

„Integration“ of Switzerland in the EU emission trading scheme

Some legal aspects

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A. Introduction

Among other things the so-called „Bilaterals II“¹ contain a dossier concerning environmental law and environmental policy, respectively, namely the „participation“ of Switzerland in the European Environment Agency. Apart from this altogether rather „organisational“ integration step of Switzerland towards Community environmental law – which is discussed elsewhere² and is therefore neglected below – a „participation“ of Switzerland in the *acquis communautaire* in the ambit of environmental law is neither foreseen in the „Bilaterals II“ nor in other international treaties – if one prescind from the product rules which also strongly concern the free movement of goods and technical barriers to trade (which particularly set up technical requirements for products, so that in this connection parts of the Accord on Technical Barriers³ as well as the Free Trade Agreement of 1972 in general become applicable).

This could lead to the assumption that Community environmental law is in principle not relevant for Switzerland. However, this at a first glance given irrelevance of Community environmental law is relativised if one takes a closer look, which is also – as in other legal areas – due to the strong economic, political and geographic involvement of Switzerland with the EU. As a result, Switzerland is „exposed“ in many ways to the influences of European Community law, and the Swiss legal order is to a large extent – also regarding environmental law – conceived in a „euro-compatible“ manner⁴, whereas this refers to the legislative process as well as to jurisprudence. However, the „integration“ of Switzerland in European legislation raises particular problems where the intended aim cannot be reached solely by an „autonomous implementation“ („Autonomer Nachvollzug“) due to the chosen regulation framework or regulation system. An example therefore is the initiated union wide emissions trading with greenhouse gas emissions⁵.

Against this background, this contribution aims at presenting – on the basis of a overview on the different forms of „Europeanization“ of Swiss (environmental) law (B) – the legal framework of a participation of Switzerland in a material regulation in the field of environmental law (C), exemplified by the emissions trading. The choice of the emissions trading scheme is not only to be seen against the background of the up-to-dateness of the problem, but is also and especially explained by the fact that an „autonomous implementation“ alone would not be able to secure the participation of Switzerland in the system.

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¹ See the Federal Council message concerning the „Bilaterals II“ on <http://www.europa.admin.ch/nbv/off/botschaft/d/botschaft.pdf>.

² Cf. ASTRID EPINEY/NATHALIE SCHNEIDER, *Zu den Implikationen des gemeinschaftlichen Umweltrechts in der Schweiz, Europäisches Umwelt- und Planungsrecht (EurUP) 2005*, 252 et seqq. (253 et seqq.); ASTRID EPINEY/NATHALIE SCHNEIDER, *L'Agence européenne pour l'environnement et la Suisse; URP/DEP 2005* (soon to be published).

³ Which was concluded in the frame of the „Bilaterals I“ and has already become effective. The „Bilaterals I“ concern the following domains: free movement of persons, research, technical barriers to trade, agricultural products, land transport, civil aviation and public contracts. For the texts of all agreements see OJ 2002 L 114, 1.

⁴ For a comparison of selected new Community concepts with the status of Swiss environmental law cf. ASTRID EPINEY/HANSPETER PFENNINGER/RETO GRUBER, *Europäisches Umweltrecht und die Schweiz. Neuere Entwicklung und ihre Implikationen*, Berne 1999.

⁵ Cf. Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ 2003 L 275, 32.

B. As to the forms of Europeanization of Swiss law – in particular consideration of environmental law

Due to the non-membership of Switzerland in the EU, the legally binding or also factual „taking over“ of Community law occurs in different forms which differ regarding their legal character and their implications⁶. In this respect, Community law or parts of it, respectively, take effect in Switzerland in many different ways. Thereby, basically three large groups of cases of „direct“ Europeanization of Swiss law as well as the „harmonisation“ by means of multilateral international public law treaties can be distinguished:

- First of all, certain standards – which correspond to the respective *acquis communautaire* – can be established in a legally binding manner for Switzerland or, respectively, by the participation of Switzerland in Community regulatory frameworks or systems by means of international treaties⁷. As regards environmental law - as already mentioned above -, no international treaties concerning material environmental law between Switzerland and the EC exist which would oblige Switzerland to (virtually) „take over“ a part of Community environmental law. However, in this connection, the planned participation of Switzerland in the European Environment Agency should be brought to mind⁸. Rules held in international treaties are – from a Swiss point of view – always reasonable or necessary, respectively, when the intended aims cannot be reached by means of “autonomous implementation”.
- Furthermore, the „inspiration“ of Swiss law in the framework of the so-called „autonomous implementation” must be pointed out: This means that legislative enactments are elaborated in basically full accordance with the corresponding provisions in the EU. The background is often the concern of avoiding competitive disadvantages for Swiss undertakings by „parallel“ legislation. Moreover, an effort to elaborate the legal order in a „Europe-friendly“ manner can (in the meantime) generally be observed, which is attributable to very different motives⁹. As far as environmental law is concerned, it must be held that Swiss legislation generally corresponds to Community law „requirements“, so that only very few significant divergences from Community law can be listed¹⁰; this statement applies to the fundamental conceptions as well as to material requirements. Important divergences can mainly be detected in the field of public participation in different contexts, which, however, will be substantially reduced subsequent to the ratification of the Aarhus Convention¹¹. Moreover, it remains to be said that in the field of environmental law, a „genuine“ “autonomous implementation” is rather an exception than a rule, since it is only (but all the same) in the area of product-related environmental law where the absence of “autonomous implementation” immediately entails „noticeable“ economic disadvantages.
- Also the „free inspiration“, particularly of the judge but also of the legislator, by foreign and therewith also Community law developments in the frame of „classical“ comparative law must be mentioned. Thus, here Community law rather acts as a kind of source of inspiration¹².

⁶ More detailed on this and in connection with environmental law cf. EPINEY/SCHNEIDER, EurUP 2005 (note 2), 252 et seqq.

⁷ As to the „autonomous implementation“ with numerous further references see THOMAS COTTIER/DANIEL DZAMKO/ERIK EVTIMOV, Die europakompatible Auslegung des schweizerischen Rechts, Schweizerisches Jahrbuch für Europarecht 2003, Zurich et al. 2004, 357 et seqq. (360 et seqq.). Concerning the difficult questions as to interpretation which therewith arise see MARC AMSTUTZ, Interpretatio multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335, FS Ernst A. Kramer, Basel et al. 2004, 67 et seqq; in connection with the free movement of persons see also ASTRID EPINEY, Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommens, ZBJV 2005, 1 et seqq.

⁸ See the references in note 2.

⁹ About which it can partly also only be speculated. Most motives may relate to the general concern of *a priori* excluding “difficulties” with disparities.

¹⁰ For a research on some selected fields cf. EPINEY/PFENNINGER/GRUBER, Europäisches Umweltrecht und die Schweiz (note 4).

¹¹ On this see EPINEY/SCHNEIDER, EurUP 2004 (note 2), 252 et seqq. (258 et seqq.).

¹² Generally on this cf. for instance COTTIER/DZAMKO/EVTIMOV, Schweizerisches Jahrbuch für Europarecht 2003 (note 7), 357 et seqq. (389 et seqq.); KATHRIN KLETT, Inspiration des Bundesgerichts durch das EU-

Consequently, the Federal Council regularly investigates the legal situation in the EU in a general manner while examining the compatibility of a draft legislation with Community law („Verhältnis zum europäischen Recht“), even though the corresponding solution in the EU is only adopted partly or in a rudimentary manner. Furthermore, the messages („Botschaft“) of the Federal Council often, especially in those cases in which the EC has (still) not enacted any secondary Community legislation, contain a short legal comparison with the legal situation in (selected) EU Member States. In the message concerning the amendment of the Federal Law relating to the Protection of the Environment¹³ it is thus mentioned that the intended regulation for the decontamination of polluted soil corresponds to a large extent with the concepts of those European states (e.g. the Netherlands and Germany) which have so far been concerned with qualitative soil protection.

- An important role is also played by the „indirect harmonisation“ of the legal situation in the Union and Switzerland by the conclusion of multilateral international treaties: Because the Europeanization of the Swiss legal system or parts of it, respectively, can also be based on commitments entered into by the Community and/or its Member States as well as Switzerland by the conclusion of international treaties. In other words, a „harmonisation“ on the level of international public law – particularly by concluding multilateral international treaties – also leads to a certain, where appropriate extensive, approximation of the legal systems of the states or international organisations, respectively, which have committed to the corresponding obligations. An example in the field of environmental law is the so-called Aarhus Convention which has been (or will be) ratified by the EC and its Member States as well as by Switzerland¹⁴.

If one tries to evaluate the relevance of these different „forms of Europeanization“ of Swiss legislation for environmental law, the „autonomous implementation“ as well as comparative law are altogether likely to play a less important role in comparison to other legal fields; in the case of „autonomous implementation“ this is above all due to the already mentioned frequently missing economic implications of divergences in the legal system. The rather minor significance of comparative law in the field of environmental law can mainly be attributed to the fact that Swiss environmental law has mostly grown independently, at least of Community influences; against this background, since the systematic coherence of the entirety of environmental law regulations is also - and particularly - important for its interpretation, it is only in exceptional cases that comparative law considerations are likely to be methodically applicable while interpreting provisions. The „harmonisation“ by means of international law agreements is altogether likely to gain importance in the course of the increment of international law regulations in this field. In connection with state treaty provisions it must finally be held that these are less significant for „traditional“ regulatory instruments (particularly such as certain technical standards related to installations or authorisation requirements) than for incentive systems or instruments referring to economic approaches: Namely, if an „integration“ of Switzerland in such systems shall be achieved, an „autonomous implementation“ is not sufficient; instead it is necessary to explicitly provide rules for the participation in such systems. Examples therefore are ecolabels or emissions trading which will be dealt with below. In view of the altogether rather increasing importance of such instruments, it can be expected that in the future – and with Switzerland still refraining from becoming an EU Member State – international treaties will be utilised (more often) also within environmental law (at least in specific fields) in order to secure the integration of Switzerland in Community legislation.

C. In particular: as to the perspectives of a participation of Switzerland in the communitywide emissions trading scheme from a legal point of view

Switzerland has – just as the EC – ratified the United Nations Framework Convention on Climate Change¹⁵ and the Kyoto Protocol thereto¹⁶. This international law legislation is to be seen in

Recht im Bereich der Gleichstellung der Geschlechter, in: Astrid Epiney/Ira von Danckelmann (eds), Gleichstellung von Frauen und Männern in der Schweiz und der EU, 2004, 133 et seqq.

¹³ BBl 1993 II 1445.

¹⁴ On this see EPINEY/SCHNEIDER, EurUP 2005 (note 2), 252 et seqq. (258 et seqq.).

¹⁵ SR 0.814.01.

connection with the efforts of the community of states to reduce the output of carbon dioxide and other greenhouse gases; it represents a first step on the road to the reduction of greenhouse gases. For the obliged industrial states¹⁷, the Kyoto Protocol entails challenges which are not to be underestimated, since they are committed to the reduction (percentage is defined in detail) or stabilisation of the output of carbon dioxide and certain other greenhouse gases¹⁸. During the commitment period from 2008 to 2012, the EU should accordingly reduce by a total of 8% its greenhouse gas output compared to 1990, whereas the EU provides for a certain internal gradation between the Member States¹⁹; Switzerland is also committed to a reduction by 8%²⁰.

Against this background, some central legal questions as to a (possible) integration of Switzerland in the communitywide emissions trading scheme shall be discussed in the following (c), this on the basis of an overview of the Community Directive (a) and the current implementation strategy in Switzerland (b).

a) As to the implementation of the Kyoto Protocol in the EU: Directive 2003/87

In the EU, emissions trading is to play a decisive role during the implementation of the obligations arising from the Kyoto Protocol: Subsequent to the submission of a green paper in 2000 in which the Commission presented its conceptions regarding the introduction of a communitywide emissions trading scheme²¹, it submitted a proposal for a directive on the introduction of emissions trading in October 2001²²; and in October 2003 the Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community²³ was adopted.

Directive 2003/87 provides for the introduction of emission allowance trading with a limited total volume. The basic concept of Directive 2003/87 is on the one hand to make certain installations subject to authorisation in order for them to be able to emit greenhouse gases. On the other hand, this authorisation shall only be granted provided that (among other things) the companies oblige themselves to give back quantified emission rights („allowances“) for the emission of greenhouse gases falling within the scope of the Directive (currently only CO₂), according to the extent of their emissions. The tradable entitlements shall be allocated by the Member States to the companies pursuant to certain criteria, whereas this allocation shall initially take place free of charge.

The following primary issues of Directive 2003/87 are to be pointed out in detail²⁴:

- The scope of application of Directive 2003/87 (cf. Article 2 para. 1 Directive 2003/87) covers emissions caused by the activities held in Annex I – closely following the scope of application of Directive 96/61 (IPPC Directive²⁵), but with additional consideration of some major carbon dioxide emitters (particularly such as heat and energy generating plants)²⁶ – and emissions of the greenhouse gases held in Annex II which correspond with the greenhouse gases falling within the scope of the Kyoto Protocol.

¹⁶ ILM 1998, 32 et seqq.

¹⁷ The developing countries do not underlie the obligation to reduce their output of greenhouse gases; however, they can take part in the implementation of the commitments of the industrial countries within the framework of the implementation strategy of „Clean Development Mechanism“. On this see ASTRID EPINEY/MARTIN SCHEYLI, *Umweltvölkerrecht*, Berne 2000, 252 et seq.

¹⁸ As to the details on the obligations resulting from the Kyoto Protocol cf. EPINEY/SCHLEYLI, *Umweltvölkerrecht* (note 17), 246 et seqq.

¹⁹ So that the Member States have to comply with different reduction goals, and some states may even slightly increase their emissions. Cf. the intended burden sharing in Annex I of KOM (1999) 230 final.

²⁰ Cf. BBl 2002 VI 6387.

²¹ COM (2000) 87 final.

²² COM (2001) 581.

²³ OJ 2003 L 275, 32.

²⁴ As to Directive 2003/87, with further references, cf. ASTRID EPINEY, *Umweltrecht in der EU*, 2nd ed., Cologne et al. 2005, 323 et seqq.

²⁵ Directive 96/61 concerning integrated pollution prevention and control, OJ 1996 L 257, 26.

²⁶ Other emitters, especially such as private households and transportation, are therewith left out. However, approximately 46% of carbon dioxide emissions are said to be attributed to the emitters included in the scope of application of Directive 2003/87, cf. ALEXANDER REUTER/RALPH BUSCH, *Einführung eines EU-Emissionshandels – die Richtlinie 2003/87/EG*, EuZW 2004, 39 et seqq. (40), with further references.

- As a fundamental obligation – which is eventually also to be seen in close connection with the implementation and supervision of emissions trading – the Member States must make sure that all installations falling within the application area of the Directive are subjected to authorisation; only if the requirement of authorisation is fulfilled, the emission of greenhouse gases, which are specified according to the activity of the respective installation, will be permitted (Article 4 Directive 2003/87).
- Central issues for the actual emissions trading scheme are the national allocation plans and the repartition of greenhouse gas emission allowances. The „national allocation plan“, which is to be elaborated by the Member States, is decisive for the way the allowances are allocated to the undertakings. It must relate to certain periods of time which result from Article 11 paras. 1, 2 Directive 2003/87: One distinguishes between a first three-year period (as of 1 January 2005) and the following periods which last five years each (as of 1 January 2008). As to the contents of the plan, it must quantify the total amount of allowances which are to be distributed – in other words, it must determine the total quantity of emissions for which allowances are issued – and define the allocation criteria. These criteria must be „objective and transparent“ (Article 9 para. 1 Directive 2003/87), whereas certain specifications can be drawn from Annex III to Directive 2003/87 – in addition to the criteria contained in the text of the Directive itself. Within certain time limits, the allocation plan must be communicated to the Commission, which may reject it within three months if it does not meet the requirements of the Directive (Article 9 para. 3 Directive 2003/87). The elaboration of the allocation plan is to be distinguished from the repartition of the allowances themselves, which however – as already mentioned – must be conform to the criteria defined in the allocation plan. The allocation is carried out free of charge for at least 95% of the allowances within the first three-year period, and afterwards for at least 90% of the allowances (Article 10 Directive 2003/87). When deciding upon repartition, the Member States must additionally „consider“ the necessity to provide access to allowances for new market participants (Article 11 para. 3 sentence 2 Directive 2003/87).
- The Member States must assure that allowances are transferable between persons within the Community, which therewith also implies the recognition of allowances issued in other Member States (Article 12 Directive 2003/87).
- Furthermore, it must be arranged that the undertakings return a number of allowances according to the amount of their emissions; these allowances are subsequently to be cancelled by the Member States (Article 12 para. 3 Directive 2003/87).
- Finally, it must be pointed out that the allowances shall only be valid during the respective periods (1 January 2005 – 31 December 2007, afterwards five-year periods). Unused allowances are to be cancelled by the responsible authorities, whereas the Member States can provide for the replacement by new allowances during the first three-year period; this possibility of reserve accumulation shall be mandatory as of 1 January 2008 (Article 13 paras. 2, 3 Directive 2003/87).
- Further provisions of the Directive concern the modification of the IPPC Directive (Article 26 Directive 2003/87) and supervision and sanction mechanisms which are significant in respect of the functioning of the system. The latter are therefore defined quite extensively in Articles 14 et seqq. Directive 2003/87.

b) *As to the implementation of the Kyoto Protocol in Switzerland: the CO₂ Law*

The legal framework for the appliance of the flexible mechanisms and the establishment of an emissions trading scheme in Switzerland is currently provided by the CO₂ Law²⁷, which became effective on 1 May 2000 and represents the core of Swiss climate policy. From a material point of view, the act should achieve a 10% reduction - compared with the 1990 level - of the emission of climate relevant carbon dioxide gases resulting from the exploitation of fossil fuels (oil, gas and coal) by 2010²⁸. In view of reaching this target, the law distinguishes between two phases: In the first phase

²⁷ SR 641.71.

²⁸ The two purposes – a 10% reduction of CO₂ (CO₂ Law) and an 8% reduction of all greenhouse gases (Kyoto Protocol) – are compatible. How precisely they match is of course dependant on the development of the five non-CO₂-gases (CH₄, N₂O, HFC, PFC, SF₆), for which currently no quantitative goals have

(which is scheduled to last at least by 2004), the aimed reduction should primarily be achieved by measures of energy, transportation and fiscal policy²⁹ as well as by voluntary measures of companies and individuals³⁰. Only if it is observed that these measures are not sufficient to achieve the reduction goal, the Confederation can in a second phase introduce a steering tax on fossil fuels (the so-called CO₂ tax³¹). The most recent CO₂-perspectives show that the measures taken in Switzerland so far are not able to reach the goals of the CO₂ Law by 2010, so that the Federal Council decided in June 2004 to submit three alternatives concerning the introduction of a CO₂ tax as well as a variant of a (voluntary) „climate centime“ on fuels to the consultation procedure³². After having evaluated the results of the consultation procedure (presumably in 2005), the Federal Council will determine which variant(s) shall be proposed to the parliament and how to proceed, respectively.

c) As to the perspectives of an integration of Switzerland in the communitywide emissions trading scheme

As things are now, an emissions trading scheme – whether „single-handedly“ or within the frame of an „annexation“ to the Community system – is neither already decided upon nor the object of concrete (legislative) projects in Switzerland. The introduction of such a system – which would probably not actually replace the CO₂ Law, but would rather be introduced in view of a more efficient attainment of the aims – could however prove to be reasonable as a contribution to the reduction or stabilisation, respectively, of greenhouse gas emissions in Switzerland – just as in other countries. However, it would most likely not be optimal for Switzerland to establish an entirely independent system next to the EU scheme, facing the rather small (potential) market in Switzerland which bears the risk of a too strong market concentration in the hands of a few major enterprises, and that the system for the rest would be inefficient and hardly practicable due to the (too) small market. Therefore, it can be anticipated that - in case of the introduction of an emissions trading scheme - Switzerland would show quite a large interest in the „integration“ into the EU system. Against this background, the central legal questions which arise in this connection shall be discussed in the following.

1. As to the legal basis in the CO₂ Law

The Federal Council apparently assumes that it could introduce an emissions trading system (at national level) on the basis of the CO₂ Law, and may in principle also be taking this step into account. It consequently points out in the afore mentioned report on the consultation procedure for the

been set. Different partial goals apply for combustibles and fuels. Thus, combustibles (for instance heating installations, industrial furnaces) shall be reduced by altogether 15% and all the fuels (for example benzine, diesel) by 8%. Aircraft fuels for international flights remain exempted.

²⁹ Already in force are: The Energy Law since 1 January 1999 and the capacity-linked levy on heavy goods vehicles (leistungsabhängige Schwerverkehrsabgabe, LSWA). On 30 January 2001, the Federal Council also launched the Energy Switzerland programme, which is supposed to trigger a sustainable energy supply based on innovations and new technologies.

³⁰ See the common guideline of the Swiss Federal Office for the Environment (Bundesamt für Umwelt, Wald und Landschaft, BUWAL) and the Swiss Federal Office for Energy (Bundesamt für Energie, BFE) of 2 July 2001, available on <http://www.umwelt-schweiz.ch/imperia/md/content/oekonomie/klima/politik/30.pdf>. See also the first target agreement of 23 April 2004 which was signed by the Energy Agency for Industry and the Federal Council. Therein, altogether 45 groups of companies with over 600 businesses commit themselves voluntarily to the limitation of their energy consumption and CO₂ emissions. BUWAL, Unterzeichnung der ersten CO₂-Zielvereinbarung mit der Energie-Agentur der Wirtschaft, press release of 23 April 2004, <http://www.umwelt-schweiz.ch/buwal/de/medien/presse/artikel/20040423/01086/index.html>.

³¹ This levy is not actually a tax in its strict sense, but a steering tax whose revenues flow back to the population (*per capita*) as well as to the economy (proportionally to the old-age and survivors' insurance wage bill) pursuant to Article 10 CO₂ Law. BUWAL, Bundesrat schickt CO₂-Abgabe in die Vernehmlassung, press release of 11 June 2004, <http://www.umwelt-schweiz.ch/buwal/de/medien/presse/artikel/20040611/01091/index.html>. As to the system of the CO₂ tax cf. HERIBERT RAUSCH, Weitere Materien des Umweltrechts, in: Walter Haller (ed.), Umweltrecht, 2004, 234.

³² www.uvek.admin.ch/dokumentation/medienmitteilungen/artikel/20040611/01924/?lang=de.

introduction of a CO₂ tax³³ that the introduction of such a levy will or could be, respectively, linked to an emissions trading system with similar characteristics as the one in the EU. In any case, while elaborating the system in detail, attention would have to be paid to the compatibility with the EU scheme, and the possible link with the EU emissions trading scheme would have to be analysed in general. However, the ideas of the Federal Council in this matter remain very vague (at least based on the report on the consultation procedure).

In passing it may be mentioned that there indeed are certain doubts as to whether such a delegation conferred on the Federal Council to introduce an emissions trading system can effectively be derived from the CO₂ Law. An explicit authorisation in this regard can namely not be found in the law, so that one would have to „read“ this delegation in the one allowing the introduction of a CO₂ Law – a proceeding of rather doubtful admissibility, given that a CO₂ levy is not necessarily connected to an emissions trading system. Furthermore, in view of the potentially considerable repercussions of such a system, particularly on the affected companies, an explicit legal basis defining the broad outlines of such a trading system appears to be necessary in the light of the principle of legality.

2. As to the necessity of an international treaty integrating Switzerland into the Community system

A participation of Switzerland – or also of other third countries – in the communitywide emissions trading is *a priori* only reasonable provided that the affected companies themselves can actually participate in the trading. However, this is in the first place only possible on condition that the allowances are also transferable in trade with persons from third countries. Article 12 para. 1 Directive 2003/87, however, only obliges the Member States to guarantee the transferability of allowances between persons domiciled in the Union, whereas transferability with persons domiciled outside the Union is only to be ensured on the condition of a corresponding recognition of the allowances in an international treaty. Thus, the possibility of third-country nationals to participate in the communitywide emissions trading is only effectively guaranteed in connection with the conclusion of an international treaty.

A link between an eventually introduced Swiss emissions trading system with the one of the EU is therefore only possible by concluding a corresponding international agreement; consequently, Article 25 para. 1 Directive 2003/87 explicitly provides for the possibility of the conclusion of such agreements³⁴. These would have to assure the mutual recognition and therewith the transferability of the allowances which were issued in the framework of the Community scheme and other systems for greenhouse gas emissions trading. The Commission would, if required, be charged with the elaboration of the necessary provisions concerning the mutual recognition, Article 25 para. 2 Directive 2003/87.

3. As to the Community law requirements regarding the contents of an international treaty

So far the question has not yet been answered whether also requirements in terms of the contents of such a treaty can be drawn from Community law, for instance in respect of the elaboration of the emissions trading system in the third country or specific aspects thereof. Concerning this matter, it must first of all be mentioned that such possible material restrictions – which in the first place can only concern the intra-Community, however not the public international law level, given that the rules of public international law are in any case applicable to the international bindingness of an international treaty³⁵ – can anyway not result from secondary legislation, since public international treaty law prevails over secondary legislation in the hierarchy of norms; and moreover there is no provision in the Treaty indicating that the Community was bound to the entirety of secondary legislation while

³³ http://www.umwelt-schweiz.ch/imperia/md/content/oekonomie/klima/politik/vernehmlassungsbericht_d.pdf.

³⁴ The background of this cooperation possibility with third countries is that it will lead to higher cost efficiency while fulfilling the emission reduction goals of the Community, cf. consideration 18 Directive 2003/87/EC.

³⁵ On this, with further references, see ASTRID EPINEY, Zur Stellung des Völkerrechts in der EU, EuZW 1999, 5 et seqq.

concluding international agreements. Therefore it can anyway not be derived from Directive 2003/87 itself that the treaties which are to be concluded in view of the mutual recognition were subject to certain restrictions in terms of their contents. Some sort of prohibition of interference with Community secondary legislation by international treaties cannot be derived from primary legislation either: From Article 300 paras. 5, 6 ECT it can only be learned that no treaties may be concluded which conflict with the Treaty itself; this obviously implies that a contradiction with secondary legislation is in principle not relevant, even if it is not necessarily “desirable”. Against this background, to derive (for instance from the effectiveness of Community law) some sort of prohibition to interfere with existing secondary legislation by international treaties would be contrary to this system of the Treaty and also to the hierarchy of norms resulting from the Treaty.

This conclusion will not either be altered by the fact that - regarding the mutual recognition of allowances - the conclusion of corresponding treaties is mentioned in Article 25 Directive 2003/87, from which at first sight it could be gathered that some sort of “conformity” should exist between the allowances which are to be recognised or the system of their repartition, respectively, and Directive 2003/87. Because the pertinent Community provisions in any case remain the legal basis for the conclusion of an international treaty, so that secondary legislation is not able to modify them. Therewith it is also unremarkable that an agreement providing for the mutual recognition of such allowances is only reasonable in the case that such a system virtually exists in the Community.

Against this background it is consequently only primary legislation that constitutes a limitation as to the contents of a treaty on the mutual recognition of emission allowances. This comprehends among other things the fundamental rights, moreover the objectives held in Article 174 ECT which are also to be observed in the field of external trade. It is however not apparent that these requirements are fundamentally violated solely by the recognition of emission allowances issued in third countries; the difficulty in this regard rather lies primarily in the enactment of Directive 2003/87³⁶.

However, as soon as secondary legislation is enacted by the Commission based on Directive 2003/87, the requirements of the Directive are to be met, since it constitutes the basis of these acts. This is also valid for the provisions on the mutual recognition of allowances mentioned in Article 25 para. 2 Directive 2003/87, which are to be issued by the Commission subsequently to the conclusion of a “recognition agreement”³⁷.

4. As to the possible contents of a „recognition agreement“ and the implementing measures

Even if therewith no requirements as to the contents of a „recognition agreement“ can be drawn from Community legislation - apart from the exigencies of primary legislation which are not to be discussed in detail in this context -, the question still arises how such an agreement could be conceived. Thereby, certain indications result from Article 25 Directive 2003/87, since it can be expected that the EU will comply with this provision while concluding a treaty, even if it does not contain any legal requirement in the sense that it would set legal barriers to the contents of such agreements. This provision is apparently based on the assumption that the principle of recognition is provided for in the international treaty itself (Article 25 para. 1 Directive 2003/87), whereas “any necessary provisions relating to the mutual recognition of allowances under that agreement” are to be elaborated by the Commission pursuant to the committee procedures held in the Directive (Article 25 para. 2 Directive 2003/87).

The legal character of these provisions which remain to be elaborated by the Commission is (for the time being) somewhat kept in the dark: If these shall be significant “under that agreement”, they must also - according to a procedure which is to be specified in the agreement - be accepted by the contracting party in any form whatsoever. A legal act of the Commission as such can anyhow not become binding for the contracting parties. Essentially, the relevance or legal bindingness, respectively, (also) for the contracting party can thereby be guaranteed in two different manners: Either the agreement states that a panel (“mixed committee”) established by the treaty can declare the pertinent Commission decisions binding, or a provision is included into the agreement which provides

³⁶ As to the compatibility of Directive 2003/87 with the primary legislation requirements see for instance MEINHARD SCHRÖDER, *Der Handel mit Emissionszertifikaten als völker- und europarechtliches Problem*, in: Peter Marburger (ed.), *Emissionszertifikate im Umweltrecht*, Berlin 2004, 35 et seqq. (59 et seqq.).

³⁷ On this below 4.

for the bindingness of the (future) Commission decisions for the contracting party. Article 25 Directive 2003/87 is anyway not opposed to the insertion of material implementing measures as well into the agreement itself. In addition to this, it remains to be recalled that the Commission must of course also observe - besides primary legislation - the frame of Directive 2003/87 while taking its decisions. Against this background, it can be expected that the agreement itself basically formulates the principle of the mutual recognition of emission allowances, where appropriate with certain basic requirements as to the allowances subject to recognition, and that here the decisions of the Commission provide the necessary specifications.

As things are now – as already mentioned, neither the introduction of an emissions trading system nor an agreement on emissions trading with the EC are currently considered concretely in Switzerland – it is not possible to go into the details of potential contents of such an agreement or the decisions of the Commission. Anyhow, the following primary features can be pointed out:

- It should anyway not be necessary for a Swiss emissions trading scheme to follow a parallel conception such as the Community system in every single aspect, even though a certain parallelism would certainly facilitate negotiations on a participation of Switzerland. As things are now in Switzerland, the participation in an emissions trading system is only being considered for those enterprises which commit themselves to a legally binding reduction obligation. For them, due to the connection with the CO₂ tax, the aim of a participation in the trade also and precisely lies in its avoidance. This conception is fundamentally diverse from the one of the Directive, which is based on the assumption that certain installation categories are included in the system. Consideration 24 of Directive 2003/87 moreover emphasises that the levy of taxes may be utilised by the Member States as an instrument for emission limitation, but apparently only for installations which are temporarily excluded from the scope of application of the Directive. This conceptual difference is however not likely to affect the prerequisites of the possibility of a mutual recognition of the allowances, so that it should not constitute an obstacle for the inclusion of Switzerland into the EU system.
- From a political point of view, it can on the other hand be expected, or – as far as specifications are made by the Commission – it must be ensured from a legal point of view that a mutual recognition of foreign allowances does not question the effectiveness of the system provided for by Directive 2003/87. This is likely to imply that Switzerland would virtually also have to guarantee the compliance with certain requirements of the Directive while establishing an emissions trading system. Against the background of securing the effectiveness of the EU emissions trading scheme, emphasis may be put on the following aspects of Directive 2003/87:
 - The effectiveness of the supervision and notification of the emissions by the operator of the installations would have to be ensured (cf. also Article 6 Directive 2003/87 in connection with the requirements for the issue of an authorisation for the installations). Because only in this case the restitution of emission allowances according to the emissions would be guaranteed, so that the circulation of allowances, which have in fact already been used, could be avoided, and so that therewith the observance of the “maximum quantity of emissions” would altogether (in the EU and in Switzerland) be secured.
 - Subsequently, it would have to be provided that the allowances are returned according to the quantity of emissions.
 - For parallel reasons, it must be ensured that not too many allowances are issued by Switzerland, since otherwise the total quantity of emissions in the EU and in Switzerland could also be exceeded. In other words, a system would have to be established that secures that Switzerland at least achieves its reduction goal (or even falls below it), whereas not only the emissions of the emitters participating in the trade, but also all other greenhouse gas emissions would have to be taken into account, so that allowances could only be issued in such an amount which would still enable the compliance with the reduction goal (cf. also the requirements in Annex III of Directive 2003/87 for the allocation criteria for allowances which are to be included in the national allocation plan).
 - The effectiveness of the compliance with the total quantity of emissions may moreover demand the validity of the allowances – according to the framework of Directive 2003/87 (cf. Article 13 Directive 2003/87) – to be limited in time, since otherwise the volume of future emissions would hardly be controllable or manageable, respectively. This would

however not preclude a „replacement“ of allowances which have not been used (cf. also Article 13 paras. 2, 3 Directive 2003/87). Furthermore, a parallel definition of the validity period in the EU and Switzerland would probably be necessary or at least reasonable in view of securing of the negotiability of the allowances.

- The negotiability of the allowances issued in Switzerland and in the EU would have to be guaranteed, which would imply the recognition of allowances issued in the EU.
- Finally, a certain minimum standard in terms of supervision and sanction mechanisms would probably also be necessary in Switzerland, without having to correspond in every single aspect with the standard set in Directive 2003/87; however, the effective execution of the requirements of the emissions trading scheme would altogether have to be ensured.

It therewith becomes clear that the options open to Switzerland in case of an integration into the communitywide emissions trading scheme would, at least from a political point of view, be noticeably restricted; some discretion would primarily remain while defining the field of application of the emissions trading, thus the definition of the persons or enterprises, respectively, participating in the trading; whereas, as to the implementation of the system, it should - against the background of securing the effectiveness of the Community system - probably occur in extensive dependence on the latter.

D. Conclusion

It could not and should not have been the aim of this contribution to in any way “compare” the Community and Swiss environmental law. However, a closer look at the possible integration of Switzerland into the communitywide emissions trading scheme gives rise to the following comments as to the relationship between Swiss and Community environmental law:

- Even if in different respects a certain pioneer character was - or still is - undoubtedly inherent in Swiss environmental law³⁸, it would not be appropriate to “repose” on the present achievement; the development within the field of environmental law in the EU shows some very interesting aspects which should anyhow also be observed and included into the legal and legal policy considerations in Switzerland. This applies not only for the hereby discussed domain of emissions trading, but also for other questions of environmental law, as for instance public participation, access to the courts or also parts of environmental law which primarily focus on media protection, such as the water pollution control legislation.
- Subsequently, in numerous areas of environmental law an „inspiration“ by Community law is possible, which can appear in very different forms. It is thus in manifold ways that Swiss environmental law is under the influence of Community environmental law, whereas here different mechanisms (can) apply. Still, it must be acknowledged that environmental law - in spite of numerous parallels - only rarely shows fields of „genuine“ „autonomous implementation“.
- As soon as one resorts to environmental instruments in the EU which also hold organisational aspects – which can again be of very different nature -, an integration of Switzerland can only be considered on the basis of an international treaty. Within this frame, a „taking over“ of important characteristics of the Community system will normally (as also in other fields of law) become necessary, which has been illustrated by the example of emissions trading. Therewith, also within the field of environmental law the question arises whether and to what extent a non-membership in the EU can actually be reasonable in terms of environmental policy and law as well as in view of general integration policy considerations - a problem which will be posed even more pointedly in the course of the increase of use of instruments with „system character“.

³⁸ Cf. also the retrospection and evaluation in URSULA BRUNNER/HELEN KELLER, 20 Jahre Umweltschutzgesetz – Rückblick und Würdigung, ZBl. 2005, 1 et seqq.