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Bundes  
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Für Mensch und Umwelt



# **Legal Aspects of User Charges on Global Environmental Goods**

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## **Final Report**

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## Table of Contents

Part One ( <i>Ecologic</i> ).....	1
A. Introduction .....	1
I. The Environmental Impacts of Aviation and Shipping .....	1
1. Emissions from Aviation.....	1
2. Environmental Impacts of Shipping.....	2
II. Starting Point: User Charges as a Means of Internalising External Costs .....	3
1. The Discussion in Germany .....	4
2. Discussion in the European Union .....	5
3. The International Discussion.....	7
4. Recent Discussion .....	8
B. Methodology and Structure of this Study.....	10
C. User Charges on Aviation and Shipping: Definition, Effects, and Use of Revenues .....	10
I. Definition .....	10
1. User Charges Linked to Emissions (Emissions Charges) .....	12
2. User Charges Linked to Fuel Consumption (Kerosene or Diesel Taxes) .....	13
3. User Charges on the Use of Facilities (Airport- or Harbour Fees) .....	14
4. User Charges on Individual Trips (Ticket Fees) .....	14
II. Effects of User Charges .....	15
III. Use of Revenues .....	17
Part 2: General Requirements for User Charges on Aviation and Shipping.....	19
A. Preliminary Remarks: The Relevance of Law ( <i>Epiney/Hofstötter</i> ) .....	19
B. International Law ( <i>Ecologic</i> ).....	21
I. General International Law .....	21
II. World Trade Law .....	26
1. General Agreement on Trade in Services (GATS) .....	27
a.) Application to Aviation .....	27
b.) Application to Shipping.....	28
2. General Agreement on Tariffs and Trade (GATT) .....	29
a.) Substantive Scope of GATT.....	29

## II

b.) Violation of the Principle of Non-Discrimination in Articles I and III of GATT .....	30
c.) Violation of Freedom of Transit under Article V GATT .....	32
d.) Justification of Protective Measures under Article XX (b) and (g) of GATT.....	33
3. Agreement on Subsidies and Countervailing Measures (SCM).....	36
4. Summary and Application to Individual User Charges.....	37
C. European Community Law .....	38
I. Community Power to Introduce a User Charge ( <i>Epiney/Hofstötter</i> ).....	38
1. (Potential) Legal Bases for the Introduction of User Charges on Global Environmental Goods.....	39
a.) Article 93 ECT (Harmonisation of Indirect Taxes).....	39
b.) Article 71 in Connection with Article 80 (2) ECT (Transport).....	46
c.) Article 175 ECT (Environment).....	48
2. On the Differentiation of Legal Bases.....	52
a.) Multiple Legal Bases .....	52
b.) On the Criteria for a Differentiation of Legal Bases .....	54
3. Conclusion and Summary: Case Studies on the Determination of the Relevant Legal Basis.....	60
a.) Product-related Measures .....	60
b.) Charges for the Use of Transportation Routes or Infrastructures.....	62
c.) Emissions Charges.....	64
d.) Conclusion .....	64
II. On the Requirements of the Subsidiarity Principle ( <i>Epiney/Hofstötter</i> ).....	65
III. Budgetary Aspects ( <i>Ecologic</i> ) .....	67
1. Collection and Administration of User Charges by the European Community .....	69
a.) Collection by the European Community .....	69
b.) Expenditure of Revenues by the European Community.....	74
c.) Entering User Charges in the Budget .....	78
2. Expenditure of Revenue and Creation of a Special Fund .....	78
3. Summary and Application to Individual User Charges.....	81
IV. Community State Aid Rules ( <i>Ecologic</i> ).....	82

### III

1. The Concept of State Aid .....	82
2. Earmarked Expenditure as State Aid.....	83
3. Distortion of Competition in the Common Market.....	84
4. Discretionary Decision under Article 87 (3) ECT.....	85
5. Summary and Application to Individual User Charges.....	87
V. Substantive Requirements for the Design of User Charges under European Community Law: Fundamental Freedoms and Fundamental Rights ( <i>Epiney/Hofstötter</i> ) .....	88
1. On the Fundamental Freedoms of the Community .....	90
a.) Free Movement of Goods .....	93
b.) Article 43 ECT (Freedom of Establishment).....	102
c.) Article 56 ECT (Free Movement of Capital).....	108
d.) On the General Prohibition of Discrimination on Grounds of Nationality (Article 12 ECT).....	109
2. On the Fundamental Rights of the Community.....	110
a.) Freedom of Occupation .....	111
b.) Right to Property .....	112
3. Summary .....	114
D. Domestic Law: Constitutional Requirements for Environmental User Charges ( <i>Klinski</i> )	115
I. Fiscal Measures and their Classification under Constitutional Law.....	116
1. Taxes and Permissible Types of Taxes .....	117
2. Charges Imposed in Return for Services.....	124
3. Special Charges (Other Non-Fiscal Charges) .....	131
a.) Conceptual Aspects .....	131
b.) Admissibility Requirements for Special Charges.....	133
c.) Consequences for Special Charges on Environmental Use.....	133
II. Classification and Assessment of Individual Environmental User Charges under the Financial Provisions of the Constitution .....	134
1. Charges on Fuel.....	134
2. Charges on Emissions .....	135
3. Charges on the Use of Facilities (Airports, Harbours).....	137

#### IV

4. Charges on the Use and Pollution of Environmental Spaces .....	138
5. "Ticket Charges" .....	140
a.) Background.....	140
b.) "Ticket Charges" as Taxes.....	140
c.) "Ticket Charges" as Charges in Return for Services.....	144
6. Other Compensation Duties .....	145
III. Stipulations under Community Law .....	146
IV. Basic Rights .....	148
V. Conclusion .....	150
Part 3: Sectoral Requirements for User Charges on Aviation and Shipping .....	153
A. Shipping ( <i>Scheyli, Hofstötter, Epiney</i> ) .....	153
I. International Law of the Sea .....	154
1. Mandatory Requirements of International Maritime Law (Convention on the Law of the Sea) .....	155
a.) The Law of the High Seas .....	155
b.) The Law of the Sea in Areas subject to the Sovereignty and Jurisdiction of Coastal States .....	158
c.) Obligations relating to Marine Environmental Protection.....	167
2. Interim Conclusions: Restrictions on the Introduction of User Charges arising from General Maritime Law.....	168
a.) Summary of the Central Requirements under UNCLOS .....	168
b.) Consequences under General Maritime Law for Specific Maritime Zones .....	169
c.) Conclusions Regarding the Choice of a Suitable Point of Reference for the Introduction of User Charges on Ships Pursuant to UNCLOS.....	173
3. On the the Relationship of General Maritime Law under UNCLOS and Specific Maritime Conventions .....	175
4. Requirements under Specific Maritime Conventions .....	177
a.) Global Conventions on the Prevention of Marine Pollution .....	178
b.) Regional Conventions on the Prevention of Marine Pollution.....	184
c.) Paris Memorandum of Understanding on Port State Control.....	190
d.) Conclusions Regarding the Requirements under Specific Maritime Conventions .....	192

5. Summary and Conclusions on International Maritime Law .....	193
II. European Community Law .....	195
1. Regulation 4055/86 and the Freedom to Provide Services in Maritime Transport.....	196
a.) Relationship to Primary Law .....	196
b.) Scope and Application of the Freedom to Provide Services in Maritime Transport.....	198
c.) Conclusions for User Charges .....	200
d.) Conclusion .....	201
2. Maritime Cabotage .....	202
3. Further Elements of the 1986 Liberalization Package .....	202
4. Secondary Legislation relating to Taxation of Shipping Fuel.....	204
a.) Scope of Application .....	204
b.) Conclusions for User Charges .....	205
III. Domestic Law .....	207
1. Questions relating to Legislative Powers .....	207
2. Provisions of Sub-Constitutional Law .....	210
B. Aviation ( <i>Ecologic</i> ) .....	210
I. International Law .....	211
1. General International Law .....	211
2. The 1944 Chicago Convention.....	214
a.) Article 15 of the Chicago Convention.....	214
b.) Article 24 of the Chicago Convention .....	218
3. Relevant ICAO-Resolutions.....	219
a.) Institutional Framework .....	219
b.) Legal Nature of ICAO Decision-Making .....	220
c.) Relevant Recommendations and Standards.....	221
4. Bilateral Air Service Agreements (BASAs).....	224
II. European Law .....	229
1. Primary Community Law .....	229
2. Secondary Community Law .....	230
a.) Regulations on the Freedom of Services in Aviation .....	230

b) The Energy Tax Directive 2003/96/EC .....	231
III. National Law .....	232
Part 4 Recommendations for Action.....	234
I. User Charges Linked on Fuel Consumption (Kerosene or Diesel Taxes) .....	234
II. User Charges on Individual Trips (Ticket Fees).....	236
III. User Charges on Emissions (Emissions Charges) .....	237
IV. User Charges on the Use of Facilities (Airport- or Port Fees).....	238
V. User Charges in Return for Services within Environmental Resource Management Systems .....	238
Bibliography.....	240



## Part One (*Ecologic*)

### A. Introduction

International airspace and the High Seas constitute **global environmental goods** (open-access-goods), the use and consumption of which do not fall under the jurisdiction of any national sovereign body. Open-access-goods are primarily characterized by the non-rivalry of consumption and their non-exclusiveness, that is: they can be used by anyone virtually without restrictions. Airspace and the High Seas are classic examples of such common goods. They are **over-used** because the laws governing access to them are underdeveloped.<sup>1</sup>

Two environmentally intense forms of use – the airline and shipping industries – account for a growing proportion of such **environmental impacts**. Two types of impacts can be distinguished in this regard: direct deterioration of the environmental goods themselves, for instance through pollutant discharges into the sea, and damage caused to other environmental goods by way of the indirect impact of aviation and shipping, for instance changes in the global climate resulting from the emission of greenhouse gases.

The following paragraphs will provide an overview of the environmental impacts of aviation and shipping. What follows is a summary of the discussion on ways to approach these environmental impacts.

### I. The Environmental Impacts of Aviation and Shipping

#### 1. *Emissions from Aviation*

Due to the increasing convergence of global markets, the rising Gross National Product (GNP) in various regions of the world, global population growth, and a marked increase in long-distance tourism, **aviation** will account for **36%** of overall passenger transport volumes by 2050 as opposed to 9% in 1990.<sup>2</sup>

In the most comprehensive assessment of the impacts of aviation on the global climate to date, submitted by the Intergovernmental Panel on Climate Change (IPPC), the emission of gases and particles by airplanes was found to influence the atmospheric concentration of greenhouse gases and promote the creation of condensation and cirrus clouds, **adversely affecting** the global climate.<sup>3</sup>

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<sup>1</sup> See generally WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, 1 *et seq.*

<sup>2</sup> WBGU, *supra*, note 1, at 7.

<sup>3</sup> IPCC, *Special Report on Aviation and the Global Atmosphere*, particularly Chapter 6.

As a result, the proportion of anthropogenic climate change attributable to aviation is projected to increase from its present level of 3.5% to 15% by the year 2050. If recent predictions on the effects of **cloud formation** are confirmed, suggesting that the impacts of such clouds are far greater than previously assumed, this proportion might rise even higher.<sup>4</sup> Likewise, CO<sub>2</sub> emissions from aviation are expected to rise threefold between 1992 and 2025, rendering aviation the fastest-growing source of greenhouse gases worldwide. Improvements in the efficiency of propulsion systems for aircraft will not suffice to counter this trend, thereby calling for additional measures.<sup>5</sup>

## 2. *Environmental Impacts of Shipping*

Although shipping generally requires less energy than air travel and is thus one of the most environmentally friendly means of transport, the growing use of oceans for transportation purposes is leading to **serious environmental damage** in coastal waters as well as in the – still relatively untouched – High Seas. In contrast to aviation, shipping therefore contributes more directly to the degradation and destruction of **ecosystems**.

The main cause for these impacts is the exchange of ballast water and contamination caused by the discharge of waste, sewage and a variety of pollutants. Whereas the introduction of oil into the oceans formerly constituted the most significant source of marine pollution from shipping, nowadays the damage is mainly caused by the introduction of toxic chemicals from antifouling-paint. What is more, a dangerous shift in the ecological balance of certain ocean areas is attributable to the introduction of foreign plant and animal species as a result of shipping.

Altogether, shipping is also responsible for 7% of global CO<sub>2</sub> emissions within the transport sector, or nearly 2% of overall CO<sub>2</sub> emissions. In addition, shipping is responsible for approximately 7% of sulphur dioxide (SO<sub>2</sub>) and 11% to 12% of nitrous oxide (NO<sub>x</sub>) emissions.<sup>6</sup> Aside from damages caused by **acid rain**, these also interact with the nutritional balance of coastal waters. The emission of nitrous oxides may also aggravate the greenhouse effect. As in the case of aviation, these emissions are closely linked to the development of shipping, given that progress in the design of ship propulsion systems is more than compensated by the changing structure of ocean travel, with

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<sup>4</sup> Recent scientific results presented at the European Conference on Aviation, Atmosphere and Climate (AAC) in 2003 in Friedrichshafen clearly document the underestimated and previously unquantified radiative forcing effects of cirrus clouds, allowing the following conclusion: “current estimates suggest that aircraft-induced cirrus clouds are potentially the biggest contributors to climate change from aircraft emissions.” See Amanatidis and Friedl, “Science Related to Atmospheric Effects of Aircraft Emissions Continues to Mature,” in *ICAO-Journal* (2004:5): 14, at 15.

<sup>5</sup> Brosthaus et al., *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 11.

<sup>6</sup> WBGU, *supra*, note 1, at 22; in absolute figures, estimates suggest that European shipping alone resulted in emissions of 2.6 mill. tonnes of SO<sub>2</sub> and 3.6 mill. tonnes of NO<sub>x</sub> in 2000, see NERA, *Evaluation of the Feasibility of Alternative Market-Based Mechanisms to Promote Low-Emission Shipping In European Union Sea Areas*, at 1 *et seq.*

the high-speed segment currently experiencing strong growth.<sup>7</sup> With the European Commission forecasting a significant expansion of shipping relative to overall transportation,<sup>8</sup> effective approaches to reducing these environmental impacts are of particular urgency.

## II. Starting Point: User Charges as a Means of Internalising External Costs

So far, conventional command-and-control approaches to environmental policy have not proven sufficient to surmount the user problems associated with aviation and shipping. With far-reaching restrictions on economic activity not a feasible option, it is widely recognised that additional policies are necessary. At the same time, it has also become increasingly apparent that public expenditures in the area of environmental protection and transportation are facing budgetary constraints, necessitating the mobilisation of **new sources of state income**.<sup>9</sup>

Against this backdrop, several efforts have aimed at internalising the external costs of environmentally detrimental behaviour in accordance with the **polluter-pays-principle**.<sup>10</sup> An internalisation of environmental costs requires the price of products or services to **reflect their external costs**.<sup>11</sup> These, in turn, are such costs which do not appear in the cost accounting of consumers and polluters, being ultimately a burden carried by society at large. Variable external costs in the transportation sector include the costs of accidents and the negative effects of insufficient infrastructure capacities, but also environmental impacts caused by pollutants and other aspects of traffic.<sup>12</sup>

**User charges** may help internalise such environmental costs by allocating the costs of environmental damages to **those who cause** them, giving rise to a twofold advantage: an economic **incentive** to reduce environmentally detrimental patterns of behaviour while at the same time generating revenues, thereby reducing the burden on public budgets. As a result, in the case of elastic – that is, adaptable – patterns of behaviour, a balance between the external costs of such behaviour and the burden ensuing from the reallocation of these costs to users will follow as a result

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<sup>7</sup> Landau, *Les nouvelles contributions financières internationales*, at 86.

<sup>8</sup> European Commission, *European Transport Policy for 2010 – Time to Decide: White Paper*, COM(2001)370 final, at 46 *et seq.*

<sup>9</sup> See, e.g., European Commission, COM(2001)370 final, *supra*, note 8, at 66 *et seq.*

<sup>10</sup> The polluter-pays principle, a guiding principle of German environmental law since the federal Environmental Action Programme of 1971 and recognized under European Community law pursuant to Article 174 (2) ECT, calls for the allocation of costs for the prevention, restoration and compensation of environmental impacts to their originators, see Bundesministerium des Inneren, *Umweltbrief 1/1973*, at 2.

<sup>11</sup> On this issue, see Wicke, *Umweltökonomie*, at 129.

<sup>12</sup> On this issue, see European Commission, *Fair Payment for Infrastructure Use: A Phased Approach to a Common Transport Infrastructure Charging Framework in the EU - White Paper*, COM(98)466 final, at 8.

of the increased shift to environmentally preferable forms of behaviour. At the same time, user charges allow for the generation of significant **revenues**.

In the **transport sector**, whose environmental costs are substantial,<sup>13</sup> ways to internalise these costs have been under discussion for some time. In the area of road traffic, for instance, vehicle taxes, higher mineral oil taxes and distance-based motorway tolls for heavy goods vehicles have not only helped internalise the costs of infrastructure, but also part of the environmental costs. The following overview summarises the discussion to date on user charges at the international, European and German levels, including recent proposals to introduce user charges with a view to financing measures in the area of development co-operation.

### 1. *The Discussion in Germany*

With its national **Sustainability Strategy**, the Federal Government has committed itself to supporting the European Union in the introduction of emissions-based charges on the European level.<sup>14</sup> In the **coalition agreement** of 2002, moreover, it declared its support for an internationally coordinated introduction of charges on the use of airspace and the High Seas.<sup>15</sup> The Parliamentary Enquête Committee on Globalization, moreover, has advocated an extensive internalisation of social and ecological costs, recommending that revenues from environmentally motivated transport charges **be earmarked** for environmental purposes and to reduce the social and ecological costs originating in the transport and logistics sectors, while at the same time promoting better environmental technologies in these areas.<sup>16</sup> Individual political parties have also placed user charges on their agendas. In 2000, for instance, Bündnis 90/Die Grünen submitted a proposal for a **European aviation tax**. In particular, they expressed support for the introduction of kerosene taxes in the entire European Union, along with an inclusion of transboundary flights in the sales tax regime.<sup>17</sup> Most recently, the Federal Republic of Germany has joined Algeria, Brazil, Chile, France, and Spain in a Technical Group on Innovative Financing Mechanisms with the aim of securing compliance with the Millennium Development Goals.<sup>18</sup>

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<sup>13</sup> See, generally, the Final Report of the High-Ranking Group “Verkehrsinfrastruktur-Entgelte”, Cost Estimates in the Transport Sector, May 26, 1999, available at: <<http://europa.eu.int/comm/transport/infr-charging/library/hlg-4-99-rep-de.pdf>>, at 13.

<sup>14</sup> Bundesregierung, *Perspektiven für Deutschland - Unsere Strategie für eine nachhaltige Entwicklung*, available at: <[http://www.bundesregierung.de/Anlage585668/pdf\\_datei.pdf](http://www.bundesregierung.de/Anlage585668/pdf_datei.pdf)>, at 187.

<sup>15</sup> Sozialdemokratische Partei Deutschlands and Bündnis 90/Die Grünen, *Erneuerung – Gerechtigkeit – Nachhaltigkeit: Für ein wirtschaftlich starkes, soziales und ökologisches Deutschland. Für eine lebendige Demokratie*, Coalition Agreement of October 16, 2002, at 37.

<sup>16</sup> BT-Drs. (Federal Records of Parliament) 14/9200, at 141.

<sup>17</sup> Available at : <[http://www.gruene-fraktion.de/cms/steuern\\_finanzen/dok/13/13027.subventionsabbau](http://www.gruene-fraktion.de/cms/steuern_finanzen/dok/13/13027.subventionsabbau)>.

<sup>18</sup> “Technical Group on Innovative Financing Mechanisms – Action Against Hunger and Poverty.”

## 2. *Discussion in the European Union*

An important role in this debate has been assumed by the **European Union**. In a **Green Paper** submitted in 1995, the European Commission had already called for fair and efficient pricing in transport policy.<sup>19</sup> Ever since, this matter has found its reflection in several Communications submitted by the Commission, including documents relating to aviation and shipping.<sup>20</sup> A **White Paper** on fair pricing for infrastructure use confirmed this objective in 1998.<sup>21</sup> Unsurprisingly, better internalisation of costs in the transport sector was taken up as a central element of the 2001 **White Paper** on European Transport Policy for 2010, in which the Commission identified the social costs of transport – including growing expenditures for environmental protection measures – as a serious challenge.<sup>22</sup> As a main reason for these imbalances, it identified the fact that traffic participants are not required to cover all costs they trigger, that existing burdens are inappropriately distributed, and that the ensuing costs are not adequately reflected.<sup>23</sup>

These initiatives were largely welcomed by individual **Member States** and the **Council**. Already in 1998, the European Conference of Ministers of Transport (ECMT) had emphasised the need to internalise the external costs in the transport sector,<sup>24</sup> an objective also adopted by the European Council in Gothenburg.<sup>25</sup> To a certain extent, these initiatives have already been implemented in current legislation. The Directive on a Community Framework for the Taxation of Energy Products

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<sup>19</sup> European Commission, *Towards Fair and Efficient Pricing in Transport Policy – Options for Internalising the External Cost of Transport in the European Union: Green Paper*, COM(95)691 final. This Green Paper recommends calculating fees in accordance with the principle of marginal costs and achieving a higher degree of cost recovery and transparency as important pillars of an efficient transport system, and suggests engaging in a broad consultation process.

<sup>20</sup> See, e.g., European Commission, *Report to the Council and the European Parliament under Article 8(6) of Council Directive 92/81/EEC, on the Situation with Regard to the Exemptions or Reductions for Specific Policy Considerations as set out in Article 8(4) of Directive 92/81 and Concerning the Obligatory Exemption of Mineral Oils used as Fuel for the Purpose of Air Navigation other than Private Pleasure Flying and the Exemptions or Reductions possible for Navigation on Inland Waterways other than for Private Pleasure Craft as set out in Articles 8 (1) (b) and 8 (2) (b) of the same Directive*, COM(96)549 final.

<sup>21</sup> European Commission, COM(98)466 final, *supra*, note 12.

<sup>22</sup> European Commission, COM(2001)370 final, *supra*, note 8, at 83 *et seq.*

<sup>23</sup> *Ibid.*, at 83.

<sup>24</sup> Resolution No. 98/1 on the Policy Approach to Internalising the External Costs of Transport, CEMT/CM(98)5/FINAL, Ministers of Transport of the ECMT, Meeting in Copenhagen on May 26 to 27, 1998, available at: <<http://www1.oecd.org/cem/resol/env/index.htm>>.

<sup>25</sup> According to the Conclusions of the Presidency, a sustainable transport policy should promote the complete internalisation of social and environmental costs, European Council, Conclusions of the Presidency, Gothenburg, adopted on June 15 and 16, 2001, Doc. SN 200/1/01 REV 1, Annot. 29.

and Electricity,<sup>26</sup> for instance, contains important provisions on the taxation of mineral oils, expressly with a view to promoting the protection of the global climate and the environment.<sup>27</sup>

In this regard, the most recent advance was made with a proposed Directive on the Charging of Heavy Goods Vehicles for the **Use of Certain Infrastructures**,<sup>28</sup> which seeks the approximation of motorway tolling and charging systems in the Member States for the use of road infrastructures in accordance with a framework of common principles. Despite these efforts by the European Commission, no measures specifically targeted at aviation and shipping have been adopted to date. On November 17, 2004, however, the European Parliament clearly indicated its support for an inclusion of the greenhouse gases emitted by aviation and shipping within the scope of the Kyoto Protocol.<sup>29</sup> This was followed by the Commission announcement of a **Communication** for 2005, in which it assessed the options for an introduction of kerosene taxes, emissions charges on aviation, and an expansion of the European emissions trading scheme to cover air traffic.<sup>30</sup> A stakeholder consultation carried out in March and April 2005 was designed to provide input on the European strategy to reduce the environmental impacts of aviation<sup>31</sup> and led to the consecutive Communication on Reducing the Climate Change Impact of Aviation.<sup>32</sup>

At its meeting on February 17, 2005, however, the Economic and Financial Affairs Council (ECOFIN) signalled a certain degree of **political reticence** in this regard. Serious legal and political reservations against the introduction of user charges on global environmental goods are widely held both at the political level and on the level of affected economic sectors.<sup>33</sup> Even opinions in the Member States **differ**. Several states are opposed to a wide introduction of user charges in the

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<sup>26</sup> Council Directive 2003/96/EC of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity, OJ EU No. L 283 of October 31, 2003, at 51 *et seq.*

<sup>27</sup> See recitals 2 through 7 of Directive 2003/96/EC, *supra*, note 26.

<sup>28</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Directive 1999/62/EC on the Charging of Heavy Goods Vehicles for the Use of Certain Infrastructures*, COM(2003)448 final.

<sup>29</sup> European Parliament, European Parliament Resolution on the EU Strategy for the Buenos Aires Conference on Climate Change (COP-10), Doc. P6\_TA(2004)0060 of November 17, 2004.

<sup>30</sup> As stated in a preparatory document, the Commission is likely to recommend a coordinated implementation of various suitable instruments, see European Commission, *Roadmaps – Commission Work Programme 2005*, 2005/ENV/008, at 92.

<sup>31</sup> See European Commission, Press Release No. IP/05/281 of March 11, 2005.

<sup>32</sup> Communication of the Commission to the Council, the European Parliament, the European Social and Economic Committee and the Committee of the Regions: Reducing the Climate Change Impact of Aviation, COM(2005) 459 final of September 27, 2005.

<sup>33</sup> See, *e.g.*, the recent Position Paper of the Association of European Airlines (AEA) of February 7, 2005, available at: <<http://www.aea.be/AEAWebsite/DataFiles/Pr05-008.pdf>>, which highlights competitive distortions and added bureaucratic challenges.

aviation sector, whereas regional or unilateral measures give rise to questions of **competitiveness** in the affected areas of the economy.<sup>34</sup> As of now, only environmental interest groups have expressed unconditional support for user charges, as is apparent in relevant position papers on the introduction of a user charge on aviation.<sup>35</sup>

### 3. *The International Discussion*

By contrast, there have been no **comprehensive efforts** to date at the international level aimed at introducing user charges on global environmental goods. That does not, however, mean that such measures have not been amply discussed. The introduction of a user charge on aviation, in particular, has featured in a lively academic and political debate for several years, giving rise to frequent disagreement. With a view to earlier proposals submitted by individual – mostly European – states, the International Civil Aviation Organization (ICAO) issued a Resolution on December 9, 1996, in which it generally **disapproved** of any charges adopted on the global scale.<sup>36</sup> This statement was soon followed by a working paper of the Organisation for Economic Co-operation and Development (OECD), however, which highlighted the various advantages of fuel taxation (as another sub-form of user charges).<sup>37</sup> At the 35<sup>th</sup> General Assembly of the International Civil Aviation Organization, held in Montreal from September 28 to October 8, 2004, it again became apparent that a number of states were **strictly opposed** to the introduction of emission charges on air traffic.

In the run-up to this meeting, the United States – joined by 21 further member states – had proposed a Resolution to ICAO condemning any unilateral efforts in the absence of concerted action under ICAO itself.<sup>38</sup> Affected industry representatives have also repeatedly and strongly censured any attempts to introduce user charges.<sup>39</sup> Only

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<sup>34</sup> The positions adopted by finance ministers at the Council meeting of April 12, 2005, are symptomatic, with several representatives voicing concern about negative impacts on transport and tourism, Environment Daily (ENDS) No. 1858 of April 13, 2005, available at: <<http://www.environmentdaily.com/articles/index.cfm?action=issue&No=1858>>.

<sup>35</sup> See European Environmental Bureau (EEB), Friends of Nature International (FNI), Friends of the Earth Europe (FoEE) and European Federation for Transport and Environment (T&E), Joint Press Release of April 8, 2005, available at <[http://www.t-e.nu/docs/Press/2005/2005-04-08\\_joint\\_statement\\_ecofin\\_aviation.pdf](http://www.t-e.nu/docs/Press/2005/2005-04-08_joint_statement_ecofin_aviation.pdf)>.

<sup>36</sup> ICAO, Council Resolution on Environmental Charges and Taxes, adopted by the Council on 9 December 1996 at the 16<sup>th</sup> meeting of its 149<sup>th</sup> session, Para. 2 und 4, available at: <<http://www.icao.int/icao/en/env/taxes.htm>>.

<sup>37</sup> OECD, *Special Issues in Carbon/Energy Taxation: Carbon Charges on Aviation Fuels*.

<sup>38</sup> See, for instance, the statement by the European Federation for Transport and Environment (T&E) of September 10, 2004, available at: <[http://www.t-e.nu/docs/Positionpapers/2004/t-e\\_2004\\_icao\\_assembly\\_overview.pdf](http://www.t-e.nu/docs/Positionpapers/2004/t-e_2004_icao_assembly_overview.pdf)>, at 3.

<sup>39</sup> See, e.g., the sharply critical statement of the International Air Transport Association (IATA) on kerosene taxes, available at: <[http://www.iata.org/pressroom/serious\\_solutions.htm](http://www.iata.org/pressroom/serious_solutions.htm)>: “The International Air Transport

environmental groups have so far shown unconditional support for the international introduction of user charges on aviation.<sup>40</sup>

As for the use of the High Seas through **shipping**, user charges have not been seriously discussed by the responsible bodies at the International Maritime Organization (IMO). On the regional level, the Helsinki-Commission (HELCOM) established by the parties to the Helsinki Convention proves an exception, given that it has issued a – albeit legally non-binding – recommendation to introduce a charging system for the treatment of shipping waste, an approach that loosely resembles a user charge.<sup>41</sup>

#### 4. Recent Discussion

Renewed efforts to pay greater attention to the environmental impacts of aviation and shipping have been apparent since **early 2005**. In January 2005, for instance, on occasion of the World Economic Forum in Davos, the French President Jacques Chirac suggested introducing of a user charge on aviation as a potential source of revenue for **development co-operation**.<sup>42</sup> At the same time, the finance ministers of the G7 states announced negotiations on the introduction of new charges on aviation and shipping at the G8 Summit in July 2005, with consideration to be given to a tax on kerosene, a tax on the use of airspace, and an air ticket tax, along with corresponding measures for the shipping sector. In the end, however, the Summit was unable to deliver significant progress. A **Plan of Action** adopted at the Summit mentions aviation as a focus area, but restricts itself to an appeal for increased research on the scientific background as well as the development of more environmentally friendly technologies for aviation.<sup>43</sup> A document on development aid for Africa generally affirms the commitment of a group of states to **innovative financing mechanisms** and their intention to give consideration to a “solidarity contribution” on plane tickets; what is more, a working group is mandated with considering the implementation of these mechanisms.<sup>44</sup> No

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Association (IATA) is deeply concerned by proposals being circulated among European Finance Ministers to finance health and development programs in poorer countries through additional aviation taxes ... Whimsical proposals that hurt one of the largest contributors to growth are simply not the answer.”

<sup>40</sup> See European Environmental Bureau (EEB), Friends of Nature International (FNI), Friends of the Earth Europe (FoEE), and European Federation for Transport and Environment (T&E), Joint Press Release of April 8, 2005, available at <[http://www.t-e.eu/docs/Press/2005/2005-04-08\\_joint\\_statement\\_ecofin\\_aviation.pdf](http://www.t-e.eu/docs/Press/2005/2005-04-08_joint_statement_ecofin_aviation.pdf)>.

<sup>41</sup> For a more detailed analysis, see *infra*, 3<sup>rd</sup> Part, A.I.4.b.)bb.).

<sup>42</sup> This proposal was based on a report submitted by the French Inspector General of Finance, Jean-Pierre Landau, which stated that a tax on aviation would potentially raise up to \$ 8 bio., see Landau, *Les nouvelles contributions financières internationales*, 84.

<sup>43</sup> G8, *Gleneagles Plan of Action on Climate Change, Clean Energy and Sustainable Energy*, available at: <[http://www.fco.gov.uk/Files/kfile/PostG8\\_Gleneagles\\_CCChangePlanofAction.pdf](http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CCChangePlanofAction.pdf)>, at 3.

<sup>44</sup> G8, *Gleneagles Summit Document on Africa*, available at: <[http://www.fco.gov.uk/Files/kfile/PostG8\\_Gleneagles\\_Africa,0.pdf](http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_Africa,0.pdf)>, at 16: “A group of the countries above



specific measures, let alone legally binding instruments, were adopted.

One may currently expect no new initiatives on the European level. Although the European Commission compiled a **working paper on new sources of financing for development**,<sup>45</sup> which was even discussed by the ECOFIN Council during its meeting on April 12, 2005, no consensus has been reached on the adoption of actual measures.<sup>46</sup> At its meeting of June 7, 2005, the ECOFIN Council again approached the issue of a contribution based on airline tickets as a source of development funds, and requested that the Commission submit a **technical analysis**.<sup>47</sup>

The results of this analysis were presented by the Commission on June 15, 2005,<sup>48</sup> with a more detailed description of various implementation options. According to this paper, Member States should generally have discretion as to the introduction of such a contribution. Moreover, the communication distinguishes between compulsory and voluntary contributions imposed on passengers, with voluntary participation to be achieved through an “opt-in” or “opt-out” clause. The level of the contribution is to be kept low, between €1 and €5, raising a maximum of €2.7 billion of revenues.<sup>49</sup> These are to be earmarked for measures of development co-operation and will ideally be administered by the Community.<sup>50</sup> Altogether, the contribution would clearly be focused on providing benefits for development co-operation policy. As for the environmental impacts of aviation, however, an inclusion in the European emissions trading scheme currently appears to be the more favoured option.<sup>51</sup>

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firmly believe that innovative financing mechanisms can help deliver and bring forward the financing needed to achieve the Millennium Development Goals. They will continue to consider the International Financing Facility (IFF), a pilot IFF for Immunisation and a solidarity contribution on plane tickets to finance development projects, in particular in the health sector, and to finance the *IET SQQ*. A working group will consider the implementation of these mechanisms.”

<sup>45</sup> European Commission, *New Sources of Financing for Development: A Review of Options*, SEC(2005)467.

<sup>46</sup> See Environment Daily (ENDS) No. 1858 of April 13, 2005, available at: <<http://www.environmentdaily.com/articles/index.cfm?action=issue&No=1858>>.

<sup>47</sup> See European Commission, *An Analysis of a Possible Contribution based on Airline Tickets as a New Source of Financing Development*, SEC(2005)733, at 2.

<sup>48</sup> European Commission, *ibid.*

<sup>49</sup> European Commission, *ibid.*, at 6 *et seq.*

<sup>50</sup> European Commission, *ibid.*, at 12.

<sup>51</sup> See Environment Daily (ENDS) No. 1923 of July 27, 2005, available at: <<http://www.environmentdaily.com/articles/index.cfm?action=issue&No=1923>>; Wit et al., *Giving Wings to Emissions Trading – Inclusion of Aviation under the European Emission Trading System (ETS): Design and Impacts*.

## B. Methodology and Structure of this Study

The diverse legal issues raised by user charges on global environmental goods need to first be studied before such charges can be introduced. To date, however, a comprehensive legal analysis of this issue has not yet been compiled. The following assessment therefore aims at covering the entire **legal framework** relevant to the introduction of user charges in the area of aviation and shipping. Its focus rests not so much on a discussion of various instruments and their mutual delineation as it does on the legal admissibility of a user charge and – in particular – on the requirements imposed by applicable law on its design. The analysis will cover applicable areas of European law as well as public international law and German constitutional law, with an emphasis on the rules of EC law.

Methodologically, this approach first requires a **definition** of the concept of user charges, in turn necessitating a distinction of conceivable models and design options. The expected effects of these user charges and options for the use of revenues will be briefly outlined. Drawing thereon, the study will proceed to identify the legal framework of a user charge introduced on the international, Community and national levels, followed by an assessment of various design options.

The substantive analysis starts out by addressing **general requirements** imposed on the introduction of user charges on global environmental goods. It distinguishes between requirements set out under public international law, including general international law and the rules on world trade, requirements under European Community law, such as legislative powers, budgetary provisions, and state aid rules, and basic freedoms. Finally, it moves on to list central requirements under the German constitution, or Basic Law, relating to financial issues. **Sector-specific issues** are then covered in a further section, which only addresses requirements relevant to aviation and shipping, respectively.

Given the large amount of studies and political documents compiled on user charges for the aviation sector, this analysis will place its focus on shipping.

## C. User Charges on Aviation and Shipping: Definition, Effects, and Use of Revenues

### I. Definition

Broadly speaking, user charges constitute a form of **fiscal charge** assessed against a specified group for the use of a certain good.<sup>52</sup> Accordingly, the ability to use said good is understood as an advantage settled through payment of the charge. This payment fulfils a compensatory function closely related to the **polluter-pays principle**. In other words, the *collection* of the user charge, in

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<sup>52</sup> Jarass and Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, at 1041.

itself, already exerts an influence on the behaviour of those who are required to pay: it attaches a price to certain forms of usage, creating an incentive to alter the underlying behaviour.

User charges on environmental goods, such as airspace and the High Seas, impose a financial compensation duty for the exploitation of these environmental goods. By requiring an **act of payment** from the respective user for his or her environmentally detrimental patterns of behaviour, that is, the use of the environment and the resulting impacts, the user charge creates an **economic incentive** and thereby acquires an ecological control function. With the environmental impacts no longer free of cost, the price is thus factored into the behaviour, which in turn becomes economically less attractive. The scarcity of a good and the costs arising from its use are consequently given adequate consideration in the behavioural choices of users, ultimately leading to changes in behaviour.

In the assessment of design options for a user charge, this study will also look at the *expenditure* of revenues. It is worth noting that the revenue of a user charge – unlike those of certain taxes – may be **earmarked** for specific purposes. In other words, the income generated by a user charge does not necessarily accrue to the general budget of a state or international organisation, restricting its expenditure for general tasks, but may instead be used to **finance** a very specific mission, for instance by benefiting a newly established fund or similar financial instrument.

Several design options are conceivable when it comes to the **expenditure** of revenues. If, moreover, the regulatory framework for the imposition and expenditure are linked, they may exert a maximum degree of control on the behaviour of users.<sup>53</sup> Therein lies the main difference between user charges and tax-based measures, whose purpose – pursuant to welfare economics – frequently does not account for the realities in practice.<sup>54</sup> To **maximise the environmental benefits** of user charges, their revenues will ideally be applied towards specific objectives of environmental policy. This allows for additional leverage when influencing behaviour in favour of more sustainable behavioural patterns, as it helps generate funds for actual protection measures necessitated by the exploitation of the respective environmental goods. Still, other ways of applying the revenues are conceivable, for instance to benefit development policy. These are briefly outlined in a separate section.<sup>55</sup>

Drawing on what has just been said, user charges – as a financial instrument – involve:

- making the use of a particular good or right conditional on the payment of compensation;

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<sup>53</sup> It should then be noted, however, that earmarking of revenues limits the flexibility of applying revenues towards the most productive purpose in any given situation; nonetheless, a transparent assignment may help reduce political resistance against the introduction of user charges, see WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 4.

<sup>54</sup> WBGU, *ibid.*, at 3 *et seq.*

<sup>55</sup> See *infra*, 1<sup>st</sup> Part, C.

- payment being understood as compensation in return for exercising said right;
- controlling a certain pattern of behaviour;
- the generation of revenue for a specific purpose. Earmarking the revenue, however, is not a prerequisite, as that would exclude certain forms of taxation.

So as to permit a wide scope of analysis, this study will cover all forms of user charges currently under discussion. To that end, any charge will be considered a user charge for the purposes of this study, provided only that it is linked to the use of an environmental good; whether the user charge is primarily imposed to generate revenue for specific purposes or to influence the behaviour of users will not be decisive for this categorisation. Likewise, the classification as a user charge will not depend on the question of who is subject to payment, with passengers and carriers primarily suited as debtors.

The concept of user charges, thus, comprises **all measures** designed to ensure that revenues are applied to a specified purpose. It therefore includes taxation measures to the extent that their revenues are earmarked. It does not, however, include:

- emissions trading;
- compensation of waivers of use.

Instead, **conceivable user charges** include:

- emissions-based user charges (general emissions charges, carbon dioxide emissions charges);
- fuel-based user charges (mineral oil or kerosene taxes);
- facility-based user charges (port fees, landing charges, tolls, waterway charges);
- service-based user charges (e.g., so-called ticket fees, transport/freight fees).

Inasmuch as these models are currently under discussion, the following analysis will describe their main characteristics, in particular with a view to their general design and expected effects. They can apply on a global, European or national scale. Accordingly, they may be based on an international treaty, European Community legislation, or national measures adopted by the Member States (which, in turn, may be harmonised or purely unilateral).

### *1. User Charges Linked to Emissions (Emissions Charges)*

One option available when introducing user charges on global environmental goods consists in imposing a charge on aviation and shipping **relative to the amount of greenhouse gases or other pollutants emitted**. Setting the level of the charge in accordance with the type, amount and

harmfulness of the emissions allows for a high direction of purpose.<sup>56</sup> Compared to other approaches, emissions charges also have the advantage of generating significant revenues and an effective incentive to adopt specific patterns of behaviour; at the same time, they also provide for much flexibility in their design. Reliance on the amount and harmfulness of emissions, however, also incurs high administrative costs.

Unlike user charges linked to the consumption of fuel or ticket fees, emissions charges presuppose the **establishment of observation and monitoring facilities** as well as the determination of complex procedures. Moreover, they require precise information on the pollutant content of fuels and the levels emitted during operation, data which is typically difficult to collect and will commonly necessitate reliance on indirect aspects, such as the type of propulsion system, the routing system, carrying capacities, and the type and amount of fuel consumed. For the actual design, this raises several options, such as the determination of staggered or flat rates.

## 2. *User Charges Linked to Fuel Consumption (Kerosene or Diesel Taxes)*

A user charge assessed on the basis of **fuel consumption** may already be collected from fuel suppliers as a proportional surcharge on the fuel price, or as a lump sum applied to each litre of fuel, with the latter option affording greater independence from the fluctuations of crude oil prices.<sup>57</sup> In such a scenario, the economic burden will typically be passed on to **consumers**. By increasing the price of fuel, this option allows for a **more just allocation** of costs among different forms of transport. This is particularly true for the aviation sector, which has traditionally been exempted from mineral oil and value added taxes, as opposed to road traffic and shipping. A further advantage commonly ascribed to fuel taxes is the direct connection between the rate of fuel consumption and the amount of greenhouse gases emitted, thereby ensuring a rise in the price of emissions that are harmful to the global climate.<sup>58</sup> With regard to the aviation sector, however, this view is at odds with recent scientific claims that the gases generated in the combustion process, notably CO<sub>2</sub>, merely account for a small fraction of the damage caused to the global climate by air traffic. An equal – if not greater – risk stems from the emissions of nitrous oxides (NO<sub>x</sub>), condensation trails, and – above all – the cirrus clouds generated by air traffic.<sup>59</sup>

And these negative consequences of aviation are not directly linked with fuel consumption, however, but depend on the type of propulsion system and the aircraft design, weather conditions,

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<sup>56</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, 12.

<sup>57</sup> As the German Advisory Council on Global Environmental Change (*Wissenschaftliche Beirat der Bundesregierung Globale Umweltveränderungen*, WBGU) has stated, moreover, the charge would have to be adapted over time to compensate for changes in pricing structures and in the demand for revenues, see WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 10.

<sup>58</sup> Landau, *Les nouvelles contributions financières internationales*, at 84; WBGU, *ibid.*, at 9.

<sup>59</sup> Cirrus clouds, heretofore not afforded much attention and altogether difficult to assess, are likely to contribute more to climate change than any other aspect of aviation, see Amanatidis and Friedl, “Science Related to Atmospheric Effects of Aircraft Emissions Continues to Mature,” *supra*, note 4, at 15.

flying altitude and flight time, as well as additional factors. Such difficulties do not arise in the context of shipping. A further disadvantage of kerosene taxation schemes lies in their **propensity for evasive action**, at least when they are not applied on a uniform global scale. Regional taxes on kerosene, as for instance introduced in Norway, have already shown that airlines can go to great lengths to acquire untaxed fuel abroad (“tankering”). Due to the increased load then carried by air vessels and the possible detours such tankering entails, these evasive manoeuvres counteract the environmental benefits of the user charge.<sup>60</sup>

### 3. *User Charges on the Use of Facilities (Airport- or Harbour Fees)*

Unlike the foregoing models, a user charge imposed on the use of public facilities such as airports or ports is linked to a specific **benefit**. Whenever such benefits are provided by the **state**, an increasingly rare event in the case of – typically privatised – airports, the assessment will occur by way of a **fee** (compensating actual use) or a **contribution** (compensating the opportunity of use). Governments are prevented, however, from levying fees and contributions for the use or availability of private facilities, being restricted to the other forms of user charges available.

As for the **expenditure of revenues**, it should be noted that the provider of the benefits is entitled to the revenues from the user charge. What is more, the permissible level of the charge is constrained by the **value of the benefit** accorded.

### 4. *User Charges on Individual Trips (Ticket Fees)*

A **ticket fee** is a user charge imposed by way of a surcharge on the price of passenger or freight transport services, thereby subjecting the use of airspace and the high seas to a payment requirement. Various design options are conceivable: the collection of a flat fee, a staggered hike in the price of tickets, or a distance-based fee.<sup>61</sup> A charge applied to tickets, moreover, allows for a gradation in accordance to origin and destination, for instance to exempt certain developing countries with a strong economic dependence on air travel for tourism.<sup>62</sup> With an appropriate gradation system, the ticket fee can be designed to be **revenue-neutral** by rewarding ecologically desirable modes of transport with a bonus and sanctioning harmful modes of transport with a penalty.

As a rule, the compensation duty will apply to the **individual** employing the services of the airline or shipping company. A similar duty is also conceivable for freight transports. The advantages of a ticket fee consist in the relatively simple collection and high revenue potential, with a low risk of

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<sup>60</sup> The European Commission has projected a decrease in the environmental benefits of a purely European charge of between 35% and 70%, see European Commission, *Air Transport and the Environment: Towards Meeting the Challenges of Sustainable Development*, COM(99)640 final.

<sup>61</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 9.

<sup>62</sup> Landau, *Les nouvelles contributions financières internationales*, at 84.

competitive distortions.<sup>63</sup> For the aviation sector, however, low price elasticity of demand for airline services results in a limited ability to shift behaviour towards more ecologically desirable patterns; likewise, airline carriers have little incentive to invest in more efficient technologies. Intended effects on the behaviour of passengers may be accompanied by unwanted effects, such as the evasive action mentioned earlier, ultimately resulting in potentially higher emissions of greenhouse gases.<sup>64</sup>

To the extent that a ticket fee is not assessed as a flat rate, it may be calculated on the basis of the **following criteria** or a combination thereof:<sup>65</sup>

- the distance traveled;
- calculated or measured emissions of greenhouse gases;
- the propulsion system of the aircraft or sea vessel; and
- the capacity of the aircraft or sea vessel.

## II. Effects of User Charges

While a comprehensive assessment of the effects of user charges is impossible in this context, the following section will draw on aviation to illustrate the **central effects** expected from a user charge on air traffic. Economic models compiled by Wit and Dings have shown that an emissions charge may reduce the emissions of greenhouse gases in the **aviation sector** by 2 to 13% in the mid-term, depending on the specific design.<sup>66</sup> A surcharge of 0.05 € on each litre of fuel for aircraft turbines could generate global revenues of €13 to 21 billion, an amount roughly sufficient to cover the estimated environmental costs of €3 to 13 billion currently incurred by air travel.<sup>67</sup> Changes in the level of emissions are due to an equal degree to supply-side and demand-side adaptations. For the **shipping sector**, in turn, a charge of €0.5 to 1 for each kilowatt would already generate an adequate environmental response as well as revenues of approximately €360 to 720 million from European shipping companies alone.<sup>68</sup>

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<sup>63</sup> Assuming current global turnover in civil aviation is roughly €330 bio. annually, a surcharge of 5% would raise annual revenues of €10 to 16 bio., see WBGU, *ibid.*

<sup>64</sup> Cf. *supra*, C. I. 2.

<sup>65</sup> See, for instance, European Commission, COM(99)640 final, *supra*, note 60, at 15.

<sup>66</sup> Wit and Dings, *Economic Incentives to Mitigate Greenhouse Gas Emissions from Air Transport in Europe*, at 68.

<sup>67</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 11.

<sup>68</sup> WBGU, *ibid.*, at 31.

Critics have pointed out that user charges are likely to incur real **environmental benefits** only when assessed on a larger scale, ideally on the global level.<sup>69</sup> Nonetheless, even user charges collected on a **regional level** only may incur significant incentives and revenues. For instance, a tax on aircraft fuel of €245 per 1000 litres on all flight routes within the European Community is expected to reduce CO<sub>2</sub> emissions from aviation by 15 Mt.<sup>70</sup> In the long run, this would allow reductions of greenhouse gases by 25% to 50%.<sup>71</sup> A Community-wide fee of €0.32 per litre of aircraft fuel, in turn, would raise revenues of up to €14 bio.,<sup>72</sup> whereas a fee of €0.20 per litre along with a staggered departure and landing tax would allow for greenhouse gas reductions of 25% to 35% by 2025, coupled with a significant increase in the efficiency of aircraft turbines.<sup>73</sup> Estimates by the European Commission suggest that a uniform ticket fee on air travel of €10 on flights within the Community, and €13 on international flights, would render approximately €6 billion annually.<sup>74</sup>

Concern about the negative impact of user charges on the **competitive position** of European airlines and shipping companies is largely centred on the question whether foreign competitors will be subject to similar treatment. For that reason, and also for reasons of environmental protection, any user charge should have the broadest coverage possible. Both the environmental benefits and the competitive distortions potentially arising from a user charge are, moreover, strongly dependent on the level of the user charge imposed. Still, the economic burden incurred by unilateral action on part of the European Community should not be overestimated, given the level of the user charge one may expect with the current political background.<sup>75</sup> For the **shipping sector**, in turn, any user charge would amount to merely a small fraction of current charter rates, and should therefore incur no noticeable drop in shipping volume or negative impacts on employment.<sup>76</sup> The demand for **air services** in the decisive areas of leisure travel, business travel, and freight transportation, in turn, is subject to very low price and substitution elasticity; accordingly, an increase in the price of air travel would have only moderate effects on the demand for flights.<sup>77</sup> Additionally, fuel consumption

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<sup>69</sup> See, e.g., European Commission, COM(99)640 final, *supra*, note 60, at 13 *et seq.*, highlighting the limited environmental benefits of a taxation scheme for aircraft fuel introduced on the Community-level only.

<sup>70</sup> European Commission, *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Taxation of Aircraft Fuel*, COM(2000)110 final, at 4.

<sup>71</sup> Brockhagen and Lienemeyer, *Proposal for a European Aviation Charge*, at 54-55; Bleijenberg and Wit, *A European Environmental Aviation Charge – Feasibility Study*.

<sup>72</sup> Brockhagen and Lienemeyer, *ibid.*, at 44; as the Commission has stated, however, a fuel tax of €330 per 1000 litres – the minimum rate under the energy tax directive – would roughly yield €6 to 7 bio., depending on the elasticity of demand for aviation services, see European Commission, *New Sources of Financing for Development: A Review of Options*, SEC(2005) 467, at 13 *et seq.*

<sup>73</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 11.

<sup>74</sup> European Commission, SEC(2005) 467, *supra*, note 72, at 14.

<sup>75</sup> Cf. *supra*, A. II. 4.

<sup>76</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 31.

<sup>77</sup> WBGU, *ibid.*, at 10.



currently amounts for a mere 15% of the overall costs of air travel,<sup>78</sup> so that the introduction of an intra-Community kerosene tax would result in a loss of income of 0.5% to 7% for each kilometre ton.<sup>79</sup> The political discussion, however, will have to take into account that rising levels of user charges lead to stronger behavioural adaptation and have a greater impact on demand. Reliable long-term calculations of the effects of user charges are currently not available.

As increased costs will almost exclusively be passed on to passengers by way of higher travel fares, the **profit margins** in the airline industry will remain largely unchanged. Nonetheless, rising airfares may ultimately impact the growth of the airline industry, which – in the case of a user charge imposed on European airspace only – might place the European airline industry at a disadvantage. Even then, however, European airline carriers would only suffer a reduction in market growth by 1.7%, assuming a charge of €50 per tonne of CO<sub>2</sub>.<sup>80</sup> Rather than an additional economic burden, the improvements in the environmental performance of aircraft incurred by a system of incentives (for instance with more efficient propulsion systems and aircraft designs, or more efficient routing systems) may be considered an overall improvement in efficiency. What is more, slower growth of the affected airline markets would be compensated by increased activity in other sectors.<sup>81</sup> Likewise, the effects on other economic sectors, such as tourism, are limited: in the Mediterranean states, for example, the introduction of a user charge would result in a drop in tourism of merely 0.01% to 0.15% annually.<sup>82</sup> With airfares only constituting a part of the overall price of travel packages, the effects of a ticket fee of up to €40 are negligible.<sup>83</sup>

### III. Use of Revenues

Various **applications** have been suggested for the revenues incurred by user charges. Against the background of growing environmental problems arising from air and sea travel as well as perpetually constrained public budgets, an expenditure of revenues aimed at countering these problems and ensuring a more effective protection of global environmental goods has been among the favoured options.

The **German Advisory Council on Global Change** (*Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderungen*, WBGU), for instance, has proposed earmarking

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<sup>78</sup> According to IATA calculations cited by Caroline Lucas, MdEP, in a speech on October 11, 2000, available at: <[http://www.carolinelucasmep.org.uk/speeches/iata\\_fuel\\_trade\\_meeting.html](http://www.carolinelucasmep.org.uk/speeches/iata_fuel_trade_meeting.html)>; these figures vary considerably, however, and depend on several facts. See, also, WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 10, according to which fuel costs amount to 10-25% of overall operating costs, and Brosthaus et al., *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 102, who estimate the cost of fuel and lubricants relative to overall costs of scheduled airlines at 12,8 %.

<sup>79</sup> European Commission, COM(2000)110 final, *supra*, note 70, at 4.

<sup>80</sup> Wit and Dings, *Economic Incentives to Mitigate Greenhouse Gas Emissions from Air Transport in Europe*, at 76.

<sup>81</sup> Brockhagen and Lienemeyer, *Proposal for a European Aviation Charge*, at 9.

<sup>82</sup> Wit and Dings, *Economic Incentives to Mitigate Greenhouse Gas Emissions from Air Transport in Europe*, at 9, 79.

<sup>83</sup> European Commission, *New Sources of Financing for Development: A Review of Options*, SEC(2005)467, at 14.

revenues from user charges on the use of airspace and oceans for the restoration or preservation of the global climate and the global seas.<sup>84</sup> Revenues yielded by the **aviation sector** should be applied to a reduction of greenhouse gas emissions as well as – in a secondary step – to measures for the adaptation to climate change.<sup>85</sup> The income from user charges on the use of the **oceans**, in turn, should be expended for an improved environmental performance of the global trade fleet and for the remediation of damage to the marine environment.<sup>86</sup>

By calling for an application of revenues to purposes outside of aviation and shipping, such proposals differ from suggestions to strictly tie spending **to the respective transport sector**. The **International Civil Aviation Organization** (ICAO), for instance, has recommended using the revenues generated by user charges within the aviation sector to reduce the environmental impact of aircraft, e.g. by promoting research and development of more efficient propulsion technologies.<sup>87</sup>

Recently, however, the political discussion has shifted towards applying income generated by user charges for purposes of **development aid**. The ambitious **Millennium Development Goals** adopted by the United Nations on September 8, 2000,<sup>88</sup> call for new sources of revenues.<sup>89</sup> Aside from various new types of taxes, for instance on trade in arms or transboundary financial transactions, pertinent studies have also suggested charges for the use of environmental goods.<sup>90</sup> Revenues from such instruments could largely or entirely serve to reduce poverty in developing countries, for instance by feeding an International Financing Facility (IFF).<sup>91</sup> With the European Council already endorsing a closer analysis of innovative sources of financing for development aid at its summit in Barcelona on March 14, 2002, the Commission recently submitted a document containing an evaluation of various options.<sup>92</sup>

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<sup>84</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 18, 32.

<sup>85</sup> WBGU, *ibid.*, at 18.

<sup>86</sup> WBGU, *ibid.*, at 32 *et seq.*

<sup>87</sup> ICAO, Council Resolution on Environmental Charges and Taxes, adopted by the Council on 9 December 1996 at the 16<sup>th</sup> meeting of its 149<sup>th</sup> session, *lit.* 4, available at: <<http://www.icao.int/icao/en/env/taxes.htm>>.

<sup>88</sup> Millennium Declaration of the United Nations, adopted by the General Assembly at the 8<sup>th</sup> Plenary Meeting, New York, September 8, 2000, United Nations General Assembly Resolution (UNGA Res.) UN Doc. A/Res/55/2 of September 18, 2000; in this declaration, 189 states committed themselves to reducing extreme poverty in its most important manifestations by 2015, an objective further specified through eight Millennium Development Goals.

<sup>89</sup> See, e.g., the International Conference on Financing for Development (UNFfD), held from March 18 to 22, 2002, in Monterrey, Mexico (“Monterrey Consensus”), UN Doc. A/CONF.198/3.

<sup>90</sup> For a summary of individual proposals, see European Commission, SEC(2005) 467, *supra*, note 72, at 12 *et seq.*

<sup>91</sup> For instance, the International Financing Facility (IFF) proposed by the United Kingdom, see Landau, *Les nouvelles contributions financières internationales*, at 43 *et sqq.*

<sup>92</sup> European Commission, SEC(2005) 467, *supra*, note 72, *passim*.

Occasionally, a further option for the use of revenues has been suggested: the income may be accrued to the **regular budget** so as to reduce the costs of employment and other public burdens. Proponents of this approach expect a reduced impact on the competitiveness of affected economic sectors as well as positive effects on the labour market, ultimately improving the political acceptability of user charges with the public.<sup>93</sup>

## Part 2: General Requirements for User Charges on Aviation and Shipping

### A. Preliminary Remarks: The Relevance of Law (*Epiney/Hofstötter*)

As stated earlier,<sup>94</sup> when analysing the legal framework for user charges on aviation and shipping, a distinction can be made between general and sectoral requirements. **General requirements** are equally relevant for air and sea traffic as they apply irrespective of the affected transport sector. Primarily, such requirements are constitutional in nature,<sup>95</sup> with two separate “categories” discernible:

- issues of **legal competence** relate to the authority of a particular polity to introduce user charges, with consideration given to different design options. Such issues predominantly arise within the ambit of European Community and national law, with various aspects conditional on the purpose of the user charges, their substantive design and, on a general level, the collection and expenditure of revenues.
- **substantively**, general requirements can also impose constraints on the legal design of user charges, with particular importance accruing to fundamental guarantees and basic rights.

Moreover, it bears noting that these requirements can gain importance in various ways, depending on which level the user charges are introduced. The following analysis will be limited to public international law, European Community law and German domestic law:

- A user charge introduced on the **international level** – primarily by way of an international treaty<sup>96</sup> – can be designed without consideration for the provisions of Community and national law, given that the subjects of international law are not bound by supranational or national law. Still, from a political perspective, the separate question arises whether it would be expedient for the EC or Germany to ratify an international treaty whose substance is at

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<sup>93</sup> Cf., e.g., European Environmental Bureau (EEB), Friends of Nature International (FNI), Friends of the Earth Europe (FoEE), and European Federation for Transport and Environment (T&E), Joint Press Release of April 8, 2005, available at: <[http://www.t-e.eu/docs/Press/2005/2005-04-08\\_joint\\_statement\\_ecofin\\_aviation.pdf](http://www.t-e.eu/docs/Press/2005/2005-04-08_joint_statement_ecofin_aviation.pdf)>.

<sup>94</sup> See *supra*, Introduction.

<sup>95</sup> In a material sense; thus, the following study will address constitutional issues on all three regulatory levels: public international law, European Community law and domestic constitutional law.

<sup>96</sup> At present, there are no grounds to assume that an international organization would have the authority to impose compulsory user charges on its member states without an international agreement.

variance with aspects of domestic law. The answer to this question also depends on the design of the international treaty and the manner of collisions with domestic law.

Clarification is necessary, however, as to whether – and to what extent – the introduction of a user charge must comply with other rules of international law. This raises the challenging issue of the mutual relationship of international agreements (and, if applicable, general international law),<sup>97</sup> for which conventional means of conflict resolution provide no satisfactory solution.<sup>98</sup> In the context of this study, it bears noting that pertinent rules of international law (notably general international law and the law of world trade) are virtually universal in nature, thus gaining relevance for at least two reasons: for one, it can hardly be expected that an international treaty on user charges would find semi-universal application; from that, it follows that existing international rules need to be observed with regard to non-parties. What is more, it would not be very opportune to design a user charge on global environmental goods without heeding the principal tenets of general international law.

- A user charge introduced on the level of the **European Community**, in turn, must comply with international law, as international agreements concluded by the Community are an integral part of Community law, and the Community is otherwise bound by customary law.<sup>99</sup> Additionally, the – largely general – requirements of primary Community law need to be observed, since a user charge would be introduced by way of secondary law. New secondary rules need not respect existing secondary law, however, given that both originate on the same regulatory plane. Nonetheless, the Community legislator may find it advisable to adapt new instruments to the framework of existing rules, particularly when these instruments affect fundamental rules of the policy area they are being embedded in. “Compliance” with secondary law is thus a (political) consideration for the Community legislator.
- The introduction of a user charge on the **domestic plane** calls for observance of the entire body of applicable rules in international and European Community law, with the exception of organisational rules such as those frequently encountered in Community law, for instance the provisions relating to the legislative powers of the Community. Additionally, with the introduction occurring by way of a statute, constitutional requirements need to be respected.

Against said backdrop, the following sections will address the legal rules governing the introduction of user charges on the use of airspace and oceans, distinguishing requirements under international

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<sup>97</sup> With a view to the relationship of international environmental agreements to other international treaty regimes, see *Falke*, ZEuS 2000, 307 *et seq.*; *Biermann*, ArchVR 2000, 455 *et seq.* See generally, *Sadat-Akhavi*, Methods of Resolving Conflicts between Treaties, *passim*.

<sup>98</sup> See, generally, International Law Commission, Study on the Function and Scope of the Lex Specialis Rule and the Question of ‘Self-Contained Regimes’, UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004).

<sup>99</sup> Cf. with further references *Epiney*, EuZW 1999, 5 *et seq.*

(B.), Community (C.) and domestic (German) (D.) law. The analysis draws on the wide **concept of user charges** set out in the introduction.

## **B. International Law (*Ecologic*)**

### **I. General International Law**

With regard to the implementation of user charges with application to a particular territory and group of users, it is crucial to determine whether, as a matter of general international law, the collecting entity – regularly a state or group of states – possesses the legal authority to introduce the user charge. On which territory and against which group of addressees may a user charge be imposed, and what basis may states rely on for the calculation of the user charge? Spatially, public international law distinguishes between areas subject to the territorial sovereignty of states and territory not subject to the sovereignty of any state or states and which possesses a special status, that is: the *res nullius* and the *res communis*.<sup>100</sup> The **territorial sovereignty** of a state applies to that part of the earth's surface physically delimited from the territory of other states and common spaces by national boundaries, including the air and water surfaces within these boundaries, as well as the territorial subsoil and the airspace above the earth's surface.<sup>101</sup> Within its territory, a state exercises the supreme, and normally exclusive, authority.<sup>102</sup> Exceptions from this general principle, if any, will arise from other provisions of public international law, notably international agreements.

In effect, territorial sovereignty comprises the right of states to exercise state authority within their territory, thus manifesting the sovereign capacity of that state.<sup>103</sup> Based on this territorial sovereignty, thus, states have the authority to regulate events within their state territory, also with effect for foreign persons and objects entering their state territory.<sup>104</sup> Subject to subsequent commitments entered under international law, states have **unconditional jurisdiction** within their territory, including judicial, legislative, and administrative competence.<sup>105</sup> However, this authority which, in principle, is unconditional, is limited to the state territory.<sup>106</sup>

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<sup>100</sup> Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 105.

<sup>101</sup> See generally Dahm/Delbrück/Wolfrum, Völkerrecht, Vol. I/1, 380 *et seq.*; Doehring, Völkerrecht, 2<sup>nd</sup> ed., § 2 Annot. 95 *et seq.*; a more detailed definition of state territory with a view to the *res communis* of the High Seas can be found *infra*, Part 3, A.I. and B.I.

<sup>102</sup> Jennings/Watts, Oppenheim's International Law, Vol. I, 564.

<sup>103</sup> Seidl-Hohenveldern, Völkerrecht, 10<sup>th</sup> ed., Annot. 1113 *et seq.*

<sup>104</sup> This tenet is expressed by the legal precepts *Quidquid est in territorio, est etiam de territorio* and *Quid in territorio meo est, etiam meus subditus est*, see Jennings/Watts, Oppenheim's International Law, Vol. 1, 564.

<sup>105</sup> See Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 297.

<sup>106</sup> Doehring, Völkerrecht, 2<sup>nd</sup> ed., § 16 Annot. 808.

At the same time, the territorial sovereignty of states results in a general prohibition of measures taken in the territory of another state without their consent,<sup>107</sup> also known as the principle of non-intervention in the internal affairs of other states.<sup>108</sup> In other words, states are prevented from imposing **unilateral measures** beyond their own territory on nationals of another state.<sup>109</sup> Under this principle, no state would be permitted to introduce a user charge outside its own territory, unless the duty to pay is exclusively applied against its own nationals. **Exceptions** to this rule exist, although their precise scope and requirements are not entirely clear and subject to debate. For instance, **nationality**, as a mark of allegiance and an aspect of sovereignty, is also recognised as a basis for jurisdiction of a state over extraterritorial acts of its own nationals, although it does not release from the duty to observe the law of the foreign state.<sup>110</sup> Primarily in the context of grave criminal offences, a number of states have adopted a **principle of universality** allowing jurisdiction over acts of non-nationals as a matter of international public policy.<sup>111</sup> Finally, several states have recognised a **principle of effectiveness**, pursuant to which states should be entitled to defend their national interests by way of extra-territorial acts – also against foreign states – under exceptional circumstances.<sup>112</sup> Invoking this latter principle, for instance, the United States sought an

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<sup>107</sup> Jennings/Watts, Oppenheim's International Law, Vol. I, 564: "*The importance of state territory is that it is the space within which the state exercises its supreme, and normally exclusive, authority*"; see also Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 306; Dahm/Delbrück/Wolfrum, Völkerrecht, Vol. I/1, 332; Seidl-Hohenveldern, Völkerrecht, 10<sup>th</sup> ed., Annot. 1504.

<sup>108</sup> Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 309.

<sup>109</sup> An earlier statement by the Permanent Court of International Justice to the effect that public international law contained no prohibition of extra-territorial jurisdiction ("*[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*" PCIJ – *France v. Turkey*, P.C.I.J. [1927] (Ser. A) Nr. 10, 18 *et seq.*) has since been largely revoked by the International Court of Justice, see *inter alia* the Nottebohm-case, ICH, *Liechtenstein v. Guatemala*, Second Phase, Judgment, I.C.J. reports 1955, Rep 4.

<sup>110</sup> See Doebling, Völkerrecht, 2<sup>nd</sup> ed., § 16 Annot. 811, for discussion of this *active nationality principle*; in penal law, the existence of a *passive nationality principle* is also occasionally affirmed, allowing states to regulate the behaviour of foreigners on foreign territory, although such a principle is highly contested in international law and would – if at all – apply to cases of particular urgency, e.g. a violation of fundamental state interests or the protection of nationals, by virtue of the protective principle, see Oxman, EPIL, Vol. 3, 58; critical in this regard Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 299 *et seq.* In the *Lotus*-case, the Permanent Court of International Justice had still assumed a permissive international order and ruled in favour of extra-territorial acts of domestic criminal law, see PCIJ – *France v. Turkey*, P.C.I.J. [1927] (Ser. A) Nr. 10, 20.

<sup>111</sup> Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 303.

<sup>112</sup> Doebling, Völkerrecht, 2<sup>nd</sup> ed., § 16 Annot. 823 *et seq.*; regarding the limited recognition, for instance by the United Kingdom, see Brownlie, Principles of Public International Law, 6<sup>th</sup> ed., 302 *et seq.* and, with a view to enforcement measures, 307 *et seq.*

extraterritorial effect of domestic provisions on the protection of endangered species,<sup>113</sup> although they never sought to enforce any measures abroad, instead merely drawing on circumstances abroad for the application of domestic law.<sup>114</sup>

These exceptions **cannot be directly applied** to the extraterritorial introduction and enforcement of a user charge, given that user charges possess no penal aspects whatsoever, and no immediate threat to the international community is apparent. Still, because climate change and the pollution of the global atmosphere are transboundary phenomena and will thus affect any state intending to introduce a user charge, the foregoing **effectiveness principle** might serve as the basis for measures linked to circumstances abroad. The existence of an international climate regime underscores the threat posed to the interests of individual states by the greenhouse effect. Even though **enforcement measures** on foreign soil – being the most severe infringement of the territorial sovereignty of a foreign state – are likely to remain illegal, including, notably, the administration required to collect a user charge, current state practice – for instance that of the United States<sup>115</sup> – would seem to imply that mere reference to circumstances originating on foreign territory is not ruled out. Accordingly, it would be conceivable to impose a domestic user charge on arriving or departing vessels based on a calculation covering emissions, the distance traveled or the fuel consumed on foreign territory.

Such cases will, however, require observance of certain **principles** devised for sovereign measures with extraterritorial effect.<sup>116</sup> Notably, they will necessitate a relevant connection between the object of the measure and the state adopting it; due to the departure and arrival of vessels in the collecting state as well as the global scope of environmental damage resulting from air and sea traffic, which causes non-local deterioration affecting all states, such a connection is likely to exist in the case of user charges. Moreover, the assessing state must give consideration to the principle of non-intervention in the internal affairs of foreign states, and take measures on the basis of the principles of proportionality and mutual consideration. Otherwise, the reliance on circumstances within foreign territory will in all likelihood be considered a violation of the *ordre public* of affected states.<sup>117</sup> Given the importance of a sufficiently wide calculation

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<sup>113</sup> For a summary of the facts, see the Panel Reports in the following disputes before the WTO dispute settlement mechanism: *United States – Restrictions on Imports of Tuna*, not adopted, WT/DS21/R 39S/155, Panel Report, 3 September 1991, and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (United States – Shrimp Products), WT/DS58/R, Panel Report, 15 May 1998.

<sup>114</sup> The foregoing disputes touching upon environmental considerations arose over import restrictions for marine products caught with certain fishing methods entering the U.S. market, and thus involved no enforcement measures beyond United States territory; see *Hunter/Salzman/Zaelke*, *International Environmental Law and Policy*, 2<sup>nd</sup> ed., 1436 *et seq.*

<sup>115</sup> In the aforementioned case concerning an import prohibition for shrimp and shrimp products, the WTO Appellate Body ultimately ruled that the United States, having strived for a multilateral solution, was allowed to make the import of said products conditional on certain fishing methods applied beyond its territory, see *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (United States – Shrimp Products, Recourse to Art. 21.5), Report of the Appellate Body on Article 21.5, WT/DS58/AB/RW, 22 October 2001, Annot. 153.

<sup>116</sup> On this issue, see generally *Brownlie*, *Principles of Public International Law*, 6<sup>th</sup> ed., 308 *et seq.*, with further references.

<sup>117</sup> *Doehring*, *Völkerrecht*, 2<sup>nd</sup> ed., § 2 Annot. 93 *et seq.*

basis for the behavioural effects and the revenue-raising potential of a user charge, however, the reliance on circumstances beyond the sovereign territory of the collecting state is likely to be held proportional to the environmental objective. Mutual consideration, in turn, could be ensured by performing consultations prior to the introduction of the user charge, and by ensuring a high level of transparency throughout the entire process.

Assessing user charges against the **nationals of a state** beyond the sovereign territory of that state, in turn, will hardly produce any benefits and also incur an unreasonable level of administrative effort.

Within the **European Community**, individual Member States can adopt legal measures aimed at the introduction of a user charge within their own territory, whereas the Community – as a supranational entity – may pass legislation binding on all Member States within the purview of its legal competences. Whenever a user charge is to be linked to circumstances in the territory of third states, however, this ample scope of discretion is curtailed. While such a linkage – for instance to the distance traveled of the fuel consumed in foreign airspace – is not, in principle, excluded, it will need to comply with the principles mentioned earlier. No difficulties arise, of course, if the measure is adopted with the **approval** of the foreign state, for instance through an international treaty. An altogether different situation applies to user charges adopted in the *res nullius* and the *res communis*, that is, in the airspace beyond national boundaries and in the High Seas, as these areas are not subject to the territorial sovereignty of any state.<sup>118</sup>

The requirements arising from territorial sovereignty and the general ban on extra-territorial enforcement measures affect **all options for the design** of user charges. Legal obstacles may thus arise whenever user charges are imposed in such a manner as to have an effect beyond the sovereign territory of the collecting state, or if they are calculated by recourse to foreign circumstances without consulting or involving the affected third states. Moreover, in all cases – in particular with a view to *res nullius* and *res communis* – the framework of international, European Community and domestic law needs to be observed, as these contain a number of relevant provisions.<sup>119</sup> To that effect, one may distinguish the following cases:

- The international principle of territorial sovereignty does not rule out a user charge introduced exclusively **within domestic territory**. Relevant rules of public international law, European Community law and domestic law need to be observed, however.<sup>120</sup>
- User charges based on the use of facilities or the enjoyment of services within the collecting state, for instance through a benefit tax or special public charge in return for services, do not infringe on the prohibition of extraterritorial legislation and enforcement measures, given that they involve no sovereign measures. A different situation arises if states seek to

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<sup>118</sup> See *infra*, Part 3, A.I. and B.I.

<sup>119</sup> Cf. *infra*, Part 3.

<sup>120</sup> See *infra*, Part 3.



introduce a user charge on facilities or services rendered on foreign territory, and perhaps even collect them abroad. Due to the territorial sovereignty of the affected foreign states, their relevant provisions apply, ruling out the introduction of such a user charge without the approval of said states. In *res nullius* and *res communis* areas, special rules apply; these are outlined below in the sectoral chapters.<sup>121</sup>

- **All other models** of user charges with extraterritorial effect may only be introduced subject to the approval of the states whose sovereign territory is affected. For, while nationals of the collecting state may be included within the scope of a user charge even when abroad due to the nationality principle, that state may not assess a charge against foreign passengers or air and sea vessels abroad in the absence of exceptional circumstances. If the foreign state refuses to allow the collection of a user charge within its sovereign territory, its sovereignty precludes the user charge. This does not apply to user charges merely based on circumstances occurring in the foreign state, for instance emissions discharged within foreign airspace or fuel consumed abroad. Provided the principles described earlier are respected, such designs should be admissible.

(1) Under general international law, a user charge on **fuel** consumed and purchased abroad can be imposed within the territory of the assessing state, but not be collected offhand beyond the territorial boundaries of that state without the approval of affected third states. At any rate, the unilateral enforcement of the user charge without foreign approval can only occur on domestic territory. A charge on fuel consumed during international air traffic poses difficulties, given that – in the case of foreign debtors – only the fuel consumed after entry into the territory of the collecting state clearly falls within the purview of that state's sovereignty. A design merely linking the user charge to fuel consumed beyond the territorial boundaries of the collecting state is not inadmissible *per se*, however, provided it complies with the principle of proportionality. Due to the importance of a sufficiently ample calculation basis for the achievement of the objectives of the user charge, that is, to influence behaviour and generate revenue, the measure is likely to be proportional.

(2) By virtue of the international principle of territorial sovereignty, a **distance- or emissions-based charge** assessed on distances traveled or emissions discharged within the territory of the collecting state is always permissible. Under observance of the principles mentioned above, moreover, a calculation taking into account distances traveled or emissions discharged abroad is also permissible.

(3) **Ticket fees** imposed on passengers or transport carriers as the debtors are again subject to the primacy of territorial sovereignty. Due to the nationality principle, however, the sovereign authority of a state over its nationals can also extend to foreign territory, offering

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See *infra*, Part 3, A. I. and B. I.

an opportunity to assess a user charge against nationals engaged in air or sea travel abroad. The introduction of such a user charge would hardly appear expedient, however, given that it would generate little income and incur substantial monitoring costs as a result of the ban on extraterritorial enforcement measures. A unilateral charge, in turn, could also be based on circumstances partly occurring on foreign territory, for instance the distance traveled, fuel consumed, or pollutants discharged. Difficulties may arise when ticket fees are collected through **new channels of distribution**, for instance the internet, which allow for the purchase of tickets abroad and thus in states potentially not participating in the introduction of the ticket fee. In such cases, the foregoing principles of customary international law relating to enforcement measures would prevent collecting the ticket fee without the endorsement of the affected states. A viable solution would consist in imposing the ticket fee on the act of departure or arrival, not on the purchase of a ticket.

## II. World Trade Law

Established on 1 January 1995, the **World Trade Organization** (WTO)<sup>122</sup> monitors and enforces the provisions of the multilateral trading system, with the overall purpose of ensuring unrestricted market access and eliminating customs and barriers to trade in products and services. These provisions notably include the principle of **non-discrimination**, which covers the principles of most-favoured nation and national treatment, as well as the prohibition of **quantitative restrictions**.

In the context of user charges on global environmental goods, the question arises whether the rules of international trade apply in the first place. This can only be determined by analysing the scope of relevant provisions in the **General Agreement on Tariffs and Trade** (GATT) of 15 April 1994<sup>123</sup> and the **General Agreement on Trade in Services** (GATS) of 15 April 1994,<sup>124</sup> whereupon the ensuing requirements for user charges can be identified with a view to the jurisprudence of the dispute settlement mechanism. Additionally, a determination whether the earmarked expenditure of revenues generated by a user charge constitutes an illegal subsidy and therefore violates the **Agreement on Subsidies and Countervailing Measures** (SCM Agreement) is necessary. In the

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<sup>122</sup> Agreement Establishing the World Trade Organization (WTO Agreement), opened for signature at Marrakesh, 15 April 1994, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 *International Legal Materials* (1994) 1144.

<sup>123</sup> General Agreement on Tariffs and Trade (GATT), done at Geneva, 30 October 1947, in force 1 January 1948, 55 *United Nations Treaty Series* (1947) 188, replaced by the General Agreement on Tariffs and Trade (GATT 1994), opened for signature at Marrakesh, 15 April 1994, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 *International Legal Materials* (1994) 1153.

<sup>124</sup> General Agreement on Trade in Services (GATS), opened for signature at Marrakesh, 15 April 1994, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 *International Legal Materials* (1994) 1168.

event of a conflict, the relationship of world trade law and an international agreement on the introduction of a user charge has to be clarified.

### 1. *General Agreement on Trade in Services (GATS)*

Since user charges are imposed on the use of certain traffic pathways and not on the transboundary movement of goods, it stands to reason that, of the various rules on world trade, user charges are most likely to fall within the ambit of the **General Agreement on Trade in Services (GATS)**.

Pursuant to its Article 1 (1), the GATS applies to all “measures by Members affecting trade in services.” The concept of **trade in services** has been purposefully endowed with a wide definition in Article 1 (2) of GATS, which primarily includes the supply of services “from the territory of one Member into the territory of any other Member.” In principle, it comprises all types of services.<sup>125</sup> Even if they only exercise an indirect effect on trade in services,<sup>126</sup> measures taken by governmental bodies and other entities with governmental authority are subject to the principles laid down in the GATS, as well as to obligations specifically entered by the Members and included on a separate list.

#### a.) *Application to Aviation*

To begin with, the transportation of passengers and freight by way of aviation and shipping constitutes a service.<sup>127</sup> Due to its wide scope, which includes all measures involving the provision of services (and be it only indirectly), user charges on shipping and aviation could be subject to the requirements of this Agreement. Two Annexes<sup>128</sup> to the Agreement, however, contain special provisions relating to air transport services and maritime transport services. Pursuant to these Annexes, all **air transport services** are **excluded** from the substantive scope of the GATS, with the exception of:

- aircraft repair and maintenance services;
- the selling and marketing of air transport services;

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<sup>125</sup> As Article 1 (3) (b) clarifies, the GATS applies to “any service in any sector except services supplied in the exercise of governmental authority.”

<sup>126</sup> For instance, in the EC – Bananas dispute, the panel affirmed that “no measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services”, *European Communities – Regime for the Importation, Sale and Distribution of Banana* (EC – Bananas III), WT/DS27/R/ECU, WT/DS27/R/MEX und WT/DS27/R/USA, Panel Report, 22. Mai 1997, Tz. 7.285.

<sup>127</sup> See *Trebilcock/Howse*, *The Regulation of International Trade*, 2<sup>nd</sup> ed., 270.

<sup>128</sup> Specifically, the “Annex on Air Transport Services” and the “Annex on Negotiations on Maritime Transport Services.”

- computer reservation system (CRS) services.

The introduction of a user charge does not affect these services; rather, it would constitute a measure affecting traffic rights or the exercise of traffic rights, and would therefore be **excluded from the scope** of GATS by virtue of paragraph 2 of the Annex. Likewise, the selling and marketing of air transport services would not be affected by a user charge as they relate to the ability of an air transport carrier to sell or market its air transport services freely, including all aspects of marketing such as market research, advertising, and distribution. The “pricing of air transport services” and the definition of “applicable conditions” are explicitly excluded from the scope of the Agreement, moreover, imposing no restrictions on a ticket fee.

Given that the supply of air transport services is excluded from the scope of GATS by this Annex, Members could only be bound by **specific commitments** separately entered under paragraph 1 of the Annex. Such commitments are contained in independent schedules, listed in accordance with issue areas. As the Schedule of Specific Commitments of the European Communities and their Member States confirms, however, **no specific commitments** have been entered in the area of aviation.<sup>129</sup> Accordingly, GATS does **not** apply to user charges on air transport.

#### b.) Application to Shipping

As for **shipping**, a separate Annex states that most-favoured-nation treatment shall only apply to “international shipping, auxiliary services and access to and use of port facilities” following the conclusion of additional negotiations on maritime transport services within the World Trade Organization. Most-favoured-nation treatment requires that any trade benefits afforded to one Member shall be accorded to all other Members.

With a Decision of 28 June 1996,<sup>130</sup> however, the Council for Trade in Services resolved to **suspend** the maritime transport negotiations until the commencement of the next comprehensive round of negotiations on the liberalisation of services. With the failure of the Ministerial Conference in Cancún, Mexico, from 10 to 14 September 2003, a conclusion of the negotiations on maritime transport services is currently not in sight.

In the area of maritime transport services, therefore, again only such requirements apply which have been entered by way of **specific commitments** and which are thus exempted from the general exclusion in paragraph 1 of the Annex. In the area of international shipping and port services, however, the European Community has **not** taken on any pertinent commitments.<sup>131</sup> It follows that the General Agreement on Trade in Services **does not apply** to user charges on maritime traffic.

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<sup>129</sup> *World Trade Organization*, European Communities and their Member States – Schedule of Specific Commitments, WTO Doc. GATS/SC/31 of 15 April 1994, 88 *et seq.*

<sup>130</sup> *World Trade Organization*, Decision on Maritime Transport Services, Adopted by the Council for Trade in Services on 28 June 1996, WTO Doc. S/L/24 of 3 July 1996.

<sup>131</sup> See *World Trade Organization*, Maritime Transport Services, WTO Doc. S/C/W/62 of 16 November 1998, 12.

## 2. General Agreement on Tariffs and Trade (GATT)

### a.) Substantive Scope of GATT

Although benefits in the aviation and shipping sectors are to be primarily classified as services rendered, it is conceivable that such services would also involve the **transfer of products** across national borders. This could include the transfer of freight, but also the transportation of baggage for passengers.<sup>132</sup> Since the provisions of GATS are clearly more specific as far as services are concerned, the preliminary question arises whether the General Agreement on Tariffs and Trade (GATT) still applies, or whether its application is already ruled out as a matter of principle. On this question, however, the WTO Appellate Body clarified that – depending on the measure – the scope of both Agreements could indeed **overlap** if the transfer of a good involves a service relating to that particular good.<sup>133</sup> The two Agreements do not, as a matter of principle, exclude each other; consequently, they may both apply simultaneously to the same set of circumstances.

It should be born in mind, however, that any user charge would be imposed on aviation and shipping **as such**, and not so much on the transboundary movement of goods. Its purpose, in other words, would be to subject aviation and shipping to a financial charge, not the transferred freight, even though the latter may provide a point of reference when assessing the user charge. It could therefore be assumed that the introduction of a user charge does not fall within the ambit of GATT.<sup>134</sup> The question then arises whether GATT only covers measures **directly affecting the movement of goods**, or whether it also states requirements for measures with indirect effects. If the latter were the case, it could be argued that user charges constitute a burden on the maritime and air transport sectors and are thus capable of interfering with the free movement of goods by way of

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<sup>132</sup> World Trade Organization, Air Transport Services, WTO Doc. S/C/W/59 of 5 November 1998, 2.

<sup>133</sup> *European Communities – Regime for the Importation, Sale and Distribution of Banana* (EC – Bananas III), WT/DS27/AB/R, Appellate Body Report, 9 September 1997, Annot. 221: “*These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.*”

<sup>134</sup> Thus, for instance, *Brockhagen/Lienemeyer*, Proposal for a European Aviation Charge, 73, note 116; the authors merely assume an exception for taxes imposed on international trade in aircraft fuel, a scenario which does not touch upon the issues addressed in this study.

these means of transportation.<sup>135</sup> For that reason, the regulatory scope of GATT needs to be specified.

The movement of goods by air or sea does not, in itself, exclude an application of GATT. Article III of GATT states that the principle of national treatment applies to all imported products, and the legislative history of this provision clarifies that this covers **any means of transportation**.<sup>136</sup> Likewise, Article V of GATT, which specifies a general freedom of transit, refers to various modes of transport. Although paragraph 7 of this provision exempts aircraft in transit from its scope, it does affirm the application to air transit of goods, including baggage.

**Indirectly effective** measures are also covered by GATT. In this regard, Article I (1) of GATT declares its application to customs duties and charges of any kind imposed on or in connection with importation or exportation. This ample scope extends to the method of levying duties and charges as well as to the entirety of rules and formalities in connection with importation and exportation.

**Article III** of GATT has a similarly extensive scope. Its first paragraph sets out a prohibition against internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products so as to afford protection to domestic production. As the WTO Appellate Body has repeatedly confirmed, moreover, these principles forbid both *de iure* and purely factual – *de facto* – discrimination.<sup>137</sup>

Against the backdrop of these ample concepts, GATT is **essentially applicable** to user charges. Consequently, it cannot be ruled out that user charges collected by states would be considered measures for the purposes of Articles I and III of GATT and thus be subject to the requirements thereof, even if they only result in an indirect burden on freight and baggage transportation by air and sea.

#### b.) Violation of the Principle of Non-Discrimination in Articles I and III of GATT

A violation of the **principle of non-discrimination** contained in Articles I and III of GATT presupposes that the measure in question:

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<sup>135</sup> It would appear that the Secretariat of the World Trade Organization shares this view, see *World Trade Organization*, Air Transport Services, WTO Doc. S/C/W/59 of 5 November 1998, 2.

<sup>136</sup> *World Trade Organization*, Air Transport Services, WTO Doc. S/C/W/59 of 5 November 1998, 2.

<sup>137</sup> For instance, the Appellate Body confirmed in a dispute involving Canada, Japan, and the European Community: “Neither the words “*de jure*” nor “*de facto*” appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only “in law”, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also “in fact”, or *de facto*, discrimination.” *Canada – Certain Measures Affecting the Automotive Industry* (Canada – Autos), WT/DS139/AB/R, WT/DS142/AB/R, Appellate Body Report, 31 May 2000, para. 78.

- confers **advantages** to foreign suppliers that are not immediately and unconditionally granted to all like products originating in or destined for the territories of all other WTO contracting parties (Article I of GATT),<sup>138</sup> or
- places foreign products and suppliers at a **disadvantage** in relation to domestic products and suppliers (Article III of GATT).<sup>139</sup>

As regards user charges on aviation and shipping, the imposition of a charge would have to result in **advantages** for certain foreign providers or the domestic air and maritime transport industries which do not equally accrue to all suppliers in all other Members.<sup>140</sup> That would be the case if a tax on aircraft fuel or shipping diesel were to afford benefits for the transportation of freight and baggage by certain domestic or foreign air and sea transport service providers only.

A user charge introduced on the international plane, however, is not likely to result in such benefits. Even if the user charge were only imposed within a limited group of states, it would **not result in advantages** for the affected aviation and shipping industries. In the contrary, carriers covered by the user charge would suffer an **economic burden** voluntarily imposed by their respective home states with the introduction of a user charge. As a result, carriers in other WTO Members are not discriminated against. Disadvantages much rather accrue to carriers in participating Members, who – it bears repeating – have consciously accepted the economic consequences when introducing the user charge. Such **self-imposed restrictions** do not, however, fall within the scope of non-discrimination under Articles I and III of GATT. Said provisions merely rule out the exclusive conferral of advantages to individual states or groups of states, as such advantages have to be extended to all Members pursuant to Article I and the most-favoured-nation principle contained therein.

Nor are **carriers from third states** subject to the user charge upon entry into the territory of a participating state discriminated against in relation to domestic carriers. After all, the user charge should apply equally to all relevant forms of use, irrespective of the country of origin. If states A and B were to jointly introduce a user charge on aviation

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<sup>138</sup> Accordingly, in a dispute involving Indonesia, Japan, the European Community and the United States, the panel stated that: “[T]o establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all ‘like products’ of all WTO Members”, Case” *Indonesia – Certain Measures Affecting the Automobile Industry* (Indonesia – Autos), WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, Panel Report, 2 July 1998, para. 14.138.

<sup>139</sup> On this issue, the Appellate Body clarified that: “The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.” *Japan – Taxes on Alcoholic Beverages* (Japan – Alcoholic Beverages II), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report, 4 October 1996, 16.

<sup>140</sup> A potential discrimination arising from the earmarked expenditure of revenues is discussed in the following section on subsidies.

and shipping also covering carriers from state C, the latter would do not suffer disadvantages relative to carriers in states A and B, which would be subject to the same burden. As long as benefits are not afforded to certain states or groups of states only, for instance by way of an exemption clause, the principle of most-favoured-nation is not violated.

Applying the rationale of Article III (4) of GATT, which allows for the application of differential internal transportation charges based on the economic operation of the means of transport and not on the nationality of the product, it can also be argued that the burden incurred by a user charge is precisely intended to reflect the true costs of aviation and shipping in economic calculations. It does not, however, lead to a discrimination based on nationality.

c.) Violation of Freedom of Transit under Article V GATT

To finish, the question of whether the assessment of a user charge against carriers transporting goods across the territory of a WTO contracting party constitutes a violation of the **freedom of transit** set out in Article V of GATT needs to be addressed. Goods, including baggage, are deemed to be in transit when the passage begins and terminates beyond the frontier of a contracting party. Such traffic in transit is **exempt** from customs duties and from all transit duties or other charges imposed in respect of transit by Article V (3) of GATT, with the exception of charges for transportation or those **commensurate** with administrative expenses entailed by transit or with the cost **of services rendered**. All charges and regulations imposed on traffic in transit shall, moreover, be **reasonable**, having regard to the conditions of the traffic. Finally, Article V (5) also extends most-favoured-nation treatment to traffic in transit.

A charge imposed on air and sea vessels engaged in traffic in transit on the basis of fuel consumption, emissions or the distance traveled could, accordingly, face legal obstacles. Given that user charges – with the exception of airport and port fees – are not commensurate with the **costs of administrative services**, but instead seek to assign the costs of environmental damage, they are not covered by the exemption contained in Article V (3) of GATT. The **ample wording** of that provision, which – aside from transit duties – includes all charges imposed in respect of transit and other unnecessary delays or restrictions of traffic in transit, implies that its scope extends to all user charges not imposed in return for services. Accordingly, it applies to distance-, emissions- and fuel-based user charges, as well as ticket fees. It may therefore be concluded that no state is entitled to impose a user charge on flights and shipping routes merely passing from one contracting party to another contracting party via its territory. The right to collect a user charge would, instead, be limited to the country of origin and the destination of the carrier. Charges and contributions imposed on the use of ports and airports, in turn, have to be **reasonable**, which they will usually be if they are commensurate with actual expenses and do not have the effect of a strangling tax. Still, a violation of the freedom of transit may be justified under certain conditions outlined in GATT.



d.) Justification of Protective Measures under Article XX (b) and (g) of GATT

Inconsistency with the duties laid down in GATT does not, by necessity, result in the inadmissibility of the user charge: Article XX of GATT provides for several **exceptions** from the foregoing rules of free trade, for instance if the measure in question is

- necessary to protect human, animal or plant **life** or **health** (Article XX (b) of GATT);
- relates to the conservation of exhaustible **natural resources** (Article XX (g) of GATT).

The **introductory clause** of this provision, often referred to as the *chapeau*,<sup>141</sup> sets out an additional requirement, pursuant to which such measures may not be applied in a manner which would constitute a means of arbitrary or unjustifiable **discrimination** or a disguised restriction on international trade. Ultimately, thus, the exceptions in this provision amount to a test of proportionality.<sup>142</sup> Their scope is comprehensive and extends to all duties arising for Members from GATT.<sup>143</sup>

da.) Requirements under Article XX (b) of GATT

In the course of past dispute settlement proceedings, three central requirements were identified in the context of Article XX (b) of GATT:

- the policy in respect of the measures for which the provision is invoked **must fall within the range** of policies designed to protect human, animal or plant life or health;
- the inconsistent measures for which the exception is invoked must be **necessary** to fulfil the policy objective;
- and the measure must be applied in conformity with the requirements of the **introductory clause**.<sup>144</sup>

With a view to the far-reaching environmental impacts of aviation and shipping and the ensuing risks for human, animal and plant health,<sup>145</sup> user charges – which aim at preventing these negative effects – comply with the first requirement.

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<sup>141</sup> *Birnie/Boyle*, International Law and the Environment, 2<sup>nd</sup> ed., 701.

<sup>142</sup> See the report of the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp), Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 156: “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Member.”

<sup>143</sup> *United States - Standards for Reformulated and Conventional Gasoline* (US – Reformulated Gasoline), Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, 24.

<sup>144</sup> See, for instance, *United States - Standards for Reformulated and Conventional Gasoline* (US – Reformulated Gasoline), Report of the Panel, WT/DS2/R, 29 January 1996, para. 6.20.

A more difficult assessment is needed when establishing whether such user charges are **necessary** measures in the sense of this provision. A measure is necessary if no alternative measure consistent with, or less inconsistent with, the rules of free trade and equally effective is available.<sup>146</sup> Although the measure in question must also be reasonably available, a minor burden, such as administrative difficulties, does not result in an alternative measure ceasing to be reasonably available and the original measure being fully justified.<sup>147</sup>

With a view to this requirement, it could be objected that other measures less inconsistent with free trade, such as national and international command-and-control obligations to reduce pollutant levels, are equally effective to protect the global atmosphere and High Seas. To date, however, it has proven impossible to reach an agreement on effective international measures, while unilateral measures – aside from resulting in serious, and arguably unreasonable, competitive distortions for domestic sectors of the economy – would **hardly be effective** in meeting this global challenge. What is more, the Appellate Body itself has declared that measures designed to achieve important common interests are more likely to be considered necessary.<sup>148</sup> Finally, it must be kept in mind that command-and-control measures would not yield any revenues applicable towards environmental or development co-operation purposes; in that sense, too, these measures are not equivalent. Invoking Article XX (b) of GATT for the justification of a user charge is not, therefore, ruled out because equally effective and less inconsistent measures are unavailable.

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<sup>145</sup> In this regard, one is reminded of the impacts of climate change forecast by the Intergovernmental Panel on Climate Change (IPCC), including rising sea levels, altered precipitation patterns with increased flooding, droughts and water shortages, extreme weather events as well as the displacement of animal and plant habitats, including pathogens, see *IPCC, Climate Change 2001, Vol. 4: Synthesis Report*, 59 *et seq.*

<sup>146</sup> See, fundamentally, the panel report in *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes* (Thailand – Cigarettes), BISD 37S (1991), 7 November 1990, para. 75: “The import restrictions ... could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”

<sup>147</sup> *United States - Standards for Reformulated and Conventional Gasoline* (US – Reformulated Gasoline), Report of the Panel, WT/DS2/R, 29 January 1996, para. 6.26: “an alternative measure [does] not cease to be ‘reasonably’ available simply because the alternative measure involve[s] administrative difficulties for a Member.”

<sup>148</sup> *Korea – Measures affecting Imports of Fresh, Chilled and Frozen Beef* (Korea – Various Measures on Beef) Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, para. 162: “The more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument”; if one recalls that protective measures against health risks arising from asbestos were considered to be extremely vital and important by the Appellate Body, the sweeping consequences of climate change should also meet this requirement (see also *supra*, note 145), *European Communities – Measures affecting Asbestos and Asbestos-Containing Products* (EC – Asbestos), Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, paras. 170-172.

db.) Requirements under Article XX (g) of GATT

These considerations can also be applied to the second exception relating to the **conservation of exhaustible natural resources**. Under that provision, the measure and the policy in respect of that measure have to serve the conservation of such resources and be made effective in conjunction with restrictions on domestic production or consumption. The ‘exhaustible resources’ covered by this provision also include large-scale aspects of the **natural environment** such as air.<sup>149</sup> The term ‘exhaustible’ has to be read in the light of **contemporary concerns of the community of nations** about the protection and conservation of the environment.<sup>150</sup> Taking into account the manifold international efforts to protect and conserve the atmosphere and the High Seas, it can be safely assumed that the fragile and exhaustible nature of these environmental goods is widely recognised.

Applying this consideration to Article XX (g) of GATT, airspace and the High Seas can be considered an exhaustible resource. Earlier decisions, according to which the resource had to be located within the territory of the acting state, have been replaced in newer case law by the requirement of a mere nexus between the protected aspect of the environment and the state in question.<sup>151</sup> International airspace and the High Seas are, by nature, transboundary, and their deterioration affects all states equally; even landlocked states with no access to the open sea **have an interest** in the environmental condition of these natural spaces as manifestations of a common heritage of mankind. There is, accordingly, no lack of a sufficient nexus between these resources and any states proposing to introduce a user charge.

The requirement that measures under Article XX (g) of GATT be made effective in conjunction with restrictions on **domestic production or consumption**, formerly subject to a strict interpretation, is no longer an obstacle given the recent judicial practice of the WTO dispute settlement mechanism. Accordingly, measures only have to be aimed at the conservation of resources – and not merely have coincidental or unintended conservation effects – while being accompanied by domestic restrictions.<sup>152</sup> This general trend towards greater openness for environmental protection requirements has continued in recent WTO dispute settlement. As repeatedly stated, user charges are specifically intended to also cover the domestic economies of collecting states; their environmental purpose is beyond doubt.

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<sup>149</sup> See, for instance, the panel report in *United States - Standards for Reformulated and Conventional Gasoline* (US – Reformulated Gasoline), Report of the Panel, WT/DS2/R, 29 January 1996, para. 6.37: “In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted.”

<sup>150</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp), Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 129: “The words of Article XX(g) ... must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”

<sup>151</sup> A “sufficient nexus” between the state adopting the measure and the exhaustible resource was held decisive by the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp), Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 133.

<sup>152</sup> *United States - Standards for Reformulated and Conventional Gasoline* (US – Reformulated Gasoline), Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, 18 *et seq.*

dc.) Requirements of the *Chapeau* of Article XX of GATT

Finally, there is no reason to assume a violation of the **introductory clause** of Article XX of GATT, which rules out measures applied in a manner constituting arbitrary or unjustifiable **discrimination** or a disguised restriction on international trade. As the Appellate Body has stated in a seminal decision, serious and good faith efforts to negotiate an international agreement are necessary to meet this requirement, given that a multilateral approach is preferable from the perspective of free trade.<sup>153</sup> The European Community and its Member States have repeatedly sought to reach an understanding within the International Civil Aviation Organization with the aim of finding a multilateral solution. In effect, the purpose of a user charge on global environmental goods is not to impede **free trade of products** in a manner discriminating foreign states and their carriers. Rather, depending on its design, the user charge is more likely to result in an economic burden for domestic air and maritime transport companies. Even if one were to differ with the legal opinion outlined above and find the user charge inconsistent with the principle of non-discrimination in Articles I and III of GATT or consider it a restriction of the freedom of transit guaranteed by Article V of GATT, said user charge would be **justified** as a protective measure under Article XX (b) and (g) of GATT.

### 3. *Agreement on Subsidies and Countervailing Measures (SCM)*

While a user charge may not result in a unilateral discrimination, given that it is imposed equally on all participants in sea and air traffic, the **expenditure** of revenues it generates for particular purposes, including environmental protection measures, could in itself result in a violation of world trade law. Depending on the manner of expenditure, it could be considered an **illegal subsidy** for particular areas of the economy. Pursuant to Article 1 of the Agreement on Subsidies and Countervailing Measures (SCM),<sup>154</sup> a subsidy is a **financial contribution** by a government or any public body, be it by way of a direct transfer of funds, foregone revenue that would otherwise be due and is not collected, the provision of goods or services, or payments to a funding mechanism or private body entrusted with carrying out one or more functions normally vested in the government.

Moreover, a subsidy has to be **specific**, which – according to Article 2 of the SCM – means that it has to be limited to an enterprise or industry or group of enterprises or industries. Finally, the subsidy has to be contingent upon **export performance** or the use of domestic over imported goods. Under these conditions, Article 3 of the Agreement prohibits the subsidy.

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<sup>153</sup> See the Appellate Body reports in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimps Products, Recourse to Art. 21.5), Report of the Appellate Body, WT/DS58/AB/RW, 22 October 2001, paras. 176 *et seq.*; on the run-up to this dispute, see *Beyerlin*, Umweltvölkerrecht, Annot. 637 *et seq.*

<sup>154</sup> Agreement on Subsidies and Countervailing Measures, opened for signature 15 April 1994, 1869 *United Nations Treaty Series* 14.

Regardless of whether the earmarked expenditure of revenues generated by a user charge constitutes a specific subsidy, it can be safely affirmed that the additional requirement, namely that they be contingent upon **export performance** or upon the **use of domestic over imported** goods, is not met in the case of user charges. Even the exclusive expenditure of revenues for the benefit of aviation and shipping would **not** be contingent upon the export performance or the use of domestic over imported goods, but rather draw on other criteria for its assessment, for instance the discharge of pollutants. To the extent that they even benefits individual enterprises or industries, the application of revenues discussed to date would, if at all, be linked to environmental and development criteria, not economic criteria.<sup>155</sup> It follows that the Agreement on Subsidies and Countervailing Measures does **not** apply to user charges. Neither does Article XVI of GATT apply, given that the use of revenues will not help increase exports or reduce imports of certain products.

#### 4. *Summary and Application to Individual User Charges*

Although the transportation of passengers and freight in international shipping and aviation amounts to a the provision of a traditional service, the introduction of a user charge in these areas is excluded from the scope of the General Agreement on Trade in Services (GATS) by way of two separate Annexes. This applies to all types of user charges, including **ticket fees**, since the exception also extends to the pricing of air transport services and setting of conditions. The European Community and its Member States have not entered any **specific commitments** which would warrant a different conclusion.

At the same time, the movement of freight and baggage constitutes a **movement of goods** and is thus covered by the General Agreement on Tariffs and Trade (GATT). As a result, Articles I and III of GATT apply, imposing a general prohibition of discrimination on an ample range of measures, including different types of user charges. Due to the **absence of discrimination** against foreign air and maritime transport service providers, however, **no** design option of a user charge violates the principle of non-discrimination.

A user charge collected by the country of departure or destination will also **avoid inconsistencies** with the older under Article V of GATT. A different situation applies if a country of passage collects the user charge. Such a constellation is unlikely, however, given that a kerosene tax would be collected by the country of departure during the fuelling process, and a ticket fee would be assessed at the point of sale or departure, usually in the country of origin, whereas only the country of destination would typically possess the information required to impose a distance- or emissions-based user charge, namely the distance traveled or the emissions discharged. Even if one were to assume a violation of Article V of GATT, the inconsistency would be **justified** as a **protective measure** under Article XX (b) and (g) of GATT.

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<sup>155</sup> See above, Part 1, A. C. III.

Likewise, the Agreement on **Subsidies** and Countervailing Measures (SCM) does not apply to user charges, unless the revenues are applied towards specific enterprises or industries contingent upon export performance or the use of domestic over imported goods. Currently discussed applications, such as environmental protection and development co-operation, do not face any obstacles. Even a more specific expenditure of revenues generated by an environmentally motivated user charge for the benefit of affected transport sectors, however, would not be contingent upon **export performance** or the use of **domestic over imported** goods.

## C. European Community Law

Several questions arise in the context of European Community law, notably: (I.) Does the Community itself have the power to introduce any type of user charge, and if so, what is the scope of that power? (II.) Which restrictions arise from the subsidiarity principle? (III.) Finally, does substantive law – and, in particular, freedoms and fundamental rights – impose any limitations on the introduction of a user charge?

### I. Community Power to Introduce a User Charge (*Epiney/Hofstötter*)

Under the so-called **principle of conferred powers (Article 5 (1) ECT)**,<sup>156</sup> the Community may only act if and to the extent it has been given a legal mandate in the establishing treaties.

When applying this principle, the **nature of the treaties as a “preliminary constitution”**<sup>157</sup> must be born in mind; frequently, they do not lay down “static” duties and powers, but are instead designed to achieve rather comprehensive objectives, thus acquiring a functional and final character.<sup>158</sup> For the interpretation and application of legislative powers, this primarily requires consideration of the aims of integration and not so much of a – somehow or other – defined issue area, with the consequence that every issue area can potentially fall within the ambit of Community law and (some) of its legislative powers..<sup>159</sup> Taken together, these two elements mean that, against the backdrop of the distribution of

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<sup>156</sup> On this issue, fundamentally and in depth *Kraußer*, Prinzip gegrenzter Ermächtigung, *passim*; with a summary Calliess/Ruffert-Calliess, Article 5 ECT, annot. 8 *et sqq.*

<sup>157</sup> On this issue with further references and giving consideration to the rules of interpretation of Community law *Epiney*, Umgekehrte Diskriminierungen, 1995, 80 *et sqq.*

<sup>158</sup> Cf. e.g. *Herdegen*, FS Helmut Steinberger, 2002, 1193 (1202); *Arnold*, EWS 2002, 216 (221).

<sup>159</sup> Cf. on the nature of the distribution of powers in the Union against the backdrop of the final-functional character of the establishing treaties *Blanke*, in: Die Europäische Verfassung, 2004, 39 (47 *et sqq.*); *Boeck*, Abgrenzung der Rechtsetzungskompetenzen, 62 *et sqq.*; *Mosiek*, Effet utile und Rechtsgemeinschaft, 92 *et sqq.*; *Beneyto*, in: Europäische Verfassungsordnung, 101 (104 *et sqq.*); see also *v. Bogdandy/Bast*, EuGRZ 2001, 441 *et sqq.*; *Nettesheim*, in: v. Bogdandy (Hrsg.), Europäisches Verfassungsrecht, 415 *et sqq.*; *Dubey*, La répartition des compétences au sein de l’UE, 2002, 49 *et sqq.*; specifically on the jurisprudence of the ECJ *Colneric*, EuZW 2002, 709 *et sqq.*; *Everling*, EuZW 2002, 357 *et sqq.*

powers between the Community and its Member States, hardly any issue area can be conceivably excluded from the scope of activities of the Community from the outset.<sup>160</sup>

The introduction of user charges could be based on several legal bases whose scope needs to first be clarified (1.), before the study can proceed to delineate the different legal bases (2.) and the results can finally be summarised (3.).

### *1. (Potential) Legal Bases for the Introduction of User Charges on Global Environmental Goods*

Against the background of the introductory outline<sup>161</sup> of user charges – as understood in the context of this study – and their characteristics, the following legal bases, above all, come into consideration when introducing a user charge: Article 93, 71 (in connection with Article 80 (2)), 175 ECT.

Legal questions relating to the polity responsible for the expenditure of revenues (Member States or Community) shall not be addressed here. Such questions touch upon budgetary issues discussed elsewhere.<sup>162</sup> Distinct relevance, however, for the (distinction of) different legal bases can accrue to the purpose of the environmental user charge (is the purpose primary financial or environmental in nature, or other).

#### *a.) Article 93 ECT (Harmonisation of Indirect Taxes)*

Article 93 ECT allows for a harmonisation of legislation concerning “**indirect taxation**” to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market. Clearly, thus, the scope of this legal basis depends on the concept of “indirect taxes” (aa.) and the link between the measure and the internal market (bb.). Following an analysis of these two aspects, the scope of Article 93 ECT can be assessed with a view to the introduction of user charges (cc).

#### *aa.) On the Concept of “Indirect Taxation”*

The notion of indirect taxation cannot be defined against the backdrop of any (specific) national understanding of this concept, but must rather be approached with a view to the object and purpose of Article 93 ECT and the **methods of interpretation** of Community law.<sup>163</sup>

With this in mind, the following elements should prove decisive here:

- by necessity, “**indirect**” taxes are to be understood as an opposite of “direct” taxes; harmonisation of the latter is admissible on the basis of Article 94 ECT. Ultimately, it would seem expedient in this context to base the distinction on whether the tax is assessed against

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<sup>160</sup> Cf. already *Epiney*, EuR 1994, 301 (302 *et seq.*), with further references.

<sup>161</sup> *Supra* Part 1, C. I.

<sup>162</sup> See Part 3, C. III.

<sup>163</sup> Regarding the methods of interpretation in Community law, see *Epiney*, in: *Die Europäische Union*, § 9, Annot. 16 *et sqq.*

income or property itself, or against the **use of income and property**.<sup>164</sup> Unlike reliance on other criteria, such as tax shifting, drawing on the distinctive characteristic of “indirect” taxation – which obviously is not meant to affect income and property – allows for a conceptually stringent categorisation.

- It is, moreover, unclear how the concept of “taxation” should be defined, in particular<sup>165</sup> as to whether **charges assessed in return for benefits or services** (commonly referred to as fees and contributions<sup>166</sup>) should be included alongside with **taxes levied without any form of consideration or return service**.<sup>167</sup> On this issue, the case law provides no final clarification. The starting point for an analysis of this issue is the realisation that the EC Treaty – also and particularly taking into account the different language versions<sup>168</sup> – contains no clear legal doctrine on taxation and fiscal issues, and that, moreover, national conceptions and approaches cannot be directly applied to Community law.

Nonetheless, a distinction can be made between “taxes” and other charges to the effect that taxes are imposed as a payment obligation without individualised benefits or services rendered in return, whereas other charges are collected as compensation for an actual or potential (return) service of some sort;<sup>169</sup> in Community law, these two categories are complemented by customs duties within the purview of Article 25 ECT.

The decisive criterion, therefore, is the **object and purpose** of the provision and its **systematic relationship** with other provisions in the Treaty (notably Article 95 (2) ECT): the object and purpose of Article 93 ECT is evidently to facilitate harmonisation measures necessary to **achieve the internal market**. In our view, this clearly suggests an extension to

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<sup>164</sup> Cf. also *Kirchhof*, EUDUR I, § 38, Annot. 74; in great detail on this issue, and arriving at the same conclusion, *Wasmeier*, Umweltabgaben, 39 *et seq.*; *Heselhaus*, Abgabenhöhe, 84 *et seq.*; *Amend*, Instrument der Umweltabgabe, 96 *et seq.*; *Ohler*, Fiskalische Integration, 194 *et seq.*

<sup>165</sup> Altogether, it is largely accepted that “taxes” are payment duties unilaterally imposed by public authorities and accruing to public budgets in some way (this does not, yet, contain any determination on the earmarking of revenues). Taxes are, thus, to be distinguished from other types of enforcement fines and sanctions of a penal nature. On this issue in great detail *Kreibohm*, Begriff der Steuer, 100 *et seq.*, 162 *et seq.*

<sup>166</sup> Fees are typically levied for actual return services, whereas contributions merely remunerate a “potential” service. In the case law, see *e.g.* ECJ, Case 18/87, ECR 1998, 5427; ECJ, Case C-11/89, I-1735 (regarding fees); regarding a system of contributions, see for instance Regulation 1101/89 on structural improvements in inland waterway transport, OJ 1989 L 116, 25. Cf. at length on the terminology with further references *Heselhaus*, Abgabenhöhe der EG, 34 *et seq.*, 56 *et seq.*

<sup>167</sup> In great detail on this problematic issue *Heselhaus*, Abgabenhöhe der EG, 256 *et seq.*; *Amend*, Instrument der Umweltabgabe, 83 *et seq.*; *Kreibohm*, Begriff der Steuer, 69 *et seq.*; see also *Kirchhof*, EUDUR I, § 38, Annot. 60 *et seq.*

<sup>168</sup> On this *Amend*, Instrument der Umweltabgabe, 86 *et seq.*; *Schwarze-Kamann*, Article 93, Annot. 3; *Kirchhof*, EUDUR I, § 38, Annot. 71; in depth *Kreibohm*, Begriff der Steuer, 78 *et seq.*

<sup>169</sup> Similarly *Wasmeier*, Umweltabgaben, 38 *et seq.*; *Amend*, Instrument der Umweltabgabe, 83 *et seq.*; at length *Heselhaus*, Abgabenhöhe der EG, 50 *et seq.*



**charges imposed in return for benefits or services**, given that – depending on the design – these can also affect the functioning of the internal market to a significant degree.<sup>170</sup> It does not appear reasonable to assume that such “special charges” generally affect the functioning of the internal market to a lesser degree than conventional taxes; decisive importance should rather accrue to the design of the taxes and charges than to the existence or non-existence of a return service.

This view is further corroborated by the interplay between Article 93 and Article 95 (1) and (2) ECT. Pursuant to Article 95 (2) ECT, the “internal market competence” of Article 95 (1) ECT does not apply to “fiscal provisions”, thus excluding these from the general scope of Article 95 (1) ECT (which calls for the co-decision procedure). The rationale of this provision clearly has its origin in a desire of the Member States not to expose this “sensitive” area to a majority decision.<sup>171</sup> Adding to that, the fact that – unlike Article 175 (2) ECT<sup>172</sup> – this provision does not contain a limitation to measures “primarily of a fiscal nature” further supports a wide interpretation of the concept of fiscal provisions to include “taxes” imposed without return services as well as charges in return for actual services, given that the latter can noticeably determine the discretion afforded to Member States in the “taxation” area.<sup>173</sup>

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<sup>170</sup> With the same conclusion von der Groeben/Schwarze-Eilers/Bahns/Sedlacek, Article 93, Rndr.15; Schwarze-Kamann, Article 93, Annot. 3; Lenz/Borchardt-Wolffgang, Article 93, Annot. 8; grundsätzlich auch Wasmeier, Umweltabgaben, 227 *et seq.*; unklar Hof, Straßenverkehrsabgaben, 91; differing Grabitz/Hilf-Voß, Article 93, Annot. 8; Kirchhof, EUDUR I, § 38, Annot. 72; Amend, Instrument der Umweltabgabe, 88 *et seq.*; Ohler, Fiskalische Integration, 192. Differentiating (albeit not convincingly, if one considers the purpose of Article 93 ECT and the difficulties arising from this approach with regard to the separation of legal bases) Kreibohm, Begriff der Steuer, 163 *et seq.*, who suggests excluding charges in return for services from the scope of Article 93 ECT, but only considers charges in return for services to be charges aimed at the compensation of a “concrete governmental effort”. Under such an approach, user charges would, as a matter of principle, be taxes in the sense of Article 93 ECT, given that they impose a price on the use of an environmental good, but not – in all likelihood – a compensation duty for actual state efforts.

<sup>171</sup> Cf. in this regard on the protection of the fiscal sovereignty of Member States as a “Treaty Principle” (although this wording is probably not suitable, given that no “Treaty Principle” is under discussion here, but rather the background of certain Treaty provisions) Freytag, Europarechtliche Anforderungen an Umweltabgaben, 46 *et seq.*; see also Kreibohm, Begriff der Steuer, 187 *et seq.*

<sup>172</sup> On this provision, see *infra*. Apparently suggesting a parallel interpretation of Article 95 (2) and Article 175 (2) ECT in all situations, however, Heselhaus, Abgabenhoheit der EG, 259 *et seq.*

<sup>173</sup> Likewise Amend, Instrument der Umweltabgabe, 89 *et seq.*; Wolf, ZUR 2000, 123 (129); Wasmeier, Umweltabgaben, 227 *et seq.*; probably also von der Groeben/Schwarze-Pipkorn/Bardenhewer-Counciling/Taschner, Article 95, Annot. 55 *et seq.*; differing Heselhaus, Abgabenhoheit der EG, 260 *et seq.*, who suggests that harmonization provisions must have “special fiscal significance” comparable to that of conventional taxes. This approach, however, not only overlooks the difference to Article 175 (2) ECT, but also results in significant demarcation problems. With a differing opinion also Kreibohm, Begriff der Steuer, 166 *et seq.*, who generally rejects including charges in return for services in the scope of Article 95 (2) ECT.

Moreover, a differentiation between charges imposed in return for services and other charges is difficult, with different Member States applying highly divergent conceptions in this regard. In absence of a conceptual determination in Community law, one is inclined to conclude that the reference to fiscal provisions should find a wide interpretation. Consequently, charges in return for services are covered by the exception in Article 95 (2) ECT. If one were to exclude them from the scope of Article 93 ECT, the Community would possess no specific legislative competence to regulate charges imposed in return for individualised benefits or services with a view to harmonising these for the achievement of the internal market. Considering the objective of ensuring the establishment and the functioning of the internal market, however, this approach is unconvincing. Against the background of the internal market objective, therefore, Article 93 ECT will be given a wide interpretation in the sense outlined above.

From this, it follows for the application of Article 95 (2) ECT and – accordingly – of Article 93 ECT that the **purpose** of the tax or charge (revenues, modification of behaviour, or other) is **irrelevant** (to begin with),<sup>174</sup> since the repercussions on the fiscal discretion of Member States need to be considered irrespective of the purpose and effects. Another consideration in support of this approach is the jurisprudence of the ECJ, which has generally relied on the effect – and not the purpose – of a measure when testing the applicability of Community law.<sup>175</sup> The purpose of a measure may, however, become relevant when delineating its legal basis from other potentially pertinent legal bases.<sup>176</sup>

Consequently, Article 93 ECT can serve as the legal basis for harmonisation measures, including measures commonly referred to as fees and contributions imposed in return for an individualised, reciprocal benefit or service of some type.

#### ab.) Relevance for the Internal Market

A second requirement set out by Article 93 ECT – as a substantive parallel to Article 95 (1) ECT – is that harmonisation be “necessary to ensure the establishment and the **functioning of the internal**

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<sup>174</sup> Similarly *Heselhaus*, Abgabenhöhe, 275; *Ohler*, Fiskalische Integration, 193. See also *Kreibohm*, Begriff der Steuer, 162 *et seq.*, according to whom the generation of revenue must at least be a “secondary objective”; in the case of the user charges, however, that should regularly be the case.

<sup>175</sup> *Cf. Heselhaus*, Abgabenhöhe, 45 *et seq.*, with further references

<sup>176</sup> On this issue *infra* Part 1, C. I. 2.

**market**".<sup>177</sup> While this is not an appropriate setting for an in-depth assessment of the relevance to the internal market,<sup>178</sup> it may be affirmed for our purposes that:

- although the limitation of harmonisation to particular norms in Article 93 ECT may seem to suggest that the Community may only act on the condition that similar provisions already exist within one or more Member States, resulting in a substantive restriction of Community powers. Such a narrow view is problematic, however: Ultimately, it would result in an obligation to "wait" for Member State legislation even in the face of imminent disturbances of the internal market, thereby impeding both an effective establishment of the internal market as well as forward-thinking and innovative legislation by the Community. Against this background, the reference to a harmonisation of legislation may not be interpreted all too narrowly. Consequently, a Community measure may also contain **innovative elements**, provided it serves the establishment of the internal market.<sup>179</sup>
- Harmonisation must occur with a view to the establishment of the internal market, which is why the definition of "**internal market**" is decisive for the applicability of Article 93 ECT.

Under Article 14 ECT, the internal market comprises an area without internal frontiers in which the four fundamental market freedoms are guaranteed. Undoubtedly, thus, the internal market includes elements such as the elimination of border controls and the implementation and guarantee of the fundamental freedoms. It has been subject to dispute, however, whether distortion-free competition also falls within the ambit of the internal market.<sup>180</sup>

According to the established caselaw of the ECJ,<sup>181</sup> both market freedoms (achievement of the fundamental market freedoms) as well as market equality rights (ensuring distortion-free competition) are covered by the internal market, thereby applying a wide interpretation of the concept, given that nearly all provisions with transboundary effects also touch upon the competitive situation of market participants from different Member States and thus on the achievement of (or failure to achieve) distortion-free competition.

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<sup>177</sup> The reference to the time-limit laid down in Article 14 is of no significance. *Cf., inter alia, Kuntze, Kompetenzen der EG auf dem Gebiet des Steuerrechts*, 182 *et seq.*

<sup>178</sup> *Cf. in detail von der Groeben/Schwarze-Pipkorn/Bardenhewer-Counciling/Taschner*, Article 95, Annot. 7 *et seq.*, with further references

<sup>179</sup> Likewise von der Groeben/Schwarze-Taschner, Article 94, Rn. 33 *et seq.*; von der Groeben/Schwarze-Eilers/Bahns/Sedlaczek, Article 93, Rndr. 99; Ohler, Fiskalische Integration, 195 *et seq.*; Amend, Instrument der Umweltabgabe, 91 *et seq.*; Calliess/Ruffert-Kahl, EUV/ECT, Article 94, Rn. 7; in depth on this problem and with the same conclusions Kuntze, Kompetenzen der EG auf dem Gebiet des Steuerrechts, 183 *et seq.*; a.A. Kirchhof, EUDUR I, § 38, Annot. 67; Heselhaus, Abgabenhöhe, 276.

<sup>180</sup> *Cf. on the controversial scholarly debate Pernice*, NVwZ 1990, 201 (204); Epiney/Möllers, Freier Warenverkehr und nationaler Umweltschutz, 8 *et seq.*; Everling, FS Steindorff, 1155 (1163 *et seq.*).

<sup>181</sup> ECJ, Case C-300/89 (Commission/Council), ECR 1991, I-2867; ECJ, Case C-155/91 (Commission/Council), ECR 1993, I-939; ECJ, Case C-187/93 (Parliament/Council), ECR 1994, I-2857.

- Article 93 ECT does not require that measures **pertain to products**.<sup>182</sup> Unlike Articles 90 to 92 ECT,<sup>183</sup> Article 93 ECT is clearly characterised by its reference to the internal market, which is both necessary and also sufficient. This view is further backed by the systematic relationship with Article 95 (2) ECT, which excludes fiscal provisions from the purview of Article 95 (1) ECT, thereby resulting in the application of Article 93 or 94 ECT (depending on whether indirect or direct taxes are to be harmonised). Having affirmed that, the substantive requirement of a connection to the internal market – which both Article 93 ECT and Article 95 (1) ECT set out – should be interpreted in a parallel manner. The object and purpose of Article 93 ECT also suggest this outcome, given that a limitation to measures with relevance for products would also compromise the ability of this provision to achieve its regulatory purpose, namely to allow a harmonisation of indirect taxes impeding the functioning of the internal market. In essence, thus, provided no other legal basis applies, Article 93 ECT allows for the adoption of provisions aimed at the achievement of other fundamental market freedoms (in this context, notably the free movement of services), as well as taxation measures relating to installations.
- The relevance for the internal market must be present with regard to both the “income” side and the “**expenditure**” side; in other words, should the application of revenues also be harmonised, such harmonisation must serve the attainment of the internal market. Only thus can the principle of conferred powers be upheld: if the application were defined arbitrarily and with no regard for the relevance to the internal market, the Community could appropriate powers at its own discretion in countless policy areas on the grounds that the collection of certain taxes had to be harmonised for the establishment of the internal market. Given that, generally, the functioning of the internal market will only be affected by differing fiscal burdens, not by the use of revenues, basing a mandatory application of fiscal revenues by the Member States on Article 93 ECT will regularly not be an option. Instead, such a definition would be incumbent on the Member States, unless a more specific legal basis – such as e.g. Article 175 (1) ECT – applies. Due to the distribution of powers between the EC and the Member States in the ECT,<sup>184</sup> this would have to be determined with a view to the purpose of the expenditures.

#### ac.) Conclusions

Against this backdrop, the scope of Article 93 ECT – which calls for a **unanimous Council decision** after consultation of the European Parliament and the Economic and Social Committee -

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<sup>182</sup> Likewise *Heselhaus*, Abgabenhöhe, 88 *et sqq.*; *Schwarze-Kamann*, Article 93, Annot. 4; vague *Groeben/Schwarze-Eilers/Bahns/Sedlaczek*, Article 93, Annot. 15; *Grabitz/Hilf-Voß*, Article 93, Annot. 6.

<sup>183</sup> At length on these provisions *Epiney/Gruber*, Verkehrsrecht, 183 *et sqq.*

<sup>184</sup> Likewise *Heselhaus*, Abgabenhöhe, 242.

with regard to the adoption of Community measures for the introduction of user charges on global environmental goods can be **summarised** as follows:

- Based on Article 93 ECT, the Community can only harmonised **indirect** taxes, that is: taxes not assessed against income or property, but against the use thereof.
- The wording “**taxation**” comprises both taxes *strictu sensu* – i.e., payment duties not attached to any return services – as well as **special compensation duties** imposed on the provisions of **benefits or services**. Following from this wide interpretation of the scope of Article 93 ECT, it would seem that Article 94 ECT does not apply to environmental user charges, given that a more specific legal basis is available.<sup>185</sup>
- As any necessary and also sufficient condition, moreover, the provision in question must pertain to the **functioning of the internal market** (notably to the achievement of the fundamental market freedoms and the guarantee of distortion-free competition), something that will generally only apply to the harmonisation of the rules on the collection – and not on the expenditure – of the tax.

In order for Article 93 ECT to apply, however, the measure need not somehow relate to goods. Likewise, it does not presuppose the existence of Member State rules. A contribution to the functioning of the internal market is sufficient.

As a rule, thus, the introduction of user charges will clearly fall within the scope of Article 93 ECT, regardless of whether they relate to products or are imposed in return for benefits or services. That applies to all types of user charges described earlier,<sup>186</sup> including user charges primarily related to products (in particular, fuel taxes) as well as other user charges, given that Article 93 ECT also covers indirect taxes not relating to products. What is more, such measures will generally be relevant for the functioning of the internal market because of the economic impact of user charges on market participants and the resulting significance for distortion-free competition. Altogether, user charges do not amount to a taxation of income or property, but to a particular usage thereof,<sup>187</sup> thus constituting an indirect tax in the sense of Article 93 ECT. As a matter of principle, however, Article 93 ECT merely allows for the harmonisation of rules on the introduction of charges, not of rules on the expenditure of revenues. Accordingly, user charges in the strict sense – whose revenues

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<sup>185</sup> On the delineation of legal bases, see also *infra* Part 1, C. I. 2. It should, however, be noted that authors proposing to interpret Article 95 (2) ECT extensively and Article 93 ECT narrowly (limiting the latter to charges not imposed in return for services, e.g. *Kirchhof*, EUDUR I, § 38, Annot. 72 *et seq.*; *Amend*, Instrument der Umweltabgabe, 88 *et sqq.*), have to draw on Article 94 ECT for fiscal measures not covered by Article 93 ECT.

<sup>186</sup> 1. Teil A.

<sup>187</sup> Cf. insoweit auch *Heselhaus*, Abgabenhöhe, 90.

do not accrue to the general (public) budget, but are earmarked for particular purposes – could not be based on Article 93 ECT.

b.) Article 71 in Connection with Article 80 (2) ECT (Transport)

Given that user charges on global environmental goods are, by necessity, closely related to transport, their adoption at Community level on a legislative power in the transport sector would also appear viable.<sup>188</sup> Article 80 (2) ECT grants the Community the power to adopt measures necessary for the implementation of the common transport policy in the sea and air transport sectors, which are of particular relevance in the context of this study. It follows that the **Community powers** in the areas of **transport by rail, road and inland waterways**, on the one hand (Article 80 (1) ECT), and in the area of **sea and air** transport, on the other hand (Article 80 (2) ECT), are ultimately **alike** in structure. In practice, at any rate, the distinction between different forms of transport should have no consequences<sup>189</sup> for the scope of the legislative powers.<sup>190</sup> In the following analysis, therefore, the general competences in the transport sector will be directly referred to also in the context of air and sea transport.

Against this backdrop, it is unnecessary to distinguish between transport by road or inland waterways and sea and air transport when determining the scope of Community powers, a question which would otherwise become relevant for the categorisation of sea ports and airports. In the end, however, it may be advisable to base such a determination on the central purpose of activities or services originating in the ports, and these will regularly relate to air and sea transport.<sup>191</sup>

Article 80 (2) ECT was amended by the Single European Act to refer to the procedural provisions of Article 71 ECT. Therefore, substantive measures need to be adopted in the procedure set out in Article 71 ECT. The first sentence of Article 80 (2) ECT should therefore be of primary importance for a fundamental determination;<sup>192</sup> such a fundamental determination will also have to be made with a view to individual measures, given that “appropriate provisions for sea and air transport” are to be laid down; in most cases, this determination will already be inherent to the substantive act of legislation. Somewhat unclear is the passage in Article 80 (2) ECT according to which the Council may decide “by what procedure” such appropriate provisions are to be laid down. The reference to the procedural provisions of Article 71 ECT contained in the second sentence of Article 80 (2) ECT will only retain its purpose and a practical effect if the procedural reference in the first sentence of Article 80 (2) ECT is considered subsidiary in nature, covering only

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<sup>188</sup> Zu den Rechtsgrundlagen im Verkehrsbereich ausführlich *Freytag*, Europarechtliche Anforderungen, 77 *et seq.*; *Epiney/Gruber*, Verkehrsrecht in der EU, 45 *et seq.*; *Epiney*, in: Dausen (Hrsg.), Hdb. EU-WirtschaftsR, L, Annot.50 *et seq.*

<sup>189</sup> Cf. von der Groeben/Schwarze-Erdmenger, preliminary remarks on Articles 70-80, Annot. 13; Schwarze-Stadler, Article 80, Annot. 1.

<sup>190</sup> This does not apply to the provisions contained in Article 70 *et seq.* ECT, which are not in themselves applicable to air and sea transport, cf. Calliess/Ruffert-Jung, Article 80, Annot. 9.

<sup>191</sup> On this issue with further references *Epiney*, in: Dausen (Hrsg.), Hdb. EU-WirtschaftsR, L, Annot. 41.

<sup>192</sup> Which ultimately grants the power to amend the Treaty to the Council, cf. also on the significance of the first sentence of Article 80 (2) ECT von der Groeben/Schwarze-Erdmenger, preliminary remarks on Articles 70-80, Annot. 12 *et seq.*

constellations which are not regulated by Article 71 ECT and the pertinent procedures of the bodies.<sup>193</sup> Ultimately, this reference would acquire little practical significance.

Article 71 ECT generally charges the Community with the adoption of measures for the purpose of implementing the common transport policy and attaining the objectives of the Treaty in the areas covered by Article 71 (1) ECT in accordance with the procedure referred to in Article 251 ECT (**co-decision procedure**) and after consulting the Economic and Social Committee and the Committee of the Regions. The choice of instrument is given to the discretion of the Community legislator.

Departing from the procedure in Article 71 (1) ECT, Article 71 (2) ECT requires a unanimous decision after consultation of the European Parliament and the Economic and Social Committee for certain areas; these are not relevant in the context of user charges, however.

Since Article 71 (1) lit. a)-c) ECT does not apply to the introduction of a user charge by the Community,<sup>194</sup> pertinent legislation could only be based on **Article 71 (1) lit. d) ECT**, which allows the Community to adopt “**any other appropriate provisions.**” The regulatory scope of this provision is limited in that it requires the measure in question to be substantively related to transport – a requirement that will regularly be met by the different conceivable types of user charges; in addition, however, the provisions adopted have to be “appropriate”. As the systematic relationship with Article 71 (1) lit. c) ECT already shows, this provision must be interpreted as relating to such measures which serve the purposes of the common transport policy<sup>195</sup> and that of the Treaty. “Appropriate”, in this context, is to be read as meaning “useful” and “necessary” for the achievement of the respective goal.<sup>196</sup> Clearly, this affirms that “appropriate” measures in the purview of Article 71 (1) lit. d) ECT are not only measures serving the achievement of the **fundamental market freedoms** in the transport sector, given that the provision would otherwise become largely obsolete: after all, this aspect is already covered by Article 71 (1) lit. a), b) ECT.<sup>197</sup> Rather, Article 71 (1) lit. d) ECT also allows for the adoption of **other measures in the transport sector**, provided these are **useful** for the attainment of Treaty objectives.<sup>198</sup> Because the objectives of the Treaty have been

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<sup>193</sup> Thus also Grabitz/Hilf-Frohnmeier, Article 80, Annot. 13, who even describes this reference as an “editorial oversight”.

<sup>194</sup> On the scope of these provisions and with further references *Epiney*, in: Dausen (Hrsg.), Hdb. EU-WirtschaftsR, L, Annot. 58 *et seq.*

<sup>195</sup> Cf. ECJ, ECR 1997, I-4475, Annot. 22 *et seq.*

<sup>196</sup> *Freytag*, Europarechtliche Anforderungen an Umweltabgaben, 121; see also ECJ, ECR 1997, I-4475, Annot. 27, 32, 37, 43.

<sup>197</sup> Which form the legal basis for the adoption of Community measures on the attainment of the free movement of services in the transport sector.

<sup>198</sup> Sharing the same outcome: Grabitz/Hilf-Frohnmeier, Article 71, Annot. 33; von der Groeben/Schwarze-Erdmenger, Article 71, Annot. 44 *et seq.*; Amend, Instrument der Umweltabgabe, 104 *et seq.*; Streinz-Schäfer, Article 71, Annot. 79 *et seq.*; in this direction also auch (with an emphasis on the wide discretion afforded to

given a fairly extensive definition, the scope of this legislative power is rather wide. Practically no transport-related measure (at least of a transboundary nature) *prima facie* excluded from the scope of Article 71 (1) lit. d) ECT is conceivable.

Regarding the pursuit of environmental policy objectives, specifically, it needs to be born in mind that environmental protection requirements must be integrated and implemented in the context of other policies under the so-called “**Integration Principle**” (Article 6 ECT),<sup>199</sup> with the result that, in principle, even primarily environmentally motivated Community measures may still be adopted on the basis of Article 71 (1) lit. d) ECT.

Altogether, thus, Article 71 (1) lit. d) ECT enables the Community to pursue an autonomous transport policy, albeit within the general Treaty objectives. Accordingly, the range of “useful” provisions includes e.g. measures to co-ordinate the financing of transport infrastructures, the introduction of a toll system to assign the costs of traffic infrastructures to transport users, and measures to approximate the domestic transport markets.<sup>200</sup> Irrespective of the design chosen, the **introduction of user charges** can generally be based on Article 71 (1) lit. d) ECT.

Nonetheless, with regard to the expenditure of revenues, it must be recalled that a determination of the **use of revenues** also has to be covered by Article 71 (1) lit. d) ECT and thus – provided all other requirements are met – may only relate to the transport sector (for instance the promotion of cleaner transport options). Mandatory application of revenues to other purposes, in turn, would no longer fall within the scope of Article 71 (1) (together with Article 80 (2)) ECT; accordingly, the same considerations formulated with regard to Article 93 ECT apply here, too.<sup>201</sup>

#### c.) Article 175 ECT (Environment)

In Title XIX (“Environment”), Article 175 ECT is the **legal basis** for Community action to achieve the objectives of Community environmental policy set out in Article 174 ECT. Article 175 (1) ECT is a general power to adopt environmental policy measures (in the co-decision procedure), whereas Article 175 (2) ECT provides for a special decision procedure for particular issue areas (unanimity in the Council).

Substantively, measures adopted under Article 175 (1), 2 ECT must relate to the **achievement of the objectives contained in Article 174 ECT**; the Community has discretion as to the choice of instruments.<sup>202</sup> The Community notion of the environment acquires significance in this context,<sup>203</sup> given that Article 175 (1), 2 ECT *et al.* can (only) be drawn on for such measures which serve

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the Community legislator) ECJ, ECR 1997, 4475, Rndr. 23 *et sqq.*; see also already ECJ, ECR 1985, 1513, Annot. 49 *et sqq.*

<sup>199</sup> On the significance of the Integration Principle: with further references *Epiney*, Umweltrecht in der EU, 108 *et sqq.*

<sup>200</sup> Grabitz/Hilf-Frohnmeier, Article 71, Annot. 33; see also *Heselhaus*, Abgabenhöhe, 213 *et sqq.*; ambiguous: Lenz/Borchardt-Mückenhausen, Article 71, Annot. 16.

<sup>201</sup> *Supra*, Part 1, C. I. 1. a) bb).

<sup>202</sup> Likewise *e.g.* *von Borries*, EUDUR I, § 25, Annot. 22.

<sup>203</sup> On this issue *supra Epiney*, Umweltrecht in der EU, 3 *et sqq.*



environmental protection. The scope of Community legislative powers is not, however, constrained by this conceptual aspect, as the objectives of Article 174 ECT<sup>204</sup> and, thus, the Community definition of “environment” are sufficiently wide. If a measure meets this requirement – that is, if it serves the attainment of the objectives laid down in Article 174 ECT – and other applicable provisions do not state of the ones,<sup>205</sup> sent measure falls within the scope of Article 175 ECT and is thus covered by Community powers. Accordingly, no policy area can, *prima facie*, be excluded from the regulatory ambit of this provision; in other words, this legal basis may potentially justify the adoption of measures **in all issue areas**,<sup>206</sup> given that only a contribution to the objectives of Article 174 ECT is decisive. That means that **user charges** may also, in principle, be based on Article 175 ECT, provided they serve the objectives of Article 174 ECT.<sup>207</sup>

This view is confirmed by Article 175 (2) ECT, which mentions policies – such as, for instance, measures concerning town and country planning as well as energy supply – that undoubtedly remain within the powers of the Member States; nevertheless, these can become the object of Community environmental measures, despite clearly not belonging to environmental policy *strictu sensu*.

Given that Article 175 (1), 2 ECT requires different decision procedures, the scope of the issue areas listed in Article 175 (2) ECT<sup>208</sup> acquires great significance.<sup>209</sup> It requires an interpretation and more detailed definition of the areas mentioned in Article 175 (2) ECT against the background and structure of Article 175 ECT: Article 175 (1) ECT is a general legislative power granted to the Community in order for it to act in pursuit of the objectives laid down in Article 174 ECT in

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<sup>204</sup> The wording of Article 175 (1) ECT, moreover, confirms the binding legal nature of the objectives in Article 174 ECT, *cf.* in this regard *Epiney*, *Umweltrecht in der EU*, 114 *et sqq.*

<sup>205</sup> On this issue *infra*, Part 1, C. I. 2.

<sup>206</sup> For a different view, however, *cf.* *Matuschak*, DVBl. 1995, 81 *et sqq.* (particularly 86 *et seq.*), who starts from a restrictive concept of the environment and argues that Article 175 ECT is a special legal basis which only covers the “core areas” of environmental law. This view does not take into account the extensive wording of Article 174 ECT referred to in Article 175 (1) ECT, nor does it do justice to the concept of the environment in the Community; moreover, it does not serve the objectives sought with the introduction of a Title “Environment” into the ECT.

<sup>207</sup> At length and with the same conclusions *Heselhaus*, *Abgabenhöhe*, 169 *et sqq.*; see also *Kuntze*, *Kompetenzen der EG auf dem Gebiet des Steuerrechts*, 209; *Amend*, *Instrument der Umweltabgabe*, 94; von der Groeben/Schwarze-Krämer, Article 175, Annot. 26.

<sup>208</sup> Article 175 (2) ECT does not embody a separate legislative power, but merely introduces a special decision process for select areas, see aptly *Matuschak*, DVBl 1995, 81 *et sqq.* When the same author questions whether the Community can base its own energy and land-use policy on Article 175 ECT, however, he is addressing an illusory problem, for naturally the scope of Article 175 ECT is curtailed by the objectives of Article 174 ECT (as was already mentioned). With a view to the reasons mentioned earlier, *supra*, note 206, a narrow interpretation of the latter does not appear justifiable.

<sup>209</sup> Pursuant to the second subparagraph of Article 175 (2) ECT, the Council may, however, unanimously define those matters referred to in the same paragraph on which decisions are to be taken by a qualified majority.

application of a certain procedure. Article 175 (2) ECT excludes a number of explicitly mentioned issue areas from this general competence.<sup>210</sup> In case of doubt, however, exceptional clauses are to be **interpreted narrowly**, as this is most likely to do justice to the relationship of rules and exception.<sup>211</sup> As soon as a measure is no longer covered by Article 175 (2) ECT and legislative competences in other policy areas do not state otherwise, Article 175 (1) ECT applies.

In the context of this study, the interpretation of “**provisions primarily of a fiscal nature**” is of central importance. The ECJ has not yet had one opportunity to rule on this passage. In scholarly literature, however, it is still under debate,<sup>212</sup> with the main point of contention again – as in the case of Article 93 ECT<sup>213</sup> – whether such provisions extend beyond taxes *strictu sensu*, i.e., payment duties not attached to any return services, so as to include charges imposed on the provisions of **benefits or services**. Considering that European Community law has not given rise to a uniform concept of taxation and national criteria may not be directly applied on the Community level,<sup>214</sup> one may assume that – despite the need to interpret Article 175 (2) ECT narrowly – provisions of a fiscal nature comprise all **payment duties imposed in exercise of public authority**. Any interpretation deviating from that applied in the context of Article 93 and Article 95 (2) ECT would not do justice to the common background of these provisions, namely to protect the fiscal prerogatives of Member States. Nonetheless, Article 175 (2) ECT only refers to provisions **primarily** of a fiscal nature, clarifying that, within the purview of Article 175 (2) ECT, and contrary to Article 95 (2) ECT in this regard, fiscal provisions need not be categorically adopted by unanimous decision. This is where the principle of narrow interpretation of acquires a bearing: as a rule, a provision will only be “primarily of a fiscal nature” when it actually imposes a payment duty independent of any return benefits or services. Charges attached to an individualised return service, in contrast, will regularly – albeit not always – lack the “primary” fiscal nature, given that such charges are generally selective and do not affect the foundations of the economic and fiscal system,

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<sup>210</sup> Ultimately, this was based on political considerations: the Member States were not willing to introduce majority decision-making for the sensitive areas listed in Article 175 (2) ECT.

<sup>211</sup> This conclusion is shared by *Calliess*, ZUR 2003, 129 (130); *Lenz/Borchardt-Breier/Vygen*, Article 175, Annot. 13; *Calliess/Ruffert-Calliess*, EUV/ECT, Article 175, Rn. 18; *von der Groeben/Schwarze-Krämer*, Article 175, Annot. 28; with a different view *Scherer/Heselhaus*, in: *Dausen* (ed.), Hb. EU-WirtschaftsR, O, Rn. 63. Meanwhile, the ECJ appears to have implicitly subscribed to this view, cf. ECJ, Case C-36/98 (Spain/Council), ECR 2001, I-779, paras. 46 *et seq.* With a very critical review of this judgment *Heselhaus*, EuZW 2001, 213, who censures the ECJ for departing from the wording of Article 175 (2) ECT on behalf of questionable systematic considerations.

<sup>212</sup> Cf. the extensive overview of scholarly positions in academic literature by *Heselhaus*, *Abgabenhöhe*, 197 *et seq.*; see also *Kuntze*, *Kompetenzen der EG auf dem Gebiet des Steuerrechts*, 207 *et seq.*

<sup>213</sup> On this issue, *supra*, Part 1, C. I. a) aa).

<sup>214</sup> *Supra*, Part 1, C. I. a).

being instead a form of compensation for a “return service”.<sup>215</sup> Against this backdrop, it may be concluded that, as a rule, Article 175 (2) ECT covers **taxes imposed regardless of return services**, while it does not cover **charges paid in return for benefits or services rendered**.<sup>216</sup>

Incidentally, it is also subject to dispute whether “**provisions primarily of a fiscal nature**” merely has to apply to the individual **fiscal provisions** contained in a Community **measure**,<sup>217</sup> or whether the entire Community measure needs to meet this requirement.<sup>218</sup> In the end, only the latter view seems reasonable, since Article 175 (2) ECT would otherwise always apply because the fiscal provisions within a measure are by necessity always “primarily” of a fiscal nature, unless they are – as outlined above – imposed in return for benefits or services. Objections against this approach based on the assertion that it would allow the Community legislature to circumvent the procedural requirements of Article 175 (2) ECT by “enriching” fiscal provisions with other provisions are not convincing. In particular, they overlook that, by all means, the Community legislator is entitled to adopt a coherent system of different substantive elements as part of one measure (frequently a more sensible approach), provided it has been granted a substantive legislative power; in such cases, the legal basis needs to be determined by way of a “centre of gravity” test applied to the measure.<sup>219</sup> The is no reason not to apply this system to Article 175 (1), 2 ECT, in particular with a view to the narrow interpretation of Article 175 (2) ECT.

It should be noted, moreover, that Article 175 (2) lit. c) ECT calls for a unanimous decision for measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply. The inclusion of this issue area in the purview of Article 175 (2) ECT should prevent environmental policy measures adopted with majority vote from influencing energy supply policy, which is, as a matter of principle, left to the competence of the Member States. However, Article 175 (2) lit. c) ECT only applies when the energy supply structure is “significantly” affected. At any rate, that is the case when certain energy sources are rendered unavailable or their availability is constrained. A “shift” between different energy sources will regularly not affect the general structure of energy supply, and is thus unlikely to be covered by this provision.<sup>220</sup> From this, it clearly becomes apparent that Article 175 (2) lit. c) ECT does not apply to the introduction of user charges, given that these do not rule out the use of certain energy sources.

By way of conclusion, Article 175 (1) ECT is a sufficient legal basis for the introduction of user charges are global environmental goods, and it covers all conceivable designs of user charges

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<sup>215</sup> Cf. however the slightly different reasoning – albeit not result – in *Epiney*, Umweltrecht in der EU, 58.

<sup>216</sup> Sharing the same conclusion, albeit occasionally with slight differences in reasoning, what is apparently the majority view, cf. *Müller*, Möglichkeiten und Grenzen der indirekten Verhaltenssteuerung, 83 *et seq.*; *Calliess*, ZUR 2003, 129 (130 *et seq.*); von der Groeben/Schwarze-Krämer, Article 175, Annot. 26 *et seq.*; Lenz/Borchardt-Breier/Vygen, Article 175, Rn. 13; *Breier*, EUDUR I, § 13, Annot. 22; *Calliess/Ruffert-Calliess*, EUV/ECT, Article 175, Annot. 19; differing in views *Wasmeier*, Umweltabgaben und Europarecht, 225; *Kirchhof/Kemmler*, EWS 2003, 217 (220 *et seq.*); *Thiel*, Umweltrechtliche Kompetenzen, 75 *et seq.*; wit the same outcome suggested here, albeit with a different reasoning, *Scherer/Heselhaus*, in: Dausen (Hrsg.), Hb. EU-WirtschaftsR, O, Annot. 64 *et seq.*; *Heselhaus*, Abgabehoheit, 205 *et seq.*; ambiguous *Kreibohm*, Begriff der Steuer, 206 *et seq.*

<sup>217</sup> Thus in reliance on the wording of Article 175 (2) ECT *Scherer/Heselhaus*, in: Dausen (Hrsg.), Hb. EU-WirtschaftsR, O, Annot. 65; *Heselhaus*, Abgabehoheit, 211 *et seq.*

<sup>218</sup> Thus Lenz/Borchardt-Breier/Vygen, Article 175, Annot. 13; *Kreibohm*, Begriff der Steuer, 203 *et seq.*, observing that the ECT contains no consistent distinction between measures and provisions.

<sup>219</sup> On this issue, see *infra*, Part 1, C. 2.

<sup>220</sup> Sharing the same conclusion *Calliess/Ruffert-Calliess*, Article 175, Annot. 21a; *Scherer/Heselhaus*, in: Dausen (Hrsg.), Hb. EU-WirtschaftsR, O, Annot. 70.

mentioned earlier.<sup>221</sup> After all, what is decisive is that the Community measure serve the objectives of Article 174 ECT. To the extent that this requirement is met and the user charge constitutes a compensation for services rendered, the Community is entitled to determine the application of revenues, although – in line with the objectives of Article 174 ECT – it is limited to applications which serve environmental policy purposes. Any other purpose of earmarked revenues could not be based on Article 175 ECT.<sup>222</sup> Moreover, it needs to be borne in mind that the pursuit of environmental objectives –in the sense outlined in Article 174 ECT – may also consist in the promotion of environmental projects in developing countries, with the result that environmentally relevant measures of development co-operation are not, *prima facie*, excluded as an application of earmarked revenues.

## 2. On the Differentiation of Legal Bases

The foregoing overview of available Community powers for the introduction of user charges has shown to large number of potentially applicable legislative competences. This raises the question of the relevant provisions for a specific course of action and, thus, of the mutual distinction of these powers. The answer to this question may, in turn, be decisive for the applicable legislative procedure. Moreover, the ability of individual Member States to maintain or introduce more stringent measures under primary Community law differs depending on the chosen legal basis.

### a.) Multiple Legal Bases

The first question encountered in this connection is whether the Community may simultaneously base legislative measures on **two or more legislative competences**. In other words, when a measure falls within the scope of different legal bases, may several or all of these be simultaneously referred to for the adoption of that measure?

This question acquires particular relevance in the context of this study, given that – as shown above – all conceivable types of user charges can, in principle, be adopted on the basis of Article 71 (1) lit. d) in connection with Articles 80 (2), 93, 175 ECT.

The **jurisprudence of the ECJ** on this issue<sup>223</sup> can be summarised as follows:

- In a series of decisions, the ECJ apparently assumed that simultaneous recourse to several legislative competences was **not permissible**, for instance when – based on a wide interpretation of the scope of Article 43 ECT –its decided on the relationship of the formal

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<sup>221</sup> Part 1, A.

<sup>222</sup> Sharing this view the based on an extensive line of reasoning *Heselhaus*, Abgabenhöhe, 241 *et sqq.*

<sup>223</sup> Cf. in academic literature on this issue and with further references *Ullrich*, ZEuS 2000, 243 *et sqq.*; *Heselhaus*, NVwZ 1999, 1190 *et sqq.*; see also the overview of case law at *Scheuing*, in: *Umweltrecht im Wandel*, 129 (143 *et sqq.*).

Articles 43 and 100 a ECT<sup>224</sup>, but also with a view to the relationship of Articles 175, 95 ECT.<sup>225</sup>

- One may, however, also find decisions in which the ECJ chose **not to exclude** the possibility of simultaneous reference to **multiple legal bases** on the condition that the issue under regulation was “inseparably” affected by more than one legislative competence, without a clear centre of gravity apparent.<sup>226</sup> Withal, the ECJ has also emphasised that such multiple legal bases may not compromise the “essential point” of the respective legislative procedure; in other words, the **legislative procedures** have to be **reconcilable**.<sup>227</sup> At any rate, the requirement of a unanimous decision was held to be irreconcilable with the co-decision procedure and qualified majority voting.<sup>228</sup>
- The Court is generally eager to determine the objective **centre of gravity**<sup>229</sup> of a harmonisation measure, and – in case of doubt – tends to prefer drawing on a single legal basis,<sup>230</sup> with a twofold legal basis remaining the exception.<sup>231</sup>

In cases where the applicable provisions call for **irreconcilable legislative procedures** or contain other substantive differences (e.g. differences in the availability of more stringent measures for Member States, or substantive requirements imposed on the legislation to be adopted), a **twofold**

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<sup>224</sup> ECJ, Case 68/86 (Great Britain/Council), ECR 1988, 855, paras. 4 *et seq.*; ECJ, Case 131/86 (Great Britain/Council), ECR 1988, 905, paras. 11 *et seq.*; ECJ, Case C-131/87 (Commission/Council), ECR 1989, 3743, paras. 10; ECJ, Case C-269/97 (Commission/Council), ECR 2000, I-2257.

<sup>225</sup> ECJ, Case C-300/89 (Commission/Council), ECR 1991, I-2867; ECJ, Case C-155/91 (Commission/Council), ECR 1993, I-939; ECJ, Case C-187/93 (Parliament/Council), ECR 1994, I-2857.

<sup>226</sup> ECJ, Case C-42/97 (Parliament/Council), ECR 1999, I-869, paras. 38 *et seq.*; ECJ, Case C-36/98 (Spain/Council), ECR 2001, 829 *et seq.*; Legal Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713.

<sup>227</sup> ECJ, Case C-491/01 (The Queen/Secretary for Health, ex parte: British American Tobacco Ltd. *et al.*), ECR 2002, I-11453, paras. 108 *et seq.*; ECJ, Judgm. of 29 April 2004 – Case C-338/01 – Commission/Council.

<sup>228</sup> ECJ, Judgm. of 29 April 2004 – Case C-338/01 – Commission/Council.

<sup>229</sup> On this issue, see immediately *infra*

<sup>230</sup> ECJ, joint Cases C-164/97, C-165/97 (Parliament/Council), ECR 1999, I-1139, paras. 12 *et seq.*; ECJ, Legal Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713, paras. 22 *et seq.*; ECJ, Case C-377/98 (Netherlands/Parliament und Council), ECR 2001, I-7079, paras. 10 *et seq.*; ECJ, Case C-491/01 (The Queen/Secretary for Health, ex parte: British American Tobacco Ltd. *et al.*), ECR 2002, I-11453, paras. 94 *et seq.*

<sup>231</sup> Thus explicitly ECJ, Case C-491/01 (The Queen/Secretary for Health, ex parte: British American Tobacco Ltd. *et al.*), ECR 2002, I-11453, paras. 94; ECJ, Legal Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713, paras. 23; ECJ, Case C-281/01 (Commission/Council), ECR 2002, I-12049, paras. 35; ECJ, Judgm. of 29 April 2004 – Case C-338/01 – Commission/Council.

**legal basis** will generally be ruled out,<sup>232</sup> in spite of the more recent case law, which is – at least partially – unclear in this regard.<sup>233</sup> To begin with, such recourse to two legal bases would result in uncertainties regarding the applicable procedure; simply applying the “stricter” procedure<sup>234</sup> is not a satisfactory solution, given its determination would vary in line with different perspectives. Moreover, such an approach would fail to adequately meet the substantive requirements laid down in several legal bases, adding to the problem of differing options for more stringent unilateral measures. Finally, the simultaneous recourse to several legislative competences would incur a shift, if not even a collapse of the system of Community competences and factually circumvent the principle of conferred powers. After all, the general admissibility of a reference to multiple legal bases would allow for arbitrary combinations of different legal bases, resulting in the “fusion” of procedures. It would also render it impossible to determine the substantive scope of new legislation on the basis of the legislative competences set out in the Treaty. The differentiated system of powers and procedures set out in the Treaty on the basis of conferred powers would be left to the discretion or disposition of the Community organs.

If one applies these principles to the legislative competences potentially applicable to **user charges**, recourse to **multiple legal bases** is not an option. For Article 93 ECT requires unanimity, whereas Articles 71 (1), 175 ECT call for the co-decision procedure; simultaneous application of Article 93, on the one hand, and Articles 71 (1), 175 (1) ECT, on the other, is thus entirely ruled out. Likewise, Articles 71 (1), 175 (1) ECT may not be combined, since Article 176 ECT contains a special authorisation of more stringent unilateral protective measures and is thus not transferable by way of analogy.

#### b.) On the Criteria for a Differentiation of Legal Bases

Even though recourse to multiple legal bases is thus relegated to exceptional circumstances and would probably remain altogether inadmissible for the introduction of a user charge, it may become

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<sup>232</sup> Likewise *Scheuing*, EuR 1989, 152 (185); *Calliess*, ZUR 2003, 129 (133); *Jarass*, EuZW 1991, 530; *Middeke*, DVBl 1993, 769 (770 *et seq.*); *Kahl*, Umweltprinzip, 302 *et seq.*; see also *Epiney*, JZ 1992, 564 (568 *et seq.*); with a divergent view *Everling*, EuR 1991, 179 (181); *Gundel*, EuR 2003, 100 (103 *et seq.*), who generally holds reference to multiple legal basis to be permissible; see also *Wasmeier*, Umweltabgaben, 257 *et seq.*, who affirms the admissibility of multiple legal bases if all relevant provisions result in the application of parallel procedures; likewise *Breier*, EuR 1995, 46 (51).

<sup>233</sup> Cf. for instance ECJ, Case C-281/01 (Commission/Council), ECR 2002, I-12049, paras. 35, where the ECJ generally affirmed that, “by way of exception”, if it is established that a measures simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, two legal bases may be simultaneously relied upon. See since the clarification in this regard in ECJ, Judgm. of 29 April 2004 – Case C-338/01 – Commission/Council.

<sup>234</sup> In this sense *Everling*, EuR 1991, 179 (181).

necessary to define criteria for the distinction of the scope of different legal bases.<sup>235</sup> Two problematic issues may be discerned in this regard:<sup>236</sup> the question of a “primacy” of individual legislative powers (aa) and the criteria of distinction (bb).

ba.) On the “Primacy” of Individual Legislative Competences

First, a clarification is needed as to whether certain provisions have a (relative) primacy in relation to other provisions, be it because of their character as *leges speciales* or because the other provisions are to be considered subsidiary norms.

For instance, Article 308 ECT is subsidiary with regard to all other legislative powers. According to the jurisprudence of the ECJ, Article 37 ECT – a specific provision concerning agricultural policy – takes precedence over the general provisions on the establishment of the common market, notably Article 94 ECT.<sup>237</sup>

If one assumes the primacy of a legislative competence in the Treaty, it would always be applicable as soon as a measure falls within its purview, irrespective of whether said measure also falls within the scope of subsidiary norms or the *lex generalis*. Determination of this methodological relationship *in casu* must occur with a view to the object and purpose of the provision and the system of the Treaty, but also, in particular, based on the substantive scope of the legal competence in question. Community law contains no universal rules setting out a general principle guiding the distinction of legal bases in all situations.

Although the distinction of different legal bases may not, thus, be based on the formulation of a general rule, the question remains whether individual provisions take relative precedence (of application) over other individual provisions. Starting from the earlier discussion of conceivable legal bases for user charges,<sup>238</sup> three groups of problems may be distinguished:

- **Articles 175, 93 ECT** stand alongside with equal status; the Treaty provides no indication for any type of hierarchy or competition.<sup>239</sup> The requirements of speciality are not met, nor

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<sup>235</sup> Cf. in this regard the overview of different distinction criteria applied in academic literature and pertinent case law of the ECJ at *Ullrich*, ZEuS 2000, 243 *et sqq.*; specifically on the case law, see also *Scheuing*, in: *Umweltrecht im Wandel*, 129 (143 *et sqq.*).

<sup>236</sup> Cf. insofar also *Schröder*, *Kompetenzverteilung*, 113 *et sqq.*, who arrives at the same conclusion by distinguishing a relationship of “methodological competition” and isolated, parallel competences.

<sup>237</sup> Cf. ECJ, Case 68/86 (Great Britain/Council), ECR 1988, 855, paras. 4 *et sqq.*; ECJ, Case 131/86 (Great Britain/Council), ECR 1988, 905, paras. 11 *et sqq.*

<sup>238</sup> See Part 1, C. I. 1.

<sup>239</sup> With the same outcome *Heselhaus*, *Abgabenhöhe*, 276 *et sqq.*; *Müller*, *Möglichkeiten und Grenzen der indirekten Verhaltenssteuerung*, 84 *et seq.*; *Amend*, *Instrument der Umweltabgabe*, 109 *et seq.*; *Kuntze*, *Kompetenzen der EG auf dem Gebiet des Steuerrechts*, 215 *et sqq.*; apparently also *Schwarze-Kamann*, Article 93, Annot. 12; differing (precedence of Article 93 ECT) e.g. *Calliess/Ruffert-Calliess*, Article 175, Annot. 16;

are any other indications apparent which would support generally subjecting Article 175 ECT to Article 93 ECT, in the contrary: by explicitly mentioning fiscal provisions, Article 175 (2) ECT clearly affirms that such provisions can, indeed, be based on Article 175 ECT. Then, however, Article 93 ECT is not a specific provision in the sense that it would always be relevant to measures with a fiscal aspect.<sup>240</sup> Against this background, it would seem cogent to see Article 93 ECT as a legal basis primarily for indirect tax adjustments of domestic markets, whereas Article 175 ECT deals primarily with measures that serve to meet objectives pertaining to environmental policy.

This interpretation is supported by the fact that Article 175 and 95 ECT stand on equal footing.<sup>241</sup>

Moreover, it is worth noting that giving “precedence” to Article 93 ECT because of the prevailing wide interpretation of the internal market<sup>242</sup> would lead to the conclusion that this provision applies in practically all cases of (indirect) environmental charges or taxes, given that competition will be regularly affected and Article 175 ECT would no longer apply; as a result, the first indent of subparagraph one of Article 175 (2) (1) ECT would lose all meaning.

- Ultimately, the relationship between **Article 175 ECT** and **Article 71 ECT** – which represents a legislative competence in a particular policy field – has to be seen as one of equal footing.<sup>243</sup> It also involves legislative powers aimed at furthering different objectives in different issue areas,<sup>244</sup> without any subordination apparent. Article 175 ECT should therefore be seen as an **independent competence** equal to the legislative powers contained in other policy areas.
- Finally, the relationship between **Article 93 ECT** and **Article 71 ECT** requires clarification (with the latter being a legislative competence based in a specific policy area). There is as little evidence for any type of subordination in the Treaty as there is for Article 93 ECT and

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for a precedence of Article 175 (2) ECT *Jans/von der Heide*, *Europäisches Umweltrecht*, 52; *Lenz/Borchardt-Breier/Vygen*, Article 175, Annot. 8.

<sup>240</sup> With a different view, albeit regarding the legal situation under the SEA: *Breuer*, DVBl. 1992, 485 (494 *et seq.*); see also *Hilf*, NVwZ 1992, 105 (107 *et seq.*), who starts out by assuming a general primacy of Article 93 ECT, but then suggests a somewhat ambiguous distinction based on substantive powers.

<sup>241</sup> On this issue *Epiney*, *Umweltrecht in der EU*, 69 *et seq.*, who provides further references.

<sup>242</sup> Cf. on this issue *supra* Part 1, C. I. 1. a) bb).

<sup>243</sup> Cf. already *Epiney/Furrer*, *EuR* 1992, 369 (395 *et seq.*); likewise *Heselhaus*, *Abgabenhoheit*, 280; *Schwarze-Kahl*, Article 175, Annot. 72 *et seq.*; disagreeing *Calliess/Ruffert-Calliess*, Article 175, Annot. 16. The ECJ has apparently taken the view outlined here, cf. ECJ, Joined Cases C-164/97, C-165/97 (Parliament/Council), ECR 1999, I-1139, paras. 12 *et seq.*; ECJ, Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713, paras. 22 *et seq.*; ECJ, Case C-377/98 (Netherlands/Parliament and Council), ECR 2001, I-7079, paras. 10 *et seq.*

<sup>244</sup> The equal standing of Article 175 ECT and the legislative powers in substantive policy areas was already suggested by *Vorwerk*, *Umweltpolitische Kompetenzen*, 90 *et seq.*; apparently with the same conclusions *Müller*, *Möglichkeiten und Grenzen der indirekten Verhaltenssteuerung*, 84 *et seq.*; disagreeing *Middeke*, DVBl. 1993, 769 (770).



Article 175 ECT. At issue here are two legal bases in different policy areas (achievement of the internal market on the one hand, and transport policy on the other), and there is no indication that Article 93 ECT would take “precedence” as a legislative power in fiscal matters.<sup>245</sup>

Legal practice seemingly attests to this trend, as Directive 99/62 (Motorway Tolls),<sup>246</sup> which specifically contains taxation-related aspects, was based on Article 71 ECT. Article 93 ECT was also referred to, although that raises concerns given the divergent decision procedures (unanimity and codecision procedure).

It cannot be argued that the principle of unanimity in Article 93 ECT would be undermined if one followed the foregoing interpretation; for that principle is limited to the approximation of indirect taxes for the achievement of the internal market. That does not change the fact that fiscal measures may be based on legislative powers in other issue areas, provided the conditions for such action are met.

Thus, the different **legal bases** potentially available for an introduction of **user charges** stand on a “**level playing field**”, such that none is in any way subordinate to another.

#### bb.) Criteria for a Distinction *in casu*

This raises the question as to how different potentially applicable legal bases are to be demarcated in scope.<sup>247</sup> If the criteria used to this end are to be both feasible and compatible with the Treaty and its systematic structure, one must side with the ECJ<sup>248</sup> and assume that the applicable legal basis can only be determined through **objective** factors which are amenable to **judicial review**. Only thus may one preclude the Community legislator from deciding on the applicable legal basis of its own accord, thereby placing the determination of competences and applicable procedures within its discretion.

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<sup>245</sup> Likewise Schwarze-Kamann, Article 93, Annot. 12.

<sup>246</sup> OJ 1999 L 187, 42.

<sup>247</sup> Cf. the assessment of different views held in scholarly literature and the criteria applied by the ECJ at *Ullrich*, ZEuS 2000, 243 (255 *et sqq.*); *Amend*, Instrument der Umweltabgabe, 114 *et sqq.*; *Schröer*, Kompetenzverteilung, 97 *et sqq.*; *Kahl*, Umweltprinzip, 275 *et sqq.*; *Epiney/Möllers*, Freier Warenverkehr und nationaler Umweltschutz, 13 *et sqq.*

<sup>248</sup> See, *inter alia*, Case C-45/86 (Commission/Council), ECR 1987, 1493, para. 11; ECJ, Case C-62/88 (Greece/Council), ECR 1990, I-1527, para. 13; ECJ, Case C-155/91 (Commission/Council), ECR 1993, I-939, para. 7; ECJ, Case C-70/88 (Parliament/Council), ECR 1991, I-4529, para. 9; ECJ, Case C-187/93 (Parliament/Council), ECR 1994, I-2857, para. 17; ECJ, Joined Cases C-164/97, C-165/97 (Parliament/Council), ECR 1999, I-1139, para. 12 *et sqq.*; ECJ, Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713, paras. 22 *et sqq.*; ECJ, Case C-377/98 (Netherlands/Parliament and Council), ECR 2001, I-7079, annot. 10 *et sqq.*; ECJ, Case C-491/01 (The Queen/Secretary for Health, ex parte: British American Tobacco Ltd. *et al.*), ECR 2002, I-5463, paras. 94 *et sqq.*; see already ECJ, Case 68/86 (Great Britain/Council), ECR 1988, 855, paras. 4 *et sqq.*; ECJ, Case 131/86 (Great Britain/Council), ECR 1988, 905, paras. 11 *et sqq.*; ECJ, Case C-300/89 (Commission/Council), ECR 1991, I-2867, para. 10.

The subjective perception of legislative objectives by the Community legislator is thus ruled out as the sole criterion.<sup>249</sup> Likewise, exclusive reliance on the objective effects of a measure would also be at variance with the foregoing system of Community powers. For that would ultimately give priority to the legal powers contained in specific policy areas, given that these would always apply when a measure objectively touches upon the substantive ambit of such provisions. Article 93, 95 (1), and 175 ECT would then be relegated to a role of “catch-all” provisions, a status that could not be reconciled with their described equal footing with other legislative bases

More aptly, determination should occur with a view to the **centre of gravity of a measure**,<sup>250</sup> which in turn can be inferred by drawing on the content and the purpose of said measure. These criteria must be objectively identifiable against the respective measure, however, as the subjective intent of the Community legislator would otherwise become at least partly decisive and be subject to the objections outlined above. The centre of gravity of a measure depends both on its substantive content, that is: the **objective proximity to a specific issue area**, as well as its **(objectively discernible) purposes**.<sup>251</sup> Consideration of these two elements allows for a comprehensive appreciation of the content and scope of a measure. Ultimately, this approach thus requires a thorough assessment of the **regulatory ambit** and **objectives** of the legislative act in question. While this may incur difficulties and considerable uncertainties when distinguishing different legal bases *in casu*, frequently resulting in an ambiguous determination of the applicable legislative power, it is the only approach that ensures an equal standing of different legal bases as mandated by a wide interpretation of the internal market.<sup>252</sup>

Although this ultimately calls for an assessment of the regulatory substance and objective of each individual measure, amounting to reliance on the **circumstances *in casu***, certain criteria defined with a view to the premises and the system of the Treaty may be identified to guide the determination of the “centre of gravity” of a measure:

- Application of Article 93 ECT may not be solely based on the fact that a particular measure affects the **(production) costs accruing to an enterprise**, thereby affecting its competitiveness and operation in the internal market; after all, nearly all environmental policy measures have some form of repercussion on corporate expenses.
- Determination of the scope of Article 93 ECT may, however, draw on the relationship between that provision and the guarantee of fundamental freedoms: pursuant to Article 93 ECT, legal approximation has to serve the establishment of the internal market, which, in turn, is directly geared towards actual achievement of the fundamental freedoms. Adoption of Community legislation should thus help eliminate restrictions of the fundamental freedoms

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<sup>249</sup> With the same conclusion *Kahl*, Umweltprinzip, 283; *Middeke*, DVBl. 1993, 769 (774 *et seq.*).

<sup>250</sup> Likewise *Lenz/Borchardt-Breier/Vygen*, Article 175, Annot. 5 *et seq.*, and the case law of the ECJ, see the references in previous footnotes.

<sup>251</sup> Thus already *Epiney/Furrer*, EuR 1992, 369 (396 *et seq.*); holding a similar view *Kahl*, Umweltprinzip, 283 *et seq.*

<sup>252</sup> On this issue *supra* Part 1, C. I. 1. a) bb).

which cannot be countered directly through the freedoms themselves. Accordingly, it would seem appropriate to generally rely on **Article 93 ECT for measures relating to products** (provided, of course, that the objective lies in harmonising indirect taxes). Under those circumstances, after all, a direct and close connection to the establishment of the internal market exists; in case of doubt, the centre of gravity will be located there.

- Application of the “genuinely environmental” legislative basis laid down in **Article 175 ECT** cannot be solely based on the general relevance for environmental protection.<sup>253</sup> First, environmental protection is a “cross-sectoral” challenge,<sup>254</sup> with measures in of the policy areas also affecting the environment; second, different provisions in the Treaty suggest – in principle – an applicability of other legislative competences (also) to issues of environmental policy.<sup>255</sup> Accordingly, Article 175 ECT is, in effect, everything **but a conclusive legal basis** for measures of environmental law.
- When it comes to demarcating Article 93 and 175 ECT against **Article 71 ECT** as a legislative power set out within a specific policy area, the determination of the centre of gravity of a measure needs to take into account the significance of that measure in defining and implementing said policy. As soon as a secondary act of legislation can – or needs to – be considered an **integral element of the respective policy area**, it will have to be based on the specific legislative power for that policy. As such, the measure will then define and guide the conception of the affected policy, typically placing its centre of gravity in the same area, even if it was ultimately motivated by environmental considerations. The inclusion of specific legislative powers in different policy areas must also be understood as a way of providing the Community legislator with means<sup>256</sup> to implement coherent strategies.
- Conversely, **isolated measures of transport policy** that are not inseparably linked to the remaining elements of the common transport policy and largely pursue or touch upon objectives of another policy area may be based on the pertinent legislative powers of said policy areas, including – for our purposes – **Article 175 ECT**.
- The **decision procedures** stipulated by these different legal bases should generally **not affect** their demarcation.

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<sup>253</sup> See already ECJ, Case C-62/88 (Greece/Council), ECR 1990, I-1527, paras. 19 *et seq.*, where the Court emphasized that inclusion of a specific environmental competence in Article 175 ECT did not mean that all environmentally relevant measures had to henceforth be based on that provision. With a view to the foreign trade implications of the import restrictions for agricultural products originating in third states at issue, the Court considered Article 133 ECT to be the appropriate legal basis.

<sup>254</sup> Cf. with further references *Epiney*, Umweltrecht in der EU, 55.

<sup>255</sup> Article 95 (3) ECT and the “Integration Principle” set out in Article 6 ECT, in particular, bear mentioning.

<sup>256</sup> Generally and in particular by drawing on parallel procedures.

Statements to the contrary by the ECJ in the *Titanium Dioxide* case<sup>257</sup>, where the Court placed particular emphasis on an extensive implementation of the principle of democracy, are thus not convincing.<sup>258</sup> In the meantime, the ECJ has changed its practice: whereas it based its decision in Case C-155/91<sup>259</sup> solely on the centre of gravity of Directive 91/156/EEC amending Directive 75/442/EEC on waste,<sup>260</sup> concluding – after thorough analysis – that said measure primarily pursued objectives of environmental policy, and had only “ancillary” effects on the conditions of competition and trade. A similar line of argument was adopted by the Court in Case C-187/93 regarding Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community;<sup>261</sup> the Regulation in question primarily aimed at preserving, protecting and improving the quality of the environment and the protection of human health.

### 3. Conclusion and Summary: Case Studies on the Determination of the Relevant Legal Basis

Regarding the existence and applicability of Community legal bases for the **introduction of user charges on aviation and shipping**, it can be concluded that, aside from **Article 93 ECT**, **Article 71 (1) lit. d) ECT** and **Article 175 ECT** may apply. Reliance on **double- or triple** legal bases is **not permissible** under the criteria set out above, given differences in the procedural requirements and the admissibility of more stringent unilateral measures (*cf.* Article 176 ECT).

Determination of the legal basis is thus contingent on the **centre of gravity** of the measure in question, which, in turn, depends on the purpose and content of each individual measure and may thus only be identified *in casu* for a specific act of legislation and pursuant to the foregoing principles. Nonetheless, the principles set out in this section allow for identification of a set of **cases** covering the conceivable legal bases for measures available when introducing user charges.

#### a.) Product-related Measures

Environmental user charges related to **products** – in other words, imposed on certain products or their movement – will generally be closely linked with the internal market, given that they (also) essentially affect the achievement of free movement of goods and uniform competitive conditions, rendering a harmonisation of the fiscal burden relevant for the functioning of the internal market.

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<sup>257</sup> ECJ, Case C-300/89 (Commission/Council), ECR 1991, I-2867, paras. 20, 23.

<sup>258</sup> On this issue *Epiney*, JZ 1992, 564 (568 *et seq.*); *Everling*, EuR 1991, 179 *et sqq.* Further statements by the Court regarding the criteria when determining the applicable legal basis are, to say the least, ambivalent: for instance, reference to the integration principle in Article 6 ECT (Article 130r (2) (2) EEC) and the objective of a high level of environmental protection obligation set out in Article 95 ECT is hardly helpful in this context. For while it may certainly be inferred from these provisions that Article 175 ECT is not the only legal basis for measures of environmental policy, they still contain no indication as to how different relevant legal bases should be demarcated against each other, *cf.* already *Epiney*, JZ 1992, 564 (569).

<sup>259</sup> ECJ, Case C-155/91 (Commission/Council), ECR 1993, I-939, paras. 7 *et sqq.*

<sup>260</sup> OJ 1991 L 78, 32.

<sup>261</sup> ECJ, Case C-187/93 (Parliament/Council), ECR 1994, I-2857, paras. 17 *et sqq.*

Such a **product bearing** may be established through various ways. Due to systematic considerations, and following the case law on Article 90 ECT,<sup>262</sup> the determination should be based on whether a discernible relevance for products exists, resulting in a financial burden imposed on goods. Such a “connection” to goods can, for one, lie in the taxable event; in other words, the taxable event may be a certain product or its production, distribution or use.<sup>263</sup> Relevance for products can also arise from the respective definition of the calculation basis, for instance if the value or weight of a good is used as the reference value when determining the fiscal burden, as is the case with registration, storage and postal fees.

This results in a certain presumption for **Article 93 ECT** as the appropriate legal basis, not so much for the objectives pursued as for the objective centre of gravity of respective measures and their relevance for products. In any case, reliance on Article 93 ECT would not be precluded merely because the measure in question also seeks to further aims of environmental policy.

The relevance for the **internal market has to outweigh other considerations**, however; if that is not the case, Article 175 ECT will, instead, apply. If environmental policy objectives outweigh the promotion of the functioning of the internal market in a product-related measure, in other words, that measure may only be based on Article 175 ECT, given that its centre of gravity falls within the purview of Article 175 ECT.<sup>264</sup>

Such a “shifted” centre of gravity would, *inter alia*, occur in case of a measure including provisions on the expenditure of revenues for environmental purposes, especially since Article 93 ECT would not provide a suitable legal basis for such earmarking in the first place.<sup>265</sup>

Aside from the two foregoing legal bases, Article 71 (1) ECT may also apply, provided the respective measure forms an integral part of the pursuit of a certain policy objective, even when it also seeks to fulfil environmental policy objectives. Of decisive importance in this regard is the substantive relevance for transport policy. An inseparable connection to the overall conception of transport policy will, however, frequently be absent when it comes to product-related measures.

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<sup>262</sup> In depth and with further references *Epiney/Gruber*, Verkehrsrecht, 188 *et seq.*

<sup>263</sup> In case-law, see, e.g., ECJ, Case 112/84 (Humblot), ECR 1985, 1317, Annot. 13 *et seq.*; ECJ, Case 393/92 (Almelo), ECR 1994, I-1477; ECJ, Case C-213/96 (Outokumpu), ECR 1998, I-1777.

<sup>264</sup> This also appears to be the opinion held by the ECJ, at least when it comes to distinguishing Article 133 from Article 175 ECT, *cf.* ECJ, Opinion 2/00 (Cartagena Protocol), ECR 2001, I-9713; likewise *Breier*, RIW 1994, 584 (585); *Nettesheim*, EuR 1993, 243 (259); with a critical assessment relating to external competences, however, *Schwarz*, ZEuS 2003, 51 (65 *et seq.*); *Herrmann*, NVwZ 2002, 1168 (1173 *et seq.*), who primarily rely on the trade law character and would always allow for application of Article 133 ECT when a treaty has relevance for products and a trade-regulating character. When separating Article 95 I from 175 ECT, the ECJ assumes the existence of product-related rules when the respective measure is dominated by environmental considerations, for instance in the case of certain waste-law measures. *Cf.* ECJ, Case C-155/01 (Commission/Council), ECR 1993, I-939, Annot. 7 *et seq.*; ECJ, Case C-187/93 (Parliament/Council), ECR 1994, I-2857, Annot. 17 *et seq.* *Cf.* generally on the practice of Community bodies regarding Article 95 (1) ECT *Epiney*, Umweltrecht in der EU, 75 *et seq.*

<sup>265</sup> *Supra*, Part 1, C. I. 1. a) bb).

If one applies these criteria to user charges, which are at the centre of attention in this study, instruments linked to **fuel consumption** (notably mineral oil or kerosene taxes, but also the taxation of air and sea vessels as vehicles, possibly depending on the transport capacity or pollutant discharge) will generally result in the applicability of **Article 93 ECT**, given that the objective centre of gravity of such a measure is precisely aimed at harmonising these excise taxes; an added, (originally) even predominant environmental motive for such harmonisation does not change this outcome. As a rule, Article 175 ECT will not apply in such cases; the same can be said of Article 71 ECT, given that fuel taxes are unlikely to be an integral element of the common transport policy, inseparably linked to the other rules of that policy area.

This clearly shows how the substantive centre of gravity and the purpose of a measure, both determined objectively, can become separated; such cases require weighing the respective considerations, with the relevance of product-related excise taxes for the internal market regularly outweighing other aspects.

To the extent that the product bearing arises from a particular **basis of assessment** (as would conceivably be the case with fees imposed on the use of ports, for instance, when the value or weight of a good serves as the main point of reference for calculation of the fiscal burden), the relevance for the internal market no longer takes clear precedence over the relevance for other policy areas. Ultimately, thus, the centre of gravity of such a measure would be decisive; as evidenced by market conditions for the rendition of services by ports, to name but one example, the centre of gravity of such measures can rest with establishment of the internal market, but also with environmental or transport policy, depending on their actual design and primary purpose and effects.

#### b.) Charges for the Use of Transportation Routes or Infrastructures

Only in exceptional cases will **user charges** imposed on the **use of “transport routes”** (contingent on the duration of use) or **infrastructures** (contingent on the extent and/or timing of use) give precedence to the achievement of the internal market. As a rule, such measures will instead act as “prototypes” of environmental user charges by imposing a financial burden on the use of the environment as such. In line with the polluter-pays-principle,<sup>266</sup> thus, such measures will typically pursue **objectives of environmental policy**, as they impose a duty to “compensate” the use of a public good, aiming at lowered use as a result of (increased) prices – ultimately furthering the objectives of Article 174 (1) ECT. In such cases, **Article 175 ECT** will typically be the most suitable legislative power, unless an inseparable link to the fundamental tenets of Community transport policy can be demonstrated.

Drawing on the criteria set out above,<sup>267</sup> charges imposed on the use of infrastructures and transportation routes will commonly be based on **Article 175 (1) ECT** (which calls for application

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<sup>266</sup> On its significance in this context, see *Heselhois*, Abgabenhöhe, 184 *et seq.*

<sup>267</sup> Cf. Part 1, C. I. 1. b).

of the codecision procedure), rather than Article 175 (2) ECT and the unanimous vote required pursuant to that provision. Since these measures involve charges imposed on individualised benefits, they are unlikely to constitute measures “primarily of a fiscal nature”.

In this context, one might still question whether and to what extent provisions on the use of revenues collected through a user charge affect the centre of gravity of a measure. Whenever revenues are recycled into the general (state) budget or can accrue thereto, or are earmarked for environmental policy objectives, the centre of gravity is liable to remain with Article 175 ECT. A different assessment would apply when revenues are earmarked for other purposes, for instance for development co-operation. Such cases require an *in casu* determination: if an analysis of the measure reveals it to be primarily aimed at financing (public) tasks, the centre of gravity of that measure will shift to Article 93 ECT, a provision which does not grant the Community a power to specify the application of revenues.<sup>268</sup> Accordingly, the respective measure will not be covered in its entirety by the legislative powers conferred on the Community. This outcome is by no means mandatory, however: if revenues should be merely used for a “sensible purpose”, with environmental policy considerations simultaneously calling for a specific measure which needs to be adopted, there are sufficient reasons to assume that such measures may then be based on Article 175 ECT, given that the financing purpose is likely to be secondary to the primary purpose – *i.e.*, that of protecting the environmental good by reducing unsustainable forms of use. Still, the general absence of a legislative power for other purposes – such as development co-operation – would remain, as they are not covered by Article 174 ECT.<sup>269</sup>

As a side comment, it may be worth noting that Community powers on the harmonisation of charges do not generally include the power to regulate the expenditure of revenues; instead, that is a question that needs to be addressed separately. Whereas the expenditure of revenues for environmental purposes is generally possible under Articles 174 (1), 175 ECT, other applications – aside from budgetary aspects<sup>270</sup> – require careful determination of whether the Community actually has the power to decide on the intended purpose.

In the area of development co-operation, it appears more than doubtful whether Article 179 ECT – which calls for the codecision procedure – may serve as a suitable legal basis for the earmarking of revenues collected by the Member States (primarily for a different purpose, in this case environmental protection); a more persuasive argument would deny this possibility, given that the Community could thus transfer revenues to any policy area by harmonising taxes without possessing an explicit legal power to that effect – ultimately undermining the principle of conferred powers.

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<sup>268</sup> *Supra* Part 1, C. I. 1. a) bb).

<sup>269</sup> See above, Part 1, C. I. 1. b).

<sup>270</sup> On this issue, see Part 3, C. III.

### c.) Emissions Charges

**Emissions charges** – in this context, primarily as a CO<sub>2</sub>-levy – are likely to have their centre of gravity in the pursuit of **environmental policy objectives**, given that they are assessed with a view to the amount of pollutants discharged and aim at protecting the affected environmental goods. The undeniable economic effects of such a charge – notably the ensuing harmonisation of market conditions – will typically play only a subordinate role. Objections against this understanding cannot be based on the fact that emissions charges – especially when implemented as a CO<sub>2</sub>-levy – act like fuel taxes for all practical purposes, thus potentially calling for application of Article 93 ECT as a legal basis. While such a view might have the merit of accounting for the practical effects of user charges, it stands at variance with the foregoing principles governing the demarcation of legal bases, notably the substantive centre of gravity of the measure and, in particular, its objective purpose, calling for comprehensive appreciation of the measure and all its elements. In the case of emissions charges, which seek to impose a price on the use of environmental goods and thus ultimately aim at limiting their use so as to protect them, the centre of gravity will generally rest on contents and objectives of environmental law and policy, a fact that remains unchanged even when pursued by way of fiscal measures.

Having said that, it remains unclear whether Article 175 (1) or Article 175 (2) ECT then applies.

Seeking to introduce a CO<sub>2</sub>/energy tax,<sup>271</sup> the Commission relied on Article 175 (2) ECT (as well as Article 93 ECT, an approach that seems implausible for the foregoing reasons<sup>272</sup>), without providing any form of justification. It should be noted, moreover, that the planned CO<sub>2</sub>/energy tax – which will hardly be introduced in the near future – is not a user charge in the sense analysed here.

If a **CO<sub>2</sub> levy is merely applied to certain transport carriers**, the view held here would suggest basing it on **Article 175 (1) ECT**: its proximity to user charges is evident, as it imposes a duty to compensate the use of a common good, with the level of compensation defined relative to the emissions of CO<sub>2</sub>. As such, therefore, the resulting levy is not primarily of a fiscal nature.

The legislative competences of specific policy areas may also be drawn upon; in the event of overriding environmental policy aims, however, they can only apply to the extent that measures based thereon become integral elements of the respective policy – for instance, transport policy. This will hardly be the case with emissions charges.

### d) Conclusion

Altogether, it can be affirmed that “**product-related user charges**” can generally be based on **Article 93 ECT** (requiring a unanimous Council decision) due to the strong objective connection with the internal market; other **conceivable user charges**, in turn, will commonly have their centre

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<sup>271</sup> Cf. the revised Commission proposal COM (95) 172 final.

<sup>272</sup> See above, Part 1, C. I. 2. a).



of gravity in the area of environmental policy and thus be primarily based on **Article 175 ECT**. Due to the strong environmental bearing of such measures, this provision will also regularly “displace” Article 71 (1) lit. d) ECT. If user charges are effectively designed as compensation for services rendered, the requirements of Article 175 (2) ECT will typically not be met, thus leading to an applicability of **Article 175 (1) ECT** (codecision procedure). Finally, it should be noted that, from the point of view of legislative competences, **earmarking the revenues** of user charges for purposes other than environmental protection is not unproblematic. Article 175 ECT – unlike Article 93 ECT – is a suitable legal basis for the earmarking of revenues for environmental purposes, the latter being amenable to a wide interpretation in accordance with Article 174 ECT. Accordingly, Article 175 ECT can also be used to regulate the funding of environmental projects in developing countries.

Should the Community legislator therefore choose to base a user charge on Article 175 ECT, a choice that would already seem expedient given the codecision procedure it entails, revenues should preferably be earmarked for environmental projects, in which case even measures with a direct product bearing would still have their centre of gravity within the ambit of Article 175 ECT.

## II. On the Requirements of the Subsidiarity Principle (*Epiney/Hofstötter*)

While the principles discussed up to now support a Community power to adopt measures resulting in the introduction of a (specific type of) user charge, the Community can only exercise this power observing the requirements set out by the so-called **subsidiarity principle** (Article 5 (2) ECT), which is set out in the EC Treaty as a **rule governing the exercise of powers**.<sup>273</sup>

Given that the Community powers at issue here are not exclusive powers, the **scope** of this principle is affected.<sup>274</sup>

Article 5 (2) ECT renders Community action in its areas of competence conditional on a **twofold requirement**: for one, the objectives of the proposed action may not be sufficiently achieved by the Member States, and, by reason of the scale or effects of the proposed action, they also have to be

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<sup>273</sup> Consideration must, furthermore, be given to the principle of proportionality (Article 5 (3) ECT), a requirement which will not be further analysed here. *Cf.* in connection with the fundamental freedoms and fundamental rights *infra*, Section D. See also generally on this principle with regard to environmental user charges *Heselhaus*, *Abgabenhoheit*, 314 *et seq.*

<sup>274</sup> *Freitag*, *Europarechtliche Anforderungen*, 171 *ff.*; *Amend*, *Das Instrument der Umweltabgabe auf Communitysebene*, 2001, 69 *et seq.*; *Lenaerts/van Nuffel*, *Constitutional Law*, Annot. 5-022; *cf.* also *von Borries*, *EUDUR I*, § 25, Annot. 26. With an extensive analysis of exclusive Community powers relating to environmental charges *Heselhaus*, *Abgabenhoheit*, 286 *et seq.*

better achieved by the Community. Both conditions have to be met cumulatively before action can be taken at the Community level.<sup>275</sup>

The **Protocol on the Application of the Principles of Subsidiarity and Proportionality** sets out guidelines for the determination of whether both conditions are met.<sup>276</sup> For instance, consideration should be given to whether the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States. Also, an assessment should be made as to whether actions by Member States alone would conflict with the requirements of the Treaty, such as the need to avoid disguised restrictions on trade, or would otherwise significantly damage the interests of Member States. And finally, action at Community level should produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

While the principle of subsidiarity is, without doubt, **legally binding**, and its observance subject to judicial review by the ECJ, the criteria set out in Article 5 (2) ECT have remained fairly vague, despite various attempts at specification.<sup>277</sup> At any rate, the Community legislator is left with a **wide scope of discretion**. For instance, the ECJ also presumes the binding nature of the subsidiarity principle, but affords the Community legislator a substantial margin of discretion, limiting itself to a “cursory” review of challenged secondary legislation with a view to the reasons provided for its justification;<sup>278</sup> a merely cursory assessment is made as to whether the objective specified in the reasons can be better achieved by the Community due to the scale of the measure,<sup>279</sup> with – unsurprisingly – no violation affirmed to date. The – largely procedural – innovations contained in the draft Constitution would hardly curtail this ample discretion,<sup>280</sup> although this should not be understood as putting to question the significance of these mechanisms.

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<sup>275</sup> Protocol (No. 30) to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, OJ 1997 C 340/105, para. 5. Cf. also *Freytag*, *Europarechtliche Anforderungen*, 175 with further references.

<sup>276</sup> Protocol (No. 30) to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, para. 5.

<sup>277</sup> Cf. with further references *Epiney*, *Umweltrecht in der EU*, 87 *et seq.*

<sup>278</sup> Para. 4 of the Protocol (No. 30) to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality specifies the general requirement of a reasoning for secondary legislation, stating that, for any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality.

<sup>279</sup> Cf. ECJ, Case C-377/98 (Netherlands/Parliament und Council), ECR 2001, I-7079, paras. 30 *et seq.*; ECJ, Case C-84/94 (Great Britain/Council), ECR 1996, I-5755, para. 47; ECJ, Case C-491/01 (The Queen/ Secretary for Health, ex parte: British American Tobacco Ltd. *et al.*), ECR 2002, I-11453, paras. 181 *et seq.* On the case-law of the ECJ *Calliess*, *EuGRZ* 2003, 181 (186 *et seq.*).

<sup>280</sup> Relating hereto *Oppermann*, *DVBl.* 2003, 1165 (1171).

Against this backdrop, an attempt to ascertain the relevance of the subsidiarity principle as an “obstacle” to user charges imposed at the Community level or through Community legislation will yield two insights:

- the (over-) use of global environmental goods is a **global problem** that clearly transcends the national boundaries of Member States. As such, therefore, it appears highly doubtful whether Member States could achieve the intended protection “satisfactorily” through domestic measures, particularly since it is equally unclear whether Member States would be willing to proceed unilaterally.<sup>281</sup>
- Regulation of the use of these global environmental goods through a user charge would also appear to be the “better” solution, in particular with a view to the **functioning of the internal market**, given that divergent measures adopted by the Member States are more likely to result in distortions of competition.

All in all, it is clearly not conceivable that Community measures on the introduction of a user charge would go beyond the **discretion afforded to the Community legislator**,<sup>282</sup> even though only an *in casu* assessment can, of course, provide a definite answer to this question.

Whether – and to what extent – provisions on the **use of revenues** can be reconciled with the principle of subsidiarity is a more difficult question. Ultimately, the answer will depend on the application mandated for revenues and the design of the respective rules. In any case, it can be surmised that, given the absence of sufficient political will in some Member States, achievement of the environmental objectives of the revenue use may be more likely on the Community level. Accordingly, provisions on the use of revenues may be – in principle – consistent with the requirements of the principle of subsidiarity, at least insofar as a substantive connection to the reasons for collecting the user charge remains.<sup>283</sup>

### III. Budgetary Aspects (*Ecologic*)

Given that the introduction of a user charge necessarily involves the **collection, administration and expenditure** of substantial revenues, **budgetary provisions** can acquire relevance alongside the rules in sectoral policies. For Community principles of budget law to apply, however, certain

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<sup>281</sup> Whether the “satisfactory” achievement of objectives on the level of Member States relates to the “abstract ability” of Member States or to “concrete action” is subject to debate. Better reasons support the latter alternative. On this problem *Epiney*, *Umweltrecht in der EU*, 88, with a summary of the discussion.

<sup>282</sup> More sceptical: *Heselhaus*, *Abgabenhoheit*, 295 *et seq.*, albeit based on an understanding of the discretion left to the Community legislator which is significantly curtailed as opposed to the case-law of the ECJ. See also the reasoning by *Freytag*, *Europarechtliche Anforderungen an Umweltabgaben*, 174 *et seq.*, who (likewise) seems to assume a wide discretion for the Community legislator.

<sup>283</sup> On this issue, see the earlier section on the distribution of powers, *supra*.

conditions have to be met regarding the collection and use of user charges. In principle, the participation of the European Community could be confined to the mere definition of general **framework provisions** implemented by the Member States in the course of their – otherwise independently executed – collection and administration of revenues.<sup>284</sup> In such a scenario, the revenues accruing from a user charge would remain within the purview of Member States, removed from access by the Community; budget rules of the Community would not apply, but rather the budget and financial provisions of the respective Member State.<sup>285</sup>

If collection of the user charge by Member States is to occur as uniformly as possible and centrally guided, however, it would stand to reason that the Community should be given a wider mandate. To that end, the power to collect and apply revenues could be directly conferred on the supranational level. Inasmuch as the European Community can collect and apply a user charge as part of its **own responsibilities**, the legal framework governing the **Community budget** needs to be observed. Community budget law thus only becomes relevant once the Community implements the user charge itself. The legal evaluation of a user charge under budgetary law, in turn, depends on its legal characterisation and whether it can be included in the Community budget plan as “own resources”, possibly subject to a maximum limit.

As for the **enforcement** of a user charge, it makes no difference whether collection and administration occur **directly** through Community bodies or **indirectly** and decentralised by the Member States, provided the Community retains the authority to decide on the design and use of revenues. With a view to the organisational implementation, however, there has been some debate as to whether Community bodies can have the prerogative of deciding on the applicable procedure.<sup>286</sup> Due to the enforcement challenges incurred by a user charge on global environmental goods and the limited enforcement capacities of Community bodies, collection of revenues is only feasible through the Member States. As a result, the foregoing question will not be further dealt with.

Additionally, a determination is needed as to the compatibility of a separate **special fund** with the budget rules of the European Community. On all foregoing issues, the Treaty establishing the European Community already contains a number of precepts in Articles 268 *et seq.* ECT. GV. Likewise, secondary legislation contains pertinent requirements, including the Council Decision on the European Communities’ own resources<sup>287</sup> and the Financial Regulation,<sup>288</sup> which primarily

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<sup>284</sup> These include, for instance, excise and turnover taxes as well as other indirect taxes of Member States harmonised pursuant to Article 93 ECT; an example of this approach is, for instance, Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283 of 31 October 2003, 51 *et seq.*

<sup>285</sup> See on this issue regarding Germany Part 3, D.

<sup>286</sup> In depth on this controversy *Heselhaus*, Abgabehoheit der Europäischen Gemeinschaft in der Umweltpolitik, 322 *et seq.* with further references

<sup>287</sup> Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities’ own resources, OJ L 253/42.

<sup>288</sup> Council Regulation (EC, Euratom) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248/2.

governs the establishment and implementation of the budget. This legal framework is the starting point for the following analysis.

### 1. *Collection and Administration of User Charges by the European Community*

Budgetary requirements can significantly constrain the design of a user charge collected at the Community level. Based on the Community legislative powers affirmed earlier,<sup>289</sup> different forms of public charges are conceivable at the Community level. A prerequisite for the applicability of its budget provisions, however, is that the European Community possess the authority to independently collect, administer and spend a user charge on global environmental goods. Only if these conditions are met, the analysis may proceed to whether revenues arising from such a charge should be collected by the European Community and count against its budget. The following subsections will address these questions in greater detail.

#### a.) Collection by the European Community

The **power to impose a user charge** goes hand in hand with the right to define the ensuing compensation duty and its amount, including, in particular, the entitlement to payment which ultimately results in revenues.<sup>290</sup> Generally, the Community only plays a **subordinate role** to Member States when it comes to the collection of taxes and other charges. Community action in this area is limited to the **powers conferred** by the Treaty.<sup>291</sup> Unlike the legal systems of Member States, which contain originary legislative powers for taxes and other charges, the Community neither possesses a comprehensive financial constitution nor a stringent fiscal doctrine.<sup>292</sup>

Instead, Community law uses the concept of charges in numerous provisions, without being able to draw on a **legal definition**.<sup>293</sup> As a result, both case-law and legal scholarship have largely backed the view that charges denote “**unilaterally imposed pecuniary charges**”<sup>294</sup> introduced by the **public administration**,<sup>295</sup> covering different manifestations such as taxes, customs, fees,

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<sup>289</sup> On this issue, see Part 3, C. I.

<sup>290</sup> *Heselhaus*, Abgabenhoheit der Europäischen Gemeinschaft in der Umweltpolitik, 154.

<sup>291</sup> *F. Kirchhof*, in Rengeling (ed.), EUDUR, Vol. 1, § 38, Annot. 32.

<sup>292</sup> *Kreibohm*, Der Begriff der Steuer im Europäischen Gemeinschaftsrecht, 37.

<sup>293</sup> *Wasmeier*, Umweltabgaben und Europarecht, 13 *et seq.*

<sup>294</sup> On this conceptualisation ECJ, Case 24/68 – *Italian Statistics Fee*, ECR 1969, 193 (201); Case 87/75 – *Bresciani*, ECR 1976, 129, head note 1.

<sup>295</sup> ECJ on Article 90 ECT, Case 20/76 – *Schöttle*, ECR 1977, 247 (258 *et seq.*); Case 45/75 – *REWE*, ECR 1976, 181 (197); Case 4/81 – *Andresen*, ECR 1981, 2835 (2850).

contributions and special charges.<sup>296</sup> According to the European Court of Justice and its case-law, the **use of revenues** is not decisive for this classification.<sup>297</sup> The provisions of the Treaty, notably the fiscal provisions in Articles 90 *et seq.* ECT, allow for identification of several types of charges.<sup>298</sup> Aside from fees and contributions imposed in return for the use of public facilities or services, taxes and fiscal charges as well as a wide category of “parafiscal charges” – which do not accrue to the general budgets – are covered by the concept of charges.<sup>299</sup>

The European Court of Justice has applied this generic term both to Member State charges as well as Community charges. No distinction has occurred at the conceptual stage, at any rate. Given the patchy legal framework for fiscal measures by the Community, the **financial and budgetary principles of Member States** tend to be more influential at the Community level compared to domestic precepts in other policy areas.<sup>300</sup> Still, the substance of concepts set out in Community law has to be generally interpreted with a view to the overall *acquis*, not only because the latter is independently valid, but also because of the imperative of coherent implementation.<sup>301</sup> Accordingly, the European Court of Justice has not referred to domestic terminology in the Member States when classifying different types of charges.<sup>302</sup>

Although European Community law thus refers to different types of charges, the conditions for Community action in this area have not been conclusively clarified. This applies, in particular, to user charges in the environmental arena, where the requirements imposed on the collection and expenditure of such charges are **not explicitly** specified.<sup>303</sup> Instead, the power to introduce such a charge must be drawn from the general powers set out in primary Community law, with consideration also given to Article 6 ECT (given that user charges on global environmental goods are at issue) that calls for an integration of environmental protection requirements in all policies. Legislative competences applicable to user charges have already been identified at length in an earlier section.<sup>304</sup>

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<sup>296</sup> Wasmeier, Umweltabgaben und Europarecht, 14; see also Heselhaus, Abgabenhöhe der Europäischen Gemeinschaft in der Umweltpolitik, 34 with further references.

<sup>297</sup> ECJ, Case 7/68, ECR 1968, 633 (643); Case 29/72, ECR 1972, 1309 (1318).

<sup>298</sup> The multiplicity of charges currently applied at the Community level cannot be described in detail here; for an overview, see Lienemeyer, Die Finanzverfassung der Europäischen Union, 112 *et seq.*; Heselhaus, Abgabenhöhe der Europäischen Gemeinschaft in der Umweltpolitik, 50 *et seq.*; Wasmeier, Umweltabgaben und Europarecht, 14 with further references.

<sup>299</sup> On this concept ECJ, Case 78-83/90 – *Compagnie Commerciale de l'Ouest*, ECR I-3899 (3901); see also Heselhaus, Abgabenhöhe der Europäischen Gemeinschaft in der Umweltpolitik, 67 *et seq.* with further references.

<sup>300</sup> Schoo, in Schwarze (Hrsg.), EU-Kommentar, Art. 268 Annot. 10.

<sup>301</sup> ECJ, Case 44/79 – *Hauer*, ECR 1979, 3724 (3744).

<sup>302</sup> ECJ, Case 7/68, ECR 1968, 633 (643).

<sup>303</sup> See already Schröder, in P. Kirchhof, Umweltschutz im Chargin- und Steuerrecht, 88.

<sup>304</sup> See above, Part 2, C. I.

Despite systematic concerns, a number of scholars have supported the view that these provisions confer no **legislative power** on the Community to introduce environmental charges of its own, the revenues of which would directly accrue to its budget.<sup>305</sup> According to these views, the introduction of new Community taxes supposedly disrupts the institutional balance in Community financing and violates the principle of democracy by shifting fundamental Member State prerogatives to the Community without an explicit mandate in the Treaty.<sup>306</sup> Accordingly, the Community is denied the authority to “invent” new taxes. Instead, it is supposedly limited to **harmonising** environmental taxes of its Member States, a prerogative which may only be exercised once several Member States have implemented different rules on the same category of charge. Harmonisation should then be limited to ensuring uniform competitive conditions and a high level of environmental protection, but not seek achievement of identical provisions.<sup>307</sup>

Critics have countered that the Community has introduced **sectoral charges** in a variety of policy areas, ensuring their collection and administration.<sup>308</sup> Such sectoral charges do not constitute resources in the sense of Article 269 (2) ECT; rather, they are charges introduced within the ambit of substantive Community powers.<sup>309</sup> They include production and storage levies, additional or compensatory amounts on agricultural products<sup>310</sup> as well as levies imposed in the coal and steel sector.<sup>311</sup> The European Court of Justice has repeatedly confirmed the **legal admissibility** of such charges collected within the substantive ambit of a Community policy and used to finance the latter.<sup>312</sup> In a judicial opinion, it also upheld the legality of a charge in the transport sector to establish a laying-up fund for inland waterway vessels.<sup>313</sup>

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<sup>305</sup> See, for instance, *F. Kirchhof*, in Rengeling (ed.), EUDUR, Vol. 1, § 38, Annot. 33.

<sup>306</sup> On this discussion *Freytag*, *Europarechtliche Anforderungen an Umweltabgaben*, 140 *et seq.*

<sup>307</sup> See, for instance, *F. Kirchhof*, in Rengeling (ed.), EUDUR, Vol. 1, § 38, Annot. 33.

<sup>308</sup> See generally *Lienemeyer*, *EuR* 1998, 478 (490 *et seq.*); *Freytag*, *Europarechtliche Anforderungen an Umweltabgaben*, 137.

<sup>309</sup> *Freytag*, *Europarechtliche Anforderungen an Umweltabgaben*, 146.

<sup>310</sup> The formerly imposed coresponsibility levies on milk and cereals, which were not agricultural levies pursuant to Article 2 (1) lit. a of Council Decision 2000/597/EC, are frequently cited as examples, see *Bieber*, in von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar*, 6<sup>th</sup> ed., Vol. 4, Article 269 Annot. 38; in this context, see also the production levies on the production of sugar under Articles 15 *et seq.* of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector, OJ L 178/1, which is intended to secure the self-financing of the sugar sector and imposes financial responsibilities by way of levies assessed against producers.

<sup>311</sup> See Article 49 of the – no longer valid – Treaty establishing the European Coal and Steel Community (ECSC).

<sup>312</sup> See ECJ, Case 138/78 – *Stölting/Hauptzollamt Hamburg – Jonas*, ECR 1979, 713, para. 9; Case 265/87 – *Schröder Kraftfutter/Hauptzollamt Gronau*, ECR 1987, 2237, para. 7.

<sup>313</sup> ECJ, Opinion 1/76 – *Laying-up Fund*, ECR 1977, 741 para. 5.

Since the decision procedures under substantive powers often deviate from the strict requirement of unanimity under Article 269 subpara. 2 ECT, however, the introduction of Community charges on another basis is occasionally rejected for circumventing the procedure in Article 269 subpara. 2 ECT.<sup>314</sup> At any rate, advocates of this view contend, the revenues thus achieved would have to be limited to a small side-income.<sup>315</sup> In a decision on the co-responsibility levy on cereals imposed under Article 37 ECT, however, the European Court of Justice explicitly stated that, “**regardless of the amount of the levy**”, it had found “an appropriate and adequate legal basis” in the respective policy area.<sup>316</sup>

Under this adjudication practice of the European Court of Justice, the legality of such measures is conditional on their **expediency** and **effectiveness**; given the **discretionary powers** afforded to the Council, however, only a “patently unsuited” measure would provide sufficient grounds to call into question its admissibility.<sup>317</sup> The level of the rate of a charge also has to be **proportionate** in relation to the objectives it pursues.<sup>318</sup> The Court as justified its case-law with the Community powers conferred by the Treaty to make use of charges as an instrument within its substantive policies.<sup>319</sup>

User charges on aviation and shipping seek to further **environmental objectives**, which are recognised by Community law as an independent task.<sup>320</sup> Introduced as a levy within a substantive policy, thus, a user charge on global environmental goods would primarily appear feasible within the ambit of **Community environmental policy**. The required **bearing** on environmental protection can be achieved by various means, for instance by designing it as a levy guiding the behaviour of payers (as a guidance charge), but also by funding measures of environmental protection (as a financing charge) or compensating environmental damage (compensation charge). Another conceivable option would be to link the charge to **consumption** of an **environmental good** (user charge in the narrow sense),<sup>321</sup> again resulting in a guidance effect on behaviour.<sup>322</sup>

The **purpose** of such user charges will typically consist in guiding human behaviour by defining a price for the use of vulnerable environmental goods, notably the atmosphere and the High Seas.<sup>323</sup>

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<sup>314</sup> Breuer, DVBl. 1992, 485 (496).

<sup>315</sup> Hilf, UTR 1992, 121 (135).

<sup>316</sup> ECJ, Case 265/87 – *Schröder Kraftfutter/Hauptzollamt Gronau*, ECR 1989, 2237, para. 9.

<sup>317</sup> ECJ, Case 138/78, ECR 1979, 713 – *Stölting/Hauptzollamt Hamburg – Jonas*, para. 7.

<sup>318</sup> ECJ, *ibid.*

<sup>319</sup> Lienemeyer, Die Finanzverfassung der EU, 121; cf. on the EECT *Hilf*, who refers to special charges based on “accessory substantive powers” (*sachkompetenzannexe Sonderabgaben*), UTR 1992, 121 (135).

<sup>320</sup> See already ECJ, Case 240/83 – *ADBHU*, ECR 1985, 531 para. 13; nowadays in the ECT in Articles 2 and 174 ECT.

<sup>321</sup> On this issue at length *Meßerschmidt*, Umweltabgaben als Rechtsproblem, 36.

<sup>322</sup> *Wasmeier*, Umweltabgaben und Europarecht, 30 *et seq.*

<sup>323</sup> If, for once, the generation of revenues is the main purpose of a user charge, reference may also be made to the behavioural guidance effect towards more sustainable behaviour patterns resulting from its collection to establish the required environmental link.



As such, they serve to achieve substantive aims of Community environmental policy. Although different design options of user charges on environmental goods may differ substantially in their environmental policy effects, there is no reason to doubt their general **expediency** and **effectiveness** in achieving environmental policy objectives and raising (earmarked) revenues through a price on environmentally detrimental behaviour. Given the environmental threats arising from the use of airspace and the High Seas, user charges are also likely to be suited, necessary, and appropriate, with the ensuing burden proportionate to their objective. No equally effective, but less constraining measures are available; indeed, economic incentives such as user charges afford a certain flexibility to take into account individual cost-benefit-calculations. In principle, therefore, the requirements set out by the European Court of Justice should be met by a suitably designed user charge.

Incidentally, this conclusion applies to **all conceivable design options** for user charges on global environmental goods, notably to user charges imposed on emissions, fuels, use of certain facilities such as airports and seaports, as well as tickets. While these exert different guiding effects on environmentally relevant behaviour in practice, with staggered charges generally guiding behaviour more strongly than flat charges, and while a variety of other influential factors exist, such as the price elasticity of demand and the feasibility of evasive action, their general expediency and effectiveness as measures of environmental policy **cannot** be questioned. Only user charges designed in a way that raises doubts as to their effectiveness, for instance by imposing too low rates, would prove inadmissible. Given the judicial practice of the European Court of Justice, that would, at best, apply to symbolic user charges. In conclusion, thus, the **user charge level** may not be so low as to exert negligible guidance effects from the point of view of environmental policy; nor may it yield revenues which are so low that their expenditure does not allow for funding of environmental projects. These requirements already arise from the chosen legal basis.

Irrespective of their design, all user charges generate revenues which may be used for particular purposes. Different such **purposes** are conceivable.<sup>324</sup> If the user charge is introduced as a levy within the framework of Community environmental policy, the foregoing case-law will only allow for expenditure of revenues within that substantive policy to achieve the objectives set out therein, in other words: for purposes of environmental protection. A user charge introduced at the Community level as a environmental policy charge would preclude the application of revenues to purposes other than environmental protection, even if its collection already exerts a substantial guiding effect towards more sustainable patterns of behaviour.

If the revenues of a user charge should accrue to other purposes, such as funding of **development co-operation**, its collection and administration by the European Community cannot be based on the legal basis contained in Community environmental policy. In the event of such a designation of revenues, the legal basis for the introduction of the user charge would have to be drawn from the respective policy area and the user charge be expedient and effective in achieving the substantive objectives of that policy. Invariably, however, user charges on global environmental goods will have an environmental bearing, thereby rendering such expediency and effectiveness in the achievement of other policy objectives unlikely. After all, the proceeds of such user charges will hardly ever be used in such a manner as to clearly outweigh the environmental policy benefits arising from the behavioural changes they induce. In other words, the inevitable guidance effects of user charges imposed on global **environmental** goods will rarely be entirely superseded by the subsequent application of revenues, with the act of collecting the user charge – intentionally or coincidentally – always promoting an environmental policy objective. If nothing else, application of revenues to other purposes will then compromise the achievement of uniform objectives. As a result, one is faced with difficult, often intrinsically political value judgements. At the very least, when revenues of a user charge on global **environmental** goods are used for purposes other than environmental protection, their comprehensive assessment must demonstrate that, in their entirety, the achievement of said other purposes still predominates. Clearly, then, the introduction and

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See above, Part 1, Section C. II.

expenditure of a user charge within the purview of Community environmental policy and based on the powers conferred by that policy are subject to less legal uncertainty.

Even when revenues are used for environmental protection measures, they will not benefit only those **liable to payment of the user charge**, unless such measures are exclusively adopted within the area of aviation and shipping. Scholars have occasionally held that revenues from an environmental user charge must always benefit those subject to payment, for instance by accruing to a fund or financing measures benefiting the **interests of payers**.<sup>325</sup> This view is not convincing, given that neither Community rules nor the case-law of the European Court of Justice require such a connection; instead, it has its origins in the financial rules set out by the German constitution,<sup>326</sup> and cannot, thus, be simply applied at the Community level. As such, thus, it can be challenged on systematic grounds, given that legal doctrines recognised by individual Member States cannot be directly translated to the Community level.<sup>327</sup>

#### b.) Expenditure of Revenues by the European Community

As the preceding section showed, the Community can choose to introduce environmentally motivated user charges under **its own responsibility**. Accordingly, the question arises as to how the **expenditure of revenues** can be reconciled with Treaty provisions on the Community budget.

In a first step, an assessment has to be made as to whether proceeds of a user charge form part of the so-called **“own resources”** of the Community. Under Article 269 subpara. 1 ECT, the budget shall be financed wholly from own resources without prejudice to “other revenue.”<sup>328</sup> The position of the European Community and its financial independence *vis-à-vis* the Member States is clearly contingent on the ability to raise own resources.<sup>329</sup> Such resources are **fiscal revenues** accruing directly to the Community to finance its budget, and they require no further decisions by the authorities of Member States.<sup>330</sup> They are governed by Community law and are thus removed from the autonomy of Member States. Instead, Member States are under an obligation to grant the Community access to payments within the framework established by the budget plan.

Pursuant to Article 269 subpara. 2 ECT, more detailed provisions on the collection of own resources are to be adopted through a **special procedure**. On 29 September 2000, the Council adopted the fifth Decision on the system of the

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<sup>325</sup> Schröder, in P. Kirchhof, *Umweltschutz im Abgaben- und Steuerrecht*, 95.

<sup>326</sup> See below, Part 2, D. I. 3. b.)

<sup>327</sup> Freytag, *Europarechtliche Anforderungen an Umweltabgaben*, 150.

<sup>328</sup> This source of revenues will be addressed again at the end of this section.

<sup>329</sup> On the collision of interests between the Community – which is entitled to revenues – and the Member States *Vogel/Rodi*, *Probleme bei der Erhebung von EG-Eigenmitteln aus rechtsvergleichender Sicht*, 21 *et seq.*

<sup>330</sup> See, generally, *Reister*, *Budget und Finanzen der Europäischen Gemeinschaften*, 29 *et seq.*; *Strasser*, *Die Finanzen Europas*, 123 *et seq.*

European Communities' own resources,<sup>331</sup> which has been in force since 1 January 2002.<sup>332</sup> It does not constitute an instrument of derived legislation, but is rather adopted by the Member States unanimously and supplements the Treaty.<sup>333</sup> As such, it is commonly considered Community legislation with the effect of primary Community law.<sup>334</sup> Only such Community revenues may be considered own resources which accrue to it on the basis of this decision.<sup>335</sup>

Under Article 2 (1) of the decision on the system of the European Communities' own resources, the latter shall primarily consist of **four types of income**, notably:

- payment duties imposed within the framework of the common agricultural policy,
- customs tariff duties,
- income from VAT,
- and a rate determined pursuant to the GNP of Member States.

The introduction of a user charge on aviation and shipping is unlikely to fall within these categories as listed in Article 2 (1) of Decision 2000/597/EC, given that environmental user charges would neither constitute agricultural levies, customs tariffs, VAT or a rate of Member States' GNP.<sup>336</sup> Under Article 2 (2) of said decision, however, other own resources entered in the budget of the European Union can be "revenue deriving from **any new charges** introduced within the framework of a common policy." In other words, such income includes all Community revenues obtained on a legal basis other than Article 269 subpara. 2 ECT, or – essentially – an independent source of funding.<sup>337</sup> As a category of own resources, only these would appear to accommodate the proceeds of a user charge on aviation and shipping.

In that case, the revenues accrued to the general budget of the Community, placing the decision on their **expenditure** in the hands of the budgetary legislator. Pursuant to Article 8 (1) of Decision 2000/597/EC, the latter are collected by the Member States for the Community.<sup>338</sup> Under Article 2

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<sup>331</sup> Currently Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources, OJ L 253/42.

<sup>332</sup> On the evolution of EC/EU-budgetary policy *Lienemeyer*, *Die Finanzverfassung der EU*, S. 179 *et seq.*

<sup>333</sup> See *Niedobitek*, in Streinz, EUV/ECT, Art. 269 Annot. 9 *et seq.*

<sup>334</sup> *Waldhoff*, in Calliess/Ruffert, Kommentar zu EU-Vertrag and EG-Vertrag, Art. 269 Annot. 3.

<sup>335</sup> *Bieber*, in von der Groeben/Schwarze (Hrsg.), Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar, 6<sup>th</sup> ed., Vol. 4, Art. 269 Annot. 7.

<sup>336</sup> *Freytag*, Europarechtliche Anforderungen an Umweltabgaben, 140.

<sup>337</sup> On this issue *Bieber*, in von der Groeben/Schwarze (Hrsg.), Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar, 6<sup>th</sup> ed., Vol. 4, Art. 269 Annot. 34; *Freytag*, Europarechtliche Anforderungen an Umweltabgaben, 137, 146.

<sup>338</sup> Details can be found in Council Regulation (EC, Euratom) No. 1150/2000 of 22 May 2000 on the implementation of Decision 94/728/EG, Euratom on the system of the European Communities' own resources, OJ L 130/1.

(3) of Decision 2000/597/EC, Member States shall retain 25 % of the amounts referred to in Article 2 (1) (traditional own resources), which shall be established after 31 December 2000, to cover **collecting expenses**. The revenues of a user charge – which would constitute revenue from new charges under Article 2 (2) of Decision 2000/597/EC – would **not be affected**.

A further important corollary of the classification as own resources is the **ceiling** imposed on the **total amount** by Article 3 of Decision 2000/597/EC. Linking the development of resources to the development of the GNPs of Member States, this provision sets quantified limits. A fixed amount of **1,27 %** of the GNP of Member States serves as the starting point, adjusted by certain factors affecting the calculation. Commitments entered in the general budget are also subject to a ceiling currently fixed at **1,35 %** of the overall GNP in the Community, again with adjustment factors determining the calculation.<sup>339</sup>

Pursuant to Article 3 (3) of Decision 2000/597/EC, the Commission shall communicate to the budgetary authority the new **ceilings for own resources**, which are currently set at 1,24 % of the GNP of Member States for own resources and 1,31 % of the overall GNP in the Community.<sup>340</sup> During 2000, the overall GNP of Member States amounted to €8,3 trillion,<sup>341</sup> of which 1,24 % would have been roughly €103 billion and 1,31 % roughly €109 billion. For the same year, the own resources of the Union totalled €88 billion.<sup>342</sup> Both the own resources and commitments were thus far from reaching the ceiling, with a substantial gap of more than €15 bio., which is unlikely to change significantly in the future. Given the expected income of a user charge on aviation and shipping introduced at the Community level, which – even based on generous assumptions – would not exceed €14 billion for the air transport sector and €800 billion for sea transport,<sup>343</sup> these ceilings will not prove an obstacle for now.

With a view to the general review of the own resources system required from the Commission by 1 January 2006 under Article 9 of the decision on the system of the European Communities' own resources, the Commission published a communication on 6 September 2004, discussing several basic options to improve the system of own resources.<sup>344</sup> On that occasion, the Commission also proposed a new source of revenues based on **taxes** and potentially covering up to 50 % of the budget, thereby lessening the dependence on VAT. Such a step would also help improve the financial autonomy of the budget, creating a more direct financial link between the budget of the European Union and its

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<sup>339</sup> Cf. *Bieber* in von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar*, 6<sup>th</sup> ed., Vol. 4, Art. 269 Annot. 23.

<sup>340</sup> *European Commission*, *Adaptation of the ceiling of own resources and of the ceiling for appropriations for commitments following the entry into force of Decision 2000/597/EC*, Euratom, COM(2001) 801 final, 3.

<sup>341</sup> *European Commission*, *ibid.*, 6.

<sup>342</sup> *European Commission*, *Financing the European Union – Commission report on the operation of the own resources system*, COM(2004)505 final, 3.

<sup>343</sup> See Part 1, C. II.

<sup>344</sup> *European Commission*, *ibid.*

citizens.<sup>345</sup> As a category of taxes already subject to harmonisation by the Community, **energy taxes**<sup>346</sup> are referred to as ideally suited, with a possible emphasis on taxes on transport carriers as well as – with explicit mention – a charge on aircraft fuel or the ensuing emissions. A European charge on air travel is even described as a reasonable supplement to charges on road transport fuel, given that “the European air transport system is highly integrated” and its emissions transcend national borders. An additional advantage listed by the Commission is that taxing such emissions at the European level would allow “internalising the external socio-economic costs of climate change and other environmental effects caused by aviation into the price of air travel”.<sup>347</sup> Such charges could be introduced within a relatively **short time-frame of three to six years**.<sup>348</sup> So far, however, no specific legislative proposals have been submitted in this regard. Instead, European decision makers are currently discussing the inclusion of aviation in the European emissions trading scheme as a more favourable option.<sup>349</sup>

Categorisation of user charge revenues as own resources of the Community can be **avoided** by counting them as “**other revenues**”<sup>350</sup> as defined in Article 269 subpara. 1 ECT; for, as this provision states, the budget “shall be financed wholly from own resources without prejudice to other revenue.” Other revenue under this provision have already been collected in a variety of sectors, for instance by way of the aforementioned co-responsibility levies on agricultural products, but also as taxes on Community employees, bonds and administrative income. So far, however, they have only played a **subordinate** role. It is subject to debate, moreover, whether they might be used to balance the budget.<sup>351</sup> Occasionally, they are defined as income arising from Community activities that is not primarily applied to balancing the budget.<sup>352</sup> While this category of revenues may afford greater **flexibility** when compared to own resources, for instance by its absence of ceilings, the increased transparency and universality of the budget – both of which are budgetary principles mentioned in Article 3 of the Financial Regulation – support inclusion of user charge proceeds in the budget as own revenues. As an added advantage, this would accommodate critics

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<sup>345</sup> *European Commission, ibid.*, 10.

<sup>346</sup> This is a reference to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283/51.

<sup>347</sup> *European Commission*, Financing the European Union – Commission report on the operation of the own resources system, COM(2004)505 final, 12.

<sup>348</sup> *Ibid.*

<sup>349</sup> See the references contained in note 51.

<sup>350</sup> Not identical with the “new charges” mentioned in Article 2 (2) of the fifth decision on the system of the European Communities’ own resources, which specifically are own resources.

<sup>351</sup> Rejecting this option, for instance, *Bieber*, in von der Groeben/Schwarze (Hrsg.), Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar, 6<sup>th</sup> ed., Vol. 4, Art. 269 Annot. 36; *Schoo*, in Schwarze (Hrsg.), EU-Kommentar, Art. 268 Annot. 20; backing it, in turn, this *Niedobitek*, in Streinz, EUV/ECT, Art. 269 Annot. 23.

<sup>352</sup> *Bieber*, in von der Groeben/Schwarze (Hrsg.), Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft - Kommentar, 6<sup>th</sup> ed., Vol. 4, Art. 269 Annot. 36.

who reject “other revenues” beyond a minimum level as distorting the **distribution of burdens** between the Community and the Member States.<sup>353</sup>

By way of an interim conclusion, it may be affirmed that user charges on global environmental goods can be introduced as a sectoral charge within the framework of Community environmental policy. The proceeds of such a charge may then either be categorised as **new charges** under Article 2 (2) of Decision 2000/597/EC and thus as **own resources**, or as **other revenues** pursuant to Article 269 subpara. 1 ECT, both with differing legal consequences.

#### c.) Entering User Charges in the Budget

As Community revenue, the proceeds of a user charge introduced by the Community have to be shown in the **budget** pursuant to Article 268 subpara. 1 ECT.<sup>354</sup> Proceeds of such a user charge would constitute an item of revenue, whereas earmarked application of such proceeds an expenditure for the purposes of Articles 268 (1) and 3 ECT.

According to Article 272 (9) ECT, all expenditure other than that necessarily arising from the Treaty is subject to a **maximum rate of increase** fixed annually by the Commission. Application of the proceeds of a user charge would fall within this category of “**non-obligatory expenditure**.”<sup>355</sup> A budgetary increase of such expenditure relative to the preceding year would thus have to be covered by the maximum rate declared by the Commission after consultation of the Economic Policy Committee; this maximum rate is communicated by 1 May of each year. It takes into account the economic development in Member States, notably the trend of the gross national product, the average variation in the budgets of the Member States, and the trend of the cost of living during the preceding financial year.<sup>356</sup> What is more, the Council and the European Parliament may agree on a higher rate under Article 272 (9) subpara. 5 ECT if the activities of the Community require that the original rate be exceeded. Each of these bodies can initiate the relevant procedure, with the decision ultimately taken by the Council acting by qualified majority and the European Parliament by a majority of its members and three-fifths of the votes cast.<sup>357</sup>

## 2. *Expenditure of Revenue and Creation of a Special Fund*

Aside from the collection of a user charge, questions arise as to whether the Community is constrained in **administering** its revenues and **earmarking the expenditure**, and whether a **special fund** may be established to administer the application of proceeds.

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<sup>353</sup> On this issue with further references *Schröder*, in P. Kirchhof, *Umweltschutz im Abgaben- und Steuerrecht*, 98.

<sup>354</sup> On the budget and the applicable principles and procedures, see generally *Strasser*, *Die Finanzen Europas*, 19 *et seq.*, 35 *et seq.*; *Reister*, *Budget und Finanzen der Europäischen Gemeinschaften*, 133 *et seq.*

<sup>355</sup> Cf. on the distinction of obligatory and non-obligatory expenditure, see *Bieber* in von der Groeben/Schwarze (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft – Kommentar*, 6<sup>th</sup> ed., Vol. 4, Art. 272 Annot. 25 *et seq.*

<sup>356</sup> *Geiger*, *EUV/EGV*, Art. 272 Annot. 6.

<sup>357</sup> On the agreement necessary for this purpose, see ECJ, Case C-41/95 – *Council/European Parliament*, ECR 1995 I-4411.

Charges collected by the **Member States** – also through taxes harmonised at the Community level – can accrue both to the general budget of those states as well as to specific bodies subject to designation by the government, including special funds.<sup>358</sup> Proceeds of a user charge collected by the Community itself are subject to the restrictions set out below.

As a rule, the powers relating to expenditure – along with the powers relating to the use of revenues from a user charge – in connection with a substantive Community task correlate with the requirements of the respective task; the **powers of expenditure** are, in other words, a necessary consequence of the **substantive powers**.<sup>359</sup> Pursuant to Article 6 of Decision 2000/597/EC, however, the Community revenue – including new charges – shall be used without distinction to finance all expenditure entered in the budget. Such application of proceeds from a user charge may be avoided by earmarking these. In view of the case-law of the European Court of Justice, moreover, user charges imposed as a sectoral charge on the basis of a substantive competence presuppose expenditure within the same substantive area as a matter of law.<sup>360</sup> Despite the principle of comprehensive coverage set out in Article 6 of Decision 2000/597/EC and in Article 4 (2) of the Financial Regulation, earmarking of revenue is permissible and has already been occasioned with several sectoral charges.<sup>361</sup>

An expedient and – to the extent possible – transparent administration of proceeds may occur through an independent **fund**, such as the environmental fund proposed by the European Parliament in connection with the introduction of an energy tax.<sup>362</sup> By far the largest part of the expenditure entered in the Community budget has been assigned to various funds which are shown in the budget and governed by the pertinent budgetary rules of Community law.<sup>363</sup> Their existence can be partly traced back to the provisions of the **Treaty** itself, for instance in the case of the European Agricultural Guidance and Guarantee Fund (EGGF) based on Article 34 (3) ECT, the European Social Fund (ESF) based on Article 146 ECT, and the European Regional Development Fund (ERDF) based on Article 160 ECT. Creation of an environmental fund on this basis would require a separate amendment of the Treaty.<sup>364</sup>

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<sup>358</sup> *Heselhaus*, Abgabenhoeheit der Europäischen Gemeinschaft in der Umweltpolitik, 47.

<sup>359</sup> *Niedobitek*, in Streinz, EUV/EGV, Art. 268 Annot. 2.

<sup>360</sup> See *supra*, Part 2, C. III. 1. a.)

<sup>361</sup> Examples can be found in *Freytag*, Europarechtliche Anforderungen an Umweltabgaben, 153.

<sup>362</sup> See the 3<sup>rd</sup> Interim Report of the Institutional Affairs Committee on the Intergovernmental Conference of 31 Oktober 1990, Doc. PE 144.177 final.

<sup>363</sup> Providing an in-depth description of these individual funds: *Reister*, Budget und Finanzen der Europäischen Gemeinschaften, 66 *et seq.*

<sup>364</sup> A similar concern is expressed by *Wit/Dings*, Economic Incentives to Mitigate Greenhouse Gas Emissions from Air Transport in Europe, 96, who instead propose establishing an autonomous fund.

Introducing a fund on the basis of derived legislation promises to be both more expedient and successful. For instance, the European Regional Development Fund (ERDF) was formerly based on a regulation adopted in exercise of the supplementary power contained in Article 308 ECT.<sup>365</sup> A condition for Community action under this provision has to appear necessary for achievement of Community objectives within the internal market. What is more, the Treaty may not contain the necessary powers elsewhere.

For the creation of a fund relating to the **environment**, Article 175 (4) ECT may seem a suitable legal basis, given that it charges the Member States with financing and implementing the environment policy. The purpose of this provision is unclear, however, and the establishment of an environmental fund thus widely considered permissible.<sup>366</sup> The primary objective of Article 175 (4) ECT is much rather to ensure implementation of Community environment policy even in times of budgetary constraints in the Member States,<sup>367</sup> and not to prevent independent measures by the Community. Indeed, the environmental funds already created at the Community level serve as an illustration for the way in which the Community participates in financing its own environment policy.<sup>368</sup>

As the European Development Fund (EDF) demonstrates, a fund may also be created on the basis of an **international agreement**.<sup>369</sup> As the European Court of Justice affirmed in this regard, Community powers in the area of development co-operation are not exclusive, entitling the Member States to enter into commitments themselves *vis-à-vis* non-member States, “either collectively or individually, or even jointly with the Community.”<sup>370</sup> The underlying agreement establishes the European Development Fund and specifies the contributions from individual Member States. Since all necessary expenditure for Community financial aid is directly borne by the Member States,<sup>371</sup> such aid is not classified as Community expenditure, thereby obviating the necessity of adoption on the basis of Article 279 ECT and inclusion in the Community budget. Individual procedural elements reminiscent of the provisions on Community expenditure do not challenge this inference.<sup>372</sup>

Another design option aside from creating a new fund would be to let revenues from a user charge accrue to an existing fund within the ambit of Community environmental policy, which would also allow targeted and expedient administration of revenues for purposes of environmental protection. Current measures in this regard include the financial instrument **LIFE**. It has three major themes and promotes projects of Community interest, including projects in third states in the Mediterranean and Baltic Sea area aimed at building necessary capacities and administer to

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<sup>365</sup> See Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund (ERDF), OJ 1975 L73/1.

<sup>366</sup> *Freytag*, *Europarechtliche Anforderungen an Umweltabgaben*, 152.

<sup>367</sup> See ECJ, Case C-42/89 – *Commission/Belgium*, ECR 1990 I-2821.

<sup>368</sup> See von der Groeben/Schwarze-Krämer, Art. 175, Annot. 54.

<sup>369</sup> In depth on the European Development Fund: *Reister*, *Budget und Finanzen der Europäischen Gemeinschaften*, 162 *et seq.*

<sup>370</sup> ECJ, Case C-316/91 – *Parlament/Rat*, ECR 1994 I-625, Para. 26.

<sup>371</sup> In greater detail: [http://europa.eu.int/comm/budget/fed/index\\_de.htm](http://europa.eu.int/comm/budget/fed/index_de.htm).

<sup>372</sup> ECJ, a.a.O., Para. 39 *et seq.*



structures in the environmental sector (LIFE-third states). An amendment of the pertinent regulation would allow inclusion of the proceeds from a user charge in future promotion measures adopted under the financial instrument LIFE.

The options outlined above are geared towards very different approaches with clearly divergent consequences for the budgetary implementation of a user charge. Different degrees of integration in the Community budget – all the way to nearly complete independence by way of a fund created through an international treaty – result in a more or less ample **power of discretion** when designing the user charge. Given that such special funds only affect the proceeds of a user charge, the foregoing requirements apply equally to all conceivable types of user charge.

### 3. *Summary and Application to Individual User Charges*

Provided it acts within the boundaries of an existing Community policy, the Community may introduce a user charge **on its own responsibility** if it is expedient and effective in achieving a proportionate objective. Revenues must be applied **within the respective sectoral policy** to further the objectives set out therein. Expenditure for purposes beneficial to the entities covered by the payment duty is not a condition. Sectoral charges introduced within the ambit of Community environment policy may, thus, be collected relative to fuel consumption, the distance traveled or emissions discharged, as well as in connection with the purchase of passenger tickets, all provided that proceeds are applied towards environmental protection objectives. Given the substantive proximity of the user charges on global environmental goods and the objectives of Community environment policy, expenditure for purposes other than environmental protection is only permissible if the user charge itself was introduced under a separate policy and the mere expenditure of revenues is an effective and expedient means of achieving the (non-environmental) objectives of a rule or that policy.

User charges imposed **in return for the use of certain infrastructures**, for instance airports and seaports, appear to be a **less suitable** option, given that the Community possesses no facilities of its own in the decisive areas of aviation and shipping. If, however, the legal framework adopted at the Community level merely seeks to regulate the use of Member State facilities, it would not constitute an originary Community charge and would therefore not be subject to Community budget rules.

Once a user charge has been introduced at the Community level, however, rather than the level of individual Member States (for instance through a harmonised tax), its collection, administration and expenditure are governed by the **budgetary principles of the Treaty** and applicable secondary legislation. Accretion to the own resources of the Community pursuant to Article 269 subpara. 1 ECT, in particular, is subject to additional constraints, for instance the procedure set out in Article 269 subpara. 2 ECT and the ceilings defined in Article 3 of Decision 2000/597/EC. These requirements apply equally to all types of user charges.

Finally, the principles guiding the establishment and implementation of the budget under Article 3 of the Financial Regulation need to be observed, along with the – dynamic – **ceiling** for non-obligatory expenditure. Proceeds may be administered through a **special fund** based on existing

powers under primary and secondary Community law as well as an international treaty. The latter does not necessitate inclusion in the Community budget. Again, the same conditions apply to all types of user charge.

#### IV. Community State Aid Rules (*Ecologic*)

At this point, the analysis will also extend to the **Community rules on competition**, notably the **prohibition of state aid** contained in Article 87 ECT. This assessment will be largely limited to ascertaining whether the **use** of proceeds from a user charge **for certain political objectives** is compatible with the prohibition of distortionary state aid set out in Article 87 ECT.

##### 1. *The Concept of State Aid*

Article 87 (1) ECT sets out a general **prohibition** of state aid which distorts or threatens to distort competition in the European Community. The object and purpose of this provision is to safeguard the **competition** in the common market against distortion and establish general guidelines for the alignment of state aid practices in Member States as well as for the prevention of distorting state aid.<sup>373</sup> Not all state aid is routinely precluded, however. The European Court of Justice has developed a comprehensive case-law on this matter. Drawing on the doctrines developed in this process, the **applicability** of Community state aid rules to proceeds from a user charge on global environmental goods will be assessed with a view to identifying legal requirements imposed on the expenditure of revenues.

**State aids** are **advantages** voluntarily granted by **public authorities** to the benefit of certain undertakings or the production of certain goods without customary compensation, thereby distorting competition in the common market.<sup>374</sup> With a view to the wording of Article 87 ECT (“in any form whatsoever”), the concept of advantage must be interpreted **widely** to comprise any **financially relevant benefit** for the recipient.<sup>375</sup> Such an advantage may also consist of a burden imposed on other economic sectors. Whether such an advantage has been granted has to be determined from the perspective of an investor acting rationally under normal market conditions.<sup>376</sup> What is more, state aid has to be granted through **state resources**, that is, at the expense of public budgets,<sup>377</sup> although it is irrelevant whether this occurs directly through the state or through a public or private body designated or established by the state.<sup>378</sup> Finally, state aid has to be granted to **specific undertakings** or the **production of specific goods**, in other words: to a sufficiently

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<sup>373</sup> Geiger, EUV/EGV, Art. 272 Annot. 6.

<sup>374</sup> Herdegen, Europarecht, 6<sup>th</sup> ed., § 22 Annot. 366; cf. also ECJ, Case 241/94 – *France/Commission*, ECR 1996, I-4575, para. 20 and I-4578, para. 34.

<sup>375</sup> Koenig/Kühling, in Streinz, EUV/EGV, Art. 87 ECT, Annot. 28.

<sup>376</sup> ECJ, Case 234/84 – *Belgium/Commission*, ECR 1986, 2263 para. 14; in greater detail cf. Rydelski, Handbuch des EU-Beihilfenrechts, 66.

<sup>377</sup> ECJ, Case 379/98 – *PreussenElektra*, ECR 2001 I-2099 para. 58 *et sqq.*

<sup>378</sup> Koenig/Kühling, in Streinz, EUV/EGV, Art. 87 ECT, Annot. 43 *et sqq.*

determinate “economic unit”<sup>379</sup> or sector (principle of specificity<sup>380</sup>). General promotion and infrastructure measures serving the economy as a whole do not meet this requirement.

## 2. *Earmarked Expenditure as State Aid*

As the foregoing section has shown, earmarked application of the proceeds from a user charge on global environmental goods can only be categorised as **state aid** if:

- the aid accrues to **certain** undertakings or the production of **certain** goods as a financially relevant advantage;
- the aid is granted through **state budgets** of the Member States – and not the Community;
- the advantage granted **benefits** said undertakings or production of goods.

Accordingly, these requirements are met if the proceeds of a user charge are collected, administered and spent by **Member States** in such a manner that the aid has to be at least temporarily considered part of the public budget.<sup>381</sup> By definition, the administration of user charge revenues by the **Community** – which was described in an earlier section – cannot constitute state aid.<sup>382</sup> Moreover, the advantages have to accrue to **certain** undertakings or the production of **certain** goods within the Community.

With a view to a resolution of the International Civil Aviation Organization of 9 December 1996, which recommended applying the proceeds of a charge on aviation to an improvement of propulsion technologies and research on the environmental impacts of aviation,<sup>383</sup> the question

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<sup>379</sup> ECJ, Case T-234/95 – *DSG Dradenauer Stahlgesellschaft mbH*, ECR 2000, II-2603 para. 124 with further references.

<sup>380</sup> On this issue *Rydelski*, Handbuch des EU-Beihilfenrechts, 69.

<sup>381</sup> See, in greater detail, *Koenig/Kühling/Ritter*, EG-Beihilfenrecht, 72. Exemption regulations adopted under Article 89 ECT for sectors such as education-related state aid or state aid for small and medium-sized enterprises will not be discussed here, given that a user charge on global environmental goods is unlikely to affect these addressees as beneficiaries of its proceeds.

<sup>382</sup> Since the state aid provisions of Articles 87 *et seq.* ECT aim at safeguarding the common market, and not the competitiveness of third states, expenditure of proceeds from a user charge by the Community will, if at all, only be subject to international trade rules on subsidies, see *supra*, Section 3; on the relationship of international subsidy rules to the state aid rules of the Community, see *e.g.* *Koenig/Kühling*, in Streinz, EUV/EGV, Art. 87 ECT, Annot. 9.

<sup>383</sup> See *ICAO*, Council Resolution on Environmental Charges and Taxes, adopted by the Council on 9 December 1996 at the 16<sup>th</sup> meeting of its 149<sup>th</sup> session, para. 4: „*Stongly recommends* that any environmental levies on air transport which states may introduce should be in form of charges rather than taxes and that the funds collected should be applied in the first instance to mitigating the environmental impact of aircraft engine emissions, for example to:

a. addressing the specific damage cause by these emissions, if that can be identified;

arises whether such application would also constitute an **advantage** for affected aviation undertakings. Given the proposed purpose of such application, however, an advantage in the sense set out above is unlikely: despite indirect advantages that may arise for individual aviation companies, the measures funded in this manner are primarily geared towards serving the **common interest** in an improved environment; moreover, faithful implementation of this recommendation would not benefit actual airline operators, but rather entities in the area of research and development.<sup>384</sup>

Such application of revenues would only constitute an advantage for the latter entities if it was not granted as a **customary compensation** in return for services provided by the research and development bodies. The same applies to proceeds granted to “green” companies for reasons of environmental policy, for instance by subsidy programmes, tax exemptions or other market incentives.

Expenditure of proceeds towards public measures of environmental protection adopted in the common interest or for purposes of development co-operation do not, in turn, result in an advantage for certain undertakings or the production of certain goods, given the absence of a specifically granted benefit. Only applications benefiting very **specific** enterprises or sectors, for instance through subsidies, tax exemptions or other advantages, meets the conditions for classification as state aid; even if revenues were to be returned to the entire aviation sector, for instance, the required specificity would be missing. Central applications are thus beyond the scope of the rules on state aid.

### 3. *Distortion of Competition in the Common Market*

Article 87 (1) ECT also presupposes that advantages granted result in a **distortion of competition**. Such a distortion will occur whenever changed market conditions improve the **competitiveness** of beneficiaries relative to other competitors, or give market access for new entrants is made more difficult.<sup>385</sup> Additionally, Article 87 (1) ECT requires that such distortion affect trade between Member States.<sup>386</sup>

Whether the application of revenues from a user charge amounts to incompatible state aid or not depends on the **type of application** and its **beneficiaries**. Granting financially relevant advantages

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- b. funding scientific research into their environmental impact; or
  - c. funding research aimed at reducing their environmental impact, through developments in technology and new approaches to aircraft operations (...).“

<sup>384</sup> This obviates the need to address the difficult question of granting state aid as compensation for compliance with obligations in the common interest, see *Herdegen*, *Europarecht*, 6<sup>th</sup> ed., § 22 Annot. 366.

<sup>385</sup> *Geiger*, *EUV/EGV*, Art. 272 Annot. 13; *Rydelski*, *Handbuch des EU-Beihilfenrechts*, 72; *Koenig/Kühling/Ritter*, *EG-Beihilfenrecht*, 83.

<sup>386</sup> Given the increase in trade and capital flows as well as the provision of services across national borders, such a distortion will only be absent in exceptional cases, see *Koenig/Kühling/Ritter*, *EG-Beihilfenrecht*, 86.

to certain undertakings or the production of certain goods will typically **distort competition** if it does not accrue equally to all competitors in the affected sector. In the foregoing examples of an expenditure benefiting “green” companies or entities in the area of research and development, an incompatible distortion of competition in the common market could only be assumed if the other conditions of state aid – for instance the absence of customary return services – are simultaneously met. At any rate, the establishment of a special fund to promote general measures in the area of environmental protection or development co-operation with not constitute state aid, given that it would not benefit certain undertakings or the production of certain goods.

#### 4. *Discretionary Decision under Article 87 (3) ECT*

Moreover, the prohibition set out under Article 87 (1) ECT does not apply directly,<sup>387</sup> as it first requires the Commission to **declare the incompatibility of state aid with** the review procedure described in Article 88 ECT. New state aid, in turn, is exempted from this rule pursuant to Article 88 (3) 3<sup>rd</sup> sentence ECT.<sup>388</sup> This provision requires national authorities to submit plans for the grant of new state aid to the Commission for a preliminary review prior to implementation. State aid requiring notification, which essentially includes all new or altered state aid, may only be granted after the Commission has issued a **final decision** or the state aid is presumed compatible due to lapse of time.<sup>389</sup>

Individual Member States may not **disregard** Article 88 (3) ECT, even if they consider the state aid measure to be compatible with the common market.<sup>390</sup> Violation of this duty voids the domestic legislation granting state aid,<sup>391</sup> and incurs various procedural consequences as well as benefits granted being recalled.<sup>392</sup> Since the application of proceeds from newly introduced user charges on global environmental goods could, if at all, only be ascribed to this category of state aid (provided it also meets all the other conditions outlined above), notification of the Commission by Member States would be necessary prior to the introduction of said user charge.<sup>393</sup>

After being informed of plans by Member States, the Commission will initiate a preliminary review procedure based on Article 87 ECT to determine whether an ordinary review subject to Article 88 (2) ECT is necessary. If the exemptions listed in Article 87 (2) ECT are inapplicable, giving rise to

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<sup>387</sup> Cf. on the debate on direct effect already ECJ, Case 78/76, ECR 1977 595 (613); also, see *Metaxas*, Grundfragen des europäischen Beihilfenrechts, S. 84.

<sup>388</sup> ECJ, Case C-17/91 – *Lornoy/Belgium*, ECR 1992 I-6523 Para. 30.

<sup>389</sup> On this issue, see the procedure outlined in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1.

<sup>390</sup> *Metaxas*, Grundfragen des europäischen Beihilfenrechts, 84.

<sup>391</sup> ECJ, Case C-354/90 – *Fédération Nationale du Commerce Extérieur des Produits Alimentaires*, ECR 1991, I-5505 paras. 16 *et seq.*

<sup>392</sup> *Koenig/Kühling*, in Streinz, EUV/EGV, Art. 88 ECT, Annot. 21 *et sqq.*

<sup>393</sup> In federally organised Member States, this requirement only applies to the federal level, not that of federate entities.

concern that the state aid will prove incompatible with the common market, the Commission will apply its mandatory discretion and determine whether the state aid, for once, is justified under Article 87 (3) ECT. Here, too, the Commission has a wide scope of discretion.<sup>394</sup> The following justifications may apply:

1. aid to promote the economic development of areas where the standard of living **is abnormally low**;
2. aid to promote the execution of an **important project** of common European interest or to remedy a serious disturbance in the economy of a Member State; as well as
3. aid to facilitate the **development** of certain economic activities or of certain economic areas.

State aid in the area of **environmental protection** will typically meet the description in Article 87 (3) lit. b) ECT, which pertains to aid to promote **important projects** of common European interest.<sup>395</sup> When exercising its discretion, the Commission will adhere to the guidelines and Community frameworks it has adopted to provide principles for the application of this discretionary provision. Due to the ample powers of discretion, such guidelines and Community frameworks acquire particular importance bordering on a *de facto* binding effect.<sup>396</sup>

For the area of **environmental protection**, the Community has also adopted such guidelines listing different categories of state aid for environmental protection and setting out requirements for their admissibility.<sup>397</sup> The *in casu* approach of this Community framework obviates the need for a detailed reproduction, given that the proceeds from a user charge will, in all likelihood, not be granted to certain undertakings only. Worth noting, however, is the high standing afforded to the polluter-pays principle in the Commission guidelines, given that this principle also underlies the objective of **internalising external environmental costs** through user charges.<sup>398</sup> The guidelines also concede that state aid will frequently become necessary to achieve a high level of environmental protection.<sup>399</sup>

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<sup>394</sup> See most recently ECJ, Case C-355/95 P – *Textilwerke Deggendorf*, ECR 1997, I-2549 para. 26; also *Oppermann*, *Europarecht*, Rn. 1120.

<sup>395</sup> *Koenig/Kühling*, in Streinz, EUV/EGV, Art. 87 ECT, Annot. 79; *Metaxas*, *Grundfragen des europäischen Beihilfenrechts*, 84.

<sup>396</sup> See on this issue *Koenig/Kühling*, *ibid.*, Annot. 7.

<sup>397</sup> *European Commission*, Commission Guidelines on State Aid for Environmental Protection, OJ 2001 C 37/3; regarding research and development, see OJ 1996 C45/5.

<sup>398</sup> *European Commission*, *ibid.*, para. 4, 10, 14 *et seq.*

<sup>399</sup> *European Commission*, *ibid.*, para. 5.

In other words, state aid for environmental protection is most likely to be compatible with the common market if current circumstances do not allow for full internalisation of environmental costs and compliance with applicable rules calls for supplementary measures or incentives for over-compliance with improved environmental behaviour are needed.<sup>400</sup> Generally, however, a **strict standard of review** will apply.<sup>401</sup> The second part of these guidelines contains additional requirements specified for individual types of state aid, for instance regarding financial support in the energy sector or to promote the clean-up of contaminated sites. To the extent that revenue from a user charge is to be applied for environmental purposes, thus, this second part may contain pertinent requirements.

It has already been established that an expenditure of user charge proceeds for purposes of environmental protection or development co-operation will **almost never** constitute **incompatible state aid**. Only the assignment of revenues by Member States to certain undertakings or the production of certain goods can violate the Community prohibition of state aid, provided it also results in a distortion of competition. Even then, however, aid for important projects of common Community interest may be exempt from that prohibition, given that complete internalisation of environmental costs of aviation and shipping will significantly affect the competitive position of affected undertakings, therefore justifying such application of revenues. At any rate, state aid for **environmental purposes** is not generally ruled out.

##### 5. *Summary and Application to Individual User Charges*

Community rules on state aid do not apply to the introduction of a user charge; if at all, they can impose requirements on the **expenditure** of proceeds. The foregoing assessment has shown that application of revenues from a user charge on aviation and shipping may, under certain circumstances, be considered state aid under the pertinent provisions of Community law. Only aid directly benefiting **certain** undertakings or the production of certain goods without appropriate return services may give rise to legal challenges. That may be the case, for instance, with the targeted promotion of individual research and development activities or particularly sustainable behaviour without requiring a commensurate return service. A recommendation by the International Civil Aviation Organization may prove problematic in this regard, however, given that it calls for expenditure of revenues within the aviation sector only to reduce the environmental impact of aircraft, for instance through promotion of research and development or the development of more efficient propulsion technologies. Even if the use of proceeds from a user charge were to be considered state aid, however, its compatibility with the common market would first have to be determined with the state aid review procedure set out in Article 88 (3) ECT, with particular attention given to the exception clauses contained in Article 87 (3) ECT and the Community

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<sup>400</sup> *European Commission, ibid.*, para. 18.

<sup>401</sup> *European Commission, ibid.*, para. 20.

guidelines on state aid for environmental protection. The outcome will largely depend on the purpose of expenditure, with environmental protection and other common interests likely to obtain Commission approval.

## V. Substantive Requirements for the Design of User Charges under European Community Law: Fundamental Freedoms and Fundamental Rights (*Epiney/Hofstötter*)

Aside from formal aspects, European Community law also sets out a number of substantive requirements for the design of a user charge on global environmental goods. This section will focus on such requirements to the extent that they originate in primary Community law, whereas legal aspects arising from secondary legislation will be outlined in the sectoral chapters.<sup>402</sup> In primary Community law, substantive requirements primarily arise from the **fundamental freedoms** (1) and **fundamental rights** (2).

Substantive requirements set out specifically for Community and Member State transport policy in the transport Title of the Treaty (Articles 72 *et seq.* ECT)<sup>403</sup> do not apply to aviation and shipping (see Article 80 (1) ECT)<sup>404</sup>, unlike the general Treaty provisions (with the exception of the freedom of services<sup>405</sup>).

The significance of these fundamental guarantees differs in relation to their **scope of application**:

- The **fundamental freedoms of the Community** apply in their entirety both at the **Member State** and the **Community** level,<sup>406</sup> rendering their observance mandatory when introducing user charges at the Community and at the Member State level.

The wording of these fundamental freedoms and the obligations arising from them are, first and foremost, directed at the Member States. With a view to Article 3 (1) lit. a and c ECT and the very explicit case-law of the ECJ in this regard,<sup>407</sup> they also apply to the Community legislator and provide “normative guidance” for, *inter*

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<sup>402</sup> See below, Part 2.

<sup>403</sup> In this regard, see *Epiney/Gruber*, Verkehrspolitik und Umweltschutz, 47 *et seq.*; *Epiney/Gruber*, Verkehrsrecht in der EU, 107 *et seq.*; *Epiney*, in: Dausen (ed.), Hdb. EU-WirtschaftsR, L, Annot. 122 *et seq.*, 151 *et seq.*

<sup>404</sup> Cf. only von der Groeben/Schwarze-Erdmenger, Vorbem. zu den Art. 70-80, Annot. 12 *et seq.*, who – from a contemporary point of view – criticises the divergent structure of Treaty provisions on road transport, shipping in internal waters and rail transport, on the one hand, and aviation and international shipping, on the other.

<sup>405</sup> On this issue, see also *infra* Part 1, C. III. 1., at the beginning.

<sup>406</sup> It is generally recognised that the fundamental freedoms apply equally to the Member States and the Community and its organs. Cf. for instance Calliess/Ruffert-Kluth, Art. 50, Annot. 44; Müller-Graff, EUDUR I, § 10, Annot. 87; Jarass, EuR 1995, 202 (211); as regards the free movement of goods, see ECJ, Case 15/83, Denkavit, ECR 1984, 2171, para. 15; ECJ, Case C-51/93, ECR 1994, I-3879, para. 11. Consequently, however, the Community should enjoy the same restriction powers afforded to the Member States.

<sup>407</sup> Cf. ECJ, joint Cases C-80 and 81/77, Commissionaires Réunis, ECR 1978, 927, para. 35; ECJ Case C-108/01, Consorzio del Prosciutto di Parma, ECR 2003, I-5121, para. 53; ECJ, Case 15/83, Denkavit, ECR 1984, 2171, para. 15; ECJ, Case C-51/93, ECR 1994, I-3879, para. 11.



*alia*, secondary legislation.<sup>408</sup> This also follows from the hierarchical structure of Community law, with Community primary law at the top of the normative hierarchy in the Community. Likewise, Article 90 ECT can be applied to the action of its institutions.<sup>409</sup>

Regarding Article 25 ECT (the prohibition of customs duties and charges having equivalent effect), it should also be noted that the ECJ has, in effect, considered charges imposed by Member States when implementing inspection measures required under Community law compatible with Article 25 ECT.<sup>410</sup> This line of argument is unlikely to extend to all types of charges required by the Community legislator, however, notably because the ECJ has apparently interpreted such inspection fees as promoting the free movement of goods, an argument that would not apply directly to user charges and their tendency to exert a constraining impact.<sup>411</sup> Given that, as a matter of principle, Article 25 ECT does not apply to user charges,<sup>412</sup> however, this issue will not be further pursued here.

- The applicability of **Community fundamental rights**, in turn, is clearly restricted to the **Community legislator**, thus rendering them pertinent only for user charges imposed by the Community legislator.<sup>413</sup>

Member States are only bound to the Community fundamental rights when implementing or applying Community law.<sup>414</sup>

Accordingly, the **Community legislator** is bound to **strict observance** of the **entirety of primary law**, which is removed from its disposition. Community measures motivated by environmental policy, such as user charges on global environmental goods, are thus also constrained by the written and unwritten rules of primary Community law.

It should be noted, however, that the ECJ has afforded the Community legislator relatively wide **powers of discretion** when ascertaining the compatibility of Community secondary legislation (directives and regulations adopted by the Council or by the Council and the Parliament) and primary law,<sup>415</sup> at any rate wider than will typically be available to national legislatures. This is of particular importance when determining the

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<sup>408</sup> *Müller-Graff*, EUDUR I, § 10, Annot. 87; see also *Jatzke*, IStR 1999, 137 (138).

<sup>409</sup> *Cf.* ECJ, Case C-475/01, *Commission/Greece*, Judgment of 5 October 2004, para. 15-18.

<sup>410</sup> *Cf.* ECJ, Case 46/76, *Bauhuis*, ECR 1977, 5, paras. 27-30; ECJ, Case 18/87, *Commission/Germany*, ECR 1988, 5427, para. 8.

<sup>411</sup> ECJ, Case 46/76, *Bauhuis*, ECR 1977, 5, para. 30.

<sup>412</sup> See below, V. 1. a) aa).

<sup>413</sup> On the relevance of Community fundamental rights for the Community legislator, see, for instance, *Szczekalla*, EUDUR I, § 12, Annot. 30.

<sup>414</sup> In the case-law, see particularly ECJ, Case 5/88 (*Wachauf*), ECR 1989, 2609; ECJ, Case C-260/89 (*ERT*), ECR 1991, I-2925; ECJ, Case C-386/95 (*Familiapress*), ECR 1997, I-3689; ECJ, Case C-309/96 (*Annibaldi*), ECR 1997, I-7493; ECJ, Case C-292/97, ECR 2000, I-2737, Annot. 37; extensively on this problematic issue *Epiney*, *Umgekehrte Diskriminierungen*, 125 *et sqq.*; *Wallrab*, *Die Verpflichteten der Gemeinschaftsgrundrechte*, 43 *et sqq.*, 90 *et sqq.*; *Szczekalla*, EUDUR I, § 12, Annot. 31, all with further references, although the latter – departing from the case-law of the ECJ – argues in favour of a comprehensive application of Community fundamental rights to Member States. See also Art. 51 of the Charter of Fundamental Rights and Art. II-111 of the Constitution.

<sup>415</sup> *Cf. e.g.* ECJ, Case C-280/93, *Banana Market*, ECR 1994, I-4973; ECJ, ECR 1994, I-555.

proportionality of Community measures as part of the compatibility with fundamental freedoms and fundamental rights of the Community.<sup>416</sup>

### 1. *On the Fundamental Freedoms of the Community*

Depending on the design of user charges, these may fall within the **scope of application** of one or more **fundamental freedoms** of the Community. As a matter of principle, all fundamental freedoms may apply, and only a detailed analysis based on the actual design of a user charge would allow determination of specifically affected fundamental freedoms.

The **free movement of workers** will not, as a rule, be affected, given that user charges will hardly ever restrict the free movement of workers. After all, their design is geared towards application to companies, not individuals. Even if one were to assume an indirect restriction in exceptional cases, the restriction of other fundamental freedoms would likely dominate.

The **freedom to provide services**, on the other hand, may indeed be affected, given that transport services can be categorised as services and therefore fall within its scope.

Pursuant to the definition contained in Article 50 (1) ECT, services shall be considered such where they are “normally provided for remuneration”. Article 50 (2) ECT lists several examples, including industrial and commercial activities as well as those of craftsmen and the professions. As for the freedom of movement for goods, capital and persons, Article 50 (1) ECT declares the freedom to provide services subsidiary to the foregoing freedoms. It is characteristic of the freedom to provide services that such services are only temporarily provided within another state (*cf.* Article 50 (3) ECT), whereas the right of establishment covers a permanent integration in the economic activities of the host state. The freedom to provide services is a freedom enjoyed by nationals of Member States pursuant to Article 49 (1) ECT, with companies or firms formed in accordance with the law of a Member State treated in the same way as natural persons due to Article 55 ECT and Article 48 ECT.

Against this background, transport services temporarily provided within other Member States may be freely subsumed under the Community definition of services.<sup>417</sup> If the provision of services is subjected to a charge, the latter may constrain the provision of services in another Member State or render it less attractive,<sup>418</sup> thereby raising the possibility of a violation of the freedom to provide services.

**Article 51 ECT** exempts transport from the scope of the Treaty Title on services, however. Instead, the freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport (Article 51 (1) EGV). This exemption extends to transport by road, rail and inland waterway, as well as to aviation and sea transport,<sup>419</sup> regardless of the differentiation of

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<sup>416</sup> On this issue and the judicial review standards of the ECJ *Pache*, NVwZ 1999, 1033 *et sqq.*; *Pache*, DVBl. 1998, 380 *et sqq.*; *Nettesheim*, EuZW 1995, 106 *et sqq.*; *Lenaerts/van Nuffel*, Constitutional Law, Rn. 5-084; in depth on this issue *Pache*, Tatbestandliche Abwägung und Beurteilungsspielraum, *passim*.

<sup>417</sup> *Freytag*, Europarechtliche Anforderungen, 257 *et sqq.*; *Müller-Graff*, EUDUR I, § 10, Annot. 60.

<sup>418</sup> *Cf.* on port fees, for instance, ECJ, Case C-49/89, *Corsica Ferries*, ECR 1989, 4441, paras. 7 *et sqq.*; ECJ, C-381/93, *Commission/France*, ECR 1994, I-5145, paras. 14 *et sqq.*

<sup>419</sup> *Cf.* von der Groeben/Schwarze-Troberg/Tiedje, Art. 51, Annot. 1; *Epiney*, in: Dausen (ed.), Hdb. EU-WirtschaftsR, L, Annot. 181; Grabitz/Hilf-Frohnmeier, Art. 51, Annot. 19; Schwarze-Müller-Graff, Art. 51, Annot. 3.

these modes of transport set out in Article 80 ECT, a differentiation which, incidentally, does not otherwise affect the existence of Community powers.<sup>420</sup>

This provision was drawn upon as the basis for Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport,<sup>421</sup> for instance, in order to realise the freedom to provide services in the field of shipping.<sup>422</sup>

Given this sectoral approach to implementation of the freedom to provide services,<sup>423</sup> its compatibility with user charges on global environmental goods will be assessed specifically with a view to the means of transport<sup>424</sup> outlined in the third part of this survey, giving consideration to the secondary legislation implementing this freedom in said areas.

With that in mind, the following sections will address the free movement of goods (a), the freedom of establishment (b) and the free movement of capital (c) and ascertain their relevance for the introduction of a user charge. As a “fall-back clause”, the general prohibition of discrimination on grounds of nationality – Article 12 ECT (d) – will also be briefly analysed.

When it comes to analysing the fundamental freedoms *strictu sensu* (Article 28 *et seq.*, 43 *et seq.*, 56 *et seq.* ECT), it should already be noted at this point that their – essentially divergent – substantive scope has increasingly converged as a result of the case-law of the ECJ (“**convergence of the fundamental freedoms**”<sup>425</sup>). Even though the scope and substance of the fundamental freedoms have not yet been fully clarified in the sense of a uniform doctrine, a consensus on central requirements pertaining to the introduction of user charges can be inferred from the case-law of the

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<sup>420</sup> Cf. already *supra*, Part 1, C.I.1.b).

<sup>421</sup> OJ 1986 L 378/1.

<sup>422</sup> Cf. ECJ, Case C-49/89, *Corsica Ferries*, ECR 1989, 4441, para. 13.

<sup>423</sup> In this context, it must be born in mind that the Community legislator has to observe the freedom to provide services when implementing it through secondary legislation, cf. ECJ, Case 13/83, ECR 1985, 1513, para. 64; ECJ, Case C-17/90, *Wieger*, ECR 1991, I-5253; *Epiney/Gruber*, *Verkehrsrecht*, 101 *et seq.*; *GA van Gerven*, final pleadings in Case C-18/83, *Corsica Ferries*, para. 23; von der Groeben/Schwarze-Troberg/Tiedje, Art. 51, Annot. 3.

<sup>424</sup> Which also suggests that the question of whether – and to what extent – Articles 49 *et seq.* ECT can have direct effect in the transport sector under certain circumstance (especially in the event of an inactive Community legislator) no longer is current. Cf. on this issue *Epiney/Gruber*, *Verkehrsrecht*, 103 *et seq.*; von der Groeben/Schwarze-Troberg/Tiedje, Art. 51, Annot. 2. In the case-law, notably ECJ, Case C-17/90, *Wieger*, ECR 1991, I-5253, paras. 11 *et seq.*

<sup>425</sup> On this issue *Behrens*, EuR 1992, 145 *et seq.*; *Füller*, *Grundlagen und inhaltliche Reichweite der Warenverkehrsfreiheiten*, 165; *Classen*, EWS 1995, 97 *et seq.*; *Eberhartinger*, EWS 1997, 43 *et seq.*; *Jarass*, EuR 1995, 202 *et seq.*; *Jarass*, EuR 2000, 705 *et seq.*; *Kingreen*, *Struktur der Grundfreiheiten*, 74 *et seq.*; *Kingreen*, EuGRZ 2004, 570 *et seq.*; *Classen*, EuR 2004, 416 *et seq.*; *Steinberg*, EuGRZ 2002, 13 *et seq.*; *Weiß*, EuZW 1999, 493 *et seq.*; *Oliver/Roth*, CMLRev. 2004, 407 *et seq.*

European Court of Justice and legal scholarship. Without being able to explore the general doctrine of the fundamental freedoms in this context,<sup>426</sup> the following considerations can be identified:

- To the extent that market access itself is affected or the measure significantly affects such access, the fundamental freedoms are to be interpreted as a **prohibition of restrictive measures**,<sup>427</sup> meaning that not only measures (directly or indirectly) linked to nationality are covered by their scope, but also measures generally restricting the exercise of each freedom.<sup>428</sup>
- Building on this interpretation of the fundamental freedoms as prohibitions of restrictive measures, a restriction of the fundamental freedoms can be justified both for the reasons expressly mentioned in the Treaty as well as other public interests;<sup>429</sup> the latter may not, however, be purely of an economic nature.<sup>430</sup>
- Finally, measures encroaching on the fundamental freedoms always have to suffice the requirements under the principle of proportionality.<sup>431</sup>

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<sup>426</sup> Cf. on the doctrine relating to fundamental freedoms the references in note 412.

<sup>427</sup> On Article 28 ECJ, see Case 120/78, *Rewe/Bandesmonopolverwaltung für Branntwein*, ECR 1979, 649 (“Cassis de Dijon”); ECJ, Case C-470/93, *Mars*, ECR 1995, I-1923; on the freedom to provide services ECJ, Case 33/74, *van Binsbergen*, ECR 1974, 1299, para. 10; ECJ, Rs C-76/90, *Säger*, ECR 1991, I-4221, para. 12; ECJ, Case C-275/92, *Schindler*, ECR 1994, I-1039, para. 43; on the freedom of establishment ECJ, Case C-212/97, *Centros*, ECR 1999, I-1459; ECJ, Case C-255/97, *Pfeiffer*, ECR 1999, I-2835; ECJ, Case C-55/94, *Gebhard*, ECR 1995, I-4165; on the free movement of capital ECJ, Judgment of 23 September 2003 - C-452/01 - *Ospelt and Schlössle Weissenberg Familienstiftung*; ECJ, ECR 2003, I-4581 - *Commission/Spain*; ECJ, ECR 2003, I-4641 - *Commission/United Kingdom*; ECJ, Case C-503/99 (*Commission/Belgium*), Judgment of 4 June 2002, *EuZW* 2002, 429; ECJ, Case C-483/99 (*Commission/France*), Judgment of 4 June 2002, *EuZW* 2002, 433; ECJ, Case C-367/98 (*Commission/Portugal*), Judgment of 4 June 2002, *EuZW* 2002, 437.

<sup>428</sup> It is still unclear and subject to debate whether the “Keck-doctrine” developed in application of Article 28 ECT (ECJ, joined Cases C-267, 268/91, *Keck and Mithouard*, ECR 1993, I-6097) can be applied to the other fundamental freedoms. On this issue *Calliess/Ruffert-Epiney*, Art. 28, Annot. 57. This aspect of the fundamental freedom doctrine should not become relevant in connection with user charges, however, given that the latter are hardly “modalities of the exercise of the fundamental freedoms”.

<sup>429</sup> Cf. the references contained in note 488.

<sup>430</sup> On this requirement, see with further references *Calliess/Ruffert-Epiney*, Art. 30, Annot. 14 *et seq.*

<sup>431</sup> From the case-law, see, for instance, ECJ, Case 8/89, *Zardi*, ECR 1990, 2515; ECJ, Case C-296/94, *Pietsch*, ECR 1996, I-3409; ECJ, Case verb. C-133/93, C-300/93 and C-362/93, *Crispoltini et al.*, ECR 1994, I-4836; ECJ, Case C-180/96, *BSE*, ECR 1998, I-2265, para. 96. In depth on the principle of proportionality in Community law *Emmerich-Fritzsche*, *Grundsatz der Verhältnismäßigkeit*, *passim*; *Koch*, *Grundsatz der Verhältnismäßigkeit*, *passim*.

### a.) Free Movement of Goods

An introduction of user charges would seek to compensate external costs caused by air and sea transport. Both in aviation and shipping, the provision of transport services will generally dominate quantitatively, with goods transported aside from passengers. Against this backdrop, even if a user charge is not directly imposed on goods, it can raise a variety of questions relating to the movement of goods whose answer may be decisive for the compatible design of a user charge. The following analysis will therefore cover implications of user charges for the movement of goods, distinguishing between the Articles 25 and 90 ECT (aa.), bb.)), which directly relate to charges, and Article 28 ECT with its prohibition of quantitative restrictions imports and all measures having equivalent effect (cc.)

#### aa.) Article 25 (Prohibition of Customs Duties and Charges Having Equivalent Effect)

A user charge could violate the prohibition of customs duties on imports and exports and charges having equivalent effect (Article 25 ECT). Since user charges are not customs duties in the sense of this provision, given that they are not referred as such,<sup>432</sup> only the prohibition of **charges having equivalent effect** to customs duties might prove relevant. Pursuant to the jurisprudence of the European Court of Justice, which draws on the “typical” characteristics of customs duties, such charges having equivalent effect presuppose that:<sup>433</sup>

- a unilaterally **compensation duty**
- of a **pecuniary** nature
- is levied at the time of, or by reason of, the **transboundary movement**
- of a **product**.

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<sup>432</sup> On the concept of customs duties *strictu sensu*, see ECJ, joined Cases 2, 3/69, Diamantarbeiders, ECR 1969, 211, paras. 15/18; siehe also on this issue *Freytag*, *Europarechtliche Anforderungen*, 245, with further references.

<sup>433</sup> Cf. from the seminal case-law ECJ, joined Cases 2, 3/62, Commission/Luxembourg, Belgium, ECR 1962, 869; and furthermore ECJ, joined Cases 2, 3/69, Diamantarbeiders, ECR 1969, 211, paras. 15/18; ECJ, Case C-72/92, Scharbatke/Bandesamt für Ernährung und Forstwirtschaft, ECR 1993, I-5509, para. 16; ECJ, Case C-266/91, Celulose Beira Industrial SA/Fazenda Pública, ECR 1993, I-4337, para. 10; in the scholarly literature, see *inter alia* von der Groeben/Schwarze-Vaulont, Art. 25, Annot. 5 *et sqq.*, with further references.

Even in the absence of an examination of all substantive elements contained in Article 25 ECT,<sup>434</sup> it can already be affirmed that **user charges** do not constitute charges having equivalent effect, given that they are not levied by reason of the transboundary movement of products and thus fail to meet that criterion: in order to fall within the scope of the prohibition set out through Article 25 ECT, a charge – however small – would have to be imposed precisely because of the “transboundary movement”, irrespective of the object and purpose of the measure.<sup>435</sup> By definition, a user charge on the use of global environmental goods will not be imposed on the transboundary movement. Instead, it implements the polluter-pays principle (*cf.* Article 174 (2) ECT<sup>436</sup>) in order to achieve compensation for the use of certain environmental goods. In other words, the event giving rise to the compensation duty is typically not the transboundary movement of a product, but the use of an environmental good.<sup>437</sup>

Incidentally, it bears noting that user charge geared towards “compensating” the use of an environmental good, also aiming at a certain behavioural effect in the process, are precisely not linked to the importation of products, given that such a measure would neither be suited nor necessary to achieve said objective, rendering it ultimately disproportionate.

Furthermore, any attempt to finance environmental policy by subjecting imported products to a compensation duty would violate Article 25 ECT and thus Community law.<sup>438</sup>

With the charge not linked to the transboundary movement of products, it cannot be classified as a charge having equivalent effect for the purposes of Article 25 ECT. By way of conclusion, it can be affirmed that a user charge may not, at any rate, be imposed on the transboundary movement of products, nor will it typically do so. Accordingly, the prohibition set out in Article 25 ECT will not apply to user charges, provided these are not linked to the criterion of a transboundary movement of products.

Such a user charge imposed on the transboundary movement of products could not be **justified** as such, since the prohibition contained in Article 25 ECT applies “absolutely”; its violation is not amenable to justification.<sup>439</sup>

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<sup>434</sup> Aside from the criterion of transboundary movement, the link to products, in particular, might be doubtful. Although it would not be decisive that the charge be directly imposed on a product, given that it suffices if the fee imposes an added burden on the transboundary movement of goods, *cf.* von der Groeben/Schwarze-Vaulont, Art. 25, Annot. 10, certain categories of user charges would not allow for any sort of product bearing. *Cf.* on this issue in connection with Article 90 ECT *infra* Part 1, C. III. 1. a.) bb.)

<sup>435</sup> ECJ, Case C-24/68, Commission/Italy, ECR 1969, 193, para. 16; see also ECJ, joined Cases 2 and 3/69, Diamantarbeiders, ECR 1969, 211, paras. 11/14.

<sup>436</sup> On the significance of the polluter-pays-principle for the introduction of environmental charges, see in depth *Heselhaus*, Chargenhoheit, 184 *et seq.* See also *supra* C. I. 1. c).

<sup>437</sup> *Cf.* above, Introduction, Part 1 A., regarding the notion of user charges applied here.

<sup>438</sup> *Müller-Graff*, EUDUR I, § 10, Annot. 38; *Seeger*, in: *Rechtliche Probleme von Umweltabgaben*, 165 (171).

<sup>439</sup> *Cf.* ECJ, Case 78/76, Steinike & Weinlig, ECR 1977, 595; ECJ, Case C-242/95, GT-Link, ECR 1997, I-4449; in academic literature *Balke*, Steuerliche Gestaltungsfreiheit, 149 *et seq.*; *Calliess-Ruffert-Waldhoff*, Art. 25, Annot. 11; *Seeger*, in: *Rechtliche Probleme von Umweltabgaben*, 165 (171).

ab.) Article 90 ECT (Prohibition of Discriminating Internal Taxation)

Pursuant to Article 90 ECT, products of other Member States may not be subjected to **internal taxation in excess** of that imposed on similar domestic products. The object and purpose of this provision is to ensure the **competitive neutrality** of internal taxation for imported and domestic products.<sup>440</sup> It also follows that this provision does not preclude the collection of internal, product-related charges as such, but (merely) aims at preventing discrimination arising from the ensuing fiscal burden. Accordingly, Article 90 (1) ECT can be considered a special manifestation of the general prohibition of discrimination already contained in Article 12 ECT, albeit drawing on the origin of products as the inadmissible grounds for differentiation.<sup>441</sup>

“Internal taxation” presupposes that the tax is not a charge having equivalent effect within the meaning of Article 25 ECT,<sup>442</sup> given that cumulative application of these two provisions is already ruled out with a view to their differing legal consequences (“absolute” prohibition in Article 25 ECT<sup>443</sup>, possibility of justification in Article 90 ECT<sup>444</sup>). When it comes to demarcating the scope of both provisions, the decisive criterion is the **transboundary movement** of a product, as it sets apart “charges having equivalent effect” as customs duties from “internal taxation” in the sense of Article 90 ECT, which forms part of a **comprehensive internal fiscal system**. Such internal taxation applies to the respective products on the basis of objective criteria,<sup>445</sup> irrespective of their origin and at the same trade level.<sup>446</sup> Internal taxes, in other words, apply both to domestic and foreign products,<sup>447</sup> albeit not necessarily imposing the same rates; charges having equivalent effect, in contrast, ultimately only affect products of foreign origin.<sup>448</sup>

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<sup>440</sup> ECJ, Case C-101/00, *Tulliasiamies and Antti Siilin*, ECR 2002, I-7487, para. 52; ECJ, Case C-47/88, *Commission/Denmark*, ECR 1990, I-4509, para. 9. See also *Wasmeier*, *Umweltabgaben*, 126.

<sup>441</sup> *Wasmeier*, *Umweltabgaben*, 127; *Hof*, *Straßenverkehrsabgaben*, 193; *Ohler*, *Fiskalische Integration*, 99. Other than that, Article 90 (1) ECT is directly applicable, cf. ECJ, Case 57/65, ECR 1966, 258 (265 *et seq.*) – *Lüttike GmbH*; ECJ, Case 34/67, ECR 1968, 363 (373) – *Lück*; *Grabitz/Hilf-Voß*, Art. 90, Annot. 52 *et seq.*; *Calliess/Ruffert-Waldhoff*, Art. 90, Annot. 11.

<sup>442</sup> ECJ, Case 57/65, *Lütticke*, ECR 1966, 267. See also *von der Groeben/Schwarze-Vaulont*, Art. 25 ECT, Annot. 18; *von der Groeben/Schwarze-Eilers/Bahns/Sedlaczek*, Art. 90 ECT, Annot. 4; *Welzel*, in: *Rechtliche Probleme von Umweltabgaben*, 1996, 197.

<sup>443</sup> See above, Part 1 C. III.

<sup>444</sup> On this issue, see the following passages.

<sup>445</sup> ECJ, Case 90/79, ECR 1981, 283, paras. 13 *et seq.* – *Commission/Frankreich*; ECJ, Case 105/76, ECR 1977, 1029 – *Interzuccheri/Rezzano*; ECJ, Case 193/85, ECR 1987, 2085 – *Cooperativa CO-Frutta*; *Grabitz/Hilf-Voß*, Art. 90, Annot. 57; in depth *Wasmeier*, *Umweltabgaben*, 106 *et seq.*; *Balke*, *Steuerliche Gestaltungsfreiheit*, 149 *et seq.*; *Wiebe*, *Abgaben zollgleicher Wirkung*, 122 *et seq.*, each with further references.

<sup>446</sup> ECJ, Case 39/82, ECR 1983, 19 – *Donner/Niederlande*; ECJ, Case C-149/91, ECR 1992, I-3899, paras. 17 *et seq.* – *Sanders*; *Wasmeier*, *Umweltabgaben*, 117; *Jobs*, *Steuern auf Energie*, 261.

<sup>447</sup> ECJ, Case 90/79, *Commission/France*, ECR 1981, 283, paras. 12 *et seq.*; ECJ, Case 32/80, *Kortmann*, ECR 1981, 251, para. 20; ECJ, Case 15/81, *Schul*, ECR 1982, 1409, para. 20.

<sup>448</sup> On individual aspects of this distinction, see, for instance, *Calliess/Ruffert-Waldhoff*, Art. 25, Annot. 11; *von der Groeben-Vaulont*, Art. 25, Annot. 18 *et seq.*

## (1) Legal Scope of Article 90 (1) ECT

The legal scope of Article 90 ECT primarily depends on its **scope of application**. Drawing on the wording of Article 90 ECT, the scope of application can be described as follows:

- Article 90 ECT is based on an extensive **concept of taxation**,<sup>449</sup> as can already be inferred from the choice of language in Article 90 (1) ECT: “internal taxation of any kind.” For the purposes of this provision, “taxation” can be understood as any charge collected by a body governed by public law,<sup>450</sup> irrespective of its designation<sup>451</sup> as a tax, fee, or contribution, *i.e.* its classification under domestic law, and the type and purpose of its expenditure.<sup>452</sup>
- Given that Article 90 (1) ECT only covers taxation “of products”,<sup>453</sup> application of this provision presupposes a **product bearing**, which does not, however, require direct and specific taxation of a product.<sup>454</sup> Rather, a distinction is necessary: on the one hand, the object of taxation can itself be a product. Accordingly, a progressive tax on motor vehicles based on their fiscal power rating would fall within the purview of Article 90 ECT.<sup>455</sup> The same applies to taxes on mineral oil and energy,<sup>456</sup> which the European Court of Justice has classified as products.<sup>457</sup> On the other hand, taxation of the movement of goods is itself product-related if

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<sup>449</sup> Cf. *Ohler*, Fiskalische Integration, 106; *Calliess/Ruffert-Waldhoff*, Art. 90, Annot. 10; *Grabitz/Hilf-Voß*, Art. 90, Annot. 14 *et seq.*; ECJ, Case 20/76, ECR 1977, 247, Ziff. 13 – *Schöttle & Söhne*.

<sup>450</sup> ECJ, Case 74/76, *Ianelli and Volpi*, ECR 1977, 557, para. 19; *Müller*, Abgaben im Umweltrecht, 109; *Ohler*, Fiskalische Integration, 106.

<sup>451</sup> von der Groeben/Schwarze-Eilers/Bahns/Sedlaczek, Art. 90 ECT, Annot. 18 *et seq.*; *Seegers*, in: *Rechtliche Probleme von Umweltafgaben*, 165 (173); *Grabitz/Hilf-Voß*, Art. 90, Annot. 14; *Ohler*, Fiskalische Integration, 106; *Müller*, Abgaben im Umweltrecht, 109; *Calliess/Ruffert-Waldhoff*, Art. 90, Annot. 10. A sanction imposed in the event of a violation of applicable fiscal provisions can also fall under the concept of taxation. See ECJ, Case C-276/91, ECR 1993, I-4413, para. 28 – *Commission/France*.

<sup>452</sup> Proceeds could accrue to the state budget or be appropriated separately for a specific purpose as special charges. ECJ, Case 74/76, *Iannelli & Volpi*, ECR 1977, 557, paras. 18 *et seq.*; *Grabitz/Hilf-Voß*, Art. 90, Annot. 14 *et seq.*

<sup>453</sup> Charges on capital and services are thus excluded. Cf. ECJ, Case 267/86, *van Eycke*, ECR 1988, 4769, para. 25. An analogous application of Article 90 (1) ECT has to be rejected, cf. *Calliess/Ruffert-Waldhoff*, Art. 90, Annot. 10; *Balke*, *Steuerliche Gestaltungsfreiheit*, 24 *et seq.*

<sup>454</sup> von der Groeben/Schwarze-Eilers/Bahns/Sedlaczek, Art. 90, Annot. 23, 27.

<sup>455</sup> ECJ, Case 112/84, *Humboldt*, ECR 1985, 1367, paras. 12 *et seq.*

<sup>456</sup> ECJ, Case C-213/96, *Outokumpu Oy*, ECR 1998, I-1777; *Wasmeier*, *Umweltafgaben*, 92; *Jobs*, *Steuern auf Energie*, 254 *et seq.*; *Epiney/Gruber*, *Verkehrsrecht in der EU*, 188 *et seq.*

<sup>457</sup> A product is defined as being valued in money and thus able to be the subject of commercial transactions, see ECJ, Case 7/68, *Commission/Italien*, ECR 1968, 633, para. 6. In ECJ, Case C-393/92, *Almelo*, ECR 1994, I-1477, para. 28, the Court considered electricity a product. The same would have to apply to oil and gas; see *Grabitz/Hilf-Leible*, Art. 28, para. 45.



it can be “ascribed” to the product.<sup>458</sup> That would be the case, for instance, if a feature of the transported product (notably its weight or size) determined the rate of the charge,<sup>459</sup> not, however, if the overall weight of the motor vehicle in question serves as the basis for calculation.<sup>460</sup> A product bearing can also follow otherwise from the calculation basis, for instance when the weight or value of a product serves as a reference value for the fiscal burden; such indirect taxation of products is, for instance, common when assessing fees on registration, storage and postal services.<sup>461</sup>

Substantively, Article 90 (1) ECT contents a fiscal **prohibition of discrimination** for products from other Member States, with “**similar domestic products**” providing the standard of comparison. The likeness of products has to be determined on the basis of a comprehensive normative assessment of objective product features and the subjective impressions of consumers.<sup>462</sup> Within the ambit of Article 90 (1) ECT, likeness thus depends on whether products have similar features and serve the same needs of consumers.<sup>463</sup> At any rate, products are not like if they differ in the method of their manufacture or their essential characteristics, something the European Court of Justice upheld in the case of liqueur wines fortified with spirits and wines resulting from natural fermentation.<sup>464</sup>

Article 90 (1) ECT does not apply in the absence of comparable domestic production,<sup>465</sup> given that such circumstances cannot give rise to a discrimination of imported products relative to domestic products. Accordingly, Article 90 (1) ECT does not generally rule out imposing a burden on foreign products.

A violation of Article 90 (1) ECT occurs when charges imposed on imported products and similar domestic products are calculated differently and based on divergent modalities, resulting in imported products being subjected to a higher burden – even in very exceptional cases – and thus in

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<sup>458</sup> von der Groeben/Schwarze-Eilers/Bahns/Sedlacek, Art. 90 ECT, Annot. 31.

<sup>459</sup> Wasmeier, Umweltabgaben and Europarecht, 94ff.; Epiney/Gruber, Verkehrsrecht, 189.

<sup>460</sup> Epiney/Gruber, Verkehrsrecht, 199 *et seq.*

<sup>461</sup> ECJ, Case 32/80, Kortmann, ECR 1981, 251; ECJ, Case 34/37, Variola, ECR 1973, 981; ECJ, Case 39/82, Donner/Niederlande, ECR 1983, 19.

<sup>462</sup> Calliess/Ruffert-Waldhoff, Art. 90, Annot. 12; Epiney/Gruber, Verkehrsrecht, 193.

<sup>463</sup> ECJ, Case C-302/00, Commission/Frankreich, ECR 2002, I-2055, para. 23; ECJ, Case C-265/99, Commission/Frankreich, ECR 2001, I-2305, para. 42; ECJ, Case C-101/00, Tulliasiamies and Antti Siilin, ECR 2002, I-7487, para. 56.

<sup>464</sup> ECJ, Case 104/81, ECR 1982, 3641, para. 46.

<sup>465</sup> ECJ, Case C-47/88, Commission/Denmark, ECR 1990, I-4509, para. 10.

a **discrimination** of the latter.<sup>466</sup> Both direct and indirect discrimination are covered by this provision.<sup>467</sup>

A protectionist approach to internal taxation, for instance by imposing the lowest tax rates to all domestic products and the highest rates to all foreign products, would clearly meet the concept of discrimination set out in Article 90 (1) ECT.<sup>468</sup>

Fiscal measures imposed equally on domestic and foreign products can still be discriminating if “return services” or reimbursements of any kind mainly (or exclusively) benefit domestic companies, or if tax exemptions merely or primarily apply to domestic producers.<sup>469</sup>

A differentiation of taxes on like products may be **justified by legitimate public interests** which are themselves compatible with the objectives of the Community, provided they are based on objective criteria and not the mere state of origin.<sup>470</sup> Article 90 (1) ECT does not, in other words, contain an absolute duty to afford equal treatment.<sup>471</sup> Member States are thus given the possibility to guide behaviour in desired ways by differentiating tax rates on the basis of objective criteria.<sup>472</sup>

Accordingly, the ECJ considered an electricity tax which varied in accordance with the manner in which the electricity was generated and the raw materials used for its production compatible with Article 90 (1) ECT if ecological considerations motivated such differentiation; purely practical difficulties cannot be considered legitimate public interests, however.<sup>473</sup>

Likewise, the **proportionality** of differentiation – as measured against the objective thereby pursued – is of decisive importance.<sup>474</sup>

## (2) On the Significance of Article 90 (1) ECT for the Design of User Charges

If one attempts to frame more concrete requirements arising from Article 90 (1) ECT for user charges against the foregoing analysis of its legal scope, the following will generally apply:

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<sup>466</sup> ECJ, Case C-101/00, *Tulliasiamies and Antti Siilin*, ECR 2002, I-7487, para. 53; ECJ, Case C-213/96, *Outokumpu*, ECR 1998, I-1777, para. 34; ECJ, Case C-393/98, *Gomes Valente*, ECR 2001, I-1327, para. 21; ECJ, Case C-302/00, *Commission/France*, ECR 2002, I-2055, para. 21.

<sup>467</sup> ECJ, Case 112/84, *Humblot*, ECR 1985, 1367, para. 13-16; ECJ, Case C-302/00, *Commission/Frankreich*, ECR 2002, I-2055, para. 30; *Craig/de Búrca*, EU Law, 593 *et seq.*; Calliess/Ruffert-Waldhoff, Art. 90 ECT, Annot. 13.

<sup>468</sup> *Jatzke*, EWS 2000, 491 (495).

<sup>469</sup> *Pieper*, DÖV 1996, 232 (238 *et seq.*); *Wasmeier*, Umweltabgaben, 132.

<sup>470</sup> ECJ, Case 140/79, *Chemical Farmaceutici*, ECR 1981, 1, para. 15; ECJ, Case 196/85, *Commission/France*, ECR 1987, 1597, para. 9; ECJ, Case C-90/94, *Haahr Petroleum*, ECR 1997, I-4085, paras. 30 *et seq.*; *Jatzke*, EWS 2000, 491 (495); *Hof*, Straßenverkehrsabgaben, 207 *et seq.*; *Grabitz/Hilf-Voß*, Art. 90, Annot. 33 *et seq.*; *Jobs*, Steuern auf Energie, 264.

<sup>471</sup> *Epiney/Gruber*, Verkehrspolitik, 195 *et seq.*

<sup>472</sup> Calliess/Ruffert-Waldhoff, Art. 90 ECT, Annot. 13; *Craig/de Búrca*, EU Law, 597 *et seq.*

<sup>473</sup> ECJ, Case C-213/96, *Outokumpu Oy*, ECR 1998, I-1777, para. 31.

<sup>474</sup> *Wasmeier*, Umweltabgaben, 136; *Epiney/Gruber*, Verkehrsrecht, 195; *Seegers*, in: Rechtliche Probleme von Umweltabgaben, 165 (175).

- **User charges** must definitely be considered **taxation** within the purview of Article 90 ECT, given the (undisputedly) wide scope of taxation as a concept.
- Application of Article 90 (1) ECT to user charges will typically depend on whether the latter **relate to a product**; depending on the design of the user charge, such a product bearing may be present or not. Different user charge models need to be distinguished with a view to this characteristic. Only if the user charge is related to products in the sense outlined above will Article 90 (1) ECT set out certain requirements for the design of user charges.
- What is more, for Article 90 (1) ECT to apply, the user charge would have to demonstrably possess a **discriminating effect** linked to the origin of products.
- Even in the event that Article 90 (1) ECT proves applicable, objective public interests – Including environmental protection – might justify the measure in question.

Against this backdrop, different design options for a user charge may now be assessed with a view to Article 90 (1) ECT:

- A charge imposed on **freight** relative to a certain distance (**toll**) will generally relate to products in a manner sufficient to incite application of Article 90 (1) ECT, given that the charge is then calculated on the basis of freight volumes. In the case of a user charge based on objective criteria, however, a violation of Article 90 (1) ECT is unlikely given the absence of discrimination, which is one of the required criteria. Aside from that, it would still be difficult to ascertain how such an instrument could discriminate against certain products, seeing how it is linked to freight capacities as such and not the actual products being transported.

At best, one might assume a substantive discrimination if the user charge is imposed solely on the transport of certain (foreign) products, a design that is hardly likely to be implemented.

Altogether, thus, the conditions for a violation of Article 90 (1) ECT will typically not be met by such a user charge design.

- User charges collected relative to the distance traveled (**toll**), the **load capacity** or the passengers transported (“**Ticket Charge**”) do not possess the required product bearing, given that they are not imposed on the transported products as such. An analogous reasoning applies to **time-based user charges**.
- **Fees imposed on the use of infrastructures** (port-/landing fees) do not have a product bearing, as they are solely geared towards the use of infrastructures by a certain vehicle. Application of Article 90 (1) ECT might result from a product bearing established through the means of transportation, which is a product in itself.<sup>475</sup> In the case of port and landing fees, however, the linkages with free movement of goods will commonly be too indirect and uncertain: after all, the fees are not intended as compensation for the vehicles as such, but for

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Thus in relation to motorway tolls *Hof*, Straßenverkehrsabgaben, 200; *Epiney/Gruber*, Verkehrsrecht, 200 *et seq.*

the service rendered; generally, therefore, such charges will not affect trade and the free movement of products. A different view could only apply if the fee was designed to be so high as to result in a breakdown of demand in the market for transportation services.<sup>476</sup> At any rate, it bears noting that port and landing fees will generally fail to have a discriminating effect given that they relate to the use of infrastructures, with differentiation in accordance with origin of vehicles unlikely. As a rule, thus, Article 90 (1) ECT will not apply to fees on infrastructure usage.

- **Emissions-based user charges** and charges imposed on the **consumption of fuel** have a **product bearing**. In the case of charges linked to the fuel consumption, the product bearing follows directly from the capacity of fuel as a product. An indirect bearing may also arise in the event of emissions-based charges, however, given the direct correlation between fuel consumption and resultant emissions.<sup>477</sup>

Thus, the ECJ qualified a Danish tax determined by reference to fuel consumption and emissions as an excise tax imposed on the consumption of products for purposes of secondary legislation.<sup>478</sup> A product bearing may also follow from reference to the means of transportation. Emissions-based user charges may, after all, affect the free movement of goods by guiding users towards less emitting means of transportation.

A system of environmental tariffs based on objective criteria should not give rise to any objections under Article 90 (1) ECT, provided it is proportionate to the environmental objectives it seeks to achieve. In such a case, objective differentiation relative to pollutants emitted would also be permissible if it benefited means of transportation meeting strict domestic pollutant ceilings by affording them a preferential rate.<sup>479</sup> Indeed, a system of user charges cannot be considered discriminating merely because products imported from other Member States fall within the highest tax category.<sup>480</sup> Protectionist charges, in turn, which grant preferential treatment to domestic means of transportation despite their being more polluting, would clearly violate the prohibition of discrimination set out in Article 90 (1) ECT. Otherwise, however, Article 90 (1) ECT generally allows for measures to guide behaviour towards less emitting means of transportation.

For the sake of completeness, mention should also be made of **Article 90 (2) ECT**: aside from prohibiting discrimination of similar products, this provision also contains a **prohibition of protectionism**. The comparison of fiscal burdens necessitated by Article 90 (2) ECT relates to products – directly or indirectly – competing within the same market and thus susceptible to mutual substitution.<sup>481</sup> A charge can prove protectionist both by differentiating relative to the origin of imported products, or by their effect (products subject to a higher burden are primarily imported,

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<sup>476</sup> Cf. *Epiney/Gruber*, Verkehrsrecht, 200.

<sup>477</sup> *Freytag*, Europarechtliche Anforderungen, 311 *et seq.*

<sup>478</sup> ECJ, Case C-346/97, *Braathens Sverige*, ECR 1999, I-3419, paras. 22 *et seq.*

<sup>479</sup> *Wasmeier*, Umweltabgaben, 136.

<sup>480</sup> ECJ, Case C-132/88, *Commission/Greece*, ECR 1990, I-1567, para. 18.

<sup>481</sup> *Calliess/Ruffert-Waldhoff*, Art. 90, Annot. 18.

rather than produced domestically).<sup>482</sup> Article 90 (2) ECT supplements Article 90 (1) ECT by precluding protectionist effects of charges to the benefit of domestic production.

Whether the objective of a charge is compatible with Article 90 (2) ECT has to be determined by way of a comprehensive **test of proportionality**. The pursuit of a legitimate common interest will typically rule out a protectionist effect, however.<sup>483</sup> Charges based on objective criteria, with no link to the origin of products, do not give rise to objections under Article 90 (2) ECT.

#### ac.) Article 28 ECT (Prohibition of Quantitative Restrictions and Measures Having Equivalent Effect)

Article 28 ECT prohibits quantitative restrictions on trade and all measures having equivalent effect between Member States. Like the foregoing provisions, Article 28 ECT is designed as a prohibition of restrictions.<sup>484</sup> Generally, however, **Article 25 ECT** will be classified as *lex specialis* in relation to **Article 28 ECT** whenever the free movement of goods is restricted by customs duties and charges having equivalent effect.<sup>485</sup> Charges not prohibited by Article 25 ECT may not, then, be precluded by Article 28 as a fall-back clause. In that sense, charges only need to be tested with reference to Article 25 ECT (or Article 90 EGV).

If at all, only internal taxes prohibited neither by Article 25 ECT nor by Article 90 ECT might be reviewed pursuant to Article 28, and then only, if the taxes are sufficiently high to restrict the free movement of goods within the common market.<sup>486</sup> Only measures amounting to a *de facto* import or export prohibition would be affected, however, for instance because the tax rates are so high as to have a prohibitive effect; that is not likely in the case of user charges. Article 28 ECT will thus only apply under very limited circumstances and are thus of little relevance for the questions addressed in this study,<sup>487</sup> obviating the need for more detailed analysis.

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<sup>482</sup> Calliess/Ruffert-Waldhoff, Art. 90, Annot. 19.

<sup>483</sup> Epiney/Gruber, Verkehrsrecht, 205.

<sup>484</sup> ECJ, Case 120/78, Cassis de Dijon, ECR 1979, 649, para. 8.

<sup>485</sup> Standing case-law: Cf. ECJ, Case 74/76, Iannelli and Volpi, ECR 1977, 557, paras. 9/10; ECJ, joined Cases C-78-83/90, Compagnie Commerciale, ECR 1992, I-1847, para. 20; ECJ, Case C-266/91, Celulose Beira, ECR 1993, I-4337, para. 26. See also Epiney, ZUR 1995, 24 (30); Wasmeier, Umweltabgaben, 104; Freytag, Europarechtliche Anforderungen, 256; von der Groeben/Schwarze-Müller-Graff, Art. 28 ECT, Annot. 328.

<sup>486</sup> Thus, for instance, the ECJ in an *obiter dictum*, cf. ECJ, Case 47/88, Commission/Denmark, ECR 1990, I-4509, paras. 12-13.

<sup>487</sup> Likewise Freytag, Europarechtliche Anforderungen an Umweltabgaben, 257. Critically as regards the aforementioned tendencies in the case-law of the ECJ Wasmeier, Umweltabgaben, 112, who considers an application of Art. 28 ECT alongside the more specific provisions set out in Art. 25 and 90 ECT unnecessary.

b.) Article 43 ECT (Freedom of Establishment)

ba.) Principles

Article 43 ECT prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.<sup>488</sup> Pursuant to Article 43 (2) ECT, the **freedom of establishment** includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings. What is more, the freedom of establishment implies the opportunity of participating, on a stable and continuous basis, in the economic life of another Member State.<sup>489</sup> Article 43 ECT only applies to **measures not related to products**, given that product-related charges are already conclusively regulated by Articles 25 and 90 ECT.<sup>490</sup>

Although Article 43 (2) ECT only refers to taking up and pursuing activities as self-employed persons “under the conditions laid down for its own nationals by the law of the country where such establishment is effected”, initially rendering it a requirement of equal treatment, the European Court of Justice has largely approximated the freedom of establishment and the product-related freedoms. Accordingly, the freedom of establishment extends to national legislation which – despite not being discriminatory on the basis of origin – may prove suited to restrict or render less attractive the exercise of a fundamental freedom set out in the Treaty,<sup>491</sup> at least to the extent it restricts the establishment itself (**prohibition of restriction**).

Again, however, restrictive measures may be **justified** – even if they are additionally discriminatory in an indirect sense<sup>492</sup> – under the following conditions.<sup>493</sup>

- They must be justified by an **overriding reason relating to the public interest**;
- They must be **appropriate** for achievement of the pursued objective;
- They may not go beyond what is **necessary** to achieve the pursued objective.

Under the case-law of the ECJ, **direct discrimination** will probably only be justifiable with the reasons outlined in the Treaty (that is, reasons of public order, security or health, *cf.* Article 43 ECT);<sup>494</sup> given the restrictive interpretation of

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<sup>488</sup> In depth on the freedom of establishment *Lackhoff*, Niederlassungsfreiheit, *passim*.

<sup>489</sup> *Cf.* ECJ, Case C-55/94, Gebhard, ECR 1995, I-4165, para. 25.

<sup>490</sup> *Seeger*, in: *Rechtsprobleme von Umweltabgaben*, 165 (171); *Wasmeier*, *Umweltabgaben*, 161.

<sup>491</sup> ECJ, Case C-19/92, Kraus, ECR 1993, I-1663, para. 32. *Cf.* auch *Epiney*, *Umgekehrte Diskriminierungen*, 69; *Lenaerts/van Nuffel*, *Constitutional Law of the EU*, Annot. 5-129; von der Groeben/Schwarze-Tiedje/Troberg, Art. 43 ECT, Annot. 87ff.

<sup>492</sup> Grabitz/Hilf-Randelzhofer/Forsthoff, Art. 43 ECT, Annot. 109.

<sup>493</sup> Siehe ECJ, Case C-55/94, Gebhard, ECR 1995, I-4165, para. 37; ECJ, C-424/97, Haim, ECR 2000, I-5123, para. 57; ECJ, Case C-19/92, Kraus, ECR 1993, I-1663, para. 32.

<sup>494</sup> *Cf.* *Lenaerts/van Nuffel*, *Constitutional Law*, para. 5-111 and para. 5-144.

these concepts by the ECJ, directly discriminating measures will typically not be amenable to justification on environmental protection grounds.<sup>495</sup>

bb.) On the Significance of Article 43 ECT for the Design of User Charges

To the extent that they are not related to products, in which case Articles 25, 90 ECT would apply, the **introduction of user charges** may generally fall under the **prohibition** set out in **Article 43 ECT**:

- That would be the case if the introduction of the user charges still results in **indirect discrimination**, despite being applied without distinction for reasons of origin.

That would be the case, for instance, if entrepreneurs from other Member States encounter greater difficulties in meeting the conditions of a tax exemption than domestic entrepreneurs.<sup>496</sup> Although such provisions might apply indiscriminately to both domestic and foreign entrepreneurs, foreign companies would still suffer discrimination in the end, given that only domestic companies will commonly benefit from the tax exemptions.

Direct discrimination arising from a charge, for instance by differentiating rates on the basis of nationality, will not *prima facie* preclude suitability for the achievement of environmental policy objectives, setting aside the fact that justification on environmental grounds is likely to fail given the case-law of the ECJ.<sup>497</sup> Against this backdrop, measures discriminating on grounds of nationality will, at best, be a political option in exceptional cases only.

- Additionally, it should be borne in mind that any measure capable of **restricting the establishment** in other Member States or rendering it **less attractive**, thereby affecting the choice of location of a company, is covered by the prohibition of restrictions inferred from Article 43 ECT. This also applies to fiscal measures which may restrict the freedom of establishment.

Deciding on French legislation affording a tax credit to French insurance companies for dividends from stocks held by these companies, but not to agencies of insurance companies with registered offices in another Member State, the Court found a violation of Article 43 ECT.<sup>498</sup>

A **user charge** assessed against transport undertakings may, in principle, result in a **restriction** of their freedom of establishment, given that it incurs additional expenses and thus

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<sup>495</sup> Although the Court has relativised this principle somewhat with a view to the free movement of goods, *cf.* ECJ, Case C-379/98, Preussen Elektra/Schleswig AG, ECR 2001, I-2099; it appears doubtful that this case-law has general application and can be “extended” to Art. 43 ECT, especially since it was inspired by the specific constellation of the underlying case. Other than that, direct discrimination would likely prove unsuitable or at least unnecessary for the achievement of the objectives pursued with a user charge, obviating the need for additional analysis of this issue. *Cf.* on the scope of said ECJ judgment for instance *Scheuing*, in: *Umweltrecht im Wandel*, 129 (156 *et seq.*); *Skouris*, *Festschrift Rodriguez Iglesias*, 497 (503 *et seq.*).

<sup>496</sup> *Freytag*, *Europarechtliche Anforderungen*, 263 *et seq.*

<sup>497</sup> *Cf.* the references provided in note 482.

<sup>498</sup> ECJ, Case 270/83, Commission/Frankreich, ECR 1986, 273, para. 11 *et seq.*; *cf.* auch ECJ, Case C-1/93, Halliburton, ECR 1994, I-1137, paras. 14 *et seq.*; ECJ, Case C-264/96, Imperial Chemical Industries, ECR 1998, I-4695, para. 18. On the compatibility of a fiscal provision on the taxation of motor vehicles with the freedom of establishment of workers, see also ECJ, EuZW 2004, 413, Weigel. On this issue *Sutter*, EuZW 2004, 590 *et seq.*

impairs their competitive position (for instance in relation to undertakings from third states).<sup>499</sup> It would stand to reason that Article 43 ECT applies to fees on the **use of infrastructures** (port and landing fees), in particular, as these are liable to influence the choice of location and have no product bearing; emissions- and time-based user charges as well as charges on fuel consumption commonly lead to an application of Article 90 (1) ECT.<sup>500</sup> In the case of tolling systems, insofar as they are not already governed by Article 90 (1) ECT, pertinence for the freedom of establishment will likely be superseded by the freedom to provide services, which has yet to be outlined below; after all, the toll will not be imposed on the establishment as such, but rather be a charge assessed in connection with the provision of a service, thus largely precluding a restriction of the freedom of establishment.

The possibilities of a **justification** by an overriding reason relating to the public interest remain to be determined, drawing on the foregoing principles, notably the need to give particular consideration to the principle of proportionality:

- The **overriding reasons relating to the public interest** are entirely based on judicial decisions and do not form part of an exhaustive catalogue; accordingly, they can be expanded to include additional justifications of a non-economic character.<sup>501</sup> In the area of free movement of goods, the European Court of Justice has explicitly recognised environmental protection as an overriding reason suited to restrict the application of Article 28 ECT.<sup>502</sup> A similarly explicit recognition has yet to be declared in the area of freedom of establishment. Still, with a view to the largely analogous development of the personal freedoms as a ban on restrictions, it would seem to follow that overriding reasons of environmental protection should also serve to justify restrictions of the freedom of establishment.<sup>503</sup> Such an interpretation would also find support in Article 3 lit. 1 ECT, which charges the Community with implementation of a policy in the sphere of the environment. In the absence of Community harmonisation measures, moreover, Member States are not prevented from relying on environmental protection as a justification.<sup>504</sup> Other than that, however, user charges are generally compatible with the objectives of the Treaty in that they seek to

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<sup>499</sup> Cf. also *Wasmeier*, Umweltabgaben, 163 *et seq.*

<sup>500</sup> *Supra*, Part 1, C. III.

<sup>501</sup> Grabitz/Hilf-Randelzhofer/Forsthoff, Art. 43 EGV, para. 108 and Vorbemerkungen zu Art. 39-55, para. 162 *et seq.*

<sup>502</sup> For the seminal case, see ECJ, Case 302/86, Commission/Denmark, ECR 1988, 4607, para. 9; confirmed, for instance, by the ECJ in Case C-379/98, Preussen Elektra/Schleswig AG, ECR 2001, I-2099.

<sup>503</sup> Likewise *Müller-Graff*, EUDUR I, § 10, para. 84; *Freytag*, Europarechtliche Anforderungen, 262.

<sup>504</sup> Cf. on this approach AG *Jacobs* in Case C-112/00, Schmidberger, ECR 2003, I-5659, para. 102, who (regarding the fundamental rights in the Treaty) states that: “Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue.”



implement a central tenet of the environmental principles set out in Article 174 (2) EGV, the principle that the polluter should pay.<sup>505</sup>

Generally, therefore, **user charges** restricting the freedom of establishment may be justified on **environmental grounds** – including the need to **protect the global commons** by limiting their exploitation in accordance with the principle that the polluter should pay.

- As for the requirement that a measure be **appropriate**, the (Community or national) legislator will possess ample powers of discretion.<sup>506</sup> The legislator may choose among different approaches for the achievement of a set objective, provided the chosen approach is generally conducive to such achievement.<sup>507</sup> Phrased differently, the measure may not be manifestly unsuitable for achievement of the pursued objective.<sup>508</sup> As such, then, a plausibility test is called for.<sup>509</sup> Altogether, it needs to be borne in mind that this involves testing a means-end-relation, with the suitability of a measure only ascertainable relative to the objectives set out by the national or the Community legislator.

Exact determination of the **objective** is thus decisive for an assessment of the suitability of a **user charge** on global environmental goods: if the user charge is only meant to guide behaviour towards environmentally less detrimental means of transportation, the chosen design would have to be evaluated with a view to its conduciveness to said objective. If, however, the guiding effect cannot be achieved, for instance because the specific design of the charge creates an incentive to engage in environmentally detrimental behaviour or because the rates it imposes are so low that it cannot influence behavioural choices, it cannot be considered appropriate.<sup>510</sup> If, on the other hand, the purpose of the charge is to redress environmental damages or provide funds for the promotion of research on environmental technologies, its appropriateness would have to be determined with a view to this financing objective. The decisive factor, thus, would seem to be the expenditure of proceeds: a user charge imposed without earmarking for specific purposes and thus merely accruing to the general budget would not, accordingly, be conducive to achievement of a certain purpose, all the more since it does not yield revenues which can be use for said purpose. If the user charge

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<sup>505</sup> Cf. *Amend*, Instrument der Umweltabgabe, 185 *et seq.*

<sup>506</sup> Cf. only ECJ, Case C-293/93, Houtwipper, ECR 1994, I-4249, para. 22 (for the national legislator); ECJ, Case 265/87, Schröder, ECR 1989, 2237, paras. 22 *et seq.* (for the Community legislator).

<sup>507</sup> von der Groeben/Schwarze-Müller-Graff, Art. 30 ECT, Annot. 130.

<sup>508</sup> von der Groeben/Schwarze-Tiedje/Troberg, Art. 43, Annot. 106; von der Groeben/Schwarze-Müller-Graff, Art. 30 ECT, Annot. 130; ECJ, Case 265/87, Schröder, ECR 1989, 2237, para. 22; see also ECJ, Case C-341/95, Safety Hi-Tech, ECR 1998, I-4801; ECJ, Case C-284/95, Bettati/Safety Hi-Tech, ECR 1998, I-4335. At length *Epiney*, in: Klimaschutz durch Emissionshandel, 207 (235 *et seq.*).

<sup>509</sup> Cf. von der Groeben/Schwarze-Tiedje/Troberg, Art. 43 ECT, Annot. 106.

<sup>510</sup> *Freytag*, Europarechtliche Anforderungen, 185 *et seq.*

solely aims at “compensating” the use of an environmental good in accordance with the principle that the polluter should pay, however, it will likely prove appropriate, unless it is designed in a way that it provides an incentive for more intense use of the environmental good.

Lacking appropriateness, clearly, is a charge whose proceeds would be used purely to finance measures of development co-operation, despite the charge being imposed for environmental policy purposes. Likewise, a charge on shipping which incurs a shift to more detrimental means of transportation and thereby counteracts the environmental policy objectives would have to be considered inappropriate. And finally, a system of charges which, although based on the distance traveled, is merely charged on the negligibly small fraction of the overall distance traveled within a specific area, would tend to be inappropriate. In either case, the appropriateness has to be determined with a view to the legislative purpose only.

- The criterion of **necessity** requires that measures taken be commensurate with the objectives they pursue or, in other words, that these objectives not be met by less onerous measures.<sup>511</sup> Put differently, the means chosen to reach a specified objective have to be proportionate.<sup>512</sup> This necessitates a comparison of alternative means. If these are less onerous than the measure ultimately taken, the latter is not necessary and thus not justified; again, the legislative definition of objectives is decisive, given that any determination of the least restrictive means can only occur in relation to the pursuit of specific objectives. By all means, the legislator enjoys a wide scope of discretion.<sup>513</sup> Command-and-control regulation prohibiting the use of certain routes of transportation is, as a rule, not less onerous as a means,<sup>514</sup> nor are regulatory approaches generally the mildest instrument; instead, the legislative powers of discretion also – and precisely – extend to the choice between different environmental policy instruments.

At any rate, when assessing the necessity of a user charge, the rate it imposes is of crucial importance. A “strangling charge” amounting to a *de facto*-prohibition of the activities it is imposed on cannot be considered necessary. Other than that, however, no general inferences can be made regarding the necessity and – in consequence – the admissibility of rates. Again, the determination has to occur against the background of relevant economic factors and the objective pursued with the introduction of the charge. If a desired behaviour can only be achieved with a certain rate, this rate will generally be necessary.

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<sup>511</sup> See recently with regard to the free movement of goods ECJ, Case C-41/02, Commission/Netherlands, Judgment of 2 December 2004, para. 46.

<sup>512</sup> von der Groeben/Schwarze-Tiedje/Troberg, Art. 43, para. 107.

<sup>513</sup> Freytag, Europarechtliche Anforderungen, 187.

<sup>514</sup> Kirchhof, DVBl. 2000, 1166 (1172).

Certainly, strangling charges fail to meet the necessity test. Aside from the rates of a user charge, moreover, the chosen calculation basis can also rule out its necessity. Here, however, a differentiating view is called for: despite the discretion basically afforded to the legislator, preference must be given to the calculation basis which is least restrictive for the affected fundamental freedoms while still being appropriate in the achievement of specified objectives. A flat-rate, time-based user charge – for instance an annual fee collected in the transport sector irrespective of actual usage – would not be necessary when calculation based on the actual distance traveled allows for a more targeted and typically lower fiscal burden. Still, an abstract hierarchy of charges and their ability to meet the necessity test can hardly be compiled. Against the background of environmental protection, a high fiscal burden imposed on certain categories of sea vessels for reasons of transport policy, for instance, would not be necessary, unless the distinction of affected vessels from other sea vessels can be directly based on reasons derived from the policy objective (environmental protection).

A separate criterion of **disproportionateness** can occasionally be found in the case-law of the ECJ, requiring an assessment whether the burden imposed is disproportionate to the aims pursued.<sup>515</sup> This can only be understood as requiring a comprehensive balancing of values and interests.<sup>516</sup> As a rule, the judicial practice of the ECJ has integrated this test within that of necessity,<sup>517</sup> obviating the need for further discussion here.

When performing the balancing test to assess whether a measure is justified, consideration also needs to be given to the fundamental rights, as these guide both the interpretation and application of reasons for justification<sup>518</sup> and are mandatory for Member States when restricting fundamental freedoms of the Community.<sup>519</sup>

Overall, environmental protection may serve as an overriding public interest justifying possible restrictions of the freedom of establishment; at any rate, however, the contribution of the user charge to environmental protection has to be actually demonstrated relative to the specified objective. “Symbolic” user charges, whose conduciveness to achievement of environmental policy objectives is doubtful or not apparent, are thus ruled out. As for the necessity of the rate of charges, only a “strangling charge” will generally fail to pass the proportionality test, given that it is based on the necessity for achievement of a certain, specified objective. Against this backdrop and the

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<sup>515</sup> Cf. ECJ, Case 265/87, Schröder, ECR 1989, 2237, para. 21.

<sup>516</sup> *Epiney/Möllers*, Freier Warenverkehr und nationaler Umweltschutz, 88; See also *Kingreen*, Struktur der Grundfreiheiten, 173.

<sup>517</sup> Grabitz/Hilf-Verfasser, Vorbemerkungen zu Art. 39-55, para. 158.

<sup>518</sup> ECJ, Case C-23/93, TV 10/Commissariaat voor de Medi, ECR 1994, I-4795, Annot. 23 *et sqq.*; ECJ, Case C-260/89, ERT, ECR 1991, I-2925, para. 43; ECJ, Case C-368/95, Familiapress, ECR 1997, I-3689, para. 24; see, in detail, *Craig/de Búrca*, EU Law, 341 *et sqq.*; on the implications of the Community fundamental rights for user charges see below, Part 1, C. III. 2.

<sup>519</sup> *Szczekalla*, EUDUR I, § 12, Annot. 31.

discretionary powers afforded to the legislator,<sup>520</sup> it can be affirmed that, in principle user charges are **compatible** with the requirements set out through **Article 43 ECT** if they meet certain design criteria.<sup>521</sup>

For the sake of exhaustiveness, it bears noting that cases in which one measure pursues several objectives simultaneously (for instance guiding behaviour and yielding revenue for a specific purpose) will be disproportionate if it fails to meet the requirements with a view to all objectives.<sup>522</sup>

#### c.) Article 56 ECT (Free Movement of Capital)

Movements of capital are all **financial operations** which are not incurred by the free movement of goods and services, notably as compensation for services rendered.<sup>523</sup> These are financial transactions essentially concerned with the investment of funds.<sup>524</sup> Article 56 (1) ECT prohibits all restrictions on the movement of capital between Member States and between Member States and third countries. As with the earlier fundamental freedoms, the free movement of capital also extends beyond a mere prohibition of discrimination on grounds of nationality.<sup>525</sup>

The free movement of capital may be affected by a user charge, notably in connection with branch operations in other Member States. After all, the establishment of branch operations will frequently necessitate application of foreign capital; meanwhile, Article 43 (2) ECT provides that investments and financing measures relating to operations in other Member States are not covered by the freedom of establishment, but are subject to the free movement of capital.<sup>526</sup> Free movement of capital may also be affected in the event of charges imposed on income from investments and other activities. On the one hand, thus, it needs to be asked whether the collection of user charges serves to restrict investment in the Member States; on the other hand, the question arises whether a charge on capital yield would be compatible with Article 56 ECT.

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<sup>520</sup> Cf. on this issue in great detail with reference to the free movement of goods Calliess/Ruffert-*Epiney*, Art. 30, Annot. 21 *et sqq.*, 51 *et sqq.*

<sup>521</sup> See, in this regard, the comments of *Sutter*, which point in the same direction (albeit with a specific focus on road transport), EuZW 2004, 590 (593): “*Das vorliegende Urteil zeigt, dass der ECJ in sich stringente und diskriminierungsfreie Besteuerungsmodelle der Mitgliedstaaten, die der Verwirklichung eines einheitlichen Besteuerungsgedankens dienen, als grundfreiheitenkonform akzeptiert,*” with reference to ECJ, EuZW 2004, 413, Weigel.

<sup>522</sup> Cf. only *Amend*, Instrument der Umweltabgabe, 191.

<sup>523</sup> ECJ, joined Cases C-286/82 and 26/83, *Luisi and Carbone*, ECR 1984, 404, para. 21; von der Groeben/Schwarze-*Kiemel*, Art. 56 ECT, Annot. 1.

<sup>524</sup> ECJ, joined Cases C-286/82 and 26/83, *Luisi and Carbone*, ECR 1984, 404, para. 21.

<sup>525</sup> ECJ, Case C-483/99, *Commission/France*, ECR 2002, I-4801, para. 40; ECJ, Case C-503/99, *Commission/Belgium*, ECR 2002, I-4830, para. 39.

<sup>526</sup> von der Groeben/Schwarze-*Tiedje/Troberg*, EUV/EGV, Art. 43 EGV, Annot. 20.

In this context, it needs to be recalled that restrictions of the free movement of capital do not include the **general fiscal framework**.<sup>527</sup> Instead, the determination must be based on formal or substantive differences in the internal legislation on transboundary movement of capital and domestic movement of capital.<sup>528</sup> This is complemented by the exception clause set out in Article 58 (1) lit. a ECT, which allows Member States to apply pertinent tax rules distinguishing between taxpayers who “are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.”

Against this backdrop, the free movement of capital should generally not preclude the introduction of a charge which imposes a variable burden on capital yield for reasons of environmental policy and irrespective of origin.<sup>529</sup> The same is likely to apply to other restrictions on the movement of capital.

d.) On the General Prohibition of Discrimination on Grounds of Nationality (Article 12 ECT)

Article 12 ECT sets out a **general prohibition of discrimination** banning any form of **discrimination on grounds of nationality** within the scope of the Treaty. Article 12 ECT only applies “without prejudice to any special provisions” contained in the Treaty. From this **subsidiary application of Article 12 ECT**, it follows that the prohibition of discrimination included as an element of the prohibition of restriction set out under the fundamental freedoms takes precedence.<sup>530</sup> As already outlined earlier, product-related charges have to be measured against the provisions on free movement of goods, notably against Article 90 ECT. Charges imposed relative to installations or locations may touch upon the freedom of establishment. Subject to a precise sectoral analysis, the freedom to provide services may be affected when charges are imposed on the temporary provision of services in another Member State. Comparatively little leeway remains for an application of the **general prohibition of discrimination**.<sup>531</sup> The latter can only apply in the absence of charges relating to products or lacking applicability of the freedom of establishment and the freedom to provide services, a situation which might arise if, for instance, restrictions are imposed on private traffic.<sup>532</sup> In the context of user charges on global environmental goods at issue here, this provisions will generally not acquire great importance.

Altogether, it bears noting that – pursuant to the case-law of the ECJ – Article 12 ECT is an expression of a general principle of equality which reaches beyond a mere prohibition of differentiation on the basis of nationality, requiring that “comparable situations ... not be treated

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<sup>527</sup> Hence the majority opinion, *cf.* only Calliess/Ruffert-Bröhmer, Art. 56 EGV, Annot. 51.

<sup>528</sup> Calliess/Ruffert-Bröhmer, Art. 56 EGV, Annot. 52; von der Groeben/Schwarze-Kiemel, Art. 56 EGV, Annot. 7.

<sup>529</sup> Wasmeier, Umweltabgaben, 168. See also Seeger, in: Rechtliche Probleme von Umweltabgaben, 173, who altogether assumes that movement of capital offers no link to ecologically motivated rules on taxation.

<sup>530</sup> ECJ, Case C-20/92, Hubbard and Hamburger, ECR 1993, I-3777, para. 10.

<sup>531</sup> Likewise Seeger, in: Rechtliche Probleme von Umweltabgaben, 165 (179).

<sup>532</sup> *Cf.* also Wasmeier, Umweltabgaben, 190 *et seq.*

differently and different situations not be treated in the same way”.<sup>533</sup> Treatment which is at variance with this general requirement of equal treatment can be justified, however, if it is based on **objective considerations** and is not motivated by **nationality**, and, moreover, is proportionate to a **legitimate objective**.<sup>534</sup> A staggered taxation of identical means of transport for reasons of environmental policy may amount to unequal treatment, but it could still be justified on legitimate grounds of environmental protection. Again, the proportionality of the measure would prove decisive for its admissibility. Identical considerations apply here to those expounded in the section on the freedom of establishment.<sup>535</sup>

If at all, Article 12 ECT might apply to capacity-based user charges imposed on the distance traveled, as these would not have a bearing on products as required by Article 90 ECT.<sup>536</sup> Still, an assessment would be required as to whether applicable secondary legislation on the freedom to provide services takes precedence.<sup>537</sup> At any rate, factual discrimination of foreign entrepreneurs would only be conceivable if certain capacity classes typically used abroad and not by domestic transport service providers are subjected to a higher charge. *Mutatis mutandis*, this would also be the case with abatements for certain capacity categories which are typically used by domestic providers. In either case, such a rule could not be challenged under Article 12 (1) ECT if the factual discrimination was only the result of objective criteria uniformly applied for purposes of environmental protection, with the criteria proportionate to the objective.<sup>538</sup>

## 2. On the Fundamental Rights of the Community

Although the European Community is not a party to the European Convention on Human Rights (ECHR), the European Court of Justice has – prompted, in part, by the tenacity of the German Federal Constitutional Court – recognised fundamental rights as general principles under Community law since the 1960s. The judicial practice of the Court in this regard has evidenced a strong reliance on the ECHR and the case-law of the European Court of Human Rights, whose jurisprudence has essentially served as an inspiration to the ECJ.

With the Maastricht Treaty, this judicial development also found its reflection in the Treaty on European Union (TEU). Article 6 (2) TEU codifies case-law in that it declares that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>539</sup>

The fundamental rights of the Community were later incorporated in the so-called Charter of Fundamental Rights, which has now been included in the second part of the Constitution for Europe.

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<sup>533</sup> ECJ, Case C-354/95, *National Farmers' Union et al.*, ECR 1997, I-4559, para. 61; ECJ, Case C-148/02, *Garcia Avello*, ECR 2003, I-11613, para. 31.

<sup>534</sup> ECJ, Case C-148/02, *Garcia Avello*, ECR 2003, I-11613, para. 31.

<sup>535</sup> *Supra* Part 1, C. III. 1. b). *Cf.* otherwise on the relevance of Article 12 ECT in the transport sector *Epiney/Gruber*, *Verkehrsrecht*, 68 *et seq.*

<sup>536</sup> *Cf. supra* Part 1, C. III. 1. a.) bb.).

<sup>537</sup> On this issue *infra*.

<sup>538</sup> *Cf. Wasmeier*, *Umweltabgaben*, 136.

<sup>539</sup> *Cf.* in depth on the development of fundamental rights doctrines in the European Union *Rengeling/Szczekalla*, *Grundrechte in der EU*, § 1, Annot. 1 *et seq.*

Community legislation violating such fundamental rights recognised at the Community level are illegal<sup>540</sup> and may be challenged before the ECJ with an action for annulment (*cf.* Article 230 ECT).

Secondary measures introducing a user charge on global environmental goods could *prima facie* violate both the freedom of occupation as well as the right to property. According to the case-law of the ECJ, both guarantees belong to the general principles of Community law<sup>541</sup> and will therefore be now assessed with a view to their implications for the design of user charges.

#### a.) Freedom of Occupation

The **freedom of occupation** has been recognised as a general principle of Community law and been afforded ample attention in the case-law of the ECJ.<sup>542</sup>

In the Charter of Fundamental Rights and the Constitution for Europe, this freedom is laid down in Articles 15 *et seq.* and II-75 *et seq.*, respectively, although it bears emphasising that this extends beyond the mere freedom of occupation to comprise a “right to conduct a business.”<sup>543</sup>

The freedom of occupation governs both the **freedom to choose an occupation**<sup>544</sup> as well as the **right to engage in an occupation**,<sup>545</sup> thereby affording a comprehensive protection of participation in economic life.<sup>546</sup> Imposing a fiscal burden on a certain activity, namely that of providing commercial transport services for passengers and freight through aircraft and sea vessels, can generally restrict the freedom to engage in a certain occupation and the right to conduct a business. Accordingly, the **introduction of a user charge will generally restrict the freedom of occupation**,<sup>547</sup> an assessment that applies to all forms of user charges discussed here.<sup>548</sup> At any rate,

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<sup>540</sup> Cf. ECJ, Case C-404/92 P, X/Commission, ECR 1994, I-4737, paras. 24-25.

<sup>541</sup> ECJ, Case 265/87, Schröder, ECR 1989, 2237, para. 15; ECJ, joined Cases C-248/95 and C-249/95, SAM Schiffahrt, ECR 1997, I-4475, para. 72.

<sup>542</sup> Cf. in depth on the freedom of occupation *Rengeling/Szczekalla*, Grundrechte in der EU, § 20, Annot. 773 *et seq.*; *Wunderlich*, Grundrecht der Berufsfreiheit, *passim*, both with further references to case-law and academic literature.

<sup>543</sup> Cf. specifically on these provisions *Rengeling*, DVBl. 2004, 453 *et seq.*

<sup>544</sup> ECJ, Case 116/82, Commission/Germany, ECR 1986, 2519, para. 27.

<sup>545</sup> ECJ, joined Cases C-248/95 and C-249/95, SAM Schiffahrt, ECR 1997, I-4475, para. 72.

<sup>546</sup> Cf. *Wunderlich*, Berufsfreiheit, 105 *et seq.*

<sup>547</sup> This direction has also been assumed by the ECJ. Cf. with a view to the payment of contributions to a scrapping fund ECJ, joined Cases C-248/95 and C-249/95, SAM Schiffahrt, ECR 1997, I-4475, paras. 72-74; on the case-law on freedom to engage in a business, see ECJ, joined Cases 63/84 and 147/84, Finsider/Commission, ECR 1985, 2857, paras. 13 *et seq.*; ECJ, joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen, ECR 1991, I-415, paras. 72 *et seq.*; in academic literatures, *Wolf*, ZUR 2000, 125; *Amend*, Das Instrument der Umweltabgabe, 211; *Freytag*, Europarechtliche Anforderungen, 193.

<sup>548</sup> Cf. *supra*, Part 1, A.

the cost of providing the transport services covered by the charge will incur a restriction – at least indirectly<sup>549</sup> – of the work and business of affected transport operators.

Nonetheless, restrictions of the freedom of occupation can be **justified** by objectives of general interest pursued by the Community, as long as such restrictions do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.<sup>550</sup> The **collection of user charges** will generally be justified by its pursuit of objectives of general interest to the Community: last, if not least, both the integration principle laid down in Article 6 ECT and the aim set out in Article 3 (1) lit. 1 ECT demonstrate the legitimacy of the Community objective of internalising external costs through user charges.<sup>551</sup> As a matter of principle, thus, the introduction of user charges cannot be challenged on behalf of the freedom of occupation. User charges need to be proportionate, however, especially with regard to the rates they impose. Insofar, they call for similar consideration as were outlined in connection with the freedom of establishment.

#### b.) Right to Property

The extent to which a **charge on assets** may affect the **scope of the right to property** has been discussed controversially in academic literature, with the majority view arguably opposing the review of public charges against the right to property.<sup>552</sup>

Support for this view<sup>553</sup> is generally sought by reference to the judgement in *Zuckerfabrik Süderdithmarschen*, in which the ECJ affirmed that “[t]he obligation to pay a levy cannot ... be regarded as a measure restricting the right to own property.”<sup>554</sup>

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<sup>549</sup> It has remained subject to debate, however, whether and to what extent indirect restrictions of fundamental rights are covered by the latter. The case-law arguably suggests including such indirect restrictions, *cf.* ECJ, Case C-84/95, *Bosphorus*, ECR 1996, I-3964, paras. 22 *et seq.* Also tending towards inclusion of indirect restrictions *Rengeling/Szczekalla*, *Grundrechte in der EU*, § 7, Annot. 516; *Calliess/Ruffert-Kingreen*, Art. 6 EUV, Annot. 68.

<sup>550</sup> Standing case-law: *cf.* for instance ECJ, Case 5/88, *Wachauf*, ECR 1989, 2609, para. 19; ECJ, Case C-404/92 *X/Commission*, ECR 1994, I-4737, para. 18; ECJ, Case C-62/90, *Commission/Germany*, ECR 1992, I-2575, para. 23; specifically relating to the freedom of occupation *cf.* ECJ, joined Cases C-248/95 and C-249/95, *SAM Schiffahrt*, ECR 1997, I-4475, para. 72. On the issue of guaranteeing the “very substance” of Community fundamental rights, see, *e.g.*, *Freytag*, *Europarechtliche Anforderungen*, 194 *et seq.*

<sup>551</sup> Regarding environmental protection as a constitutional objective of the Community, see, for instance, *Schröder*, *EUDUR I*, § 9; *Müller-Graff*, *EUDUR I*, § 10, Annot. 15 *et seq.*; specifically with a view to environmental charges and applying an environmental economics approach, *Amend*, *Instrument der Umweltabgabe*, 185 *et seq.*; for an overview of Treaty provisions with relevance to the environment, see *Epiney*, *Umweltrecht*, 17 *et seq.*; as for affected transport issues, see *Freytag*, *Europarechtliche Anforderungen*, 194.

<sup>552</sup> *Grabitz/Hilf-Pernice/Mayer*, Art. 6 EUV, Annot. 148; *Calliess/Ruffert-Kingreen*, Art. 6 EUV, Annot. 146; von der Groeben/Schwarze-Beutler, Art. 6 EUV, Annot. 79; disagreeing *Freytag*, *Europarechtliche Anforderungen*, 193.

<sup>553</sup> To back up this interpretation, *Freytag* points to the fourth recital of the judgment, which affirms that the levy in question “by virtue of its nature” cannot be regarded as an infringement of the right to own property.



Based on this view, user charges would raise no difficulties with regard to the right to property. Only fiscal measures with a strangling or confiscatory effect compromising the use of property itself could be challenged on grounds of the fundamental right to property.<sup>555</sup>

And yet, the case-law of the ECJ has displayed tendencies to include fiscal measures within the scope of the right to property. To this end, *e.g.*, the ECJ has reviewed mandatory contributions to a scrapping fund as to their compatibility with general interests of the Community and, moreover, their proportionality.<sup>556</sup> Apparently, the Court has operated on the assumption that fiscal measures can, in principle, affect the scope of the right to property. This same tendency can be discerned in another judgement on co-responsibility levies in the cereal sector: in that case, the ECJ held that passing the levy on from the processors to the producers did not, in any way, infringe the processors' property rights.<sup>557</sup>

What is more, the view held in the judgement on *Zuckerfabrik Süderdithmarschen* should be amenable to a different interpretation from that commonly held in academic literature. As a preface to the stated absence of a violation of the right to property, the ECJ referred to the judgement in *Schröder* and declared that "the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."<sup>558</sup> From a systematic point of view, this passage could be understood as a abridged proportionality test (the ECJ merely refers to the submission of the United Kingdom), without including a statement that fiscal measures are generally exempt from review against the right to property.

Altogether, given the judicial practice of the ECJ, several reasons support adopting an **ample concept of property** in line with the case-law of the European Court of Human Rights, covering infringements of personal wealth by way of **fiscal charges**; accordingly, **user charges** can generally incur a restriction of the right to property.<sup>559</sup>

Again, however, restrictions of the right to property can be **justified** by general interests of the Community, subject to the same considerations mentioned in the context of the freedom of occupation.<sup>560</sup>

This clearly shows that the existence or absence of a restriction of the right to property through user charges is ultimately not highly relevant, given that, at any rate, the user charge will typically infringe on the freedom of occupation, necessitating an assessment of the conditions for a justification of restrictions of fundamental rights.

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<sup>554</sup> ECJ, joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, ECR 1991, I-415, para. 74.

<sup>555</sup> *Calliess/Ruffert-Kingreen*, EUV/EGV, Art. 6 EUV, Annot. 146.

<sup>556</sup> ECJ, joined Cases C-248/95 and C-249/95, *SAM Schiffahrt*, ECR 1997, I-4475, paras. 73-74.

<sup>557</sup> ECJ, Case 265/87, *Schröder*, ECR 1989, 2237, paras. 15-17.

<sup>558</sup> ECJ, joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, ECR 1991, I-415, para. 73.

<sup>559</sup> Sharing this conclusion *Freytag*, *Europarechtliche Anforderungen*, 193.

<sup>560</sup> *Cf. supra*, Part 3, C. III. 2. a).

### 3. *Summary*

By way of conclusion, the following requirements can be inferred from the Community fundamental rights and freedoms with regards to the design of user charges:

- **Article 90 (1) ECT** (prohibition of discriminating internal taxation) generally applies to the following types of user charges due to the existence of a product bearing, and irrespective of the purpose and expenditure of the user charge:
  - user charges imposed on freight;
  - emission-based user charges;
  - user charges based on fuel consumption;
  - time-based user charges for the use of certain vehicles (akin to the model of a motor vehicle tax).

Given that this provision rules out discriminating charges, direct reliance on the origin of affected products is, at any rate, precluded when designing user charges, something that is however unlikely to occur. While indirect discriminations are also, in principle, prohibited, they may be justified for general reasons of public interest, which include considerations of environmental policy in the sense applied here. The existence of indirect discrimination – which should prove to be an exception in the case of user charges – an assessment is needed as to whether the differentiation is based on objective criteria and passes the test of proportionality. A design of user charges to meet these requirements does not really seem possible, but – given their objective and its achievement – altogether expedient and necessary. As seen earlier, objective differentiation based on pollutant emissions is permissible, notably when means of transportation meeting stringent national standards are afforded reduced rates. In contrast, a system which ultimately aimed at protectionism, for instance by granting preferential treatment to more detrimental domestic means of transport, would be ruled out by Article 90 (1) ECT.

- To the extent that they have no bearing on products (in which case Articles 25 and 90 ECT would apply), user charges may also fall within the scope of the **prohibition** set out in **Article 43 ECT (freedom of establishment)**.

**User charges** imposed on transport operators are, in principle, able to **restrict** the freedom of establishment, given that they raise corporate expenses and may thus affect the competitive situation (for instance in relation to foreign companies) in a detrimental way.

Article 43 ECT would appear applicable, in particular, to the introduction of fees for the use of infrastructures (landing or port fees).

Still, environmental protection can justify a potential restriction of the freedom of establishment as an overriding reason of public interest, provided the measure is proportionate relative to the pursued objective.

- The fundamental guarantee of **freedom of occupation** will typically be affected by a user charge introduced at the Community level; under the view held here, the same applies to the **guarantee of property**. Again, however, such restrictions may be justified by general interests of the Community. Given their suitability to achieve the principle that the polluter should pay, be it by guiding behaviour or (additionally) providing revenues to fund certain environmental projects, user charges will generally be compatible with these fundamental rights as long as they are proportionate.

Altogether, this shows that neither the Community fundamental freedoms nor the Community fundamental rights rule out the introduction of a user charge; an infringement of individual fundamental freedoms and fundamental rights can, in principle, be justified. Because the requirement of **proportionality** is of crucial significance, the admissibility of a specific “model” of user charges essentially depends on its design. The following general criteria may, however, be formulated:

- In principle, all “models” of user charges outlined above<sup>561</sup> may meet the requirements of the fundamental freedoms and fundamental rights.
- Measures incurring formal discrimination – for instance by relying on nationality or the origin of products – can never be proportionate.
- Measures incurring substantive discrimination may, in principle, be justified, provided they are a necessary consequence of a chosen, objective criterion of differentiation. Objective differentiation based on the emission of pollutants, for instance, would not be precluded even when resulting in a greater burden for carriers from certain Member States due to their higher emissions, thereby resulting in indirect discrimination.
- An assessment of the appropriateness and necessity of actual measures may, of course, only occur with a view to the specified primary objectives. In principle, however, the Community legislature is afforded a wide power of discretion. The appropriateness of a measure will be absent whenever the actual design suggests that it will be counterproductive in achieving the pursued objective, notably if it provides an incentive for a different type of behaviour.

#### **D. Domestic Law: Constitutional Requirements for Environmental User Charges (*Klinski*)**

Under the German Constitution, or Basic Law (*Grundgesetz*), a number of questions relating to the **financial chapter of the Basic Law** and – closely linked thereto – to **legislative powers** arise. In Germany, federal constitutional law sets out a fairly strict corset for fiscal measures, with clearly specified requirements and legislative powers. As a result, the discretionary powers of the (federal)

legislature relating to the design of fiscal instruments is strongly determined. In a first step, the following section will outline the general constitutional framework relating to different types of fiscal measures (Chapter I.), before proceeding to a fiscal categorisation of different conceivable design options for environmental user charges in a second step, with a view to their constitutional admissibility (Chapter II.)

In this context, it bears noting that the comprehensive jurisprudence of the Federal Constitutional Court (*Bundesverfassungsgericht*) only provides guidance for fiscal measures adopted **domestically** and within national responsibility. Charges determined in form and design by higher-ranking **European Community law** are only constrained to a limited extent by Community law. Consequently, the latter constellation will be addressed separately in Chapter III., after having considered provisions adopted within the ambit of domestic powers in the two preceding chapters.

The implications of **fundamental rights** are altogether limited, given that they primarily arise on the level of specific design options, with solutions generally available to comply with their requirements. Issues relating to fundamental rights are dealt with in greater detail in Chapter IV.

## I. Fiscal Measures and their Classification under Constitutional Law

Under German law, the state may introduce three different types of payment duties generically designated as “charges”, each affording a distinct capacity to induce behavioural change: taxes, fees imposed in return for services, and other non-fiscal charges (special charges in the widest sense).

All three types of charges are, in principle, available to pursue the objectives of an environmental user charge on aviation and shipping. Depending on the instrument chosen, different legal requirements apply. Altogether, it needs to be borne in mind that the term “environmental user charges” used in the context of this study is not meant to prejudice a particular form of charge. Rather, the study will seek to ascertain which types of payment duties may be legitimately introduced. From the point of view of the constitutional provisions on public finance, the following analysis will draw on the generic term “charges”. Considering the substantive intentions linked to the introduction of an environmental user charge, it would seem appropriate to apply the concept of “user charges” – rather than any other terms, such as taxes or fees – when referring to them on a general level.

And anyway, it bears noting that a distinction of the different types of charges is not so much dependent on the wording chosen by the legislator. Rather, according to the Federal Constitutional Court, the substantive core of the measure in question is decisive.<sup>562</sup>

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<sup>562</sup> Federal Constitutional Court Reports (*BVerfGE*) Vol. 55, 274 (304 *et seq.*); Federal Constitutional Court Reports, Vol. 67, 256 (276); Federal Constitutional Court Reports, Vol. 92, 91 (114).

## 1. *Taxes and Permissible Types of Taxes*

### a.) The Concept of Taxes

Taxes are the classical means of financing state budgets. The Basic Law does not define the concept of taxes, but rather presupposes it. As such, therefore, it draws on the established definition of taxes which is also included in Fiscal Code (*Abgabenordnung*) gebrauchten Steuerbegriff an.<sup>563</sup> Pursuant to that definition, taxes are “payments collected by a public authority for **revenue purposes** and imposed by that authority on all those who fulfill the conditions establishing liability for payment, without constituting **remuneration for services** rendered; the collection of revenue may be a secondary objective.” (Section 3 (1) of the Fiscal Code).

A central feature of taxes, thus, is their contribution to meeting **public funding requirements**. Under the Basic Law, they are designated the standard financing instrument for public expenditure, prompting many to describe the Federal Republic of Germany as a “tax state.”<sup>564</sup> Given this public funding purpose, the state requires no further legitimation for the assessment of taxes against its citizens.

Given the financial burden arising from taxes for citizens and their fundamental rights, however, every tax must also draw legitimacy from taxing a behaviour reflecting the **economic capability** of the citizen. The point of departure of a tax, in other words, is to siphon off part of the economic capability of citizens. This also serves as the reason for taxation, which, in turn, allows classification to one of the different categories of taxes.<sup>565</sup>

### b.) Behavioural Guidance as a Purpose of Taxes

Aside from the purpose of generating revenue, **political guidance of behaviour** may also be a legitimate purpose of taxes, provided the fiscal purpose is still discernible – in other words: the guidance purpose does not amount to a behavioural command in scope and effects<sup>566</sup> or *de facto* prohibit the behaviour it is imposed on (“strangling tax”).<sup>567</sup> Behavioural guidance may result from

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<sup>563</sup> With an insightful analysis of the concept of taxes *Vogel/ Waldhoff*, in: BK-GG, Vorbem. Art. 104a – 115 (looseleaf: 1999), Annot. 373 *et seq.*, 394 with further references

<sup>564</sup> Cf. Federal Constitutional Court Reports, Vol. 93, 319 (342); Federal Constitutional Court Reports, Vol. 91, 186 (201); Federal Constitutional Court Reports, Vol. 82, 159 (178); Federal Constitutional Court Reports, Vol. 78, 249 (266 *et seq.*).

<sup>565</sup> On this issue at length *Vogel/ Walther*, in: BK-GG, Art. 105 Annot. 68c *et seq.*

<sup>566</sup> Similarly Federal Constitutional Court Reports, Vol. 98, 106 (118).

<sup>567</sup> Federal Constitutional Court Reports, Vol. 16, 147 (161); Federal Constitutional Court Reports, Vol. 38, 61 (79 *et seq.*); Federal Constitutional Court Reports, Vol. 96, 272 (276); Federal Constitutional Court Reports, Vol. 98, 106 (118).

both the **collection** of the tax (*e.g.*, targeted introduction of higher tax rates for undesired or lower tax rates for desired behaviour as in the case of mineral oil taxation) as well as the **expenditure** of revenue (by earmarking proceeds). The mere pursuit of certain behavioural guidance effects by way of taxation does not preclude classification of a measure as a tax, let alone necessitate classification as a special charge.<sup>568</sup> Caution is necessary when earmarking revenues, however, given that the Federal Constitutional Court has declared an *overly strong limitation* of the rights of disposal assigned to the budget legislator a reason to presume that the measure in question is not a tax, but a special charge (especially if proceeds accrue to a special fund).<sup>569</sup>

#### c.) Categories of Taxes: Excise, Transaction and Expenditure Taxes

According to the predominant view in legal scholarship, the Basic Law contains a conclusive catalog of admissible **tax categories** available for introduction on the federal level or that of individual federate states (the *Länder*, *cf.* Article 105 of the Basic Law), with detailed constitutional provisions on the apportionment of tax revenue (*cf.* Article 106 of the Basic Law). If one subscribes to this view (notwithstanding considerable arguments against it<sup>570</sup>), the constitution does not grant the respective budget legislator a right to invent new taxes,<sup>571</sup> that is to say, the legislature may not “devise” new taxes at will. That does not, however, imply that the legislator is prevented from introducing new taxes. Pursuant to the majority view, the restriction on “inventing” new taxes merely applies to the spectrum of available tax *categories*.<sup>572</sup> Without question, it may introduce new taxation provisions, provided they can be assigned to the various tax categories set out by the Basic Law.

Admissible taxes would, notably, include (also new) excise, expenditure and transaction taxes. Careful distinction of these three categories of taxes – the only categories suitable for implementation of environmental user charges – is important, as the Basic Law contains detailed provisions on the legislative powers and the apportionment of revenue for each category. In effect, the legislative power of the Federation largely depends on the apportionment of revenue.

Three categories of taxes can be summarily described as follows:

- *Excise Taxes*

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<sup>568</sup> Federal Constitutional Court (*BVerfG*) – Cases 1 BvR 1748/99 and 1 BvR 905/00 – (ecotax), C II 2. (Annot. 65 *et seq.*), DVBl. 2004, 705.

<sup>569</sup> Federal Constitutional Court Reports, Vol. 93, 319 (348).

<sup>570</sup> Forcefully *Tipke*, *Steuerrechtsordnung*, Vol. 3, Section 25, 1088 *et seq.*

<sup>571</sup> In-depth *Heintzen*, in: von Münch/ Kunig, GG, Art. 105 Annot. 45 *et seq.* with further references; *Pieroth*, in: Jarass/ Pieroth, GG, Art. 106 Annot. 2 with further references.

<sup>572</sup> *Cf. Wolf*, ZUR 2000, 123 (126).

According to the Federal Constitutional Court, an excise tax is a tax imposed on the **consumption** of **consumer goods**.<sup>573</sup> Excise taxes are taxes on goods imposed on the consumption of fungible goods regularly destined for quick consumption or use.<sup>574</sup> As such, they target consumption as an indicator of the solvency of final consumers.<sup>575</sup>

One of the typical features of current excise taxes, such as mineral oil or electricity taxes, is that they are commonly assessed against the entrepreneurs offering the consumer goods for general demand, but are designed to be passed on to **final consumers**.<sup>576</sup> Significantly, thus, this shifting potential allows for a tax to be imposed on those who distribute the taxed goods to final consumers rather than the consumers themselves, and still be classified as an excise tax. That is the case, for instance, with mineral oil taxes, which are collected from producers and importers, and are then passed on by these to final consumers. It is subject to dispute whether an excise tax can also be designed in a manner that does not involve such shifting, but rather is collected from final consumers directly.<sup>577</sup> Such a design is most likely permissible. At any rate, the Federal Constitutional Court has left sufficient leeway for such an interpretation by declaring that excise taxes are (only) “regularly” geared towards being passed on from the taxpayer to consumers.<sup>578</sup>

The basis for calculation of an excise tax will generally relate to the (consumed) **amount**; nonetheless, taxation of the economic value is not altogether precluded.<sup>579</sup>

- *Transaction Tax*

By contrast, the transaction tax does not relate to an act of consumption or use, but rather an act or event in **legal traffic**.<sup>580</sup> Occasionally, they are therefore also referred to as “legal traffic taxes”,

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<sup>573</sup> Federal Constitutional Court Reports, Vol. 14, 76 (96); 27, 375 (384).

<sup>574</sup> Federal Constitutional Court Reports, Vol. 98, 106 (123) – municipal packaging taxes.

<sup>575</sup> *Jachmann*, in: v. Mangoldt/ Klein/ Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 48 with further references; *cf.* also Federal Constitutional Court NJW 1984, 785 (786).

<sup>576</sup> *Cf.* Federal Constitutional Court Reports, Vol. 98, 106, 123 *et seq.*; most recently Federal Constitutional Court, Judgment of 20 April 2004 – 1 BvR 1748/99 and 1 BvR 905/00 – (ecotax), C II 2. (Annot. 62 *et seq.*), DVBl. 2004, 705.

<sup>577</sup> With a detailed analysis *Hidien*, in: Bonner Kommentar zum Grundgesetz (BK-GG), Art. 106 Annot. 1413 *et seq.* with further references; *cf.* also *Heintzen*, in: von Münch/ Kunig, GG, Vol. 3, Art. 105 Annot. 56 with further references

<sup>578</sup> Federal Constitutional Court Reports, Vol. 98, 106, 124.

<sup>579</sup> *Cf.* *Jachmann*, in: v. Mangoldt/ Klein/ Starck, GG III, 4. Ed. 2001, Art. 105 Annot. 49 with further references

<sup>580</sup> Fundamentally, Federal Constitutional Court Reports, Vol. 16, 64 (73); in detailed on the distinction of excise and transaction taxes *Kirchhof*, in: HdStR Vol. IV, 2nd ed. 1999, Section 88 Annot. 156 *et seq.* with further references; likewise *Jachmann*, in: v. Mangoldt/ Klein/ Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 50 with further references

differing from excise taxes in that they are meant to be imposed on specific legal positions rather than specific consumable goods.<sup>581</sup>

They place a fiscal burden on the economic capacity of taxpayers, as expressed in specific types of transactions.<sup>582</sup> Transaction taxes typically apply to both parties to the respective legal transaction;<sup>583</sup> likewise, they are typically calculated on the basis of **value criteria**.<sup>584</sup> Generally recognized examples for transaction taxes include insurance taxes and land transfer taxes.<sup>585</sup>

- *Expenditure Taxes*

Expenditure taxes, in turn, are similar to excise taxes in that they place a burden on private consumption. Nonetheless, they do not relate to the *consumption* of goods, but rather to certain types of **use**.<sup>586</sup> The Federal Administrative Court has described consumption taxes as taxes on goods or services which are, as a rule, not amenable to consumption.<sup>587</sup> Similarly, in its decision on the taxation of second homes, the Federal Constitutional Court applied a wide definition of expenditure taxes to include the act of using services.<sup>588</sup> The tax is linked to ownership of a certain object or a factual or legal set of circumstances.<sup>589</sup>

The practical implementation of recognized expenditure taxes is evidence of how these can, in principle, also be linked to different usages: for instance keeping of a physical object (as in the case of the dog tax), ownership or use of an object (as in the case of the tax on second homes<sup>590</sup>), but

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<sup>581</sup> Thus persuasively *Hidien*, in: BK-GG, Art. 106 Annot. 1425.

<sup>582</sup> *Jachmann*, in: v. Mangoldt/ Klein/Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 50 with further references.

<sup>583</sup> Cf. Federal Constitutional Court Reports, Vol. 98, 106, 124. Cf. also Kirchhof, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 157.

<sup>584</sup> Cf. *Jachmann*, in: v. Mangoldt/ Klein/Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 50.

<sup>585</sup> Cf. *Heintzen*, in: von Münch/Starck, GG, Art. 106 Annot. 24; *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 158 *et seq.* with further references

<sup>586</sup> Cf. *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154 with further references; *Jachmann*, in: v. Mangoldt/ Klein/Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 51.

<sup>587</sup> Federal Administrative Court Reports (*BVerwGE*) 98, 272 (281) – municipal packaging taxes.

<sup>588</sup> Cf. Federal Constitutional Court NJW 1984, 785 (785 *et seq.*) with further references

<sup>589</sup> Federal Constitutional Court NJW 1984, 785; cf. *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154 with further references.

<sup>590</sup> Federal Constitutional Court NJW 1984, 785.



also the exercise of a right (as in the hunting tax<sup>591</sup>) or the enjoyment of services (as in the case of the entertainment tax<sup>592</sup>).

The reason for taxation is the personal economic capacity expressed by the respective expenditure.<sup>593</sup> Expenditure taxes, thus, are similar to excise taxes in that they impose a burden on the economic capacity of consumers to apply income for the satisfaction of **personal needs**.<sup>594</sup> Like excise taxes, they are meant to be borne by (final) consumers. Accordingly, the Federal Constitutional Court soon recognized expenditure taxes as a (sub-)category of **excise taxes**.<sup>595</sup> While this categorisation of expenditure taxes as a subcategory of excise taxes is largely backed in academic literature<sup>596</sup> and also suggests itself in view of recent case-law of the Federal Constitutional Court,<sup>597</sup> it is still occasionally disputed.<sup>598</sup>

- Categorisation Problems with Existing Taxes

The constitutional **assignment of individual taxes** to tax categories may occasionally give rise to serious differentiation problems, given that many taxes have properties of more than one tax category. Very different views on this issue are held in academic literature.

This notably applies to the **Turnover Tax**, which, on the one hand, relates to a legal transaction (namely the provision of contractual services), with the Turnover Tax thus traditionally assigned to

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<sup>591</sup> Federal Constitutional Court NVwZ 1989, 1152.

<sup>592</sup> Federal Constitutional Court Reports, Vol. 40, 56; *cf.* also *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154.

<sup>593</sup> Federal Constitutional Court Reports, Vol. 16, 65 (74); Federal Constitutional Court NJW 1984, 785 (786).

<sup>594</sup> Federal Constitutional Court NJW 1984, 785 (786); expressly also *Jachmann*, in: v. Mangoldt/Klein/ Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 52; moreover *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154; *cf. also* *Hidien*, in: BK-GG, Art. 106 Annot. 1416 *et sqq.* with further references

<sup>595</sup> Federal Constitutional Court Reports, Vol. 16, 64 (74). This decision was adopted before the financial reform of 1969, which first resulted in the inclusion of expenditure taxes in the Basic Law.

<sup>596</sup> In detail and convincing *Hidien*, in: BK-GG, Art. 106 of the Basic Law Annot. 1416 *et sqq.* (1418); moreover *Maunz*, in: Maunz/Dürig, GG, Art. 105 Annot. 49 und Art. 106 Annot. 24; *Pieroth*, in: Jarass/Pieroth, GG, Art. 106 Annot. 4; *Fischer-Menshausen*, in: von Münch/ Kunig, GG (3<sup>rd</sup> ed. 1996), Art. 106 Annot. 16; *Heintzen*, in: von Münch/Kunig, GG, Art. 105 Annot. 57 (note, however, his commentary on Art. 106 Annot. 18).

<sup>597</sup> *Cf.* Federal Constitutional Court NJW 1984, 785 (786); additionally Federal Constitutional Court Reports, Vol. 49, 343 (353); Federal Constitutional Court Reports, Vol. 65, 325 (344, 347).

<sup>598</sup> *Heintzen* (in: von Münch/Kunig, GG, Art. 106 Annot. 18), for instance, claims that expenditure taxes are not merely a subcategory of excise taxes, and infers that, in the absence of an express provision in Art. 106 of the Basic Law regarding the apportionment of revenue for regional expenditure taxes, the federation does not possess legislative power to adopt federal expenditure taxes.

the category of transaction taxes.<sup>599</sup> On the other hand, it cannot be overlooked that the Turnover Tax is nowadays geared towards taxation of the (final) consumption of goods (and other services). Consequently, given this substantive burdening effect, it would seem more appropriate – in line with the majority view in scholarship – to consider it (altogether) as a “general excise tax”<sup>600</sup> imposed both on the consumption of goods and the use of services, thereby possessing elements of an expenditure tax. In the context of European Community law, the Turnover Tax is therefore classified as a general excise tax,<sup>601</sup> even though it is not subject to the special EC-directives on excise taxes. Likewise, the ECJ has conceptually approached the Turnover Tax as an excise tax.<sup>602</sup>

Similar uncertainty arises when attempting a classification of the **motor vehicle tax** (*Kfz-Steuer*). As such, it is imposed on the keeping of a motor vehicle, subjecting the economic capacity of the keeper (reflected in the keeping of a motor vehicle) to a fiscal burden. Strictly speaking, it should be classified as an expenditure tax.<sup>603</sup> In judicial practice (albeit not that of the constitutional courts), however, it is considered a transaction tax.<sup>604</sup> The legal act incurring the duty to pay this tax is the vehicle registration, even though the mere act of registration does not mirror the economic capacity of the taxpayer.<sup>605</sup>

#### d.) Legislative Powers and Apportionment of Revenue for the Tax Categories

Whether the power to introduce new tax legislation belongs to the federation or the *Länder* is determined by Article 105 (2) in connection with Article 106 of the Basic Law, which govern the apportionment of revenue from different categories of taxes. Under these provisions, the following rules apply:

- if the tax is an **excise tax**, revenue accrues (entirely) to the federation pursuant to Article 106 (1) No. 2 of the Basic Law, given the absence of a provision setting out a different apportionment in

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<sup>599</sup> Thus the standing case-law of the Federal Fiscal Court (*Bundesfinanzhof*), cf. BFH, Official Gazette of the Federal Ministry of Finance (*BStBl.*) II 1987, 95, 96; sharing this view, for instance, *Heintzen*, in: von Münch/Kunig, Art. 106 Annot. 24; *Pieroth*, in: Jarass/Pieroth, Art. 106 Annot. 5.

<sup>600</sup> With convincing reasons *Tipke*, *Steuerrechtsordnung*, Vol. II, Section 19 S. 894 *et seq.* with further references; *Reiß*, in: Tipke/Lang: *Steuerrecht*, 17<sup>th</sup> ed. 2002, Section 14 Annot. 1; *Jachmann*, in: v. Mangoldt/Klein/Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 50 with further references; *Seer*, in: BK-GG, Art. 108 Annot. 61 with further references; *Kirchhof*, in: HdStR, Vol. IV, 2nd ed. 1999, Section 88 Annot. 156 with further references

<sup>601</sup> Art. 2 (1) of the first VAT-Directive 67/227/EEC, OJ EC No. 71, 1301.

<sup>602</sup> Cf. ECJ. Case 89/81 (Hong Kong Trade) ECR 1982, 1277 Annot. 6 *et seq.*; Case C-317/94 (Elida Gibbs), ECR 1996, I-5340 Annot. 18 *et seq.*

<sup>603</sup> *Reiß*, in: Tipke/Lang: *Steuerrecht*, 17<sup>th</sup> ed. 2002, Section 15 Annot. 48; likewise *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154.

<sup>604</sup> Cf. only Federal Fiscal Court Reports (*BFHE*) 110, 213, 217.

<sup>605</sup> With persuasive criticism *Reiß*, in: Tipke/Lang: *Steuerrecht*, 17<sup>th</sup> ed. 2002, Section 15 Annot. 48 *et seq.*

the Basic Law. As a result, the federation may also introduce such a tax pursuant to Article 105 (2) (1<sup>st</sup> Alt.) of the Basic Law, if and to the extent that the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

- If the tax is a **transaction tax**, however, the legislative power again rests with the federation pursuant to Article 105 (2) (3<sup>rd</sup> Alt.) of the Basic Law, but the revenue accrues solely to the *Länder* (Article 106 (2) No. 4 of the Basic Law).
- As for **expenditure taxes**, Article 106 of the Basic Law contains a provision on the apportionment of revenue. With a view to Article 105 (2) of the Basic Law, this is occasionally interpreted as a general prohibition of federal expenditure taxes.<sup>606</sup> If one takes the majority view, however, which is also the view held by this author, expenditure taxes are to be treated as a particular type of excise tax due to their structural similarity;<sup>607</sup> accordingly, Article 105 (2) (1<sup>st</sup> Alt.) of the Basic Law again applies in connection with Article 106 (1) No. 2 of the Basic Law, resulting in a federal power to legislate and dispose of revenue (provided there is sufficient need for federal regulation).

#### e.) Consequences for Environmental User Charges

The objectives discussed in connection with environmental user charges may thus only be pursued at the federal level by way of a tax if it is designed as an excise or expenditure tax, not however if it is introduced as, or has to be considered, a transaction tax. Accrual of tax revenue to the federate *Länder* is not an option in this regard.

A certain degree of uncertainty remains if the user charge is implemented as an expenditure tax, given the divergent view that such taxes are not a (mere) subcategory of excise taxes. Considering the clear predominance of opposing tendencies both in case-law and scholarly literature, however, the remaining risk is clearly limited.

The fiscal categorisation of different design options for environmental user charges and their consequences for the constitutional admissibility will be discussed in further detail below (see *infra*, Chap. 3.2).

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<sup>606</sup> Cf. Heintzen, in: von Münch/Kunig, GG, Art. 106 Annot. 18.

<sup>607</sup> Cf. Federal Constitutional Court Reports, Vol. 16, 64 (74); in legal scholarship, moreover, Hiden, in: BK-GG, Art. 106 GG Annot. 1416 *et seq.* (1418); furthermore Maunz, in: Maunz/Dürig, GG, Art. 105 Annot. 49 und Art. 106 Annot. 24; Pieroth, in: Jarass/Pieroth, GG, Art. 106 Annot. 4.

## 2. Charges Imposed in Return for Services

### a.) Conceptual Aspects

The second type of charge generally recognized as permissible under the Basic Law are charges imposed in return for services. These are payment duties justified by an **individual advantage** afforded by the state to those liable for payment.

Typical (if not exclusive) examples of charges imposed in return for services are fees and contributions, which used to be summarily referred to under the generic term of “preferential burdens”. Fees and contributions are, by nature, remuneration for services rendered by the state, with fees presupposing actual utilization of the service, whereas contributions already are collected for the mere opportunity to benefit from public services.

Aside from the traditional charges imposed in return for services, one might also conceive of charges imposed by the state for the use of certain commons, absorbing the benefits thereby incurred. In several *Länder*, for instance, the extraction of water incurs a duty to pay a charge.<sup>608</sup> Such a charge, designated a **benefit setoff charge** (*Vorteilsabschöpfungsabgabe*)<sup>609</sup> by the Federal Constitutional Court, could also be applied to the use of global airspace or the High Seas.

### b.) Behavioral Guidance through Fees and Contributions

It is widely recognized that charges imposed in return for services may also seek to **guide behavior**.<sup>610</sup> Both the Federal Constitutional Court<sup>611</sup> and a majority of scholars<sup>612</sup> deem it admissible for the legislator to set rates for fees and contributions in excess of the expenses incurred, provided they seek to influence behaviour in a certain way. Other than that, the general restrictions arising from the principles of equality and proportionality, notably in its manifestation as a principal of reasonableness (*Angemessenheitsprinzip*), apply.<sup>613</sup> The latter renders

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<sup>608</sup> Cf. Federal Constitutional Court Reports, Vol. 93, 319; confirmed by the Federal Constitutional Court, NVwZ 2003, 467.

<sup>609</sup> Federal Constitutional Court Reports, Vol. 93, 319 (345).

<sup>610</sup> Fundamentally, Federal Constitutional Court Reports, Vol. 50, 217 (226).

<sup>611</sup> Federal Constitutional Court Reports, Vol. 50, 217 (226 *et seq.*).

<sup>612</sup> Cf. P. Kirchhof, in: Isensee / Kirchhof, HdStR IV, Section 88 Annot. 207 with further references; Murswiek/Wilms, Die Entlastung der Städte vom Individualverkehr, 111 with further references; Selmer/Brodersen, Rechtliche Probleme der Einführung von Straßenbenutzungsgebühren, 24; more reticent, Kodal/ Krämer, Straßenrecht, Chap. 16 Annot. 19.3.

<sup>613</sup> Federal Constitutional Court Reports, Vol. 50, 217 (227); fundamentally Wilke, Gebührenrecht und Grundgesetz, 241 *et sqq.*, 301 *et sqq.*

constitutional admissibility contingent on the means-end-relation rather than cost recovery or equivalence.<sup>614</sup>

Although the Federal Constitutional Court held in its decision on the “water penny” (*Wasserpennig*) that the state may not set the rates of benefit setoff charges so high as to exceed the value of the public services to be compensated, effectively not in excess of the individual advantage afforded by the service,<sup>615</sup> it should be recalled that this decision solely concerned a constellation involving a benefit setoff charge. In the case of a charge aimed at guiding behaviour, the purpose of that charge would clearly reach further than that of a mere benefit setoff charge. It would strain the limits of the principle of proportionality to extend the cap for benefit setoff charges – which is the value of the advantage conferred – to charges pursuing additional purposes, such as guidance of human behaviour. If one considers the end-means-relationship, which is decisive for the application of the test of proportionality, the economic value of the advantage conferred may only be the decisive criterion when the charge pursues no further objective than offsetting this advantage.

#### c.) Focus: The Benefit Offset Charge

For these charges, the legal terminology and conceptualization has undergone an evolution in recent years. Scholarly literature continues to apply the fairly rigid concept of preferential burdens.<sup>616</sup> Meanwhile, with its landmark judgment on the “water penny” levied in Baden-Württemberg, the Federal Constitutional Court clarified in 1995 that no constitutional definition of fees or contributions existed.<sup>617</sup> Rather, so the Court, any type of charge assessed in return for an individual benefit conferred to the citizen paying the charge will meet no constitutional obstacles.<sup>618</sup> This jurisprudence was confirmed by the Court in its later decision on the groundwater-leivies imposed in Schleswig-Holstein.<sup>619</sup>

The legal justification for charges imposed in return for services is the compensation of an advantage and/or passing on the expenses incurred by the person paying the charge.<sup>620</sup> If one of

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<sup>614</sup> Cf. already *Wilke*, *Gebührenrecht und Grundgesetz*, 301 *et seq.*; in depth *Kloepfer*, in: *AöR* 93, 232 (247 *et seq.*).

<sup>615</sup> Cf. Federal Constitutional Court Reports, Vol. 93, 319 (347). *Wolf*, *ZUR* 2000, 123 (127); cf. in detail on the “water penny” judgment also *Murswiek*, *NVwZ* 1996, 417 *et seq.*

<sup>616</sup> Cf. for instance *Kodal/Krämer*, *Straßenrecht*, Kap. 16 Annot. 9 *et seq.*

<sup>617</sup> Federal Constitutional Court Reports, Vol. 93, 319 (345); cf. also Federal Constitutional Court Reports, Vol. 50, 217 (225 *et seq.*).

<sup>618</sup> Clarifying: Federal Constitutional Court Reports, Vol. 93, 319 (343 *et seq.*) with further references.

<sup>619</sup> Federal Constitutional Court, *NVwZ* 2003, 467 (469 *et seq.*).

<sup>620</sup> Cf. *P. Kirchhof*, in: *Isensee / Kirchhof*, *HdStR* IV, Section 88 Annot. 208 *et seq.* with further references.

these reasons for the introduction of a charge is meant, the charge cannot be, in principle, challenged on constitutional grounds.

The surprisingly liberal position adopted by the Federal Constitutional Court with regard to benefit offset charges is based on the fact that the Court does not determine the admissibility of non-fiscal charges on formal or historical grounds, but rather on the sole question of constitutional relevance, namely whether the respective charge threatens the **principles set out in the constitutional chapter on finance**. In the course of this assessment, the Court has arrived at the conclusion that these principles cannot be threatened as long as the charge absorbs an **individually attributable advantage conferred by the state**.<sup>621</sup>

Three fundamental principles of the constitutional chapter on finance monitored by the Federal Constitutional Court may be endangered by non-fiscal charges:

- (1) The ordering function of the constitutional chapter on finance. The legislative powers and apportionment of revenue for taxes are governed by the constitution in Articles 104 a *et seq.* of the Basic Law. Introduction of new taxation act will on the basis of the general legislative powers (Articles 71 *et seq.* of the Basic Law) would undermine these provisions.<sup>622</sup> Exceptions are thus admissible under strict conditions only.
- (2) The principle of equitable burden sharing. Those required to pay the charge are regularly also taxpayers. Imposing an additional financial burden for a specific substantive task therefore requires a special justification.<sup>623</sup>
- (3) The constitutional principle of a comprehensive budget plan. This principle may be affected if the legislator organizes revenue and expenditure outside of the public budget. As a rule, public finances are subject in their entirety to the budget planning and decision making of the budget legislature. Only that will ensure that both revenue and expenditure are completely subjected to the applicable planning, control and public account procedures. Breaches of this principle require a special justification and will typically remain an exception.<sup>624</sup>

In this context, it is important to clarify the difference between non-fiscal charges and taxes. Non-fiscal charges differ from taxes in that, unlike taxes, they are not imposed unconditionally.<sup>625</sup> “Unconditional”, in this context, stands for a constitutive trait of taxes, notably that the payment

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<sup>621</sup> Cf. Federal Constitutional Court Reports, Vol. 93, 319 (346 *et seq.*).

<sup>622</sup> Federal Constitutional Court Reports, Vol. 93, 319 (342 f).

<sup>623</sup> Federal Constitutional Court Reports, Vol. 93, 319 (343).

<sup>624</sup> Federal Constitutional Court Reports, Vol. 93, 319 (343, 348).

<sup>625</sup> Federal Constitutional Court Reports, Vol. 93, 319 (343, 346).

duty does not depend on conferral of a (public) return service.<sup>626</sup> If, however, the citizen is granted an (individually attributable) public return service, the payment duty is not a tax by nature and thus cannot threaten the constitutional provisions on finance.

A relationship involving **services** and **return services** was recognized by the Federal Constitutional Court in the case of water extraction levies. To quote the relevant passage:

“The assessment of water extraction levies is legitimate in relation to the principle of the fiscal state (*Steuerstaat*). It is irrelevant whether this already follows from the behavioral guidance function of these charges. At any rate, the substantive legitimation arises from its character as a benefit offset provision introduced within the framework of public rules governing the use of certain goods. Scarce natural resources, such as water, are public goods. If individuals are granted access to such resources subject to public management (...), they are given the possibility of partaking in a public good (...). They are thus afforded a specific advantage *vis-à-vis* all those who are not granted the same access to the respective good. It is legitimate to offset this advantage entirely or in part (...).”<sup>627</sup>

Although the Federal Constitutional Court draws on its earlier case-law in this regard, declaring that Articles 105 and 106 of the Basic Law may **not** be surrendered to the discretion of the legislature by introducing a **right to choose** between fiscal and non-fiscal charges,<sup>628</sup> it denies such a threat in connection with charges imposed in return for services. According to the Court, the criterion of conditionality on a return service is meant when the charge is imposed for an “individually attributable public service”, for instance the “opportunity to extract water”.<sup>629</sup>

In addition, the Federal Constitutional Court has emphasized that the rate of the charge may not exceed the **value of the public service** rendered. Otherwise, the charge would be imposed unconditionally like a tax, as it would go beyond offsetting the benefit and encroach upon the general economic capacity of those liable for payment, an exclusive purpose of taxes.<sup>630</sup> The decision on the “water penny” does not contain more detailed criteria relating to the value of the public service, given that the rate in question was comparatively low.

#### d.) Consequences for Environmental User Charges

Conceptually, “environmental user charges” are very similar to the category of “charges imposed in return for services”. In either case, those paying the charge are paying “for something” obtained individually, as it were. In the case of environmental user charges, however, the problem arises that the state imposing the payment duty cannot directly point to financial expenses mirroring that same

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<sup>626</sup> Federal Constitutional Court Reports, Vol. 93, 319 (346).

<sup>627</sup> Federal Constitutional Court Reports, Vol. 93, 319 (345 *et seq.*) < translation by the author >.

<sup>628</sup> Federal Constitutional Court Reports, Vol. 93, 319 (346) with reference to Federal Constitutional Court Reports, Vol. 55, 274 (302).

<sup>629</sup> Federal Constitutional Court Reports, Vol. 93, 319 (346).

<sup>630</sup> Federal Constitutional Court Reports, Vol. 93, 319 (347).

payment duty. The legitimacy of an individually imposed environmental user charge is thus not, *prima facie*, ensured.

Still, the collection of water extraction levies by the *Länder*, explicitly condoned by the Federal Constitutional Court, evidences that the state is not generally precluded from imposing charges in return for services which do **not correspond to public expenses**. Admittedly, this decision of the Federal Constitutional Court met with fairly sharp criticism from parts of scholarship.<sup>631</sup> Moreover, there is some manner of disagreement on the interpretation of various aspects of the “water penny” decision.<sup>632</sup> This does not, however, change the central insight that the only constitutional body charged with authoritative interpretation of the Basic Law has acknowledged the legitimacy of charges in return for services, including charges for individual advantages conferred by the state.<sup>633</sup> From the point of view of the Federal Constitutional Court, a charge can be considered imposed in return for services if it corresponds to an advantage individually granted by the state, with the payment not exceeding the value of the service conferred. According to the “water penny” decision, that is explicitly the case when the charge serves to offset a benefit within a public system for the management of natural resources, and the charge does not exceed the value of the specific advantage.

Against this background, the prospects for an introduction of “real” environmental user charges on aviation and shipping as part of climate policy can be generally considered favorable under constitutional finance law. That notably applies if the legislator goes beyond simply introducing a new payment duty and designs the charge after the model of the water extraction levies to become part of a **management system** for airspace and the sea.

In principle, the simple introduction of a **new charge** in the area of aviation and shipping would also be admissible. After all, a distinct, already existing individual benefit could be offset from the very outset. Indeed, those burdened by such an environmental user charge enjoy such a **(special) advantage**: they are not required to pay **mineral oil taxes** for the consumption of aircraft and shipping fuel. For whatever reasons, the legislature has refrained from taxing these fuels. Users of these means of transportation (be it as providers of transport services or as their customers) are afforded a measurable economic advantage relative to the “normal” means of transport by road and

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<sup>631</sup> Rejecting this view notably *Birk*, in: FS Ritter, 41 *et seq.*; *Tipke/Lang*, Steuerrecht, Section 4 Annot. 19; differentiating *Jachmann*, StuW 1997, 299, 307 *et seq.*; positive notably *Murswiek*, NVwZ 1996, 417 *et seq.*; *Vogel/Waldhoff*, in: BK-GG (1999), Vorbem. Art. 104 a – 115, Annot. 408 *et seq.*; *Heimlich*, DÖV 1997, 996 *et seq.*; *Schmidt*, ZUR 1996, 88 *et seq.*; *Pieroth*, in: *Jarass/Pieroth*, GG (5<sup>th</sup> ed.), Art. 105 Annot. 17; in depth, furthermore, *Klinski*, Die novellierten Stellplatzregelungen (2000), 232 *et seq.*

<sup>632</sup> Cf. on the one hand *Murswiek*, NVwZ 1996, 417 *et seq.* and *Klinski*, *ibid.*; on the other hand v. *Mutius/Lünenburger*, NVwZ 1996, 1061 *et seq.*; *Raber*, NVwZ 1997, 219 *et seq.*

<sup>633</sup> Expressly confirmed by the Federal Constitutional Court, NVwZ 2003, 467 (469 *et seq.*).



rail, and this advantage is due to a conscious governmental choice (albeit in the form of an omission).

By establishing an all-too-loose connection to this advantage, however, the legislator would run the risk of further classification problems. In effect, it would place itself at the center of the questions which remained unanswered in the “water penny” decision, that is: whether the legislature possesses the right to **choose** between introducing a tax (in this case by expanding the scope of mineral oil taxes) and introducing a charge in return for services when the special benefit to be offset merely consists in the absence of taxation. It cannot be entirely ruled out that the Federal Constitutional Court, if invoked in the course of judicial proceedings, might consider the charge a fiscal measure given its inherent dependence on (the absence of) a tax – resulting in the charge being subject to the legislative powers and apportionment of revenue set out in **Articles 105 and 106 of the Basic Law**. If, moreover, the charge proved to be a transaction tax in view of its content, it could not be introduced without a constitutional amendment unless the revenue were surrendered to the *Länder* by the Federation.<sup>634</sup> It would not give rise to this risk as an excise tax or (with the foregoing restrictions) an expenditure tax. If the actual charge were to meet the requirements of constitutional law even as an excise tax, however, respective action by the the legislator would not face any constitutional obstacles.

Yet more interesting, in perspective, is the notion of establishing a type of **management system** for the use of airspace and the sea, subjecting those forms of use incurring a particular environmental impact to a charge. Such a regulatory approach could be modeled after the existing institutions of public use of streets and roads, on the one hand, and separate use, on the other. Conceivably, a law could set out that use of airspace or the sea for certain purposes is public use (free of charge), but that use resulting in particularly large amounts of emissions is separate use permissible only upon payment of an offset charge, thereby ensuring that no over-use of the environmental could occurs. By opening airspace and the sea to separate use, the latter becomes an individual advantage that can be offset by a charge. In contrast to the separate use of streets, it would not appear feasible to render such use conditional on a regulatory permit.

Structurally, the special advantage created by such a design would go beyond a mere offset of the difference to mineral oil taxes. Essentially, the special advantage conferred within the framework of such a management system would be to afford those paying the charge an individual opportunity to use the environmental space in excess of the average use, thereby reducing the ability of all other community members to use the environmental space for other purposes. Such separate use incurs significant external costs for the state as the trustee of the community. From an economic point of view, thus, the special benefit consists in not having to individually cover the costs incurred by one’s own behavior. This advantage could be offset by a charge imposed in return for services; such compensation need by no means occur only by way of a fiscal measure addressing social costs.

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<sup>634</sup> Cf. *supra*, Part 1, D. I. 1. d).

Constitutional law provides no convincing reason generally preventing the state from applying the principle that the polluter should pay and adopting measures to separate individually attributable environmental impacts from the common responsibility of the state, assigning them, instead, to the responsibility of the polluter.

Likewise, the creation of new management systems for environmental spaces such as airspace or oceans does not face any convincing obstacles in legal doctrine, provided the transition to such a system does not result in violations of fundamental rights which prove to be disproportionate upon closer analysis.<sup>635</sup> The latter, however, largely depends on the actual design of the management system. In the area of climate protection, at any rate, the Federal Republic of Germany will generally possess the power to initiate such a systemic transition. It is, after all, required to reduce the emission of greenhouse gases within its jurisdiction by international agreements. That calls for a systemic – and not only sporadic – national climate policy. With Article 20a of the Basic Law, the introduction of a type of management system at the national level can be justified with recourse to high-ranking, constitutionally vested considerations. Although individual scholars have voiced opposition against the introduction of a management system for the air,<sup>636</sup> they have overlooked or given insufficient consideration to the evident connections between such a management system and international climate policy, which pursues the same objectives.

Against the background of the “water penny” decision, there is no reason to assume that the state will be generally prevented from subjecting other environmental goods besides water to a management system.<sup>637</sup> In this connection, it should be borne in mind that existing rights could very well be taken into consideration within a management system and, given the applicability of the principle of proportionality, might even have to be taken into account. Likewise, the coordination with other legal instruments would not pose major problems. For instance, it is clearly possible to design a system in which the separate use of the air – manifested as particularly intense use by certain industrial activities – is offset by mandatory participation in an emissions trading system or, in the case of transport, by imposition of mineral oil taxes. With that as a starting point, the conceptual transition to a management system for the environmental goods “air” and “sea”, while accompanied by restrictions on the exercise of fundamental rights, would by no means constitute a disproportionate restriction of individual freedom.

In practice, the creation of a management system would also require uniting existing instruments of environmental protection in the affected area within a coherent system pursuing common

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<sup>635</sup> In depth *Klinski*, Die novellierten Stellplatzregelungen, 233; cf. also *Murswiek*, NVwZ 1996, 417 (419 *et seq.*); furthermore *Jachmann*, StuW 1997, 299 (308 *et seq.*); critically *v. Mutius/ Lünenburger*, NVwZ 1996, 1061 (1064 *et seq.*).

<sup>636</sup> Thus, for instance, *Burgi*, NVwZ 2004, 1162 (1164).

<sup>637</sup> More reticent *v. Mutius/ Lünenburger*, NVwZ 1996, 1061 (1064), who only recognize such a possibility where an existing permit requirement can be drawn upon.

management objectives; if needed, moreover, remaining *lacunae* would have to be filled with additional instruments. Such an approach would seem equally suited for the area of climate protection as well as for the pursuit of a comprehensive protection of natural resources or conservation of valuable natural spaces (such as the marine environment).

In the area of climate policy, where the creation of a comprehensive management system would appear particularly expedient, existing instruments aimed at limiting or reducing greenhouse gas emissions could be combined with new instruments under a type of “umbrella legislation” on climate protection. As has already occurred to some extent with the National Allocation Act (*Zuteilungsgesetz*) (albeit without covering aviation and without achieving coordination between different legal instruments), such legislation would have to define specific management objectives on the one hand, and set out suitable instruments to achieve these objectives (to the extent necessary) or integrate existing instruments (as far as these are available) on the other hand. One element of such a system could be a user charge on aviation.

Given the international commitments entered by the Federal Republic, it bears noting that a management system for the “airspace” (or the “sea”) would by no means imply the extension of sovereign powers to these respective areas. Although the management system would be motivated by the intention of reducing the overall environmental impact on the environmental space in question, its “management”, in this context, merely refers to the establishment of a regime comprising different instruments for impacts **originating and caused in Germany**. To be precise, the management does not relate to the environmental space as such, but to the impacts it is subjected to from Germany. It follows that Germany does not stake any sovereign claims regarding the respective environmental space. Consequently, a delimitation of areas covered by such a management system is obviated.

Practical design options for the introduction of charges imposed in return for services within such a setting will be outlined below.<sup>638</sup>

### 3. *Special Charges (Other Non-Fiscal Charges)*

#### a.) Conceptual Aspects

A third category of charges not explicitly mentioned in the Basic Law is commonly referred to a special charges. Frequently, a distinction is made between special charges focused on the creation of revenue (“financing special charges”) and special charges where the legislator is seeking to provide an incentive for behavioral change (“guiding special charges”).<sup>639</sup> In its “water penny”

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<sup>638</sup> Cf. sections II. 4. and II. 5.

<sup>639</sup> Cf. *Smeddinck/ Schomerus*, ZUR 1995, 75 *et seq.*; differentiating *Pieroth*, in: Jarass/ Pieroth, GG, Art. 105 Annot. 9 *et seq.* with further references.

decision, which reflects the main tenets of its jurisprudence on the financial provisions of the constitution, the Federal Constitutional Court simply referred to non-fiscal charges aiming at behavioral change as “further charges” of a non-fiscal nature, rather than using the term “special charges.”<sup>640</sup> One might therefore generalize and designate them as **non-fiscal charges without an (individual) return service character**. In its recurrent case-law, however, the Court emphasizes that the designation or classification are not decisive, but rather the substantive content of the respective charge.<sup>641</sup>

Like taxes, special charges differ from charges imposed in return for services by not corresponding to an individually attributable return service.<sup>642</sup> By nature, they are thus very similar to taxes, differing from the latter in that they do not generate (general) revenue, but serve to provide funding for specific sectoral tasks.<sup>643</sup> The earmarking of revenue alone does not yet prompt classification of a charge as a special charge. A certain degree of earmarking is also permissible and common in connection with taxes.<sup>644</sup> Instead, special charges are characterized by the extent of earmarking, which goes so far as to restrict the discretionary powers of the budget legislator.<sup>645</sup>

Whenever financial flows are organized outside of the general public budget,<sup>646</sup> for instance by creation of a special fund not subject to the disposition of the budget legislator, one may speak of a special charge. That is unreservedly the case with special charges resembling taxes. Regarding charges imposed in return for services, however, the Federal Constitutional Court also felt the need to address the question in its “water penny” decision whether revenue was (illegally) channeled past the public budget.<sup>647</sup> It would be premature, thus, to interpret the “water penny” decision so as to imply that this aspect was of no relevance for charges imposed in return for services.

To date, it has not been conclusively clarified where the threshold lies for an excessive restriction of the discretionary powers of the budget legislator by way of provisions on funds. After all, the Federal Constitutional Court clearly stated in its decision on the ecotax that, in the event of

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<sup>640</sup> Federal Constitutional Court Reports, Vol. 93, 319 (344) with further references.

<sup>641</sup> Federal Constitutional Court Reports, Vol. 55, 274 (304 *et seq.*); Federal Constitutional Court Reports, Vol. 67, 256 (276); Federal Constitutional Court Reports, Vol. 92, 91 (114).

<sup>642</sup> Federal Constitutional Court Reports, Vol. 81, 156 (186 *et seq.*); Federal Constitutional Court Reports, Vol. 78, 249 (267); Federal Constitutional Court Reports, Vol. 75, 108 (147).

<sup>643</sup> Fundamentally Federal Constitutional Court Reports, Vol. 55, 274 (299 *et seq.*, 310 *et seq.*); *cf.* auch Federal Constitutional Court Reports, Vol. 67, 256 (277 *et seq.*).

<sup>644</sup> *Cf.* most recently Federal Constitutional Court – 1 BvR 1748/99 and 1 BvR 905/00 –, Annot. 61, DVBl. 2004, 705.

<sup>645</sup> *Cf.* Federal Constitutional Court Reports, Vol. 93, 319 (347 *et seq.*).

<sup>646</sup> Fundamentally Federal Constitutional Court Reports, Vol. 91, 186 (201, 202) – coal penny –.

<sup>647</sup> *Cf.* Federal Constitutional Court Reports, Vol. 93, 319 (347f.).

relatively small revenue, the restriction of budgetary powers would not be large enough to turn a tax into a special charge.<sup>648</sup> The same reasoning can be inferred from the “water penny” decision with regard to the category of charges imposed in return for services.<sup>649</sup>

#### b.) Admissibility Requirements for Special Charges

The Federal Constitutional Court has defined **extremely strict admissibility requirements** for special charges with a financing function. As they are considered a problematic foreign body in the context of the financial provisions in the constitution, they are only permissible if

- first, the payment obligation applies to a clearly distinguishable *homogenous group*,
- which, second, bears a *common group responsibility* for the achievement of the respective sectoral task,
- and, third, revenue is expended at least primarily with a view to benefiting the entire group required to pay the charge (*group benefit*).<sup>650</sup>

The strict stance of the Federal Constitutional Court *vis-à-vis* special charges aiming at the generation of revenues can be explained with the “principle of the fiscal state.” This principle states that the public polity has to generally finance itself by way of taxes, given that the Basic Law only provides conclusive rules for taxes.<sup>651</sup> According to the Federal Constitutional Court, this principle may not be undermined or rendered meaningless. Its deeper purpose is to provide the community with a permanent and reliable source of revenue that is amenable to political decision-making.<sup>652</sup>

#### c.) Consequences for Special Charges on Environmental Use

If introduced under domestic responsibility, the types of environmental user charges discussed earlier will always constitute a special charge if proceeds are fed past the regular budget into a special fund.

The domestic introduction of special charges for environmental purposes will only meet the requirements set out by the Basic Law if it can ensure that proceeds accrue primarily or entirely to the group bound by the payment obligation. Current initiatives to introduce an environmental user

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<sup>648</sup> Federal Constitutional Court – 1 BvR 1748/99 and 1 BvR 905/00 –, Annot. 65, DVBl. 2004, 705.

<sup>649</sup> Federal Constitutional Court Reports, Vol. 93, 319 (347 *et seq.*).

<sup>650</sup> Fundamentally on the admissibility requirements for special charges Federal Constitutional Court Reports, Vol. 55, 274 (274 *et seq.* und 305 ff, notably 307 *et seq.*).

<sup>651</sup> Cf. Federal Constitutional Court Reports, Vol. 93, 319 (342); Federal Constitutional Court Reports, Vol. 91, 186 (201); Federal Constitutional Court Reports, Vol. 82, 159 (178); Federal Constitutional Court Reports, Vol. 78, 249 (266 *et seq.*).

<sup>652</sup> In depth Federal Constitutional Court Reports, Vol. 93, 319 (342 *et seq.*) with further references.

charge and do not provide for such expenditure benefiting those who pay the charge. Instead, revenue is to be used for purposes of development cooperation or climate mitigation policies. Funneling the proceeds back to those burdened by the user charge (for instance through a fund for the promotion of research on low-emission aircraft or sea vessels) is not currently an option under discussion.

On the level of national decision-making, thus, regulatory approaches channeling revenue to a special fund outside the public budget are not permissible.

## II. Classification and Assessment of Individual Environmental User Charges under the Financial Provisions of the Constitution

The foregoing description of the constitutional chapter on finance as it relates to fiscal and non-fiscal charges has shown that classification of individual user charges will depend on two criteria:

- first, as regards **expenditure** of proceeds, the question arises whether the charge leaves sufficient decision-making powers to the budget legislator. If that is not the case (for instance because of the creation of a special fund), the charge will be classified as a special charge. That applies irrespective of how the charge might be otherwise classified.
- if the user charge is not a special charge, the modalities of its introduction need to be assessed; if the charge is imposed in return for an individual advantage conferred by the state, then it is a charge in return for services; if not, it is a tax.

On this basis, the following section will classify and assess the admissibility of the various types of environmental user charge currently under discussion.

For better comprehension, it will be noted at this point that the discussion on the introduction of environmental user charges has been geared towards different **calculation models**, whereas the classification under the constitution solely depends on the **reason** for their introduction.<sup>653</sup> Consequently, it may happen that one and the same approach to calculation of a user charge fulfills the criteria of different types of charges in the legal sense.

### 1. Charges on Fuel

Charges on fuel (such as kerosene taxation as a specific type of mineral oil tax) are legally classified as **taxes**, unless they are assigned to a fund.

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<sup>653</sup> In depth *Vogel/ Walther*, in: BK-GG, Art. 105 Annot. 68c *et seq.*

Pursuant to Article 105 (2) in connection with Article 106 (1) Nr. 2 of the Basic Law, they are typical **excise taxes**<sup>654</sup> and as such subject to the concurrent legislative power of the federation.<sup>655</sup> Revenue from a tax on bunker fuels would accrue to the federation under Article 106 (1) Nr. 2 of the Basic Law.

To some extent, the introduction of a tax also allows for earmarking of revenue. Legislative assignment of proceeds to a fund, however, would render the tax a special charge; given that expenditure is not likely to benefit only the group against whom the special charge is assessed, such a design would be illegal. If proceeds are to be used for certain purposes, the only permissible option would be to include a general specification of its use in the implementing legislation. The decision on the use of revenue may not be entirely withdrawn from the budget legislator.

Accordingly, the constitution does not preclude the introduction of a tax on aircraft and shipping fuel. It could be implemented by simply eliminating current exemptions within the framework of the mineral oil tax (*cf.* Section 4 MinÖStG).

## 2. *Charges on Emissions*

A more varied picture arises when assessing charges on emissions. Several design options are conceivable for emissions-related charges. Reliance on emissions can translate into calculation of the amount of fuel consumed, the individual trip or the emissions performance of the aircraft or sea vessel in question. Depending on the chosen basis, very different consequences may result from a legal perspective.

Whenever proceeds from an emissions charge are assigned to a **fund**, the charge will have to be classified as a **special charge**. As such, it would be subject to the strict criteria elaborated by the Federal Constitutional Court, which requires that revenue be expended to benefit the group paying the charge, *i.e.* in the overall interest of the group burdened by the charge.<sup>656</sup> In practice, however, this requirement will hardly ever be met if proceeds are applied towards purposes of development cooperation or climate policy measures. The requirement of expenditure in the group's interest would, if at all, be only met if proceeds were exclusively used for climate policy measures benefiting the group burdened by the charge.

If revenue is to accrue to the general budget, the charge would be generally classified as a **tax**. After all, none of the alternative design options outlined just now would correspond to an individually attributable service by the state; instead, its collection is simply based on the emission of particular substances. As a tax, an emissions charge would be subject to the strict classification rules set out

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<sup>654</sup> Thus explicitly Federal Constitutional Court – 1 BvR 1748/99 and 1 BvR 905/00 –, Annot. 62 *et seq.*, DVBl. 2004, 705.

<sup>655</sup> *Cf.* on this concept *supra*, Part 1, D. I. 1. c).

<sup>656</sup> *Cf.* Federal Constitutional Court Reports, Vol. 55, 274 (274 *et seq.* and 305 ff, notably 307 *et seq.*).

by the Basic Law. As mentioned earlier,<sup>657</sup> it is generally held that the federation possesses no power to invent taxes, being instead limited to the categories of taxes listed in Articles 105 und 106 of the Basic Law (unless the constitution were to be amended).

- a tax on emissions cannot be assigned to any of these tax categories. In particular, it would be neither an excise, nor an expenditure or transaction tax. As such, therefore, an “emissions tax” would **not be permissible**.
- Still, the regulatory framework for taxes would leave ample space to amend an existing or **otherwise permissible tax** in such a way as to reflect emissions, given that classification of taxes does not depend on the calculation basis as much as it depends on the reason for its assessment. A suitable starting point might be existing mineral oil taxes (which so far largely exempt aviation and shipping) as well as vehicle taxes, which could be extended to aircraft and ships.
- Being a typical excise tax, mineral oil taxes are justified by the presumption that consumption of mineral oil reflects a financial capacity that is sufficiently high to impose an additional burden as a contribution to the community finances. From a constitutional point of view, the chosen basis for calculation of rates is largely irrelevant. Since the fiscal legislator is (fairly) free to pursue a politically desirable behaviour through taxation, it cannot be prevented from choosing an emissions-related calculation basis to this end (as is the case *e.g.* with the motor vehicle tax). It needs to be borne in mind, however, that current mineral oil taxes (in areas outside of aviation and shipping), being an excise tax already in existence, carefully differentiate between different categories of fuel and thereby permit achievement of a reasonable correlation between fiscal burden and emissions volume. Additional emissions-related aspects are likely to increase the administrative expenses associated with a user charge without noticeably furthering its objectives.
- An emissions charge linked to the **emissions performance of individual aircraft or sea-vessels** would resemble the motor vehicle tax, which also contains emissions-related elements. In both cases, the justification of the tax lies in tapping the economic capacity of the operator, which, in turn, is expressed by his or her keeping of the respective vehicle. Although motor vehicle taxes relate to a property asset, a common view in judicial practice and legal scholarship holds such taxes to be transaction (and not expenditure) taxes, claiming that the keeping of a motor vehicle is a legal act.<sup>658</sup> The introduction of an aircraft or sea vessel tax linked to emissions would face the same categorisation problem. If one were to depart from the view

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<sup>657</sup> Cf. Part 1, D. I. 1. c).

<sup>658</sup> Thus Federal Fiscal Court Reports 110, 213 (217); *Heintzen*, in: von Münch/ Kunig, GG, Art. 106 Annot. 24; with a differing opinion (expenditure tax) *Pieroth*, in: Jarass/ Pieroth, GG, Art. 106 Annot. 5 as well as *Hidien*, in: BK-GG, Art. 106 Annot. 1416.



submitted here<sup>659</sup> and classified such taxes as a transaction tax, proceeds would be apportioned to the *Länder*. Altogether, however, the introduction of such a tax is likely to be of little political interest, given that it would create an incentive to shift the vehicles affected by the tax abroad.

For a genuinely emissions-related charge, only the model of a “real” charge imposed in return for the use of the environmental space would appear feasible; this design option would be addressed in greater detail below.<sup>660</sup>

From all this, it follows that an emissions charge imposed by the federation under national responsibility would be precluded as a special charge, would not be practical if designed as a variation on fuel taxes (excise tax) and would hardly be interesting as a tax imposed on the respective aircraft or sea-vessel. Only as a benefit offset charge would it meet the specifically emissions-related objectives.

### 3. *Charges on the Use of Facilities (Airports, Harbours)*

Charges imposed on the use of public facilities such as airports or ports belong to the classic **charges imposed in return for services**. They are based on a relationship of service and return service. If the charge is geared towards actual use, it would be classified as a fee. If the charge already imposes a burden on the mere opportunity of use, it would be a contribution.

In this context, however, it needs to be recalled that charges imposed in return for services may only be applied to services provided by the recipient of proceeds. In other words: the state may only introduce a fee or contribution for use (or the opportunity of use) of **its own facilities**, not for services provided by private entities. That is of particular significance for passenger airports, given that these are typically operated by private companies (as opposed to ports).

Regarding the expenditure of proceeds, it bears noting that revenue from the charge will be apportioned to whoever provides the service. Even if the facility in question is operated by a public entity, revenue will by no means automatically accrue to the federation. That would only be the case if the federation operated the facility itself. *A fortiori*, it would not be possible to assign the revenue from a fee or a contribution directly to a special fund.

The permissible rate of such a charge is, in principle, limited to the value of the advantage conferred. The legislator is not prevented from going beyond mere compensation of the service rendered and pursuing behavioural change through fees and contributions. To some extent, therefore, it may include environmental criteria in the determination of the charge rates (for instance relating to CO<sub>2</sub>-emissions or noise levels of engines). It may not, however, depart entirely from the

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<sup>659</sup> Cf. Part 1, D. I. 1. c).

<sup>660</sup> Cf. Part 1, D. II. 2. and 4.

underlying idea of an exchange of advantages, merely applying the fee or contribution as a means to achieve far more extensive environmental objectives.

#### 4. *Charges on the Use and Pollution of Environmental Spaces*

Charges imposed on the use and pollution of airspace and the sea may be designed in various conceivable ways. Their calculation may, for instance, be based on distances travelled (as in the case of a toll) or the amount of harmful pollutants discharged into the environmental space (calculation based on emissions), but also by applying flat rates to certain incidences of use (for instance departure and landing fees).

Conceptually, collection of the charge may occur with the carrier (airlines, shipping companies) or its customers (passengers, freight customers). In this context, only such design options will be addressed which may be imposed against airlines and shipping companies.

As with other types of “environmental user charges”, constitutional law prevents assignment of revenue to a special fund unless expenditure occurs in the common interest of the group burdened with the charge.

In principle, a charge on the use of environmental space would be conceivable as a tax, but it would not correspond to any tax category outlined in the Basic Law (excepting fuel taxation, which could basically be harnessed for similar purposes) and thus find no appropriate legal basis in the constitution.

Of particular interest, however, would be an introduction of environmental user charges as a benefit offset charge imposed in return for services. Currently, the required legislative framework does not yet exist. To the extent that it falls within Germany jurisdiction, use of airspace and the sea are not subject to a **public management regime**. Such use is free. To date, the legislator has not considered it necessary to render the use of these environmental goods conditional on particular requirements, let alone to introduce quota rules. Against that backdrop, the provision of such use cannot be currently considered a “service” provided by the state that may be offset.

A different situation would apply, however, if the state decided to introduce a comprehensive management system for certain environmental spaces, subjecting pollution and environmental impacts originating in Germany – which constitute *de facto* “environmental uses” – to a regime in accordance with their amount and origin, adopting suitable legal instruments for actual achievement of the quantitative targets set out within such a system. An **umbrella law** specifically adopted to this end, allowing domestic management of greenhouse gases, could bring together various pertinent instruments (such as emissions trading, regulatory reduction obligations or – to draw on the subject of this study – financial instruments). If the “environmental user charge” were assigned a specific control function within this framework, it would become part of the overall management system.

Such a system does not necessarily have to be designed so as to place forms of environmental use covered by it under an individualized licensing and permitting requirement. Given the legal typology of charges imposed in return for services, however, it would have to be ensured that only such use of the protected environmental space are subjected to a charge which correspond to an **individual advantage** for the user arising from the legally vested **possibility of using the environment to a greater extent** within the management system.

When adopting such legislation, of course, the legislator would have to indicate its serious intent to create a management system rather than merely introduce new sources of financial revenue. That should pose no serious problem, however, given that Germany is held to limit its emissions of greenhouse gases under international law for one, and because a series of measures already exist which may be considered a first step towards (and later elements of) a comprehensive management system, such as emissions trading and the electricity tax. As shown above, a majority of reasons support the introduction of such a management system, at least with regard to airspace, which is particularly sensitive from the point of view of climate policy.<sup>661</sup>

In practice, the creation of a management regime would incur the challenge of bringing together existing instruments for the limitation and reduction of greenhouse gas emissions under some sort of “**umbrella law**” on climate change. As already has occurred to some extent with the National Allocation Act (*Zuteilungsgesetz*) (albeit without covering aviation and without achieving coordination between different legal instruments), such legislation would have to define specific management objectives and set out suitable instruments for the achievement of these objectives (to the extent necessary) or integrate existing instruments (as far as these are available).

Again, it needs to be emphasized that such a system would not seek to manage the environmental space as such. Instead, it would manage impacts on the affected environmental space **originating and caused in Germany**. Ultimately, thus, the system would seek to manage emissions and impacts, but not the environmental space as such. The environmental space is the object of protection, in other words, but not the substance of regulation. It follows that Germany does not raise any sovereign claims regarding the respective environmental space. Consequently, a delimitation of areas covered by such a management system is obviated.<sup>662</sup>

Within such a management regime, it would constitute an individually attributable advantage for the owners or operators of aircraft and sea vessels to be allowed to use the environmental space protected by said regime to a particular degree, that is: beyond common public use. This advantage could be offset by a charge imposed in return for services.

It would meet with legal difficulties, however, if such a charge were introduced prior to the creation of a management system as described above. A charge designed in this manner would enter the

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<sup>661</sup> Cf. in detail *supra*, Part 1, D. I. 2. d).

<sup>662</sup> Cf. already *supra*, Part 1, D. I. 2. d).

problematic area between charges and taxes. Because the legislator may not “choose” between taxes and charges imposed in return for services, such a design is not recommended.

## 5. *“Ticket Charges”*

### a.) Background

It is a characteristic trait of “ticket charges” that their substantive effect is not supposed to impact airlines and shipping companies (unlike charges imposed on the respective means of transport), but rather the individual person benefiting from the transport services of the airline or shipping company. The economic burden is supposed to unfold with the (end) consumer.

Designating such charges as “ticket charges” could easily result in a **misunderstanding** that it is a flat fee imposed on each ticket purchase. Caution is called for in this regard, both to avoid limiting the range of available design options and to prevent a problematic classification under constitutional law. Aside from a flat fee, such a charge could equally be calculated based on the distances travelled, an alternative which would appear preferable as the more expedient and equitable choice. Less suited, although not categorically precluded, would be calculation based on the pricing of tickets. From a regulatory perspective, a “ticket charge” may assume very different designs. In principle, both consumers and airlines could be conceivable addressees of such a charge, with airlines passing on the compensation duty to their (end) customers. The designation as “ticket charges” is not applied here as a synonym for a specific mode of collection or calculation, but rather as an open **collective** term for charges imposing an additional payment duty on end customers for each flight or trip.

Aside from solutions which involve the creation of a special fund and thus render the charge a special charge in the constitutional sense, incurring its inadmissibility under the Basic Law, such ticket charges could be imposed by way of a **tax** or a **charge in return for services**. Both types of charges need to be distinguished systematically:

### b.) “Ticket Charges” as Taxes

The different design options available for a “ticket charge” imposed as a tax are all located at the contentious nexus between **expenditure** and **transaction taxes**. Categorisation as an excise tax is ruled out, however, given that – regardless of the design chosen – ticket charges are not imposed on the consumption of an economic good.

Starting from the criterion of the material burden effected by the charge, it would appear far more convincing to classify “ticket charges” as **expenditure taxes**. According to the view posited here (which builds on the case-law of the Federal Constitutional Court, but is partially disputed in

academic literature), the federation has the legislative power for, and is also entitled to the revenue from, expenditure taxes.<sup>663</sup>

The reason for classification as an expenditure tax lies in the fact that “ticket charges” are geared towards travel by airplane and ship as a specific manifestation of personal consumption. In keeping with both excise and expenditure taxes, they place a burden on the economic capabilities of airline and ship passengers in their capacity as consumers, capabilities expressed by the **application of income to cover personal needs**.<sup>664</sup> They differ essentially from transaction taxes in that they do not seek to tax a special legal transaction (such special transactions would be, for instance, an insurance contract or the purchase of real estate) as opposed to daily transactions to cover personal needs; instead, they impose a charge on expenditure for a specific type of consumption. Irrespective of additional (admissible) behavioural guidance purposes, they are thus based on the assumption that expenses incurred for air- or sea-travel reflect the economic capacity of the respective individuals.

Charges imposed on air- and sea-travel are expenditure taxes because they inherently seek to place a burden on expenses incurred for daily livelihood. This conclusion does not lose its validity because such expenses are geared towards enjoyment of third-party **services** rather than the use of an object. The case-law of both the Federal Constitutional Court and the Federal Administrative Court contains indications that expenditure taxes can also be imposed on the enjoyment of services.<sup>665</sup> An example which is both practiced and recognized are enjoyment taxes.<sup>666</sup> Likewise, hunting taxes, which are also categorized as expenditure taxes under the constitution, are evidence for the fact that classification as an expenditure tax is not conditional on the use of a physical object.<sup>667</sup>

In its decision on the constitutionality of municipal hunting taxes, the Federal Constitutional Court maintained its classification as an expenditure tax, arguing that the decisive criterion was “**consumption** in the form of a discernible situation involving the application of financial means”.<sup>668</sup> The Court considered expenses incurred in the “exercise of hunting rights” to be an

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<sup>663</sup> Cf. *supra*, Part 1, D. I. 1. d).

<sup>664</sup> Cf. notably Federal Constitutional Court NJW 1984, 785 (786); BVerwGE 98, 272 (281); furthermore *Jachmann*, in: v. Mangoldt/Klein/Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 52; *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154. On these issues, see also *supra*, Teil 1, D. I. 1. c).

<sup>665</sup> Cf. Federal Constitutional Court NJW 1984, 785 (785 *et seq.*); Federal Administrative Court Reports (BVerwGE) 98, 272 (281).

<sup>666</sup> Cf. Federal Constitutional Court Reports, Vol. 40, 56.

<sup>667</sup> Cf. Federal Constitutional Court NJW 1989, 1152.

<sup>668</sup> Federal Constitutional Court NJW 1989, 1152 (1152) < emphasis and translation by the author >.

expression of such consumption.<sup>669</sup> Accordingly, the Court has applied and ample interpretation (in line with the factual circumstances) of “consumption”, leaving no room for conceptions which would only include the use and consumption of physical goods.

While the “ticket charge” can be generally classified as an expenditure tax, given the wide definition of consumption, such classification would not extend to **freight** included in the taxation system. Applying the criteria outlined above, the tax would then leave the realm of income expenditure characteristic for expenditure taxes. No difficulties are raised by an inclusion of **business travel**, however. As in the case of excise taxes, the inclusion of corporate transactions does not put to question the nature of the tax and its objective of imposing a burden on personal consumption.<sup>670</sup>

Still, it cannot be ignored that a widely held view distinguishes between transaction and expenditure taxes by drawing on the **regulatory point of reference** of the tax in question rather than its substantive justification.<sup>671</sup> If a tax has as its point of reference a legal transaction, it will always be a transaction tax under this view. From the perspective submitted here, such an interpretation does not seem convincing, as it gives insufficient consideration to the shared substantive scope of excise and expenditure taxes, both of which impose a fiscal burden on general acts of consumption.<sup>672</sup> In this regard, they differ from transaction taxes, which neither seek to place a burden on consumption or consumer-like use of goods, nor constitute a tax on the enjoyment of services within the framework of general livelihood.

Still, the continuing debate on the classification of turnover and motor vehicle taxes, in particular, reveals how the distinction of expenditure and transaction taxes still **lacks clarification**.<sup>673</sup> Decisions by the Federal Constitutional Court to date do not to Fort certainty, given the that the Court has not yet adopted a decisive position on the demarcation of transaction and expenditure taxes. Existing case-law merely contains an indication of certain tendencies which – in the view of

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<sup>669</sup> Federal Constitutional Court NJW 1989, 1152 (1152).

<sup>670</sup> Cf. Federal Constitutional Court (1 BvR 1748/99 and 1 BvR 905/00) – ecotax–, C II 2 und 4 (Annot. 63 *et sqq.*).

<sup>671</sup> Thus the long-standing case-law of the Federal Fiscal Court relating to turnover taxes (*cf.* Federal Fiscal Court, Official Gazette of the Federal Ministry of Finance Vol. II 1987, 95, 96) and motor vehicle taxes (*cf.* Federal Fiscal Court Reports (*BFHE*) 110, 213, 217); see also *Heintzen*, in: von Münch/ Kunig, Art. 106 Annot. 18 and 24 (relating to turnover and motor vehicle taxes); *Pieroth*, in: Jarass/Pieroth, Art. 106 Annot. 5; ambivalent *Hidien*, in: BK-GG, Art. 106 Annot. 1441 *et seq.*

<sup>672</sup> Explicitly in this direction (on the distinction of excise and transaction taxes) *Jachmann*, in: v. Mangoldt/ Klein/ Starck, GG III, 4<sup>th</sup> ed. 2001, Art. 105 Annot. 50; *Tipke*, Steuerrechtsordnung, Vol. II, Section 19, 894 *et sqq.* (on the turnover tax); heading in the same direction *Hidien*, in: BK-GG, Art. 106 Annot. 1425 (distinction of excise and “legal transaction taxes” based on whether specific goods or specific legal positions are taxed); vague in this regard *Kirchhof*, in: HdStR, Vol. IV, 2<sup>nd</sup> ed. 1999, Section 88 Annot. 154 und 157.

<sup>673</sup> Cf. already *supra*, Part 1, D. I. 1. c).

this offer – suggest classification of “ticket charges” as expenditure taxes. A case in point, notably, is the decision on the hunting tax, where the Federal Constitutional Court did not categorize a tax linked to a legal act (the “exercise of hunting rights”; in that sense, the hunting tax resembles the motor vehicle tax, which is linked to vehicle registration) as a transaction tax (without, however, providing explicit guidance on the demarcation of transaction taxes).<sup>674</sup> Given the widely held view that motor vehicle taxes are transaction taxes, it would have at least suggested itself to also categorize the hunting tax accordingly.

Important criteria for the distinction of expenditure and transaction taxes may also follow from the individual **design properties** of the respective charge, notably with a view to the **mode of calculation and collection**. If one followed the view (opposed here) that classification as a transaction tax (which results in apportionment of revenue to the *Länder*) does not depend on the justification of the fiscal burden, but rather on the regulatory point of reference, such criteria may acquire particular relevance. Aiming to limit the constitutional risks, the following section will briefly address the significance of such criteria:

- a construction where the duty to pay arises with the **purchase of the ticket** should be avoided. The purchase of a ticket should not be the taxable event, but rather the **departure** (or arrival) in Germany of a flight or journey by sea, also because trips booked abroad would otherwise not be covered. If the arrival is chosen as the taxable event, questions relating to proof of purchase would need to be clarified. Otherwise, if the payment duty is incurred at the point of departure, it can easily be linked to the issue of the boarding pass. No other concerns arise under constitutional law relating to the separation of an arrival and a departure tax. From a technical point of view, it will likely prove easier to impose only a departure tax. That should also tackle the potential challenge of double taxation in different countries introducing similar charges.
- Regarding the classification under different categories of taxes, it would seem advisable to designate the respective transport carrier as the **taxable entity** and provide for reimbursement (as in the case of mineral oil taxes) if the carrier provides suitable evidence that available seats remained unoccupied during the respective trip. This might necessitate clarification of suitable forms of evidence (especially relating to return trips).
- As for the modalities of collection, transaction taxes are typically (if not always) geared towards addressing **both sides** of the transaction subjected to the tax. That could be achieved by defining the individual passenger as the taxpayer of the “ticket charge”, but requiring the company to disburse the tax to the state. If a tax modelled after the mineral oil tax does not appear feasible, it might become necessary to implement a variation of this kind, given that direct taxation of passengers will likely prove impracticable.

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<sup>674</sup> Cf. Federal Constitutional Court NJW 1989, 1152 (1152).

- With a view to general reasons of equal treatment and the behavioural guidance effects, it would seem recommendable to avoid lumping the rates of the charge (a flat rate on each trip), even though it would not result in unconstitutionality of the charge.<sup>675</sup> By power of association, however (notably if it included designation as a “ticket charge”), such a design would probably favour classification as a transaction tax. Still, that is by no means certain. In principle, calculation based on the value of the individual trip (i.e. the concrete transportation service) would seem an option for both expenditure and transaction taxes, yielding no useful criteria for classification. The same is likely to apply to calculation based on the (possibly staggered) length of the journey. Although the legislator would then compromise the strict link between tax rates and economic capacity of taxpayers, the (legitimate) behavioural changes it would seek to induce are likely to justify continued categorization of the tax as an expenditure tax.

In conclusion, it can be affirmed that “ticket charges” – understood as **taxes on flights and trips by sea** – can be classified as expenditure taxes for purposes of constitutional law, with convincing reasons supporting such classification. The federation would possess the power of legislation and be entitled to all proceeds. The pertinent law in this regard is somewhat ambiguous, however, with classification as a transaction tax also conceivable. The Federal Constitutional Court has not yet established decisive criteria for such a distinction.

These problems should be considered when addressing the **specific design** and **name** of such a flight- or sea travel tax. Establishing a legal connection between the tax and the ticket purchase does not seem advisable, given that it might evoke an unwarranted association with a transaction tax. Likewise, formal designation as a “ticket levy” or “ticket tax” is not to be recommended.

#### c.) “Ticket Charges” as Charges in Return for Services

A “ticket charge” would represent an admissible **benefit offset charge** if it were imposed as compensation in return for an individual advantage conferred by the state. As such, it would appear feasible as part of a newly created **management system**, in particular (given the view held here that such a management system is generally admissible).<sup>676</sup> As in the parallel case of environmental user charges on aircraft and sea vessels, the individual advantage would consist allowing the individual passenger (or freight customer) to use an environmental space in a particularly intense manner corresponding to separate use.

In principle, use of the charge on flights and sea travel could also be imposed in **the absence of a special management regime**, given that consumption of mineral oils for aviation and shipping is not subject to mineral oil taxation. The decision not to include such fuel in current mineral oil taxation could also be interpreted as an individual advantage conferred to passengers by the state.

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<sup>675</sup> Cf. also *infra*, Teil 1, D. II. 4.

<sup>676</sup> Cf. already *supra*, Part 1, D. I. 2. d) sowie D. II. 4.



Bearing in mind the earlier observations,<sup>677</sup> it is worth noting that a “ticket charge” based solely on that line of reasoning would face the risk of being classified as a tax. It is well possible, thus, that a “ticket charge” based on such justification would be perceived as a tax by the Federal Constitutional Court. And that would bring us back to the insight that, by nature, “ticket charges” are most likely expenditure taxes as a subcategory of excise taxes – with the result that, pursuant to the view held here, they would be subject to federal legislative power (whether they are classified as a tax or not).

## 6. *Other Compensation Duties*

The categories of environmental user charges discussed just now do not exhaust the entire range of possible design and calculation options for environmental user charges. Additional variations on the type of instrument are certainly conceivable. Still, the central criteria for their classification and assessment illustrated here should also apply to other manifestations of user charges.

With regard to the delimitation from other economic instruments of environmental policy, it may still bear mentioning that all categories of user charges described here are “real” charges in that they impose a compensation duty requiring payment to the state or other entities endowed with public authority. Barring such charges, other specific instruments are conceivable to subject particular forms of environmental use to a more generally defined “compensation system” with the aim of exerting political control. Examples from other areas of law include the feed-in tariffs guaranteed under the Renewable Energies Act (EEG), which are subject to private law, and the recently launched emissions trading scheme.

Such variations would all be located outside the formal corset set out by the constitutional chapter on finance; consequently, this cannot be the place for an assessment of their compatibility with constitutional law. According to the Federal Constitutional Court, a charge in the sense outlined by the constitutional provisions on finance presupposes a monetary compensation duty generating revenue for the public budget.<sup>678</sup> That is not the case if the state imposes payment duties on citizens which can only be met *vis-à-vis* other citizens, for instance the feed-in tariffs under the Renewable Energies Act.<sup>679</sup> Said reservation applies all the more to indirectly incurred payment duties between citizens, for instance within a market for tradable permits. Such regulatory structures are altogether exempted from the constitutional regime on finance. From a constitutional point of view, they could merely be assessed from the perspective of basic rights (and, if applicable, legislative powers).

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<sup>677</sup> Cf. already Teil 1, D. I. 2. d).

<sup>678</sup> This aspect was emphasized by the Federal Constitutional Court in its court order of 9 January 1996, rejecting the submission of the Regional Court (*Landgericht*) Karlsruhe regarding the constitutionality of the Electricity Feed-in Act (*StrEG*) (NJW 1997, 573).

<sup>679</sup> Cf. Federal High Court of Justice (*BGH*) ZUR 2003, 411 (413 *et seq.*) – on the *StrEG* 1998 and the EEG 2000 – as well as BGHZ 134, 1 (27 *et seq.*) – on the *StrEG* 1990 –.

### III. Stipulations under Community Law

It was already mentioned at the outset that the case-law of the Federal Constitutional Court on financial issues only applies to charges imposed under German national responsibility. The same applies to the lively academic debate in German scholarly literature.

Should the situation arise that Germany is faced with stipulations imposed by Community law, the foregoing conclusions would apply to a limited extent only. They would be valid in their entirety if Community law did not require specific action from Germany (that differed from the fiscal rules under the constitution). In that regard, Community law may itself contain a limitation of powers (*cf.* notably Article 5 ECT). Beyond the clause set out in Article 23 of the Basic Law, however, German constitutional law does not provide any further means of limiting the influence of EC law on domestic law.

More specifically, the Community disposes of essentially two different ways of exerting an influence in the area of fiscal instruments: by imposing charges directly at the Community level, and by exercising its power to adopt directives Requiring certain measures from the Member States.

In the former case, which involves the **introduction of a charge directly at the European level**, Article 106 (1) No. 7 of the Basic Law explicitly states that revenue originating from “levies imposed within the framework of the European Communities” accrues to the federation. This provision, which has not acquired great importance so far given the limited number of fiscal measures imposed at the European level, is even considered superfluous by representatives from academia, who argue that revenue from such levies will always be but an item in transit for the federation.<sup>680</sup> Still, it may play a role in the context of environmental user charges because it affirms that the Basic Law recognizes a general category of Community charges which goes beyond the national concept of taxes laid down in Articles 105 and 106 of the Basic Law. Consequently, there can be no question that Article 106 (1) No. 7 of the Basic Law would also apply to Community charges which meet the description of a special charge under national law. Provided Community law does not state otherwise, the perspective proceeds would be first collected by the federation and then possibly transferred to a fund established at the European level.

If the Community merely adopts a **directive** requiring Member States to introduce a certain type of charge, the general rules governing the relationship of domestic and Community law would stipulate that Community law would take precedence over domestic law in the event of a collision.<sup>681</sup>

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<sup>680</sup> *Cf.* only *Heintzen*, in: von Münch/ Kunig, GG, Art. 106 Annot. 22.

<sup>681</sup> Fundamentally on this issue Federal Constitutional Court Reports, Vol. 73, 339 (“Solange II”); Federal Constitutional Court Reports, Vol. 89, 155 (Maastricht).

Given that European Community law ensures a protection of fundamental rights which is, at least in essential regards, comparable to the guarantee of basic rights under the Basic Law, the Federal Constitutional Court ruled on 7 June 2000 in a decision on the organization of the banana market that mandatory Community law could not be measured against the German basic rights, unless European fundamental rights doctrine had fallen below the necessary level of protection and was therefore unable to guarantee the indispensable protection of fundamental rights.<sup>682</sup>

Although this decision has only an indirect bearing on the protection of basic rights, without clarifying the relationship between European Community law and the German constitutional provisions on finances, please no apparent reason why a substantively different conclusion should apply when faced with divergent requirements under Community law and the financial provisions of the constitution.

The backdrop to this “EC-friendly” stance of the Federal Constitutional Court is the explicit wording in this regard of Article 23 (1) of the Basic Law, which allows the federation to transfer sovereign powers to organs of the European Union. As long as the Community legislator does not exceed these sovereign powers transferred by Germany under Article 23 (1) of the Basic Law, Community legislation will always take priority over domestic law. That applies to the entirety of domestic law<sup>683</sup> and therefore also to domestic constitutional law.<sup>684</sup>

Pursuant to Article 23 (1) of the Basic Law, this primacy finds its limitations in the so-called “eternity clause” of Article 79 (3) of the Basic Law. Consequently, only such provisions of EC law may be tested for their constitutionality which affect the division of the federation into *Länder*, the participation on principle of the latter in the legislative process, or the principles laid down in Articles 1 and 20. Clearly, none of these circumstances will arise in the context of environmental user charges – even taking into account the principle of federalism laid down in Article 20 (1) of the Basic Law. Partial departure from the constitutional principles on finance does not suffice to compromise the normative substance of the federal tax structure.<sup>685</sup>

Altogether, thus, it is fairly evident that restrictions imposed by the German constitution relating to the admissibility of charges are of no relevance whatsoever when Community law mandates a departure from these restrictions:

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<sup>682</sup> Federal Constitutional Court Reports, Vol. 102, 147 (164) = NJW 2000, 3124 (3125), drawing on Federal Constitutional Court Reports, Vol. 73, 339 (387) and Federal Constitutional Court Reports, Vol. 89, 155 (174 *et seq.*).

<sup>683</sup> Cf. Federal Constitutional Court Reports, Vol. 73, 339 (375).

<sup>684</sup> Explicitly *Jarass*, in: *Jarass/Pieroth*, GG, Art. 23 Annot. 34.

<sup>685</sup> Cf. on these issues *Jarass*, in: *Jarass/Pieroth*, GG, Art. 23 Annot. 35 *et sqq.* with further references; *Pieroth*, *ibid.*, Art. 79 Annot. 9 *et sqq.* with further references.

- that notably concerns the important postulation under German Law that **special charges** are only permissible to the extent that revenue is expended for the benefit of the group burdened by the charge.<sup>686</sup> From the point of view of Germany, it would indeed be conceivable to create a mandatory fund for an environmental user charge through the European Community. Such a scheme would also be mandatory for Germany, even though a correspondent domestic scheme introduced under national responsibility would fail because of constitutional constraints.
- it would also have relevance for the foregoing<sup>687</sup> restrictions imposed on “real” **emissions charges**. Such restrictions would also become irrelevant if confronted with divergent requirements under Community law (which, after all, enjoy primacy over domestic law).
- And finally, it would also obviate the necessity of assigning the environmental user charge to a particular **tax category**. If the precepts in Articles 105 and 106 of the Basic Law prevented unambiguous classification of a charge mandated by the Community, the constitutional legislator would probably be forced to amend the constitution to accommodate the new type of charge based on higher-ranking Community law.

Mention should be made of the fact that this “special case” of mandatory Community law requiring the introduction of a certain charge cannot be applied to other international arrangements, whether these are concluded between Member States of the European Union or also include third states. If such arrangements contain obligations for Germany, and these prove incompatible with the financial provisions of the constitution, it is likely that the ratification legislation will require approval of two thirds of the members in both houses of Parliament, *Bundestag* and *Bundesrat* (*cf.* Article 79 (2) of the Basic Law).

#### IV. Basic Rights

From the point of view of basic rights, the different design options available for user charges raise the question of their proportionality *vis-à-vis* the affected basic rights as well as their compatibility with the principle of equality.

If the regulatory scope of the charge in question specifically relates to occupational aspects, it has to be assumed that the charge will (objectively) infringe upon the freedom of occupation protected by **Article 12 (1) of the Basic Law**.<sup>688</sup> Furthermore, the Federal Constitutional Court has held that, on principle, fiscal duties infringe only on the general freedom of action (**Art 2 (1) of the Basic**

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<sup>686</sup> *Cf. supra*, Part 1, D. I. 3.

<sup>687</sup> In Part 1, D. II. 2.

<sup>688</sup> *Cf.* Federal Constitutional Court Reports, Vol. 38, 61 (85 *et sqq.*).

**Law).**<sup>689</sup> None of the design options discussed earlier suggest an infringement of the right to property (Article 14 (1) of the Basic Law).

Of the design options discussed earlier, none of the more promising options would seem to incur a restriction of basic rights that could not be sufficiently legitimized by the objectives pursued with the measure:

- under the established case-law of the Federal Constitutional Court, provisions encroaching upon the freedom of occupation can be sufficiently justified by all **reasonable considerations of public interest**,<sup>690</sup> with wide powers of discretion and judgment afforded to the legislator.<sup>691</sup> The objectives of climate policy pursued with environmental user charges are undoubtedly reasonable considerations of public interest. Indeed, they contribute to achievement of the state objective laid down in **Article 20a of the Basic Law** in a targeted way and are thus of particular constitutional merit. Thus, for instance, the Federal High Court of Justice emphasized the importance of Article 20a of the Basic Law in legitimising the feed-in tariffs of the former Electricity Feed-in Act (*Stromeinspeisungsgesetz*, StrEG) 1998 and the Renewable Energies Act (*Erneuerbare-Energien-Gesetz*, EEG) 2000 with regard to the freedom of occupation.<sup>692</sup>
- Although an infringement on the freedom of action (**Article 2 (1) of the Basic Law**), the introduction of fiscal charges is on principle already legitimized by the objective of generating revenue for the community. In the case of charges imposed in return for services, the legitimacy follows from the purpose of offsetting benefits. Only special charges require a specific substantive justification; with a view to the foregoing conclusions, however, the introduction of a special charge is already ruled out for reasons of constitutional law.
- The burden incurred by the charge must be **proportionate**, irrespective of its design. To this end, the charge has to be substantively related with the objective it pursues (appropriateness), needs to appear necessary for achievement of that objective (necessity), and the rates it imposes may not be disproportionate with regard to the objective pursued (disproportionateness).<sup>693</sup> Given the design options discussed earlier, it would seem that none of these criteria give rise to significant obstacles.

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<sup>689</sup> Cf. Jarass, in: Jarass/ Pieroth, GG. Art. 2 Annot. 21 with further references.

<sup>690</sup> Federal Constitutional Court Reports, Vol. 70, 1 (28); Federal Constitutional Court Reports, Vol. 95, 173 (183).

<sup>691</sup> Federal Constitutional Court Reports, Vol. 81, 156, 186; on these issues Tettinger in: Sachs, GG, Art. 12 Annot. 101 *et seq.*

<sup>692</sup> Federal High Court of Justice (*BGH*) ZUR 2003, 411 (412).

<sup>693</sup> Summarizing the three elements of proportionality Federal Constitutional Court Reports, Vol. 67, 157 (173 *et seq.*).

Finally, all design options need to observe the **principle of equality** (Article 3 (1) of the Basic Law). Of particular relevance in this regard is the chosen **calculation basis**. As a rule, the Federal Constitutional Court affords fairly ample powers of discretion to the legislator when it comes to determining the addressees and calculation methods of charges. Usually, the Court has also allowed for application of flat fees. It needs to be borne in mind, however, that this discretion shrinks to the same extent that unequal treatment under the charge impacts the exercise of basic rights. In its recent decision on the ecotax, the Federal Constitutional Court endowed the legislator with a particularly extensive scope of discretion when determining the addressees of said tax, given that the contested measure conferred a benefit to a certain group (namely exemptions from electricity taxation for the producing sector).<sup>694</sup> When assessing a burden imposed on certain addressees, however, the Federal Constitutional Court will apply a far stricter standard. To that end, it will apply a test of proportionality by which it also assesses compatibility with the principle of equality. Passing this test depends on whether the reason for differentiation is (still) proportionate to the degree of unequal treatment.<sup>695</sup>

Application of predominantly **flat rates** (for instance in the case of ticket charges by imposing the same rate on each ticket) would already prove less than ideal as a basis for calculating environmental user charges because it does not accurately reflect the actual use of the respective environmental space. It is possible that such a simplified design would still remain within the ambit of permissible options. Far more appropriate in-substance, and thus also more defensible from a legal point of view, would be to calculate rates on the basis of criteria which reflect more accurately the degree of environmental use.

## V. Conclusion

The outcome of the constitutional assessment can be summarized as follows:

- (1) With their substantive approach and as an instrument, environmental user charges do not, on principle, face constitutional challenges.
- (2) If the charge is to be implemented under national responsibility, it would be advisable not to choose a design which appoints revenue to a special fund. Under constitutional law, such an approach would be classified as a special charge with a financing purpose and would only be justified if proceeds were expended in a way benefiting the group of burdened taxpayers. Since such expenditure would not serve the intended purpose of an environmental user charge, a domestic fund scheme compatible with the requirements of constitutional law appears to be ruled out.

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<sup>694</sup> Federal Constitutional Court – 1 BvR 1748/99 and 1 BvR 905/00 – (Annot. 68 *et sqq.*) DVBl. 2004, 705.

<sup>695</sup> Federal Constitutional Court Reports, Vol. 102, 68 (74); *cf.* also Jarass, in Jarass/ Pieroth, GG, Art. 3 Annot. 27.

- (3) Given the primacy of European Community law, however, it should be borne in mind that the constitutional constraints applying to special charges would be overruled by mandatory requirements imposed under Community law. At the level of Community law, thus, it remains worthwhile to consider the establishment of such a fund.
- (4) Likewise, a genuine Community charge (that is, a charge imposed by the European Union itself) would not be subject to the requirements set out under the German constitution.
- (5) No constitutional concerns would arise from the inclusion of – currently exempted – aircraft and shipping fuel in mineral oil taxation (“kerosene tax”). By nature, such a tax would constitute an excise tax, with the federation possessing both the power to legislate and an entitlement to revenue. Of the different compensation duties assessed here, fuel taxes appear to be the safest option available from a constitutional point of view.
- (6) Introduction of a (real) emissions tax is ruled out by the financial provisions in the constitution. Emissions cannot be construed as an expression of the economic capacity of emitters. Constitutional law requires such a justification for taxes, however. Again, this conclusion only applies if the tax is to be introduced under national responsibility. Should, in turn, its introduction be mandated by higher-ranking European Community law, such constitutional constraints would lose all relevance.
- (7) Categorisation challenges arise with regard to taxation of aircraft or sea vessels (even if emissions performance is taken into account). Depending on the point of view, such a tax could either be classified as an expenditure tax or as a transaction tax. Politically, however, a tax imposed on the keeping of a vehicle (modelled after existing motor vehicle taxes) would seem to possess little attraction, given that its introduction would result in evasive reactions to third countries.
- (8) Environmental user charges imposed on the use of airports or seaports are largely ruled out; being charges imposed in return for services, they would call for the state to impose rates which do not significantly exceed the value of advantages conferred by it. In the case of airports, moreover, an added difficulty arises from the fact that these are very often privately owned, thus preventing the state from collecting such a charge.
- (9) Conceptually of particular interest would be charges directly imposed on the pollution (use) of environmental spaces. The Federal Constitutional Court has outlined the options available in this regard with its “water penny” decision:
  - such a charge is unlikely to be classified as a tax or as a special charge if it serves to offset an advantage individually conferred by the state. Instead, such a charge will be a charge imposed in return for services and will thus pose no threat for the constitutional provisions on finance.
  - the Federal Constitutional Court has confirmed the admissibility of a scheme to offset such benefits in the case of the water extraction fees imposed by the *Länder* within their

public management systems for water resources. The starting point in this context is strikingly similar – with the only difference that a comparable management system has not yet been created for airspace or the sea.

- given current international commitments in the area of climate policy, it would appear reasonable to subject environmental impacts on the atmosphere to a management system. Such a management system, framed by an “umbrella law” on climate protection, could also accommodate other instruments such as emissions trading. It is emphasizing that such a system would not seek to manage the environmental space as such, but instead would manage atmospheric impacts originating in Germany.
- On the basis of such a management regime (which, according to the view held here, is clearly permissible), one might notably consider introducing a “ticket” or “freight” charge (addressed at the passengers or freight customers), or a user charge directed at the transport carrier. If possible, the assessment of such a charge should be based on the distance travelled or actual emissions.
- To ensure that the charge is not classified as a special charge, revenue from the “management charge” would have to accrue to the general budget (which does not rule out some degree of earmarking of proceeds).

(10) In the absence of such a management system, introduction of a “ticket charge” would seem particularly appealing. Such a charge would involve placing a burden on passengers as end customers; designating it as a “flight charge” or “sea travel charge” would therefore seem more appropriate. In this context, one must distinguish:

- a “ticket charge” may conceivably be introduced as a tax. In that case, revenue would also have to accrue to the general budget. By its concrete nature, such a “ticket tax” or “flight tax” would probably have to be classified as an expenditure tax, given that it is linked to the economic capacity of citizens expressed by their consumption of a non-physical service. According to the majority view, expenditure taxes result in the federation possessing both the power to legislate and an entitlement to revenue. It bears noting, however, that a significant number of legal scholars has instead suggested classifying such taxes as transaction taxes, with the result that revenue would not accrue to the federation. A certain classification risk thus remains. The actual design may prove of relevance for the categorisation. Legal reference to the ticket purchase and formal designation as a “ticket charge” or “ticket tax” should therefore be avoided.
- freight does not constitute a permissible object of taxation by expenditure taxes.
- a final option would be to design the charge as a benefit offset charge. To avoid being categorized as a special charge, its revenue would have to accrue to the general budget. The legislative decision not to impose mineral oil taxes on the affected fuel can be construed as the individually attributable advantage, allowing consideration of the ticket



charge as a charge imposed in return for services. Due to the inseverable link to the mineral oil tax, however, it could also be considered a special type of mineral oil taxation. Ultimately, this brings us back to the insight that, by nature, a “ticket charge” (probably) needs to be understood as a subcategory of excise taxes implemented as an expenditure tax – which, under the view upheld here, would render it a permissible object of federal legislation, including fiscal legislation.

- (11) Finally, given its essential importance, a decisive aspect bears mentioning: fundamentally different consequences ensue if the charge is implemented under national responsibility or, instead, as a mandatory consequence of European Community law. To the extent that a European Community directive contains mandatory requirements relating to the type of charge, the use of revenue or the concrete design, these provisions will take precedence over the provisions of the German constitution in the event of a collision (so-called primacy of European Community law). It needs to be emphasized, however, that this particular legal situation follows from Article 23 of the Basic Law and cannot, thus, be extended to other international treaties.

### Part 3: Sectoral Requirements for User Charges on Aviation and Shipping

Drawing on the analysis of general requirements for user charges on aviation and shipping,<sup>696</sup> the following sections will address requirements specifically arising for shipping (A.) and aviation (B.) (with interpretation potentially guided by the principle that the polluter shall pay<sup>697</sup>). In each case, requirements under international law, European Community law and domestic (German) law need to be distinguished.<sup>698</sup>

#### A. Shipping (*Scheyli, Hofstötter, Epiney*)

It was already outlined in the introductory section of this study that shipping is responsible for increasing **environmental impacts** in coastal waters and the high seas, accounting for nearly 7 % of CO<sub>2</sub>-emissions in the transport sector or roughly 2 % of global CO<sub>2</sub>-emissions.<sup>699</sup> Moreover, transport by sea is not only expected to grow further as part of general economic development, if the European Commission has its way, it will also enjoy further support relative to other transport

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<sup>696</sup> *Supra* Part 2.

<sup>697</sup> On the relevance of this principle in the Law of the Sea, see *Dupuy*, *Mélanges Lucchini et Quéneudec*, 205 *et seq.*

<sup>698</sup> On these different regulatory planes, see *supra* Part 1.

<sup>699</sup> See Part 1, A. I. 2.

sectors.<sup>700</sup> In contrast to other environmental threats originating from shipping, for instance oil spills, emissions of greenhouse gases and thus its atmospheric impact have not yet been subjected to an international legal arrangement. The relevant international agreement in this regard, the **Kyoto Protocol** to the United Nations Framework Convention on Climate Change,<sup>701</sup> merely states in its Article 2 (2) that “[t]he Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from (...) marine bunker fuels working through the (...) International Maritime Organization.”

The introduction of user charges on shipping in the high seas promises to close an important regulatory gap. The following analysis will identify the legal framework of such user charges by addressing requirements under the international Law of the Sea and regional agreements on marine environmental protection as well as generally on maritime transport. What is more, the analysis will include primary rules and derived secondary legislation of European Community law.

## I. International Law of the Sea

When addressing the introduction of user charges on the use of maritime resources, this study, at any rate, refers to “compensation” for use of the oceans as a global environmental good and thus relates to the use of maritime waters in their entirety, irrespective of their territorial status under the international Law of the Sea.<sup>702</sup> It already bears mentioning at this point, however, that the hierarchically staggered sovereign powers in the high seas (which are entirely exempted from territorial sovereignty) and coastal waters (which are subject to territorial sovereignty) under the international Law of the Sea can have legal consequences for the admissibility and design of user charges.

Against this backdrop, the following analysis of legal requirements for the introduction and design of user charges under international maritime law has to distinguish between the geographically and substantively most comprehensive<sup>703</sup> international agreement, the United Nations Convention on the Law of the Sea (UNCLOS)<sup>704</sup> (1), and – drawing on the conclusions of that assessment – the

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<sup>700</sup> *European Commission*, European Transport Policy for 2010 – Time to Decide: White Paper, COM(2001)370 final, 46 *et seq.*

<sup>701</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), Kyoto, December 10, 1997, in force February 16, 2005, 37 *International Legal Materials* (1998), at 22.

<sup>702</sup> Likewise, the WBGU has based its study on user charges on global environmental goods on this premise, *cf.* WBGU, Entgelte, 24.

<sup>703</sup> On the universal character of UNCLOS, see, for instance, *Proelß*, Meeresschutz im Völker- und Europarecht, 74 *et seq.*, 124 *et seq.*, with further references.

<sup>704</sup> United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, December 10, 1982, 21 *International Legal Materials* (1982), at 1261.

most important sectoral and regional maritime conventions (2); in the process, the analysis will be limited to such aspects which might be of relevance within the scope of this study.

In the context of the study, attention will focus on the legal status of sea vessels, on the one hand, and on the legal status of coastal states, on the other. Outside of the high seas, the sovereign rights of flag states and of coastal states need to be related to each other, a relationship that varies and affords coastal states increasing rights as the ships approach its sovereign territory.

### 1. *Mandatory Requirements of International Maritime Law (Convention on the Law of the Sea)*

Any analysis of pertinent requirements under the Convention on the Law of the Sea has to distinguish between the Law of the high seas (a) and the law of maritime zones subject to certain sovereign rights and state authority (b). This will be followed by an analysis of obligations relating to marine environmental protection (c).

#### a.) The Law of the High Seas

Pursuant to Article 86 and 89 UNCLOS,<sup>705</sup> the high seas are all parts of the sea that are not subject to state sovereignty and jurisdiction, and are characterised by the **principle of the freedom of the high seas**.<sup>706</sup> According to Article 87 (1) UNCLOS, the latter includes, *inter alia*,<sup>707</sup> the freedom of navigation, the freedom of overflight and – subject to certain conditions and restrictions – the freedom to lay submarine cables and pipelines, the freedom to construct artificial islands and other installations, the freedom of fishing, and the freedom of scientific research. These freedoms extend to all states, also land-locked states.<sup>708</sup>

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<sup>705</sup> Regarding the international regulation of the high seas, an additional issue-specific convention, the Geneva Convention on the Law of the Sea of 1958, needs to be mentioned. Despite the entry into force of UNCLOS in 1994, it has remained in force. Nonetheless, pursuant to Article 311 (1) UNCLOS, the latter prevails over the Geneva Convention; it is justifiable, thus, to limit the following analysis to the relevant provisions of UNCLOS. On the relationship of the Geneva Convention and UNCLOS *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 341; *Gloria*, in: *Völkerrecht*, 816 (824 *et seq.*).

<sup>706</sup> On the law of the high seas, see generally *Brownlie*, *Principles of Public International Law*, 223 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 340 *et seq.*; *Evans*, in: *International Law*, 623 (637 *et seq.*); *Gloria*, in: *Völkerrecht*, 816 (877 *et seq.*); *Jennings/Watts*, *Oppenheim's International Law*, Vol. I, 722 *et seq.*; *Pancraccio*, *Droit international des espaces*, 173 *et seq.*; *Shaw*, *International Law*, 542 *et seq.*; *Verhoeven*, *Droit international public*, 554 *et seq.* Specifically on the freedom of the high seas, see *Anand*, in: *Marine Issues*, 19 *et seq.*, who emphasizes problematic aspects of this principle.

<sup>707</sup> The list in Article 87 (1) UNCLOS is not conclusive in that regard.

<sup>708</sup> Article 87 (1) 3<sup>rd</sup> sentence UNCLOS; *cf.* also Article 125 UNCLOS, pursuant to which land-locked states have a right of access to and from the sea.

Generally, however, it needs to be borne in mind that the modern international regime relating to oceans provides for staggered sovereignty and usage rights of coastal states<sup>709</sup> and – by necessity – incurs a reduction of maritime spaces subject to no state sovereignty<sup>710</sup>.

Of the various features of the freedom of the high seas, **freedom of navigation** (Article 87 (1) lit. a UNCLOS) bears emphasizing in this context.<sup>711</sup> Pursuant to Article 90 UNCLOS, the freedom of navigation affords every state, whether coastal or land-locked, the right to sail ships flying its flag on the high seas. Coupled with the fact that the high seas are not subject to territorial sovereignty, the freedom of navigation further implies a prohibition of the exercise of jurisdiction with regard to foreign ships on the high seas.<sup>712</sup> Die Freedom of navigation ist unbestrittenermaßen Teil des Völkergewohnheitsrechts<sup>713</sup>.

By no means, however, is the freedom of navigation in the high seas absolute,<sup>714</sup> with the following restrictions acquiring particular relevance:

- first and foremost, the rights arising from the freedom of the high seas freedoms are to be exercised by all states with due regard for the interests and rights of other states (Article 87 (2) UNCLOS),<sup>715</sup> a clause, that extends to all dimensions of the freedom of the high seas.
- furthermore, the freedom of the high seas – and, indeed, the freedom of navigation – are to be generally exercised under the conditions laid down by the convention and by other rules of international law (Article 87 (1) UNCLOS).

With regard to such “other rules,” it may be worth mentioning that restrictions of the freedom of navigation can also originate from other conventions adopted to ensure the safety of navigation and protection of the marine environment.

- and finally, the freedom of navigation is subject to a number of exemptions related to abuse of the freedom of the high seas, which set aside the freedom of navigation to the extent that other states enjoy extraordinary enforcement powers.<sup>716</sup>

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<sup>709</sup> On these different levels of sovereignty, see the following sections.

<sup>710</sup> Cf. *Evans*, in: *International Law*, 623 (641); *Schrijver*, *Sovereignty over natural resources*, 202 *et seq.* In this regard, *Gloria*, in: *Völkerrecht*, 816 (853), points out that roughly one third of global ocean surfaces are assigned to the different zones subject to exclusive economic sovereignty of coastal states.

<sup>711</sup> *Vitzthum*, *ZaöRV* 2002, 163 (163 *et seq.*), refers to the freedom of navigation as a principle of “*ius cogens*.”

<sup>712</sup> See *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 350 *et seq.*

<sup>713</sup> *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 350, with further references.

<sup>714</sup> See, on this issue, *Brown*, *International Law of the Sea*, Vol. I, 293 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 362 *et seq.*, 376; *Johnson*, in: *EPIL*, Vol. III, 528 (529 *et seq.*).

<sup>715</sup> On this particular issue *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 347 *et seq.*

<sup>716</sup> Mention can be made of piracy, slavery and drug traffickin, although such occurrences can be ruled out within the scope of this study. Cf. on these events *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 364 *et seq.*

The **flag state principle** acquires importance when addressing the issue of legal rules applying on the high seas (in the absence of territorial sovereignty).<sup>717</sup> On the one hand, the flag is an indication of the nationality of a ship and thus a starting point for national jurisdiction on the high seas, even in the absence of territorial sovereignty.<sup>718</sup> On the other hand, the freedom of navigation corresponds to the right of states to issue a flag.<sup>719</sup> The flag state principle affords a number of **rights** to the flag state and to ships flying its flag, with three connected aspects of particular noteworthiness in this context:

- first, pursuant to Article 91 (1) UNCLOS, ships have the “nationality” of the state whose flag they are entitled to fly.
- likewise – and, in that sense, as a direct consequence of the freedom of the high seas – Article 92 (1) UNCLOS provides that ships shall be subject to the exclusive jurisdiction of the state under whose flag they are legitimately sailing.
- barring certain exceptional cases in which other states enjoy a corresponding right of intervention,<sup>720</sup> thus, only the flag state is ultimately entitled to adopt sovereign measures on the high seas against ships flying its flag.<sup>721</sup>

Aside from the foregoing rights arising from the jurisdiction of the flag state, the flag state principle also brings about certain **duties of the flag state** regarding the adoption and enforcement of legislation.

Pursuant to Article 94 (1) to (5) UNCLOS, flag states are subject to no small number of administrative, technical and social obligations seeking to uphold certain minimum standards in social matters and environmental protection. Notably, the flag state is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance when adopting measure to this end (Article 94 (5) UNCLOS). And finally, the convention contains further specific obligations for flag states, for instance, pursuant to Article 211 (2) UNCLOS, a duty to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Again, this provision contains a clause pursuant to which such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards.

Altogether, with a view to compliance with its international commitments, the flag state must **actually exercise its jurisdiction** over ships flying its flag. Postulation of such duties in the

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<sup>717</sup> Cf. on the following issues *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 352 *et seq.*; *Evans*, in: *International Law*, 623 (637 *et seq.*); *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, 731 *et seq.*; *Kamto*, in: *Mélanges Lucchini et Quéneudec*, 343 *et seq.*; *Shaw*, *International Law*, 545 *et seq.*

<sup>718</sup> *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 353.

<sup>719</sup> *Gloria*, in: *Völkerrecht*, 816 (879).

<sup>720</sup> Cf. the references contained in note 716.

<sup>721</sup> On the jurisdiction of flag states, see for instance *Marston*, in: *EPIL*, Vol. III, 316 (317 *et seq.*).

convention may face the problem, however, that no flag state can be forced to actually adopt and enforce these international rules.<sup>722</sup>

This inability under international law to enforce the duty of flag states to actually exercise their jurisdiction over ships flying their flag is also partly responsible for the **problem of so-called flags of convenience**.<sup>723</sup> As an expression of the right of navigation set out in Article 90 UNCLOS and the general principle of sovereign equality of states,<sup>724</sup> a flag state is largely<sup>725</sup> free to fix the conditions for the grant of its nationality to ships and for the right to fly its

flag (freedom of registration,<sup>726</sup> see Article 91 (1) UNCLOS). By and large, the challenge in this regards<sup>727</sup> is that flag states considered “flags of convenience”<sup>728</sup> are frequently not in possession of the administrative resources to effectively implement and enforce domestic and – notably – international rules pursuant to Article 94 (1) to (5) UNCLOS. By contrast, the incentive for registration with such low-cost flag states is based on the opportunities this affords to reduce operating expenses, in particular employment costs, by applying the lower social and labour standards of the state issuing the flag of convenience.<sup>729</sup>

#### b.) The Law of the Sea in Areas subject to the Sovereignty and Jurisdiction of Coastal States

The high seas, which – aside from the rights attached to the flag flown by a ship – are free from national sovereignty and jurisdiction and thus constitute an area “subject to international

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<sup>722</sup> See *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 356, 358.

<sup>723</sup> *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 360.

<sup>724</sup> On the latter issue, see *Wolfrum*, BerDGV 1990, 121 (122).

<sup>725</sup> The requirement of a genuine link between a state and the ships flying its flag set out by Article 91 (1) UNCLOS has not proven an effective constraint in practice; cf. the decision of the International Tribunal of the Law of the Sea in the case of the *M/S Saiga*, St. Vincent und die Grenadinen vs. Guinea (ILM 38 [1999], 1322 [Para. 75 *et seq.*]); see also *von Brevern/von Carlowitz*, RIW 1999, 856 [859 *et seq.*]). A convention adopted on this issue in 1986, the United Nations Convention on Conditions for Registration of Ships, has not yet entered into force for lack of sufficient ratifications.

<sup>726</sup> On this issue *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 357 *et seq.*; *Wolfrum*, BerDGV 1990, 121 (122 *et seq.*).

<sup>727</sup> Cf. generally *Behnam*, in: *International Marine Environmental Law*, 123 (124 *et seq.*); *Brown*, *International Law of the Sea*, Vol. I, 287 *et seq.* *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 360 *et seq.*; *Ignarski*, EPIL, Vol. II, 404 *et seq.*; *Wolfrum*, BerDGV 1990, 121 (130 *et seq.*); on this problem against the backdrop of German domestic regulation of flags Federal Constitutional Court Reports 92, 26 *et seq.*; on these legal issues from the viewpoint of German law furthermore *Basedow*, BerDGV 1990, 75 *et seq.*

<sup>728</sup> The most important states according to registered tonnage are currently Panama, Liberia and the Bahamas; cf. *WBGU*, Entgelte, 24.

<sup>729</sup> On this issue, for instance, *Drobnig*, BerDGV 1990, 31 (32 *et seq.*); *Ignarski*, EPIL, Vol. II, 404 (404); cf. also Federal Constitutional Court Reports (*BVerfGE*) 92, 26 (29 *et seq.*).

administration”,<sup>730</sup> have to be distinguished from those parts of the sea which are subject – in varying degrees – to the territorial sovereignty of coastal states.<sup>731</sup> Such parts of the sea with (different) sovereign rights of coastal states are listed in Article 86 UNCLOS as the exclusive economic zone, the territorial sea and the internal waters of a state as well as the archipelagic waters of an archipelagic state.

At this point, one may already anticipate the following general trait of all these zones relative to the high seas: by necessity, the existence of staggered sovereign rights of coastal states incur restrictions of the freedom of navigation<sup>732</sup> and thus of the legal position of vessels from other states. Of particular interest for the purposes of this study is the sliding scale between sovereign rights of coastal states, on the one hand, and the freedom of navigation, on the other.

#### aa.) Exclusive Economic Zone

Article 55 UNCLOS defines the exclusive economic zone as an area beyond and adjacent to the territorial sea, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by a specific legal regime. The main feature of this regime is that coastal states enjoy the exclusive right to exercise certain sovereign rights in this part of the sea, as opposed to in the high seas.<sup>733</sup>

As the catalogue of rights listed in Article 56 UNCLOS shows, the coastal state does not exercise unrestricted sovereignty in the exclusive economic zone, a situation that also extends to the continental shelf.<sup>734</sup> Instead, these sovereign rights are limited to rights for the purpose of exploiting and conserving the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil.<sup>735</sup> It is, indeed, mostly<sup>736</sup> the economically relevant

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<sup>730</sup> Cf. the categorization in this regard by *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 339 *et seq.*

<sup>731</sup> Cf. on this distinction, for instance, *Verhoeven*, *Droit international public*, 527 *et seq.*, 539 *et seq.*, 554 *et seq.*, who distinguishes the high seas as a common sea (*mer ‘commune’*), on the one hand, and the exclusive and (entirely) sovereign parts of the sea, on the other hand. Similarly *Pancraccio*, *Droit international des espaces*, 67 *et seq.*, 77 *et seq.*, 173 *et seq.*

<sup>732</sup> Cf. *Johnson*, in: *EPIL*, Vol. III, 528 (529): “The existence of these zones may have a serious effect upon freedom of navigation.”

<sup>733</sup> Cf. on the following *Brown*, *International Law of the Sea*, Vol. I, 216 *et seq.*; *Gloria*, in: *Völkerrecht*, 816 (852 *et seq.*); *Gündling*, 200 *Seemeilen-Wirtschaftszone*, 114 *et seq.*; *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, 782 *et seq.*; *Oda*, *EPIL*, Vol. II, 305 *et seq.*; *Orrego Vicuna*, *Exclusive economic zone, passim*; *Pancraccio*, *Droit international des espaces*, 142 *et seq.*; *Schrijver*, *Sovereignty over natural resources*, 211 *et seq.*; *Verhoeven*, *Droit international public*, 539 *et seq.*

<sup>734</sup> On this issue immediately below.

<sup>735</sup> In this context, *Gündling*, 200 *Seemeilen-Wirtschaftszone*, 277, suggests that a coastal state does not exercise sovereign rights as such in the economic zone, but rather sovereign rights for particular purposes, notably exploration and exploitation of living and non-living resources and other economic purposes. Cf. on this issue

exploitation of the sea which is subjected to the control of coastal states within an area up to 200 nautical miles from the coast (Article 57 UNCLOS).<sup>737</sup> In this regard, one may legitimately refer to a “principle of functional sovereignty” superseding the principle of the freedom of the high seas in parts of the sea adjacent to the coast.<sup>738</sup>

By being limited to usage of resources, the maritime regime governing the exclusive economic zone affords other states the opportunity to continue using the sea in ways which are not related to resources, always subject to the foregoing prerogatives of coastal states.<sup>739</sup> It follows that, in this zone, Article 58 (1) UNCLOS affords all states, whether coastal or land-locked, the freedoms referred to in Article 87 UNCLOS, including the freedom of navigation, albeit subject to the restrictions arising from the specific purposes of the exclusive economic zone (Article 58 (3) UNCLOS)<sup>740</sup>. In line with this conception, the coastal state may only enforce national legislation and other provisions to the extent necessary for enjoyment of its rights to explore, exploit, conserve and manage the living resources (Article 73 UNCLOS).

#### bb.) Continental Shelf

Likewise, the notion of a continental shelf set out by the Law of the Sea is based on the exploitability of natural resources, albeit specifically with a view to the seabed and subsoil adjacent to the coast.<sup>741</sup> In essence, the legal regime relating to the continental shelf is identical with that of the exclusive economic zone<sup>742</sup> in that it also provides for different sovereign rights of coastal

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*Schrijver*, Sovereignty over natural resources, 212. With regard to the powers of coastal states to exploit natural resources, moreover, attention must also be given to Article 62 UNCLOS.

<sup>736</sup> The sovereign rights mentioned in Article 56 (1) lit. b UNCLOS regarding marine scientific research and the protection and preservation of the marine environment would seem secondary or, if at all, meant to support the economic forms of use.

<sup>737</sup> Only of passing interest is the fact that states with no coastal areas as well as geographically disadvantaged states have the right to participate, on an equitable basis and subject to further conditions, in the exploitation of the living resources (Articles 69 to 72 UNCLOS).

<sup>738</sup> Thus *Lagoni*, GS Martens, 803 (814).

<sup>739</sup> *Gloria*, in: *Völkerrecht*, 816 (859). Cf. also *Oda*, EPIL, Vol. II, 305 (306); *Verhoeven*, *Droit international public*, 549.

<sup>740</sup> According to *Gündling*, 200 Seemeilen-Wirtschaftszone, 271, the reference in Article 87 UNCLOS does not imply that the same freedoms apply in the exclusive economic zone that apply in the high seas. Cf. on this issue also *Brown*, *International Law of the Sea*, Vol. I, 235 *et seq.*

<sup>741</sup> On the background to the concept of continental shelf, see *Brownlie*, *Principles of Public International Law*, 205 *et seq.*; *Gloria*, in: *Völkerrecht*, 816 (860 *et seq.*).

<sup>742</sup> See *Verhoeven*, *Droit international public*, 549; on the distinction of the regimes of exclusive economic zone and continental shelf, see also *Gündling*, 200 Seemeilen-Wirtschaftszone, 197 *et sqq.*



states.<sup>743</sup> Pursuant to Article 77 (1) and (2) UNCLOS, for instance, the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The definition of resources used in the context of the continental shelf differs from that applied within the exclusive economic zone in that Article 77 (4) UNCLOS merely (on the one hand) covers the non-living resources of the seabed and subsoil, as well as (on the other hand) living organisms belonging to sedentary species, that is to say, organisms which either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

In line with this definition of resources and the uses afforded to coastal states, Article 78 (1) UNCLOS provides that the legal regime relating to the continental shelf does not affect the legal status of the superjacent waters. Insofar, the rights of ships from other states – at least to the extent they do not interfere with the sovereign rights of coastal states relating to the continental shelf – do not differ from those under the regime on the exclusive economic zone. It bears mentioning that, conversely, the foregoing prerogatives of coastal states are granted under the condition that exploration and exploitation of the continental shelf does not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states as provided for in the Convention, see Article 78 (2) UNCLOS.

#### cc.) Territorial Sea and Contiguous Zone

While the sovereign rights and jurisdiction of coastal states in the exclusive economic zone and the continental shelf are confined to certain aspects, as shown above, to ensure central interests relating to the exploitation of resources, the **territorial sea** is characterised by actual **territorial sovereignty of the coastal states**:<sup>744</sup> pursuant to Article 2 (1) UNCLOS, the sovereignty of a coastal state<sup>745</sup> extends beyond its land territory and internal waters to an adjacent belt of sea not

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<sup>743</sup> Cf. on the following issues generally, for instance, *Brown*, International Law of the Sea, Vol. I, 255 *et seq.*; *Brownlie*, Principles of Public International Law, 205 *et seq.*; *Gloria*, in: *Völkerrecht*, 816 (860 *et seq.*); *Jennings/Watts*, Oppenheim's International Law, Vol. I, 764 *et seq.*; *Pancracio*, Droit international des espaces, 151 *et seq.*; *Rozakis*, EPIL, Vol. I, 783 *et seq.*; *Schrijver*, Sovereignty over natural resources, 207 *et seq.*; *Verhoeven*, Droit international public, 539 *et seq.*

<sup>744</sup> On the following, for instance, *Brown*, International Law of the Sea, Vol. I, 43 *et seq.*; *Brownlie*, Principles of Public International Law, 205 *et seq.*; *Evans*, in: International Law, 623 (629 *et seq.*); *Gloria*, in: *Völkerrecht*, 816 (830 *et seq.*); *Jennings/Watts*, Oppenheim's International Law, Vol. I, 599 *et seq.*; *O'Connell*, International Law of the Sea, Vol. I, 59 *et seq.*; *Pancracio*, Droit international des espaces, 77 *et seq.*; *Shaw*, International Law, 493 *et seq.*; *Sharma*, EPIL, Vol. IV, 818 *et seq.*; *Verhoeven*, Droit international public, 527 *et seq.*

<sup>745</sup> For instance of an archipelagic state, whose respective sovereignty extends to the so-called archipelagic waters (Article 2 (1) UNCLOS).

exceeding 12 nautical miles,<sup>746</sup> described as the territorial sea. The sovereignty of the coastal states is exclusive and comprehensive, as it is only limited by the right of innocent passage through the territorial sea enjoyed by all states.<sup>747</sup> Aside from the right of innocent passage – which comprises different aspects requiring consideration<sup>748</sup> – it is essentially a prerogative of the coastal state to decide how and to what extent it should exercise its territorial sovereignty.<sup>749</sup>

The **right of innocent passage** (Article 17 UNCLOS) through the territorial sea for ships of all states is an important restriction of the sovereignty of coastal states.<sup>750</sup> Basically, it implies that coastal states may not impede the passage<sup>751</sup> of ships flying a foreign flag, provided such passage is innocent, that is: so long as it is not prejudicial to the peace, good order or security of the coastal state (Article 19 (1) UNCLOS). Pursuant to Article 18 (1) UNCLOS, it makes no difference whether such passage through the territorial sea occurs with the intention of entering or leaving internal waters, or calling at a roadstead or port facility outside internal waters.

An important consideration for the purposes of this study relates to the regulatory prerogatives left to coastal states in the context of innocent passage – aside from the exceptions listed in Article 19 (2) UNCLOS, which are of no relevance in this context.<sup>752</sup> On the one hand, the Convention on the Law of the Sea leaves room for legislation on a variety of issue areas, subject to certain conditions; on the other hand, it also places restrictions on this regulatory prerogative:

- pursuant to Article 21 (1) UNCLOS, coastal states may adopt laws and regulations relating to innocent passage through the territorial sea, in respect of certain issues, provided this occurs in conformity with the provisions of the convention and other rules of international law. Of the issue areas that may be of potential relevance in this context, the following bear mentioning: conservation of the living resources of the sea<sup>753</sup> and preservation of the

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<sup>746</sup> Article 3 UNCLOS.

<sup>747</sup> See *Gloria*, in: *Völkerrecht*, 816 (836); *Sharma*, *EPIL*, Vol. IV, 818 (818, 821).

<sup>748</sup> Relevant aspects of the right of innocent passage in the context of this study will be addressed in the following passages.

<sup>749</sup> See also *Gloria*, in: *Völkerrecht*, 816 (835 *et seq.*).

<sup>750</sup> On the following issues see generally *Brown*, *International Law of the Sea*, Vol. I, 53 *et seq.*; *Brownlie*, *Principles of Public International Law*, 186 *et seq.*; *Evans*, in: *International Law*, 623 (633 *et seq.*); *Gloria*, in: *Völkerrecht*, 816 (837 *et seq.*); *Jennings/Watts*, *Oppenheim's International Law*, Vol. I, 614 *et seq.*; *Johnson*, *EPIL*, Vol. II, 994 *et seq.*; *Lagoni*, *LA Eitel*, 605 (614 *et seq.*); *O'Connell*, *International Law of the Sea*, Vol. I, 259 *et seq.*; *Pancracio*, *Droit international des espaces*, 90 *et seq.*; *Shaw*, *International Law*, 507 *et seq.*

<sup>751</sup> For a more detailed definition of the concept of passage, see Article 18 UNCLOS.

<sup>752</sup> These notably include threats to the peace, good order or security of the coastal state, wilful and serious marine pollution and forbidden fishing activities. The catalogue in Article 19 (2) UNCLOS is conclusive; *cf. Lagoni*, *LA Eitel*, 605 (615, 616).

<sup>753</sup> Article 21 (1) lit. d UNCLOS.

environment of the coastal state and prevention, reduction and control of pollution thereof.<sup>754</sup> The regulatory powers of coastal states regarding the latter are additionally outlined in Part XII of UNCLOS on protection and preservation of the marine environment: under Article 211 (4), for instance, coastal states may, in the exercise of their sovereignty within their territorial sea, adopt laws and other regulations for the prevention, reduction and control of marine pollution from foreign vessels. Under the condition that such laws and regulations do not hamper innocent passage of foreign vessels,<sup>755</sup> the regulatory prerogative of coastal states also extends to vessels exercising the right of innocent passage.

- When exercising these regulatory prerogatives, coastal states need to observe a number of “restrictions”, of which the following, in particular, are worth noting here:
  - the right of innocent passage under Article 21 (2) UNCLOS precludes application of laws and regulations relating to the design, construction, manning or equipment to foreign ships by coastal states, unless they are giving effect to generally accepted international rules or standards.<sup>756</sup>
  - of yet greater significance in this context, it would seem, is, of course, the provision of Article 26 UNCLOS, pursuant to which **no charge<sup>757</sup> may be levied upon foreign ships by reason only of their passage through the territorial sea**; under the second paragraph of this provision, only such charges are permissible which are levied as payment only for specific services rendered to the ship, such as piloting, towing or salvaging services.<sup>758</sup>
  - in this connection, attention must also be given to Article 24 (1) UNCLOS and the obligation it stipulates for coastal states not to hamper the innocent passage of foreign ships through the territorial sea. Lit. a of said provision particularly highlights that coastal states may not impose requirements on foreign ships (unless in the cases

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<sup>754</sup> Article 21 (1) lit. f UNCLOS.

<sup>755</sup> On the difficulties of interpreting these restrictions within the system of UNCLOS, see *infra*, Part 3, A. I. 2. b.) bb.).

<sup>756</sup> These include rules or standards developed by the IMO and adopted through international conventions; see *Blanco-Bazán*, in: *International Marine Environmental Law*, 31 (34); *Lagoni*, *LA Eitel*, 605 (616). Examples include the diverse IMO-conventions on the protection of safety at sea and protection of the marine environment; for an overview in this regards, see, for instance, *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 376 *et seq.*

<sup>757</sup> The German translation (as published in the Federal Gazette (*BGBI.*) 1994 II, 1798) of Article 26 UNCLOS refers to both “Gebühren” (title and para. 2) as well as “Abgaben” (para. 1). Given that the English version – which is one of six authoritative language versions pursuant to Article 320 – only mentions “charges”, the distinction in the German version is likely of no significance.

<sup>758</sup> See *Gloria*, in: *Völkerrecht*, 816 (838).

provided for by UNCLOS itself) which have the practical effect of denying or impairing the right of innocent passage.

- Article 24 (1) lit. b UNCLOS, moreover, confirms the **principle of non-discrimination for foreign ships of different flags**.

The parts of the sea subject to (certain) sovereign rights of coastal states include the **contiguous zone** defined in Article 33 UNCLOS relative to the territorial sea and reaching up to twice the breadth of the latter.<sup>759</sup> The particularity of this zone<sup>760</sup> lies in the right it affords to coastal states to exercise the control necessary to prevent and, if necessary, punish infringement of their customs, fiscal, immigration or sanitary laws within their territory or territorial sea. Within the context of this study, the contiguous zone acquires particular significance in that legislation on user charges might be understood as part of domestic customs or fiscal legislation. Article 33 UNCLOS merely affords coastal states the right to prevent or punish the aforementioned types of infringement. On the one hand, thus, the provisions relating to the contiguous zone do not give rise to arguments against an introduction of user charges by coastal states. On the other hand, however, that is the only conclusion supported by the wording of Article 33 UNCLOS, with no indication that the regimes relating to adjacent zones, notably the exclusive economic zone and the territorial seas are in any way affected.<sup>761</sup>

For the sake of completeness, two additional comments are called for at this point: a special variation of the right of innocent passage is separately framed in UNCLOS in Articles 34 *et seq.* as the right of passage through straits used for international navigation. The pertinent provisions contain no stipulations of particular relevance in the context of this study, however, and will thus not be described any further. The same applies to the special regime on so-called archipelagic states pursuant to Article 46 *et seq.* UNCLOS.

#### dd.) Internal Waters

The sovereign rights and jurisdiction of coastal states regarding waters adjacent to their landmasses reach their greatest extent in the internal waters.<sup>762</sup> These,<sup>763</sup> along with **sea ports** located at the

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<sup>759</sup> Pursuant to Article 33 (2) UNCLOS, the contiguous zone may not extend beyond 24 nautical miles from the coast, allowing for partial overlap with the exclusive economic zone.

<sup>760</sup> Cf. on this issue *Gloria*, in: Völkerrecht, 816 (846 *et seq.*, with further references); *Woolridge*, EPIL, Vol. I, 779 *et seq.*

<sup>761</sup> On the other hand, one might agree with *Paust*, LA Oda, 1255 (1266 *et seq.*), that the powers of coastal states in the contiguous zone – which, after all, lies closer to the coast than the exclusive economic zone – must at least include those (additional) sovereign rights they enjoy in the exclusive economic zone. Conversely, one cannot assume that coastal states enjoy the same degree of territorial sovereignty in the contiguous zone – beyond the limited scope of Article 33 UNCLOS – that they enjoy in nearby territorial waters.

<sup>762</sup> On the following issues, see *Brown*, International Law of the Sea, Vol. I, 37 *et seq.*; *Brownlie*, Principles of Public International Law, 116 *et seq.*; *Evans*, in: International Law, 623 (630 *et seq.*); *Gloria*, in: Völkerrecht, 816 (825 *et seq.*); *Jennings/Watts*, Oppenheim's International Law, Vol. I, 572; *Lagoni*, in: EPIL, Vol. II, 1034

coast, form part of the **sovereign territory of the coastal state**; indeed, with regard to their internal waters, as with any other part of their territory, coastal states enjoy **unrestricted and exclusive sovereignty**.

With certain legal exceptions,<sup>764</sup> foreign ships enjoy no right of innocent passage through internal waters, as opposed to the territorial sea. In other words, the freedom of navigation is revoked within internal waters. It follows that, on principle,<sup>765</sup> ships neither have a right to enter foreign internal waters, nor call at foreign port facilities, and, conversely, that coastal states have no duty to allow foreign ships to enter their internal waters or call at their port facilities.<sup>766</sup> In effect, the International Court of Justice held in a decision that coastal states may regulate access to their ports by virtue of their sovereignty.<sup>767</sup> Restrictions only apply insofar as the legislation adopted by coastal states governing access to their internal waters and port facilities may not discriminate against foreign ships flying a certain flag.<sup>768</sup> Still, from the point of view of general maritime law, even after such access rights have been granted, the coastal state retains the right to render access to its ports

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*et sqq.*; ders., in: EPIL, Vol. II, 1036 *et sqq.*; Pancraccio, Droit international des espaces, 67 *et sqq.*; Peters, Innere Gewässer, 81 *et sqq.*; Shaw, International Law, 493 *et sqq.*

<sup>763</sup> On the geographical delimitation of internal waters against the territorial sea, see Article 8 UNCLOS.

<sup>764</sup> See Article 8 (2) and Article 35 lit. a UNCLOS; on these exceptional cases, see *Lagoni*, EPIL, Vol. II, 1034 (1035).

<sup>765</sup> This applies, even though the interest of the coastal state and all other states in upholding the freedom of trade and navigation *de facto* favour open ports; cf. *Badura*, EPIL, Vol. III, 1068 (1070). Legally, this interest has resulted in a great number of bilateral international agreements on reciprocal rights of access to ports; see *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 351.

<sup>766</sup> The only multilateral agreement explicitly referring to the right to call at foreign port facilities is the Geneva Convention and Statute on the International Regulation of Ports of 1923, which has only been ratified by a handful of seafaring nations and never acquired great legal relevance. Cf. in this regard *Lagoni*, AVR 1988, 261 (275 *et sqq.*). The appeal contained in Article 255 UNCLOS to contracting states to facilitate access to their harbours merely relates to marine scientific research vessels.

<sup>767</sup> Judgment in the Case *Nicaragua v. USA*, ICJ Reports 1986, 14 (111). By contrast, an arbitration of 1958 (*Saudi Arabia v. Arabian American Oil Company*; see ILR 27 [1963], 117 [212]) proposed that customary international law conferred a right of access to foreign ports, but this view neither prevailed in judicial practice, nor did it gain footing in international legal scholarship; cf. *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 351.

<sup>768</sup> On this issue *Badura*, in: EPIL, Vol. III, 1068 (1070); *Lagoni*, EPIL, Vol. II, 1036 (1037). From the point of view of general maritime law, thus, the refusal by New Zealand to allow foreign nuclear-powered vessels access to its ports cannot be challenged, provided that restriction is applied against ships of all flags; on this example, *inter alia*, *Pancraccio*, Droit international des espaces, 72.

conditional on observance of certain standards, for instance relating to ship safety or environmental protection.<sup>769</sup>

The extensive sovereignty of coastal states in their internal waters also affects their power to impose certain restrictions on the right of passage of foreign ships through the territorial sea: for instance, Article 25 (2) UNCLOS entitles coastal states “in the case of ships proceeding to internal waters or a call at a port facility outside internal waters (...) to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”

The rights of coastal states specifically relating to operation of their port facilities also flow from territorial sovereignty. Additionally, the monitoring and enforcement rights of port and coastal states are constantly being expanded by way of international agreements.<sup>770</sup> Departing from the conventional view that only flag states may enforce internationally recognized rules on ship safety and marine environmental protection, the Convention on the Law of the Sea also contributes to enforcement of international rules on the prevention of marine environmental pollution by ships<sup>771</sup>: pursuant to Articles 218 and 220 UNCLOS, port and coastal states have the right to undertake investigations and institute proceedings against vessels voluntarily located within one of its ports or at one of its off-shore terminals. Furthermore, port states are required by Article 219 UNCLOS to take administrative measures against vessels in violation of applicable international rules relating to seaworthiness of vessels and thereby threatening damage to the marine environment in order to prevent these from sailing.

It bears noting, moreover, that the foregoing principle of non-discrimination *vis-à-vis* foreign ships not only applies to access to ports, but also to any other use of port facilities.<sup>772</sup>

Finally, Article 211 (1) UNCLOS stipulates that “states, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels.” The legislative action required by this provision and complementing the general maritime law of UNCLOS has been, and continues to be, largely carried out by the International Maritime Organization (IMO).<sup>773</sup> The actual bearing of powers (and obligations) of port states to enforce international rules on the

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<sup>769</sup> Cf., for instance, *Behnam*, in: *International Marine Environmental Law*, 123 (132); *König*, in: *Marine Issues*, 37 (38); *Pancraccio*, *Droit international des espaces*, 72; *Ringbom*, *RECIEL* 1999, 21 (23). On corresponding powers of coastal and port states resulting from specific conventions, see *infra*, Part 3, A. I. 4.

<sup>770</sup> Cf. *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 354; *Gloria*, in: *Völkerrecht*, 816 (830); *Lagoni*, *EPIL*, Vol. II, 1036 (1038 *et seq.*).

<sup>771</sup> On the following issues cf. *Proelß*, *Meeresschutz im Völker- und Europarecht*, 96 *et sqq.*; *Schiano di Pepe*, in: *International Marine Environmental Law*, 137 (140 *et sqq.*).

<sup>772</sup> On this issue *Badura*, *EPIL*, Vol. III, 1068 (1071).

<sup>773</sup> On the relationship between UNCLOS and the international conventions elaborated by the IMO, see *infra*, Part 3, A. I. 3.

safety of navigation and the protection of the marine environment will be addressed in connection with the specific conventions.<sup>774</sup>

c.) Obligations relating to Marine Environmental Protection

As mentioned earlier, the sovereign rights of states in the various maritime zones assigned to them include certain powers to enforce existing international and national rules on the protection of the marine environment. Under Articles 218 and 220 UNCLOS, port states enjoy the most extensive rights of enforcement in relation to ships located at their ports.

Correlating with these rights are the obligations set out for contracting states in Part XII of UNCLOS relating to protection and preservation of the marine environment, with the following worthy of separate mention:<sup>775</sup>

- a general obligation to protect and preserve the marine environment (Article 192);
- an obligation to adopt measures to prevent, reduce and control pollution of the marine environment, comprising pollution from any source (Article 194 (1) to (4));
- a general obligation to protect and preserve ecosystems as well as marine life (Article 194 (5));<sup>776</sup>
- an obligation to adopt national legislation to prevent, reduce and control pollution of the marine environment from various sources (land-based sources, seabed activities, dumping, from vessels and from or through the atmosphere) (Articles 207 to 212);
- the obligation to enforce national and international rules with respect to pollution from various sources (Articles 213 to 222).

Again, when meeting these obligations, contracting parties of UNCLOS needs to observe the principle of non-discrimination *vis-à-vis* foreign vessels.<sup>777</sup>

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<sup>774</sup> See Part 3, A. I. 4. d.)

<sup>775</sup> Cf. generally, for instance, *Beyerlin*, Umweltvölkerrecht, 122 *et sqq.*; *Heintschel v. Heinegg*, in: *Völkerrecht*, 973 (998 *et sqq.*); *ders.*, EUDUR, Vol. I, 750 (775 *et sqq.*); *Proelß*, Meeresschutz im Völker- und Europarecht, 77 *et sqq.*; *Sands*, Principles of International Environmental Law, 395 *et sqq.*; *Wolfrum/Röben/Morrison*, in: *International, Regional and National Environmental Law*, 225 (226 *et sqq.*).

<sup>776</sup> As opposed to the UNCLOS-provisions relating to marine pollution (contained in Part XII), the rules relating to preservation of the marine environment – aside from Article 194 Abs. 5 – are contained in the zone-specific Parts V (on the exclusive economic zone) and VII (on the high seas); cf. *Proelß*, Meeresschutz im Völker- und Europarecht, 105 *et sqq.*

<sup>777</sup> Article 227 UNCLOS.

## 2. *Interim Conclusions: Restrictions on the Introduction of User Charges arising from General Maritime Law*

### a.) Summary of the Central Requirements under UNCLOS

Given how the introduction of charges on the use of the oceans for shipping might potentially infringe upon the freedom of navigation, the exact scope of this freedom acquires central importance within the context of this study. Based on the foregoing analysis, the central requirements arising from general maritime law in this regard can be summarized as follows:

- The **high seas** are characterized by freedom of navigation, which reaches its greatest extent here, if not without any restriction (Article 87 (1) lit. a and Article 90 UNCLOS). Accordingly, the exercise of sovereign authority on the high seas against foreign vessels is generally prohibited. In the absence of national sovereignty, the flag state principle constitutes the only point of reference for the exercise of national jurisdiction on the high seas. This principle goes hand in hand with the obligation of flag states to adopt and enforce certain rules, including rules to protect the marine environment against pollution, with effect for ships flying their flag. Still, no flag state can be forced to adopt and effectively enforce such international rules.
- As opposed to the high seas, the **exclusive economic zone** marks the first opportunity of coastal states to exercise a set of sovereign rights arising from their territorial sovereignty. These sovereign rights are limited in scope, however, by merely extending to the exploitation and protection of living and non-living natural resources within the respective zone, including the seabed and subsoil. By contrast, other states still enjoy all uses not related to these resources, including the freedom of navigation to the extent that it is not linked to a certain use.
- The legal regime relating to the **continental shelf** is comparable to that governing the exclusive economic zone in that it has no consequences for the freedom of navigation, provided coastal states are not prevented from exercising their sovereign rights relating to use of resources.
- In the **territorial sea**, the rights of coastal states are no longer confined to use of marine resources, but already resemble actual territorial sovereignty. Still, the national sovereignty of coastal states is restricted by the right of all the other states to innocent passage through the territorial sea (Articles 17 to 19 UNCLOS). That means that the coastal state may not impede the passage of ships flying foreign flags as long as such passage is innocent. It makes no difference whether such passage through the territorial sea occurs with the intention of entering (or leaving) internal waters, or calling at a port facility (or leaving it).

Pursuant to Article 21 (1) UNCLOS, coastal states may may adopt national rules, in conformity with the provisions of the convention, relating to innocent passage through the territorial sea, in respect of certain matters; these matters include protection of the environment, including the prevention, reduction and control of pollution, including by ships. With a view to the conceivable measures regulating innocent passage through the territorial sea, the following



restriction of coastal state authority through UNCLOS requires mentioning: with certain exceptions, no charges may be levied upon foreign ships by reason only of their passage through the territorial sea (Article 26 UNCLOS). Likewise, except in the cases provided for by the convention, coastal states may not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage (Article 24 (1) lit. a UNCLOS).

- in certain cases, the rights of control available to coastal states within their territorial sea lichen extend to the **contiguous zone**, which is located somewhat further away from the coast. Here, too, coastal states possess the power to prevent and, if necessary, punish infringement of their customs and other fiscal laws, immigration or sanitary laws within their territory or territorial sea.
- In the **internal waters**, the sovereign rights and jurisdiction of coastal states reach their greatest extent, given that this maritime zone – along with sea ports – forms part of state territory. With certain exceptions, this unrestricted sovereignty results in foreign ships enjoying no right of innocent passage, thus revoking the freedom of navigation. Based on their sovereignty, coastal states are free to render access to their ports contingent on fulfilment of certain conditions, for instance observance of standards relating to navigational safety or environmental protection. Restrictions only apply insofar as the legislation adopted by coastal states governing access to their internal waters and port facilities may not discriminate against foreign ships flying a certain flag.

#### b.) Consequences under General Maritime Law for Specific Maritime Zones

Drawing on the foregoing observations, the following can be inferred: the closer a maritime zone is located to the coast, and the more extensive thus the sovereign rights of coastal states, the larger the opportunity for far-reaching legislation and the wider the scope of discretion relating to introduction of a user charge. Against this backdrop, the following specific inferences can be derived for different “types of waters” regarding requirements under international law and restrictions on the regulatory powers of states.

##### aa.) Consequences for the Internal Waters, Including Ports

Given the **unrestricted territorial sovereignty** available to coastal states regarding their internal waters, the international Law of the Sea does not prevent these states from subjecting access to their internal waters and ports to certain conditions, as long as the general principle of non-discrimination is observed. Likewise, no provision within UNCLOS would seem to preclude such coastal state regulation from aiming at, or at least resulting in, the collection of a charge from ships; nor does general maritime law, on principle, prevent the port state from declaring a charge imposed on ships entering their internal waters or ports as compensation for the use of the ocean as such, rather than for the use of its port facilities. An additional question which may arise in this regard, namely

whether charges can be admissible unless they relate to use of port services, will, if at all, become relevant under the specific maritime conventions.<sup>778</sup> General maritime law codified by UNCLOS set out no obstacles in this regard.<sup>779</sup>

bb.) Consequences for the Territorial Sea

By contrast, important restrictions apply to the introduction of user charges in the territorial sea, given that the right of innocent passage goes hand-in-hand with a prohibition for coastal states to levy charges by reason only of passage through the territorial sea (Article 26 UNCLOS). Compared to the freedom of port states to render access by foreign ships to their internal waters and ports conditional on observance of certain requirements, which may also include payment of certain charges, the sovereign rights of coastal states in the area of the territorial sea are clearly curtailed in one aspect: in the territorial sea, the freedom of navigation, coupled with the respective flag sovereignty, takes precedence over the sovereignty of coastal states to introduce charges for the navigational use of the territorial sea.<sup>780</sup>

The question arises whether Article 26 UNCLOS has effects – and, if so, what these effects are – on the right of port states to impose charges on foreign ships based on the unrestricted sovereignty within their internal waters. If a foreign ship is located in the internal waters, a **potential conflict** arises between the unrestricted sovereignty of the port state, on the one hand, and the prohibition on levying charges by reason only of passage through the territorial sea (by which the foreign ship entered the internal waters), on the other hand.

With a view to the legal assessment of this conflict, two aspects need to be considered:

- four one, as soon as a foreign ship enters the internal waters or calls at a port facility rather than merely passing through the territorial sea (as stipulated by Article 26 UNCLOS), it also subjects itself to the unrestricted sovereignty of the coastal state. Within the ambit of this sovereignty, and without prejudice to general maritime law and the international league concept of sovereignty, the coastal state is generally free win this thing restrictions on access to its territory. If the legal scope of territorial sovereignty within internal waters were the only

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<sup>778</sup> This question will be revisited in the respective context, see *infra*, Part 3, A. I. 4. d.).

<sup>779</sup> The following section will ascertain whether restrictions perhaps arise from Article 26 UNCLOS (which stipulates the right of innocent passage through the territorial sea).

<sup>780</sup> Albeit with the exception explicitly mentioned in Article 26 (2) UNCLOS, according to which charges may be levied upon a foreign ship as payment for specific services rendered to the ship. Furthermore, it bears mentioning in this regard that parallel provisions relating to the freedom of navigation also apply to internal navigation: for instance, Article 3 of the Mannheim Rhine Shipping Act of 1868 (revised version, see Federal Gazette 1969 II, 597) states that – starting from the principle of freedom of navigation (Article 1 (1)) – no charges solely based on the fact of navigation may be imposed on ships navigating on the Rhine and the other watercourses covered by the convention.

consideration, it would follow that the respective coastal state could also, in theory, refer to passage of its territorial sea with the intention of calling at one of its ports as a reason for the introduction of charges on ships voluntarily entering its internal waters and ports.

- On the other hand, the coastal state imposing a charge on foreign ships when these call at its ports, with the charge linked to passage of the territorial sea (for instance as a toll), would risk being vulnerable to accusations of having undermined Article 26 UNCLOS – and, with it, the right of innocent passage through the territorial sea (Article 17 UNCLOS) – and thus exercised its territorial sovereignty in an abusive manner.<sup>781</sup>

From a legal perspective, it appears doubtful whether Article 26 UNCLOS actually extends beyond the territorial sea and also affects actual sovereign territory. Instead, the object and purpose of this provision lies in regulating the relationship between the sovereign rights of coastal states and the freedom of navigation in the territorial seas – and not in the internal waters or ports. Ultimately, it can be presumed that Article 26 UNCLOS does not incur a restriction of the sovereignty of coastal and port states within their state territory. As a result, there is no reason to assume that exercise of unrestricted territorial sovereignty within internal waters could constitute an abuse of rights because of Article 26 UNCLOS.

If at all, such abusive behavior might be conceivable if the coastal state, drawing on Article 26 (2) UNCLOS (according to which charges may be levied for specific services rendered to the ship), imposed a charge on foreign ships by reason only of their use of the territorial sea for passage. Linking such a charge to the mere passage of foreign ships through the territorial sea would incur an inadmissible expansion of the concept of service – which refers to actual services rendered by the coastal state, such as piloting, towing or salvaging.<sup>782</sup>

From a **legal perspective**, thus, the **central inference from Article 26 UNCLOS** for this study is that mere passage of foreign ships through the territorial sea (without being followed by a voluntary call at a port facility) is not a suitable event to base a charge on by the coastal state; for a charge may not be levied by reason only of passage through the territorial sea, or, in other words, the coastal state does not have jurisdiction over foreign ships whose presence in the territorial sea solely serves the purpose of innocent passage. By contrast, the coastal or port state is generally free to exercise his unrestricted sovereignty (albeit with a view to the principle of non-discrimination) in its internal waters and ports to impose any requirements on foreign ships.

Aside from the purely legal appreciation of Article 26 UNCLOS, however, a further aspect needs to be taken into consideration: **politically**, the respective coastal state may weaken its position as a

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<sup>781</sup> On abuse of law and its significance when exercising port state control *cf.* Ringbom, RECIEL 1999, 21 (23 *et seq.*).

<sup>782</sup> *Cf.* Brown, International Law of the Sea, Vol. I, 62, with further references; Gloria, in: Völkerrecht, 816 (838); Nandan/Rosenne/Grandy, UNCLOS Commentary, Vol. II, 235 *et seq.*

user of the oceans relative to other states if it unilaterally exercises its sovereign right to design requirements for entrance into its internal waters and ports as it chooses. The foregoing argument of abuse, although refutable as a matter of law, is likely to acquire distinct significance at the political level. To some extent, a preemptive effect might be achieved by way of explicit declaration that only such ships would be subject to a user charge which voluntarily enter the internal waters or ports, and not ships suffering an emergency or other extraordinary circumstances. Furthermore, political reservations may also be dispelled by not choosing passage of the territorial sea as the event leading to payment of the charge (as in the case of a toll).

cc.) Consequences for the Maritime Zones subject to Special Resource-related Sovereign Rights

Maritime zones characterized by special resource-related sovereignty rights of coastal states continue to be open to all other states for non-resource-related uses, along with guaranteed freedom of navigation (Article 58 (1) in connection with Article 87 UNCLOS). Drawing on this premise, the international regime on the exclusive economic zone and the sea above the continental shelf allow for no particular conclusions.

dd.) Consequences for the High Seas

If the regulatory powers of coastal states in the territorial sea already prevent it from imposing a charge for the mere navigation through this maritime zone, that applies all the more for the high seas.

Despite potential restrictions of its scope, for instance by specific conventions on marine environmental protection, freedom of navigation enjoys priority on the high seas, given that –in the absence of territorial sovereignty – the flag state principle generally<sup>783</sup> provides the only point of reference for national enforcement powers and state jurisdiction over a particular ship. To the extent that the flag state does not exercise its powers with regard to marine environmental protection rules, enforcement of such provisions would presuppose that the vessel in question called at the port of a third state willing to carry out enforcement measures.<sup>784</sup> The powers of enforcement of third states with regard to the shared commons of the marine environment are thus confined to the sovereign rights arising from the territorial sovereignty of coastal states in the territorial sea.

For the purposes of this study, that does not mean that the regime of the high seas and its strong emphasis on the freedom of navigation altogether prevents the introduction of user charges. Still, navigational use of the high seas, as well as mere passage through the territorial sea, are not suitable points of reference for the introduction of a user charge. In either case, the third state will lack the necessary enforcement powers, unless the ship in question enters an area subject to the unrestricted

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<sup>783</sup> On such exceptions, see *supra*, Part 3, A. I. 1. a.).

<sup>784</sup> See *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 364, 376. In this direction also the special survey of the German Advisory Council on the Environment: *SRU*, *Meeresumweltschutz für Nord- und Ostsee*, 162.

sovereignty of said state. In this connection, it bears keeping in mind that conceivable user charges should also take into account the challenge of flags of convenience. Accordingly, a user charge should not be designed to solely rely on the enforcement powers of flag states characterizing the regime of the high seas.

c.) Conclusions Regarding the Choice of a Suitable Point of Reference for the Introduction of User Charges on Ships Pursuant to UNCLOS

The foregoing observations have shown that, pursuant to the provisions of **UNCLOS**, neither the mere passage of foreign ships through the territorial sea nor the navigational use of the high seas pose suitable points of reference for the introduction of a user charge. Instead, an event would be needed which is subject to the unrestricted jurisdiction of the imposing state. In the interest of practicality, moreover, this event should not be subject only to the control powers of flag states. With this in mind, linking a user charge to ship registration, for instance, would be ruled out, given that registration is an expression of flag state sovereignty.<sup>785</sup> Referring to ship registration would, if at all, only be feasible under a consensual and reciprocal charging system created between contracting parties to a binding international treaty.<sup>786</sup>

At this point, it again bears recalling that – at least *prima facie* – a semi-universal international treaty on user charges can hardly be expected,<sup>787</sup> for instance after the model of the more important IMO-conventions with global scope. Rather, one has to assume that even in the medium term, a significant number of states will prove unwilling to enter contractual commitments relating to the introduction of user charges. Regarding the treatment of ships flying the flag of such third states, it would then be irrelevant whether user charges are imposed under an international treaty concluded between certain states or unilaterally by the coastal state; in either case, foreign ships would be subject to the same international rules. Differentiation of the point of reference relative to the approach chosen (introduction of user charges on the basis of an international treaty between a certain number of parties, or unilateral introduction) is thus not necessary from the point of view of general maritime law. Even if a larger number of states decided to (reciprocally) introduce user charges, the constraints imposed by UNCLOS relative to third states would still apply.

The foregoing observations relating to different parts of the sea have shown that the only event allowing for expedient collection of a user charge from **foreign ships** would be when these **call at a**

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<sup>785</sup> Cf. Article 91 (1) UNCLOS; on this issue *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 357 *et sqq.*; *Wolfrum*, in: *BerDGV* 1990, 121 (122 *et sqq.*).

<sup>786</sup> Cf. also in this regard the solution favoured by the WBGU in its special study; see *WBGU*, *Entgelte*, 29: for the sake of simplicity, the WBGU considers the introduction of an annual fee for all ships registered with participating states. Nonetheless, it also concedes that, regarding ships from third states (not participating in the respective international arrangement), collection could only occur simultaneously with collection of port fees.

<sup>787</sup> On this issue already Part 2, B. I., on the general relevance of international rules; see, in this regard, *WBGU*, *Entgelte*, 26.

**port of the collecting state.** This basic point of reference could be complemented with additional considerations, depending on the model chosen.

From the point a few of general maritime law, the **choice of a user charge design** merits attention in this context. Beyond the choice of the point of reference (voluntary calling of foreign ships at ports of the collecting state), general maritime law does not result in specific restrictions – relative to the design of the user charge, and, consequently, the chosen user charge model – for charges imposed on the occasion of calling at a port. At this point, it shall be presumed that such a charge would be collected under the heading of a “port fee” (although its designation should not ultimately be of relevance). Based on the unrestricted regulatory power of port states under international maritime law, any type of circumstance or event could be linked to collection of a “port fee.” Given that UNCLOS contains no provision<sup>788</sup> requiring that charges levied in connection with the use of port facilities be related to enjoyment of port services and similar advantages, port states are free to pursue any objective through the collection of “port fees.”<sup>789</sup> As opposed to the regime governing the territorial sea, international maritime law contains no provisions calling on states not to hamper the innocent passage of foreign ships voluntarily entering their internal waters or ports.<sup>790</sup> Likewise, beyond the (staggered) freedom of navigation, UNCLOS does not afford any right – that might then be infringed upon by a user charge – to engage in economic activities at the coast of the respective state.<sup>791</sup> In conclusion, a port state could even impose prohibitive charges (in the sense of a general restriction on access to ports) when assessing its “port fees”.<sup>792</sup>

From the point of view of general maritime law, thus, the different conceivable models<sup>793</sup> of a user charge, for instance implementation as a tax, as a freight- or passenger-related charge based on a certain distance travelled (toll), as an emissions-based charge (notably a CO<sub>2</sub>-levy) or as a fee linked to fuel, freight or ship tonnage, cannot, thus, be distinguished with a view to their legal admissibility. The respective criteria (for instance the achievement of certain emissions values in the case of a CO<sub>2</sub>-levy; coverage of a certain distance in the case of a toll; minimum volume of a

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<sup>788</sup> See Part 3, A. I. 2. b.) aa.).

<sup>789</sup> A different question relates to whether – given the political implications – this freedom should actually be exercised; see on this issue *supra*, 3. Teil, A. I. 2. b.) bb.).

<sup>790</sup> Cf. Article 24 (1) UNCLOS relating to the territorial sea.

<sup>791</sup> Cf. *Badura*, EPIL, Vol. III, 1068 (1070); *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 351.

<sup>792</sup> Apparently of a different opinion, albeit not on the issue of port fees, but on other conditions of port access – *Ringbom*, RECIEL 1999, 21 (23 *et seq.*). This author assumes that port states have to exercise their rights with a view to general principles of international law, notably the principle of proportionality and the prohibition of an abuse of law. He does not, however, allow for the fact that port states determining the conditions of access to their ports are acting within their full territorial sovereignty and thus, in theory, could altogether forbid access to foreign ships.

<sup>793</sup> In greater detail on the respective models, see *supra*, Part 1, C. I.

ship in the case of a tonnage fee) merely constitute **additional considerations** in the sense of substantive assessment criteria for normative implementation of the chosen **point of reference** (that is, foreign ships calling at a port of the collecting state) with a view to achievement of the pursued legal outcome.

The chosen point of reference also raises no concerns relating to **extraterritorial jurisdiction**.<sup>794</sup> After all, the national jurisdiction (that is, exercise of sovereign authority) required for collection of the charge originates in the territorial sovereignty of the coastal state into whose internal waters a foreign ship has (voluntarily) entered. If the introduction of a charge indirectly forces ships flying a foreign flag to adopt certain measures, for instance regarding the reduction of certain emissions, that would have to be considered a consequence of domestic law. While it may, thus, *de facto* affect foreign legal subjects, it merely constitutes a transboundary effect of territorial jurisdiction and thus raises no concerns under international law.<sup>795</sup>

Finally, one may also ask whether a contractual arrangement between certain states resulting in the introduction of a user charge for foreign ships irrespective of the flag they are flying, and thus also for ships flying the flag of non-parties, poses a violation of Article 34 of the Vienna Convention on the Law of Treaties (VCLT), which provides that a treaty does **not create obligations** for third states without their consent (“*pacta tertiis*”-rule).<sup>796</sup> Again, it can only be repeated that non-parties would by no means be forced to adopt measures ensuring that ships flying their flag are exposed to the lowest possible burden by such a charge. Indeed, non-parties would (at the most) be indirectly compelled to ensure compliance with certain standards (which might serve as the basis for assessment of the charge) by ships flying their flag. Such measures would not, however, reflect a legal obligation in violation of the “*pacta tertiis*”-rules of Article 34 VCLT.<sup>797</sup>

### 3. *On the Relationship of General Maritime Law under UNCLOS and Specific Maritime Conventions*

In Part XII on the protection and preservation of the marine environment, the Convention on the Law of the Sea itself clearly concedes that its provisions require elaboration by further – UNCLOS-consistent – international rules and standards: to this end, for instance, Article 197 UNCLOS calls on contracting states to generally engage in international cooperation; in Article 207 *et seq.*, states

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<sup>794</sup> Cf. on general questions of extraterritorial jurisdiction, see also *supra*, Part 2, B. I.

<sup>795</sup> On the central distinction between extraterritorial jurisdiction, on the one hand, and (legally admissible) intraterritorial jurisdiction with extraterritorial effects, on the other hand, see *Meng*, *Extraterritoriale Jurisdiktion*, 76 *et seq.*

<sup>796</sup> Generally on this problem, for instance, *Schweisfurth*, in: *ZaöRV* 1985, 653 *et seq.*

<sup>797</sup> Thus also the reasoning applied by *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 379, in connection with the non-favouring clauses of the SOLAS and MARPOL conventions.

are requested to elaborate, on a global and regional basis, international rules on the prevention, reduction and monitoring of pollution of the marine environment from different sources.<sup>798</sup> This mandate set out by UNCLOS has been met with the adoption of a considerable number of international conventions.

With regard to the specific issue of marine environmental protection, the relationship between the global framework of UNCLOS and further maritime conventions<sup>799</sup> is already reflected in Article 197 UNCLOS, which states that additional international rules and standards (to be elaborated by the contracting states) have to be consistent with UNCLOS. In other words, this “normative evolution”<sup>800</sup> provided for in UNCLOS has to occur within the normative boundaries set out by that convention.<sup>801</sup> These not only include the principles on environmental protection laid down in Part XII, but also (by necessity) the general rights and duties of states in different parts of the sea, notably those concerning the extension of national sovereignty. In keeping with this relationship, individual specific conventions also explicitly refer to the special role of UNCLOS and its “primacy”.

For instance, the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution<sup>802</sup> states that nothing in that convention or its protocols shall prejudice the rights or position of contracting parties under UNCLOS. The Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area affirms that it “shall be without prejudice to the rights and obligations of the Contracting Parties under existing and future treaties which further and develop the general principles of the Law of the Sea”<sup>803</sup> – notably under UNCLOS. Regarding the Helsinki Convention, it is also worth noting that it itself states that none of its provisions should “be construed as infringing upon the freedom of navigation (...) and other legitimate uses of the high seas, as well as upon the right of innocent passage through the territorial sea”,<sup>804</sup> thereby effectively assigning primacy to the basic principles of international maritime law contained in UNCLOS.<sup>805</sup> That is also borne out by the fact that all maritime conventions concluded before adoption of UNCLOS in 1982, but already reflecting the codification work of the International Law Commission (for instance the London Dumping Convention of 1972 and the MARPOL Convention in the amended version of 1978), contain clauses explicitly stating that they shall not prejudice the codification and development of the law of the sea by the United

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<sup>798</sup> See, in detail, Article 207 (4), Article 208 (5), Article 209 (1), Article 210 (4), Article 211 (1), Article 212 (3) UNCLOS.

<sup>799</sup> Cf. on the relationship of UNCLOS and these global IMO-conventions, for instance, *Blanco-Bazán*, IMO interface with the Law of the Sea Convention.

<sup>800</sup> *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 341.

<sup>801</sup> Cf. in this regard also *Jenisch*, in: *Marine Issues*, 63 (64 *et seq.*), pursuant to whom Article 197 UNCLOS allows for the conclusion of regional maritime conventions, but also simultaneously restricts the legal framework set out by UNCLOS.

<sup>802</sup> Article 3 (3) Barcelona Convention; on this convention, see also Part 3, A. I. 4. b.) aa.).

<sup>803</sup> Article 29 Helsinki Convention; on this convention, see also Part 3, A. I. 4. b.) bb.).

<sup>804</sup> Article 27 Helsinki Convention.

<sup>805</sup> Although, of course, it needs to be taken into consideration that this primacy is already established by UNCLOS itself, with the Helsinki Convention merely restating the already present relationship between both conventions; cf. on this issue *Jenisch*, in: *Marine Issues*, 63 (64 *et seq.*).



Nations.<sup>806</sup> Put differently, these older conventions adopted before UNCLOS already assume a general primacy of the Law of the Sea later codified by UNCLOS.<sup>807</sup>

For the purposes of this study, it follows from the primary function of UNCLOS as a comprehensive “legal order for the seas and oceans”<sup>808</sup> that the general provisions of UNCLOS determine which questions still require addressing on the level of specific maritime conventions: since all further maritime conventions have to operate within the legal framework established by UNCLOS, such conventions will only prove relevant for the introduction of user charges if the issue at stake is not already governed by UNCLOS, thus leaving a certain leeway for regulation. In this context, finally, it also bears noting that fundamental principles of the international Law of the Sea codified by UNCLOS are also recognized as customary international law,<sup>809</sup> including, for instance, the sovereign rights of fact states and coastal states and, last but not least, the freedom of navigation in its different gradations. With other words, UNCLOS has codified the essential structures of international maritime law, and must therefore by necessity also apply within the ambit of all other maritime conventions.

#### 4. *Requirements under Specific Maritime Conventions*

In line with the point of reference chosen in response<sup>810</sup> to the general requirements of UNCLOS (a foreign ship calling at a port of the collecting state), the assessment of specific maritime conventions will be limited as follows: the focus will exclusively rest on the parts of the sea subject to unrestricted territorial sovereignty, *ergo* on the internal waters and ports, with attention centering on the powers of port states *vis-à-vis* foreign vessels. Given the insights derived from the general Law of the Sea regarding the suitable choice of a point of reference for the introduction of user charges, one question is of particular interest in this context: which powers do port states enjoy *vis-à-vis* foreign ships under specific maritime conventions?

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<sup>806</sup> See Article XIII of the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as well as Article 9 (2) MARPOL 1978. On both conventions, see *infra*, Part 3, A. I. 4. a.) aa.) and bb.).

<sup>807</sup> The question of whether this primacy of UNCLOS also extends (retroactively, as it were) to treaties concluded before the codification process on the Law of the Sea had begun (and thus without “knowledge” of its existence or outcome) is of no relevance here, given that the London Convention on Dumping of 1972 is the oldest convention considered in the following passages.

<sup>808</sup> Preamble of UNCLOS. On the “overarching” or universal character of UNCLOS, see also *Proelß*, Meeresschutz im Völker- und Europarecht, 74 *et sqq.*, with further references; *Vitzthum*, in: *ZaöRV* 2002, 163 (163).

<sup>809</sup> On this issue generally *Sioussouras*, *Revue hellénique de droit international* 2001, 299 *et sqq.*; *cf.* furthermore *Ringbom*, in: *RECIEL* 1999, 21 (22), with further references.

<sup>810</sup> On the conclusions arising from the relationship between the general Law of the Sea and UNCLOS and the specific maritime conventions for the purposes of this study, see *infra*, Part 3, A.I.3.

Given the large number of conventions elaborating on the general Law of the Sea codified in UNCLOS, an additional substantive limitation of the ambit of this study becomes necessary. With a view to the pertinent questions, the following analysis will focus on, first, those conventions which seek to prevent marine pollution, notably by shipping; international conventions exclusively relating to the conservation and use of living marine resources will thus be left unconsidered. Given the potential relevance for an introduction of user charges, therefore, the analysis would include global conventions on the prevention of marine pollution, most of which were elaborated within the institutional context of the International Maritime Organisation (IMO) (a). Second, several regional regimes were developed within the European context, of which the most important will also be given consideration (b). Finally, a both substantively and legally independent status is held by the Paris Memorandum of Understanding on Port State Control, which would be addressed towards the end (c).

a.) Global Conventions on the Prevention of Marine Pollution

aa.) London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

The London Convention<sup>811</sup> of 1972 requires contracting parties to prohibit and control the deliberate disposal at sea (“dumping”) of certain wastes and other matter.<sup>812</sup> To this end, it mandates port states with the issue of permits for dumping certain matter subject to a permit requirement under the convention and loaded in their territory.<sup>813</sup> Moreover, contracting parties are required to apply the measures required to implement the present convention to all vessels and aircraft loading in its territory or territorial seas matter which is to be dumped.<sup>814</sup>

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<sup>811</sup> London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, in force 30 August 1975, 1046 United Nations Treaty Series 120, 11 International Legal Materials 1294 (1972). Generally on the London Convention, for instance, *Beyerlin*, Umweltvölkerrecht, 116 *et seq.*; *Proelß*, Meeresschutz im Völker- und Europarecht, 144 *et seq.*; *Sands*, Principles of International Environmental Law, 416 *et seq.*

<sup>812</sup> Pursuant to Article IV London Convention, dumping of certain wastes and other matters (listed in Annex 1) is forbidden. Further wastes and other matters (listed in Annex 2) may only be disposed subject to a special permit. Other waste and matters may only be disposed at sea upon condition of a prior “general” permit. While radioactive material had originally been listed in Annex 2, dumping of any radioactive material has been forbidden since 1993. A protocol to the convention was adopted in 1996 which, once it has been ratified by a sufficient number of states (which has yet to occur) is set to replace the convention (for the protocol, see 36 International Legal Materials 1 (1997)). The main feature of the protocol relative to the convention is its more restrictive character; for an overview in the literature listed on the convention, see, for instance, *Beyerlin*, Umweltvölkerrecht, 117 *et seq.*

<sup>813</sup> Article VI (2) lit. a London Convention on Dumping.

<sup>814</sup> Article VII (1) lit. b London Convention on Dumping.

The same applies to all vessels under the jurisdiction of a contracting party believed to be engaged in dumping.<sup>815</sup> Although the geographic scope of the convention does not extend to internal waters,<sup>816</sup> it affords port and coastal states important rights, but also imposes obligations to implement the objectives of the convention.

No provision under this convention could be construed as an obstacle for the introduction of user charges by contracting parties.<sup>817</sup>

bb.) International Convention for the Prevention of Pollution from Ships (MARPOL-Convention)

Of the international conventions on the safety of navigation, the prevention of marine pollution and other important topics elaborated within the framework of the IMO<sup>818</sup> to date, various conventions are of relevance in the context of this study. Starting in chronological order, the MARPOL-convention will be addressed first.

Originally dating from 1973, the MARPOL-convention applies in the version of a protocol adopted in 1978.<sup>819</sup> Designed as a framework convention, the convention itself contains rather little normative substance. The actual substantive commitments of contracting parties relating to the prevention of Marine pollution have been laid down in (so far) six annexes to the convention:<sup>820</sup>

- Annex I on Regulations for the Prevention of Pollution by Oil;
- Annex II on Regulations for the Control of Pollution by Noxious Liquid Substances;
- Annex III on Regulations for the Prevention of Pollution by Harmful Substances in Packaged Form;
- Annex IV on Regulations for the Prevention of Pollution by Sewage from Ships;

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<sup>815</sup> Article VII (1) lit. c London Convention on Dumping.

<sup>816</sup> As can be inferred from Article III (1) lit. a in connection with Article III Abs. 3 of the Convention. In this regard, pending its entry into force, Article 7 of the protocol of 1996 will be far more explicit.

<sup>817</sup> The same applies to the protocol of 1996.

<sup>818</sup> On the function and legislative activities of IMO, see generally, for instance, *Blanco-Bazàn*, in: *International Marine Environmental Law*, 31 *et seq.*; *Proelß*, *Meeresschutz im Völker- und Europarecht*, 125 *et seq.*; *Sands*, *Principles of International Environmental Law*, 97 *et seq.*; *Vitzthum*, *ZaöRV* 2002, 163 (165 *et seq.*).

<sup>819</sup> Henceforth MARPOL 1978. The currently valid text in the version of the protocol of 1978 is reproduced in 1341 United Nations Treaty Series 3, 17 International Legal Materials 546 (1978); in literature, see generally, for instance, *Beyerlin*, *Umweltvölkerrecht*, 119 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 380 *et seq.*; *Proelß*, *Meeresschutz im Völker- und Europarecht*, 129 *et seq.*; *Sands*, *Principles of International Environmental Law*, 440 *et seq.*; *Schiano di Pepe*, in: *International Marine Environmental Law*, 137 (144 *et seq.*).

<sup>820</sup> After Annex VI entered into force on 19 May 2005, all sectoral regimes adopted under MARPOL have become mandatory.

- Annex V on Regulations for the Prevention of Pollution by Garbage from Ships;
- Annex VI on Regulations for the Prevention of Air Pollution from Ships.

In the context of this study, it bears noting that violations against the provisions of the regime established under Article 4 MARPOL 1978 are to be primarily sanctioned by the government of the state under whose authority the ship is operating.<sup>821</sup> Consequently, the MARPOL-convention is largely modeled on the flag state principle.<sup>822</sup>

Nevertheless, the convention also confers certain indispensable rights on port states with a view to ensure achievement of the system set out in Article 5 requiring regular inspections of ships and issuance of international certificates on observance of the measures provided for in the annexes relating to different pollution risks.<sup>823</sup> Accordingly, port states enjoy the authority to perform inspections of ships in their ports or off-shore terminals, and to take such steps as to ensure that ships whose condition or equipment does not correspond substantially with the particulars of the respective certificate shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment.<sup>824</sup> Furthermore, port states are entitled to inspect foreign ships at their ports or off-shore terminals for the purpose of verifying whether these have discharged any harmful substances in violation of the provisions set down in the annexes to the convention.<sup>825</sup>

The legal effectiveness of the MARPOL-regime has been strengthened to a significant extent by the clause in Article 5 (4) MARPOL 1978, requiring that contracting parties also apply the provisions of the convention to ships of non-parties as may be necessary to ensure that no more favorable treatment is given to such ships. In other words, port states are afforded the right to impose the rules of the MARPOL-regimes *vis-à-vis* ships flying the flag of non-parties. In that regard, the MARPOL-convention conforms to the non-discrimination principle set out under general maritime law<sup>826</sup> and requiring that ships flying different flags not be treated differently.<sup>827</sup>

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<sup>821</sup> In connection with Article 2 (5) MARPOL 1978.

<sup>822</sup> See *Beylerlin*, Umweltvölkerrecht, 120; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 381.

<sup>823</sup> The international certificates introduced by the MARPOL-regime refer to the rules and standards included in the Annexes and whose observance is mandatory for ships. Pursuant to Rule 11 of Annex II, for instance, any ship carrying noxious liquid substances in bulk and engaged in voyages to ports under the jurisdiction of other parties to the convention shall be issued an International Pollution Prevention Certificate.

<sup>824</sup> Article 5 (2) MARPOL 1978.

<sup>825</sup> Article 6 (2) MARPOL 1978.

<sup>826</sup> *Cf.* Article 227 UNCLOS.

<sup>827</sup> The scholarly debate in academic literature on whether the clause on preferential treatment in the MARPOL-convention (and in the SOLAS Convention, see *infra*) violates the “pacta tertiis”-rule of Article 34 VCLT does not need to be pursued further in this context. *Cf.* in that regard *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 378 *et seq.*, as well as, differentiating, *Proelß*, Meeresschutz im Völker- und Europarecht, 129 *et seq.* On the significance of the “pacta tertiis”-rule in connection with the introduction of user charges under an

It follows that the convention and its annexes contain no provision which may be construed as an obstacle for the introduction of user charges by its contracting parties.

cc.) International Convention for the Safety of Life at Sea (SOLAS)

This convention, dating from 1974,<sup>828</sup> primarily aims at protecting human life, but still acquires relevance with regard to marine environmental protection. Worthy of mention is the approach it sets out: based on inspections (carried out by the flag state), ships obtain certificates on compliance with minimum technical standards, whose observance can be controlled by all contracting governments at whose ports foreign ships have called. As under the MARPOL-regime, port states have the right and duty to ensure that no ship sets sail until it can proceed to sea without presenting a threat of harm to the crew and possible passengers.<sup>829</sup> Likewise, the SOLAS Convention also contains a clause prohibiting preferential treatment of ships flying the flag of non-party states.<sup>830</sup>

No provision of this convention would seem to stand in the path of user charges introduced by the contracting states, however.

dd.) London Convention on Oil Pollution Preparedness, Response and Co-Operation

This convention,<sup>831</sup> concluded in 1990 under the auspices of the IMO, calls on its parties to take all appropriate measures to prepare for and respond to an oil pollution incident.<sup>832</sup> In 2000, a protocol to the convention (not yet in force) was adopted concerning pollution by other noxious substances.

The rights and duties of port states vis-à-vis foreign ships are limited to enforcing the requirement that ships entitled to fly the flag of parties have on board a shipboard oil pollution plan.<sup>833</sup> While in

international treaty vis-à-vis ships flying the flag of states that are not parties to that treaty, see *supra*, Part 3, A. I. 2. c.)

<sup>828</sup> International Convention for the Safety of Life at Sea (SOLAS), 1 November 1974, in force 25 May 1980, reproduced in 14 International Law Materials 956 (1975); generally on the convention, *inter alia*, Dahm/Delbrück/Wolfrum, Völkerrecht, Vol. I/2, 377 *et seq.*; Proelß, Meeresschutz im Völker- und Europarecht, 139 *et seq.*

<sup>829</sup> Cf. on the respective rights and duties of port states Chapter XI in the Annex to the SOLAS Convention regarding special measures to enhance maritime safety.

<sup>830</sup> Article II (3) of the 1978 SOLAS Protocol.

<sup>831</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation, 30 November 1990, in force 13 May 1995, 30 International Law Materials 735 (1991). Cf. generally Beyerlin, Umweltvölkerrecht, 127 *et seq.*; Sands, Principles of International Environmental Law, 451 *et seq.*

<sup>832</sup> Article 1 (1) London Convention on Oil Pollution.

<sup>833</sup> On this duty Article 3 (1) lit. a London Convention on Oil Pollution.

a port or at an offshore terminal, a ship is under the jurisdiction of the port state regarding inspection of the existence on board of such an emergency plan.<sup>834</sup>

Nonetheless, the convention contains no provision that may be construed as precluding an introduction of user charges by parties.

ee.) International Convention on the Control of Harmful Anti-Fouling Systems

This IMO-convention of 2001<sup>835</sup> aims at reducing marine pollution by toxic so-called antifouling-systems used to coat the bodies of ships to prevent attachment of unwanted organisms; to this end, certain substances will be prohibited from 1 January 2008 onwards. The convention has not yet entered into force.

Port states participate in the implementation of the rules under the convention by virtue of the obligation of all parties to enforce the prohibition of certain toxic anti-fouling systems against foreign vessels calling at their ports or at an offshore terminal. To allow effective inspection of ships (under participation of port states), the convention establishes a system of international certificates.

No provision under this convention could be construed as an obstacle for the introduction of user charges by contracting parties, however.

ff.) International Convention for the Control and Management of Ships' Ballast Water and Sediments

This convention, adopted in 2004, is geared against the transfer of foreign organisms through uncontrolled exchange of ballast water by ships.<sup>836</sup> It has not yet entered into force.

Through a number of specific powers and obligations, this convention mandates port states with achievement of its objectives: For one, it is up to port states to ensure that adequate facilities are provided for the reception of sediments in ports.<sup>837</sup> Coastal states are, moreover, required to monitor

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<sup>834</sup> Article 3 (1) lit. b London Convention on Oil Pollution.

<sup>835</sup> International Convention on the Control of Harmful Anti-Fouling Systems, 5 October 2001, not yet in force, reproduced in IMO, *Anti-Fouling Systems: International Convention on the Control of Harmful Anti-Fouling Systems on Ships* (London, IMO, 2005); for a general overview of the content of this convention cf. <[http://www.imo.org/Conventions/mainframe.asp?topic\\_id=529](http://www.imo.org/Conventions/mainframe.asp?topic_id=529)>.

<sup>836</sup> International Convention for the Control and Management of Ships' Ballast Water and Sediments, 13 February 2004; for an overview cf. <[http://www.imo.org/Conventions/mainframe.asp?topic\\_id=867](http://www.imo.org/Conventions/mainframe.asp?topic_id=867)>. On the convention and the underlying problem cf. *SRU*, *Meeresumweltschutz für Nord- und Ostsee*, 172 *et seq.*; also generally *Böckenförde*, in: *Marine Issues*, 241 (253 *et seq.*).

<sup>837</sup> Article 5 Ballast Water Convention.

the effects of ballast water management in waters under their jurisdiction.<sup>838</sup> Based on a certification duty<sup>839</sup> for ships, these may be inspected by port states; in the process, port states must also ensure that no ship discharges ballast water until it can do so without presenting a threat of harm to the environment.<sup>840</sup> Still, port states must also take all possible efforts to avoid a ship being unduly detained or delayed in their ports.<sup>841</sup>

Still, the convention contains no provision that may be construed as precluding an introduction of user charges by parties.

gg.) Convention on Facilitation of International Maritime Traffic

Aside from the IMO conventions directly or indirectly geared towards protecting the marine environment against pollution, the Convention on Facilitation of International Maritime Traffic requires consideration in the context of this study.<sup>842</sup> The purpose of this convention<sup>843</sup> is generally to facilitate and expedite formalities, requirements relating to documents, and procedures relating to the arrival, stay and departure of foreign ships.<sup>844</sup>

An Annex to the convention specifies the formalities relating to arrival, stay and departure of foreign ships that may be imposed by public authorities of the port state.<sup>845</sup> The list contained in this annex is not exhaustive, however, as it declares that it “shall not be read so as to preclude a requirement for the presentation for inspection by the appropriate authorities of certificates and other papers carried by the ship pertaining to its registry, measurement, safety, manning and other related matters” by the port state.<sup>846</sup> Under this convention, port states have the right not only to view certain documents and forms required for presentation by foreign ships, but also to retain

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<sup>838</sup> Article 6 Ballast Water Convention.

<sup>839</sup> Article 7 Ballast Water Convention; see also Section B of the Annex to the convention (“Management and Control Requirements for Ships”).

<sup>840</sup> Article 9 Ballast Water Convention.

<sup>841</sup> Article 12 Ballast Water Convention.

<sup>842</sup> No consideration will be given in this context to the, in principle, also pertinent Geneva Convention and Statute on the International Regulation of Ports of 1923, given that it never acquired great significance and has since been superseded by the IMO Convention on Facilitation of International Maritime Traffic; *cf. Lagoni*, AVR 1988, 261 (275 *et seq.*).

<sup>843</sup> Convention on Facilitation of International Maritime Traffic (FAL-Convention), 9 April 1965, in force 5 March 1967. *Cf.* generally on the convention *Badura*, EPIL, Vol. III, 1068 (1069, 1071).

<sup>844</sup> See Article I and II FAL-Convention.

<sup>845</sup> See Section 2 of the Annex zum to the FAL-Convention.

<sup>846</sup> Text before Paragraph 2.1 of the Annex to the FAL-Convention.

them.<sup>847</sup> This includes a so-called General Declaration, listing, *inter alia*, the name and description of the ship, the nationality of ship, particulars regarding registry, particulars regarding tonnage, a description of the cargo, the number of crew and passengers, as well as particulars of voyage. Port states may also retain a Cargo Declaration (which, *inter alia*, lists the quantity and description of the goods as well as the ports arrived from and at which cargo will be discharged), the Crew List and, if applicable, the Passenger List.

While this convention aims at facilitating and expediting the formalities and procedures imposed on foreign ships, it contains no provisions relating to the powers of port states which might incur any manner of restriction relevant for the introduction of user charges, also with the view to the procedure such user charges might bring about. In this context, reference also needs to be made to Article V (3), pursuant to which all matters that are not expressly provided for in the convention remain subject to the legislation of the contracting governments.

#### b.) Regional Conventions on the Prevention of Marine Pollution

As already stated earlier, the following observations will be limited to the three most important conventions in the European context. In a global comparison, these are at the same time the most sophisticated regional treaty regimes relating to marine environmental protection.<sup>848</sup>

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<sup>847</sup> Paragraphs 2.1 *et seq.* of the Annex to the FAL-Convention.

<sup>848</sup> Cf. generally on the significance of regional maritime conventions *Treves*, *Mélanges Lucchini et Quéneudec*, 591 *et seq.*



aa.) Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention)

The Barcelona Convention, concluded in 1976 and valid in the amended version of 1995,<sup>849</sup> is one of ten conventions to date adopted under the auspices of the UNEP Regional Seas Programme on the protection of regional ocean spaces.<sup>850</sup> The different conventions all pursue a uniform approach in that they contain obligations for contracting parties relating to the prevention, abate and combat pollution of the marine environment from various sources, on the one hand, and on the exploitation and protection of natural resources, on the other. Additional protocols (of which six have been adopted for the legally and institutionally most elaborate of these conventions, the Convention for the Protection of the Mediterranean Sea) further specify the rules relating to pollution.

Among other duties, contracting parties to the Barcelona Convention are required to take all measures in conformity with international law to prevent, abate, and combat pollution of the Mediterranean Sea area caused by discharges from ships, and to ensure the effective implementation in that area of the rules which are generally recognized at the international level relating to the control of this type of pollution.<sup>851</sup>

In connection with the pollution of the marine and coastal environment originating from ships, two of the six protocols elaborating on the convention, the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (Dumping Protocol)<sup>852</sup> as well as the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (Prevention- and Emergency Protocol)<sup>853</sup> are of particular interest. Nevertheless, as regards the pertinent question of the rights and duties of port states, the Barcelona Convention limits itself to

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<sup>849</sup> The amendment of the first Barcelona Convention of 1995 entered into force on 9 July 2004, with *inter alia* the EC as a party; on the text, see <<http://www.unepmap.org>>, also reprinted in: Law of the Sea Bulletin Nr. 31, 1996, 65 *et sqq.* Generally on the Convention, for instance, *Beyerlin*, Umweltvölkerrecht, 133 *et sqq.*; *Skjaerseth*, in: Green Globe Yearbook 1996, 47 (48 *et sqq.*).

<sup>850</sup> Aside from the convention on the protection of the marine environment and coastal region of the Mediterranean area, similar conventions exist for the following ocean areas: the Arab Gulf, the Gulf of Guinea, the Southeast Pacific, the Red Sea, and the Gulf of Aden, the Caribbean, the Indian Ocean and East Africa, the Pacific, the Black Sea as well as the Northeast Pacific (in the chronological order of adoption). On the conventions adopted under the auspices of the UNEP Regional Seas Programme, see the overview at *Sands*, Principles of International Environmental Law, 399 *et sqq.*

<sup>851</sup> Article 6 Barcelona Convention.

<sup>852</sup> Text at <<http://www.unepmap.org>>; and amendment of this 1976 protocol was agreed in 1995, although it has not yet entered into force.

<sup>853</sup> Text available at <<http://www.unepmap.org>>; upon entering into force on 17 March 2004, the protocol of 2002 replaced the earlier Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency of 1976.

imposing obligations which have already been set out by other, geographically more comprehensive conventions.

No different from the London Dumping convention,<sup>854</sup> the Dumping Protocol to the Barcelona Convention mandates port states with issuing the permits specified by the protocol in respect of certain matter intended for dumping subjected to a permit requirement by the protocol<sup>855</sup> and loaded in their territory.<sup>856</sup> Likewise, a parallel obligation of port states relates to application of the measures required to implement the protocol to all ships – including both ships flying their flag<sup>857</sup> and foreign ships – loading in their territory wastes or other matter which are to be dumped, or which are believed to be engaged in dumping in areas under their jurisdiction.<sup>858</sup>

Under the Prevention- and Emergency Protocol, in turn, port states are primarily held to take measures in order to ensure the effective implementation of relevant international conventions on the prevention of pollution of the Mediterranean Sea Area.<sup>859</sup> Quite evidently, this provision makes reference to the conventions elaborated under the auspices of the IMO, notably the MARPOL-convention.<sup>860</sup> In addition, parties are required to take the necessary steps to ensure that reception facilities operate efficiently to limit any impact of their discharges to the marine environment.<sup>861</sup>

bb.) Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention)

Originally dating from 1974, the Helsinki Convention<sup>862</sup> currently applies in the amended version of 1992. The focus of this convention and its seven annexes rests on preventing pollution from

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<sup>854</sup> On this issue, see *supra*, Part 3, A. I. 4. a.) aa.).

<sup>855</sup> See Article 5 in connection with Annex II as well as Article 6 of the Dumping Protocol to the Barcelona Convention.

<sup>856</sup> Article 10 (2) lit. a of the Dumping Protocol to the Barcelona Convention.

<sup>857</sup> Article 11 (1) lit. a of the Dumping Protocol to the Barcelona Convention.

<sup>858</sup> Article 11 (1) lit. b and c of the Dumping Protocol to the Barcelona Convention.

<sup>859</sup> Article 4 (2) of the Prevention- and Emergency Protocol to the Barcelona Convention.

<sup>860</sup> Cf. Article 1 lit. e of the Prevention- and Emergency Protocol to the Barcelona Convention, which refers to the particular role of IMO. Explicit reference to the MARPOL-regime is, in turn, contained in Article 14 (4).

<sup>861</sup> Article 14 (1) to (3) of the Prevention- and Emergency Protocol to the Barcelona Convention.

<sup>862</sup> Convention on the Protection of the Marine Environment of the Baltic Sea Area, in force 17 January 2000, UN Law of the Sea Bulletin No 22, reprinted in 8 International Journal of Marine and Coastal Law 215 (1993). Generally on the Helsinki Convention, for instance, *Beyerlin*, Umweltvölkerrecht, 143 *et sqq.*; *Ebbeson*, GYIL 2000, 38 *et sqq.*; *Ehlers*, in: Meeresumweltschutz für Nord- und Ostsee, 103 *et sqq.*; *ders.*, in: Marine Issues, 93 (95 *et sqq.*); *Fitzmaurice*, RECIEL 1993, 24 *et sqq.*; *Fitzmaurice-Lachs*, in: Marine Issues, 73 (75 *et sqq.*); *Haas*, in: Institutions for the Earth, 133 *et sqq.*; *Jenisch*, in: Marine Issues, 63 *et sqq.*; *Sands*, Principles of International Environmental Law, 412 *et sqq.*

different sources.<sup>863</sup> Normative elaboration of the provisions set out in the convention and its annexes occurs within the framework of a special Commission established by contracting parties (Helsinki Commission on the Protection of the Marine Environment of the Baltic Sea Area, HELCOM).<sup>864</sup>

Annex IV of the convention addresses pollution of the Baltic Sea by ships.<sup>865</sup> As a rule, it refers to the corresponding provisions of the MARPOL-regime, which are to be applied by the contracting parties to the Helsinki Conventions *in corpore*, as it were.<sup>866</sup> Additionally, and complementing the provisions of MARPOL, Annex IV contains rules on the treatment of sewage discharged by ships not covered by the corresponding Annex IV to the MARPOL convention on Regulations for the Prevention of Pollution by Sewage from Ships.<sup>867</sup> Because Annex IV to the Helsinki Convention requires contracting parties to apply the MARPOL-regime, the corresponding rights and duties of port states automatically also apply under the Helsinki Convention.<sup>868</sup> In addition, Annex IV to the Helsinki Convention requires port states to exercise port state control on the basis of the 1982 Paris Memorandum of Understanding on Port State Control<sup>869</sup> or Council Directive 95/21/EC<sup>870</sup> concerning port state control.<sup>871</sup>

Worthy of particular mention in the context of this study is a charging system developed by the Helsinki Commission in respect of the treatment of shipping waste (including shipping oil and

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<sup>863</sup> Only as a secondary aspect, the convention contains some provisions on the use and preservation of marine resources.

<sup>864</sup> Cf. Article 19 to 23 Helsinki Convention. On the task and functions of HELCOM, see *Jenisch*, in: *Marine Issues*, 63 (65 *et seq.*).

<sup>865</sup> See also Article 8 Helsinki Convention.

<sup>866</sup> Regulation 4 of Annex IV to the Helsinki Convention. Cf. on this aspect *Ebbeson*, *GYIL* 2000, 38 (55 *et seq.*); *Treves*, *Mélanges Lucchini et Quéneudec*, 591 (596 *et seq.*); *Vitzthum*, *ZaöRV* 2002, 163 (169).

<sup>867</sup> On the following aspects, see Regulation 5 of Annex IV to the Helsinki Convention.

<sup>868</sup> It needs to be borne in mind that, as *Jenisch*, in: *Marine Issues*, 63 (64 *et seq.*), recognizes, the contracting parties of the Helsinki Convention would not have the power to adopt unilateral legislation relating to marine pollution by ships in departure from the rules of the pertinent IMO conventions (notably the MARPOL convention), given the provision of Article 211 (1) UNCLOS, which assigns legislative powers relating to marine pollution from vessels to the “competent international organization”, and thus effectively to the IMO.

<sup>869</sup> On this issue *infra*, Part 3, A. I. 4. c.)

<sup>870</sup> Council Directive 95/21/EC of 19 June 1995 Concerning the Enforcement in Respect of Shipping Using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution, Prevention and Shipboard Living and Working Conditions (Port State Control), OJ 1995 L 157, 1 and.

<sup>871</sup> Regulation 10 of Annex IV to the Helsinki Convention.

sewage) in the ports of contracting parties.<sup>872</sup> Within the framework of a “Baltic Strategy for Port Reception Facilities for Ship-generated Wastes and Associated Issues”, a Recommendation of the Helsinki Commission relating to the prevention of respective discharges by ships into the Baltic Sea calls upon contracting parties to include a charge for the disposal of ship-generated waste in the harbor a fee or otherwise.<sup>873</sup> A particularity of this charge is that it should always be levied, irrespective of whether a particular ship delivers its waste in the respective port or not (“no-special-fee”-system).<sup>874</sup> Ultimately, this aims at creating an incentive for ship owners to actually use the garbage reception facilities available in ports in line with the requirements imposed on port states.<sup>875</sup> The gross tonnage may be taken as the basis of calculation by the port, and may take into account the waste processing equipment on board.<sup>876</sup> In keeping with the “no-special-fee”-approach, however, the waste management fee imposed should be independent of the volume of the waste delivered to the port reception facilities.

The system needs to be understood against the backdrop that, under the MARPOL-regime, no legal obligation existed to date requiring ships to dispose ship-generated waste in ports using available reception facilities.<sup>877</sup> While dumping of ship-generated waste into the ocean is, in principle, prohibited, this legal situation had resulted in frequent illegal disposal at sea (given that violations are hard to prove), for instance discharge of lubricating oil.

The special charging system for ship-generated waste established under the Helsinki Convention is an example of how – based on the territorial sovereignty of port states in their internal waters – a special treaty can be used to introduce **harbor fees** for the achievement of a **specific environmental objective**. It bears emphasizing in this regard that the reason for imposition of the charge is precisely not the use of certain port facilities, given that the waste management fee is imposed independently of the actual volume of waste delivered to the port reception facilities. As a caveat, however, it also bears mentioning that the “Recommendations” set out by the Helsinki

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<sup>872</sup> On the following aspects *Jenisch*, in: *Marine Issues*, 63 (69 *et seq.*).

<sup>873</sup> See, in detail, HELCOM Recommendation 26/1 (Application of the no-special-fee system to ship-generated wastes in the Baltic Sea area) of 2 March 2005, which replaced the earlier HELCOM Recommendation 19/8 dating from 1998. Text available at <[http://www.helcom.fi/Recommendations/en\\_GB/rec26\\_1/](http://www.helcom.fi/Recommendations/en_GB/rec26_1/)>. HELCOM Recommendation 26/1 also includes the “attached” “Guidelines for the establishment of a harmonised “no-special-fee” system for the delivery of ship-generated oily wastes originating from machinery spaces and for the delivery of sewage and garbage to port reception facilities.”

<sup>874</sup> On this issue para. 1.1 of the Guidelines to HELCOM Recommendation 26/1.

<sup>875</sup> *Cf.* paras. 3 and 4 of HELCOM Recommendation 26/1.

<sup>876</sup> Paras. 4.1 und 4.2 of the Guidelines to HELCOM Recommendation 26/1.

<sup>877</sup> *Cf. Jenisch*, in: *Marine Issues*, 63 (69). Such a duty has now been included in Regulation 6 of Annex IV of the Helsinki Convention; see on this issue – still referring to a outdated numbering of the pertinent regulation – *idem.*, 63 (71).

Commission are not legally binding on contracting parties as long as they are not also included in the convention and its annexes.<sup>878</sup>

cc.) Convention for the Protection of the the Marine Environment of the North-East Atlantic (OSPAR Convention)

Concluded in 1992, the OSPAR Convention<sup>879</sup> pursues a comprehensive approach of integrated environmental protection for the entire marine ecosystem.<sup>880</sup> This extends both to the prevention and elimination of pollution from all possible sources and the protection and conservation of marine ecosystems and biological diversity of the North-East Atlantic, including the North Sea. Corresponding duties are laid down in five annexes and three appendices.

Regarding the powers and obligations relevant for port states, Annex II on the Prevention and Elimination of Pollution by Dumping or Incineration bears emphasizing.<sup>881</sup> Like that of the Barcelona Convention,<sup>882</sup> the Dumping Protocol of the OSPAR Convention is clearly modelled after the London Convention on Dumping (that is pioneering in respect of this source of pollution)<sup>883</sup>: the contracting parties (here, the port states<sup>884</sup>) are responsible for ensuring observance of this annex and, thus, also for the issue of an authorization<sup>885</sup> when substances subject to a permit requirement<sup>886</sup> are loaded in their territory with the intention of dumping or incineration.<sup>887</sup>

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<sup>878</sup> On the legal status of recommendations, see *Jenisch*, in: *Marine Issues*, 63 (68).

<sup>879</sup> Convention for the Protection of the the Marine Environment of the North-East Atlantic (OSPAR), in force 25 March 1998, 32 *International Legal Materials* 1069 (1993); on the convention generally *Beyerlin*, *Umweltvölkerrecht*, 147 *et seq.*; *Heintschel v. Heinegg*, in: *Marine Issues*, 135 *et seq.*; *Hilf*, *ZaöRV* 1995, 580 *et seq.*; *Marr/Beyer/Rüsch*, in: *EG-Kompetenzen bei völkerrechtlichen Verträgen im Umweltbereich*, 49 *et seq.*; *Proelß*, *Meeresschutz im Völker- und Europarecht*, 192 *et seq.*; *Sands*, *Principles of International Environmental Law*, 409 *et seq.*

<sup>880</sup> See the Preamble and Article 2 (1) OSPAR Convention.

<sup>881</sup> *Cf.* also Article 4 OSPAR Convention.

<sup>882</sup> See *supra*, Part 3, A. I. 4. b.) aa.).

<sup>883</sup> *Cf. infra*, Part 3, A. I. 4. a.) aa.).

<sup>884</sup> For the respective obligation of contracting parties as flag states of the ships in question (and aircraft), see Article 10 (1) lit. a of Annex II to the OSPAR Convention.

<sup>885</sup> Articles 4 and 5 of the Annex II to the OSPAR Convention.

<sup>886</sup> See Articles 3 (2) and Article 4 (1) lit. a of the Annex II to the OSPAR Convention.

<sup>887</sup> Article 10 (1) lit. b and c of the Annex II to the OSPAR Convention.

Aside from the issue of dumping and incinerating waste and other matter, the OSPAR Convention addresses land-based pollution,<sup>888</sup> pollution by off-shore sources<sup>889</sup> and assessment of the quality of the marine environment;<sup>890</sup> a further annex contains provisions on the protection and conservation of marine ecosystems and biological diversity.<sup>891</sup> The integrative approach<sup>892</sup> of the OSPAR-regimes does not acquire concrete significance in the context of this study, as it does not apply to ships as sources of pollution (with the exception of the foregoing provisions on dumping). In this connection, it also bears mentioning that Article 7 of the OSPAR Convention regarding “Pollution from Other Sources” (which may also include ships<sup>893</sup>) allows for adoption of additional annexes to the convention to the extent that such pollution is not already the subject of effective measures agreed by other international organisations or prescribed by other international conventions. Clearly, this can be understood as a reference to the (global) conventions adopted within the framework of IMO. The primacy of the IMO-regime is even more obvious in Annex V: where the OSPAR-Commission (responsible for the normative elaboration of the convention)<sup>894</sup> considers that action under that annex is desirable in relation to a question concerning maritime transport, it explicitly states that the IMO and its legal provisions shall be given consideration.<sup>895</sup>

#### c.) Paris Memorandum of Understanding on Port State Control

Aside from the maritime regime outlined so far, the Paris Memorandum of Understanding on Port State Control<sup>896</sup> bears mentioning in respect of the Western European area.<sup>897</sup> Its objective lies in

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<sup>888</sup> Article 3 OSPAR Convention in connection with Annex I.

<sup>889</sup> Article 5 OSPAR Convention in connection with Annex III.

<sup>890</sup> Article 6 OSPAR Convention in connection with Annex IV.

<sup>891</sup> Annex V to the OSPAR Convention.

<sup>892</sup> Cf. *Heintschel v. Heinegg*, in: *Marine Issues*, 135 (152).

<sup>893</sup> Cf. *Hilf*, *ZaöRV* 1995, 580 (601).

<sup>894</sup> Article 10 *et seq.* OSPAR Convention; cf. *Proelß*, *Meeresschutz im Völker- und Europarecht*, 197 *et seq.*

<sup>895</sup> Article 4 (2) of Annex V to the OSPAR Convention. On this issue also *Proelß*, *Meeresschutz im Völker- und Europarecht*, 230, according to whom this clearly underscores the primacy of the IMO.

<sup>896</sup> Federal Gazette 1998 II, 2779; for the text currently in force and all annexes, see <<http://www.parismou.org>>. Cf. on the Paris MOU generally, for instance, *Badura*, *EPIL*, Vol. III, 1068 (1071); *König*, in: *Marine Issues*, 37 (39 *et seq.*); *Lagoni*, *EPIL*, Vol. II, 1036 (1038); *Peters*, *Innere Gewässer*, 128 *et seq.*; *Ringbom*, *RECIEL* 1999, 21 (25); *Schiano di Pepe*, in: *International Marine Environmental Law*, 137 (145 *et seq.*); *SRU*, *Meeresumweltschutz für Nord- und Ostsee*, 164 *et seq.*

<sup>897</sup> The Paris MOU has served as a model in several other maritime areas; similar memoranda have been concluded for the Asian Pacific (Tokyo MOU), Latin America (Viña del Mar-MOU), the Indian Ocean, the Mediterranean (while the most important European nations of the Mediterranean are represented under the Paris MOU, coastal states of the Near East and Northern Africa are not) and the Black Sea.

creating a harmonized system of port state control with a view to ensuring that foreign merchant ships comply with the standards laid down in relevant instruments.<sup>898</sup> This system of port state control is subject to the principle of equality of all vessels, without discrimination as to flag.<sup>899</sup> The backdrop to this Memorandum of Understanding lies in the necessity of effective action to prevent the operation of substandard ships regarding maritime safety and the protection of the marine environment, and to avoid distorting competition between ports;<sup>900</sup> The Memorandum of Understanding is complemented by seven annexes detailing applicable procedures and criteria.<sup>901</sup>

In the context of this study, it is important to note<sup>902</sup> that the Paris Memorandum of Understanding does not seek to expand the control powers of port states. Rather, it merely seeks to safeguard the enforcement of standards already adopted elsewhere, notably in (currently) twelve international agreements.<sup>903</sup> Of the maritime conventions outlined earlier, the Paris Memorandum of Understanding contains reference<sup>904</sup> to the SOLAS Convention with two protocols and the MARPOL Convention.

At this point, it is sufficient to affirm that the Paris Memorandum of Understanding merely describes a detailed procedure for implementation of the port state control powers and obligations set out in the foregoing conventions. Seeing what has been outlined above, the Paris Memorandum of Understanding does not allow for further conclusions with regard to the focus of this study.

Incidentally, it bears noting that the Paris Memorandum of Understanding, albeit referring to “commitments”, has only been adopted as an intergovernmental “Memorandum of Understanding” and thus possesses no binding legal force.<sup>905</sup> Nonetheless, the Memorandum of Understanding has

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<sup>898</sup> See the Preamble and para. 1.2 of the Paris MOU.

<sup>899</sup> See paras. 1.2 and 2.4 of the Paris MOU.

<sup>900</sup> See the Preamble of the Paris MOU.

<sup>901</sup> These are, specifically, Annex 1 concerning port state control procedures; Annex 2 concerning procedures for investigations under the MARPOL-regime; Annex 3 concerning access refusal measures for certain ships; Annex 4 concerning information systems on inspections; Annex 5 concerning publication of information related to detentions and inspections; Annex 6 concerning qualitative criteria regarding adherence to the Memorandum; and Annex 7 concerning minimum criteria for port state control officers.

<sup>902</sup> See *Dahm/Delbrück/Wolfrum, Völkerrecht*, Vol. I/2, 381 *et seq.*; *Schiano di Pepe*, in: *International Marine Environmental Law*, 137 (145).

<sup>903</sup> Para. 1.2 in connection with para. 2.1 of the Paris MOU.

<sup>904</sup> Para. 2.1 of the Paris MOU.

<sup>905</sup> Cf. in this regard *Proelß*, *Meeresschutz im Völker- und Europarecht*, 130 (Fn. 286) and 408 *et seq.*, with further references. Likewise, Directive 95/21/EC concerning port state control (*cf. supra*, n. 870) primarily aims at rendering mandatory the standards of the Paris Memorandum within the framework of Community law. As a “Memorandum of Understanding”, the Paris Memorandum is part of “soft law”, which – *inter alia* as multilateral declarations of intent or Codes of Conduct – reflect certain expectations of behaviour, despite their

become indirectly binding for certain states by inclusion of the corresponding procedures in European Community legislation – such as Directive 95/21/EC concerning port state control<sup>906</sup> – or through other specific maritime conventions – notably the Helsinki Convention<sup>907</sup> – binding contracting parties to the provisions of the Paris Memorandum of Understanding.

#### d.) Conclusions Regarding the Requirements under Specific Maritime Conventions

Based on the discussion of the general Law of the Sea codified in UNCLOS and the conclusions inferred with a view to the choice of a point of reference for the introduction of user charges (calling of a foreign ship at a port of the collecting state),<sup>908</sup> a further question needed to be addressed, namely the question of powers of port states with regard to foreign vessels under specific maritime conventions.

After having assessed all conventions of relevance for the purposes of this study (including the Paris Memorandum of Understanding on Port State Control), the following general conclusion can be made: generally, the view occasionally encountered in scholarly literature on public international law that enforcement and control powers of coastal and port states are constantly being expanded appears justified.<sup>909</sup> At the same time, none of the provisions contained in the analyzed sources of law relating to rights and duties of port states can be construed as posing a legal obstacle to the introduction of user charges.

Likewise, as regards the operation of ports and port facilities, these conventions do not support the notion that charges not justified by actual use of port-related services are inadmissible. Consequently, the conclusion already reached with a view to UNCLOS<sup>910</sup> also applies to the specific maritime conventions: no provision exists in these conventions which states that charges levied for the use of harbours may only be imposed on actual use of port-related services and similar services. Furthermore, it bears noting that the charging system for the management of

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formal lack of binding force; on the meaning of “soft law” in general and also for the area of international environmental law *Epiney/Scheyli*, *Strukturprinzipien des Umweltvölkerrechts*, 78 *et sqq.*, with further references.

<sup>906</sup> On this issue in detail *König*, in: *Marine Issues*, 37 (39 *et sqq.*); *Schiano di Pepe*, in: *International Marine Environmental Law*, 137 (152 *et sqq.*).

<sup>907</sup> Annex IV of the Helsinki Convention requires contracting parties to apply the port state control procedures of the Paris MOU.

<sup>908</sup> See in detail *supra*, Part 3, A. I. 2. c.)

<sup>909</sup> Thus *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 354, with a general reference to the conventions elaborated by the IMO and ILO as well as (in n. 38) explicit mention of the MARPOL- and SOLAS-conventions; with the same reasoning and conclusions *Lagoni*, *EPIL*, Vol. II, 1036 (1038); see also *Gloria*, in: *Völkerrecht*, 816 (830).

<sup>910</sup> *Cf. supra*, Part 3, A. I. 2. b.) aa.).



shipping waste created under the Helsinki Convention<sup>911</sup> provides an existing example for a charge imposed for the mere act of calling at a port, irrespective of actual enjoyment of services. The system established by the Helsinki Commission provides for a payment duty, irrespective of whether a particular ship delivers its waste in the respective port or not, and aims at creating an incentive for ship owners to actually use the garbage reception facilities available in ports. Moreover, the charge can be calculated on the basis of gross tonnage, and may take into account the waste processing equipment on board of the ship in question.

Regarding the introduction of user charges, the regulatory powers of port states *vis-à-vis* foreign ships are only confined by the same limitations already arising from UNCLOS.<sup>912</sup>

## 5. *Summary and Conclusions on International Maritime Law*

The central insights inferred from the chapter on international maritime law in this study can be summarized as follows:

- the high seas are characterized by freedom of navigation. In the absence of territorial sovereignty, the flag state principle constitutes the only point of reference for the exercise of national jurisdiction on the high seas.
- the gradation under the international Law of the Sea between sovereign rights in the high seas (which are entirely free of territorial sovereignty) and the internal waters (which are subject to territorial sovereignty) acquires relevance in the area of the territorial sea. In this area, the coastal state already enjoys territorial sovereignty. Still, the national sovereignty of coastal states is restricted by the right of all the other states to innocent passage through the territorial sea. With certain exceptions, no charges may be levied upon foreign ships by reason only of their passage through the territorial sea (Article 26 UNCLOS).
- By contrast, the internal waters, and with them the sea ports, form part of the territory of coastal states and are thus subject to their full territorial sovereignty. Accordingly, foreign ships, on principle, enjoy no right of innocent passage. Based on their sovereignty, coastal states are free to render access to their ports contingent on fulfilment of certain conditions, for instance observance of standards relating to navigational safety or environmental protection. Restrictions only apply insofar as the legislation adopted by coastal states governing access to their internal waters and port facilities may not discriminate against foreign ships flying a certain flag.
- For the area of the internal waters, including ports, this allows for a central conclusion: given the unrestricted territorial sovereignty in this area, no rule under general maritime law would

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<sup>911</sup> In detail *supra*, Part 3, A. I. 4. b.) bb.).

<sup>912</sup> On this issue *supra*, Part 3, A. I. 2., and in the following summary of central conclusions.

seem to prevent states from rendering access to their internal waters – including their ports – conditional on certain requirements, provided they observe the principle of non-discrimination.

- Likewise, no provision within UNCLOS would seem to preclude such coastal state regulation from aiming at, or at least resulting in, the collection of a charge from ships; nor does general maritime law, on principle, prevent the port state from declaring a charge imposed on ships entering their internal waters or ports as compensation for the use of the ocean as such, rather than for the use of its port facilities.
- In the territorial sea, in turn, the prohibition to levy charges by reason only of passage through the territorial sea imposes an important restriction on the introduction of user charges. For the purposes of this study, the central inference is that mere passage of foreign ships through the territorial sea (without being followed by a voluntary call at a port facility) is not a suitable event to base a charge on by the coastal state.
- If not for legal reasons, the prohibition of levying charges by reason only of passage through the territorial sea could, for political reasons, restrict the general freedom of port states to subject entrance to their internal waters and ports to any requirement they desire. User charges that are not linked to passage of the territorial sea are thus preferable from the point of view of their political lack of contention.
- From the perspective of UNCLOS, thus, neither the mere passage of foreign ships through the territorial sea nor the navigational use of the high seas pose suitable points of reference for the introduction of a user charge. In the interest of practicality, moreover, this event should not be subject only to the control powers of flag states. This also rules out linking a user charge to ship registration, for instance.
- The only event allowing for expedient collection of a user charge from foreign ships would be when these call at a port of the collecting state.
- General maritime law does not contain specific restrictions relative to the design of the user charge, and, consequently, the chosen user charge model for charges imposed on the occasion of calling at a port. Based on the unrestricted regulatory power of port states under international maritime law, any type of circumstance or event could be linked to collection of a port fee.
- From the point of view of general maritime law, thus, the different conceivable models of a user charge cannot, thus, be distinguished with a view to their legal admissibility. The respective criteria merely constitute additional considerations in the sense of substantive assessment criteria for normative implementation of the chosen point of reference (that is, foreign ships calling at a port of the collecting state).
- The point of reference of anchoring at a port of the collecting state raises no concerns relating to extraterritorial jurisdiction or a violation of the “pacta tertiis”-rule of Article 34 VCLT.

- UNCLOS enjoys primacy *vis-à-vis* all other conventions relevant in this context. The general framework of UNCLOS thus determines which questions at the level of specific maritime conventions still require analysis; such conventions will only prove relevant for the introduction of user charges if the issue at stake is not already governed by UNCLOS, leaving a certain leeway for regulation, with a focus on powers of port states relating to foreign ships.
- The specific sources of maritime law analyzed in this study contained nothing which might be construed as a legal obstacle for the introduction of user charges, however.

By way of conclusion, the international Law of the Sea sets out no fundamental barriers for the introduction of user charges, provided these meet the conditions specified by UNCLOS. Primarily, this requires linking the user charge to the sovereign rights of port states and observing the principle of non-discrimination. Further restrictions governing the choice of user charge models can, at best, only be inferred from political considerations or legal objections originating outside of international maritime law. It bears noting, however, that the introduction of charges for the use of the oceans as a global environment good has not yet seriously been considered in international maritime law, at least not on a universal level. Simultaneously, one does not garner the impression that user charges are entirely at variance with the system of international maritime law, given that they can be accommodated in the existing structure of the law of the sea on the basis of the powers outlined above. Modern maritime conventions have, in effect, already begun opening up to the idea of an incentive system based on user charges. The Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea dating from 1992 serves as an example with its charging system for the management of ship-generated waste.

## II. European Community Law

As a rule, secondary Community legislation only contains requirements with effect for **Member State** activities. By contrast, the Community legislator is free to exercise its powers within the framework established by primary Community law. Consideration of secondary legislation by the Community would, if at all, seem advisable for political reasons, in order to accommodate a certain legislative project within the existing framework of legislation.<sup>913</sup> Additionally, it might be a result of a “clasp” with primary rules requiring adoption of certain secondary law when regulating a specific issue area.

Against this backdrop, the following section will identify the secondary rules governing maritime transport with effect to Member States and, potentially, Community action. An important position in this regard is occupied by the liberalisation package for maritime transport adopted in 1986. It consists of the following individual measures:

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<sup>913</sup> See already *supra*, Part 2, A.

- **Council Regulation (EEC) No 4055/86** of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries,<sup>914</sup>
- **Council Regulation (EEC) No 4056/86** of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 (now Articles 81 and 82) of the Treaty to maritime transport,<sup>915</sup>
- **Council Regulation (EEC) No 4057/86** of 22 December 1986 on unfair pricing practices in maritime transport,<sup>916</sup>
- **Council Regulation (EEC) No 4058/86** of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades.<sup>917</sup>

Complementing this package of regulations are the Community provisions on maritime cabotage, *i.e.* “maritime transport within a Member State”: due to staunch opposition from individual Member States, the liberalisation of cabotage was only possible after the 1986-liberalisation package had already been adopted,<sup>918</sup> with the 1992 **Council Regulation (EEC) No 3577/92** of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)<sup>919</sup>. And finally, attention will also be given to fiscal measures to the extent that they relate to the taxation of shipping fuel.

# *1. Regulation 4055/86 and the Freedom to Provide Services in Maritime Transport*

## *a.) Relationship to Primary Law*

As already outlined earlier,<sup>920</sup> Article 51 (1) ECT refers to the title relating to transport in the ECT for services in the field of transport. The latter only governs transport by road, rail and inland waterway, however. Regarding maritime transport, the reference can thus only relate to the legislative power in Article 80 (2) ECT, pursuant to which the Council **may**, acting by a qualified majority, decide to lay down appropriate provisions for sea transport.

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<sup>914</sup> OJ 1986 L 378, 1.

<sup>915</sup> OJ 1986 L 378, 4.

<sup>916</sup> OJ 1986 L 378, 14.

<sup>917</sup> OJ 1986 L 378, 21.

<sup>918</sup> See *Riccomagno*, EurTranspR 1993, 374.

<sup>919</sup> OJ 1992 L 364, 7.

<sup>920</sup> See Part 2, C.V.1.

This discretionary provision (“may”) has been given a distinct articulation by the Single European Act, however. For instance, Article 8a (now Article 14 ECT) called on the Community to adopt measures with the aim of progressively establishing the internal market by 31 December 1992 based on Article 14 ECT and a series of other legislative powers, **including Article 80 ECT**. The ample discretion afforded to the Council by Article 80 ECT is thus limited in the sense that it has to be interpreted as a legal obligation, albeit without an explicit sanction for lack of Council action provided for in the ECT.<sup>921</sup>

With the adoption of Regulation 4055/86 – together with the other Regulations of the 1986-package – the EC has met its obligation under primary law to liberalise the provision of services in the Community. This raises the question whether, in view of the situation under primary law outlined earlier, the freedom to provide services set out in Regulation 4055/86 may be subjected to restrictions which go beyond the restrictions explicitly provided for in the Regulation itself. In principle, such an “extension” of the provisions of restriction may be based on two considerations:

- on the one hand, Article 49 *et seq.* ECT could be applied directly, something the ECJ rejected before adoption of the SEA,<sup>922</sup> but – following the entry into force of the SEA – such direct application of Article 49 ECT could now be based on Article 49 in connection with Article 14 ECT.<sup>923</sup>
- On the other hand, the freedom to provide services in maritime transport could be restricted (further) by modifying existing or adopting new secondary legislation. In this regard, it needs to be borne in mind that the liberalisation duty programmatically set out by Article 14 ECT implies that the principle of freedom to provide services in the area of sea transport cannot be retroactively revoked. New restrictions, as a rule, will have to observe the boundaries established by Articles 49 *et seq.* ECT, which acquire great importance in the transport sector notwithstanding the lack of direct application.<sup>924</sup> The Community legislator must exercise its discretion under Article 80 (2) ECT with a view to the basic principles set out in Articles 49 and 50.<sup>925</sup>

Against this backdrop, an assumption that the Community legislator may rescind or restrict the freedom to provide services in the area of maritime transport set out in secondary legislation by adoption of new legislation cannot be sustained.

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<sup>921</sup> Basedow, ArchVR 1994, 457; see also Farantouris, European Integration, 210; cautiously affirmative Aussant, EurTranspR 1993, 348. Moreover, the SEA resulted in the unanimity requirement in the Council under Article 80 (2) being replaced by the principle of qualified majority.

<sup>922</sup> ECJ, Case 49/89 (Corsica Ferries), ECR 1989, 4441, Annot. 10 *et seq.*

<sup>923</sup> Basedow, ArchVR 1994, 457 und 460. See also Farantouris, European Integration, 206 and, with further references, Epiney/Gruber, Verkehrsrecht, 103 *et seq.*

<sup>924</sup> Cf. with further references Epiney/Gruber, Verkehrsrecht, 101 *et seq.*

<sup>925</sup> Frohnmeyer/Mückenhausen-Hering, ECTR 41, Annot. 16.

Before this problem can acquire relevance, however, it needs to be affirmed that legislation introducing a user charge would somehow collide with the principle of freedom to provide services. First, therefore, a clarification is needed as to the extent to which the principle of freedom to provide services applies to maritime transport (b) and the extent to which said principle precludes – or otherwise imposes constraints on – the introduction of user charges (c).

#### b.) Scope and Application of the Freedom to Provide Services in Maritime Transport

Pursuant to Article 1 (1) of Regulation 4055/86, the freedom to provide maritime transport services between Member States and third countries applies in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 1 (2) extends the personal scope of the Regulation to nationals of the Member States and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

Two inferences can be drawn from these provisions:

- For one, the principle of freedom to provide services is extended to international maritime transport,<sup>926</sup> but not to services provided within a Member State,<sup>927</sup> with Article 1 (3) of Regulation 4055/86, furthermore, declaring Articles 45 to 48 ECT applicable to maritime transport. In addition, Article 8 of Regulation 4055/86 provides that, without prejudice to the provisions of the Treaty relating to right of establishment, anyone providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. It follows that Member States may not draw on establishment as a criterion for the right to provide services.<sup>928</sup>
- What is more, these provisions define the personal scope of application of the freedom to provide services. In this regard, the ECJ has ruled that Article 1 (1) of Regulation 4055/86 defines the beneficiaries of the freedom to provide maritime transport services between in terms which are substantially the same as those used in Article 49 ECT.<sup>929</sup>

Against this legal backdrop, the ECJ has also held that Regulation 4055/86 thus renders applicable to the sphere of maritime transport between Member States the totality of the Treaty rules

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<sup>926</sup> See also *Aussant*, EurTranspR 1993, 349.

<sup>927</sup> Cf. on this issue II. *infra*.

<sup>928</sup> *Riccomagno*, EurTranspR 1997, 544.

<sup>929</sup> ECJ, Case C-381/93 (Commission/France) ECR 1994, I-5145, Annot. 10; zum persönlichen Anwendungsbereich cf. also *Aussant*, EurTranspR 1993, 353; *Greaves*, EC Transport Law, 71, *Farantouris*, European Integration, 229.

governing the freedom to provide services.<sup>930</sup> It can hardly come as a surprise, then, that the ECJ has applied its case-law on Articles 49 *et seq.* ECT to maritime transport.<sup>931</sup> Ultimately, the fact that Regulation 4055/86 precedes, as it were, the Treaty provisions on freedom to provide services.<sup>932</sup>

With the expiration of the deadlines set out in Article 2 of Regulation 4055/86 relating to the phase-out of interim provisions at the latest on 1 January 1993, one may join the standing case-law of the ECJ and assume that a **prohibition of restriction** also applies to the freedom to provide services in the area of maritime transport.<sup>933</sup> Accordingly, *e.g.*, national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State is prohibited.<sup>934</sup> Not only discrimination based on nationality is at issue, but rather the elimination of all restrictions – even if they apply equally to domestic and other providers of services – rendering the provision of services more difficult or less attractive and thus infringing upon the freedom to provide services.<sup>935</sup> Nevertheless, in keeping with the general doctrine of fundamental freedoms, substantive discrimination and restrictions may also be justified by **compelling reasons of public interest** in the area of maritime transport, provided they satisfy the requirements of proportionality.<sup>936</sup> In the case-law relating to fundamental freedoms, environmental protection has already been recognized as a legitimate common interest for purposes of justification by the ECJ.<sup>937</sup>

A violation of the freedom to provide services was recognized by the ECJ *e.g.* in relation to harbour charges which differ according to whether a journey is undertaken within one Member State or between Member States. Varying harbour charges may be justified by compelling reasons of public interest; criteria relating to the distance or geographical location of the port of destination may not, in themselves, justify varying harbour charges, however.<sup>938</sup> Objective justification of varying charges was recognized by the ECJ in the *Nedlloyd* case.<sup>939</sup> This case involved a

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<sup>930</sup> ECJ, Case C-381/93 (Commission/France), Annot. 13; ECJ, Case C-430 und 431/99 (Nedlloyd), ECR 2002, I-5235, Annot. 31; see also Frohnmeier/Mückenhausen-Hering, ECTR 41, Annot. 27.

<sup>931</sup> *Cf. e.g.* ECJ, Case C-381/93 (Commission/France), ECR 1994, I-5145, Annot. 16.

<sup>932</sup> *Cf. Epiney*, in: Dausen (Hrsg.), Hdb. EU-WirtschaftsR, L, Annot. 463.

<sup>933</sup> ECJ, Case 288/89 (Gouda), ECR 1991, I-4007, Annot. 16 *et seq.*; Case C-381/93 (Commission/France), Annot. 17; ECJ, Case C-70/99 (Commission/Portugal), ECR 2001, I-4845, Annot. 27; ECJ, Case C-295/00 (Commission/Italy), ECR 2002, I-1737, Annot. 10 *et seq.*; ECJ, Case C-435/00 (Geha Naftiliaki), ECR 2002, I-10615, Annot. 20 *et seq.*; ECJ, Case C-430 and 431/99 (Nedlloyd), ECR 2002, I-5235, Annot. 32; *Epiney*, in: Dausen (Hrsg.), Hdb. EU-WirtschaftsR, L, Annot. 463.

<sup>934</sup> ECJ, Case C-381/93 (Commission/France), ECR 1994, I-5145, Annot. 17.

<sup>935</sup> ECJ, Cases C-430 and 431/99 (Nedlloyd), ECR 2002, I-5235, Annot. 32, 38.

<sup>936</sup> On these general principles, see already *supra*.

<sup>937</sup> See, notably, ECJ, Case 302/86 (Commission/Denmark), ECR 1988, 4607, Annot. 9, and Case C-379/98 (Preussen Elektra/Schleswig AG) ECR 2001, I-2099.

<sup>938</sup> ECJ, C-435/00 (Geha Naftiliaki), ECR 2002, I-10615, Annot. 20 *et seq.*

<sup>939</sup> ECJ, Case 430/99 und 431/99 (Nedlloyd), ECR 2002, I-5235.

vessel traffic services system that provided for payment of a tariff by sea-going vessels longer than 41 metres, but not by inland waterway vessels. After the ECJ had concluded that this system constituted no discrimination,<sup>940</sup> but affirmed an infringement upon the freedom to provide services,<sup>941</sup> it justified the measure as follows:

*“42 Vessel traffic services supplied within the framework of the VTS system constitute a nautical service essential to the maintenance of public security in coastal waters as well as in ports, and the VTS tariff to which sea-going vessels longer than 41 metres are subject, as users of that service, contributes to the general interest in public security in those waters.*

*43 Lastly, as regards proportionality, the VTS system, in that it requires the payment of a VTS tariff by sea-going vessels longer than 41 metres, fulfils that criterion in so far as there is in fact a correlation between the cost of the service from which those vessels benefit and the amount of that tariff. This would not be the case where that amount included cost factors chargeable to categories of ships other than sea-going vessels longer than 41 metres, such as, in particular, inland waterway vessels.”*

### c.) Conclusions for User Charges

The starting point of this analysis was the **subsidiarity** of the freedom to provide services with respect to other fundamental freedoms (Article 50 (1) ECT). In Part 2, C. V. 1., a product bearing was recognized for a variety of different user charge models, with the consequence that the provisions relating to the free movement of goods applied. Likewise for the freedom of establishment. To the extent that these models are drawn on in the context of the freedom to provide maritime services, the analysis regarding that freedom can only be understood as a contingent assessment.

Against the foregoing legal background and the pertinent case-law of the ECJ, the following conclusions can be inferred regarding the admissibility of user charges: given that the principle of freedom to provide services applies as a general prohibition of restriction, as a rule, every addition of financial burden imposed on the provision of services between Member States and between Member States and third states infringes upon the prohibition set out in Article 49 ECT in connection with Regulation 4055/86. Any financial compensation duty affecting the provision of services has the capacity of rendering the exercise of the freedom to provide services between Member States and between Member States and third states less attractive. What is more, the introduction of user charges could incur indirect discrimination.

That would be the case, for instance, if internal navigation routes generally operated by domestic providers are subjected to a disproportionately low charge relative to routes between Member States primarily operated by foreign providers.

Accordingly, the options for justification of such infringement have to be addressed, differentiating the different points of references of conceivable models of user charges. A user charge linked to the

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<sup>940</sup> ECJ, Case 430/99 und 431/99 (Nedlloyd), ECR 2002, I-5235, Annot. 33.

<sup>941</sup> ECJ, Case 430/99 und 431/99 (Nedlloyd), ECR 2002, I-5235, Annot. 38.



consumption of fuel could be justified by the coherence of domestic fiscal systems<sup>942</sup> and considerations of environmental protection. If reference is made to emissions, one may again draw on the protection of the environment.<sup>943</sup> A more divergent picture arises with regard to charges for the use of harbours: in principle, these may also be justified by recourse to environmental protection. A more complex question relates to the permissible criteria for varying charges. On this issue, the ECJ has ruled that a criterion solely relating to the distance or geographical location of the port of destination may not, in itself, justify varying harbour charges.<sup>944</sup> It should be added, however, that in the case decided by the ECJ, parties have not submitted that the varying charges were motivated by reasons of environmental policy, where the greater environmental impact of longer journeys could be reflected in varying charge rates. Instead, said case involved charges which varied in accordance with whether a journey was undertaken within one Member State only or between Member States.<sup>945</sup> By contrast, a system of varying harbour charges calculated on the basis of objective ecological criteria should satisfy the requirements of justification. Analogous considerations apply with regard to a toll on the distance traveled as well as a time-based charge. As for the test of proportionality, reference can be made to the observations already presented in connection with the freedom of establishment.<sup>946</sup> In the light of the freedom to provide services, one may thus assume the compatibility of an environmentally motivated charge with Community law, provided it satisfies the requirements of proportionality and – if the need arises – the fundamental rights of the Community.<sup>947</sup> Aside from restrictions in respect of the conceivable points of reference of user charges and their subjection to the principle of proportionality, the freedom to provide services gives rise to no further substantive requirements.

#### d.) Conclusion

By way of conclusion, it can thus be affirmed that potential infringements upon the freedom to provide services – which is subsidiary to the other fundamental freedoms – as a consequence of user charges will typically be justified by the legitimate objective they pursue, which constitutes a compelling reason of public interest. Based on this conclusion, no answer is needed for the question as to whether the Community legislature would have the power to partially resend the legislative freedom to provide services in the area of maritime transport.

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<sup>942</sup> Cf. ECJ, Case C-204/90 (Bachmann), ECR 1992, I-249.

<sup>943</sup> Cf., however, on both models the observations under IV. On the significance of environmental protection as a compelling reason of public interest, see already Part 1, III. 1. b) bb) *supra*.

<sup>944</sup> ECJ, Case C-435/00 (Geha Naftiliaki), ECR 2002, I-10615, Annot. 28.

<sup>945</sup> ECJ, Case C-435/00 (Geha Naftiliaki), ECR 2002, I-10615, Annot. 19.

<sup>946</sup> See Part 1, III. 1. b) bb).

<sup>947</sup> On this issue, see already *supra* in Part 1, III. 1. b) bb).

## 2. *Maritime Cabotage*

After cabotage had been traditionally reserved to nationals for reasons of state sovereignty, Regulation 3577/92 finally opened up this area to the free provision of services.<sup>948</sup> Article 1 (1) of Regulation 3577/92 defines maritime cabotage as provision of “maritime transport services within a Member State”, whereas Article 2 (1) of Regulation 3577/92 lists different types of cabotage by way of example.<sup>949</sup> After the last derogation clauses expired on 1 January 2004 (Articles 3 and 6 of Regulation 3577/92), the principle of freedom to provide services also extends to maritime transport within a Member State (Article 1 (1) of Regulation 3577/92). Going beyond the provisions of Regulation 4055/86 regarding registration, Article 1 (1) Regulation 3577/92 provides that only ships complying with all conditions for carrying out cabotage in the state of registration may enjoy freedom to provide services in the area of cabotage.

In conclusion, it can be affirmed that the liberalization of maritime cabotage has also subjected measures only affecting maritime transport within a Member State to the principle of freedom to provide services. As a consequence, even user charges which merely **address maritime transport services within a Member State** would have to be measured against **the freedom to provide services**; as for the substantive outcome, one may refer to the observations in the preceding section.

## 3. *Further Elements of the 1986 Liberalization Package*

**Regulation 4056/86** laying down detailed rules on the application of Articles 85 and 86 (now Articles 81 and 82) of the Treaty to maritime transport places international maritime transport within the context of the Treaty rules on competition, notably Articles 81 and 82 ECT.<sup>950</sup> Article 81 (1) ECT forbids agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The legal consequence set out under Article 81 (2) is automatic voidance of any prohibited agreements or decisions, whereas Article 81 (3) provides for the inapplicability in certain cases of the prohibition in Article 81 (1) ECT. By contrast, Article 82 ECT prohibits any abuse of a dominant position within the common market or in a substantial part of it. Both provisions are extended to the area of international maritime transport by Regulation 4056/86 and further specified for that sector.

A detailed analysis of the scope of this Regulation is obviated in the case of an introduction of user charges on global environmental goods. For these regularly constitute sovereign measures which

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<sup>948</sup> Basedow, ArchVR 1994, 453; Farantouris, European Integration, 264 *et sqq.*; Riccomagno, EurTranspR 1993, 377; Frohnmeier/Mückenhausen-Hering, ECTR 42, Annot. 6 *et sqq.*

<sup>949</sup> Cf. also Riccomagno, EurTranspR 1993, 372; Power, EC Shipping Law, 223; Farantouris, European Integration, 277.

<sup>950</sup> Cf. Article 1 of Regulation 4056/86; see also Frohnmeier/Mückenhausen-Hering, ECTR 44, Annot. 13.

are precisely not imposed on the basis of an agreement between market participants are unilaterally abusive behaviour: the rules on competition set out in Articles 81 and 82 ECT are thus **not applicable**. A different conclusion, however, may be inferred from the case-law of the ECJ regarding competition. In *Vlaamse Reisebureaus*, for instance, the ECJ recognized that while Article 81 ECT, in particular, concerned the conduct of undertakings and not laws or regulations of the Member States, the EC-Treaty nevertheless imposed a duty on Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness. That would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 or to reinforce their effects.<sup>951</sup> Only in the **hardly practicable situation** that the introduction of a user charge occurred in a manner leaving the determination of prices of maritime transport services to autonomous negotiations by market participants, and then declaring such determination mandatory by Member States are the Community, for instance, could a violation of Article 10 ECT in connection with Regulation 4056/86 in connection with Article 81 ECT be conceived of. Article 82 ECT might acquire relevance if a public undertaking in the sense of Article 86 ECT owned and operated a harbour, affording it a dominant position within a substantial part of the common market. In such a situation, the Member State would not be allowed to promote this dominant market position by imposing high mandatory harbour fees. For instance, the ECJ considered it a violation of Article 82 in connection with Article 86 (1) ECT to impose a statutory 40% import surcharge on a general duty levied on goods loaded, unloaded, or otherwise taken on board or landed within ports.<sup>952</sup>

The substantive scope of **Regulation 4057/86** on unfair pricing practices in maritime transport is governed by its Article 1, pursuant to which this Regulation lays down the procedure to be followed in order to respond to unfair pricing practices by certain third country shipowners engaged in international cargo liner shipping. Given that this legislation thus relates to certain practices of third country shipowners, it is not of relevance within the context of this study, thereby obviating further analysis.

**Regulation 4058/86** concerning coordinated action to safeguard free access to cargoes in ocean trades provides for procedures applicable when action by a third country or by its agents restricts or threatens to restrict free access by shipping companies of Member States or by ships registered in a Member State in accordance with its legislation (Article 1 of Regulation 4058/86). Substantively, thus, this Regulation governs restrictions by third states and is geared towards facilitating “coordinated action” of Member States by way of diplomatic measures (Article 4 (1) lit. a) or counter-measures (Article 4 (1) lit. b).<sup>953</sup> From this scope, it follows that Regulation 4058/86 does not apply to potential restrictions of free access to maritime transport services by Community and Member State measures. **Again, further analysis is obviated within the context of this study.**

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<sup>951</sup> ECJ, Case 311/85 (*Vlaamse Reisebureaus*), ECR 1987, 3801, Annot. 10.

<sup>952</sup> ECJ, Case C-242/95 (*GT-Link*), ECR 1997, I-4449, Annot. 28 *et sqq.*; on this issue, see also *van Hooydonck*, in: *van Hooydonck*, *European Seaports Law*, 115.

<sup>953</sup> In detailed on this issue *Farantouris*, *European Integration*, 253 *et sqq.*

#### 4. *Secondary Legislation relating to Taxation of Shipping Fuel*

##### a.) *Scope of Application*

The starting point for an analysis of fiscal rules can be found in Directive 92/81, which harmonizes excise duties on mineral oils in the Member States (Article 1 (1) of Directive 92/81). Pursuant to Article 8 (1) (c) of Directive 92/81, Member States have to exempt mineral oils supplied for use as fuel for the purposes of navigation within Community waters (including fishing) from the harmonized excise duty. This does not apply to mineral oil used for private pleasure craft.<sup>954</sup>

By contrast to the mandatory provision of Article 8 (1) (c), Member States **may** apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control for **navigation on inland waterways** other than for private pleasure craft (Article 8 (2) (b)).

Pursuant to Article 30 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity,<sup>955</sup> Directive 92/81 was repealed on 31 December 2003. Substantively, however, the exceptions set out by Directive 92/81 are perpetuated by Directive 2003/96. In comparison to the repealed to mineral oil tax directive, Directive 2003/96 possesses a wider scope of application to energy products – and not only mineral oil.<sup>956</sup> Specifically, Article 14 of Directive 2003/96 contains an almost identical exemption to the provision contained in Article 8 (1) of the mineral oil tax directive. Pursuant to Article 14 (2) of Directive 2003/96, Member States may limit the scope of this exemption to international and intra-Community transport. Furthermore, they may waive the exemption where a Member State has entered into a bilateral agreement with another Member State.<sup>957</sup> Likewise, Article 15 (1) (f) of Directive 2003/96 contains a discretionary provision akin to Article 8 (2) (b) of the mineral oil tax directive, allowing Member States to apply total or partial exemptions or reductions in the level of taxation to energy products supplied for use as fuel for navigation on **inland waterways**. Recital (23) of Directive 2003/96 clarifies that it is advisable to continue the exemptions of energy products supplied for air navigation and sea navigation, other than for private pleasure purposes, while it should be possible for Member States to limit these exemptions.

Against this background in secondary legislation, the concept of private pleasure craft, which do not enjoy tax exemptions, requires further definition.

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<sup>954</sup> This includes craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities.

<sup>955</sup> OJ 2003 L 283, 51.

<sup>956</sup> Cf. Recitals (1) and (2) of Directive 2003/96.

<sup>957</sup> In the course of the following analysis, it will be assumed that no such bilateral agreements exist.

The scope of the exemption in Article 8 (1) (c) of Directive 92/81 recently featured in proceedings before the ECJ relating to a preliminary ruling in the case of *Deutsche See-Bestattungs-Genossenschaft e.G.*<sup>958</sup>. Given the analogous structure of the respective provisions in Directive 2003/96, notably of Article 14 of Directive 2003/96, and the parallel object and purpose of both directives,<sup>959</sup> the observations of the ECJ can also be applied to the interpretation of Directive 2003/96.

Pursuant to the case-law of the ECJ, any navigation activity of a commercial nature is covered by the tax exemption, regardless of the purpose of the trip in question.<sup>960</sup> Consequently, the exemption under Article 14 of Directive 2003/96 may not be circumvented by strict interpretation of the concept of commercial navigation.

#### b.) Conclusions for User Charges

As affirmed earlier, a variety of different points of reference are, in principle, conceivable for user charges, notably the use of (port) facilities, emissions caused, the consumption of fuel, the distance travelled and the period of time during which the environmental good is used. From the perspective of fuel taxation and exemptions from such taxation required by Community law, fees imposed on use of facilities give rise to no concern, provided they are in no way linked to the consumption of fuel. Conversely, “harbour fees” would no longer qualify as fees on the use of infrastructures if they effectively referred to the distance traveled or pollutants emitted, with the harbour merely acting as the location at which the fee is collected. Such models would be subject to the considerations outlined in the following section with regard to distance-, time- and emissions-based charges as well as charges linked to the consumption of fuel. All of these variations are characterized by a more or less distinct connection to fuel consumption, a fact which might impede the introduction of such user charges from the point of view of Community law.

When seeking to answer this question, the ECJ judgment in the *Braathens Sverige*<sup>961</sup> case acquires particular importance. In this case, the Court had to determine the compatibility of fuel taxes with pertinent legislation on air traffic. Given that the exemption from harmonized excise duties for aircraft fuel under Article 8 (1) (b) of Directive 92/81/EEC (and nowadays Directive 2003/96) is

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<sup>958</sup> ECJ, Case C-389/02 (*Deutsche See-Bestattungs-Genossenschaft e.G.*), judgment of 1 April 2004, not yet reported.

<sup>959</sup> In this regard, see Recital (3) of Directive 92/81, pursuant to which it is important to the proper functioning of the internal market to determine common definitions for all mineral oil products which shall be subject to the general excise monitoring system, and Recital (5), pursuant to which it is necessary to lay down certain obligatory exemptions at Community level. Correspondingly, Recital (3) of Directive 2003/96 declares that the proper functioning of the internal market and the achievement of the objectives of other Community policies require minimum levels of taxation to be laid down at Community level for most energy products. Recital (23), moreover, considers it advisable to continue the exemptions of energy products (in this regard, see above in the main text).

<sup>960</sup> ECJ, Case C-389/02 (*Deutsche See-Bestattungs-Genossenschaft e.G.*), Annot. 28.

<sup>961</sup> ECJ, Case C-346/97 (*Braathens Sverige*), ECR 1999, I-3419.

analogous to that for shipping fuel, the observations of the ECJ are directly transferable to the questions addressed within this context. The case involved national legislation imposing an environmental protection tax on domestic commercial aviation calculated on the basis of fuel consumption and emissions of hydrocarbons and nitric oxide. Whereas the rates relating to emissions of hydrocarbons and nitric oxide were calculated solely based on average emission values, without taking fuel consumption into account, the method of calculation relating to carbon dioxide emissions was a flat-rate calculation based on the average quantity of fuel consumed by an aircraft during standard flight. Submitting this case to the ECJ for a preliminary ruling, the national court, in particular, enquired about the compatibility of such legislation with secondary Community law; more specifically, the court desired to know whether the taxation measures in question could be split up into EC-compatible and EC-incompatible parts, owing to the fact that the tax in question was calculated partly on the basis of fuel consumption and partly on the basis of emissions of hydrocarbons and nitric oxides. The ECJ held that there is a direct and inseverable link between fuel consumption and the emissions of polluting substances.<sup>962</sup> Accordingly, it was irrelevant whether a national charge was directly calculated by reference to fuel consumption, given that – due to this inseverable link – even a charge related to carbon dioxide emissions must be regarded as levied on consumption of the fuel itself.<sup>963</sup> The Court proceeded to referred to the effectiveness of the exemption clause, observing that such effectiveness would be compromised if Member States were allowed to levy another indirect tax on products exempted from harmonised excise duties.<sup>964</sup>

Drawing on this case-law, several conclusions can be inferred with regard to different models of user charges:

- Member States may introduce no charges on **shipping fuel**, given that such fuel is covered by the exemption under Article 14 (1) (c) of Directive 2003/96.
- Determination of when a charge is imposed on fuel may not merely occur mechanically on the basis of the point of reference. The mere fact that a charge is not directly linked to fuel consumption does not necessarily mean that the exemption clause no longer applies. Rather, the ECJ has based its jurisprudence on the existence of a direct and inseverable link between the point of reference and fuel consumption. Based on this judicial practice of the ECJ, such a direct and inseverable link will typically exist when the charge is calculated on the basis of **pollutants emitted**.

This “technical” link between emissions and fuel consumption has been criticized in scholarship – also with a view to the final pleadings of Advocate General Fenelly, who, in *Braathens Sverige*, had assumed that the exemption was not applicable to emissions charges – for a variety of reasons based in primary Community

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<sup>962</sup> ECJ, Case C-346/97 (*Braathens Sverige*), ECR 1999, I-3419, Annot. 23.

<sup>963</sup> ECJ, Case C-346/97 (*Braathens Sverige*), ECR 1999, I-3419, Annot. 23.

<sup>964</sup> ECJ, Case C-346/97 (*Braathens Sverige*), ECR 1999, I-3419, Annot. 24.

law.<sup>965</sup> *Inter alia*, the interpretation chosen by the ECJ was censured for not being covered by the legislative basis of the interpreted directive, Article 93 ECT.<sup>966</sup> Nonetheless, even critics concede the relevance of the judgment in *Braathens Sverige* for the issue of admissibility of emissions charges.

Accordingly, user charges designed with reference to fuel consumption and emissions are precluded by applicable secondary legislation. Whether the latter might be amended is a question which can only be answered against the background of pertinent international agreements.<sup>967</sup> In the case of user charges imposed on a distance travelled, a **direct link to fuel consumption** might still be affirmed. That would regularly be the case if the charge was imposed proportionally to the distance traveled, and thus – implicitly – also proportionally to the fuel consumed. A direct link with fuel consumption would likely no longer exist in the event of a staggered charge based on different categories of distances travelled, given that this would arguably sever the direct link to fuel consumption.<sup>968</sup> Analogous considerations apply to time-based user charges.

### III. Domestic Law

On the level of constitutional law, a number of restrictions, some of which are of substantial relevance, apply to the introduction of environmental user charges also in the context of maritime transport. These have already been described in great detail in Part 2.<sup>969</sup>

#### 1. Questions relating to Legislative Powers

From the point of view of legislative powers, it needs to be distinguished whether the charge is based on fiscal legislation or other types of legislation. The particularities of legislative powers relating to taxes have already been addressed in detail.<sup>970</sup> Outside of the area of fiscal legislation, the pertinent provisions relating to legislative powers are a set out in Articles 70 to 75 of the Basic Law. These determine whether and to what extent the federation enjoys the legislative power to introduce charges imposed in return for services and special charges.

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<sup>965</sup> Brosthaus, Schneider, Sonnborn *et al.*, Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Flugverkehrs, UBA Forschungsvorhaben 17/2001, 122.

<sup>966</sup> Brosthaus, Schneider, Sonnborn *et al.*, Maßnahmen zur verursacherbezogenen Schadstoffreduzierung, 122.

<sup>967</sup> Cf. unter I. *supra*.

<sup>968</sup> Cf. also Brosthaus, Schneider, Sonnborn *et al.*, Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Flugverkehrs, UBA Forschungsvorhaben 17/2001, 122, who, aside from severing the link between fuel consumption and an emissions charge, suggest amending pertinent secondary legislation are accepting renewed proceedings before the ECJ in the hope that the Court might reconsider its position.

<sup>969</sup> See *supra*, Part 2, D. I. 1. and D. II.

<sup>970</sup> See *supra*, Part 2, D. I. 1. d).

When it comes to assigning a measure to the individual provisions setting out substantive competences, the objectives pursued by the legislator with its measure usually determines classification.<sup>971</sup>

Under the Basic Law, the federation enjoys (concurrent) legislative power, under the conditions set out in Article 72 (2) of the Basic Law, for, *inter alia*, the area of air pollution (**Article 74 (1) No. 11 of the Basic Law**), which may also be exercised for purposes of climate policy with the aim of protecting the atmosphere against negative impacts of air pollution (for instance by greenhouse gases).

The Basic Law does not, however, contain a general competence of the federation for the area of environmental protection and the achievement of environmental objectives. With a view to water resources management and nature conservation, in particular, **Article 75 (1) No. 3 and 4 of the Basic Law** merely afford the federation the power to adopt federal framework legislation. Pursuant to Article 75 (2) of the Basic Law, in turn, such framework legislation may only contain detailed or directly applicable provisions in exceptional circumstances.

Other than that, **Article 74 (1) No. 21 of the Basic Law** affords the federation (concurrent) legislative power for the adoption of measures on maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic. This also includes the power to introduce charges for their use.<sup>972</sup>

Against this backdrop, at any rate, it cannot be generally assumed that the federation enjoys the legislative power to establish a comprehensive system for the **management of the marine environment**. While such a management system generally appears admissible for the area of air pollution, its extension to protection of the marine environment would only be possible to the extent allowed for by Article 75 of the Basic Law.

In its recent case-law, the Federal Constitutional Court clearly affirmed that the requirements of Article 75 (2) of the Basic Law need to be interpreted respectively. According to the Court, detailed or directly applicable provisions of the federation in framework legislation have to<sup>973</sup>

“necessary in a qualified manner. An exception thus applies, on the one hand, when the framework rules could not be reasonably adopted without detailed or directly applicable provisions, rendering these quite simply indispensable. Such detailed or directly applicable rules may not, on the other hand, altogether compromise the cooperative character of framework legislation.”

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<sup>971</sup> The regulatory purpose is usually decisive for assignment to the competence provisions of the Basic Law. *Cf.* only *Pieroth*, in: Jarass/Pieroth, GG, Article 70 Annot. 4 with further references.

<sup>972</sup> *Cf. Pieroth*, in: Jarass/ Pieroth, GG, Article 74 Annot. 49.

<sup>973</sup> Federal Constitutional Court Reports 111, 226 (“Juniorprofessur”), para. 94 (translation by the author).



The Court held its to be decisive that “provisions adopted under Article 75 (2) of the Basic Law have to a law, also with a view to their substantive bearing, room for a distinct influence of the federate *Land* legislator when implementing the framework legislation.”<sup>974</sup>

This does not necessarily imply that the federation has no power whatsoever to establish a comprehensive management system for the entire marine environment. Pursuant to Article 75 (2) of the Basic Law, the federal legislator is merely held to leave significant discretionary powers to the *Länder* in the respective legislation, at least to the extent that the ocean falls within the sovereignty of the latter in the territorial sea. If the environmental user charge proves to be only one element conclusively regulated by the federation in a law otherwise geared towards being implemented and elaborated by the *Länder*, it would indeed be conceivable to create federal legislation on a management system in the guise of a framework law. As an element of such legislation, the environmental user charge may not then appear as the dominant regulatory instruments alongside other rules on nature conservation and permissible uses of the marine area. Conceived as an individual element, it would seem possible under these conditions to design an environmental user charge geared towards direct application. This may, for one, be justified by the need of a federally harmonized charge to meet the transboundary geographical nature of the problem, and, second, by the fact that the territorial sea is only a small part of the marine area covered by the charge. It is unlikely that, in such a system, apportionment of the proceeds to the federation could be equally justified.

Other than that, Article 74 (1) No. 21 of the Basic Law clarifies that the federation, on principle, has the legislative power to introduce a charge for the **use of navigational waterways**. It bears emphasizing, however, that this competence does not extend to the use of **harbours**.<sup>975</sup> Pursuant to the distribution of powers under the Basic Law, the assessment of harbour fees – and thus also the right to determine the application of revenue – has been generally placed within the power of the *Länder* (Article 30 of the Basic Law).

A different conclusion could only apply if and to the extent that the federation could draw on another legislative power afforded to it. Conceivable, that could be the case if the user charge proved to be part of a comprehensive set of management instruments permissibly based on a combination of the power relating to air pollution (Article 74 (1) No. 24 of the Basic Law) and the powers to adopt framework legislation on nature protection (Article 75 (1) No. 3 of the Basic Law) and water resources (Article 75 (1) No. 4 of the Basic Law).

A different situation relating to legislative powers from that on harbour fees applies to **navigational aids**. These are included under Article 74 (1) No. 21 of the Basic Law. On this basis, the federation

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<sup>974</sup> *Ibid.* (translation by the author).

<sup>975</sup> Explicitly with a view to internal ports Federal Constitutional Court Reports 2, 347 (376); cf. *Pieroth*, in: Jarass/Pieroth, GG, Article 74 Annot. 49 with further references.

has adopted the Navigational Aids Act (*Seelotsengesetz*, SLG).<sup>976</sup> Pursuant to paragraph 45 SLG, charges are imposed on the use of navigational aids, with the acts distinguishing between charges on the use of navigational aid facilities (*Lotsabgaben*) and charges on the use of navigational aid services (*Lots gelder*). A federal ordinance sets out more specific provisions.

## 2. Provisions of Sub-Constitutional Law

Beneath the level of constitutional law, attention must be accorded to the provisions of the Mineral Oil Taxation Act (*Mineralölsteuergesetzes*, MinöStG), which largely exempts shipping fuel from taxation (*cf.* paragraph 4 (1) No. 4 MinöStG). This exemption is based on provisions set out under Community law, and can only be repealed or modified to the extent allowed for under Community law (notably Article 14 (1) and (2) of Directive 2003/96/EC)<sup>977</sup> as well as potential commitments of international law.<sup>978</sup> Purely from the point of view of German law, such amendment would be readily possible.

Otherwise, sub-constitutional law does not contain any discernible restrictions specifically precluding the introduction of new charges (as environmental user charges) in the area of shipping.

## B. Aviation (*Ecologic*)

As already shown in the first part, aviation is the **fastest-growing source** of greenhouse gases. Nonetheless, there has been **no success** on the international level and – as a consequence – within the European Community and its Member States to adopt a **comprehensive approach** to the reduction of environmental impacts of air travel.<sup>979</sup> Article 2.2 of the **Kyoto Protocol** to the United Nations Framework Convention on Climate Change,<sup>980</sup> the definitive international arrangement in the area of climate change, merely provides that “[t]he Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation ... working through the **International Civil Aviation Organization**”. Other than that,

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<sup>976</sup> Gesetz über das Seelotsenwesen – Seelotsengesetz – of 13 September 1984 (Federal Gazette I 1213), last amended by legislation of 21 August 2002 (Federal Gazette with him to you I 3322).

<sup>977</sup> See *supra*, Part 3, A. II. 5.

<sup>978</sup> See *supra*, Part 3, B.I.

<sup>979</sup> Only a small group of states has so far adopted measures on domestic aviation for *inter alia* environmental reasons; according to the European Commission, for instance, the Netherlands have introduced a kerosene tax of €200 per 1000 litres of aircraft fuel, Japan of €239 per 1000 litres, and the United States of €6 per 1000 litres on the federal level, as well as up to €24 per 1000 litres on the level of individual federate states, *cf.* European Commission, SEC(2005) 467, *supra*, note 72, at 14.

<sup>980</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), Kyoto, December 10, 1997, in force February 16, 2005, 37 *International Legal Materials* (1998), at 22.

the Kyoto Protocol sets out no binding requirements, specifically no quantitative emissions reduction targets: currently, only domestic aviation is covered by the general reduction targets imposed on Annex I Parties. As for the emissions of international aviation, Parties are merely reporting for purposes of information.

In the run-up to the Kyoto Protocol, the UNFCCC Subsidiary Body on Scientific and Technological Advice (SBSTA) had already identified various options for including the greenhouse gas emissions of aviation and shipping in the climate change regime.<sup>981</sup> A central demand it voiced was for the allocation of **emissions quotas** to international air and sea traffic in accordance with a variety of criteria. The rapid growth and transboundary nature of aviation – an impediment for ambitious unilateral measures, given the character of current international competition – prevented any notable progress, however.

Another way of bringing the climate impact of aviation to bear on cost accounting (as called for by the polluter-pays principle) would be to introduce **user charges**. For the aviation sector, the following **design options** are available:

- landing and airport fees;
- user charges linked to emissions (emissions fees);
- user charges increasing the price of airfares (ticket fees);
- user charges linked to kerosene consumption;
- distance-based user charges.

These design options will be outlined in greater detail in the following sections, taking account of applicable rules of public international law, Community law and German constitutional law.

## I. International Law

### 1. General International Law

States enjoy **complete and exclusive sovereignty** over their territorial airspace.<sup>982</sup> Article 1 of the Convention on International Civil Aviation (**Chicago Convention**) of December 7, 1944,<sup>983</sup> sets out

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<sup>981</sup> See Oberthür and Ott, *The Kyoto Protocol: International Climate Policy for the 21<sup>st</sup> Century*, at 111 *et seq.*

<sup>982</sup> Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., at 115, with reference to the principle of *cujus est solum est usque ad caelum et ad inferos*; Cheng, *The Law of International Air Transport*, at 120 *et seq.*; Dahm, Delbrück and Wolfrum, *Völkerrecht*, Vol. I/1, at 438 *et seq.*; Jennings and Watts, *Oppenheim's International Law*, Vol. I, at 572 *et seq.*; the debate on whether the upper airspace bordering on outer space falls within the scope of this principle is irrelevant here, given that all areas currently used by civil aviation are undoubtedly covered, see generally Cheng, *Encyclopedia of International Law (EPIL)*, Vol. 1, at 68. On the earlier legal framework, see McNair, *The Law of the Air*, 3<sup>rd</sup> ed., at 4 *et seq.*

<sup>983</sup> Convention on International Civil Aviation (Chicago Convention), Montreal, December 7, 1944, 15 *United Nations Treaty Series* (1944), at 295.

this principle of customary international law by stating that the “contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.” Accordingly, each state alone **determines the right** of other states to pass through its airspace.<sup>984</sup> Territorial sovereignty also covers the airspace above territorial waters, which, according to Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>985</sup> stretch 12 miles into the sea. Pursuant to Article 58 of UNCLOS, however, the airspace above the **Exclusive Economic Zone** (EEZ) – ranging 200 nautical miles from the shoreline pursuant to Article 57 of UNCLOS – must be open for air traffic, provided such traffic does not infringe on the rights of states regarding their Economic Zones.<sup>986</sup> **Complete freedom of air travel** exists only in airspace which is not subject to any form of national sovereignty, notably the airspace above **international waters**.<sup>987</sup>

The regulation of airspace and its use has largely occurred through **bilateral agreements**. Due to the greater simplicity and speedier conclusion afforded by bilateral legislation, international aviation – with its susceptibility to changing market conditions – has also been largely regulated through bilateral agreements.<sup>988</sup> Requirements arising from customary international law, themselves mostly originating in international treaties, have lost importance due to the principle of *pacta sunt servanda* and national commitments based on international treaties,<sup>989</sup> even though they are generally affirmed by the respective treaties.<sup>990</sup> The air sovereignty described earlier is limited by certain basic freedoms of the air, including freedoms of movement established in two agreements annexed to the Chicago Convention.<sup>991</sup> These freedoms comprise the right to fly over a country or to make a technical landing. The third, fourth, and fifth freedoms, which concern the **transport of passengers and cargo**, could be of particular relevance for the legal design of a user charge. As the Chicago Convention clarifies in several provisions, however, these freedoms do

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<sup>984</sup> Cheng, *The Law of International Air Transport*, 122; Doebling, *Allgemeine Staatslehre*, 3rd ed., Annot. 546.

<sup>985</sup> United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, December 10, 1982, 21 *International Legal Materials* (1982), at 1261.

<sup>986</sup> See Doebling, *Allgemeine Staatslehre*, 3<sup>rd</sup> ed., annot. 546; Cheng, *EPIL*, Vol. 1, at 68.

<sup>987</sup> See, for instance, Article 87 (1) (b) of UNLOS, which sets out the freedom of passage.

<sup>988</sup> Ipsen, *Völkerrecht*, at 784.

<sup>989</sup> See, in particular, the *SS Wimbledon* case decided by the PCIJ, *France, Italy, Japan and the United Kingdom v. Germany – SS Wimbledon*, P.C.I.J. [1923] (Ser. A) No. 1, at 2.

<sup>990</sup> See Cheng, *EPIL*, Vol. 1, at 67.

<sup>991</sup> On this issue, cf. Cheng, *The Law of International Air Transport*, at 8 *et seq.*; Diederiks-Verschoor, *An Introduction to Air Law*, at 12 *et seq.*

not apply unconditionally.<sup>992</sup> The imposition of fees and other charges, in particular, is dealt with by the Chicago Convention itself and will be covered in a separate section.<sup>993</sup>

Beyond the territory of states, aircraft are subject to the **exclusive sovereignty** of the state in which they are registered.<sup>994</sup> To the extent that foreign aircraft are to be subjected to legal obligations in international airspace, therefore, the prohibition of extraterritorial jurisdiction prevents third states from doing so.<sup>995</sup> Within the sovereign territory of third states, however, the jurisdiction of that state competes with that of the state in which the aircraft is registered.<sup>996</sup> There is no uniform approach to such incidences of competing jurisdiction in state practice, and international law does not provide a compulsory solution.<sup>997</sup> Both forms of jurisdiction take precedence over that of states whose nationals are being transported by the aircraft in question.<sup>998</sup> Other than that, however, only such rules apply which have been explicitly agreed upon by way of an international treaty or recognised as customary international law, that is, general practice accepted as law, or which are reflected in general principles of international law.<sup>999</sup>

Although it follows that the rules of general international law **do not, in principle, preclude** the introduction of user charges, this conclusion only applies unreservedly to user charges imposed on the use of airspace above the sovereign territory of the collecting states. It also applies to the airspace above the territorial waters of said state, but does not include the Exclusive Economic Zone

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<sup>992</sup> See, e.g., Article 9 of the Chicago Convention, which sets allows restrictions for reasons of military necessity and public safety:

*“Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged.”*

<sup>993</sup> See, e.g., *infra*, the discussion on Articles 15 and 24 of the Chicago Convention.

<sup>994</sup> See Article 17 of the Chicago Convention; Cheng, *The Law of International Air Transport*, at 128 *et seq.*; Dahm, *Völkerrecht*, Vol. 1, at 720 *et seq.*; Diederiks-Verschoor, *An Introduction to Air Law*, at 32; Doebling, *Allgemeine Staatslehre*, 3<sup>rd</sup> ed., annot. 550.

<sup>995</sup> See *supra*, Part 2, I.

<sup>996</sup> Unlikely, albeit challenging legal questions would arise if a ground state sought to forbid the collection of user charges for passage through its airspace by the home state of the aircraft.

<sup>997</sup> Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., at 317.

<sup>998</sup> See Cheng, *EPIL*, Vol. 1, at 69.

<sup>999</sup> See also Article 38 (1) of the Statute of the International Court of Justice; this reflects the *Lotus*-doctrine of unrestricted freedom in areas beyond state sovereignty defined by the Permanent Court of International Justice, PCIJ, *France v. Turkey - The Case of the S.S. “Lotus”*, P.C.I.J. [1927] (Ser. A) No. 10, at 19.

and the High Seas or other extraterritorial areas. In such areas, a State may only impose user charges on aircraft which are **registered** with that state.<sup>1000</sup>

## 2. *The 1944 Chicago Convention*

The **Chicago Convention** largely establishes the legal framework of international civil aviation. It has been ratified by 188 Parties, including all Member States of the European Union. Pursuant to Article 96 (a) of the Chicago Convention, the scheduled air services it regulates include “any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.” The wide scope of this convention is merely limited by its Article 3 (1), which states that it applies to **civil aircraft** only, not to state aircraft, notably vessels used for military, customs and police services. Aside from that, its applicability to particular aspects of aviation is determined by the substantive provisions.

### a.) Article 15 of the Chicago Convention

Article 15 of the Chicago Convention sets out the legal framework for access to airports and **fees** imposed thereon:

*“Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.*

*Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,*

*(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and*

*(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services. (...)*

*No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.”<sup>1001</sup>*

### aa.) Article 15 (1) and (2) of the Chicago Convention

Article 15 (1) and (2) of the Chicago Convention extend the **principle of national treatment to access to airports and other air navigation facilities**. This provision requires that airports and air navigation facilities on the territory of contracting states open to public use by their national aircraft

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<sup>1000</sup> Upholding the principle that a state retains jurisdiction over its own aircraft and that the laws of the home state continue applying on such aircraft, see Dahm, *Völkerrecht*, Vol. 1, at 722.

<sup>1001</sup> The English text is authoritative, along with the Arabic, Chinese, French, Russian and Spanish versions. Translated versions, such as e.g. the German version, are not relied upon in this study.

be **equally accessible** to the aircraft of other contracting states under uniform conditions. Likewise, the charges imposed for the use of such airports and air navigation facilities by the aircraft of other contracting states must **equal those** assessed against domestic aircraft. An arbitration panel has interpreted this requirement as precluding both formal and factual discrimination.<sup>1002</sup>

The introduction of a **user charge**, in other words, would only touch on the first part of Article 15 of the Chicago Convention if it was collected by airports themselves. At best, this would affect user charges designed as airport fees or as emissions- or distance-based charges, but not ticket fees collected by airlines, nor kerosene taxes collected by fuel suppliers. With its explicit reference to charges “for the use of ... airports and air navigation facilities”, this provision raises doubts as to whether it even applies to user charges aimed at protecting the environment, since these would merely be assessed on the occasion of airport use, but not for the actual use of services rendered there.

With a Resolution on Environmental Charges and Taxes adopted on December 9, 1996, the Council of the International Civil Aviation Organization (ICAO) clarified that “charges” comprise “levies to **defray the costs** of providing facilities and services for civil aviation.”<sup>1003</sup> Although this interpretation is not legally binding, it should at least indicate the understanding held by the Council if it had to decide on a disagreement under the Convention in its function as dispute settlement body - in which case the opinion of the Council would indeed be binding.<sup>1004</sup> It would also gain importance if the ambiguous wording of Article 15 were interpreted in accordance with customary rules of interpretation, which in turn require consideration of the systematic context of a provision, including interpretative guidance by relevant bodies.<sup>1005</sup>

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<sup>1002</sup> *United States – United Kingdom*, Arbitration Concerning Heathrow Airport User Charges (November 1992), discussed in detail by Witten, *AJIL* (1995), at 174 *et seq.*

<sup>1003</sup> ICAO, Council Resolution on Environmental Charges and Taxes, adopted by the Council on December 9, 1996 at the 16<sup>th</sup> meeting of its 149<sup>th</sup> session, Recital 5:

*“Noting that ICAO policies make a distinction between a charge and a tax, in that they regard charges as levies to defray the costs of providing facilities and services for civil aviation, whereas taxes are levies to raise general national and local governmental revenues that are applied for non-aviation purposes.”*

This view was also reiterated in subsequent Assembly Resolutions, see for instance Recital 9 of Resolution A33-7: Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection. Adopted at the 33<sup>rd</sup> Session of the Assembly, App. I, available at: <<http://www.icao.int>>.

<sup>1004</sup> See Article 84 of the Chicago Convention.

<sup>1005</sup> The customary rules on treaty interpretation recognized in general practice and accepted as law have been codified in Articles 31 *et seq.* of the Vienna Convention on the Law of Treaties (VCLT), Vienna, May 22, 1969, in force January 27, 1980, 1155 *UNTS* (1969), at 331 *et seq.* In this context, attention has to be given in particular to Articles 31 (1) and (2) VCLT:

All this allows for the conclusion that Article 15 (2) of the Chicago Convention only covers such charges which are systematically and structurally comparable to airport fees.<sup>1006</sup>

Even if one were to take the view that Article 15 (2) of the Chicago Convention applies to user charges on global environmental goods, however, **no discrimination** of foreign air service providers would occur. Rather, the user charge would apply to all air service providers **equally**, depending only on the distance traveled or the volume of emissions, not the nationality of airlines; and only the latter – potentially amounting to preferential treatment of domestic industries – is what Article 15 (2) of the Convention seeks to suppress.<sup>1007</sup> Contrary to an occasionally held view, the principle of non-discrimination contained in this provision does not also require that fee levels correspond with the economic burden caused to charging airports.<sup>1008</sup>

ab.) Article 15 (2) 3<sup>rd</sup> Sentence of the Chicago Convention

Also of relevance is the requirement laid out in the 3<sup>rd</sup> sentence of Article 15 (2) of the Chicago Convention, according to which “[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>1006</sup> Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 14: “systematisch und strukturell mit Flughafengebühren vergleichbar”.

<sup>1007</sup> This view is shared by Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 124.

<sup>1008</sup> On this matter, see Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 124; they also submit an additional argument, notably that imposition of a user charge would not be linked to actual airport use, but merely occur on the occasion of landing at an airport.



any aircraft of a contracting State or persons or property thereon.” With a view to different language versions of the Convention, one may doubt whether the wording “**other charges**” should be understood to also compromise different forms of user charges, in particular kerosene taxes, ticket fees or emissions- and distance-based user charges.<sup>1009</sup> The observation made in the preceding section with regard to Article 15 (2) should also apply here, requiring that “charges” be read as comprising only levies imposed **in return** for the provision of facilities and services for civil aviation. In this regard, however, the Council of the International Civil Aviation Organization has issued a clarification to the effect that Article 15 (2) of the Chicago Convention relates to all types of charges and taxes.<sup>1010</sup> Given that statement, it cannot be ruled out that user charges on global environmental goods fall within the ambit of the 3<sup>rd</sup> sentence of Article 15 (2) of the Chicago Convention.<sup>1011</sup>

As the **wording** itself clarifies through explicit reference to “solely”, however, any charges imposed for reasons other than the mere – “sole” – right of transit through foreign airspace (such as the prevention of environmental impacts arising from aviation)<sup>1012</sup> – are not precluded.<sup>1013</sup> The **object and purpose** of this provision is clearly limited to preventing the use of air and territorial sovereignty as a source of income or for protectionist measures.<sup>1014</sup> The user charges on global environmental goods discussed in this context aim at the achievement of entirely different objectives: they primarily seek to reduce environmental impacts. Even though the drafters of the Chicago Convention were likely unaware of such regulatory aims at the time of the original negotiations, the text of this provision – which provides the sole decisive criterion in this regard – has been explicitly left open-ended. The wording “solely of the right of transit over or entry into or exit from” leaves no doubts in this regard. If the environmental purpose of the user charge is sufficiently evident, therefore, there is no reason to assume a violation of Article 15 of the Chicago Convention.<sup>1015</sup> Since a user charge on air traffic already generates a factual incentive to adopt less

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<sup>1009</sup> See, also, the French text (“autres redevances”) of Article 15 (2) of the Chicago Convention.

<sup>1010</sup> Cited in Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 113, note 75.

<sup>1011</sup> Cf., however, Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 19 *et seq.*, who contends that only levies collected *in return* for facilities and services are covered.

<sup>1012</sup> That would readily be the case, for instance, with user charges adopted to protect the global climate.

<sup>1013</sup> Brockhagen and Lienemeyer, *Proposal for a European Aviation Charge*, at 67; WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 12.

<sup>1014</sup> Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 124 *et seq.*

<sup>1015</sup> This conclusion is shared by Brockhagen and Lienemeyer, *Proposal for a European Aviation Charge*, at 67; Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 124 *et seq.*; Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 19 *et seq.*; WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 12.

detrimental behaviour, it should suffice if the environmental purpose is adequately highlighted during the preparatory stage, for instance during negotiations or in the legislative process, and is then included in the wording of the pertinent legal provisions (for instance in the preamble).

b.) Article 24 of the Chicago Convention

Article 24 of the Chicago Convention regulates the assessment of **customs duties** and provides for an exemption from duties for any aircraft on a flight to, from, or across the territory of another contracting state. This exemption also covers fuel, lubricating oil, spare parts, and other regular equipment and aircraft stores on board an aircraft upon arrival in the territory of another contracting state and retained on board when leaving the territory of that state:

*“(a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulation of the State. Fuel, lubricating oil, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. (...)”*

The term “similar charges” serves as a generic expression for different types of compensation duties.<sup>1016</sup> According to this provision, thus, fuel **carried on board** an aircraft upon arrival and not unloaded before departure may not be taxed. This restriction does not, however, apply to fuel **supplied** in the territory of a contracting state, which is precisely what a kerosene tax modeled after existing mineral oil taxes would regulate.<sup>1017</sup> Given the explicit wording of this provision and the customary rules of treaty interpretation, a more expansive interpretation including supplied fuel in the exemption from any customs duties<sup>1018</sup> does not appear convincing.<sup>1019</sup> Likewise, by merely exempting fuel “on board an aircraft ... on arrival ... and retained on board on leaving the territory” of another contracting state, this provision does not preclude taxation of the fuel **consumed** in flight. Accordingly, user charges on the consumption of fuel are not ruled out by this provision.

As a matter of principle, therefore, Article 24 of the Chicago Convention does **not preclude** the introduction of user charges on aviation. In particular, it does not forbid user charges linked to other

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<sup>1016</sup> Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 112.

<sup>1017</sup> Brosthaus *et al.*, *ibid.*; Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 23; Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 14.

<sup>1018</sup> Efforts to expand the scope of Article 24 of the Chicago Convention are apparent in various documents of the International Civil Aviation Organization (ICAO), see the references in Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 23, note 54.

<sup>1019</sup> See *supra*, note 1005 and accompanying text.

aspects than fuel, for instance emissions fees.<sup>1020</sup> Due to Article 15 of the Chicago Convention, however, the user charge may not discriminate against airline operators from other contracting states. A problematic categorisation as a kerosene tax may be avoided, moreover, if the user charge is not linked to fuel consumption or the – directly ensuing – emissions of greenhouse gases, but rather draws on the distance traveled or environmentally relevant features of the aircraft for its calculation.<sup>1021</sup> A ticket fee assessed against individual passengers, in turn, would not even fall within the scope of Article 24 of the Chicago Convention.

### 3. *Relevant ICAO-Resolutions*

#### a.) Institutional Framework

Article 2.2 of the Kyoto Protocol provides that the “limitation or reduction of emissions of greenhouse gases ... from aviation” should be pursued “through the International Civil Aviation Organization.” The **International Civil Aviation Organization** (ICAO), with its permanent seat in Montreal, Canada, was established by the Chicago Convention and began operations in April 1947. As a special organization of the United Nations, it currently has 188 Member States. The preamble to the Chicago Convention sets out the overall objective of ICAO: defining “principles and arrangements” for the safe and orderly development of international civil aviation as well as ensuring equal opportunity in the operation of international air transport services.<sup>1022</sup> To this end, ICAO acts on the basis of its mandate in Article 44 of the Chicago Convention and develops “principles and techniques of international air navigation”, while fostering the “planning and development of international air transport.” Even though **environmental considerations** have not been explicitly included in the mandate of ICAO, they can – to some extent – be read into Article 44, which requires ICAO to “[m]eet the needs of the peoples of the world for safe, regular, efficient and economical air transport”.

The highest body of ICAO is the **Assembly**, which is comprised of representatives from all contracting states and convenes at least once every three years to adopt general decisions on organizational issues and the modification or amendment of the Convention. Substantive tasks are mostly carried out by a **Council** consisting of elected representatives from the contracting states. It adopts international standards and recommended practices. Aside from the commissions established by the Convention itself, the Council may create additional air transport commissions pursuant to Article 55 of the Chicago Convention. Since 1983, a **Committee on Aviation Environmental Protection** (CAEP) has helped prepare decision-making by the Council in the area of environmental protection, and sought to ensure its ability to prevail alongside more specialized environmental regimes.<sup>1023</sup>

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<sup>1020</sup> Thus also WGBU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 12-15; generally Lienemeyer, “Europaweite Abgaben zur Reduzierung von Treibhausgasemissionen,” 85.

<sup>1021</sup> See Oberthür, “Institutional Interaction to Address Greenhouse Gas Emissions from International Transport: ICAO, IMO and the Kyoto Protocol,” in *Climate Policy* (2003): 191, at 197; WBGU, *ibid.*, at 15.

<sup>1022</sup> See Cheng, *The Law of International Air Transport*, at 63 *et seq.*

<sup>1023</sup> Abeyratne, ‘ICAO: Some recent Developments in Aviation and Environmental Protection Regulation’, at 38.

## b.) Legal Nature of ICAO Decision-Making

As an international organisation, ICAO can only impose obligations on its contracting states to the extent that it has been explicitly **mandated** to do so.<sup>1024</sup> The pertinent provision in this regard is Article 37 of the Chicago Convention, which entitles ICAO to adopt international **standards** and **procedures** to secure a high degree of uniformity in its implementation. This mandate extends to customs and immigration procedures, and other matters concerned with the safety, regularity, and efficiency of air navigation.

*“Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.*

*To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:*

*(j) Customs and immigration procedures;*

*and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.”*

Still, even if one were to assume that this mandate also allows for the adoption of standards, recommendations and procedures with regard to user charges on global environmental goods,<sup>1025</sup> it would appear doubtful whether such decisions are **legally binding** on contracting states and limit their freedom of action in that regard.<sup>1026</sup> The wording itself only calls upon ICAO to “undertake to *collaborate*” in order to secure the “highest *practicable* degree of uniformity”, creating a presumption against a strict legal obligation. In any case, contracting states would be left with an extensive **scope of discretion**.<sup>1027</sup> This presumption also applies to standards adopted by the Council pursuant to Article 54 (l) as Annexes to the Convention in accordance with the procedure laid out in Article 90 (a) of the Chicago Convention.<sup>1028</sup>

After all, Article 38 of the Chicago Convention allows contracting states to **depart** from such international standards and procedures, provided they give immediate notification to ICAO.<sup>1029</sup> If

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<sup>1024</sup> Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 26.

<sup>1025</sup> On this discussion Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 28.

<sup>1026</sup> See generally Erler, *Rechtsfragen der ICAO: Die Internationale Zivilluftfahrtorganisation und ihre Mitgliedstaaten*, at 131 *et seq.*

<sup>1027</sup> Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 30.

<sup>1028</sup> See Abeyratne, ‘Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis’, in ZLW (1992), 387, at 389 *et seq.*; Cheng, *The Law of International Air Transport*, at 64; Ipsen, *Völkerrecht*, at 811 *et seq.*

<sup>1029</sup> The text of this provision reads as follows:

“Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or

one takes into account the wording of the first sentence of Article 38 of the Chicago Convention, according to which each contracting state has a notification duty in cases where it finds it “**impracticable** to comply with any such international standard or procedure ... or **deems it necessary** to adopt regulations or practices differing ... from those established by an international standard”, one may draw the reverse conclusion that subsequent departures are permissible.<sup>1030</sup> As a matter of law, thus, contracting states are **free to choose** whether to comply with the standards and recommendations contained in the Annexes of the Chicago Convention.<sup>1031</sup>

Accordingly, the standards and procedures adopted by ICAO do not impose **unconditional obligations** on contracting states,<sup>1032</sup> but rather serve as recommendations backed up by an obligation of “**good faith**”, at best.<sup>1033</sup> Nevertheless, it should be borne in mind that the large membership of ICAO endows its standards and recommendations with great political weight, allowing these to act as an indicator for the global feasibility of future measures. It is therefore unlikely that states would consciously ignore decisions adopted by ICAO. The organizational structure and permanent bodies of ICAO, moreover, render it a convenient forum for the ready elaboration and subsequent enforcement of global efforts.<sup>1034</sup>

#### c.) Relevant Recommendations and Standards

With a Resolution on Environmental Charges and Taxes of December 9, 1996, the ICAO Council had already recommended giving precedence to charges over general taxes and applying revenues towards a reduction of the environmental impacts of aircraft, for instance by promoting research and the development of more efficient propulsion technologies. Altogether, the Council considered

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procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.”

<sup>1030</sup> On this apparently dominant view Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 34 with further references.

<sup>1031</sup> Explicitly Cheng, *The Law of International Air Transport*, at 64 *et seq.*

<sup>1032</sup> Schwenk, *Handbuch des Luftverkehrsrechts*, at 87; the absence of a binding legal effect is even conceded by ICAO itself, see ICAO, *Manual on Air Navigation Services Economics*, Para. 1.10; still, contracting parties must observe the customary obligation of good faith to further the objectives of a treaty they have acceded to.

<sup>1033</sup> On this term, see Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 31.

<sup>1034</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 8.

the introduction of a global user charge improbable given the lacking support of ICAO member states.<sup>1035</sup> Individual states considering the introduction of a levy, it went on to recommend, should do so by way of **charges rather than taxes** and with due consideration for the principle of nondiscrimination contained in Article 15 of the Chicago Convention, with rates proportional to costs, and without resulting in discrimination of aviation relative to other forms of transport.<sup>1036</sup> At the 32<sup>nd</sup> session of the Assembly, held in Montreal from September 22 to October 2, 1998, the **Committee on Aviation Environmental Protection** (CAEP) was charged with studying “policy options to limit or reduce the greenhouse gas emissions from civil aviation, taking into account the findings of the IPCC special report and the requirements of the Kyoto Protocol.”<sup>1037</sup> A similar mandate was also given to the ICAO Council with a Resolution of October 5, 2001.<sup>1038</sup>

At its 6<sup>th</sup> session in February 2004, CAEP recommended to ICAO that environmental impacts of aviation resulting from aircraft noise and emissions, including NO<sub>x</sub> emissions, be **further reduced**. To this end, the Committee suggested developing market-oriented instruments.<sup>1039</sup> At its 35<sup>th</sup> session, held in Montreal from September 28 to October 8, 2004, the Assembly finally passed Resolution A35-5 with a consolidated statement of continuing ICAO policies and practices related to environmental protection. Although this consolidated statement recognizes the continuing validity of the Resolution of December 9, 1996, it limits itself to affirming **ongoing disagreement** between member states and the need to carry out further studies on the subject. While it acknowledges that implementation of a regional charge within the member states of an economic integration organization on the operators of such states **is not precluded**, the statement urges contracting states to refrain from unilateral implementation of a greenhouse gas emissions charge. The Council is requested to submit further guidance by 2007.<sup>1040</sup>

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<sup>1035</sup> ICAO, Council Resolution on Environmental Charges and Taxes, adopted by the Council on 9 December 1996 at the 16<sup>th</sup> meeting of its 149<sup>th</sup> session, lit. 2 and 4, available at: <<http://www.icao.int/icao/en/env/taxes.htm>>.

<sup>1036</sup> See ICAO, Council Resolution on Environmental Charges and Taxes, *supra*, note 1035, lit. 5.

<sup>1037</sup> ICAO, Resolution A32-8: Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection. Adopted at the 32<sup>nd</sup> Session of the Assembly, available at <<http://www.icao.int>>.

<sup>1038</sup> ICAO, Resolution A33-7: Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection. Adopted at the 33<sup>rd</sup> Session of the Assembly, App. I, available at <<http://www.icao.int>>.

<sup>1039</sup> See ICAO, Press Release No. PIO 02/04 of Februar 16, 2004, available at: <<http://www.icao.int>>.

<sup>1040</sup> ICAO, Resolution A35-5: Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection. Adopted at the 35<sup>th</sup> Session of the Assembly, App. I, available at: <<http://www.icao.int>>:

“*The Assembly (...)*

1) *Recognizes* the continuing validity of Council’s Resolution of 9 December 1996 regarding emission-related levies;

Chapter 4 section E of the current Standards and Recommended Practices contained in an **Annex** to the Chicago Convention and designed to **facilitate air services** sets out an exemption from import duties and taxes for stores and commissary supplies imported into the territory of contracting state.<sup>1041</sup> This exemption does not apply to fuels, however, and is thus of no relevance for user charges:<sup>1042</sup> as an explanatory document by the Facilitation Panel (FALP) has clarified, only supplies and products for use or sale on board an aircraft during flights fall within the ambit of the expression “Stores and Commissary Supplies”, including, for instance, cutlery, blankets, or other consumable articles.<sup>1043</sup>

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2) *Urges* States to follow the current guidance contained therein;

3) *Recognizes* that existing ICAO guidance is not sufficient at present to implement greenhouse gas emissions charges internationally, although implementation of such a charge by mutual agreement of States members of a regional economic integration organization on operators of those States is not precluded, and *requests* the Council to:

a) carry out further studies and develop additional guidance on the subject;

b) place a particular focus on the outstanding issues identified in earlier studies and by the Assembly; and

c) aim for completion by the next regular session of the Assembly in 2007;

4) *Urges* Contracting States to refrain from unilateral implementation of greenhouse gas emissions charges prior to the next regular session of the Assembly in 2007, where this matter will be considered and discussed again;

5) *Requests* the Council to study the effectiveness of, and to develop further guidance on emissions levies related to local air quality by the next regular session of the Assembly in 2007, and urges Contracting States to actively participate and share information in this effort; and

6) *Urges* Contracting States to ensure the highest practical level of consistency with ICAO policies and guidance on emissions levies related to local air quality.”

<sup>1041</sup> ICAO, *Facilitation: Standards and Recommended Practices*, 11<sup>th</sup> ed., Montreal 2002: “4.36 Stores and commissary supplies imported into the territory of a Contracting State for use on board aircraft in international service shall be relieved from import duties and taxes, subject to compliance with the customs regulations of the State.”

<sup>1042</sup> Inaccurate thus Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 36 *et seq.*, who apparently has applied a wrong understanding of the expressions “stores” and “commissary supplies” ausgegangen ist (see the following footnote).

<sup>1043</sup> ICAO, Facilitation Panel (FALP), Third Meeting of the FAL Panel (FALP/3), Februar 12 to 16, 2001, Draft Report on Agenda Item 2, FALP/3-WP/25, 2-7:

“Commissary supplies. Commissary supplies are those items, either disposable or intended for multiple use, that are used by the operator for provision of services during flights. Such items include glassware, dishware, cutlery, paper products, blankets, pillows and other similar items.

Stores. Articles of a readily consumable nature for use or sale on board an aircraft during flight, including commissary supplies.”

So far, efforts by ICAO in the area of environmental protection - and in particular relating to environmental charges - have been rather disappointing.<sup>1044</sup> Ultimately, the Assembly has not seen fit to advance, let alone establish, a regulatory framework for the introduction of user charges on aviation. As representatives of the Committee on Aviation Environmental Protection have themselves conceded, there is still no “clear way forward” regarding the long-standing issue of market-based instruments.<sup>1045</sup> ICAO has clearly shown that it perceives itself as an organization primarily aimed at safeguarding the **economic advantages** of aviation for the global community, to which end it is apparently willing to reject environmentally motivated charges adopted on the basis of decisions other than its own.<sup>1046</sup> And yet, with none of the statements on market-based instruments issued by ICAO to date representing a standard annexed to the Chicago Convention in the sense of Article 37, current Resolutions are merely **non-binding recommendations** whose observance is discretionary for contracting states.<sup>1047</sup> Even taking into account the political significance of Council recommendations, it can be affirmed that the wording of the most recent Resolution does not exclude **preparatory measures**.<sup>1048</sup>

#### 4. *Bilateral Air Service Agreements (BASAs)*

The provisions of the Chicago Convention are complemented by a number of **bilateral agreements**, the so-called “Bilateral Air Service Agreements” (BASAs),<sup>1049</sup> which primarily deal

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<sup>1044</sup> See, e.g., Oberthür, “Institutional Interaction to Address Greenhouse Gas Emissions from International Transport: ICAO, IMO and the Kyoto Protocol”, *supra*, note 1021, at 196.

<sup>1045</sup> Thus the Secretary of CAEP Hupe, “Work on Environmental Protection Reflects Need for Balancing many Factors,” in *ICAO Journal* (2004:5): 5, at 23.

<sup>1046</sup> That also explains the emphasis by ICAO on assuming a leadership role while rejecting any efforts from other international bodies or individual states, see Resolution A35-5: Consolidated Statement of Continuing ICAO Policies and Practices related to Environmental Protection, *supra*, note 1040, App. A:

“*The Assembly (...)*

2) *Emphasizes* the importance of ICAO taking a leadership role on all civil aviation matters related to the environment and *requests* the Council to maintain the initiative in developing policy guidance on these matters, and not leave such initiatives to other organizations; *Recognizes* the continuing validity of Council’s Resolution of 9 December 1996 regarding emission-related levies; (...)

8) *Urges* States to refrain from unilateral environmental measures that would adversely affect the orderly development of international civil aviation.”

<sup>1047</sup> Pache, *Möglichkeiten der Einführung einer Kerosinststeuer auf innerdeutschen Flügen*, at 36.

<sup>1048</sup> The Resolution text merely urges states to refrain from the *implementation* of unilateral measures: “Urges Contracting States to refrain from unilateral *implementation* of greenhouse gas emissions charges.”

<sup>1049</sup> Members of ICAO are required to deposit all such bilateral agreements with the ICAO Secretariat, which has compiled the roughly 3000 BASAs in existence in a two-volume collection, ICAO, Document 9511, *Digest of Bilateral Air Transport Agreements and Supplement 1*.



with the assignment of transit rights.<sup>1050</sup> The Air Service Agreements are only relevant for user charges imposed on aircraft operated by foreign airlines, and do not apply to flights carried out by domestic airlines.<sup>1051</sup> Although these agreements differ in specific details,<sup>1052</sup> the so-called “Bermuda II Agreement” between the United States and Great Britain<sup>1053</sup> may serve as a model agreement and has been drawn upon, for instance, by the Member States of the European Union.<sup>1054</sup> It has its origin in the “Chicago Standard Form” of 1944,<sup>1055</sup> and its popularity is at least partly due to the vague wording of several of its provisions.<sup>1056</sup> Regarding the introduction of a user charge on aviation, the more recent “Open Skies Agreement” of the United States does not differ noticeably from the older “Bermuda II Agreement.”<sup>1057</sup>

On the basis of reciprocity, Article 9 (1) of this agreement rules out all customs duties, national excise taxes, and similar national fees and charges on fuel and other consumable supplies for aircraft introduced into the territory of another contracting state or supplied there, unless such duties are based on the cost of services provided.<sup>1058</sup> Fuel on board an aircraft engaged in international air

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<sup>1050</sup> Brosthaus et al., *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 15.

<sup>1051</sup> Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 40.

<sup>1052</sup> A comparative synopsis of selected air service agreements has been compiled by Pache, *ibid.*, at 47 *et seq.*

<sup>1053</sup> Agreement Between the United States of America and United Kingdom of Great Britain and Northern Ireland Concerning Air Services, signed at Bermuda on July 23, 1977 (TIAS 8641).

<sup>1054</sup> Dahm, *Völkerrecht*, Vol. 1, at 720.

<sup>1055</sup> Amply elaborating on the relevant background, Cheng, *The Law of International Air Transport*, at 238 *et seq.*

<sup>1056</sup> Diederiks-Verschoor, *An Introduction to Air Law*, at 53.

<sup>1057</sup> Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 18.

<sup>1058</sup> “(1) Aircraft operated in international air services by the designated airlines of either Contracting Party, their regular equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, and aircraft stores including but not limited to such items as food, beverages and tobacco, which are on board such aircraft, shall be relieved on the basis of reciprocity from all customs duties, national excise taxes, and similar national fees and charges not based on the cost of services provided, on arriving in the territory of the other Contracting Party, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be relieved from the duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided: (...)

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Contracting Party for use in an aircraft engaged in an international air service of a designated airline of the other Contracting Party, even when these supplies are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.”

services<sup>1059</sup> may not be subjected to any fees and charges on arrival. Unlike Article 24 of the Chicago Convention, however, paragraph 2 (c) of this provision extends the tax exemption to fuel **supplied** in the respective contracting state.<sup>1060</sup> This also comprises fuel **consumed** above the territory of said state.<sup>1061</sup>

At first glance, this would seem to **preclude a kerosene tax** unless applicable air service agreements are first amended.<sup>1062</sup> And indeed, a majority of states observe this rule in relation to foreign aircraft.<sup>1063</sup> From a purely legal point of view, however, this conclusion is not **uncontested**. In as much as the obligations arising from such agreements are based on **reciprocity**, a mutual departure by both contracting states remains possible without a breach of treaty.<sup>1064</sup> In this context, it is possible to distinguish between **positive reciprocity**, which requires the advantages granted by one of the contracting parties to also be received by it from the other contracting party, and **negative reciprocity**, in which case benefits will not inure to one side unless that side is willing to extend the same privileges to the other side.<sup>1065</sup> Consequently, this obligation amounts to a manifestation of the national treatment principle, whereby foreign airlines may not be treated less favorably than the respective national airlines.<sup>1066</sup> It should first be noted, however, that **by no means all** air service agreements currently contain such a reciprocity clause.<sup>1067</sup> What has developed is, instead, a highly diverse state practice frequently based on purely factual

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<sup>1059</sup> Pursuant to Article 96 (b) of the Chicago Convention, international air services include any “air service which passes through the air space over the territory of more than one State.” Purely domestic flights are thus excluded from the scope of Article 9 (1) of the Bermuda-II-Agreement.

<sup>1060</sup> Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 16; this provision is included in nearly all bilateral air service agreements, since it extends beyond the scope of Article 24 of the Chicago Convention, see Cheng, *The Law of International Air Transport*, at 334 *et seq.*, who provides a number of examples.

<sup>1061</sup> Cheng, *The Law of International Air Transport*, at 335.

<sup>1062</sup> Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 113 *et seq.*; European Commission, SEC(2005) 467, *supra*, note 72, at 17.

<sup>1063</sup> For an overview, see Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 17.

<sup>1064</sup> Brockhagen and Lienemeyer, *Proposal for a European Aviation Charge*, at 69-70; Cheng, *The Law of International Air Transport*, at 341 *et seq.*; Lienemeyer, “Europaweite Abgaben zur Reduzierung von Treibhausgasemissionen,” *supra*, note **Fehler! Textmarke nicht definiert.**, at 485.

<sup>1065</sup> Cheng, *The Law of International Air Transport*, at 341 *et seq.*

<sup>1066</sup> Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 17.

<sup>1067</sup> See generally on reciprocity of obligations in aviation Cheng, *The Law of International Air Transport*, at 289 *et seq.*, who also lists several examples to the contrary.

considerations.<sup>1068</sup>

User charges which are not linked to fuel consumption or otherwise a concealed kerosene tax, for instance emissions- or distance-based **ticket fees**, are not precluded by this provision.<sup>1069</sup> What is more, existing bilateral agreements between the Member States of the European Community could be amended by way of a **uniform treaty or harmonized legislation**, both of which would take precedence over the respective air service agreements.<sup>1070</sup> A unilateral **termination** or **denunciation**, allowed for by several air service agreements with a notice period of usually 12 months,<sup>1071</sup> is not advisable, however, as it would result in a fragmented legal framework and compromise legal certainty in the aviation sector. With a view to Article 14 (2) of Directive 2003/96/EC, one may even question whether the tax exemption between Member States has not already been replaced by Community legislation.<sup>1072</sup> In any case, if one takes into account the “Open Skies”-judgment of the European Court of Justice<sup>1073</sup> and Regulation 2004/847 EC on the negotiation and implementation of air service agreements between Member States and third countries,<sup>1074</sup> it can be expected that **future negotiations** on bilateral air service agreements with third states will be required to contain a clause allowing Member States to impose charges on fuel supplied and consumed in their territory during domestic or intra-Community flights.<sup>1075</sup> The current exemption would then be replaced or lose effect as the older rule in accordance with the adage of *lex posterior derogat legi priori*.

Another relevant provision in the “Bermuda II Agreements” is Article 10, which imposes a number of requirements for the collection of user charges, for instance airport fees. Under this provision,

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<sup>1068</sup> See the synopsis in Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 17.

<sup>1069</sup> WBGU, *Entgelte für die Nutzung globaler Gemeinschaftsgüter*, at 15.

<sup>1070</sup> On this precedence see Schwenk, *Handbuch des Luftverkehrsrechts*, at 516, as well as ECJ, Case 235/87 – *Matteucci*, ECR 1988 5606 annot. 20 *et seq.*; Brosthaus *et al.*, *Maßnahmen zur verursacherbezogenen Schadstoffreduzierung des zivilen Luftverkehrs*, at 113 *et seq.*, draw attention to the power of the Community to conclude treaties with third states as a possible way of simplifying the amendment of bilateral air service agreements between Member States and third states. Generally on the amendment procedure of air service agreements Cheng, *The Law of International Air Transport*, at 475 *et seq.*

<sup>1071</sup> See Cheng, *ibid.*, at 484 *et seq.*

<sup>1072</sup> On this issue, cf. *infra*, Part 3, B. II. 2.

<sup>1073</sup> ECJ, Case C-466/98 – *Open Skies*, ECR I-2002, at 9427 *et seq.*

<sup>1074</sup> Regulation (EC) No 847/2004 of the European Parliament and of the Council of April 29, 2004, on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries, OJ L 157 of April 30, 2004, at 7 *et seq.*

<sup>1075</sup> With current examples Meijers, *Tax Flight: An Investigation into the Origins and Developments of the Exemption from various kinds of Taxation of International Aviation*, at 19 *et seq.*; see also Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 51.

every party to the contract must limit itself to the assessment of “**just and reasonable**” charges distributed evenly among users.<sup>1076</sup> More specifically, parties must ensure that:

- user charges imposed on foreign airlines are **not higher** than those imposed on the on airlines operating similar air services (para. 2);
- user charges do **not exceed** the full cost to the charging authorities of providing appropriate airport and air navigation facilities and services, although environmental impacts may be taken into account (para. 3, sentences 1 and 2);
- user charges are **based** on sound economic principles and generally accepted accounting practices (para. 3, sentence 3).

In addition, parties shall encourage consultations and the exchange of information between charging authorities and affected airlines, with reasonable notice given of any proposals for changes in the collection of user charges.

In conclusion, bilateral air service agreements currently **rule out** kerosene taxes, as they not only exempt fuel carried on board aircraft, but also fuel supplied in the territory of contracting parties. Nonetheless, it can be argued on the basis of the wording in the “Bermuda II Agreement” that a mutual departure from this exemption is possible without leading to a breach of treaty, as long as

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<sup>1076</sup> “(1) Each Contracting Party shall use its best efforts to ensure that user charges imposed or permitted to be imposed by its competent charging authorities on the designated airlines of the other Contracting Party are just and reasonable. Such charges shall be considered just and reasonable if they are determined and imposed in accordance with the principles set forth in paragraphs (2) and (3) of this Article, and if they are equitably apportioned among categories of useCase

(2) Neither Contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on its own designated airlines operating similar international air services.

(3) User charges may reflect, but shall not exceed, the full cost to the competent charging authorities of providing appropriate airport and air navigation facilities and services, and may provide for a reasonable rate of return on assets, after depreciation. In the provision of facilities and services, the competent authorities shall have regard to such factors as efficiency, economy, environmental impact and safety of operation. User charges shall be based on sound economic principles and on the generally accepted accounting practices within the territory of the appropriate Contracting Party.

(4) Each Contracting Party shall encourage consultations between its competent charging authorities and airlines using the services and facilities, where practicable through the airlines' representative organizations. Reasonable notice should be given to users of any proposals for changes in user charges to enable them to express their views before changes are made.

(5) For the purposes of paragraph (4) of this Article, each Contracting Party shall use its best efforts to encourage the competent charging authorities and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article.”

foreign air service providers are not discriminated against relative to domestic providers. Future negotiations are likely to change this legal situation, however.

## II. European Law

### 1. Primary Community Law

As was shown in the preceding section on general requirements, user charges on a global environmental goods can be adopted on the basis of **different powers** contained in primary European Community law.<sup>1077</sup> The conclusions reached there also apply to user charges in the aviation sector. For instance, due to its strong links to the internal market, a fuel tax primarily aimed at the harmonization of excise taxes will generally have to be based on Article 93 ECT, therefore requiring a unanimous vote in the Council.<sup>1078</sup> Emissions- or distance-based user charges will commonly be focused on environmental objectives, requiring adoption on the basis of Article 175 ECT, specifically Article 175 (1) ECT, which allows for a majority vote.<sup>1079</sup> This also applies to ticket fees, since their regulatory purpose primarily falls within the ambit of environmental policy. As for the expenditure of revenues, earmarking them for environmental purposes is most likely to be in line with Community law.<sup>1080</sup>

The introduction of a user charge on air travel does not infringe on the freedom of services contained in Articles 49 *et seq.* ECT. Although the provision of air travel and the transportation of freight are commonly considered a **service**, they are not covered by the freedom of services as a result of Article 51 (1) ECT.<sup>1081</sup> According to the reference contained in Article 51 (1) ECT, the special provisions on Community **transport policy** in Articles 70 *et seq.* ECT apply. In particular, this includes the duty contained in Article 74 ECT to take into account the economic circumstances of carriers when adopting measures in respect of transport rates and conditions. **Appropriate provisions** on air transport adopted by the Council with a qualified majority under Article 80 (2) ECT also need to be observed.<sup>1082</sup> As opposed to shipping, no secondary provisions have been

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<sup>1077</sup> See *supra*, Part 2, C.I.

<sup>1078</sup> See *supra*, Part 2, C.I.3. a.)

<sup>1079</sup> See *supra*, Part 2, C.I.3. c.)

<sup>1080</sup> See *supra*, Part 2, C.I.3. d.)

<sup>1081</sup> According to Article 51 (1) EC Treaty, “[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.”

<sup>1082</sup> See Grabitz/Hilf-Randelzhofer/Forsthoff, Article 51, annot. 3, and Grabitz/Hilf-Frohnemeyer, Article 80, annot. 19, as well as *infra*, Section B. II. 2. a.)

adopted elaborating the general rules on freedom of services in the ECT.<sup>1083</sup> To the extent that the principles laid out in Articles 49 *et seq.* ECT apply to air transport, the considerations already discussed with a view to sea transport, notably that an infringement on the freedom of services would be justified by the legitimacy of its purpose and compelling reasons of public interest, again apply.<sup>1084</sup>

## 2. *Secondary Community Law*

### a.) Regulations on the Freedom of Services in Aviation

The entrance into force of the third liberalization package on January 1, 1993, concluded the liberalization of the air transport sector in Europe. One cornerstone of this process is Council Regulation (EEC) No. 2407/92 of July 23, 1992, on **licensing of air carriers**, which entitles air carriers located in a Member State to receive an operating license when they meet the requirements set out in this Regulation.<sup>1085</sup> Council Regulation (EEC) No. 2408/92 of July 23, 1992, on access for Community air carriers to intra-Community air routes,<sup>1086</sup> in turn, regulates access to the **common market for air services**, entitling Community air carriers to a permit issued by the respective Member States to exercise traffic rights on routes within the Community, again provided the requirements in this Regulation are observed.

The expiration of all remaining restrictions on cabotage rights<sup>1087</sup> by April 1997 in accordance with Articles 3 (2), (3) and (4) has helped achieve full freedom of services in the air transport sector.

These Regulations aim at ensuring **harmonized market access** for air carriers within the Community, although their scope is restricted to operating licenses and access to intra-Community air routes. User charges do not fall within this scope in a way affecting the **rights afforded to air carriers**, for instance the entitlement to an operating license or to a permit relating to air routes. This applies all the more since Article 8 (2) of Regulation (EEC) 2408/92 explicitly provides that “[t]he exercise of traffic rights shall be subject to published Community, national, regional or local operational rules relating to ... the protection of the environment.”

Another act of Community legislation requiring careful assessment in the context of user charges on air transport is Council Regulation (EEC) No. 2409/92 of July 23, 1992, on **fares and rates for air**

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<sup>1083</sup> On this issue, see *supra*, Part 3, A. II. 1. b.)

<sup>1084</sup> On this issue, see *supra*, Part 3, A. II. 1. d.)

<sup>1085</sup> See Articles 4 *et seq.* of Regulation (EEC) No. 2407/92, OJ L 240 of August 24, 1992, at 1 *et seq.*

<sup>1086</sup> OJ L 240 of August 24, 1992, at 8 *et seq.*

<sup>1087</sup> Cabotage refers to flights within a Member State.

**services.**<sup>1088</sup> This Regulation repeals Council Regulation (EEC) No. 2342/90 of July 24, 1990, on fares for scheduled air services.<sup>1089</sup> It governs criteria and procedures for the establishment of fares and rates on air services by air carriers for carriage wholly within the Community. Pursuant to its Articles 3 *et seq.*, the establishment of fares and rates on air services shall, as a matter of principle, “be set by free agreement between the parties to the contract of carriage”, with interference by Member States subject to a set of specified conditions. No provision within this Regulation prevents Member States from exerting **indirect** influence on prices by imposing a user charge on air travel, however, since air carriers would continue to set fares and rates by free agreement with customers, albeit with a view to the changed cost structure. Member State intervention against the adjusted prices would not be in the interest of participants in the scheme and inadmissible for other Member States due to Article 6 (1) lit. a) of the Regulation, as increases in fares and rates would be directly proportional to the risen costs of air carriers.

#### b) The Energy Tax Directive 2003/96/EC

For the first time, Council Directive 2003/96/EC of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity<sup>1090</sup> has created a **uniform legal framework** for **energy taxes** in the European Community. Its objectives include ensuring the proper functioning of the internal market and contributing to the achievement of environmental policy requirements and climate change commitments.<sup>1091</sup> Article 1 provides that Member States “shall impose taxation on energy products and electricity in accordance with this Directive.” As the preamble already affirms, however, “[c]ertain exemptions or reductions in the tax level may prove necessary” because of the lack of a stronger harmonisation at Community level or “because of the risks of a loss of international competitiveness.”<sup>1092</sup> Under the directive, **aircraft fuel** counts as kerosene with the CN code 2710 19 21 and is subject to the minimum levels of taxation set out in Annex I from January 1, 2004, onwards. The minimum rate for kerosene has been set at €302 per 1000 litres and, starting on January 1, 2010, at €330 per 1000 litres.

Pursuant to Article 14 (1) of the Directive, “Member States shall **exempt** ... from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse ... energy products supplied for use as fuel for the purpose of **air navigation** other than in private pleasure-flying.” “Private pleasure-flying” is limited to the use of an aircraft for other than commercial

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<sup>1088</sup> OJ L 240 of August 24, 1992, at 15 *et seq.*

<sup>1089</sup> OJ L 217 of August 11, 1990, at 1 *et seq.*

<sup>1090</sup> OJ L 283 of October 31, 2003, at 51 *et seq.*

<sup>1091</sup> See Recitals 2 through 7 of Directive 2003/96/EC.

<sup>1092</sup> Recital 28 of Directive 2003/96/EC.

purposes and in particular other than for the carriage of passengers or goods for consideration, thereby leaving the vast majority of flights to benefit from the tax exemption.

Article 14 (2) of the Directive, however, **allows** Member States to limit the scope of this exemption “to international and intra-Community transport.” Purely **domestic flights**, in other words, may be included in a kerosene taxation scheme. Due to the open wording adopted by the Directive, this scheme may also be extended to foreign aircraft. What remains unclear is merely whether such a tax would have to comply with the minimum levels set out in the Annex, or whether lower rates are admissible. With a view to the possibility of total exemption, an interpretation based on the object and purpose of this provision prompts the conclusion that lower tax rates must, *a fortiori*, be a valid option.<sup>1093</sup> A kerosene tax on domestic flights is consequently admissible, with no commitment to the minimum taxation levels set out in the Directive.

Aside from that, where a Member State has entered into a **bilateral agreement** with another Member State, Article 14 (2) of the Directive allows a waiver of the tax exemption. In other words, the conclusion or amendment of a bilateral agreement between two Member States – albeit only between Member States of the European Community – can revoke the foregoing tax exemption. As a result, an **intra-Community kerosene tax** would become admissible once all Member States adjusted their mutual bilateral air service agreements accordingly. In such cases, Member States may apply a level of taxation below the minimum levels set out in the Directive. Because the levels contained in Annex I are minimum levels, moreover, higher rates are equally admissible.

### III. National Law

German constitutional law imposes a number of more or less serious restrictions of the introduction of user charges on environmental goods, including airspace. These have already been addressed in detail in Part 2.<sup>1094</sup>

As regards legislative powers, it bears emphasizing again that measures other than taxes<sup>1095</sup> largely depend on the regulatory purposes pursued by the legislator.<sup>1096</sup> Measures seeking to protect the global climate may be adopted at the Federal level under the conditions set out in Article 72 (2) of the Basic Law; the pertinent competence is contained in **Article 74 (1) No. 24 of the Basic Law**, which authorizes the Federal legislator to pass legislation on air pollution control, including rules on protecting the atmosphere against negative impacts from pollutants such as greenhouse gases.

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<sup>1093</sup> For an expanded argument see Pache, *Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen*, at 59 *et seq.*

<sup>1094</sup> See *supra*, Part 2, D.I.1. and D.II.

<sup>1095</sup> On the legal bases for the adoption of taxation measures, see *supra*, Part 2, D.I.1.d).

<sup>1096</sup> Determination of the pertinent legislative competence in the Basic Law usually depends on the regulatory purpose. See, *inter alia*, Pieroth, in: Jarass and Pieroth, *GG*, Article 70 annot. 4 with further references.



Other than that, the Federal legislator has wide discretion in the area of air traffic by virtue of the exclusive competence on aviation it has been afforded with **Article 73 No. 6 of the Basic Law**. This competence extends to the entire aviation sector.<sup>1097</sup>

Against this backdrop, it can be concluded that the Federal legislator has a legislative competence for all aviation-related instruments discussed here, provided they are not designed as taxes. Should it desire to create a comprehensive airspace management system for reasons of climate policy, it can draw on the pollution control competence (Article 74 (1) No. 24 of the Basic Law), again in accordance with the restrictions laid down in Article 72 (2) of the Basic Law.

Below the level of constitutional law, attention must be given to the provisions of the mineral tax act (*Mineralölsteuergesetzes*, MinöStG), which exempts aircraft fuels from taxation (cf. Sec. 4 (1) No. 3 MinöStG). This exemption has its origin in Community rules on energy taxation and may only be revoked or amended at the domestic level to the extent that the respective rules of Community law (notably Article 14 (1) and (2) of Directive 2003/96/EC)<sup>1098</sup> as well as international law<sup>1099</sup> allow for such changes. From the viewpoint of German law, the required changes would be readily possible.

No further restrictions on the introduction of new levies resulting in environmental user charges on the aviation sector are apparent below the level of constitutional law.

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<sup>1097</sup> Cf. Pieroth, in: Jarass and Pieroth, *GG*. Article 73 annot. 14 with further references.

<sup>1098</sup> See *supra*, Part 3, B.II.2.

<sup>1099</sup> See *supra*, 3. Teil, B.I.

## Part 4      Recommendations for Action

The foregoing legal analysis has helped identify a series of requirements which need to be observed when introducing a user charge. The following recommendations for action again distinguish between individual models and – within a model – the scope of application, for instance whether the user charge will only be applied to domestic travel or a transboundary approach is chosen. In the process, mention will be made of any particularities relating to the respective environmental good, airspace and the High Seas.

### I.      User Charges Linked on Fuel Consumption (Kerosene or Diesel Taxes)

A fuel tax on **domestic flights** and **shipping within internal waters** is legally permissible. It should observed the following aspects:

- An introduction in Germany can occur by way of an **excise tax** based on Article 105 (2) and Article 106 (1) lit. 2 GG, thus falling within the competing legislative powers of the federal legislator. Pursuant to Article 106 (1) lit. 2 GG, the revenue from such a tax would accrue to the federation.
- **Earmarking** of revenues is legally admissible to the extent that the budget legislator retains some power to decide on the use of revenues; this rules out the designation of a special fund, for instance, which would result in classification as a special charge requiring expenditure to the benefit of those subject to the payment duty.
- **Proceeds** should not be used in a manner which only benefits certain undertakings or the production of certain goods so as to avoid a violation of subsidy and state aid rules in Community and world trade law.
- Given the likelihood of evasive action by **airlines and shipping companies** when faced with a domestic fuel tax, which would result in fuel being purchased abroad and thereby counteract the fiscal and ecological objectives of the user charge, **calculation** of the user charge could be based both on fuel supplied domestically and, for aircraft introducing fuel purchased abroad, the domestic consumption of fuel.<sup>1100</sup>
- Under the pertinent rules of Community law, Article 14 (2) of **Directive 2003/96/EC** allows Member States to limit the exemption for aircraft and shipping fuel “to international and intra-Community transport.” Linking the user charge to the **origin of the fuel** is ruled out by

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<sup>1100</sup> On this issue, see also the recommendations by *Pache*, Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen, 100 *et sqq.*

the prohibition of discrimination for products from other Member States contained in Article 90 (1) ECT.

If the fuel tax is to extend **beyond domestic flights** and **shipping within internal waters**, however, it is subject to the following requirements.

- Due to the provisions contained in several **Bilateral Air Service Agreements**, neither the consumption nor the supply of fuel for international flights can be subjected to a charge, including excise taxes. These Air Service Agreements would therefore have to be first amended between states intending to apply a user charge on international aviation.
- The requirement of amending existing agreements also extends to the Community level. Pursuant to Article 14 (2) of **Directive 2003/96/EC**, only Member States that have entered into a **bilateral agreement** with another Member State can waive the tax exemption for Community and international air travel.
- With regard to **shipping**, in turn, freedom of passage in the High Seas renders the flag state principle the only permissible starting point for the exercise of jurisdiction in the High Seas; in coastal waters, on the other hand, Article 26 of UNCLOS precludes the introduction of charges on the mere passage. Consequently, neither the passage of **foreign vessels** through territorial waters nor the use of international waters for navigational purposes can serve as a legal basis for a user charge. The only context in which a state may achieve the desired legal outcome of a user charge is with foreign vessels docked at a port of the imposing state. Flag states may of course subject **their own vessels** to a user charge both within and beyond territorial waters, although this would only permit for a very limited scope of the user charge and might place the domestic shipping industry at a significant disadvantage, thus being inexpedient.
- The autonomous introduction and administration of a user charge by the **European Community** would allow circumventing the legal constraints arising from the German constitution. If a fuel tax is thus introduced within the fiscal and budgetary powers of the European Community, its proceeds may be earmarked and assigned to a special fund in a manner which would be ruled out under German law. It could be based on both Article 71 (1) lit. d) ECT and Article 175 (1) ECT, in which case revenues have to be spent with a view to achieving the transport or environmental protection objectives of the respective parts. If the expenditure of proceeds should further objectives of development policy, it could be based on Article 179 (1) ECT, which also requires a qualified majority in the Council.
- Should the European Community introduce the fuel tax as a harmonised excise tax implemented by the Member States, however, it could draw on Article 93 ECT for a legislative power, requiring of unanimous vote in the Council.

## II. User Charges on Individual Trips (Ticket Fees)

User charges levied on individual trips are subject to different legal requirements. Unilateral introduction by Germany would give rise to the following recommendations for action:

- The user charge should be regarded as a federal expenditure tax (*Aufwandsteuer*) to ensure that both the legislative power and the entitlement to revenues remain with the federation. The ticket fee should not be designed in a manner where the duty to pay coincides with the conclusion of a purchase contract for the ticket, given that this could be understood as an indication of a transaction tax denying the federation all proceeds from such a tax. Instead, it would seem expedient to lengthen the user charge at the **beginning or the end** of the flight. Likewise, the expression “ticket fee” should be avoided; for, while the mere designation has no legal consequences, it might again evoke an unwanted association with a transaction tax. Designating it as an “air travel tax” or simply “flight tax” would appear more suited and better reflect its constitutional bearing. Other expressions are also conceivable, for instance “aviation tax”, “environmental aviation tax” or “aviation climate levy”.
- It would also seem recommendable to appoint the respective transport carrier as the **tax debtor** and reimburse taxes whenever available seats have remained verifiably empty during a given trip. Direct taxation of passengers, however, is unlikely to be practicable.
- For reasons of equal treatment and to ensure the effectiveness as a means of guiding human behaviour, a **flat rate** should be avoided when designing the user charge.
- Again, **earmarking** of proceeds is only permissible to the extent that the budget legislator is not altogether excluded from deciding on the application of funds. Otherwise, the user charge would be considered a special charge requiring expenditure to the benefit of those subject to the payment duty, thereby strongly restricting the scope of application for revenues.
- **Proceeds**, in turn, should again be applied in a manner which does not only benefit certain undertakings or the production of certain goods, as that could amount to a violation of subsidy and state aid rules under Community and world trade law

Additionally, a ticket charge imposed on international air travel needs to observe the following requirements:

- It must primarily aimed at **reducing greenhouse gas emissions** and clearly signal that it is not a general tax on aircraft fuel. It would appear advisable to include environmental properties of the aircraft in the calculation of tax rates (for instance the type of engine, fuel, operating temperatures, thrust, load, loading capacity as well as routing and length of trip) in order to avoid classification as the hidden kerosene tax. Calculation has to be based on each individual flight booking in order to prevent taxation of unused seating capacities.

- Emphasis on the environmental objectives of the user charge is also important with a view to Article 15 of the Chicago Convention, which prohibits charges imposed by any contracting state solely for “the right of transit over or entry into or exit from its territory of any aircraft” of another contracting State.
- Again, autonomous introduction and administration by the **European Community** could allow circumventing the constitutional constraints under German law. The introduction of a ticket charge within the fiscal and budgetary powers of the European Community would thus permit earmarking proceeds for a special fund. Potential legal bases are again Article 71 (1) lit. d) ECT, Article 175 (1) ECT and Article 179 (1) ECT. In each case, the application of funds has to occur within the scope of the legal basis.

### III. User Charges on Emissions (Emissions Charges)

Legal requirements arising for user charges levied in relation to the distance traveled or emissions discharged depend on the type and design of the charge. The following requirements can be derived from German law:

- The allocation of proceeds to a **fund** incurs classification as a special charge (*Sonderabgabe*), which is only permissible if revenues are applied towards the common interest of the group subject to the payment duty.<sup>1101</sup> In the context of an emissions charge, such application would be unfeasible in practice.
- Aside from the designation of a fund, a direct charge on emissions would be considered a **tax**. As such, however, the tax could not be classified under any of the tax categories currently permissible under the German constitution. Barring an amendment of the constitution, a federal emissions tax is currently not admissible under German law.
- Still, another (existing) **tax or fiscal charge** could be permissibly designed in such a manner as to be indirectly linked to emissions or contain emissions-related elements (for instance as a tax on flights or sea travel, or a tax on the ownership of aircraft and sea vessels).<sup>1102</sup>

The introduction of an emissions charge on **aviation** within the **Community** or at the **international level** would again allow circumventing the restrictive constitutional framework under German law. The same recommendations for action described with regards to ticket charges apply here. Considering a legal opinion submitted by the ICAO Legal Bureau on the issue of emissions-based charges on aviation,<sup>1103</sup> as well as the case-law of the European Court of Justice, which ruled that a charge based on emissions could only be considered a kerosene tax due to the direct and inseparable

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<sup>1101</sup> Cf. BVerfGE 55, 274 (274 *et seq.* and 305 *et seq.*, particularly 307 *et seq.*).

<sup>1102</sup> See above, Part 2, D. II. 2.

<sup>1103</sup> CAEP/5, report of Working Group 5.

connection between greenhouse gas emissions and fuel consumption,<sup>1104</sup> such an emissions charge should also be based on of the environmental properties of the aircraft and its operation, for instance the type of engine, fuel, operating temperatures, thrust, load, loading capacity are routing and length of journey.

#### IV. User Charges on the Use of Facilities (Airport- or Port Fees)

Imposing a fee on the use of domestic facilities and infrastructures is not feasible for the **aviation sector**, given that such fees have to correspond to a benefit accorded by the state; a vast majority of facilities used during air traffic – be it airports or air traffic control facilities – are privately owned, however.

With regard to user charges levied against **shipping activities**, a somewhat different assessment applies. Under the law of the sea, neither the passage of foreign ships through **coastal waters** nor the use of **international waters** for navigational purposes can serve as the basis for the introduction of such fees. The law of the sea does not contain any rules preventing a port state from exacting a charge on ships entering its **territorial waters** or docking at one of its **ports** as compensation for use of the ocean as such, rather than the ports.

Due to the prohibition against discrimination, however, the only circumstance in which a state can assess a user charge against a foreign vessel that has entered its waters would be the act of docking at one of its **ports**. Practical considerations rule out linking the user charge to the registration of ships. The fee would be charged from owners of docking vessels, who would pay the fee to the respective port authority as part of the existing charging systems.

The act of docking at a port can be supplemented by other considerations when calculating the port fee, including the freight carried, the number of passengers or the tonnage of the vessel. Due to the Community exemption for shipping fuel from mineral oil taxation, any design correlating these fees to the fuel consumption are ruled out, and even a calculation directly based on emissions or the distance traveled raises legal concerns. It might be legally permissible to stagger user charges in accordance with a flat set of distances, thereby overriding the link to fuel consumption.

#### V. User Charges in Return for Services within Environmental Resource Management Systems

A particularly intriguing option would be the introduction of user charges as a constituent element of a comprehensive system for the management of environmental resources. In practice, such a

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<sup>1104</sup> ECJ, Case C-346/97.

system would appear particularly suited for purposes of climate protection, notably to **manage greenhouse gas emissions**. The legislator could draw attention to its obligations entered under international law and maintain its desired role as a leader in international climate policy.

The instrumental advantage of such a system would lie in the fact that it allows for identification of specific management objectives, the achievement of which could be ensured through a coherent set of tools.

Within such a system, it would be possible to charge particularly detrimental behaviour (such as **aircraft** or **air travel**) to induce new behaviour and attitudes. Under constitutional law, such a charge would constitute a fee imposed in return for services, given that it would serve as compensation for an individualised benefit granted by the state: the **opportunity of using the environmental space** covered by the management system. This possibility provides a compelling argument for managing the global environment.

Creation of such a comprehensive management system would appear particularly suited for the area of climate protection. In order to secure ample leeway for such a system of fees, it would be advisable to bring existing legal instruments pertaining to climate change together under a type of **umbrella act** and to establish an overall plan for the reduction of greenhouse gas emissions. Independent instruments such as emissions trading (which already comprises elements of a resource management system, albeit under exclusion of several important sectors including aviation), the Renewable Energy Act, the Energy Savings Act and mineral oil taxes could all be accommodated within this system. Moreover, it would provide a useful framework for the targeted adoption of additional measures in currently unregulated areas (“*lacunae*”) – for instance the introduction of (*quid-pro-quo*) environmental user charges.

Under international law, the legal admissibility of such a system might appear doubtful with a view to Article 15 (2) of the Chicago Convention. Such concerns are ultimately misplaced, however, given that Article 15 (2) of the Chicago Convention merely prohibits the imposition of charges solely for “the right of transit over or entry into or exit from its territory of any aircraft.” Accordingly, this prohibition does not apply to the taxation of benefits afforded within the foregoing management system.

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