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Energy taxation and key legal concepts in the EU State aid context: looking for a common understanding

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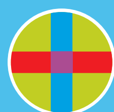

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This document has been subjected to peer review. The scientific committee is composed of academic doctors from European universities and tax expert members of the he Institute of Fiscal Studies (Spain).

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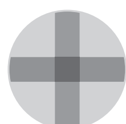

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Summary

This research project aims at clarifying the key legal concepts related to State aid and tax measures in the energy sector in order to improve legal certainty and favour greater efficiency with regard to tax benefits.

From a general perspective, the analysis shows that environmental taxes and energy taxes cannot be considered two overlapping concepts but some taxes may fit into both categories, i.e. an energy tax can be an environmental tax. In other words, energy taxes and energy incentives are not always able to achieve or improve environmental protection. However, some of them may be aimed at achieving other legitimate public policy objectives such as ensuring a competitive, sustainable and secure energy system in a well-functioning Union energy market.

The study of the concept of "environmental tax" included in the General Block Excepction Regulation (GBER) and in the European Commission's guidelines (EAG), checked against the notion of "energy tax", demonstrates that in the field of State aid a specific legal configuration is used. The latter stems from the reference to both the taxable base and the beneficial effects –from an environmental point of view– obtained from the tax concerned. In the opinion of some researchers, this way of articulating the concept of "environmental tax" causes a wide area of legal uncertainty and the exclusion of certain energy taxes and its incentives which fall outside environmental policies. However, other researchers point out that the Energy Taxation Directive covers almost all the relevant energy taxes and thus, the concept of "environmental taxes" together with the characterisation of harmonised energy taxes as environmental would provide enough certainty in this regard. Besides, the environmental protection effect should not be proven but it is construed by law in all relevant cases and so are the transparency and incentive effect.

The consistency of State aid rules on the way of setting up the treatment of energy tax incentives exclusively from an environmental point of view, combined with the fact that the incentives receiving a privileged scheme with regard to State aid regulation have both environmental and other purposes, also raises doubts about the desirability of maintaining this scheme in the future.

Two alternatives to the current regulation are proposed. The first one is to modify the current definition of "environmental tax" within the meaning of State aid scheme, extending it to accommodate therein the common and general concept of environmental tax (based on the tax structure), or by expressly incorporating to the environmental tax concept those energy taxes with similar basic characteristics, so that legal uncertainty –if it is the case– is reduced and discrimination –if any– not serving to clearly objective differences is avoided.

The second one is to create a special regime or consideration (in the GBER and the EAG) for energy taxes where the same objective application sphere as the one of the current special State aid schemes could be applied, but with increased conceptual security and maybe equity. This system would also allow placing greater emphasis on specific energy policy elements, but without necessarily implying a current change in the objective sphere of the incentives. A combination of both these alternatives can be also considered.

1. Introduction

In the context of the EU State aid modernization process, this research project aims at clarifying the key legal concepts related to State aid and tax measures in the energy sector[1]. More specifically, the analysis aims at finding the necessary definitions, categorizations and systematizations to improve legal certainty and favour greater efficiency with regard to tax benefits.

This project's baseline assumption is that imprecise definitions and terms used in the EU regulations and the Commission's guidelines cause uncertainty, also in the context of State aid. Differences between Eurostat and OECD data on the classification of taxes "related to the environment" stress the need for research in terminological and conceptual issues to reach a common understanding, at least at the EU level. Moreover, there are significant differences on taxes on energy products among countries in terms of taxable products, legal definitions, levels of taxation and exemptions and tax incentives[2]. Indeed, both at EU and national level, the lack of a common understanding of what "energy taxes" or "environmental taxes" are, does not allow progress towards an effective energy taxation model within the State aid framework.

With regard to State aid, Member States are free to decide which fiscal aid they consider most appropriate. However, in exercising their tax sovereignty, they must act consistently with the Union Law and with the EU State aid rules. In this context, the legal framework, we need to take into account, is first of all composed of article 107 of the Treaty on the Functioning of the European Union (hereinafter, TFEU). On the basis of Article 107 (3) (c) TFEU, the Commission considers environmental protection one of the sectors that deserves specific guidelines (hereinafter, EAG or guidelines).

Moreover, Article 44 of the General Block Exception Regulation (hereinafter, GBER)[3] provides that "aid schemes" in the form of reductions in environmental taxes fulfilling the conditions of the Energy Tax Directive (ETD) shall be compatible with the internal market within the meaning of the Treaty and shall be exempt from the notification requirement. The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by ETD[4]. Such aid is presumed[5] to have an incentive effect considering that these

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1 For this purpose, some key issues provided by the project coordinator to the group of researchers were the following: 1. What is the function of the "environmental tax" concept in the articulation of the categories included in the GBER for the taxes on energy? 2. To analyze the concept of "tax on energy", its typology and its use as a specific category within the GBER. 3. To analyze the feasibility of the implementation of a new treatment in the field of State aid in the taxes on energy in a direct way and not through its possible configuration as environmental taxes and the guiding criteria for its application on the basis of the principles of the TFEU and the jurisprudence of the ECJ and 4. The nature of tax incentives on energy, can justify a specific treatment for energy on State aid regulations? Could it be related to the package of energy measures and climate change also? - Are there other Community policies making advisable a specific section of exemption by categories for incentives in taxes on energy? Prof. English developed the specific analysis of the "Energy Tax Incentives and the GBER regime" in a separate document.

2 For example, Eurostat does not consider the German tax on wastewater (*Abwasserabgabe*) as an environmental tax while the OECD does.

3 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 (OJ L 187, 26 June 2014).

4 The article 44 "Aid in the form of reductions in environmental taxes under Directive 2003/96/EC" states the following: "1. Aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty, and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled. 2. The beneficiaries of the tax reduction shall be selected on the basis of transparent and objective criteria and shall pay at least the respective minimum level of taxation set by Directive 2003/96/EC. 3. Aid schemes in the form of tax reductions shall be based on a reduction of the applicable environmental tax rate or on the payment of a fixed compensation amount or on a combination of these mechanisms. 4. Aid shall not be granted for biofuels which are subject to a supply or blending obligation".

5 Recital 64 of the GBER clarifies this statement: "Aid in the form of tax reductions pursuant to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity favoring environmental protection covered by this Regulation can indirectly benefit the environment. However, environmental taxes should reflect the social cost of emissions while reductions from taxes may adversely impact on this objective. It therefore seems appropriate to limit their duration to the period of application of this Regulation. After this period, Member States should re-evaluate the appropriateness of the tax reductions concerned. In order to minimize the distortion of competition, the aid should be granted in the same way for all competitors found to be in a similar factual situation. To better preserve the price signal for undertakings which the environmental tax aims to give, Member States should have the option to design the tax reduction scheme based on a fixed annual compensation amount (tax refund) disbursement mechanism".

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 incentivizing the undertakings subject to the environmental tax to reduce their level of pollution[6].

Furthermore, although Member States may apply tax exemptions –including the implementation of a level of taxation down to zero– and reductions under Articles 15 to 17 of the current Energy Tax Directive (hereinafter, ETD)[7], these measures have to be notified following Article 26 of the ETD and may be checked by the Commission under State aid rules.

In this context, the European Commission is bound by an objective and legal concept of State aid according to the notion of aid given by the ECJ[8], and there are no guidelines on the application of State aid to indirect (or energy) taxes. In the absence of judgments, the Commission will therefore refer to its decisional practice, even if it is not possible to address all the issues on this basis. Besides, all the energy taxes do not perfectly fit into the categories of direct and indirect taxes (e.g., taxes on process and production methods – PPM – and taxes on inputs not incorporated in the final product cannot completely be regarded as indirect taxes imposed on products) or into the notion of "environmental taxes" considered in some EU legal contexts.

Bearing this in mind, this paper is built upon two main ideas: (i) the reference to environmental taxes in State aid law may be problematic, and the uncertainty caused by this term can distort the conceptual and legal framework of State aid rules; and (ii) the need to focus on different objectives rather than the environmental ones stems from the fact that not each energy tax nor all the related tax incentives are strictly environmental but they may also achieve other goals associated with other Community policies.

In this context, section 2 deals with the concept of "environmental taxes" and of "energy taxes", their classifications and their typologies. Section 3 deals with these concepts within the framework of the GBER and of the 2014 EAG and their relationship with the general concepts defined in section 2. Section 4 focuses on whether the concept of "environmental taxes" is the most appropriate mechanism for the treatment of taxes on energy in the State aid framework or whether – due to the peculiarities of energy taxes –a different solution is needed. The latter will take into account that energy taxes can achieve different objectives besides environmental ones. The conclusions of our analysis will be summarized in section 5.

2. The concept of "environmental taxes" and "energy taxes"

In the EU and international contexts, there are two different definitions of environmental taxes, i.e.: (1) a general definition; and (2) another definition that can be found in the State aid regulations and, in particular, in the GBER and in the Guidelines on State aid for environmental protection and energy 2014-2020 (2014 EAG

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6 See article 6 (5) e) of the GBER. For the sake of completeness, Article 6 (5) reads: "the following categories of aid are not required to have or shall be deemed to have an incentive effect". Therefore, there are two different situations: Not required to have an incentive effect - shall be deemed to have an incentive effect.

7 See Council 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) and Proposal 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). The unofficial codification version prepared by the Commission services may be consulted.

8 See Communication from the Commission. Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, Brussel, 2014, para.4, available at http://ec.europa.eu/competition/consultations/2014 state aid notion/draft guidance en.pdf., in particular paragraph 3 of the Draft Commission Notice: "Considering that the notion of State aid is an objective and legal concept defined by the Treaty, the Commission will simply clarify how it understands the Treaty provisions, in line with the EU case-law, without prejudice to the interpretation of the Court of Justice of the European Union".

or 2014 guidelines). Conversely, there are no defining rules for the notion of "energy taxes", which tend to be considered, by default, a subset of environmental taxes.

2.1. The general definition of environmental taxes

When using the term environmental taxes, references should be made to taxes that have environmental effects and, specifically, that encourage a behavioural change to promote environmentally friendly behaviour and discourage environmental damage and/or a reduction in the use of natural resources[9]. In other words, the term should only refer to taxes that are directed at protecting the environment. In this context, a recent judgement of the ECJ, *Transportes Jordi Besora*[10], appears to encourage this approach. As the ECJ suggested, a tax is directed at protecting the environment only if the structure of the tax, i.e. the taxable item or the tax rate, is specifically designed to reach such an objective. This means that choosing the polluting tax base as an element for identifying environmental taxes is not satisfactory, because there is no inevitable connection between taxing a polluting tax base and obtaining an environmental effect[11]. Moreover, it is not sufficient that the objective of the tax is to discourage the use of products that are considered to be harmful from an environmental perspective, but, rather, that the structure of the tax should be specifically designed to attain such an objective.

2.2. The concept of energy taxes

In a broad sense, the notion of energy taxation refers to any measure of fiscal nature which affects this sector. However, considering the legal context, energy taxation is usually connected with environmental taxation.

Some international organizations and institutions (e.g. OECD, IEA, Eurostat[12] or the European Commission[13]) consider and presume that, because of their tax base[14], energy taxes are a subset of environmental taxes[15]. However, to consider energy taxes as environmental taxes due to their tax base is too simplistic because not every energy tax can be regarded as an environmental tax. It is only when the structure of the energy tax is specifically designed to attain an environmental objective that we can consider it an environmental tax[16]. In

9 See F. PITRONE "Defining "Environmental Taxes": Input from the Court of Justice of the European Union", 69 *Bull. Intl. Tax* nº. 1, at pp. 62-63, 2015.

10 Judgement of the Court, 27 Feb. 2014, Case C-82/12, *Transportes Jordi Besora S.L. v. Generalitat de Catalunya*, EU: C: 2014:108.

11 C. SOARES, "Environmental Tax: The Weakening of a Powerful Theoretical Concept", in *Critical Issues in Environmental Taxation: International and Comparative Perspectives*, ch. I.2, (J. Milne et al. eds., Oxford U. Press 2005).

12 EUROSTAT, *Environmental taxes – a statistical guide*, 2013, available at http://ec.europa.eu/eurostat/documents/3859598/5936129/KS-GQ-13-005-EN.PDF, pp. 10 et seqq.

13 According to the 2014 Report "Taxation trends in the European Union" "energy taxes include taxes on energy products used for both transport and stationary purposes (…) the most important energy products for transport purposes are petrol and diesel. Energy products for stationary use include fuel oils, natural gas, coal and electricity. Note that CO2 taxes are included under energy taxes (rather than under pollution taxes), as it is often not possible to identify them separately in tax statistics. A further disaggregation is provided for energy taxes, namely a category giving the tax revenues stemming from the transport use of fuels. Transport fuel taxes include only those taxes which are levied on the transport use of fuels/energy products (including CO2 taxes) and hence form a subgroup of energy taxes", p. 277. This economic classification of taxes and the categorization of energy taxes are computed specifically for this statistical publication, using the National Tax List (National Accounts data) and complementing this with more detailed tax revenue data provided by the Member States.

14 The tax bases are grouped by four main categories: energy, transport, pollution, resources. According to EUROSTAT, the category of energy taxes "includes taxes on energy production and on energy products used for both transport and stationary purposes. The most important energy products for transport purposes are petrol and diesel. Energy products for stationary use include fuel oils, natural gas, coal and electricity. Taxes on biofuels and on any other form of energy from renewable sources are included. Taxes on stocks of energy products are also included. Carbon dioxide (CO2) taxes are included under energy taxes rather than under pollution taxes. There are several reasons for this. First of all, it is often not possible to identify CO2 taxes separately in tax statistics, because they are integrated with energy taxes, e.g. via differentiation of mineral oil tax rates according to the carbon content of the fuel. In addition, they are partly introduced as a substitute for other energy taxes and the revenue from these taxes can be very large compared to the revenue from pollution taxes. This means that including CO2 taxes with pollution taxes rather than energy taxes would distort both the time series at national level and international comparisons. If CO2 taxes are identifiable, these taxes should be reported as a separate category next to the total energy taxes. Taxes on greenhouse gas emissions other than CO2 should also be included here".

15 See OECD, *Taxation trends in the European Union and Mobilizing investments in energy efficiency*, 2014; OECD/IEA, 2012.

16 See *Transportes Jordi Besora* case (cit. ut supra) and F. PITRONE "Defining "Environmental Taxes": Input from the Court of Justice of the European Union", 69 *Bull. Intl. Tax* nº. 1, at pp. 62-63, 2015.

other words, environmental taxes and energy taxes cannot be considered two overlapping concepts but some taxes may fit into both categories, i.e. an energy tax can be an environmental tax. In this sense, the example of the minimum rates of the current ETD is clear cut. These rates being based on the volume of the energy products consumed rather than on energy content or on the CO2 emissions, are contradictory to the global climate change goals[17]. Moreover, they discriminate against renewable energy sources. The latter are taxed at the same rate as the energy source they are intended to replace, e.g. biodiesel is taxed the same as diesel. As this rate is based on volume, products with lower energy content, such as renewable, carry a heavier tax burden compared to the fuels they are competing with[18]. In other words, as the Commission pointed out, the ETD provides no incentive or even price signal to promote alternative energies and to encourage consumers to save energy. This means that these energy taxes do not produce any environmental effects and, taking into account the general definition of environmental taxes, they cannot be considered environmental taxes.

On the contrary, an example of energy tax that could be included into the broader category of environmental taxes can be seen in the proposal to amend the ETD. More specifically, there is the will to split the minimum tax rate of energy taxes into two parts: one based on carbon dioxide emissions of the energy product (i.e. minimum carbon tax); the other one based on energy content of the energy products[19].

In conclusion, the term "environmental taxes" refers to taxes that are directed at protecting the environment and, therefore, have environmental effects encouraging a behavioural change to promote environmentally friendly behaviour and discourage environmental damage and/or a reduction in the use of natural resources. This means that energy taxes –due to their peculiarities and/or the fact that they are ill-designed[20]– cannot always be considered environmental taxes.

2.2.1. Classifications and typologies of energy taxes

One of the greatest difficulties in providing a classification and systematization of energy taxation is the lack of uniform data. There are not the same or similar tax laws in the countries and as statistics are derived from information provided by each State, these categories include subsidies mixed with tax incentives[21]. In addition, aid in the form of exemptions and tax incentives appear scattered in the different levels of taxation and tax instruments – incentives are widely used for industries with intensive energy consumption to avoid loss of competitiveness and maintain the level of employment, or for companies that have been trading scheme allowances, to name just two of the most popular examples in the countries of the European Union. These circumstances blur the classical conceptual lines based on separating direct and indirect taxes as well as defining and categorizing taxable events as a classification and systematization criteria consensually valid.

Taking into account the environmental objectives of public policies, it can be seen that the dichotomy of "taxes on polluting emissions" (*carbon tax*) as opposite and distinct from "taxes on energy products and

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17 See also, A. ANTÓN ANTÓN, M. VILLAR EZCURRA, "Inherent logic of EU energy taxes: toward a balance between market protection and environment protection", in L. KREISER, S. LEE, K. UETA, J. E. MILNE, H. ASHIABOR (eds.), *Environmental Taxation and Green Fiscal Reform. Theory and Impact*, 2014, p. 57 et seqq.

18 EUROPEAN COMMISSION, Summary of the impact assessment. Accompanying document to the Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, SEC(2011) 410, pp. 2 et seqq.

19 EUROPEAN COMMISSION (2011), Proposal for a Council Directive amending Directive 2003/96/CE restructuring the Community Framework for the Taxation of Energy Products and Electricity, COM (2011) 169/3.

20 The wording "ill-designed" is used in terms of environmental protection objectives not in terms of fiscal aims.

21 Concerning the role of tax incentives in the energy sector under Climate Change's challenges, see the results of the Seminar I of the Project (Working Paper 49 in this serie). In this context, the role of tax incentives on the energy sector is reviewed and also its relation with tax expenditures, command and control regulation and other instruments to promote the reduction of polluting emissions.

electricity" is the most widespread in all countries. The OECD in its Reports[22] has a classification methodology that compares effective tax rates in terms of energy content and carbon emissions in the context of thirty-four countries and distinguishes energy taxes according to the three categories of its use: Transportation, heat and generation process and electricity[23], to highlight that the products of energy used in transport are taxed significantly more (the damage to environment is higher) in most countries. In the second category (heat), energy products used for industrial or energy conversion purposes are taxed with lower rates (albeit through explicit types or emission trading systems) than residential or commercial use, probably not to undermine industrial competitiveness. However, the OECD Reports also highlight that in some countries exactly the opposite is happening, and as exemptions lead to a decrease in energy prices in certain sectors, such benefits may distort the use of energy in a negative sense for the environment. As for electricity, being a by-product of energy generated from primary sources (e.g. gas, coal or wind), rather than simply showing the energy consumed finally, data on Reports consider fuels used to generate electricity and conversion losses. The 2013 Report presents the effective rates in the use of energy together in terms of energy content (measured in gigajoules) and carbon emissions (measured in tones of CO_2 emitted). Different countries undergo energy taxation in two ways: by taxing the fuels used in energy generation and/or taxing energy consumption.

In any case, a look at the design of energy taxation in other countries according to the data provided by the OECD and EEA, shows substantial differences both in structure and level of taxation to energy in developed countries.

Most energy taxes are classified as excise *duties* on consumption, although often identified with *carbon tax* instruments as opposed to *CO_2 tax*[24]. At other times, the term carbon tax is used as a generic and comprehensive term for taxes on energy products, pollutant emissions and other forms of taxation related to energy, such as those applied to natural sources[25]. However, in our opinion, only energy taxes that encourage the reduction of pollutant emissions should be considered genuine *carbon tax* and not those taxes with a levy not related to the amount of carbon emitted in the burning of fuel, as reducing emissions is not directly encouraged within the tax structure[26].

Moreover, energy taxes are usually referred to as "other taxes" associated with the most varied instruments and classified based on the use of energy (transport, industry, or domestic sector).

A possible classification criterion to use could be to distinguish taxes on different energy uses, though, the most widespread system in doctrine that has dealt with this issue is to separate taxation on energy products from the one on pollutant emissions, often by placing natural resources taxation under the category of products taxation.

Janet E. Milne and Michael Skou Andersen propose a classification criterion that address to their design, separating taxes on emissions and effluent taxes, product taxes and natural sources taxes[27]. These taxes have also been systematized depending on their taxable elements according to the taxation of consumed energy

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22 See for instance, OECD (2013 and 2014), *Taxing Energy Use: A Graphical Analysis*, OECD Publishing. (http://dx.doiorg/10.1787/9789264183933-en).

23 See OECD, *Taxing Energy Use: A Graphical Analysis*, 2013, p. 13.

24 J. ROGERS-GLABUSH (ed.), *International Tax Glossary*, IBFD, 6ª ed., 2009, p.158.

25 VIVID Economics, *Carbon taxation and fiscal consolidation: the potential of carbon pricing to reduce Europe´s fiscal deficit*, May 2012.

26 Many energy taxes do not include measures to encourage reductions of pollutant emissions, or carbon capture or sequestration. See. C. O´BRIEN; M. FARMER; M. DREIBELBIS, y C.G. JENKINS, *"Carbon taxes", International Tax Monitor*, June 7, vol. 13, No. 112.

27 See J. E. MILNE, M. SKOU ANDERSEN, "Introduction to environmental taxation concepts and research", in MILNE, J.E. and M. SKOU ANDERSEN (eds.), *Handbook of Research on Environmental Taxation*, Eduard Elgar, Northampton, Cheltenham, Massachusetts, 2012, p. 22.

amount, heat content or emissions associated to consumption[28]. Although some studies include taxes on natural resources as product taxes, the difference of approach on its taxation ought to recognize that they belong to a different category. So while taxes on products are linked to the price of pollution, taxes on natural resources put a price on the use of scarce natural resources. In each case the social value is different, but the ultimate goal may be, or may be related to, the environmental protection.

Another possible classification is the one focusing on the prevalent role of tax (environmental or fiscal) and it can be distinguished between energy tax incentives, financial energy taxes and fiscal or revenue energy taxes. The first type is characterised by its environmental impact, the second one by its ability to finance environmental measures and the third one by the fact that it primarily pursues to collect public revenue. Such classifications are useful to draw attention to the various forms and functions of energy taxes. The Pigouvian tax[29] reflects the marginal social cost, and it is designed to internalise negative externalities in the economy, providing incentives to change behaviours. Other taxes are simply placed in tax systems to finance specific schemes that allow to ease environmental burdens caused by water, air or waste pollution and they are often included in the other two categories: Furthermore they are not considered rates as the product of its revenue is affected to reduce pollution and not to finance collection services or waste treatment.

Energy taxes may also be classified independently or in a complementary way assessing their role in relation to other instruments. In the light of the above it is clear how energy taxes go beyond conventional tax classifications and how different legal and non-legal disciplines can be set in either index or criteria to offer a typology of classification and evaluation of environmental taxation and especially of that applied to the energy sector. For example, the distinction between fiscal and non-fiscal taxes is the most relevant element according to theorists of public finances, while for others, what is important is the distinction between financing and incentives.

2.2.2. Our proposal: classification of energy taxes based on their taxable event

Given that taxes to energy and transport are usually regarded as environmental taxes –especially for statistical purposes[30]– we propose to classify energy taxes[31], according to their taxable events taking into account that they should always be considered indirect taxes[32]. This leads us to the following categories:

- Taxes on energy products, depending on their use (transport[33], heat, electricity generation[34])

- Taxes on polluting emissions[35]:

- CO_2 emissions

28 See The Report *Economics for Energy*, 2013, p. 23.

29 The idea behind these taxes is to discourage environmental damages. See P.M. HERRERA MOLINA, "Design options and their rationale", in J.E. MILNE, M. SKOU ANDERSEN (eds.), *Handbook of Research on Environmental taxation*, Cheltenham, Massachusetts, 2012, cit., p.86.

30 EEA: *Environmental signals 2002 – Benchmarking the millennium*; Environmental assessment Report No 9, Copenhagen, 2002.

31 See OECD: *Taxation trends in the European Union*, 2013, p. 17.

32 An essential element in shaping the energy taxes is fixing tax incentives, which technically can be adopted in various ways (exemption, non-liability, reductions in tax base, reductions in rates to zero, deductions, taxes refund and tax credits).About the role that tax incentives for energy should play, we have dealt with that in the Seminar 1 of this research project.

33 In the taxation of energy products to be used in transport, the most important ones are gasoline (leaded or unleaded) and diesel.

34 For uses different than transport, fuel oil, natural gas, coal and electricity are included.

35 Emissions taxes are treated as energy taxes rather than pollution taxes, because it is not possible to treat them separately for statistical purposes.

- Measured or estimated NO_x emissions
- SO_2 content of fossil fuels
- Other air emissions
- Regarding electricity as a result of the use of primary energy sources:
- Taxes on production activities/electricity generation
- Taxes on electrical installations
- Taxes on electricity consumption

3. The definition of environmental tax enshrined in the GBER and in the 2014 guidelines. A critical analysis

Article 2 (119) of the GBER and article 1.3 (15) of the 2014 guidelines define an environmental tax as "a tax with a specific tax base that has a clear negative effect on the environment or which 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"[36]. Neither the GBER nor the 2014 guidelines provide a definition of energy taxes.

As for the definition of environmental taxes, it is important to point out a few elements. First, from a historical perspective, this definition was not provided for by the 1998 Guidelines. It was introduced for the first time in 2001 and it was changed in 2008. In particular, in 2001 the definition of environmental tax was – using the one already implemented by the Communication from the Commission *Environmental taxes and charges in the single market* (COM (97) 9 final, 26.3.1997) – the following: "Environmental tax: 'One likely feature for a levy to be considered as environmental would be that the taxable base of the levy has a clear negative effect on the environment. However, a levy could also be regarded as environmental if it has a less clear, but nevertheless discernible positive environmental effect [. . .] In general, it is up to the Member State to show the estimated environmental effect of the levy [. . .]"[37]. This definition seems stricter than the one chosen in 2008 and based mostly on a domestic evaluation.

Second, from a formal perspective, it is worth mentioning that due to its position under the heading "*definitions applying to aid for environmental protection*", the definition of environmental taxes enshrined in the GBER applies specifically to aid for environmental protection[38]. In other words, it seems that, at least in

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[36] 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 (OJ L 187, 26 June 2014); European Commission, Communication from the Commission. Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, 28 June 2014.

[37] Community guidelines on State aid for environmental protection (2001/C 37/03), 3 February 2001 under B.6. (Definitions and scope).

[38] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible within the internal market in application of Articles

principle, this definition is also based –as the general definition analysed above– on the will to achieve a higher environmental protection.

If we consider the relationship between the general definition of environmental taxes and the specific definition enshrined in the GBER and in the 2014 guidelines, we can observe that both the GBER and the 2014 guidelines provide a broad definition of environmental taxes that includes both taxes with a polluting tax base and taxes with environmental effects. According to these definitions, energy taxes –due to their tax bases– should be considered environmental taxes. However, there is no inevitable connection between taxing a polluting tax base and obtaining an environmental effect[39]. Therefore, if one wants to achieve a higher protection of the environment it should follow the general definition of environmental taxes, and, consequently, a reference to *"the specific tax base that has a clear negative effect on the environment"* is not enough.

As far as tax reductions are concerned, compared to the previous guidelines from 2001, the 2008 guidelines for environmental protection maintained the possibility of long term derogations from "environmental taxes" without conditions as long as, after reduction, the companies concerned pay at least the Community minimum level of taxation. Where the companies do not pay at least this minimum level, long term derogations remain possible, but Member States must demonstrate that these derogations are necessary and proportionate. The beneficiaries of very important reductions or even full exemptions are sometimes big polluters. The Commission considers that under certain conditions, such derogations may be justified, but in any case Member States should justify their necessity[40].

At present, the new 2014 environmental guidelines follow a common approach and are based on "strengthening the internal market[41], promoting more effectiveness in public spending through a better contribution of State aid to the objectives of common interest, greater scrutiny on the incentive effect[42], on limiting the aid to the minimum necessary, and on avoiding the potential negative effects of the aid on competition and trade"[43].

Compared with the earlier 2008 guidelines, the scope of application is extended in an alternative way to "State aid granted for environmental protection or energy objectives in all sectors governed by the Treaty". Thus, they apply also to those sectors that are subject to specific Union rules on State aid (transport, coal, agriculture, forestry, fisheries and aquaculture) unless such specific rules provide otherwise[44].

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107 and 108 of the Treaty; European Commission, Communication from the Commission. Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, 28 June 2014, (119).

39 F. PITRONE, Defining "Environmental Taxes": Input from the Court of Justice of the European Union, cit., pp. 64.

40 See http://europa.eu/rapid/press-release_MEMO-08-31_en.htm?locale=en.

41 "Internal energy market legislation includes Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks or any subsequent legislation replacing these acts in full or in part" (see GBER, Article 2, 131).

42 An incentive effect occurs when the aid induces the beneficiary to change its behaviour to increase the level of environmental protection or to improve the functioning of a secure, affordable and sustainable energy market, a change in behaviour which it would not undertake without the aid. The aid must not subsidize the costs of an activity that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity (see para. 49 of the guidelines 2014-2020).

43 Communication from the Commission, *Guidelines on State Aid for environmental protection and energy 2014-2020*, OJ C 200/1, 28 June 2014. See para.12.

44 See para. 13 of the 2014 guidelines.

3.1. Energy taxes within the GBER and the 2014 guidelines framework

In any case, in our opinion, under the current rules on State aid, the following taxes on energy should be considered:

- Taxes of energy products and electricity harmonized by the ETD

- Taxes of energy products and electricity not harmonized by ETD - included analogous products covered on the ETD scope and extra-budgetary taxes[45].

- Taxes meeting the requirements of the GBER and the 2014 EAG definitions, exclusively including taxes "with a specific tax base that has a clear negative effect on the environment or which 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"[46].

On the contrary, the following usual taxes on the energy sector would be excluded from the environmental taxes classification and the consequent application of the GBER and the 2014 EAG special regime for State aid:

- Taxes on raw materials or on energy sources when they cannot be regarded as "environmental taxes" in the light of the GBER and the 2014 EAG

- Taxes on energy consumption, other than taxes on energy products and electricity, covered by ETD, which are not regarded as "environmental taxes" within the meaning of the GBER and the 2014 guidelines (e.g. tax on electricity consumption)

- Taxes on energy products and electricity, nor harmonized neither eligible for the minimum level of taxation under the harmonized energy taxes

To all of this we must add the restrictive consequences resulting from the criterion expressed by the EU General Court (Fifth Chamber) in case T-251/11 (Republic of Austria v. European Commission), according to which "it must be pointed out that any element in the Directive on the energy taxation allows the Court to conclude that the European Union legislature had the intention, directly or indirectly, when adopting it, to establish any sort of regulation in order to strengthen, include or limit extra budgetary structured systems such as that at issue in this case, namely pursuing specific involvement objectives or, in other words, equipped with a specific direct and predetermined purpose. It must therefore be concluded that the Commission did not commit any error by stating that the purpose of the GSO was to pass on the extra costs generated by the promotion of renewable energy to the final consumers of electricity, in an extra budgetary way, the aim of the Directive of energy taxation was, however, to harmonize the general taxation of the designated products, including electricity, benefiting the general budget and without specific involvement (see also, by analogy, Judgment of 27 February 2014 (TJ 2014 1)"[47].

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45 According to the GBER, 'Union minimum tax level' means the minimum level of taxation provided for in the Union legislation; for energy products and electricity it means the minimum level of taxation laid down in Annex I to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (see article 2 (120)).

46 See GBER and 2014 guidelines. Also see EU:T:2014:1060, paras. 195 and 200.

47 See EU:T:2014:1060, para. 169. Free text translation from Spanish official version (not yet available in English).

3.2. Should we use a general definition of environmental taxes also in the context of State aid law and, specifically, within the GBER and the 2014 guidelines?

However, one question remains: should we use the general definition of environmental taxes also in the context of State aid law and, specifically, within the GBER and the 2014 guidelines?

Looking at the objectives of environmental and energy aid, one of the possible solutions is to use the general definition of environmental taxes (see section 2.1.) also in the context of State aid law and, specifically, within the GBER and the 2014 guidelines.

The 2014 guidelines differentiate between environmental and energy aid, their objectives and the incentive effects they need to have. With regard to environmental aid, the guidelines underscore that the goal of environmental aid is to increase the level of environmental protection compared to the level that would be achieved in the absence of the aid[48]. Moreover, the aid must induce the beneficiary to change its behaviour to increase the level of environmental protection[49]. As for the objective of aid in the energy sector, this is to ensure a competitive, sustainable and secure energy system in a well-functioning Union energy market[50]. In this case, the incentive effect is to improve the functioning of a secure, affordable and sustainable energy market.

When it comes to aid in the form of reduction in or exemptions from environmental taxes[51], only environmental taxes that discourage environmentally harmful behaviour and increase the level of environmental protection[52] are taken into account by the GBER and the 2014 guidelines.

More specifically, the GBER allows reductions in environmental taxes –that can indirectly benefit the environment and contribute to a higher level of environmental protection– as long as the minimum level of taxation set by the ETD is paid. Broadly speaking, tax reductions in or exemptions from environmental taxes are tolerated when "the beneficiaries would be placed at such a competitive disadvantage that it would not be feasible to introduce the environmental tax in the first place"[53].

Due to the above mentioned differentiation between environmental and energy aid, one could say that the energy sector should be excluded from this framework. However, analysing the definition of environmental protection, a different solution shall be considered. 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"[54]. In other words, environmental protection is a broad concept that also includes energy saving measures and the use of renewable sources of energy. Accordingly, the legal framework defined for aid in the form of reduction in or exemptions from environmental taxes is applicable also to energy taxes and tax incentives.

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48 See 2014 guidelines, Objectives of the aid, para. 3.2.1.1.

49 See 2014 guidelines, Incentive effect, para. 3.2.4.1.

50 See 2014 guidelines, Objectives of the aid, para. 3.2.1.1.

51 See Article 44 of the GBER and 3.7 of the 2014 guidelines.

52 See 2014 guidelines, para. 3.7.1., (167) and GBER, preamble (64).

53 See 2014 guidelines, para. 3.7.1. (167).

54 See 2014 guidelines, para. 1.3. (19) and GBER "Definitions applying to aid for environmental protection" (101).

This is also supported by the fact that the 2001 guidelines on State aid for environmental protection, clearly indicated that much aid for measures in the energy sector, whether in support of energy saving or to promote the use of renewable sources of energy, have been given especially in the form of ecotaxes[55], tax reductions and exemptions[56].

In other words, a link between aid in the energy sector and tax reductions or exemptions shall be established. However, it must be emphasized that –according to the actual framework– this link should be clearly, inevitably and indissolubly based on the search for a higher level of environmental protection (even if indirectly). This means that not each tax incentives, reductions and exemptions should be allowed under the GBER and the 2014 guidelines as they stand but only those related to environmental taxes that can achieve a higher level of environmental protection.

This implies that the GBER and the 2014 guidelines refer, in principle, to well-designed energy taxes that include environmental elements aimed at changing taxpayers' behaviour, at reducing energy consumptions and promoting renewable sources of energy.

In this sense, a downside of the entire framework can be seen in the fact that the only aid schemes in the form of tax reductions allowed within the GBER are the ones related to the environmental taxes that fulfil the conditions of the ETD. The latter, as already explained, is contradictory to the global climate change goals, leads to an inefficient energy use from an environmental point of view and provides no incentive or even price signal to promote alternative energies. In other words, the GBER does not seem to be in line with the requested search for a higher level of environmental protection and this could make the GBER partly void of meaning from an environmental perspective. This is because there could be other non-environmental reasons to consider, and in this specific case it is not clear which positive benefits are really taken into account by the Commission in order not to require the notification of the aid creating, to say the least, uncertainty. Therefore, if we only take the environmental objectives into account, either the GBER should be modified or the concept of environmental aid should be changed in order to become broader.

However, the peculiarities of taxes on energy and energy policies do not enable tax incentives requiring a special regime to be approached only from the point of view of environmental objectives; and the evidence of this is that although the guidelines exclusively concern energy taxes of environmental nature, incentives receiving special treatment are not limited to those pursuing to improve the environment. These elements will be analysed in the following sections.

55 See 2001 guidelines, para. 27.
56 See para. 2 of the Preamble of the 2001 guidelines.

4. Is it feasible to anticipate future separate guidelines or block exemption rules concerning reductions or exemptions from energy taxes in the context of EU State aid law?

The Enabling Regulation specifies the categories of horizontal aid that may be subject to a block exemption[57]. This includes, among others, aid in favour of environmental protection and research, development and innovation. These categories are all characterized by the fact that the Commission has a substantial experience in assessing the certain types of aid, and on the basis of the experience acquired is able to conclude that the aid does not give rise to any significant –or at least only limited– distortions of competition, and is able to define clear compatibility conditions[58]. On the basis of the experience of the Commission –provided the aid fulfils certain criteria– we are on safe ground and no individual examination is required, and therefore these certain situations are exempted as a group/block.

Consequently, the categories on the GBER may change over time as the Commission becomes more experienced with a particular field of aid. For instance, aid for innovation was not included in the original Enabling Regulation, but was one of the categories included when the Regulation was amended. Thus, the Regulation emphasises that innovation has "become a Union policy priority in the context of "Innovation Union", one of the Europe 2020 flagship initiatives". And since "many aid measures for innovation are relatively small and create no significant distortions of competition"[59], it makes sense to empower the Commission to group certain exempted types of aid for this particular purpose.

A potential separate legal framework for energy tax exemptions or reductions in relation to EU State aid law may be addressed in either a block exemption regulation or the specific guidelines adopted by the EU Commission.

4.1. Tax considerations of the energy taxes in a State aid regulation context

In order to determine, in the present state of our research project, whether the use of "environmental taxes", as they are being defined by the ECJ and by the rules and guidelines for State aid, is the most suitable mechanism for the treatment of energy taxes in the field of regulation of State aid, the first step necessarily has to be a reflection on how the EAG and the GBER are dealing with the role of energy taxes.

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57 Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ 1998 L 142/1, as amended by Council Regulation (EU) No 733/2013 of 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 aid, (OJ 2013 L 204/11), Article 1(1.)(a).

58 See Council Regulation (EU) No 733/2013 of 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 aid, OJ 2013 L 204/11, recitals 5, 7-12; see also Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, (OJ 1998 L 142/1), recital 4.

59 Council Regulation (EU) No 733/2013 of 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 aid, (OJ 2013 L 204/11), recital 4.

For this purpose, beyond what it has been advanced in the previous sections (section 3 and 3.2.), it is important to insist that in both cases, the preambles[60] and the respective articles refer to environmental and energy policies separately, assuming that the objectives pursued by them deserve a special regime for State aid. Moreover, analysing each of the specific criteria adopted for the different aid, it is more than evident that aid to achieve the production, storage, transport and distribution of energy products in the best conditions of safety, sustainability, generality and efficiency have their own autonomy and lead to concrete actions without regard to the ones seeking to achieving environmental objectives.

For example, the provisions of the GBER on regional aid should not apply to measures concerning energy generation, distribution and infrastructure[61]. Besides, investments enabling undertakings to go beyond Union standards or increase the level of environmental protection in the absence of Union standards are considered separately from investments for early adaptation to future Union standards; investments for energy efficiency measures, including energy efficiency projects in buildings, investments for remediation of contaminated sites and aid for environmental studies do not directly influence the functioning of energy markets. At the same time, such investments may contribute to both regional policy objectives and to the energy and environmental objectives of the EU. In such cases, the provisions of the GBER relating to both regional aid and aid for environmental protection may be applicable, depending on the main objective pursued by the measure concerned[62].

In the GBER a modern energy infrastructure is considered crucial both for an integrated energy market and to enable the Union to meet its climate and energy goals. In particular, infrastructure construction and upgrade in assisted regions contribute to the economic, social and territorial cohesion of Member States and the Union as a whole by supporting investment and job creation and the functioning of energy markets in the most disadvantaged areas. In order to limit any undue distortive effects of such aid, only aid to infrastructures subject to and in accordance with the internal energy market legislation should be block exempted[63].

Despite the GBER and the 2014 guidelines' general approach regarding the energy sector, when aid is addressed in the form of exemptions or reductions of taxes, any category related to "taxes on energy" is avoided and only references to "environmental taxes" are used, given that even in cases where the starting point is the tax benefit granted on a "harmonized tax" on energy, this is conceived as an environmental tax.

Although an explanation for this situation could be the existence of a broad concept of environmental taxes, generally covering taxes on energy, it was previously discussed (Section 2) that this is not the guiding idea of tax benefits regulation in taxes on energy. On the contrary, the ECJ has been involved in clarifying the concept of "environmental tax" in strict terms, which exclude many taxes on energy, and, in any event, making the conceptualization or not of each tax on energy as an "environmental tax" becomes a process of uncertain outcome in which the last word is always the ECJ.

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60 In particular, see recitals 4, 9 and 10 of the 2014 guidelines: "On 22 January 2014 the Commission proposed the energy and climate objectives to be met by 2030 in a Communication 'A policy Framework for climate and energy in the period from 2020 to 2030' (the 2030 Framework). The pillars of the 2030 Framework are: i) a reduction in greenhouse gas emissions by 40 % relative to the 1990 level; ii) an EU-wide binding target for renewable energy of at least 27 %; iii) renewed ambitions for energy efficiency policies; and iv) a new governance system and a set of new indicators to ensure a competitive and secure energy system (recital 4) …The 2030 Framework calls for an ambitious commitment to reduce greenhouse gas emissions in line with the 2050 roadmap. Delivery of this objective should follow a cost-efficient approach, providing flexibility to Member States to define a low-carbon transition appropriate to their specific circumstances and encourage research and innovation policy to support the post-2020 climate and energy framework. These Guidelines respect those principles and prepare the ground for the 2030 Framework (recital 9) … In these Guidelines, the Commission sets out the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty (recital 10). Also paragraph 18 differentiates "environmental and energy measures for which State aid under certain conditions may be compatible with the internal market under Article 107(3)(c) of the Treaty" (see also paras. 31, 49 and 69).

61 See Recital 33 of the GBER. Regional aid granted under Section 1 of this Regulation pursues economic development and cohesion objectives, and is therefore subject to very different compatibility conditions.

62 See Recital 34 of the GBER.

63 See recital 67 of the GBER.

Another approach to the situation could be the existence of a general criterion to exclude any special State aid regime for those in the form of tax measures, outside the scope of “environmental taxes”, but does not seem to be any legal argument or efficiency, even common logic, to justify this approach. First, because the concept of aid is objective and independent of the instrument chosen for its implementation. Second, because both GBER and the 2014 guidelines provide specific objectives and measures for the energy sector and tax reductions, and probably constitute some of the normative acts of greater generality and economic reach in this sector. It does not seem justifiable if regulation is articulated on all forms of economic interventions on the energy sector, i.e. that taxes on energy may be excluded from it if they do not respond to other autonomous and different forms of energy policies, such as environmental policy.

Additionally, it is noteworthy that the incentives covered by the special regime for State aid are not specific environmental incentives. They constitute a broad category of incentives that could be deemed necessary, either to enable the implementation of the tax with a spectrum of general applications, or the implementation to be done with high tax rates so that the primary role of incentives that are intended to give priority would be the introduction of taxes with a function of environmental protection, with general implementation, but which would not be feasible without considering exceptions for cases where unacceptable damages occur in certain activities or sectors.

Also one might think that the formula chosen by the EU institutions’ attempts to drive Member States to introduce energy taxes focused on environmental goals, because otherwise State aids regime would penalize them. However, this would not be consistent with the needs and goals of energy policy, whose importance is unnecessary to weigh and diverge from the appropriate legal technique, which is the adoption of unified standards.

Due to the close relationship between them, and because the starting point of the overall approach to the issue has departed from the harmonized rules of energy taxation, in particular from the ETD reference, it does not appear that the regulation of tax benefits on energy taxes on State aid meets other reasons than the treatment of all tax incentives for energy and environmental issues.

However, this situation gives rise to various disorders whose importance grow as Member States increase the figures and the economic burden of taxes on the energy sector. The creation and expansion of these fiscal instruments –including extra-budgetary systems– makes it necessary to have a large extent of freedom and security in tax benefit settings that prevent unacceptable damages to economic operators in the sectors concerned and to the market needs, certain sectors of the population, technological innovation, supply security or strategic needs, among others.

The problems mentioned above arise regardless of whether the taxes concerned merit to qualify as “environmental taxes”, or merely are considered as taxes for revenue. This dichotomy, however, faces collateral problems of enormous importance. The tax collection purpose and the lack of a precise connection between environmental objectives and taxes do not exclude the fact that all taxes on energy have inexcusable environmental effects. Furthermore, the same tax instrument can include both purely tax collection aspects and others with a verifiable environmental impact. Differences in tax techniques can lead to taxes with similar charges from different Member States to be classified as environmental taxes in some cases and not in others –because of the lack of evidence from the Member States– generating different treatments which hurt the level playing field in the market that is intended to promote.

All these circumstances make it advisable to investigate whether it is necessary, or simply desirable, that the regulation of State aid confronts the treatment of incentives in taxes on energy through the special regime for environmental taxes, or whether it is possible and preferable to focus it towards a special regulation for taxes on energy that would be more equitable and at the same time provide greater security to a subject in need of the proper running of markets and the energy policies themselves.

4.2. Do energy tax incentives deserve independent regulation?

The first stage of this analysis should be the objective sphere definition of tax incentives on energy taxes that are currently included in the block exemption to the general regime for State aid in accordance with the GBER.

Secondly, we consider whether this objective sphere can define own categories of energy taxation that allows greater precision and avoids legal uncertainty associated with the test of classification as "environmental tax" or, where it is not possible, whether this can be done by combining concepts of the two tax areas with a substantial improvement in the safety and fairness of the application of the existing legal regime.

Finally, we want to assess whether the result of applying the proposed concepts is compatible with the purposes of the various policies that justify special treatment in the field of State aid.

4.2.1. Objective sphere of energy taxes within the GBER and the 2014 guidelines

The current regulation only refers to energy taxes directly in the case of those harmonized by the ETD and indirectly, through reference to non-harmonized environmental taxes. Accordingly, it seems that harmonized energy taxes are considered in any case "environmental" for the purposes of the regulation. The reason is twofold: first, because of the presumption of the Directive. Second, because, according to the ECJ, taxes that are not included in the ETD but that are similar to or are imposed on similar products to the one included in the ETD, must be treated as non-harmonized taxes[64].

This is not surprising because the Directive itself justifies the harmonization of electricity and taxation of energy products when obtaining a minimum taxation for the proper functioning of the internal market while achieving other Community policy objectives, especially through the integration of environmental policy into other policies.

In short, the references to "harmonized taxes on energy", provide the minimum of the Directive is applied; taxes described therein are incorporated into the exemptions of notification to the general scheme of State aid, i.e. those taxes imposed on electricity and energy products other than mineral oils included in their objective sphere and depending on their uses.

Additionally, as set out in Article 4.2 of the ETD, it seems that also any "other indirect taxes" (excluding VAT) calculated directly or indirectly on the quantity of energy products or electricity would be incorporated, insofar that they are suitable for the determination of the total tax burden and relevant for determining the compliance with the minimum tax requirements imposed by the ETD.

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[64] See the General Court judgment of 11 December 2014 (EU:T:2014:1060) related to the Austrian Green Electricity Act.

Although these "other indirect taxes" may be considered suitable for compliance with the minimum harmonised taxation on energy products and electricity, it may be questioned whether they could be covered by the regime of exemption form the notification in State aid matters – fulfilling or not – and whether the criteria for Community case-law, or those specifically developed based on the definitions of the GBER and EAG could be considered as environmental taxes (see for this issue section 3.1.).

A similar problem arises in relation to non-harmonized taxes on energy products and electricity, directly or indirectly, because they involve additional taxation superimposed on minimum harmonized taxation and, applying the same criteria as those applied to harmonized taxation, they should be included in the sphere of the exemption from the notification of the State aid regime. In case C-41/06 on a Danish State aid in tax form, the European Commission accepted that any energy tax not even harmonized could be considered compatible with the common market if the minimum harmonized levels of taxation are respected, although such a compatibility analysis is made on the basis of prior notification and assessment by the Commission[65].

The recent Judgment of the General Court of the EU, 11 December 2014 (Case T-251/11, *Austria v Commission*[66]) also seems to promote the same approach as the Commission when analysing this issue, but though from the perspective of the exemption Regulation previously in force (Regulation 800/2008) – the Commission states that it "is not possible, in interpreting Article 25 of Regulation No 800/2008, to decouple the criterion of "fulfilling the conditions laid down in Directive (on energy taxation)" from the criterion according to which it must be an environmental tax as those envisaged by the Directive, i.e.harmonized taxes at the European level. Indeed, the aim of the Regulation is to exempt certain categories of tax exemptions –regulated by the above mentioned Directive– from the notification requirement. In this context, this (Regulation) cannot be considered as a repetitive document regarding the guidelines because it enables not to carry out a prior notification of an environmental aid scheme in certain specific cases"[67].

Apart from the above assumptions, the energy taxes could only fall within the exemption from the notification regime if they meet the requirements which must be considered as "environmental taxes" under the description in the GBER, and thereby it is interpreted by the ECJ.

According to the ECJ the features to meet an energy tax (although based on the harmonizing Directive of hydrocarbon taxes) must be related to its legal setup for its admission as environmental tax, especially in the case *Transportes Jordi Besora* referred to above. Meanwhile, in the case T-251/11, it is recalled that while extra cost or additional cost are comparable to a special tax levied on electricity, the rules governing reductions of energy taxes under the law of the Union cannot be applied to para-fiscal charges by analogy[68].

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65 Commission Decision of 17 June 2009 on aid scheme C 41/06 (ex N 318/A/04) which Denmark is planning to implement for refunding the CO 2 tax on quota-regulated fuel consumption in industry (notified under document C(2009) 4517), para.163.

66 EU:T:2014:1060. Dismissing an appeal by Austria against a European Commission Decision that a provision of the revised Austrian Green Electricity Act would result in the imposition of extra costs on undertakings that do not qualify for the relevant exemption, and so constituted unlawful State aid, the General Court upheld the Commission's finding that the partial exemption constituted State aid. Although the General Court did consider that the Commission erred in considering that the exemption mechanism fell outside the scope of the Guidelines on environmental aid, it, nevertheless, found that the Commission, in continuation of its analysis, correctly held that the exemption mechanism did not fulfil the conditions of the guidelines so as to be regarded as compatible with the internal market.

67 Judgment of the General Court (Fifth Chamber) of 11 December 2014. *Republic of Austria v European Commission*, case T-251/11.See para. 202 Free text translation from Spanish version (not yet available in English).

68 See para. 68 and 169 and case-law referred on this paragraph.

4.2.2. Possible definition of an objective sphere referred to taxes on energy for the GBER and the 2014 guidelines

The purpose of this analysis is to assess the potential benefits of avoiding the concept of "environmental tax", given all the interpretive and application problems involved, as the core of special treatment in the field of State aid and this "no reference" at the same time could serve as a starting point for addressing the inclusion of other measures demanded by the energy sector and from outside the strict sphere of the measures to protect the environment.

As discussed above, the guiding criterion for appropriateness and approval by the European Commission of a tax regime for State aid regarding taxes on energy, accept that they have a beneficial environmental effect, whether or not such tax regime may have other equally positive impacts. This would be the case, for instance, if you reduced the dependence on energy from outside the EU, renewable and local energy were impelled, or the application of other tax incentives were promoted with a broader degree of State Members' freedom in order to avoid unacceptable economic effects. It would be incentives that, in many cases, do not pursue environmental aims neither *stricto sensu* nor *lato sensu*, so that the environmental function prevalence would apply only to taxes but not to incentives which will benefit from the special regime for State aid, and which only requires approval based on objective and transparent criteria.

On this basis it seems clear that there would be no detriment to competition in the special regime for State aid on energy taxes concerning taxation of energy products and electricity covered by ETD, as well as other taxes on similar products. Only in such cases this similarity could be considered comparable, although they may not have the character of environmental taxes in accordance with the current definition of the GBER and the 2014 EAG[69].

The same objective could also be achieved considering the purposes of the GBER, as "environmental taxes" and all taxes on energy products and electricity covered by the ETD harmonized or not harmonized taxes. But this path would have the disadvantages of using different definitions of environmental taxes and rely, once again, on the environmental nature of the tax, actions that are justified by other Community policies which go far beyond the environment.

On the other hand, it seems desirable to dissociate the exclusive environmental purpose of energy taxes from its treatment with regard to State aid to evolve into a conceptual model where taxes on energy are specifically treated as such, and tax incentives have, in turn, what correspond to environmental protection measures or to other measures justified on grounds of protection of industrial sectors, technology development, combating relocation or other relevant measures.

One must take into account, as recognized by the Judgement of the Court of First Instance on *British Aggregates*, that, "it is open to the Member States, which, in the current state of Community law, retain, in the absence of coordination in that field, their powers in relation to environmental policy, to introduce sectorial environmental levies in order to attain certain environmental objectives. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regard to the protection of the environment and, as a result, to determine, which goods or services they are to decide to subject to an

[69] See ECJ criteria on *Austrian v Commission* case (EU:T:2014:1060), para. 202 and point 6 "Effect on trade and competition" of the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFUE cit. *ut supra*).

environmental levy, with the result that the fact that such a levy does not apply to all similar activities which have a comparable impact on the environment does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage"[70].

Although the General Court has disregarded this statement as an absolute principle when the ruling was annulled[71], the limitation imposed to it by the General Court only affects similar activities or products from an economic point of view when the free competition could be affected. The General Court considered that an "approach based solely on a regard for the environmental objective being pursued, excludes a priori the possibility that the non-imposition" of the tax "on operators in a comparable situation in the light of the objectives being pursued might constitute a `selective advantage´, independently of the effects of the fiscal measure in question, even though Article 87 (1) EC does not make any distinction according to the causes or objectives of State interventions, but defines then on the basis of their effects"[72].

In conclusion, taxes on energy may or may not fall within the category of environmental taxes, and the scope of its environmental projection may be higher or lower but we are not talking about a general category which content and characteristics have the desirable legal certainty.

Bearing this in mind, the following paragraph will deal with the possible special treatment of energy taxes within the State aid framework taking into account different EU policies besides the environmental one.

4.2.3. Justification of special treatment for the energy taxes within the GBER or/and the 2014 guidelines, based on EU policies different from environmental policies

The aim of this section is to find arguments for the authorization –in a State aid context– of tax incentives on energy not linked to environmental protection.

Energy has a multidimensional dimension covering, at least, three EU policies: Energy Policy (itself), Transport and Environment, but also Climate Change policy[73]. This multidimensionality is clearly explained in the 2020 and 2030 strategies where, for example, the efficient use of energy has not only environmental/climate change targets but also other ones like the reduction of dependency/guaranteeing security in supply. In this sense the energy independence is a non-environmental target that could, naturally, justify exceptions (in this sense, see for example Article 15.4 of the Directive 2009/72/EC[74]).

The use of European sources of energy, with a neutral environmental impact comparing to import ones, could deserve a tax incentive. Efficiency[75] is a very interesting horizontal reason that goes beyond the environmental protection since it contributes also to the conservation of natural resource, economic growth and reduction

70 Judgement of The Court of First Instance, T-210/02, *British Aggregates*, ECR 2006 II-2789, para. 115.

71 See the appeal (C-487/06P) to the case T-210/02 para. from 86 to 88 and also from 78 to 80.

72 See para. 87 of the General Court judgement.

73 For further information of cross-sectorial polices, see M. VILLAR EZCURRA, "Fiscalidad y medio ambiente: Hacia una imposisición ambiental de la energía", in *La recepción del Derecho de la Unión Europea en España. Derechos, mercado único y armonización fiscal en Europa. Liber amicorum Antonio Martínez Lafuente*", Wolters Kluwer España, Madrid, 2013, pp. 364-376.

74 A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding, in any calendar year, 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

75 See "Consultation on a draft General Block Exemption Regulation (GBER) on state aid measures Coalition for Energy Savings Response".

of dependency on imports. As it was proposed by Finland in its comments on the Guidelines, for example, cogeneration should be included among the tax exceptions[76]. Industrial Policy (and the competitiveness of EU industry) is also another argument that could be used. In fact, during the consultation process of the 2014 guidelines, the UK and Luxemburg were very concerned about how to avoid the overlapping between CO_2 taxation and the ETS[77].

4.2.3.1. Energy policy

According to Article 194 TFEU[78], the energy policy of the EU is twofold. Firstly, for the establishment and functioning of an European energy market; secondly, for guaranteeing environmental protection. It is true that, sometimes, it is difficult to differentiate environmental protection and *strictu sensu* energy policy aims. However, it is clear that the energy policy goes beyond the protection of the environment and certain conditions for the establishment and functioning of the European energy market have their own importance.

Firstly, ensuring security of energy supply is an aim mentioned in Article 194 TFEU and recently developed by European Commission strategy "*A stable and abundant energy supply for Europe*"[79]. It is true that some measures proposed could be qualified as "environmental" (e.g. the ones related to "moderating energy demand"), and others are difficultly related to energy taxes (e.g. the proposed measures of coordination of national energy policies). Many of these measures could be achieved (non-exclusively) with the help of tax incentives, which gives us a good base for a general exception: (a) increasing storage capacity for those countries dependent on a single gas supplier; (b) increasing indigenous EU energy production; (c) diversifying external supplies and related infrastructure; (d) ensuring an efficient and integrated internal market capacity (interconnections). Although security is, in a good number of measures, conditioned by environmental targets, it is clear that guaranteeing the supply goes beyond the protection of the environment and, in many cases, are completely independent of them.

Secondly, energy efficiency which is one of the main goals of the 2020[80] and 2030[81] frameworks is an objective with a clear impact on climate change policy, but it also contributes to other aims of the EU energy policy. In this sense the proposed targets for greenhouse gas emission reductions and renewable energy as part of the Union's transition to a competitive low carbon economy help reduce the impact of energy consumption on climate change. However, it also promotes reduced energy dependency and more affordable energy for business and consumers via a well-functioning internal market. In fact, since the crisis started in 2008, the EU has decoupled economic growth from energy consumption through increased efficiency. Then, energy

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76 Finland "Consultation on Community Guidelines on State Aid for Environmental Protection" object HT 359, 24 February 2014, p. 7. Similarly, Sweden "Swedish comments on the draft Guidelines on environmental and energy aid for 2014-2020 (EEAG) " p. 9; and Denmark" The Danish position on the Commission draft for Environmental and Energy Aid Guidelines 2014-2020", p. 3. This idea is repeated in the GBER consultation: Danish response to second round of public consultation on the Commission draft on the General Block Exemption Regulation (GBER), pp. 5-6.

77 UK proposed to take into account the accumulative effect of emission costs. See UK "UK Response to Commission consultation on the draft guidelines on environmental and energy state aid for 2014-2020" Annex E, p. 2. See also the positions of Luxemburg and Denmark. See Danish response to second round of public consultation on the Commission draft on the General Block Exemption Regulation (GBER), pp. 5-6.

78 "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks".

79 Communication from the Commission to the European Parliament and the Council: European energy security strategy (COM (2014) 330 final of 28 May 2014).

80 Commission Communication of 10 January 2007 "Sustainable power generation from fossil fuels: aiming for near-zero emissions from coal after 2020" (COM (2006) 843 final).

81 Communication from the Commission to the European Parliament and the council Energy Efficiency and its contribution to energy security and the 2030 Framework for climate and energy policy /* COM/2014/0520 final.

efficiency should be understood as a horizontal objective with a clear impact in, at least, three EU policies: environment, energy and economic growth.

4.2.3.2. Common Transport Policy

The interconnections between transport, energy and environment are evident. Transport depends on 96% in oil as energy, which is 90% imported[82]. Consequently, it is responsible of a good part of carbon emission and pollution as well as of energy dependency. For these reasons the white paper "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system"[83] concentrates its efforts on efficiency with the target of 60% emission reduction by 2050 with respect to 1990 while, at the same time, exchanges will continue growing. Efficiency is not limited to energy efficiency performance of vehicles. The white paper proposes also to increase it by optimizing the performance of multimodal logistic chains; and using infrastructure more efficiently through use of improved traffic management and information systems. Moreover, the paper makes clear that efficiency is necessary not only for cutting emissions but also for reducing oil dependency. That is an aim not only linked to environmental/climate change goals.

4.2.3.3. Climate change

Normally we assume that climate change is part of the environmental policy (less pollution, waste management, combating disforestation, soil protection, etc.) However, as it happened with the EU policy for sustainable development[84], there is not a complete identification between both of them. The EU climate change action aims to drive Europe to a low carbon economy. This, of course, will have a positive impact on the environment in Europe and worldwide. However, reducing the consumption of carbon energy will also have other positive effects, like reducing European dependency on energy imports, encourage energy efficiency and low carbon technologies, redistribute land use (and find another target for European agriculture), and foster economic growth and create jobs[85].

In this large and non-exhaustive list of actions it is easy to find reasons for energy tax incentives. In this sense it would be interesting to study and compare the definitions of environmental tax and climate change/carbon tax and see whether the two concepts could be synonyms and/or whether the last one should be understood as included into first one. There is another question that, maybe, is also worth to analyse: should climate change measures, particularly in the fiscal field, be reduced to carbon taxes or, on the other hand, it could cover any other aspects that, indirectly, tackle climate change goals but, at least in the short term, it does not produce nor encourage the reduction of carbon emissions. For example, the electrification of transport could not necessarily produce a reduction of carbon emissions (it would depend, on one hand, on the distribution of the electricity production mix and, on the other hand, on the efficiency of petrol/diesel engines). However, it gives transport the opportunity to be independent of oil and, in the long term, it could help to reduce emissions when political conditions and/or technology would permit a low carbon emission electricity mix.

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82 Eurostat, *Energy production and imports*, May 2014.

83 Commission Communication of 28 March 2011, "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system", COM (2011) 144 final.

84 Commission Communication of 15 May 2001, "A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development" (Commission proposal to the Gothenburg European Council) (COM (2001) 264 final).

85 EUROPEAN COMMISSION "Climate action. Building a world we like, with a climate we like. A low-carbon economy boosts economic growth and creates jobs", Directorate-General for Communication, November 2014.

In summary, there is a horizontal aim that could be found in the policies analysed: energy efficiency. Efficiency is a positive goal of different policies, including the quoted Energy, Transport and Climate Change but also other ones like economic growth, industrial policy, competitiveness, consumers, external trade and innovation. Although efficiency was already pointed out in the Communication of 2011 (in the 2020 targets framework)[86] and, probably the best example of development is the Directive of 2012 on Energy Efficiency[87], in the GBER it is only present for Investment aid (Articles 38, 39 and 40).

We consider that the aim of energy efficiency could be better achieved by other measures more directly related to energy costs, for example, benefits on energy taxes. Sometimes energy efficiency is achieved not necessarily through investment but with management measures. In other situations, the efficiency is a result of a long period of little improvements that could not qualify as "investments". For those cases it makes sense to permit incentives on energy taxes in the extend that the taxpayer could prove that he/she is achieving the same or better results using less energy (green or traditional).

5. Conclusions

The objective of this research project arises from the need to assess whether the reference to "environmental taxes" suits the purpose and effectiveness of the special treatment of energy taxation in the field of State aid.

Energy taxes and energy incentives are not always able to achieve or improve environmental protection. However, some of them may be aimed at achieving other legitimate public policy objectives such as ensuring a competitive, sustainable and secure energy system in a well-functioning Union energy market. In this context, the different EU policies such as the energy policy and the need of ensuring security of energy supply and energy efficiency can play an important role that need to be recognised.

The first step in our analysis has been the study of the concept of "environmental tax" included in the GBER and in the guidelines, checked against the notion of "energy tax", coming to the conclusion that in the field of State aid a specific legal configuration is used. The latter stems from the reference to both the taxable base and the beneficial effects –from an environmental point of view– obtained from the tax concerned.

In the opinion of some researchers, this way of articulating the concept of "environmental tax" causes a wide area of legal uncertainty and the exclusion of certain energy taxes and its incentives which fall outside environmental policies. However, other researchers point out that the ETD covers almost all the relevant energy taxes and thus, the concept of "environmental taxes" together with the characterisation of harmonised energy taxes as environmental would provide enough certainty in this regard. Besides, the environmental protection effect should not be proven but it is construed by law in all relevant cases and so are the transparency and incentive effect.

The consistency of State aid rules on the way of setting up the treatment of energy tax incentives exclusively from an environmental point of view, combined with the fact that the incentives receiving a privileged scheme

[86] Commission Communication "A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy" COM (2011) 21 final.

[87] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text with EEA relevance (OJ L 315, 14 of November 2012, pp. 1-56).

with regard to State aid regulation have both environmental and other purposes, also raises doubts about the desirability of maintaining this scheme in the future.

There are essentially two alternatives to the current regulation:

To modify the current definition of "environmental tax" within the meaning of State aid scheme, extending it to accommodate therein the common and general concept of environmental tax (based on the tax structure), or by expressly incorporating to the environmental tax concept those energy taxes with similar basic characteristics, so that legal uncertainty –if it is the case– is reduced and discrimination –if any– not serving to clearly objective differences is avoided.

To create a special regime or consideration (in the GBER and the EAG) for energy taxes where the same objective application sphere as the one of the current special State aid schemes could be applied, but with increased conceptual security and maybe equity. This system would also allow placing greater emphasis on specific energy policy elements, but without necessarily implying a current change in the objective sphere of the incentives.

A combination of both a) and b) alternatives to regulate the environmental purpose driven and other policy driven measures, in a separate way or to replace environmental references with harmonised ones, can be also considered.

The new definition looking at the environmental protection as the main element and not only focused on the tax base as it now happens, may be consistent with the request of both the GBER (para. 65 of the preamble 2014 GBER) and the guidelines (para. 3.7.1. (167)) that the aid in the form of tax reductions should be environmental in nature.

A special regime for energy tax regulation (option b) would allow full coherence with both environmental policies and the Community policies on energy and transport –among others– or those of cross-cutting nature such as climate change and sustainability. At the same time, this approach would be consistent with the adoption of special measures for environmentally-related incentives and would probably fit better to the combination of the environment and climate change policies with the rest of the policies involved in energy taxation (e.g. energy efficiency).

It is true that the GBER covers certain categories of horizontal State aid which aim at solving problems that may arise in any industry or country, implying that the objectives pursued are not related to a specific sector; however, the specific rules in the GBER may relate to a specific sector, and it is also important to note that the categories included are defined by their objective.

Common public interests –and among them, environmental protection– were taking into account in the design of the GBER rules and of course, they must be present and developed in any future improvement, but granting the respect to other conceptual categories would improve certainty and contribute to refine concepts for all legal purposes. On the other hand, energy tax benefits granted for social or similar reasons to final consumers or other non-business entities should be eligible for the simplified GBER procedure even if the respective tax benefit does not respect the minimum taxation levels set by the ETD.

On this basis, it seems clear that with these alternatives, as far as the concrete incentives actually covered by the State aid scheme are not enlarged, there would be no detriment to competition.

On the other hand, it seems desirable to dissociate the exclusive environmental purpose of energy taxes from their treatment with regard to State aid, to evolve into a conceptual model where taxes on energy are specifically treated as such, and tax incentives have, in turn, what correspond to environmental protection measures or other measures justified on grounds of protection of industrial sectors, technology development, combating relocation or other relevant measures.

In the development of our project it is essential to assess to what extent the needs of the energy sector and European consumers could be articulated more efficiently with any of the alternative approaches than those who are considering the current regulation, bearing in mind the foreseeable developments in sensitive areas, such as greater integration of national markets, security of supply, infrastructure policy, the needs of specific industries and specific consumer groups, among others.

In the search for the optimal solution, regardless of the legal concepts analysed above, it is essential in our research to consider the international framework that limits the scope for action at EU level, especially the one resulting from the application of Energy Charter Treaty and obligations under the GATT and WTO.

It will also be necessary to consider the perspective of what is the formula that can offer better compatibility and greater efficiency from the requirement of State regulatory aspects' point of view where some of the most significant litigation has been posed.

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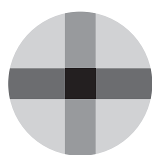

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Abstract: The study of the concept of "environmental tax" included in the GBER and in the guidelines, checked against the notion of "energy tax", demonstrates that in the field of State aid a specific legal configuration is used. The latter stems from the reference to both the taxable base and the beneficial effects –from an environmental point of view– obtained from the tax concerned. In the opinion of some researchers, this way of articulating the concept of "environmental tax" causes a wide area of legal uncertainty and the exclusion of certain energy taxes and its incentives which fall outside environmental policies. However, other researchers point out that the Energy Taxation Directive covers almost all the relevant energy taxes and thus, the concept of "environmental taxes" together with the characterisation of harmonised energy taxes as environmental would provide enough certainty in this regard. Besides, the environmental protection effect should not be proven but it is construed by law in all relevant cases and so are the transparency and incentive effect.

Keywords: energy, environmental taxes, energy taxes, European State aids

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