

wait until all Alpine States have ratified the Protocol before signing and ratifying itself⁹¹. Nevertheless, the Commission in its proposal regarding the signature of the Transport Protocol had suggested a concerted action of the Community and all the other contracting parties⁹², but this has not become reality. In the meantime, the Community's hesitations leave potential legal uncertainties.

4.1.2. Hierarchical conflicts as long as the Community does not ratify

As long as the Community does not ratify the Transport Protocol, several issues concerning the relationship between the Transport Protocol and Community law may arise.

First scenario: A Member State of the Community ratifies the Protocol, as Austria and Germany have already done. In case of an incompatibility with Community law, the latter prevails as far as Community competence is concerned. This both according to Community law (supremacy) and according to international customary law on successive agreements between different parties relating to the same subject-matter⁹³. As far as Community competence is not touched, Austria and Germany are bound by the provisions of the Transport Protocol.

The same is true for national measures implementing the Transport Protocol but infringing Community law. Member States of the Community cannot bypass the application of Community law by means of an agreement of public international law⁹⁴.

⁹¹ See *supra*, note 80, p.153.

⁹² See *supra*, note 62, p.3.

⁹³ Article 30(4)(b) of the Vienna Convention on the Law of Treaties from 1969 states: "When the parties to the later treaty do not include all the parties to the earlier one [...] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations"; See as well *supra*, note 83, p.310.

But see P. Haßlacher, "Die Alpenkonvention und ihr Verkehrsprotokoll", in Transitforum Austria Tirol (ed.), *Am Brenner für die Alpen. Tatort Brenner*. Vol. 2, Innsbruck 2000: "When the Alpine countries decide on a common action based on the Alpine Convention, public international law prevails on Community law." (own translation).

⁹⁴ But see R. NORER, "Die Alpenkonvention aus rechtlicher Sicht. Ein Beitrag zum Jahr der Berge 2002", (2002) 7 *Agrarrecht* 209, n.62: "In case of a conflict with dispositions of secondary Community law, the general rules of public international law prevail." (own translation). The author bases this opinion on C. TOMUSCHAT, in H. GROEBEN/J. THIESING/C.-D. EHLERMANN, *Kommentar zum EWG-Vertrag*, 4th ed., Nomos Verlagsgesellschaft, Baden-Baden 1991, at Article 210 n.42; as well as on M. RÖTTINGER, in C. O. LENZ, *EGV-Kommentar*, Bundesanzeiger Verlagsges.m.b.H., Köln 1994, Article 210 n.6. To my opinion, these references are mistaken in this context because both deal with the hierarchy between