1. Introduction

The relationship between energy productions and the environment plays a central role both in the European taxation and in the specific ecological policy of the Union[1].

In order to achieve the objectives of environmental protection, increasingly integrated into the supranational legislation, Member States, at various levels of government, have different fiscal schemes, among which taking particular importance, many tax reliefs designed to encourage operators to adopt behavior compliant with the aims of environmental protection, preferring energy productions with lower environmental impact[2].

The European "polluter pays" principle is the leading principle for States aiming to establish environmental taxes. Next to energy taxation, harmonized at European level, it is relevant all the system of ecofriendly tax reliefs compliant with the State aid rule; these tax reliefs are permitted only if they respect the principles of non-discrimination and proportionality[3].

The aim of this paper is to draw some conclusions on the Energy Taxation and State aid control by analyzing the European Court of Justice case-law. In the following pages we will analyze several topics. In particular, the minimum level of taxation on Energy Taxation Directive, the relationship between energy taxes and free emissions allowance and States aid for eco-friendly energy.

2. European Union Court of Justice case-law and the minimum level of taxation on Energy Taxation Directive

Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (hereinafter, Energy Taxation Directive) is the result of a long process of negotiation which has resulted in harmonizing "lows "of energy products and electricity. Energy Taxation Directive has been limited to integrate existing legal regimes of the various Member States. This means that in no case one can speak of establishing a real energy tax harmonized within the EU as an instrument of policy environmental protection.

The basic content of the Directive can be summarized in three major issues:

First, the target area is increased, and happens to include, in addition to oil, natural gas, coal and electricity widens.

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1 The proposed activity aims to analyze the European Court of Justice's case-law on some selected issues.

2 The new regulation (no. 651/2014), adopted by Commission on June, 17, 2014, makes easier for the authorities to grant a significant number of aid measures in favour of the environmental protection or the fight against climate change: among these, there are aid aimed at promoting investments in energy saving and renewable energy sources and aid in the form of environmental tax reliefs. For more information, see: Tenuta, F., "Deroghe al principio di incompatibilità", in VV.AA (L. Salvini, ed.), *Aiuti di Stato in materia fiscale*, 2007; Pepe, G. and Tozza, C., "Le deroghe al divieto di aiuti di Stato", in VV.AA (M. Ingrosso and G. Tesauro, eds.), *Agevolazioni fiscali e aiuti di Stato*, 2009, cit., p. 255.

3 In the Community guidelines on State aid for environmental protection (2008/C 82/01), Official Journal of April, 1, 2008, no. 82, 1-33, the Commission has identified a number of measures for which State aid may be compatible with the internal market. In particular: aid to enterprises to increase the level of environmental protection beyond the thresholds set by community regulations or in lack of community regulations; aid for the purchase of new means of transport to increase the level of environmental protection; aid to environmental studies; aid for energy saving; aid in favour of renewable energy sources; aid for waste management, etc.

Secondly, on the one hand, new imposition minimum taxation of energy products already settled down by harmonized taxation (hydrocarbon) that there were subject to minimum levels obligation by the Directive 92/82/EEC of 19 October 1992 on the approximation of the rates hydrocarbons special tax. On the other hand, the requirement of " levels of taxation " minimum for energy products, such as is the case of natural gas and coal and electricity is introduced, which to date had not been taxed harmonized.

Finally, a wide range of assumptions differentiation and tax exemptions is established which reduce, and even eliminate in some cases, the effective taxation of certain products.

This highlights the importance of defining the scope of the directive because the minimum tax levels only apply to products covered by the Directive. In this way, it should be excluded from the minimum level of taxation of non-liability cases.

2.1. Objective scope and minimum tax levels

The first issue to consider is that the Energy Taxation Directive only explicitly sets a minimum level of taxation for some products and which are the following: petrol, diesel, kerosene, fuel oil, LPG, natural gas, coal, coke and electricity.

However, the Energy Taxation Directive incorporates other energy products not listed explicitly in the minimum levels of taxation. This is because these are products that although technically suitable for taxable purposes, their normal use is not for fuel. If they were used as fuel and therefore, were placed under lien, these products "are taxed, depending on their use, with the same tax rate for heating oil or fuel equivalent locomotion"[4].

In addition, the Directive regulates a closing clause under which considered to be within the target area to all products used as fuel, as fuel additive or extender in a fuel. The same goes for those hydrocarbons (except peat) intended for use, offered for sale or used for heating. In both cases, the assessment will apply the tax rate for the equivalent energy product.

Thirdly, the Directive establishes a tax differentiation depending on whether the product is used or not for industrial or commercial purposes.

Fourthly, the Directive regulates expressly few cases of non-liability. The common characteristic lies in the absence of liability based on the use of the products. Thus, the following products are not subject:

a) Energy products used for purposes that are neither automotive fuel nor fuel for heating. In this sense, when energy products are used as raw material or in an application that does not involve combustion, they are not subject to the Directive and therefore the Member States are free to tax those assumption fact.

b) Dual-use energy products. In particular they are considered dual-use energy products for chemical reduction and in electrolytic and metallurgical processes. Likewise, the directive states not subject to the electricity used for the above assumptions. However, in general, an energy product has a dual use when it is used both as heating fuel and for purposes other than motor fuel and heating fuel.

[4] Art. 2.3 of the Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31 October 2003).

c) It is also excluded from the scope objective of the Directive when the electricity represents more than 50% of the cost of the final product. In those cases the electricity is considered analogous to that which would have a raw material.

d) Energy products used in mineralogical processes.

Finally, the Directive regulates several mandatory and optional exemptions. The mandatory exemptions are related to the following assumptions:

a) When energy products and electricity are, on the one hand, used to produce electricity or, secondly, to maintain the ability to produce electricity. However it allows to the State Members to tax these assumptions by environmental reasons policy. In this case, compliance with the minimum levels of taxation of the Directive is not required.

b) In the case of energy products supplied as fuel for the purpose of air navigation which is different of private pleasure craft.

c) In the case of energy products supplied as fuel for navigation within Community waters (including fishing), except those used in private pleasure craft, and electricity produced on board boats.

d) Therefore the importance of the implementation of the minimum level of taxation is clear, the definition of the criteria for utilization and the use of energy products as well as the determination of legally undefined concepts which are regulated by the Directive.

The European Court of Justice has issued several resolutions in this regard that we will discuss below.

2.2. The case-law

a) The ECJ case-law makes clear that Member States are empowered to approve taxes on energy products covered by Article 2.1 of the Directive (application field goal) when they are used for purposes other than as motor fuels or the fuel heating (Article 4.2 letter b) of the Directive: not subject course)[5]. However, any product used as an additive, whether they constitute an "energy product", and whether or not intended for consumption, put yourself or sale or used not as fuel or fuel, is considered subject to the rules of imposition of the Directive and, therefore, the minimum tax level[6].

b) There is a necessary link between the chargeable event for the tax at issue and the amount of energy generated by the time of release for consumption.

   ECJ has analyzed Article 4(2) of the Directive, according to which, level of taxation must be understood as: "the total charge levied in respect of all indirect taxes (except [value added tax]) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption".

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5 Judgment of the Court, 5 July 2007, Case C-145/06 and C-146/06, *Fendt Italiana Srl v Agenzia Dogane Ufficio Dogane di Trento*, EU:C:2007:411.

6 Judgment of the Court, 18 December 2008, case C-517/07, *Afton Chemical Ltd v The Commissioners for Her Majesty's Revenue & Customs*, EU:C:2008:751, paragraph 27 to 42.