

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

“ENVIRONMENT AND LAND TRANSPORTATION LAW”

ANSWERS TO THE QUESTIONNAIRE: GERMANY

A. TRANSPORTATION LAW

I. EUROPEAN UNION LAW

- *What are the legal effects of the integration principle as far as transport law is concerned? Can the meaning of the principle be defined more precisely for this area?*
- *Especially: Is it – from a legal point of view – possible to restrict the traffic volume as such? By which measures? Can the integration principle be interpreted in a way that such measures have to be taken at EU level?*
- *How can the polluter-pays principle be defined more precisely?*
- *In which way does secondary law take environmental concerns into consideration? Is the integration principle implemented sufficiently in secondary law?*
- *What is the legal framework in European Union law for national measures trying to limit negative environmental effects especially of road and air traffic? In particular:*
 - *What is the exact scope and objective of Directive 1999/62 in relation to vehicle taxation, tolls and user charges? What limits have to be drawn from the fundamental freedoms, in particular free movement of goods in view of the case law of the ECJ (C-195/90, C-205/98, C-320/02, C-28/09)? What is the discretion Member States have in implementing such measures?*
 - *As the Alps are concerned: which measures could be taken on European, International and/or National level in order to limit the transalpine freight transports by road?*
 - *What EU measures have an impact on the construction of roads, and how could they be made more environmentally friendly?*
 - *What EU measures provide for product labelling concerning the transportation of a product?*

As agreed these questions will primarily be answered by the Swiss report. We have just one additional remark on the question to what extent EU law would allow for

measures that aim at reducing the volume of individualised motorised transportation. Such volume reduction could serve to abate many environmental and social nuisances at the same time, including the emission of noxious gases, the emission of green house gases, the consumption of scarce energy resources, the consumption of metal and other material, the production of waste, noise pollution, soil sealing, the dissection of landscapes, the destruction of biotopes, etc. Volume reduction would be a means to avoid the frequent shifting of problems from one to another concern, like, e.g., if a ringroad is built in order to reduce noise pollution but causes nature destruction.

It is important to note that the ECJ has acknowledged this causality in relation to air pollution by NO_x. In *Commission vs Austria* of 21.12.2011 (C-28/09 n. 129) the court stated:

“It is common ground that the implementation of measures aimed at limiting road traffic, such as the sectoral traffic prohibition, brings about a reduction of emissions of atmospheric pollutants and so contributes to the improvement of air quality. In the present case, it is not disputed that that prohibition allows nitrogen dioxide emissions to be reduced by about 1.5% a year in the zone concerned.”

This means in the context of justification of trade restrictions that the limiting of road traffic is a suitable measure to reach health and environmental protection goals. The court also approves that there is no freedom of choice of transportation means, but that it is a legitimate strategy to direct goods transportation from roads to more environmental friendly modes. In the same judgement (at n. 130) the court says in that regard:

“In this context, it must be recalled that the need to reduce the transport of goods by road, if appropriate by directing operators towards other more environment-friendly modes of transport such as rail transport, has been acknowledged in the framework of the common transport policy, as the Commission accepted at the hearing. Mention should also be made of Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States (OJ 1992 L 368, p. 38), the third recital in the preamble to which states that ‘the increasing problems relating to road congestion, the environment and road safety call, in the public interest, for the further development of combined transport as an alternative to road transport’.”

These statements on what could be called quantity reduction or modal shift policy should be retained for general use even though in the concrete case of Alpine

transportation the court found that the sectoral total ban of lorries above 7,5 tonnes was unnecessarily strict in comparison with other means (see also Ehlotzky, Eine (rein) österreichische Angelegenheit?- Der alpenquerende Güterverkehr in der aktuellen EuGH-Judikatur, in A. Epiney/ J. Heuck (Hg) Der alpenquerende Gütertransport, 2012, 57 et seq.). The statements can be used wherever the internal market principles of Articles 34 – 36 TFEU come into play, i.e. when MS have discretion of implementing EU environmental secondary law (such as of taking measures to reach the particles thresholds), when MS wish to take more environmentally protective measures under Article 193 TFEU, or when they take measures non regulated by EU secondary law. This is we believe important as a basis for our further discussions on quantity or modal shift policies.

II. NATIONAL LEGISLATION

1. GENERAL QUESTIONS ON NATIONAL TRANSPORT POLICIES AND LAWS

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

The focus of German transport legislation is on requirements concerning automotive engineering, traffic restrictions, protection against traffic noise, and nature protection in relation to transport infrastructure projects.

The German Federal Government currently elaborates a sustainability strategy concerning transportation. One core element shall be the shifting of fuel from fossil sources to electricity from renewable sources, see

<http://www.bundesregierung.de/Content/DE/StatischeSeiten/Breg/Nachhaltigkeit/0-B%C3%BChne/2012-08-13-pm-mobilitaets-kraftstoffstrategie.html;jsessionid=EE437EFAE33090D8F7F9D9320C578772.s3t2>

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

⇒ General instruments of “green” transport policy are especially:

- Green tax on fuel (Energiesteuergesetz, 15.07.2006)
- Car tax depending on cubic capacity and carbon dioxide emission / lorry tax depending on maximum permissible weight (Kraftfahrzeugsteuergesetz, 26.09.2002 latest amendment 29.05.2009)
- Road tax for lorries on federal motorways (Autobahnmautgesetz, 05.04.2002)

⇒ Instruments of regional traffic steering:

- Authorization of the traffic authorities to undertake individual measures of protection against noise and air pollution (§ 45 Straßenverkehrsordnung), e.g. speed restrictions, lock-out of lorries in particular zones, etc.
 - Emission-Badge-System (35. Bundesimmissionschutzverordnung): classification of vehicles in four pollutant classes (1 = worst, 4 = best); lock-out of vehicles in lower classes in certain metropolitan areas
- ⇒ Health and environmental protection thresholds for noise and air pollution (TA Lärm, TA Luft)
- ⇒ Environmental requirements for transportation infrastructure (EIA – Law, Law on Federal Long Distance Roads – Bundesfernstraßengesetz)
- ⇒ Discussion of compact settlement policy to avoid commuter traffic (<http://www.umweltbundesamt-daten-zur-umwelt.de/umweltdaten/public/theme.do?nodeId=5677>)
- ⇒ Road traffic relocation on rail: Different measures are discussed and proposed, but not yet fully implemented, e.g. improvement of railroad capacity, improvement of reloading sites for modal split traffic, European realignment of rail control engineering to permit transnational rail traffic for goods (<http://www.umweltdaten.de/publikationen/fpdf-l/3773.pdf>)

b. What are important constitutional law provisions?

Art. 20 a Grundgesetz lays down a general obligation of all branches of government to protect the environment. The provision does however not provide the citizen with subjective rights.

Subjective rights to environmental protection can however be derived from the basic right to health (Article 2 (2) Grundgesetz) insofar as environmental deterioration also affects human health.

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

see above

2. INSTRUMENTS TO MANAGE AND REDUCE ROAD TRAFFIC

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

There is a discussion about introducing user charges or tolls for vehicles on motorways (for trucks it already exists). Yet the primary intention is not the reduction of traffic but letting users share the costs for maintaining the motorways and for noise reduction devices along motorways.

a. *Tolls and user charges*

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

- *Are user charges and/or tolls being levied for the use of infrastructure?*

- *If so, on which roads are they levied?*

- *On which vehicles are user charges/tolls being levied (minimum weight etc.)?*

A toll within the meaning of Art. 2 b) of Directive 1999/62 is levied for trucks carrying goods on roads with an overall weight of 12 tons upwards on all motorways and on 84 federal roads consisting of two or more traffic lanes in one direction (§ 1 BFStrMG)

- *In case of a toll, which costs, infrastructure costs and/or external costs are taken into account?*

The weighted average tolls are related to the costs of constructing, operating, maintaining and developing the infrastructure network of streets on which the toll is levied caused by all vehicles which have to pay the toll (§ 3 Abs. 2 S. 2 BFStrMG).

- *Does national law fix a maximum amount for user charges/tolls (infrastructure costs/external costs)?*

The concrete toll depends on the distance travelled and the type of vehicle. A maximum amount is not fixed.

- *Is there a possibility for a mark-up for special infrastructure/regions?*

No.

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

No, in Germany only road tolls on motorways and on some multi-lane roads exist.

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

That is hard to say. Railroads are exempt from the cost of the promotion of renewable energy by the "Erneuerbare Energien Gesetz – EEG". Other "Ecotaxes" on electricity are applicable to the rail sector. There is no clear policy to charge external costs in the rail sector.

The main energy use of German rail is electric. German rail committed itself to use 35% of electricity from renewables by 2020 and 100% in 2050.

b. Emission Trading

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

No.

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

The introduction of such a system would necessitate an extensive new regulatory system. In our view, the experience with the existing emission trading system gives clear indications not to introduce such a system for vehicles.

c. Transit Exchange System

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

No.

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

It would be necessary to introduce a complete new system and therefore an adaption in extensive scale. A possibility would be to introduce a transit exchange system for the main axes of lorry transport. A main obstacle is the limited rail capacity.

3. INSTRUMENTS TO PROMOTE RAIL TRAFFIC AND COMBINED TRAFFIC?

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

b. How are infrastructure costs for rail traffic financed?

To the public welfare and to the transport needs under Article 87 e IV GG, the federal government finances in accordance with § 8 Federal Railway Infrastructure Development Act (Bundesschienenwegeausbaugesetz) new constructions, expansion and replacement investments in the rail infrastructure of the federal railways, while the cost of maintenance and repair of rail infrastructure will be borne by the federal railways themselves. On the financing of planned investments (new construction, expansion, replacement) according to § 9 BSWAG agreements between the Government and the EIU (Eisenbahninfrastrukturunternehmen) deal in particular with the scope of the federally funded construction projects and with the payment and potential repayment of capital.

The financing of the measures (new or expansions) and replacement investments in the existing infrastructure is provided in the form of so called construction costs grants (Baukostenzuschüsse). In addition the EIU helps fund the non-eligible costs. Furthermore there are funds that are awarded on the basis of other legislation (zB Eisenbahnkreuzungsgesetz) and grants from third parties.

The Eisenbahnbundesamt also provides grants on other legal bases, according to the Municipal Transport Financing Act (Gemeindeverkehrsfinanzierungsgesetz), for the noise abatement measures, the development of combined transport and to charge new build/expansions or reactivation of sidings. It is, with few exceptions, about the financing of investments in fixed assets and not in the maintenance.

Since March 1998, investments for the construction, expansion or development in loading and unloading plants for the combined transport of non-state enterprises (the state-owned railways – Deutsche Bahn – is subsidized directly) could be promoted. According to the calculated impact of a promotion to be levied on the turnover rate, the Federal government funds up to 80% of the determined eligible investment costs. This funding can - according to the Directive on the promotion of loading and unloading plants for the combined transport (Richtlinie/Verwaltungsvorschrift zur Förderung von Umschlaganlagen des Kombinierten Verkehrs, http://www.eba.bund.de/cln_031/SharedDocs/Publikationen/DE/Infothek/Finanzierung/KV/44__FRL__20KV,templateId=raw,property=publicationFile.pdf/44_FRL_%20KV.pdf) - be extended. For the promotion of combined transport loading and unloading plants € 94.2 million per year are available. The directive expires on 31/12/2015 . It is intended to continue the promotion of combined transport.

4. CASE LAW

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

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

b. *Is there any national case law on transport issues where EU issues came into play?*

- relating to tolls and user charges?
- relating to driving bans (e.g. night lorry ban in London)?

The first two rulings have been of relevance especially for the legal design of the Motorway Toll Act (Autobahnmautgesetz, ABMG) for freight and its interpretation.

In the crediting of car tax and Mineralölsteuer under § 3 III 1 ABMG it had to be ensured that the price paid by a foreign haulier per km of motorway tolls actually is not exceeding the price paid by a domestic carrier. The Community legal non-discrimination principle also requires that the administrative procedures of this accounting process are not discriminating foreign carriers. (see Neumann, NVwZ 2002, 1295, 1297 f.)

Furthermore the case-law could be relevant in the current discussion about a private car toll combined with reducing the tax for German cars. A main goal for the German Government is to make foreign car users pay up for the use of the Autobahn. This is certainly not a restraint of trade, as in the above cases, but it is doubtful whether such discrimination would be consistent with other parts of EU law.

The rulings 3 and 4 have not yet played a role in Germany.

B. LAND-USE PLANNING AND ENVIRONMENTAL IMPACT ASSESSMENT

1. *Are there different levels of the planning of transportation infrastructure? If so, which ones and how do they differ from each other?*
2. *If there is road construction planning on a higher level, are the different transportation modes (roads, railways, air transportation, waterways etc) weighed against each other with a view to select the least environmentally burdensome?*
3. *Concerning the approval of individual road construction projects: Is there a test of need for more roads? If so, is it taken into consideration that new roads may trigger further individual transportation?*
4. *To what extent have alternatives to be taken into account?*
 - a. *What is the legal basis of alternatives testing: SEA and EIA? Natura 2000?*
 - b. *Do these alternatives include "other" projects (e.g. rail construction, instead of road construction)?*
 - c. *Does/should the "zero-option" need to be taken into account?**What is provided for on national basis in addition to EU requirements?*

Federal, state and communal roads must be distinguished. Federal roads which shall here only be addressed are highways (Autobahn) and federal roads (Bundesstraße). The generic term for the two categories is Federal Long Distance Roads (Bundesfernstraßen). The Bundesfernstraßen are planned in four steps. These steps are taken at different federal levels and have different degrees of legal effect.

The system of planning, construction and maintenance is largely determined by the Federal Long Distance Roads Act (Bundesfernstraßengesetz).

The highest level of plan is the Federal Traffic Lines Plan (Bundesverkehrswegeplan - BVWP). The plan is adopted by the federal government and given legal status as attachment to the periodically renewed Federal Act on the Construction of Long Distance Roads Act (Fernstraßenausbaugesetz). The Bundesverkehrswegeplan lays out, in a rough manner, the roads which shall be constructed or enlarged as a priority or secondary need during the planning period which is about 10 years. Its legal effect is to enable new projects, especially by indicating the political will to provide the projects with the necessary financial means. It mandates the competent authorities to implement the projects of priority need and authorizes them to implement the projects of secondary need. In addition, it hinders any other authority to negatively prejudice the projects by their own land-use planning priorities.

The presently valid Bundesverkehrswegeplan was adopted in 2003.¹ The plan is guided by a prognosis of traffic volume which was 17 % for road traffic at the time. It follows the traditional paradigm of 'predict and provide'. Apart from looking at the expected demand for road capacity a cost-benefit analysis was prepared which confronts the investment costs with the benefits resulting from the reduction of transportation costs, the improvement of road safety, the development of regions and environmental advantages. In addition a rough environmental impact assessment was conducted resulting in categorising the various priority and secondary projects into 5 classes of adverse environmental effects. Where actual or potential Natura 2000 sites were affected a rough impact analysis was also undertaken. In spite of related rhetoric there was however no serious testing of possibilities to shift traffic from road to railway. For the construction and improvement a separate federal railway plan (Bundesschienenwegeplan) was elaborated.

Currently a new BVWP is under preparation. Following a broad public debate and submissions by environmentally minded people and CSOs the methodology of planning shall now be changed, not the least in view of the requirements of the SEA Directive. Most importantly, it is accepted that the modal split including the shifting of transportation from road to rail shall be taken more seriously. This is even legally required because the testing of alternative transportation carriers and networks is prescribed by Section 19b of the Law on Environmental Impact Assessment (UVPG). Such requirement appears to be an interesting specification of what the SEA Directive 2001/42, Article 5, understands by "reasonable alternatives".

The second planning level is the determination of the road line of individual projects (Linienbestimmung) by decision of the Minister for Traffic. The decision is taken on the basis

¹ <http://www.bmvbs.de/cae/servlet/contentblob/34254/publicationFile/955/bundesverkehrswege-plan-2003-beschluss-der-bundesregierung-vom-02-juli-2003.pdf>

of a rather detailed plan which however may leave alternative routes open for subsequent decisions on lower levels. The plan is elaborated by the Transportation Ministry of the Land where the project shall be realised. The Land Ministries are also competent to construct and maintain the federal long distance roads, albeit at the cost of the Bund. The major substance of the decision on the Linienbestimmung is the allocation of budgetary means, but also a check of compatibility with the legal framework. The decision is considered to be internal and not subject to court appeal.

As a third step the plan must be checked as to its compatibility with competing land-use interests. A procedure is set up for this purpose on the Land level called Spatial Planning Procedure (Raumordnungsverfahren). The procedure results in a decision of the Land Minister (landesplanerische Feststellung). An EIA is mandatory for this decision. The procedure is open for public participation. The decision is regarded as internal and cannot be appealed at a court.

The fourth and final step is the plan approval (Planfeststellung). Now the project – most often a certain part of a road – is elaborated in full detail. Once more an EIA is required but may be confined to those aspects which were not already covered by the higher level SEAs. The plan approval procedure is once again open for public participation. The authority has discretion whether or not to hold a public hearing (Section 17a (5) BFStrG). The plan approval procedure is the step of the entire four which is most concrete and therefore most noticed by the affected population. This is somewhat paradox because most of the core decisions will already have been taken at previous steps. Therefore, public protest comes too late at the final stage. The only way for opponents of projects is to bring the case to court and ask the court to implicitly also check then legality of decisions taken at the previous steps. This can be successful because the plan approval is dependent on the validity of those prior decisions.

There is a wealth of court judgements on environmental questions concerning the construction of highways. Most of the concerns brought to court are adverse effects on nature protection, air pollution and noise. They shall not be presented here given the focus of the meeting on quantitative measures. We will therefore concentrate on whether planning authorities must give up the doctrine of 'provide and predict' and thus desist from or reduce new constructions if there is no need for them because there will be no demand, or new traffic will be induced by them, or alternative means of transportation are available or can be improved.

The question of quantity does have a place in the plan approval procedures. This framework is based on the acknowledgment of planning discretion of the responsible authority (the Land Ministers in the case of federal long distance roads). The discretion is however limited by four yardsticks, including

- 1) any land-use determinations in higher level plans
- 2) any binding requirements of environmental legislation
- 3) the showing of a need for the project
- 4) a fair balancing of all concerns pro and contra the project in view of relevant alternatives

Questions of quantity and possible modal shift are addressed by yardsticks 3) and 4). Plaintiffs often allege before a court that the authority overstated the expected traffic demand and that for this reason the new road was not needed (yardstick n 3). After initial reticence² the Federal Administrative Court has accepted and checked such allegations as part of the weighing requirement (yardstick n 4), assuming that if there is no urgent need for the project its adverse effects on the environmental or human health are not justifiable.

However, courts normally accept the project developer's calculation of demand. This we submit should cause a turn in opponents' strategies. It might be argued that new infrastructure induces ever more individual transportation which however is generally unwished given its negative environmental profile. At this point the climate effects of individual transportation could be brought in. As a matter of fact, hitherto neither planning decisions nor court judgements on transportation infrastructure have adequately considered the necessity to consider climate effects of infrastructure.

Concerning the scope of alternatives that must be tested court practice tends to limit this to alternatives "within" the project, i.e. relocations of the planned route, but not alternatives "to" the project such as the improvement of a railway instead of the envisaged new road. This is commendable if there is a higher level of decision-making where such alternatives are indeed taken into consideration (such as by the above described higher levels of road planning), and if any failures in doing this are open for the checking by the courts. As indicated above this is indeed possible in the court proceedings on the plan approval. Even better would be the possibility of directly challenging higher level plans. If however no higher level plan is foreseen by the relevant legislation, alternatives' testing on the plan approval level should be extended to alternatives "to" the project.

C. PRODUCT LABELING (EXCURSUS)

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

² If a project was included in the Fernstraßenbaugesetz the question of need is decided and cannot be reopened by competent administrative body. The plaintiff can then only challenge the constitutionality of the Fernstraßenbaugesetz and ask the court to stay proceedings and submit the law to the Bundesverfassungsgericht. This has until now never been successful.

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

As far as we can see national law does not provide any such rules. In the private sector some big food retailers started advertising schemes that are promoting local production (“Von hier” – brand and others). A promotion of local production by law might breach EU-law (free transport of goods – ECJ on “buy irish” etc., rules on public procurement – ECJ, 10.5.2012 – C-368/10, Ecolabelling EKO and MAX HAVELAAR)

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

EU-law still follows the common-market doctrine, thereby generally forbidding taking into account the ecological effect of transport at least in the common-market. A change will not be easy to achieve, because there is the danger, that ecological considerations will be used as an instrument to segment the market once again. An ecologically orientated reform must itself evaluate the ecological costs of production, distribution, recycling etc.

NATIONAL REPORTS – RECENT DEVELOPMENTS IN MEMBER STATES ENVIRONMENTAL LAW

TO BE SUBMITTED ORALLY.