1. Introduction

In all Member States of the European Union, tax benefits or tax relief granted in the context of a harmonized energy tax[1] are a frequent phenomenon. The legal basis for such relief is to be found, primarily, in the EU Energy Tax Directive[2]. Some national energy tax concessions indeed merely reflect a standard measure of the harmonized energy tax regime, in particular the exemptions for energy products supplied for use as fuel for the purpose of air navigation or navigation within Community waters, laid down in Art. 14 (1) (b) and (c) of the Energy Tax Directive. In the light of settled case law, these tax concessions are to be regarded as Union aid and therefore not subject to the State aid control under Art. 107 and 108 TFEU[3]. Most energy tax reliefs, however, are granted at the discretion of the Member States, based on the authorizations of Art. 5 and 15-19 of the Directive. According to Art. 5 and 6 of the Directive, such favourable measures may take the form of tax exemptions, tax reductions, tax rate differentiation and tax refunds. As can be inferred from the aforementioned articles, the respective tax relief measures can affect many different sectors of the economy and they may pursue a variety of objectives, most of which are also mentioned in recital 28 of the preamble to the Directive.

Certain types of relief are granted for social reasons, such as lower tax rates, exemptions, or refunds for local public passenger transport, for waste collection, for disabled people, or for the use of heating fuels in households. Others seek to enhance activities in the general interest, such as tax relief for taxable products used by charitable institutions. The fiscally most relevant categories of energy tax relief are granted in order to avoid a negative impact of taxation on the competitiveness of certain sectors of the economy; such as for instance relief for energy products and electricity used for agricultural purposes or by energy-intensive businesses. Finally, some energy tax reliefs may be granted for environmental purposes; for example, for the use of taxable products in the field of pilot projects for the development of more environmentally-friendly products, for electricity from renewable resources, or in the context of combined heat and power generation. Four years ago, the Commission has proposed a directive to amend the Energy Tax Directive[4]; according to the draft, the number of admissible categories of tax relief would be significantly reduced, and taxation should be more aligned with the objective of curbing climate change. However, the proposal has not as yet been adopted in Council, and the political prospects for an adoption of the draft in its current form are rather dim.

Since the implementation of the optional categories of energy tax relief described above depends on national political preferences, Art. 26 (2) of the Energy Tax Directive clarifies that such preferential treatment might constitute State aid. If this is indeed the case according to the criteria of Art. 107 (1) TFEU, the measure normally has to be notified pursuant to what is now Art. 108 (3) TFEU, in order to allow the Commission to assess the compatibility of the aid scheme with the common market under the provisions of Art.107 (2) and (3) TFEU. No such need for notification exists, though, and the respective aid scheme is automatically approved[5], to the extent that it is covered by the General Block Exemption Regulation (GBER)[6] and meets the formal and substantive criteria specified therein.

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1 In the following, the expression "energy tax" refers only to those kind of taxes that are within the substantive scope of the EU Energy Tax Directive.

2 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

3 See CFI5 April 2006, T-351/02, Deutsche Bahn [2006] ECR II-1047, paras. 99 et seq.

4 Proposal of 13 April 2011, for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 169/3.

5 See *Van de Casteele*, in: Hancher/Ottervanger/Slot, EU State Aids, 4th ed. 2012, para. 11-004.

6 Commission Regulation (EU) No 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.

The question to be dealt with in this paper is whether the nature of tax relief measures in the context of energy taxation can justify a specific treatment under the GBER, and in particular, whether it can justify a more global exception for energy tax incentives beyond the categories of tax incentives that are currently eligible for a waiver of notification requirements. The analysis will, however, be limited to the exemptions admitted within the framework of the Energy Tax Directive. Apart from singular national phenomena of taxes on raw materials or production facilities such as nuclear fuel / nuclear capacity taxes in Germany and Sweden, there do not exist relevant taxes directly related to the production and use of energy products and electricity that would not be covered by the Energy Tax Directive and that would therefore not be subject to its limitations also regarding the possibilities for granting tax benefits[7]. In particular, national "carbon taxes", i.e. taxes levied on the carbon content of energy products that have already been introduced in some Member States, must be considered as merely an alternative approach to taxing energy products from the perspective of the Energy Tax Directive. They are therefore also subject to the harmonized energy tax regime of the EU and any tax concessions must respect the restrictions set out in the Energy Tax Directive[8].

2. The status quo of energy tax incentives under the GBER

Currently, only certain categories of energy tax incentives qualify for an automatic approval under the GBER. This is due to both, the legal framework into which the GBER is embedded, and the conditions established in the Regulation itself:

Pursuant to Art. 109 TFEU, the Council, acting on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 TFEU; and in particular, it may specify categories of aid which are exempted from the notification procedure under Art. 108 (3) TFEU. On this basis, the Council has adopted, and subsequently amended[9], the Regulation 994/98 (the so-called "Enabling Regulation")[10] authorizing the Commission to declare that certain categories of aid "should be compatible with the internal market and shall not be subject to the notification requirements" of Art. 108 (3) TFEU. Art. 1 (1) (a) of the Enabling Regulation lists as categories of aid qualifying for this simplified procedure, inter alia, aid in favour of environmental protection; however, the Enabling Regulation provides no legal basis for the Commission to generally exempt energy tax incentives from the notification requirement.

The Commission originally relied on the Enabling Regulation to adopt a series of topical Regulations dealing with certain types of aid, which were eventually amalgamated into a broader General Block Exemption Regulation in 2008[11]. Last year, this Regulation was replaced by the current, modernized GBER. The new GBER reflects the 2013 amendments to the Enabling Regulation, but it also goes beyond that and clarifies some important issues regarding its application to energy tax relief measures.

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7 This is also due to the strict requirements of Art. 1 (2) of the umbrella Directive 2008/118/EC concerning the general arrangements for excise duty, of 16 December 2008, regarding the admissibility of other indirect taxes on excise goods for specific purposes; see, in this regard, ECJ 9 March 2000, C-437/97, Evangelischer Krankenhausverein Wien [2000] ECR I-1157, paras. 47 et seq.

8 See ECJ 10 June 1999, C-346/97, Braathens [1999] ECR I-3419, paras. 23-25.

9 See Council Regulation (EU) No 733/2013of 22 July 2013, amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.

10 Council Regulation (EC) No 994/98of 7 May 1998on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.

11 See Commission Regulation (EC) No 800/2008, of 6 August 2008, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).

Under both the former and the current version of the GBER, fiscal aid schemes "in the form of reductions in environmental taxes fulfilling the conditions of [the Energy Tax Directive] shall be compatible with the internal market within the meaning of Article 107(3) TFEU and shall be exempted from the notification requirement of Article 108(3) TFEU", provided that certain formal criteria and minimum taxation requirements are fulfilled[12]. The current GBER furthermore provides in its Art. 6 (5) that under these premises, energy tax relief measures "are not required to have or shall be deemed to have an incentive effect"; contrary to standard procedure for direct subsidies, such an effect therefore need not be demonstrated by an energy tax aid scheme in order to qualify for privileged treatment under the GBER. In the former version of the GBER, it was stated only in the preamble that reductions in environmental taxes covered by its Art. 25 "should be presumed to have an incentive effect in view of fact that these reduced rates contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned, thereby incentivising the undertakings subject to the environmental tax to reduce their level of pollution."[13]

The wording of the original GBER of 2008 had furthermore created some confusion regarding the precise scope of the exemption available for energy tax relief measures. According to its Art. 25 (1), only "*environmental* aid schemes in the form of reductions in environmental taxes" could be automatically considered to be compatible with the common market. This has led some to assume that the aid scheme as such must serve environmental objectives, and that a relief measure was therefore not covered by the GBER if it did not, in itself, contribute to the objective of "environmental protection" as defined in Art. 17 (1) GBER 2008[14]. Such an isolated interpretation of Art. 25 (1) GBER 2008 based on its ambiguous formulation was presumably incorrect, though, as the ECJ will soon have the opportunity to clarify[15]: Read in the context of the preamble, which has to be taken into account when interpreting the provisions of a directive[16], it appears to be clear that the Commission assumed that environmental tax concessions" contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned"[17]. In other words, the Commission assumed that if environmental tax relief for certain sensitive sectors, recipients, or product categories was not available, the national legislator might feel compelled to lower the overall level of the tax concerned, thereby impairing the positive environmental effects of the tax regime to an even greater degree than by admitting exceptions. Based on such reasoning, it is therefore inherent to any aid scheme in the form of reductions in environmental taxes to be "environmental" in nature. It is therefore only consistent that Art. 44 of the modernized GBER 2014 does not mention this requirement any more.

Against this background, it can be inferred that energy tax relief measures already qualify to a great extent for privileged treatment under the GBER. Besides certain formalities regarding their publication etc. set out in Art. 9 GBER, which shall not be analyzed within the framework of this paper, only the following conditions must be fulfilled:

First, the (harmonized[18]) energy tax concerned must be an "environmental tax" within the meaning of Art. 2 (119) GBER, i.e. "a tax with a specific tax base that has a clear negative effect on the environment or which seeks

12 See Art. 25 (1) GBER 2008; Art.44 (1) GBER 2014.

13 See recital 31 of the preamble to the GBER 2008.

14 See, for instance, the decision of the Austrian Bundesfinanzgericht of 31 October 2014, case RE/5100001/2014; in a similar vein, see *Bieber*, EuZW 2012, 257 (259).

15 See pending case ECJ C-493/14, Dilly's Wellnesshotel GmbH.

16 See, for example, ECJ 17 October 1996, joined cases C-283/94, C-291/94 and C-292/94, Denkavit International a.o. [1996] ECR I-5063, para. 22; ECJ 4 October 2001, C-294/99, AthinaïkiZythopoiia [2001] ECR I-6797, para.25; ECJ 1 October 2009, C-247/08, Gaz de France [2009] ECR I-9225, para.27; *Lasok/Millet*, Judicial Control in the EU: Procedures and Principles, 2008, paras. 663 et seq.

17 See, once more, recital 31 of the preamble to the GBER 2008.

18 This requirement is indeed indispensable, see GC 11 December 2014, T-251/11, Austria/Commission, EU:T:2014:1060, para. 202.