1. Outline

Within the framework of a European internal market, one of the points to be assessed by Member States designing the taxation on energy –the way how energy taxes and fiscal benefits and/or reliefs on energy activities work- ought to be whether some parts of the system could be considered as an infringement of the EU State aid rules.

Within the specific constitutional framework of any European State Member, national legal systems must be in line with European Treaties and with European Regulations. When we are in the field of energy taxes, European Law has to be considered from four points of view: tax law, energy law, environmental law and competitiveness law. So, we cannot restrict the analysis just to one perspective, and it is crucial to understand that under the logic of all these different approaches, principles such as "polluter pay", "precautionary" or "proportionality" do not have not the same sense and incidence. Therefore, a case-by-case approach is required to resolve the compatibility of each national energy tax or tax measure with European rules on State aid.

From this point of view, the position adopted by both the European Court of Justice (hereafter ECJ) in several cases affecting environmental taxation –some of them refer particularly to energy taxes-, *Adria-Wien*[1], *British Aggregates*[2], *Republic of Austria v European Commission*[3], *and Kernkraftwerke*[4], and the European Commission (hereafter EC) in the most recent documents on State aid concept[5] –in the General Block Exemption Regulation[6], and in the Guidelines on state aid for environmental protection and energy 2014-2020[7]– shows that some European Law principles –polluter pays principle, precautionary principle (both of them included within the same TFEU' article[8]), and proportionality– play a significant role in base guidelines and approaches: to justify and to evaluate if a specific energy tax or tax benefit could be considered a State aid. In view of the above, the question arises as to whether the current legal context on State aid and energy taxes could adopt other more pertinent approaches. These other approaches might take into account not only ECJ case law but also the legal principles referred to above. So, understanding if an energy tax or measure is in line with the European law, State aid rules is not easy; it requires a case-by-case analysis of each of the following set of rules which may be inferred from the ECJ cases and EC regulations about this question.

According to Ferreiro[9], environmental taxes –energy taxes when qualified as environmental– may be considered as not forming part of a general tax system; therefore, at least theoretically, if we follow EC considerations they do not present problems from a State aid framework as selective rules:

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1 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, 8 Nov. 2001.

2 In the three decisions set on this case: *British Aggregates Association v. Commission of the European Communities*, Case T-210/02, 13 September 2006; *British Aggregates Association v. Commission of the European Communities and United Kingdom*, case C-487/06 P, 22 December 2008; and *British Aggregates Association v European Commission*, Case T-210/02 REENV, 7 March 2012.

3 *Republic of Austria v European Commission*. Case T-251/11, 11 December 2014.

4 *Kernkraftwerke Lippe-Ems GmbH v. Hauptzollamt Osnabrück*, C-5-14, 4 June 2015.

5 2014 Draft Notice on the notion of State aid pursuant to Article 107 (1) TFUE. Available at: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html. (Hereinafter, 2014 Draft Notice). This Notice replaces the 1998 Notice.

6 Commission Regulation (EU) No 651/2014 of 17 June declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26 June 2014).

7 Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200/1, 28 June 2014).

8 Art. 191.2 Treaty on the Functioning of the European Union (art. 174 TEU): "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the *precautionary principle* and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the *polluter should pay.*"

9 Ferreiro, E.: "Taxes with environmental purposes and State aid Law: the relevance of the design of the tax in order to justify their selectivity", in Pistone, P., Villar Ezcurra, M. (eds.): *Energy taxation, environmental protection and State aids: tracing the path from divergence to convergence*, Amsterdam, IBFD, in press, p. 6.

> "special-purpose (stand-alone) levies, such as those on certain products or activities with a negative impact on the environment or health", do "not really form part of a wider taxation system"[10];
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> "the structure of certain special-purpose levies (and in particular their tax basis), such as *environmental and health taxes* imposed to discourage certain activities or products that have an adverse effect on the environment or on human health, will *normally* integrate the policy objectives pursued"[11].

But, in fact, "any aid (…) in any form whatsoever (…) shall (…) be incompatible with the internal market" (art. 107.1 TFEU). Thus, special-purpose taxes or levies –and tax exemptions, reliefs or benefits within their structure– could be considered a State aid. The point here would be then to define the concept of "environmental tax" on these effects[12], and to analyze whether the energy tax is structured in a manner that could be considered "normal", integrating the policy objectives pursued. In other words: when is an energy tax qualified as an environmental tax? When might its structure be assessed as "normal" regarding its objectives, within the "underlying logic of the system"? (Section 1). In order to answer both questions, a set of principles, polluter pays principle, precautionary principle and proportionality principle, may be the key when looking for other approaches which could address the current issues and inconsistencies (Section 2). Then, following this scheme of reasoning, based on the general regulations and specific decisions enacted by the EC, and from the judgments set by the ECJ, it is possible to deduce some rules to understand how the set of principles play in this field without undermining the need to consider the more economic-based approach on the selectivity criteria for State aid analysis[13] (Section 3).

2. Scheme of the analysis

In order to evaluate a tax rule to be established on an energy product, activity or service, from a European State aid perspective, it is necessary, first of all, to understand if we are facing an environmental issue (section 1.1). Only once this point has been clarified, will it be possible to proceed with the analysis, checking if the tax or measure is consistent with its specific environmental system: its own point of reference to carry out the State aid test (section 1.2).

2.1. Environmental taxation

When designing an energy tax in accordance with European law on State aid, the framework differs depending on whether the energy tax is recognized as an environmental tax. The set of principles to be considered in one case or in another are different. The reference system to evaluate whether a specific regulation may be qualified as selective from a State aid perspective will be also different.

An energy tax –or whatever energy taxation measures, such as an advantage, benefit or exemption in general taxes, with a specific incidence on the energy market– may be qualified as an environmental tax, or an environmental tax incentive. Not all the energy taxes and incentives can be qualified as environmental.

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10 2014 Draft Notice, par. 134.

11 2014 Draft Notice, par. 136.

12 Regarding this question, see M. Villar Ezcurra, P. Wegener Jessen (2015), "Energy taxation and key legal concepts in the EU State aid context: looking for a common understanding", *Documentos de trabajo del IEE – Serie Política de la Competencia* No 50, CEU Ediciones.

13 Micheau, C.: *State aid, subsidy and tax incentives under EU and WTO Law*, Wolters Kluwer, 2014, p. 296,298.

However, the yardstick to judge an energy tax or incentive from a State aid perspective is different if it is qualified as environmental[14].

Once an energy tax or measure has been identified as environmental –it will not always be the case– the reference used to consider if it respects European Law on State aid will not be the general taxation system, but the specific system of the tax or the measure whereby the environmental objectives and principles play a significant role.

Key concepts on State aid analysis, as "a system of reference", "comparability" or "selectivity" may be built in the same way only when we are in front of an environmental tax or measure[15]. If we are faced with an energy tax or measure that cannot be qualified as environmental, the meaning of these words, from the perspective of European rules on State aid, will change.

Therefore, the first step in the assessment must be to decide whether the energy tax or measure is environmental or not. The problem at this stage, of course, is that this characteristic is hardly ever clear[16]. However, some presumptions in this respect may be identified[17]. For instance, a point of reference in this sense is how the revenues of the tax are used, if they are totally or partially earmarked for a more or less broad environmental objective[18].

2.2. Specific scheme of the tax or measure

Once it has been settled that the energy tax or measure to be checked under the light of the European regulations on State aid is considered an environmental one, the next step is not to take the taxation system as reference in the process, but the specific system within which the tax or the measure has been set up. When an environmental policy is the proper framework of the tax instrument implemented on the energy market, the point of reference – the "system of reference"– will not be the general taxation system, but those particular environmental objectives pursued by the tax rule.

In this sense, EC regulations and decisions, and ECJ cases, often appeal for rationality and reasonability of the rules under the logic and nature of the tax. Therefore, the rationality and reasonability of the rules have to be addressed not only under the logic of the tax system, but, most importantly, under the logic of the specific environmental framework whereby the tax rule has been enacted.

Thus, it is necessary to analyse the entire structure of the tax, on one hand, and the use of the revenues on the other. Then, the skeleton of the tax –taxable events, exemptions, taxable basis, benefits (reliefs, deductions and refunds), tax rates, tax liability– must be analysed under the environmental logic that supported its enactment. In order to understand if the tax, or a specific section of the tax, could be considered an infringement of the State aid regulations, the analysis has to check if the tax, all its structure, is consistent with the environmental

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14 See on that regard M. Villar Ezcurra, P. Wegener Jesenn (2015), cit. *ut supra*.

15 See M. Villar Ezcurra (2013), "State Aids and Energy taxes: Towards a Coherent Reference framework", Intertax, Vol. 41, Vol. Issue 6&7, at p.343-348, and case-law references.

16 Some authors distinguish between environmental taxes and fiscal environmental taxes qualifying the second ones as those "primarily aimed at generated revenue" [K. Määttä, *Environmental Taxes. From an Economic Idea to a Legal Institution* (Finnish Lawyer's Publishing 1997), p. 64, quoted by E. Ferreiro, "Taxes with environmental…", p. 12], admitting that the boundaries between ones and others are not easily traced.

17 See J. English (2015) "Energy tax incentives and the GBER regime", *Documentos de trabajo Serie Politica de la Competencia*, No 51/2015, CEU Ediciones.

18 *Cfr*. Case C-5/14 Kernkraftwerke Lippe-Ems, § 78.