Art 9*b* EBG (Eisenbahngesetz/*railway law*) every railway-concessioner has the right to charge a fee for the use of the infrastructure. The amount of the fee complies with the marginal costs,

[55] Cf. *Sollberger/Epiney*, Verkehrspolitische Gestaltungsspielräume, 2001, 62-63.
[56] Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Italienischen Republik über den Bau und den Betrieb eines Strassentunnels unter dem Grossen St. Bernhard vom 23. Mai 1958, SR 0.725.151.
[57] SR 741.71.
[58] See Bundesgesetz über die Nationalstrassen (NSG) vom 8. März 1960 (Stand am 1. Januar 2011), SR 725.11.

where it also has to be taken account of the damaged caused to the environment by the railway vehicles and of the demand. The rates have been fixed in detail in Art. 18 ff. Eisenbahn-Netzzugangsverordnung (NZV)[59] by the federal council (see also Art. 9*a* para. 3 EBG). According to this the price for the trail is based on the basic-price (minimum price) and the price for additional services.
As far as the damage caused to the environment by the railway vehicles is concerned, Art. 20*a* NZV sets a positive appeal, by giving a "noise-bonus" to users that use vehicles with noise-reducing brake-systems.
This "noise-bonus" has to be reimbursed by the railway-concessioner.

b. Emission Trading

aa) Does an emission trading system on vehicles exist and how does it function?

No, currently such a system does not exist in the transport sector. However studies on the feasibility to introduce an Alpine emissions trading system (AETS) based on the CO_2 emission has been mandated by the Zurich-Process. The Zurich Process, named after the "Declaration of Zurich", is the formal platform of cooperation of the Ministers of Transport of the Alpine countries. The chair is currently held by Switzerland.

bb) If not, to what extent adaption of national law will be necessary in order to introduce an emission trading system on vehicles?

OTA: prohibits quotas, the maximum fee has to be respected
→ See also remarks concerning transit exchange system

c. Transit Exchange System

aa) Does a transit exchange system exist and how does it function?

No, currently such a system does not exist in Switzerland. However, in fulfilment of the constitutional mandate to transfer as much transalpine heavy road traffic as possible to the rail system (road-to-rail policy) and to limit the number of vehicles to an annual maximum of 650,000, it has been examined whether the introduction of an Alpine Crossing Exchange would be operationally, economically and legally feasible. For the purposes of the Alpine Crossing Exchange, the total number of annually permissible journeys is converted into the form of alpine crossing rights. An alpine crossing right is purchased through the payment of several alpine crossing units. These are initially auctioned

[59] SR 742.122.

off and can then be freely purchased and sold by freight forwarders on the market, the price being determined by supply and demand. Improvements to the transalpine rail freight transport system are a precondition for this initiative.[60]

In order to prevent traffic from taking alternative routes through neighbouring countries, this system depends on a concerted approach throughout the alpine region. Therefore the feasibility studies have been mandated by the Zurich-Process.

Also the Swiss Parliament has given the competence to the Federal Council to negotiate with the European Union the introduction of an ATE system (Art. 6 GVVG). The final introduction has however to be approved by the Swiss Parliament.

bb) If not, to what extent will the adaption of national law be necessary in order to introduce a transit exchange system, such as the Alpine Crossing Exchange for example?

The following provisions of the OTA could be primarily important to the ATE: the principle of „free choice of mode of transport" (1), the prohibition of quantitative restrictions (2), the principle of non-discrimination (3), the principle of proportionality of the charged costs (4) as well as the fiscal provisions of the agreement (5).

(1) Legal consequences of the principle of „free choice of mode of transport"

According to Art. 1 para. 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.[61] 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.[62] It is apparent that the principle has no individual legal

[60] http://www.are.admin.ch/themen/verkehr/00250/02541/index.html?lang=en.
[61] The term is used in certain statements of the Commission, cf. *Epiney*, "Der „Grundsatz der freien Wahl des Verkehrsträgers" in der EU: rechtliches Prinzip oder politische Maxime? ", ZUR 2000, 239 et seq. Cf. as to the use of the principle in the OTA already II.2.
[62] Also *Weber*, AJP 2008, 1213 (1215).

relevance that would go beyond the principle of proportionality.[63] Therefore, the principle is not in conflict to the introduction of the ATE.[64]

(2) 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.[65] 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 TFEU[66], measures that would normally fall within the scope of the provision can, however, be justified on grounds of general public interest. [67] Therefore, in referring to the reflections developed in relation to Art. 34 TFEU, an incompatibility of the ATE with Art. 32 indent 3 OTA cannot be assumed.

(3) Principle of non-discrimination

Art. 1 para. 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 law[68], since Art. 18 TFEU also prohibits the discrimination on the grounds of nationality.

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

With the introduction of the ATE, 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:[69]

- 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

[63] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.) Bilaterale Abkommen, 2001, 521 (530 et seq.); also *Weber*, AJP 2008, 1213 (1215); *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz, 2003, 55-56.
[64] Also *Weber*, AJP 2008, 1213 (1215).
[65] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (534); as well as *Weber*, AJP 2008, 1213 (1220-1221).
[66] Cf. *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz, 2003, 338-339; *Weber*, AJP 2008, 1213 (1214).
[67] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (535 et seq.); as well as *Weber*, AJP 2008, 1213 (1221).
[68] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (528).
[69] Cf. in general *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (538 et seq.).

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 ATE should lead to a non-respect of the principle of proportionality.[70]

- Finally there seems to be no indication that the introduction of an ATE 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.[71]

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 ATE 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.

(5) 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 of central interest 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 para. 4 OTA).[72] 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 may partly made up by toll fees for the

[70] Also *Weber*, AJP 2008, 1213 (1221), who mentions that the OTA envisages the subsidisation of the rail and that the contracting parties therefore wish to privilege the rail.
[71] Cf. *Epiney/Sollberger*, in: Felder/Kaddous (Hrsg.), Bilaterale Abkommen, 2001, 521 (539-540).
[72] On tax charges see in detail *Sollberger*, Konvergenzen und Divergenzen im Landverkehrsrecht der Europäischen Gemeinschaft und der Schweiz, 2003, 304 et seq.; *Epiney/Gruber*, URP/DEP 1999, 597 (609 et seq.); *Sollberger/Epiney*, *Verkehrspolitische Gestaltungsspielräume*, 2001, 36 et seq.

use of specialised Alpine infrastructure (Art. 40 para. 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.[73] Switzerland is not allowed to charge higher fees for the transalpine traffic than defined by the OTA.[74]

The compelling conclusion is that the ATE will only be compatible with the OTA, if the charges correspond to the (rather low) amount as defined by the OTA. This assessment is not affected by the procedure (either free of charge for the first allocation or by the means of an auction).[75] 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.[76] It cannot be argued that the state does not impose charges because the first allocation is issued without tax and that the trade with CO_2-certificates is equally not qualified as a "tax".[77] The system of the ATE 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 Art. 40 para. 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 ATE 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 para. 4 OTA.

Moreover, according to the OTA, a deviation from the maximum road toll for the reference distance for reasons of the protection of the environment cannot be justified. 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.

---

[73] On protection clauses that are not relevant as regards the ATE see *Epiney/Gruber*, URP/DEP 1999, 597 (612 et seq.).
[74] Cf. *Sollberger/Epiney*, Verkehrspolitische Gestaltungsspielräume, 2001, 62-63.
[75] 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, *ATE* (note 48), 96-97.
[76] Coming to the same result *Weber*, AJP 2008, 1213 (1217 et seq.). Other point of view *Bundesamt für Raumentwicklung*, ATE, 223-224.
[77] Representing this point of view Bundesamt für Raumentwicklung, ATE, 223.

This is why the introduction of an ATE must be considered as contrary to a road tax regime as provided for by the OTA.

In addition to this, Art. 8 para. 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 Art. 7 para 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 ATE to introduce a quota it would equally constitute a breach of the OTA.

3. INSTRUMENTS TO PROMOTE RAIL TRAFFIC AND COMBINED TRAFFIC?

a. Is there any specific legislation promoting rail traffic and combined traffic, such as regulation, price control, subsidies etc.?

Art. 84 para. 2 of the Federal Constitution provides that the border-to-border road traffic (as freight is concerned) shall be relocated to the rail within 10 years.

For this purpose Art. 6 GVVG gives the competence to the federal council to introduce an Alpine Transit Exchange system.
Also, according to Art. 8 GVVG the Confederation has the competence to take non-discriminating measures in order to promote the combined traffic on long distances. The maximum amount of subsidies has to decrease from year to year. Also the accompanied combined traffic shall be promoted only additionally to the unaccompanied combined traffic.
Detailed provisions on the promotion of the combined traffic can be found in the decree on the promotion of the transport of goods by rail (Verordnung über die Förderung des Bahngüterverkehrs (BFGV)).

b. How are infrastructure costs for rail traffic financed?

In order to shift the traffic from road to rail, a modernisation of the rail infrastructure is necessary, which of course leads to the problem of financing.

As far as the modernisation of the rail infrastructure is concerned, it was decided to build two base-tunnels (Lötschberg and Gotthard) as a new rail link through the Alps (NEAT/NRLA), which has also been stipulated in Art. 34 para. 1 OTA.
In return, the European Union is obliged to increase the capacity of the north and south access to these routes (Art. 34 para. 2 OTA). Also both Contracting Parties shall work together to enable their respective competent authorities to plan and implement, in a

coordinated manner, the infrastructure, rail and combined transport measures necessary to meet their commitments (Art. 34 para. 3 OTA).

The specific provisions on the implementation of the base-tunnels can be found in the Alpentransit-Gesetz (Alpine Transit Law).[78]

The necessary financial means are provided for by a legally dependent fond, which is alimented by the HVT. However, this fond is limited to 20 years (Art. 196, 3 para. 3 Federal Constitution).

4. CASE LAW

a. To what extent have the following rulings of the Court of Justice also been of relevance in your countries?

- CJUE, C-195/90, Commission/Germany (Toll and heavy goods vehicles)
- CJUE, C-205/98, Commission/Austria (Brenner-Toll).
- CJUE, C-320/02, Commission/Austria (Sectoral driving ban I); CJUE, C-28/09, Commission/Austria (Sectoral driving ban II)

No relevance in so far as Switzerland is not obliged to respect these rulings. However the rulings are of interest for Switzerland to the extent as they may have an important influence on the development of trans-alpine-traffic and potential diverted traffic to Switzerland.
See especially C-28/09 Sectoral driving ban II, where it was criticized that the Austrian measure would have as effect that "transit traffic by the foreign lorries concerned would have to be diverted either via Switzerland or via the Tauern route in Austria, which would involve a considerably longer journey. Furthermore, the additional costs caused by the Swiss customs formalities would also have to be taken into account" (para. 74).
It seems more than questionable whether such diverted traffic corresponds to the swiss interest to reducing boarder-to-boarder heavy good traffic by shifting it from road to rail. Considerable increase of traffic would make it even more difficult to reach that goal.

b. Is there any national case law on transport issues where EU issues came into play?
- relating to tolls and user charges?
- relating to driving bans (e.g. night lorry ban in London)?

BVGer Urteil vom 21. Oktober 2009, A-5550/2008
BGer Urteil vom 19. April 2010, 2C_800/2009
→ both concerning the question whether the cost of time-loss due to traffic jam can be considered as external costs when calculating the HVT.
See above for details

[78] SR 742.104.

B. LAND-USE PLANNING AND ENVIRONMENTAL IMPACT ASSESSMENT

The land use planning law (Raumplanungsgesetz) and the law on environmental protection (Umweltschutzgesetz) have come into force in 1980 respectively 1985. The land use planning serves to ensure the appropriate and economic use of the land and its properly ordered settlement (Art. 75 para. 1 Federal Constitution) whereas environmental law envisages to protect the humans and the natural environment from nuisances.[79] Both matters aim at a sustainable development.
Land use planning, environmental protection and transport law are closely linked, as traffic planning is essentially met with the instrument of land use planning, namely sectoral plans, directive plans and use zoning plans.

1. Are there different levels of the planning of transportation infrastructure? If so, which ones and how do they differ from each other?

Provisions on the Environmental Impact Assessment can be found in the law on environmental Protection (Umweltschutzgesetz[80]).
All projects of Annex I of the EIA-decree (Verordnung über die Umweltverträglichkeitsprüfung[81]) are subject to the EIA. Among those, we find all national-roads and main roads, as well as railway lines. The decision of constructing national roads and railway lines is taken on federal level and is subject to a multi-level procedure (Art. 6 UVPV, Annex I) , which is also of importance as Switzerland does not have a specific regulation on strategic EIA for plans and programmes. The multi-level procedure shall allow taking into account environmental aspects already at an early stage, especially if an EIA at a later stage does no longer seem pertinent.

As far as the national roads are concerned, the different levels can be differentiated as such:
1/ decision on the general layout of the road
2/decision on the general project
3/decision on the more concrete project for the execution

However corrections are possible, if for instance the first report is incomplete, e.g. if an incorrect traffic-prognose has been undertaken (BGE 124 II 129 Erw. 11 ff.).

As far as a strategic EIA on plan- and programme-level is concerned, as mentioned above, there exists no explicit legislation.
Nevertheless, additionally to the multi-level EIA procedure a certain examination of environmental impacts on plan-level takes place, as use-zoning-plans are subject to justification (Art. 47 RPG). The competent authority has to show that

[79] *Griffel*, in: Müller (Hrsg.), Verkehrsrecht, 2008, 5 (36).
[80] SR 814.01.
[81] SR 814.011.

environmental concerns have sufficiently been taken into account. The authority has not only to take into account the different interests (Art. 3 RPV), but also alternatives and variations (Art. 2 para. 1 lit. b RPV). However, the procedure is not detailed by federal law, thus leading to differences in the Swiss cantons.
Environmental concerns have also to be taken into account whenever federal sectorial plans are being adopted, as Art. 16 RPV stipulates an explanation.

2. If there is road construction planning on a higher level, are the different transportation modes (roads, railways, air transportation, waterways etc.) weighed against each other with a view to select the least environmentally burdensome?

Not explicitly, but see in so far, answer to the question concerning "alternatives".

3. Concerning the approval of individual road construction projects: Is there a test of need for more roads? If so, is it taken into consideration that new roads may trigger further individual transportation?

Art. 84 para. 3 of the Federal Constitution prohibits the increment of road transit capacities in the alpine region. Exceptions are only permitted for bypass-roads to reduce transit traffic. The provisions are substantiated by national law.[82] According to this law, four road sections in Switzerland are classified as „transit roads"[83]. 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.[84]

Also, there is a close link between transport and environmental law as far as the construction of new traffic intensive infrastructure, such as shopping malls, is concerned. The limitation and regulation of traffic, for instance by limiting the parking possibilities, is primarily managed by imission law.[85] However, transport law itself does not provide for any measures or stipulations to limit the individual traffic.[86]

4. To what extent have alternatives to be taken into account?
   a. What is the legal basis of alternatives testing: SEA and EIA? Natura 2000?

There is no legal obligation in the USG, which ask the developers to take into account possible alternatives when working out the EIA-report.

[82] Cf. Bundesgesetz über den Strassentransitverkehr im Alpengebiet vom 17.6.1994, SR 725.14.
[83] San Bernardino, Gotthard, Simplon and Grosser Sankt Bernhard.
[84] 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.
[85] *Griffel*, in: Müller (Hrsg.), Verkehrsrecht, 2008, 5 (36).
[86] Critical *Griffel*, in: Müller (Hrsg.), Verkehrsrecht, 2008, 5 (37).

However, the Federal Court decided that the comparison of variations and alternatives might be a criteria in order to evaluate the project.[87]
Also, the fact that according to the old Art. 9 para. 4 USG the public and concessioned private projects needed to be justified, requires an examination of possible alternatives (BGer, URP 1997, 519, 521; Botschaft zum UNO/ECE-Uebereinkommen, BBl 1995 IV 493).
In case of a multi-level procedure, the justification had to be integrated already on the first level (BGer, RDAF 1997 I 137, 140).[88]
However, with revision of the USG in 2006 such a justification is no longer required. Nonetheless, this does not mean that a balancing of interests has not to take place (it explicitly results from Art. 3 NHG). Also the comparison of alternatives and variation can still be considered as criteria in order to evaluate the project, even if there is no obligation.[89]
Whenever the project is part of the competences of the Federation, an obligation of examining alternative locations results from Art. 15 para. 3 lit. b RPV.

b. Do these alternatives include "other" projects (e.g. rail construction, instead of road construction)?

According to the Federal Court yes, as he is talking about "variations and alternatives".

c. Does/should the "zero-option" need to be taken into account?

According to scholars, the "zero-option" eventually needs to be taken into account.[90] However if there is a real need for the project, the zero-option must not be taken into account (for a road BGE 118Ib 599).[91]

d. What is provided for on national basis in addition to EU requirements?

C. PRODUCT LABELLING (EXCURSUS)

1. To what extent is long-distance travelling taken into account in the Eco Management and Audit Scheme-Regulation (1221/2009)?

→ See above

[87] BGer, 22.12.1998, in RDAF 1999 I, 375.
[88] *Rausch/Keller*, USG, Art. 9, Rn. 92.
[89] *Griffel/Rausch*, Kommentar zum USG, Ergänzungsband zur 2. Auflage, Art. 10a USG, Rn 16.
[90] *Rausch/Keller*, USG, Art. 9, Rn. 90 m.w.N.
[91] *Rausch/Keller*, USG, Art. 9, Rn. 92.

2. To what extent does national law provide for product labelling in order to reflect long-distance transportation and thus energy-consumption of products? Does EU law set any (and if so which) limits to such a labelling?

   No state measures in Switzerland. There exist some initiatives from enterprises, to transport a maximum of goods by train, e .g. Interessengemeinschaft Detailhandel Schweiz (http://www.igdhs.ch/gueterverkehr.html), Migros MGB Logistik Transport (http://www.logistiktransport.ch/g3.cfm/s_page/54120).

3. How can this labelling be done nationally without breaching EU rules? Is adaptation of EU-law necessary?

NATIONAL REPORTS – RECENT DEVELOPMENTS IN MEMBER STATES ENVIRONMENTAL LAW

Participants are asked to submit a short paper (max 2-3 pages) which highlights what in their view are significant developments in national environmental law (cases, new laws, new institutional arrangements, significant new policies) which might be of interest to other members of the Group. Please do so until the 9th of November 2012 (two weeks in advance of the meeting) so that the chair of that session will then have the opportunity to present their own cross cutting analysis of the most interesting aspects and lead the discussion accordingly.

See on recent developments: *Alain Griffel*, Entwicklungen um Raumplanungs-, Bau- und Umweltrecht, SJZ 2011, 464 ff.

Part-Revision of the law on **water protection** (Gewässerschutzgsetz): concerning, the definition and use of the riverine zone; the revitalization of water bodies; measures against hydropeaking, rehabilitation of the flow regime.

Adaptation of the **Chemical-Risk-Reduction-Decree** (Chemikalien-Risikoreduktionsverord-nung) to European Standards.

Adaptation of the **CO_2-Emissions of passenger vehicles** to European Standard.

"Energy Strategy 2050: The Federal Council intends to continue to safeguard Switzerland's high level of energy security although without nuclear energy in the medium term. That was the decision taken at his special meeting on 25 may 2011. Existing nuclear power plants should be decommissioned at the end of their operational lifespan and not be replaced by new nuclear power plants. In order to ensure the security of supply, the Federal Council, as part of its new Energy Strategy 2050, is placing emphasis on increased energy savings (energy efficiency), the expansion of hydropower and new renewable energies, and, if necessary, on fossil fuel-based electricity production (cogeneration facilities, gas-fired combined-cycle

power plants) and imports. Furthermore, Switzerland's power grid should be expanded without delay and energy research strengthened." [92]

In March 11rh 2012, the Swiss population has accepted the **Initiative on Secondary Residencies** which resulted in a change of the Swiss Federal Constitution. The initiative postulates that in each Swiss Community Secondary Residencies constitute a maximum of 20% of the total accommodation.

The acceptance of the Initiative has led to important debates. Several legal questions on how to implement this obligation are still open, e.g.:

- ➔ Definition of the notion "Secondary Residencies"
- ➔ Which accommodations need to be taken into account, also old ones, or only new ones?
- ➔ The situation in the Swiss regions is very different (touristic/rural), the initiative may lead to important disadvantages (especially in rural areas). Can exceptions be allowed?
- ➔ How can you implement an efficient controlling-system?

[92] http://www.bfe.admin.ch/themen/00526/00527/index.html?lang=en.