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**THE TRANSPORT PROTOCOL OF THE ALPINE
CONVENTION:
ADDED VALUE TO THE TRANSPORT POLICY OF THE
EUROPEAN COMMUNITY?**

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Statutory Declaration

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Keywords

Alpine Convention

Transport Protocol

Trans-Alpine transport

Transport policy of the European Community

Trans-European Transport Networks

European infrastructure pricing system

Abstract

The Alpine Convention and its implementing protocols are the outcome of a long process which started 50 years ago and which is still far from being concluded. While the Alpine Convention now applies to the entire Alpine Arc, meaning all eight Alpine countries and the European Community, the ratification process of the Transport Protocol is still ongoing. At this moment, it has been signed by all eight Alpine States, but not yet by the Community. In three countries, it has already entered into force.

The Alpine Convention and its Transport Protocol attempt to reconcile economic interests of the transport sector with ecological requirements by elaborating a sustainable transport policy. For the first time ever, all Alpine countries and the Community have agreed on a common (and legally binding) approach to this ambitious project, based on the understanding, that the Alpine arc is an ecologically sensitive area and that transport has negative environmental and health-related impacts.

This paper examines three levels of value added by the Transport Protocol to the European Community transport policy: First, it concentrates on the legally binding character of the Transport Protocol. After ratification of the Transport Protocol by the Community, existing positions and policies of the Community, currently only specified in a White paper, will be “upgraded” by a new legal basis. This will create legal enforceability and enhanced political accountability.

Second, this paper analyses the impact of the Transport Protocol on the trans-European Transport Networks. In this context, the Transport Protocol contains a revolutionary provision prohibiting the construction of any new trans-Alpine high-capacity road. Thus after the Community's adherence to the Protocol, it will not be possible any more to co-finance such infrastructure projects.

Third, this paper examines the relationship between the Transport Protocol and the Community's policy on infrastructure pricing. Currently, Community policy is still far from internalising external costs, despite several attempts launched by the Commission in its White Papers. This is illustrated by the Eurovignette system, the Brenner case and the Ecopoint system for trans-Alpine traffic through Austria. After ratification, the Transport Protocol will oblige the Community to gradually internalise external costs, such as costs for infrastructure, environmental pollution, noise and damages, into transport costs. This infrastructure pricing system may treat the whole Alpine arc as one sensitive area, thus allowing for a special regime compared to the rest of the Community territory, such as the levy of additional tolls and an enhanced cross-financing of rail transport.

Finally, having in mind the more than reluctant steps which the Community has taken until now in order to implement its White Papers policies, this paper mentions the Member State's role as pioneers. To a large extent the Member States enjoy some leeway to legislate in this field. This margin of discretion could be used for courageous legislation in the field of transport policy, which could then be exemplary for the development of the Community's transport policy.

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ABBREVIATIONS

AC	Alpine Convention
CMLRev	Common Market Law Review
EC	Treaty establishing the European Community
ECJ	European Court of Justice
ECR	European Court Reports
ELRev	European Law Review
NGO	Non-governmental organisation
OJ	Official Journal of the European Union
Para	Paragraph
RJE	Revue juridique de l'environnement
TEN-T	Trans-European Transport Networks
TP	Transport Protocol of the Alpine Convention

"Convinced of the need for economic interests to be reconciled with ecological requirements"¹

1. INTRODUCTION

The Alps "are one of the largest continuous unspoilt natural areas in Europe, which, with their outstanding unique and diverse natural habitat, culture and history, constitute an economic, cultural, recreational and living environment in the heart of Europe, shared by numerous peoples and countries"².

At the same time, the Alps are located in between different centres of economic activity in Europe, acting as natural barrier for communication between the Mediterranean world and the regions in Northern and Eastern Europe.

In order to cross the Alps, traffic is forced to use a limited number of routes, mostly through narrow valleys or along coasts. These are also the places where population is the most dense. Since the big economic centres are located outside the Alps, the flows of traffic are to a large extent governed by economic needs of regions outside the mountains.

In mountainous areas, traffic has an increased environmental impact compared to other regions. The same traffic load, for example, contributes to a three-times higher concentration of No_x in the ambient air than in lowland areas³. Due to the amphitheatre shape of the valleys, evasion is impossible: this holds true for noise, pollutants and the population concerned.

In a recent study analysing the influences of road freight transport on the environment in mountainous areas, the European Environment Agency explains:

¹ Para 6 of the preamble to the Alpine Convention.

² 1st para of the preamble to the Alpine Convention.

³ R. MOLITOR, A. KÄFER and O. THALLER, *Road freight transport and the environment in mountainous areas. Case studies in the Alpine Region and the Pyrenees*. European Environment Agency Technical report No 68, Copenhagen, 2001, p.5.

"Emissions of pollutants from road freight traffic pose a major environmental problem especially on trunk roads through mountainous regions. The reasons for the increased environmental impact are the following.

- Road traffic is concentrated on only a few heavily frequented trunk routes, which results in intensified noise emissions and high concentrations of pollutants in the ambient air in the valleys and areas concerned.
- In the mountainous regions, the permanent settlement area covers only a small part of the whole area and so the concentration of inhabitants, especially in some Alpine valleys, can reach urban levels. Transport infrastructure has a relatively high share of land use and is inevitably situated close to living and recreation areas.
- The specific topographic and meteorological conditions of Alpine valleys hamper the dispersion of air pollutants, thus increasing the harmful effects of pollutant emissions compared to extra-Alpine lowlands. The direct effects on the concentration of pollutants in the ambient air per unit No_x emission is [sic] almost one order of magnitude higher than in lowland areas.
- Alpine ecosystems are particularly sensitive to air pollutants and pollutant deposition owing to higher altitudes, lower soil quality, restricted vegetation periods and other biotic and abiotic hazards.
- One important function of forests covering the slopes of Alpine valleys is to protect local settlements from avalanches, mud slides, and erosion. Any impairment of this function may have disastrous consequences."⁴

The political and economic importance of the trans-Alpine transit became evident during the negotiations on the European Economic Area (EEA) and later on during the Austrian accession process to the European Community. For a long time, countries like Greece and the Netherlands blocked the adoption of the agreements because of their provisions regarding transit⁵.

Organized protests of local residents, in particular against heavy-duty vehicle traffic, have repeatedly led to blockings of transit routes and provoked controversial reactions. As an example, one may mention the currently pending case before the European Court of Justice, in which a German transport undertaking initiated proceedings against Austria, claiming compensation for the damages suffered due to a total blockage of the Brenner motorway by authorised demonstrations⁶.

⁴ See *supra*, note 3, p.21.

⁵ For further details, see E. BRANDT and P. SCHÄFER, "Trans-Alpine Transit Traffic: Towards Sustainable Mobility", (1996) 5 *CMLRev* 931, at 932.

⁶ See opinion of Advocate General Jacobs, delivered on 11 July 2002, in case C-112/00, *Schmidberger v. Austria* (not yet reported). In this context of linked traffic and single market issues, see as well the judgment of 9 December 1997, in case C-265/95, *Commission v. France*, [1997] ECR I-6959, where the ECJ held that the French authorities had infringed their obligations by failing to adopt all necessary and proportionate measures in order to prevent the free movement of goods from being obstructed by French farmers blocking the motorways.

Eight countries - Austria, France, Germany, Italy, Liechtenstein, Monaco, Slovenia and Switzerland - are situated in the Alpine arc. The first four of them are Member States of the European Community, Slovenia will join in May 2004. Given the trans-boundary dimension of the transport system, concerning both Member States of the Community and non members, "measures can only be effective if international concerted strategies and actions are agreed."⁷ Therefore, the problem of trans-Alpine transport, which is an international one, also has to be solved on this same level.

In this context, the Alpine Convention (hereinafter "Convention" or "AC") and its Transport Protocol (hereinafter "Protocol" or "TP") attempt to reconcile economic interests and ecological requirements⁸.

The present paper aims at analysing the Transport Protocol of the Alpine Convention. In a first step, the framework of the Alpine Convention and its Protocols in general will be presented. In a second step, the Transport Protocol in particular will be examined. Finally, the added value of the Transport Protocol to the Transport Policy of the European Community will be critically assessed.

⁷ See *supra*, note 3, p.6.

⁸ The text of the Alpine Convention and of the Transport Protocol is available in the official languages of the Alpine Convention, which are French, German, Italian and Slovenian, at: <http://www.convenzionedellealpi.org>.

Of the Alpine Convention only, there is also an English translation, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=51994PC0336&model=guichett.

2. THE ALPINE CONVENTION AND ITS PROTOCOLS IN GENERAL

The Alpine Convention with its 10 protocols as they exist today are the outcome of a long process which started 50 years ago and which is still far from being achieved.

2.1. Chronology

The efforts to conclude a convention covering the whole Alpine area date back to the founding documents of the CIPRA⁹ in 1952. However, it is only in the late 1980s that these efforts began to bear fruit, presumably because human influence on the environment became more visible and people became more aware of the importance of their environment.

In February 1987, the non-governmental CIPRA launched a new initiative for the elaboration of an Alpine Convention¹⁰. This initiative reached the European political floor through an application to the European Parliament asking the Commission to provide a draft of a convention on the protection of the Alps¹¹. On 15 May 1988, the European Parliament accepted the proposal unanimously.

On the intergovernmental political level, the first Alpine Conference, initiated by the then German Environment Minister Klaus Töpfer, took the first decisive step in Berchtesgaden in fall 1989. During this conference, the Alpine countries adopted on 9 October 1989 the so-called "Berchtesgaden Resolution", which served as basis for further negotiations¹².

Two years later, on 7 November 1991, the following parties signed the Alpine Convention at the second Alpine Conference in Salzburg: Austria, France, Germany,

⁹ Commission Internationale pour la Protection des Alpes (=International Commission for the Protection of the Alps), founded on 5th of May 1952. CIPRA regroups actually more than 100 other organisations and institutions and is still strongly involved in the development of the Alpine Convention. More information is available at: <http://www.cipra.org/>.

¹⁰ "Ein Meilenstein in der CIPRA-Geschichte. Die Alpenkonvention", (2002) 64 CIPRA Info 14.

¹¹ The application was submitted by Ursula Schleicher from the Group of the European People's Party (Christian Democrats) and European Democrats. See *supra* note 10.

¹² See *supra*, note 10.

Italy, Liechtenstein, Switzerland and the European Community. Slovenia and Monaco followed later. After ratification by three countries¹³, the Convention finally entered into force on 6 March 1995. Thanks to the last ratification by Italy, the Alpine Convention applies since 27 March 2000 to the entire Alpine arc¹⁴.

2.2. The golden mean? Objectives of the Alpine Convention

The main objectives of the Alpine Convention are twofold: protection on the one hand and sustainable development of the Alpine area on the other hand. This implies that ecological and socio-economic interests have to be reconciled. For this purpose, the Alpine arc is perceived as a unity, disregarding the national boundaries.

The Alpine Convention itself describes its objectives in Article 2(1) as follows:

“The Contracting Parties shall pursue a comprehensive policy for the preservation and protection of the Alps by applying the principles of prevention, payment by the polluter (the 'polluter pays' principle) and cooperation, after careful consideration of the interests of all the Alpine States, their Alpine regions and the European Economic Community, and through the prudent and sustained use of resources. Transborder cooperation in the Alpine region shall be intensified and extended both in terms of the territory and the number of subjects covered.”

The Alpine Convention applies an integrative approach which can be distinguished from the more often used sectoral approach, focussing on one single aspect, such as water pollution.

2.3. Where do the Alps end? Scope of the Alpine Convention

The Alpine Convention was signed by all eight countries of the Alpine area as well as by the European Community. However, the Alpine Convention does not apply to the entire territory of all these contracting parties, but only to the Alpine area in the meaning of Article 1(1) AC, as described and depicted in Annex 1 to the Convention. This geographical scope embraces a surface of 190.160 km² and is inhabited by 13

¹³ Austria, Germany and Liechtenstein. The same countries are the first ones having ratified the Transport Protocol (see *infra*, 3.3.1. The tearaway leaders, p.16).

¹⁴ A detailed and periodically updated overview concerning the whole ratification process is available at: http://www.convenzionedellealpi.org/page3_de.htm.

million people. More than two thirds of this surface and more than 80% of the Alp's population are part of the European Community¹⁵. The surface shares of any single country varies from 2 km² (Monaco) to 54.000 km² (Austria).

The share of the Alpine territory of a country in relation to its total state territory illustrates the importance of the Alpine Convention for every single party. In the case of Monaco and Liechtenstein, this figure amounts to 100%, followed by Switzerland (65.4%) and Austria (64.4%), ending with Germany, where only 1.5% of the total territory is concerned¹⁶.

Another interesting parameter, especially with regard to traffic issues, is the population density in the Alpine area¹⁷. Taking into account the whole Alpine area, this amounts to 60 inhabitants/km². In an international comparison, this figure is quite low. But if one considers only the constantly inhabited part of the Alpine area, the population density quadruples to 240 inhabitants/km². This figure can be compared with that of the UK (240) or Germany (229). The average of the European Community amounts to 115 inhabitants/km².

One of the merits of the Alpine Convention is to offer, as of its entry into force, a common European definition of what is called the Alps. Before, the notion of "the Alps" varied from one study to another, a phenomenon which is illustrated by the Commission publication "Europe 2000+" of 1995. In this study on a European spatial development perspective, the Alpine arc covered an area of 450.000 km² and extended from the north of Bavaria to the Emilia Romagna in the south. This perspective strongly influenced the economic assessment of the Alpine area, because huge centres on both sides of the Alps such as Strasbourg, Munich, Vienna and Milano were included. The risk is, that the specific problems of the mountainous regions in the very heart of the Alps become a

¹⁵ U. TÖDTER and P. HABLACHER, "Randregion im Herzen Europas", in CIPRA (ed.), *Alpenreport 1*, Verlag Paul Haupt, Berne Stuttgart Vienna 1998, p.110.

¹⁶ G. SCHWARZER, *The Alpine Convention. A Graduate Thesis in Partial Fulfilment of the Masters Degree in Public International Law*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Faculty of Law, University of Lund/Sweden, Lund 2002, p. 30.

¹⁷ All the following figures are available on the website of the CIPRA: See *supra*, note 9.

minority position¹⁸. Therefore, by ratifying the Alpine Convention in 1996, the European Community recognised a much narrower definition of the Alpine area¹⁹.

The importance of the definition of the Alpine arc becomes evident in the context of intra-Alpine and trans-Alpine traffic, since these two crucial terms have been defined by Article 2 TP by reference to the definition of the Alps in the Alpine Convention. "Given that an international solution is needed to traffic problems for the Alps, [it] is necessary to give a precise and official geographical description of this region. The Alpine Convention contains such a description."²⁰

2.4. Who is who? The institutional framework

In order to guarantee the effectiveness and further development of the Alpine Convention, it provides, in its Articles 5 to 9, for the creation of three organs: the Alpine Conference²¹, the Standing Committee and the Permanent Secretariat. The two organs mentioned first were installed directly by the Convention, whereas the latter was set up by a separate decision in 2000.

2.4.1. The Alpine Conference

The Alpine Conference constitutes the highest organ of the Alpine Convention. Composed of the Environment Ministers or other empowered representatives of the contracting parties, it convenes every two years²². Additionally, the United Nations and its specialized agencies, the Council of Europe, all other European countries, cross-border associations of Alpine territorial authorities and relevant international non-

¹⁸ W. BÄTZING, *Die Alpen. Geschichte und Zukunft einer europäischen Kulturlandschaft*, 2nd ed., Verlag C.H. Beck, Munich 2003, p.23.

¹⁹ Immediately after having ratified the Alpine Convention, the European Social and Economic Committee applied the narrower definition of the Alpine area in its opinion *The Alpine arc - an opportunity for development and integration*, CES 548/96 (25 April 1996).

²⁰ Report of the European Parliament's Committee on Regional Policy, Transport and Tourism on the ecopoint system from 28 January 2003, A5-0019/2003 final (approved by the European Parliament on 12 February 2003), p.9.

²¹ The Alpine Convention uses the expression "Conference of Contracting Parties", but in literature, it is mostly called "Alpine Conference".

²² Articles 5 to 7 AC.

governmental organisations may join these meetings holding observer status²³. The Conference is organised and chaired by the State having held the chairmanship during the two previous years²⁴.

At its meetings, the Alpine Conference examines the implementation of the Convention and its Protocols²⁵. For this purpose, the contracting parties are obliged to forward to the Conference information on the measures taken with a view to implementing the Convention and the Protocols²⁶. Additionally, the Alpine Conference adopts amendments to the Convention as well as new Protocols²⁷.

Within the Alpine Conference, decisions are taken in principle by unanimous consensus, which guarantees the respect of each country's sovereignty. In exceptional cases²⁸, qualified majority voting is possible²⁹. Since both the European Community and the Member States are parties to the Alpine Convention, the latter foresees particular voting mechanisms depending on whether or not a decision falls into the area of competence of the Community: In the first case, the European Community shall exercise its right to vote with a number of votes equal to the number of its Member States which are at the same time contracting parties to the Alpine Convention. In the second case, the votes are cast directly by the Member States, the Community having no right to vote regarding an issue outside its sphere of competence³⁰.

²³ Article 5(5) AC. In the context of the Alpine Convention, many authors estimate that NGOs play an extraordinary important role (see G. SCHWARZER, *supra*, note 16, p.24 or F. SERVOIN, "La Convention Alpine (la montagne et la souris)", (1997) 3 RJE 341, at 346.).

²⁴ Since the last Alpine Conference, held in Merano/Meran on 19/20 November 2002, Germany has the chairmanship till the next Alpine Conference which will be held in November 2004 in Garmisch-Partenkirchen.

²⁵ Article 6 AC.

²⁶ Article 5(4) AC.

²⁷ Article 6(a) and (b) AC.

²⁸ Article 7 AC.

²⁹ Several authors point out that France's support of Monaco's application to the Alpine Convention was motivated mainly by the fact that Monaco should constitute a counterbalance to Liechtenstein, considered as being part of the Germanic countries in contrast with the 'latin' countries. See F. SERVOIN, "La Convention Alpine (la montagne et la souris)", (1997) 3 RJE 341, at 345; and J. SOHNLE, "El Protocolo sobre la aplicación del Convenio de los Alpes en el ámbito de los transportes y el Derecho Comunitario", (2003) 216 *Noticias de la Unión Europea* 107, at 109.

³⁰ Article 7(2) AC.

2.4.2. The Standing Committee

The Standing Committee is the executive body of the Alpine Convention³¹. The representatives of the contracting parties forming the Standing Committee meet at least once a year³² in order to collect and analyse submitted information and to prepare the Alpine Conferences. It is the Standing Committee which appoints working groups for formulating new protocols and recommendations and which coordinates their activities. Finally, it examines and harmonizes the contents of draft protocols and submits these proposals to the Alpine Conference. As regards chairmanship and voting procedures, the same rules as described for the Alpine Conference apply.

Compared to other international environmental agreements, the Standing Committee has one deficiency that has been criticised by several authors³³: it is not entitled to decide itself on substantial matters. Therefore, no important decision can be taken between the only biannually organised Alpine Conferences. "These two-year intervals of the Conference meetings may contravene the continuity of implementation and leaving all decisions to the ministerial Conference may result in an exposure to political influence and arbitrariness."³⁴

2.4.3. The Permanent Secretariat

The Permanent Secretariat is the only organ of the Alpine Convention which was not established by the founding Convention itself. The Alpine Conference was given the competence to "decide unanimously to set up a permanent secretariat"³⁵. After several years of hesitation, the 7th Alpine Conference in November 2002 finally used this power

³¹ Article 8(1) AC.

³² Article 2(1) of the Rules of Procedure of the Standing Committee, available at: <http://www.alpconvention.org/>.

³³ See *supra*, note 16, p.27, as well as W. ANREITER, *The Effectiveness of International Agreements and the Implications for the Alps Convention*, Working Paper 172, School of Planning, Oxford Brookes University, Oxford 1997, p.40 and p.46.

³⁴ See *supra*, note 16, p.27.

³⁵ Article 9 AC.

and established a Permanent Secretariat with seat in Innsbruck and a branch office in Bolzano/Bozen³⁶.

The establishment of the Permanent Secretariat should remedy at least partially the weakness of the Standing Committee mentioned above. In a study comparing the effectiveness of 25 international environmental agreements, ANREITER comes to the conclusion of "clear evidence of the importance of a permanent focal point equipped with sufficient staff and resources. There is no doubt that in all treaties dealt with the Commissions needs [sic] the back-up work of a Secretariat in order to operate efficiently."³⁷ Consequently, the establishment of the Permanent Secretariat has been warmly welcomed and considered as a breakthrough for the cumbersome implementation process of the Alpine Convention³⁸.

2.5. The legal architecture of the Alpine Convention and its Protocols

The architecture of the agreements consists of a framework convention, the so-called Alpine Convention, setting out the general principles, obligations and structures of the Convention, as well as several implementing protocols dealing with the more specific issues. In international law, such a structure is quite rare since protocols to international agreements normally serve to amend the original agreement.

All implementing protocols to the Alpine Convention have the character of separate agreements under public international law. Therefore, the formal adoption of a new protocol by the Conference has to be completed by the ratification of each contracting party.

³⁶ The tasks of the Permanent Secretariat are divided as follows: Innsbruck as the official seat is competent for the political and administrative work, the branch office in Bolzano/Bozen deals more technical matters, i.e. the coordination of scientific research on the Alps and translations.

³⁷ W. ANREITER, *The Effectiveness of International Agreements and the Implications for the Alps Convention*, Working Paper 172, School of Planning, Oxford Brookes University, Oxford 1997, p.41.

³⁸ "Alpenkonvention endlich startklar", (2002) 67 CIPRA Info 9.

Up until now, eight implementing protocols as well as the Dispute Settlement Protocol have been adopted³⁹. They cover the following areas: regional planning, soil conservation, protection of nature and the countryside, mountain farming, mountain forests, tourism and recreation, energy and transport. To a major part, they have been signed by the contracting parties, but their ratification is still lacking⁴⁰. Compared to the twelve areas mentioned in Article 2(2) AC, protocols concerning population and culture, prevention of air pollution, water management, and waste management are still missing.

³⁹ The Monaco Protocol has not been included in this listing because it does not constitute a real implementing protocol in the sense of Article 2 (3) AC. It allowed Monaco, which was not present at the 1st Alpine Conference, to join on 22 March 1999.

⁴⁰ Only Austria, Germany and Liechtenstein have ratified all protocols.

3. THE TRANSPORT PROTOCOL IN PARTICULAR

The Transport Protocol of the Alpine Convention has been considered by several actors involved as a test-case for the efficiency of the Alpine Convention and the seriousness of the contracting parties regarding its implementation. For the first time, all countries of the Alpine area concluded a binding agreement on a common approach to their transport policies. This common approach is based on the understanding that the Alpine arc is an ecologically sensitive area and that transport has not only positive consequences, but also negative environmental and health-related impacts⁴¹. Therefore, the Transport Protocol aims at realising a sustainable transport policy⁴².

3.1. Context: some figures regarding traffic in the Alps

Although the different data available on the evolution of traffic in the Alps differ slightly in their absolute amount depending on the source, the tendency remains everywhere the same: traffic grows and will continue to grow. This holds true for the European level and even more so for the Alps, due to the concentration effect caused by the lack of possible passages in a mountainous landscape.

According to the European Environment Agency, passenger transport is predicted to grow within the whole European Union between 1994/95 and 2010 by 30%; freight transport is expected to increase by 50%⁴³. Focused on the Alps, the same source expects passenger transport to increase by the same percentage (50%) and freight transport to double over the next 20 years. This has to be seen in the context of heavy-duty vehicles tonne-km increasing by 292% between 1980 and 1998⁴⁴. Moreover, nowadays already, nearly 150 million people cross the Alps every year, 83% by road and 17% by railway⁴⁵.

⁴¹ See *supra*, note 3, p.31.

⁴² Article 1(1) AC.

⁴³ *Environment in the European Union at the turn of the century, Environmental assessment report No. 2*, European Environment Agency Copenhagen, 1999, p.66.

⁴⁴ See *supra*, note 7, p.5.

⁴⁵ See *supra*, note 43, p.381.

Apart from the general increase in traffic, another tendency is clear: the modal split between rail and road traffic has developed in favour of the road. Since 1970, the proportion between rail and road freight reversed from 3,5:1 to 1:2 in 2001⁴⁶. Due to different national transit transport policies during the last decades, the road's share varies from 76% in Austria or 73% in France to 31% in Switzerland, where rail transport still keeps a share of 69%⁴⁷. Additionally, in 2002, the number of lorries crossing the Swiss Alps has even decreased by 9%⁴⁸. This special position of Switzerland is mostly due to the driving ban on Sundays and at night, as well as the significantly lower maximum weight limit of 28 tonnes (compared to 40 tonnes in the Community), which Switzerland imposed until 2001⁴⁹.

This data witnessing the success of road transport sadly contradicts the fact that trucking is the least eco-efficient mode of land transport, compared with rail and inland waterways. Heavy-duty vehicles consume significantly more energy per tonne-km and emit more pollutants. Additionally, the benefits of cleaner technologies are partly offset by the constant growth of traffic⁵⁰.

3.2. Ups and downs of the history of the Transport Protocol⁵¹

During the first Alpine Conference in Berchtesgaden, the contracting parties decided to charge a working group of experts with the elaboration of a protocol in the field of transports. This working group was chaired by Switzerland.

Article 2(2)(j) AC provides the following mandate:

"the objective is to reduce the volume and dangers of inter-Alpine and trans-Alpine traffic to a level which is not harmful to humans, animals and plants and their habitats, by switching more traffic, in particular freight traffic, to the railways in

⁴⁶ Figures available at: http://www.litra.ch/Ausw_D/Vadem/vademframe_d.htm.

⁴⁷ *Bringing Trans-Alpine Freight Policy on Railtrack*, T&E, European Federation for Transport and Environment, Brussels, June 2001.

⁴⁸ "Schweiz: weniger LKW im Alpentransit im vergangenen Jahr", (2003) 10 alpMedia News 3.

⁴⁹ P. KREBS (ed.), *Fair and efficient. The Distance-related Heavy Vehicle Fee (HVF) in Switzerland*, Federal Office for Spatial Development (ARE), Bern 2002, p.5.

⁵⁰ See *supra*, note 7, p.5.

⁵¹ If there is no other source indicated, information in this chapter is based on an interview with F. NÄSCHER, the Chairman of the second and in the end successful working group in charge of the Transport protocol, on 3 March 2003.

particular by providing appropriate infrastructures and incentives complying with market principles, without discrimination on grounds of nationality".

During five years of negotiation, the working group tried in vain to establish a widely acceptable draft for a Transport Protocol. The most critical point was the Article on road and railway traffic. Finally, in June 1995, Switzerland resigned from the chairmanship of the working group because it did not see any further possibility to continue the blocked negotiations on the level of experts. But even on the level of ministers, who met at the 4th Alpine Conference in Brdo a common solution was impossible to find.

In the absence of any official negotiations, it was up to non-governmental organisations to fill in the gap and to re-launch the discussions. Following different diplomatic offensives, the 5th Alpine Conference in Bled took the decision on 16 October 1998 to start a second negotiation process concerning the Transport Protocol. This time, Liechtenstein took over the chairmanship of the working group.

Starting in March 1999, the working group held four negotiation meetings in Liechtenstein. In mid-March 2000, the Chairman of the working group sent a final proposal to the Standing Committee. The last remaining disagreements concerning Article 11 on the prohibition of new trans-Alpine high-capacity roads were settled at the Standing Committee meeting on 29-31 March 2000 in Château-d'Oex. After harmonising its different linguistic versions, the Protocol was finally signed at the 6th Alpine Conference on 30/31 October 2000 in Lucerne by 7 of the 9 contracting parties. Slovenia signed later, on 6 August 2002, the European Community's signature is still outstanding⁵².

According to the opinion of NÄSCHER⁵³, the Chairman of the second working group in charge of the Transport Protocol, this success was mainly due to the fact that, in the beginning of the negotiations, the focus was laid on the precise definition of the most controversial terms, such as "inter-Alpine traffic", "trans-Alpine traffic", "high-capacity roads" etc. These definitions now can be found in Article 2 of the Transport Protocol.

⁵² See *supra*, note 40.

⁵³ See *supra*, note 51.

3.3. The ratification process

Currently, the ratification process of the Transport Protocol is still going on. Up to now, different countries have reached different stages and, as in the case of a bicycle race across the Alps, we can distinguish between the tearaway leaders, the field and the tail ender.

3.3.1. The tearaway leaders

As already mentioned above, eight out of nine contracting parties have signed, and three of them have even ratified the Transport Protocol. Like in the case of the Alpine Convention, these countries are Austria, Germany and Liechtenstein, which all ratified the Protocol during the *International Year of Mountains 2002*. For these leading countries, the Transport Protocol entered into force on 18 December 2002⁵⁴.

3.3.2. The field

The remaining 5 contracting parties, which have already signed the Transport Protocol, are currently somewhere in the middle of the ratification process.

France

On 23 April 2003, the French Government has submitted a proposition to ratify all remaining Protocols, including the Transport Protocol. It is expected, that the Parliament will decide within the year 2003⁵⁵.

Italy

In Italy, the Chamber of Deputies approved the Transport Protocol with a large majority of 363 out of 369 voting deputies at its session of 19 November 2002⁵⁶. Now, the file has to be dealt by the Senate.

⁵⁴ See *supra*, note 40.

⁵⁵ "Alpenkonventionsprotokolle in Frankreich auf der Zielgeraden", (2003) 15 alpMedia News 4.

⁵⁶ *Resoconto stenografico dell'Assemblea*, Seduta n. 225 del 19/11/2002, p.30.

Monaco

Monaco has declared that it does not have the intention to ratify the Transport Protocol because of absence of relevance for the country⁵⁷.

Slovenia

In Slovenia, up to now, no official proposal from the Government has been submitted the Parliament regarding the ratification of the Transport Protocol. However, at the occasion of the last Alpine Conference in November 2002, the Slovenian Environment Minister stated that Slovenia is about to ratify all nine protocols to the Alpine Convention⁵⁸.

Switzerland

In Switzerland, the implementing Protocols of the Alpine Convention meet more opposition. With a proposal dating from 19 December 2001, the Swiss Government asked the Federal Assembly to ratify in one single package all eight implementing Protocols as well as the Dispute Settlement Protocol⁵⁹. On 11 March 2003, the Council of States, the smaller of the two Chambers of the Federal Assembly, refused to ratify the package as a whole and sent the file back to the preparing Committee. Now, the Committee has been asked to assess if it could recommend a successive ratification of individual Protocols, specially the Transport Protocol⁶⁰.

3.3.3. Tail ender: the European Community

The European Community is the only contracting party which has not even signed the Transport Protocol. At the 6th Alpine Conference in Lucerne in autumn 2000, when the Transport Protocol was signed by most of the other contracting parties, the Commission was notable by its absence. In any case, it would have been "unable to add its signature

⁵⁷ "Ratifizierungsprozess ist unumkehrbar", (2002) 67 CIPRA Info 9.

⁵⁸ Press release from the Slovenian Press Agency STA (Slovenska Tiskovna Agencija) from 20 November 2002.

⁵⁹ Bundesrat der Schweizerischen Eidgenossenschaft, *Botschaft zur Ratifizierung der Protokolle zum Übereinkommen zum Schutz der Alpen (Alpenkonvention) vom 19.12.2001*, Bundesblatt 2002 III 2922.

⁶⁰ "Eine kleine Wende beim Alpenschutz", *Neue Zürcher Zeitung (NZZ)*, 12 March 2003, p.13; see as well "Schweiz: Alpenkonvention kommt nicht vom Fleck", (2003) 10 alpMedia News 3.

during that meeting since the procedure for signing the protocol by the Community had not yet been completed."⁶¹

Indeed, the Commission's proposal for a Council decision on the signature of the Transport Protocol only dates back to 16 January 2001⁶². In the attached *Explanatory Memorandum*, the Commission states the following:

"The Commission considers that by signing the Protocol on the Implementation of the Alpine Convention in the field of Transport, the European Community would give an important political signal to all parties that signature and ratification of the Protocol should be an absolute priority. [...] Linked with the principle of unity in the international representation of the Community this militates in favour of simultaneous signature and eventual deposit of the respective instruments of ratification or approval, if possible, by the Community and its Member States."⁶³

It turned out to be impossible to realise the idea of a simultaneous ratification of the Transport Protocol by all the contracting parties. Moreover, it was not the Community which gave an example of speedy treatment of the subject, not to mention setting "important political signal to all parties"⁶⁴. The Council decided on 18 September 2001 to authorise the President of the Council to designate the person empowered to sign the Transport Protocol on behalf of the Community⁶⁵. After more than 18 months, no such person has been designated, consequently the Protocol has still not been signed by the Community⁶⁶.

This is astonishing because even Commissioner Loyola de Palacio, responsible for transport, expressed publicly that she expected the Council to complete the procedure till the end of the year 2001⁶⁷. On the other hand, this reflects the European Community's general attitude, observed these last years, of increasingly distancing itself

⁶¹ Answer given by Commissioner Margot Wallström on 26 January 2001 regarding the written parliamentary question E-3599/00 submitted by Luciano Caveri on 22 November 2000, OJ C 187 E, 3 July 2001, p.20.

⁶² Commission Proposal of 16 January 2001 for a Council decision on the signature of the Transport Protocol, COM(2001)18.

⁶³ See *supra*, note 62, p.3.

⁶⁴ See *supra*, note 62, p.3.

⁶⁵ Council Decision of 18 September 2001 on the signature of the Transport Protocol on behalf of the European Community, Document Number 11595/01, Inter-institutional File 2001/0017 (ACC).

⁶⁶ On 11 September 2002, the Commissioner Margot Wallström described the Commission proposal to the Council to sign the Transport Protocol as "still pending": Answer given by Mrs Wallström on behalf of the Commission on 11 September 2002 regarding the written parliamentary question E-1818/02 submitted by Michl Ebner on 17 June 2002 (not yet reported).

⁶⁷ Answer given by Commissioner Loyola de Palacio on 1 October 2001 regarding the written parliamentary question P-2470/01 submitted by Luciano Caveri on 3 September 2001, OJ C 81 E, 4 April 2002, p.182.

from the Alpine Convention. Since 1999, the Commission of the European Community has not attended the Standing Committee meetings. Nor did it attend the Alpine Conference in autumn 2000⁶⁸. The Commission gives two reasons for the Community's lack of participation: First, it invokes "budgetary and human resource limitations"⁶⁹, second, it considers that this "has to be seen together with the fact that the subsidiarity principle plays a major role as far as the implementation of the Alpine Convention and its Protocols is concerned. In fact, in a regional context, action by national and local governments can be more effective than action at Community level."⁷⁰

Following more recent developments, the Commission wants to contribute again more actively to the Alpine Convention process. Thus, a Commission representative was again present at the last Alpine Conference in autumn 2002⁷¹. It remains to be seen whether this new approach will have any influence on the pending ratification process regarding the Transport Protocol. However, Germany, currently chairing the Alpine Convention, holds the signature and the ratification of the Transport Protocol by all contracting parties, especially by the Community, as one of the main objectives of its presidency until November 2004⁷².

Recently, the European Parliament took position in this field, too, and pointed out very clearly that the "early ratification [of the Transport Protocol] by the European Union is desirable."⁷³

⁶⁸ G. STREICHER, "Die Alpenkonvention – (K)ein Thema der EU?", (2001) 3 *EUropa-Info – Das Magazin des EU-Umweltbüros* 11.

⁶⁹ See *supra*, note 61.

⁷⁰ Answer given by Commissioner Margot Wallström on 3 September 2001 regarding the written parliamentary questions E-1951/01 and E-1952/01 submitted by Johannes Swoboda on 3 July 2001, OJ C 40 E, 14 February 2002, p.148.

⁷¹ See *supra*, note 38.

⁷² *Agenda 2003-2004 of the German Presidency of the Alpine Convention*, available at: http://www.alpmedia.net/pdf/10punkte_alpenkonvention_d.pdf.

⁷³ See *supra*, note 20, p.13.

3.4. Cornerstones of the content

Seen from a distance, the Transport Protocol consists of the Preamble and of 25 Articles which are grouped together in a structure of five different chapters:

- Chapter I on general provisions (Article 1-6)
- Chapter II on specific measures (Article 7-16)
- Chapter III on coordination, research, education and information (Article 17-19)
- Chapter IV on control and assessment (Article 20-22)
- Chapter V on final provisions (Article 23-25)

This paper will first have a closer look at the objectives of the Transport Protocol, then at its implementing measures. Finally we will discuss briefly what kind of provisions one may miss in the Transport Protocol.

3.4.1. Objectives

According to Article 1(1) TP, the main objective of the Transport Protocol is the realisation of a *sustainable transport policy* by the contracting parties. This policy is characterised by the fact that it aims at:

- reducing the harms and the risks in the sector of intra-Alpine and trans-Alpine transport to a degree, which is supportable for humans, the fauna and the flora as well as for their living space and their habitats (Article 1(1)(a) TP);
- contributing to the sustainable development of the habitats and of the economic area which constitute the living space for the residents of the Alpine arc (Article 1(1)(b) TP);
- limiting as far as possible the effects of the traffic which could endanger the role and the resources of the Alpine space as well as the conservation of its natural and cultural heritage (Article 1(1)(c) TP);
- assuring the intra-Alpine and trans-Alpine transport at economically bearable costs by an increase in efficiency of the transport systems, as well as by the promotion of means of transport more respectful of the environment and more economic in using natural resources (Article 1(1)(d) TP);

- guaranteeing fair competition between the different means of transport (Article 1(1)(e) TP);
- observing the precautionary principle, the preventive principle and the polluter-pays principle (Article 1(2) TP).

Article 3(1) TP specifies the means in order to achieve a sustainable transport policy and illustrates the different interests which have to be respected in this context, namely the environmental, social and economical interests.

3.4.2. Implementing measures

The objectives mentioned above shall be realised by a number of specific measures, which are grouped on the three levels of, first, strategies, concepts and planning, second, technical measures and, third, monitoring and control.

Strategies, concepts and planning

Regarding the general strategy of transport policy, the contracting parties are obliged:

- to realise efficient and secure transport regulation in harmonised trans-border networks (Article 7 TP);
- to realise opportunity assessments, environmental impact assessments and risk analysis when building, modifying or enlarging significantly any transport infrastructures (Article 8(1) TP);
- to consult the concerned contracting parties in case transport projects have considerable cross-border effects; however, this does not apply to projects already decided at the moment of the acceptance of the Transport Protocol (Article 8(2) TP).

Technical measures

On the technical level, the contracting parties have committed:

- to improve public transport (Article 9 TP);
- to improve and to modernise rail infrastructure, especially by moving towards a modal shift in long-distance freight transport and promoting intermodality (rail, coastal ship, intermodal terminals) (Article 10 TP);

- refrain from constructing new high-capacity roads for trans-Alpine traffic (motorways, freeways) (Article 11(1) TP);
- to construct new high-capacity roads for inner-Alpine traffic only in compliance with strict conditions concerning the environment- and transport-related (e.g. potential modal shifts) impacts (Article 11(2) TP);
- to reduce as far as possible the environmentally harmful consequences of air traffic (Article 12(1) TP);
- to limit or, if necessary, to forbid any setting down out of aircrafts outside airports (Article 12(1) TP);
- to limit the construction or significant enlargement of airports in the Alpine area (Article 12(2) TP);
- to assess the effects of new tourist attractions on transport and, if necessary, to take preventive or compensatory measures (Article 13(1) TP);
- to support low-traffic or car-free zones, as well as measures to improve car-free mobility for tourists in the Alpine region (Article 13(2) TP);
- to apply the polluter-pays principle by introducing stepwise a transport tariff system reflecting real costs (Article 14 TP).

Monitoring and Controlling

Regarding monitoring and controlling, the contracting parties have agreed:

- to elaborate a reference document on the developments and improvements of high-capacity transport infrastructures which shall be updated periodically (Article 15 TP);
- to set environmental quality standards and environmental objectives and indicators based on the specific conditions of the Alpine region in order to follow the developments of environmental hazards and of health by traffic (Article 16 TP).

One may summarise that the Transport Protocol aims for a sustainable transport policy to be achieved by limiting the volume of traffic, by shifting the road traffic to more environmentally friendly modes of transport, and by increasing the efficiency as well as the coordination between the existing transport infrastructures (inter-modality). In this context, international cooperation is crucial.

3.4.3. What is missing in the Transport Protocol?

Like every international treaty, the Transport Protocol is a compromise of what the parties were able to agree on in the political context at the time of the signature of the treaty. However, there are some obvious lacunas in the Transport Protocol which are worth mentioning⁷⁴.

First, the Transport Protocol does not contain any provision on how to solve conflicts with national law of the contracting States or Community law. During the negotiations of the Transport Protocol in Autumn 1999, the Commission made a proposal for a provision dealing with the potential legal conflicts⁷⁵. In the final version of the Protocol, no traces are left of such an Article. It will be shown later⁷⁶ that this may be source of legal uncertainty.

Second, the Transport Protocol does not refer to other relevant international agreements, such as, for example, the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Madrid Convention)⁷⁷, elaborated and signed in 1980 under the auspices of the European Council.

Third, there are no measures concerning the problems of tunnels. Especially since the tunnel fires in the Mont Blanc tunnel (March 1999), in the Tauern tunnel (May 1999) and in the Gotthard tunnel (October 2001), managing the risks involved with transporting dangerous goods through tunnels has been constant matter of discussion⁷⁸.

⁷⁴ See as well J. SOHNLE, "El Protocolo sobre la aplicación del Convenio de los Alpes en el ámbito de los transportes y el Derecho Comunitario", (2003) 216 *Noticias de la Unión Europea* 107, at 119.

⁷⁵ See *supra*, note 51.

⁷⁶ See *infra*, 4.1.2. Hierarchical conflicts as long as the Community does not ratify, p.27.

⁷⁷ See *supra*, note 74, p.119.

⁷⁸ For further information, see *Safety in Tunnels. Transport of Dangerous Goods Through Road Tunnels*, OECD, Paris 2001.

4. ADDED VALUE BY THE TRANSPORT PROTOCOL TO THE TRANSPORT POLICY OF THE EUROPEAN COMMUNITY

The activities of the European Community as set out in Article 3 of the EC Treaty explicitly include a "common policy in the sphere of transport". This is not surprising because a common market is hardly conceivable without a common transport policy.

Articles 70 to 80 of the EC Treaty outline the Community's competence regarding transport matters in more detail. Despite this mandate provided for since the very beginning of the Community's existence, a common transport policy only started to develop in the mid 1980s, after a judgment of the European Court of Justice condemning the Community's inactivity⁷⁹. Initially focussing on the liberalisation of the transport sector, the Community approach slowly moved towards sustainable mobility, thus integrating environmental aspects .

This section will examine the value which the Transport Protocol adds to the following aspects of the Community transport policy: First, the changes linked to the binding character of the Transport Protocol. Second, its influences on the financing of the trans-European Transport Networks and, finally, its impact on the Community's policy on infrastructure pricing.

4.1. Binding character of the Transport Protocol

The Transport Protocol is a 'mixed agreement', meaning an agreement to which the Community and "the Member States are, or may become, parties, and which contains provisions some elements of which fall within Community competence, and some of which fall within the competence of the Member States."⁸⁰

⁷⁹ Judgment of 22 May 1985, in case 13/83, *European Parliament v. Council*, [1985] ECR 1513.

⁸⁰ I. MACLEOD, I.D. HENDRY and S. HYETT, *The External Relations of The European Communities*, Oxford European Community Law Series, Oxford 1996, p.143.

The future ratification of the Transport Protocol by the Community signifies that the TP would become integral part of Community law⁸¹. Consequently, the Protocol shares some of the key characteristics of Community law, in particular its supremacy over domestic law. This eventuality will be examined in a first part, whereas in a second section, the legal conflicts arising as long as the Community is not party to the Transport Protocol will be the centre of attention.

4.1.1. Transport Protocol as future part of Community law

According to Article 300(7) EC, international agreements concluded by the Community shall be binding on the institutions of the Community as well as on the Member States⁸². Hence, from the point of view of Community law, we can establish the following hierarchical order: primary Community law (Treaties) – international agreements (TP) – secondary Community law – national law of the Member States of the Community⁸³. Consequently, existing positions and policies of the Community, which are in conformity with the Transport Protocol but have not yet been established in a legally binding form, will be 'upgraded' by the adoption of the Protocol. Concretely, we can mention, for example, the internalising of external costs⁸⁴ or the modal shift of freight traffic from road to rail⁸⁵, which are both mentioned in a White Paper of the Commission and in the Transport Protocol. Contrary to the legally binding Transport Protocol, the Commission's White Papers are part of the informal measures of the Commission. They have a programmatic nature and serve information purposes in the decision shaping process before the adoption of a new legally binding measure. As such, White Papers do not have any legally binding effect⁸⁶.

⁸¹ Judgment of 30 April 1974, in case 181/73, *Haegeman v. Belgium*, [1974] ECR I-449.

⁸² See J. SCHWARZE (ed.), *EU-Kommentar*, Nomos Verlagsgesellschaft, Baden-Baden 2000, § 30 on Article 281 EC, p.2256.

⁸³ D. SIMON, *Le système juridique communautaire*, 3rd ed., PUF, Paris 2001, p.348.

⁸⁴ See *White Paper on a European transport policy for 2010: time to decide*, COM (2001) 370 final, p.70, as well as Article 14 TP.

⁸⁵ See *White Paper on a European transport policy for 2010: time to decide*, COM (2001) 370 final, p.26, as well as Article 1(1)(a) TP.

⁸⁶ See *supra*, note 83, p.336.

The upgrading by the legally binding Transport Protocol creates legal enforceability in the context of a preliminary ruling⁸⁷ or of an action for annulment⁸⁸ and enhanced political accountability in the framework of the Alpine Conferences. Political accountability is guaranteed by Article 21 TP, according to which the contracting parties are obliged to report regularly to the Standing Committee about the measures adopted in order to implement the Protocol. These reports will be assessed by the Committee which, finally, will give account to the Alpine Conference.

Due to the above mentioned principle of supremacy of Community law, a Member State of the Community, situated in the Alpine area, which would not have ratified the TP itself, would nonetheless be bound by it, as far as Community competence is concerned⁸⁹.

In case of an incompatibility between the Transport Protocol as an agreement of public international law and higher ranking Community law, this latter would prevail and the provision of the Transport Protocol in question be inapplicable⁹⁰. Where no such incompatibility with Community law of higher rank may be detected, the Transport Protocol adds new provisions to Community law. These provisions complement and specify the Treaty provisions on transport and can serve as legal basis for new projects of secondary law concerning transport policy in Alpine areas.

Currently, the scenario discussed above is still hypothetical because the Council has not even signed the Transport Protocol yet. There seems to be a practice for the Council to

⁸⁷ Under Article 234 EC. In the context of a preliminary ruling, the probably first mention of the Transport Protocol, even if not ratified yet by the Community, can be found in the opinion of Advocate General Jacobs, delivered on 11 July 2002, in case C-112/00, *Schmidberger v. Austria*, not yet reported, n.4 at para 3.

⁸⁸ Under Article 230 and 241 EC. See as well *supra*, note 80, p.139.

⁸⁹ See as well R. NORER, *Die Alpenkonvention. Völkerrechtliches Vertragswerk für den Alpenraum. Diskussionspapier Nr. 93-R-02*, Institut für Wirtschaft, Politik und Recht, Univ. für Bodenkultur Wien, Vienna 2002, p.30.

⁹⁰ The risk of such a conflict could in principle be eliminated by the procedure of the preventive advisory opinion, foreseen in Article 300(6) EC. In case of a negative opinion by the Court, the Primary law or the international agreement concerned would have to be amended before the new agreement could be concluded by the Community. In case of an incompatibility which arises after the Community is already bound by the agreement concerned, the Court may annul the Council's decision regarding the conclusion of this international agreement (for a detailed discussion of the compatibility of the Transport Protocol with the fundamental freedoms of Primary Community Law, see *supra*, note 74). In so doing, the Community engages its international liability (judgement of 12 December 2002, in case C-281/01, *Commission v. Council (Energy Star Agreement)* (not yet reported). For further examples and literature, see *supra*, note 83, p.310, n.2).

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

This would thus be the solution to the current discussion between the Commission and Germany on the compatibility of the planned road tolls for German highways⁹⁵.

Another scenario can be imagined: A country ratifies the Transport Protocol and then accedes to the Community. This could theoretically happen, with different probabilities, in the cases of Liechtenstein, Monaco, Slovenia or Switzerland. In the case of a conflict between the Transport Protocol and Community law, Article 307(1) EC states that the obligations arising from international agreements concluded before the date of accession of a Member State "shall not be affected by the provisions of this [EC] Treaty." Nevertheless, according to Article 307(2) EC, the new Member States would be obliged to "take all appropriate steps to eliminate the incompatibilities established." Consequently, measures based on the Transport Protocol would prevail over Community law only in exceptional cases and for a transitional period of time⁹⁶. However, the precise scope of the obligation to eliminate existing incompatibilities between Community law and prior agreements has still not been clarified in the jurisprudence of the Court and in literature, one can find different opinions thereto⁹⁷. However, the possibility of a denunciation of the Alpine Convention and its Protocols has expressly be foreseen by these documents⁹⁸.

4.2. Influences on the trans-European Transport Networks

The concept of trans-European Transport Networks (TEN-T) emerged at the end of the 1980s in view of the completion of the Single Market. The Treaty of Maastricht then inserted a provision, Article 154(1) EC, obliging the Community to "contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures."

Community law and the general rules and principles of customary international public law. The Transport Protocol is not part of these rules but is an ordinary contractual agreement of public international law.

⁹⁵ "EU attackiert deutsche Lastwagenmaut. Kommissarin Loyola de Palacio prüft Verfahren gegen rot-grünes Prestigeprojekt", *Frankfurter Allgemeine Zeitung*, 21 February 2003, p.13. For further details, see *infra*, 4.3. Influences on the Community policy on infrastructure pricing, p.32.

⁹⁶ See *supra*, note 83, p.311.

⁹⁷ See R. CHURCHILL and N. FOSTER, "European Community law and prior Treaty obligations of Member States: The Spanish Fishermen's cases", [1987] *International and Comparative Law Quarterly* 504; as well as J. KLABBERS, "Moribund on the fourth of July? The Court of Justice on prior agreements of the Member States", (2001) 26 *ELRev* 187.

⁹⁸ Article 13 AC and Article 23 TP.

Since 1996, the Community has developed a transport network, funded by the Cohesion Fund, the European Regional Development Fund, the trans-European networks budget and by loans from the European Investment Bank⁹⁹. In the future, the minimum level of this financial aid will be raised from 10% to 20% for cross-border rail projects crossing natural barriers (Alps) and for projects at the frontiers of the candidate countries¹⁰⁰.

4.2.1. No new high-capacity roads for trans-Alpine traffic

The Community policy regarding financing of the trans-European Transport Networks TEN-T is met by one of the key provisions of the Transport Protocol, which has already been classified as revolutionary¹⁰¹. Article 11(1) TP prohibits the construction of new high-capacity roads¹⁰² for trans-Alpine traffic, thus motorways and other roads which are multilane, intersection-free or have similar effects on transport as motorways do¹⁰³. This general prohibition is formulated in such a clearly binding way, that it may be considered as a self executing provision which does not need any further implementation measure¹⁰⁴.

This general prohibition of new high-capacity roads applies in principle both to *trans-Alpine* traffic, meaning traffic with source and destination outside of the Alps, and *intra-Alpine* traffic, meaning traffic with source and/or destination within the Alps¹⁰⁵. For the *intra-Alpine* traffic however, Article 11(2) TP provides for the possibility of a derogation. This derogation is subject to conditions concerning the environment- and transport-related impact (e.g. potential modal shifts).

⁹⁹ *Trans-European Transport Network. TEN-T Priority Projects*, European Commission, Brussels, 2002, p.3.

¹⁰⁰ Commission proposal for a Regulation amending Council Regulation 2236/95/EC laying down general rules for the granting of Community financial aid in the field of trans-European networks, COM (2002) 134 final, OJ C 151 E, 25 June 2002, p.291, at Article 5(3).

¹⁰¹ J. SOHNLE, "Le transport transAlpine des marchandises par rail et par route: préoccupations écologiques et politique européenne des transports", (2003) 1 RJE 5, at 7.

¹⁰² I use the term "high-capacity roads" which I took over from the European Environment Agency (EEA), see *supra*, note 7. In the versions of the official languages of the Alpine Convention, the following expressions are used: "hochrangige Strassen" (G), "routes à grand débit" (FR), "strade di grande comunicazione" (IT) and "ceste višjega reda" (SLO).

¹⁰³ Article 2 TP.

¹⁰⁴ See *supra*, note 74, p.113.

¹⁰⁵ Article 2 TP.

Moreover, according to Article 8(2) TP, the provisions of the Transport Protocol have no retroactive effect. This means that they do not affect infrastructure projects, which have already been decided or for which the need has already been recognised by law. During the negotiations, some parties tried to push through the idea of an assessment procedure in order to examine the compatibility of already decided projects with the Transport Protocol as well¹⁰⁶. However, these attempts did not succeed. Therefore, as of the date of reference, which is 30 October 2000, the date of acceptance of the Transport Protocol, the contracting parties have only had to specify these projects in a separate list. The application of the different exceptions in political day-to-day life will show whether the derogation from the general prohibition remains exceptional or becomes the rule.

Article 11 TP is certainly the most controversial provision of the Transport Protocol. It is mainly responsible for the ups and downs of the more than ten years long negotiations of the Protocol¹⁰⁷. Especially the Community tried again and again to water down the content of the prohibition and to enlarge the scope of the exceptions¹⁰⁸. But as it has been emphasized by HABLACHER, if "the Alpine Convention shall have an added value compared to the existing international agreements, this passage of the Transport Protocol [Article 11] will have to be formulated in a restrictive manner." (own translation)¹⁰⁹

This prohibition of any new high-capacity transAlpine motorway implies as of the Community's adherence to the Transport Protocol, it will not be possible any more to co-finance such infrastructure projects in the context of the TEN-T. There are still two big Member States, Italy and France, which have not yet ratified the Transport Protocol. Should they want to build new infrastructures falling under the Transport Protocol, they could not hope to be supported financially by Community means.

¹⁰⁶ R. GSCHÖPF, "Nach EU-Eklat: Verkehrsprotokoll der Alpenkonvention in Endbegutachtung", (1999) 10+11 *EUropa-Info* 10.

¹⁰⁷ For further details, see *supra*, 3.2. Ups and downs of the history of the Transport Protocol, p.14.

¹⁰⁸ P. HABLACHER, "Die Alpenkonvention und ihr Verkehrsprotokoll", in Transitforum Austria Tirol (ed.), *Am Brenner für die Alpen. Tatort Brenner*. Vol. 2, Innsbruck 2000.

¹⁰⁹ See *supra*, note 108.

4.2.2. The "Letzetunnel" - first case of application of Article 11 TP?

In May 1997, during the negotiations on the Transport Protocol, some deputies of the Parliament of Liechtenstein asked their Government to examine the applicability of the basic principles of the Alpine Convention as well as the Transport Protocol to the Austrian project regarding a new tunnel in Feldkirch, some kilometres from the Austrian border to Liechtenstein. This project, called "Letzetunnel", would, among other effects, contribute to link the two motorways which follow the Rhine Valley with only few kilometres distance between each other on both sides of the Rhine. The Letzetunnel project would realise the first intersection-free link between the two sides of the Rhine. As a part of the international route from Stuttgart to Milano, this would make the transit route over the San-Bernardino pass much more attractive and, consequently, influence the traffic flow through Liechtenstein¹¹⁰.

On 14 November 2000, after signature of the Transport Protocol, the Liechtenstein Government stated that, to his opinion, Article 11(2) TP should apply in this case¹¹¹. According to some Members of the Parliament, the project even falls under the prohibition of Article 11(1) TP¹¹². Ever since, the dispute is not resolved¹¹³.

Even if the Letzetunnel project is not part of the TEN-T, it shows clearly where problems and cases of application of the Transport Protocol will lie in the future: Projects which fill the gaps of the existing intra-Alpine motorway networks, thus creating new trans-Alpine connections¹¹⁴. In this context, the interpretation of 'intra-Alpine' and 'trans-Alpine' will be crucial for the application of Article 11 TP and it is already possible to imagine the difficulties arising.

¹¹⁰ Liechtensteinische Gesellschaft für Umweltschutz (LGU), *Verkehr in Liechtenstein – Bestandsaufnahme und Wege für die Zukunft*, Schaan (FL) 2002, p.30.

¹¹¹ Liechtenstein Government, *Postulatsbeantwortung der Regierung an den Landtag des Fürstentums Liechtenstein betreffend Alpenkonvention und Letzetunnel*, Nr. 142/2000, Vaduz 2000, p.21.

¹¹² "Der Letzetunnel fällt unter das Verkehrsprotokoll. Alpenkonvention und Letzetunnel: Landtag nahm Postulatsbeantwortung der Regierung zur Kenntnis", *Liechtensteiner Volksblatt*, 14 December 2000.

¹¹³ "Keine Alternative zu Letzetunnel. Österreichs Verkehrsminister Hubert Gorbach: Baubeginn Ende 2005", *Liechtensteiner Volksblatt*, 2 April 2003.

¹¹⁴ See *supra*, note 106.

4.3. Influences on the Community policy on infrastructure pricing

Basically, infrastructure pricing can aim at realising three different objectives. First, its purpose may be the mere coverage of infrastructure costs. Second, it may also include the external costs generated by the traffic (environmental pollution, noise, accidents). Finally, it may provide a steering effect, aiming at encouraging the modal split of transport in favour of rail or in order to reduce traffic in general¹¹⁵.

In the context of infrastructure pricing, the following provisions of the Transport Protocol are relevant:

- According to Article 1(2) TP, the contracting parties engage to develop their transport policy by observing the principles of precaution, prevention and payment by the polluter;
- Article 2 TP specifies the meaning of the polluter-pays principle: the polluters support all costs of the impact of transport on health and environment.
- According to Article 3(c)(aa) TP, the contracting parties commit to internalise external costs in order to respect the economical interests connected to the development of a sustainable transport policy,.
- Article 14 TP requires application of the true costs principle.

In summary, the Transport Protocol aims at internalising external costs into the transport costs. According to Article 2 TP, the notion of external costs includes all costs for infrastructure, environmental pollution, noise and damages.

The importance of external costs can be illustrated by the following:

"The external costs of transport in the EU are estimated to amount to around 8% of gross domestic product. Motorised road transport – which takes the highest share in both freight and passenger trips – accounts for more than 90% of these costs [...] Freight transport is estimated to be responsible for 35% of total external costs. For freight, water and rail transport have the lowest external costs per tonne-km, with air transport and trucking 10 and five times, respectively, more than rail."¹¹⁶

¹¹⁵A. EPINEY, "Straßenbenutzungsgebühren und europäisches Gemeinschaftsrecht", in L. Krämer (ed.), *Recht und Um-Welt, Essays in Honour of Prof. Dr. Gerd Winter*, Europa Law Publishing, Groningen 2003, p.87, at 90.

¹¹⁶ See *supra*, note 7, p.27.

Up to now, these external costs are supported by the society as a whole. This is equivalent to an indirect subsidy which makes transport, especially on the road, too cheap and, due to the "significant distortions of competition within and between modes"¹¹⁷, generates a disproportionate growth in this field of economic activity. "By internalising the full costs, this vicious circle, which is damaging to both the economy and the environment, can be stopped."¹¹⁸

Already in the White Paper "Fair payment for infrastructure use" of 1998, the Commission analyses this problem and proposes the inclusion of external costs¹¹⁹. In the White Paper "European transport policy for 2010: time to decide" of 2001, the Commission develops and generalises this concept:

"The fundamental principle of infrastructure charging is that the charge for using infrastructure must cover not only infrastructure costs, but also external costs, that is, costs connected with accidents, air pollution, noise and congestion. This goes for all modes of transport and all categories of user, both private and commercial."¹²⁰

As we can see, the Commission's position concerning the internalisation of external costs as stated in the above mentioned White Papers is close to the requirements of the Transport Protocol. The decisive difference lies in the legal nature of these legal documents. The White Paper is of a programmatic nature, not legally binding. The Transport Protocol as an agreement of public international law would upgrade the actual Commission's position to a legally binding requirement for future legislation in these fields. However, one can doubt about the importance of this gradual difference considering the fact that external costs are far from being internalised, despite the Commission's White Papers. Additionally, the Transport Protocol does not prescribe any period within which this has to be changed¹²¹.

In the field of charges for the use of infrastructure, some interesting questions arise relating to the Eurovignette system, the Brenner case, and the Ecopoint system.

¹¹⁷ *White Paper on Fair payment for infrastructure use. A phased approach to a common transport infrastructure charging framework in the EU*. COM (1998) 466 final, p.5.

¹¹⁸ See *supra*, note 49, p.8.

¹¹⁹ See *supra*, note 117, p.26.

¹²⁰ *White Paper on a European transport policy for 2010: time to decide*, COM (2001) 370 final, p.70.

¹²¹ See *supra*, note 108.

4.3.1. Eurovignette system

The Eurovignette system was introduced by Directive 93/89/EEC¹²². Since this Directive was annulled by the European Court of Justice because the European Parliament had not been consulted properly before adoption of the Directive¹²³, it was subsequently replaced by the very similar Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures¹²⁴.

According to Article 2 of the Directive in force, there is a basic distinction between *tolls*, which are charges for the use of a certain piece of infrastructure, and *user charges*, which confer the right to use the whole network for a given period. This user charge is symbolised by the so called Eurovignette. Both, tolls and user charges, may only be levied on the use of motorways or other similar multi-lane roads, bridges, tunnels and mountain passes¹²⁵. Though, a generalised user charge referring to the whole road network of a Member State does not fall within the field of application of the Directive in question¹²⁶.

In the Eurovignette system, fixed charges are imposed on the use of motorways which apply only to vehicles with a total weight of 12 tonnes or more. The annual charge is differentiated according to the damage the vehicle causes to the environment and to the roads, criteria being the number of axles and the emissions.

Article 7(7) of the Directive harmonises the amount of the user charge by setting maximum rates ranging from EUR 750 per year for the most environmentally friendly vehicles with a maximum of three axles, up to EUR 1550 per year for the most polluting category of vehicles with four axles or more.

As the charge is paid on an annual basis, the distances driven are not taken into account, which contradicts a pricing system based on the polluter-pays principle as well as on

¹²² Council Directive 93/89/EEC, of 25 October 1993, on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, OJ L 279, 12 November 1993, p.32.

¹²³ Judgment of 5 July 1995, in case C-21/94, *European Parliament v. Council*, [1995] ECR I-1827.

¹²⁴ Council and European Parliament Directive 1999/62/EC, of 17 June 1999, on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20 July 1999, p.42.

¹²⁵ Article 7(2) of Directive 1999/62/EC.

¹²⁶ See *supra*, note 115, p.105.

internalisation of external costs¹²⁷. This assessment is shared by the Commission¹²⁸ who intends to revise the current road charging regime, so as to make it compatible with the policy outlined in the White Paper "European transport policy for 2010: time to decide" from 2001¹²⁹.

As already mentioned, the Directive 1999/62/EC does not only contain rules on user charges but on tolls as well. These were subject of a case before the European Court of Justice regarding the Austrian Brenner pass. This case proved once more the crevice between the ideal policy concept of internalising external costs and the reality of current legislation.

4.3.2. The Brenner case

In the course of Austria's accession to the Community, the adaptation to the harmonised system regarding infrastructure pricing required a substantial reduction of the level of road-user charge, and thereby of the total costs associated with using Austrian passes. In the year of accession, the total costs of crossing the Austrian Alps fell dramatically¹³⁰ and became consequently much more interesting for hauliers than previously.

In order to compensate this price collapse, the Austrian government raised the toll for the Brenner motorway which links Innsbruck and Verona, crossing the Alps on the Brenner pass. This pass, which is the lowest natural crossing of the Alps, has the highest volume of freight transport among the 14 major trans-Alpine routes¹³¹. Having in mind the complaints of the local inhabitants, the Austrian government, among other measures, raised in the mid 1990s the road tolls on the Brenner motorway in order to reduce noise levels, air pollution, traffic congestion and other environmental impairment.

¹²⁷ See *supra*, note 49, p.10.

¹²⁸ See *supra*, note 120, p.73.

¹²⁹ See *supra*, note 7, p.28.

¹³⁰ The total cost of crossing fell by 52% at the Brenner pass and, due to a lack of toll at the Reschen pass, even by 93%. See M. HUMPHREYS, "Member States and Infrastructure Obligations. Analysis of the Case C-205/98 Commission v. Austria", (2002) 14 *Journal of Environmental Law* 101, at 116.

¹³¹ See *supra*, note 3, p.43.

The Commission challenged this increase of the Brenner toll on the basis of an alleged discrimination of the haulier's nationality and on non-respect of the obligation to use the income from the toll exclusively for the maintenance of the section of the infrastructure for the use of which the toll is paid. The Court of Justice declared both claims for well-founded¹³².

According to the Court, the first breach of Community law consists in a discrimination against hauliers from other Member States. By the new toll system for the Brenner pass, Austria had introduced three different levels of toll, for full, partial and short journeys on the motorway. At each level, this increase was of different importance. The toll for the full itinerary has been raised the most compared to the previous situation, while the toll for the other two categories had not been touched significantly. Since non-Austrian hauliers mostly used the full itinerary, they were more concerned by the increase of the toll than their Austrian competitors. This indirect discrimination of foreign hauliers infringed Article 7(b) of the former Directive 93/98/EEC then in force. According to the Court, derogations from the principle of non-discrimination may only be granted when expressly foreseen by the Directive and "neither the recitals in the preamble to the Directive nor the provisions of the Directive contemplate the possibility of relying on grounds relating to policies on national transport or environmental protection in order to justify tariff arrangements which give rise to indirect discrimination within the meaning of Article 7(b) of the Directive."¹³³

At first sight, this argument seems convincing, the principle of non-discrimination based on nationality being one of the basic principles of Community law and exceptions being subject to restrictive interpretation¹³⁴. Nevertheless, some authors do not share the Court's assessment. Advocate General Saggio stated in his opinion, that this "discrimination, being indirect, may in principle be justified on objective and impartial grounds connected inter alia with the requirements of national transport policy and protection of the environment."¹³⁵ EPINEY makes a similar argument, saying that Article

¹³² Judgment of 26 September 2000, in case C-205/98, *Commission v. Austria ("Brenner toll")*, [2000] ECR I-7367.

¹³³ See *supra*, note 132, para 95.

¹³⁴ See L. KRÄMER, *Casebook on EU Environmental Law*, Hart Publishing, Oxford and Portland/Oregon 2002, p.105.

¹³⁵ Opinion of Advocate General Saggio, delivered on 24 February 2000, in case C-205/98, *Commission v. Austria*, [2000] ECR I 7367, para 43.

7(b) of the Directive does not list exhaustively all grounds for derogation. She adds that in other cases, the Court generally accepted the possibility to justify indirect discriminations¹³⁶. The future will show in which direction jurisprudence will develop.

The second breach of Community law consists, according to the Court, in the fact that the new Austrian toll system did not respect the obligation laid down in Article 7(h) of the Directive 93/89/EEC, that "toll rates shall be related to the costs of constructing, operating and developing the infrastructure network concerned." Under the new Austrian toll system, the money raised could also be used for the financing of other parts of the motorway network, not only the Brenner motorway.

Regarding this topic, it has to be clearly pointed out that the Directive in question was not environmentally motivated. The rule that tolls may only be used for the construction and operation of the motorway where they are levied implies, that a huge frequentation is paired with low toll. The more trucks will use the motorway, the more the toll will decrease. This is a clear incentive in favour of road transport, because the more goods are shipped by road, the cheaper each single shipment will become. It is beyond doubts that, when "adopting this Directive, the Community simply had not forged Directive 93/89 as a tool for environmental protection."¹³⁷ Another author goes even further by declaring the provision of the Directive in question as contrary to primary Community law, concretely to the polluter-pays principle enshrined in Article 174(2) EC¹³⁸.

Directive 1999/62 tried to take into account some of the environmental considerations mentioned above. Under Article 7(10), Member States are allowed to vary the toll according to vehicle emission classes. Additionally, Article 9(2) of the Directive opens up for the possibility to attribute a certain percentage of the toll to "environmental protection and the balanced development of transport networks". This gives Member States "a great deal of room to decide where to spend revenue from pricing; including subsidising railways."¹³⁹ It is a first step in the direction of the policy presented in the Commission's White Paper on a "European transport policy for 2010: time to decide" of 2001.

¹³⁶ See *supra*, note 115, p.109.

¹³⁷ See *supra*, note 134, p.108.

¹³⁸ See *supra*, note 115, p.110.

¹³⁹ "How long can de Palacio remain in office?", (2003) 117 T&E Bulletin 1.

A further step towards internalising all externalities in infrastructure pricing would be a reform of the Eurovignette Directive which the Commission had announced for summer 2002. At the time of writing, this proposal has not come into existence yet, "fuelling fears that the principle of charging transport its full costs is being quietly dropped from the EU agenda."¹⁴⁰

4.3.3. The Ecopoint system

In the context of trans-Alpine traffic through Austria, the Ecopoint system is another key topic. This system had initially been introduced in 1992 by an agreement of international law between Austria and the Community. Later, the system was integrated into the Austrian Accession Treaty¹⁴¹. According to the European Environment Agency, the Ecopoint system works as follows:

"It seeks to reduce NO_x emissions starting from the base year of 1991 by 60% by the year 2003. A limited number of ecopoints are attributed annually to each country in the European Community. Each heavy goods vehicle (weighing more than 7.5 tonnes, and registered in the Community) has to pay a number of ecopoints for each transit trip through Austria. The number of ecopoints depends on the emission characteristics of the truck.

As a safeguard to ensure that technical progress in the development of cleaner engines did not make the ecopoint system ineffective, the agreement also laid down a quantitative limit of 108% of the journeys made in 1991. If this limit was exceeded then the number of ecopoints made available the following year would be revised downward through a formula laid down in the agreement."¹⁴²

The ecopoint system aimed to limit pollution and the number of heavy goods vehicles transiting the Austrian Alps. A critical assessment of the system gives not very satisfactory results. First, the limitation of pollution only focused on one specific component of pollution, NO_x, leaving out all others as, for example, CO₂ and noise. In

¹⁴⁰ "Ministers reject MEP's proposals on 2004 ecopoints extension", (2003) 117 T&E Bulletin 2. This fear has been fostered recently by comments by EU's Transport Commissioner Loyola de Palacio in two German Newspapers. On 21 February 2003, she said in an interview with the Frankfurter Allgemeine Zeitung, Nr. 44, p.13: "The Commission will not let the costs of environmental pollution be included in the road charging scheme, in order not to punish road transport, Europe's most efficient mode." See as well the Article mentioned in note 139, where the European Federation for Transport and Environment asks de Palacio either to retract her comments or to resign from her functions.

¹⁴¹ Protocol No. 9 to the Austrian Accession Treaty, OJ C 241, 29 April 1994, p.361.

¹⁴² See *supra*, note 7, p.8.

addition, the target of a 60% reduction of NO_x emissions was not achieved. Even if the emissions per vehicle have decreased, this was offset by the growth rate of road transport¹⁴³. Therefore, "its environmental benefit for the persons living along the Brenner motorway must have remained limited."¹⁴⁴ Second, the attempt to limit the number of heavy goods vehicles driving through the Austrian Alps was unsuccessful.

This is illustrated not only by the case *Austria v. Council*¹⁴⁵, currently pending at the European Court of Justice, but as well by the fact that in the context of the actual negotiations for a prolongation of the ecopoint system, the Council proposes to abolish any limitation of the number of transit journeys¹⁴⁶.

The facts of the case *Austria v. Council* date back to 1999. When the number of transit journeys exceeded the limits foreseen by the ecopoints system by 25%, Austria would have had the right to ban all transit of the last quarter of the year 2000. In order to avoid this, the Council decided, subject to opposition on the part of Austria, to amend the regulation, which divided the ecopoints between the different Member States¹⁴⁷, by spreading the reduced number of transit journeys over four years. Austria brought action before the Court, asking for annulment of the regulation in question. So far, the Court has not yet rendered its judgement. However, according to Advocate General Mischo's opinion¹⁴⁸, the Community was wrong in preventing Austria from restricting the number of transits for 2000¹⁴⁹.

The current ecopoint system will last till the end of 2003. For the past months, negotiations on a prolongation of the system have attempted to find a compromise for a transitional system applicable until the already mentioned generalised European system for infrastructure pricing will enter into force. At the last Transport Council end of March 2003, the Ministers rejected the proposal by the European Parliament "which

¹⁴³ See *supra*, note 7, p.28.

¹⁴⁴ See *supra*, note 134, p.109.

¹⁴⁵ See Opinion of Advocate General Mischo, delivered on 13 February 2003, in case C-445/00, *Austria v. Council* (not yet reported).

¹⁴⁶ Press release regarding the Council meeting of 31 December 2002, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/02/415|0|RAPID&lg=EN&display=.

¹⁴⁷ Council Regulation 2012/2000/EC, of 21 September 2000 amending Annex 4 to Protocol No 9 to the 1994 Act of Accession and Regulation 3298/94/EC with regard to the system of ecopoints for heavy goods vehicles transiting through Austria, OJ L 241, 26 September 2000, p.18.

¹⁴⁸ See *supra*, note 145.

¹⁴⁹ For a first comment on this opinion, see "Ecopoints victory brings no joy to Austria", (2003) 116 T&E Bulletin 1.

envisaged tougher restrictions on the most polluting lorries."¹⁵⁰ Additionally, the Council wishes to abolish the limitation of the total number of transit journeys¹⁵¹. It remains to be seen what the conciliation procedure between the Council and the European Parliament will bring about. However, one principle already seems to be clear: As Commissioner de Loyola, in charge of the Transport policy, stated recently, the future system for infrastructure pricing will continue to treat the Alps differently from the rest of the Community¹⁵².

4.3.4. The whole Alpine arc as one 'sensitive area'

As already mentioned¹⁵³, the Alpine Convention finally provides a legally binding definition of what can be called the Alpine arc. This definition is of special importance in the ongoing discussion on the new regulation on a European infrastructure pricing system and the recognition of 'sensitive areas'. This definition is given by the Alpine Convention, which, unlike the Transport Protocol, is already ratified by the Community.

In these discussions, two positions concerning the recognition of sensitive areas can be defined. On the one hand, the Commission seems to be ready to recognize some transit corridors through the Alps as sensitive areas. This would allow for special regimes, such as levying additional tolls and increased cross-financing in favour of rail transport¹⁵⁴. On the other hand, the Austrian government and several authors have demanded for years that the whole Alpine arc as defined by the Alpine Convention be treated as one single sensitive area¹⁵⁵. This would be the only way to avoid detour traffic resulting from different regimes applicable to the different transit routes.

¹⁵⁰ "Ministers reject MEP's proposals on 2004 ecopoints extension", (2003) 117 T&E Bulletin 2.

¹⁵¹ See *supra*, note 146. For further details, see the following documents:

- Report of the European Parliament's Committee on Regional Policy, Transport and Tourism on the ecopoint system from 28 January 2003, A5-0019/2003 final, which has been approved by the European Parliament on 12 February 2003;

- Press release regarding the Council meeting of 27/28 March 2003, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/76|0|RAPID&lg=FR&display.

¹⁵² See *supra*, note 95.

¹⁵³ See *supra*, 2.3. Where do the Alps end? Scope of the Alpine Convention, p.6.

¹⁵⁴ "Österreich gibt im Transitpoker nicht auf", *Salzburger Nachrichten*, 2 April 2003; "Bewegung in der Diskussion um Alpentransit", (2003) 13 alpMedia News 2.

¹⁵⁵ "Transit", *Salzburger Nachrichten*, 10 April 2003; P. HAßLACHER, "Alpenkonvention definiert sensible Zonen", (2002) 1 *EUropa-Info* 18.

In the context of the discussions on the extension of the ecopoint system for the Austrian Alps, the European Parliament used the description of the Alpine arc as "defined in geographical terms in the Alpine Convention", being considered as a "precise and official geographical description" of the Alps¹⁵⁶. Additionally, the European Parliament stated that the "transfrontier area comprising the whole of the Alpine arc" shall be recognised as a sensitive area¹⁵⁷.

4.3.5. The Member States as pioneers?

Finally, when talking about possible influences of the Transport Protocol on future Community infrastructure pricing policy, the indirect influences by Member States legislation should not be forgotten¹⁵⁸. In the field of infrastructure pricing, there are still a lot of possibilities for the Member States to develop their own policy with other centres of gravity than the Community policy. Therefore, Member States could play the role of pioneers in order to influence future Community legislation in this field. As EPINEY puts it: "In the EU, there is always a need for pioneers in order to be able to succeed with analogous measures on the level of the Union." (own translation)¹⁵⁹

Regarding the Eurovignette Directive 99/62/EC, discussed above, the field of application is limited to heavy-duty vehicles with a minimum weight of 12 tonnes. This means that coaches for the transport of persons, personal cars and delivery vans lighter than 12 tonnes do not fall under the Directive. Though, the Member States are free to legislate in this field, bound only by the requirements of primary Community law, especially the principle of non-discrimination¹⁶⁰.

¹⁵⁶ See *supra*, note 20, p.9.

¹⁵⁷ See *supra*, note 20, amendment 1, p.5, and amendment 10, p.9.

¹⁵⁸ See as well A. CARTA, "The common transport policy: the role of EC regions", in R. TONIATTI (ed.), *An ever more complex union*, Nomos Verlagsgesellschaft, Baden-Baden (publication foreseen in 2003).

¹⁵⁹ See *supra*, note 115, p.111.

¹⁶⁰ For a detailed analysis of these requirements, see *supra*, note 115.

5. CONCLUSION

The Alpine Convention and its implementing protocols are the outcome of a long process which started 50 years ago and which is still far from being concluded. While the Alpine Convention now applies to the entire Alpine Arc, meaning all eight Alpine countries and the European Community, the ratification process of the Transport Protocol is still ongoing. At this moment, it has been signed by all eight Alpine States, but not yet by the Community. In three countries, it has already entered into force.

The Alpine Convention and its Transport Protocol attempt to reconcile economic interests of the transport sector with ecological requirements by elaborating a sustainable transport policy. For the first time ever, all Alpine countries and the Community have agreed on a common (and legally binding) approach to this ambitious project, based on the understanding, that the Alpine arc is an ecologically sensitive area and that transport has negative environmental and health-related impacts.

This paper examined three levels of value added by the Transport Protocol to the European Community transport policy: First, it concentrated on the legally binding character of the Transport Protocol. After ratification of the Transport Protocol by the Community, existing positions and policies of the Community, currently only specified in a White paper, will be “upgraded” by a new legal basis. This will create legal enforceability and enhanced political accountability.

Second, this paper analysed the impact of the Transport Protocol on the trans-European Transport Networks. In this context the Transport Protocol contains a revolutionary provision prohibiting the construction of any new trans-Alpine high-capacity road. Thus after the Community's adherence to the Protocol, it will not be possible any more to co-finance such infrastructure projects.

Third, this paper examined the relationship between the Transport Protocol and the Community's policy on infrastructure pricing. Currently, Community policy is still far from internalising external costs, despite several attempts launched by the Commission in its White Papers. This is illustrated by the Eurovignette system, the Brenner case and the Ecopoint system for trans-Alpine traffic through Austria. After ratification, the Transport Protocol will oblige the Community to gradually internalise external costs, such as costs for infrastructure, environmental pollution, noise and damages, into transport costs. This infrastructure pricing system may treat the whole Alpine arc as one sensitive area, thus allowing for a special regime compared to the rest of the Community territory. In the Alpine arc additional tolls may be levied and rail transport may be cross-financed to a greater extent .

Finally, having in mind the more than reluctant steps which the Community has taken until now in order to implement its White Papers policies, this paper mentions the Member State's role as pioneers. To a large extent the Member States enjoy some leeway to legislate in this field. This margin of discretion could be used for courageous legislation in the field of transport policy, which could then be exemplary for the development of the Community's transport policy.

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