

1. Introduction

This research inquires on the balance between two goals, competitiveness and environmental protection, and identify the contributions of the different legal instruments under examination to this balance, in particular, State aid instruments (GBER and Environmental Guidelines) in Section 2, the Energy Tax Directive (ETD) in Section 3, the Emissions Trade System (ETS) in Section 4 and Environmental Border Tax Adjustments (EBTAs) in Section 5.

Although certain flexibility has been given to the co-authors, this study mainly focuses on the following points:

- (1) Balance between competitiveness and environmental protection in the different instruments under examination.

How these goals are defined? Which criteria are used for the balance? Is it a right balance? Should it be changed? Could it be improved? How? All in all, we intend to identify which is the contribution of each instrument to the achievement of these goals, assess how the balance is done and suggest and explain improvement proposals.

- (2) Coordination with the other instruments

Which is the role of each instrument in the overall framework? Are there specific provisions or mechanisms to coordinate the different instruments? How are they designed? Which criteria and rules govern the interaction between the different instruments? Are they missing? Should they be included or reformed? How? Is there a good and harmonic mix of regulatory instruments? All in all we intend to understand the role and interaction between the different instruments in our topic, detect lack of coordination, and suggest improvements.

- (3) Regulatory asymmetries intra-EU and extra-EU

To what extent the analysis reveals or allows regulatory asymmetries -e.g. discrimination- between different energy sources depending on their green character or between States regulation? Which are the limits to those asymmetries (limits to regulatory competition)? Which criteria are used to determine these limits?

Is there and adequate control of those asymmetries? Any improvement proposals?

2. The State Aid control instruments. The Balance between competitiveness, competition and environmental protection

State aid control of environmental tax reliefs requires a balance between different goals and values among which the most important ones may be competition and trade, environmental protection and, in an indirect way, competitiveness of national and European industry. Here below these concepts will be explained in the context of the EU State Aid system before moving to the analysis of how the balance is made between them. Attention will also be given to detecting possible regulatory asymmetries and referring to coordination with other instruments.

2.1. Environmental protection

According to Article 107.1 of the Treaty on the Functioning of the European Union (hereinafter TFEU), State aids are prohibited unless an exception of Article 107, paragraphs 2 or 3 can be applied. In the latter paragraph, letter “c”, it is stated that the Commission may consider compatible with the Common Market State aids that facilitate the development of certain economic activities in the EU provided that certain conditions are fulfilled. Among these activities, the Commission has included aids related to environmental protection and energy. In addition to individual decisions, the Commission has adopted two general acts that directly tackled this issue and are very relevant for our research: the General Block Exemption Regulation (hereinafter GBER), in particular Section 7 devoted to Aids for environmental protection¹, and the Guidelines on State aids regarding environmental protection and energy 2014-2020 (hereinafter EEAG)².

In both texts, there is a common definition of “environmental protection”, in particular in article 2, paragraph 101 of the GBER and paragraph 19 (1) of the EEAG. Although the definitions are not exactly the same, their slight differences do not affect substance. Environmental protection is defined as “any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy”. This is a very broad definition including measures addressed to, among others, the fight against climate change, sustainable and efficient use of energy and promotion of renewable energy sources. Furthermore, nowadays the term “environmental protection” should be considered into the context of the 2020 European Agenda and the goals in energy and climate contained in the so called 2030 Framework³.

This research project mainly focuses on tax reliefs of an environmental tax⁴ which is defined in Article 2, para. 119 of the GBER, as a “tax with a specific tax base that has a clear negative effect on the environment or which

¹ See Enabling Regulation, Council Regulation (EC) No 1588/2015 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, OJ L 248, 24.9.2015, p. 1, article 1 (1), a, iii). (environmental protection); and Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (GBER), OJ L 187, 26.6.2014, p. 1.

² Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

³ See EEAG, paras. 2 and 3.

⁴ For a detailed study of this type of aid, see M. Kleis and P. Nicolaidis, *Fiscal State Aid and Environmental Protection: Analysis of a Conceptual and Practical Problem*, Tijdschrift voor Staatssteun, 2008. For a more general study on tax incentives see, among others, C. Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Kluwer Law International 2014.

seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment". The interpretation, problems and difficulties arising from this definition had already been dealt in another paper and discussed in a previous seminar of this research project⁵. Without a need to insist on that issue, I will focus on the contribution of a tax relief to environmental protection.

A tax relief or exemption of an environmental tax may contribute to an increase in the protection of the environment where the beneficiaries would otherwise be placed at such a competitive disadvantage that it would not be feasible to introduce the environmental tax in the first place⁶ or where granting a more favourable tax treatment to some undertakings may facilitate a higher general level of environmental taxes⁷. Therefore, in order to prove the potential contribution of a tax reduction to a higher degree of environmental protection, we have to be convinced of:

- first, the need for State intervention, implying that a market failure is identified;
- second, appropriateness: the aid, as designed and proposed, is an appropriate policy instrument to increase environmental protection. Appropriateness comprises the existence of an incentive effect, that is to say that the aid changes the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity which it would not carry out without the aid or which it would carry out in a restricted or different manner.

2.2. Competition, trade and competitiveness. Impact on regulatory asymmetries

Competition and competitiveness are two different although related concepts. In the economic field, competition refers to a rivalry scenario between firms (or other actors) to get the consumers' favour, whereas competitiveness refers to the ability of a firm (or another actor) to offer products or services at adequate prices and conditions as to obtain reasonable profits.

As it is well known, within the EU State aid control system, the focus of the balancing exercise is between, on the one hand, distortions of competition and trade and, on the other hand, other legitimate interests, among which environmental protection.

Competitiveness of national and/or European industry might also be an 'indirect legitimate interest' (one may say that, as a general rule, it is more an expected outcome than a justification for the restriction). It is legitimate where it is achieved by more competition and by fostering a more dynamic economic environment and not through protectionist measures which will be detrimental to and very distortive of competition and trade. The logic behind is, and should be, that, as a point of departure, a competitive market is the best scenario for promoting the competitiveness of national and European operators and to prepare them to European and worldwide competition in the medium-long term.

⁵ M. Villar & P. Wegener, Energy taxation and key legal concepts in the EU State aid context: looking for a common understanding, Documentos de trabajo, Serie Política de la Competencia No 50/2015 (CEU Ediciones 2015).

⁶ EEAG, para. 167.

⁷ Ibidem, para. 168.

⁸ A regulatory asymmetry was recognised by the European Commission in the draft proposal for a reform of the ETD when it stated that one of the problems of the current ETD is that Member States can compensate differences in production costs by applying favourable tax treatment according to article 16 of the ETD. See OJ C 80/17, 7 March 2015.