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The Reform of Directive 1999/62/EC

EU Competences, Subsidiarity, Proportionality

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## Executive Summary

1. On 31 May 2017, the European Commission presented a proposal to reform Directive 1999/62/EC on the charging of heavy duty vehicles for the use of certain infrastructures. The proposal aims to extend and tighten the European Union regulation of tolls and user charges (i.e. time-based charges) for road infrastructure. The authors of the draft want to regulate light duty vehicles (including passenger cars). In future, the entire European road network would be subject to European regulation.

2. The draft aims at the phasing out of user charge (i.e. time-based charge) systems. However, there is no obligation to convert to toll systems. Member States will be provided with a content framework for the design of their toll systems in relation to the burden on heavy goods vehicles. Requirements are formulated for charging infrastructure charges, external costs charges, and congestion charges. Member States are granted the right to impose surcharges on infrastructure charges under the condition that the revenue generated is used to finance certain infrastructure projects.

3. President *Juncker* has expressed the political will to focus his presidency on areas where European regulation creates genuine added value for citizens. The regulation of toll and user charge systems for all vehicles on all roads in the European Union is arguably not part of such an agenda. President *Juncker* also promised stricter compliance with the principles of subsidiarity and proportionality. It is not clear that the authors of the draft are guided by this approach and ask critically to what extent they create genuine European added value.

4. Direct or indirect discrimination against foreign road users in connection with the levying of tolls and user charges is already prohibited (Article 18 in conjunction with Article 20 TFEU). It is thus not necessary to extend the scope of application of the current directive.

5. It should be remembered that just a few years ago, the EU Commission stated that it was not necessary to regulate road tolls on light private vehicles: “In accordance with the principle of subsidiarity, the Commission is not considering putting forward any proposals for legislation in this respect.”

6. The draft amendment is based on Article 91 (1) TFEU. This competence allows for the regulation of Member State toll and user charge (i.e. time-based charge) systems. On the other hand, a provision which allows Member States to levy charges on the use of their infrastructure only if they use the revenue for certain new infrastructure projects does not fall within the scope of transport policy in accordance with Article 91 TFEU. It is also not of a fiscal nature (Article 113 TFEU). It can only be based on Art. 352 TFEU.

7. The European Court of Justice takes the view that an act of secondary law must be based on the legal basis that represents the main focus of its content.

Accordingly, the proposal to amend Directive 1999/62/EC may be based on Article 91 TFEU even if it contains provisions which, per se, could only be adopted on the basis of Article 352 TFEU. There is a “competence creep”, i.e. an intransparent appropriation of competences not explicitly attributed to the EU by the Treaties, that deserves political attention. Such a “competence creep” raises Member State constitutional law questions.

8. The draft amendment aims at overcoming the fundamental distinction between commercial and private transport, both on the level of semantics and substance. In particular, it is using the term “light duty vehicles” for private passenger cars in a rather misleading way. This distinction, however, is central to the EU's structure of competences.

9. The amendment does not comply with the requirements of the principle of subsidiarity as set out in Article 5 (3) of the TEU. The authors of the proposal deal with the requirements of this principle in a superficial manner, indicating a sense of indifference. Article 5 (3) of the TEU establishes two tests to be applied cumulatively. According to Article 5 (3) TEU, it is decisive whether the Member States can act sufficiently on their own. It is not their political will to act that is considered decisive under Article 5 (3) of the TEU (“inability to act, not unwillingness to act”).

10. A transnational problem to which the proposed amendment responds (Test I) can only be identified in so far as the levying of tolls or user charges on transport services that are subject to transnational competition is concerned. As far as private passenger car traffic is at issue, sufficient protection is established by the protection against discrimination in accordance with Art. 18 in conjunction with Art. 20 TFEU. Objectives and aims of the European regulator, which could not be sufficiently pursued by the Member States alone, do not exist. The intention to get the Member States to switch from charging to tolling systems does not have a truly European dimension, especially since the Member States can decide freely not to impose financial burdens at all.

11. The Member States are capable of going their own way toward the implementation of the 'polluter pays' principle with regard to private cars. It is not conclusive to assume that there is no need for action by Member States, but on the other hand to aim at the harmonization possible action. Moreover, the principles of 'the polluter pays' could only justify EU harmonization if the EU legislator ensured that the charges levied are actually used to compensate for the costs incurred. However, there is no such provision in the amendment. Additionally, the regulation of private passenger car traffic cannot be justified in light of the aim to nudge road infrastructure users by imposing financial burdens: The decision in which direction to direct road users depends on the concrete circumstances of the individual case and the specific circumstances of a concrete situation. There are often conflicting goals. It is clearly not a problem to be solved on the supranational level. Finally, no transnational dimension exists in the area of financing of new transport infrastructure projects.

12. Nor do the proposed amendments create any genuine European added value as far as the regulation of non-competitive transport is concerned (Test II). A regime which obliges Member States to abolish user charge (i.e. time-based charge) systems without requiring the introduction of toll systems amounts to regulation for the sake of regulation. European added value cannot be achieved by the standardization of all vehicles and all roads (outside the competitive sector) because uniformity is not an added value per se. In areas where road users are not in a competitive market, no European added value or efficiency gain will result from the substantial unification of Member State regulation on the pricing of the use of transport infrastructure.

13. With regard to the aim of combating the adverse effects of transport on the environment and public health, direct regulation would always be the first-best solution. The regulation of emissions emitted by motor vehicles is more targeted and effective than the authorization of Member States to maintain toll and user charge (i.e. time-based charge) systems that take account of external costs. Even the “nudging” of road users through fuel taxation is more targeted and effective than the regulation of a toll or user charge system.

14. No additional European benefit would be achieved by the supranational harmonization of Member State road infrastructure investment decisions. The political aim to direct Member State infrastructure charges into the trans-European transport network does not justify an intervention on the revenue side of Member State infrastructure financing.

15. The proposed amendments also do not comply with the principle of proportionality as set out in Article 5 (4) of the TEU. It is not necessary to adopt an act with mandatory regulatory effect (outside the area in which transport is in competition), because soft forms of EU regulation are also sufficient, for example through the use of guidelines. In terms of content, the regulatory approach of the drafters of the amendment is unnecessary because it suffices to adopt “best practices” standards. Furthermore, it is not necessary because the regulation of emission standards, noise pollution protection standards, and the nudging of the behavior of road users via energy taxes is much more effective and less burdensome.

16. The requirements of the proposed amendment are aimed at measures taken by Member States that have a negative impact on fundamental rights. However, the provisions of the draft amendment do not in themselves interfere with EU fundamental rights.

## Table of Content

<b>I. The Reform of Directive 1999/62/EC on charging of heavy goods vehicles for the use of certain infrastructures</b>	<b>7</b>
1. Scope of Application <i>ratione personae</i> and <i>ratione materiae</i>	7
2. Objectives of the planned amendment	8
3. Legal obligations	9
4. Research Questions	11
<b>II. Background</b>	<b>13</b>
1. President Juncker: Need for better regulation	13
2. The Nature of the EU Treaty Framework - Limited Space for EU Action	14
3. The Draft Directive amending Directive 1999/62/EC: Better Lawmaking?	17
a) The Shifting Objectives of European transport policy	17
b) Pricing of the use of infrastructure: In principle a Question of Member States Policy	18
<b>III. Legislative Powers of the EU</b>	<b>20</b>
1. Overview of EU Competences in the Field of Transport Policy	20
2. Scope of EU Powers with regard to the Regulation of Member States' Financial Burdens on Road Users	22
a) EU Regulation of Financial Burdens relating to Passenger Cars	22
b) The Regulation of Financial Burdens on Road Users	22
aa) Delimitation of Article 91 (1) TFEU and Other Competence Provisions	23
(1) General Typology of Financial Burdens	23
(2) EU Regulation of Tolls and User Charges for the Use of Transport Infrastructure: Article 91 (1) TFEU	24
(3) Regulation of Indirect Taxation of Road Users: Art. 113 TFEU	25
(4) Regulation of Member State transport infrastructure financing: Article 352 TFEU	26
(5) Interim conclusion	27
bb) Relevance of the Actual Regulatory Design	27
3. Wide Regulatory Scope of Action	28
4. Application of these standards to the draft amending Directive 1999/62/EC	28
a) Transport policy measures in accordance with Article 91 (1) TFEU	28
b) The Regulation of Member State infrastructure financing pursuant to Article 352 TFEU	30
c) Need for parallel application of Art. 91 (1) and Art. 352 TFEU?	31
5. Conclusions	33
<b>IV. Subsidiarity</b>	<b>34</b>
1. Normative Content of Art. 5 (3) TEU	34
2. Problematic Discussion of the Subsidiarity Principle in the Amendment Proposal	35
3. Reference Point of the Subsidiarity Review: Objectives of the Proposed Action	37

<b>4. Sufficient Capacity of the Member States to act? .....</b>	<b>38</b>
a) The need for a Transnational Dimension of a Problem.....	38
b) Inability to act, not unwillingness to act.....	39
c) Lack of capacity to act cannot be justified by the fact that the Member States will not choose a single solution.....	39
d) The Proposed Amendment to Directive 1999/62/EC: Sufficient Transnationality of the problem? .....	40
aa) Protection against discrimination.....	40
bb) Ensuring fair Conditions of Competition in European Transport Markets .....	40
cc) Reasonable Pricing of the Use of Transport Infrastructure.....	42
dd) Nudging the Behavior of Road Infrastructure Users.....	43
ee) Regulatory Framework for Member State Infrastructure Financing..	44
ff) Improvement of Road Infrastructure .....	45
e) Interim result .....	45
<b>5. Sufficient European Added Value? .....</b>	<b>46</b>
a) The Need for Sufficient European Added Value (Efficiency Comparison).....	46
b) The Planned Amendment of Directive 1999/62/EC: Sufficient European Added Value through Mandatory Regulation of Member States Tolls and User Charge Systems? .....	47
aa) Protection against Discrimination .....	47
bb) Ensuring Fair Conditions of Competition .....	47
cc) Reasonable Pricing of the Use of Transport Infrastructure.....	48
dd) Ecological and Health Policy Objectives .....	49
ee) Regulatory Framework for Member State Infrastructure Financing..	50
ff) Improvement of Transport Infrastructure .....	51
c) Interim result.....	51
<b>6. Subsidiarity Deficiencies: Political Action or Judicial Protection? ...</b>	<b>52</b>
<b>7. Results of the Subsidiarity Review .....</b>	<b>52</b>
<b>V. Proportionality.....</b>	<b>53</b>
<b>1. Normative Content of the Proportionality Principle .....</b>	<b>53</b>
<b>2. Insufficient Explanation in the Amendment Proposal.....</b>	<b>54</b>
<b>3. Reference Point of the Proportionality Assessment: Objectives of the Proposed Legislative Action .....</b>	<b>55</b>
<b>4. Proportionality of the Chosen Instrument.....</b>	<b>55</b>
<b>5. Proportionality of Substantive Obligations.....</b>	<b>56</b>
<b>6. Sufficient Means: Better Coordination of the various Member State Systems .....</b>	<b>58</b>
<b>7. Results of the Proportionality Review .....</b>	<b>59</b>
<b>VI. Fundamental Rights.....</b>	<b>60</b>

## **I. The Reform of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures**

The scope of application of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures<sup>1</sup> is limited, in accordance with Article 1, Art. 2 and Art. 7 (1), to vehicles intended exclusively for the carriage of goods by road. Territorially, its scope of application is limited to the trans-European road network. The trans-European road network is defined in the maps in Annex I, Section 2 of Decision 661/2010/EC. The European Commission plans to reform Directive 1999/62/EC. It published an amendment proposal on 31 May 2017.<sup>2</sup> The proposal is based on the Treaty on the Functioning of the European Union (TFEU), in particular Article 91 (1) TFEU. It provides for the following changes:

### 1. Scope of Application *ratione personae* and *ratione materiae*

- **Vehicles covered:** The provisions of the current "Eurovignette" Directive on tolls and user charges apply to the circulation of vehicles with a gross vehicle weight of at least 3.5 tons which are intended or used exclusively for the carriage of goods by road (Article 1 (1), Article 2 (d) of Directive 1999/62/EC). The Directive was initially mandatory only for vehicles with a gross vehicle weight of at least 12 tons (Art. 7 para. 2 (a) RL). Since 2012 it applies to all vehicles with a gross weight of at least 3.5 tons (Art. 7 para. 2 (b) RL). The planned reform aims to include all vehicles in the scope of the Directive. According to Art. 1 (1)(b) and Art. 2 No. 15 of the draft directive, all vehicles with at least four wheels intended or used for the carriage of passengers or goods by road are to be covered. According to Art. 2 No. 16-22 of the draft directive, the concept of the vehicle is then divided into different subclasses.

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<sup>1</sup> The directive is usually abbreviated to "Eurovignette" directive.

<sup>2</sup> COM(2017) 275 final.

- **Infrastructure covered:** Directive 1999/62/EC so far only covers the trans-European road network (Article 2 (a), Article 7 (1) of Directive 1999/62/EC). On other roads only a prohibition of discrimination applies (Art. 7 para. 1 sentence 2 Directive 1999/62/EC). In contrast, the draft amendment of the directive extends to all roads in the Member States of the European Union (Article 7 (2) of the draft directive). However, there is no definition of the term (cf. Art. 2 of the draft directive).
- **Substantive content:** Currently Directive 1999/62/EC covers - in this context - tolls, user charges, infrastructure charges and fees for external costs (Art. 1 Para. 1, Art. 2 (b), (c), (c), Art. 7, Art. 7b, Art. 7c Directive 1999/62/EC). The draft amendment of the directive extends the substantive reach. In addition to the above-mentioned fees (Art. 2 No. 6, No. 7, No. 8, No. 14 of the draft Directive), the amendment also covers "congestion charges" (Art. 2 No. 10 of the draft Directive). The possibility of levying infrastructure charges (currently Art. 7b Directive 1999/62/EC) and adding surcharges thereon (currently Art. 7f Directive 1999/62/EC) will be significantly extended (Art. 7f of the draft Directive).

## 2. Objectives of the planned amendment

- **Objectives of the Union legislature:** The current Directive 1999/62/EC aims at eliminating distortions of competition between transport operators from the Member States (foundation recital 1, first sentence). At the same time, the EU legislature currently aims at the "introduction of fair mechanisms for charging fees from transport companies" (recital 1, sentence 2). In the operational part, the Directive seeks to establish an appropriate relationship between the infrastructure costs incurred and the tolls or user charges levied. The purpose of the draft amendment is different. The authors are concerned with achieving the objectives set out in



the White Paper of 28 March 2011.<sup>3</sup> In recital 1 of the draft amendment, the target horizon is described as follows: Enforcement of the polluter-pays principle ("the polluter pays") and the user principle ("the user pays"), generating revenue from the use of public transport infrastructure and securing financing for future transport investments. The operative part of the draft directive is therefore no longer primarily concerned with the prevention of direct and indirect discrimination in the European transport area, but with the establishment of a regulatory framework comprising a multi-layered teleological programme (revenue generation, combating congestion, combating the negative effects of transport on the environment and society). The goal of equal treatment of the fair competition is pursued within this overarching target horizon.

### 3. Legal obligations

The draft amending directive 1999/62/EC consists of two main pillars – the provisions on user charges and the provisions on tolls.

With regard to **user charges**, the following is of importance:

- **Obligation to abolish user charges:** The draft amending directive 1999/62/EC provides that the EU Member States will ultimately be obliged to pay user charges for their road network. According to Article 7 (6) of the draft directive, Member States may no longer introduce user charges for heavy duty vehicles as of 1 January 2018. Existing user charges may be maintained until 31 December 2023. From the date of entry into force of the proposed Directive, Member States will no longer be allowed to introduce user charges for light duty vehicles (including passenger cars). Existing user charges introduced before that date may

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<sup>3</sup> European Commission, White Paper „Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system“, 28 March 2011, COM(2011) 144 final.

be maintained until 31 December 2027. According to Art. 7ga of the draft, Member States are obliged to vary tolls and certain user charges according to the CO<sub>2</sub> and pollutant emissions of the light duty vehicles (including passenger cars) from 1 January 2022 onward.

- **Formulation of requirements for the amount of user charges:** The draft amending directive 1999/62/EC specifies in detail how the user charges must be structured in terms of content (Art. 7a para. 2, para. 3 of the draft directive). The proposal does not regulate the amount of user charges levied on light duty vehicles (including passenger cars).

With regard to tolls, the following stipulations are of relevance:

- **No obligation to introduce tolls:** The draft amending directive 1999/62/EC allows Member States to decide whether to make the use of their road network subject to toll payments or not. The proposal does not regulate the amount of tolls on light duty vehicles (including passenger cars). As to heavy duty vehicles, the draft does provide for a framework.
- **Regulation of infrastructure charges:** The draft amending directive 1999/62/EC updates the existing regulations on "infrastructure charges". As before, the term "infrastructure charge" is used to describe a "charge levied for the purpose of recovering the construction, the maintenance, the operation and the development costs related to infrastructure" (Art. 2 No. 7 of the draft directive). Under current law, only in "exceptional cases" may a Member State supplement the infrastructure charge levied on heavy duty vehicles on sections of road affected by acute congestion or with significant environmental damage by adding mark-ups to the infrastructure charge for "mountain roads", provided that the amount is invested in the construction of priority projects of European interest.<sup>4</sup> The draft amendment will permit the general imposition of such surcharges on heavy duty vehicles as long as the reinvestment conditions formulat-

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<sup>4</sup> Annex III of Decision No 661/2010/EU of the European Parliament and the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ 2010 L 204/1).

ed in Article 7f of the draft directive are fulfilled. In contrast to the framework for heavy duty vehicles, no specifications are made for light duty vehicles (including passenger cars) with regard to the amount of an infrastructure fee.

- **Regulation on fees for external costs:** The draft amending directive 1999/62/EC grants Member States the right to charge external costs (Article 7c para. 1 subpara. 1 of the draft Directive). More detailed provisions are made for the levying of fees on heavy duty vehicles (Art. 7c para. 1 subpara. 2, para. 2 et seq. of the draft directive). The draft defines the concept of the "external cost charge" in Art. 2 No. 8 of the draft directive. As of 1 January 2021, it will be obligatory to charge external costs in certain sections of the road network if a Member State levies tolls (Art. 7c (5) of the draft directive). The Member States will remain free to choose the height the underlying basic tolls and user charges for light duty vehicles (including passenger cars). No external cost charges are mandated. The Member States will have to impose higher tolls and user charges (according to the %-values in the annex) for light duty vehicles (including passenger cars) that emit more.
- **Regulation on congestion charges:** The draft sets out the requirements under which Member States may introduce a congestion charge on congestion sensitive sections of their road network (Art. 7da of the draft directive). The draft stipulates that the congestion charge must correspond to the costs "imposed by a vehicle on other road users, and indirectly on society" (Art. 7da para. 4 of the draft directive).

#### 4. Research Questions

The proposal for amendment therefore aims at a considerable broadening and deepening of the regulatory reach of Directive 1999/62/EC, thereby encroaching on Member States' competences and policy choices. The following considerations are intended to clarify whether the regulatory approach adopted by the drafters of the amended directive can be supported by Article 91 (1) of the

TFEU (hereinafter III), whether it is in compliance with the principle of subsidiarity (hereinafter IV), whether the requirements of the principle of proportionality are met (hereinafter V), and whether fundamental rights are sufficiently respected (hereinafter VI). First of all, the background will be further analyzed (hereinafter II.).

## **II. Background**

### 1. President *Juncker*: Need for Better Regulation

The European Union is in troubled waters. Populist movements question the value and progress of European integration. One of the most important Member States has decided, on the basis of a referendum, to turn its back on the European Union. The economic consequences of the financial and sovereign debt crisis have still not been overcome. Many citizens feel that, on the one hand, the EU does not deliver what they expect from a supranational association, while on the other it interferes in areas of life that should be left to the regulation of the Member States. President *Juncker* has therefore defined ten areas in his guidelines, which are intended to give his presidency a clear direction in terms of content – areas, in which the EU Commission expects to see real added value from European actions.<sup>5</sup> This does not include the definition of specifications for road use. The decision how Member States want to finance their infrastructure costs is a decision that is closely linked to fundamental public finance issues, questions of tax system design, and social policy. A pan-European supranational regulation of these issues has no genuine European added value. Even a selective intervention to regulate individual questions does not have any added value, as will be shown in the course of this study. The attempt to gradually move the decision on Member State financing of infrastructure to supranational level is a good example of how the European political process is losing focus on the essentials. The EU can limit itself to ensuring protection against discrimination and ensuring efficient and fair competition for road users who operate in competition.

The alienation experienced by many citizens when looking at the European Union has prompted the EU Commission to develop a review program to imple-

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<sup>5</sup> European Commission, Guidelines of 14 June 2014.

ment better regulation ("ReFIT"). The EU Commission now recognizes the problematic dimension of its legislative approach at an abstract level:

„The European Union has frequently been criticised – often rightly – for producing excessive and badly written regulation and for meddling in the lives of citizens or businesses with too many and too detailed rules. Reports abound, whether founded or not, of cases of misguided regulation or rules that apparently micromanage aspects of daily economic or social life. At the same time, citizens' expectations are that Europe should focus more on providing effective solutions to the big challenges – jobs and growth, investment, security, migratory flows, and the digital revolution, to name but a few.”<sup>6</sup>

The aim of the REFIT programme is to develop an agenda for better regulation of the Commission. EU legislation should bring real benefits to citizens, businesses, and other stakeholders in society. EU legislation should be simple and comprehensible and should not involve red tape and unnecessary costs. In November 2017, the President of the European Commission set up a "task force" with the mandate to develop standards for the EU to take better account of the principles of subsidiarity and proportionality, both in allocating and exercising competences.<sup>7</sup> The President of the European Commission's assessment that the requirements of the subsidiarity principle and the principle of proportionality must be constantly monitored and therefore strengthened in the legislative process has been widely welcomed.

## 2. The Nature of the EU Treaty framework - Limited Space for EU Action

An essential step towards subsidiarity and proportionality in the EU could be made by accepting the limited target horizon provided for by the EU treaties. EU institutions are not completely free in defining their political agenda and their policy objectives. The EU is not a state that can deal with every problem be-

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<sup>6</sup> European Commission, Communication „Better Regulation: Delivering better results for a stronger Union, 14.9.2016, COM(2016) 615 final, p. 1.

<sup>7</sup> President of the European Commission, Decision of 14.11.2017, C(2017)7810, [https://ec.europa.eu/info/sites/info/files/2017-c-7810-president-decision\\_de.pdf](https://ec.europa.eu/info/sites/info/files/2017-c-7810-president-decision_de.pdf).

cause of its omnibus competence. The magnitude of a challenge does not by itself justify European action. The idealizing exaggeration of the political goals pursued by the EU institutions seems to open up space and opportunity for action, but will, at the same time, lead to alienation. Just to give an example: When the EU speaks of "justice" in recital 1 of Directive 1999/62/EC, this will, in view of the diversity of different concepts of justice in a modern and pluralistic world, necessarily lead to questions. If the draftspersons of the draft amendment to Directive 1999/62/EC designate as one of the essential objectives the objective of "revenue generation", they choose an approach that is irrelevant under Article 91 of the TFEU: EU transport policy does not aim to strengthen the fiscal situation of the EU Member States. This is true even if it is assumed that the EU Member States' investments in their road networks are currently insufficient. The argument of wanting to pursue transport policy to strengthen the revenue situation in the Member States does not properly reflect the Treaty situation and therefore cannot play a role in the application of the principle of subsidiarity and proportionality.

An essential step towards better and proportionate regulation would also be taken if the drafters of a legislative were taking subsidiarity seriously. It is not sufficient attempting to demonstrate compliance with the principle of subsidiarity and proportionality by postulating the need for a unified European approach and a harmonized regulatory framework and then to conclude that this unification can only be achieved by the EU law making authorities ("sufficiently" and "better"). This approach can be found in the draft amendment to Directive 1999/62/EC, which does not address the issue of whether Member States' room for maneuver and regulatory diversity do not "adequately" serve the EU's transport policy objectives. This also means that the question of whether protection against discrimination would constitute a sufficient regulation commensurate with the requirements of the principle of proportionality is not dealt with in the first place.

Better regulation means asking critically in which areas the EU can achieve genuine added value that can justify the constraints on Member States' decision-making autonomy associated with any harmonization measure. The willingness to do good alone does not generate such added value. Art. 5 TEU does not justify simply because the Member States do not react adequately or (allegedly) suboptimal in the face of a political problem.

Better regulation can only be discussed if we keep an eye on the rules and regulations that can be taken directly from the TFEU. Accordingly, in designing their transport policy (including the design of toll and user charge (i.e. time-based charge) systems), Member States must respect a non-discrimination principle which prohibits the direct or indirect discrimination of foreign road users. This prohibition of discrimination already arises from Article 92 TFEU, as far as older measures are concerned, but more importantly from Article 18 in conjunction with Article 20 TFEU. The imposition of a fee on foreign road users is within the scope of the EU Treaties. Art. 18 of the TFEU does not provide for exceptional reasons justifying a direct discrimination of foreign road users. While indirect discriminations could in theory be justified, no legitimate reason exists in the context of road usage.<sup>8</sup>

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<sup>8</sup> See European Commission, Communication on the application of national road infrastructure charges levied on light private vehicles, 14 May 2012, COM(2012) 199, p. 5: „In accordance with ECJ case-law, Article 18 of the Treaty also prohibits unequal treatment which is not explicitly tied to nationality but which, by the application of other criteria of differentiation, leads in fact to the same result (indirect discrimination on grounds of nationality). Since the Treaty does not contain any special provisions concerning private transport, any vignette system for light private vehicles should accordingly be assessed in the light of Article 18 of the Treaty. “



### 3. The draft Directive amending Directive 1999/62/EC: Better lawmaking?

#### *a) The Shifting Objectives of European transport policy*

The draft amendment of 31 May 2017 must be read in the light of the efforts of the EU institutions to change the aims and means the EU's transport policy. In the first decades of integration, the EU institutions were primarily concerned with promoting the objective of opening up markets and creating competition. For some years now, they have been increasingly pursuing the goal of combating forms of market failure.<sup>9</sup> In principle, this broadening of perspective is to be welcomed. The EU institutions cannot, in fact, be content to work towards opening up the market without ensuring that fair competition is maintained, in which the participants bear the external costs they incur. However, in view of the fact that the EU and the Member States share competences in the field of transport policy (Article 4 (2)(g) TFEU), and in view of the principle of subsidiarity and proportionality, this change in the EU's transport policy raises even more concerns the more it extends to areas in which there is no European dimension, but above all no competition in the European regulatory space. This applies in particular to the traffic participation of private individuals. The legitimacy problems encountered in EU policy are clearly evident in the attempt to control the (para-)fiscal burden on road users in areas that have no European dimension.

It is striking to note in this context that the meaning of the wording "the user pays" has changed in the language of the EU institutions. While initially the priority was to protect users of transport infrastructure from excessive burdens (freedom-protecting dimension), the term is nowadays mainly used to justify burdens.<sup>10</sup> In view of the fact that the EU institutions have no influence on the

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<sup>9</sup> Maxian Rusche, in: Grabitz/Hilf/Nettesheim (Hrsg.), *Das Recht der Europäischen Union, Commentary Article by Article*, 2017, Art. 90 TFEU, para. 11.

<sup>10</sup> See, e.g., CJEU, 21. March 2002, C-451/99, *Cura Anlagen*, ECR 2002 I-3193: In a case involving the fundamental freedom to provide services, the CJEU held that the taxing of foreign vehicles by means of a consumption tax is only per-

way in which the Member States use the revenue generated by the fiscal burdens they are trying to impose on EU citizens, efforts by the EU legislator to induce Member States to introduce new financial levies appear to be difficult to account for. Users of the transport infrastructure are already paying more than is spent on construction, maintenance and expansion of transport infrastructure. It is simply the hope of the EU institutions that the additional revenue generated by amending Directive 1999/62/EC will flow into investment in the transport sector.

*b) Pricing of the use of infrastructure: In principle a question of Member States Policy*

In principle, it is right that EU policies should be up to date and respond to changing challenges. However, changing objectives and policy priorities must be pursued within the framework of the competence allocation of EU law. It has already been said that the EU is not a state that can deal with every problem and address every individual issue according to political criteria. The regulatory options of the EU legislator are limited where there are no genuine European problems. The claim, occasionally maintained by EU institutions, that good political will alone already creates legitimacy for action does not correspond to Article 5 TEU.

The question as to whether and how users of the transport infrastructure should be charged for the costs incurred is an issue, which, in principle, falls within the competence of the Member States. At this level, it is necessary to discuss and decide how the resulting costs are to be assessed (tax system / toll system / user charge system) and to what extent the inclusion of external costs is appropriate. In this context, account shall be taken of the historical, geographical, social and other framework conditions of a Member State. Given the heterogeneity of the 28 Member States, the EU is not in a position to do so. The EU can

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missible if the amount is proportionate to the period of the registration of the car.

only intervene where there is a genuinely European problem dimension. In the following, it is shown that such a European dimension is lacking with regard to the imposition of financial burdens on road users who do not operate in competition. It should be kept in mind that the attempt to achieve political objectives beyond revenue generation with toll or user charge models is always only a "second-best" option. The fight against vehicle emissions, which is motivated by climate and health policy considerations, should primarily aim at the technical regulation of permissible emissions by vehicles in the context of the type approval of new vehicles. As far as combating the environmental damage caused by the use of fossil fuels is concerned, the protection provided for in the Directive on the taxation of energy products (Directive 2003/96/EC) is relevant. Furthermore, the Energy Taxation Directive sets out minimum rates for the fuel taxes. The fight against noise pollution, which is motivated by health policy considerations, must be based on the establishment of noise limits. Further examples could be adduced.

### **III. Legislative Powers of the EU**

#### 1. Overview of EU Competences in the Field of Transport Policy

Pursuant to Art. 5 (1) sentence 1, (2) TEU, Art. 4 (1) TEU, the European Union may act (in accordance with the principle of limited conferral of competences) only where it has competence. The adoption of an act for which the EU has no competence is just as inadmissible as the choice of a wrong legal basis. The planned amendment of Directive 1999/62/EC (and the widening and consolidation of the regulatory regime for the levying of tolls and user charges contained therein) can therefore only be adopted if the legislative competence basis chosen by the authors covers the content of the amendment. The authors of the amendment rely on Article 91 TFEU.

Art. 91 TFEU allows the EU legislator to adopt measures within the framework of the common transport policy (Article 90 TFEU) in the areas referred to in Article 91 (1)(a-d) TFEU.<sup>11</sup> The regulation of tolls and charges in the Member States can only be based on Article 91 (1)(d) of the TFEU. Accordingly, the EU has full competence to adopt "appropriate provisions" for the implementation of Article 90 TFEU. This clause must be broadly understood. However, its interpretation must take into account the systematic relationship of the provision in the general context of the Treaty. An interpretation of Article 91 (1)(d) TFEU, which would lead to the suppression of other standards of competence, is inadmissible. Particular attention must be paid to the delimitation of Art. 91 (1)(d) TFEU and Art. 113 TFEU (taxation law), Art. 192 TFEU (environmental law) and Art. 352 TFEU (flexibility clause).

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<sup>11</sup> According to the CJEU, the scope of application of Article 91 para. 1 lit. d) of the TFEU is wide. See CJEU, 28.11.1978, Case 97/78, Schumalla, Rec. 1978, 2311, para. 4–6 (extensive regulatory discretion); the CJEU will only look for obvious mistakes; CJEU, 22.5.1985, Case 13/83, Komm./Rat, Rec.1985, 1513 para. 49–53; CJEU, 17.7.1997, C-249/95, SAM Schiffahrt, Rec.1997, I-4475 para. 23–44.

In the light of the long-standing and undisputed practice of the EU institutions, there is no doubt that Article 91 (1) of the TFEU does not only permit the liberalization of cross-border transport. It is true that the authors of the EEC Treaty attached particular importance to the opening up of national transport areas to international traffic and the establishment of fair conditions of competition. This can be seen in Article 91 (1)(a) TFEU. The subsequent inclusion of Art. 91 (1)(c) TFEU (traffic safety) makes it clear, however, that the horizon of the contractual objectives has opened up over time and now also includes concerns beyond the immediate transnational opening of the market. The current competence provision does not restrict Union legislation to transnational transport alone, but also allows for the regulation of traffic moving within the internal territory of a Member State. It is generally accepted that the EU legislature does not have to limit itself to regulating cross-border actions in the field of EU policies. Against this background, the planned extension of the scope of Directive 1999/62/EC to passenger car traffic is in principle covered by Article 91 (1) of the TFEU.

Moreover, European Union competence is not limited to a competition-oriented transport policy. It is generally accepted that Article 91 (1) of the TFEU also makes it possible in principle to regulate national charges for the use of transport infrastructure. By contrast, the taxation of road users is indisputably governed by Article 113 TFEU. The EU legislator expresses this difference by basing Directive 1999/62/EC not only on Article 71 (1) of the EC Treaty (now Article 91 (1) TFEU) but also on Article 93 TEC (now Article 113 TFEU). Directive 1999/62/EC covers not only the charging of road users, but also the tax burden of motor vehicle tax.

In the light of Art. 11 TFEU (environmental clause), it is also beyond question that the EU legislature need not confine itself to transport policy objectives in the narrow sense of the term (e. g. accessibility of locations, ease of transport, prevention of congestion) when it comes to the content of its transport policy. Finally, the TFEU does not allow the EU legislator to intervene in the Member

State's freedom to impose financial burdens on road users. Accordingly, the TFEU also makes it possible to subject the decision of the Member States to impose financial burdens on road users to substantive requirements, only if it can be demonstrated that they are, by their nature, part of a transport policy (Art. 91 (1)(d) TFEU: "appropriate"). In contrast, any interference with the Member State's freedom of action, which serves objectives beyond the scope of Art. 91 (1) TFEU, would be inadmissible.

## 2. Scope of EU Powers with regard to the Regulation of Member States' Financial Burdens on Road Users

These principles will be applied in the following to the draft Directive amending Directive 1999/62/EC.

### *a) EU Regulation of Financial Burdens relating to Passenger Cars*

The EU's transport policy does not only cover the use of heavy goods vehicles as a means of transport. Article 91 (1) of the TFEU also allows the EU legislator to regulate, with the intention of harmonization, Member States' measures relating to the circulation of passenger cars.

### *b) The Regulation of Financial Burdens on Road Users*

It is clear that the European Union's transport policy can also cover financial burdens on road users imposed by the Member States. However, Article 91 (1) of the TFEU only covers the regulation of national levies on road users if no other competence provision applies. Not every financial burden placed on road users can be regulated "automatically" under Art. 91 TFEU. This can be seen from Article 113 TFEU, which is relevant for the regulation of the tax burden on road users under EU law. Accordingly, the EU law making authorities have

based the (original) Directive 1999/62/EC on both transport policy and tax policy competences.

#### aa) Delimitation of Article 91 (1) TFEU and Other Competence Provisions

The delimitation of Art. 91 (1) TFEU and other competence clauses depends on the type of financial burden on road users.

##### *(1) General Typology of Financial Burdens*

*Fees* are financial burdens imposed as a specific consideration for the use of a public good or service. Prerequisite for charging a fee is the actual use of the public service; the fee is the "price" for the use of the public service in accordance with the equivalence principle. The equivalent principle is complied with if the users of a publicly provided good or service pay a market-price-like fee for the use of such a good or service. On the other hand, a fee is converted into a (para-)fiscal charge if the financial burden is not only used to compensate for the use of the service, but is also used for other purposes, such as the investment in new projects.

*Fiscal contributions* are financial burdens imposed by the public body, with the intention to cover the cost of creating, expanding or renewing public facilities, on the members of a group that is expected to benefit from the possibility of using these facilities. Fiscal contributions are imposed on a group-by-group basis; they burden groups that profit for more than on a temporary basis. A contribution is characterized by the "specific group benefit" of the public facility to be created, expanded or renewed.

On the other hand, *taxes* are financial burdens that a public body levies by virtue of coercion. Taxes are characterized by a one-sidedly fixed amount; they

are imposed on natural or legal persons within its territory without granting consideration.

*(2) EU Regulation of Tolls and User Charges for the Use of Transport Infrastructure: Article 91 (1) TFEU*

It is undisputed that, in accordance with Article 91 (1) of the TFEU, the EU transport policy can extend to the regulation of Member States' charges imposed on road users for the actual use of a route. The Court of Justice of the European Union (CJEU) has ruled in a number of judgments that the authorization to use a road network is a service for a fee within the meaning of Article 2 (1) of the Directive on the Harmonization of the Laws of the Member States Relating to Turnover Taxes (Common System of Value Added Taxes).<sup>12</sup> In this context, it is crucial for the CJEU that there is a necessary direct link between the service provided and the financial equivalent received. In Case C-276/97, the court finds that:

“As the Commission rightly submitted, providing access to roads on payment of a toll fits that definition. Use of the road depends on payment of a toll, the amount of which varies *inter alia* according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.”<sup>13</sup>

A financial burden retains the character of a fee even if the collecting public sector body, when calculating the value of the service provided to the user, does not only charge for the cost of constructing and maintaining the infrastructure itself, but also for the external costs arising from its use. In an expert opin-

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<sup>12</sup> CJEU, 12.9.2000, C-358/97, Commission/Ireland, rec. 2000, I-6301, para. 34; CJEU, 18.1.2001, C-83/99, Commission/Spain, rec. 2001, I-445, para. 11; CJEU, 12. 6. 2008, C-462/05, Commission/Portugal, Slg. 2008, I-4183, para. 34.

<sup>13</sup> CJEU, 12. 9. 2000, C-276/97, Commission/France, ECLI:EU:C:2000:424, para. 35.



ion of 11 November 2008,<sup>14</sup> the Legal Service of the Council of the European Union stated that, in accordance with Article 91 (1) of the TFEU, it is left to the EU law making authorities to decide which costs of the use of an installation should be charged to the user. The Legal Service notes:

"Whilst the Court has thus taken a position as to the necessity of such a link, it must be considered that it has left to the legislator the policy choice, within the remits of the EC Treaty and the principles deriving therefrom, to decide on the level of the financial consideration and the cost elements that can make up such a financial consideration."<sup>15</sup>

Accordingly, the EU law making authorities have consistently based the regulation of national user charges applicable to the use of transport infrastructure on Article 91 (1) of the TFEU, even if this regulation also covered charges for charging external costs. Pursuant to Art. 91 (1) TFEU, the EU law making authorities can also regulate toll or fee systems that do not relate to infrastructure costs.

### *(3) Regulation of Indirect Taxation of Road Users: Art. 113 TFEU*

It is also undisputed that any EU law regulation or harmonization of the Member States' provisions on the tax burden on road users falls within the scope of Article 113 TFEU. The EU legislator has therefore based Directive 1999/62/EC on Article 93 of the EC Treaty (today Article 113 TFEU), in light of the fact that this directive also covers taxes. Moreover, the reform of those parts of the current Directive 1999/62/EC concerning taxation (COM (2017)276 final) is also based on Article 113 of the TFEU.

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<sup>14</sup> Council of the European Union, Judicial Service, Expert Opinion dated 11. November 2008, 15554/08.

<sup>15</sup> Council of the European Union, Judicial Service, Expert Opinion dated 11. November 2008, 15554/08, para. 10.

#### *(4) Regulation of Member State transport infrastructure financing: Article 352 TFEU*

There is still no definitive clarity as to the legal basis for EU legislative decisions aimed at the regulation of Member States' measures on infrastructure financing, which are neither a fee nor a tax. In particular, the CJEU has so far not dealt with fiscal contributions imposed on road users for the construction of new infrastructure. The Court has not yet decided the question of the basis on which the EU legislature may regulate the conditions under which Member States may finance new infrastructure projects to the detriment of certain groups. It is, however, clear from the ECJ case-law that a distinction exists between fees and other financial burdens. Fiscal contributions cannot simply be equated with user fees.

In addition to Art. 91 (1) TFEU, Art. 113 TFEU, Art. 171 TFEU (Trans-European Networks) and Art. 352 TFEU (flexibility clause) must also be considered. It will have to be assumed that Art. 171 TFEU does not legitimize the adoption of binding Union rules on the form in which the EU Member States must pursue their infrastructure financing policies. Neither the wording nor the sense and purpose of Article 171 TFEU would cover such a legislative provision. Article 113 TFEU applies to the regulation of Member States' infrastructure finance policies only in the case of (indirect) taxation; financing via fiscal contributions is not covered. The limits set out in Article 91 (1) of the TFEU would be exceeded if the Union law governing infrastructure financing in the Member States were still to be regarded as part of the "transport policy".<sup>16</sup> If the scope of Article 91 (1) of the TFEU were to include infrastructure planning and financing, the regulations in Article 170-172 of the TFEU would be superfluous.<sup>17</sup> While the regulation of fees has a direct connection with transport policy because such fee rep-

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<sup>16</sup> Maxian Rusche, in: Grabitz/Hilf/Nettesheim (Hrsg.), *Das Recht der Europäischen Union, Commentary Article by Article*, 2017, Art. Art. 90 AEUV, para. 12. Maxian Rusche does not mention the EU regulation of financing of the Member State transport architecture.

<sup>17</sup> For a different view: see Martinez in Calliess/Ruffert (eds.), *EUV/AEUV*, 5. Ed. 2016, Art. 91 TFEU, para. 4.

resents the "price" for the use of a service provided by the State, the decision as to how the State finances its infrastructures, whether it uses budgetary resources or charges beneficiaries via contributions, is concerned with questions of state infrastructure (financing) policy which have no specific relation to transport. Such questions arise in every area where the state provides infrastructure. Article 113 TFEU indicates that the regulation of such issues under European Union law should not be based on the respective special competence in the field of the individual policy field (this would lead to fragmentation), but on a uniform approach. In the light of these findings, EU law provisions which seek to regulate non-tax infrastructure financing must be based on Article 352 of the TFEU.

(5) *Interim conclusion*

In summary, it is therefore possible to state the following: The regulation of the framework within which the EU Member States can impose tolls and user charges on road users must be based on Article 91 (1) of the TFEU. The regulation of the taxation of road users under European Union law is governed by Article 113 TFEU. If, on the other hand, the EU legislature aims to regulate whether and under what conditions an EU Member State can burden road users to finance new infrastructure projects, it is concerned with *infrastructure financing policy*; in this respect Art. 352 TFEU is relevant.

bb) Relevance of the Actual Regulatory Design

It is obvious that deciding whether an EU law provision can be based on Article 91 (1) of the TFEU does not depend on the wording used by the EU law making authorities, but rather on the evaluation and classification of the factual regulatory technique and effects of the measure, preferably by recourse to objective standards. Even if the EU law making authorities were to speak of a motor vehicle tax as a "fee", the regulation of this financial burden would not fall under Ar-

title 91 (1) of the TFEU, but would have to be based on Article 113 of the TFEU. The decisive factor is not how the EU law making authorities (or even a Member State) describes the financial burden, but how it is structured in terms of content.

### 3. Wide Regulatory Scope of Action

Within the framework of Art. 91 (1) TFEU, the EU legislator has a wide scope for policy-making when deciding how to regulate and harmonize Member State's toll and user charge (i.e. time-based charge) systems. The legislator is not only free to combat direct and indirect discrimination against foreign road users. Art. 91 (1) TFEU also enables it to ensure the equivalence of utility value and financial burden. In any case, it can determine which of the costs incurred during use may be included. It can determine how the equivalence of utility value and financial consideration is to be represented - for example, by stipulating that a toll system must be set up. Finally, it can also influence the incentive structure relied upon by a toll or fee system. In particular, it may seek to ensure that the structure of the burden provides incentives not to use particularly polluted routes (possibly at a particular time).

### 4. Application of these standards to the draft amending Directive 1999/62/EC

The following conclusions can be drawn in the light of the above-mentioned standards:

#### *a) Transport policy measures in accordance with Article 91 (1) TFEU*

EU law provisions setting up a framework for the Member States' systems for levying tolls and road user charges can in principle be based on Article 91 (1) of the TFEU. This competence gives the EU legislator the opportunity to subject

tolls and road user charges for passenger cars to a European Union legal regime. This covers the provisions of Article 7 (1) and (2) of the draft directive from Article 91 (1) of the TFEU.

The EU legislator is free, on the basis of Article 91 (1) of the TFEU, to combat direct and indirect discrimination arising from a Member State's system of tolls or user charges. This applies irrespective of the fact that the EU Treaty already prevents Member States from discriminating against road users (Article 18 in conjunction with Article 20 of the TFEU).<sup>18</sup> Article 91 (1) of the TFEU thus covers Article 7 (2) and (4) of the draft directive. Enforcement of fair competition is also possible within the framework of Article 91 (1) TFEU; the provision thus covers Article 7 (8) and (9) of the draft directive.

Pursuant to Article 91 (1) of the TFEU, the EU legislator is free to operate the transition from a time-based charging system to a distance-based toll system. The provisions of Article 7 (6) and (7) of the draft directive can be based on Article 91 (1) of the TFEU.

In this context, the legislator may determine which costs can be charged to the users of a traffic route. According to the jurisprudence of the CJEU, however, this can only be the costs that arise directly as a result of utilization. The enforcement of the equivalence principle is served by Article 7 (3), Article 7a and Article 7c of the draft directive.

If this does not go beyond the scope of the equivalence principle, the legislator can also influence the incentives provided by a toll or fee system. Provisions such as Article 7da, Article 7g and Article 7ga of the draft directive can therefore be based on Article 91 (1) of the TFEU.

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<sup>18</sup> See II. 2. above.

*b) The Regulation of Member State infrastructure financing pursuant to Article 352 TFEU*

According to the above findings, the EU legal regulation of "infrastructure charges", which are not levied in return for the use of a particular transport route and which serve to finance new infrastructures, does not fall within the scope of Art. 91 (1) TFEU, because they are not fees for the use of a transport route. Rather, such regulation is concerned with the decision of the Member State on how infrastructure financing policy is to be pursued and must be based on Article 352 of the TFEU. In this context, if the EU legislator speaks of "fee" - incorrectly from a financial point of view - it is irrelevant for the classification of the measure it has taken. As has already been stated above, the legislator cannot dispose of the scope of its competences by describing something as a "fee", which in the matter is a fiscal contribution.

As a consequence, the regulation on the conditions under which a Member State can involve road users (in the context of the "infrastructure charge") to finance new road construction projects (Article 7f (1) of the draft directive) does not fall within the scope of Article 91 (1) TFEU, but is to be based on Article 352 TFEU. Art. 7f (1) of the draft directive deals with the regulation of a (para-)fiscal policy decision by the Member States. The fact that the EU legislator aims to limit the number of people who can be called upon to finance a particular project does not alter the fact that it is not a question of imposing a fee on road users for the use of a transport infrastructure. The fact that the EU legislator in Art. 7f of the draft directive is concerned with formulating objective standards for an appropriate infrastructure finance policy of the Member States does not alter the fact that it is a regulation of issues which can only be regulated by recourse to Art. 352 TFEU. The fact that the "infrastructure charges" are to flow into projects of European relevance also does not lead to the application of Article 91 (1) TFEU. It is obvious that the EU's transport policy competence provision does not give the EU any right to regulate budgetary policy issues in a binding manner. It is then a question of substantive law, above all fundamental rights,

whether there is a specific group responsibility of the users involved for the new construction of roads if this new construction is located on the same transport axis as the road section on which the financial burden ("mark-up") is levied. It is irrelevant for the classification into the EU competence order whether the levy can be valid in material terms (keyword: principle of equality).

*c) Need for parallel application of Art. 91 (1) and Art. 352 TFEU?*

The foregoing considerations have shown that the planned new provisions of Article 7, Article 7a, Article 7c, Article 7da, Article 7g and Article 7ga of the draft directive can be based on Article 91 (1) of the TFEU. In contrast, Art. 7f of the draft directive provides for a regulation of the infrastructure financing policy of the Member States, which cannot be based on Art. 91 (1) TFEU (and does not fall under Art. 113 TFEU) but must be based on Art. 352 TFEU.

It is not entirely clear whether parallel recourse to Art. 91 (1) TFEU *and* Art. 352 TFEU is necessary in such a case, or whether it is adequate to select the competence standard which is more relevant for the overall regulatory measure, based on an objective assessment of the policy means and regulatory provisions. It is suggested here that, from the point of view of EU doctrine, the preferable view would be to assume that if one and the same normative provision falls within the scope of two competences, it must be based on the competence with the closer substantive nexus. Such an allocation is to be made in particular when a provision pursues different objectives at the same time. On the other hand, a parallel recourse to more than one legal basis would be necessary if one piece of legislation contained different normative provisions supported by different standards of competence. On the basis of this viewpoint, it was consistent that Directive 1999/62/EC was based on Article 71 of the EC Treaty *and* Article 93 of the TFEU.

The CJEU, on the other hand, assumes that a focal point assessment can be applied even if several provisions ("components") are contained in one legisla-

tive act. The act must, in principle, be based on the legal basis, which "is required the principal or predominant objective or component".<sup>19</sup> Only if "several objectives are pursued at the same time, which are inextricably linked without one being secondary and indirect to the other" would the act have to be based on the different legal bases.<sup>20</sup> The CJEU therefore took the view that a predominantly transport policy measure, which also includes tax provisions, should be based exclusively on Article 91 TFEU.<sup>21</sup> The reasoning of the CJEU at the time was based on the fact that the tax provisions of the relevant act were concerned with the liberalization of Member State tax systems.<sup>22</sup> However, it is not to be expected that the CJEU would come up with a different decision when assessing restrictive EU measures.

On the basis of the CJEU's viewpoint, one should expect a clear concentration of the proposed amending directive in the area of Art. 91 (1) TFEU. The regulation of the Member State's infrastructure finance policy provided for in Art. 7f of the draft directive, on the other hand, is only of minor importance.<sup>23</sup> On the Basis of the CJEU's case law, Article 91 (1) of the TFEU would suffice for the adoption of the amending directive - even if a "competence creep" can be ob-

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<sup>19</sup> See CJEU, 11.9.2003, C-211/01, Commission/Council, rec.2003, I-8913, para. 39.

<sup>20</sup> CJEU, 11.9.2003, C-211/01, Commission/Council, rec. 2003, I-8913, para. 40.

<sup>21</sup> CJEU, 11.9.2003, C-211/01, Commission/Council („Transit agreement Bulgaria and Hungary“), rec. 2003, I-8913, para. 48.

<sup>22</sup> CJEU, 11.9.2003, C-211/01, Commission/Council („Transit agreement Bulgaria and Hungary“), rec. 2003, I-8913, para. 49: „The principle of equal treatment in the area of road vehicle taxation and other fiscal charges set out in Article 8(1) and the various fiscal exemptions laid down in Article 8(2) and (4) are closely linked to the simplification of transit through Bulgaria and Hungary for the purpose of facilitating the carriage of goods between Greece and other Member States. Moreover, Article 2 of the agreements, on their scope, characterises fiscal measures as „supporting measures“, as is apparent from paragraph 44 of the present judgment“.

<sup>23</sup> This view also explains why Directive 2011/76/EC of the European Parliament and of the Council of 27 September 2011 amending Directive 1999/62/EC (OJ 2011 L 269 pp. 1-16) is based solely on Article 91 of the TFEU, even though it already contained (for a specific case) rules on the infrastructure financing policy of the Member States.



served in an area that is no longer concerned with transport policy in the narrower sense.

## 5. Conclusions

The draft amendment to Directive 1999/62/EC cannot be fully based on Article 91 (1) of the TFEU. It contains provisions on Member State infrastructure financing policy, which are not covered by Article 91 (1) TFEU but must be based on Article 352 TFEU. However, on the basis of ECJ case-law, the draft amendment can be based in Article 91 (1) of the TFEU because of its general focus on transport policy. From a political point of view, the "competence creep", which takes place in Art. 7f of the draft directive, must be considered highly problematic. The question of whether national constitutional law would restrict such an extension of the EU's action cannot be dealt with within the parameters of the present study.

## **IV. Subsidiarity**

EU legislation must comply with the requirements of the principle of subsidiarity if it does not fall within the exclusive competence of the EU (Article 3 TFEU).

The common transport policy (Article 90 TFEU) falls within the area of shared competences (Article 4 (2)(g) TFEU).

### 1. Normative Content of Art. 5 (3) TEU

The idea of subsidiarity implies that matters should be dealt with at the lowest level possible close to the people, if this can be done in a sufficiently effective manner. Article 5 (3) of the TEU prohibits EU action if it cannot be shown that the "the objectives of the proposed action" cannot be sufficiently achieved at Member State level. Only if, in this case, it can be shown cumulatively ("but can rather")<sup>24</sup> that the objectives can "be better achieved at Union level" because of scale or effects is EU action permitted.

The application of Article 5 (3) of the TFEU will thus entail a two-stage examination in which it must first be clarified whether action by the Member States is sufficient (negative criterion). In areas where this is to be denied, it must then be established whether the EU's action would bring a sufficient increase in effectiveness (positive criterion). In the practice of the EU institutions, this structure is often disregarded. The CJEU also frequently goes over the wording of the treaty and regularly only deals with the second test, without asking whether action by the Member States is sufficient. According to the ECJ's case law, Article 5 (3) of the TFEU is not merely a political program or an idea without normative content; the provision establishes legal obligations and is part of the standards of judicial review.

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<sup>24</sup> See Molsberger, Das Subsidiaritätsprinzip im Prozess europäischer Konstitutionalisierung, p. 172 f.; Eilmansberger, in: Hummer/Obwexer (Hrsg.), Der Vertrag von Lissabon, p. 189 (193).

The "tests" formulated in Art. 5 (3) TEU are rather indefinite and operate at a high level of abstraction. Initially, criteria for narrowing down the meaning of the two tests were set out in the conclusions of the Edinburgh European Council.<sup>25</sup> The Amsterdam Protocol No. 30 on the application of the principles of subsidiarity and proportionality contained substantive "guidelines" which further specified the rather indeterminate test criteria of "insufficient capacity" and "European added value". In the course of the Constitutional Convention's deliberations, the European Parliament presented a report containing important points of reference for clarifying the tests contained in Article 5 (3) of the TEU.<sup>26</sup> The drafters of the Treaty of Lisbon decided not to include these standards; rather, the substantiation of the material standards in Article 5 (3) TEU is left to the political bodies of the EU and the CJEU.

## 2. Problematic Discussion of the Subsidiarity Principle in the Amendment Proposal

The difficulties involved in applying the subsidiarity principle are not only related to the complex formulation of two separate but connected tests.<sup>27</sup> There is often a lack of political will on the part of the EU institutions involved to accept the limitations imposed by the subsidiarity principle. It seems difficult for them to check their certainly well-intentioned willingness to regulate by asking whether EU action is really needed. In many proposals for legislative action, the justification why the requirements of the principle of subsidiarity are being complied with are scant, and often even totally unsatisfactory. The authors of the draft amending Directive 1999/62/EC are satisfied with the following statement:

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<sup>25</sup> See <http://www.consilium.europa.eu/de/european-council/conclusions/1992-1975/>.

<sup>26</sup> European Parliament, Committee on Constitutional Affairs, Report of 24 April 2002 on the Division of Competences between the European Union and the Member States, A5-0133/2002.

<sup>27</sup> Keywords: How are the "effects" of the "objectives" of a Union measure to be determined? What is the relationship between the absolute test of the first half-sentence (sufficient ability to act) and the relative test of the second half-sentence (relative efficiency)?

„The EU shares competence with Member States to regulate in the field of transport pursuant to Article 4(2)(g) TFEU. However, an adaptation of the existing rules can only be operated by the Union itself. The extension of EU rules to other vehicle categories is justified by the impacts of those on the problems at EU- and global levels. Insofar as passenger cars, minibuses and vans are concerned, such inclusion would in particular help preventing the risk of Member States treating occasional users or vehicles registered abroad unequally. The inclusion of buses/coaches would help diminishing distortions of competition in the internal market for passenger transport by according preferential treatment (i.e. exemption from paying for the use of infrastructure) to these vehicles vis-à-vis rail transport, which is subject to such charging.

More generally, since all of these vehicles make use of the same road infrastructure and contribute to CO2 emissions, air pollution and congestion, their inclusion is justified in view of the identified problems.”<sup>28</sup>

This does not represent a factual examination of whether the EU Member States have sufficient capacity to act. Moreover, the prohibitions on discrimination already enshrined in the existing EU law are used to justify the new proposal. The "tests" formulated in Article 5 (3) of the TEU are not applied in a recognizable manner. The drafters of this texts demonstrate an indifference which is only seemingly wise and which will not bring the EU forward. This indifference will certainly not strengthen the now precarious legitimacy of some parts of EU policy.

In the explanatory statement of the amendment, the discussion of alternative scenarios does not take place in a way that would be necessary under Article 5 (3) of the TFEU. This explanatory memorandum deals exclusively with policy options, which extend the scope of the Directive to include personal cars (policy options 1 to 4). The question of whether the extension to private infrastructure users who are not in a competitive market generates European added value at all is not raised.

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<sup>28</sup> Draft Amendment, COM (2017) 275 final, p. 4.

It should be remembered that just a few years ago, the EU Commission stated that it was not necessary to regulate road tolls on light private vehicles:

“In accordance with the principle of subsidiarity, the Commission is not considering putting forward any proposals for legislation in this respect. On the other hand, it feels the time has come to set out and clarify EU law as currently applicable pursuant to the TFEU and the case law of the ECJ.

By publishing this Communication, the Commission is conducting an exercise in transparency and clarification of the EU rules which it is required to enforce. It is proposing to all Member States concerned a reference instrument that spells out the framework in which a vignette system would guarantee the respect of fundamental principles of EU law.”<sup>29</sup>

There is no reason given why the EU Commission has moved away from this.

### 3. Reference Point of the Subsidiarity Review: Objectives of the Proposed Action

An examination of Art. 5 (3) TEU is only possible if the objectives of the planned measure are first carefully identified and worked out. The general reference to "EU-wide and global problems" in the amendment proposal is certainly not enough in this respect. Only the objectives, which the EU may legitimately pursue in a policy area can be relevant for assessing the objectives of an action. Under Article 91 (1) of the TFEU, this does not include the objective of an unspecified increase in revenue for the Member States through the imposition of a financial burden on road users.<sup>30</sup>

If an attempt is made to identify the objectives that the authors of the draft amendment can legitimately pursue, the following points can be identified:

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<sup>29</sup> COM (2012) 199 p. 3.

<sup>30</sup> The authors of the proposed amendment ascribe a central importance to this objective, although they also see that there is no certainty that the charges will flow into the transport infrastructure (see draft amendment, COM (2017) 275 final, p. 2).

- protection against discrimination;
- ensuring fair conditions of competition,
- reasonable pricing of the use of transport infrastructure,
- ecological and health policy objectives,
- regulatory framework for Member State infrastructure financing,
- reversal of the deterioration in the quality of road infrastructure.

#### 4. Sufficient Capacity of the Member States to act?

##### *a) The requirement for a Transnational Dimension of a Problem*

According to Article 5 (3) of the TFEU, the EU must not act unless it can be shown that the Member States (at central, regional or even local level) have sufficient capacity to act to achieve the stated objectives of a policy proposal. The guidelines of the Edinburgh European Council stipulate that it is necessary to determine whether the problem, which the proposed measure intends to tackle has sufficiently significant transnational aspects which cannot be satisfactorily addressed by the Member States alone or in combination.<sup>31</sup> Uniformity, as the European Parliament states in its report, is not an end in itself.<sup>32</sup> Rather, the EU standard-setter should only strive for a uniform legal situation if equality or competition could clearly be jeopardized. In substance, the first "test" in Article 5 (3) of the TEU amounts to an assessment of the necessity of a European Union action.<sup>33</sup> It has to be determined whether the Member States are over-

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<sup>31</sup> See, e.g., European Commission, Report from the Commission "Better lawmaking 2003" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (11th Report), 12. 12. 2003, COM (2003) 770 final, p. 19: „necessity test I“.

<sup>32</sup> European Parliament, Committee on Constitutional Affairs, Report of 24 April 2002 on the Devision of Competences between the European Union and the Member States, A5–0133/2002, point 23.

<sup>33</sup> Lenaerts, *Fordham International Law Review* 1994, p. 846 (849 ff.); Kahl, *AöR* 118 (1993), p. 414 (426); Schweitzer/Fisxon, *Jura* 1992, p. 579 (581); Stein, *Subsidiarität als Rechtsprinzip?* In: Merten (Hrsg.), *Die Subsidiarität Eu-*

stretched in tackling the problem that the EU is focusing on, in the sense that they cannot achieve an adequate solution to the problem.<sup>34</sup>

The “transnationality” of a problem arises above all when disturbances occur in the Union market which cannot be eliminated by unilateral action of the Member States. Another important case group concerns constellations in which action by Member States has external effects to the detriment of other Member States and thus significantly affects their interests.

*b) Inability to act, not unwillingness to act*

In this context, it is crucial to keep in mind that it is not the subjective willingness of the Member States to act that counts, but the (lack of) objective ability to act. EU action is already excluded if the objectives of the envisaged EU measures could be sufficiently achieved by the Member States. Even if it is not certain that all Member States will take a step in line with the proposed EU measures, Art. 5 (3) TEU can rule out EU action. The wording of Article 5 (3) of the TEU is not based on the fact that there is a certainty that the Member States will actually act.

*c) Lack of capacity to act cannot be justified by the fact that the Member States will not choose a single solution*

Moreover, the subsidiarity principle in Art. 5 (3) TEU does not require the Member States to act in uniformity if EU action is to be prevented. As a consequence, it is not important to assess whether the Member States will choose a uniform solution on their own merits.<sup>35</sup> Anyone who demands this would un-

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ropas, 2nd. ed. 1994, p. 23 (29); von Borries, EuR 1994, p. 263 (277): „Notwendigkeitstest“.

<sup>34</sup> Knaup, Europäische Verfassung und Subsidiarität, 2007, p. 212.

<sup>35</sup> Lambers, EuR 1993, p. 229 (236).

determine the deeper meaning of the idea of subsidiarity, which is precisely aimed at protecting plurality and diversity.

*d) The Proposed Amendment to Directive 1999/62/EC: Sufficient Transnationality of the problem?*

In the following, the objectives pursued by the drafters of the proposed amendments are to be examined in detail. It has to be determined if Member State action would solve the relevant problems sufficiently.

aa) Protection against discrimination

The first objective to be considered is that of protection against direct and indirect discrimination. Obviously, this is an objective which cannot be achieved at Member State level to an adequate (or "sufficient") extent. The point here is precisely to ensure that the Member States do not behave in a certain discriminatory way. The relevant provisions in the proposal to amend Directive 1999/62/EC thus stand up to examination on this part of the subsidiarity requirement in Article 5 (3) of the TEU. In particular, the rules to ensure that user charges are spread over a reasonable period of time serve to protect against indirect discrimination.

bb) Ensuring fair Conditions of Competition in European Transport Markets

The proposal to amend Directive 1999/62/EC is further aimed at fair competition conditions in road transport. In principle, this objective can only be of relevance if and where transport operators compete on a transnational basis within the EU or in competition with other modes of transport. Such competition can only be observed in the transport sector of commercial vehicles and buses. With regard to the type of traffic involving such commercial vehicles, EU legislative efforts to establish a competition framework within which tolls and road tolls must be lev-



ied can in principle be justified before Article 5 (3) of the TFEU. No single transport area within the meaning of Art. 26 (2) TFEU will be established if measures are not taken to prevent the Member States from influencing the flow of commercial (freight or passenger) traffic through the design of toll or user systems. Even today, the possible surcharges for external costs for heavy commercial vehicles are already capped; this serves to protect against unreasonable burdens. There are no fundamental objections to the establishment of a reference framework.

On the other hand, private passenger transport by car is not in competition. As a consequence the idea of ensuring fair conditions of competition cannot justify the inclusion of car transport in the basic approach of the directive. The efforts of the EU legislator to regulate which costs can be taken into account in a toll or charging system can only be justified with regard to commercial traffic.

The legal obligation to phase out user charges for road use raises important questions with regard to Article 5 (3) of the TFEU, even with regard to commercial transactions. The draft amendment does not oblige Member States to introduce toll systems for the use of their road infrastructure. Member States remain free to refrain from levying any charges. The authors of the draft amendment thus pursue the immediate objective of eliminating time-based systems, but have no clear objective at a later stage. Rather, Member States will be given choice. Pursuant to Article 5 (3) of the TFEU, both the decision on the elimination of time-based systems and the decision whether (or not) to impose tolls can be implemented by the Member States themselves. Even if one recognizes that securing adequate competitive conditions is a legitimate objective, the regulatory approach of the draft amendment does not satisfy the first test under Article 5 (3) TFEU: As to the establishment of fair conditions of competition, the abolishment of time-based systems does not respond to a transnational (“European”) problem.

### cc) Reasonable Pricing of the Use of Transport Infrastructure

The authors of the amendment also aim to encourage reasonable pricing for the use of transport infrastructure ("the user pays"). The aim is to ensure that the costs arising from the use are appropriately recorded ("the polluter pays"). The EU Member States are to be encouraged not to finance the costs directly or indirectly incurred in the use of their transport infrastructure through the taxation of the general public (or even to have private third parties shoulder them), but to impose them on users. The amendment does not pursue this objective through mandatory pricing schemes, however, but only on condition that a Member State operates a toll or user charge system. In addition, a frame is only set for heavy commercial vehicles. In so far as a Member State imposes tolls or user charges on light duty vehicles (including passenger cars), the proposed amendment makes no reference to infrastructure costs.

The amended Directive would not oblige Member States to introduce a system of tolls or user charges. Indeed, the authors of the draft acknowledge that the EU Member States can completely dispense with pricing for the use of their transport infrastructure. At the same time they want to lay down concrete regulatory specifications for the type of traffic and the concrete use of transport infrastructure to be priced. In areas where there is competition (above bb)), this approach seems to be conclusive. However, in areas where there is no competition, this regulatory approach to the pricing of infrastructure seems questionable. On the one hand, the authors recognize that there is no need for action by Member States, but on the other hand they want to harmonize possible action. The regulatory approach implies the position that the EU Member States are able to act adequately, but there is nevertheless the need to harmonize Member State pricing policies. The argumentative approach cannot survive before Article 5 (3) TFEU. Just as a side note: If the EU were to pursue the objective of forcing the Member States to introduce toll systems, this would raise even more problems in view of the EU's competence under Article 91 (1) of the TFEU and the principle of subsidiarity.

The intended regulatory approach do not hold true before Article 5 (3) of the TFEU for another reason: Even if it were to be acknowledged that action by the European Union was necessary to establish uniform standards in the EU for the pricing of the use of the national transport infrastructure, the principles of "the user pays" or "the polluter pays" could only justify EU harmonization if the EU legislator ensured that the charges levied are actually used to compensate for the costs incurred. However, there is no such provision in the amendment. The amendment aims to make users of transport infrastructure pay, but does not provide for Member States to use the fees collected for transport infrastructure or to repair external damage. The proposal for an amendment is ultimately based on the idea that users should pay for something which is a matter for the Member States to decide. The problem with the proposed amendment is that, although it regulates the revenue side, it does not regulate the expenditure side. However, such an imperfect regulation can also be carried out by the EU Member States "sufficiently" on their own.

The authors of the draft amendment do not acknowledge the fact that users of the transport infrastructure are already paying more than is being invested by the state. They want to see a further increase in public revenue from the transport sector without ensuring that this money does not flow into other areas of the budget. The Union's "added value" of such an approach, which must be presented in accordance with Article 5 (3) of the TEU, is not apparent.

#### dd) Nudging the Behavior of Road Infrastructure Users

The authors of the draft amendment aim to define the framework within which EU Member States can "nudge" road infrastructure users by imposing financial burdens. Obviously, any financial burden imposed on the user of road infrastructure will have a dampening effect. The possibility of taking into account factors such as traffic congestion, environmental pollution or health risks should lead to a differentiation in the level of charges, effectuating the "nudging effect"

of the burden. The fundamental conformity of this regulatory approach with the legislative base in Art. 91 TFEU has been established above. Again, however, the following applies: As long as the EU law making authorities acknowledge that the EU Member States' unwillingness to impose fees at all is sufficient and goal-compliant in light of the treaty objectives, the assertion that EU action is necessary appears to be inconclusive.

For those areas in which road users are not competing in transnational European competition, the attempt to establish mandatory regulatory standards for the imposition of fees on road users across the EU also seems highly questionable for some other reason. The decision in which direction to direct road users depends on the concrete circumstances of the individual case and the specific circumstances of a concrete situation. There are often conflicting goals: combating congestion and pushing daytime traffic into the evening or night time hours can lead to an increase in the health consequences of traffic. The fight against noise and health problems by diverting traffic to other roads will create new problems there. A regulatory system that aims at moving consumers from ownership of cars with a poor eco-balance to ownership of cars with a good eco-balance has social consequences for those sections of the population that cannot easily compete financially. The idea that this conflict could be adequately resolved at the supranational level of the EU is mistaken; Art. 5 (3) TFEU wants to counteract such hubris. Setting a framework will not always do justice to the concrete circumstances in a specific situation. Pursuant to Article 5 (3) of the TFEU, Member States must be left to deal with concrete problems in which there is no European competition.

#### ee) Regulatory Framework for Member State Infrastructure Financing

The efforts of the draft amendment's authors to regulate the financing of new transport infrastructure projects by Member States are incompatible with the principle of subsidiarity. This is explicitly stated in Directive 2011/76/EU: "Although decisions on national public expenditure - including the use of revenue

under this Directive - are a matter for Member States, in accordance with the principle of subsidiarity, ... .<sup>36</sup> The EU legislature can at best conclude that, where fees are levied within the context of European transport competition, the fees levied must not reflect the costs involved in the construction of new infrastructures in order to prevent “over-pricing”. However, it cannot allow the imposition of such fees on condition that the revenue will be used for the financing of target projects it has approved. This regulatory approach is incompatible with Article 5 (3) of the TFEU.

#### ff) Improvement of Road Infrastructure

The explanatory memorandum to the draft amendment puts considerable strength on the argument that the road infrastructure in the Member States is deteriorating. However, this is not a transnational problem that could justify European action. The fact that a particular phenomenon occurs in many places does not yet make this phenomenon a problem with a transnational dimension. In addition, road users are already paying more than the Member States spend on maintaining and developing transport infrastructure. The EU is not in the legal or political position to influence the Member States’ decision whether to actually use the revenue from the fees imposed on road users to improve transport infrastructure. The regulatory approach of the draft amendment is incoherent when it comes to the argument that regulation is needed to enforce higher expenditure by Member States on transport infrastructure.

#### e) *Interim result*

The above considerations make it clear that protection under European Union law against direct and indirect discrimination by Member State tolls and user charges cannot be considered “unnecessary” within the meaning of Article 5 (3)

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<sup>36</sup> Directive 2011/76/EU of the European Parliament and the Council of 27 September 2011 amending Directive 1999/62/EC (OJ. 2011 L 269 p. 1-16), recital 32.

TEU. This applies even in light of the fact that the treaties themselves are already providing for protection against discrimination. The principle of subsidiarity does not prevent the EU legislator from repeating the content of Treaty provisions within the secondary law framework. In areas where road users compete, it also appears possible to regulate the framework in which tolls and user charges operate. In other areas where road users do not operate under market conditions, there is no transnational problem that could justify the regulation of Member States' toll and user charge (i.e. time-based charge) systems beyond the current prohibition of discrimination.

## 5. Sufficient European Added Value?

The wording of Article 5 (3) of the TEU contains two "tests" which must be applied cumulatively. This wording is binding on the EU institutions - even though, as has often been observed and ascertained, they try evade the treaty requirements on the regular basis. The principle of subsidiarity in Article 5 (3) of the TEU opposes EU action even if action by the EU Member States is not sufficient to achieve the objectives, but action by the EU institutions would also be ineffective.

In the following, it will be explained that the planned amendments to Directive 1999/62/EC, even if (against the foregoing statements) it is assumed that action by the Member States is not sufficient, do not in any case meet the "effectiveness test".

### *a) The Need for Sufficient European Added Value (Efficiency Comparison)*

Article 5 of the Protocol on Subsidiarity states that the positive criterion ("better") is only met if a European Union objective can be better achieved at Union level. The guidelines of the European Council in Edinburgh stated that the determination of a European "added value" should be determined on the basis of

"qualitative and, as far as possible, quantitative criteria".<sup>37</sup> The fulfilment of the positive criterion presupposes that action at European level offers clear advantages. On the basis of an efficiency comparison, it is necessary to determine the advantages and disadvantages of problem solving at the different levels of activity. This criterion can only be applied on the basis of a cost-benefit calculation. In this context, it is important and indispensable to weigh alternative scenarios and compare them.

*b) The Planned Amendment of Directive 1999/62/EC: Sufficient European Added Value through Mandatory Regulation of Member States Tolls and User Charge Systems?*

aa) Protection against Discrimination

The protection of road users against Member State discrimination cannot, as has been stated above, be sufficiently achieved at Member State level. A cost-benefit balance is clearly in favor of EU action; the added value of the EU's ban on direct and indirect discrimination against Member States is obvious.

bb) Ensuring Fair Conditions of Competition

One of the tasks which cannot be adequately addressed at Member State level is to establish fair conditions of competition in those sectors of the European transport area where road users operate in a market. This applies to commercial traffic.

It has been stated above that the objective of ensuring fair competition conditions cannot justify the harmonization of financial burdens on private transport by passenger cars: In view of competition policy objectives, no European "add-

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<sup>37</sup> See <http://www.consilium.europa.eu/de/european-council/conclusions/1992-1975/>.

ed value" can be recognized here. The EU's action in these areas cannot be justified by the argument that the EU could, in any case, achieve the objective more effectively. If private road users do not operate in a "market", the EU cannot achieve fairness in competition either. The fact that different rates of tolls and user charges are levied in the 28 Member States is not in itself a transnational problem. There is no European "added value" in this respect.

#### cc) Reasonable Pricing of the Use of Transport Infrastructure

The political debate on the amendments to Directive 1999/66/EC typically focus on efforts to persuade EU Member States to charge a certain price for the use of transport infrastructure. On the basis the above considerations, it can be deduced that the formulation of a price framework at EU level is necessary and legitimate to protect competition where road users already are in competition. Here, action at EU level offers genuine European added value.

The assessment of a European approach in areas where road users are not in a competitive market is different. In these spheres, no European added value or efficiency gain will result from the substantial unification of Member State regulation on the pricing of the use of transport infrastructure. According to Article 5 (3) of the TEU, uniformity as such is not such an added value. Nor is it a legitimate EU concern to increase the volume of fees. These considerations thus must not play a role in assessing the cost-benefit ratio of establishing a European framework for the toll and charging system in the Member States. One of the main objections to the idea of European regulatory harmonization of infrastructure usage fees is that it restricts the freedom of Member States to develop specific and level-specific solutions to problems without any discernible European added value. The fact that different price systems are used in different Member States is not, as such, a transnational problem.

Accordingly, it is not possible to see any European added value in case of a forced transition from user charges to toll systems under EU law. It may be that



the value of the use of the transport infrastructure for the user can be better represented in a toll system than in a time-based system. However, if the pricing of transport infrastructure (outside the competition sectors) as such does not have a transnational dimension, the concrete decision on the choice of a time or distance scale cannot have a transnational dimension either. In addition, the EU also contradicts itself if, on the one hand, it admits that not requiring Member States to impose infrastructure usage fees is adequate and problem-solving, but at the same time it wants to regulate prices.

The use of tolls and user charge (i.e. time-based charge) systems by Member States has a genuinely transnational dimension, in so far as transparency ought to be ensured, easy accessibility guaranteed and, if possible, interoperability made possible. The EU law making authorities could achieve European added value if they did not focus on price regulation, but instead focused on ensuring the operational integration of individual systems. Considerations of this kind make it clear that different price models do not in themselves constitute a genuinely European problem.

Even if this is a repetition, it should be emphasized here that Article 5 (3) of the TEU stipulates that the determination of the efficiency of any regulatory model, which assesses the Member States' ability to act, must be based on the objective capacity of the Member States and not on the subjective will to act. The fact that EU law harmonization induces the Member States to take action in areas where they have refrained from doing so in the past does not imply a European "added value".

#### dd) Ecological and Health Policy Objectives

It has already been pointed out above that the authors of the draft amendment cannot give any reason why the ecological and health policy guidance of the behavior of road users (outside competitive situations) must be uniform throughout the European Union: This "nudging" has no transnational aspect.

It can also be argued that such a regulation does not have any specific added value in terms of the positive criterion. The relative effectiveness of a regulatory approach under European Union law can only be assessed within the framework of a comparison with alternative scenarios. When and to the extent that it is a matter of combating the adverse effects of transport on the environment and public health, direct regulation would always be the first-best solution. The regulation of emissions emitted by motor vehicles is more targeted and effective than the authorization of Member States to maintain toll and user charge (i.e. time-based charge) systems that take account of external costs. Even the “nudging” of road users through fuel taxation is more targeted and effective than the authorization to set incentives in a toll or fee system. This applies in particular if the drafters of the proposal for a Directive do not require Member States to impose financial burdens at all. Therefore, alternative scenarios can be developed which allow a more effective realization of the regulatory objectives of the suggested amendment.

It is also important to note that the degree of effectiveness of the planned harmonization is low - in the sense that Member States are still free not to impose tolls or road tolls. In addition, the EU legislator is not in a position to make more than unspecific requirements that are too open and vague to allow for a concrete consideration of the situation on the ground. The authors of the draft consider this to be a virtue; they have reason to ask whether this does not call into question the regulatory approach as such.

#### ee) Regulatory Framework for Member State Infrastructure Financing

It has already been pointed out above that there is no transnational problem that could justify the EU giving guidance to Member States on whether and how they finance infrastructure. It remains unclear why the EU institutions claim that EU Member States cannot make these decisions “sufficiently” themselves. There is also no additional benefit that could be achieved by the supranational

harmonization of these investment decisions. The fact that the draft amendment attempts to direct Member State infrastructure charges into the trans-European transport network within the meaning of Chapter III of Regulation (EC) No 1315/2013 (Article 7f of the draft Directive) does not alter this fact. The subsidiarity principle cannot be complied with by legitimizing a (*prima facie* unjustified) intervention on the revenue side of Member State infrastructure financing by encouraging investment in the European transnational network.

#### ff) Improvement of Transport Infrastructure

Improving transport infrastructure is an important political concern. Coordinating the development of the (trans-European) transport networks is a genuine European concern (Article 170 TFEU); political efforts by the EU institutions to persuade Member States to invest can be an important part of the EU's transport policy. It has already been pointed out above that the proposed amendment does not contain any rules to encourage Member States to invest the additional fees levied on the use of transport infrastructure. A regulation that aims at an increase in the level of infrastructure use fees but at the same time does away with ensuring that the additional charges flow into the transport infrastructure cannot create a "European added value".

#### c) *Interim result*

In the light of the foregoing considerations, it is evident that the harmonization of Member States' toll and user charge (i.e. time-based charges) systems (outside the area in which infrastructure users operate in competition) envisaged by the EU legislator would not provide genuine European "added value".

## 6. Subsidiarity Deficiencies: Political Action or Judicial Protection?

The provisions of the EU Treaty are oscillating and indeterminate when it comes to the question of how to respond to subsidiarity shortcomings. At the heart of the subsidiarity mechanism today is the idea of political enforcement of subsidiarity concerns.<sup>38</sup> The subsidiarity protocol therefore establishes an early warning system that allows national parliaments to express their concerns. Citizens, businesses, and NGOs can approach the national parliaments to urge them to make use of the possibilities offered by the early warning system. The TEU makes it clear that the preferred way to enforce "lived subsidiarity" is the political process.

## 7. Result of the Subsidiarity Review

These considerations lead to the following result: In accordance with Article 91 (1) of the TFEU in conjunction with Article 5 (3) of the TEU, the EU legislator is empowered to combat Member State discrimination in the levying of (toll or user) charges for the use of transport infrastructure. The EU legislator may also introduce rules to ensure that road users operating in a market are not subject to unreasonable charges. According to Article 5 (3) of the TEU, it is just as impossible to harmonize the levying of charges on other road users as it is to mandate the elimination of certain forms of charging (time based user charges).

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<sup>38</sup> Nettesheim, Subsidiarität durch politisierte Verhandlung – Art. 5 Abs. 3 EUV als entmaterialisierte Verfahrensnorm, in: König/Uwer/Möschel (eds.), Grenzen europäischer Normgebung, 2015, p. 35-53.

## **V. Proportionality**

The planned amendment of Directive 199/62/EC must also comply with the requirements of Article 5 (4) TEU. The Union's action must not, in terms of content and form, go beyond what is necessary to achieve the objectives of the Treaties. The provision makes it clear that it is not just a question of preventing measures that are excessive because they are not necessary in terms of content. The choice of regulatory instruments must also be measured against the proportionality requirement enshrined in Article 5 (4) TEU.

### 1. Normative Content of the Proportionality Principle

With regard to the choice of the form of action, it is agreed that Article 5 (4) of the TEU establishes an "instrumental hierarchy", according to which the EU institutions should not take binding harmonization measures if alternative forms of action such as recommendations and optional codes of conduct are sufficiently effective. If the EU institutions adopt binding normative provisions, they must choose the least restrictive means (EU directive instead of EU regulation, etc.) and the least restrictive harmonization technique (minimum standards, mutual recognition, etc.). This is repeated in Art. 296 (1) of the TFEU.

With regard to content, Article 5 (4) of the TEU is opposed to action by the EU institutions if it can be shown that the choice of less burdensome and less intrusive means has the same effectiveness. Art. 5 sentence 5 of the Subsidiarity Protocol makes it clear that the measure to be adopted must be the one which, in order to achieve the regulatory objective, causes the lowest costs and administrative burden for the Member States and other interested parties. As is well known, the CJEU has refrained from a serious enforcement of the Treaty specifications in Article 5 (4) of the TEU. It is content to examine whether the EU institutions can be reproached with an obvious error or an apparent abuse of their discretionary powers of judgement. The CJEU will only intervene if the limits

imposed by the Treaty on the political discretionary powers of the EU legislator are obviously exceeded.

## 2. Insufficient Explanation in the Amendment Proposal

It has been stated above that the authors of the draft amendment have not adequately addressed the requirements of the subsidiarity principle. Their confrontation with the principle of proportionality is so superficial that astonishment is called for. The accompanying explanatory statement of the draft amendment contains the following statement:

“The proposed measures only contribute to achieving the objectives set, notably of a consistent application of the 'polluter pays' and 'user pays' principles, and do not go beyond what is necessary to this end.

The extension of the scope beyond HGVs is necessary in order to ensure that coherent rules are applied to all road vehicles and to be able to address the problems that are not only or not primarily related to HGV traffic (degrading infrastructure quality, high CO<sub>2</sub> emissions from road transport, air pollution, noise, congestion, or the discrimination of foreign users).

Costs to Member States, businesses and citizens are limited compared to the potential benefits. The proposal does not impose the application of road charges by Member States, but harmonises the way such charges should be applied across the Union. It also does not imply any increase of the level of existing charges.

As part of the impact assessment, a number of possible policy measures have been discarded based on the proportionality principle, such as mandatory infrastructure charging or mandatory congestion charging.”<sup>39</sup>

These remarks are obviously rather superficial; in some parts, they could even be considered incoherent. The objective of "applying coherent rules to all road vehicles" (in German: "uniform rules") may be a political objective of the EU Commission, but as such it is not a Treaty objective in the light of Article 5 (3) and (4) of the EU Treaty. Harmonization for the sake of harmonization, unifica-

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<sup>39</sup> Draft amendment proposal, COM(2017) 275 final, p. 5.

tion for the sake of unity alone should be prevented. Discrimination against foreign users is already prohibited today (Article 18 in conjunction with Art. 20 of the TFEU<sup>40</sup>); it is precisely thus not necessary to extend the scope of application of the current directive. A coherent proportionality test would also have required that other regulatory options had been tested for effectiveness and impact. The blanket reference to "low costs" is not sufficient to justify compliance with the requirements of Article 5 (4) TEU.

### 3. Reference Point of the Proportionality Assessment: Objectives of the Proposed Legislative Action

The application of the principle of proportionality (as well as that of the subsidiarity principle) requires a precise definition of the objectives pursued by the proposed action, as has been discussed. Again, it is true that within the framework of Article 91 (1) of the TFEU, it is not a legitimate objective of the EU law making authorities to aim at an increase of the financial revenues of the Member States. The parts in the explanation of the proposed amendment where the authors of the proposal are promising significantly higher revenues, are motivated by political and strategic considerations. The Member States are invited to do away with subsidiarity and proportionality concerns in light of the promise of "more money". In view of Art. 91 (1) of the TFEU and Art. 5 TEU, they raise considerable legal concerns.

### 4. Proportionality of the Chosen Instrument

The decision of the draft amendment's authors to choose the means of the directive (Article 288 (3) TFEU) does in principle not raise any fundamental objections. Existing provisions of the Directive can only be amended by choosing the instrument of the directive. On the other hand, the attempt to extend the scope of the directive and to cover areas that have not been covered so far must be

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<sup>40</sup> See II. 2. above.

subject to the (re-)examination under Article 5 (4) of the EU Treaty. The efforts of the draft amendment's authors to use a directive to force EU Member States into non-discrimination and to establish fair competition do not raise any concern. The EU institutions do not have at their disposal a more lenient form of action that creates sufficient legal binding force.

The situation is different with regard to those amendments aimed at extending the toll and user charge (i.e. time-based charges) systems to road users who do not operate in a market. Here, the use of soft control instruments such as guidelines is sufficient if and to the extent that the EU institutions want to give the EU Member States the right not to have to act at all. The EU Commission has comprehensively outlined the preferential status of this route in its Communication of 14 May 2012 on the application of national road infrastructure charges levied on light private vehicles (COM (2012)199 final). Instrumental proportionality is not respected if the right to inactivity is recognized, and at the same time Member State actions is regulated by the binding instrument of the directive.

## 5. Proportionality of Substantive Obligations

Pursuant to Article 5 (4) of the TEU, the EU legislator may not impose obligations upon the EU Member States that go beyond what is necessary to achieve the objectives of the treaty. Here again, the provisions made to protect against discrimination and to set an appropriate level of charges for road users in competition are compatible with Article 5 (4) of the TEU. In particular, it is important to ensure that foreign users of the transport infrastructure are not burdened "disproportionately"; they are to be protected against paying more than their amount and level of use (protective dimension of "the user pays"-principle). This was pointed out by EU Transport Policy Commissioner *Siiim Kallas* in an



answer to a parliamentary question of 28 August 2013 on "Discrimination against non-residents in respect of car tolls":<sup>41</sup>

"For this reason, road toll systems, which apply to both resident and non-resident drivers, should be implemented in the form of user charges rather than taxes, so that the charges levied are proportionate to the use of the infrastructure. The more attention is paid to the proportionality of toll systems, the more they comply with the user principle ("user pays") and the less discriminatory they are."

On the other hand, any attempt to regulate the toll and user charge burden on road users who are not in competition raises doubts. With regard to environmental objectives, such a harmonization system, which does not require the reduction of emissions, would be rather sub-optimal, if only because an immediate vehicle-specific regulation would be much more effective. If the EU institutions take the position that the current environmental burden caused by private vehicles is too high, they can take direct control via vehicle-related regulations; moreover, the adequate regulatory approach is the taxation of energy, as has been done by the EU legislator within the regulatory scheme of the Directive on Energy taxation. The Energy Taxation Directive does set an indirect framework for CO<sub>2</sub> and other pollutants. There is no need for the essentially sub-optimal instrument of harmonizing toll and user charge (i.e. time-based charge) systems. A better protection of the population's health against possible adverse effects from road traffic can be achieved by regulating noise pollution limits.

In view of the principle of proportionality, it is also problematic that the draft amendment aims at subjecting the entire road network in the Member States to European Union legislation. Transport on most roads in the Member States has no European dimension. The decision on whether and how to operate toll or user charge (i.e. time-based charge) systems on these roads compels the Member States to deal with conflicts of interest, which can only be resolved at Member State level. This is the only place where it is possible to make a mean-

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<sup>41</sup> <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2013-011520&language=DE>.

ingful assessment and to decide whether the levying of tolls or user charges has an traffic flow diversion effect on certain roads, which should be compensated for by extending it to all roads. Only there can a meaningful decision be made as to whether the associated social burden (especially in rural areas) is politically and socially acceptable. There is no need for supranational regulation here. It must be left to the Member States to decide whether and how traffic on roads which do not have a European dimension should be burdened. Moreover, when it comes to the financial burdening of all road transport, energy taxes are the more effective and milder policy option.

Concerns are also raised by the legislative attempt to abolish user charges. It may be the case that user charges describe the concrete value of use less precisely than toll charges. As long as the Member States are free to impose no tolls at all (i. e. giving road users direct access to the roads free of charge), there is no need to intervene in the choice of different fee models. Obviously, from the political point of view such a regulatory approach is not intended to achieve its immediate purpose, but to outline a regulatory model under European Union law that is aimed at in the longer term. In this respect, as stated above, it is sufficient to establish optional codes of conduct. It is adequate to remember again that the EU Commission, in its Communication of 14 May 2012 on the application of national road infrastructure charges levied on light private vehicles (COM (2012)199 final), has comprehensively outlined the value of such codes of conduct.

## 6. Sufficient Means: Better Coordination of the various Member State Systems

Accordingly, the requirements of Article 5 (4) of the TEU (outside the scope of those infrastructure users that are in competition) would be met by a regulatory approach that serves to effectively integrate the existing toll and user charge (i.e. time-based charge) systems. The Member States should be encouraged by guidelines to design their systems in such a way that the use of transport infrastructure can be made without effort (transparency, accessibility

of points of sale, etc.) and without obstacles to cross-border traffic (common Internet sites, links, etc.).

## 7. Results of the Proportionality Review

The proposed amendments to Directive 1999/62/EC are proportionate in so far as they serve to protect against discrimination and to ensure fair conditions of competition for road users in competition. On the other hand, the attempt to extend the harmonization of Member State systems to other road results in a disproportionate interference with Member State regulatory freedoms. It thus violates Article 5 (4) of the TEU. The same applies to the attempt to force the Member States to discontinue certain systems of infrastructure usage fees.

## **VI. Fundamental Rights**

The EU legislator's intention to bring about a significant extension of the scope of the current directive must also be subjected to a fundamental rights review (Article 6 (1), (3) of the EU Treaty). The same applies to the regulatory approach aiming at the elimination of Member State user charges. Politically, this approach wants to force the Member States to introduce tolls.

The planned extension of the regulatory reach raises questions relating to the scope of fundamental rights' protection of individual freedom. To date, it has not been clarified to what extent the imposition of tolls or user charges affects fundamental rights under the Charter of Fundamental Rights of the European Union or the fundamental rights protected by Article 6 (3) of the TEU. The intention to force Member States into the use of toll systems raises above all questions of privacy protection. If the infrastructure use of private road users were to be covered by a (electronic) toll system, movement profiles would be created which would raise important questions with regard to Art. 7 and Art. 8 of the Charter of Fundamental Rights of the European Union.

The draft amendment thus raises fundamental rights' issues that are not insignificant. It is not apparent that the authors of the draft amendment would have reflected on these issues. This must come as a surprise at a time when sensitivity to fundamental rights has become a criterion for the legitimacy of European Integration.

However, from a doctrinal legal point of view, the provisions of the draft amendment do not conflict with the EU fundamental rights under Article 6 (1) and (3) of the TEU. These provisions do not have any direct impact on the freedom of the individuals. They give Member States the freedom to operate toll or user fee systems, but they do not force them to do so. If a Member State decides to introduce such a system, it is responsible for the fundamental rights effects accompanying such a step - even if they act within the framework of Eu-

ropean Union law. If a Member State sees issues of fundamental rights protection, it can dispense with introducing a toll or charge system. This description of the doctrinal situation of fundamental rights protection would only have to be adjusted if the EU were to adopt a provision that would force the Member States to introduce specific fees.

The amendment therefore raises questions of fundamental rights policy, but has no direct impact on fundamental rights in a legal-doctrinal sense.

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