Environmental Taxes from the EU State Aid Control System Perspective – A Legal Analysis of the Integration of Environmental Protection

Joana Pedroso

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Markus, Maya e Thor, vocês foram essenciais para que eu superasse as adversidades do meu caminho. Amo vocês.

Abstract

This thesis is a legal analysis of environmental taxes enacted by the Member States of the European Union (EU) as a tool to protect the environment from the perspective of the State aid control system (laws, rulings, and decisions on State aid). The research problem I address has two dimensions. First, the State aid control system adds complexity for lawmakers of the Member States already grappling with various legal, social, political, and economic challenges in environmental tax imposition. Pressures such as the European energy crisis, the Russia-Ukraine conflict, rising inflation, and extreme weather events exemplify these challenges. Furthermore, lawmakers' tax sovereignty is conditional; they must not breach the Treaty on the Functioning of the EU (TFEU). In this thesis, I focus on the rules on State aid, notably the prohibition set out in Article 107(1) TFEU. This rule demands case-by-case interpretation and assessment of a State measure's actual impact. Consequently, disputes arise from the Commission's decisions and the EU courts' rulings on whether State measures constitute State aid. Without expertise in State aid matters, lawmakers are likely to violate the State aid prohibition set out in Article 107(1) TFEU when enacting environmental taxes. Environmental taxes may be general (not breaching Article 107(1) TFEU), compatible aid (breaching Article 107(1) TFEU but allowed under Article 107(3) TFEU), or incompatible aid (breaching Article 107(1) and (3) TFEU), in which case the Member State concerned is not authorized to impose or to keep imposing the tax. Due to the implications of the latter two scenarios (compatible or incompatible aid), the issue of incoherence within the State aid control system concerning environmental protection values of both the EU and the Member States laws and policies is just as crucial as addressing the system's inherent complexity. In theory, Article 11 TFEU establishes an integration principle that mandates the integration of environmental protection requirements (values articulated in Article 191 TFEU and further developed in the environmental laws of the EU and the Member States) into the EU policies, including State aid. This integration is achieved through the interpretation of the rules on State aid in relation to environmental taxes. Any inconsistencies in this regard impact the EU and the Member States' response to environmental issues and pose a problem for everyone, but in particular for the Member States that are trying to deal with the environmental issue. Therefore, it is my thesis purpose to provide clarity on the complexities of the State aid control system for lawmakers, enabling

them to legislate on environmental taxes with full awareness of these complexities. Thereby, lawmakers can, from a bottom-up approach, foster the interpretation of the rules on State aid through their choices within the environmental tax design. Additionally, this thesis provides scholarly insights into the State aid control system's inconsistencies concerning the interpretation of the rules on State aid in relation to environmental taxes and the integration principle of Article 11 TFEU.

Keywords: EU. Competition Law. State Aid Law. Tax Law. Environmental Tax Law. Environmental Taxes. Environmental Protection. Environmental Integration. Climate. Sustainable Development Goals. Environmental Policy. Circular Economy. Green Transition.

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As a Brazilian lawyer and immigrant in Sweden, pursuing my doctoral candidacy in European Union law, I faced a challenging and tumultuous journey. I constantly reassessed my preconceptions, and I had to lose my "lawyer voice" and find my voice as a researcher. In 2016, I started the program pregnant with my daughter Maya. I wrote my first article as an academic in Sweden, and I even went to labor during Erik Björling's seminar. In 2018, after a long period of maternity leave, a spiritual trip to India, and a near-death experience in a plane that almost crashed, changed my life. I held my friend's Mari hands, and I prayed for our peaceful death. After that, we have been family for each other. Without our laughs, stupid plans, and hypocritical advice, I would never have made it through the storms of my life as a doctoral candidate (thanks, marida!).

In 2019, I received a prize from Renova, and with that, I had panic attacks and intense stress. I went to Oxford University for a doctoral retreat. I was invited to present my research at Bergen University and and be a speaker in a workshop in Brussels, all thanks to Malgorzata Agnieszka Cyndecka. Ironically, in these events, I was confident and precise, even though I still have not found my voice as a researcher at that time. I am grateful for the timely doors Malgorzata opened for me. My dear friend and neighbor Lisa Glans was a genuine source of calmness that helped throughout this storm. She and her family became our family by heart. Lisa also gifted me with another family friendship, Majja and her family. Together, our three families form a close-knit, heartwarming community here in Ucklum. The safety and support they and their families offered me (and us) throughout this journey are truly priceless.

I got pregnant with Thor at the end of 2020, and this pregnancy took me down from the first day. Thanks to my supervisors, Pernilla Rendahl and Lena Gipperth, I kept going (or they kept me going). In 2021, when Andreas Morberg and Katia Cejie read my thesis and gave me insightful feedback, I could understand through their eyes the strengths and weaknesses of my project. However, I was still pregnant, sick, and ended up on sick leave. When Thor was born at the end of the summer of 2021, I decided to take a break from my thesis to recover from such a tough pregnancy and labor. I took a year apart from it.

In 2022, I went to Lisbon to present an article in the summer. Then, I went to Amsterdam to research at the IBFD Library in September and to Vienna to research at the University of Vienna in November. After the third trip, I was back at full speed with my research and writing this manuscript with a confidence I had not experienced before. I finally found my voice and felt confident with it. In September 2023, Katia Cejie and Cristina Olsen Lundh peer-reviewed my project and gave me relevant insights to finish this manuscript in October of 2023. It was very helpful, and for that, I am very grateful, that Katia was able to be part of this process twice (thank you, Katia!).

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added immeasurable joy to our lives, turning every meeting into an endless celebration. Nati for preserving our friendship in a timeless capsule protected by the passage of time.

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Ucklum,

Joana Pedroso

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PART I

Introduction
&
Fundamentals

1. Introduction

1.1. Research Problems, Purposes and Questions

Figure 1: "Demand & Supply" by Erik Johansson, available at www.erikjo.com

Lawmakers from the Member States of the European Union (EU) face multiple challenges when addressing environmental issues through taxation. One of the challenges lawmakers face revolves around the classification of *environmental taxes*[1] as State aid. Tax reductions, exemptions, and other forms of tax advantages available to particular taxpayers are frequently classified as illegal State aid in accordance with the conditions set out in Article 107(1) of the Treaty on the Functioning of EU (TFEU).[2]

[1] I further explain in Chapter 2 how *environmental taxes* should be perceived as a term in this thesis. For now, it suffices to state that it relates to any taxation (a tax, a charge, a fee, a levy) that aims for environmental protection in whichever sense the Member State might frame it, e.g., reduce greenhouse gas emissions to combat climate change, or avoid biodiversity loss.
[2] Article 107(1) writes: Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort

Environmental taxes might not be the most effective instrument to protect the environment, but they still play a relevant role as an environmental policy tool.[3] Hence, the complexity of the State aid control system represent a problem to the Member States' lawmakers addressing environmental action through taxation.[4] The State aid control system encompasses laws from various sources, including Articles 107 to 109 of the TFEU, Council Regulations, Commission Regulations, Commission Guidelines, Commission Notices; rulings by the EU Courts, and State aid decisions issued by the Commission or Council. Consequently, a comprehensive understanding of the system increases the chance of environmental taxes not breaching the prohibition on State aid in Article 107(1) and, thereby, limiting the tax discretion of the Member State on the environmental tax matter.

The lack of clarity and legal certainty surrounding the system raises significant concerns. It impacts the interplay between the EU and the Member States, and between Member States and companies that either benefit from, or are excluded from the State aid measures.[5] Unexpected outcomes stemming from EU courts' rulings and subtle Commission State aid decisions have a detrimental effect on this interplay,[6] highlighting the vertical relationship between the EU and the Member States within this system. EU State aid interventions, from the top down, also affect the tax discretion of Member States.

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competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

[3] In Chapter 2, I further discuss the roles, the context, and other relevant aspects about enviornmentla taxes.

[4] Blauberger discussion about negative integration points out that the State aid control system directly impact domestic policymakers' decisions. In Blauberger, M., 2009, *Compliance with rules of negative integration: European state aid control in the new member states*, pp. 1033 and 1043.

[5] Nicolaides, P., (2022), "The Consequences of not Knowing when State Aid is State aid," the author clarifies how actors involved in the State aid control system (apart from the EU institutions) feel uncertain about the State aid classification and its legal effects. He writes: "(…) Public officials need to know whether public policies fall within the scope of Article 107(1) TFEU, legal advisors need to guide their clients to avoid receiving unlawful aid while academics need to explain to students the boundaries of the prohibition of Article 107(1) TFEU."

[6] I will discuss this issue largely through this thesis. However, for reference, case T-210/02, C-487/06, T-210/02 RENV, *British Aggregates Association,* is a good example of how the EU courts can have opposite interpretations of the State aid conditions between them and also in comparison with the Commission.¨

To summarize the first problem I am researching in this thesis, which is closely linked to the aforementioned perspective: The complexity of the State aid control system exacerbates the challenges of the interplay between the EU and its Member States within this system, turning it into an arena for this interplay.

Several factors contribute to the complexity of the State aid control system. Article 107(1) establishes cumulative conditions for classifying a measure as a State aid, requiring interpretation on a case-by-case basis. This aspect makes it challenging to extract general interpretation parameters from State aid rulings. Moreover, since the State aid classification determines whether a tax falls under the EU State aid control system or remains a domestic concern, concrete State aid cases lead to critical legal disputes among the parties involved.[7]

Discrepancies in interpreting the State aid conditions frequently arise among the Commission, the General Court of the EU (hereafter: General Court), and the EU Court of Justice (hereafter: Court of Justice).[8] I discuss these State aid conditions extensively in Part II of this thesis.[9] Additionally, specialized terminology unique to this field can be confusing for those unfamiliar with this system's language. I clarify critical terms in a terminology section later in this chapter. Consequently, the aspects presented above introduce different forms of difficulties that make the State aid control system complex and difficult to grasp.

My first research purpose is, therefore, to clarify the complexities of the State aid control system for lawmakers. This provides them with general parameters they can use when designing environmental taxes that should avoid the State aid classification while ensuring that their environmental taxes serve their purpose of protecting the environment.

From the perspective of the State aid control system, I can classify environmental taxes into three different levels. In the first level, the tax remains a domestic issue, i.e., a general measure (not State aid). In the second and third levels, the tax falls within the EU competence because it is classified

[7] An effect of the State aid classification under Article 107(1) of the TFEU that subjects the measures to the Commission's control under Article 108 of the TFEU.
[8] *Ibid idem.*
[9] In Chapters 3, 4, and 5.

as compatible or incompatible aid. Below, I further explain each of these terminologies and levels as well as which legal effects they imply for the Member States and the companies, who benefit from the State aid.

1. An environmental tax maintains its classification as a *general measure* (domestic measure) when it does not breach Article 107(1) of the TFEU. A general measure preserves the tax sovereignty of the Member State concerned. However, this conclusion of "no breach of Article 107(1)" results from a State aid scrutiny. The latter can occur through a legal debate in national courts,[10] with the Commission investigating the measure,[11] or even with the Court of Justice responding to a national court's preliminary ruling.[12]
2. An environmental tax that breaches Article 107(1) of the TFEU but complies with the complementary laws of Article 107(3) of the TFEU is classified as State aid compatible with the internal market (hereafter: compatible aid). The environmental tax classified as *compatible aid* can be imposed under the condition that the Member State ensures its compliance with the legal requirements set out in the relevant laws. For instance, the General Block Exemption Regulation (hereafter: GBER), which establishes an automatic system for imposing compatible aid measures under Article 107(3) of the TFEU.[13]

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[10] National courts play a vital role in monitoring the Member States' compliance to the prohibition of Article 107(1) of the TFEU. That is, they ensure that domestic measures do not breach that Article. See further about the national courts role in the State aid control system in Sierra, J. L. B., and Ferruz, M. A. B., (2017), "State Aid Assessment: What National courts Can Do and What They Must Do*,"* particularly in pp. 411-417. See also how the national courts cooperate with the Commission in the State aid control system and the limits of this cooperation in Goyder, J., and Dons, M., (2017) "Damages Claims Based on State aid Law Infringements*,"* particularly in pp. 420-422.

[11] Based on Article 108, paragraphs 1 to 3 of the TFEU.

[12] Based on Article 267 of the TFEU.

[13] Environmental taxes are classified as aid measures for environmental protection, which are covered by the GBER, according to Article 1(1)(a) of the GBER and Recital 22 of the Commission Regulation EU/2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 167, 30.6.2023, p. 1–90. The *automatic system* of imposition entails that the Member State is not obliged to notify the Commission, as set out in Article 108(3) of the TFEU, and await its decision. It can simply implement the compatible aid, as long as it ensures compliance with the rules established in the GBER.

3. An environmental tax that breaches both Article 107(1) and Article 107(3) of the TFEU is classified as State aid incompatible with the internal market (hereafter: incompatible aid). The Member State concerned is prohibited from imposing the environmental tax classified as *incompatible aid*, or if it is already in place, it must cease the tax imposition.[14] In the latter scenario, the Member State must order the beneficiaries of the aid to pay for the recovery of the incompatible aid with interest payment, retroactively for ten years.[15]

The classification of whether a domestic environmental tax falls under the EU State aid control system hinges on the measure's breach of Article 107(1) of the TFEU. Hence, it requires an assessment of the measure in respect of Article 107(1) conditions. This assessment is crucial to determine when the environmental tax falls into the first, second, or third classification level (i.e., respectively, general measure, compatible aid, or incompatible aid). Therefore, the level of environmental protection the tax seeks to achieve or achieve through its imposition plays a vital role in this State aid assessment.

The integration principle set out in Article 11 of the TFEU, requires the integration of environmental protection requirements into other EU policies, such as the State aid control system discussed in this thesis.[16] Nowag writes about the effects of the integration principle in relation to the TFEU prohibitive rules on competition and free-movements as follows: "[I]t can only affect the way in which the Union invigilates the prohibition (…)".[17] Therefore, the interpretation of the State aid conditions in relation to environmental taxes (to verify compliance to the prohibition) should enable the integration of environmental protection requirements thereto if the tax presents such values.

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[14] The abolition or no imposition of the incompatible aid is based on Article 108(2) of the TFEU.

[15] The legal regime of the recovery of an imposed incompatible aid is set out mainly Article 16 of Regulation (EU) 1589/2015 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248, 24.9.2015, p. 9–29.

[16] Article 11 of the TFEU writes: Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

[17] In Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, p., 8.

Based on this perspective, another issue I explore in this thesis (the second research problem) is the potential failure of the State aid control system to integrate environmental protection requirements, as stipulated in Article 11 of the TFEU, when the State aid measures take the form of environmental taxes. When analyzing the State aid control system in the context of environmental taxes to elucidate its complexities for lawmakers, I can also investigate how this integration unfolds within that system. Through this investigation, I can identify and pinpoint potential inconsistencies in the State aid control system concerning the integration of environmental protection requirements when Member States implement (or plan to implement) environmental taxes. This represents the second purpose I have with this thesis, which provides valuable insights to lawmakers, EU courts and Commission and contribute to scholarly research in this field.

In Figure 2 below, I illustrate the vertical impact of the State aid control system on the tax discretion of Member States implementing or planning to implement environmental taxes. The map includes the theoretical perspective that the integration principle of Article 11 of the TFEU should influence the three levels of State aid classification (as I explain in subchapter 1.4).

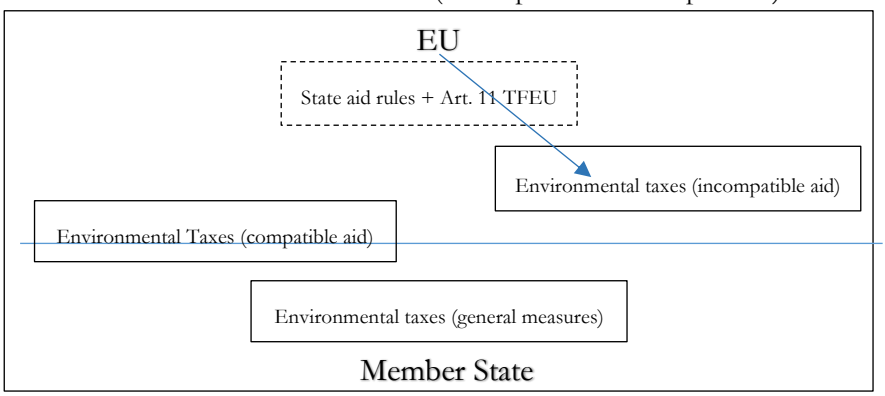

Figure 2: Mind map – three classifications of environmental taxes (State aid control system)

The interpretation of the State aid rules in relation to the integration principle requires the presence of environmental protection requirements in the tax under scrutiny. Without an environmental protection value in the tax, e.g., an

object or a tax base, the environmental protection requirements cannot be considered into that invigilation of Article 107(1).[18]

It should also be noted that the interpretation of the conditions set out in Article 107(1) requires consideration of the actual effects of the tax when imposed, or its expected effects if it is still in the planning stage. This introduces an additional layer of complexity in interpreting rules on State aid. This approach, known as the effects-based approach of Article 107(1),[19] has long been established in the State aid case law.[20] Consequently, the tax's effects on the functioning of the internal market and on the environment should take an essential part of the interpretation of this Article.

In summary, environmental taxes can be classified into three different levels within the State aid control system, as depicted in Figure 2 above. At each level, the system may exhibit varying degrees of flexibility or inflexibility in integrating environmental protection. I explain in subchapter 1.4 that *flexibility* (and its varying degrees) is about the integration principle avoiding a conflict

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[18] For instance, Article 191, paragraphs 1 and 2 of the TFEU set out the EU values about environmental protection (in a broad sense) that are the so-called *environmental protection requirements* in Article 11 of the TFEU.Article 191 (1) and (2) of the TFEU establishes what follows. "(1) Union policy on the environment shall contribute to the pursuit of the following objectives: – preserving, protecting and improving the quality of the environment, – protecting human health,– prudent and rational utilisation of natural resources, – promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. (2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. (…)." Dhondt, N., (2003), pp. 72-79, adds the *criteria* to the understanding of values of environmental protection requirements; Jans, J.H. & Vedder, H.H.B., (2012), *European environmental law: After Lisbon*, p. 23, mentions only *objectives* and *principles;* Nowag, J., (2016), p. 25, adds *sustainable development.* Also, Nollkaemper, A., (2002), "Three Conceptions of the Integration Principle in International Environmental Law", pp. 25-29, and other scholars.

[19] In Bartosch, A., (2010), "Is there a need for a rule of reason in European State aid law? Or how to arrive at a coherent concept of selectivity?", p. 738, and Villar Ezcurra, M., (2013), "State Aids and Energy Taxes: Towards a Coherent Reference Framework", p. 342. Also called *effect principle* by Aldestam, M. (2005), *EC State aid rules applied to taxes – An analysis of the selectivity criterion*, p. 41. Both terms (effect principle or effects-based approach) mean the same.

[20] In the case C-173/73, *Italy v Commission,* p. 718, para. 13, the Court of Justice stated what follows. "The aim of Article [107] is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, *Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects*." *Emphasis added.*

between the laws on State aid that protect the functioning of the internal market and the environmental tax that protect the environment. Based on this view, I guide this research with the following two questions:

1. In what circumstances do Member States' environmental taxes breach the EU's State aid laws (e.g., Article 107(1), complementary laws to Article 107(3), and other laws)?
2. How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?

I address these two research questions again in section 1.5 of this chapter, where I provide a more detailed explanation. For now, in the following subchapter, I briefly clarify the State aid control system and its intricate aspects, allowing for a better understanding of the research problems, purposes, and questions within the context of this system.

1.2. Overview of the State Aid Control System

In the subchapter above (1.1), I briefly explained that environmental taxes can easily fall under the State aid control system. Now, I present aspects of that system that are a relevant contextual background for understanding the purpose of this thesis and of my research questions.

Article 107(1) of the TFEU sets out the conditions under which a measure is to be classified as State aid. Once an environmental tax is classified as State aid, it falls under the jurisdiction of the EU's State aid control system, and thus is no longer a purely domestic measure. Article 107(3) of the TFEU presents the possibility whereby a State aid measure can be classified as compatible with the internal market, thereby allowing the environmental tax to continue under certain conditions established in complementary laws.[21] Up

[21] The GBER (i) exempts the Member States from the notification procedure determined in Article 108(3) of the TFEU, thereby granting (ii) an automatic status of compatible aid when the measure does not exceed the GBER's thresholds and meets all general and specific

to the time of writing (May 31, 2023), the GBER and the CEEAG are the most relevant legal frameworks concerning State aid for environmental protection.[22] The above-mentioned two paragraphs from Article 107 are relevant in different ways.

Article 107(1) of the TFEU is the rule responsible for subjecting an initial domestic measure to the State aid control system. In this sense, the classification of the measure as State aid under Article 107(1) entails a breach of the Member State's measure (herein: environmental tax) to that EU law. Thus, the investigation of the problem addressed in this thesis – i.e., whether Article 107(1) of the TFEU is sufficiently flexible to integrate environmental protection (as established in Article 11 of the TFEU) – also concerns the reason for breaching that rule through the environmental tax enacted by a Member State. This thesis also tests the *logic, consistency,* and *coherence* of the EU's legal system in relation to the Union's general aim of integrating environmental protection into its policies (including on State aid), as described in Article 11 of the TFEU.[23]

When I refer to *logic, consistency,* and *coherence,* I am alluding to the potential for integrating environmental protection requirements into the interpretation of the rules on State aid in relation to environmental taxes. These requirements

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standards established thereof.[21] When the environmental measure is above the GBER thresholds or does not meet on of those mandatory standards, the Member State must notify the Commission, who normally uses the CEEAG to assess the compatibility of such measure. See in Section I, para. 6 of the CEEAG and in paras. 6 and 16 of the GBER.

[22] Given their instrumental relevance in assessing aids for environmental protection, both the GBER and the CEEAG are also critically analyzed herein in Chapter 3, although their analysis in this thesis is less relevant than Article 107(1) of the TFEU, which I discuss in Chapters 4, 5, and 6. Other laws of relevance are found Article 108 of the TFEU that establishes the State aid control system centering the analysis, review, and control of State aid to the Commission, and the Member States' duty to notify and provide the information necessary for the Commission to put that system into effect. The Regulation 1589/2015 laying down detailed rules for the application of Article 108 of the TFEU prescribes a system for the abolition and recovery of incompatible aid more detailed rules concerning the notification procedure, among other aspects of Article 108 of the TFEU. Moreover, considering that the Commission also issues Notices clarifying State aid critical aspects and its working agenda, these non-binding instruments (based on Article 288 of the TFEU) are relevant to this thesis, provided they give substance to the question of integration of environmental protection thereof.

[23] Article 11 of the TFEU establishes that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policy and activities, in particular with a view to promoting sustainable development." This Article has general application and determines the integration of environmental protection requirements into the Union's policy, and State aid is an EU policy, which is referred to, in this thesis, as *the State aid control system*.

embody the environmental protection values of the tax under investigation and of the applicable EU laws. For example, Article 191(1) of the TFEU emphasizes the importance of "protecting human health" as a value the measure may present. Additionally, the Water Framework Directive emphasizes the importance of "prevent further deterioration and protects and enhances the status of aquatic ecosystems (…)" as values measures protecting water should aim for.[24] Moreover, often the *logic*, *consistency*, and *coherence* of the tax's environmental protection requirements (values) are often determined by scientific evidence and data, rather than merely seeking an alleged environmental aim.[25]

Since the EU institutions interpret the State aid laws in relation to concrete cases–mainly the Commission through its State aid decisions and the EU courts through their rulings–such decisions and rulings give substance to the State aid laws with respect to the integration of Article 11.[26] From a legal perspective, Article 107(1) and Article 107(3) may represent a (il)logical, (in)consistent, and (in)coherent integration of the environmental protection requirement set out in Article 11. Such (il)logical, (in)consistent, and (in)coherent effects relate to what I referred to earlier as the (in)flexibility of the laws on State aid integrating Article 11 (the integration principle) as a way to avoid conflict of values. Recalling such conflict of values, the functioning of the internal market protected through the State aid prohibition and the protection of the environment through tax imposition.

This can result from the following circumstances:

(1) When an environmental tax achieves a level of environmental protection higher than or similar to the minimum EU level, it avoids the breach of Article 107(1). This may be a logical, coherent, and consistent integration, in relation to a concrete case, of Article

[24] In Article 1(a) of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1–73.
[25] See, for instance, Article 191(3) of the TFEU.
[26] The Court of Justice might interpret the State aid laws in concrete cases referred to the Court in preliminary rulings (based in Article 267 of the TFEU), or even the EU courts might judicially review the nullity of the Commission's State aid decisions, challenged by an interested party through annulment proceedings (based in Article 263 of the TFEU), and even reinforce the Member State concerned compliance to its obligations under the TFEU and TEU (based in Articles 258–260 of the TFEU).

11 into the interpretation of Article 107(1). Conversely, if such a tax cannot avoid a breach of Article 107(1), the result may be an illogical, incoherent, and inconsistent integration of Article 11.

(2) When an environmental tax artificially seeks to achieve a level of environmental protection higher than or similar to the minimum EU level, it breaches Article 107(1). Thus we have a logical, coherent, and consistent integration of Article 11. After that, if the tax does not achieve at least the minimum EU level of environmental protection, and so is classified as a case of incompatible aid, then here too the integration of Article 11 into Article 107(3) is logical, coherent, and consistent. However, if an environmental tax is classified as a case of compatible aid even though it harms the environment or falls below the minimum EU level of environmental protection, then we have an illogical, incoherent, and inconsistent attempt to integrate Article 11 into Article 107(3).

The underlying rationale for the two circumstances above is that the State aid control system should not slow down the overall achievement of environmental protection and climate targets due to inconsistency and incoherence within the EU's legal system. The interpretation, by the Commission and by EU courts, of the State aid laws of relevance in each case is essential to the consistency of the State aid control system with Article 11. This is because this interpretation determines when a purely domestic tax falls within the scope and competence of EU law. After that, it becomes possible to analyze the consistency of the State aid laws with Article 11, as explained in (1) and (2) above.

Besides, when it comes to taxes in general (including environmental taxes), the determination of when a purely domestic tax is also an EU State aid issue is an ordinary aspect of the legal and political relationship between the EU and the Member States – which nonetheless gives rise to tension in their interplay. It is safe to say that, in general terms, no Member State would want to be subject to an EU State-aid intervention, which is a form of negative integration of EU law.[27] However, the EU (represented by its institutions)

[27] Cf. Terra, B. J. M., and Wattel, P. J., (2012), *European Tax Law*, p. 36.

must work to promote peace,[28] which includes securing the internal market without internal frontiers,[29] and promoting free and fair trade.[30] Thus, the State aid control system is critical for ensuring that the internal market has a level playing field, that all Member States play by the same rules, and that the Union is a success as envisaged in the TFEU.[31]

The Commission's work on the State aid control system affects the interplay between the EU and the Member States, legally and politically. For instance, the failure of the EU to institute environmental taxes at the Union level (a form of positive integration of EU law[32]) enhances the relevance of the State aid control system as one of the main legal tools available to the Union to protect the functioning of the market from harmful tax competition (a form of negative integration of EU law).[33]

Up to the time of writing, the EU Council has only successfully achieved the legal requirements for approving environmental taxes at the level of the Union.[34] The EU Carbon Tax Adjustment Mechanism (CBAM) is an environmental tax applicable to imported goods (material products and electricity) deriving from countries with low environmental standards.[35] Consequently, the CBAM is not an EU environmental tax applicable to all Member States, but to the import of products from non-EU countries, and thereby is out of the scope of this thesis. The lack of EU environmental taxes imposed intra-EU creates discrepancies among the Member States in sectors and industries with a significant role in environmental and climate issues. In fact, tax competition in connection with environmental taxes is not just an internal EU issue; it is an international one too. The United Nations (UN), the International Monetary Fund (IMF), and the Organization for Economic Cooperation and Development (OCED) have been working to promote

[28] In Article 3(1) of the Treaty on EU (TEU).
[29] In Article 3(2) of the TEU.
[30] [30] In Article 3(5) of the TEU.
[31] Through those general values found in the TFEU and the TEU, e.g., Article 3 of the TFEU and Article 26 of the TFEU.
[32] Cf. Terra, B. J. M., and Wattel, P. J., (2012), "European Tax Law", p. 36.
[33] See reflection about the problem of tax competition when other Member States do not adopt similar measures or when the EU lacks such legislature or coordination in Skou Andersen, M., (2018), "The Introduction of Carbon Taxes," pp.151-153.
[34] The mentioned legal requirements are those established in Articles 113 and 115 of the TFEU. See in this regard section 2.6 EU Environmental Taxes: Legislative Possibilities and EU Aims.
[35] See Commission's Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism COM/2021/564 final.

global carbon taxes to tackle both international tax competition and climate change.[36]

For instance, if we consider that the transport sector is estimated to represent nearly "a quarter of the EU greenhouse gas emissions and is the main cause of air pollution in cities," [37] it is not hard to understand the relevance of tackling this sector's emissions with all instruments available, including at national, EU, and international levels. Within the EU, however, harmonizing the taxes of all Member States on the sector's emissions requires the agreement of all members of the Council, which is politically difficult.[38] Internationally it is even trickier, because in that case a greater number of jurisdictions have to agree on such a tax. The result is that Member States adopt environmental taxes domestically and unilaterally. The issue in such cases is that environmental taxes often reduce the competitiveness of certain activities on the internal market, because similar activities across the EU border may not have to pay such a tax.[39]

Considering the EU's difficulties in harmonizing environmental taxes at the Union level, as well as its duty to secure a level playing field on the internal market, these circumstances leave the EU with enforcing the TFEU's provisions as its sole legal recourse for dealing with environmental taxes.[40] When the negative integration of the rules on State aid, alongside other TFEU provisions, is the only legal avenue for dealing with the Member States' environmental taxes, it becomes important to understand the Commission's

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[36] See, for instance, Falcão, T., (2021), *A Multilateral Approach to Carbon Taxation*. See, also, United Nations, (2021), *Handbook on Carbon Taxation for Developing Countries,* last accessed 8 December 2022, available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-10/Carbon%20Taxation.pdf; and IMF, 2020, *Mitigating Climate Change – Growth and Distribution-Friendly Strategies*, last accessed 28 December 2022, available at https://www.imf.org/en/Topics/climate-change/climate-mitigation.

[37] In Commission, *Transport Emissions,* in Climate Action, EU Action, last accessed 28 November 2022, available at https://climate.ec.europa.eu/eu-action/transport-emissions_en.

[38] Distortion on competition through tax competition among the Member States is the reason to harmonize indirect taxes at EU level, according to Article 113 of the TFEU.

[39] See Skou Andersen, M., (2018), "The Introduction of Carbon Taxes," pp.151-153.

[40] Along the State aid rules, Article 110 of the TFEU and the free movement provisions are forms of negative integration of the EU laws prescribed in the TFEU. Blauberger states that "European state aid control is typical for the realm of negative integration. National subsidies and other types of state aid are prohibited if they distort competition unless they can be justified with regard to some other goal of common interest." In In Blauberger, M., (2009), "Compliance with rules of negative integration: European state aid control in the new member states," p. 1034.

agenda, as well as the EU case law on the subject. An example is the Commission's proposed European Green Deal (hereafter: EGD), which is relevant for tackling both harmful competition (and not just in connection with taxes) and climate issues. The plan is for the State aid control system to be aligned with the EGD.[41] The Member States can expect the Commission's State aid agenda to be consistent with the aims stated in the EGD.

The State aid control system is a relevant arena where the interplay between the EU and the Member States takes place. While the EU institutions influence the development of the State aid control system through interventions on State aid (this is the top-down effect), the Member States influence its development through the design of their environmental taxes (this is the bottom-up effect).

When the EU institutions–mainly the Commission and the EU courts–apply the State aid laws to concrete cases, this creates three types of top-down effect on the State aid control system. First, the EU's intervention on a particular Member State's environmental tax entails all of the State aid legal effects with respect to that tax (i.e., prohibition or control). If the tax is found to be a case of incompatible aid, then the Member State is forbidden to levy it, or (in the case of an already operative tax) it is to be abolished and interest recovery payments made.[42] If the tax is found to be a case of compatible aid, then the Member State concerned must control and monitor its effects, as well as keeping the Commission informed.[43] Second, the Commission's decisions in this area create new forms of aid that were not previously scrutinized under the State aid control system, but which are now part of that institution's agenda.[44] Third, the EU courts' rulings are case law that set legal precedents for similar or analogous cases in the future. [45] If lawmakers in the Member

[41] See in section 1, para. 1 of the CEEAG.
[42] In Article 16 (1) and (2) of the Regulation 2015/1589.
[43] In Article 108(1) and (3) of the TFEU, in Article 4 of the Regulation 2015/1589, and provisions of the GBER or CEEAG.
[44] See about the tax rulings as State aid, more particularly, how environmental taxes could become State aid scrutinized through tax rulings, in subchapter 2.7. Environmental Taxes Overlapping the Concept of *Aid*.
[45] About the use of the Court of Justice rulings as a legal precedent to analogous cases, see for instance para. 85 of the judgement in the joined cases C-885/19 P and C-898/19 P Fiat Chrysler Finance Europé, where the Grand Chamber of the Court of Justice explicitly uses analogy to apply another case law of that Court namely, C-203/16 P, *Andres (insolvency of Heitkamp BauHolding)* v *Commission)* to interpret the State aid law in that given case.

States are to avoid colliding with the State aid laws when they enact environmental taxes, they must consider all three of these top-down effects.

Within the Member States' different levels of lawmaking (municipal, regional, national, etc.), the design features of each environmental tax have the potential to influence the interpretation and application of the State aid laws, thereby creating a bottom-up effect. Consequently, lawmakers benefit from a deep understanding of the State aid control system, because it gives them the knowledge to choose consciously and proactively how to design the environmental tax in question, so as to reduce the chances of an EU intervention.

1.3. The Research Problems and Their Facets

1.3.1. Interconnection between the first and second problems and purposes

Lawmakers from the Member States of the EU are already grappling with various complexities as they endeavor to address environmental issues through taxation. These complexities are intricately tied to tax legislation and encompass challenges such as addressing social inequality, generating revenues during times of economic crisis, and mitigating greenhouse gas emissions, all of which must be carefully considered and dealt with while designing environmental tax policies. Each of these challenges has the potential to undermine lawmakers' plans.[46]

From a domestic perspective within the Member States, the State aid control system introduces an additional layer of complexity to this scenario. It serves

[46] Recalling the first problem I am researching in this thesis: *The complexity of the State aid control system exacerbates the challenges of the interplay between the EU and its Member within this system, turning it into an arena for this interplay* Based on this problem, I framed the first purpose I have with this research as follows (recalling it): *To clarify the complexities of the State aid control system for lawmakers. This provides them with general parameters they can use when designing environmental taxes that should avoid the State aid classification while ensuring that their environmental taxes serve their purpose of protecting the environment.*

as a legal constraint stemming from the EU level[47] through the likelihood of environmental taxes being classified as State aid (thereby breaching Article 107(1) of the TFEU). To navigate EU law successfully, lawmakers must possess a profound understanding of the Union's overall control system regarding State aid. This is understanding particularly vital when considering the influence of EU case law on that classification, not to mention the role of the Commission's State aid agenda, Regulations, Guidelines, and Notices in shaping that control system. As a result, lawmakers' familiarity with the State aid control system may prove to be crucial in avoiding a breach of Article 107(1) of the TFEU and altering their plans for environmental taxes. This aligns with the first problem and purpose outlined in this thesis.

Historically, the State aid control system is one of several legal tools of the EU[48] to safeguard the internal market (and a level-playing field thereof) and promote fair and free competition.[49] Article 107(1) of the TFEU fundamentally forbids protectionist and anti-competitive *State measures*[50] that provide advantages to certain undertakings within the internal market at the expense of others.[51] The potential for environmental taxes to breach the rules on State aid hinges on the interpretation of these rules, particularly Article 107(1) of the TFEU. If the interpretation of State aid conditions fails to accommodate economic concerns in favor of environmental values, environmental taxes may be classified as State aid and subjected to EU control or prohibition.[52] It is imperative to determine whether this cornerstone EU

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[47] In the light of the principle of sincere cooperation, in Article 4(3) of the TFEU, and the negative integration of EU law through the prohibition of State measures contrary to the TFEU. In Terra, B. J. M., and Wattel, P. J., (2012), *European Tax Law*, p. 4.

[48] Alongside the free movement provisions, Article 110 of the TFEU, and positive integration of EU law under Articles 113 and 155 of the TFEU.

[49] Concerning the aims of the State aid prohibition, see Terra, B. J. M., and Wattel, P. J., (2012), *European Tax Law*, p. 3.

[50] By *State measures*, I mean any State action, e.g., a tax law, or a tax ruling interpreting and applying this law. See, for instance. section 5.4 of the Notice on the notion of State aid as referred to in Article 107(1) of the TFEU, where the Commission dedicated that section to "tax measures". About the State aid aim to forbid protectionism and anticompetitive State measures, see for instance Nowag., J., (2016), *Environmental Integration in Competition and Free Movement Laws*, p. 181.

[51] About the protectionist and anti-competitive purposes or aims of Article 107(1) of the TFEU, see Nowag., J., (2016), *Environmental Integration in Competition and Free Movement Laws*, p. 181.

[52] Recalling the second problem I research in this thesis: *the potential failure of the State aid control system to integrate environmental protection requirements, as stipulated in Article 11 of the TFEU, when the State aid measures take the form of environmental taxes.* Based on this second problem, I framed my second research purpose with this thesis as follows (recalling it): *identify and pinpoint potential*

law, originally intended to safeguard economic values within the internal market,[53] can also uphold environmental values, as Article 11 of the TFEU enjoins.[54]

The degree of flexibility in interpreting rules on State aid ultimately determines whether the integration principle outlined in Article 11 is exercised, and to what extent, in relation to environmental taxes.[55] The result of this interpretation determines whether an environmental tax is classified as State aid or not. Consequently, the integration principle should be an integral part of that interpretation process, leading to classification into one of the three categories: a general measure, a compatible aid, or an incompatible aid (described above in Figure 2: Mind map – three classifications of environmental taxes (State aid control system). This aligns with the second research problem I address in this thesis, where I analyze the degree of flexibility in interpreting of the State aid laws for integrating environmental values in relation to environmental taxes.

I have formulated the second research problem in this manner because I understand that the State aid control system should not become a legal barrier to the endeavors of lawmakers in addressing environmental issues through taxation.[56] The environmental problems faced by the EU and the global community, presently and in the foreseeable future, require effective action at all levels, including that of the rules of the internal market. Not to mention that Article 11 of the TFEU mandates this integration even within the rules regulating internal market, as the State aid control system. Thus, if the EU's laws on State aid are sufficiently flexible to integrate environmental values when interpreted in relation to environmental taxes, they ensure that the

inconsistencies in the State aid control system concerning the integration of environmental protection requirements when Member States implement (or plan to implement) environmental taxes (…), which provides valuable insights to lawmakers, EU courts and Commission and contribute to scholarly research in this field..

[53] In Werner, P., Verouden, V., (2017), "EU state aid control: law and economics", p. 14.

[54] Article 11 of the TFEU establishes: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development." Nowag dedicated his doctoral thesis on the analysis of the effects of the integration of environmental protection prescribed in Article 11 of the TFEU into competition and free movement laws. In Nowag., J., (2016), *Environmental Integration in Competition and Free Movement Laws*.

[55] See in Nowag., J., (2016), *Environmental Integration in Competition and Free Movement Laws*, pp. 7-9.

[56] See, for instance, in Segura, M., Clayton, M. & Manuel, L., (2020), "State aid rules for environmental purposes: an effective instrument for implementing EU policy priorities?", p. 668 reflection about this system to ensure environmental purposes within the internal market.

system does not obstruct incoherently the effective response of Member States to the environmental challenges we collectively confront.

In the light of the above, the second research purpose, where I analye the integration of environmental values into the interpretation of State aid laws in relation to environmental taxes, is a logical result of the first research purpose, where I aim to elucidate complexities of State aid for lawmakers. The second research purpose entails a thorough analysis of the State aid control system, going beyond mere descriptions of the system. Through such comprehensive analysis, I intend to uncover hidden aspects of the system that impact lawmakers' efforts when designing and imposing environmental tax policies.

1.3.2. The rules on State aid underline difficult aspects of the interplay between the EU and the Member States

The TFEU prohibits[57] domestic measures – e.g., environmental taxes – which meet the cumulative conditions set out in Article 107(1), thereby meriting classification as State aid.[58] However, since the prohibition in Article 107(1) is not unconditional, measures shall not be deemed a case of incompatible aid if they seek the objectives set out in Article 107(2)[59] or Article 107(3),[60] which

[57] When Article 107(1) states *shall … be incompatible with the internal market.*

[58] The State conditions are: (1) granted by a Member State or through State resources; (2) affect trade between Member States; (3) favors certain undertakings or the production of certain goods (or simply selective advantage); (4) distort or threatens to distort competition.

[59] Article 107(2) reads as follows. "The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point."

[60] Article 107(3) reads as follows. "The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious

set out various circumstances under which such measures are to be deemed compatible with the internal market.

Ferri and Piernas López explain that these exemptions are based on the view "that markets are not entirely self-regulating, and do not always work properly if left alone."[61] National interventions may therefore be needed to ensure that markets function properly.[62] Undoubtedly, the internal market is an area more complex than that envisaged in the aftermath of the Second World War. The zone it covers contains a great diversity of social, political, environmental, monetary, and other values.[63] Thus, in view of this complex and diverse internal market, the rules for establishing a "level playing field" must somehow balance all these different values, while also ensuring peace across the EU through "fair" conditions for *competition and trade*.[64]

Given that Article 107(1) requires the application of the State aid conditions to a concrete case, the interpretation of these conditions generates a legal debate involving the EU institutions (usually the Commission) and representatives of the Member States, alongside various stakeholders affected by the measures in question. The undertakings thereby favored benefit from such measures because they gain advantages which they would not otherwise have obtained. At the same time, the measures in question serve to deprive (relative to the former) those who are denied the aid in question. Thus, given

disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission." For instance, the General Block Exemption Regulation and the *De Minimis* Regulation.

[61] Ferri, D., & Piernas López, J., (2019), "The Social Dimension of EU State Aid Law and Policy," p. 79.

[62] *Ibid idem.*

[63] These multilevel concerns are found widespread within the EU law, *inter alia*, in the Preambles of the Treaty on EU (TEU) and TFEU, in Article 3(3) of the TEU, in Articles 8-13, 26 of the TFEU.

[64] I framed "fair" as such since this philosophical value is up for debate. In this thesis, the EU courts ultimately determine the "fairness" of the State aid rules interpretation and application to taxes through their rulings. However, such State aid rules' fairness is debatable the same way as tax systems' fairness are. See input about the State aid control system and the issue of tax fairness in Pirlot, A., (2020), "The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'", pp. 404–405.

the negative impact of the aid on the latter undertakings, the *recovery*[65] of funds lost due to incompatible aid – with interest payments applying retroactively for up to ten years – is not to be seen as a punishment, but rather as a restoration of the *status quo ante*.[66] The recovery of funds lost on account of incompatible aid granted in the form of a lower level of taxation relates to the amount of tax reduced by the State aid measure, which the beneficiaries of the aid should have paid but did not (due to the aid). In this case, the beneficiaries of the aid pay the tax benefit back to the Member State concerned. Consequently, an illegal grant of State aid can negatively impact economic activities benefiting from the measure once the incompatible aid is discovered.

Since the legal effect of the incompatible aid is the recovery of the tax benefits, the legal debate on the conditions of State aid involves many different actors and creates tension among their particular interests. This tension gets worse when EU courts arrive at inconsistent verdicts in different State aid cases. As a result of such inconsistency between different State aid rulings, the State aid control system comes to be characterized by legal uncertainty and unpredictability.[67] The discussion of Article 107(1) brings up

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[65] *Recovery* of the aid is the legal effect of *incompatible aid*, from which the beneficiaries are obliged to "pay back" what has been illegally granted, under an EU law point of view. It falls to the Member State concerned to order the beneficiaries to repay the incompatible aid. The Member States are obliged to recover the incompatible aid based on Article 4(3) of the TEU, based on the principle of sincere cooperation and the legally binding effects of the State aid or judicial decision, in Article 288 of the TFEU. For discussion concerning the procedural aspects about the aid recovery and the Member States' duty to recover, see case C-232/05, *Commission v France.* Articles 13, 16(2), 17(1) of the Regulation 2015/1589 lay down detailed rules for the application of Article 108 of the TFEU establish the abolishment, recovery, and interest payments of incompatible aid.

[66] About the *status quo ante,* the Court of Justice explains the meaning of this effect in case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1,* paras. 117–119, as follows. "(117) In addition, in circumstances such as those in the case in the main proceedings, re-establishing the status quo ante means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the tax reduction. (118) That does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible. (119) Re-establishing the status quo ante merely enables account to be taken, at the stage of recovery of the aid by the national authorities, of tax treatment which may be more favourable than the ordinary treatment which, in the absence of unlawful aid and in accordance with domestic rules which are compatible with Community law, would have been granted on the basis of the operation actually carried out." See, also case C-404/97, *Commission v Portugal*, para. 52, and case C-372/97*, Italy v Commission*, para. 105.

[67] See input in this regard concerning tax rulings as State aid measures in Bal, A., (2020), "Tax Rulings, State Aid and the Rule of Law."

challenging social, economic, environmental, legal, political, and other concerns; and the agendas of the EU on the one hand and the Member States on the other are not necessarily the same. Thus, the State aid control system naturally becomes an arena where the interplay between the EU and the Member States can become difficult. I subsequently and briefly examine what these different agendas might be.

It is incumbent on the Union, acting through its institutions, to safeguard the functioning of the internal market and to ensure a level playing field. In its efforts to do so, however, it must deal with some challenging events and developments. These include the climate crisis; the COVID-19 pandemic, with its far-reaching social and economic effects;[68] and the war between Russia and Ukraine, with the humanitarian action it has urgently required and the negative impact it has had on energy and food markets.[69]

The Member States, for their part, fight to keep their own (tax) sovereignty, so as to ensure an effective response to the above-mentioned global events, to secure a sustainable welfare system for their citizens, and to protect labor, health, and environmental standards. Depending on the particulars, the Member States' responses to the various pressures may serve to strengthen or to weaken the Union. The more that the Member States adopt protective domestic measures in order to cope with such pressures, the more sensitive the interplay between the EU and the Member States becomes. Such protective measures may conflict, namely, with the rules of the internal market (on State aid, for example). A careful balance must be struck between varying aims and values, and the means employed to achieve them must be proportional.[70]

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[68] In the Commission's official webpage, *Energy supply and pandemic,* last accessed 26 October 2022, available at https://energy.ec.europa.eu/topics/energy-security/energy-supply-and-pandemics_en.

[69] In the European Council's official webpage, *Impact of Russia's invasion of Ukraine on the markets: EU response,* last accessed 26 October 2022, available at https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/impact-of-russia-s-invasion-of-ukraine-on-the-markets-eu-response/.

[70] The Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01 C/2020/1863 OJ C 91I , 20.3.2020, p. 1–9*,* was a urgent adaptation of the State aid control system and the functioning of the internal market to the pandemic outbreak in 2020. About the proportionality principle discussion in the State aid control system, see for instance case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, and in Honoré, M., (2016), "Selectivity*",* pp. 139–140.

The Commission, which is the most active EU institution in the State aid control system, has extensive leeway under Article 107 to control, monitor, and review measures taken by the Member States.[71] It assesses the economic and technical features of such measures, as well as their proportionality.[72] The Commission's active work has spurred substantial changes in the State aid control system, notably in connection with the integration of environmental protection.[73]

Under Article 108 of the TFEU, there are mainly two ways that Member States can grant State aid. One way is by not notifying the Commission before implementing the aid, thereby failing to comply with the notification obligation and the standing still clause set out in Article 108(3). In such cases, the Member State concerned is usually unaware of the impact of its domestic measure in terms of State aid; or it assumes that the measure is general and not selective (i.e., that it does not involve State aid). The other way is by notifying the Commission beforehand and awaiting its decision.[74] Either way, the measure may be (1) a case of general aid; (2) a case of compatible aid, to be controlled and monitored by the Commission if it is classified as such;[75] or (3) a case of incompatible aid that is not to be levied (if the Commission was notified beforehand), or that is to be abolished with recovery (if it was not). The classification of a State aid measure as compatible or incompatible under Article 107(3) falls solely to the Commission, as described in Article 108. Thus, when the Commission classifies an environmental tax as compatible or incompatible, that decision determines whether the tax breaches Article 107(3).[76] Thus, the Commission's application of Article 107 to specific environmental taxes materializes the interplay between the EU and the

[71] Based on Article 108 of the TFEU. See, for instance, Articles 12 to 16 of the Council Regulation (EU) 1589/2015.

[72] About the Commission's leeway in the State aid control system, see Ferri, D., & Piernas López, J., (2019), "The Social Dimension of EU State Aid Law and Policy", p. 79.

[73] For instance, the Commission published its first Community Guidelines on State aid for environmental protection in 1994 integrating environmental protection in its State aid control system agenda.

[74] As prescribed in Article 108(3) of the TFEU.

[75] See Article 9 of the Council Regulation (EU) 1589/2015.

[76] In this case the conflict with Article 107(1) of the TFEU has been already established by the Commission or national court. See about the national courts role in the State aid control system in Sierra, J. L. B., and Ferruz, M. A. B., (2017), "State Aid Assessment: What National courts Can Do and What They Must Do*,"* particularly in pp. 411-417. See also how the national courts cooperate with the Commission in the State aid control system and the limits of this cooperation in Goyder, J., and Dons, M., (2017), "Damages Claims Based on State aid Law Infringements," particularly in pp. 420-422.

Member States within the State aid control system – under the following circumstances:

1. A national court applies Article 107(1) to a domestic case;[77]
2. The Court of Justice, in preliminary rulings, answers questions put by national courts about its interpretation of the State aid laws;[78]
3. A decision by the Commission in this area is legally binding according to Article 288 of the TFEU.
4. A decision by the Commission in this area is judicially disputed in the EU courts.[79]
5. The Council accepts a given State aid measure as compatible with the internal market.[80]

The situations (2) and (4) listed above concern EU courts' rulings that directly impact the interplay between the EU and the Member States, due to their legally binding effects on the issue under analysis, and as case law for interpreting future matters. Thus, the rulings of the Court of Justice ultimately materialize the integration of environmental protection into the cases that reach the EU's judicial system.

The interpretation of the conditions set out in Article 107(1) concerns the formal and substantial effects of measures.[81] From a national perspective,

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[77] *Ibid idem.*

[78] In Article 267 of the TFEU.

[79] For instance, through Article 263 of the TFEU establishing the possibility to seek judicial annulment of the Commission State aid decision. The Commission issues the State aid decisions, pursuant the powers established in Article 108 of the TFEU, having legally binding effects pursuant Article 288 of the TFEU.

[80] In Article 108(2) of the TFEU.

[81] In case C-173/73, *Italy v Commission*, p. 718, para. 13, the Court of Justice stated what follows. "The aim of Article [107] is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, *Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects*." *Emphasis added* to the part establishing the so-called *effect principle* by in Aldestam, M. (2005), *EC State aid rules applied to taxes – An analysis of the selectivity criterion*, p. 41, and *effects-based approach* in Bartosch, A., (2010), "Is there a need for a rule of reason in European State aid law? Or how to arrive at a coherent concept of selectivity?", p. 738, and Villar Ezcurra, M., (2013), "State Aids and Energy Taxes: Towards a Coherent Reference Framework", p. 342. Both terms (effect principle or effects-based approach) mean the same, i.e., that Article 107(1) of the TFEU conditions should be interpreted and applied based on the measure's *de jure* and *de facto* effects.

environmental taxes can be an effective tool for achieving environmental protection,[82] although they may not always be the most suitable choice for the purpose.[83] The effects of environmental taxes in terms of State aid add another level of complexity to the legislative process, as well as complicating the interplay between the EU and the Member States. As the Commission has stressed on several occasions, the rules on State aid are not supposed to pose a legal barrier to the Member States when they act to achieve the Union's green targets for 2030 and 2050.[84] All the same, this is precisely the risk.

One critical need in connection with climate change and other environmental matters is to alter habits of consumption and methods of production. This may seem to collide with the EU's aim of promoting competition and spurring economic progress. Among other things, the Commission needs to protect the internal market against the use of environmental concerns as a

[82] See, in this regard, the economic study by Muller, A., Löfgren, Å., and Sterner, T., (2014), pp. 343-359, titled "Decoupling: is there a separate contribution from environmental taxation?" The authors make an economic estimation of the environmental taxation effects on environmental pressures and whether its contribution to such environmental aims requires other tools or is sufficient. The legal and economic study by Faure G., M. and Weishaar E., S., 2014, pp. 399-421, titled *The role of environmental taxation: economics and the law,* addresses the efficiency and effectivity effects of environmental taxes to ensure a desired level of environmental protection under a legal and economic view. The legal Ph.D. study by Pitrone, F., 2014, called *Environmental Taxation: A Legal Perspective*, on pp. 55-59, discusses a perspective change in the law to create a duty to protect the environment instead of ensuring a right to environmental protection. In her thesis, she discusses the use of environmental taxes to ensure this duty, which in my view relates to the efficiency and effectivity of environmental taxes.

[83] In my view, a clear example of environmental taxes' unsuitability is the case of nuclear power plants, where the leakage threat is too significant to address with a tax imposition. Nuclear power plants' safety is an ongoing concern in the spotlight of the EU energy crisis and the war between Russia and Ukraine. The last aspect raised concerns about the risk of a hostile attack on such facilities and the consequential and dreadful impact. While in parallel to such risk, the EU struggles to produce affordable and clean energy, particularly during the cold months when they become vital. Except in such circumstances, the suitability and effectiveness of taxes to deal with diverse environmental issues are far-reaching. Economic scholars have explored the question concerning the suitability of different economic instruments to deal with environmental protection, comparing the political and social pressures governments face when choosing all sorts of taxes to address an environmental issue. See, for instance, in Cardona, D., De Freitas, J., Rubí-Barceló, A., (2020), "Environmental policy contests: command and control versus taxes," pp. 654–684, available at https://doi.org/10.1007/s10797-020-09631-4. In Westin, R., (1995), "Environmental Taxes," pp. 157-163, about different possibilities to tax mining activities.

[84] See, for instance, Commission, Directorate-General for Taxation and Customs Union, Taxation in support of green transition: an overview and assessment of existing tax practices to reduce greenhouse gas emissions: final report; see also, at the Commission's official webpage, Commission, Taxation and Customs Union, Green Taxation – in support of a more sustainable future, last accessed 13 October 2022, available at https://taxation-customs.ec.europa.eu/green-taxation-0_en.

cover for protectionist and anti-competitive measures. In the following section I discuss these issues in greater detail.

1.3.3. Environmental taxes as a possible compatible or incompatible aid

As mentioned above, environmental taxes are potentially a case of State aid, because they often result in differential levels of taxation in a manner set out in Article 107(1). Rights to tax benefits such as deductions, exemptions, rebates, and the like are supposed to be general in character; they may not, under Article 107(1), be selective or discriminatory.[85] A domestic tax might be thought a case of State aid for a variety of reasons. For example, a certain undertaking may contend that the tax discriminates indirectly against it, thereupon seeking a judicial remedy for such treatment at the national court;[86] or the Commission may receive a complaint from a competitor about a case of non-notified aid, prompting it to investigate the measure in question. So, when taxes (and not just environmental ones) result in selective benefits for *certain taxpayers,* they are likely a case of State aid.

Environmental taxes usually confer an economic advantage on certain taxpayers for the sake of environmental protection – to penalize the polluter and/or reward the improver.[87] For instance, undertakings that pollute the environment must bear the normal tax burden, while those that pollute less are exempted in whole or in part from it. What determines whether a given tax is a case of State aid is its design: i.e., what the tax base is; what the rates are; what incentives it affords; and who the taxpayers are.

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[85] See, for instance, discussion in case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. vNemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága.*

[86] Note that this argument cannot be used by taxpayers to avoid the tax payment based on the domestic tax's alleged unlawfulness (EU law-wise). See, for instance, the discussion about the progressivity of turnover taxes as an indirect discriminatory measure within the State aid rule and freedom of establishment context. Also, the impossibility of refraining from the tax payment using the State aid excuse. In the preliminary ruling case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. vNemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága.*

[87] See, in this regard, Truby, J. M., (2011), *Environmental Tax Law – Is it possible to design a Universal Legal Model for Environmental Taxation?*, p. 287.

Although the classification of a measure as an instance of State aid under Article 107(1) is not final (since said measure may qualify as an instance of compatible aid), one of the main problems with the State aid control system is the uncertainty to which it gives rise as to whether a given tax is in breach of the Article. When faced with this doubt, domestic lawmakers must make a choice: to notify the Commission and await its decision, or to assume the tax is general rather than selective.[88] A mistaken assumption on this point may lead to the imposition of heavy costs on beneficiaries of the tax in question, who will need to make steep recovery and interest payments if the tax ends up being classified as a case of incompatible aid.[89]

Historically, environmental taxes have often burdened the most vulnerable: i.e., small companies and low-income individuals.[90] Their imposition can generate a sense of injustice when lawmakers fail to take into account their social and economic impact, particularly on those most affected.[91] Ladefoged and Mirka suggest using exemptions, credits, allowances, and deductions to counteract the injustices arising from the imposition of environmental taxes[92]

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[88] A common practice natural from the Member States' tax discretion. For instance, in Sweden, *the tax proposal on plastic carrier*, the lawmakers concluded that the tax was not State aid and did not notified the Commission, thereby assuming the risk of granting an unlawful (non-notified) State aid. See in the Swedish Finance Department*, Referral to the Law Council about the tax proposal on plastic carrier bags* (*'Lågrådremiss om Skatt på plastbärkassar'),* in pp-37-38, last accessed on 25 May 2021, available at https://www.regeringen.se/4a6301/contentassets/930f13dda6f64e99af09bbd7d9d47ffb/skatt-pa-plastbarkassar.pdf?TSPD_101_R0=088d4528d9ab2000719e009fd010b2cb3adda9aa6dc4064835d66e343a5a6f9545ac5298e70b473a08ef8892681430007a12f7be0321f64df61d0d6b3c82d760889d6ffa97acbe8319257604106fff8b8d823bfc68ffa51a7d65ea063621e04d.

[89] The recovery of unlawful State aid with interest payments is not a penalty, which means recovery of incompatible aid is disrespectful of the economic and social impact on the companies' beneficiaries and jobs related to the activity. Cf. case C-404/97, *Commission v Portugal*, para. 52, case C-372/97*, Italy v Commission*, para. 105, and case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1,* paras. 117–119. Consequently, bankruptcy and job loss are not a cause to avoid the State aid legal effects.

[90] In Rendahl, P., and Nordblom, K. (2020) *"*Identifying Challenges for Sustainable Tax Policy,*"* in pp. 400–403, the authors discussed how environmental taxes might maximize the economic gap between rich and poor, and other social circumstances that the environmental tax imposition might negatively and positively affect people.

[91] For example, motor fuels taxes directly (negatively) affect the people that cannot rely on public transportation, such as the case of rural inhabitants. Often, the price of properties in rural areas are lower than those in urban areas, which means that such taxes could be also directly (negatively) affecting lower income inhabitants.

[92] In Ladefoged, A., and Mirka, J., (2021), "*100 years of externalities."*

– and it is precisely such common tax mechanisms (e.g., exemptions) that risk being classified as State aid.

Below, I explain an example of environmental tax that has been classified as a case of State aid. Sweden has an excise duty on motor fuels, which the Commission has classified as a case of compatible aid.[93] See the description of the scheme in Box 2 below.

Box 1: The Swedish excises on motor fuels – a case of compatible aid

Swedish taxes on motor fuels include an energy tax and a carbon tax.[94] They are a "lesson learned" for other Member States that want to levy energy and carbon excises on fuels, because the environmental rationale for the Swedish scheme has not made it possible to avoid breaching Article 107(1), although said scheme complies with the Commission Guidelines on State aid for climate, environmental protection and energy (CEEAG).[95] Sweden must periodically control the effects of the aid and report them to the Commission.[96] These energy and carbon excises are part of a larger scheme regulating vehicles in Sweden. A car owner in that country pays various taxes with fiscal, environmental, infrastructural, and other aims, alongside these excises on fuels.[97] Consequently, the environmental

[93] In paras. 3 and 33 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.*

[94] Swedish Parliament (*"Sveriges Riskdag"*), Law 1994:1776 about tax on energy ("Lag om skatt på energi"), last accessed 21 February 2023, available in Swedish at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19941776-om-skatt-pa-energi_sfs-1994-1776.

[95] See the reference to the Swedish tax scheme compliance to the previous Guidelines (EEAG), in para. 35 of the Commission State aid decision S.A.55695. The new prolongation decision is SA.102347 (2022/N), *Tax reductions for pure and high blended liquid biofuels in Sweden*, which maintains the same scheme and complies with the CEEAG. See details of the original scheme in force now in the Commission State aid decision SA.48069 (2017/N), Sweden, *Tax reductions for pure and high-blended liquid biofuels.* Prolonged until 2022 (in SA.63198 (2021/N) *Prolongation of the tax reductions for pure and high blended liquid biofuels in Sweden*), and now until 2026 in SA.102347 *Tax reductions for pure and high blended liquid biofuels.*

[96] In paragraphs 15 to 19 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels*

[97] A vehicle tax (e.g., "*fordonsskatt*") that also takes into consideration the car's environmental impact. See information in English about this vehicle tax in the Swedish Transport Agency ("*Transportstyrelsen*"), Vehicles, Vehicle Tax, Payment of the Tax, last updated 15 January 2015, last accessed 22 April 2021, available at https://www.transportstyrelsen.se/en/road/Vehicles/Vehicle-tax/Payment-of-tax/. A congestion tax based on urban peak traffic times—could have an environmental rationale to reduce the use of vehicles in town during certain hours (e.g., "*trängselskatt*"). See information in

effectiveness of the excises cannot be understood or verified in isolation; rather, it must be considered in conjunction with the impact of other factors. The Commission restricted its assessment to the effects of the Swedish excises on energy and carbon, the objective of which is to help Sweden reduce emissions in its transport sector by 70 percent by 2030, and to achieve zero net emissions and a fossil fuel-free vehicle fleet by 2045.[98] The transport sector accounts for a third of Sweden's CO2 emissions.[99] The Swedish excises reflect the fact that sustainable biofuels have much higher production costs than fossil fuels do.[100] The idea is to tax fossil fuels normally, and to exempt pure and high-blended biofuels from the burden, in order to increase the market demand for the latter while stimulating investments to adapt vehicles and infrastructure for a transition away from fossil fuels.[101] By contrast, low-blended and unsustainable biofuels are taxed similarly to fossil fuels.[102] The excises affect the market price of these products in Sweden, indirectly benefiting biofuel producers that meet the blending conditions, who receive the full exemption.[103] The current excise scheme for sustainable pure and

English about this congestion tax in the Swedish Transport Agency ("*Transportstyrelsen*"), Road, Road Tolls, Congestion Taxes in Stockholm and Gothenburg, last updated 14 December 2020, last accessed 22 April 2021, available at https://www.transportstyrelsen.se/en/road/road-tolls/Congestion-taxes-in-Stockholm-and-Goteborg/. A motor vehicle inspection ("*besiktning*"), where private institutions provide the service for the Transport Agency in Sweden (*Transportstyrensen)* and ensures that cars circulating meet the minimum standards of safety and even emissions. See information in English about this vehicle fee in the Swedish Transport Agency ("*Transportstyrelsen*"), Vehicles, Motor Vehicle Inspection, last updated 14 February 2020, last accessed 22 April 2021, available at https://www.transportstyrelsen.se/en/road/Vehicles/motor-vehicle-inspection2/. Also, VAT on the car and fuel prices.

[98] In paras. 5 and 6 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.*

[99] *Ibid,* in para. 6.

[100] *Ibid idem.*

[101] *Ibid idem.*

[102] *Ibid idem.* See more details about the low-blended and unsustainable biofuels in paragraphs 10-12 of the Commission State aid decision SA.48069 (2017/N), Sweden, *Tax reductions for pure and high-blended liquid biofuels.* The biofuels exempted are: hydrogenated vegetable and animal oils and fats, known as HVO when the volume of these motor fuels consists of more than 98 % biomass; synthetic petrol, when the volume of these motor fuels consists of more than 98 % biomass; high-blended biofuels that are not petrol or diesel/HVO, for example FAME (Fatty Acid Methyl Esters) (B100) or ethanol (E85); cf. para. 13 of the SA.102347 decision.

[103] About the benefits, see paragraph 13 of the Commission State aid decision SA.48069 (2017/N), Sweden, *Tax reductions for pure and high-blended liquid biofuels.* About the conditions to exempt the biofuels, see in paragraphs 48 and 49 of the Commission State aid decision S.A. 55695 Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.*

high-blended biofuels have increased the blending conditions over time and the proportion of tax exemption from a partial to a total exemption.[104]

I explain briefly below how the Swedish scheme ended up being classified as an instance of State aid under Article 107(1):[105]

1. *[G]ranted by a Member State or through State resources* is a condition with two effects. The first concerns the Member State agent: i.e., the local, regional, or national body granting the aid.[106] For instance, national legislators enacted the Swedish tax on fuels. Thus, Sweden granted the aid.[107] The second effect concerns tax revenues lost to the public coffers due to the aid.[108] One effect of the Swedish scheme, then, was a reduction in public revenues.[109]
2. *[B]y favouring certain undertakings or the production of certain goods* (hereafter: *selective advantage* condition) is a condition with two different effects that have interconnected legal rationales:[110] namely, the granting of differentiated tax treatment (the *favoring* effect) to

[104] Compare when such biofuels received partial exemptions, in the Commission State aid decision SA. 43301, Sweden, *Tax exemptions and tax reductions for liquid biofuels*, para. 6.
[105] Note that the clarification and summary that follows is my understanding of the Commission State aid decision SA.48069*,* and its prolongation through the Commission State aid decision SA.55695 (2020/N). The last prolongation only refers back to the previous decisions, in SA.102347, p. 1 footnote 1.
[106] See, in case C-248/84, *Germany v Commission*, paragraph 17.
[107] In paragraph 33 of the Commission State aid decision SA.55695.
[108] In paragraph 10 of the Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, the Commission explains that "a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure."
[109] In paragraph 33 of the Commission State aid decision SA.55695.
[110] The assessment of the State aid conditions–effects prescribed in Article 107(1) of the TFEU change (but not in its essence) if the measure in question is an *individual aid.* Cf. case C-15/14 P, *Commission v MOL Magyar Olaj- és Gázipari Nyrt,* paragraph 60, that states: "It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity." See the nuances of the two in the Commission Regulation (EU) 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 Text with EEA relevance, also called as General Block Exemption Regulation (or the GBER), in Article 2(14) and (15). I discuss this in more detail in section 4.3.2. Parameters for the advantage effect assessment.

selected (*certain*) undertakings or producers.[111] Following the introduction of the carbon excise in Sweden, eligible biofuels were granted a full exemption from it, while fossil fuels and ineligible biofuels were fully taxed. Thus, it conferred selective benefits on eligible biofuel producers.[112]

3. *[W]hich distorts or threatens to distort competition* is a condition relating to levels of competition and the position of undertakings on the internal market. As the wording makes clear, the mere threat of distortion is enough here. However, the circumstances of such a threat must still be interpreted.[113] The Swedish scheme was judged to distort competition among producers of transport fuel, because it deliberately lowered the market price of eligible biofuels relative to that of fossil fuels and non-eligible biofuels.[114] The *affects trade between Member States* condition, like the previous one, concerns the effect of the measure on different undertakings and producers on the internal market.[115] Here too, moreover, there is no need for any actual impact. The Swedish scheme affected trade by seeking to reduce the selling of fossil fuels and non-eligible biofuels.[116]

The brief explanation above exemplifies how Article 107(1) and a domestic environmental tax can come into conflict through a breach of this Article. However, such a tax can still be considered compatible with the internal market under Article 107(3)I,[117] as well as under secondary laws on the subject, such as the General Block Exemption Regulation (GBER) and the

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111 See, for instance, case C-409/00, *Spain v Commission,* para. 52, an example of an advantage granted that did not meet the selective effect because the Court considered that the latter effect arose from the "nature and structure of the system of charges of which they form part", and consequently did not meet this effect.

112 In paragraph 33 of the Commission State aid decision SA.55695.

113 See, in joined cases C-296/82 and C-318/82, *Netherlands and Leeuwarder Papierfabriek BV v Commission*, para. 24.

114 In paragraph 33 of the Commission State aid decision SA.55695.

115 See in joined cases C-197/11 and C-203/11, *Libert and Others,* paragraph 76, and in case C-518/13, *Eventech,* ECLI:EU:C:2015:9*,* paragraph 65.

116 In paragraph 33 of the Commission State aid decision SA.55695.

117 See the discussion about how State aid for environmental protection was decided to fall under old Article [107](3)(c) of EC (now Article 107(3)(c) of the TFEU) in case C-351/98, *Spain v Commission,* pp.74-91. See also the scholarly input regarding the compatibility of State aid for environmental protection under each subparagraph of Article 107(2) and (3) of the TFEU, in Nowag, J., (2016), *Environmental Integration in Competition and Free-Movement Laws,* pp. 114-117.

Commission Guidelines on State aid for climate, environmental protection and energy (CEEAG).[118]

From a bottom-up (i.e., domestic) perspective, the procedures involved add an extra layer of complexity – an additional legal and political burden. Take, for example, legislators who are planning to pass an environmental tax. They may need to change the initial design of their tax in response to previous cases where such a tax has run afoul of EU rules on State aid. The Commission, for instance, may need to be notified, so that uncertainty about the compatibility of the tax is resolved. The effects hereof slow down the domestic response to environmental problems. However, the most relevant issue from this bottom-up perspective is that domestic legislators also shape the EU's State aid laws, through the effect which the design of their tax has on the case-by-case interpretation of said laws by EU institutions (e.g., Commission and EU courts).

From a top-down perspective, the EU's laws on State aid affect the tax jurisdiction of the Member States. This is a natural and predictable effect, but it still gives rise to legal debate. Ezcurra criticizes the use of the Rules on State aid as "a method of promoting harmonization of tax systems (indirect tax harmonization) in an environmental way."[119] This is particularly relevant in view of the effect that cases in this area have as legal precedents or as "lessons learned" as seen in the case of the Swedish energy and carbon tax.[120]

1.3.4. An overview of the EU case law on State aid concerning environmental protection as a value of the system

Now that I have established how environmental taxes could meet the State aid conditions, discussed in the previous section, I examine the second research problem from the perspective of early case law on State aid. Recalling

[118] In Article 1(1)(c) of the GBER, and in Section 1(7) of the CEEAG.
[119] In Ezcurra V., M., (2016), "Energy Taxation, Climate Change and State aid Policy in the European Union: Status Quo and the Need for Breakthroughs," p. 29
[120] See a similar position about the State aid law harmonization effects on taxation, in Gormsen L., L., (2019), *European State aid and Tax Rulings,* p. 86.

the second research problem, notably Article 107(1) (and other State aid laws) may be inflexible when it comes to integrating environmental protection mandated in Article 11 of the TFEU, especially when interpreted in relation to environmental taxes. Article 107(1) holds greater relevance than other State aid laws since it serves as the rule that classifies and prohibits State aid, thereby justifying the EU intervention into the tax discretion of Member States.

I frame this second research problem in this manner because earlier Court of Justice case law consistently classified environmental taxes as State aid albeit as potentially compatible aid. Below, I present the case law.

In 2001, in the *Adria-Wien Pipelines GmbH,*[121] without delving into the specific details of this case, the energy tax in question, despite its alleged aim of environmental protection, was classified as State aid.[122] The Court of Justice expressed the following view regarding the integration of environmental protection requirements into the rules on State aid:

> *Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3).*[123]

The Court justifies the inclusion of that particular tax within the legal regime for compatible aid, as established by the 1994 Guidelines on State aid for environmental protection (hereafter: 1994 CEEG).[124] By interpreting Article 107(1) and classifying the measure in question as State aid, the Court also seems to determine a mainstream approach to integrating environmental protection within the compatibility aid regime. Following this perspective, environmental taxes would inherently breach Article 107(1) due to the conflict between their environmental values and the economic considerations safeguarded by that rule. Subsequent rulings after *Adria-Wien Pipelines GmbH*

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121 In case C-143/99, *Adria-Wien Pipelines GmbH.*

122 *Ibid,* paras. 31 and 53, see in particular the Advocate General opinion on this case in paras 55-76.

123 *Ibid,* para. 31.

124 Commission Guidelines on State aid for environmental protection, OJ 72 10.3.1994, p. 1–9.

yielded similar outcomes.[125] In 2006, in the *British Aggregates Association* appeal ruling, the Court of Justice expressed the following viewpoint on the matter:

> *However, the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of [now Article 107(1)] (…), as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article [107](3) EC.*[126]

The wording of the Court of Justice underwent some changes compared to the previous ruling (the *Adria-Wien Pipelines GmbH*), yet the essence remained consistent. The Court mentions that considering (integrating) environmental protection requirements is legitimate, that is, it is set out in the Treaty. However, the Court goes on explaining that environmental taxes (even in the form of levies) still fulfill the selective condition and thereby were ought to be regulated under the compatible aid regime. Once more, in 2008, in the case *Commission v Netherlands*, the Court of Justice reiterated the same perspective, albeit with a bit more elaboration. In the Court's own words:

> *According to settled case-law, Article [107](1) [now Article 107(1)] EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. Even if environmental protection constitutes one of the essential objectives of the European Community, the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article [107](1) EC, as account may, in any event, usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article [107](3) EC (…).*[127]

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125 In C-159/01, *Netherlands v Commission* ('MINAS'), in the three rulings concerning the environmental levy on aggregates in cases T-210/02, C-486/06 P, and T-210/02 RENV, *British Aggregates v Commission*.

126 In case C-487/06 P, para. 92.

127 In case C-278/09, *Commission v Netherlands,* para. 75.

Above, the Court emphasizes the effects-based approach of Article 107(1) in the sense that the objective of the measure does not justify selective treatment. In this sense, the tax's environmental protection objective cannot exempt it from meeting the selective condition, and therefore, the State aid classification.[128] Accordingly, the sense that environmental taxes inherently meet the State aid conditions set out in Article 107(1), particularly the selective aspect the Court mentions, since the *Adria-Wien Pipelines GmbH* case. In addition to environmental taxes being classified as State aid, the Court of Justice also categorized several other fiscal measures in the early 2000s.[129]

It appears that various types of taxes, not limited to environmental ones, have gained significance within the State aid control system over the past two decades, as evidenced by the increasing numbers of cases being deemed State aid by the EU courts.[130] This is evidently connected to the first problem addressed in this thesis. It concerns the complexity of the State aid control system that places lawmakers in a position where they may enact State aid measures unaware of their (EU) legal classification as State aid and consequences (such as prohibition and recovery, or monitoring).

However, in 2015, the Court of Justice ruled on a State aid case involving an environmental tax (in the *Kernkraftwerke Lippe-Ems GmbH* case), but this time, it did not classify it as State aid.[131] Interestingly, around that time, the Court of Justice issued rulings on some environmental taxes and other tax types, finding them as not in violation of Article 107(1).[132]

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[128] I discuss this view again more thorough in Chapter 5 when I analyze the three-steps to assess the *selective advantage* condition.

[129] Environmental taxes classified as State aid: C-159/01, *Netherlands v Commission* ('MINAS'), in the three rulings concerning the environmental levy on aggregates in cases T-210/02, C-486/06 P, and T-210/02 RENV, *British Aggregates v Commission*. Several fiscal measures were classified as State aid, but the following were highly debated: C-88/03, *Portugal v Commission,* C-148/04, *Unicredito Italiano,* C-172/03*, Heiser,* C-222/04*, Cassa di Risparmio di Firenze and Others, C-78/08 to C-80/08, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v Paint Graphos Soc. coop. Arl,,* among others.

[130] *Ibid idem. NB* that the cases mentioned in the previous footnote are prior to the Lisbon Treaty. Several cases discussed in this thesis are after the Lisbon Treaty and also classfied as State aid.

[131] In case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück.*

[132] In cases: in case C-233/16, *ANGED,* in joined cases C-234/16 and C-235/16, *ANGED,* in joined cases C-236/16 and C-237/16, *ANGED,* in joined cases C-108 to 113/18, UNESA, in case C-562/19 P, *Commission v Poland and Hungary,* and in joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission.*

I question if this shift in the outcomes of State aid rulings concerning environmental taxes is a result of the Lisbon Treaty coming into force and altering Article 11 of the TFEU, or if it is a result of other factors. Nowag analyzed the integration principle set out in Article 11 from a historical perspective and concluded that the Lisbon Treaty did not substantially change this principle.[133] Multiple factors could influence this shift. One of the reasons could be that lawmakers gradually became more aware of the intricacies of the State aid control system and adjusted their designs based on this awareness. Other factors including political, social, and economic considerations, could have influenced the change in State aid outcomes.[134] While these factors might confer possible reasons for that shift, they fall outside of the scope of this thesis.[135] In the following section, I delve into the theoretical perspective of the integration principle set out in Article 11 of the TFEU, shedding light on the second research problem I address in this thesis.

1.4. The Theoretical Perspective of the Integration Principle

1.4.1. Preliminary remarks

In this subchapter 1.4, I explain the second problem addressed in this thesis from a theoretical perspective of Article 11 of the TFEU (in section 1.4.2). Within this section, however, I discuss preliminary remarks essential for grasping the theories surrounding the Article 11 integration principle. As mentioned earlier, Article 107(1) and other State aid laws may be inflexible when integrating environmental protection requirements mandated in Article 11. Article 11 reads:

[133] In Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, p. 18.
[134] For instance, this change comes during a time when the Brexit process is starting to gain force. See the European Council meeting on 25 June 2015 (European Council, EUCO 22/15, Brussels 26 June 2015, section IV, para 14, p. 8.). Consider Brexit as a sign of UK unwillingness to suffer interventions from the EU, including from the State aid control system.
[135] See in subchapter 1.6 the method and scope of this thesis.

> *Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*[136]

First and foremost, this integration within the State aid control system unfolds through the *interpretation* of State aid laws.[137] This implies that integration through interpretation demands that something (in this thesis, environmental protection requirements) is interpreted in relation to something else (the State aid laws). Furthermore, State aid laws can only be interpreted when a concrete case is subject to scrutiny. In this thesis, the focus is on environmental taxes (encompassing taxes, charges, fees, levies, and environmental mechanisms within taxes) that grants tax reductions (e.g., through a partial exemption) to some taxpayers but not others.[138] These represent the central aspects of the integration researched in this thesis.[139]

In section 1.1, I noted the inflexibility of the State aid laws. This notion of inflexibility, or conversely, flexibility, pertains to *how* the interpretation of these laws deals with the Article 11 integration principle. Consequently, I analyze the interpretation of State aid laws in the context of environmental taxes through the prism of rulings from EU courts, seeking insights into how such integration unfolds. These rulings' wording composes the framework for the integration of Article 11 into the interpretation of laws on State aid since, as Nowag contents, they delineate "[t]he boundaries for integration."[140] Thus, this analysis concerning the integration of environmental protection requirements is only achievable through an analysis of EU courts' case law, as they represent the EU's ultimate authority on the matter.

Furthermore, the premise that the interpretation of State aid laws might be inflexible implicitly presupposes that they ought to be flexible. In this

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136 Article 11 of the TFEU.

137 See in Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, p. 9 about the integration of Article 11 of the TFEU occurring through *interpretation.*

138 In Chapter 2, I discuss environmental taxes in more details showing how they should be perceived from a State aid control system perspective, which difficulties lawmakers face when they seek to protect the environment through taxes, along other aspects that could shape these instruments.

139 I further explain this choice in section 1.6.3 concerning the scope of the thesis.

140 See in Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, p. 9. Also in Kingston, S. (2011), *Greening EU Competition Law and Policy,* p. 115–116.

scenario, *inflexibility* within the interpretation of the State aid laws results in a failure to accommodate or balance competition and environmental objectives to prevent their mutual conflict.[141] Such inflexibility, in turn, leads to the disintegration of environmental protection within this interpretation. Consequently, this viewpoint entails that the interpretation of the State aid conditions set out in Article 107(1) in relation to environmental taxes should accommodate or balance the tax's environmental protection values in a manner that prevents it from breaching the State aid prohibition and the values inherent therein. This suggests that environmental taxes would not inherently breach Article 107(1) because the integration principle compels the inclusion of environmental values within this rule.

However, Jans and Vedder note that a conflict between environmental protection and the functioning of the internal market (where I place the prohibition on State aid) would be resolved through the principles of proportionality and equal treatment, and not stemming from the integration principle.[142] In my view, their opinion implies that the integration principle lacks normative force. In contrast, Nowag adopts a different approach, where the integration principle in itself could theoretically avoid such conflicts, notably concerning the TFEU prohibitive rules, such as Article 107(1). [143] In this context, Nowag calls it *the first form of integration* of Article 11,[144] where the integration principle accommodates or balances environmental protection values with the objectives of the TFEU prohibitive rules. Consequently, this approach precludes any breach of these rules because environmental protection values must be included into their interpretation.[145] In the following section, I delve into the theoretical discussions about the Article 11

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[141] *Ibid,* p. 10.

[142] In Jans, J.H. & Vedder, H.H.B., (2012), *European environmental law: After Lisbon*, pp. 23-24.

[143] Nowag analyzes on pp. 92–118 (in Nowag, J., 2016, *Environmental Integration in Competition and Free-Movement Laws*) the first form of environmental integration into Article 107(1) and (2) of the TFEU, where the integration of environmental protection values thereto would avoid a conflict of values that would lead the State measures be classified State aid. About the principle of *proportionality, s*ee also Kingston, S. (2011), *Greening EU Competition Law and Policy,* p. 124 concluded that the integration of environmental protection into competition rules would also occur through a proportionality analysis.

[144] *Ibid idem.,* in the author's words: "(…) the first form of integration is characterized by the possibility of bringing integration/cross-sectional aim in line with the sectoral policy objective. In these cases, both integration/cross-sectional aim and the sectoral objective can be pursued simultaneously without creating a conflict."

[145] See Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, p. 9 about

effect on the interpretation of the State aid laws and thereby the standpoint I construct this thesis.

1.4.2. Article 11: Theoretical avenues

Article 11 of the TFEU proclaims the need to integrate environmental protection requirements into all policies and activities the Union undertakes. However, as discussed in section 1.3.4 about the EU courts case law, the binding force of the integration principle could be problematic.[146] In this thesis, I analyze the wording of the case law setting boundaries for the integration of Article 11 of the TFEU into the laws discussed in relation to environmental taxes. In sections 8.4 and 8.5, however, I discuss the issue of this integration from the perspective of lawmakers' practice, thus an informal one that deviates from this perspective since those integration forms unfold through lawmakers' actions and not State aid laws *per se*.[147] Below, I briefly discuss the theories concerning Article 11's force so that the analysis I propose in this thesis related to the integration principle becomes clearer, as well as the standpoint from which I construct this research. Finally, after conducting this research based on the theoretical perspective I explain in this section, in Chapter 9, I reflect on my choice (of the theoretical perspective) and outcomes I could achieve through this framework. Now, to the theories about Article 11's force (i.e., legal effects).

Scholars have concluded that even in the previous version of Article 11 (i.e., in Article 6 EC with a condition to Article 3(c) EC),[148] the integration of

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[146] See previous section discussion section 1.3.4. An overview of the EU case law on State aid concerning environmental protection as a value of the system, and even the study concerning problems with environmental integration in Hey, C., (2002), "Why Does Environmental Policy Integration Fail? The Case of Environmental Taxation for Heavy Goods Vehicles."

[147] These two informal integration forms became evident during this research that gives insights about the effects of the State aid control system in the interplay between the EU and the Member States

[148] Article 6 of the TFEU (the previous Article 11 of the TFEU) established: "Environmental protection requirements must be integrated into the definition and implementation of *the Community policies and activities referred to in Article 3*, in particular with a view to promoting

environmental protection extended to EU institutions and their actions.[149] Nollkaemper discussed three different theoretical approaches for viewing the integration principle (in the previous version of Article 11), which was limited to specific activities and policies.[150]

In the first approach, Nollkaemper argues the integration principle as an objective or as a policy with the effect of *integrating something into something else*.[151] According to Nollkaemper, the problem with this approach is that "as long as integration is only an objective, courts are likely to invalidate any decisions that have not brought that objective any closer."[152] In conclusion, Nollkaemper points out that this approach would only safeguard a formal integration of environmental values but not a substantial one, where environment should be protected from the negative impact of development.[153]

In the second view, Nollkaemper discusses the integration principle serving as a rule of reference, lacking autonomous meaning but referring to those rules with expertise.[154] Hence, in this approach, the integration principle is not defined in itself but in other norms, such as the objectives, principles and criteria set out in Article 191 of the TFEU.[155] Nollkaemper discusses other perspectives within this view of the integration principle being a rule of reference, concluding that none of those perspectives give the integration principle autonomous normativity.[156] Nollkaemper explains that "(…) it does not solve problems relating to the interpretation and enforceability of the objectives and principles of Article 174 (now Article 191 of the TFEU), secondary law and possibly non-legal instruments."[157]

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sustainable development." *Emphasis added* in the part that suffered substantive changes with the Lisbon Treaty.

149 In Dhondt, N., (2003), *Integration of Environmental Protection into other EC Policies – Legal theory and practice,* p. 49

150 In Nollkaemper, A., (2002), "Three Conceptions of the Integration Principle in International Law*",* pp. 22-32.

151 *Ibid,* p. 25.

152 *Ibid idem.*

153 *Ibid idem.*

154 *Ibid,* p. 26.

155 *Ibid,* pp. 26–27.

156 *Ibid,* p. 27.

157 *Ibid idem.*

In the third and last view, Nollkaemper discusses the integration principle as a rule of reference and as a legal principle carrying autonomous normativity.[158] As a result, EU institutions or Member States do not have "to apply prior agreed norms" but simply integrate the environment and environmental concerns into other norms without them conflicting.[159] Nollkaemper is inclined toward this last approach concerning the integration principle.[160]

Nowag argues that both the EU and Member States are directly bound to the integration principle, but Member States, in particular, are bound "when they are acting in their capacity as Union organs, namely when applying EU law,"[161] and "whenever a national measure is within the scope of EU law."[162] However, Nowag contends that from a teleological perspective of EU law, the binding effect on Member States is under the condition that they have not been expressively excluded from the EU law implementation in question.[163] His conclusion is based on an analogous discussion of the EU Fundamental Rights' binding effects, in which he applies toArticle 11.[164] Finally, Nowag also clarifies that Article 11 binds the EU to integration through the implementation of general policies, strategies, and action programs, more specifically through directives, regulations, and decisions at the EU level.[165]

To be clear, I build my research upon on the view that the integration principle stands as a rule of reference having autonomous normative force, thereby legally binding the EU and the Member States.[166] As a result, the interpretation of Article 107(1) and other State aid laws in relation to environmental taxes should integrate environmental protection requirements, as enjoined by Article 11. Consequently, any inflexibility in the interpretation

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158 *Ibid,* p. 28.
159 *Ibid,* pp. 28–31.
160 *Ibid,* pp. 29-31.
161 In Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws,* p. 21. In constract, Dhondt concludes that the EU is bound to secure the integration principle set out in the previous version of Article 11 of the TFEU, while Member States were only bound through EU secondary laws expressly demanding it. In Dhondt, N., (2003)*, Integration of environmental protection into other EC policies legal theory and practice: legal theory and practice,* pp. 37–38.
162 *Ibid,* p. 24.
163 *Ibid,* p. 22.
164 *Ibid,* p. 23.
165 *Ibid,* p. 23.
166 See Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws,* p. 24

of the rules on State aid from the EU institutions (mainly the EU courts) would be inconsistent with the Article 11 integration principle.

Notably, both EU and Member States proclaimed the need for protection of the environment, nationally, at the EU level (in Article 191 of the TFEU, in the secondary EU laws on climate and the environment, among others)[167] and internationally, as seen in the Paris Agreement.[168] Considering the EU's climate and energy targets for 2030, which require Member States to cut greenhouse gas emissions by 55%,[169] achieve a 32% share for renewable energy,[170] and improve energy efficiency by 32.5%[171] (all relative to 1990 levels). To achieve these targets, Member States must choose suitable (effective) instruments, such as taxes discussed here, regulations, prohibitions, changes in urban infrastructure, etc., based on their varying domestic circumstances.[172] It is therefore essential that the rules on State aid, particularly their interpretation, do not conflict with such environmental protective aims, as such conflict leads to a breach of the prohibition on State aid. Conversely, Member States must not misuse this possibility to disguise

[167] Primary law means the EU Treaties, older and current versions. Secondary laws derive from such primary laws and are regulations, directives, decisions, recommendations, and opinions (cf. Article 288 of the TFEU). In this sense, I adopt a similar position to the Commission, expressed in its official webpage about types of EU law, where the Commission states what follows. "Every action taken by the EU is founded on the treaties. These binding agreements between EU member countries set out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its members. Treaties are the starting point for EU law and are known in the EU as primary law. The body of law that comes from the principles and objectives of the treaties is known as secondary law; and includes regulations, directives, decisions, recommendations and opinions." In Commission, Law, Law-making process, Types of EU Law, *Primary versus secondary law*, last accessed 26 October 2022, available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en.

[168] For instance, when the Council declared that the 2050 climate neutrality aim of the Paris Agreement is in line with the EU 2050 climate target, in the General Secretariat of the Council, 'European Council meeting (12 December 2019) – Conclusions' (12 December 2019) EUCO 29/19. Such a decision also made the Paris Agreement an EU secondary law based on Article 288 of the TFEU and the understanding cited in the previous footnote.

[169] In section 2.1.1 of the European Green Deal.

[170] See, for instance, in European Parliament Press Room, *Energy: new target of 32% from renewables by 2030 agreed by MEPs and ministers,* Press release, 14 June 2018, last accessed 28 June 2021, available at https://www.europarl.europa.eu/news/en/press-room/20180614IPR05810/energy-new-target-of-32-from-renewables-by-2030-agreed-by-meps-and-ministers.

[171] In Recital 6 of Directive 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency.

[172] See, for inspirational purposes, reflection concerning the achievement of climate change resilience (a type of environmental target), in Kennedy, A., and Phromlah, W., (2011), "Behavioural strategies to support climate change resilience*,"* in pp. 79-95.

measures that make domestic undertakings more competitive on the internal market through disguised State aid. From an environmental protection perspective, the legally binding force of Article 11 is evidently necessary to ensure widespread protection in the EU system.

Clearly, achieving the environmental targets of the EU and of the Member States (e.g., climate targets requiring greenhouse gas emissions reduction) depends on interpreting the rules on the functioning of the internal market in a way to strike a balance between different values. That is, the interpretation of the laws on State aid must be flexible because the contrary, inflexibility, does not allow such balance of values. Andenas' discussion, "*Why do we regulate?*," emphasizes the multiple purposes of the EU's regulation of the internal market,[173] where measures with economic, social, and environmental objectives need not be found as breaching the rules on State aid. This view is based on the premise that the EU system theoretically enables the integration of multiple values through the flexibility of its rules on the functioning of the internal market when interpreted in relation to concrete cases.[174] Consequently, it aligns with the issue I raised in section 1.1 that the laws on State aid cannot be inflexible to integrate environmental protection, otherwise the State aid control system is incoherent with the EU environmental protection values.

Van Calster argues that in the context of a global economy, "markets function best when all industries in the given market […] operate under the same conditions, including the same regulatory pressure for health, safety, and environmental issues."[175] The integration of environmental protection mandated in Article 11 is vital for ensuring that the internal market functions as a level playing field, striking a balance of other values such as environmental protection.

Furthermore, in the EU Green Deal[176] the Commission emphasizes that environmental protection (e.g., conserving biodiversity) and addressing

[173] See, in this regard, in Andenas, M. (2012), *Harmonizing and Regulating Financial Markets*, p. 3.
[174] Such regulatory market tools are the free movement provisions, competition rules (in Articles 101 to 106 of the TFEU) and the State aid. Nowag discusses the integration of other values alongside environmental protection, such as health, consumer protection, equality, etc., in Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, pp. 4-5.
[175] Van Caster, G. (2008), p. 90.
[176] Communication from the Commission to the European Parliament, the European Council, the Council, the European Social and Economic Committee and the Committee of Regions,

climate change are vital aspects of EU development.[177] requiring new laws to address these issues and changes in the interpretation of those laws that enable such a flexible approach. This view suggests that the TFEU rules regulating Member States' actions through a prohibition (such as to State aid) need to be made more flexible.

Regarding the *promotion of sustainable development*, Sadeleer writes that Article 11 "implies an approach to economic growth that furthers the internalisation of environmental externalities."[178] The internalization of environmental externalities is one aspect of sustainable development, which environmental taxes may seek to promote (particularly through so-called Pigouvian taxes).[179] However, the "concept" of environmental protection involves far more than just recognizing environmental externalities and market failures.[180] Sadeleer points out the importance of viewing trade and the environment as interconnected, and of ensuring their mutual compatibility thereby:

> *"(…) the compatibility between trade/investment and the environment depends on the vision of the economy that respects the limits of environmental protection and stimulates exchanges in sustainable products and services."*[181]

Compatibility between trade (economic values) and the environment (environmental values) is what Article 11 of the TFEU mandates through an integration of "cross-sectional clauses".[182] Hence, Sadeleer's view about the

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The European Green Deal, Brussels, 11 December 2019, COM/2019/640 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2.

[177] In section 1 of the European Green Deal.

[178] Sadeleer, N.de, (2014), "EU environmental law and the internal market", p. 178.

[179] In Cottrell, J., and Falcão, T., (2018), "A Climate of Fairness – Environmental Taxation and Tax Justice in Developing Countries", p. 35.

[180] I mention environmental protection as a "concept" to stress that the conceptualization of environmental protection is intricate and complex. I adopt the same position as the Commission in the understanding of environmental protection as including climate protection, in section 1(7) of the Commission Guidelines on State aid for climate, environmental protection and energy. I return to this discussion further in this section, but more deeply in chapter 2. For a more general analysis of environmental taxes' rationale, i.e., not only constricted to Pigouvian taxes, concerning their use to achieve the 17 United Nations sustainable development goals (SDGs), which is also the EU goals, see Rendahl, P., and Nordblom, K., (2020), *"*Identifying Challenges for Sustainable Tax Policy*",* mainly p. 395, 408-410.

[181] Sadeleer, N.de, (2014), *EU environmental law and the internal market*, p. 178.

[182] In Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws* p. 8.

promotion of sustainable development included in the end of Article 11 aligns with the view that the integration of Article 11 into the interpretation of the State aid laws should avoid conflicts between competition and environmental values, including of sustainable development.

In summary, I stand on the view that the integration principle proclaimed in Article 11 has legally binding effects on the EU concerning the interpretation of laws on State aid, thereby requiring for flexibility to accommodate or balance competition and diverse environmental values without a conflict.

1.5. Research Questions in More Detail

In this section, I explain more in detail the two research questions introduced in section 1.1, elucidating their relevance to the two problems and two purposes I address in this thesis. Additionally, I clarify how these questions are lifted in other chapters of this thesis. Below, I reiterate the first problem, followed by the first purpose and the first question, in order to emphasize their interrelationship. I follow the same approach for the second research problem, purpose, and question.

1. The first research problem is: The complexity of the State aid control system exacerbates the challenges of the interplay between the EU and its Member States within this system, turning it into an arena for this interplay. The first research purpose is: To clarify the complexities of the State aid control system for lawmakers. This provides them with general parameters they can use when designing environmental taxes that should avoid the State aid classification while ensuring that their environmental taxes serve their purpose of protecting the environment. Finally, the first research question is: *In what circumstances do Member States' environmental taxes breach the EU's State aid laws (e.g., Article 107(1), complementary laws to Article 107(3), and other laws)?*
2. The second research problem is: The potential failure of the State aid control system to integrate environmental protection requirements, as stipulated in Article 11 of the TFEU, when the State aid measures

> take the form of environmental taxes. The second research purpose is: To identify and pinpoint potential inconsistencies in the State aid control system concerning the integration of environmental protection requirements when Member States implement (or plan to implement) environmental taxes (…), which provides valuable insights to lawmakers, EU courts and Commission and contribute to scholarly research in this field. Finally, the second research question is: *How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?*

The first question posed (1) delves into the analysis of the circumstances leading to the classification of environmental taxes as State aid, and as compatible or incompatible aid. These classifications subject environmental taxes to the scope and competence of EU law. The relevance of this research lies in the crucial role that environmental taxes play for both Member States and the EU in achieving environmental protection and climate targets in the short and long term. Environmental taxes serves as pivotal instrument for realizing sustainability, climate neutrality, green transition, and circular economy, among other objectives. Consequently, their potential subjection to the State aid control system has a profound impact on how Member States respond to these environmental goals, influencing the speed and manner in which these objectives are pursued. The State aid control system establishes a framework for the implementation of compatible aid, while incompatible aid must be either abolished and recovered or prevented from being implemented in the first place. Building upon this perspective of the first research question, I adapt it to the specific focus of each chapter (chapters 3 through 7), as Table 2 exemplifies below.[183] Note that the breach of Article 107(1) require the fulfillment of all cumulative conditions, the same occurs with Article 107(3) where the classification of compatible aid requires a fulfillment of legal requirements, so in chapters 3 through I replaced "breach" for "fulfill".

[183] This is because the present chapter 1 introduces the main elements of the thesis and chapter 2, for its part, further develops environmental taxes and other notions and understandings from this introductory chapter. For instance, chapter 2 looks at what makes taxes *environmental* from the perspective of the EU and its State aid control system. In the last chapter of this thesis, chapter 8, I summarize my research findings and answers.

Table 1: Adaptation of the first research question to the subject of the different chapters

Chapter 3	In what circumstances do environmental taxes *fulfill the granted by Member State or through State resources condition set out in Article 107(1)?*
Chapter 4	In what circumstances do environmental taxes *fulfill the selective advantage condition set out in Article 107(1)?*
Chapter 5	In what circumstances do environmental taxes *fulfill the competition and trade conditions set out in Article 107(1)?*
Chapter 6	In what circumstances do environmental taxes *fulfill the legal requirements of the GBER or the CEEAG?*
Chapter 7	In what circumstances do environmental taxes breach with *Article 107(1) and Article 107(3)?*[184]

In my pursuit of answering the first question, I expect to clarify the most important and challenging aspects of the State aid control system for lawmakers. This includes examining how the integration of environmental protection unfolds concerning the interpretation of laws on State aid in connection with environmental taxes. Following this discussion, I can delve into addressing the second research question, which is about identifying potential actions that lawmakers and EU institutions can take to increase the integration of environmental protection within the system. However, such identification is only feasible by highlighting inflexible points while addressing the first research question. I subsequently provide insights for lawmakers, EU institutions, and legal scholars regarding which aspects of the State aid control system require review, attention, and possibly changes at the EU level.

More specifically, lawmakers can exert their influence on the system changes through a bottom-up approach by designing their environmental taxes in a manner that aligns with the interpretation of the laws on State aid integrating Article 11 environmental protection values. Conversely, EU institutions can influence system changes through a top-down approach by interpreting laws on State aid while considering the environmental protection values associated with Article 11, provided that the environmental taxes under examination

[184] In subchapter 7.2 Incompatible aid. I do not raise the first research question in the remainder of Chapter 7.

similarly embody these values. Therefore, while the first question revolves around the circumstances under which environmental taxes become subject to the scope and competence of EU State aid laws. This includes how the integration principle unfolds within the system. The second question focuses on actions that could prompt revisions to the interpretations of such laws, thereby promoting further integration of environmental protection thereto.

Regarding the interpretation of Article 107(1), integration has predominantly advanced based on the *selective advantage* condition, as discussed in section 1.3.4. Consequently, my analysis in chapter 4, concerning what lawmakers and EU institutions can do to further integrate environmental protection into the *selective advantage* condition, differs from my analysis in chapters 3 and 5 of the other State aid conditions. This is primarily because the conditions *granted by a Member State or through State resources*, *competition* and *trade* have not yet been interpreted in a manner that allows for such integration in relation to environmental taxes.[185] Based on the theoretical perspective presented in the previous section 1.4, I understand that the integration principle of Article 11 could potentially apply to the other State aid conditions discussed in chapters 3 and 5.

Chapter 6 deviates from the pattern explained about chapters 3, 4, and 5, as it primarily focuses on the State aid complementary laws that give substance to Article 107(3) of the TFEU. Consequently, the interpretation of these complementary laws, particularly the GBER and the CEEAG framework, pertains to the compatible aid regime. However, since the distinction between general measures and compatible aid is blurred, I analyze what lawmakers should do to prevent their environmental taxes from being classified as State aid, given the difficulty in maintaining the general measure classification. In Chapter 7, I analyze this integration in other aspects of the system, enabling me to offer insights into the various levels at which this integration unfolds.

The second research question thereby guides the analysis of Chapters 3 through 7. Unlike the first research question, however, this one remain unchanged in the form presented here.

[185] The case law mentioned in section 1.3.4 previously shows that the integration discussion has been primarily developed in the *selective advantage* condition.

1.6. Methods, Materials, and Other Clarifications

1.6.1. Methods and materials

I situate this thesis within the discipline of legal science.[186] The method I employ to carry it out is the dogmatic method. Consequently, my primary source of materials are black-letter laws and case law of the EU legal system.[187] As explained previously, the EU State aid control system consists of primary laws (e.g., Articles 107 to 109); Council Regulations; Commission's Regulations, Guidelines, and Notices. Moreover, the system also encompasses the Commission's State aid decisions that are legally binding according to Article 288 of the TFEU, and EU courts' rulings on the subject, which are also referred to as case law. I conduct this research based on such legal sources.

The dogmatic method is suitable for researching the first and second problems I address and fulfilling the purposes I frame in this thesis. To fulfill my thesis purpose concerning the first problem (about the complexity of the State aid control system), I analyze several case law and laws on State aid to clarify the system for lawmakers. During this analysis, I also examine the issue of the integration principle therein, which is connected to the second research problem. That is, the potential failure of the State aid control system to integrate environmental protection requirements, as stipulated in Article 11 of the TFEU, when the State aid measures take the form of environmental taxes. I rely on other legal scholars' reflections on the issue to fulfill the second purpose I have with this thesis. That is, identify and pinpoint potential inconsistencies in the State aid control system concerning the integration of environmental protection requirements when Member States implement (or plan to implement) environmental taxes (…), which provides valuable insights to lawmakers, EU courts and Commission and contribute to scholarly research in this field.

In section 1.4, I explained that the analysis of the integration principle set out in Article 11 requires an interpretation of the State aid laws into a concrete

[186] Chynoweth, P., (2008), "*Legal research*", p. 29.
[187] Smits, J. M., (2015), "What is legal doctrine? On the aims and methods of legal-dogmatic research", p. 210.

case, and that the wording of the case law sets the boundaries of this integration.[188] Based on this theoretical perspective, the analysis of EU courts' rulings is critical for the investigation concerning the system itself and its (in)flexibility in integrating environmental protection. Consequently, the analysis of the State aid case law is essential for researching the first and second research problems and achieving the first and the second research purposes.

The wording of these rulings poses practical issues for lawmakers when they aim to avoid a State aid classification for fiscal measures or when addressing the issue of protection of the environment through taxes.[189] When I clarify the system's complexities for lawmakers, I analyze the State aid rulings concerning other fiscal and environmental taxes, since they have the same starting point legal rationale. For example, there are general parameters for the interpretation of the State aid conditions for all sorts of taxes, including environmental taxes, which I discuss in Chapters 3, 4, and 5. So, when I analyze these general parameters, I clarify the system for lawmakers.

Environmental taxes add an extra layer of legal discussion to the interpretation of the State aid conditions in comparison to other fiscal measures because of the integration principle. In this sense, when I examine the integration principle in the case law, I fulfill the second purpose. However, how I fulfill this second purpose differs depending on the chapter's subject.

Currently, the Court of Justice integrates Article 11 into the interpretation of the *selective advantage* condition in relation to environmental taxes, as discussed in section 1.3.4. Consequently, the State aid case law on environmental taxes is my primary source in Chapter 4, when I analyze the integration principle in the interpretation of the *selective advantage* condition.

In Chapter 3, however, I adopt a different approach regarding how I use the case law on State aid. The condition granted by a Member State or through State resources is not critical in State aid cases on fiscal taxes (including environmental taxes), and therefore, it is limited. This is not the case for

[188] See footnote 140.

[189] They spur legal debate concerning the nature and limits of Article 107(1) in terms of the Member States' sovereignty – an interplay of great legal complexity. See in Schültze, R., (2018), *European Union Law,* pp. 43-75, and Tuori, K., (2014), "Transnational Law on Legal Hybrids and Perspectivism", pp. 11-57.

environmental subsidies, in which the most critical condition is granted by a Member State or through State resources.[190] Consequently, I fill the gap left by the lack of State aid cases on environmental taxes by discussing that condition through an analysis of State aid cases on environmental subsidies, analogously.

Since the interpretation of *competition and trade* conditions has been consistent with respect to different types of State measures (namely, fiscal measures or subsidies) and lacks any integration consideration, I adopt a diverse approach in Chapter 5. I analyze the possibility of integrating environmental protection into the interpretation of those conditions based on legal scholars' input in this regard.

Chapter 6 and 7 differs from the previous approaches because they concern the issue of integration in other parts of the system. In Chapter 6, the laws discussed there integrate environmental protection at the compatibility-assessment level. I mainly reflect on these laws concerning how they shape the State aid control system and how lawmakers could use them to enact general environmental taxes. In Chapter 7, I analyze different circumstances where this integration unfolds, reflecting on them based on black-letter law, case law, and legal scholars' input.[191]

I adopt an inductive method for the analysis of State aid ruling, as Schön's clarifies, because this facilitates an analysis of "the existing corpus of decisions one by one, thereby assembling a picture of the case law and forming a judgment on the coherence of the overall view."[192] The Court of Justice ultimately establishes what EU law is, as the last authoritative judicial interpreter of the content of State aid laws and of other primary and

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[190] See discussion in subchapter 3.5. Further Integrating Environmental Protection .

[191] Studies on environmental taxes that are not done from a State aid perspective are obviously relevant to this thesis particularly in respect of how environmental taxes can effectively achieve the protection of the environment. For instance, Määttä discussed fiscal and ecological illusions, when debating taxpayers' perception concerning tax imposition that are relevant aspects for lawmakers to consider during their preparatory work of an environmental tax, as the State aid discussion in this thesis. Cf. Määttä, K., (2005), *Environmental Taxes an Introductory Analysis,* discussion about the regulatory feature of environmental taxes, pp. 5-6. In also Atkinson, G., and Mourato, S., (2015), *"*Cost-Benefit Analysis and the Environment*"*, pp. 1–60.

[192] Schön, W., (2015), "*Neutrality and Territoriality — Competing or Converging Concepts in European Tax Law?",* p. 271.

secondary EU laws.[193] Thus, the interpretative methods adopted by the Court of Justice influence the development of the interpretation of these laws since the Treaties do not specify any order of precedence among the interpretative methods used by EU courts.[194]

Furthermore, Neergaard and Nielsen clarify that the analysis of the Court of Justice's interpretative actions and forms is part of the European Legal Method.[195] Since I reflect on the Court of Justice's interpretative actions, I also conduct this research based on the European Legal Method, as framed by Neergaard and Nielsen above.

Only some rulings of the Court of Justice achieve the status of case law. Some cases are simply reproductions of previous interpretations adapted to the facts of a case, without the substance of the cited view being changed. Such cases are irrelevant to my analysis because including them would entail a focus on the quantity of cases selected, rather than on their quality. Consequently, I only mention the State aid cases on other types of taxes and environmental subsidies when they are relevant to this thesis concerning environmental taxes from the perspective of the State aid control system.

1.6.2. Previous research

The first problem and purpose I address in this thesis (concerning the issue of the complexity of the State aid control system particularly for lawmakers) is built on Aldestam' doctoral research titled *EC State aid rules applied to taxes* –

[193] In Itzcovich, G., (2009), "*The Interpretation of Community Law by the European Court of Justice*", p. 544.

[194] In Lenaerts, K., Gutiérrez-Fons, J. A., (2013), "*To say what the law of the EU is: methods of interpretation and the European Court of Justice*", p. 4; and Itzcovich, G., (2009), "*The Interpretation of Community Law by the European Court of Justice*", p.539, and Maduro discuss the Court of Justice rulings implementation, application, and interpretation that gives different effects to such case law analysis, in Maduro, M., (2007), "*Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*", pp.137-152.

[195] In Neergaard, U., and Nielsen, R., (2011), "*Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union*", p. 96., the author discuss as forming part of the European Legal Method to analyze the Court of Justice interpretative actions and forms, which I do in this thesis.

An analysis of the selectivity criterion from 2005. Based on this thesis, I discuss developments in the State aid control system pertaining to fiscal and environmental taxes in the period following Aldestam's research. I do so by examining case law developments in a historical and systematic manner.

As extensively discussed in the section 1.4. The Theoretical Perspective of the Integration Principle , the second problem and purpose I built upon Nowag's doctoral thesis titled *Environmental Integration in Competition and Free-Movement Laws*. Nowag's analysis of the integration principle in diverse EU laws, including State aid, focuses on both environmental subsidies and taxes.[196] Consequently, this thesis provides a more profound insight into the issues concerning environmental taxes.

Other doctoral theses were relevant for understanding the use of environmental taxes as a policy instrument to protect the environment or not, depending on how they are designed. They are particularly pertinent in guiding the conscious choices lawmakers should make when planning environmental taxes. I use these theses especially when the effectiveness of environmental taxes might influence the interpretation of the STtae aid laws. They include Dias Soares' doctoral thesis titled *The Design Features of Environmental Taxes* from 2012, and Pitrone's doctoral thesis titled *Environmental Taxation: A Legal Perspective* from 2014. Both theses delves into the environmental effectiveness of taxes from an international and EU legal perspective. However, they do not analyze environmental taxes solely from the perspective of the State aid control system to give a specific input in this regard.

1.6.3. Scope and delimitations

I focus this research on the State aid control system, which consists of laws, interpretations of laws, Commission decisions on State aid, and EU case law on State aid. Furthermore, I focus on environmental taxes to narrow down

[196] In Nowag, J., (2016), *Environmental Integration in Competition and Free-Movement Laws*, pp. 92-118 and 180-202.

the scope of the analysis concerning integration principle within that system and to provide thorough insights into the complexity of the system for lawmakers addressing the issue of environmental protection through taxation.

Faure and Weishaar point out that environmental law and economics scholars have lifted the critical question regarding "how to usefully determine the desired level of environmental protection".[197] I do not address this questioning within the integration analysis of the laws on State aid, rather how the integration unfolds and could be further developed through interpretation of said laws.

Given the State aid rule set out in Article 107(1), the legal conceptualization of environmental taxes is irrelevant,[198] because a general attempt to define them is too limited for the State aid effects-based approach that goes beyond formal aspects of taxes.[199] For instance, a tax may be called as an "environmental tax" by lawmakers and even have an environmental protection objective, but if nothing else in the tax connects to this objective, it could be that the tax is only fiscal and even anti-competitive, hiding behind the "green" purpose. Moreover, since the State aid for environmental protection falls under Article 107(3), I do not address possible aid for environmental protection under Article 107(2).[200]

Article 107(2) grants an automatic status as compatible aid for measures that strictly meet the objective listed in its subparagraphs. For instance, Article 107(2)(b) concerns "aid to make good the damage caused by natural disasters or exceptional occurrences". Its interpretation is narrow and to the extent of the damage. It has been recently used by with the COVID-pandemic but regulated through the Temporary framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak, which expired on 30 June 2022.[201] Nowag discussed whether climate change effect could be

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[197] In Faure G., M. and Weishaar E., S., 2014, *The role of environmental taxation: economics and the law*, p. 399.

[198] See *why* in section 2.7. Environmental Taxes Overlapping the Concept of *Aid*.

[199] Cf. e.g., the GBER conceptualization of environmental taxes in sections EU Environmental Taxes: Legislative Possibilities and EU Aims and Environmental tax, where such textual description might give guidance but does not contain the all the possibilities with environmental taxes in a broader sense than that.

[200] For input in this regard, see Nowag, J., (2016), "*Environmental Integration in Competition and Free-Movement Laws"*, pp. 114–117.

[201] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.

classified under Article 107(2)(b) and concluded that it could, however, in case of major accidents.[202]

Those acquainted with EU competition law know that the discussion about the relevant market is not limited to the State aid control system; it also concerns other aspects of EU competition law.[203] In this study, however, I focus on the relevant market rationale and on the discussion pertinent to the State aid control system.[204] Finally, I consider laws, rulings, and other sources issued or published up to May 31, 2023.

1.6.4. Choice of audience (primary and secondary)

The primary audience for this thesis is the *lawmakers* of the Member States. This group consists of elected politicians with the power to propose, approve, and reject tax laws. I also address their staff – composed of legal advisors, economists, and other professionals – who are no less critical; as well as civil servants at various levels (municipal, regional, national). These individuals are equally crucial since they are "responsible for confronting policy problems and finding solutions for them."[205] In this thesis, I employ the term *lawmakers* to encompass all individuals engaged in the preparation of tax legislation, regardless of whether they are elected representatives, advisors, or other roles.

The secondary audience consists of legal scholars conducting research on the integration principle within EU laws since I provide scholarly insights into this topic through the analysis of the interpretation of the State aid laws in relation to environmental taxes. Furthermore, it also includes the Commission and EU courts since I demonstrate areas where the

[202] In Nowag, J., (2016), *Environmental Integration in Competition and Free-Movement Laws*, pp. 116–117.
[203] See, for instance, the Commission issue the Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13.
[204] In section 5.2.1. The relevant market: Finding its circumstances .
[205] A. Rahman, S., *et al.,* (2022), "*Introduction to How to Engage Policy Makers with Your Research*", p. 2.

interpretation could potentially integrate environmental protection values but currently does not.

1.6.5. Terminology

In this section, I repeat the description of key terms used throughout this thesis to facilitate their understanding. They are described in Table 2 below.

Table 2: Description of key terms

Environmental taxes	Taxes, fees, charges, levies, and mechanisms within fiscal taxes having environmental protection requirements.[206]
General measure	Not State aid – no breach of Article 107(1) of the TFEU.
State aid measure	Breach of Article 107(1) of the TFEU
Compatible aid	Measure classified as State aid – breach of Article 107(1) – but compliant to the complementary laws to Article 107(3), e.g., the GBER and the CEEAG.
Incompatible aid	Measure classified as State aid – breaching Article 107(1) and the complementary laws to Article 107(3), as well as the EU primary and secondary laws, and general principles of EU law.
Unlawful aid	"new aid put into effect in contravention of Article 108(3) TFEU."[207]
State aid control system	Articles 107 to 109 of the TFEU. Complementary laws to Articles 107 and 108, legislated based on Articles 108(4) and 109 of the TFEU. The Commission's Guidelines and Notices. The EU courts' rulings. The Commission's State aid decisions (Article 108, paras. 1–3 of the TFEU).

[206] See in section Environmental Taxes Overlapping the Concept of *Aid*.
[207] In Article 1(f) of the Council Regulation (EU) 1589/2015 laying down detailed rules for the application of Article 108 of the TFEU.

	The Council's State aid decisions (see Article 108, para. 2 of the TFEU).
Environmental protection requirements (values)	Objectives, principles, criteria, sustainable development, defined in Article 191(1) and (2) of the TFEU and EU environmental laws.
Undertakings	"(…) encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."[208] "Although the Treaty does not define the concept of an undertaking, the Court has consistently held that any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be categorised as an undertaking (…)."[209]
Integration principle	Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[210]
Effects-based approach (also called effects principle)	The interpretation of the conditions on State aid set out in Article 107(1) of the TFEU must consider the measure in question *de jure* and *de facto* effects.[211]
Environmental (effectiveness) taxes	the ability of environmental taxes to reach environmental protection targets within a stipulated timeframe.[212]

[208] See in the case C-41/90, *Klaus Höfner and Fritz* Elser v *Macrotron* GmbH, para. 21.
[209] In C-49/07, *MOTOE*, in paragraph 21, where the Court of Justice summed up C-41/90, *Klaus Höfner and Fritz* Elser v *Macrotron* GmbH, para. 21 and cited the following joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others*, para. 46.
[210] Legal scholars defined Article 11 of the TFEU mandate to integrate environmental protection requirements as establishing the integration principle.
[211] Based on C-173/73, *Italy v Commission,* p. 718, para. 13.
[212] See in section 2.3.

1.7. Thesis Outline

This thesis is divided into nine chapters and three parts. I explain the logic behind this outline below.

Part I, which consists of three chapters (1, 2, and 3), sets up all of the legal elements necessary for this thesis. Chapter 1 has introduced fundamental aspects of the thesis, such as the problem I investigate, my purposes in so doing, my intended audience, the research questions that drive this research, and the methods and materials I use.

Chapter 2 complements this chapter, because I further explore the role of environmental taxes within the EU legal system and the State aid control system, based on the latter's system logic, reach, and limitations. In Chapter 2, I further develop fundamental "concepts" I use in this thesis (presented in section 1.6.5. Terminology). I discuss seven aspects that limits the scope of environmental taxes in this thesis.

Part II consists of three chapters (3, 4, and 5). These take up the four State aid conditions and the integration of environmental protection into Article 107(1) (i.e., at the first level of integration). I explain the approach adopted in this thesis, which is to discuss the State aid conditions in three chapters. This is not a proposal to assess Article 107(1) of the TFEU, or to problematize or criticize any practice. It is rather an active and conscious choice to facilitate discussion and to reduce repetition and cross-references. Besides, Article 107(1) of the TFEU does not establish any method for the analysis of the State aid conditions, only that the measure meets the cumulative conditions as a consequence of the effects-based approach inherent in the Article 107(1) of the TFEU conditions.[213] Hence, the approach described below should not be problematic. The State aid conditions examined in the three chapters are as follows:

(1) The "*granted by a Member State or through State resources*" condition, in Chapter 3 (one State aid condition with two conditions).

[213] In case C-487/06 P, *British Aggregates Association v Commission and UK*, para. 89.

(2) The "*favor[s] certain undertakings or the production of certain goods*" condition, in Chapter 4 (one State aid condition with two interconnected but different effects, namely advantage and selectivity).

(3) The *distorts or threatens to distort competition* condition and the *affects trade between Member States* condition, in Chapter 5 (two separate but closely related State aid conditions, namely competition and trade).

In Chapter 3, I examine the *granted by a Member State or through State resources* condition. It has two alternative preconditions for ensuring that direct aid (i.e., subsidies) and indirect aid (taxes) are detected.[214] Unlike subsidies, tax measures scrutinized under the State aid control system automatically meet the *granted by a Member State* effect because of the presumption of the principle of legality rooted in the tax discretion enjoyed by each Member State. That is, in the Member State legislative actions to approve environmental taxes in different (internal) levels and in the interpretation of environmental taxes into concrete cases are formal acts set out by the Member State laws.

In the words of Vanistendael, the principle of legality means "that no tax can be levied except under authority of a law"[215] – in this case a law enacted by a Member State. Consequently, the analysis in Chapter 3 of the *granted by a Member State or through State resources* condition differs substantively from State aid in the form of subsidies that requires an assessment concerning whether the Member State can be held imputable for the aid directly granted (i.e., subsidy). Hence, State aid cases on taxes hardly focus on "*granted by a Member State or through State resources*". Despite this, Chapter 3 focuses on the interpretation of the "*through State resources*" condition in relation to environmental taxes, and the possibility of integrating environmental protection into that condition.

In Chapter 4, I analyze the *selective advantage* condition as two distinct but connected parts of one condition, since their rationale proceeds from a common point, which is the reference regime that establishes the normal and

[214] See, for instance, case C-30/59, *De Gezamenlijke in Limbur v. High Authority of the European Coal and Steel Community*, p. 19, reference to positive aid when the State measure is a subsidy.
[215] In Vanistendael, F., 1996, *Legal Framework For Taxation*, p. 16.

the abnormal tax treatment (the *advantage* effect), and the logic of which persons or companies should be treated similarly in terms of taxes but are not (the *selective* effect).

Finally, in Chapter 5, I look at the *distorts or threatens to distort competition* condition and the *affects trade between Member States* condition. *Competition and trade* are two distinct State aid conditions. They are analyzed jointly in most State aid cases, due to their intertwined legal rationale regarding the *relevant market*,[216] which forms the starting point for the substantive discussion following this introduction.[217] Although the wording of the *affects trade between Member States* condition gives the impression that the forbidden effect occurs when the measure *de facto* affects trade*,* EU courts have long proceeded on the understanding that a simple threat – i.e., a threat to affect trade between Member States – suffices to generate the effect forbidden by this condition.[218] This approach is another sign of how the *competition and trade* conditions are intertwined. Article 107(1) identifies the threat to the *distorts competition* condition*,* but the EU case law extends the threat to the *affects trade* condition.[219] A threat by itself, then, meets both State aid conditions; no actual effect is necessary.[220]

In each chapter, I analyze one or two State aid conditions that proceed from a similar rationale. I do this to avoid unnecessary repetition and circularity, to reduce cross-references, and to conduct certain discussions in one section instead of two. Since the State aid conditions are cumulative, their analysis is equally relevant to the State aid classification and to the issue of the integration of environmental protection. Thus, the identification of any points of flexibility or inflexibility concerning the integration of environmental protection into each State aid condition yields insight into which part of

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[216] See, in case C-279/08 P, *Commission v Netherlands* (known as NO_x case), para. 131, and in para. 90 of the Commission Guidelines on State aid for environmental protection and energy; and, in para. 186 of the Commission Notice on the notion of State aid; also in Derenne, J., and Verouden, V., (2017), "Distort of Competition and Effect on Trade," p. 169., and in Szyszczak, E., (2016), "Distortion of Competition and Effect on Trade between EU Member States*",* p. 151.

[217] In section 5.2.1.

[218] In case C-730/79, *Philip Morris v Commission*, para. 12; and confirmed five years later in the joined cases C-296/82 and C-318/82, *Netherlands and Leeuwarder Papierfabriek BV v Commission*, para. 24.

[219] *Ibid idem.*

[220] In Case C-372/97, *Italy v Commission,* para 44; C-222/04, *Cassa di Risparmio di Firenze and Others*, para. 140; and case C- 494/ 06 P, *Commission v Italy and Wam SpA,* para. 50, among many other cases.

Article 107(1) of the TFEU is inconsistent with Article 11 of the TFEU. Finally, the first research question is adapted to each State aid condition, as displayed in Table 1. And in section 1.5.

My chosen approach can be compared to the Court of Justice in the *Altmark Trans* ruling, issued in 2003. In this ruling, the Court divided the State aid conditions into four different categories; and since then, it has taken this same approach to State aid cases in connection with both taxes and subsidies.[221] The Court has slightly changed its description of Article 107(1) of the TFEU over time, without significantly altering its view of the four conditions since the *Altmark* case.[222] It made the following statement concerning the third condition in tax cases: "*confer a selective advantage on the recipient*."[223] This is because the selective effects of taxes are often more critical than the advantage effect.

For instance, in cases where the advantage is granted *de jure (*e.g., through a tax exemption), the discussion often treats the selective-advantage effects as one condition.[224] However, when the advantage is granted *de facto*, the discussion is likely to separate the advantage from the selective effect.[225] For

[221] In case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, para. 75, the Court stated: Article [107](1) of the Treaty lays down the following conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, *it must confer an advantage on the recipient.* Fourth, it must distort or threaten to distort competition. *Emphasis added* on the sentence that changed the linguistic construction over time. Before Altmark case, the Court of Justice did not make any reference to Article 107(1) of the TFEU division of conditions. See, for instance, case C-173/73, *Italy v Commission,* case C-387/92, *Banco Exterior de España,* para. 12; case C-143/99, *Adria-Wien Pipelines GmbH* where the Court did not mention four conditions.

[222] In the joined cases C-20/15 and C-21/15, *Commission v World Duty-Free Group S.A. and others*, para. 53, the Court stated: First, it must be recalled that, according to the Court's settled case law, classification of a national measure as "State aid," within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, *it must confer a selective advantage on the recipient.* Fourth, it must distort or threaten to distort competition (…). *Emphasis added.*

[223] *Ibid idem.* See also in the *World Duty-Free Group S.A* ruling the discussion about *selectivity* in the *Adria-Wien Pipelines* ruling (C-143/99), particularly in paras. 82-86 in the first mentioned ruling.

[224] Cf. C-487/06 P, *British Aggregates* v *Commission.*

[225] Cf. joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europe, Ireland, Luxembourg v Commission.*

example, a tax ruling interpreting a legal tax scheme and granting a State aid to a particular company.[226]

In the Notice on the notion of State aid, the Commission describes the selective and advantage effects in two separate sections, as if they are two conditions; and it deals with competition and trade in one section, as if they are one condition.[227] To be clear, I only separate them into three chapters in order to avoid repetition and circular discussion that might reduce the comprehensibility of this thesis. Besides which, Article 107(1) of the TFEU does not require any specific type of assessment of the State aid conditions. It is simply necessary, rather, to ascertain whether the measure in question should be classified as *aid*, due to its formal and substantive effects.[228] Consequently, it is the assessment of the effects of the measure that is key to the State aid classification – not the method used to assess the conditions.

The three-chapter approach adopted here does not conflict with the praxis of the Court of Justice, or with the Commission's. It is an active choice to simplify the discussion of laws on State aid without compromising an in-depth analysis. This is particularly relevant since the discussion on State aid conditions can be circular and confusing. For instance, the ANGED rulings[229] became infamous because the reasoning of the Court of Justice confused legal scholars, and perhaps policymakers too, about the Court's actual understanding.[230] The three-chapter approach adopted here, then, is not about proposing a different way to assess the effects of environmental taxes in terms of State aid; rather, it is a way to simplify a complex discussion.

Part III consists of three chapters (6, 7, and 8). In Chapter 6, I analyze the integration of environmental protection at the compatibility level (i.e., the second level of integration) and answers the first and second research

[226] See also discussion in subsection 4.3.3.1. Aid scheme or individual aid.
[227] The *advantage* effect is discussed in section 4, while the *selectivity* effect is discussed in section 5, and competition and trade conditions jointly in section 6.
[228] See, in this regard, case C-487/06 P, *British Aggregates Association v Commission and UK*, para. 89.
[229] Another common circular reasoning in the State aid conditions occurred in the *selective advantage* discussion in the cases C-233/16 to C-237/16, *ANGED*, where the Court went back and forth in the selectivity steps, creating a confusing and circular reasoning.
[230] See, for instance, in this regard, Bernatt, M. and Grzejdziak, Łukasz, (2022), "Selectivity of State aid and progressive turnover taxes – Leaving the door (too) wide open? Commission v. Poland," p. 194; and Snell, J., (2019), "Differential tax burdens of undertakings and internal market law: The way forward after ANGED," p. 1101.

questions. In Chapter 7, I examine other forms of integration (or lack thereof) of environmental protection not directly related to the interpretation of Article 107(1). In Chapter 8, finally, both Part III and the thesis come to a conclusion. In that chapter, I reflect on the findings of the thesis, on the theoretical framework chosen and on the recommendations I suggest for lawmakers, who are my main intended audience. I also venture some forecasts of what they will encounter in the State aid control system in the future.

2. Environmental Taxes

2.1. Introduction and Outline

In the previous Chapter, I pointed out that environmental taxes are often classified as State aid (compatible or incompatible aid) and that this classification could pose problems for lawmakers addressing environmental concerns through taxation. A State aid classification limits the tax discretion of the Member States concerned and subjects the environmental taxes to the State aid control system. The fact that the system is extremely complex only compounds the already challenging task that tax lawmakers face when planning, designing, and implementing taxes for environmental protection. To clarify the levels of complexity of the system for lawmakers, (which is my first research purpose) including how the integration of environmental protection unfolds in different parts thereof, some further clarifications are necessary regarding environmental taxes.

In this chapter (2), I discuss different legal aspects concerning environmental taxes that I consider crucial in shaping their scope with respect to the State aid control system analysis proposed. Consequently, the discussion in this chapter furnishes a legal foundation for examining the two research problems and purposes and for answering the two research questions in the other chapters of this thesis.

This chapter proceeds as follows. Subchapter 1.1 is introductory. In subchapter 2.2, I discuss the contextual background of environmental taxes as an environmental protection policy. In subchapter 2.3, I explore some pressures lawmakers face, which may reduce the effectiveness of environmental taxes and increase the likelihood of them being classified as State aid. In subchapter 2.4, I discuss the EU law concept of environmental taxes to provide lawmakers with an understanding of the design features these taxes are expected to present from the perspective of EU law. In subchapter 2.5, I examine which environmental protection rationales would align with EU law, allowing lawmakers to make explicit choices regarding their inclusion in their environmental tax design. In subchapter 2.6, I examine the legislative possibilities available to EU legislators when enacting environmental taxes at

the EU level, and consequently, the rationales that eventual EU environmental taxes would encompass. The discussions in sections 2.4, 2.5, and 2.6 could reduce the likelihood of a State aid classification, depending on how lawmakers incorporate these EU law aspects into their environmental taxes. In subchapter 2.7, I delve into the "concept" of *aid* as defined in Article 107(1) and how it delineates the scope of "environmental taxes." Finally, in subchapter 2.8, I summarize the discussions.

2.2. Placing Environmental Taxes within an Alarming Scene: Not the saver but a helper of environmental problems

Figure 1: "Demand & Supply" by Erik Johansson, available at www.erikjo.com in Chapter 1 reminds us what is at stake. The Earth has its limits. No human lives, economic activities, or even the *law* will exist without a sound, healthy, and safe environment.[231] The scientific projections for 2050 are alarming.[232] The United Nations (UN) has called for immediate action against the triple planetary crisis: i.e., the three interlinked issues of climate change, pollution, and biodiversity loss.[233] By 2050, according to one study, the southern Member States of the European Union (EU) will suffer from water scarcity for growing crops if they fail to adapt their agricultural sectors.[234] Scientists also estimate that, by that same year in the EU and the

[231] I was inspired by Davies' discussion concerning the challenges of legal theory to "think of law and the physical Earth together, coexisting rather than separated and as an interconnected system." In Davies, M., 2017, *Asking the Law Question*, p. 453. If the environment degrades to the point of a collapsing a community, the *law* in that community will collapse too.

[232] See, for instance, Panagos, C. B. P., *et al.,* (2021). "*Projections of soil loss by water erosion in Europe by 2050"*, pp. 380-392. See also, Orru, H. *et al.* (2019), "*Ozone and heat-related mortality in Europe in 2050 significantly affected by changes in climate, population and greenhouse gas emission",* last accessed 14 February 2023, available at https://iopscience.iop.org/article/10.1088/1748-9326/ab1cd9/pdf.

[233] In United Nations, Climate Change, Blog, "What is the Triple Planetary Crisis?", published in 13 April 2022, last accessed 11 May 2023, available at https://unfccc.int/blog/what-is-the-triple-planetary-crisis.

[234] In Joint Research Centre and EU Commission, 2020, *"Analysis of climate change impacts on EU agriculture by 2050",* p. 15.

UK, the loss of agricultural soil due to water erosion will increase by 13–22.5%.[235] These are just a few of many concerns.

People all over the world must act, through both public and private institutions. The costs of dealing with climate change, pollution, and biodiversity loss in the future will be immense, as will the risks involved. According to one estimate, the EU will need to spend nearly €1 trillion annually in order to move away from high-carbon technologies and to reach the EU's target for 2050.[236]

Through both domestic measures and international arrangements (such as the Paris Agreement), countries across the world are trying to deal with these global issues. The instruments employed include subsidies, environmental taxes, and regulations for curbing greenhouse gas (GHG) emissions.[237] The Member States of the EU, moreover, need to meet certain minimum climate targets,[238] such as those which the Union has set for 2030 and 2050.[239] They must do so in order to minimize negative effects on society, as well as to comply with EU law.

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[235] The study used the 2016 situation as a baseline. In Panagos, C. B. P. *et al.*, (2021), *"Projections of soil loss by water erosion in Europe by 2050",* p. 390.

[236] In McKinzey & CO., 2020, *"Net-Zero Europe – Decarbonization pathways and socioeconomic implications"*, p. 11.

[237] Some scholars call them as *market-based instruments*, see for instance Kreiser, L., *et al.,* (2013), "*Market Based Instruments – National Experiences in Environmental Sustainability",* which is a compilation of different governmental instruments to address environmental concerns. In this thesis, I refer to them as *governmental tools* or *instruments* similarly to *market-based instruments.*

[238] For instance, the EU regulates the cap on GHG emissions through the European Trading System (EU ETS), which should ensure that the EU Member States decrease their emissions by annually by cutting the emission allowances over the years. See in section 2.1.1 of the European Green Deal about the ETS revision, and in Commission, Climate Action, *Revision for phase 4 (2021-2030),* last assessed 24 February 2023, available at https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/revision-phase-4-2021-2030_en. The Commission issued a Guidelines, the Communication from the Commission Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021, which covers aid to compensate for increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to the EU ETS (commonly referred to as 'indirect emission costs'), in section 1.2.1, which shows another possible State aid effects even resulting from the ETS imposition.

[239] See, for instance, Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people,* COM/2020/562 final, where the Commission discuss both timeframes and targets about the EU current legal system in general.

The distinction drawn by Myers and Kent between implicit and formal government subsidies highlights the problems that governments must confront within their legal systems.[240] The long history of fossil-fuel subsidies is a clear example of the environmental harm that formal subsidies can cause, due to the increased carbon-dioxide emissions (and worsened global warming thereby) that they encourage.[241] At the same time, the old story whereby economic activities fail to internalize their environmental costs is an example of the harm to which implicit subsidies can give rise. It matters little whether such subsidies were been introduced due to a lack of awareness of the environmental effects of the activities subsidized,[242] or whether the problem instead just reflects a political unwillingness to deal actively with environmental problems.[243] Our future as a global community depends on the actions that individuals – as well as both public and private institutions – take today to avert the most alarming prospects.

Within the Member States of the EU, lawmakers face multiple challenges when seeking to tackle environmental and climate issues by means of taxation. At the national level, they are constrained among other things by their own country's physical environment, by its tax jurisdiction, by the political agendas pursued by various actors within it, by the social and economic concerns that animate its population, and by the legislative procedures though which the taxes in question are designed and adopted.

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[240] They argued that "(…) a formal subsidy can cause problems because of what a government *does*, whereas an implicit subsidy in the form of an environmental externality causes problems because of what a government *does not do*." In Myers, N., and Kent, J., (2001), "Perverse Subsidies: How tax dollars can undercut the environment and the economy", p. 14.

[241] See the report concerning fossil fuels subsidies within the Member States in Commission (2022) "2022 Report on Energy Subsidies in the EU", last assessed 14 February 2023, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0642. Or even, a more specific study conducted in 2014, appointing several harmful environmental subsidies in Germany, divided them in the following four categories: (1) energy supply and use, (2) transport, (3) construction and housing, (4) agriculture and forestry, fisheries. See in Köder, L., *et al.,* (2014), "Environmentally Harmful Subsidies in Germany", pp. 14–57.

[242] Governments became aware of environmental problems in 1972, when the United Nations held the Stockholm Conference on the Human Environment that led to the Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972). Since then, this awareness and political willingness has only increased over time,

[243] See, for instance, the discussion about the level of internalization costs of the EU transport industry in Ferrón-Vílchez, V., *et al.*, (2015), "How Much Would Environmental Issues Cost? The Internalisation of Environmental Costs in the European Transport Industry", available at SSRN: https://ssrn.com/abstract=2577132.

Environmental taxes enter the scene as an instrument with a challenging mission, yet with a great potential to alter the behaviors that drive climate change and environmental degradation.[244] Equally important, environmental taxes can encourage green technologies that have a less harmful impact (or even a positive one) on the climate and the environment.[245] They can restore a level playing field between competitors that have been directly affected by formal and implicit subsidies over a long period. The cost of sustainable biofuel production, for example, is too high to make competition efficient with fossil fuels that have been subsidized for decades.[246] In sum, far-reaching adaptation is necessary if legal and scientific targets are to be met, and environmental taxes can help governments to spur the changes needed.[247]

At the EU level, furthermore, the discretion enjoyed by Member States in this area is not unconditional, because environmental taxes must comply with the provisions of the Treaty on the Functioning of the European Union (TFEU). Article 107(1) of the TFEU, one of the rules that forbid Member States from granting State aid, reads as follows:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so*

[244] In this regard, see Faure G., M. and Weishaar E., S. (2014), "*The role of environmental taxation: economics and the law"* pp. 399-417.

[245] *Ibid idem.* Just to clarify, "climate effective" as meaning economies and technologies with low or zero GHG emissions, and "environmentally friendly" as meaning those which low negative impact on the environment, e.g., circular economies.

[246] For instance, in Sweden, the energy and carbon excise on motor fuels aims to reduce the production costs of sustainable biofuels, which otherwise would have a hard time competing with fossil fuels, given the latter long praxis and formal subsidies. See in Recitals 8, 27, and 28 of SA.102347 (2022/N) Tax reductions for pure and high blended liquid biofuels.

[247] In this regard, see section 2.2.2. of the Communication from the Commission to the European Parliament, the European Council, the Council, the European Social and Economic Committee, and the Committee of Regions, *The European Green Deal*, hereafter only "the European Green Deal", where the Commission expressed the following. "Well-designed tax reforms can boost economic growth and resilience to climate shocks and help contribute to a fairer society and to a just transition. They play a direct role by sending the right price signals and providing the right incentives for sustainable behaviour by producers, users and consumers. At national level, the European Green Deal will create the context for broad-based tax reforms, removing subsidies for fossil fuels, shifting the tax burden from labour to pollution, and taking into account social considerations."

far as it affects trade between Member States, be incompatible with the internal market."

However, it is inherent in the logic, rationale, values, and effectiveness of environmental taxes to create a discrepancy of tax burdens between different *undertakings*.[248] Such differentiated tax treatment may result, if it is considered to favor certain undertakings, in a classification of the environmental tax as State aid.[249] Although the prohibition on State aid is neither absolute nor unconditional, an environmental tax classified as compatible aid[250] is subjected to a regime of control and monitoring at the EU level.[251] This regime adds an extra administrative burden to the Member State imposing the tax.[252] It also burdens the Commission with the costs of monitoring.

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[248] The Court of Justice developed the concept of *undertakings* in competition law (e.g., State aid law) as follows. "… first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity." See in the case C-41/90, *Klaus Höfner and Fritz* Elser v *Macrotron* GmbH, paragraph 21. In a later case, C-49/07, *MOTOE*, in paragraph 21, the Court of Justice summed up *Klaus Höfner and Fritz* Elser v *Macrotron* GmbH ruling as follows. "Although the Treaty does not define the concept of an undertaking, the Court has consistently held that any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be categorised as an undertaking (…)."

[249] A breach of Article 107(1) of the TFEU.

[250] A not previously notified State aid is classified as *unlawful aid*. This term is used in the State aid control system in reference to a breach of Article 107(1) of the TFEU and Article 108(3) of the TFEU. The latter Article states the Member States' obligation to notify the Commission before granting State aid. Article 1(f) of the Council Regulation (EU) 1589/2015 laying down detailed rules for the application of Article 108 of the TFEU defines as *unlawful aid* "new aid put into effect in contravention of Article 108(3) TFEU". Non-notified aid can still be considered compatible aid in *a posteriori* analysis, as set out in case C-301/87, *France v Commission,* para. 21, p. 357, and in the Commission's Notice on the notion of State aid, section 7.3, *Aid to operators*, para. 224. *Unlawful aid* can also mean *incompatible aid,* as set out in case C-705/20, Fossil (Gibraltar) Ltd v Commission, para. 39, and in joined cases C-164/15 and C-165/15 P, *Aer Lingus Ltd, Ryanair Ltd, Ireland v Commission*, paras. 116–117. Thus, I will use *incompatible aid* to not cause the confusion the case law and the State aid varied laws cause using such term to represent two different legal situations and effects.

[251] Because it needs to comply with the GBER or CEEAG, and keep the Commission informed periodically about the effects of the measure.

[252] For instance, Article 12 of the GBER writes the following actions the Member State must ensure for the monitoring of the compatible aid: "In order to enable the Commission to monitor the aid exempted from notification by this Regulation, Member States, (…), shall maintain detailed records with the information and supporting documentation necessary to establish that all the conditions laid down in this Regulation are fulfilled. Such records shall be kept for 10 years from the date on which the ad hoc aid was granted or the last aid was granted under the scheme. The Member State concerned

The purpose of the picture of "*Demand and Supply*" above (in Figure 1: "Demand & Supply" by Erik Johansson, available at www.erikjo.com) is to spur reflection on the role of "law" *(*as meaning statutes, case law, principles*,* and even customs) and on the need for change in society. For instance, certain behaviors that were once acceptable and rational are now – given our knowledge and information today – unacceptable and irrational. In various ways, "law" regulates the development of economic activities, such as those shown in the picture. It may allow such an activity under certain conditions; or it may forbid it, tax it, impose minimum standards on it, etc. In view of the role played by "law", and considering the global situation in connection with environmental issues and climate change, it must be reckoned irrational that the State aid control system presents an obstacle to the efforts of lawmakers in the Member States to tackle such issues with environmental taxes.

Connected to my first purpose in this thesis, therefore, is to erect a communication bridge between lawmakers and the State aid control system; and to discuss the latter in such a way as to reduce the uncertainty of these legal provisions, and thus the sense that they pose a threat to the environmental efforts of lawmakers. Instead, I suggest, there is a way that lawmakers can perceive the State aid control system as a legal tool they can use when designing environmental taxes that genuinely tackle the issues, even while complying with the EU's laws on State aid. The example in Box 1 below shows a case of State aid granted in the form of an environmental tax.

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shall provide the Commission within a period of 20 working days or such longer period as may be fixed in the request, with all the information and supporting documentation which the Commission considers necessary to monitor the application of this Regulation."

Assume that lawmakers enact a carbon tax, with the aim of reducing carbon-dioxide emissions from a specific sector (transport), by taxing motor fuels. Fuels are exempt from the tax, fully or in part, when their use results in zero or in low carbon-dioxide emissions, respectively. The tax thus incentivizes consumers to use no-carbon or low-carbon fuels. Such a tax has a fiscal purpose – i.e., to raise revenue (which it does in a regressive way). Over time, however, its revenue-raising capacity should diminish, as no-carbon and/or low-carbon fuels increase their market share, thereby reducing carbon emissions from the transport sector. In this way, the tax fulfills its environmental purpose, which is to stimulate the decarbonization of the transport sector. The idea is that, within a certain timeframe, the consumption of fossil-based fuels will be sharply reduced, in favor of a reliance on energy sources free from carbon emissions. This example is inspired by the Swedish excise on motor fuels. The Commission classified this tax as a case of compatible aid, to be subjected to periodic monitoring, review, and control. Although this scheme is helping Sweden achieve a green transition in the transport sector, its effectiveness in environmental protection has been insufficient to relieve it from the State aid control system.[253] Consequently, environmental taxes of this kind may become subject to the State aid control system – even though such a legal (EU law) impact would seem to contradict established policy goals, given the urgent call to action against climate change and other environmental concerns.

Box 2: Example of State aid measure – inspired in the Swedish excise on motor fuels

[253] See the following cases: N.112/2004, Sweden, *Tax Exemptions for Biofuels*, OJ C 207 of 30 August 2006; SA.35414 (2012/N) Sweden, Modification to the Swedish tax exemption on biofuels for low-blending, OJ C 122 of 27 April 2013, pp.1-6. SA.43301 (2015/N), Sweden, *Tax exemptions and tax reductions for liquid biofuels*, OJ C 41 1 July 2016, pp.1-8; SA.48069 (2017/N), Sweden, *Tax reductions for pure and high-blended liquid biofuels,* OJ C380 10 November 2017, pp.1-6; SA.55695 (2020/N), Sweden, Prolongation of the tax exemptions for pure and high-blended liquid biofuels, OJ C 7 8 January 2021, p. 1; SA.63198 (2021/N) Prolongation of the tax reductions for pure and high blended liquid biofuels in Sweden; SA.102347 (2022/N) Tax reductions for pure and high blended liquid biofuels in Sweden.

2.3. Environmental Effectiveness of the Tax

Environmental taxes are fiscal taxes, but they are not necessarily the most effective instrument for raising revenue. An environmental tax that aims to achieve a specific environmental purpose, and which is designed to have such an effect, may find its revenue-raising capacity decreasing over time as it progressively reaches its aims.

Looking more closely at how environmental taxes can be designed, it becomes evident why they may not be the most effective fiscal instrument.[254] For instance, the tax base, the tax burden, the choice of taxpayers, and the use to which the revenues are put may ensure that the tax is successful at reducing undesired environmental behavior.[255] So, the more the tax changes behavior, the lower the revenue it raises. That is, the environmental effectiveness of the tax rises while its fiscal effectiveness falls. Thus, the *environmental effectiveness* of environmental taxes lies in their ability to reach environmental protection targets within a stipulated timeframe.[256]

Scholars who believe in the environmental effectiveness of taxes stress the importance of designing them with a specific environmental protection purpose in mind.[257] Thus, a genuine environmental tax (i.e., a tax designed to

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[254] Based on the opposite reflection where environmental taxes do not acheiev environmental protection effects. In Soares, C. A. D., (2011), *The Design Features of Environmental Taxes*, pp. 130–137. In Pitrone, F., (2015), "Designing 'Environmental Taxes': Input from the Court of Justice of the European Union."

[255] Depending on percentage of the earmarking the tax could become a fee, for instance, in the case where the total amount of revenues is relocated (earmarked) for the environmental issue.

[256] Based on Määttä K., 2005, *Environmental Taxes – An introduction analysis*, p. 8.

[257] See, in this regard, Muller, A., *et al.*, (2014), "*Decoupling: is there a separate contribution from environmental taxation?*" pp. 343-359. The authors make an economic estimation of the environmental taxation effects on environmental pressures and whether its contribution to such environmental aims requires other tools or is sufficient. The legal and economic study by Faure G., M. and Weishaar E., S., (2014), "*The role of environmental taxation: economics and the law*," pp. 399-421, addresses the efficiency and effectivity effects of environmental taxes to ensure a desired level of environmental protection under a legal and economic view. The doctoral thesis of Pitrone, F., (2014), "*Environmental Taxation: A Legal Perspective"*, pp. 55-59, discusses a perspective change in the law to create a duty to protect the environment instead of ensuring a right to environmental protection. In her thesis, she discusses the use of environmental taxes to ensure this duty, which in my view relates to the environmental effectiveness of taxes as an actual effect. Also, the doctoral thesis of Soares, C. A. D., (2011), "*The Design features of Environmental Taxes*," p. 130, the author defends the necessity of the environmental tax design

be environmentally effective) should have a greater environmental protection effect than a tax for which environmental objectives are incidental. If, for example, the purpose of the tax is to reduce carbon dioxide emissions from a particular sector, it will only achieve said objective by tackling the behavior that causes emissions in that sector. However, if the tax keeps raising revenue and does not change the behavior that results in carbon dioxide emissions, then it is environmentally ineffective. In such a case, the design of the tax is likely illogical when it comes to the connection between the tax's environmental protection purpose and its structure, in terms of the tax base, rates, etc. An environmentally effective tax raises less and less revenue over time, as it progressively reduces emissions in the targeted sector. Its environmental effectiveness increases; its revenue-raising capacity diminishes.

External pressures may change the design of an environmental tax and compromise its effectiveness. The Member States have various environmental taxes in place, although not all of them are effective at providing environmental protection (in whatever sense and level lawmakers may have planned).[258] For instance, the Nordic countries have a tradition of being pioneers in imposing domestic environmental taxes and not finding much of resistance from their taxpayers.[259] However, after the COVID-19 pandemic, the war in Ukraine, and the energy crisis in the EU might change how taxpayers receive an environmental tax imposition. Environmental and energy taxes often burden the most vulnerable individuals of the community. Hence, in crisis times they became the subject of political and social turmoil and a key point in elections – even in the Nordic countries, which have traditionally accepted environmental taxes.[260]

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having "a direct causal linkage between the behavioural change they induce and the fulfilment of an environmental objective."

[258] In Pitrone, F., (2015), "*Designing "Environmental Taxes": Input from the Court of Justice of the European Union*," on pp. 58-64, the author discusses different legal concepts of environmental taxes that establish different aims and effects, including only fiscal effects. Westin discusses environmental taxes that do not necessarily protect the environment but are levied on environmental issues, e.g., emissions. In Westin, R., (1997), "*Environmental Tax Initiatives and Multilateral Trade Agreements: Dangerous and Collisions*," p. 24.

[259] See in Skou Andersen, M., **(**2018), "*The Introduction of Carbon Taxes in Europe*," reflection about the Nordic countries' assumption of how energy and carbon taxes would be viewed across the EU, and what was the actual effects of their imposition.

[260] In Sweden, see article about environmental taxes becoming center of the political debate prior to the elections of 2022 in Fitch Ratings, (2022), "*Sweden's Energy Crisis Response to Take Full Shape After Elections*," published 09 September 2022, last accessed 26 October 2022,

Moreover, the closer we get to 2030, the heavier the pressure on lawmakers to adapt their domestic systems and transitional measures, and the narrower the range of choices available to governments to achieve the targets in time.[261] Environmental taxes may be optimal instruments, relatively speaking: they can be levied quickly and they can deliver results, despite the social and political backlash against them in times of crisis. At the same time, pressures such as war, energy crisis, high inflation, and the like may compromise their environmental effectiveness – if political, social, and economic concerns cause a departure from the original design of such taxes.[262]

From a domestic governmental perspective, other instruments (e.g., command and control, environmental regulations, other market-based instruments) might be more effective than taxes at dealing with a particular environmental issue.[263] However, environmental taxes can be a way to force economic undertakings to internalize the environmental costs their activities generate.[264] This is the polluter-pays principle, a cornerstone of EU environmental law.[265]

For instance, a multidisciplinary study claimed that a polyethylene factory in Stenungsund, Sweden, leaked plastic pellets constantly, despite several regulations designed to ensure that the facility would not pollute the

available at https://www.fitchratings.com/research/sovereigns/swedens-energy-crisis-response-to-take-full-shape-after-elections-09-09-2022.

[261] For instance, the EU Emissions Trading System (ETS) substantially closes the Member States' choices to introduce new policy instruments, such as environmental taxes, to emitters covered by the ETS.

[262] For instance, France's taxpayers' rejection, and political and social pressure it faced with the introduction of a motor fuels tax that became known as the (in)famous yellow vest movement. See, for instance, in Kipfer, S., (2019), "*What colour is your vest? Reflections on the yellow vest movement in France*," pp. 209-231.

[263] In Soares, C. A. D., (2011), "*The Design features of Environmental Taxes*," pp. 16–17. Example of discussion concerning when environmental taxes are the most suitable governmental choice in Dodds, S. H., (2005), "*When Should We Use Taxes to Address Environmental Issues? A Policy Framework and Practical Agenda for Australia*." Examples of studies assessing the effectiveness of market instruments (including environmental taxes) to address specific environmental issues, in Bubna-Litic, K., (2016), *"The use of market-based instruments in protecting South Australia's marine protected areas*," Hymel, M. L., (2016), *"Fighting for water: The role of federal market instruments in addressing water issues in the United States*," among others.

[264] Scholars often call then as Pigouvian taxes given the economic theory (Pigou, A. C., 1920, *The Economics of Welfare*, Macmillan) behind these taxes. See Cottrell, J., and Falcão, T., (2018), "*A Climate of Fairness – Environmental Taxation and Tax Justice in Developing Countries*" p. 35.

[265] In Jans, J.H. & Vedder, H.H.B., **(**2012), "*European environmental law: after Lisbon*," p. 49, and prescribed in Article 191(2) of the TFEU.

environment.[266] Given the negative impact of such spills and the fact that none of the laws in place could stop them, it was thought that using taxation to force the company to internalize the costs of such pollution might lead to some actual changes in its practice.[267] Such changes might occur due to the economic burden imposed by the tax. Moreover, some of the revenues raised by such a tax could be used to reduce the impact of such spills on the environment.[268] Environmental taxes, then, may be able to fill the gap when local, regional, national, EU, or international laws fail to stop pollution.

Another aspect might influence the effectiveness of environmental taxes. Environmental problems are extraterritorial – i.e., they often cross countries' borders and the legal understanding of their territories.[269] They might therefore be seen as irreparably in conflict with taxation, which is inherently limited to a given country's territory and tax jurisdiction. Environmental taxes may thus seem to be an unsuitable means for addressing environmental concerns, since they can only do so in a "sliced-up" manner, according to territory or jurisdiction.[270] The principle of territoriality limits the geographical

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[266] In Karlsson, T., *et al.*, (2018) *"The Unaccountability Case of Plastic Pellets Pollution.*"

[267] I discussed this case in a paper addressing the issue of such spills not being sufficiently avoided by multi-levels laws in Pedroso, J. (2019) "*Could environmental taxes help tackle plastic pellets leakage*," where I proposed a tax imposition to, at least, not allow activities to carry out their businesses without paying societal costs of their environmental damage. Note that depending on the level of the earmarking, the tax might have an effect of a fee, which would still be effective from an environmental protection point of view.

[268] *Ibid idem.*

[269] Rockström, J., *et al* divided the global community environmental problems as "planetary boundaries" in Rockström, J., *et al.,* (2009), "Planetary boundaries: exploring the safe operating space for humanity," last accessed 28 June 2021, available at http://www.ecologyandsociety.org/vol14/iss2/art32/. In this study, twenty-nine researchers involved in the project presented the concept of planetary boundaries "for estimating a safe operating space for humanity with respect to the functioning of the Earth System" and called for action to not transgress nine planetary boundaries that ensure the Earth's operating system. The nine planetary boundaries are (1) climate change, (2) ocean acidification, (3) stratospheric ozone depletion, (4) interference with the global phosphorus and nitrogen cycles, (5) rate of biodiversity loss, (6) global freshwater use, (7) land-system change, (8) aerosol loading, and (9) chemical pollution. See, also, in Chris D. Thomas et al., 2004, *Extinction risk from climate change*, p. 147; and in Bradley J. Cardinale et al., 2012, *Biodiversity loss and its impact on humanity*, pp.59–67. See also in Cooreman, B., (2017), "*Global Environmental Protection Through Trade – A systematic approach to extraterritoriality*," p. 182 describing the extraterritorial effect of the US measure to protect sea turtle species found within US waters that impact third countries.

[270] I discussed this view in Pedroso, J. and Kyrönviita, J.**,** (2020), "*A Pluralistic Approach to the Question How to Balance Different Objectives of Sustainable Development through Environmental Taxes within the Framework of EU State Aid Law*," pp. 370–371.

reach of any given country's environmental taxes.[271] The extraterritoriality of the environment makes for an unavoidable reduction of such taxes' effectiveness for pursuing environmental protection targets, since they do not apply beyond the territory in question.

Furthermore, depending on the country's contribution to the environmental issue, e.g., greenhouse gas emissions that lead to climate change, it could be that levying the environmental tax is even harder. Consider the situation of small countries in territory and/or population where their contribution to climate change is insignificant. In this case, it could be hard to maintain the need of addressing the issue with environmental taxes due to such limitations, including the acceptance of such imposition.[272]

Yet, despite these distinct drawbacks, environmental taxes can reduce the negative effects on the environment of human activities – activities that put great pressure on nature, that have a heavy impact on the environment, and that accordingly compromise our quality of life and our prospects on Earth.[273] Consequently, such taxes are logical instruments for reducing human behaviors that negatively affect the environment, and for incentivizing activities with a light environmental footprint. Moreover, unilateral domestic taxes do not require international cooperation;[274] nor do they necessitate EU legislation, the passage of which can be politically difficult and time-

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[271] See this effect of the territoriality principle to the EU Member States in case C-35/08, *Grundstücksgemeinschaft Busley and Cibrian Fernandez v Finanzamt Stuttgart-Körperschaften,* para. 30, and in Schön, W., (2015), "*Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?*" p. 272.

[272] See, for instance, economic study titled "Understanding the resistance to carbon taxes: Drivers and barriers among the general public and fuel-tax protesters" discussing social and political pressures on the environmental tax imposition in Ewald, J., Sterner, T., and Sterner, E. (2022).

[273] Rockström, J., *et al.,* 2009. Planetary boundaries: exploring the safe operating space for humanity. *Ecology and Society,* 14(2), last accessed 28 June 2021, available at http://www.ecologyandsociety.org/vol14/iss2/art32/.

[274] As explained in Chapter 1, the UN, the OCED, and the IMF are working to promote global cooperation to establish carbon taxes to tackle both international tax competition and climate change. In See, for instance, Falcão, T., 2021, *A Multilateral Approach to Carbon Taxation.* See, also, United Nations, 2021, *Handbook on Carbon Taxation for Developing Countries,* last accessed 8 December 2022, available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-10/Carbon%20Taxation.pdf; and IMF, 2020, "Mitigating Climate Change – Growth and Distribution-Friendly Strategies", last accessed 28 December 2022, available at https://www.imf.org/en/Topics/climate-change/climate-mitigation.

consuming.[275] Thus, given the lack of environmental taxes imposed by the EU, and the absence of any global coordination of environmental taxation, the national level is where limited and yet relevant changes can be introduced. Furthermore, even if an EU tax were successfully legislated, or countries agreed on an international environmental tax, the implementation of such a tax at the national level would still be critical.[276]

2.4. Environmental Taxes as a Legal Concept of EU Law

In this section, I analyze what makes taxes environmental, based on the EU's legal understanding of the concept. The EU has two laws in place in this area, which understand environmental taxes in partly similar ways. They are found in Commission Regulation 651/2014, which declares certain categories of aid to be compatible with the internal market, in accordance with Article 107 and Article 108 of the Treaty (the General Block Exemption Regulation, or GBER);[277] and in Regulation (EU) No 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts. The GBER classifies such categories of aid as environmental taxes or environmental levies;[278] Regulation 691/2011 classifies them as

[275] For instance, the special legislative procedure that requires the Council's unanimity votes, based on Articles 113 and 115 of the TFEU.
[276] See subchapter Comparative Learning through Policy Diffusion where I also discuss the issue of environmental problems evasion.
[277] Revised and extended until 31 December 2023 by the Commission Regulation 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments.
[278] After the GBER amendment Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance) C/2023/4278, OJ L 167, 30.6.2023, p. 1–90

environmentally related taxes.[279] Table 3 below shows how these terms are conceptualized, and whether they differ.

Table 3: Conceptualization of environmental taxes in EU law

Article 2(119) of the GBER	Article 2(2) of the Regulation (EU) No 691/2011
(…) means a tax or a levy applied on a specific tax base, products or services that have a clear negative effect on the environment or which seeks to charge certain activities, goods or services so that the environmental costs may be included in their price or so that producers and consumers are oriented towards activities which better respect the environment;	(…) a tax whose tax base is a physical unit (or a proxy of a physical unit) of something that has a proven, specific negative impact on the environment, and which is identified in ESA 95 as a tax;

The concept established by Article 2(2) of Regulation (EU) No 691/2011 seems to overlap with the first part of the GBER's approach to the tax base regarding the negative impact on the environment. The GBER provides two other possibilities for environmental taxes (which are not included in the Regulation) that give guidance on the rationale, aim, and effectiveness of environmental taxes at the EU level. However, none of these concepts matter for the interpretation of Article 107(1) in relation to environmental taxes, in the sense that they can avoid breaching the Article simply because the tax incorporates such concepts within its design. The concept of *aid* is determined based on the effects-based approach in Article 107(1) – i.e., the interpretation of the State aid conditions in view of the effects (formal or substantive) of the laws in question.[280] What these taxes are called is irrelevant (as is the way in which the law describes them), because the interpretation of the State aid laws concerns the effects of such taxes.[281]

[279] See input about both types of legal conceptualization in the doctoral research of Soares, C. A. D., (2011), "*The Design Features of Environmental Taxes*."

[280] See discussion in section 2.7. Environmental Taxes Overlapping the Concept of *Aid*.

[281] For instance, eco-taxes (in Pirlot, A., (2017), *Environmental Border Tax Adjustments and International Trade Law: Fostering Environmental Protection*, p. 58.); green taxes (in Garcia, E. G.,

The way in which environmental taxes are designed depends on the agenda that legislators have for them. Which environmental issues, for example, are they designed to tackle? What political and social difficulties do they face? The innumerable possibilities hereof are only relevant to this discussion in connection with the environmental effectiveness of such laws.[282]

However, since environmental taxes are also fiscal tools – i.e., revenue-raising instruments – they naturally have a dual purpose (i.e., budgetary and environmental). Depending on the weight that domestic lawmakers put on the fiscal purpose, the environmental impact of such taxes may be compromised.[283] Stressing the budgetary purpose may reduce the environmental effectiveness of such a tax,[284] even as it efficiently raises funds for welfare and other purposes.[285] What makes taxes *environmental* is their

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and Roch, M. T. S., (2016), "Environment and Taxation: State Intervention from a Theoretical Point of View," pp. 37 and 57); environmentally related taxes (in Milne, J. E., and Andersen, M. S., (2014), *Introduction to environmental taxation concepts and research*, p. 22); Pigouvian taxes (in Cottrell, J., and Falcão, T., (2018), "A Climate of Fairness – Environmental Taxation and Tax Justice in Developing Countries," p. 35); and sustainable taxes (In Van Thiel, S., (2020), "Sustainable Taxes for Sustainable Development," p. 15), among other names and scholars. In Ezcurra V., M., (2017), "The Concept of 'Environmental Tax' in a State Aid Context When a Fiscal Energy Measure Is Concerned," where she discusses the concept of environmental tax as a fiscal energy measure, pp. 12.

[282] The effectiveness or efficient content of environmental taxes is based on the studies, Muller, A, Löfgren, Å., and Sterner, T., (2014), pp. 343-359, Faure G., M. and Weishaar E., S., (2014), *The role of environmental taxation: economics and the law*, pp. 399-421, and Pitrone, F., (2014), *Environmental Taxation: A Legal Perspective*, in pp. 55-59, Pitrone, F., (2015), pp. 58-64, and Määttä, K., (2005), pp. 35-77, referred above.

[283] See input about the relevance to connect environmental taxes to environmental components in the doctoral thesis of Soares D., C. A., (2011), *The Design Features of Environmental Taxes*, pp. 9–27.

[284] Soares D., C. A., (2005), "Environmental Tax: The Weakening of a Powerful Theoretical Concept," p. 27.

[285] See, reflection about the fiscal efficiency of environmental taxes, in Melis, G. & Pitrone, F., (2011), "Coordinating tax strategies at the EU level as a solution to the economic and financial crisis," p. 337, and in Pitrone, F., (2014), F. *Environmental Taxation: A Legal Perspective,* p. 65, Bovenberg L., A., and Gouder H., L. (1996), pp. 985-100, study called "Optimal Environmental Taxation in the Presence of Other Taxes: General-Equilibrium Analyses," where the authors discussed the optimality of environmental taxes in consideration to the other tax levels (tax neutrality), at the time of the study, in 1996. See also a domestic perspective of the Spanish use of environmental taxation to raise revenues for fiscal and social purposes, instead of environmental targets, in Márquez R., J. (2016), "Environmental Taxes and Tax Incentives: The Spanish Model of Intervention," on p. 128, where the author argues the difficulty to increase the environmental efficiency due to an internal financial and social crisis. See also studies providing an economic perspective about the fiscal sustainability in a similar way used in this study as *fiscal efficiency*, used as contextual references in Afonso, A., & Rault, C., (2010), "What do we really know about fiscal sustainability in the EU? A panel data diagnostic", pp. 731-755; and Horne, J., & K. Chand, S., (1991), "Indicators of Fiscal Sustainability", pp. 1-

effectiveness in securing environmental protection, even when they trade off fiscal and social purposes in order to achieve that aim.

Environmental taxes that focus on changing behavior, mentioned in Article 2(119) of the GBER,[286] are likely to be less efficient from a fiscal perspective. This is because their revenue-raising capacity diminishes after a certain period – i.e., once they have succeeded at changing behavior.

For instance, the Swedish excises on motor fuels incentivize consumers to opt for cars that run on sustainable biofuels, as well as to choose other energy products that are low or net-zero carbon emitters. If these excises, together with other measures in place, prove successful in the future, consumers in the decades to come will be driving cars that do not run on fossil fuels. When that goal is achieved, the excises will no longer be collecting any revenue. They are designed to implement the polluter-pays principle reviewed in section 2.3.5.[287]

Finally, the conceptualization of environmental taxes in the EU laws mentioned above gives guidance on what design features the environmental tax legislature can have, albeit they do not directly avoid breaching Article 107(1).[288] In the following section, I discuss the legal basis for a possible environmental tax at the EU level.

23; C. Tanner, E, (2013), "Fiscal Sustainability: A 21st Century Guide for the Perplexed," pp. 1-49; Dimitrova, A., *et al.,* (2013), "Literature Review on Fundamental Concepts and Definitions, Objectives and Policy Goals as well as Instruments Relevant for Socio-Ecological Transition," p. 15-18. See, also in Dresner, S. (2008), *The Principles of Sustainability*, p. 71.

[286] "(…) 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."

[287] Prescribed in Article 191(2) of the TFEU. See input in this regard in Andersen S., M. (2016), "Reflections on the Scandinavia Model: Some Insights into Energy-related Taxes in Denmark and Sweden," pp. 99-101, reflection about environmental taxes levied since 1991 in Denmark, Finland, and Sweden. He discusses these countries imposition of energy tax, carbon tax, and air pollution tax on motor fuels and heating industry, as well as electricity tax on domestic and industry to address the environmental issues of the energy sector.

[288] According to Articles 113, 114(2), and 115 of the TFEU.

2.5. Environmental Rationale of Taxes Consistent with EU Law

Adopting a legal and environmental rationale consistent with EU environmental policy reduces the chances of a State aid intervention. Article 191(1) of the TFEU lays down broad and general environmental protection objectives, as required by Article 11. Therefore, if the purpose of the environmental tax is connected to one of the objectives listed in Article 191(1), then the State aid interpreter is theoretically obliged to integrate that objective into the analysis of that tax.[289] The environmental effectiveness of the tax in a broad sense refers to what is prescribed in Article 191(1); while the question of whether the tax achieves its specific target within the specified timeframe (e.g., net-zero carbon emissions by 2045), refers to its environmental effectiveness in a narrower sense.

The same applies to implementing the polluter-pays principle, the source principle, the prevention principle, or the precautionary principle, all of which are set out in Article 191(2). Generally speaking, implementing these principles through an environmental tax should not breach the State aid law, because they are also *requirements*, as stated in Article 11.[290] Thus, if the environmental taxes enacted by Member States accomplish any of the objectives set out in Article 191(1), or implement the principles of environmental law enunciated in Article 191(2),[291] then to that extent such taxes cannot be breaching the State aid laws.[292] The logic behind this view rests on the simple consistency and coherence of the EU legal system, based on the integration principle stated in Article 11. However, as discussed later in this thesis (in section 7.2. Incompatible Aid), these principles may not ensure the incompatible aid classification when the measure negatively impact

[289] Again, the objectives prescribed in Article 191(1) of the TFEU are: – preserving, protecting and improving the quality of the environment, – protecting human health, – prudent and rational utilisation of natural resources, – promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
[290] In Dhondt, N. (2003) *Integration of environmental protection into other EC policies legal theory and practice: legal theory and practice,* pp. 72–79, in J.H. & Vedder, H.H.B., (2012) *European environmental law: After Lisbon,* p. 23, in Nowag, J., (2016), p. 25, and in Nollkaemper, A. (2002) "Three Conceptions of the Integration Principle in International Environmental Law", pp. 25-26.
[291] *Ibid idem.*
[292] See again section 1.4.2. Article 11: Theoretical avenues explaining this perspective of Article 11.

the environment if EU law is not precise on the prohibition of the environmental issue in question.[293]

For instance, Sweden's excises on motor fuels aim at a 70 percent reduction (relative to 2010 levels) in carbon dioxide emissions in the country's domestic transport sector.[294] Suppose that Sweden reaches this target by 2030, and that it achieves zero net emissions by 2045. In that case, the Swedish excises (and allied instruments) will have proven effective at achieving environmental protection.[295] It is true that Sweden's transport sector only accounts for 0.46 percent of greenhouse gas emissions in the EU;[296] however, each country must pursue a significant decrease in its greenhouse gas emissions domestically.[297] Finally, while Sweden has a higher standard for climate targets than the EU, its measures in this regard are still monitored and controlled by the Commission as compatible aid.[298]

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[293] Briefly, in subchapter 7.2. Incompatible Aid, I discuss the fact that since the EU primary and secondary law does not the development of forbid nuclear power activities, such environmental law principles are not strong enough to enforce such prohibition.

[294] In paragraphs 5 and 6 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.*

[295] According to the economist scholar Andersson, J. J., (2019), *Carbon Taxes and CO2 Emissions: Sweden as a Case Study,* p. 5, "Sweden's geographical location makes it less susceptible to carbon leakage from the transport sector, leaving estimated emission reductions unbiased." Consequently, the environmental effectiveness of the energy and carbon excises, namely carbon emissions reductions, are more accurately controlled and verified. In Andersson's study, he calls environmental efficiency (see, for instance, p. 2) the effect of reducing carbon emissions, which in this thesis corresponds to what I called environmental effectiveness of the tax.

[296] Sweden overall greenhouse gas emissions, i.e., from all sectors, corresponds to approximately 1.4 percent of the EU total emissions in 2019, in p. 2 of the European Parliament Research Service, 2021, *Climate action in Sweden – Latest state of play.* EPRS Climate Action Research and Tracking Service, Member's Research Service, PE 698.764, October 2021, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698764/EPRS_BRI(2021)698764_EN.pdf. As mentioned above, Sweden's transport sector corresponds to one-third of the Swedish emissions. In paragraph 6 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.* Thus, the Swedish transport sector corresponds to approximately 0.46 percent of the EU emissions.

[297] The Paris Agreement recognizes in its Preambles that domestic actions and multilevel engagement are critical elements in the combat of climate change.

[298] In paragraphs 5 and 6 of the Commission State aid decision S.A. 55695, Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels.* Sweden uses as reference 2010 levels, while the EU uses the 1990 levels. The EU lifted from 40 to 55 percent reduction on carbon dioxide emissions based on 1990 levels. In section 2.1.1, Increasing the EU's climate ambition for 2030 and 2050 of the European Green Deal.

In my view, Member State policies aimed at achieving higher levels of environmental protection than the minimum ones set by the EU will necessarily have a stringent environmental target and tax structure to ensure their effectiveness. For instance, Sweden significantly reduced excises on sustainable biofuels relative to those on fossil fuels, thereby encouraging users to opt for the former and to abstain from the latter.[299]

Minimum standards in the EU are set by EU environmental laws, based on Article 114 and Article 192 of the TFEU.[300] However, the EU may also adopt environmental laws for energy through Article 194, which cites Article 192(2)(c), which in turn cites Article 114.[301] Either way, once the EU enacts an environmental law, the Member States are bound to the minimum standards set therein. However, since EU legislature on the environment is based on ordinary procedure, the Union's environmental laws exclude taxation, because a special legislative procedure is required for the latter.[302] Consequently, the EU's environmental laws do not legally bind the Member States when the latter legislate on similar environmental concerns through taxation.[303]

For instance, a domestic national tax on waste incineration is not legally bound to the EU waste directive.[304] A domestic fiscal measure dealing with waste is outside the binding scope of that EU law, since it is not based on

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[299] See, in Swedish, the history of the energy and carbon excises tax burden increase since 2008 until 2021 in Skatteverket, *Historik Skattesatser,* last accessed 31 October 2022, available at https://www.skatteverket.se/download/18.339cd9fe17d1714c0771557/1638268882897/skattesatser%20bränsle%20t.o.m.%202021-12-31.pdf. Compare the history of previous years with their tax burden in 2022 in Skatteverket, *Excise duty on fuel,* last accessed 31 October 2022, available at https://www.skatteverket.se/servicelankar/otherlanguages/inenglish/businessesandemployers/startingandrunningaswedishbusiness/payingtaxesbusinesses/energytax/excisedutyonfuel.4.676f4884175c97df4192d1e.html.

[300] Based on Article 4(2)(e) of the TFEU, the EU shares competence with the Member States on matters concerning the environment.

[301] Based on Article 4(2)(i) of the TFEU, the EU shares competence with the Member States on matters concerning energy.

[302] Based on Article 4(2)(a) of the TFEU, the EU shares competence with the Member States on matters concerning the internal market, and taxes fall within the internal market scope. See the fiscal legislative procedure in Articles 113, 114(2), and 115 of the TFEU. I discuss this again in the following subchapter 2.6.

[303] They will influence, however, the State aid analysis. See subchapter 7.2 7.2. Incompatible Aid.

[304] Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing other Directives, OJ L 312, 22.11.2008, p. 3–30.

Article 113 or Article 115, but instead on Article 114. However, domestic lawmakers can ensure that their environmental tax does not breach the State aid laws, by complying with the minimum EU standards on the subject legislated (e.g., waste). In such a case, namely, the role of the interpreter of the State aid laws is to integrate environmental protection values into the interpretation of the legislation, and to ensure the coherency and consistency of the EU's legal system.

In the *ANGED* cases, for instance, Spain's environmental tax on large retail establishments was essentially based on the view that "prevention is better than cure."[305] The Court of Justice accepted this objective as not breaching Article 107(1).[306] The Spanish environmental prevention objective also aligns with Article 191(2),[307] even though the Court of Justice did not mention it as a legal basis in the *ANGED* rulings. Despite this, the Court of Justice explained the effects of Article 191(2) as follows in another case.

Article 191(2) sets out the aim of EU policy in this area: to achieve a high level of environmental protection, among other things by applying the polluter-pays principle (hereafter: PPP). The Court explained that Article 191(2) defines the EU's general environmental objectives, while Article 192 establishes the conditions for EU institutions to take action to attain these aims.[308] As a consequence, the Court stated, Article 191(2) cannot be used by individuals to question the validity of a national law when there are secondary EU laws enacted through Article 192 that deal with the environmental aspects of the national law in question.[309] The Court made clear that Article 191(2) is not a provision that competent environmental authorities can use in the absence of a national law mandating preventive and remedial measures.[310] In light of the above Court's view concerning the application of Article 191(2)

[305] In de Sadeleer, N., 2018, Preliminary ruling on the compatibility of taxation of superstores with the right to freedom of establishment and State aid law: Case C-233/16, ANGED, p. 344.
[306] See in case C-233/16, *ANGED,* paras. 52-53; in cases C-234/16 and C-235/16, *ANGED*, paras. 45-46; and in cases C-236/16 and C-237/16, *ANGED*, paras. 40-41.
[307] Article 191(2) of the TFEU says: Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
[308] In case C-534/13, *Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Ministero della Salute, Ispra — Istituto Superiore per la Protezione e la Ricerca Ambientale v Fipa Group Srl, and others*, para. 39.
[309] *Ibid,* para. 40.
[310] *Ibid,* para. 41.

of the TFEU, I expect that this Article applies also in respect of other principles mentioned therein (not only the PPP).[311]

In the *Ministero dell'Ambiente e della Tutela del Territorio e del Mare* case, the Court discussed that Article 191(2) of the TFEU applies to EU legislative actions based on Article 192 of the TFEU. Following a similar logic of that ruling but now to negative integration of EU law, Article 191(2) should be also relevant for the EU actions by the Commission, EU courts, and national courts that enforces the TFEU rules, such as on State aid (Article 107(1)). This view was intrinsic to the *ANGED* ruling discussed above, which was in line with the preventive principle also prescribed in Article 191(2).

2.6. EU Environmental Taxes: Legislative Possibilities and EU Aims

In this section, I analyze some possibilities in the TFEU that might be used to legislate on environmental taxes at the EU level. The idea is to throw light on the logic of such taxes from the standpoint of EU law. EU legislators meet with considerable legal and political difficulties when seeking to legislate such taxes at the EU level. This helps to explain the lack of such taxes at that level.

Another aspect of this issue is the fact that when the EU fails to legislate on an environmental tax (because unanimity proves not to be possible, for instance), the interplay between the EU and the Member States is affected. This is because such matters can only be regulated at the EU level through the enforcement of the TFEU rules. This is particularly relevant considering that, the closer we get to the years which have been set for achieving the EU's climate targets, the greater the impact that domestic environmental taxes may have on conditions of competition. Lawmakers in the Member States may find themselves in a position where they need to get results quickly (e.g., during the seven years that remain before we reach 2030). Taxes may, in fact, be just the instrument needed to achieve quick results. By discussing the EU's possibilities of legislating on environmental taxes, the rationale of such laws

[311] Recalling them: the source principle, the prevention principle, or the precautionary principle.

becomes straightforward. Also, this discussion highlights some issues in connection with the EU's internal market that domestic lawmakers may fail to consider when drawing up legislation for an environmental tax, but which may mean that their tax is found to be in breach of TFEU rules.

The EU has only passed one law that may result in an environmental tax at the Union level – if the Council approves the Commission's proposed revision of the well-known Energy Tax Directive (ETD).[312] In its proposal, the Commission recognizes what scholars have long maintained:[313] that "the ETD is not in line with EU climate and energy objectives," and that it "de facto favors fossil fuels."[314]Moreover, the Commission states, "the ETD is no longer contributing to the proper functioning of the internal markets the minimum tax rates have lost their converging effect on national tax rates."[315] The Commission suggests switching from the logic of taxing energy sources according to their volume to taxing them according to their environmental performance, thereby ending any incentive to use fossil fuels.[316] If the Council approves these changes, the revised ETD (RETD) will become the first environmental tax at the EU level.[317] However, current ETD harmonization does not prevent the Member States from levying energy taxes that are also State aid,[318] as in the case of the Swedish excises on energy and carbon, which are classified as compatible aid.

If the Council approves the Commission's proposal to change the ETD, energy and carbon excises may no longer be classified as State aid, despite the fact that they impose different rates on different types of fuel. I will return to this question after examining the Commission's proposal. If the RETD is

312 Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), COM/2021/563 final.
313 In Pitrone, F., (2015), "Designing "Environmental Taxes": Input from the Court of Justice of the European Union," pp.61-62. About a presumed indirect connection of the ETD to environmental protection, see Ezcurra, M. V., (2013), "State Aids and Energy Taxes: Towards a Coherent Reference Framework," p. 342.
314 Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in section 1.
315 *Ibid idem.*
316 *Ibid idem.*
317 *Ibid idem.* See in the 'environmental performance' the explanation of the proposed ETD rationale about the rates.
318 See, for instance, recital 32 and Article 26(2) of the ETD.

adopted, fuels will be categorized and ranked according to their *environmental performance*:[319]

> *[C]onventional fossil fuels, such as gas oil and petrol will be taxed at the highest rate. The next category of rates applies to fuels that are fossil based but are less harmful and still have some potential to contribute to decarbonisation in the short and medium term. 2/3 of the reference rate applies for example to natural gas, LPG and hydrogen of fossil origin for a transitional period of 10 years. Thereafter this rate will increase to the full reference rate. The next category is that of sustainable but not advanced biofuels. To reflect their contribution to decarbonisation, ½ of the reference rate applies. The lowest rate applies to electricity, regardless of its use, advanced biofuels, bioliquids, biogases and hydrogen of renewable origin. The rate applicable to this group is set significantly below the reference rate as electricity and these fuels can drive the EU's clean energy transition towards achieving the objectives of the European Green Deal and ultimately climate neutrality by 2050.*[320]

If the proposal is adopted, there will be a significantly lower tax rate on fuels that are critical for achieving the desired green transition. The fuels favored by the RETD are electricity, bioliquids, biogases, advanced biofuels, and renewable hydrogen.[321] Consequently, the Member States' implementation of the RETD will reduce their risk of granting State aid the fuels just mentioned because the RETD grants the incentive effect.[322] Not the Member States. This means the *aid* will not be classifiable as *State aid*, because the EU granted it.[323]

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[319] In Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in section 1, where it also explains the following about *environmental performance.* "(…) The 'environmental performance' has been defined in relation to other EU policies under the European Green Deal and in particular to the rest of the proposals in the "Fit for 55" package."

[320] Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in section 1.

[321] Based on Article 113 of the TFEU.

[322] The RETD would be granting Union aid. See discussion in this regard in section Member State aid or Union aid?

[323] In section Member State aid or Union aid?, I discuss the difference between State aid and Union aid. See in this regard Englisch, J., (2013), "EU State Aid Rules Applied to Indirect Tax Measures," p. 15.

Passing the RETD would appear to ensure that a critical aspect of the EU's legal system is consistent with the climate and environmental objectives of the Union. However, the political difficulty of gaining the needed approval is considerable. This is not the first time, namely, that a revision of the ETD has been proposed. In 2011, the Commission proposed a revision to correct for the ETD's lack of alignment with EU policy on climate change.[324] The Council was unable, however, to reach the unanimity required to approve the changes.[325]

In 2021, the Commission declared revision of the ETD to be one of the priorities of the European Green Deal. The inconsistency of the current ETD with EU targets for phasing out fossil fuels and their subsidies needed to be corrected.[326] Once again, however, approval will require a special legislative procedure in the Council, in accordance with Article 113. If unanimity is not achieved, the REDT will have to be withdrawn again. In the latter case, the State aid field will remain the EU legal regime for regulating taxes on motor fuels in accordance with a rationale that is more consistent with the EU's climate and environmental aims than is the outdated ETD.[327] Sweden's energy and carbon excises are an example of when a Member State adopted a more stringent approach than the ETD, and ended up being subject to the State aid control system. In this sense, as Hacher points out, the State aid regime has been important for ensuring "good aid" across the EU in pursuit of the Union's environmental and climate targets – such as phasing out fossil fuels[328] – despite the opposite impact of the ETD in this area.[329] The special legislative procedure required to approve the RETD is set out in Article 113, which regulates EU legislation on indirect taxes:

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[324] Commission, Smarter taxation for the EU: Proposal for a revision of the Energy Tax Directive, COM(2011) 168 final.

[325] The special legislative procedure of Article 113 of the TFEU.

[326] In sections 2.1.5, p. 10, and 2.2.2, p. 18 of the European Green Deal, and the Commission Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in 2021.

[327] According to the Commission, and scholars criticizing the ETD, for instance, Pitrone, F., (2015), "Designing "Environmental Taxes": Input from the Court of Justice of the European Union," pp.61-62. For a presumed indirect connection of the ETD to environmental protection, see Ezcurra, M. V., (2013), "State Aids and Energy Taxes: Towards a Coherent Reference Framework," p. 342.

[328] Hancher, L., (2017), "Editorial: Can the Treaty State Aid Regime Come to the Rescue of Climate Change?", p. 1.

[329] See also input in this regard in Kymenvaara, S., (2020), "Towards Low-Emission Transport: Biofuels' Tax Incentives and State Aid for Climate Change Mitigation."

> *[T]o the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.*[330]

The RETD, if approved, will impact the functioning of the internal market, in the sense that it will correct the long established praxis of providing aid to fossil fuels, which is an anticompetitive praxis in relation to other fuels.[331] Furthermore, it will tilt the functioning of the internal market in such a way as to favor energy products in the transport sector that are net-zero carbon emitters.

Article 114(1) establishes a legislative procedure for harmonizing laws at the EU level, so as to achieve the aims of Article 26. Article 26(2) establishes a single market without internal frontiers – meaning that laws enacted through Article 114 set a standard across the EU for the functioning of the internal market. Article 114 establishes the legislative procedure for enacting environmental laws at the EU level, but not for imposing environmental taxes at that level. Its second paragraph excludes fiscal measures, namely.[332]

Article 115 establishes that the EU can legislate direct taxes on subjects that "directly affect the establishment or functioning of the internal market." Consequently, legislation for direct taxes at the EU level does not have to consider the impact on competition, unlike legislation for indirect taxes. However, any economic activity development impacts the environment. As a consequence, they should also impact the functioning of the internal market that relies on the environment to provide resources and conditions for those activities. Despite this view, Article 113 and Article 115 do not seem to have any direct environmental protection rationale integrated into their legislative objectives.

Instead, Article 192(2)(a) provides for the possibility of legislating EU fiscal measures for achieving the objectives of environmental protection set out in Article 191.[333] Note that Article 191(1) includes protection of human health

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[330] In Article 113 of the TFEU.

[331] Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in section 1.

[332] In the following section, I explain that environmental taxes are too fiscal measures.

[333] Article 191 of the TFEU says: (1) Union policy on the environment shall contribute to pursuit of the following objective– preserving, protecting and improving the quality of the environment, – protecting human health, – prudent and rational utilisation of natural resources,

as an objective of EU environmental policy. Moreover, Article 194(3) provides for the possibility of legislating EU fiscal measures to achieve the aims of EU energy policy, as well as to protect the environment and human health. The RETD discussed above would be an example of a fiscal energy measure for achieving EU aims in connection with both energy and environmental protection.

The legislative procedure for enacting environmental taxes at the EU level is laid down in Article 113 for indirect taxes, and in Article 115 for direct taxes. When the legislative procedure for enacting environmental taxes is not explicitly carried out in conjunction with Article 192(2)(a) or Article 194(3), the integration of environmental protection into such taxes seems to be implicitly legitimized by Article 11.

Regardless of which article the Council would base its legislation for an environmental tax on, it seems the following would apply: the more the EU tax has an environmental rationale, aim, and effect, the lower the likelihood would be that implementation of such a tax by the Member States would activate the provisions of Article 107(1) on State aid. This conclusion is based on the fact that, in such a case, the environmental rationale, aims, and desired effects of the tax would be established by the EU legislator, not the domestic one.[334] Environmental taxes enacted by the EU would thus serve to reduce legal uncertainty on the part of the Member States. If this fact becomes widely known, it may be easier to reach the requisite unanimity.

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. (2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union. (3) In preparing its policy on the environment, the Union shall take account of: – available scientific and technical data, – environmental conditions in the various regions of the Union, – the potential benefits and costs of action or lack of action, – the economic and social development of the Union as a whole and the balanced development of its regions. (4) Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organizations (…).

[334] I discuss this matter in more detail in chapter 4, subchapter 3.3.

2.7. Environmental Taxes Overlapping the Concept of *Aid*

Article 107(1) of the TFEU contains a legal conceptualization of what *aid* means. This concept has been developed significantly through EU case law since 1961, with the *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* ruling.[335] The broad understanding of *aid,* by means of Article 107(1) of the TFEU, is the reason why *environmental taxes* are potential State aid and may overlap with the notion of *aid.* In this section, I discuss *how* and *why environmental taxes* overlap with the notion of *aid.*

This discussion is relevant for showing how the design of a domestic environmental tax can lead to a breach of Article 107(1) of the TFEU. The discussion here should help lawmakers to become more aware and conscious of their environmental taxes' effects on EU law (i.e., as forbidden State aid), and of the domestic tax authorities' State aid granted through individual tax decisions on companies. In this sense, *aid* can be granted on an individual basis: e.g., through a tax authority decision on the income taxation of a company, or in a scheme, e.g., through one or several environmental tax laws that do not address undertakings individually.[336]

Article 107(1) refers to "*any aid […] in any form whatsoever.*" The wording of the Article is far-reaching by meaning all sorts of State measures that meet the cumulative conditions of the Article 107(1). In this sense, the aid measure has to offer some sort of economic help – to offer public money in a selective way potentially affecting *competition and trade* within the EU. Consequently,

[335] In case C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, p. 19, that establishes the following view. "The Treaty contains no express definition of the concept of subsidy or aid referred to under Article 4 (c). A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. *The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.*" *Emphasis added.*

[336] See, in this regard, for instance, Article 2(14) and (15) of the GBER, or in section 2.3(18) and 2.4(19)(1) of the Commission Guidelines on State aid for climate, environmental protection and energy 2022.

how the *aid* might take form is not important. What does matter is that it is classified *prima facie* as incompatible with the internal market. The conclusion about the State aid incompatibility is based on Article 107(2) or Article 107(3).

Environmental taxes and any other type of taxes are potentially classified as State aid because of their common feature of providing for different tax levels: advantages for (or burdens on) different taxpayers and tax objects that can be hiding an aiding scheme. Advocate General Tizzano criticized this view in an opinion on case C-53/00, *Ferring SA versus Agence centrale des organismes de sécurité sociale (ACOSS)*:

> *The difficulty and subtlety of the question arise from the fact that any new tax imposed on a given category of economic operators may be viewed in theory as an advantage conferred upon all operators who are not subject to that tax but are in more or less close competition with the first category. To give just a few examples, a tax that affects beer producers could be regarded as indirect aid to wine producers; a tax imposed on road hauliers could be seen as aid to rail freight undertakings; a tax on cinema operators could imply aid to theatres, and so on.*
>
> *A broad interpretation of the concept of aid, one that encompasses the levying of a tax on third parties whose competitive relationship with the presumed beneficiaries of the aid is no more than tenuous, risks transgressing the letter and spirit of the law. Indeed, such an interpretation would also include as aid indirect advantages that are difficult to ascertain and arise from different tax regimes being applied to economic activities that are only partly comparable, rather than from State intervention designed to alter significantly the conditions of competition. That does not take into account the fact - which would be of no little consequence - that such an interpretation would entail a risk of unjustified interference in the fiscal policy of Member States by means of the improper use of Community instruments designed for quite different purposes.*[337]

The Court addressed this issue in its ruling, clarifying that the differentiated tax treatment is general – i.e., it "is justified by reasons relating to the logic of

[337] In the AG Opinion to case C-53/00, *Ferring SA versus Agence centrale des organismes de sécurité sociale (ACOSS)*, paras. 36-37.

the system."[338] In practical terms, this logic can only be verified through an analysis of State aid, which is often spurred by the Commission or by national courts. To be clear, the differentiated tax treatment is a general feature of tax law that can be a case of State aid if, under the logic of the tax, it is not objectively justified[339] or is discriminatory (among other circumstances discussed in Chapter 5).[340]

It is the rationale, design features, and substantive effects of taxes – and more precisely of environmental taxes – that determine whether said taxes are to be regarded as *aid* or as general. Historically, first taxes, and then environmental taxes, have increasingly been considered to involve forbidden State aid. The discussion about taxes being *aid* or being general becomes more critical as it blurs legal certainty about the taxes paid domestically, as well as about the possible economic and legal consequences of unlawful State aid. I show this with the timeline below.

In 1961, the Court of Justice "opened the door" for scrutiny of other types of State aid than subsidies.[341] In 1974, thirteen years after the Court of Justice issued its first ruling on a broader concept of aid than subsidies, the first State aid case concerning taxation reached the level of the EU courts. In *Italy versus Commission,* Italy claimed that taxation did not fall within the purview of the State aid control system, because it was in "an area reserved for the sovereignty of Member States," and "provisions of such nature do not fall within the ambit of Article [107]"[342] Italy's argument was simply that taxation

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[338] In case C-53/00, *Ferring SA versus Agence centrale des organismes de sécurité sociale (ACOSS*), para. 17.

[339] For example, the discussion in the preliminary ruling C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* about the progressivity of turnover taxes on telecommunication activities in Hungary been State aid or a freedom of establishment breach, where the Court discuss the progressivity of turn over taxes under an EU law point of view, and the Member States freedom to exercise their tax jurisdiction due to the state of harmonization of the EU tax law, in para. 50.

[340] In case C-562/19 P, *Commission v Poland and Hungary*, para. 28; and case C-374/17, *Finanzamt B v A-Brauerei, Bundesministerium der Finanzen*, para. 35, and other case law referred in the late case.

[341] In case C-30/59, *De Gezamenlijke in Limbur v. High Authority of the European Coal and Steel Community*, p. 19, where the Court of Justice stated what follows: "The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."

[342] In case C-173/73, *Italy v Commission,* p. 713, para. 4

could not be classified as *aid*, due to the tax sovereignty of the Member States. However, the Court of Justice once again enunciated the concept of *aid*, benchmarking what scholars call the effect principle or the effects-based approach set out in Article 107(1).[343] This refers to the prohibition in Article 107(1) of actions by the Member States that have the effects (formal and substantive) described in said article. In the Court's words:

> *The aim of Article [107] is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects. Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article [107].*[344]

This ruling made clear that the conceptualization of State measures as *State aid* is conditioned on these actions' meeting all of the conditions set out in Article 107(1). Clearly, moreover, the words quoted above from the *Italy versus Commission* ruling did not allow for the integration of environmental protection into State aid conditions at the time it was issued (in 1974). The Court stated, namely, that Article 107(1) does not differentiate between State measures according to their causes and aims (e.g., environmental protection), but instead according to their effects (the effects-based approach of Article 107(1)).

The *Italy versus Commission* ruling was issued twelve years prior to the European Single Act (ESA) of 1986, which integrated environmental protection into the EU Treaty for the first time.[345] Consequently, the interpretation of the State aid rule in relation to environmental protection was legally impossible at the time of the ruling. The Treaty did not mandate any integration of environmental protection at that time, which also shows that, historically,

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[343] Aldestam, M. (2005), p. 41, in Cisotta, R. (2016), "Criterion of Selectivity," p. 137. I use only effects-based approach and not the effect principle as called by Aldestam.
[344] In case C-173/73, *Italy v Commission,* p. 718, para.13.
[345] The European Single Act inserted Article 130r to the Treaty, established that "*environmental protection requirements shall be a component of the Community's other policies."*

Article 107(1) was only based on economic values. The progressively stronger demand since the ESA was adopted for the integration of environmental protection has affected the interpretation of the State aid rule.

State measures aimed at environmental protection only became part of the State aid policy through the first Commission Guidelines on the subject (hereafter: the 1994 Guidelines).[346] The 1994 Guidelines classified environmental measures as State aid compatible with the internal market when they meet certain legal requirements. The Commission stated in the 1994 Guidelines that the goal was "to strike a balance between the requirements of competition and environment policy, given the widespread use of State aid in the latter policy."[347] Environmental aid would be considered justifiable – i.e., as compatible with the internal market – when the environmental benefits of a measure outweigh its harmful effects on competition.[348] The 1994 Guidelines also expressed the Commission's desire that the Member States explore the use of taxes to tackle environmental issues and to achieve the Union's environmental objectives.[349] Subsequent Commission Guidelines on the subject of State aid for environmental protection have also related to energy; and the latest version includes climate besides.[350]

The year 1994 marks the beginning of a new phase. The Member States started claiming that environmental taxes should not classified as *aid*. After the ESA and the 1994 Guidelines, the Member States and the EU institutions started "arm wrestling" about environmental taxes and the concept of *aid*.

In 2001, the Court of Justice issued a preliminary ruling in answer to two questions from Austria's national court.[351] The first question was whether the energy tax regime in Austria, which rebated taxes on natural gas and electricity to manufacturing undertakings, was to be considered State aid.[352] The second question was whether the energy tax regime would still be classified as State

[346] Commission Guidelines on State aid for environmental protection, OJ C 72 of 10 March 1994, p. 3.
[347] In Section 1.6.
[348] In Section 1.6.
[349] In subsection 1.2 and section 2 of the 1994 Guidelines.
[350] See, for instance, subsection 2.3 of the 1994 Guidelines. The current Guidelines are called Commission Guidelines on State aid for climate, environmental protection and energy 2022.
[351] In case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, para 13.
[352] *Ibid idem*.

aid if it were applied to all undertakings regardless of their activity.[353] Before answering the two questions, the Court of Justice made the following observation:

> *"It should be borne in mind that the basic prohibition of State aid is neither absolute nor unconditional. Thus, Article [107](3) of the Treaty confers on the Commission a wide discretion to declare certain aid compatible with the common market by way of derogation from the general prohibition laid down in Article [107](1) of the Treaty.*
>
> *Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3).*
>
> *It follows from the foregoing considerations that the answer which the Court decides to give to the national court regarding the question whether the measures in question may constitute State aid cannot prejudge the issue of their compatibility with the Treaty."*[354]

In the above paragraphs from the *Adria-Wien Pipelines GmbH* ruling, the Court of Justice could be understood as saying that energy taxes are inherently State aid by virtue of Article 107(1), but that they still might be compatible with the internal market.[355] However, the Court answered the second question to the effect that, in the absence of a *selective* impact – that is, an economic benefit to certain undertakings only – the scheme could not be regarded as State aid.[356] Later in that ruling (the Court answered the first question after the second), the Court made a statement which has given rise to another debate concerning the concept of *aid*. The Court stated that, "although objective, the criterion applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid."[357] Here, scholars have discussed

[353] *Ibid idem*.
[354] *Ibid,* paras. 30–32.
[355] *Ibid,* para. 23.
[356] *Ibid,* paras. 33–36.
[357] *Ibid,* para. 53.

whether the Court took another approach (known as the objective-based approach) to the conceptualization of *aid* – an approach different from the effects-based approach taken in *Italy versus Commission*.[358] According to the objective-based approach, the objective of such measures suffices to relieve them from being classified as State aid under Article 107(1). In many cases after the *Adria-Wien Pipelines GmbH* ruling, the Court has stressed the effects-based approach.[359]

The *Adria-Wien Pipelines GmbH* case was about three laws: one introducing a tax on electricity; one introducing a tax on natural gas; and one introducing a rebate on energy taxes.[360] The fact that the energy tax regime was established through three different laws did not matter with regard to the concept of *aid*, due to the wording ("*in any form whatsoever*") in Article 107(1).

In 2014, when the Commission requested that the Member States submit information about their domestic *tax rulings*[361] in relation to multinational companies – so that it could verify the effect of these laws in terms of State

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[358] See, for instance, in Bartosch, A., (2010), "Is there a need for a rule of reason in European State aid law? Or how to arrive at a coherent concept of selectivity?", p. 732. Also, in Cisotta, R. (2016), "Criterion of Selectivity", p. 137.

[359] In case C-487/06 P, *British Aggregates Association v Commission and U.K.*, paras. 85 and 89; and in case C-279/08 P, *Commission v Netherlands*, para. 75, in case C-106/09 P and C-107/09 P, *Commission v Gibraltar*, para. 54, in joined cases C-20/15 and C-21/15, *Commission v World Duty-Free Group S.A. and others*, para. 74, among other cases.

[360] In case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, para. 3.

[361] Non-tax lawyers might find this term (*tax rulings*) confusing. They are used by tax lawyers to refer to the administration tax decisions that are legally binding to the company addressed. For instance, in the executive summary of the "'Tax Rulings' in the EU Member States" (2015) of the European Parliament, p. 6, clarifies the following view about this term." The term 'tax rulings' is used as collective term for all kinds of tax 'arrangements'. A tax ruling may occur in the form of an advance tax ruling, an advance pricing agreement or any other 'tax arrangement'. There are formal and informal 'tax rulings'. An 'advance tax ruling' is a statement provided by the tax authorities, or an independent council, regarding the tax treatment of a taxpayer with respect to his future transactions and on which he is – to a certain extent – entitled to rely. An 'advance pricing agreement' determines (in accordance with the law and the OECD Guidelines) in advance if the transfer price between two related parties within a group is at arm's length compared to the transfer price with an unrelated party. In practice, many other 'tax arrangements' are made – without any framework – between the taxpayer and the local tax inspector before a specific transaction takes place or before filing the tax return, after a tax mediation process, in court, within a horizontal monitoring process, or, within the context of a tax audit. It is clear that it is the European Commission's intention to cover the administrative practice of advance tax rulings, advance pricing agreements and all 'other advance tax arrangements', even within the context of a tax audit. The crucial question arises if Member States will qualify their country-specific 'statements', 'opinions', 'decisions', 'clearances', etc. as a 'tax ruling' in the sense of this EC proposal on automatic exchange of information."

aid – the Member States received such request with surprise.[362] This State aid investigation benchmarked a "new era" of aid in the form of domestic tax rulings. In the *Luxembourg* (*Fiat) versus Commission* case, the General Court stated once again that the form of the aid is irrelevant, because the concept of *aid* is defined by the effects of the action in question.[363] Thus, it should not be a surprise that the concept of aid evolves over time, concomitantly with changes in corporate practices, societal needs, and many other factors that directly affect the EU as a community. Where domestic tax rulings are concerned, multinational corporations have been consistently made arrangements (of progressively greater sophistication) to evade or to avoid taxes.[364] Thus, targeting the Member States' tax rulings in this area as State aid can be seen as a natural development of the State aid control system, the aim of which is to prevent anticompetitive and protectionist practices.

Two years after this request and the issuance of the first decisions about such tax rulings being State aid, the Commission issued the *Notice on the notion of State aid as referred to in Article 107(1)*,[365] which clarified certain aspects of its interpretation of Article 107(1). The Notice also clarified the Commission's approach to targeting domestic tax rulings in its State aid investigations. The Commission expanded the notion (or "concept") of *aid* when it concluded tax rulings to be incompatible aid that accepted multinationals' intra-group transactions with values not practiced on the open market that lowered their tax base, and consequently their overall income tax. Since the Commission's interpretation of the State aid conditions regarding each domestic tax ruling defined those measures as State aid, it is comprehensible that the Commission's decisions on State aid have drawn sharp criticism from lawyers

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362 See in Commission, Press release: "State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)," Brussels, 11 June 2014, last accessed 15 November 2022, available at http://europa.eu/rapid/press-release_IP-14-663_en.htm.

363 In case T-755/15 and T-759/15, *Luxembourg (Fiat) v Commission,* para. 182, where the General Court repeated the Court of Justice case law on the subject, as the following statement: "It must be borne in mind that the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary (…). It follows from this that Article 107 TFEU prohibits any aid measure, irrespective of its form or the legislative means used to grant such aid (…)."

364 Wolters Kluwer Expert Insights, (2020), "*Tax Avoidance Is Legal, Tax Evasion Is Criminal*," last accessed 22 February 2023, available at https://www.wolterskluwer.com/en/expert-insights/tax-avoidance-is-legal-tax-evasion-is-criminal.

365 OJ C 262 19 July 2016, pp. 1–50.

and legal scholars.[366] Since such tax rulings concerned direct taxes (corporate income taxation) – a matter not harmonized through Article 114(2) or Article 115 – the Member States were found to have sole tax discretion unless they clearly breached Article 107(1).[367] The Court of Justice ruling in the case *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission* made clear that domestic tax rulings could classify as State aid in other cases:

> *"Such a finding does not, however, rule out the possibility that direct tax measures, such as tax rulings granted by the Member States, may be classified as State aid provided that all the conditions for the application of Article 107(1) TFEU recalled in paragraph 66 of the present judgment have been fulfilled.*
>
> *After all, as has been recalled in paragraph 65 of the present judgment, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid."*[368]

Again, a measure is classified as State aid if it meets the conditions set out in Article 107(1) in terms of its effects, whether *de jure* or *de facto*. Moreover, the Notice clarifies the Commission's leading role in developing new notions of what is to be classified as aid[369] through the monitoring and control system established by Article 108.[370]

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366 Gormsen, L. L., (2019), *European State aid and Tax Rulings*, p. 78, criticizes the Commission as being aggressive in its position about the interpretation of arm's length principle in its State aid decisions concerning administrative tax rulings. The scholarly commotion concerning the State aid in the form of administrative tax rulings is by no means over, as there is still much debate going on, while we all wait until one of the Court of Justice delivers its rulings on *Luxembourg (Fiat) v Commission* appeal, the first case to be reviewed by the Court. See, also Sheppard, L. A., (2015), "EU Amazon case: Is transfer pricing really the issue?" criticizing the Commission's similar approach in the Amazon case. See, also, Monsenego, J., (2018), *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base.* Kyriazis, D., (2019), "Why the EU Commission won't appeal the Starbucks judgment," last accessed 17 October 2022, available at https://mnetax.com/why-the-eu-commission-wont-appeal-the-starbucks-judgment-37043 discuss the predictability of the Commission approach–agenda.

367 In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 94.

368 *Ibid,* paras. 119-120.

369 See in special paragraph 3 of the Notice on the notion of State aid.

370 See, for instance, scholarly criticism about the Commission subtle approach to tackle harmful competition of tax rulings through the State aid control system in Gormsen, L.L., & Mifsud-Bonnici, C., (2017), "Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax."

Merola and Caliento discuss the notion of aid from the perspective of the development of the EU case law on the subject that challenged the Commission's State aid decisions or gave national courts guidance on the matter. They point out that the Court of Justice has set aside several judgments of the General Court that upheld the Commission's development of the notion of aid; and overall, the notion of aid has been both stretched and shrunk over time.[371] However, regarding the notion of aid for fiscal matters, they conclude as follows:

> *"State aid policy is today a tool to create convergence between Member States and closer interaction between them and the EU institutions with a view to fostering positive integration, for instance by indirectly harmonizing the industrial and fiscal policies in the EU, as well as budgetary discipline of Member States.*
>
> *Unavoidably, this evolution creates strains around the notion of aid, which is at the same time the gateway for making the new policy approach effective and the element which Member States attempt to leverage to avoid interference with their choices of economic and industrial policies. Such evolution of State aid control has triggered criticism of the Commission from both outside and inside the EU: inside, Member States perceive State aid law as intrusive, in particular when it touches upon fields traditionally reserved to State sovereignty, such as taxation(…)".*[372]

This conclusion about the concept of aid development concerning tax measures shows critical and sensitive aspects of the interplay between the EU and the Member States within the State aid control system. For instance, as already explained in Chapter 1, the Council has a hard time reaching the unanimity required to pass environmental taxes. This ultimately leaves the EU with only one legal alternative: the enforcement of the TFEU's rules for tackling the harmful tax competition that environmental taxes may create. Such enforcement, known as the negative integration of EU law, is where the Commission can develop new notions of what should be classified as aid to ensure that the Member States are not in breach of Article 107(1). Finally, the development of the concept of aid also affects environmental taxes, in the

[371] In Merola, M., and Caliento, F., (2020), "Is the notion of aid broadening or shrinking over time, and if so, why? A subjective view on the rationale of the case law", p. 39
[372] *Ibid,* p. 51.

sense that it affects tax authorities' interpretation of when an environmental tax constitutes State aid.

Several studies define which types of environmental taxes exist domestically, within the EU, and internationally, differing in their names and concepts through their logic of imposition (i.e., structure), their environmental aims, and their effects. For instance, an environmental tax can be levied in order to penalize the behavior of a polluter, or to encourage consumers to choose products and services with a lighter environmental footprint.[373] The scholarly debate about the different types of environmental taxes and their names possibly fits, albeit indistinctly, with the concept of *aid* set out in Article 107(1) ("*any aid [...] in any form whatsoever*"). I refer here simply to *environmental taxes*.[374] Other names are eco-taxes,[375] green taxes,[376] environmentally related taxes,[377] Pigouvian taxes,[378] energy taxes,[379] sustainable taxes,[380] and circular taxation.[381] However, even when their name refers in some way to the

[373] Truby, J. M., (2011), described them as "the polluter pays" and "the improver is rewarded," in p. 287 of his doctoral thesis., called "*Environmental Tax Law – Is it possible to design a Universal Legal Model for Environmental Taxation?*"

[374] EU laws' concepts are also included in this study's notion. For instance, in Article 2(119) of the GBER refers to environmental taxes, in Article 2(2) of the Regulation 691/2011 on European environmental economics accounts refers to environmentally related taxes.

[375] In Pirlot, A., (2017), "*Environmental Border Tax Adjustments and International Trade Law: Fostering Environmental Protection*," p. 58.

[376] Garcia, E. G., and Roch, M. T. S., (2016), "*Environment and Taxation: State Intervention from a Theoretical Point of View*," pp. 37 and 57.

[377] Milne, J. E., and Andersen, M. S. (2014) p. 22.

[378] In Cottrell, J., and Falcão, T., (2018), "*A Climate of Fairness – Environmental Taxation and Tax Justice in Developing Countries*", p. 35.

[379] Pitrone, F. (2016), respectively, pp. 162-163, and p. 159.

[380] In Van Thiel, S., (2020), 'Sustainable Taxes for Sustainable Development," p. 15., and in Pedroso, J. and Kyrönviita, J.**,** (2020), "A Pluralistic Approach to the Question How to Balance Different Objectives of Sustainable Development through Environmental Taxes within the Framework of EU State Aid Law," pp. 371–372.

[381] Economic scholars argue that circular taxation differ from environmental tax and green tax because of the economic logic of the circular tax. However, to assert this, it would be required that environmental taxes and green taxes have a fixed concept, which they don't. Despite, it worth quoting their understanding of circular taxation as an example of what environmental taxes can be under the State aid control system perspective. In their words: "Comparatively, we can affirm that the objectives of circular economy taxation are more ambitious than those of environmental taxation in recent decades. In range and reach, they far exceed policies involving small, super specific environmental taxes or the green tax par excellence: the carbon tax. Existing environmental taxes aim to reduce some externalities and give small impulses to change economic behaviour, but they leave the basic structure of the linear economy intact. On the contrary, circular taxation aims to contribute to a more radical change in the economic structure, significantly altering relative prices and changing the behaviour of firms and consumers to achieve an economy that respects the limits of the planet." In Vence, X.; López

environment (eco, green, etc.), it does not mean they actually protect the environment.[382] It may also be a question of an emissions tax, a pollution tax, or other such policies.[383] As a consequence, the effectiveness of environmental taxes is inextricably linked to their environmental effects, particularly for the State aid analysis proposed in this thesis.

The discussion of different concepts of environmental taxes, whatever name and format the author may choose, can be relevant to the State aid legal discussion if it is concerned with the substantive effects of the tax on the environment. It also means that other types taxes could become "environmental taxes" for the purpose of this thesis if they have mechanisms that address an environmental protection objective.

The tax may be fiscal in nature with an environmental incentive, or it may be fully environmental – i.e., with respect to its aim, base, object, logic, etc.[384] For example, the tax authority responsible for reviewing a company's income tax may allow it to deduct the costs of reducing its environmental footprint. In such a case, the *aid* takes the form of the deduction of environmental expenses; and the deduction analysis in light of the State aid conditions also determines the level of integration of environmental protection requirements into the rule. That means that the environmental protection mechanism (deduction of environmental costs) of a fiscal tax constitutes the *aid* in question. Thus, fiscal taxes are englobed within the meaning of the term "*environmental taxes*" as used in this study, regardless of whether the issue concerns a tax law as such or a decision interpreting such a law in relation to a concrete case.

Pérez, S.d.J., (2021), "Taxation for a Circular Economy: New Instruments, Reforms, and Architectural Changes in the Fiscal System," p. 12.

382 Westin discusses environmental taxes that do not necessarily protect the environment but are levied on environmental issues, e.g., emissions. In Westin, R., (1997), "Environmental Tax Initiatives and Multilateral Trade Agreements: Dangerous and Collisions," p. 24.

383 *Ibid*, pp. 43–45, where the author discusses environmental taxes as divided in two main economic theories, one with legal rationale to correct market failures, and the other which the tax based is determined by the activity negative impact on the environment. For this analysis, the author discussed emissions taxes.

384 See, in Chico, P., Grau, A. and Herrera, P., (2005), "Tax Incentives for renewable Energies as a Means of Fostering Sustainable Development in Spain," pp. 191–200.
pp. 191–200, reflection about the difference of effects of environmental taxes and environmental incentives in fiscal taxes.

Moreover, energy taxes may pursue environmental protection as a secondary aim, after energy efficiency.[385] However, scholars have criticized the current EU Energy Tax Directive (ETD) for lacking a connection to environmental protection.[386] Since the ETD provides no particular format in which the State action is to take place, trying to contain the notion of "environmental taxes" within a discussion of State aid seems pointless. This is because the primary factor determining whether or not a given tax is environmental should be its environmental protection effect.

There are three types of taxes from a State aid perspective. They are:

1. Environmental taxes which are general (i.e., which are not classified as State aid), because of the higher level of their environmental protection effect and rationale.[387]
2. Environmental taxes classified as State aid that deal with specific environmental concerns or that achieve some level of environmental protection.[388] These are classified as compatible with the internal market under Article 107(3), because they meet the general and specific requirements of the laws on the subject (i.e., the GBER and the CEEAG) [389]
3. Alleged environmental taxes that are classified as incompatible aid, because they do not meet the general and specific requirements of the laws on the subject (i.e., the GBER and the CEEAG).

Placing an environmental tax in one of these three categories necessitates interpreting Article 107 in relation to the measure in question. Only when

[385] See which energy aims in Article 194(1) of the TFEU.
[386] In Pitrone, F., (2015), "Designing "Environmental Taxes": Input from the Court of Justice of the European Union," pp. 61–62. For a presumed indirect connection of the ETD to environmental protection, see Ezcurra, M. V., (2013), "State Aids and Energy Taxes: Towards a Coherent Reference Framework," p. 342.
[387] See to this effect the *ANGED* rulings (in the case C-233/16, joined cases C-234/16 and C-235/16, and joined cases C-236/16 and C-237/16).
[388] As a legal scholar, I lack the knowledge to provide an expert opinion about the levels of environmental protection achieved through the tax imposition. Instead, I provide a legal input of the EU legal system concerning the integration the environmental protection as a value within the tax that was or could be scrutinized under the State aid rule.
[389] The requirements set in the GBER and, or, in the CEEAG. The Swedish energy and carbon excises discussed in chapter 1 is an example of such circumstance.

such analysis is conducted with the competent institution (national court, EU courts, or the Commission) will the debate about its classification be known.

Summarizing the above, on the basis of a broad and comprehensive concept of *aid* for environmental protection, the effects-based approach of Article 107(1) of the TFEU, the environmental taxes in this thesis that can overlap with the concept of aid are the ones listed below.

1. Environmental taxes, fees, levies, or charges as one law or several laws.
2. A fiscal tax law that contains an environmental protection mechanism, and which has environmental protection as an incidental aim. In this case, it is the environmental protection aim which is the potential object of scrutiny from a State aid perspective.
3. Administrative tax decisions (e.g., a tax ruling) that interpret domestic laws into a concrete case.

In all the above three circumstances, the laws by themselves, or their interpretation in relation to concrete cases, might be classified as State aid. In the following section, I explain the approach adopted in this thesis for analyzing the four State aid conditions.

2.8. Summary

As the second and final chapter forming the fundamentals of this Part I, Chapter 2 introduced fundamental aspects concerning environmental taxes that define their scope from the perspective of the State aid control system.

In subchapter 2.2., I placed environmental taxes within the alarming backdrop of globally spreading environmental problems, such as climate change. I discussed that while environmental taxes may not be the most appropriate solution to address environmental issues, they still play a relevant role as an environmental protection policy tool. Consequently, the likelihood of environmental taxes being classified as State aid and becoming subject to the

system could alter lawmakers' responses to these urgent environmental concerns.

In subchapter 2.3, I discussed the issue of the effectiveness of environmental taxes in achieving environmental protection objectives. Various factors influence taxes' environmental effectiveness, including specific timeframes and intentional environmental objectives. I also consider the challenges and pressures lawmakers face when addressing environmental concerns through taxation, which can potentially diminish this effectiveness. Furthermore, depending on the nature of the pressure (political, social, etc.), it could impose practical problems for lawmakers in terms of taxpayers' acceptance of environmental tax impositions.

In subchapter 2.4, I discussed how two EU law conceptualizations of environmental taxes establish possible design features that lawmakers could utilize. In subchapter 2.5, I examined EU environmental laws that establish values of environmental protection that lawmakers could refer to when legislating on their domestic environmental tax. In subchapter 2.6, I explored the legislative possibilities for EU legislators to enact environmental taxes and how their legal rationale could also be employed by lawmakers when designing environmental taxes. In all three subchapters (2.4, 2.5, and 2.6), if lawmakers choose to incorporate one of the rationales discussed from the diverse EU law into the design of their environmental tax, they could reduce its likelihood of being classified as State aid.

Finally, in the last subchapter (2.7), I introduced the concept of aid as a broad and far-reaching notion, one that encompasses environmental taxes that have environmental protection as a rationale, objective, or effect. Moreover, the concept of aid also encompasses the interpretation of tax laws in concrete cases. I also demonstrated that what defines whether a tax is environmental is its effects, as Article 107(1) concerns the formal and substantive effects of measures.

PART II

Integration into the State Aid Conditions

3. The *Granted by a Member State or Through State Resources* Condition

3.1. Introduction and Outline

This chapter is about the first State aid condition discussed in this thesis, as laid down in Article 107(1) of the TFEU: that *granted by a Member State or through State resources*. I delve into the interpretation of this condition concerning fiscal measures in general, including environmental taxes, and explore the possibility of integrating environmental protection into said condition. However, due to the limitations of State aid case law regarding environmental taxes and this condition, I analyze cases involving environmental subsidies.[390] In an analogous way, these cases can be useful due to their rationale for environmental protection. They prove valuable in understanding the interpretation of the aforementioned condition regarding environmental taxes and the potential integration of environmental protection into it.

In Chapter 3, I address both research problems and fulfill both research purposes concerning the condition *granted by a Member State or through State resources*. I explain how I approach these problems and purposes in the chapter's outline, detailed below. I answer the first research question posed in this thesis by explaining how taxes (not solely environmental ones) meet this condition.[391] I then address my second research question by utilizing the responses to the first question to propose an alternative logic compared to that of the rationale for environmental taxes,[392] thus suggesting a different interpretation of the condition in question.

Chapter 3 is divided into six subchapters. The first (this portion) is introductory. In subchapter 3.2, I discuss the wording of Article 107(1), which introduces an alternative with the word: "or." This section is concise,

[390] See again explanation about this in section 1.6.1.
[391] Recalling the first research question adapted to this Chapter 3: *In what circumstances do Member States' environmental taxes fulfill the condition granted by a member State or through State resources?*
[392] Recalling the second research question: *How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?*

demonstrating how EU court rulings interpret this alternative concerning both components of the condition. It clarifies the underlying reason for the alternative in the condition, contributing to a better understanding of the complex system, which is my first purpose (related to the problem of the system's complexity).

In subchapters 3.3 and 3.4, I discuss EU courts' general interpretation of this condition in relation to environmental taxes, other taxes, and environmental subsidies. These subchapters address the first research problem and fulfill the first research purpose by answering the first research question. I explain *granted by a Member State* (in subchapter 3.3) and *through State resources* (in subchapter 3.4), neither of which is critical in State aid cases involving taxes of all types. However, in subchapter 3.5, I reflect on how the condition, *through State resources* component of the condition could be interpreted by integrating environmental protection in relation to environmental taxes. Consequently, I address the second research problem concerning the inflexibility of integrating environmental protection into the interpretation of this condition. Additionally, I fulfill the second research purpose by pinpointing where this integration could potentially occur but does not. Consequently, I answer the second research question by demonstrating to the EU courts and the Commission that it is possible to integrate environmental protection into this condition interpretation in relation to environmental taxes.

I end the chapter in subchapter 3.6 with a summary of the most relevant points from subchapters 3.2 through 3.5.

3.2. Two Alternative Effects: *Or* – or Something Else?

This brief section explains that the alternative offered in Article 107(1) – between granted by a Member State *or* through State resources – is more relevant for subsidies than for taxation. This is a clarification that establishes a fundamental differentiation concerning the interpretation of this condition for these two types of aid.

Initially, the State aid control system targeted only subsidies, since taxation was a matter solely for the Member States. In 1961, the Court of Justice explained the concept of aid, initiating the State aid rationale for State aid measures other than subsidies.[393] However, it was only in 1974 that the Court confirmed for the first time that fiscal measures could be classified as State aid.[394] The above-mentioned alternative was initially intended for tackling subsidies; it thus makes more sense for such measures. I explain why below.

While tax benefits are common aspects of general fiscal measures, and their classification as State aid revokes the tax discretion of the Member States, subsidies have a different logic. They have the sole purpose of providing aid, since they grant money directly to their beneficiaries. However, it is the following elements that distinguish State aid: (a) the body granting the aid (i.e., the aid is *granted by a Member State*); and (b) the use of public money (*through State resources*) to assist certain undertakings.[395] If private bodies give away private money, it is not State aid. However, if private bodies give away public money, it can be state aid. Hence, the alternative signified by the *or* is necessary for distinguishing the body granting the aid from the source of the money (i.e., public or private). [396]

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[393] See footnote 335 about the concept of aid extracted from case C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, p. 19. See also section Environmental Taxes Overlapping the Concept of *Aid*.

[394] In case C-173/73, *Italy v Commission*, para. 13, pp. 718–719. The Court established the following view. "The aim of Article [107] is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects. *Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article [107].*" *Emphasis added.*

[395] In 1977, the Court of Justice adopted the following understanding concerning this condition to deliver a ruling in the case C-78/76, *Firma Steinike und Weinlig, Hamburg, v Germany*, paras. 21, p. 611. "The prohibition contained in Article [107] (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid."

[396] In 1993, the Court of Justice explicitly clarified the following view concerning the alternative in joined cases C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, para. 19. "The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State…"

The source of money is not an issue for taxation in general. Any tax requires a formal act by a legitimate body. For example, a tax law must be legislated by Member State lawmakers with jurisdiction over the matter. Even the interpretation of the tax law(s) is only legitimate if the tax authorities have competence on the issue. Hence these two matters are, in their nature, *granted by the Member State*'s official and legitimate representatives: namely, the legislator and the tax authority, respectively. Where the *through State resources* part is concerned, tax advantages can have the effect of reducing public revenues, if they are selective.

Considering the situation where two companies (undertakings) A and B are comparable under the tax logic, but they bear different tax burdens. Company A pays the normal tax. Company B is exempted from the tax altogether, and so contributes nothing to the public coffers. Hence, the absence of tax revenue from Company B into the public coffers represents the effect *through State resources*. However, the fulfillment of this part of the condition depends on whether the tax advantage is also selective. I return to this discussion in subchapters 4.3 and 4.4, where I discuss the interpretation of this condition in relation to environmental taxes. For now, this overview of the *granted by a Member State or through State resources* condition suffices to show that the above-mentioned alternative is more relevant to subsidies than to taxation.

3.3. Granted by a Member State

3.3.1. The concept of Member State

The effect *granted by a Member State* of the State condition in question, on which I focus on in this subchapter is about the Member State being held imputable for the measure.[397] To understand this part of the condition, it is necessary to discuss the far-reaching (yet uncomplicated) concept of *Member State*.[398]

[397] In case C-482/99, *France v Commission*, para. 51. See also the Commission Notice on the notion of State aid, paragraphs 39 to 42, which makes reference to Member States' imputability.
[398] See Aldestam (2004), p. 46. Aldestam's doctoral study discussed the concept of Member State under the view of the EU State aid case law.

Between the 1970s and the early 1900s, the Court had several opportunities to develop the concept of *Member State*, thereby clarifying that the level within a Member State from which authority derives is irrelevant.[399] Hence, whether the public authority (e.g., legislator or tax authority) is federal, national, local, regional, communal, and any other possible jurisdictional level within the national legal system of the Member State, it falls within the concept of *Member State* set out in Article 107(1).[400]

It was in 2001 that the first "environmental" tax reached the level of the EU courts in connection with its possible State aid effects. A preliminary ruling asked the Court of Justice whether an energy tax scheme granted State aid when it only allowed producers of goods (primarily) to receive tax rebates if they met other requirements.[401] The Court did not discuss the *granted by a Member State or through State resources* condition in the Adria-Wien Pipeline case, or in later environmental tax cases either.[402] Once the Court established that any jurisdictional level within a Member State is to be classified as *granted by a Member State,* the Member State's imputability became a settled matter in State aid cases concerning any type of taxation, since the automatic presumption of the principle of legality in tax law is that a legitimate body of the Member State in question has legislated on the fiscal measure.[403]

However, when the aid arises from an interpretation of a Member State's tax law, it still qualifies as *granted by a Member State* as long as the interpreter is a public authority or a body of the Member State concerned. It can be a court,

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[399] See the discussions about the "Member State" concept in the cases C-78/76, *Firma Steinike und Weinlig, Hamburg, v Germany*, paragraph 21, p. 611; in the case C-248/84, Germany v Commission, paragraph 17; in the joined cases C-67/85, 68/85 and 70/85, *Van der Kooy v Commission*, paragraphs 35-36; and, in the case C-303/88, *Italy v Commission*, paragraphs 11-12.
[400] In case C-248/84, *Germany v Commission*, paragraph 17.
[401] In case C-143/99, *Adria-Wien Pipeline GmbH.*
[402] In case C-159/01, *Netherlands v Commission* ('MINAS'), in the three rulings concerning the environmental levy on aggregates in cases T-210/02, C-486/06 P, and T-210/02 RENV, *British Aggregates v Commission*, in case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück,* nor in cases C-233/16, joined cases C-234/16 and C-235/16, and joined cases C-236/16 and C-237/16, *ANGED,* and finally in joined cases C-105 to C-113/18, *UNESA.*
[403] About the principle of legality, see Vanistendael, F. (1996) p. 16. Such an approach that differs immensely from subsidies. See, for instance, Kaur, S., (2009), "Using State Aid to Correct the Market Failure of Climate Change," which inspired this reflection about the nuances of the State aid control system for environmental subsidies compared to environmental taxes, including the interpretation of the State aid laws to subsidies and taxes.

a tax agent, or a tax agency (among other possibilities) that is competent to take such action according to the laws of the Member State.[404]

Considering a situation where a Swedish tax agency issues guidelines explaining how it interprets a national environmental tax law. When the interpretation of such guidelines might grant State aid, Sweden will be imputable for the measure if the tax agency based on the guidelines issues a tax ruling.[405]

Finally, recalling the notification procedure established by Article 108(3) of the TFEU, the Court of Justice explained that this part of the condition can be fulfilled when the aid is "granted or planned by the Member States."[406] Hence, it not only covers measures in place; it also applies to measures that are awaiting the Commission's decision before being implemented. Now to a circumstance that may change the view of a Member State's being held imputable for a fiscal measure.

3.3.2. Member State aid or Union aid?

The circumstance that may change a Member State's imputability in connection with taxes is when the EU legislates on a fiscal law, thereby limiting the tax discretion of the Member States.[407] In such a case, a Member State can only be held imputable for the State aid effects of a tax if two conditions are met.[408] The first is that the EU legislator did not mean to reproduce the State aid effects resulting from the national measure. The State aid arose from that implementation. The second condition is that the State

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[404] For instance, the Commission stated in its State aid decision that "*as regards the imputability of the measure*," the tax ruling in question *"was issued by the Dutch tax authorities, which is part of the Dutch State*." The Commission named the tax decision as "SMBV APA" that granted the aid, in the Commission State aid decision SA.38374, paragraph 70.

[405] The same logic applies to the Commission Guidelines. The Commission has the power to decide if a tax is State aid or not, and it will use the Guidelines in its decisions. Thus, the Guidelines reproduce binding effects.

[406] In case C-173/73*, Italy v Commission*, paragraph 7, p. 716.

[407] For instance, based on Article 113 or 115 of the TFEU.

[408] See the theoretical discussion about Union aid and State aid at Englisch, J., (2013), "EU State Aid Rules Applied to Indirect Tax Measures," pp. 9-18.

aid effects occurred within the Member States' level of discretion when implementing EU law, because the EU law in question provided for such a margin of discretion. The Member State in question can be held imputable for the aid when both conditions are met. Otherwise the tax is Union aid, not Member State aid.

As discussed previously, the EU has not legislated on any tax for the express purpose of environmental protection. This is because the current version of the ETD does not have such an objective; nor does it align with the EU Green Deal, or with other EU environmental policies.[409] However, if the Council approves the ETD revision (the Recast of the ETD, hereafter: RETD), it can become an environmental taxation directive that legally binds the Member States regarding the results to be achieved.[410] Hence, the Member States would still have relatively large great discretion in how to achieve RETD results, which means such an implementation could involve State aid. On the other hand, the EU's VAT-harmonized framework has reduced the discretion of the Member States to such an extent that it has prevented State aid issues from arising.[411]

Currently, the ETD legally requires the Member States to impose a certain minimum level of taxation on energy products and electricity consumption.[412] It also allows the Member States to set different levels of taxation in particular circumstances, as listed in Article 5. The Member States are free to make exemptions and reductions in conformity with Article 6. According to both of these articles, the Member States can stipulate different levels in their national tax system.[413] Consequently, they are likely imputable for measures they undertake to implement the ETD, especially if the ETD does not aim to

[409] Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), in section 1.
[410] Based on Article 288 of the TFEU that establishes: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."
[411] See scholarly reflection concerning the development of the principle of equal treatment in Article 107(1) of the TFEU that could influence future State aid cases concerning VAT in Englisch, J., (2019), "Equality under State aid rules and VAT," pp. 17–43.
[412] Article 1 combined with Article 4(1) of the ETD.
[413] Article 16 of the ETD establishes the same freedom to biofuel taxation. See input on this regard at Ánton, A. A. (2016), "Energy Taxes and Promotion of Renewable Energy Sources (RES): Combination of Excise Reliefs and Supply Obligations of RES Seen from the State Aid Perspective – The case of the Spanish support systems to promote Biofuels," pp. 315-317. About Denmark and Sweden's energy-related taxes that touch upon the ETD and State aid, see input at Andersen, M. S. (2016) at pp. 99-119.

aid any specific sector.[414] However, if the RETD is approved, reducing the tax rates on certain fuels, I believe it will grant Union aid to these fuels. Hence, the Member States will not be held imputable for granting State aid, provided their implementation of the measures is in conformity with EU law, and with EU courts' interpretation of EU law. Now to the analysis of the *use of State resources* condition, which is the second part of this State aid condition.

3.4. Through State Resources

3.4.1. General Interpretation

The assessment of whether an environmental tax meets this State aid condition is also about the part *through State resources*. In its 1961 ruling in *De Gezamenlijke in Limbur v. High Authority of the European Coal and Steel Community*, the Court of Justice called attention to:

> *"…interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."*[415]

In the State aid control system, taxes are not called subsidies (as they may be in some other legal fields), but they can have similar effects, as noted in the quote above. In 1974, in the *Italy v Commission* case, the Court cited the above understanding when it ruled that Italy's reduction of fiscal charges for financing social-security benefits for the employees of textile undertakings merited classification as State aid.[416] Since that ruling, the interpretation of

[414] See, input on this discussion, at Ánton, A. A. (2012), "Promotion of Biofuels and EU State aid rules: the case of Spain," pp. 41-55; and, Ánton, A. A. (2016), "Energy Taxes and Promotion of Renewable Energy Sources (RES): Combination of Excise Reliefs and Supply Obligations of RES Seen from the State Aid Perspective – The case of the Spanish support systems to promote Biofuels," pp. 305-339. Ezcurra discusses the State aid implications on national energy taxes covered by the ETD and the Community Guidelines on State aid for environmental protection. See Ezcurra, M. V. (2014).
[415] In case C-30/59, *De Gezamenlijke in Limbur*, p. 19.
[416] In case C-173/73, *Italy v Commission*.

State aid conditions in relation to fiscal measures has developed substantively, and the *through State resources* condition was widely discussed until the year 2000. Any selective mitigation of charges was judged to entail the use of State resources – i.e., to fulfill this condition. Even just postponing the obligation to pay the tax (as with a tax deferral), so that the revenue was not collected within the normal timeframe, could be seen as conferring an advantage and thus fulfilling the condition.[417]

In 1978, in the *Openbaar Ministerie (Public Prosecutor) of the Kingdom of the v Jacobus Philippus van Tiggele* case, the Court of Justice clarified that this condition could be met even with a direct or indirect transfer of State resources.[418] In 1993 the Court stated, citing the previous clarification in the *Openbaar Ministerie* case, that "only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article [107](1) of the EEC Treaty."[419] Thus, it stressed the connection between *selective advantage* and the *through State resources* condition. In 1994, however, in the *Banco Exterior de Espanã* ruling, the understanding of the relationship between State aid measures and the direct or indirect transfer of State resources became confusing, as the Court stated the following:

> *[A] measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article [107](1) of the Treaty.*[420]

The Court stated that no State resources were transferred. In 1998, however, in order to reduce the uncertainty caused by the *Banco Exterior de Espanã* case, the Commission issued a Notice on the application of the Rules on State aid to measures relating to direct business taxation, in which it explained that *"*a

[417] In the Commission Notice on the application of the State aid rules to measures relating to direct business taxation, para. 9.
[418] In case C-82/77, *Openbaar Ministerie*, para. 25.
[419] In joined cases C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG*, paragraph 19. The Commission Notice on the notion of State aid, paragraph 47 quotes the same sentence and cites this case.
[420] Emphasis added, in case C-387/92, *Banco Exterior de España*, para. 14.

loss of tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure."[421]

In 2001, the Court ended the doubt resulting from the *Banco Exterior de Espanã* case, making clear that State resources have to be transferred directly or indirectly if they are to be regarded as State aid.[422] Following the Court's previous rulings and the Commission's Notice, the fulfillment of the *through State resources* condition became less problematic in State aid law when applied to taxes of any nature after the beginning of the 2000s. Hence, the *through State resources* condition is the effect where public funding is used indirectly through the granting of a selective tax advantage.

When an environmental tax is classified as granting a *de facto selective advantage*, its objective, logic, and effects are to some extent incoherent or inconsistent with the aim of protecting the environment. And so it is with the condition *State resources*.[423] However, integrating environmental protection into the interpretation of the *selective advantage* condition does not ensure any change in the interpretation of the *through State resources* condition. The discussion of environmental taxes as State aid cases at EU courts are the same as the case law concerning fiscal measures. [424] Hence, there is no integration of environmental protection into this part of the *through State resources* condition.

Aldestam explains that "the criterion that the measure must be granted by the State or through State resources also covers the situation in which public income is reduced, in fact, or exponentially. Accordingly, a loss of tax revenue is synonymous with public spending in the form of tax expenditures."[425] As a consequence, selective tax advantages of any kind impact the collection of revenues, and thereby represent an expenditure of public resources.

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[421] At paragraph 10.
[422] In the case C-379/98, *Preussen Elektra AG v Schleswag*, paras. 58-60. Also in case C-482/99, *France v Commission*, paragraph 24. The Court of Justice changed the statement of reasons of the case C-82/77, *Open Baar* (paragraph 25), and in the joint cases C-72/91 and C-73/91, *Sloman Neptun* (in paragraph 19) slightly. Both cases were cited at the end of the Court's quotation.
[423] I discuss the integration of environmental protection within the interpretation of the *selective advantage* condition in Chapter 4.
[424] See, in case C-143/99, *Adria-Wien Pipeline*, in case T-210/02, British Aggregates, ECLI:EU:T:2006:253; paras. 70–156, in cases C-233/16, joined cases C-234/16 and C-235/16, and joined cases C-235/16 and C-236/16, *ANGED*.
[425] In Aldestam, M. (2005) p. 51.

Summarizing this section about the general interpretation of the *through State resources* condition, I list the most relevant points as follows:

1. Fiscal measures are founded on the principle of legality and must proceed from a formal legal provision. Hence, the *through State resources* becomes, in practice, verified in State aid cases concerning taxes in respect of the *granted by a Member State or through State resources* condition.[426]
2. Assessing the *through State resources* condition in concrete cases depends on finding selective-advantage tax treatment.[427] Hence, if a fiscal measure confers a selective-advantage tax treatment, it automatically fulfills the *granted by a Member State or through State resources* condition.
3. The connection between the *through State resources* condition and the granting of a *selective advantage* does not ensure a direct integration of environmental protection into that first condition, but instead only an indirect one.

3.4.2. EU resources unmixable with State resources

An alternative interpretation of the through-State-resources condition is seen when a Member State uses EU funds. This section provides another way of interpreting this condition, which can also further the integration of environmental protection at this level.

An aid measure financed through EU resources only meets the through-State-resources condition if the EU resources (1) are entrusted to a national public or private body, and (2) said body has some discretion concerning the granting of the aid.[428] Interestingly, the current General Block Exemption

[426] In case C-387/92, *Banco Exterior de España*, paragraph 14; Commission Notice on the application of the State aid rules to measures relating to direct business taxation, paragraph 10; and case C-379/98, *Preussen Elektra AG v Schleswag*, at paragraphs 58-60.
[427] *Ibid idem.*
[428] Aldestam, M. (2004), p. 50.

Regulation (GBER), in force since 2014, addresses this issue with the following statement:

> *Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the Union that is not directly or indirectly under the control of Member States does not constitute State aid.*[429]

The GBER's reference to direct or indirect control concerns the discretion mentioned by Aldestam, whereby the use of Union resources can only be considered State aid when the Member State exercises some control over the funding. This is a case where the fulfillment of this effect requires only the imputability of the Member State, and not the consumption of State resources, because it is the EU that is providing the resources. However, this view is unduly narrow, as I explain below.

Approximately 70% of EU funds are financed with the Member State's gross national income annually, and the rest (30%) from VAT-based payments and customs duties.[430] The grant of Union funds to the Member States is relevant mainly for developing areas of shared competence, such as the environment and the internal market,[431] through the use of EU funding for sustainable growth.[432]

For instance, the Commission recently issued a State aid decision about subsidies granted for the construction of a high-efficiency waste-to-energy municipal plant in Gdansk, Poland. The project was funded by the EU Structural Funds and by municipal resources from Gdansk. It generated an abnormally high rate of return on the investments, relative to that usual in the market.[433] In this situation, Union and State resources were both used.[434] If, however, only EU funds had been used to grant selective environmental subsidies to certain taxpayers, the measure would have met the through-State-

[429] In Regulation 651/2014, at paragraph 26 of the Preamble.
[430] Council Decision 335/2014 on the system of own resources of the European Union.
[431] In Article 4(1)(a) and (e) of the TFEU.
[432] EU Commission, EU Budget, "EU spending by country," data available until 2018, available at: https://ec.europa.eu/info/strategy/eu-budget/spending/country_en .
[433] In case State Aid SA.55100 (2019/N) Poland, Aid for the construction of the municipal waste thermal treatment plant in Gdansk, paragraph 26.
[434] See paragraph 33 of the SA55.100.

resources condition only if Poland had exercised some discretion over the EU funding (i.e., had direct or indirect control over the grant).[435]

From the standpoint of tax law, however, the grant of EU funds to a Member State can be seen as the application of the benefit principle from tax law. According to this view, the Member States contribute revenue to the EU, which in turn gives them the right to receive various benefits from the EU, such as funding. The funds in question should be seen as belonging to the Member States in the first place. Moreover, when a Member State uses EU funding to achieve an environmental target, it reduces a series of societal costs thereby. This is a logic that should be considered when the through-State-resources condition is discussed, but it is not. Such a perspective would change the debate about how the through-State-resources condition is fulfilled in connection with environmental taxes. It would render this condition independent from the *selective advantage* condition, thereby directly integrating environmental protection.

3.5. Further Integrating Environmental Protection

3.5.1. Preliminary remarks

In this subchapter, I analyze the possibility of (directly) further integrating environmental protection when the "*granted by a Member State or through State resources*" condition is interpreted in relation to environmental taxes. Hence, the analysis in this subchapter relates to the purpose of this thesis. I answer my second research question by suggesting that lawmakers use a different rationale for their taxes, thereby promoting a bottom-up change in the interpretation of this condition.

I analyze State aid cases concerned with subsidies in section 3.5.2, since environmental protection seems to have been integrated into the interpretation of the "through State resources" condition in these cases. In

[435] Respectively, in case C-82/77, *Openbaar Ministerie*, paragraphs 23-25, and case C-387/92, *Banco Exterior de España*, paragraph 14.

sections 3.5.3 and 3.5.4, I conduct an analogous analysis of said condition in respect of environmental taxes. The reason for this approach is that, as discussed in subchapters 3.3 and 3.4, the interpretation of said condition in the cases concerned did not allow for any integration of environmental protection.

3.5.2. A risk of environmental damage

The first case of interest is the *Bouygues*, a non-environmental subsidy case from 2013. The Court of Justice established that "a sufficiently concrete economic risk of burdens on that budget" meets the "*through State resources*" condition.[436] This view forms the starting point for my analysis of the case law discussed in the next paragraph.[437]

In 2020, in the *Iberpotash, SA v Commission* case, the General Court interpreted the idea of "concrete risk" in a certain manner, but now in relation to a State aid case concerned with an environmental subsidy. This case is particularly relevant, because the concrete (economic) risk related to the possibility that environmental damage would occur without sufficient financial guarantees being given to cover the damage. Hence, the question here concerned the economic impact that environmental damage has on the public budget.

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[436] In joined cases C-399/10 P and C-401/10 P, *Bouygues SA, Bouygues Télécom SA, v Commission and France*, para. 109.

[437] See also Commission Notice on the Notion of State Aid, in para. 51, where the Commission summarizes different ways to meet through State resources, as quoted as the follows. "The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. A positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. For example, a 'shortfall' in tax and social security revenue due to exemptions or reductions in taxes or social security contributions granted by the Member State, or exemptions from the obligation to pay fines or other pecuniary penalties, fulfils the State resources requirement of Article 107(1) of the Treaty. (78) The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 107(1)."

The *Iberpotash SA* case concerned guarantees for the restoration of mining sites.[438] The Court explained that the "*through State resources*" condition is met if the financial guarantees are "inadequate and significantly lower than that which would have been necessary to cover the costs of restoring the mining sites operated by the applicant."[439] Moreover, this condition can be met if there is simply a risk that the guarantees will not be enough to cover the costs.[440] Hence, this view about the "*through State resources*" condition in relation to an environmental subsidy that integrates environmental protection. Now, I consider this rationale in connection with an environmental tax case.

The *Iberpotash SA* case concerned bank guarantees provided by a mining company to meet the costs for a restoration program for potash-mining activities. The program implemented the guarantee obligation set at the EU level.[441] The Spanish law in question established the purpose of the restoration program in relation to the environmental impact of the activity.[442] Thus, the Spanish law further implemented the issue of guarantees, laying down that the restoration program could be forcibly executed by the competent authorities if the operator was unable or unwilling to execute said program.[443] The General Court understood that bank guarantees set below the amount required to cover all costs of the restoration program had a potential impact on State resources.[444] The General Court's logic was that Spain would then have "*a subsidiary obligation to intervene in the event of non-compliance with the environmental protection obligations imposed on the undertakings*

[438] In the case T-257/18, *Iberpotash, SA v Commission,* ECLI:EU:T:2020:1, para. 80.
[439] In case T-257/18, *Iberpotash, SA v Commission*, para. 94.
[440] See input in this regard in Vasbeck, D. (2020), "State measures that mitigate an undertaking's environmental obligations," pp. 378–383, particularly on pp. 382-383.
[441] In case T-257/18, *Iberpotash SA v Commission,* paras. 1–35. The obligation concerned the Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from extractive industries and amending Directive 2004/35/EC, OJ L 102 of 11 March 2006 p. 15, Article 14.
[442] In case T-257/18, *Iberpotash SA v Commission*, paras. 9 and 10, where it was stated the following. "… the restoration programme must define measures to prevent and compensate for expected harmful environmental consequences of planned extractive activities. It must include the restoration measures to be executed at the end of different phases of the operation and at the end of the extractive activity. (…) in order to secure the discharge of the restoration programme, the mining operator must provide a financial guarantee. The amount of the guarantee is set depending on the area affected by the restoration or the overall cost of the restoration."
[443] *Ibid*, para. 11.
[444] *Ibid*, para. 59.

engaged in mining activity."[445] Thus, by allowing the company to present bank guarantees below the actual costs, Spain had increased its own liability in respect of the unsecured amount.

Moreover, Spain's subsidiary liability was prescribed by the secondary EU law on the subject, alongside the obligation to require guarantees fully capable of covering eventual costs, irrespective of the operator's financial position.[446] The ruling thus connected the potential State subsidiary liability with the use-of-State-resources condition. The General Court's understanding seems to direct integrate environmental protection requirements into the interpretation of "through State resources" condition. Because it considers that a potential risk of environmental damage not being entirely covered by the guanrantee could fulfill the condition. However, this case did not concern an environmental tax. The *Iberpotash* ruling involved a development of previous case law, in connection with the *Bouygues and Bouygues Télécom v Commission and Others* case, in which the General Court recognized that the cost of environmental restoration generates concrete risks for the Member States, mainly when the guarantees are not sufficient to cover the estimated costs of the environmental externalities produced by the activities in question.[447]

The General Court's view concerning the financial capacity of the mining company to carry the environmental burden of its activities involved a clear and direct integration of environmental protection into the condition in question. The General Court noted that:

> *[T]he information provided by the applicant in order to determine its financial capacity to bear the costs of any environmental damage associated with the operation of its mining sites is*

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[445] *Ibid*, para. 61.

[446] *Ibid*, paras. 61 and 62. In paragraph 61, the General Court states: "…under EU law, and in particular Article 6(3) of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 156), if an operator responsible for taking remedial measures following environmental damage fails to comply with its obligations, the competent authority may take these measures itself, as a means of last resort. Moreover, if the State were to fail to act in lieu of the undertakings, in the event that those undertakings fail to fulfil their environmental obligations, the State might be in breach of its obligations under Directive 2006/21 and risk being the subject of infringement proceedings and being ordered to pay periodic penalty payments until it complies with those obligations."

[447] See joined Cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*.

> *incomplete and does not make it possible to conclude with certainty that it would have had the necessary financial capacity to cover them at the time of the possible occurrence of the environmental risks.*
>
> *In any event, on the assumption that the applicant does have sufficient financial capacity to reduce the risk of the State having to intervene, it must be held that, in view of the fact that the financial situation of a company is capable of changing at any time due to various random economic factors, and in so far as, in general, the obligation to provide a financial guarantee is aimed precisely at ensuring that funds are available at any time and irrespective of the financial capacity of the entity required to provide that guarantee, the financial capacity of that entity has no bearing on the determination of the appropriate amount of those guarantees and, ultimately, on the assessment of whether there is a sufficiently concrete risk of a burden being placed on the State budget.* [448]

Thus, guarantees that fully cover the costs of the environmental restoration program reduce the State's subsidiary liability to cover such costs. Such guarantees should cover all restoration costs in the event of environmental damage, so that the costs are not borne by society. The contrary situation entails an increase in the State's subsidiarity liability, and a potential consumption of State resources thereby. If the guarantees are insufficient, the State will be liable for at least some of the costs of restoration.[449]

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[448] In case T-257/18, *Iberpotash SA v Commission*, parass 66 and 67.

[449] Note that this kind of State aid measure is not easy to uncover. It may require a complaint from competitors to the Commission to find that the Member State granted State aid by accepting environmental guarantees below the actual costs to mitigate the environmental damages. The value of the environmental guarantees and how to account for them makes such State aid analysis more complex. For instance, if the Member States properly implemented the relevant EU secondary law at the national level or if the methods of accountability employed were used to mask a State aid measure. The accountability methods to determine the economic values of the environmental degradation and restoration of activities will determine the values of the guarantees. Thus, if the Commission would start to scrutinize State aid cases concerning environmental guarantees, the methods to achieve the value of the guarantees could become part of the interpretation of the State aid conditions into these kinds of cases. Despite this, in situations where environmental guarantees are not required by the secondary EU law, but only by the national law of that State that took a higher level of environmental protection than the

When the General Court concluded that the financial situation of companies changes over time, perhaps making them unable to support the necessary guarantees, it increased the State's subsidiary liability to cover environmental costs in cases where an operator loses its financial capacity to cover the costs involved.[450] The General Court confirmed the Commission's interpretation of the through-State-resources condition, to the effect that precautions are needed in order to ensure that public resources will be consumed if the operator proves unable to cover the economic costs of mitigating the environmental impact. While this will not prevent the environmental damage from occurring, it will at least ensure that the polluter pays for the environmental damage, thereby implementing the polluter-pays principle in a preventive way. Hence, the Commission's State aid decision, which was sustained by the General Court, integrated environmental protection into the assessment of the "*through State resources*" condition, at a potential level. I write "potential" because the State assumes that the economic risk of having to defray (at least some of) the costs of restoration fulfills the through-State-resources condition.[451] In the following section, I discuss how the General Court's reasoning in the *Iberpotash* case establishes a legal rationale for interpreting the "*through State resources*" condition in relation to environmental taxes.

3.5.3. Environmental damage: a societal costs

In the previous section, where I considered the *Iberpotash* case, I discussed how environmental risks can provide a legal rationale for interpreting the through-State-resources condition in a certain way in connection with taxes. Based on other EU case law, I now present an argument to the effect that

EU, the State aid analysis of the values of the guarantees are limited to the logic of that national law.

[450] *Ibid*, para. 80.

[451] The calculation of the guarantees' economic value is the key issue to determine whether they are set below the overall costs required to cover eventual environmental damages. In the *Iberpotash* case, the guarantees were set too low in *Súria and Sallent/Balsanery*, respectively, EUR 828.013,24 and EUR 1.130.128 (in case T-257/18, *Iberpotash SA v Commission,* paras. 3 and 4). The national authorities revised these guarantees only in 2015, after the Spanish court rulings, correcting their values in *Súria and Sallent/Balsanery*, respectively, in EUR 6.160.872,35 and EUR 6.979.471,83 (*ibid,* para. 5).

addressing environmental risks through taxation saves public resources (not spending them).

In a preliminary ruling from 2015, the Court of Justice analyzed whether a German excise duty on nuclear fuels merited classification as State aid. In its ruling, the Court described the excise as:

> *"(…) a duty on the use of nuclear fuel for the commercial production of electricity with a view to raising revenue intended, inter alia, to contribute, in the context of fiscal consolidation and in accordance with the polluter-pays principle, to a reduction in the burden entailed for the Federal budget by the rehabilitation required at the Asse II mining site, where radioactive waste from the use of nuclear fuel is stored."*[452]

The part where the Court refers to "a reduction in the burden" recognizes that the environmental impact of activities being taxed entails economic costs for Germany, and that the tax deals with this issue. In this case, the tax is imposed on the actual environmental damage resulting from the activities taxed, thereby having a clear connection to German public resources: the revenues raised by the excise serve to bolster State revenues. However, the Court answered the State aid question concerning the German excise duty on nuclear power through a comparative analysis of fuels that had been excluded from the tax (i.e., through a discussion of the selective advantage condition). The Court could have built on a discussion of the *Iberpotash* case, in which the risk of environmental damage was deemed sufficient to meet the "through State resources" condition. However, the Court did not mention the *Iberpotash* case or discussed through State resources condition fulfillment of the German excise on nuclear power. In the latter case, saving State resources was more tangible than in the *Iberpotash* case, which concerned an environmental subsidy. Hence, the Court could have solved the German case by stating that the tax bolstered public revenues, and so could not be classified as State aid, since Article 107(1) requires a fulfillment of all State aid conditions. This way, the Court could have integrated environmental protection directly into the

[452] In case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, para. 78.

"through State resources" condition, and avoided the breach of Article 107(1) by this means, instead of through the selective advantage condition.[453]

Substantive environmental damage known to lawmakers is a tangible consideration, and can be used as a rationale for a tax to bolster public resources. Climate change, biodiversity loss, and similar developments are examples of environmental risks. Some of these, moreover, are tangible, and they require governments to deal with their impact now (e.g., droughts). Other environmental dangers are predictable but not yet tangible (their full impact will only become palpable in the future: e.g., rising ocean waters that will flood islands and coastal cities).[454] I focus now on the latter type of situation, which is more closely related to the *Iberpotash* case.

When scientific studies predict environmental damage at a risk level (i.e., the damage is not yet tangible but is likely), the following rationale should apply. Lawmakers should levy taxes to address the impact that climate change or biodiversity loss would have on society economically, socially, and environmentally. Such taxes can save public resources over the long run, because of how they address the issues now instead of waiting until they become severe. In this case, the logic of the tax is to compare the cost of addressing the issues now rather than later, including the biodiversity savings that can be gained by addressing the issue now. Such taxes would not meet the "*through State resources*" condition, because the State would be saving resources.[455] However, when scientific findings conflict with each other, lawmakers should take a precautionary approach and heed the most severe

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[453] *Ibid,* paras 79–80.

[454] It seems an undisputed fact that the countries (and private institutions) across the world, not only the EU Member States, will have to mobilize immense public (and private) capital to combat climate change's multilevel impacts. See, for instance, the United Nations Environment Programme, 2008, Public Finance Mechanisms to Mobilise Investment in Climate Change – An overview of mechanisms being used today to help scale up the climate mitigation markets, with a particular focus on the clean energy sector. The estimative of costs that will be needed to address each impact is debatable, and many losses cannot be accounted for financially, e.g., loss of cultural traditions of indigenous peoples, biodiversity, among others.

[455] This reflection was inspired in Ánton, A. Á., (2016), "Energy Taxes and Promotion of Renewable Energy Sources (RES): Combination of Excise Reliefs and Supply Obligations of RES Seen from the State Aid Perspective – The case of the Spanish support systems to promote Biofuels," p. 314 footnote 17, about Bilbao Estrada work published in Spanish, titled "El Sistema tributario como complemento de los instrumentos económicos previstos en el protocol de Kioto," available at: https://www.fundacionmapfre.org/documentacion/publico/i18n/catalogo_imagenes/grupo.cmd?path=1047771 .

prediction. The idea is that prevention is better than cure. This is also a principle of EU environmental law, as laid down in Article 191(2) of the TFEU.

Another circumstance this rationale would be pertinent is when a Member State chooses to reach climate neutrality faster than according to the timeframe set by the EU. For instance, a Member State may seek to become climate-neutral by 2040 instead of 2050,[456] and it may choose to pursue an aggressive climate action plan with multilevel targets and diverse instruments that enable it to achieve a climate-neutral transition by 2040. The fiscal measures associated with the plan may have the logic of addressing climate issues so as to achieve targets sooner. Hence they save public resources, by conserving biodiversity and tackling climate change at an earlier point. From the perspective of State aid law, such taxes should not be classified as State aid, since they logically, coherently, and consistently address the climate issues they set out to tackle. Thus, it would save public resources (e.g., biodiversity conservation) over the long run, instead of spending public resources now.[457]

However, such an interpretation is only possible if lawmakers consistently and coherently include this rationale in the objectives and structure of the tax. The State aid interpreter must also consider that, in today's market and environment, the environmental issues context of the tax is wider than the tax law reach itself. The interpreter should consider the logic, objectives, and structure of the tax when interpreting the "through State resources" condition, in view of how the State saves resources by addressing

[456] Commission, EU Climate Action, "2050 long-term strategy," available at: https://ec.europa.eu/clima/policies/strategies/2050_en . See also the European Green Deal.

[457] See Ánton's reflections on Estrada's work explained in a footnote of his study hits the core of this discussion. In Ánton's words, at length: "… the loss of fiscal revenues associated with the implementation of a tax incentive would be offset by the savings obtained by the public authorities, for example, by fighting climate change or promoting renewable energies. Specifically, the tax expenditure in the latter case could be offset by the benefits that the development of green technologies will have for society as a whole (positive externality), because through them both the CO_2 emissions and the energy dependence on foreign countries of EU Member States will be reduced. However, this objective would be fulfilled as long as the fiscal instrument proves its efficiency and effectiveness. This is the case when a tax measure influences the decisions of a private investor. Otherwise, the tax measure would complicate the tax system without contributing to the achievement of the ends that justified its concession. If this is the case, it will be better to pick a direct grant rather than measures in the form of tax expenditure." In Ánton, A. Á., (2016), "Energy Taxes and Promotion of Renewable Energy Sources (RES): Combination of Excise Reliefs and Supply Obligations of RES Seen from the State Aid Perspective – The case of the Spanish support systems to promote Biofuels," p. 314.

environmental and climate issues now instead of in the future.[458] The tax can thereby avoid breaching Article 107(1).[459] Moreover, such a tax helps ensure the conformity of the EU's legal system with the provisions of Article 11 of the TFEU, which proclaims environmental protection to be a general aim of all EU policies and activities.

Judging from the above, if the entire logic of a Member State's environmental and climate policy is not perceivable in the tax law under scrutiny, then this approach fails to integrate environmental protection into that State aid interpretation. So, if the Commission ends up scrutinizing that tax in isolation from the Member State's central policy (e.g., the action plan discussed previously), it will fail to integrate environmental protection. However, Member State lawmakers can prevent this by stating in their proposal for an environmental tax that its logic arises from a specific policy (e.g., an action plan), thereby prompting the State aid interpreters to consider this fact in their analysis.[460]

However, such a strategy would not prevent another possible issue with this kind of tax rationale. The interpretation of the "*through State resources*" condition depends on accountability for environmental and climate costs. Judging from previous case law on other types of taxation, methods for accounting for the taxation of certain activities have (arguably) been misused so as to hide State aid.[461] In such cases, accounting of this kind has led to a classification of the measures in question as State aid. The discussion concerning whether a measure saves or spends State resources depends on *how* climate and environmental costs are accounted for. Thus, regarding the methods of accountability that should be used – based on the level of laws (e.g., national, EU, or international), and even the period by which the

[458] A contrary approach would be to interpret the tax in a narrower context, only focusing on the tax burden levels, the selective treatment of the advantage effects on today's market and environment. This interpretation fails to integrate environmental protection in the condition through State resources.

[459] This paragraph was inspired by the discussion about adaptive policy design to environmental taxes in Barg, S. (2005), "Applying the Principles of Adaptive Policy Design to Environmental Taxes," pp. 173-181.

[460] As the Court of Justice did in the case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, paras 51 and 78, mentioning the explanatory memorandum to the proposal of the excise on nuclear power in Germany.

[461] For instance, when the Commission framed tax rulings for multinationals corporate taxation that relied on transfer pricing accountability methods to reach a result that determines those multinationals' tax burden, discussed in this thesis in section 6.2.1. The Commission's dual role in the State aid control system.

"saving" rationale is to be benchmarked – become critical for reaching a conclusion about the through-State-resources condition.

EU case law shows that, unless the EU establishes such methods of accountability in its environmental laws, the Member States remain free to choose the methods for quantifying climate costs and address them through a domestic environmental tax.[462] The Commission may still verify the evidence concerning the validity of the prediction used, but it can only consider the Member States' laws on the subject as long as EU laws have not established any standard in this regard.[463]

Considering a situation where a Member State decides to transition away from fossil fuels and to achieve a transport sector based entirely on renewable fuels by 2030, rather than by 2050.[464] In such a case, it is critical that the Member State show, in its economic action plan, *the costs* for achieving this transition within the shorter timeframe, as well as the savings made thereby.

The problem is that not all losses caused by climate change can be made good through refunding (e.g., biodiversity loss).[465] J. M. Harris, a political economist, asserts that an environmentally sustainable system ensures a stable resource base over time, avoids over-exploitation of natural resources, safeguards biodiversity and the stability of the atmosphere, and substitutes renewable resources for non-renewable ones to the extent that alternatives are available.[466] Biodiversity loss may be difficult to estimate economically, but an environmental tax that seeks to prevent such loss should be regarded as saving public resources. While estimating "how much" can be lost or saved is debatable, one factor that does not change is the fact that climate change and other environmental problems have been causing and will continue to cause biodiversity loss. Biodiversity loss, both prospective and already

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462 A conclusion reached based on the case T-257/18, *Iberpotash v Commission,* paras. 94–99 about evidence and joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 95 about the member States tax discretion on matters not harmonized nor approximated by EU laws.

463 *Ibid idem.*

464 See, for instance, in the Commission Guidelines on State aid for climate, environmental protection and energy 2022, in section 1, paras. 3 and 4, about the transition to climate neutrality in the transport sector, which involves private and public funds, and its effects on competition.

465 See in this regard Dempsey, J. et al. (2022), "Biodiversity targets will not be met without debt and tax justice."

466 In Harris, J. M. (2003), "Sustainability and Sustainable Development," p. 1.

tangible, must be given due weight in the State aid control system.[467] Hence, when a tax has such objectives and embodies such a logic, it should not be considered to fulfill the "through State resources" condition.

3.6. Summary

In this chapter, I analyzed the *granted by a Member State or through State resources* condition to explain its general interpretation in relation to environmental taxes for lawmakers to fulfill my first research purpose. This analysis enabled an examination concerning whether there is any integration of environmental protection thereto to fulfill my second research purpose.

I concluded that environmental protection is not integrated at all in this condition when it is interpreted in relation to taxes. However, EU case law about subsidies provides an analogous environmental rationale that may, if lawmakers adopt certain environmental rationales for such a tax, spur such integration directly into the condition in question. Thus, this part of the analysis in this chapter has answered my second research question. The most relevant points in the first part of my analysis can be summarized as follows:

1. Regardless of level (federal, regional, municipal, etc.), many public bodies fit within the "Member State" concept. Such a public body can be, among other possibilities: (a) the environmental tax legislator; (b) a domestic court that rules on the application and interpretation of an environmental tax law; (c) a tax agency that clarifies matters concerning the application and interpretation of an environmental tax law; (d) a tax authority that analyses particular cases and interprets an environmental tax law in relation to these cases. A private body controlled by the State can also meet the *granted by a Member State* condition. This situation is rare in connection with environmental or fiscal taxes, but it is theoretically possible, according to EU case law, to hold a Member State imputable for aid.

[467] See, Wesseling, R., and Bredenoord-Spoek, M., (2017), "State Measure," p. 115 input about stretching the concept of concrete risk.

2. The *granted by a Member State* condition seems irrelevant in practice today. Like any other taxes, environmental taxes must – as the principle of legality dictates – be enacted by the duly constituted authorities of the Member State concerned. Even if the *aid* takes a different form from a tax law – e.g., a tax ruling – it must still be prescribed by the laws of that State. Thus, *granted by a Member State* is a part of the State aid condition that is automatically fulfilled in tax cases and, thereby, does not seem capable of integrating environmental protection within this part of the condition interpretation.
3. However, despite (2) above, Union resources can be regarded as *granted by a Member State* if the latter has significant discretion over the disposition of said resources.
4. The *through State resources* condition is commonly fulfilled when the aid grants an abnormal tax benefit to selected taxpayers, thereby causing a loss of tax revenue. Such a loss occurs when the money that was supposed to fill the public coffers does not arrive, due to the selective advantage treatment conferred on certain taxpayers. This condition is therefore connected to the *selective advantage* condition.
5. The *through State resources* condition indirectly integrates environmental protection through its connection with the selective advantage condition, which considers the objectives and logic of the measure in question. Thus, if environmental objectives are consistently and coherently embodied in the structure of a tax law, the fulfillment of this condition depends on the assessment of the *selective advantage* condition. This means that, if the environmental tax is considered general – and thus does not meet the *selective advantage* condition – it will not be found to consume State resources.
6. Union resources *granted to Member States* should be considered State resources, based on the benefit principle, regardless of the degree of the Member State's discretion. This approach should be incorporated into the interpretation of the *selective advantage* condition.

The findings in this chapter that relate to the second purpose of this thesis – i.e., to identify prospects for further integrating environmental protection into the interpretation of the through-State-resources condition – is what follows:

The *through State resources* condition can directly integrate environmental protection when the objective and rationale of the tax is to save public resources by tackling tangible or predicted environmental risks. The methods used to account for the cost of addressing environmental risks determine whether the tax saves or spends public resources. For instance, the cost of solving environmental problem over a shorter period should be less than that of solving them over a longer period. Moreover, such methods of accounting should consider savings in connection with biodiversity, culture, and other intangible elements.

4. The *Selective Advantage* Condition

4.1. Introduction and Outline

This chapter is about the *selective advantage* condition. This is what Article 107(1) of the TFEU establishes as *favoring* (the advantage effect) *certain undertakings or the productions of certain goods* (the selective effect). They are two interconnected but different effects that form the *selective advantage* condition.[468]

I start by discussing general aspects of the *selective advantage* condition developed through their interpretation to fiscal measures of any kind, including environmental ones.[469] These general aspects give substance to this condition, particularly how environmental taxes meet its two forbidden effects and fulfill the condition. Consequently, this analysis addresses the first research problem regarding the complexity of this condition, clarifying its interpretations thereby fulfilling the first research purpose. After this, I analyze the current integration of environmental protection into this condition (an analysis of the second research problem), reflecting on how it could be further developed. I thus fulfill the second research purpose.[470] This analysis should contribute to the academic research concerned with the consistency of the EU legal system with environmental protection, as prescribed by Article 11 of the TFEU. Moreover, it gives input about ways that the EU and the Member States might succeed at achieving their environmental (e.g., climate) targets.

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[468] Recalling the concept of "undertaking" as defined by the Court of Justice as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity," in C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, para.21. Then, in case C-49/07, *MOTOE*, para. 21, the Court of Justice clarified *Klaus Höfner and Fritz* Elser ruling as follows: "Although the Treaty does not define the concept of an undertaking, the Court has consistently held that any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be categorised as an undertaking."

[469] I included laws here because the Commission interprets this condition in its State aid laws. I get back to this discussion in Chapter 6.

[470] Recalling the second research purpose: analyze the issue of integration of environmental protection, based on Article 11 of the TFEU, within the State aid control system (as it is today) concerning environmental taxes.

The *selective advantage* condition is the most debatable State aid condition, as well as the core of the TFEU interpretation for all sorts of fiscal measures.[471] Consequently, it needs clarifications. It also entails that its discussion highlights critical aspects of the interplay between the EU and the Member States. Lawmakers can use the general parameters I identify in this chapter to understand when their choices lead to a general measure classification or the fulfillment of the *selective advantage* condition that leads to a State aid classification. Hence, I answer to the first research question.

This chapter is divided into six subchapters. The first portion is introductory. Subchapters 4.2 to 4.4 follow the so-called three-step approach used by the EU courts and the Commission for assessing the *selective advantage* condition.[472] I investigate the general circumstances of environmental taxes that led to the fulfillment (or not) of the *selective advantage* condition. Then, I analyze the current stage of the integration of environmental protection within those three steps. I guide these subchapters' investigation with the first research question.[473] Below, in Table 4, I show this three-step approach in a mind map

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[471] See Sutter, F., (2001), "*The 'Adria Wien Pipeline' case and the State Aid provisions of the EC Treaty in tax matters*," p. 241, and in Nicolaides, P., 2014, "A Surprising Interpretation of the Concept of Selectivity," last accessed January 10, 2023, available at https://www.lexxion.eu/en/stateaidpost/a-surprising-interpretation-of-the-concept-of-selectivity/. The case C-143/99, *Adria-Wien Pipelines GmbH*, from 2001, benchmarked the three-step approach for assessing selectivity, and the integration of environmental protection within the *selective advantage* condition, as it is discussed throughout this Chapter 5. As mentioned in Chapter 1, the reason the *selective advantage* condition is a core issue of Article 107(1) of the TFEU for tax measures is due to the fact that the latter instruments commonly establish different levels of tax burdens that meet the effects of that condition. For instance, taxes' differentiated rates (e.g., progressive, or flat) or relieves granted in different ways (e.g., full and partial tax exemption, credit, rebate, etc.) and circumstances could meet the *selective advantage* condition. Environmental taxes differ from the fiscal ones because they often present a differentiated tax burden levels and circumstances based on an environmental rationale. Historically, it was not until the 2015 that the Court of Justice ruled on an environmental tax without qualifying it as State aid through the analysis of the selectivity effect of that condition. In case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*. Kurcz pointed out in 2008 the lack of such general classification at the Court of Justice level. In Kurcz, B., and Vallindas, D., (2008), in "*Can General Measures Be... Selective? Some Thoughts on the Interpretation of a State Aid Definition*," on p. 160.

[472] The Court of Justice established such a three-step approach in the *Adria-Wien Pipeline* ruling, interpreting a previous case law of that Court. See in case C-143/99, *Adria-Wien Pipeline GmbH,* para. 42. Note that although this approach is the dominant among State aid cases concerning taxes, Article 107(1) of the TFEU does not prescribe a method to assess *favor certain undertakings and the production of certain goods,* and thereby it is possible to deviate from it. Cf. the well-established case law of the Court of Justice, in C-487/06 P, *British Aggregates Association*, para. 89.

[473] Recalling it: *In what circumstances do environmental taxes fulfill the selective advantage condition set out in Article 107(1)?*

to clarify them, giving examples and raising questions guiding questions for their assessment.

Table 4: Mind map of the three- step approach for assessing the selective advantage condition.

1st step: Identification of the reference tax regime, in order to find the logic of the tax (what is) or the determination of the reference regime based on the logic of the tax (what should be). What is or should be the reference regime?
2nd step: The *prima facie* selective-advantage effect. 2.1 Finding the favorable tax treatment ("favors"): *What is or what should be the tax burden, based on the logic of the reference tax regime?* E.g.: – Is it logical to present two different flat rates, progressive rates, or tax advantages to the circumstance? – Is it logical to exclude undertakings from the scope of the tax? 2.2. Delimiting the circle of comparable undertakings based on the logic of the reference tax system. Who are the taxpayers and tax objects or who should be taxpayers and tax objects based on the logic of the reference tax regime? E.g.: – A derogation from the logic? – De facto selective? – Discriminatory treatment? – the Commission and EU courts will further develop tax treatments as State aid.
3rd step: Justification. Is it justifiable under the logic and structure of the reference tax system? Yes, then the measure is general. If it is not, then the measure confers a selective advantage tax treatment (condition fulfilled). E.g.: – Justifiable under an environmental protection logic? – Justifiable under a fiscal logic – e.g., avoidance of double taxation?

The first step identifies or determines the reference tax regime that establishes the objective and logic of the tax (yellow box). The second assesses the *prima facie* effects of the *selective advantage* condition (green box). It consists of identifying the economic benefit granted only to specific undertakings as compared with those not receiving the tax benefit. The third step is about the possibility of justifying the selective-advantage tax treatment and determining whether the measure fulfills this condition (blue box).[474]

[474] In more recent rulings, the Court of Justice explain this three-step approach as follows. "(57) As regards, in particular, national measures that confer a tax advantage, it must be recalled

Then, I reflect on ways to improve that integration (in subchapter 4.5). The integration of Article 11 of the TFEU occurs within the interpretation of the *selective advantage* condition in a concrete case. It should lead to a fulfillment or not of this condition. Thus, in subchapter 4.5, I analyze the possibility of further integrating environmental protection in four cases that spurred reflections about lawmakers' choices that likely led to such fulfillment or non-fulfillment. In this subchapter 4.5, the second research question is more appropriate for guiding such an analysis.[475] I end this chapter with a summary of the most relevant findings (in subchapter 4.6).

4.2. The First Step: Identification or Determination of the Tax Regime

4.2.1. Preliminary remarks

In this section (4.2.1), I make some preliminary remarks concerning identification or determination of the reference tax regime, before moving into the analysis of the general parameters for assessing this first step. In sections 4.2.2 and 4.2.7, I discuss six (two in one section, 4.2.6) general

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that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (…). (58) In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (…). (60) It follows from all the foregoing that the appropriate criterion for establishing the selectivity of the measure at issue consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system (…)." In joined cases C-20/15 P and C-21/15 P, *Commission v World Duty-Free Group SA, Banco Santander SA, and Santusa Holding SL*, paras. 57, 58, and 60.

[475] Recalling the second research question: *How, where environmental taxes are concerned, can lawmakers and the EU (acting through its institutions) influence the further integration of the environmental protection requirements set out in Article 11 into Article 107?*

parameters for assessing the reference regime for geographic and material selectivity.[476] These are:

1. Section 4.2.2 is about the three-autonomy test (the sole parameter for geographic selectivity).
2. Section 4.2.3, which is about the identification or determination of the reference regime, is based on the *de jure* and *de facto* effects of the tax regime and its scope (first out of five parameters for material selectivity);
3. Section 4.2.4 is about exclusion from the scope of the tax (second parameter for material selectivity);
4. Section 4.2.5, which is about the Commission's determination of the reference tax regime, is restricted to the laws of the Member States (third parameter for material selectivity);
5. Section 4.2.6 is about how the Commission must exchange information with the Member State concerned (fourth parameter for material selectivity). Also, it is about how the Commission must carry out an objective examination of the content, the structure, and the specific effects of the applicable rules under the national law of that State (fifth and last parameter for material selectivity).

Then, in section 4.2.7, I map all the parameters found in the previous sections. This first step is called the identification or determination of the reference tax regime (also called "normal," "ordinary," or "common"; and "system" or "framework").[477] It is about the legal foundation for the assessment of

[476] I explain briefly here the difference between *geographic* and *material selectivity*. Consider the following situation. The legislator of an overseas territory or a particular region of a Member State has legislated a tax law in that particular area, and that tax became the object of the State aid control system. That tax could be granting a *geographic selectivity*, if the regional tax is considered derogation from the ordinary tax regime of the Member State concerned. In order to consider that regional tax as a derogation, the Court of Justice case law established one parameter that I explain in section 5.2.2. *Material selectivity* is any economic advantage granted *de jure* or *de facto,* which was not by a regional tax regime. Thus, the latter is farther reaching, in the sense that relates to all other possibilities.

[477] See, for instance, 'framework' and 'tax system' in paras. 38 and 39 of the case C-88/03, *Portugal v Commission; 'common system'* in para. 124 of the joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar; 'legal regime'* in para. 51 of joined Cases C-164/15 P and C-165/15 P, *Commission v Aer Lingus Ltd, Ryanair Designated Activity Company, and Ireland*; 'common tax regime' in para. 71 of joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, among other cases.

selective and advantage as effects that meet this State aid condition, which I discuss in the later subchapters (subchapters 4.3 and 4.4).[478]

Since 2001, when the Court of Justice delivered the *Adria-Wine Pipelines* preliminary ruling, it has consistently held that its assessment of the *selective advantage* condition proceeds on the basis of the reference tax system.[479] However, it was in the *Portugal v Commission* ruling from 2006 that the Court stressed the relevance of the determination of the reference system when assessing the selectivity effect of tax measures, in the sense that a wrongful analysis can compromise the State aid conclusion entirely.[480]

The reference tax regime enables the State aid interpreter (e.g., the Commission or the national court) to find whether the tax grants selective-advantage tax treatment legally or factually. In its Notice on the notion of State aid, the Commission stated:

> *The reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.*[481]

The Commission's explanation above is very instructive concerning the reference regime, providing the logic of how the objective of the tax defines

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[478] Based on the *Portugal v Commission* ruling (in case C-88/03, *Portugal v Commission,* para. 52, and the case law mentioned therein), the Court of Justice specified the three-step test for the selectivity assessment for the first time as such. Although the *Adria-Wien Pipeline* ruling (in case C-143/99, *Adria-Wien Pipelines GmbH,* paras. 41–42) was the case law that established the legal rationale of the three-step assessment of selectivity. In the *Adria-Wien Pipelines GmbH* case, the Court of Justice interpreted its previous case law to reach that position (e.g., case C-143/73, *Italy v Commission,* para. 33 through analogy, and case C-75/97, *Belgium* v *Commission,* paras. 28–31).

[479] In case C-143/99, *Adria-Wien Pipeline GmbH,* paras. 41–42. Then, in case C-88/03, *Portugal v Commission,* para. 56; case C-524/14 P, *Commission v Hansestadt Lübeck,* para. 55; joined cases C-105/18 to C-113/18, para. 62; joined Cases C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation, v Agenzia delle Entrate, Ministero dell'Economia e delle Finanze (C-79/08), and Ministero delle Finanze v Michele Franchetto (C-80/08),* para. 49.

[480] In case C-203/16 P, *Andres (insolvency of Heitkamp BauHolding) v Commission*, para. 107.

[481] In para. 133 of that Notice.

the tax's scope and structure – not only what it is, but also what it should be. So, before understanding a tax system's logic and structure based on its objectives, it is first necessary to know (i.e., to identify) what the objective, instrumental effects of the tax system.[482] After this, it becomes possible to analyze the consistency of the tax's objective with its scope and structure, thereby identifying or determining the reference regime. That is why one relevant preliminary question is: *why is there an alternative "identification" or "determination"?*

Identifying the reference tax regime is a simple step. It is about referring which is the tax law legal text of concern, which the Member State of reference officially recognizes as legitimate. The Commission states in the Notice on the notion of State aid that "the reference system is, in principle, the levy itself" – i.e., the tax law itself.[483] However, the Commission also explained in the Notice that, based on the effects-based approach of Article 107(1),[484] such an assessment can be more complex, leading to a determination of the reference system.[485] That is a determination of *what the tax regime should be* (based on its objective) that influences the logic and structure of the tax regime directly.

The determination of the reference regime is a highly debatable assessment from a legal point of view. Its underlying legal issue concerns the line between, on the one hand, the reach of the State aid control system to taxes not harmonized with EU laws, and, on the other, the tax discretion of the Member States.[486] One of the main problems here concerns the parameters developed through the case law for identifying or determining the reference tax regime in actual cases. An error in the identification or determination of the reference regime compromises the remainder of the selective-advantage

[482] In joined cases C-51/19 P and C-64/19 P, *World Duty Free Group and Spain* v *Commission,* paras. 61-62.
[483] In the Commission Notice on the notion of State aid, para. 134, where the Commission explained the following. "In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system, (205) the VAT system, (206) or the general system of taxation of insurance. (207) The same applies to special-purpose (stand-alone) levies, such as levies on certain products or activities having a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and subject to special cases illustrated in paras. 129 to 131 above, the reference system is, in principle, the levy itself."
[484] *Ibid*, para. 129
[485] *Ibid,* in paras. 130–131.
[486] *Ibid,* para. 134,

assessment. Hence, it is likely to disqualify the measure as State aid under Article 107(1), since the State aid conditions are cumulative.[487] This means a wrongfully identified reference tax regime compromises the entire State aid assessment, because the conclusion was based on a wrongful benchmark. [488] Not to mention that, every time the assessment of this first step leads to a determination of the reference tax regime (i.e., what the tax law should be), this action creates tension and legal debate between the EU, the Member States, and the parties affected.[489]

Throughout this subchapter, I discuss and identify six parameters of EU case law, in order to clarify this first step. For the analysis proposed here, I follow as much as possible a timeline concerning the relevant development of these parameters. Moreover, the Court clarified that the identification or determination of the reference tax regime gives information about the normal tax system. From there, it is possible to assess the *selective advantage* condition. The Court stated:

> *It is clear from the foregoing that in order to determine whether the measure at issue is selective it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. The determination of the reference framework has a particular*

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[487] In case C-203/16 P, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, para. 107, the Court of Justice stated that "(…) an error in the determination of the reference framework against which the selectivity of the measure should be assessed necessarily vitiates the whole of the analysis of the condition relating to selectivity."

[488] In this sense, in joined cases C-51/19 P and C-64/19 P, *World Duty Free Group and Spain* v *Commission,* para. 61, the Court stated what follows. "For the purposes of assessing the selective nature of a tax measure of general application, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of the selectivity of an aid scheme, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (see, to that effect, judgments of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, para. 107, and of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, para. 46)."

[489] See the discussion about the parties affected by a State aid decision in subchapter 7.2 Incompatible Aid. Note that even other Member States having a similar tax regime could be a party concerned since State aid decisions are often disputed at the EU courts and become a case law for other unresolved cases.

> *importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation. The "normal" tax rate is the rate in force in the geographical area constituting the reference framework.*[490]

Based on the above, the logic of a *selective advantage* condition is a deviation from the "normal" tax treatment, which one can only assess by establishing (identifying or determining) the normal tax regime of reference. Without a normal regime of reference, it is impossible to find selective tax treatment, which is the State aid condition in discussion. Finally, although the last sentence of the quote above refers to a geographical area, the Court applies this view in most of its rulings concerning both geographic and material selectivity, and without necessarily using that last sentence.[491] Now to the geographic selectivity.

4.2.2. The sole parameter for assessing geographic selectivity: The three-autonomy test (*Azores* case law)

In 2006, in the *Portugal v Commission* (Azores) ruling, the Court of Justice established that a regional tax regime must meet three cumulative criteria to be regarded as the reference tax regime.[492] The regional tax must cumulatively

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[490] In case C-88/03, *Portugal v Commission*, para. 56.

[491] Examples of cases citing case C-88/03, *Portugal v Commission*, para. 56, are: C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v Paint Graphos Soc. coop. arl* (C-78/08), *Adige Carni Soc. coop. arl, in liquidation, v Agenzia delle Entrate, Ministero dell'Economia e delle Finanze* (C-79/08), a*nd Ministero delle Finanze v Michele Franchetto* (C-80/08), para. 49; C-109/09 P, *Spain v Gibraltar and UK,* paras. 80 and 115; C-524/14 P, *Commission v Hansestadt Lübeck*, para. 55; in joined cases C-105/18 to C-113/18, *UNESA and others v Administración General del Estado (Spain) and others,* para. 62.

[492] In case C-88/03, *Portugal v Commission,* paras. 67-68, where the Court of Justice stated the following. "(67) As the Advocate General pointed out in para. 54 of his Opinion, in order that a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that decision must, first of all, have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government. Next, it must have been adopted without the central government being able to directly intervene as regards its content. Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government. (68) It follows that political and fiscal independence of central government which is sufficient as regards the

exhibit (a) institutional autonomy, (b) procedural autonomy, and (c) financial autonomy from the central government, then it is the regime of reference.[493] In this case, it cannot grant a geographic selectivity, because the regional tax system is the reference, although it can still give material selective-advantage tax treatment from the perspective of the logic and structure of that regional system.[494] However, suppose it fails to meet one of the autonomy criteria. In that case, the tax regime of reference is the central government's, and the regional tax may be granting geographic selective advantage tax treatment.[495]

Looking closer at the three autonomy criteria, herein called *(i) the three-autonomy test*, based on the *Portugal v Commission* (Azores) ruling and the Commission's Notice on the notion of State aid, I explain my understanding of this *test* and its circumstances as follows:

> (i.a) "Institutional autonomy" is the legal circumstance where the tax legislators have autonomous tax power, defined by the laws of the Member State in question, which grants them total discretion to decide politically, legally, economically, and administratively the design features of the regional tax law.[496]
> (i.b) "Procedural autonomy" is the circumstance in which the central government does not have the power, i.e., legitimacy, to intervene in the tax directly.[497]
> (i.c) "Financial autonomy" is the circumstance where the economic situation of the undertakings of the region means they cannot receive

application of Community rules on State aid presupposes, as the United Kingdom Government submitted, that the infra-State body not only has powers in the territory within its competence to adopt measures reducing the tax rate, regardless of any considerations related to the conduct of the central State, but that in addition it assumes the political and financial consequences of such a measure."

[493] Based on the content of paras. 67-68 in case C-88/03, *Portugal v Commission,* quoted in the previous footnote.

[494] See geographic and material selectivity discussion in in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar.*

[495] Note that in this case, the tax could be also granting material selectivity, as discussed in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* where the Commission took this view that the Gibraltar's proposed tax reform to companies' income taxation were both geographic and material selective, in paras. 20-21, 24, 26, 34, and 109.

[496] In the Commission Notice on the notion of State aid, in section 5.3.1, paras. 145-146.

[497] *Ibid,* in section 5.3.2, paras. 147-151.

> public benefits (whether tax exemptions or subsidies) from other areas, or from the central government of the Member State.[498]

So, unless these three criteria are met, the tax regime of reference is the central government's, and the regional tax may be granting a geographic selective-advantage tax treatment.[499] Thus, it is only when the geographic tax law exhibits all three circumstances (i.e., institutional, procedural, and financial autonomy) that the reference tax system is the regional one.[500] The following example based on the above discussion clarifies the geographic selectivity effect.

Madeira is an overseas territory of Portugal. Suppose Madeira has a corporate income tax system (herein: MCIT) that grants tax exemptions for specific kinds of income: interest and capital gains, for example, provided the company in question meets specific legal requirements prescribed in the MCIT. In this case, I need to investigate the *three-autonomy test* of that tax law, namely the MCIT. If the MCIT meets all three criteria, then it is the regime of reference, and the exemptions may still grant a material (economic) selective-advantage tax treatment concerning the MCIT's ordinary tax regime. However, when the MCIT does not exhibit one of the three cumulative autonomy criteria, then Portugal's corporate income tax is the regime of reference. In this case, the MCIT may be granting a geographic selective-advantage tax treatment to companies registered in Madeira that meet the MCIT's legal requirements. Moreover, these companies may also be receiving a material selective-advantage tax treatment compared to other companies, which are taxed under Portugal's corporate income tax. [501]

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[498] *Ibid,* in section 5.3.3, paras. 152-155.

[499] See discussion joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* particularly paras. 86–108.

[500] See scholarly criticism about these three criteria in da Cruz Vilaça, J., (2009), "Material and geographic selectivity in state aid recent Developments", pp. 449–450. Although Biondi, A., (2013), "State Aid is falling down, falling down: An analysis of the case law on the notion of Aid" in p. 1.729, footnote 39 regards this test as a the only settled one, i.e., not complex as the material selectivity test.

[501] See the selective discussion in both rulings *Portugal v Commission* ruling (C-88/03), and in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar* (for instance, the paragraphs mentioned in the previous footnote), where the geographic selectivity discussion only adds an extra layer to that assessment. Also, in joined cases C-51/19 P and C-64/19 P, *World Duty Free Group and Spain* v *Commission,* paras. 61-62. In da Cruz Vilaça, J., (2009), "Material and geographic selectivity in state aid recent Developments," the author criticizes the EU courts

Based on the above, the *three-autonomy test* for identifying the MCIT or Portugal's national system as the reference tax regime relates to constitutional aspects of the Member State. For instance, Portugal's constitution may determine Madera's tax jurisdiction and level of discretion for enacting fiscal measures. Hence, whether the geographic tax law in question is about an overseas territory or about a specific area of the Member State concerned, the parameter adopted in the *Portugal v Commission* (Azores) ruling remains the case law of reference. That is, the *three-autonomy test* should be used to identify the geographic regime or the national tax regime as the tax regime of reference. In the latter case, the geographic regime is the one that grants selective-advantage tax treatment.

Consequently, geographic selectivity adds another layer to the assessment of the identification or determination of the reference tax regime. Finally, the underlying question about this matter is: *which should be the tax regime of reference: the regional tax regime or the central government's?* Once the State aid investigator (e.g., the Commission, the national court, etc.) finds the answer, the follow-up assessment can be finding material selective tax treatment (see subsequent sections 4.2.3 to 4.2.6) or a move to the second step of the *selective advantage* condition (see subchapter 4.3).

4.2.3. The first parameter for assessing material selectivity: *De jure* and *de facto* effects of the reference tax regime

In 2011, the Court of Justice benchmarked the first parameter in order to assess the reference regime of a material selective fiscal measure in the (in)famous Gibraltar ruling.[502] I have called this assessment as "*de jure* and *de*

lack of coherency and consistency in the selective advantage condition discussion, including the identification of the reference regime.

[502] The appeal in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* and the annulment proceeding in joined cases T-211/04 and T-215/04, *Gibraltar v Commission.* Concerning the scholarly criticism to classify this case as (in)famous, see Lang, J. (2012), "The Gibraltar state aid and taxation judgment a methodical Revolution" p. 811, and in Nicolaides, P. (2016), "State Aid Rules and Tax Rulings," pp. 424-425; in Traversa, E., & Flamini, A., (2015), "Fighting harmful tax competition through EU state aid law: will the hardening of soft law suffice," pp. 328–329. While the scholars that appraised it, among others, are Rossi-

facto effects of the reference tax regime". Gibraltar's reform of corporate tax (herein: GRCT) was the object of a State aid debate that divided scholars and highlighted the inconsistent view of the EU institutions involved about the interpretation of the selective effect of the GRCT.[503] Below, in Box 3, I included detailed information on the object of the debate.

Joined cases T-211/04 and T-215/04 (C-109/06 P) *Gibraltar, UK and Northern Ireland v Commission*

(18) This reform comprises a system of taxation applicable to all companies established in Gibraltar and a top-up (or penalty) tax applicable solely to companies in the financial services sector and to utilities, which include undertakings operating in the telecommunications, electricity and water sectors. […]

(21) The system of taxation that is introduced by the reform and will be applicable to all companies established in Gibraltar consists of a payroll tax, a business property occupation tax and a registration fee: – payroll tax: all Gibraltar companies will be liable to a payroll tax in the amount of GBP 3 000 per employee each year; every 'employer' in Gibraltar will be required to pay payroll tax in respect of the total number of its full-time and part-time 'employees' who are 'employed in Gibraltar'; the legislation relating to the tax reform will define the abovementioned terms; – business property occupation tax ('BPOT'): all companies occupying property in Gibraltar for business purposes will have to pay a tax on the occupation of that property at a rate equivalent to a percentage of their liability to the general rates charged on property in Gibraltar; – registration fee: all Gibraltar companies will have to pay an annual registration fee, of GBP 150 per annum in the case of companies not intended to generate income and of GBP 300 per annum in the case of companies intended to generate income.

(22) Liability to payroll tax together with BPOT will be capped at 15% of profits. The effect of this cap is that companies will pay payroll tax and BPOT only if they make a profit, and in an amount not exceeding 15% of profits.

Maccanico, P., (2012), "Gibraltar: Beyond the Pillars of Hercules of Selectivity," and Aalbers, M. (2017), "Gibraltar: Rock Solid Interpretation of the Selectivity Criterion."

[503] See supra footnote. The EU institutions involved in this case were the Commission, the General Court, and the Court of Justice.

(23) Certain activities, namely financial services and activities of utilities, will be subject to a top-up (or penalty) tax on profits generated by them. The top-up tax will apply only to profits that can be allocated to those activities.
(24) Thus, financial services companies will be charged, in addition to payroll tax and BPOT, a top-up (or penalty) tax on profits from financial services activities at a rate of between 4% and 6% of profits (calculated in accordance with internationally accepted accounting standards); such companies will have their tax liability (payroll tax, BPOT and top-up tax) capped, in aggregate, at 15% of profits.
(25) Utility companies will be charged, in addition to payroll tax and BPOT, a top-up (or penalty) tax on profits from their activities at the rate of 35% of profits (calculated in accordance with internationally accepted accounting standards). Such companies will be permitted to deduct payroll tax and BPOT from their liability to top-up tax. Although utility companies will also have their annual liability to payroll tax and BPOT capped, in aggregate, at 15% of profits, the operation of the utilities top-up tax will ensure that these companies always pay a tax equal to 35% of profits.

Box 3: Joined cases T-211/04 and T-215/04 (C-109/06 P) Gibraltar, UK and Northern Ireland v Commission.

The Commission classified the GRCT as incompatible aid, since the "payroll tax and BPOT as basis for corporate taxation in an economy such as Gibraltar's, where there is a large offshore sector of companies without employees or property" was in its nature selective.[504] The General Court concluded the opposite of what the Commission stated in its State aid decision concerning the three-autonomy test set out in the *Portugal v Commission* (Azores) ruling in the Gibraltar case.[505] That is, the GRCT should be the reference regime instead of the U.K.'s regime, and it thereby could not confer a geographic selective-advantage tax treatment, as the Commission viewed.[506] In essence, the General Court accepted the view that the Commission had not adequately assessed the geographic and material selectivity of the GRCT, in particular by not identifying the formal reference regime and a derogation from it.[507] The Court of Justice set aside the General

[504] In joined cases T-211/04 and T-215/04, *Gibraltar v Commission,* para. 136.
[505] *Ibid*, in paras. 83–116.
[506] *Ibid,* para. 116.
[507] *Ibid,* paras. 89–116.

Court ruling.[508] It clarified that, indeed, the formal reference regime did not establish any tax treatment consisting of a selective advantage, but rather a *de facto* discrimination against offshore companies.[509]

The GRCT's combination of rules did not concern a derogation from the formal reference system – i.e., tax treatment that deviates from the ordinary tax burden – but rather *de facto* discriminatory tax treatment that was selective and forbidden by Article 107(1).[510] Thus, it established the parameter "*(ii) the identification or determination of the reference regime is based on the de jure and de facto effects of the tax regime*." The Gibraltar case benchmarked the possibility that a direct tax regime can grant a *de facto* selective-advantage tax treatment, since only offshore companies could benefit from the reform rules. In *de jure* (formal) terms, the reform rules applied equally to all companies, but offshore companies benefitted *de facto* (substantively) – from zero taxation.[511] Once again, the Court of Justice had applied the effects-based approach of Article 107(1).[512]

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[508] In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para. 109.
[509] *Ibid,* paras. 90–96.
[510] *Ibid,* paras. 102–107.
[511] In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* in paras. 95–96 and 100-102, the Court explained how the Commission properly assessed the *de facto* selective advantage condition of the GRCT. Later, in 2016, the Commission Notice on the Notion of State Aid, in paras. 121-122, the Commission clarified as *de jure* and *de facto* selective effect with the following view. "(121) *De jure* selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance: those having a certain size, active in certain sectors or having a certain legal form; companies incorporated or newly listed on a regulated market during a particular period; companies belonging to a group having certain characteristics or entrusted with certain functions within a group; ailing companies; or export undertakings or undertakings performing export-related activities …). *De facto* selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (as in the examples in the preceding sentence). (122) *De facto* selectivity may be the result of conditions or barriers imposed by Member States preventing certain undertakings from benefiting from the measure. For example, applying a tax measure (for example a tax credit) only to investments exceeding a certain threshold (other than a minor threshold for reasons of administrative expediency) may mean that the measure is *de facto* reserved for undertakings with significant financial resources. A measure granting certain advantages for a brief period only may also be de facto selective."
[512] In Aalbers, M., (2017), "Gibraltar: Rock Solid Interpretation of the Selectivity Criterion" p. 497. Because Article 107(1) of the TFEU "defines the State aid intervention on the basis of their effects," disrespectfully of the techniques of the measure in question, when granting those effects (in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para 87).

Scholars strongly criticized the Gibraltar judgment at that time, because the Court had benchmarked the possibility of determining what they viewed as *what the tax system ought to be*, by endorsing the Commission's view that the GRCT conferred a *de facto* selective-advantage tax treatment.[513] However, Traversa and Flamini argue that the Commission and the Court of Justice was mistaken about the GRCT rules, writing as follows:

> *In fact, the measure at stake did not define specific rules for a category of companies by departing from the general reference framework of Gibraltar: that measure, in defining the tax base for the corporate tax, was the general reference framework.*[514]

Their criticism shows how identifying or determining the reference tax regime can be extremely difficult in the State aid control system arena.[515] The conclusion differs depending on how the interpreter looks at the combination of rules in the GRCT. For instance, the General Court took an opposite view from the Commission's, while the Court of Justice confirmed the Commission's interpretation of the GRCT's fulfillment of the *selective advantage* condition.[516] Moreover, in this particular case, the Court of Justice concluded that the General Court was too formalistic in its review of the Commission's assessment of the GRCT, stressing that Article 107(1) disregards such formalities due to its effects-based approach.[517] So, the Gibraltar case increased legal uncertainty in the State aid control system concerning taxation, because of the blurred lines separating *de facto* selective-advantage tax treatment from formal general tax treatment.

Historically, once the Gibraltar case had benchmarked the effects-based approach at the first step of the selective-advantage assessment, the analysis of *what the reference regime should be* became a legal possibility accepted by the

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513 In Lang, J. (2012), "The Gibraltar state aid and taxation judgment a methodical Revolution," p. 811.
514 In Traversa, E., & Flamini, A., (2015) "Fighting harmful tax competition through EU state aid law: will the hardening of soft law suffice," in p. 329.
515 See also in Nicolaides, P. (2016) "State Aid Rules and Tax Rulings," pp. 424-425. Also, Romariz, C., (2014), "Revisiting material selectivity in EU state aid law or the ghost of yet-to-come," pp. 44-46. Forrester, E., (2018), "Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?" pp. 27-28 also criticized the Court approach in Gibraltar ruling questioning its effects in terms of legal certainty of what State aid is and what is general.
516 In the joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* in paras. 77–109.
517 *Ibid,* paras. 95–105.

EU courts, and gave rise to a problematic legal debate. The latter effect directly influences the interplay between the EU and the Member States within the State aid control system. Considering an example in which the identification or determination of the reference regime shows how the legal debate and effects of the State aid control system can impact the interplay between the EU and the Member States.

Ireland had imposed a flight tax (known as "ATT") on passengers, with two flat rates levied simultaneously: namely, 10 euros for flights more than 300 kilometers from Dublin, and 2 euros for flights within that area.[518] The Commission took the view that the lower rate was an incompatible aid, and ordered Ireland to recover the monies involved.[519] However, the parties directly affected by that decision defended the view that the 2-euros rate was the ordinary tax regime and that the 10 euros rate was levied in excess, resulting in a breach of the freedom to provide services (i.e., flight services).[520] Despite this, since the Commission had chosen to assess the ATT as State aid, the Court of Justice confined its analysis of the legal matter at issue to the Commission's State aid assessment whether it had been conducted properly.[521]

The fundamental legal discussion was, in essence, about which rate should be considered the reference rate for determining the ordinary tax burden, since both rates were levied simultaneously. In my view, the Gibraltar case created the legal possibility of viewing the two flat ATT rates not as a general tax regime, but rather as a selective one, because it applied the effects-based approach of Article 107(1). Moreover, it created another possibility of assessing the *selective advantage* condition (without requiring a derogation), by verifying the effect of the selective-advantage tax treatment. That is why the

[518] In joined cases C-164/15 P and C-165/15 P, *Commission v Ireland, Aer Lingus Ltd, and Ryanair Designated Activity Company*, in paras. 9 to 14.
[519] In C-164/15 P and C-165/15 P, *Commission v Ireland, Aer Lingus Ltd, and Ryanair Designated Activity Company*, paras. 9 to 14, and paras. 1–13 in cases T-473/12 and T500/12, the original annulment proceedings that are object of appeal to the first case reference. See the recovery discussion of this case in section Recovery of Incompatible Aid.
[520] In joined cases C-164/15 P and C-165/15 P, *Commission v Ireland, Aer Lingus Ltd, and Ryanair Designated Activity Company*, paras. 42–46.
[521] Based on my view of the arguments found in paras. 75–79 of joined cases C-164/15 P and C-165/15 P.

ATT unquestionably breached Article 107(1): that is, the differentiation of the tax rates had no apparent purpose.

Besides, in my view, the legal argument that the ATT may have breached the freedom to provide services is evidence of the direct effect of the State aid control system on the interplay between the EU and the Member States, due to the legal consequences involved. A breach of the freedom to provide services would have granted the airlines operating more than 300 kilometers from Dublin the right to reimbursement for the taxes paid in excess. Thus, Ireland would have had to pay 8 euros per passenger (the difference between the two rates) to each airline that had paid the tax in excess. While the State aid, the legal consequence would have been the recovery of that difference, even though it was an indirect tax passed on to passengers.[522] Consequently, assessing Ireland's breach of Article 107(1) was a much more diplomatic settlement between Ireland and the EU than finding it to be a breach of the freedom to provide services. The reason for this conclusion is relatively straightforward, since the legal consequences entailed revenues for Ireland's public coffers instead of a liability for Ireland to compensate companies for the tax levied in excess.

4.2.4. The second parameter for assessing material selectivity: Exclusion from the scope of the tax

Following the *Gibraltar* ruling, the determination of the reference regime based on *what the tax should be* led the Court of Justice to conclude that, when

[522] Conclusion based on the Court statement that what follows: "Indeed, contrary to the view expressed by the General Court in para. 105 of the Aer Lingus judgment and para. 136 of the Ryanair judgment, the advantage, as identified by the Commission in the decision at issue, did not consist in the fact that the airlines subject to the lower rate were able to 'offer more competitive prices'. It consisted, quite simply, in the fact that those companies had to pay a lower rate of ATT than they would have had to pay if their flights had been subject to the higher rate of ATT. The question whether that advantage enabled them to offer more competitive ticket prices, or whether they exploited that advantage differently, relates to the assessment of any benefit they were able to accrue from the exploitation of the advantage granted; that assessment is irrelevant to the recovery of the aid." In para 102 of C-164/15 P and C-165/15 P.

a tax has a too narrow scope, it can also be selective.[523] The underlying questions concerning the exclusion from the scope of the environmental tax are: *who are the logical taxpayers, and how should the tax burden be distributed among them, given the environmental objective of the tax?* These questions can guide the identification of the reference regime concerning the scope of the environmental tax.

In 2015, the Court of Justice received a preliminary ruling from Germany, whether an excise duty on nuclear fuel (known as the *KernbrStG*) could be classified as State aid.[524] This case can be seen as having begun a new "era" in the State aid control system in connection with environmental taxes, since it was the first time the Court of Justice did not classify an environmental tax as State aid.[525] More importantly, it benchmarked a general parameter for identifying or determining the reference regime concerning environmental taxes, notably excluding certain undertakings from the scope of the tax. The Court of Justice analyzed whether the *KernbrStG*'s exclusion of non-nuclear fuels from the scope of the tax[526] could be classified as selective tax treatment.[527] Based on the *KernbrStG*'s explanatory memorandum (used to propose the tax law), the Court identified two purposes: (1) the fiscal purpose of raising revenues to reduce the societal burden of the pollution caused by nuclear fuels; and (2) the environmental protection purpose of addressing the environmental impact caused by radioactive waste from the use of nuclear fuels and the PPP imposition.[528]

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[523] Based on case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, para. 76.
[524] Ibid idem.
[525] Case C-143/99, *Adria-Wien Pipeline GmbH*, case C-159/01, *Netherland v Commission,* and case C-487/06 P, *British Aggregates Association, U.K. v Commission.*
[526] When it stated the last sentence in para. 76 of the case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück.*
[527] *Ibid,* based on paras. 72–74. Lopez clarified that when there is an assumption that the reference scheme is too broad, the burden of proof falls on the Member State concerned to show otherwise. However, this view is mostly applicable in an Sttae aid investigation procedure. The *KernbrStG*, the *ANGED* and the *UNESA* cases were all preliminary rulings, which the national court needs to interpret, apply, and implement the Court of Justice ruling and its key legal points. In Piernas Lopez, J., (2018), "Revisiting Some Fundamentals of Fiscal Selectivity: The ANGED Case," p. 278.
[528] *Ibid,* para. 78, where the Court of Justice stated the following. "On the other hand, it is apparent from the order for reference that, in accordance with the explanatory memorandum to the proposal for the law which culminated in the adoption of KernbrStG, that law introduced for a specific period, namely from 1 January 2011 to 31 December 2016, a duty on the use of nuclear fuel for the commercial production of electricity with a view to raising revenue intended, inter alia, to contribute, in the context of fiscal consolidation and in

The Court of Justice understood that the exclusion of non-nuclear fuels to produce electricity was not affected by the *KernbrStG*, since they could not cause radioactive waste pollution – i.e., the same environmental impact targeted by the tax.[529] Thus, the Court of Justice answered the national court that the *KernbrStG* did not qualify as State aid.[530] This was because other methods of electricity production could not be in a comparable situation with nuclear-based energy production, given their different impact on the environment.[531]

The Court of Justice used the *KernbrStG*'s objectives to conclude that the reference regime and the restriction of the tax burden to nuclear fuels were logical and proportional to the objective of the tax,[532] in such a way that the first and second steps of the *selective advantage* condition seemed to be one. The exclusion from the scope of the tax was a question, namely, about the circle of comparable undertakings. Hence, the three-step approach for assessing the *selective advantage* condition concerning the environmental protection objective of the tax seems pointless to discuss when the alleged selective tax treatment arises from the exclusion of the tax's scope.[533] Moreover, the interpretation

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accordance with the polluter-pays principle, to a reduction in the burden entailed for the Federal budget by the rehabilitation required at the Asse II mining site, where radioactive waste from the use of nuclear fuel is stored."

[529] *Ibid,* para. 79, where the Court of Justice stated the following. "It must be noted that methods of producing electricity, other than that based on nuclear fuel, are not affected by the rules introduced by *KernbrStG* and that, in any event, they are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel."[529]

[530] *Ibid,* para. 80.

[531] *Ibid,* para. 79.

[532] See discussion regarding the *KernbrStG*'s objective to finance the rehabilitation of the mining site to lower the public budget for the costs of such rehabilitation in section Environmental damage: a societal costs.

[533] Based also on the *ANGED* and *UNESA* cases that present similar reference regime discussion. See in case C-233/16, *ANGED,* para. 46, in joined cases C-234/16 and C-235/16, *ANGED,* para. 39, and in joined cases C-236/16 and C-239/16, *ANGED,* para. 34, where the Court of Justice stated: "Next, although the tax criterion relating to the sales area does not appear to formally derogate from a given legal reference framework, its effect is nonetheless to exclude retail establishments whose sales area is less than 2 500 m² from the scope of that tax." See also in joined cases C-105/18 to C-113/18, *UNESA,* para. 63, where the Court of Justice stated a similar view quoted in the following. "As regards, in the first place, the examination on the selective nature of the measure at issue in the main proceedings, which might arise from the fact that the tax on the use of inland waters for the production of electricity is not payable by electricity producers whose source of production is other than water, it must be found that while the tax criterion, relating to the source of production of the electricity, does not appear to derogate formally from a given legal reference framework, its

of the Court of Justice concerning the *KernbrStG* as not fulfilling the *selective advantage* condition integrated the environmental protection objective of that tax into the condition assessment, thereby avoiding that the tax breached Article 107(1).[534]

4.2.5. The third parameter for assessing material selectivity: The Commission's determination of the reference tax regime is restricted to the laws of the Member States.

Another parameter for the identification or determination of the reference regime was established by the *Hungary v Commission* ruling, from March 16, 2021. Hungary had levied a turnover tax on the net turnover generated during the fiscal year by advertisements broadcast or publicized by any person.[535] The Commission concluded that Hungary's turnover tax on advertisement was selective, and thereby qualified as State aid.[536] The Commission's conclusion was based on its view that the turnover tax on advertisements should be levied at a single rate.[537] However, the Grand Chamber of the Court of Justice rejected that conclusion. It stated that such progressive rates would

effect is nonetheless to exclude such electricity producers from the scope of that tax." So, in the *ANGED* and *UNESA* rulings, the Court of Justice recognized the possibility that the proper reference regime should have broader scopes and include undertakings *de facto* excluded from their imposition, based on the objectives of those taxes and the lack of comparability of undertakings excluded from the tax's scope. According to Bernabeu, the Court of Justice took wrongful assumptions of the Spanish general tax system to electricity producers (in joined cases C-105/18 to C-113/18, *UNESA*), particularly the view that Water Law had the three autonomies (established in *Portugal v Commission ruling,* the Azores case) to be considered the reference regime. In the author's view, the Water Law was a derogation from the national ordinary tax regime to electricity production. In Bernabeu, B., (2020), "The Spanish hydroelectric tax: asymmetrical taxation with environmental flavour," pp. 352-358.

534 Given that the case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück,* is a preliminary ruling, the national court still had to interpret, apply, and implement that ruling into the case in the main proceedings, particularly the Court of Justice's approach concerning the weight of the *KernbrStG*'s memorandum to give logic to its imposition.

535 In case T-20/17, *Hungary v Commission,* paras. 11-12, and 82, and in its appeal C-596/19 P, *Commission v Hungary*, paras. 3–4,

536 In case T-20/17, *Hungary v Commission,* paras. 11-12, and 82.

537 *Ibid idem.*

be State aid if they reproduced a discriminatory effect, which was not the case with Hungary's measure.[538]

From the perspective of State aid law, the Court's appeal ruling clarifies why the Commission is not allowed to determine the reference tax regime (i.e., *what the tax should be*) of direct taxes when they are not discriminatory. The case concerned a turnover tax with progressive rates. The Grand Chamber stated:

> *As regards the fundamental freedoms of the internal market, the Court of Justice has held that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, meaning that the application of progressive taxation falls within the discretion of each Member State […]. The same is true in the field of State aid […].*
>
> *(4It follows that, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. This includes, in particular, the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event.[539]*

Thus, the Grand Chamber restricted the reach of the State aid control system over the tax discretion of the Member States, particularly in fiscal areas where the EU has not legislated on the matter. The Grand Chamber simply recognized the choices of rate (progressive or flat) as falling within the tax discretion of the Member States.[540] Without discriminatory treatment, Article

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[538] In case, C-596/19 P, *Commission v Hungary,* para. 48, the Grand Chamber stated the following. "It follows from the foregoing that the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. That said, it cannot be ruled out that those characteristics may, in certain cases, reveal a manifestly discriminatory element, which it is, however, for the Commission to demonstrate."

[539] In case C-596/19 P, *Commission v Hungary*, paras. 43–44.

[540] *Ibid,* in para. 45, the Grand Chamber stated the following position. "(45) Those characteristics constituting the tax therefore, in principle, define the reference system or the

107(1) of the TFEU cannot forbid progressive rates on turnover taxes because other Member States do not impose them.[541] The Grand Chamber stated that the logic of a progressive rate is taxpayers' ability to pay, which means that unless such progressivity is determined on a discriminatory basis, that State aid rule cannot forbid it.[542]

Thus, based on the *Commission v Hungary* ruling, the Grand Chamber of Court of Justice established another parameter concerning the identification or determination of the reference tax system: namely, *the Commission's determination of the reference tax regime is restricted to the laws of the Member States.* Thus, it cannot compare other Member States' tax practices to determine what the reference regime should be.

This parameter was also delimited in a later ruling, from 8 November 2022: the *Fiat v Commission*,[543] where the Grand Chamber of the Court of Justice adopted a similar position to that in *Commission v Hungary*. The Commission disregarded Luxembourg's identification of the reference rules applied to tax rulings to corporate income taxes for group companies, and applied the general corporate tax regime based on its independent view of that system.[544] In its defense, the Commission argued that, even in "a more limited reference system," the selective tax advantage would still factually exist.[545] However, the Grand Chamber of the Court of Justice rejected the Commission's reference system assessment entirely, clarifying the limits of the Commission's discretion when determining the reference tax regime, particularly when the direct tax matter has not been harmonized by EU law.[546] The Grand Chamber explained why the Commission was not allowed under Article 107(1) of the

'normal' tax regime, from which it is necessary, in accordance with the case law referred to in para. 37 of the present judgment, to analyse the condition relating to selectivity."

[541] *Ibid,* in para. 46, the Grand Chamber stated the following position. "(46) In that regard, it must be stated that EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates intended to take account of the ability to pay of taxable persons. The fact that recourse to progressive taxation is, in practice, more common in the taxation of natural persons does not mean that they are prohibited from using it in order also to take account of the ability to pay of legal persons, in particular undertakings."

[542] *Ibid idem.*

[543] In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*.

[544] *Ibid,* para. 21

[545] *Ibid idem.*

[546] *Ibid*, in paras. 92–97

TFEU to overstep the Member States' discretion on direct taxes with the following view.

> *[P]arameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them.*
>
> *This finding is an expression of the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, requiring that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable (…).*[547]

In essence, the Grand Chamber clarified that the determination of the normal tax burden cannot be based on external laws of the Member State concerned. In the *Hungary v Commission* ruling, discussed previously, the Grand Chamber already mentioned that the Commission cannot compare the tax practices of other Member States to define whether turnover taxes can have progressive rates. Here, this case differs from that in *Hungary v Commission*, because the external laws were the OECD guidelines – i.e., an international law.[548] Based on the above, my understanding of this ruling is that the Commission cannot use any other logic, structure, and rationale which is not established in the national law when determining the reference tax regime for assessing the *selective advantage* condition of taxes not harmonized nor approximated by EU law.[549] Once again, the Grand Chamber confined the determination of the reference regime to the laws of the Member State concerned, as it did in the *Hungary v Commission* ruling.[550]

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[547] *Ibid,* paras. 96-97.
[548] *Ibid,* in paras. 95–98.
[549] Those taxes legislated based on Articles 113 or 115 of the TFEU.
[550] *Ibid*, in para. 74, the Grand Chamber stated the following view. "It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential

In my view, the *Fiat* ruling also shows a continuity with the *Gibraltar* case, but in the sense of limiting the Commission's leeway when identifying or determining the reference tax regime for direct taxes. Consequently, the Commission cannot compare the Member States practices' for determining what the reference regime should be, as it did in *Hungary v Commission*.[551] Nor can it adopt international law as a complementary source to the national tax system, as it did in *Fiat Chrysler Finance Europé*.[552] It must carry out such a determination based on the national law.

4.2.6. The fourth and fifth parameters for assessing material selectivity: An exchange of arguments (the fourth) and an objective examination of the content, the structure, and specific effects of the national law (the fifth)

In a later case, from October 6, 2022, the Court ruled in the *World Duty-Free Group and Spain* v *Commission* case that the proper identification of the reference tax regime is vital for the selective assessment, and that an error in this step can vitiate the entire analysis.[553] The Court of Justice clarified its general understanding concerning the proper determination of the reference tax regime – mainly how the Commission should have conducted its State aid investigation and the assessment of the *selective advantage* condition – as follows.

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prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature." Cf. in case C-596/19 P, *Commission v Hungary,* in paras. 43–45.

[551] In T-20/17, para. 54.

[552] In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, paras. 98-101.

[553] In joined cases C-51/19 P and C-64/19 P, *World Duty Free Group and Spain* v *Commission,* para. 61, where the Court of Justice stated the following. "(61) For the purposes of assessing the selective nature of a tax measure of general application, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of the selectivity of an aid scheme, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (…)."

> *In that context, it must be stated, as a preliminary point, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State. In that regard, the selectivity of a tax measure cannot be assessed on the basis of a reference framework consisting of some provisions of the national law of the Member State concerned that have been artificially taken from a broader legislative framework..*[554]

Based on the above ruling, I extract the fourth and fifth parameter for assessing material selectivity. They are: (iv) an exchange of arguments with the Member State concerned, and (v) an objective examination of the (v.a) content, (v.b) the structure, and (v.c) the effects of the applicable rules under the national law of that State.

When the Court of Justice stated that the Commission must have an "*exchange of arguments with the Member State concerned*," this fourth parameter is logical for two reasons. First, the measure in question is a tax, which inherently derives from the Member State's national laws, as well as its system for applying, interpreting, and implementing those laws. Second, the EU's legal system is founded on the premise that the EU and the Member States cooperate to safeguard what is established in the Treaties.[555] In this case, the Member State is to cooperate with the EU institution, so that the EU institutions–such as the Commission– can carry out the enforcement of Article 107(1) of the TFEU.[556]

For instance, the Commission can only assess the State aid conditions of the measure, and the Court of Justice can only deliver a preliminary ruling, if the Member State's representatives cooperate by providing such information. Thus, it is logical that the Member State concerned appoint the reference regime and provide all the information about that system's logic, structure, and effects. After this exchange of information, (or of arguments, in the words of the Court of Justice), the Commission is to carry out "an objective

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554 *Ibid,* in para. 62.
555 Based on the general principle of EU, the principle of sincere cooperation established in Article 4(3) of the TEU.
556 Based specifically on the regime established in Article 108(1-3) of the TFEU.

examination of the content, the structure and the specific effects of the applicable rules under the national law of that State."[557] After such of an objective examination, the Commission can reach a different conclusion about the reference regime than that informed by the Member State, because of those elements (i.e., content, structure, and effects) of the laws in question. After the Gibraltar case, namely, it had become possible to determine *what the reference regime should be* based on those elements.

In the *World Duty-Free Group* case, the Court of Justice ruling clarified the use of the *Gibraltar* case. Following the Court's view, the Commission could not determine a reference regime (i.e., *what the tax regime should be*) based on parts of the national law.[558] This determination was also a further development of the previous parameter, in the sense that the Commission's restriction to the laws of the Member State does not mean it can choose parts of those laws.[559]

The parameters discussed here are problematic in practice, and this is where the legal analysis gets interesting. A misunderstanding or misinterpretation of the information received by the Member State may lead to an error in the assessment, or a different interpretation of the Member State's tax system may turn the debate into a judicial battle in the EU courts.

A good example, recently resolved, can be seen in the *Fiat Chrysler Finance Europé* case. The Commission concluded that Luxembourg's tax ruling accepting Fiat's advance transfer pricing agreement was an instance of State aid,[560] among several other similar State aid decisions.[561] To reach its conclusion, the Commission argued that the reference regime was the general corporate income tax system of Luxembourg, the objective of which was to

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[557] In joined cases C-51/19 P and C-64/19 P, *World Duty Free Group and Spain* v *Commission,* para. 62.

[558] *Ibid idem.*

[559] See in section 4.2.5. The third parameter for assessing material selectivity: The Commission's determination of the reference tax regime is restricted to the laws of the Member States.

[560] In the joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, paras. 2-4.

[561] Up to date (18 January 2023), the case T-778/16, *Ireland v Commission* about two tax rulings to two companies forming the Apple Group, see in para. 2 of the annulment proceeding before the General Court, the joined cases T-816/17 and T-318/18*, Luxembourg v Commission, Luxembourg v Commission* about tax rulings to two Amazon companies registered in Luxembourg*,* all these cases are pending appeal before the Court of Justice, respectively under the references C-465/20 P, and C-457/21 P, among other cases.

tax the profits of any company resident in that Member State.[562] The Commission "objectively" analyzed the content, structure, and specific effect of Luxembourg's general corporate income tax system, and found it to be the reference regime.[563] In contrast, Luxembourg contended that the regime of reference should be the special one established in Article 164 of the Tax Code or Circular No. 164/2, a domestic law, which applied to groups of companies.[564]

The Court of Justice considered the Commission's dismissal of Luxembourg's specific rules to be an error in law, alongside the General Court's endorsement of that Commission's view.[565] *Why an error?*

The Commission could have identified a different reference tax regime other than the one chosen by Luxembourg. However, it would have had to show that, under the special rules for groups of companies in Luxembourg's system, it was illogical (disproportionate, discriminatory, etc.) for Luxembourg to tax Fiat's corporate income in the way that it did in its tax ruling. However, the Commission did not show how Article 164 was illogical. It simply dismissed Luxembourg's special rules by interpreting Luxembourg's general corporate income tax rules as the reference regime (a selective one).[566]

The Court of Justice, in essence, clarified that Article 107(1) was not a free card for the Commission to override Luxembourg's special rules.[567] The Commission cannot simply dismiss Luxembourg's special tax rules for groups of companies under Article 107(1). In my view, the Court of Justice position means that the Commission should have demonstrated why Article 164 should not be applicable to the case, thereby disqualifying its application, to justify the determination of a different regime.[568] Thus, the Commission's

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[562] *Ibid,* para. 16.
[563] *Ibid idem.*
[564] *Ibid idem.*
[565] In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 105. The Commission interpreted Luxembourg's general tax system as the reference regime and the arm's length principle as deriving from Article 107(1) of the TFEU, instead of interpreting the specific rules set out in Article 164. In case T-755/15 and T-759/15, *Luxembourg and Fiat Chrysler Finance Europe v Commission*, paras. 143-143.
[566] See paras. 90–94 of the joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission.*
[567] *Ibid,* see also para. 96 of the appeal ruling (joined cases C-885/19 P and C-898/19 P).
[568] In this regard, in joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, paras. 93-94, the Court states what follows. "(93) It is true, as the parties all agree, that the national law applicable to companies in Luxembourg is intended,

dismissal of those special rules was not an objective analysis of that system, but rather an error in law in the interpretation of Article 107(1) in relation to Luxembourg's rules. Finally, the Court of Justice also considered the General Court to have erred in endorsing the Commission's decision.[569]

4.2.7. Summary

In this subchapter, I summarize the six parameters mentioned in sections 4.2.2 and 4.2.6 for identifying or determining the reference regime. Looking back at the Gibraltar ruling and understanding the historical development of the State aid rulings concerning tax matters and the reference regime until today, that ruling seems to have contributed to making the selective effect of tax matters a difficult subject in the State aid control system. Tax law in general, and the State aid control system in particular, are inherently conflictual. The first is founded on the legality principle, in its simple understanding that no taxation shall be levied unless established by law.[570] The second is founded on the effects-based approach set out in Article 107(1), which transgresses the formalities of tax law and the legality principle farther

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as regards the taxation of integrated companies, to bring about a reliable approximation of the market price. While that objective corresponds, in general terms, to that of the arm's length principle, the fact remains that, in the absence of harmonisation in EU law, the specific detailed rules for the application of that principle are defined by national law and must be taken into account in order to identify the reference framework for the purposes of determining the existence of a selective advantage. (94) In addition, by accepting, in paragraph 113 of the judgment under appeal, that the Commission may rely on rules which were not part of Luxembourg law, even though it recalled, in paragraph 112 of that judgment, that that institution did not, at that stage of development of EU law, have the power autonomously to define the 'normal' taxation of an integrated company, disregarding national tax rules, the General Court infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular Article 114(2) TFEU and Article 115 TFEU. The autonomy of a Member State in the field of direct taxation, as recognised by the settled case-law cited in paragraph 73 of the present judgment, cannot be fully ensured if, in the absence of any such approximation measure, the examination carried out under Article 107(1) TFEU is not based exclusively on the normal tax rules laid down by the legislature of the Member State concerned."

[569] In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, paras. 86–105 (about the General Court error in law), and in paras. 105–113, about the effects of this error in law to the State aid decision in question.

[570] In Vanistendael, F., (1996), "Legal Framework For Taxation," p. 16.

reaching the tax law in practice and what it should be to not breach that article. Determining the reference regime other than the one identified by the Member State concerned encroaches on the tax discretion of the Member States.

Several tax scholars criticize the State aid control system as an "indirect way [of harmonizing] direct taxation."[571] This criticism of the identification or determination of the reference system step highlights the turmoil of the interplay between the EU and the Member States (particularly the Commission's role in investigating State aid), while also spurring development in the concept of aid.[572] As discussed in section 4.2.3 above, the case law of EU courts shows that, beyond the traditional and formal tax law benefits considered to be a derogation from the normal tax burden,[573] a *de facto* tax law could be discriminatory, or it could exclude from its scope taxpayers that should have been included. Hence, these non-traditional forms of State aid led to a determination of the reference system different from the simple identification of the formal tax law, as mentioned at the beginning of this section, as an effect of the *Gibraltar* ruling discussed in section 4.2.3. Because of this determination, measures that before *Gibraltar* case would have been seen as general (i.e., as not being State aid), might now qualify as State aid under Article 107(1). The latter effect is what made this step the epicenter of the interplay of the EU and the Member States within the State aid control system, particularly in cases such as the *Fiat* ruling discussed above.

I now list (again) the six parameters found, following the order of discussion and numbering used during in sections 4.2.2 and 4.2.6. They are:

1. the tax meets the three-autonomy test (for geographic selectivity);

[571] In López, H., (2010), "General Thought on Selectivity and Consequences of Broad Concept of State Aid in Tax Matters," p. 807, forecasting in 2010, the legal debate that was coming. Similar view in Ezcurra V., M., (2016), "Energy Taxation, Climate Change and State aid Policy in the European Union: Status Quo and the Need for Breakthroughs," p. 29, and in Gormsen L., L., (2019), *European State aid and Tax Rulings*, p. 86, among other scholars.
[572] The Commission acknowledges its role to develop new forms of aid within the State aid control system as naturally deriving from the powers granted through Article 108 of the TFEU.
[573] For example, tax exemptions, credits, rebates, etc.

2. the identification or determination of the reference regime is based on the *de jure* and *de facto* effects of the tax regime and its scope (for material selectivity);

3. the exclusion from the scope of the tax is logical i.e., proportional, non-discriminatory, etc., (for material selectivity);

4. the Commission's determination of the reference tax regime is restricted to the laws of the Member States (for material selectivity);

5. the Commission must exchange information with the Member State concerned (for material selectivity);

6. the Commission must carry out an objective examination of the content, the structure, and the specific effects of the applicable rules under the national law of that State (for material selectivity).

4.3. The Second Step: *Prima Facie* a Selective–Advantage Tax Treatment Effect

4.3.1. Preliminary remarks

This subchapter is about the second step concerning the assessment of a *prima facie* selective-advantage effect, which is about the advantageous tax treatment granted to undertakings in a selective basis. However, since this is not the final step of the analysis, the conclusion of the assessment regards an initial fulfillment of the condition.

I start the substantive analysis in section 4.3.2, by identifying and discussing general parameters established mainly in EU State aid case law concerning the advantage effect. Then, in subchapter 4.3.3, following the same approach of the previous section, I discuss and identify general parameters for the selective effect, which has been spurring the most critical discussion in State aid cases concerning taxes with different objectives (not just environmental protection). Although I will analyze the EU State aid case law concerning

fiscal taxes, the focus of this section is on discussing the general parameters relevant to environmental taxes. Consequently, the fiscal taxes cases discussed below are the ones that may be useful for environmental taxes. By analyzing the environmental requirements of environmental taxes that breach or avoid breaching Article 107(1) (i.e., each step of the *selective advantage* condition), I can extract the general parameters and answer part of the first research question related to this second step.[574] Finally, given the length of the discussion below, I conclude this subchapter with a summary of the general parameters discussed.

4.3.2. Parameters for the advantage effect assessment

In this section, I discuss the general parameters for identifying when an economic benefit confers an advantage proscribed by Article 107(1). This analysis focuses on the State aid case law concerning on the one hand taxes imposed for revenue-raising purposes, and on the other environmental taxes. (Their circumstances and thus legal rationales are similar.) For instance, both types of taxes (environmental and other types of taxes in general) may introduce an advantage through differentiated rates (e.g., progressive or flat rates) or tax benefits (e.g., tax rebates, reductions, exemptions, and so on). The main difference is in their objectives: i.e., fiscally motivated taxes prioritize raising revenue, whereas environmental taxes prioritize the environmental protection. Hence, the State aid case law concerning taxes without environmental protection objectives can be relevant to this section analysis in an analogous way – i.e., when the case can be similarly applied to an environmental tax. Finally, while I discuss the general parameters of the advantage effect specifically for environmental taxes, I also discuss the integration of environmental protection into the interpretation of this effect. So that later, in subchapter 5.5, I analyze the possibility of further integrating environmental protection aim into the *selective advantage* condition.

[574] Recalling the first research question: *In what circumstances do environmental taxes conflict with the selective advantage condition thereby subjecting taxes enacted by the Member States to the EU's State aid control system?*

The advantage effect of the *selective advantage* condition is what Article 107(1) establishes as "*favor[ing]*" selected undertakings, which potentially means any economic benefit.[575] EU case law defines advantage as described in Article 107(1) when it is granted on a selective basis.[576] The evident inextricable connection of both effects is why they are one State aid condition, albeit two different effects.[577] Essentially, the advantage effect concerns a lowered tax burden, while the selectivity effect concerns who receives a tax advantage but should not. Indeed, without the selectivity effect, the economic benefit cannot be classified as State aid.[578] Despite this, the advantage effect

[575] See, for instance, the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, para. 68, where the Commission explains what follows about the advantage effect. "*The precise form of the measure is also irrelevant in establishing whether it confers an economic advantage on the undertaking.* Not only the granting of positive economic advantages is relevant for the notion of State aid, *but relief from economic burdens can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities.* For instance, if a Member State pays part of the costs of the employees of a specific undertaking, it relieves that undertaking from costs that are inherent of its economic activities. An advantage also exists where public authorities pay a salary supplement to the workers of a specific undertaking, even if the undertaking was under no legal obligation to pay such a supplement. It also covers situations where some operators do not have to bear costs that other comparable operators normally do under a given legal order, regardless of the non- economic nature of the activity to which the costs relate." *Emphasis added* in those parts concerning tax advantages. In the previous Commission notice on the application of the State aid rules to measures relating to direct business taxation, in para 9, the Commission exemplified different forms of tax advantages for the Member States so they could understand what could be expected from the Commission State aid control duty. Para. 9. Established what follows. "Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including: - a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet), - a total or partial reduction in the amount of tax (such as exemption or a tax credit), - deferment, cancellation or even special rescheduling of tax debt."

[576] See in case C-143/99, *Adria-Wine Pipelines,* paras. 33–36.

[577] In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para. 101. Moreover, in paras. 103–104, the Court stated what follows. "(103) Admittedly, according to the case-law cited in paragraph 73 above, a different tax burden resulting from the application of a 'general' tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of Article [107](1) EC. (104) Thus, the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article [107](1) EC."

[578] Based on the joined cases C-20/15 P and C-21/15 P, *World Duty-Free Group SA*, para. 56.

discussion in EU case law clarifies such a complex State aid condition, as I explain in this section.

Historically, the legal rationale of the advantage as a State aid condition goes back to 1961, when the Court of Justice ruled on *Steenkolenmijnen* v *High Authority,* thereby benchmarking the concept of aid as not only englobing subsidies but also taxation.[579] According to this ruling, an advantage is a reduction of financial charges normally internalized within an undertaking's expenses.

In the *Italy v Commission* ruling from 1974, the Court of Justice concluded that the reduction of social charges payable by employers in the textile sector amounted to State aid, because it diminished the labor costs of that sector.[580] Despite the objective of that measure, it was still classified as State aid, because Article 107(1) interpretation regards the effects of the measure. The connection between the advantage effect (i.e., economic benefit) and the selective effect (i.e., who receives the economic benefit) is evident in the interpretation of the conditions for all sorts of fiscal measures. In the *Belgium v Commission* ruling from 1999, the Court stressed that the main circumstance qualifying an advantage as State aid is its selective effect.[581]

In *Adria-Wien Pipelines* ruling from 2001, the Court discussed an energy tax regime that granted tax rebates only to the sector primarily producing

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[579] In case C-30/59, *Steenkolenmijnen v High Authority*, p. 19 that stated: "The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."

[580] In case C-173/73, *Italy v Commission*, in the third part of para. 15, the Court stated: "It must be concluded that the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system."

[581] In case C-75/97, *Belgium v Commission,* in para. 26, where the Court of Justice stated the following. "According to established case-law, it is necessary to determine whether the (…) scheme entail advantages accruing exclusively to certain undertakings or certain sectors and do not therefore fulfil the condition of specificity which constitutes one of the characteristics of the concept of State aid namely the selective character of the measures in question (…)." Repeated in case C-501/00, *Spain, UNESID v Commission*, para. 120, in similar words but not referring to the *Belgium v Commission* case.

goods.[582] In this case, the tax law formally (*de jure*) prescribed that only that sector could claim tax rebates, thereby excluding suppliers of services from that claim. The Court found the tax rebate to be a selective-advantage tax treatment for that sector.[583]

In the *Portugal v Commission* ruling from 2006*,* the Court of Justice confirmed the Commission's view that reductions in corporate income tax in the Azores, an oversea territory of Portugal, granted a selective-advantage tax treatment through a geographic allocation of the tax benefit.[584] This case benchmarked the geographic selectivity effect of certain taxes, and thus another way of granting an advantage by means of Article 107(1).

A *de jure* advantage stems from the formal reference tax regime – i.e., what legislators prescribed in their tax law as an economic reduction in the normal tax burden[585] – while a *de facto* advantage stems from the tax in practice, e.g., a combination of tax rules that reduces the ordinary tax burden. The latter situation (*de facto* advantage) was benchmarked in the *Gibraltar v Commission* ruling*,* where the Court of Justice confirmed the Commission's view that Gibraltar's corporate income tax granted a *de facto* selective-advantage tax treatment to offshore companies through a combination of rules that lowered their income tax to zero. [586] This case also benchmarked the view that discriminatory tax treatment for offshore companies fulfilled the *selective advantage* condition *de facto*.[587]

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[582] In case C-143/99, *Adria-Wien Pipelines,* para. 7

[583] *Ibid,* para. 53.

[584] In case 88/03, *Portugal v Commission,* paras 13–14.

[585] Based on the principle of legality in tax law, explained previously in section 4.2.7. Summary cf. Vanistendael, F., 1996, *Legal Framework for Taxation,* p. 16.

[586] See description of the measure in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* paras. 20-21.

[587] I will discuss this case again in the following section 5.3.2, and its effects on the circle of comparable undertakings. in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* in paras. 100–105, the Court of Justice stated what follows. "(100) The features of that regime are, first, a combination of the payroll tax and BPOT as the sole bases of assessment, together with the requirement to make a profit, the tax on which is capped at 15%, and second, the absence of a generally applicable basis of assessment providing for the taxation of all companies covered by that regime. (101) In view of the features of that regime, outlined in the preceding paragraph, it is apparent that the regime at issue, by combining those bases, even though they are founded on criteria that are in themselves of a general nature, in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar. (102) Combining those bases of assessment not only results in taxation

In the *Kernkraftwerke* ruling about an excise on nuclear fuels, alongside other cases (the *ANGED* and the *UNESA* rulings), as discussed previously, the taxes could have granted selective-advantage tax treatment through the exclusion of certain undertakings from the scope of those taxes.[588] In those cases, if the objective of the tax logically excluded those undertakings from the scope, no advantage would be considered de facto to be granted. At the same time, the contrary would entail that an illogical exclusion from the scope of the tax could grant a *de facto* selective-advantage tax treatment.

Based on the above, the EU case law evolved to catch up with other forms of advantage not only granted traditionally – i.e., arising from the tax law text that granted an exemption or any other type of tax reduction derogating from the normal tax burden.[589] Then, with the Gibraltar ruling benchmarking *de facto* discriminatory tax treatment as meeting the *selective advantage* condition,[590] this discussion eventuated in the later view that a *de facto* exclusion from the scope of the tax could *de facto* meet the *selective advantage* condition.[591] Such evolution in the interpretation of the *selective advantage* condition was founded, is founded, and will continue to be founded on the effects-based approach of Article 107(1).

In 2016, the Court of Justice ruled on an appeal to annul the Commission State aid decision that considered Ireland's flight tax on passengers (the ATT),

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according to the number of employees and the size of the business premises occupied, but also, due to the absence of other bases of assessment, excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property. (103) Admittedly, according to the case-law cited in paragraph 73 above, a different tax burden resulting from the application of a 'general' tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of Article [107](1) EC. (104) Thus, the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain' undertakings or the production of 'certain' goods within the meaning of Article [107](1) EC. (105) That is specifically the case here."

588 Discussed in the previous subchapter 5.2, sections 4.2.3. The first parameter for assessing material selectivity: *De jure* and *de facto* effects of the reference tax regime, and 4.2.4. The second parameter for assessing material selectivity: Exclusion from the scope of the tax.

589 In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para. 93

590 *Ibid,* para. 95.

591 In *ANGED* (C-233/16 to C-237/16) and *UNESA* (C-105/18 to C-113/18) discussed in the previous section.

consisting of two different flat rates, to be State aid.[592] In this case, the tax advantage was the lower flat rate, which was considered illogical from the standpoint of the tax regime's objectives.[593] This case was particularly critical because Ireland levied both flat rates concomitantly, which made the reference regime and thus the finding of the advantage effect arising from the lower rate a more complex discussion. Not to mention that questioning the flat rates' effects also hit the core of the State aid discussion concerning the tax discretion of the Member States and the reach of EU State aid law. I subsequently discuss another case that also discusses the limits of the Commission's leeway to determine the reference regime.

The Commission concluded that Hungary's turnover tax on advertisements, consisting of progressive rates and with a mechanism to partially deduct losses carried forward, was to be classified as State aid.[594] In 2021, the Court of Justice rejected the Commission's State aid assessment that turnover taxes could not have progressive rates, since Article 107(1) does not support such a position; nor do the legal principles that comprise that EU's legal system.[595]

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[592] In joined cases C-164/15 P and C-165/15 P, *Commission v Ireland, Aer Lingus Ltd, and Ryanair Designated Activity Company* discussed previously in section 5.2.1 above and in subchapter Comparative Learning through Policy Diffusion.

[593] In joined cases C-164/15 P and C-165/15 P, *Commission v Ireland, Aer Lingus Ltd, and Ryanair Designated Activity Company*, para. 58.

[594] In case C-596/19 P, *Commission v Hungary*, paras. 16–17, the Court of Justice summarized the Commission's view of the advantage effect of the tax in question as follows. "(16) As regards the existence of an advantage, the Commission noted that, just like positive benefits, measures which mitigate the charges normally borne by undertakings provide an advantage. In the present case, taxation at a considerably lower rate mitigated the charges borne by undertakings with a low turnover by comparison with the costs borne by undertakings with a higher turnover, thus conferring an advantage on smaller undertakings over larger undertakings. (17) The Commission added that the mechanism for the partial deductibility of losses carried forward also constituted an advantage, since it was tantamount to reducing the tax burden of undertakings with losses carried forward which had not generated profits in 2013 compared with the burden on other undertakings, which could not benefit from that mechanism."

[595] *Ibid*, para. 47, where the Court of Justice explained the following. "EU law thus does not preclude progressive taxation from being based on turnover, including where such taxation is not intended to offset the negative effects likely to be caused by the activity being taxed. Contrary to what the Commission maintains, the amount of turnover constitutes, in general, a criterion of differentiation that is neutral and a relevant indicator of the taxable person's ability to pay (…). It does not follow from any rule or principle of EU law, including in the field of State aid, that progressive rates may apply only to taxes on profits. Moreover, like turnover, profit in itself is merely a relative indicator of ability to pay. The fact that it may constitute, as the Commission contends, a more relevant or more precise indicator than turnover is irrelevant in matters of State aid, since EU law on that matter seeks only to remove the selective

Nowadays, the trickiest discussion about advantage in the State aid control system regards multinationals' tax rulings that lower their corporate income tax. Based on the appeal ruling of the Court of Justice in the *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission* case, the advantage effect can only stem from national law. More precisely, it must establish transfer pricing methods to account for taxable transactions for corporate income taxation, so that the assessment of a derogation from the normal tax scheme (through the lowering of the corporate tax liability) becomes evident.[596] That is, it should be clear that the multinational in question received a selective tax treatment. The Commission cannot use OECD guidelines or other broad rules of the national tax system to reach such a conclusion.[597]

Where environmental taxes are concerned, the tax's environmental protection objective determines the tax rate(s), base, benefits, taxpayers, taxable event, and objects as a consequential connection among these design features with that objective. These tax's features are relevant for the assessment of the environmental tax's advantage effect. The discussion of the advantage effect in section 5.3.1 can be summarized as follows:

> *"Advantage" is any economic benefit that (i) derogates from the reference tax regime, (ii) de facto (ii.1) discriminates, (ii.2) excludes from the scope of the tax, (ii.3) and any other possibility that the case law develops.*

4.3.3. Parameters for the determination of the circle of comparable undertakings

In this section 4.3.3, I discuss three general parameters to assess whether a measure is *prima facie* selective. They are:

advantages from which certain undertakings might benefit to the detriment of others which are placed in a comparable situation. The same is true of the possibility of economic double taxation, linked to combined taxation on turnover and taxation of profits."

[596] Cf. Commission's view in joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 21.

[597] *Ibid,* paras. 81–105.

1. In subsection 4.3.3.1, the differentiated approach for assessing an aid scheme or individual aid;
2. In subsection 4.3.3.2, the environmental impact of undertakings that is a specific circumstance of environmental taxes, which is also use for determining the circle of comparable undertakings analysis;
3. In subsection 4.3.3.3, the *de facto* discriminatory tax treatment.

These parameters are useful for determining the circle of comparable undertakings that leads to the *prima facie* selective conclusion, or disqualification of the measure as State aid. This involves an assessment of whether the beneficiaries of the aid are comparable in legal or factual terms to undertakings that are excluded from beneficial tax treatment. This analysis focuses on the State aid case law concerning fiscally motivated taxes and environmental taxes, due to their similar tax law logic and rationale. This discussion is based on subchapter 4.5, where I analyze the possibility of further integrating environmental protection.

Article 107(1) of the TFEU points to "certain undertakings or the production of certain goods." This represents the selective effect of the advantage ("favors"). It is forbidden to treat comparably situated undertakings differently. This assessment proceeds on the basis of the analysis of the objective of the reference tax regime, which indicates the logic of who should be paying the normal tax burden but is not.[598]

First and foremost, the Court of Justice repeatedly explains that, based on the objective of the measure, it is possible to determine whether the undertakings are in a comparable legal and factual situation.[599] Thus, the objective of the tax gives logic to the tax structure, including the circle of comparable

[598] First, a derogation from the reference tax regime. Second, discriminatory tax treatment. Third, an exclusion from the tax's scope (that is too narrow). Fourth, any other *de jure* or *de facto* reason.

[599] In case C-15/14, *Commission v MOL Magyar Olaj-és Gázipari Nyrt.* para. 61, where the Court of Justice stated the following. "It follows that the appropriate comparator for establishing the selectivity of the measure at issue in the present case (…) draws a distinction between operators that are, in the light of the objective of the measure, in a comparable factual and legal situation, a distinction not justified by the nature and general scheme of the system at issue." Also repeated in in joined cases C-20/15 and C-21/15, *Commission* v *World Duty Free Group and Others,* para. 60, where the Court of Justice states "…a distinction that is not justified by the nature and general *structure* of that system…" *emphasis added* in the word *structure,* which in the previous case was referred as to *scheme.*

undertakings (taxpayers) where the distribution of their tax burden is concerned. I return to this discussion in subsection 4.3.3.2.

Second, the effects-based approach of Article 107(1) also plays a key role in this second step. The Court of Justice clarified in several cases that, for the selective effect, the number of undertakings receiving the advantage does not matter; nor does the scale of the aid. It is instead the State aid effect – *de jure* or *de facto* selective – of the measure that is important.[600] For instance, in the *Spain v Commission* ruling, the Court of Justice found that the small amount of aid was not sufficient reason not to classify the measure as State aid.[601] Nowadays, however, the Commission Regulation (EU) No 1407/2013 (hereafter: De minimis aid Regulation) creates a system of automatic implementation of small aid (i.e., an exemption from the obligation to notify the Commission under Article 108(3) of the TFEU).

Third, the assessment of the circle of comparable undertakings differs depending on the type of aid: i.e., *is it an aid scheme or individual aid?* I subsequently discuss these two forms of aid and at how their assessment differs.

4.3.3.1. Aid scheme or individual aid

The assessment of the selective effect of a tax measure might differ concerning the type of aid – i.e., is it individual aid or an aid scheme? The Commission clarifies their difference in the GBER, as shown below in Table 6.[602]

[600] For instance, in cases C-56/93, *Belgium* v *Commission*, para. 79, C-241/94, *France* v *Commission*, para. 20, and C-75/97, *Belgium* v *Commission*, para. 25

[601] In case C-409/00, para. 46.

[602] The CEEAG defines *individual aid* similarly to the GBER (see section 2.4, paras., 1 and 50), but it does not define *aid scheme*.

Table 5: Definition of individual aid and of an aid scheme (GBER).

	Individual aid	Aid scheme
GBER	Article 2 (14) 'individual aid' means: (i) ad hoc aid; and (ii) awards of aid to individual beneficiaries on the basis of an aid scheme; (17) 'ad hoc aid' means aid not granted on the basis of an aid scheme;	(15) 'aid scheme' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

One typical example of individual aid for tax matters is tax rulings on multinationals concerning their corporate taxation, where each tax ruling can be potential State aid to the multinational concerned.[603] An example of an aid scheme repeatedly discussed in this thesis was the Austrian energy tax scheme: the *Adria-Wien Pipeline* case. It concerned three tax laws that imposed an energy tax on electricity and natural gas and granted a tax rebate only to primary producers of goods.[604] Assessing the circle of comparable undertakings could differ depending on the type of aid – i.e., individual aid or an aid scheme. I discuss the view of the Court of Justice in the *Commission v MOL* ruling in the following paragraph:[605]

[603] When the Commission scrutinized multinationals advanced (transfer) price arrangements fixed through tax rulings to assess if they were State aid, See in Commission, Press release, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg), Brussels, 11 June 2014, last accessed 7 February 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_14_663. See, for instance, in cases T-755/15 and T-759/15, *Luxembourg and Fiat Chrysler Finance Europe v Commission,* para. 24.

[604] In case C-143/99, para. 7.

[605] In case C-15/14, *Commission v MOL Magyar Olaj- és Gázipari Nyrt*, para. 59, the Court of Justice introduced the issue in discussion with the following statement. "(59) …, the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified

> *It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.*[606]

In the case of individual aid, the simple identification of the advantage would be sufficient to presume the measure was selective, as stated in paragraph 60 of the *Commission v MOL* ruling and repeated in later cases.[607] Consequently, the Court of Justice benchmarked a general parameter to assess the selective effect of a case of *individual aid* by identifying the advantage effect so as to presume the effect of the measure is selective. However, the use of this parameter is trickier than it seems.[608] I discuss why this is so below.

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an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others.

606 *Ibid.* para. 60

607 The Court of Justice repeated para. 60 of *Commission v MOL* ruling quoted above in later cases, namely *Belgium v Commission* (case C-270/15 P, in para. 49) and months later in *Orange v Commission* (case C-211/15 P, in paras. 48 to 54). Note that *Belgium v Commission* case is irrelevant to this analysis because it was an aiding scheme and not a case of individual aid, cf. case C-270/15 P, *Belgium v Commission*, para. 50.

608 For instance, In the annulment proceeding of *Luxembourg, Ireland, and Fiat Chrysler Finance Europe v Commission,* this case law interpretation, adopted by the Commission concerning Luxembourg advance price arrangements to *Fiat*, was put to test at the General Court level and sustained. In cases T-755/15 and T-759/15, *Luxembourg and Fiat Chrysler Finance Europe v Commission,* the General Court argued as follows. "(333) It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective ('the presumption of selectivity'). By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49; see also, to that effect, judgment of 26 October

The Hungarian law (known as "the Mining Act") detailed the general scheme that regulates mining activities in Hungary, in accordance with which the mining authorities were responsible for issuing mining exploitation rights.[609] *MOL*[610] received such a decision, called "the 2005 agreement," concerning 12 hydrocarbon fields and an exploitation fee regime for fifteen years.[611] In 2008 the Mining Act was amended, establishing a new regime of rates for accounting mining fees called "the 2008 amendment."[612] The Commission received a complaint that gave rise to a formal investigation concerning a possible case of individual State aid granted to *MOL* through the 2005 agreement, on the basis of which the Commission found it to be incompatible

2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraphs 53 and 54). It should be made clear that, where individual aid is at issue, the presumption of selectivity operates independently of the question whether there are operators on the relevant market or markets which are in a comparable factual and legal situation (judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 79)." See also the discussion in the paragraphs that follows para. 333 quoted. However, on grounds of the appeal, the Court of Justice reverted that view disqualifying the Commission's assessment concerning the existence of an advantage since it understood that the Commission assessed the wrong reference regime and tax's objective. Cf. joined cases C-885/19 P and C-898/19 P, *Luxembourg and Fiat Chrysler Finance Europe v Commission*, paras. 122–123.

[609] In case T-499/10, *MOL v Commission,* paras. 1–6.

[610] *MOL Magyar Olaj-és Gázipari Nyrt.* (or simply MOL) "is a company established in Budapest (Hungary) whose core activities are the exploration for and production of crude oil, natural gas and gas products, the transportation, storage and distribution of crude oil products at both retail and wholesale levels, the transmission of natural gas and the production and sale of alkenes and polyolefins." In case T-499/10, para. 1.

[611] *Ibid*, in paras. 7–13.

[612] *Ibid,* in paras. 14 and 15 established what follows. "(14) The … (Act CXXXIII of 2007 on mining activities amending the Mining Act; 'the 2008 amendment') came into force on 8 January 2008. The 2008 amendment amended the rate of the mining fee. Most importantly, following this amendment, Article 20(3) of the Mining Act provides for a rate of 30% of the value of the quantity extracted for fields put into production between 1 January 1998 and 31 December 2007, for the existing mathematical formula under the Mining Act regime to be applied to natural gas fields put into production before 1 January 1998, subject to a floor of 30%, and for a differentiated mining fee to be applied to fields where production began after 1 January 2008, according to the quantity of crude oil or natural gas extracted, i.e. a rate of 12% where the annual quantity produced does not exceed 300 million m3 of natural gas or 50 kt of crude oil, a rate of 20% for production between 300 and 500 million m3 of natural gas or between 50 and 200 kt of crude oil and a rate of 30% for production over 500 million m3 of natural gas or 200 kt of crude oil. Finally, for all fields, whenever they were put into production, the mining fee payable is increased by 3% or 6% if the price of Brent crude oil exceeds 80 or 90 US dollars (USD) respectively. (15) Article 235 of the 2008 … (Act LXXXI of 2008 amending rates of taxes and fees) amends the Mining Act by reducing the mining fee for fields put into production between 1 January 1998 and 31 December 2007 inclusive and the minimum mining fee payable for natural gas fields put into production before 1 January 1998 back to 12%. That amendment entered into force on 23 January 2009."

aid.[613] According to the Commission, the 2005 agreement gave a *selective advantage* treatment to *MOL* by establishing lower rates for the exploitation fee over a period that lasted longer than the new regime of rates set by the 2008 amendment.[614] The Commission took the view that the 2008 amendment's new regime of (higher) rates intentionally granted *MOL* an advantage through the 2005 agreement.[615]

The General Court analyzed the relevant aspects established in Article 26/A(5) of the Mining Act of the authorization regime, viewed by the

[613] *Ibid,* paras. 16–31. See also the Commission four arguments to conclude the selective effect of the measure summarized in paras. 42 to 45 of case T-499/10. Note that the first argument discussed in para. 42 was about the reference framework.

[614] *Ibid,* para. 47, where the General Court stated the following. "The Commission therefore relied on the selective nature of the 2005 agreement, in so far as it sets the rate of the increased mining fee for each of the fifteen years of its duration and as it provides that the rates thus set would remain unchanged, in order to regard the contested measure as State aid incompatible with the internal market."

[615] Cf. paras. 64–67 of the case T-499/10, *MOL v Commission*, but mainly paras. 66–67, where the General Court stated what follows."(66) However, a combination of elements such as that observed by the Commission in the contested decision may be categorised as State aid where the terms of the agreement concluded were proposed selectively by the State to one or more operators rather than on the basis of objective criteria laid down by a text of general application that are applicable to any operator. In that regard, it must be pointed out that the fact that only one operator has concluded an agreement of that type is not sufficient to establish the selective nature of the agreement, since that may result inter alia from an absence of interest by any other operator. (67) Moreover, it should be recalled that, for the purposes of Article 107(1) TFEU, a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another (…). In that context, a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators."

Commission as selective.[616] But the General Court rejected that view.[617] In essence, the General Court considered that the Commission failed to assess the selective effect of the 2005 agreement in relation to other undertakings, i.e., miners of other minerals, issued under the same regime of Article 26/A(5).[618] Among its arguments, the General Court pointed out that the discretion of the mining authorities was not an indication of the selective nature of Article 26/A(5),[619] and that the 2008 amendment could not constitute the reference regime of rates for the establishment of the mining fees.[620] The General Court concluded that the Commission had not proven that Article 26/A(5) created a case of individual aid that only *MOL* could

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[616] *Ibid,* para. 6 explains that provision as follows. "Article 26/A(5) of the Mining Act provides that where, under the authorisation regime, i.e. for fields located in open areas, a mining company does not start extraction within five years of the date of authorisation, it may ask the Mining Authority, on one occasion only, to extend this deadline by no more than five years. Where the Mining Authority agrees to this, a contract between the Minister in charge of mining issues and the mining company establishes, for the extended fields, the quantity of mineral raw materials to be used as a basis for calculating the mining fee and the rate of that fee, which must be higher than the rate applicable at the date of the extension application but no more than 1.2 times that rate ('the extension fee'). If the extension application concerns more than two fields, the rate of the extension fee is applied to all the mining company's fields by a contract entered into for a period of at least five years ('the increased mining fee'). If the extension application concerns more than five fields, an additional one-off payment may also be required, corresponding to a maximum 20% of the amount payable on the basis of the increased mining fee ('the one-off payment')."

[617] *Ibid,* in paras. 70–74.

[618] *Ibid,* para. 80, where the General Court stated the following. "Correlatively, although the Commission mentioned that there were indeed other extension agreements in the solid minerals sector, it took the view that it was not necessary to take account of them, since they concerned other types of minerals subject to other mining fees and that, in respect of those minerals, the fees were not changed by the 2008 amendment (recital 68 of the contested decision). However, it should be pointed out that, according to recital 70 of the contested decision, the selective nature of the contested measure stems from the selectivity of the 2005 agreement (see para. 46 above) and not from the nature of the minerals extracted, the rates of fees applicable to those categories of minerals or from the fact that those rates were not subsequently modified. Thus, the Commission's findings in recital 68 of the contested decision are not relevant for the purposes of rejecting the line of argument based on the existence of other extension agreements concluded under Article 26/A(5) of the Mining Act in terms similar to the 2005 agreement. By the approach that it followed, the Commission therefore declined to take account of all the factors by means of which it would have been in a position to assess whether the 2005 agreement was selective vis-à-vis the applicant in the light of the situation created by other extension agreements also concluded on the basis of Article 26/A(5) of the Mining Act the existence of which was revealed to the Commission by the applicant. In addition, the Commission did not even seek to obtain from the Hungarian authorities more detailed information on the extension agreements concluded by mining undertakings in the solid minerals sector."

[619] *Ibid,* paras. 42, 43, 45, 72.

[620] *Ibid,* para. 45, 46, 80.

enjoy, pointing out that the Commission failed to provide the circle of comparable undertakings.[621]

The Court of Justice sustained the General Court ruling, annulling the Commission's State aid assessment, based on the discussion about the lack of proof of the selective effect of that case.[622] The 2005 agreement consisted of (i) an authority decision issued (ii) only to *MOL* that established a (iii) specific tax regime, which are common features (i-iii) of different cases of individual aid. However, given the nature of the Hungarian mining system that requires such decisions, as established in Article 26/A(5), if other companies operating in the same sector received similar decisions, it is hard to sustain that only the 2005 agreement granted selective treatment. Thus, the MOL case was not about individual aid but likely an aid scheme instead, the State aid effects of which remain questionable given the presumption that the 2008 amendment comprised the reference regime. That is why, before paragraph 60 of the appeal ruling that established the parameter to presume that the effect of individual aid is selective, the Court of Justice clarified that the Commission had an obligation to establish the selective effect of the economic benefit.[623] Following this position, the Commission should have shown that other companies did not get a pre-established mining fee regime with a similar burden for similar periods that were initiated prior to the 2008 amendment and that lasted years after that amendment. In my view, such proof would be sufficient to show the selective treatment of the 2005 Agreement, because the regime of Article 26/A(5) required such a decision. Thus, the analysis of the circle of comparable undertakings and the tax treatment they received based on Article 26/A(5) would be the most appropriate assessment of that case.

In the *MOL* case, the Commission failed to prove that the 2005 agreement was an instance of incompatible (individual) aid. Despite the circumstances of this case, the Court of Justice established a parameter for individual aid for

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[621] *Ibid,* in paras 79–81. In paragraph 81, the General Court summarizes the previous paragraph (80) conclusion as follows. "In the light, first, of the absence of selectivity characterising the legal framework governing the conclusion of the extension agreements and given the considerations justifying the grant of a margin of assessment to the Hungarian authorities during the negotiations relating to the rates of the fees and, second, of the absence of any evidence that those authorities treated the applicant favourably in relation to any other undertaking in a comparable situation (see paras. 70 to 74, 79 and 80 above), the selective nature of the 2005 agreement cannot be regarded as established."

[622] In case C-15/14, *Commission v MOL,* in para. 61–70.

[623] *Ibid,* paras. 59. See also the follow up arguments of the Court of Justice in paras. 61–70.

a later case, where one individual undertaking clearly benefited from the advantage; the selective effect could thereby be presumed.[624] So, based on the legal discussion in the *MOL* rulings, the presumption of selectivity is only valid for tax decisions that clearly and originally intended to benefit one undertaking. However, depending on the case's complexity, the advantage effect analysis might be so complex that such a presumption can hardly be a logical consequence of the individual measure and the advantage effect.[625] The *MOL* case law put the spotlight on State aid measures in the form of authorities' tax decisions, which adds another layer of complexity to the analysis of the *selective advantage* condition and its development through case law.

Niejahr pointed out that "the MOL case is one of a series of State aid cases in which the Commission appears to be testing the traditional boundaries of State aid control, particularly about the notion of selectivity and advantage."[626]

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[624] In case C-211/15 P, *Orange v Commission,* paras. 53–54, where the Court of Justice stated the following. "(53) The General Court stated in paragraphs 52 and 53 of the judgment under appeal that the 1996 Law affected only France Télécom and that, as a result, it was selective. According to the General Court, the test requiring a comparison of the beneficiary with other operators in a comparable factual and legal situation in the light of the aim pursued by the measure in question is based on, and justified by, the assessment of whether measures of potentially general application are selective and that test is therefore irrelevant where, as in the present case, it would amount to assessing the selective nature of an ad hoc measure which concerns just one undertaking and is intended to modify certain competitive constraints which are specific to the undertaking. (54) As those findings are, as observed by the Advocate General in points 66 to 72 of his Opinion, consistent with the Court's case-law in this field (see, to that effect, judgment of 4 June 2015, Commission v MOL, C-15/14 P, EU:C:2015:362, paragraph 60), they are not vitiated by any error of law and, as a result, the second part of the first ground of appeal must be rejected as unfounded."

[625] See for instance in joined cases C-885/19 P and C-898/19 P, *Luxembourg and Fiat Chrysler Finance Europe v Commission*, paras. 122–123, a glimpse of such complex discussion, in the Court of Justice following arguments. "(122) In particular, after having observed that a Member State has chosen to apply the arm's length principle in order to establish the transfer prices of integrated companies, the Commission must, in accordance with the case-law cited in paragraph 70 of the present judgment, be able to establish that the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies, whether integrated or not, pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to integrated companies or to certain of them, such as finance companies, as compared to market prices for comparable transactions carried out by non-integrated companies. (123) In the present case, as has been concluded in paragraph 105 of the present judgment, the Commission did not carry out such an examination in the decision at issue, since its analytical framework did not include all the relevant norms implementing the arm's length principle under Luxembourg law."

[626] Niejahr, N. (2015). "The ECJ Confirms Limits to the Commission's Expansive Application of the Selectivity Criterion in State Aid Cases: Annotation on the Judgment of the Court of

The Commission constantly encroaches on the tax discretion of the Member States to develop legal arguments in the assessment of the *selective advantage* condition, which the EU courts may uphold or reject. This resembled the *MOL* rulings that resulted in the annulment of that State aid decision but in the development of a general parameter that the Commission can use in future cases, namely the presumption of the selectivity of the effect after the fulfillment of the advantage of individual aid that clearly benefits only one undertaking.

Now back to the analysis of comparable undertakings *in light of the objective of the measure*. Previously in this chapter, I pointed out that a selective-advantage tax treatment can arise from (i) tax treatment that derogates from the normal tax regime, (ii) *de jure* objective tax treatment that is *de facto* discriminatory, (iii) *de facto* exclusion from the scope of the tax that is illogical, and (iv) other possibilities developed through future cases. Considering these possibilities, on the basis of which a domestic tax might be considered to grant a selective advantage, the tax regime's objective presents the logic of the tax imposition; i.e., its structure and effects. Consequently, when taxes introduce environmental protection as an objective and thereby address the environmental impact of the taxable undertakings, such an objective adds an extra layer to the analysis of the circle of comparable undertakings. Direct competitors – e.g., undertakings within the same sector – are the most logical circle of comparable undertakings from the point of view of fiscal tax law, because of the principle of equal treatment or non-discrimination. I return to these principles in point 5.3.3.3 below. However, due to their environmental impact, different sectors can also be comparable undertakings, particularly for environmental taxes.

Justice of 4 June 2015 in Case C-15/14 P, *European Commission v MOL Magyar Olaj-és Gázipari Nyrt,*" p. 447.

4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings

In 2001, through the *Adria-Wien Pipeline* ruling, the Court of Justice initiated a specific parameter for the determination of the circle of comparable undertakings for environmental taxes. It concerns their environmental protection objective and the logic of tax undertakings based on their environmental impact. Hence, this specific parameter would fit into the definition of environmental protection requirements and be relevant for their integration.

Austria established an energy tax scheme on natural gas and electricity that granted tax rebates only to primarily manufacturers of goods.[627] The Court of Justice concluded that two non-competing sectors could be in legal and factual comparable circumstances under the logic of that regime.[628] In essence, the tax rebate conferred a selective advantage on the sector that primarily produced goods, since it derogated from the ordinary regime for taxing energy consumption. In this regard, the Court stated that, from an environmental protection perspective, the measure was selective, because the sectors taxed differently both had a similar negative effect on the environment in respect of their identical energy consumption.[629] I discuss this part of the ruling, since it benchmarked the issue of the integration of environmental protection into the *selective advantage* condition below. In the words of the Court of Justice's:

> *For another thing, the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.*[630]

[627] In case C-143/99, *Adria-Wien Pipeline GmbH,* paras. 3–8.
[628] *Ibid,* paras. 50 and 52.
[629] *Ibid,* para. 52.
[630] *Ibid idem.*

In my view, the Court's reasoning meant that the environmental logic of the Austrian energy tax regime was illogical, incoherent, and inconsistent with any environmental protection purpose. Energy consumption is the action that impacts the environment, and it does not concern who consumed but rather how much energy was consumed. So, differentiating two sectors in an energy tax regime cannot have any logical, coherent, or consistent foundation in terms of their impact on the environment; instead there must be other reasons – such as to protect the benefitted sector's competitiveness, as argued in this case.[631]

The Court of Justice benchmarked the integration of environmental protection into the rationale of the assessment of the *selective advantage* condition in paragraph 52 of the *Adria-Wien Pipeline* ruling. However, despite the contention of several scholars that it did so in the justification (third) step, it seems that the Court's reasons were more closely related to the first and second steps of the selective assessment, rather than to the third.[632]

When the Court argued that both sectors were equally damaging to the environment, based on their significant energy consumption, it recognized that they were in a comparable circumstance, because both sectors (1) consumed significant amounts of energy, and (2) that consumption impacted the environment equally. The Court of Justice took an environmental protection perspective in paragraph 52, with the words "ecological

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[631] Stated in para. 54 of that ruling (C-143/99,). Just to exemplify, if the tax scheme would have been genuinely designed to address an environmental issue, then it should consider, e.g., (1) energy consumption based on (2) the environmental impact of the source of energy (fossil-based or sustainable). In this case, the tax scheme would have an environmental protection objective and a rationale, provided that the energy taxation follows those two circumstances' logic, and not look at *who* is consuming, rather *what* source of energy is being consumed. See, for instance, S. Andersen discussion about the tax bases and rates of energy taxes in Scandinavian countries, in S. Andersen, M. (2016), *"Reflections on the Scandinavian Model: Some Insights into Energy-related Taxes in Denmark and Sweden,* p. 102, where the tax base on energy use that presents carbon dioxide emission is "taxed according the associated direct emissions of CO_2 – the carbon tax component;" and "taxed based on emissions of conventional air pollutant, notably sulphur dioxide (SO_2) and nitrogen oxide (NO_x) – the pollution component." Them he reflects about the tax rates aims of those bases.

[632] See, for instance, See in Sutter, F., (2001) "The 'Adria Wien Pipeline' case and the State Aid provisions of the EC Treaty in tax matters," pp. 241-242, in F. Serret, E., (2016), "Taxes with Environmental Purposes and State Aid Law: The Relevance of the Design of the Tax in Order to Justify Their Selectivity," p. 254; also, in Jans, J.H. & Vedder, H.H.B., (2012), *European environmental law: after Lisbon*, pp. 325–326. In Gormsen, L., (2019), *European State Aid and Tax Rulings*, p. 14, the author pointed out that both *Adria-Wien Pipeline* and *British Aggregates Association* rulings are case law concerning justification grounds.

considerations." It stated that, from such "ecological" (environmental protection) perspective, the measure did not justify treating those sectors differently. The use of the word "justify" in paragraph 52 was not related to the step concerning the justification analysis (the third step), but rather to the logic of the circle of comparable undertakings. A tax that aims at environmental protection must employ a tax treatment that is logical, coherent, and consistent with that aim, including the choice of taxpayers and of the beneficiaries of tax reductions. The only way to verify if the tax is logical, coherent, and consistent with its aim is by testing the environmental protection rationale that connects the tax's objective with the distribution of the tax burden among taxpayers. This is what the Court did in paragraph 52, where it stated that both sectors were "equally damaging to the environment." It was discussing their comparability under the logic of the tax. Below, I test the perspective of paragraph 52 by replacing the words that make it confusing with other terms that makes it clearer, while maintaining its essence. This is how paragraph 52 would read in that case:

> *For another thing,* ***based on*** *the ecological considerations underlying the national legislation at issue, treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods* ***is illogical, incoherent, and inconsistent with that objective****. Energy consumption by each of those sectors is equally damaging to the environment.*[633]

It only makes sense to use the environmental protection objective of the tax for the determination of the circle of comparable undertakings, which is a step that comes before the justification step. After the second step, the environmental protection objective that was not strong enough to disqualify the measure as selective will not avoid the State aid classification in the justification step. Otherwise, the second and third steps of the *selective advantage* condition become contradictory. The environmental protection objective of the tax serves to determine the tax structure – i.e., the distribution of the tax burden among taxpayers/undertakings. *Prima facie* selective tax treatment requires discriminatory tax treatment or differentiated tax treatment, which conflicts with its the alleged aim of environmental protection. Hence, the

[633] ***Emphasis*** on the words I added. I excluded "do not justify" and replaced it by is illogical, incoherent, and inconsistent with that objective.

objective of environmental protection that created the selective tax treatment cannot justify what it created. I discuss this view using an example.

In the *Adria-Wien* case, the Austrian tax legislator dismissed the fact that suppliers of services and producers of goods had a similar negative environmental impact due to their massive energy consumption. From the perspective of environmental protection, the source of the energy and the amount of energy consumed should be the basis for judging the impact of an undertakings on the environment. That, however, was not the approach that Austria took. The tax rebate was only available to primary producers of goods. This condition had no connection to the objective of protecting the environment. On the contrary, the differentiated tax treatment arose from that sector's weakened competitive position once that tax was introduced. Hence, it had an illogical structure with respect to the alleged objective of environmental protection.

The tax's environmental protection objective determines who should pay the normal tax burden and who should receive the tax advantages. From an environmental protection perspective, polluters producers and service suppliers that impact the environment negatively should be the taxpayers.[634] The second step involves verification of the consistency of the tax with its alleged aim. If the distribution of the tax burden among comparable taxpayers is consistent with that aim, then the tax is logical.

The Court of Justice stated in paragraph 49 that the measure in question did not offer any justification from the standpoint of its "nature or general scheme," and it confirmed this view later, in paragraph 53.[635] In paragraph 54,

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[634] Consumers of the goods and services that received environmental tax imposition become the final payers of such tax once those goods and services internalize that fiscal cost. However, the PPP imposition aims at driving consumers to cheaper choices. And because of consumers' choice, the tax imposition should stir producers for greener practices. For instance, in the OECD, (2022), "Background note: The implementation of the Polluter Pays Principle," p. 5, explains my view with the following position. "Policymakers can use this principle to curb pollution and restore the environment. By applying it, polluters are incentivized to avoid environmental damage and are held responsible for the pollution that they cause. It is also the polluter, and not the taxpayer, who covers the costs created by pollution. In economic terms, this constitutes the "Internalization" of "negative environmental externalities." When the costs of pollution are charged to the polluter, the price of goods and services increases to include these costs. Consumer preference for lower prices will thus be an incentive for producers to market less polluting products."

[635] In case C-143/99, *Adria-Wien Pipelines GmbH,* para. 53, where the Court of Justice stated the following. "It follows from the foregoing considerations that, although objective, the criterion

the Court sustained the Commission's position on the scheme as aiming to preserve the intra-EU competitiveness of goods manufacturers. [636] The Court's position about the Austrian tax scheme is an indication of the scheme's lack of environmental protection connection. So, if the Austrian energy scheme lacked a genuine environmental protection aim, then any discussion concerning this aim to justify the selective treatment of primary producers of goods would be illogical, given that the tax disregarded the environmental impact of these sectors. Moreover, if it had taken such an approach, then it would not have created the tax discrepancy concerning the rights to energy tax rebates, and thus it would not have been selective in the first place. Hence, my understanding is that paragraph 52 sets a parameter specific to environmental taxes concerning the circle of comparable undertakings: the environmental impact of the activities also determines the comparability assessment.

Similarly, in 2004, the Court of Justice ruled an annulment proceeding concerning the Netherlands's taxation on minerals of fertilizer use, the "MINAS" system. The Court of Justice seems to have discussed the justification step in paragraphs 43 through 47 of that ruling.[637] However, having looked more closely at the substantive discussion in these paragraphs, I conclude that the Court mainly discussed the comparability of undertakings and not the justification of prima facie selective tax treatment. Looking at one of these paragraphs, it states:

> *It should be noted in this case, as the Advocate General stated …, that while it seems plausible that, over a comparable area of cultivation, crops grown in glasshouses or on substrate allow a greater uptake of phosphates and nitrogen by plants in the course of a year than crops grown in the open, it does not follow from the arguments raised by the Netherlands Government that the uptake is eight times higher than that for crops grown in the open and*

applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid."

[636] *Ibid,* para. 54, where the Court of Justice stated the following. "Besides, as the Commission has rightly observed, the statement of reasons for the bill which led to the enactment of the national legislation at issue indicates that the advantageous terms granted to undertakings manufacturing goods were intended to preserve the competitiveness of the manufacturing sector, in particular within the Community."

[637] In case C-159/01, *Netherlands v Commission.*

> *that it corresponds to average annual quantities of 460 kg of phosphates and 800 kg of nitrogen.* [638]

Judging from the above, the logic of the MINAS system concerned the taxation of the uptake of chemicals by crop growth in glasshouses, substrates, or open fields. The underlying selective issue was whether glasshouse and substrate crop producers were comparable to open fields crops producers in terms of their environmental impact. The Netherlands should have demonstrated that the MINAS tax regime relied on the scientific evidence concerning the actual environmental impact of these three forms of production. But the Netherlands never produced such evidence, as the Court clarifies in the following paragraphs of from the ruling:[639]

> *According to the documents in the case-file the Commission indicated to the Netherlands Government throughout the administrative proceedings that it was not convinced by the justification for the contested exemption, referred to in the preceding paragraph, based on the much higher uptake of nitrogen and phosphates by plants grown in glasshouses or on substrate.*
>
> *(Accordingly, in order to show that the contested exemption was justified by the nature and general scheme of the system in question, the Netherlands authorities should have adduced scientific proof in that regard. They did not however adduce any proof to that effect.*

The Court of Justice wrote that, due to "the nature and general scheme" of the scheme, it seems logical to regard this as the justification possibilities of prima facie selective tax treatment, which is the last step of the *selective advantage* condition analysis). However, the Court was simply assessing the existence of the selective effect in the first place, which requires some sort of logic based on the objective of the tax. In this case, the logic is that of a proportional distribution of the tax burden in relation to the chemicals uptake of the crops. The normal taxation of open fields crop producers, and the tax exemption for glasshouse or substrate crop producers, relied on the view that the exempted taxpayers polluted proportionally less than the others.[640]

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[638] *Ibid,* para. 44.
[639] *Ibid,* paras. 45–46, where the Court of Justice explained the following.
[640] *Ibid,* implicit in the para. 44 discussions.

Consequently, the justification cited by the Court of Justice is about this logic of the tax burden distribution among the three different types of taxpayers, which concerns the circle of comparable undertakings (i.e., the second step of the analysis).

This case was an annulment proceeding against the Commission's State aid decision about the MINAS system. The Court analyzed whether the Commission's had erred in its contention that the Netherlands had failed to produce the scientific proof required.[641] In the event, the Court endorsed the Commission's conclusion that the Netherlands had not produced scientific evidence that glasshouse or substrate crop producers had a lower environmental impact; thus the Court confirmed that tax exemption was selective.[642] As can be seen, the environmental impact of producers was critical for the assessment.

So, if the Netherlands had produced such proof, then the tax would have been logical and consistent with its purpose, as discussed earlier in connection with *Adria-Wine Pipeline GmbH*. Thus, if only (1) crop production determined the circle of comparable undertakings, then the tax was not connecting its objective with the distribution of the tax burden among producers in terms of (2) their environmental impact. This analysis is incomplete concerning the objective of the tax, since both elements should constitute the rationale of the aim of environmental protection. Such a disconnection from the objective compromises the essence of environmental taxes, which to tackle environmental impacts and to achieve a desired level of environmental protection. Thus, bringing the second element into the discussion of the circle of comparable undertakings is critical for assessing the selective effect of the tax and for integrating environmental protection into the State aid analysis.

In 2008, the Court of Justice ruled on the *British Aggregates Association* appeal concerning an environmental levy on aggregates, which granted exemptions

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[641] *Ibid,* paras. 45–46, where the Court of Justice stated the following. "(45) According to the documents in the case-file the Commission indicated to the Netherlands Government throughout the administrative proceedings that it was not convinced by the justification for the contested exemption, referred to in the preceding paragraph, based on the much higher uptake of nitrogen and phosphates by plants grown in glasshouses or on substrate. (46) Accordingly, in order to show that the contested exemption was justified by the nature and general scheme of the system in question, the Netherlands authorities should have adduced scientific proof in that regard. They did not however adduce any proof to that effect."
[642] *Ibid,* para. 47.

to materials that had an equally bad environmental impact as those taxed at the normal rate.[643] The Court concluded, contrary to the General Court's finding, that the materials exempted from the levy were comparable undertakings with the materials normally taxed. Hence, the Court understood that the measure was thereby *prima facie* selective, because of (1) the legal classification of the materials in question as aggregates, and (2) their similar environmental impact. The underlying selective issue of the levy in question was that it lacked a logical, consistent, or coherent connection between its environmental protection objective and the distribution of the tax burden among those materials classified as aggregates to be taxed normally and those exempted based on their environmental impact.[644] A measure that aims at environmental protection has to secure this aim somehow, at nd in a tax case iis logical to do so by looking at the environmental impact of the undertakings in question. Thus, a logical, consistent, and coherent determination of the tax burden should be based on the materials classified as aggregates and their respective environmental impact.[645] It goes without saying that the environmental levy on aggregates hid an anti-competitive measure beneath a green cover story.

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[643] In case C-487/06 P, *British Aggregates Association,* para. 86 where the Court of Justice stated the following. "In the light of that case-law, the unavoidable conclusion is that the Court of First Instance disregarded Article [107](1)EC, as interpreted by the Court of Justice, by holding, in paragraph 115 of the judgment under appeal, that Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they decide to subject to an 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."

[644] Based on the following paragraphs 87 and 88 of the case C-487/06 P, *British Aggregate,* where the Court of Justice discussed the following. "(87) As the Advocate General noted in point 98 of his Opinion, that approach, which is based solely on a regard for the environmental objective being pursued, excludes a priori the possibility that the non-imposition of the AGL on operators in comparable situations in the light of the objective being pursued might constitute a 'selective advantage,' independently of the effects of the fiscal measure in question, even though Article [107](1) EC does not make any distinction according to the causes or objectives of State interventions, but defines them on the basis of their effects. (88) That conclusion is all the more cogent in the light of paragraph 128 of the judgment under appeal, to the effect that potential inconsistencies in the definition of the scope of the AGL in relation to the environmental objectives pursued may be justified, even if they are based on objectives unrelated to environmental protection, such as the desire to maintain the international competitiveness of certain sectors. Consequently, the distinction made as between undertakings also cannot be justified by the nature or general scheme of the system of which it forms part (…)."

[645] Conclusion drawn based on paras. 83–92, but in particular the paragraphs quoted in the previous footnotes (namely, paras. 86–88) of the case C-487/06 P, *British Aggregates Association.*

In 2015, the Court of Justice issued a preliminary ruling concerning a German energy tax on electricity production. The measure in question, known as *KernbrStG*, was a tax levied only on nuclear sources during a specific period (1 January 2011 to 31 December 2016).[646] The national court questioned whether the *KernbrStG* was to be classified as State aid, as prescribed in Article 107(1) of the TFEU.[647] The Court of Justice identified three objectives with the *KernbrStG*: (1) a transitory aim; (2) a fiscal aim (to raise revenue); and (3) a cost-covering aim – i.e., to reduce the public costs in Germany of rehabilitating sites polluted by radioactive waste where nuclear fuels had been stored.[648] In paragraph 79, following the identification of these three objectives, the Court stated that fuels other than nuclear were not in a comparable situation, and thus were unaffected by the *KernbrStG*.[649] Based on the environmental objective of that tax, the Court stated:

> *It must be noted that methods of producing electricity, other than that based on nuclear fuel, are not affected by the rules introduced by KernbrStG and that, in any event, they are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel.*[650]

The last part of the Court's statement concerns the environmental impact of the radioactive waste left over from the use of nuclear fuels. The tax had been designed to address that issue. Radioactive waste derived from the use of nuclear fuels impacts the environment negatively, and only nuclear fuels have such effects. This is why the Court concluded that non-nuclear fuels were not in legally or factually in the same situation as nuclear fuels because only the latter had such a harmful impact. Thus, this case was crystal-clear about the parameter discussed here, which had applied since *Adria-Wien Pipelines GmbH*. A tax with a genuine environmental protection objective defines the circle of the comparable undertakings and tax burden based on their respective environmental impact.[651] After the words quoted above, the Court concluded

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[646] In case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, paras. 76 and 78.
[647] *Ibid,* para. 69.
[648] *Ibid,* para. 78.
[649] *Ibid,* para. 79.
[650] *Ibid idem.*
[651] In Nicolaides, P. (2018), *State Aid Uncovered – Critical Analysis of Developments in State Aid 2018*, p. 173, where he explained that the logic behind analyzing the objective of the tax to define its

that the measure was not selective,[652] which means that this parameter essentially safeguards the non-selective treatment of environmental taxes and the integration of environmental protection therein.

In 2018, the Court of Justice ruled on three preliminary rulings concerning three taxes on large retail establishments that had environmental protection as their purpose. [653] Their similar design features allow us to discuss one case here and still get a general understanding of the other two. The national court questioned the Court of Justice in a preliminary ruling as to whether a full or a partial exemption from a tax on large retail establishments was selective since establishments below a certain size (2.500m^2) – as well as collective (group) retail establishments and those engaged in certain specific activities – received the benefit.[654] The view the legislators adopted in those taxes was that the specific activities in question required large sales areas by their nature and because of that, they reproduce a negative impact on the environment. Implicitly in this logic was the establishments below the specified size had a lower adverse effect on the environment than did large retail establishments.[655]

The Court found that the threshold to determine the scope of the tax could grant *de facto* selective treatment if the establishments excluded from the tax could be in a legally or factually comparable position to the large establishments, which were taxed at the normal rate..[656] However, the Court pointed out that it was undisputed in these cases that there was a direct link between the size of the establishments and their negative environmental impact, due to high public attendance. It therefore concluded that the thresholds for the tax were *consistent* with its environmental protection

scope is about "who falls within its scope and, necessarily, who falls outside its scope," concluding that when "activities or undertakings are those that genuinely fall outside its scope, then they do not receive a selective advantage."

[652] *Ibid,* para. 80 where the Court of Justice stated the following. "It follows that KernbrStG is not a selective measure, for the purpose of Article 107(1) TFEU, and it does not therefore constitute State aid prohibited by that provision."

[653] Cases C-233/16, C-234/16 and C-235/16, C-236/16 and C-237/16, *ANGED*. I discuss the first case.

[654] In case C-233/16*, ANGED*, paras. 11, 36, and 57. Note that in joined cases C-234/16 and C-235/16, paras. 6, 8, and 19, the collective retail establishments did not receive any exemption as the first case. In the joined cases C-236/16 and C-237/16, the tax on retail establishment did not mention collective establishments.

[655] *Ibid,* paras. 57 and 59.

[656] *Ibid,* para. 49.

objective.[657] Based on this view, the Court concluded that the undertakings below the thresholds were not comparable to those above,[658] whereupon the threshold was not selective.[659] Given that the case was a preliminary ruling, the national court had to assess whether the negative impact on the environment due to the size of undertakings was based upon a false or an accurate threshold. As discussed previously, the environmental impact is a parameter for determining the circle of comparable undertakings, and not the justification for a *prima facie* selective environmental tax.

Regarding the exemption granted to collective retail establishments and certain specific retail categories,[660] the Court pointed out that the exemption seemed to derogate from the normal tax regime, since those retail areas were above the threshold but were exempted.[661] The key issue in this part of the discussion concerning the comparable circle of undertakings was the legislators' view that the specific categories of retail establishments exempted required large sales areas by their nature, but that did not produce the same negative effects as those that were taxed at the normal rate.[662] The Court

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[657] *Ibid,* para 53, where the Court stated the following. "In that regard, it is not disputed that the environmental impact of retail establishments is largely dependent on their size. The larger the sales area, the higher the attendance of the public, which results in greater adverse effects on the environment. Consequently, a condition relating to sales area thresholds, such as that adopted by the national legislation at issue in the main proceedings, in order to distinguish between undertakings with a greater or lesser environmental impact, is consistent with the objectives pursued."

[658] *Ibid,* para. 55, where the Court of Justice stated the following. "In those circumstances, a condition under which the imposition of a tax is based on the sales area of an undertaking, such as that in the case in the main proceedings, differentiates between categories of establishments that are not in a comparable situation in the light of the objectives pursued by the legislation that imposed that condition."

[659] A conclusion the Court reached in para. 56 of case C-233/16, *ANGED*.

[660] *Ibid,* para. 57, where the Court of Justice explained the following. "The referring court is also uncertain as to the other features of the tax at issue in the main proceedings. It questions whether the total tax exemption granted to collective retail establishments and individual retail establishments pursuing the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies, as well as the 60% reduction of the tax base for establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores, constitute advantages for those establishments."

[661] *Ibid,* in para. 58.

[662] *Ibid,* para. 59, where the Court of Justice explained the Regional Government of Catalunya's argument in this regard, as quoted in the following. "(…) the activities of the retail establishments concerned require, by their very nature, large sales areas *that are not intended to attract the greatest number of consumers or increase flows of customers who travel there by private vehicle*. Thus, those activities will have fewer adverse effects on the environment and on town and country planning than the activities of establishments liable for the tax in question." *Emphasis was added on* the factors that could potentially increase their environmental impact.

recognized that, if the environmental impact of the exempted retail establishments was *de facto* lower than that of the establishments taxed at the normal rate, then the exemption would be *justified,* and no selective tax treatment would have been granted.[663] The Court of Justice then pointed out that the national court needed to verify such a premise.[664] I examine the Court's reasoning as quoted in the following, in order to assess whether this part of the discussion was about the determination of the circle of comparable undertakings or a justification for a *prima facie* selective tax:

> *That factor may be such as to justify the distinction adopted in the contested legislation in the main proceedings, which, accordingly, would not result in selective advantages being given to the retail establishments concerned. It is, however, for the referring court to determine whether in fact that is the case.*[665]

If the national court verifies that those specifically exempted activities had a lower impact on the environment than did the larger establishments (which were taxed at the normal rate), then the tax would not qualify as a selective one.[666] So, *did the Court of Justice mean that the measure could be justified by the nature or general scheme of the tax in question?* Or *did it recognize that, if such a circumstance were confirmed, then the exempted undertakings would not be in a position comparable to that of the normally taxed undertakings?* As discussed in the previous cases, it seems more logical to presume that the combination of the two factors – (1) the larger size of certain retail establishments, and (2) their negative impact on the environment – determines the circle of comparable undertakings of the environmental tax. In my view, when the Court stated that "accordingly, [the tax] would not result in selective advantages being given to the retail establishments concerned," it did so because large retails and small retails were not comparable. Hence, the exclusion of small retails from the tax scope was not a tax treatment to be "justified by the nature and general structure of that scheme".[667]

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[663] *Ibid,* para. 60.
[664] Ibid idem.
[665] *Ibid idem.*
[666] *Ibid idem.*
[667] See also the Court of Justice answer in para. 67, stated in the following. "In the light of the foregoing, the answer to the second question is that a tax such as that at issue in the main proceedings imposed on large retail establishments according, in essence, to their sales area does not constitute State aid within the meaning of Article 107(1) TFEU to the extent that it

However, the environmental impact of the collective retail establishments which occupy larger areas due to their grouping was not smaller as those selected activities formally exempted from the tax imposition that required bigger areas by their nature. The Court of Justice therefore deemed them objectively to be in a situation comparable to that of normally taxed establishments.[668] This part of the tax law in question had no connection with the environmental protection objective or with the logic based on the environmental impact. Then, upon concluding thusly, the Court did not discuss any possible ways of justifying that selective effect,[669] and jumped instead to other State aid conditions.[670]

In 2019, the Court of Justice ruled on another preliminary ruling concerning an environmental tax on the use of inland waters to produce hydroelectricity: the *UNESA* case.[671] The tax was only imposed on water that crossed at least one autonomous community of Spain.[672] Thus, electricity producers other than those that were water-based and those that crossed internal jurisdictions of Spain were outside the scope of the tax. The Court addressed the question of whether the electricity producers not taxed because of their source of energy (not water) or jurisdiction (water that did not cross more than one autonomous community) were comparable to those taxed.[673] The tax in question aimed at the protection and improvement of public water resources, and it was undisputed in that preliminary ruling that only hydroelectricity

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exempts establishments whose sales area is less than 2 500 m². Nor, in so far as that tax exempts establishments which pursue the business of a garden centre or of selling vehicles, construction materials, machinery or industrial supplies or reduces by 60% the tax base of establishments selling furniture, sanitary ware and doors and windows and those that are do-it-yourself stores, does it constitute State aid within the meaning of Article 107(1) TFEU, *provided that those establishments do not have as significant an adverse effect on the environment and on town and country planning as the others, which it is for the referring court to ascertain." Emphasis added* to the part concerning the parameter related to the environmental impact.

[668] *Ibid,* para. 61.

[669] *Ibid idem*, where the Court stated the following. "Lastly, as far as concerns the criterion drawing a distinction for fiscal purposes on the basis of the individual nature of retail establishments, the effect of which is to exempt collective large retail establishments from the IGEC, it creates, by contrast, a distinction between two categories of establishment that are objectively in a comparable situation in the light of the objectives of environmental protection and town and country planning pursued by the legislation at issue in the main proceedings. As a result, the exemption of those collective large retail establishments from that tax is selective and is therefore likely to constitute State aid if the other conditions set out in Article 107(1) TFEU are met."

[670] *Ibid,* paras. 62–66, and 68.

[671] In joined cases C-105/18 to C-113/18, *UNESA*, paras. 10–15.

[672] *Ibid*, para. 55.

[673] *Ibid,* paras. 55–79.

producers could negatively impact public water.[674] Thus, in a finding similar to that the *KernbrStG* case, it concluded that only water-based production was comparable for the purpose of the tax, since only hydroelectricity production impacted public waters.[675] As discussed above, the Court applied the general parameter identified previously to establish the comparability of undertakings: i.e., their environmental impact.

The Court's answer to the issue regarding the comparability between hydroelectricity producers according to their location – i.e., between those making use of water located in one autonomous community and those making use of water located in two or more – followed a different logic, unrelated to their environmental impact.[676] In my view, implicit in this part of the ruling is the fact that hydroelectricity producers of both types negatively impact public waters. However, given Spanish tax discretion, they could be considered not to be in a comparable circumstance if the legislators of the tax law in question only had tax jurisdiction to regulate in cross-regional cases.[677] The Court answer was based on the premise that the jurisdiction of the law in question only applied over water located in more than one autonomous community.[678] Thus, this part of the case does not relate to the general parameter concerning the *environmental impact* of the undertakings in a possibly comparable situation, but instead to the national delimitation of tax jurisdictions.

In terms of the general parameter identified for environmental taxes and discussed above, the environmental protection objective of the tax determines the distribution of the tax burden among taxpayers based on their environmental impact. The consistency between these elements (or lack thereof) determines the circle of comparable undertakings, and thus whether the measure is selective. The comparability analysis of environmental taxes seems to have an implicit proportionality test, where the level of the environmental impact of the undertakings normally taxed and those exempted is logical, coherent, and consistent with the distribution of the tax burden among those undertakings. This view could explain why the cases

[674] *Ibid,* para. 66.
[675] *Ibid,* paras. 66–67.
[676] *Ibid,* this discussion started in para. 70.
[677] *Ibid idem.* In para. 70, the Court of Justice explained this view, adding in para. 71 that the discussion if tax law in question could be the reference regime relied on the extent of that legislators' competence according to the Spanish constitution or laws.
[678] *Ibid,* paras. 74–76.

discussed do not seem to reach the last step to assess the *selective advantage* condition (the justification step, i.e., the third step). It is rather a proportionality discussion within the circle of comparable undertakings analysis (i.e., the second step).[679] Moreover, as mentioned above, the Court's integration of environmental protection into Article 107(1) of the TFEU was based on the environmental impact of the different undertakings.

4.3.3.3. De facto selective – discriminatory

The Gibraltar ruling from 2011 was a State aid case law that benchmarked the possibility of qualifying a case of *de facto* discriminatory tax treatment, which is applicable to any type of tax measures, including environmental ones. Briefly, Gibraltar's corporate income tax reform set up rules determining the income taxation of companies, and the combination of employment rules resulted in no surcharge for offshore companies given their lack of workers in Gibraltar.[680] The Court of Justice considered the Commission to have been correct when it averred that, under the logic of Gibraltar's tax regime, the objective of the tax in question was to "introduce a general system of taxation for all companies established in Gibraltar."[681] And, based on the purpose of that tax system, the Commission correctly assessed the selectivity effect of that regime on offshore companies, since they were in a situation comparable

[679] Similarly, Rossi-Maccanico, P., (2007) "Commentary of state aid review of multinational tax regimes," p. 40, where the author analysed this case stating the following. "The assessment of whether a measure is selective in a way proscribed by Article [107](1) accordingly follows a familiar discrimination test under the traditional interpretative criteria of proportionality often used by the Court to identify disparities between the tax treatment of undertakings in a comparable legal and factual situations."

[680] In case C-106/09 P and C-107/09 P, *Commission v Gibraltar, and others*, in para. 21, we can get an overview of the Commission's selectivity interpretation as following. "The Commission finds that certain aspects of the proposed tax reform are materially selective. Thus, the following are selective from that viewpoint: first, the requirement to make a profit before incurring liability to payroll tax and BPOT, since that requirement favours companies which make no profit (recitals 128 to 133 of the contested decision), and second, the cap limiting liability to payroll tax and BPOT to 15% of profits, since that cap favors companies which, for the tax year in question, have profits that are low in relation to the number of employees and occupation of business property (recitals 134 to 141 of the contested decision). Third and lastly, imposition of a payroll tax and BPOT is also materially selective, since both taxes inherently favour offshore companies which have no real physical presence in Gibraltar and which as a consequence do not incur corporate tax (recitals 142 to 144 and 147 to 151 of the contested decision)." See also paras. 100–101 of that ruling.

[681] *Ibid,* para. 101.

to that of the other companies established in Gibraltar.[682] Consequently, the objective of the corporate income tax – to tax all companies based in Gibraltar – determined the judgment of comparability as between inshore and offshore companies in Gibraltar. Thus, the Commission concluded that Gibraltar's regime favored *de facto* offshore companies through tax discrimination.[683]

The Gibraltar case spurred scholarly debate concerning a *de facto* selectivity effect. [684] The Court put considerable stress on the objective of the tax – to determine the circle of comparable undertakings[685] – while the effects-based approach of Article 107(1) of the TFEU disregards the measure's objectives.[686] However, the interpretation of the State aid conditions is not restricted to the techniques of the tax law; instead, it also concerns the effects it delivers in practice.[687] Thus, there was no conflict between the two views; instead they complement each other. Cisotta clarified that Article 107(1) effects-based approach "regard to the concrete functioning of the national legal system."[688] Thus, the objective of the tax gives logic to the assessment of the tax measure's formal (*de jure)* and substantial (*de facto)* effects.[689] Before

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[682] *Ibid,* paras. 101–102.

[683] *Ibid,* cf. 106–107.

[684] In *Adria-Wien Pipeline* case (C-143/99) the Court of Justice explained to the national court in its preliminary observations (in para. 31) that "Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3)." Then, in para. 32, the Court stated "It follows from the foregoing considerations that the answer which the Court decides to give to the national court regarding the question whether the measures in question may constitute State aid cannot prejudge the issue of their compatibility with the Treaty." Given that at that time no "environmental" tax was regarded by the Court of Justice as general, and based on those preliminary observations of the Court, it could be assumed that environmental objectives were only accepted at a compatibility level, and not to interpret Article 107(1) of the TFEU to disqualify a measure as State aid based on its environmental protection objective. Also, see paras. 52 and 53 of that ruling. In case T-210/02, *British Aggregates Association,* set aside by the Court of Justice in case C-487/06 P, and in case T-233/04, *Netherlands v Commission*, also set aside by the Court of Justice in case C-279/08 P. See in Cisotta, R. (2016) "*Criterion of Selectivity*," p. 136, and in Biondi, A., (2013), "State Aid is falling down, falling down: An analysis of the case law on the notion of Aid," pp. 1719-1743, among other scholars and cases that shows such confusion.

[685] In case C-106/09 P and C-107/09 P, *Commission v Gibraltar, and others*, paras. 75 and 101

[686] *Ibid,* para. 87.

[687] *Ibid* idem.

[688] In Cisotta, R. (2016) "*Criterion of Selectivity*," p. 137.

[689] See, for instance, a similar position in joint cases C-20/15 P and C-21/15 P, *World Duty-Free Group SA*, paragraph 77, where the Court argued: "Indeed, while it is not always necessary that a tax measure, in order for it to be established that it is selective, should derogate from an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard where the effect of that measure is that two categories of operators are distinguished and are

this case, a direct scrutiny of the tax from the standpoint of State aid law only concerned the *de jure* (formal) selective tax treatment.[690] The foundation of Article 107(1) on the effects-based approach ensures that artificial purposes masking anti-competitive or protectionist measures are caught up by that Article's prohibition, irrespective of how such hidden effects are achieved.[691]

When it came to the determination of the circle of legal and factual comparable undertakings in the light of the objective pursued by the tax regime, the assessment of discriminatory effects also generated an interesting legal debate. Article 107(1) also founded on the non-discrimination principle, or the principle of equal treatment.[692] This principle directly prohibits discrimination on grounds of nationality; moreover, "indirect distinctions on the basis of nationality or origin are just as prohibited as direct discrimination."[693]

In Article 107(1), the principle of equal treatment is embedded in the selectivity effect, and more precisely in the circle of comparable undertakings, from which the logic, coherence, and consistency of the tax's objective and structure becomes the object of scrutiny, including with regard to its actual

subject, a priori, to different treatment, namely those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system, although those two categories are in a comparable situation in the light of the objective pursued by that system." In a later moment of the ruling, this position complements that *selectivity* is about discriminatory tax treatment, a discussion initiated in paragraph 54 of that ruling, quoted above in this section.

690 For instance, in case C-88/03, *Portugal v Commission* (Azores).

691 Based on case C-173/73, *Italy v Commission*, para. 13, p. 718, and several other EU case law, e.g., case C-75/97, *Belgium v Commission,* para. 25, and in joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar, and others*.

692 In Article 18 of the TFEU, amd case law of the EU courts. I discuss below in case C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission.*

693 In Terra, B. J. M., and Wattel, P. J., (2012), *European Tax Law*, p. 54.

effects.[694] In an analysis of EU case law,[695] Biondi stresses the general principle of equality (herein equal treatment or non-discrimination) within the selectivity test as one of the legal foundations of the State aid rule that aims to protect competition.[696] So, based on Biondi's view, we can see selective treatment as unequal tax treatment that *distorts competition*, which violates the foundations of the internal market. The connection between the *selective* and the *competition-distorting* effect becomes logical, since the legal foundation of the selective effect is the equality principle, which affects the undertakings' competitiveness. As De Sadeeler argues, "the more an aid measure is selective, the more it is likely to distort competition."[697] No wonder the comparison

[694] Based on the discussion of joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission,* paras.79 and 80, where the Court of Justice stated the following."(79) It is in the light of those considerations that the General Court, for its part, specified, in paragraph 161 of the judgment under appeal, that the statement in recital 228 of the decision at issue that the arm's length principle is a general principle of equal treatment in taxation which falls within the scope of Article 107(1) TFEU must not be taken out of context and could not be interpreted as meaning that the Commission had asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU. (80) As is apparent from paragraph 141 of the judgment under appeal, the General Court found that the arm's length principle applies where the relevant national tax law does not make a distinction between integrated 'undertakings' and stand-alone 'undertakings' for the purposes of their liability to corporate income tax, since, in such a case, that law would be intended to tax the profit arising from the economic activity of such an integrated 'undertaking' as though it had arisen from transactions carried out at market prices. That legal basis having been identified, the General Court considered, in essence, in paragraph 145 of the judgment under appeal, that that principle was applicable in the present case in so far as the objective of the Tax Code was to tax integrated and stand-alone companies in the same way with regard to corporate income tax." The General Court stated in the annulment proceeding T-755/15 and T-759/15, para. 161 the following. "(161) It is true that the Commission indicated, in recital 228 of the contested decision, that the arm's length principle was a general principle of equal treatment in taxation, which fell within the scope of Article 107(1) TFEU. However, that wording must not be taken out of context and cannot be interpreted as meaning that the Commission asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU, which would give that article too broad a scope." So, these rulings discussed if the arm's length principle could be considered inherent in the principle of equal tax treatment, which is general principle of EU law inherent in Article 107(1) of the TFEU.

[695] Namely, the *British Aggregates Association,* T-210/02 and C-486/06 P rulings*,* and *NOx* rulings*,* T-233/02 and C-279/08 P, *Commission v Netherlands*.

[696] In Biondi, A., (2013), "State Aid i.s falling down, falling down: An analysis of the case law on the notion of Aid," p. 1.733, where the author stated the following. "In the area of economic law, equality in its formal archetype functions as a general criterion for "consistency and rationality": it requires both Member States and the EU institutions to abstain from engaging in arbitrary conduct. In the context of economic integration, therefore, if "different rules are laid down for similar situations, the result is not just inequality before the law, but, also inevitably distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market."

[697] See, in De Saleeder, N. (2018) p. 345.

test in the selectivity analysis, founded on the non-discrimination principle, is the State aid cornerstone for protecting the functioning of the internal market from discriminatory and distorting tax actions.[698]

Given that the selective test is also an analysis of the concrete case, the Member State's internal perspective on the principle of equal treatment embedded in its tax measure also integrates such selective analysis when the circle of comparable undertakings is determined.[699] Finally, I will quote Påhlsson's discussion – about the equality principle from the perspective of EU law, human rights law, and tax law – that summarizes the challenges and reasons for inconsistency regarding the comparability assessment in the selective analysis.[700] He writes as follows:

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[698] Based on Bionti mentioned in the previous footnote, and Cisotta, R. (2016) "*Criterion of Selectivity*," p. 137. See, also about the non-discrimination principle or principle of equal treatment in the selectivity effect analysis, in Aldestam, M. (2005) p. 17.

[699] Cf. case C-15/14 P, *Commission v MOL*, in paras. 64 and 65, the Court of Justice applies what seems to be an understanding (interpretation) of the Member State concerned equal treatment principle in the measure in question. (64) As the Advocate General stated in point 86 of his Opinion, there is a fundamental difference between, on the one hand, the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and, on the other, the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, as the Commission claimed in its appeal, cannot be sufficient to establish that the corresponding scheme is selective. (65) Consequently, it must be stated, first, that the General Court correctly held in paragraph 72 of the judgment under appeal that the margin of assessment at issue in the present case allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can be distinguished, by its very nature, from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator.

[700] Påhlsson describes the challenges of the equality principle as follows. "Western jurisprudence has a basic norm that expresses and summarizes the idea of justice and the rule of law: equal cases should be treated alike. This principle of equal treatment recurs in declarations of human rights and in the EU Treaties. It is found in the constitutions of individual states, including the Swedish Instrument of Government (*Regeringsformen,* IG) which provides equality before law regardless of race, religion, etc.: … The equality principle can be traced through public law and tax law. It stands as a fundamental norm that requires universality, the same rules for everyone, and deviation from this norm must be justifiable. In tax law it can be used to justify taxation under the ability to pay principle. But the notion of overall similarity is an ideology, a false perception of reality. Instead, it is more reasonable to speak about relative similarities. This comparability, which motivates equality is, like any other legal phenomenon, a social construction, albeit is based on man's long-term experience of how people can best live and work together. The equality principle's general meaning must in fact be that relatively similar, comparable cases should be treated equally." In Påhlsson, R., (2014),

> *[W]hile everyone is presumed to agree that comparable cases should be treated equally, consensus cannot be presumed to prevail when it comes to defining what cases are comparable.*[701]

In view of the lack of consensus regarding what counts as comparable situations, it is not surprising that the EU institutions (the Commission, the General Court, and the Court of Justice) reach completely different conclusions in their interpretation of the circle of comparable undertakings.[702] Consequently, the scholarly discussion and the debate found in the case law could not be more uncertain. Such inconsistencies in the assessment of comparability seems to be an inevitable yet natural part of the assessment of the *selective advantage* condition.[703] Now to the summary of this subchapter.

4.3.4. Summary

I now summarize the central aspects of sections 4.3.2 and 4.3.3. In section 4.3.2, which was about the advantage effect, I discussed how EU courts' case law clarifies that an economic benefit, whichever form it takes, must be selective if it is to fall under Article 107(1). For instance, it can include differentiated rates, various tax advantages that lower the ordinary tax burden, and even exclusion from the scope of the tax; but it is only State aid if it features the selectivity effect.

"Equality in Taxation: Reflections on the Social Construction of Comparability in Tax Law," pp.151-152.

[701] *Ibid,* p. 152.

[702] Among several cases, the case C-106/09 P and C-107/09 P, *Commission v Gibraltar, and others*, and joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission* are example where such analysis led to two different outcomes at the EU courts level that led the Court of Justice to set aside the General Court ruling.

[703] Biondi, A., (2013), "State Aid is falling down, falling down: An analysis of the case law on the notion of Aid," pp. 1719-1743 criticism is very on point of this "backfire" effect from the EU courts' rulings, Commission's soft laws having effect of hard laws, and the scholarly difficulty in dealing with the previous EU institutions' diverse actions. The series of cases concerning tax rulings to multinationals also spurred the scholarly criticism concerning the Commission way in assessing the circle of comparable undertakings, a discussion that also overlaps with the determination of the reference tax regime in subchapter 5.2, and the scholars' criticism mentioned there.

In section 4.3.3, which was about the *prima facie* selective assessment through the identification of the circle of comparable undertakings based on the objective of the tax measure, I discussed three general parameters that could influence this analysis (from which one was specifically for environmental taxes). They were:

1. The assessment of the selectivity effect of an aid scheme differs from that of an individual aid. In the latter situation, it is possible to presume the selective effect given the evident nature of the State aid aimed at helping an individual undertaking.
2. The environmental impact of undertakings is a vital part of the parameter for identifying their comparability, specifically for environmental taxes. Depending on how the tax legislator considered the environmental impact of the undertakings receiving different tax burdens, the measure may be general or selective. The logical, coherent, and consistent tax burden distribution accordingly to the environmental impact of undertakings being taxed should avoid fulfilling the *selective advantage* condition due to the integration principle.
3. A combination of tax rules can have a *de facto* selective effect, e.g., tax discrimination.

4.4. The Third Step: Justification

4.4.1. Preliminary remarks

In this subchapter, I analyze the third and final step, namely the justification for a *prima facie* selective tax measure that leads to the conclusion concerning the fulfillment of the *selective advantage* condition.[704] As discussed in subchapter

[704] In joined cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group SA, Banco Santander SA, Santusa Holding S,* para. 58, the Court of Justice stated what follows. "The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part.(…)"

5.3, the environmental impact of undertakings is a general parameter for determining the circle of comparable undertakings and verifying whether the measure confers a *prima facie* selective advantage tax treatment.[705] However, the State aid case law analyzed in subchapter 5.3 showed that the environmental protection objective of the tax defines what the circle of comparable undertakings is or should be, which leads to a conclusion of whether the measure fulfills the *selective advantage* condition. Because of that conclusion, it is not possible to justify selective treatment with the environmental protection objective.

In essence, a tax that does not prioritize the environmental protection objective or is not genuinely designed to address that purpose is likely to meet the *selective advantage* condition, as noted in subchapters 5.2 and 5.3. However, a *prima facie* selective tax treatment might be justifiable in some circumstances, which discuss in this subchapter 5.4. Finally, the disconnection of the tax from its environmental protection objective, regardless of the reason, means that the undertakings' environmental impact is not used as a parameter for defining the distribution of their tax burden. Consequently, the *prima facie* fulfillment of the *selective advantage* condition is a form of integrating the environmental protection values into the interpretation that requires a higher level of environmental protection.

In this subchapter, 4.4, therefore, I identify and discuss ways to justify an environmental tax that *prima facie* grants a selective advantage tax treatment. Moreover, the fact that the environmental protection objective of the tax does not matter at this step means that no integration of environmental protection occurs at this level, although the *selective advantage* condition integrates it in the first and second steps. Where the research questions posed in Chapter 1 are concerned, the discussion of the general parameters at this step answers the first research question.[706]

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[705] In sections 4.3.2 and 4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings.

[706] Recalling the first research question: In what circumstances do the environmental components of environmental taxes conflict with the *selective advantage* condition, established in Article 107(1) of the TFEU, thereby subjecting taxes enacted by the Member States to the EU's State aid control system?

4.4.2. Parameters to justify a prima facie selective-advantage tax treatment

Now to the discussion regarding the limited general parameters for justifying a tax that confers a *prima facie* selective-advantage tax treatment. In 2001, when the Court of Justice ruled in the *Adria-Wien Pipeline* case concerning Austrian energy tax regime that granted tax rebates only to primary producers of goods, it discussed the possibility of justifying such selective treatment as a temporary and transitional measure.[707] The Court dismissed this argument, because it could not find this objective set out in the Austrian scheme.[708] In my view, the Court of Justice disqualified the Austrian government's justification because it was a mere argument, and the necessary element was not found in any part of the regime in question (e.g., in the preparatory work for that energy tax regime). Nonetheless, the Court would not have accepted the temporary and transitional objectives as a justification for the selective-advantage treatment even if they constituted the tax regime, because the latter clearly aided the manufacturers of products for that transitional period. Aid schemes must be temporary, and they must follow the regime established in Article 107(3), as well as complementary laws covering setting out the objectives of the aid.[709]

In 2006, in the *Portugal v Commission* (Azores) ruling, a case concerning the taxation of natural and legal persons resident in Azores, the Court explained what it meant by the words "justified the nature and overall structure," which have been used in more recent rulings as well.[710] Below, the Court's explanation:

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[707] In case C-143/99, *Adria-Wien Pipelines GmbH,* paras. 49–53.

[708] *Ibid,* in para. 51, where the Court of Justice stated the following. "There is nothing in the national legislation at issue to support the conclusion that the rebate scheme restricted to undertakings which primarily manufacture goods is a purely temporary measure enabling them to adapt gradually to the new scheme because they are disproportionately affected by it, as the Austrian Government maintains."

[709] See, for instance, para. 70 of the CEEAG, where the Commission stipulates that compatible aid measures can have the maximum of 10 years period, and their prolongation requires a new notification procedure.

[710] For instance, in T-210/02 RENV, *British Aggregates Association* (from 2012), in para. 48, in the *ANGED* rulings from 2018, in C-233/16, para. 43, in C-234/16 and C-235/16, para. 36, and in C-236/16 and C-237/16, para. 31.

> *A measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that the measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself, which are necessary for the achievement of those objectives.*[711]

Based on the above, it should be possible to justify a *prima facie* selective measure when the selective effect arises from the "basic or guiding principles" of the tax system. Once again, the objective of the tax does not play any role here;[712] rather, it is the *basic and guiding principles* of the tax that matters. Pinto confirms the view that it meant the ability to pay and the proscription of double taxation.[713] Aldestam clarifies that the Commission's State aid practice at the time meant the tax neutrality principle.[714]

Rossi-Maccanico points out that, since a "tax advantage is a derogation or exception from the tax system being per se unjustified by its inherent logic," the justification relates to the selective effect, which is an illogical discrimination between comparable undertakings.[715] This author views the

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[711] In case C-88/03, *Portugal v Commission,* para. 81.

[712] Based on the Court of Justice view stated in case C-487/06 P, *British Aggregates Association,* para. 84, where the Court of Justice states the following. "The Court has also held on numerous occasions that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article [107] EC …" And, in para. 92, the following. "However, the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article [107](1) EC (…)."

[713] In Pinto, C. (2003), *Tax competition and EU law*, p. 146.

[714] In Aldestam, M. (2004), *EC State aid rules applied to taxes – An analysis of the selectivity criterion*, pp. 200–202.

[715] In Rossi-Maccanico, P., (2007) "Commentary of state aid review of multinational tax regimes," p. 40, when the author stated the following. "In Adria-Wien, the ECJ clarified that a tax measure is specific if it effectively discriminates between market situations being legally and effectively comparable in the light of the objectives set by the tax system. The assessment of whether a measure is selective in a way proscribed by Article [107](1) accordingly follows a familiar discrimination test under the traditional interpretative criteria of proportionality often used by the Court to identify disparities between the tax treatment of undertakings in comparable legal and factual situations. Therefore the notion of justification by the nature of the scheme does not pertain to derogation from normal taxation or advantage, but rather to selectivity as unreasonable discrimination. This is also consistent with the general principles of

Adria-Wien Pipelines GmbH case as granting a selective treatment due to an unreasonable discrimination between undertakings.[716] He explains that the general principles of EU law on discrimination concerning tax disparity is only justified when it is reasonable and proportionate.[717] When explaining this position, however, the author argues that these aspects for determining the comparable, which seem to better fit in the second step, inherently englobe such reasonable and proportionate features.[718]

Lopez clarifies that both the Commission and the Court of Justice practice seem to have accepted as justification those legal principles that promote the effectiveness of Member States' fiscal supervision.[719] Lopez goes on explaining that "rules whose purposes are inherent to the logic or objectives of the system do not discriminate between undertakings, but define the parameters of the very system."[720] Thus Lopez concludes that, when the measure is considered to be justified by the nature and general scheme, no selective-advantage tax tratment is granted to any undertakings in the first place.[721] This is the same conclusion I reached when I systematically analyzed certain environmental taxes in subchapter 5.3. Finally, Lopez adds that the justification is unimportant for the selective assessment but relevant for the advantage test, since – pace Rossi-Maccanico – it vindicates the discrepancy in economic treatment.[722]

EC law on discrimination, according to which a justification for tax disparity must be reasonable and proportionate to the factual situations considered. Under the case law on taxation and discrimination against the internal market principles, any tax difference must be objectively justified and reasonable, and must not go further than what is warranted by the differences in the circumstances that are governed by the different objective situations. In particular, to determine whether a difference in tax treatment is discriminatory, it is necessary to consider whether or not, having regard to a national tax measure under review, the non-nationals subject to unfavourable taxation are in an objectively comparable situation than the nationals. Hence, a different tax treatment between residents and non-residents is not per se discriminatory if there is an objective difference to justify the differential treatment under the discrimination test. For State aid review, it is similarly crucial to determine whether a national tax regime favouring certain undertakings (the difference of treatment criterion) might be justified by the nature of the scheme as to the different character of the situations under review (the comparability criterion)."

716 *Ibid idem.*

717 *Ibid idem.*

718 *Ibid idem.*

719 In Lopez, (2010), "General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters," p. 817.

720 *Ibid idem.*

721 *Ibid idem.*

722 *Ibid idem.*

Romariz discusses a "free-movement-approach" to the State aid rule, according to which it is logical to apply the free movement rationale to the State aid discussion.[723] The objectives of effective fiscal supervision and the prevention of tax evasion, as long as they are sought by proportional means, are justifications for a selective-advantage tax treatment.[724] Thus, analogously, the free movement cases could also be a legal source of justification for this State aid condition.

The Commission sets out possible justifications in its Notice on the notion of State aid, which corroborates the view that the environmental protection objective does not play any role here. These possibilities are as follows.[725]

(1) fight fraud or tax evasion,
(2) the need to consider specific accounting requirements,
(3) administrative manageability,
(4) the principle of tax neutrality,
(5) the progressive nature of income tax and its redistributive purpose,
(6) the need to avoid double taxation, and
(7) the objective of optimizing the recovery of fiscal debts.

The seven possible justifications listed by the Commission are part of the EU tax law practice concerning breaches of TFEU rules (not just State aid). None of these justifications seems to have any direct connection with environmental protection.

Finally, Rodi and Ashiabor note that the polluter pays principle (PPP) functions more like a justification for levying an environmental tax in a certain way than a right to be protected.[726] The PPP can justify a selective-advantage since it is one of the cornerstone principles of EU environmental law, as set out in Article 191(2) of the TFEU. The view of these authors about using the PPP as justification can be seen as similar to the approach taken by the Court of Justice, as discussed in subchapter 4.3. Finally, the use of the PPP in the

[723] He reviewed Biondi's scholarly contribution that based the analysis of the Rules on State aid on the free movement legal rationale, discussing that as one of the pillars rules of the internal market and similarities with the State aid legal rationale, it would be possible to extract logic from the free movement provisions. In Romariz, C. (2014), "Revisiting material selectivity in EU state aid law or the ghost of yet-to-come," *pp. 48–49*.
[1] In C-478/98, *Commission* v *Belgium*, para. 38.
[725] In paragraph 139 of that Notice.
[726] In Rodi, M., and Ashiabor, H. (2014), "Legal authority to enact environmental taxes," p. 74.

tax structure, i.e., tax burden distribution among the taxpayers based on their pollution is not a legal principle used to justify a *prima facie* selective tax treatment but the reason to qualify the measure selective or general.

4.4.3. Summary

Clearly, scholars disagree about this last step, due to the ambiguity of State aid case law, as discussed in subchapter 4.3 and in this subchapter. In my view, the justification possibilities are very narrow, and they are not connected with the environmental protection objective of the tax but rather with other objectives that are critical for the functioning of the tax system, or with its fundamental principles (e.g., administrative manageability and the principle of tax neutrality).[727] Consequently, the justification of the selective-advantage effects of environmental taxes has nothing to do with the environmental protection aim. However, the seven justifications listed by the Commission, reviewed above,[728] can be used to justify the condition.

4.5. Further Integrating Environmental Protection

4.5.1. Preliminary remarks

In this subchapter, I reflect on the possibility of further integrating environmental protection into the *selective advantage* condition. Given the current integration of environmental protection into the *selective advantage* condition, I discuss some of the EU State aid cases (analyzed previously) that spurred such a reflection with respect to the taxes' design features.

[727] *Ibid idem*.

[728] Namely, (i) fight fraud or tax evasion, (ii) the need to consider specific accounting requirements, (iii) administrative manageability, (iv) the principle of tax neutrality, (v) the progressive nature of income tax and its redistributive purpose, (vi) the need to avoid double taxation, or (vii) the objective of optimizing the recovery of fiscal debts.

Consequently, the analysis in this subchapter seeks to answer the second research question.[729]

4.5.2. The *Adria-Wien Pipeline GmbH* case: An energy tax scheme

In the *Adria-Wien Pipelines* ruling from 2001, the national court questioned the Court of Justice whether an Austrian tax reform concerning a new energy tax scheme at that time was State aid.[730] The energy tax scheme consisted of three laws: one introduced a tax on electricity consumption (the 'EAG'); another concerned natural gas consumption (the 'EGAG'); and a third established the conditions for tax rebates resulting from the other two tax laws.[731] The EGAG set two-conditions for granting the tax rebates:

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[729] Recalling it: How, where environmental taxes are concerned, can lawmakers and the EU (acting through its institutions) influence the further integration of the environmental protection requirements set out in Article 11 into Article 107?

[730] In case C-143/99, *Adria-Wine Pipeline,* in para. 13, states: "The Verfassungsgerichtshof therefore referred the following questions to the Court for a preliminary ruling: (1) Are legislative measures of a Member State which provide for a rebate of energy taxes on natural gas and electricity but grant that rebate only to undertakings whose activity is shown to consist primarily in the manufacture of goods, to be regarded as State aid within the meaning of Article [107] of the EC Treaty? (2) If the answer to Question 1 is in the affirmative, is such a legislative measure to be regarded as State aid within the meaning of Article [107] of the EC Treaty even if it applies to all undertakings, regardless of whether their activity is shown to consist primarily in the manufacture of goods?"

[731] In case C-143/199, *Adria-Wien Pipeline*, paras. 3–6 stated the following. "(3) Under tax reforms within the framework of the … (Structural Adjustment Law) 1996 (*BGBl.* 1996, No 201), the Republic of Austria adopted, published and brought into force at the same time three laws, namely: – … (Law on the tax on electricity, the 'EAG'); – …(Law on the tax on natural gas, the 'EGAG'); – …(Law on the rebate of energy taxes, the 'EAVG'). (4) The EAG provides for a tax of EUR 0.00726728 per kilowatt hour of electricity consumed. Pursuant to Article 1(1) of the EAG, the following are subject to electricity tax: - the supply of electricity other than electricity supplied to electricity supply undertakings, and - the consumption of electricity by electricity supply undertakings and the consumption of electricity produced by the consumer himself or imported into the territory covered by the tax. (5) By virtue of Article 6(3) of the EAG, the electricity supplier must pass on the tax to the recipient of the supply. (6) The EGAG lays down similar rules for the supply and consumption of natural gas."

(1) Reimbursement of the taxes levied on electricity or natural gas when they exceed 0.35% of net production value. The rebate was due once a maximum amount of the first ATS 5,000 was deducted.[732]
(2) Only primary producers of goods had the right to claim the energy tax rebate.

The first condition, concerning the energy tax debt above 0.35% of net production value, did not target any specific sector, so the Court of Justice did not regard it as State aid.[733] However, the Court of Justice considered that the second condition granted a selective advantage to that sector, since primary producers of goods were comparable to suppliers of services with respect to their energy consumption, yet only the first could claim the benefit.[734] The Court considered the main factor in this regard to be the fact that both sectors had (1) similar levels of energy consumption that had (2) an identical environmental impact.[735] Finally, the Court concluded that the scheme did not provide any form of justification.[736]

In paragraph 52, the Court discussed the issue from the standpoint of the environmental protection objective of Austria's energy tax scheme. It concluded that the differentiated tax treatment bore no logical relationship to the environmental protection objective of that scheme:

> *For another thing, the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.* [737]

When the Court of Justice stated that the energy consumption of the two sectors was equally bad for the environment, it integrated an environmental protection rationale into its interpretation of the *selective advantage* condition.

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[732] *Ibid,* para. 7.
[733] *Ibid,* implicit in the discussion of paras. 33–36.
[734] *Ibid,* in paras. 49, 50, and 52.
[735] *Ibid,* in para. 52.
[736] *Ibid,* in para. 51 and 53.
[737] *Ibid,* in para. 52.

The environmental impact of the sectors was the basis for determining whether the two sectors should be similarly taxed. Consequently, the Court of Justice concluded that the Austrian energy tax scheme breached Article 107(1) of the TFEU. As pointed out earlier in section 4.3.3, Austria's energy tax scheme was not genuinely designed to achieve any environmental protection objective. Thus, the Court of Justice integrated the environmental protection objective established in Article 11 of the TFEU into its interpretation of the State aid rule, due to the measure's lack of effectiveness in terms of environmental protection.

It is well-known that the Energy Taxation Directive (ETD) regulates energy taxes[738] alongside the GBER and CEEAG, which apply to State aid measures for environmental protection.[739] It seems the EU's practice is to supervise the differentiation of the tax burden among energy sources through the notification procedure of Article 108 (1-3) of the TFEU. Despite this, I will reflect on ways that such energy taxes could be general, given the environmental parameter discussed in subchapters 4.2 and 4.3.

An energy tax in today's energy market, where consumers choose the source of electricity delivered to their homes and businesses, could present different tax burden levels on the actual impact on the environment of the source of energy chosen.[740] In this sense, renewable energy sources would be taxed differently among themselves and compared to fossil fuels, as they are in many countries that implement a carbon tax alongside the energy tax.[741]

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[738] See Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), COM/2021/563 final, see this proposal discussion in the European Parliament, 2022, "Revision of the Energy Taxation Directive: Fit for 55 package". Briefing EU Legislation in Progress, pp.1–8, last accessed 21 January 2023, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698883/EPRS_BRI(2022)698883_EN.pdf , and the stage of the negotiations in European Parliament, Legislative Train Schedule, *Revision of the energy taxation directive as part of the European Green Deal In "A European Green Deal",* last updated 20 January 2023, last accessed 1 February 2023, available at *https://www.europarl.europa.eu/legislative-train/spotlight-JD21/file-revision-of-the-energy-taxation-directive*. See scholars' criticism in V. Ezcurra, M., (2016) "Energy Taxation, Climate Change and State aid Policy in the European Union: Status Quo and the Need for Breakthroughs*"*, p. 25, and Pitrone, F., (2016), "Design of Energy Taxes in the European Union: Looking for a Higher Level of Environmental Protection"*,* pp. 159–175, among others. See

[739] See analysis of energy taxes having environmental protection purposes being qualified as compatible aid in G. Ruiz, M. A., 2016, "State Aid Schemes for Environmental Protection For of Tax Exemptions or Reliefs in Energy Taxes", pp. 271–287.

[740] As proposed in the Recast of the ETD.

[741] See, for instance, Skou Andersen, M., (2018), "The Introduction of Carbon Taxes."

However, there are other types of environmental impact related to energy consumption that do not involve carbon dioxide emissions. Such cases could also be addressed through taxation. Examples include pollution, environmental degradation, loss of biodiversity, and the deleterious impact on cultural communities arising from the exploitation of sacred lands.[742] I expect legislators to be under increasing pressure to deal with these social and environmental issues through taxation which could be State aid. Such cases can be addressed not only through an eventual recast of the ETD but through the GBER and CEEAG as well.

From the perspective of the integration principle, an energy tax scheme can theoretically avoid breaching Article 107(1) if it has key aspects. The tax burden (namely the tax rates, base, and benefits) should be based on the scientific evidence concerning the various sources of energy and their environmental impact (not just emissions). The different energy sources must be taxed in proportion to their environmental footprint (scientifically proven), so the tax treatment is logical, coherent and consistent with their environmental impact.

4.5.3. The *KernbrStG* case: An excise on nuclear fuel

In this case, the Court of Justice answered a national court in a preliminary ruling to the effect that the German excise duty on nuclear fuels for commercial purposes (the *KernbrStG*) was *likely* a general measure (i.e., was

[742] See, for instance, A. Martinelli, L., and Filoso, S., (2008), "Expansion of Sugarcane Ethanol Production in Brazil: Environmental and Social Challenges" for insight regarding other types of impact of biofuels productions. See, also another analysis including the impact of ethanol production to indigenous communities in Brazil in A. Murillo, I., (2013), "Analysis of the Viability of Ethanol Production in Brazil: Economical, Social & Environmental Implications," p. 172. For instance, the EU CBAM to foreign (non-EU) energy products only deals with the carbon dioxide issue, not loss of biodiversity and impact on indigenous communities.

not State aid).[743] The *KernbrStG* was levied only on nuclear power.[744] In my view, the connection of this tax to any environmental protection objective was weak.[745] The Court relied on the *KernbrStG*'s memorandum–seemingly a preparatory work– as establishing the environmental protection objective of the tax scheme.[746] The Court's view, adopted in paragraph 78 of the preliminary ruling, spurred reflection about ways of further integrating environmental protection, as I discuss below.

The Court concluded that the purpose of the excise was to finance the rehabilitation of the mining sites (where the environmental protection effect would take place), thereby reducing outlays for public budget for these costs. This is relevant for two reasons. First, it set out two possible purposes behind such a tax: (1) to raise revenues, and (2) to protect the environment. The tax imposition based on the polluter-pays principle (2) impose a financial burden to the polluters, while it also raises revenues for the State (1). The environmental protection issue lies on the unquestionable negative impact nuclear fuels can cause on the environment and for human health. In connection with such impact, the Court also implicitly touched on the discussion concerning the *through State resources* condition, since rehabilitating those sites should lower the societal costs.[747] Thus, the Court of Justice

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[743] *Likely* because the national court still had to interpret, apply, and implement that preliminary ruling in the main case. See discussion in sections 4.2.4. The second parameter for assessing material selectivity: Exclusion from the scope and in subsection 4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings.

[744] In case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück,* in paras. 69–82, but in particular in para. 80.

[745] *Ibid,* in para. 77, where the Court of Justice stated the following in this regard. "However, subject to verification by the referring court, it is not apparent from the material available to the Court that — regardless of the fact that the energy sector in Germany is, from a tax perspective, according to the information provided by that court, heavily regulated and subject to measures of State intervention — it is possible, in the light of the effects of that degree of regulation and those measures, to identify a tax regime which has as its objective the taxation of energy sources used to produce electricity or energy sources used to produce electricity which do not contribute to CO_2 emissions."

[746] *Ibid,* para. 78, where the Court of Justice stated the following view. "On the other hand, it is apparent from the order for reference that, in accordance with the explanatory memorandum to the proposal for the law which culminated in the adoption of KernbrStG, that law introduced for a specific period, (…), a duty on the use of nuclear fuel for the commercial production of electricity with a view to raising revenue intended, inter alia, to contribute, in the context of fiscal consolidation and in accordance with the polluter-pays principle, to a reduction in the burden entailed for the Federal budget by the rehabilitation required at the Asse II mining site, where radioactive waste from the use of nuclear fuel is stored."

[747] See this discussion in

integrated environmental protection into its analysis, although the national court still had to interpret, apply, and implement the preliminary ruling. Not to mention that the national court must confirm if the memorandum of *KernbrStG* is a preparatory work that gives logic to that imposition.[748] Now, I consider the possibility of further integrating environmental protection using this case as a reference.

The imposition of the tax, the raising of revenue, and the rehabilitation of sites are not necessarily connected with each other. A tax can be imposed in order to raise revenue for the public coffers, and not for any environmental purpose.[749] Consequently, the Court's interpretation – that the KernbrStG raised money to pay the costs of cleaning up radioactive waste at the sites in question – may not have been correct. That was just one possible way of using the revenues. Serret points out that, in this case, using the revenue to rehabilitate the areas affected by the activities taxed "was only one of the possible uses" of it, and the tax was not necessarily imposed for this reason.[750] Based on the above, I consider the following hypothetical circumstance: Due to the revenues raised by the *KernbrStG*, public outlays for rehabilitating the polluted sites end up being significantly lower than the revenues raised by the tax. *Could this fact change the view about the KernbrStG*'s *not being State aid?*

In my view, it could. The *KernbrStG* increases the costs of nuclear power with the excuse that it protects the environment through the adoption of the polluter pays principle. However, suppose the revenues mostly go to the public coffers. In that case, this tax cannot be regarded as protecting the environment, at least not through a direct link between the tax and that effect.

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[748] Based on the memorandum, the Court of Justice reached the non-State aid conclusion. *Ibid,* in paras. 79–80. The Court of Justice also viewed that the KernbrStG did not breach other primary and secondary EU law. The secondary EU laws are: Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity and Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC. Note that the latter Directive is no longer in force and has been replaced by Directive (EU) 2020/262 laying down the general arrangements for excise duty (recast). The primary EU law is the Treat Establishing the European Atomic Energy Community. See their discussion in case C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück,ibid,* respectively, in paras. 40–68 and in paras. 83–106.

[749] See, for instance, Spitzer, H.D., (2003), "*Taxes vs. fees: a curious confusion*," pp. 337–339, and 343–345.

[750] in F. Serret, E., (2016), "Taxes with Environmental Purposes and State Aid Law: The Relevance of the Design of the Tax in Order to Justify Their Selectivity," p. 267.

The environmental purpose of the tax may solely be to internalize the environmental costs within the energy production, which is better than not taxing. However, the problem is that the *KernbrStG* places other power sources in a more competitive position than nuclear power, especially when these other sources also negatively impact the environment but do not have to pay any tax. In my view, the *KernbrStG* is a clear transitional tax measure to help German move away from nuclear fuels. However, accepting such specific taxes as not being State aid would be ignoring their distorting effects on the market, while using an ecological excuse that may in practice be artificial.

The *KernbrStG*'s seeming avoidance of breach to Article 107(1) does not ensure that the rehabilitation of those sites was *de facto* carried out, for two reasons. First, the tax's nature is to collect revenues for the public coffers, not to address any specific issue, such as environmental pollution.[751] Second, the simple fact that a tax base is connected to a negative environmental impact does not mean it protects the environment.[752] So the *KernbrStG* was not necessarily an environmentally efficient tax, and it likely amounted to State aid for other (non-nuclear) sources of power. Since the national court still has to interpret, apply, and implement this ruling, it is hard to calculate its actual effects. However, the Court of Justice could have been more explicit about which aspects the national court must verify in order to conclude the main proceedings in respect of the *KernbrStG*'s non-fulfillment of the State aid conditions. For instance, *should the revenue (or part of it) be used to reduce the negative environmental impact of radioactive waste, so as not to breach Article 107(1) and to ensure de facto environmental protection?* In my view, this ruling created a margin for (mis)interpretation that can be cited in support anti-competitive measures that are hidden behind an ecological mask.

[751] Based on Spitzer, H.D., (2003), "*Taxes vs. fees: a curious confusion.*"
[752] Based on Pitrone, F., (2015), "Designing "Environmental Taxes": Input from the Court of Justice of the European Union."

4.5.4. The *ANGED* cases: Three taxes on large retail establishments

The *ANGED* cases from 26 April 2018 concerned three almost identical taxes on large retail establishments, which the Court of Justice had analyzed in preliminary rulings as whether they granted selective advantage tax treatments and amounted to State aid.[753] In this section, I primarily refer to the joined cases C-234/16 and C-236/16 in the main text, and I refer to the other cases – C-233/16, C-236/16, and C-237/16 – when they differ from the first-mentioned.

The tax on large retail establishments, known as "IGEC,"[754] essentially granted three types of economic relief that the Court scrutinized as possibly being selective. The first was exclusion from the scope of the tax (*de facto exemption*): individual or collective sales establishments were not taxed if their area were equal to or below the 4,000m² threshold (paragraph 6).[755] The second involved a partial formal exemption granting 10% of relief for large retail establishments: (a) not located in population centers, which could be accessed with two methods of public transportation, and (b) those that "put into effect environmental protection projects deemed to be suitable by the competent authorities" (paragraph 10).[756] The last tax entailed the formal exemption of individual and specific sales establishments (garden centers,

[753] Thus, the national court submitted information to the Court of Justice about the two taxes known "IGEC" and another known as "IDEMGAV," questioning if these taxes constituted State aid, as defined by Article 107(1) of the TFEU. Consequently, the national court must verify if the "IGECs" or the "IDEMGAV" met all the circumstances the Court of Justice assumed or presumed in the rulings to conclude if they are not *de facto* State aid.

[754] In joined cases C-234/16 and C-235/16. In case C-233/16 the tax on large retail establishment was also known as "IGEC," while in joined cases C-236/16 and C-237/16, it was "IDMGAV."

[755] Similarly, in case C-233/16, para. 9, the threshold was 2,500 m² to dividual large retail establishments, and para. 11 that it also applied for individual retails established in a collective retail. In joined cases C-236/16 and C-237/16, para. 5 the IDMGAV threshold was 500m² and did not mention individual or collective establishments. Thus, the retail establishments below those thresholds were also excluded from the scope of the tax. However, in joined cases C-236/16 and C-237/16, para. 8, it also explained a method for calculating the IDMGAV that resulted in zero taxable amount for establishments equal or below 2,000 m².

[756] In case C-233/16, para. 12, the IGEC partially exempted (net taxable amount reduction of 60%) for specific activities, namely ale of furniture, sanitary ware, and doors and windows, and for do-it-yourself. In joined cases C-236/16 and C-237/16, the IDMGAC did not prescribed any partial exemption possibility.

vehicle ales, construction materials, machinery, and industrial supplies), the area of which did not exceed 10,000m^2 and which required a larger establishment by their nature (paragraph 7).[757] The Court considered these taxes to be general, not State aid, provided that the national court could verify the logical, coherent, and consistent connection between their (1) environmental protection objective and (2) the undertakings exempted based on their allegedly (3) lower environmental impact. I will analyze the ICEG's environmental protection objective, as stated in the following paragraph.

> *As regards the tax at issue in the main proceedings, the information provided by the referring court shows that the purpose of that tax is to contribute towards environmental protection and town and country planning. Its purpose is to correct and counteract the environmental and territorial consequences of the activities of these large retail establishments, deriving, inter alia, from the ensuing rise in traffic flows, by having those establishments contribute to the financing of environmental action plans and making improvements to infrastructure networks.*[758]

Based on the above, the Court of Justice explained the specific environmental protection objective of the taxes: namely, to "correct and counteract" the large establishments' impact on the environment and territory. It seems the Court relied on the idea that the taxes would likely ensure *de facto* environmental protection by using the revenues raised to carry out such correction. However, the view that all three taxes had an environmental protection aim, and that they all used the revenue to achieve that aim is not accurate. The joined C-236/16 and C-237/16 cases did not have any information regarding the use of revenue to protect the environment affected by the establishments in the tax description,[759] although the Court still

[757] In case C-233/16, para. 10, the IGEC formally fully exempted garden center or of selling vehicles, construction materials, machinery or industrial supplies, but did not set a maximum area threshold. In joined cases C-236/16 and C-237/16, para. 7, the IDMGAV formally fully exempted specific activities, namely machinery, vehicles, tools and industrial supplies; construction materials, plumbing materials, doors and windows, for sale only to professionals; nurseries for gardening and cultivation; fittings for individual, 'conventional' and specialist establishments; motor vehicles, in dealerships and repair workshops; motor fuel. It did not set a maxim threshold, nor conditions.

[758] Iin joined cases C-234/16 and C-235/16, in para. 45, in case C-233/16, in para. 52. In joined cases C-236/16 and C-237/16, in para. 40, the Court added "*on the territory in question* of the activities of these large retail establishments…" *emphasis added* to the modification in this case.

[759] In joined cases C-236/16 and C-237/16, in paras. 3–9.

presented the same view quoted above. So, the first criticism concerned whether the three *ANGED* cases were about integrating environmental protection objectives so as to avoid breaching Article 107(1). Alternatively, they were simply about the tax discretion of the Member States that limits the State aid reach due to the lack of EU harmonization on the tax subject under scrutiny. I take the first view: i.e., that the case concerned the integration of environmental protection. I shall now offer some reflections about those rulings.

Certain elements here are relevant to consider concerning the allocation of revenues to correct and counteract the negative impact of the activities on the environment. First, the idea is the revenue would be allocated in such a way as ensure environmental effectiveness. The latter conclusion is based on the view that imposing a tax based only on the environmental impact penalizes activities that harm the environment but does not particularly benefit the environment directly.[760]

Second, it is unclear what weight the Court ascribed to the use of the revenues. If the revenues were not used to correct and counteract the negative impact of the undertakings being taxed, *would the Court still have reached the same conclusion?*

As mentioned earlier, these rulings do not clearly explain the Court's position. The description of the IMGDAV has no information about the use of revenues for environmental protection (in joined cases C-236/16 and C-237/16),[761] which makes the analysis of this ruling more difficult. So, to answer the question above, I subsequently discuss two opposing circumstances.

In the first circumstance, the Court did not mean to require the use of revenues to conclude that the measure *de facto* protect the environment and thereby did not seem to breach Article 107(1). In this case, the Court's integration of environmental protection into the interpretation of Article 107(1) to the ANGED taxes only involved a formal integration that did not require substantial environmental protection effect. All that was needed was

[760] See in this regard, García, E. G. and Roch, M. T. S. (2016), "Environment and Taxation: State Intervention from a Theoretical Point of View," pp. 37-64 discussion, in special, p. 63, in Pitrone, F. 2014. *Environmental Taxation: A Legal Perspective*, p. 60.
[761] In joined cases C-236/16 and C-237/16, paras 3–9.

that a logical, coherent, and consistent environmental protection rationale be offered for the tax – that is, an environmental protection objective that logically, consistently, and coherently determines the use of environmental damage as the parameter defining the distribution of the tax burden (not only the tax base and rate but also benefits) among taxpayers. Such a tax would implement the polluter pays principle by taxing the pollution – which still would not, however, ensure *de facto* environmental protection, as scholars have pointed out.[762] Consequently, the integration of environmental protection is only formal. In this case, there is a margin to further integrate the environmental protection aim by requiring a *de facto* protection of the environment, which leads to the second circumstance (supposition) that I will soon discuss. The above view can be inferred from the part of the ruling wherein the Court of Justice stated that the Member States enjoyed tax competence and fiscal autonomy.[763] Consequently, the State aid reach would end here.

However, a tax measure is general unless it breaches Article 107(1), the interpretation and application of which should concern not only *de jure* but also *de facto* effects of the measure, since that Article is founded on the effects-based approach. This means the lack of a State aid rule breach could not be simply about the logic, coherence, and consistency of the tax with regard the tax burden, but also with regard to the tax effects sought by the legislators and achieved with by the tax. Now, considering that the Court's view that the use of the revenues ensures *de facto* environmental protection. In this case, the Court integrated that aim at its highest level, thereby establishing another general parameter for environmental taxes that would have an indirect harmonization effect: namely, earmarking the revenues for environmental purposes. This view seems to go against the idea that such harmonization should follow Articles 113 and 115 of the TFEU. Yet, it is logical from the effects-based perspective of Article 107(1).

Finally, the only way to further integrate environmental protection in this circumstance is by analyzing the revenues collected by the tax, as well as the actual impact recovered by using these revenues – in other words, by

[762] For instance, García, E. G. and Roch, M. T. S. (2016), "Environment and Taxation: State Intervention from a Theoretical Point of View", pp. 37-64 discussion, in special, p. 63, in Pitrone, F. 2014. *Environmental Taxation: A Legal Perspective*, p. 60.
[763] In case C-233/16, paras 50–51, in joined cases C-234/16 and C-235/16, paras. 43–44, and in joined cases C-236/16 and C-237/16, paras. 38–39.

analyzing the environmental effectiveness of the tax. For instance, when only a small fraction of the revenues are used to counteract the environmental damage and the positive effect on the environment is insignificant, the tax lacks the *de facto* effect, and may thereby breach Article 107(1). However, a criticism of this view is that it does not consider that taxing environmental damage is better than inaction, and that businesses' internalization of environmental costs also plays a crucial role in environmental policy.[764] Moreover, the tax raises money for society that will eventually "pay" for the environmental bill. Clearly, there are several *pros* and *cons* to the environmental tax that go beyond the State aid control system. Perhaps this type of discussion would be more suitable under the regime of Article 107(3), under which the GBer and the CEEAG strongly regulate State aid measures undertaken for the sake of environmental protection. Despite this, given the effects-based approach set out in Article 107(1), the *de facto* integration of environmental protection has a logical-legal foundation in that Article. This may make the field even more uncertain concerning the limits of the State aid control system and the extent of the tax discretion of the Member States.

It is also worth mentioning that, in the joined cases of C-234/16 and C-235/16, and of C-236/16 and C-237/16 (i.e., not in case C-233/16), the Court added a point about the discretion of domestic lawmakers in establishing such thresholds. In the Court's words:

> *The determination of the threshold comes within the discretion of the national legislature and is based on technical, complex assessments that the Court only has limited powers to review.*[765]

The question concerning the extent of the negative impact on the environment of such large retail establishments in connection with the distribution of the tax burden among retail establishments seems to be critical to the logic of environmental taxes when the use of the revenue is irrelevant

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[764] Governments' inaction is a form of implicit subsidies, according to Myers and Kent. In Myers, N., and Kent, J., (2001),"Perverse Subsidies: How tax dollars can undercut the environment and the economy," p. 14.

[765] In joined cases C-234/16 and C-235/16, *ANGED,* in para. 48, and in joined cases C-236/16 and C-237/16, *ANGED,* in para. 43. The first mentioned case, had even the following statement: "In that context, the initial threshold of 2 500 m², or the subsequently adopted threshold of 4 000 m², should not be regarded as manifestly inappropriate for the purposes of the objectives pursued." In joined cases C-234/16 and C-235/16, *ANGED,* in para. 48. Not that this paragraph does not exist in case C-233716.

for avoiding a breach of Article 107(1). This question is particularly relevant because a general tax should have some logic between the negative impact on the environment and the tax burden based on the tax aim, although this approach does not ensure *de facto* environmental protection. If the revenues are used to offset the negative impact on the environment, it is the offsetting action that reaches the environmental protection in practice, which means that the link between the tax objective and the structure is less critical in this case than in the previous situation. Consequently, the use to which the revenue is put would be a general parameter required to ensure the *de facto* environmental protection effect of the tax, and thereby the compliance with Article 107(1) prohibition (i.e., not breaching this Article). In this case, domestic legislators would have more flexibility concerning the link between the tax objective and the distribution of the tax burden, although their discretion regarding the use of the revenue would become more limited. The latter aspect is, in my view, an apparent conflict between the tax discretion of the Member States and the powers granted to the EU to ensure compliance to Article 107(1) prohibition.

Furthermore, considering the view that the negative environmental impact of large retail establishments is not as severe as assumed in those taxes, relative to that of "small" retail establishments. The national court must verify this. Nicolaides criticized the Court's position in this ruling concerning the need for the national court to prove that the assumption of the Court of Justice in this regard was correct. In Nicolaides' words:

> *However, the important question that arises from these judgments concerns the standard of proof that Member States must meet in order to demonstrate that the exempted undertakings are indeed not comparable to those which are taxed. The judgments reveal inconsistencies with respect to the standard of proof both within each case and across the three groups of cases. Admittedly, the Court of Justice did not have at its disposal sufficient information to decide whether the various thresholds and exemptions were objectively justified. However, the mere fact that in three similar regions, the structure of the taxes varied so significantly should have prompted the Court of Justice to instruct the national court to establish on objective grounds the link between the tax rates and tax base, on the one hand, and the harm to the environment, on the other. If a Member State claims that an exemption is justified*

by the logic or structure of the reference system, that Member State should be required to prove it rather than assert it.[766]

Such a view concerns the issue about thresholds, and the presumed environmental impact thereof, which distinguished "larger" from "smaller" establishments differently as between the three cases.[767] Nicolaides questioned the Court's logic in accepting three different thresholds connected to the environmental impact of establishments without requiring scientific proof. The author's criticism is crucial, especially if I consider that establishing the threshold logic would ensure a higher level of integration of environmental protection. Despite this, the Court of Justice made clear that, due to the technicality and complexity of the question, the determination of the threshold was not something that it could judge.[768]

4.5.5. The *UNESA* case: A tax on hydroelectricity production

The *UNESA* case was another preliminary ruling addressed to the Court of Justice. Briefly put, the Spanish environmental tax discussed in that ruling was a tax on the use of inland waters to produce hydroelectricity from water located in at least one autonomous community.[769]

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[766] In Nicolaides, P., (2018), "Exemption from Taxes that Protect the Environment May not be Selective – Part I". Lexxion Publishing, State Aid Uncovered, blog, 15 May 2018, last accessed 2 June 2021, available at https://www.lexxion.eu/en/stateaidpost/exemption-from-taxes-that-protect-the-environment-may-not-be-selective-part-i/

[767] Like the Court's view in case C-487/06, *British Aggregates,* para. 86, where the comparable impact of activities being taxes differently should play roll in the decision of who were in a comparable situation (the second step analysis).

[768] In joined cases C-234/16 and C-235/16, *ANGED,* in para. 48, and in joined cases C-236/16 and C-237/16, *ANGED,* in para. 43, that stated "The determination of the threshold comes within the discretion of the national legislature and is based on technical, complex assessments that the Court only has limited powers to review." Case C-233716 does not have this statement.

[769] In joined cases C-105/18 to C-113/18, *UNESA*, paras. 13–15, describing that tax design features as follows. "(13) Article 12 of … (Royal Decree No 198 implementing Article 112 bis of the consolidated text of the Water Law and regulating the tax on the use of inland waters for the production of electricity in inter-communities basin districts), of 23 March 2015 (BOE No 72 of 25 March 2015, p. 25674) ('Royal Decree 198/2015'), provides: 'Revenue of the taxes collected' 1. The amount of the collected revenue will be paid over to the Basin Authority by virtue of the provisions of Article 112 bis(8) of the Water Law (…) 3. 2% of the net revenue

The Court considered that the scope of this law did not involve State aid treatment of electricity producers that were not water-based, since only hydroelectricity production impacts the water environment.[770] This was reminiscent of the *KernbrStG* case discussed in subchapter 4.5.3, in that such an environmental tax needs somehow to secure actual environmental protection. Otherwise, it increases the price of hydroelectricity production without actually protecting the environment.[771] Such a tax could thus involve State aid for sources of electricity production that were not water based but

collected shall be considered as revenue of the Basin Authority. 4. Of the amount of the net revenue collected, 98% shall be paid to the public exchequer. The General State Budgets shall allocate at least an amount equal to that sum to actions for the protection and improvement of public water resources, in accordance with the provisions of Article 14. To that end, the investment projects that guarantee the protection and improvement of public water resources shall be determined annually in the General State Budget Laws. 5. In the month following that in which the tax is collected, the Basin Authority shall calculate the balance of the final account and pay that amount to the public exchequer, while accounting for the receipts and costs justifying that balance to … [State Tax Administration Agency].' (14) Article 13 of that royal decree provides: 'Guarantee of protection of public resources In order to ensure compliance with the environmental objectives established in [Directive 2000/60] and provided for in Article 98 and subsequent articles of the consolidated text of the Water Law, and in accordance with the principle of cost recovery established in Article 111 bis of the consolidated text of the Water Law, the General State Budgets shall allocate at least an amount equal to the amount provided for in paragraph 4 of the previous Article 12, in accordance with the requirements of Article 14, to actions for the protection and improvement of public water resources and the bodies of water affected by hydroelectric developments.' (15) Article 14 of Royal Decree 198/2015 provides: 'Protection and improvement of public water resources 1. For the purposes of the present Royal Decree, the protection and improvement of the public water resources shall mean the activities which the General administration of the State responsible for managing river basins encompassing more than one autonomous community must carry out in order to meet a threefold objective: to determine the constraints on the bodies of water due to human activity, to correct the status of the bodies of water and the deterioration of public water resources, and to implement sufficiently the tasks of monitoring and supervising public water resources and water police. 2. Activities enabling more efficient and sustainable resource management by rationalising the use of public water resources fall within the activities listed in paragraph 1. 3. Activities seeking to achieve the aims stated in paragraphs 1 and 2 include, in particular:(a) to (i)."

[770] *Ibid,* paras. 65–67.

[771] Only 2% of the net revenues collected is directed to the Basin Authority, and then 98% of that net revenue goes to the public exchequer, which leaves almost no revenue left for that aim. However, that law also establishes that "The General State Budgets shall allocate at least an amount equal to that sum to actions for the protection and improvement of public water resources." In Article 12 of Royal Decree No 198 implementing Article 112 bis of the consolidated text of the Water Law and regulating the tax on the use of inland waters for the production of electricity in inter-communities basin districts, paras. 3 and 4 thereof. By "that sum," I understood 98% of the 2% of the revenues collected, which is a very low percentage in consideration of the entire tax.

which also impacted the environment, yet did not have to bear a similar tax burden.

Considering a situation where a Member State legislates on environmental taxes in order to address the environmental impact of one a particular energy source, as in the case of the Spanish water law for hydroelectricity or in that of the *KernbrStG* for nuclear power, but where the tax does not achieve any environmental protection in practice. Such a law would be anti-competitive and perhaps even protectionist, giving undue advantage to sources that are not taxed but which still harm the environment. Based on this view, it would be critical to analyze the Member State's concerned tax regime for other sources of energy known for their impact on the environment than just assuming that, given the tax objective and scope, the measure is not State aid. The integration of environmental protection becomes even more compromised in the following paragraphs 68 and 69 of the *UNESA* ruling, where the Court of Justice dismisses the environmental protection objective of the tax system in question, analyzing it based on a solely economic objective.[772] Without the environmental protection purpose and only based on the fiscal purpose of such a water law, the tax becomes more anti-competitive or protectionist towards other electricity productions that do not have to pay any similar tax.

The Court averred that the Spanish constitution delimited the tax jurisdiction of the Water Law. Thus, the exclusion of hydroelectricity producers in one autonomous community from the tax followed a completely different logic – i.e., that of purely national tax law.[773] The Court accordingly concluded that

[772] In joined cases C-105/18 to C-113/18, *UNESA*, paras. 68–69, where the Court of Justice stated the following view. "(68) While the referring court, which has sole jurisdiction to interpret national law, indicates that that tax — notwithstanding the wording of Article 112 bis of the Water Law and the provisions of Royal Decree 198/2015 implementing the tax — pursues, in the light of its essential characteristics and its structure, a purely economic objective, it should be observed that, in the absence of EU rules governing the matter, it falls within the tax competence of the Member States to designate bases of assessment and to spread the tax burden across the various factors of production and economic sectors (see, to that effect, judgment of 26 April 2018, ANGED, C-233/16, EU:C:2018:280, paragraph 50 and the case-law cited). (69) Consequently, a criterion for taxation connected with the source of production of electricity enables, as a rule, a Member State to apply a tax, such as that at issue in the cases in the main proceedings, only to electricity producers using water as the source of electricity production."

[773] In joined cases C-105/18 to C-113/18, *UNESA*, para. 70, where the Court of Justice initiated its analysis of this measure selectivity to hydroelectricity producers of water within one autonomous community. In paras. 74–75, the Court of Justice explained the information

the measure did not grant a selective advantage tax treatment to hydroelectricity producers that used the water of just one autonomous community, provided that the national court had confirmed the power division.[774] This part of the *UNESA* ruling could have been an issue regarding the environmental protection discussion if the national court had concluded differently than the Court of Justice about the tax jurisdiction of Spain's water law. In that case, hydroelectricity producers would have been in a comparable circumstance due to their similar impact on the water environment, regardless of whether the water had been located in more than one autonomous community. The latter was the factor for the discussion on the internal (domestic) tax jurisdiction. However, the Court of Justice clearly stated that the national court should verify that opinion.[775]

4.5.6. Summary

The cases analyzed in subchapter 5.5 were all preliminary rulings. In the *KernbrStG*, *ANGED,* and *UNESA* cases,[776] the Court of Justice concluded for a non-breach of Article 107(1) prohibition. All of these cases that seemingly avoided breaching Article 107(1) had two common parameters.

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received to reach a conclusion whether the Water Law was selective to hydroelectricity producers of one autonomous community. "(74) In the present case, the Spanish Government stated, both in its written observations and at the hearing before the Court, that the fact that the tax on the use of inland waters for the production of electricity is payable only by hydroelectricity producers using river basins extending over the territory of more than one autonomous community was justified by the territorial structure of the Spanish State, the powers of each administration, and the respective powers of the Central Government and the autonomous communities, which, as regards public water resources, develop their own legal regimes. (75) The national legislature therefore adopted the national legislation establishing that tax, which applies only to the holders of administrative concessions in respect of river basins extending over the territory of more than one autonomous community, by exercising a power which is limited to those river basins alone."

[774] *Ibid,* in para. 76, the Court stated: "In those circumstances, and subject to verification of the division of powers which it is for the referring court to carry out, it is apparent that the relevant reference framework for examining the selective nature of any aid measure is the taxation of hydroelectricity production within river basins encompassing more than one autonomous community."

[775] *Ibid idem.*

[776] Note that the *ANGED* cases corresponded to three almost identical taxes on large retail establishments.

First, they all excluded undertakings from the scope of the tax according to their presumed environmental impact. Second, all but one of them (except one of the *ANGED* cases, namely cases C-236/16 and C-237/16) sought to use the revenues raised to offset the environmental impact of the undertakings taxed. However, it is still unclear to what extent the Court considered the second parameter crucial for avoiding a breach of Article 107(1). As discussed, taxes in general not involve such a demand on the use of the revenues they raise, but the effects-based approach set out in Article 107(1) should ensure a *de facto* integration of the aim of environmental protection. Consequently, legislators can ensure that their environmental tax genuinely integrates environmental protection by earmarking a substantial portion of the revenues for offsetting *de facto* the environmental impact of the undertakings, so that their tax does not breach Article 107(1).

4.6. Summary

In this subchapter, I analyze the most relevant findings of subchapters 4.2 through 4.5.[777] I also answer the two research questions, as explained in the Chapter's introduction, I have sought to identify and discuss the general parameters established in EU case law concerning the fulfillment (or not) of the *selective advantage* condition in connection with environmental taxes. This discussion relates to the first research problem (about the complexity of the *selective advantage* condition) and the general parameters should clarify it for lawmakers (the first research purpose).

The identification and discussion of these parameters[778] were helpful for two reasons. To give scholarly input about (1) how the integration of

[777] For a more detailed summary of each subchapter, I recommend their final sections 4.27, 4.3.4, 4.4.3, and 4.5.6.

[778] Concerning the first step, the sole parameter for geographic selectivity is the *tree-autonomy test*, and the five parameters for material selectivity are: (1) identification or determination of the reference regime based on the *de jure* and *de facto* effects of the tax regime and its scope; (2) exclusion from the scope of the tax; (3) the Commission's determination of the reference tax regime restricted to the laws of the Member States; (4) the Commission must exchange information with the Member State concerned; and (5) the Commission must carry out an objective examination of the content, the structure, and the specific effects of the applicable rules under the national law of that State. Concerning the second step, the parameters for

environmental protection into the interpretation of the *selective advantage* condition into concrete environmental taxes occurred; (2) which general parameters of environmental taxes might avoid breaching Article 107(1). The parameters are relevant for lawmakers regarding what they should consider when designing their environmental tax. At the same time, the discussion here adds constructively to the academic research on the subject, and to the debate about the State aid control system. Subchapters 4.2 to 4.4 answered to first research question regarding the subject that each section addressed.[779] Now, to the first research question answer.

Based on the *Adria-Wien Pipeline GmbH, MINAS,* and *British Aggregates Association* cases, I could start to understand the position of the Court of Justice concerning the integration of environmental protection into the interpretation of the *selective advantage* condition.[780] After a systematic analysis of those cases, and of the *KernbrStG*, *ANGED,* and *UNESA* cases as well, I found that the fulfillment of the *selective advantage* condition was not a sign of inflexibility Article 107(1) in relation to the integration principle of Article 11. Instead, *Adria-Wien Pipeline GmbH* and *British Aggregates Association* did not genuinely aim at environmental protection, and in the *MINAS* case the lack of scientific proof could be due to the tax not aiming for environmental protection in a logical way.[781] Consequently, ever since the *Adria-Wien Pipeline GmbH* ruling of 2001, the reason why environmental taxes have been classified as State aid has been due to their illogical, inconsistent, and

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assessing the advantage effect are summarized as follows. Advantage" is any economic benefit that (i) derogates from the reference tax regime, (ii) de facto (ii.1) discriminates, (ii.2) excludes from the scope of the tax, (ii.3) and any other possibility that the case law develops. Concerning the second step, the parameters for assessing the selective effect are: (1) the differentiated approach for assessing an aid scheme or individual aid; (2) the environmental impact of undertakings that is a specific circumstance of environmental taxes, which is also use for determining the circle of comparable undertakings analysis; (3) the *de facto* discriminatory tax treatment. Concerning the third step, the parameters are: (1) fight fraud or tax evasion; (2) the need to consider specific accounting requirements; (3) administrative manageability; (4) the principle of tax neutrality; (5) the progressive nature of income tax and its redistributive purpose; (6) the need to avoid double taxation, and (7) the objective of optimizing the recovery of fiscal debts.

779 Recalling it: In what circumstances do environmental taxes conflict with the selective advantage condition, established in Article 107(1) of the TFEU, thereby subjecting taxes enacted by the Member States to the EU's State aid control system?

780 In the first and second step of the *selective advantage* condition analysis, thus in subchapters 4.2 and 4.3

781 That is, it may be that the tax was not scientifically based on the environmental impact of undertakings being taxed differently.

incoherent distribution of the tax burden among the undertakings in question.[782]

I was also able, in the *KernbrStG*, *ANGED,* and *UNESA* cases, to analyze the two parameters identified and discussed in the previous cases. These *seemingly*[783] avoided fulfilling the *selective advantage* condition and breaching Article 107(1). Based on the Court's positions in those rulings, I can conclude the parameter regarding the specific environmental protection objective of the tax – to justify the determination of the tax burden (i.e., the tax rate, base, and benefits) based on the *environmental impact* of the undertakings being taxed – seemingly avoided the State aid classification. If the environmental impact of different undertakings is a general parameter in the determination of the level of environmental taxes' burdens, the tax becomes logical, coherent, and consistent with its environmental protection objective, so it cannot grant a *prima facie* selective-advantage tax treatment. Thus, the Court of Justice integrated environmental protection into the interpretation of the first and second steps of the *selective advantage* condition at a formal level.

When it came to the first research question – in the third step about the justification of a *prima facie* selective advantage tax treatment (in subchapter 4.4) – the analysis did not differ from that in the case of taxes where an environmental tax reached this level. This was either because the tax did not genuinely aim at environmental protection, or because that aim was not prioritized. In the latter situation, other objectives justified the fulfillment of the *prima facie selective advantage* condition.[784]

When it concerns the third step of the analysis of the *selective advantage* condition, the justification for such "environmental" taxes followed the same reason as for any other tax. There are very few possibilities to justify a selective tax treatment and thereby avoid breaching Article 107(1). Also, when

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[782] Note that the *MINAS* case (C-159/01, *Netherlands v Commission*), the Netherlands failed to produce scientific proof of the environmental impact of undertakings to make the differentiated tax treatment logical, coherent, and consistent with that alleged tax purpose. The lack of burden of proof in this sense shows that the legislators likely assumed that the environmental impact was such or were artificially aiding the beneficiaries under the environmental excuse.

[783] *Seemingly* because all five judgements, i.e., the *KernbrStG*, the three *ANGED* and the *UNESA* were preliminary rulings.

[784] In the *Adria-Wien Pipeline GmbH* case (C-143/99), the MINAS case (C-159/01, *Netherlands v Commission*), and the *British Aggregates Association* case (C-487/06 P).

the tax aim for environmental protection at a secondary or tertiary level, it seems to not be able to avoid breaching Article 107(1) due to the environmental protection aim be too weak.[785] Based on the above, I may conclude that there is no integration of environmental protection at this (third) level and the environmental law principles seems to be of no rescue for avoiding the State aid classification under Article 107(1). In my view, this finding does not mean that the *selective advantage* condition is inflexible towards the demand in Article 11 to integrate environmental protection, only the third step–justification– seems to be (which is my second research problem). This conclusion follows because the first two steps of the *selective advantage* condition already ensure such integration.

As for the tax's environmental effectiveness – i.e., its *de facto* environmental protection effect, and thereby the *de facto* integration of Article 11 – this was the object of the main discussion in subchapter 4.5. I analyzed the possibility of further integrating environmental protection into the *selective advantage* condition based on the foundation provided by the three-step discussion in subchapters 4.2 through 4.4. I analyzed five case laws that spurred such reflection, so I could answer the second research question in two ways and fulfill the second research purpose[786]

First, as seen in the *Adria-Wien Pipelines GmbH* case, energy tax schemes can also include in their rationale environmental impacts that are not carbon dioxide emissions, such as pollution or loss of biodiversity. In this way, energy taxes can have a more far-reaching effect on other environmental issues that

[785] This conclusion does not exclude their possibility to be qualified as compatible aid under the GBER and CEEAG regimes, although the GBER establishes general and specific requirements that lawmakers must ensure in the environmental tax design to fall under that regime. Moreover, this conclusion is also based on the Court of Justice position stated the following rulings. "Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3)." In case C-143/99, *Adria-Wien Pipelines GmbH,* para. 31. And, "However, the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article [107](1) EC (see, to that effect, inter alia Case C-409/00 *Spain* v *Commission*, paragraph 54), as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article [107](3) EC." In case C-487/06 P, *British Aggregates Association,* para. 92.

[786] Recalling it How, where environmental taxes are concerned, can lawmakers and the EU (acting through its institutions) influence the further integration of the environmental protection requirements (values) into the State aid control system?

are also relevant to address. Second, another possible general parameter for environmental taxes concerns the use of the revenues raised by the tax to offset the environmental impact caused by undertakings taxed. In such cases, the tax ensures a *de facto* environmental protection effect. I reflect briefly on this second answer, since it will likely spur a complex debate on the State aid control system.

The Court of Justice seems to consider the use of the revenues raised as another general parameter for avoiding the fulfillment of the *selective advantage* condition and breaching Article 107(1). Note that this conclusion is inductive: the cases that support this view (the *KernbrStG*, *ANGED,* and *UNESA* cases) involved preliminary rulings. This means that their final conclusion relied on how the national court interpreted, applied, and implemented the ruling of the Court of Justice in the main proceedings and carried out the "fact checks" concerning the assumptions of the latter court about the measure in question.[787] Moreover, since the arguments presented by the Court of Justice answered the national court's question, and since it did so in a blurry way, it is unclear whether the use of the revenues raised was a general parameter of environmental taxes or not. I will now address some legal issues concerning such a parameter.

Taxes are, in their nature, revenues-raising instruments for the public coffers in general – and not for any specific purpose. Moreover, the Member States are free to decide how to use the revenues thereby raised. This is one side of this coin. The tax discretion of the Member States limits the leeway of the EU institutions in the State aid control system. However, as long as the EU institutions do not demand that revenues be used in any particular way, but instead only the issue as a parameter for interpreting the *selective advantage* condition, they are not interfering with the tax discretion of the Member States.

It may also be that focusing on the use of the revenues is the only way the EU courts can ensure the integration of environmental protection *de facto* into the interpretation of the *selective advantage* condition at the level of EU's judicial branch. Otherwise, this work is left to the Commission (through its State aid investigations) and to national courts. So, this parameter would be a choice

[787] The Court of Justice narrative of the preliminary rulings discussed showed the national courts how the environmental taxes in question could avoid conflict with the State aid rule so the national courts could reach a conclusion in the main proceedings.

available for the Member States to ensure that their tax measures do not breach Article 107(1), and also that they need not undergo the legal regime for compatible aid measures (i.e., the GBER and the CEEAG). Based on Article 107(1) of the TFEU foundation on the effects-based approach and Article 11 of the TFEU integration demand, I can conclude a different perspective explained in the following. The interpretation of the *selective advantage* condition in relation to the environmental taxes that present such a feature (revenue use) would ensure a *de facto* integration and environmental protection and thereby should avoid the fulfillment of that condition. Thus, it seems logical that the use of the revenues is a parameter used in interpreting Article 107(1) when lawmakers opt for such tax features.

Finally, it seems the EU institutions can rely on the effects-based approach set out in Article 107(1) to verify a substantive integration of environmental protection into the analysis of the *selective advantage* condition. Thus, whenever lawmakers choose this method – i.e., when they earmark at least some of the revenues for offsetting the environmental damage – their environmental tax is likely to avoid such a breach. However, the tax burden should be determined based on the undertakings' environmental impact in a proportionate way that is coherent and consistent with the tax environmental objective. Based on the above, I can answer the second research question: the *use of the revenues* can be a parameter used by national lawmakers and the EU institutions to further integrate environmental protection not just at a *de jure* level, but at a *de facto* level as well.

5. The *Competition and Trade* Conditions

5.1. Introduction and Outline

This chapter concerns the two last State aid conditions extracted from Article 107(1) of the TFEU: the *distorts or threatens to distort competition* condition, and the *affects trade between Member States* condition (hereafter referred to simply as the *competition and trade* conditions). As explained in section 1.1, my first research purpose is to clarify the complexity of the State aid control system for lawmakers which is a problem (the first research problem). This means I discuss how the EU Courts and even the Commission interpret these conditions.[788] During this discussion, I can also examine if this part of the State aid control system is inconsistent with the integration principle set out in Article 11, which is a problem I address in this thesis.[789]

This chapter consists of five subchapters. This subchapter (5.1) introduces the subject of this chapter and provides an outline.

In subchapter 5.2, I provide a general understanding of the *competition and trade conditions*. For instance, in section 5.2.1, I examine the *relevant market*, which is these conditions common point of departure, an approach also adopted by the Commission in its Notice on the notion of State aid.[790] In sections 5.2.2 and 5.2.3, I discuss the general effects of the *competition and trade* conditions respectively regarding their interpretation in the case law (connected to the first research problem), and whether said interpretation affects the interplay between the EU and the Member States. Consequently, I fulfill the first research purpose by clarifying the general understanding of these condition,

[788] See again section 1.6.1 where I explain the use of the materials for the analysis of Chapter 5.

[789] My second research problem connected to the second research purpose with this examination.

[790] In section 6 of the Commission Notice. See also, in case C-279/08 P, *Commission v Netherlands*, paragraph 131, and in paragraph 90 of the Commission Guidelines on State aid for environmental protection and energy; and, in paragraph 186 of the Commission Notice on the notion of State aid; in, also Derenne, J., and Verouden, V., 2017, *Distort of Competition and Effect on Trade,* p. 169; and in Szyszczak, E., 2016, *Distortion of Competition and Effect on Trade between EU Member States,* p. 151; a similar approach.

while also answering the first question concerning how environmental taxes could meet these conditions.[791] Although most of the case law discussed in this chapter does not concern environmental taxes, such a discussion benchmarks the general understanding of EU courts regarding the *competition and trade* conditions pertaining to all sorts of State aid measures, such as subsidies and taxes (including environmental taxes).

In subchapter 5.3, I then proceed to analyze whether the interpretation of these conditions enables the integration of environmental protection requirements, as set out in Article 11, thereby fulfilling my second research purpose.

In subchapter 5.4, I discuss the possibility of integrating environmental protection requirements through a different interpretation of the *competition and trade* conditions in relation to environmental taxes, the one that enables such integration. This means I deal with the second research problem and answer the second research question.[792]

In subchapter 5.5, finally, I summarize the most important points covered in this chapter.

5.2. *Threatens to Distort Competition and to Affect Trade between Member States*

5.2.1. The relevant market: Finding its circumstances

Now to EU courts' understanding of the Commission's assessment of the *relevant market*.[793] Historically, EU courts have required the Commission to

[791] Recalling the first research question: In what circumstances do environmental taxes fulfill the *competition and trade* conditions set out in Article 107(1)?
[792] Recalling the second research question: How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?
[793] The term *relevant market* can be defined in different ways by different actors. The Commission, for instance, issued the

assess (to some extent) the relevant market on which the State action investigated is likely to affect *competition and trade*, so that the Commission can conclude whether the measure meets those State aid conditions.[794] Thus, this assessment is the starting point for interpreting and applying these conditions in the case law.

As I explain in section 1.6.3 about the scope of this thesis, the relevant market is a "concept" of EU competition law, and not just of the State aid control system.[795] Despite this, I discuss the relevant market rationale on the basis of the State aid case law. Now to the historical development of the Commission's duty to assess the relevant market when assessing the *competition and trade* conditions.

In 1980, the Court of Justice ruled on the *Philip Morris Holland BV versus Commission* case, in which Philip Morris sought to get a Commission State aid decision annulled. The measure in question was a premium for investment projects that exceeded Hfl 30 000 000, provided that the amount of jobs created accounted for up to 4% of that investment.[796] The purpose of the Dutch measure was to help *Phillip Morris* re-arrange its facilities and production, thereby increasing manufacturing capacities at one of its facilities by 40%, and 13% of the overall production in the Netherlands.[797] *Philip Morris* argued that the Commission had failed to assess the circumstances on the relevant market from the perspective of time, the product, and the market pattern.[798] Thus, one of the central legal debates in this case concerned the Commission's assessment of the relevant market. The Dutch measure helped

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Commission Notice on the definition of relevant market for the purposes of Community competition law, clarifying in paras. 7 and 8 the following two definitions of the term. *Relevant product market*, which "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use," in para. 7. *Relevant geographic market,* which "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area," in para. 8. The Commission explained that it the assessment of the relevant market is a combination of both understandings described in paras. 7 and 8, from which the Commission's based their interpretation on the case law on the subject and the "orientations" explained in that Notice (in para. 9).

[794] I go through its development in a timeline below.

[795] See, for instance, the Commission issue the Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13.

[796] *Ibid,* para. 2

[797] *Ibid,* para. 3.

[798] *Ibid,* para. 9.

Philip Morris to enlarge its production of cigarettes for export to other Member States; and the actual production increase was aimed at meeting a higher demand for these products in those Member States.[799] Hence, the view that the measure affected *competition and trade* because it reduced *Philip Morris*'s costs for producing cigarettes, thereby increasing the company's sales capacity within the EU. At the same time, other producers had to carry their production costs themselves.[800]

The Court then began the legal debate about the relevant market in the State aid case law in the *Philip Morris* ruling. The Court rejected Philip Morris's view that the Commission had failed to verify that the measure affected *competition and trade* by failing to assess the situation on the relevant market properly.[801] The Court concluded that, since the Commission had assessed all of these *competition and trade* effects from the measure in question, it had established the circumstances on the relevant market.

Five years later, in 1985, the Court had an opportunity to discuss the issue concerning the relevant market assessment again, in another State aid decision involving the Netherlands: the *Netherlands and Leeuwarder Papierfabriek BV v Commission* case.[802] This concerned a company in a financial crisis (*Leeuwarder*) that another company had acquired. The discussion concerned the Commission's burden of proof regarding the circumstances on the relevant market. The Court concluded that, even when the exact circumstances of a concrete case show that the aid granted can affect *trade and competition*, the Commission must still set out these circumstances in its statement of reasons

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[799] *Ibid,* paras. 11, where the Court stated the following. "(11) When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid. In this case the aid which the Netherlands Government proposed to grant was for an undertaking organized for international trade and this is proved by the high percentage of its production which it intends to export to other Member States. The aid in question was to help to enlarge its production capacity and consequently to increase its capacity to maintain the flow of trade including that between Member States. On the other hand, the aid is said to have reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant.

[800] *Ibid idem.*

[801] According to Philip Morris, the Commission should first have established the relevant market by considering the product, territory, timeframe, and patterns, in order to assess the effects of the Dutch policy on *trade and competition.* In case C-730/79, *Philip Morris v Commission*, para. 9.

[802] In joined cases C-296/82 and C-318/82, *Netherlands and Leeuwarder Papierfabriek BV v Commission.*

for the State aid decision, thereby connecting the facts of the case with the distortion of *competition and trade*.[803] With this ruling, the Court maintained that the Commission was not obliged to define the relevant market itself, but that it was still required to state the circumstances on the relevant market, as it had done in the *Philip Morris* case.

Otter and Balasingham point out that the Court adopted a more stringent approach than simply requiring the Commission to state the circumstances on the relevant market when the aid in question concerns individual aid.[804] They reach this conclusion based on the Court's statement of reasons, according to which the Commission should conduct a more specific market analysis for individual aid.[805] They criticize the Court's approach, however, finding that the relevant market is "indispensable for conducting an economically sound assessment of the effects of aid on competition."[806] The Commission seems to adopt that approach implicitly in its Notice on the notion of State aid, where it states that it conducts more specific market analysis in the case of individual aid, whereas it suffices in the case of aid schemes to "examine characteristics of the particular scheme."[807]

It seems logical that the assessment of the *relevant market* differs between individual aid and aid schemes. Individual aid benefits only one beneficiary rather than several selected competitors, which is the case with an aid scheme. Thus, the impact of individual aid on the *relevant market* requires the verification of an improvement in the beneficiary's competitive position compared with that of undertakings in a legally and factually comparable position.[808] The latter analysis concerns the selective effect of the measure,

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[803] *Ibid,* para. 24, p. 824.
[804] About joined cases C-329/93, C-62/95 and C-63/95, *Germany v Commission,* particularly para. 53, and joined cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani SpA v Commission*, particularly para. 228.
[805] *Ibid idem.*
[806] Otter, J., & Balasingham, B., (2013), "R*egional state aid: market definition in large investment projects of the automotive industry*," p. 518.
[807] In para. 198 of the Notice on the notion of State aids, where the Commission based this position on *Germany v Commission* case (C-248/84), stated the following. "Even if the circumstances in which the aid is granted are in most cases sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, those circumstances should be appropriately set out. In the case of aid schemes, it is normally sufficient to examine the characteristics of the particular scheme."
[808] In case C-730/79, *Philip Morris v Commission*, para. 11.

which is intertwined with the *competition* condition concerning who the competitors are and how they are affected by the individual measure.

In 2000, the General Court clarified that, although the Commission must establish the circumstances on the relevant market, it does not have to assess the actual market in detail. [809] The Court understood that putting such high demands on the Commission's work would result in unlawful State aid being hard to caught up, which is the opposite of the aim of Article 107 and Article 108. Scholars find this position problematic, because it does not give enough weight to the connection between preferential treatment and the effects on *competitio*n.[810] Their criticism concerning the small relevance of establishing the impact on the *competition* condition is due to the *selective advantage* condition being the most critical one. Thus, although all State aid conditions are cumulative, some are more relevant than others. If the Commission is not required, namely, to assess the actual market in detail,[811] such an approach is less restrictive than the one necessary for fulfilling the *selective advantage* condition discussed in Chapter 5. Consequently, the *competition and trade* conditions seem less critical than the *selective advantage* condition for the conclusion about State aid. However, this does not mean the Commission can presume that the measure in question automatically affects *competition and trade*.[812]

Based on Otter and Balasingham's position discussed above, where they conclude that the relevant market assessment (and not just the circumstances on the market) is indispensable for properly assessing the economic effects of the aid on competition,[813] I have a final reflection on this regard. Although the Commission is not required by EU courts to define the relevant market, but instead just the circumstances on the relevant market, domestic lawmakers can cite these scholars' perspectives in their favor. How? Lawmakers can shape the interpretation of the State aid conditions by

[809] In case T-55/99, *Confederación Española de Transporte de Mercancías (CETM) v Commission*, paras. 102-103.
[810] See, in Otter, J., & Balasingham, B., (2013), "*Regional state aid: market definition in large investment projects of the automotive industry*," p. 518; and in Heidenhain, M., (2010), "*European state aid law: [handbook]*," p. 50.
[811] This position is still valid and stated in paras.194–195 of the Commission Notice on the notion of State aid.
[812] In para.195 of the Commission Notice on the notion of State aid.
[813] *Ibid idem*.

establishing the starting point for the eventual State aid legal dispute by identifying the following:

1. Which relevant market they have considered, so that they are transparent and clear about which relevant market the environmental tax will impact, and what the likely effects will be on *competition and trade*.
2. What environmental effects they expect the tax to have, as well as what impact they expect the tax to have on the *competition and trade* situation faced by competitors. So, whichever trade-off they seek between environmental-climate concerns and competition-trade values, they are logical and clearly stated regarding the rationale and structure of the tax. And finally,
3. Which competitors they have identified as the ones likely to be affected by the tax, so that they are transparent about the impact on competitors, and so that they show their awareness of the possible State aid effects of the tax.

By addressing these questions, lawmakers can also establish the starting point for the legal debate on an eventual State aid legal dispute with the Commission under Article 108. Obviously, the Commission will still be able to deviate from such an approach later in its State aid scrutiny. Thus, any attempt at disguise should be caught in the course of the State aid analysis. Consequently, when lawmakers are genuinely concerned about the environmental issue that their tax is designed to tackle, the elements they consciously include in the tax can offer an opportunity to shape the interpretation of the State aid laws, and thus the manner in which they develop. I return to this question in subchapter 6.4.

In sum, the assessment of the *competition and trade* conditions requires a relatively simple consideration of the circumstances on the relevant market. Moreover, this assessment may become more stringent if the aid is individual, and less stringent it is an unnotified aid scheme. Lawmakers can use this element of the assessment in their favor, in order to induce changes in the

interpretation of these conditions. I turn now to more specific aspects of the *competition* condition and of the trade condition, in sections 6.2.2 and 6.2.3 respectively. Then, in subchapter 6.3, I analyze whether these conditions integrate environmental protection requirements.

5.2.2. The *threatens to distort competition* condition

In this section, I discuss general aspects of the effects of the *competition* condition, based on EU case law on the subject. Although this section is about the *competition* condition, a discussion of the effects on trade and selectivity is inevitable, due to their close connection with the subject of this section.

First, delimiting the scope of the effects of the *competition* condition. Considering when a Member State grants financial aid to selected companies that solely produce goods or supply services for export to non-EU countries. This aid can strengthen the competitive position of such exporters when they trade on the international market; therefore, the aid can *distort competition* on that market. However, such aid would not meet the *competition and trade* conditions set out in Article 107(1), because the effects are international and not intra-EU. It is thus necessary that the aid beneficiary trades and competes with other undertakings within the internal market, since the State aid qualification is a legal tool for ensuring a level playing field on that market. It is instead the GATT and the GATS[814] that apply to State measures that affect competition and trade internationally, and it is the charge of the World Trade Organization (WTO) and not the EU to regulate such measures. Now, I discuss the effects on *competition* on the internal market.

In the *Philip Morris* ruling discussed in section 5.2.1, the Court of Justice declared that: "[W]hen a State financial aid strengthens the position of an undertaking compared with other undertaking competing in intra-Community trade the latter must be regarded as affected by that aid."[815]The Court thus established that, when the aid *strengthens the position* of an

[814] The General Agreement on Tariffs and Trade as GATT and the General Agreement on Tariffs in Services as GATS.
[815] In case C-730/79, *Philip Morris v Commission*, para. 11.

undertaking, it grants the beneficiary of the aid a competitive advantage over undertakings that do not receive the aid. The comparison is critical for identifying the selective and *strengthening* effects of the measure. *Competition* is only distorted, namely, when the competitiveness of selected undertakings on the internal market is *strengthened*. Moreover, the *strengthening* effect does not have to be economically great; and the scale of the aid does not matter.[816] However, the effect on *competition or trade* cannot be merely hypothetical; instead it must amount to a real potential.[817] That is, a State measure that seems initially just to impact the local market can affect cross-border undertakings, since the circumstances on the market in question may show that they are trading in that area. *Competition* may be distorted thereby.

As seen in the *Philip Morris* ruling discussed previously, the effects on *competition and trade* (whether threatened or actual) are closely related to the *selective advantage* condition. This is because the latter ascertains when undertakings are *de jure* or *de facto* beneficiaries of a tax advantage on a selective basis. Szyszczak avers that "all that matters is whether an advantage is granted to a market operator, at the detriment of another which will, as a matter of fact, encroach upon the good functioning of competition and trade between Member States."[818] The rationale of the *selective advantage* condition is intertwined with that of the *competition and trade* conditions.

When the selectivity takes effect through the discriminatory impact of the State measure, it affects the assessment in connection with the *competition* condition.[819] In *Spain v Commission*, the Court of Justice ruled that the territorial limitations of domestic law, which by nature is restricted to its jurisdiction and does not reach competitors located in other countries, is not the reason of discrimination and the State aid qualification.[820] The logic of

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[816] In case C-280/00, *Altmark Trans.*, para 81.
I- 7747, para 81; Case C- 351/ 98, *Spain v Commission (commercial vehicle purchase aid)*, para 67.
[817] In case C-280/00, *Altmark Trans,* para. 79.
[818] In Szyszczak, E., (2016), "*Distortion of Competition and Effect on Trade between EU Member States*," p. 151.
[819] In C-351/98, *Spain v Commission*.
[820] *Ibid,* in para. 57 where the Court of Justice stated the following. "… A measure to support investment adopted by a public authority can by definition apply only in respect of the territory for which it is responsible and the authority cannot be criticised for not extending the benefit of the measure to undertakings not established in its territory, since such undertakings are in a wholly different position vis-à-vis the authority from undertakings established within the territory. That statement does not, however, mean that such a measure of support cannot be classified as 'aid' within the meaning of Article [107](1) of the Treaty if it fulfils the conditions laid down by that provision."

this view is to ensure that, when competitors from other countries decide to operate in that Member State, they should be able to receive the financial benefit. Otherwise, the measure discriminates against them and qualifies as State aid. Thus, the discussion of the effects of the *competition* condition can easily become a *selective advantage* condition analysis, due to how these factors are intertwined.

Despite this, the conclusion that State aid grants a selective advantage does not suffice to meet either the *competition* condition or the *trade* condition. According to EU case law, a selective economic advantage is insufficient to meet the *competition and trade* conditions, because the Commission still has to specify the market circumstances that the aid affects on a selective basis.[821] Otherwise, in the absence of such a situation, the *competition and trade* conditions will be automatically met once the investigation classifies the advantage as selective. Consequently, it seems that Article 107(1) conditions are fulfilled once the *selective advantage* condition is.

In its *Spain versus Commission and Lenzing AG* ruling, the Court of Justice also clarified that "an adverse effect on the competitive situation of an operator" can also be State aid.[822] That is, the *competition* condition is met if the aid affects the competitive situation of an operator, whether positively or negatively. Moreover, the Court has long maintained that the effects of *competition* distortion do not require that the beneficiary of the aid expand or gain market share. It suffices that the aid relieves the beneficiary of the costs of day-to-day management or normal activity.[823]

Unilateral measures by Member States that seek to adjust "the conditions of competition in a particular sector of the economy to those prevailing in other Member States" can still be classified as State aid.[824] In my view, this is a clear message from the Court to the Member States that the adjustment of laws is

[821] In joined cases C-296/82 and C-318/82, *Netherlands and Leeuwarder Papierfabriek BV v Commission,* para. 24, p. 824.
[822] In case C-525/04 P, *Spain v Commission and Lenzing AG,* paras. 35–36.
[823] After the Court ruling in the case C-156/98, *Germany v Commission,* para. 30, the Court repeats the sentence that follows: "(…) aid which (…) is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition".
[824] In case C-172/03, *Wolfgang Heiser v Finanzamt Innsbruck***,** para 54.

a competence of the EU, through the positive harmonization set out in Article 113 of the TFEU.

Another element that can influence the competition assessment concerns *the competition intensity of the sector*. The General Court explained that the intensity of competition in a sector also matters for the assessment of *competition distortion* and of the consequent effect on *trade*.[825] The intensity of competition may become more relevant in future cases relating to new sectors not yet developed. In the last two decades, we have witnessed (as a collective) the creation of new forms of trading through digital means. Cryptocurrencies, metaverse reality, and discussions of space colonization are proof that new sectors emerge across the globe in which competition levels are not yet established. Whichever new sector appears in the future, the key to the State aid question lies is its territoriality: i.e., is the sector found within the EU, or is it international or even extraterrestrial? The latter two areas are beyond the reach of the State aid control system.

Finally, I cannot finish this section without discussing Heimler's suggestion to address the *competition condition* at the domestic level – i.e., where lawmakers discuss which measure is the most optimal.[826] Heimler exemplifies this with the following situation:

> *[S]ubsidies for the generation of electricity via renewable sources may be authorized by State aid rules, but they may not be optimal with respect to the actual benefits they provide. Before introducing a subsidy for renewables, which is meant to reduce the demand for electricity generated through traditional energy sources, State authorities could analyze whether, for example, a tax on carbon emissions may be more effective in achieving the general interest objective of reducing air pollution. Such analysis remains outside*

[825] In T-214/95, *Het Vlaamse Gewest (Flemish Region) v Commission*, in para. 46 where the Court of Justice stated the following. "Where a public authority favours an undertaking operating in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article [107](1) of the Treaty applies to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States."

[826] Heimler, A., 2020, "State aid control: recent development and some remaining challenges," pp. 66–67.

> *the scope of the State aid control and it should be undertaken at the national level.*[827]

As Heimler sees it, the Commission should use the National Competition Authorities (NCAs) to verify the optimality of the State measure in question. He bases this conclusion on the OECD Competition Assessment Toolkit, which proposes a checklist for identifying "unnecessary restraints and developing alternative, less restrictive policies that still achieve government choices."[828] Heimler concludes that the "NCAs should be put in charge of this assessment and, by expanding the State aid control, could also evaluate the aid that now falls under the *de minimis* threshold."[829]

In my view, Heimler's suggestion that lawmakers question the optimality of measures is valid. Such an approach will demonstrate lawmakers' awareness of State aid effects in general (and not just in connection with the *competition* condition). However, his suggestion that the State aid control system be expanded through NCA assessments is problematic when it comes to taxation.

From the point of view of tax law, NCA assessments would undermine the tax discretion of the Member States. There is no legal basis for such a strategy in the State aid control system. The Member States agreed through Article 108, after all, to grant the Commission extensive leeway in the State aid control system (although such leeway is not unconditional). In areas where the EU has not harmonized the legal situation (through articles 113, 114(2), or 115 of the TFEU), the tax law of the Member States puts clear limits on the Commission's leeway in the State aid control system.[830] In view of this, I cannot see any legal possibility for using the NCAs to control State aid tax measures, unless the Member States agree to grant the NCAs such powers.

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[827] *Ibid idem.*

[828] *Ibid,* p. 66. The quote is extracted from the OECD webpage concerning the OECD Assessment Toolkit. In OECD, OECD Legal Instruments, *Recommendation of the Council on Competition Assessment,* last accessed on 16 November 2022, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0455.

[829] Heimler, A., 2020, State aid control: recent development and some remaining challenges, p. 69.

[830] See to this effect, in joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 94.

5.2.3. The *affect trade between Member States* condition

I turn now to some general aspects of the *trade* condition. The starting point established in the previous section is that the trade is intra-EU. The place where the trade occurs – the internal market – triggers the application of the State aid rule.[831] A measure can affect trade between Member States even when the beneficiary of the aid only trades on a small scale within the internal market, while most of its activity is outside the EU.[832]

Regarding the size of the aid, the *Altmark Trans* ruling benchmarked the position that the amount of the aid granted, even if small, may still be State aid, as it affects trade between Member States.[833] The De Minimis Regulation establishes the legal regime for small amounts of aid, allowing the Member States to directly implement measures that qualify as State aid under Article 107(1) without the notification procedure established in Article 108(3) of the TFEU.[834] However, the De Minimis Regulation sets the condition that such small aid cannot exceed EUR 200,000 during three fiscal years.[835] Hence, even a small amount of aid in financial terms is capable of affecting trade between Member States.

In the *Altmark Trans* ruling, the Court also clarified that, even when the selected beneficiary of the aid operated solely on the domestic market where the aid was granted, and thus did not operate across borders, the aid can still be considered to meet the trade condition.[836] In this sense, the lack of an actual cross-border situation does not mean the aid is incapable of affecting trade between Member States, since it may simply be making the entry of operators from other Member States into that market more difficult.[837]

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[831] In, Szyszczak, E., 2016, p. 154
[832] In case C-142/87, *Belgium v Commission*, para 35.
[833] In case C-280/00, *Altmark Trans,* para. 81
[834] The Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, in Article 3(1).
[835] In the De Minimis Regulation, Article 3(2).
[836] In case C-280/00, *Altmark Trans,* para. 82.
[837] In joined case C-197/11 and C-203/11, *Libert and others v Gouvernement flamand,* para. 78.

The Commission pointed out in the Notice on the notion of State aid that it had issued several decisions that raised no State aid objections when the measure "had a purely local impact and consequently had no effect on trade between Member States."[838] In such cases, the Commission's evaluation was that the application of the measure in a certain region of a Member State "was unlikely to attract customers from other Member States"; thus the effect of the measure "on the conditions of cross-border investments or establishment" was minimal[839] The Commission provided a list of examples of measures where it had found that the aid did not affect trade between the Member States.[840] In the Commission's view, a measure is likely to affect trade between Member States when economic activities providing services or trading goods are likely to cross the border, but will be ineligible for the benefit if they do. It is not mandatory that cross-border activities actually

[838] In para. 196 of the Notice on the notion of State aid.

[839] *Ibid idem*.

[840] *Ibid* in para. 197, they are: (a) sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other Member States; (b) cultural events and entities performing economic activities which however are unlikely to attract users or visitors away from similar offers in other Member States; the Commission considers that only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States; (c) hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States; (d) news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience; (e) a conference centre, where its location and the potential effect of the aid on prices is genuinely unlikely to divert users from other centres in other Member States; (f) an information and networking platform to directly address problems of unemployment and social conflicts in a predefined and very small local area; (g) small airports (or ports that predominately serve local users, thereby limiting competition for the services offered to a local level, and for which the impact on cross-border investment is genuinely no more than marginal; (h) the financing of certain cable ways (and in particular ski lifts) in areas with few facilities and limited tourism capability. The Commission has clarified that the following factors are typically taken into account to draw a distinction between installations supporting an activity capable of attracting non-local users, which are generally considered to have an effect on trade, and sport-related installations in areas with few facilities and limited tourism capability, where public support may not have an effect on trade between Member States: (294) a) the location of the installation (for example within cities or linking villages); b) operating time; c) predominantly local users (proportion of daily as opposed to weekly passes); d) the total number and capacity of installations relative to the number of resident users; e) other tourism-related facilities in the area. Similar factors could, with the necessary adjustments, also be relevant for other types of facilities.

occur; it suffices that they are likely to.[841] Thus the size and intensity of the aid is irrelevant, as far as the trade condition is concerned.[842]

5.3. Any Integration of Environmental Protection?

In this subchapter, I analyze the integration of environmental protection requirements into the interpretation of the *competition and trade* conditions. The case law cited in subchapter 5.2 concerning the general aspects of the *competition and trade* conditions, such as the reference market, does not mention environmental protection, because these benchmarking cases do not necessarily concern those objectives. Despite this, most of the integration of State aid environmental protection takes place through the assessment of the selective-advantage effects of the tax. In this subchapter, consequently, I analyze whether EU case law concerning State aid and environmental taxes contains any argumentation about integrating environmental protection into the *competition and trade* conditions.

In my view, the most relevant case law is found in the three *British Aggregates Association* (or simply BAA) rulings,[843] because they developed the *Adria-Wien Pipelines* ruling further.[844] These rulings began a long debate about a Commission decision that found the U.K.'s environmental levy on aggregates, known as "AGL," to be general, "inasmuch as its scope was justified by the logic and nature of the tax system."[845] That is to say, it was not selective.

The BAA, acting on behalf of industries whose competitive position had been directly and negatively affected by the AGL,[846] complained that the AGL constituted State aid. The BAA argued that the environmental levy excluded "certain materials from the scope of the AGL," and that its exemptions

[841] In case C-280/00, *Altmark Trans,* para. 82.
[842] In paras. 191 and 192 of the Notice on the notion of State aid.
[843] In cases T-210/02, C-487/06 P, and T-210/02 RENV.
[844] See, particularly about the *Adria-Wien Pipelines* ruling discussion in paras. 71–73, 84, 90, 92, 107, and 120 of the case T-210/02, in paras. 60, 66, 76–80, 83, 88, and 89 of the case C-487/06 P, in paras. 35, 47, 48, 62, and 68 of the case T-210/02 RENV.
[845] In case T-210/02, para. 20
[846] In case T-210/02, para.1

favored exports to other EU countries.[847] The Commission found the AGL to be an environmental levy that essentially targeted virgin materials identified as "aggregates," and that was not levied on by-products or waste products derived from other processes, because the object was to encourage the use of recycled instead of virgin materials.[848] In the three rulings concerning that environmental levy, EU courts had the opportunity to discuss the integration of environmental protection requirements into Article 107(1). Below, I quote parts of these three rulings in respect of the integration of environmental protection into the *competition and trade* conditions. The General Court stated the following:

> *[I]t should be held as a preliminary point that a levy may be described as an environmental levy where "the taxable base of the levy has a clear negative effect on the environment," […]. An environmental levy is thus an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base. It seeks to tax certain goods or services so that the environmental costs may be included in their price and/or so that recycled products are rendered more competitive and producers and consumers are oriented towards activities which better respect the environment.*[849]

With its conceptualization of an "environmental levy," this quote from the ruling initiated the legal debate concerning the integration of environmental protection requirements into Article 107(1).[850] The General Court connected the environmental objective of the levy to its tax base and its environmental impact, thereby conceptualizing the AGL as also based on its effects, which is the essence of the effects-based approach. The Commission's understanding that the AGL was not State aid involved integrating environmental protection into Article 107(1) in such a way as to allow a trade-off between competitiveness and environmental protection to occur without conflict between that article and the AGL.[851] The idea was that trading off

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[847] *Ibid*, para. 17.
[848] *Ibid,* for instance, in paras. 21 and 55.
[849] In case T-210/02*,* para. 114.
[850] Compare it with the legal conceptualization of environmental taxes in other sources, discussed in
[851] Cf. the Commission's position in the Communication from the Commission, *Environmental Taxes and Charges in the Single Market,* Brussels, 26 March 1997, COM(97) 9 Final, section *III.*

economic competitiveness for environmental competitiveness offers a flexible way of helping industries shift to better environmental practices.[852] The benefit of such an environmental transition is not the problem, which instead has to do with how and to what extent an environmental measure affects *competition and trade* among the businesses most affected.

The General Court called attention to the discretion of the Member States in addressing issues of environmental protection through taxation (in the absence of any EU law on the matter), and to their freedom to balance different values and priorities in connection therewith.[853] The General Court also distinguished the environmental levy from other fiscal measures constituting the overall tax system of a Member State, arguing in essence that the environmental levy is a specific measure with a particular rationale for assessing the *selective advantage* condition.[854] As I mentioned at the beginning of this section, the integration of environmental protection requirements into the *competition and trade conditions* is indirect, via the *selective advantage* condition. Nevertheless, since the selectivity effect is about the competitors, any debate about the competitors' competitive position is also about the *competition* condition and, from there, the trade condition.[855] So, when the General Court

Guidelines, A. Guidelines for the use of environmental levies, pp. 5–6, and 11, where it seemed that environmental levies were more likely being qualified as State aid than general.

[852] See, for instance, input in Bergmans, H., (1999), "Opportunities for Increased Use of Environmental Taxes and Charges in EU Member States and CEECs," p. 16.

[853] In case T-210/02*,* para. 115, where the General Court stated the following. "It must be emphasised in that regard 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 sectoral environmental levies in order to attain those environmental objectives referred to in the preceding paragraph. In particular, the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or services, and cannot be seen as part of an overall system of taxation which applies 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."

[854]See last sentence of para. 115 of the case T-210/02, quoted in the previous footnote.

[855] For instance, in the follow up para. 116 of the case T-210/02*,* the General Court stated the following. "In particular, the fact that an environmental levy imposed on certain specific products does not apply to those similar activities does not put it in the same position as a measure of tax relief in those sectors of activity, similar to those at issue inter alia in *Spain v Commission, CETM v Commission and Diputación Foral de Álava and Others v Commission*. Unlike an environmental levy, which can be distinguished precisely by its particular scope and purpose (see paragraph 114 above), and thus cannot in principle be related to any overall system, the measures of tax relief referred to above were an exception to the system of burdens normally imposed on undertakings. The first two judgments referred to above involved relief,

stated in paragraph 116 that an environmental levy has a different logic from that of a purely fiscal measure, it concluded that the selectivity logic differs in both cases. Hence, this view should also apply to the *competition and trade* conditions, as stated in paragraph 117:

> *In that legal framework, since environmental levies constitute by their nature specific measures adopted by the Member States as part of their environmental policies, a field in which they retain their powers in the absence of measures for harmonisation, it is for the Commission, when assessing an environmental levy for the purposes of the Community rules on State aid, to take account of the environmental protection requirements referred to in Article 6 EC. That article provides that those requirements are to be integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market.*

In my view, the last sentence of paragraph 117 indicates that Article 11 of the TFEU might avoid fulfilling the *competition* condition. This is not unconditional, however, since Member States can use environmental levies and other forms of taxation to disguise anticompetitive actions. However, based on the above, Article 11 of the TFEU affect the State aid rule interpretation in respect of *de jure* and *de facto* effects of the State action in question, as established in *Italy versus Commission*.[856] Thus, a measure hiding an anticompetitive or protectionist effect should breach Article 107(1) when the environmental protection is just a misguide to that effect. Contrary, the tax seeking substantively an environmental protection objective should establish a level of competitiveness in connection to that aim, thereby not meeting the

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in the form of interest subsidies, from burdens arising, under normal trading conditions, from the requirement for undertakings to renew their commercial vehicles. Under that system of burdens, the fact that those interest subsidies, which, moreover, were made available only to SMEs, sought to favour the renewal of commercial vehicles in the Member State concerned in the interests of environmental protection and improving road safety was not sufficient to show that that advantage formed part of a self-contained system, which, moreover, the applicant did not even identify (*CETM v Commission*, paragraphs 53 and 54). In the third judgment mentioned above, the Court of Justice held that the tax credit under consideration, which was for the benefit only of undertakings with significant financial resources, infringed the principles which formed an integral part of the tax system of the Member State concerned (paragraph 166 of the judgment)."

[856] In case C-173/73.

competition condition.[857] Then, in paragraphs 119 through 121, the General Court settled the distinction between the *BAA* case and the *Adria-Wien Pipeline* case.[858]

My overall view on the General Court's position in these paragraphs is that, in the *Adria-Wine Pipeline* case, the tax scheme had no environmental justification for taxing two sectors differently from how the energy tax in question did. Thus, in the Austrian energy scheme, there was no logical connection between any environmental protection aim and the energy rebate granted to one sector but not to the other.[859] In the first case (*British Aggregates),* the General Court understood that the AGL targeted products based on their environmental impact; thus, it had a non-selective environmental rationale all along.[860]

In my opinion, even though the Court of Justice reverted this ruling in favor of *BAA*'s appeal (in C-487/06 P), and set aside the judgment of the General Court,[861] it did not invalidate the general understanding of the integration of environmental protection into State aid law as stated in paragraph 117 quoted above. It simply recognized that the AGL lacked consistency between its purpose of environmental protection and the size of its tax burden on specific materials.[862] I explain below how I have reached this conclusion, and why the principle of integration set out in Article 107(1) remains valid today, although it may have been misunderstood during the years following that ruling. Below, I discuss briefly the critical arguments sustained in the appeal.

The *BAA* challenged the General Court's endorsement of the Commission's position, which accepted the exclusion of certain materials from the AGL charges on the grounds that the measure protected selected materials from competition on the internal market, and so should be classified as State aid.[863] In essence, the parties discussed whether the General Court's view – that the Commission could not question the environmental policy choice of the

[857] Based on Bergmans' view mentioned in footnote 852.
[858] I jumped paragraph 118 because the General Court discussed questions about the formal investigation procedure carried out by the Commission in this case.
[859] Cf. para. 52 of the case C-143/99, *Adria-Wien Pipeline GmbH.*
[860] See discussion in paras. 120–134 in case T-210/02.
[861] In case C-487/06 P, *British Aggregates,* para. 195.
[862] *Ibid,* in the discussion that starts in para. 83 about the way to justify a selective treatment, and ends in para. 92.
[863] *Ibid,* paras. 62–68.

Member State in question – was a non-objective concept of State aid. They also discussed whether this levy was an example of an integration of Article 11 into Article 107(1) conditions interpretation.[864]

The Court's findings dealt with this matter specifically concerning the AGL, which was clearly selective towards certain materials.[865] This is why the Court understood that the AGL could not escape being classified as State aid.[866] Intrinsic to the discussion about the exclusion of certain materials from the ordinary level of the tax was the Court's view concerning inconsistency between the objective of environmental protection and the actual environmental impact of the materials exempted and those taxed normally. In the case of both types of materials, namely, the environmental impact was similar. Hence, the AGL could not escape being classified as State aid.[867] In the *Adria-Wien Pipeline* case as well, furthermore, the environmental objective was irrationally pursued in regard to which materials received the tax exemption.[868]

The Court of Justice never invalidated the principle of integrating Article 11 into Article 107(1), particularly in the interpretation of the *selective advantage* condition.[869] Moreover, given that the selectivity analysis is about the competitors' position (*who should be taxed, why they should be taxed at a given level*, etc.), environmental protection is indirectly integrated into the *competition and trade* conditions through the close rationale of these conditions. This is

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[864] *Ibid idem,* and also in paras. 72–73.

[865] *Ibid,* in paras. 79–93. In paras. 90–92 the Court of Justice dealt with the issue of integration of environmental protection into the State aid rule that qualifies a measure as State aid.

[866] *Ibid,* in para. 93.

[867] In para. 73 of the case T-210/02 RENV, the General Court stated the following. "Furthermore, it is common ground that the extraction of untaxed materials, particularly slate and clay, is at least equally, if not more, harmful to the environment than the extraction of other, taxed, materials, which also produce spoil, waste or other by-products capable of being used as aggregates (see paragraph 41 above). Thus, the parties have pointed to the highly inefficient nature of the extraction of slate, ball clay and china clay, and to the significant stocks of spoil and waste from those materials damaging the landscape, and thus the particularly damaging environmental impact of the extraction process concerned, which is why the United Kingdom legislator exempted those materials from the levy in order to promote their use or recycling as aggregates (see paragraph 43 above). Consequently, aggregates of those various materials are necessarily in what is at least a comparable situation in the light of the environmental objective of the AGL."

[868] Based on the General Court position stated in para. 73 of the case T-210/02 RENV quoted in the previous footnote.

[869] For instance, *Adria-Wien Pipelines* as discussed before, and the *ANGED* rulings, cases C-233 to C-237/16. See discussion in Chapter 5 about these cases.

because a tax advantage granted on a selective basis is in itself a sign of inconsistency between the environmental objective and the tax burden. Such inconsistency is irrational from the standpoint of environmental protection; thus it is irrational too in how it influences (positively and negatively) the competitive situation and trading conditions of the undertakings affected. Here, then, the integration of environmental protection takes place through the intertwining of those conditions. I now discuss the possibility of further integrating environmental protection into the *competition and trade* conditions.

5.4. Further Integrating Environmental Protection

Based on these last two subchapters and given the integration of environmental protection in the *selective advantage* condition, I proceed in this subchapter to discuss the possibility of directly integrating environmental protection into the interpretation of the *competition and trade* conditions. That is the purpose of this thesis to the subject of this chapter.

It is well-known that, across the globe, the environmental and social costs of producing goods and supplying services are not internalized within the market price.[870] Economists refer to this phenomenon as market failure.[871] Myers and Kent argue that governments give implicit subsidies to businesses through their inaction[872] on such matters. Moreover, many activities that are extremely harmful to the environment have even received positive financial support (i.e., formal or explicit subsidies)[873] from governments in the past. Indeed, many still receive such aid, as the case of fossil fuels.[874] Such subsidies serve to worsen markets even more that are already disrupted by failure.

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[870] The idea of negative externalities discussed by Pigou, in Pigou, A. C., (1920), *The Economics of Welfare*, Macmillan.

[871] See, for instance, Bator, F. M., (1958), *The Anatomy of Market Failure,* p. 351; and, Ladefoged, A. and Mirka, J., (2021), *100 years of externalities*, p. 49.

[872] See, in Myers, N., and Kent, J., 2001, p. 14

[873]Myers, N., and Kent, J., (2001), p. 14, classify "formal subsidies" as those governmental actions, like the subsidies granted to fossil fuels.

[874] See, for instance, Sanchez, L., *et al.,* (2020), *53 Ways to Reform Fossil Fuel Consumer Subsidies and Pricing.* Global Subsidies Initiative and International Institute for Sustainable Development, last accessed 14 September 2022, available at http://www.iisd.org/gsi/subsidy-watch-

Discussing the introduction of carbon taxes in Europe, Skou Andersen points out that the Nordic countries have been pioneers at implementing carbon taxes in a manner complementary with energy excises.[875] He notes that, when this policy was first enacted, it was controversial in the Nordic countries, due to the differential effects of the carbon tax on businesses that were taxed and those that were not, as well as dashed expectations that "other countries would follow their example."[876] If other countries had followed their example, a level playing field would have resulted.[877] These expectations were dashed, however, since only small countries that emitted insignificant amounts of carbon levied carbon taxes as well.[878] The major countries and emitters did not follow the Nordic example.[879] The most they could agree on was the Energy Taxation Directive, which did not oblige Member States to levy carbon taxes outside the EU ETS (Emissions Trading System).

Carbon taxes are a clear example of an extra burden on certain industries that produce a good or supply a service for sale on the internal market. Emitters must pay a tax on each ton of carbon dioxide they emit, thereby (theoretically) internalizing the environmental costs that they generate.[880] The effect is likely to raise the price charged to final consumers, thereby worsening the competitive position of producers/suppliers that pay the tax relative to those that do not. This was a concern that the Nordic countries had before they imposed the carbon tax, and a reality that they faced after having done so.[881]

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blog/53-ways-reform-fossil-fuel-consumer-subsidies-and-pricing. See, also, Timperley, J., (2021), "Why fossil fuels subsidies are so hard to kill – Behind the struggle to stop governments propping up the coal, oil and gas industries," Nature, News Feature 20 October 2021, last accessed 14 September 2022, available at https://www.nature.com/articles/d41586-021-02847-2.

875 Skou Andersen, M., (2018), "The Introduction of Carbon Taxes," p. 151.

876 *Ibid,* p. 152.

877 *Ibid idem.*

878 *Ibid,* pp. 152-153.

879 See, for instance, the study analyzing the EU decarbonization measures, criticizes the lack of fiscal measures to tackle CO_2 emissions in Europe, and propose the implementation of taxation in Spain, that implements the polluter pays principle to all sectors that emit CO_2, NOx, and SO_2, in Robinson, D., *et al,* (2019), "Fiscal policy for decarbonization of energy in Europe, with focus on urban transport: case study and proposal for Spain," p. 80.

880 I wrote "(theoretically)" to demonstrate that a carbon tax imposition may implement the polluter pays principle and the internalization of carbon costs on businesses' activities, although the actual societal costs of carbon emissions require a complex economic analysis beyond my knowledge of expertise.

881 Skou Andersen, M., (2018), "The Introduction of Carbon Taxes," pp.151-153.

Historically, the internal market developed without regard for the need for environmental protection, until the European Single Act of 1986 started to spur change along such lines.[882] The change thus began nearly fifteen years after the United Nations Conference on the Human Environment.[883] Moreover, the interpretation of the State aid rules remained mainly focused on ensuring a level playing field in economic terms, until the Commission enacted the 1994 Community guidelines on State aid for environmental protection. Historically, then, the rules for the internal market have legitimized and perpetuated market failure where the environment is concerned. The result was a legal system based on the assumption that fair competition is only about economic efficiency and not about environmental and social values.[884] In 2001, the Commission acknowledged this historical failure indirectly, declaring the following in its second Community guidelines on State aid for environmental protection:

> *[C]ompetition policy and environmental policy are not mutually antagonistic, but the requirements of environmental protection need to be integrated into the definition and implementation of competition policy, in particular so as to promote sustainable development.*[885]

Integrating environmental protection into competition policy in the EU and internationally is essential for achieving our targets for climate and the environment. No wonder that scholars are progressively more engaged in the subject of tax fairness from an environmental and social standpoint.[886] Although the State aid control system has advanced significantly in the consideration it gives to the need for environmental protection, it seems to have discouraged the larger Member States from adopting environmental taxes, due to their possible State aid effects.

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[882] Inserted Article 130r to the Treaty about the environment.
[883] United Nations Conference on the Human Environment, Stockholm, 16 June 1972.
[884] See, for instance, in Lünenbürger, S., *et. al*, (2020), "Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State aid," p. 420.
[885] In recital 3 of the 2001 Community guidelines on State aid for environmental protection.
[886] See in Cottrell, J., and Falcão, T. study from 2018 called "A Climate of Fairness – Environmental Taxation and Tax Justice in Developing Countries," discussion of tax fairness to those countries least developed within the EU, and a more general discussion in Lünenbürger, S., *et. al,* (2020), "Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State aid*"*.

This is why it is important to subject the current State aid regime to constructive criticism. The values applying on the internal market adapt continually to societal needs and concerns. As the effects of climate change on the EU become harsher, for instance, policies addressing the issue become more relevant and necessary. Thus, environmental protection is not an ideological aim unrelated to daily activities on the internal market. It is needed, rather, to ensure Europe's resilience. Thus, State aid rules that once had solely an economic rationale must now integrate environmental values as much as possible, so as to ensure that such values become a praxis of the businesses operating in the EU. Conversely, maintaining a solely economic rationale – particularly in connection with the *competition and trade* conditions – would be irrational.

In my view, it is irrational to think that an environmental tax that internalizes the environmental costs of carbon emissions *distorts competition and trade*, and is therefore to be classified as State aid. Instead, why not perceive a carbon tax – which aims at decarbonizing environmentally destructive activities, and thus at "correcting" a longstanding market failure – as ensuring fair competition and trade?[887]

If the market has failed historically in this way, then any measure correcting it helps to make up for past mistakes. Thus, the proposed rationale for the interpretation of the *competition and trade* conditions is rational regarding the environmental problems we face today as a global community. Moreover, it complies with the EU's aim of integrating the environmental protection requirements set out in Article 11. The "correction" establishes a level playing field that strikes a balance between economic, social, and environmental considerations. It seems that is what Nordic legislators were trying to do unilaterally when they pioneered carbon taxes in their countries – i.e., to correct a market failure.[888] Yet, a carbon tax in Sweden today is classified as

[887] Compare the proposed reflection to the Commission Guidelines on State aid for climate, environmental protection and energy, in paragraph 127 that says: "Aid for decarbonisation may unduly distort competition where it displaces investments into cleaner alternatives that are already available on the market, or where it locks in certain technologies, hampering the wider development of a market for and the use of cleaner solutions. (…)".
[888] Skou Andersen, M., (2018), "The Introduction of Carbon Taxes," p.151-153.

an instance of State aid compatible with the internal market, and the Commission accordingly monitors it.[889]

With the above rationale, the fulfillment of the *competition and trade* conditions will be more coherent, as well as more consistent with the EU's environmental aims; and such taxes will not be classified as State aid. However, this will only be possible if the Commission assesses overall market conditions. Domestic legislators should highlight both implicit and explicit (or formal) subsidies, so to clarify the market failure in question, and its connection with climate change or other environmental issues. Finally, Member States must not enact protectionist measures behind a green mask.

In sum, my suggestion requires a change in how the *competition and trade* conditions are interpreted. The question is whether the tax differentiates between taxpayers based on their carbon emission status. Is the taxpayer in question (1) a carbon polluter, (2) a carbon polluter but neutral (because it trades carbon certificates and takes other measures), or (3) a carbon-free producer or supplier? The assessment of the *distortion in competition and trade* should consider the relevant market in a comprehensive way, taking full account of environmental and social values and issues. That is, the interpreter will have to identify implicit and formal subsidies, and consequently pinpoint the market failures that the tax is designed to tackle. In this case, the carbon tax should not meet these State aid conditions, because the market in reality is already distorted, and the tax tries to correct for this. (However, such a suggestion does run the risk that protectionist measures will be introduced beneath an environmental disguise.) Such a tax will also tackle the situation whereby polluters have been competing from a privileged position from the start. Such producers/suppliers have historically received (implicit or formal) subsidies – as if this practice were "fair," although nowadays we know it is not.

[889] Reference to this case with the Commission in N.112/2004, Sweden, *Tax Exemptions for Biofuels*, OJ C 207 of 30 August 2006; SA.35414 (2012/N) Sweden, Modification to the Swedish tax exemption on biofuels for low-blending, OJ C 122 of 27 April 2013, p. 10, SA.43301 (2015/N), Sweden, *Tax exemptions and tax reductions for liquid biofuels*, OJ C 41 1 July 2016, pp.1-8, SA.48069 (2017/N), Sweden, *Tax reductions for pure and high-blended liquid biofuels,* OJ C380 10 November 2017, pp.1-6; SA.55695 (2020/N), Sweden, *Prolongation of the tax exemptions for pure and high-blended liquid biofuels*, OJ C 7 8 January 2021, p. 1

5.5. Summary

In this chapter, I have discussed general aspects of the *competition and trade* conditions. I emphasized the importance of defining the circumstances of the relevant market (in section 5.2.1) to assess whether the measure fulfills these conditions. Additionally, I discussed these conditions close connection with the selectivity effects concerning the integration of environmental protection (in subchapter 5.3). What conclusions can be drawn from this discussion?

First, the identification of the circumstances on the relevant market does not just play a vital role in the assessment of the *competition and trade* conditions. It also, and more importantly, is crucial for integrating environmental protection requirements directly into the interpretation of the *competition and trade* conditions. This is particularly important for supporting the EU's aim of a sustainable internal market, where economic growth is achieved together with environmental protection and social equality. However, the reliance of the current *competition and trade* conditions on the selectivity effect is a weakness, or an inflexibility of these State aid conditions to integrate environmental protection into their interpretation.

Second, when it comes to ensuring environmental protection on the internal market, EU courts have signaled through their rulings that there is an acceptable level of trade-offs between levels of competition and levels of environmental protection. The establishment of trade-offs on a case-by-case basis is a by-product of how EU State aid law works. All the same, suppose the EU institutions commit themselves to accepting these trade-offs as not disturbing the level playing field on the internal market. In this case, lawmakers will have succeeded in spurring such an acceptance.

The third conclusion of this chapter is that suggested in subchapter 5.4. In their environmental tax, domestic lawmakers should transparently, explicitly, and irrefutably establish the logic of the relevant market and the desired level of competition. Historically, economic undertakings that damage the environment have not had to internalize the environmental costs their activities generate. On top of that, moreover – making matters still worse –

governments granted harmful subsidies (both implicit and formal)[890] to environmentally destructive activities. Consequently, the *competition and trade* conditions fulfillment should not be interconnected with the fulfillment of the selectivity-advantage condition. Instead, these conditions should be assessed considering the relevant market established from a sustainable development perspective, which accounts for the environmental and social impacts of the activities taxed, alongside the obvious and traditional economic concerns.

Finally, the impact of not relying on the selectivity effect to meet the *competition and trade* conditions means that, even when a tax may seem to be selective, it will not meet the *competition and trade* conditions if it is successful at correcting market failure. It will be integrating environmental protection, as demanded by Article 11, thereby avoiding a breach of Article 107(1).

[890] In Myers, N., and Kent, J., (2001), "Perverse Subsidies: How tax dollars can undercut the environment and the economy," p. 14.

PART III

Integration in Other Parts of the System

&

Final Reflections

6. The Compatible Aid Regime

6.1. Introduction and Outline

In this chapter, I focus on laws complementary to Article 107(3) TFEU, which establish a regime for classifying State aid measures as compatible aid. The most relevant laws are the General Block Exemption Regulation (GBER) and Commission Guidelines on climate, environmental protection, energy (CEEAG). These laws integrate environmental protection requirements into the classification of compatible aid. When discussing their general application, I clarify aspects of the State aid control system for lawmakers, which aligns with my first research purpose (considering the complexity of the system as the first research problem). Additionally, I also address the first research question regarding what lawmakers should do to comply with these laws and ensure compatible aid classification.

I also analyze how these laws integrate environmental protection into the design of general environmental taxes (as opposed to State aid). The reason for this is straightforward. If the GBER and CEEAG establish minimum requirements for compatible aid, lawmakers' choices can influence the interpretation of the State aid conditions to reduce the likelihood of environmental taxes being classified as State aid.[891] As discussed in Chapter 5, the State aid control system remains a grey area when it comes to classifying fiscal measures of all types (not only environmental taxes) as compatible aid or general. Hence, I examine how these complementary laws' standards could be beneficial for lawmakers in two different ways when designing general environmental taxes.

In one approach, I suggest that lawmakers aim for much higher standards than the ones set out in these complementary laws. In the other approach, lawmakers should completely avoid certain features. Both of these strategies

[891] For example, the *British Aggregates Association* case discussed in different parts of this thesis was about an environmental levy on aggregate materials (see T-210/02, C-487/06 P, and T-210/02 RENV). In this case, the Commission did not raise any State aid objections, the General Court confirmed the Commission's assessment (in T-210/02), and the Court of Justice reached an opposite conclusion that the levy was State aid (in C-487/06 P) and order a retrial (in C-210/02 RENV).

assist lawmakers in reducing the likelihood of their environmental taxes being classified as State aid. I address the second research question by analyzing these complementary laws, providing clarity to lawmakers on how they can increase the integration of environmental protection and influence the interpretation of the State aid conditions (pertaining to State aid classification).[892] I do not delve into the second research problem because these complementary laws successfully integrate environmental protection in relation to environmental taxes at the compatible aid classification level.

Chapter 6 is divided into five subchapters. The first is introductory. In subchapter 6.2, I discuss the Commission's dual role in the State aid control system, and how it affects the development of the State aid complementary laws. I discuss how the Commission's work impacts the interplay between the EU and the Member States in the State aid control system. This is a discussion that contextualizes the Commission's impact on that interplay and on the issue of integrating environmental protection into the State aid control system.

Then, in subchapter 6.3, I focus on analyzing elements in the GBER that may prescribe environmental protection requirements for taxes. Since the amended GBER aligned its content with that of the CEEAG, I also – to avoid repetition – refer to the CEEAG when discussing these possible environmental protection requirements. When analyzing these possible environmental protection requirements, I reflect on how they impact the tax discretion of the Member States, thereby answering the first and second research questions.[893]

In subchapter 6.4, I analyze the special regime for environmental taxes laid down by the GBER and the CEEAG. In this discussion, I answer the first research question regarding the minimum legal standards that environmental taxes must meet to qualify as compatible aid. I also answer the second research question regarding the extent which the GBER and CEEAG minimum legal requirements can set legal benchmarks for lawmakers that aim

[892] Recalling the second research question: *How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?*

[893] Recalling the first research question adapted to this Chapter's subject: *In what circumstances do environmental taxes conflict with the notions and contents of the GBER, the CEEAG, thereby subjecting taxes enacted by the Member States to the EU's State aid control system?*

to avoid the State aid classification. Lawmakers will have to aim for higher levels of environmental protection than the minimum levels set out in the GBER and the CEEAG in order to maintain the national status and avoid EU intervention. In subchapter 6.5, finally, I summarize the findings of this chapter.

6.2. General Aspects

6.2.1. The Commission's dual role in the State aid control system

Article 108(1-3) TFEU grants the Commission extensive leeway to monitor and control State aid measures. It allows the Commission to act as a legislative body of the EU with the Council's approval.[894] Hence, Article 108 stipulates the Commission's dual role in the State aid control system. As an effect, the Commission can use its laws (e.g., the GBER and the CEEAG) in State aid decisions concerning the compatibility of aid measures.

Blauberger, a legal scholar, contends that the Commission's purpose with the first GBER was the following. "By exempting certain types of state aid, the Commission creates further incentives to adjust national policies to its state aid priorities."[895] This view is still valid for the current GBER. When the Commission creates an automatic system of incentives with the GBER, it includes its State aid agenda and its priorities on what should count automatically as compatible aid.[896]

The Commission's State aid decisions are legally binding, based on Article 288 TFEU. However, the Member State or party directly concerned can seek

[894] Based on Article 109 of the TFEU.
[895] In Blauberger, M. (2009). "From Negative to Positive Integration. European State Aid Control through Soft and Hard Law," p. 20.
[896] When the State measure, e.g., environmental tax, is out of scope of the GBER because of their large budget (aid amount above the GBER's threshold), then the Member State should notify the Commission based on Article 108(3) of the TFEU and the Commission should use the CEEAG to assess its compatibility with the internal market. In Article 3 of the GBER (not amended), and in section 1, para. 6 of the CEEAG.

their judicial annulment at the courts, based on Article 263 TFEU.[897] The Commission's extensive leeway in the State aid control system does not just arise because of its dual role in matters that are often carried out by different and independent bodies. Usually, that is, the legislative body will not be responsible for interpreting and enforcing the rules it has legislated (as in this case here).

The Commission can request, at any time, that the Member States or even possible beneficiaries of a case of hidden State aid provide information about State measures concerning a subject of particular interest.[898] Hence, the Commission can monitor measures on the subject of its choice, and the Member States must cooperate.[899]

One critical element concerns the Commission's recommendations for change in Member States' measures during the exchange of information

[897] See discussion in section 7.4 concerning who can challenge the Commission State aid decisions and what problems the procedural laws of the EU may cause for environmental protection.

[898] In Recitals 9, 10 and 11 of Regulation EU/2015/1589, laying down detailed rules for the application of Article 108 of the TFEU states the following view in this regard. "(9) In order to assess the compatibility with the internal market of any notified or unlawful State aid for which the Commission has exclusive competence under Article 108 TFEU, it is appropriate to ensure that the Commission has the power, for the purposes of enforcing the State aid rules, to request all necessary market information from any Member State, undertaking or association of undertakings whenever it has doubts as to the compatibility of the measure concerned with the Union rules, and has therefore initiated the formal investigation procedure. In particular, the Commission should use this power in cases in which a complex substantive assessment appears necessary. In deciding whether to use this power, the Commission should take due account of the duration of the preliminary examination. (10) For the purpose of assessing the compatibility of an aid measure after the initiation of the formal investigation procedure, in particular as regards technically complex cases subject to substantive assessment, the Commission should be able, by simple request or by decision, to require any Member State, undertaking or association of undertakings to provide all market information necessary for completing its assessment, if the information provided by the Member State concerned during the course of the preliminary examination is not sufficient, taking due account of the principle of proportionality, in particular for small and medium-sized enterprises. (11) In the light of the special relationship between aid beneficiaries and the Member State concerned, the Commission should be able to request information from an aid beneficiary only in agreement with the Member State concerned. The provision of information by the beneficiary of the aid measure in question does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary in question."

[899] An effect of Article 108 of the TFEU and its foundation on the principle of sincere cooperation(Article 4(3) of the TFEU) where the Member States should provide information requested by the Commission so it can monitor and control their compliance to the TFEU rules, mainly Articles 107(1) and 108(3) of the TFEU.

between the two.[900] As an effect, the Commission directly influences the Member States' design of measures through the notification procedure. However, while the Commission is the most active EU institution in the State aid control system, as an effect of Article 108 TFEU, this does not mean its decisions and recommendations provide the most efficient solution. The Commission makes mistakes when assessing the impact of measures on the environment.[901] However, these mistakes might only get uncovered in a judicial dispute of the State aid decision.[902] In my view, the result of annulment procedures about the Commission's State aid decisions is two-fold. First, there is the annulment or sustaining of the decision in dispute. Then there is the possibility of benchmarking new interpretations of the State aid condition when discussing those decisions that are later used as case law for other cases.

Another critical aspect of this control system that should not be underestimated is the Commission's role in developing new forms of aid. This entails stretching the concept of aid.[903] The Member States should expect the issues that become prominent (politically) at the EU level to more likely to form part of the Commission's investigations in the State aid control system. That is, they can become instances of State aid.

Examples include the cases concerning the Commission State aid decisions that target the Member States' tax rulings granted to multinationals regarding their corporate income tax.[904] The Commission tried to get the arm's-length principle recognized as inherent in Article 107(1) TFEU through its State aid decision.[905] It based this view on an interpretation of case law in the *Belgium*

[900] Based on Article 108(1) of the TFEU.
[901] For example, in the *British Aggregates Association* case, where the Commission did not uncover the illogical selective treatment of the levy on materials with similar environmental impact than the ones being normally taxed. In case C-487/06 P.
[902] In the above case, the Commission did not raise any State aid objections. Consequently, the U.K. did not challenge that decision since it wanted to impose the environmental levy on aggregates. So, it was the competitors of exempted materials that challenged that decision as an interested party, see discussion subchapter 7.4 *Locus Standi*.
[903] In section Environmental Taxes Overlapping the Concept of *Aid*, I discuss the concept of aid from a systematic and chronological point of view.
[904] See again the discussion in section 4.2.5. The third parameter for assessing material selectivity: The Commission's determination of the reference tax regime is restricted to the laws of the Member States.
[905] See, for instance, in case *SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks*, para. 264, where the Commission explained that the arm's length principle derives

and Forum 187 v Commission case.[906] One scholar argued that the Commission's position was not significantly different from that in said case.[907] In contrast, others scholars argued that Commission had clearly overstepped its power over the State aid control system.[908] This issue has now been solved. The Court of Justice ruled in November 2022 that the arm's length principle is a matter for the domestic tax law of the Member States.[909]

This example is interesting, because of the political turmoil to which the issue of transfer pricing gave rise internationally. In 2013, the OECD efforts at international coordination through the Base Erosion and Profit Shifting (BEPS) action plan gained momentum.[910] However, the Member States did not agree to bind themselves multilaterally to the BEPS. In 2014, all of the

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from the "general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU."

[906] But not paragraph 81 of that ruling (in case C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*), but paragraph 96 that appears to be the Commission's starting point for its transfer pricing discussion, where the Court of Justice stated the following view. "In that regard, the staff costs and the financial costs incurred in cash-flow management and financing are factors which make a major contribution to enabling the coordination centres to earn revenue, inasmuch as those centres provide services, particularly of a financial nature. Accordingly, the effect of the exclusion of those costs from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition." In SA.38374, paragraph 264, footnote 126 of that decision.

[907] Kyriazis, D. (2019), "Why the EU Commission won't appeal the Starbucks judgment," the author understands that it was not such a major development.

[908] Monsenego, J. (2018), Gormsen, L. L. (2019) opposes the Commission's interpretation. Gormsen criticized the Commission's active work in such cases as unlawful concerning the Lisbon Treaty, stating that the Commission oversteps the EU exclusive competence to exercise the power of discretion on competition law (State aid). She argued that "…the Commission uses competition law to promote 'integration through law,' by allowing the Commission not merely to tackle barriers to trade, but to dictate detailed prescriptions in policy areas falling outside the remit of EU competences." In Gormsen L. L. (2019) pp. 6 and 86. Kyriaszis pointed out that the Commission won the General Court case because of its interpretation of the arm's length principle in Kyriazis, D., (2019) "Why the EU Commission won't appeal the Starbucks judgment." However, the Court of Justice already reverted this view. Nonetheless, the author grasped the Commission's State aid strategy, which in that judicial cases impact the State aid control system, as explained previously.

[909] See in joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, paras. 88-105. See also discussion in section 4.3.3. Parameters for the determination of the circle of comparable undertakings.

[910] The OECD targets low or no taxation of corporations in its Base Erosion and Profit Shift (BEPS) action plan, launched in 2013. In OECD (2013) Press release: "Closing tax gaps - OECD launches Action Plan on Base Erosion and Profit Shifting." The BEPS proposed that countries automatically exchange information about non-resident taxpayers to combat tax evasion, aggressive tax planning, and abusive action tax-related. In Action 13 of the BEPS, OECD (2013).

EU's Member States became parties to the Standard for Automatic Exchange of Financial Account Information in Tax Matters, aligning with the BEPS' exchange of information.[911] In that same year, the Commission requested that Member States provide information about tax rulings on multinationals' corporate taxation that led to a series of State aid decisions. Hence, the State aid control system became a sort of "door" for tackling the issue of corporate income taxation concerning intra-group transactions within the EU.[912]

Based on the above example, lawmakers should expect the Commission to adopt a similar approach to tackling environmental taxes that the Member States have in place. It can use the control system as a tool for dealing with the unwillingness of Member States to approve environmental taxes at the EU level.

6.2.2. The indirect integration of environmental protection within Article 107(3) through Commission Guidelines

A quick reading of Article 107(3) is sufficient to establish that environmental protection is nowhere explicitly or formally mentioned in that text. Yet, the majority of State aid cases for environmental protection falls under that classification.[913] At first glance, it is surprising that the Lisbon Treaty did not change the objectives listed in Article 107(3), maintaining aid for environmental protection as stated implicitly in subparagraph (c), which is

[911] OECD (2014), *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, OECD Publishing, Paris, https://doi.org/10.1787/9789264216525-en.

[912] Blauberger, M., (2009), "From Negative to Positive Integration. European State Aid Control through Soft and Hard Law," p. 3, the author discusses that the Commission is a supranational entrepreneur enforcing the prohibition of Article 107(1) of the TFEU but also partially creating positive integration "from above."

[913] In section 1, para. 7 of the CEEAG, the Commission states the following view. "These guidelines provide guidance on how the Commission will assess the compatibility of environmental protection, including climate protection, and energy aid measures which are subject to the notification requirement under Article 107(3), point (c), of the Treaty. Any reference to 'environmental protection' in these guidelines should be understood as a reference to environmental protection, including climate protection." Also, in Articles 1(1)(c) and 3 of the GBER.

about developing economic activities or certain economic areas.[914] A possible explanation for this implicit integration of environmental protection under Article 107(3)(c) may be that the EU is an integrated system,[915] and Article 11 of the TFEU influences the interpretation of that Article anyway.

The case law corroborates with this view in a bold way. In 2001, in the *Adria-Wien Pipeline GmbH* ruling, the national court asked the Court of Justice in a preliminary ruling whether Austria's energy tax system was State aid.[916] The Court answered with the following statement:

> *Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3).*[917]

In this quote, the Court recognized that environmental protection requirements can be considered an objective compatible with the internal ("common") market, citing the 1994 Guidelines as a legal source in support of that view. The Court stated that Article 107(3) of the TFEU "confers on the Commission a wide discretion to declare certain aid compatible with the common market by way of derogation from the general prohibition laid down in Article [107](1) TFEU".[918] Indeed, the Commission has extensive leeway when assessing State aid measures and their compatibility with the internal market. However, such leeway is also limited to what the Member States have agreed upon in the TFEU, and the Guidelines are not legally binding instruments, especially for tax measures.[919] The Commission is not obliged to

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[914] Article 107(3) (c) of the TFEU establishes: "The following may be considered to be compatible with the internal market: (…) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;"

[915] In Article 7 of the TFEU, which is a provision of general application, it states that "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

[916] In the case, C-143/99, *Adria-Wien Pipeline GmbH*, paragraph 13. See the discussion about this case in Chapter 5, particularly in section 4.5.2. 4.5.2.The Adria-Wien Pipeline GmbH case: An energy tax scheme.

[917] In the case, C-143/99, *Adria-Wien Pipeline GmbH*, paragraph 31.

[918] *Ibid*, paragraph 30.

[919] Based on Article 288 of the TFEU.

follow any legislative procedure established in the TFEU,[920] such as approving Directives or Regulations.

The idea of a formal and explicit environmental protection integration occurring under Article 107(3)(c) through Commission Guidelines is daring, not only because guidelines are not supposed to have any binding effects (based on Article 288 of the TFEU), but mainly because it reproduces effects on the Member States' taxation.[921] As a consequence, even before (and after) the Lisbon Treaty, the practice of integrating environmental protection within Article 107(3) level in relation to environmental taxes was accepted within the State aid control system through Guidelines on the subject.[922]

Besides, the Court could have integrated environmental protection into Article 107(3) through Article 11 of the TFEU first, and then referring to the 1994 Guidelines since Article 11 established that "environmental protection requirements shall be a component of the Community's other policies."[923] Consequently, this positioning corroborates to the view that Article 11 previous version did not have autonomous normative force.[924]

When the Court adopted this position concerning the 1994 Guidelines, it created uncertainty and was subjected to heavy criticism by legal scholars, who perceived its rulings as legal activism.[925] Despite this debate, the approach adopted in the *Adria-Wien Pipelines GmbH* case affected the interplay between the EU and the Member States, inasmuch as the Court of Justice had

[920] Established in Articles 113, 115, 192(2)(a) and 194(3) of the TFEU.
[921] See, for instance, case C-143/99, *Adria-Wien Pipeline GmbH*, para. 31.
[922] Through the 1994, 2001, 2008, 2014 Guidelines and the current CEEAG. The 1994 Guidelines, the Commission Guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3–15 (hereafter: The 2001 Guidelines), the Commission Guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1–33 (hereafter: The 2008 Guidelines), and Commission Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55 (hereafter: The 2014 Guidelines).
[923] Article 6 of the previous Treaty.
[924] See Nollkaemper, A., (2002), "Three Conceptions of the Integration Principle in International Law", p. 25. See again the discussion in section 1.4. The Theoretical Perspective of the Integration Principle.
[925] Maduro reflects that some legal scholars understand such Court of Justice interpretations as a legal activism and not only a judicial decision. In Maduro, M. (2007), "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism," pp. 141-142.

normalized the use of the Guidelines for assessing the compatibility of aid measures.[926]

The Commission uses the Guidelines (currently the CEEAG) as a framework for deciding whether a State aid measure should be classified as compatible aid.[927] As I discuss later in subchapter 8.2; the classification of a State aid measure as incompatible aid entails a prohibition on imposing the measure in the first place or a ban on keeping it, with recovery and interest payments being charged to the beneficiary of the aid. Therefore, there is no doubt that the classification of a State measure as compatible or incompatible aid has extraordinary effects, especially if lawmakers are unaware of the measure's State aid effects.

For instance, an environmental tax that was a general and domestic measure initially may become subject to the Commission's control and monitoring if it is classified as compatible aid, or forbidden if it is classified as incompatible aid. Consequently, the Commission's *decisions* classifying a State measure as compatible or incompatible aid based on the CEEAG are legally binding on the Member State concerned, according to Article 288 TFEU. In this sense, even if the CEEAG does not generate a direct legally binding effect that can be invoked in the national court, it indirectly generates a legally binding effect through the *decision* that uses the CEEAG as a legal source for the State aid conclusion. This is a problem from a tax law perspective, since the Member States have full tax discretion in matters harmonized by EU secondary laws,

The Commission uses the Guidelines also to inform all Member States about its position on the subject of State aid for environmental protection, energy, and with the last CEEAG, on climate. The Guidelines make the Commission's State aid agenda more transparent to all Member States, showing them what they could expect from the Commission's work in monitoring and controlling State aid measures. In a way, the Guidelines increase legal certainty concerning what the Member States could expect from that institution's work, which is highly relevant in State aid cases and for the

[926] See case C-159/01, *Netherlands v Commission,* paras. 59–63, where the Court of Justice dismiss one of the Netherlands grounds of annulment to the Commission's State aid decision that qualified the measure as incompatible aid based on the Commission's Guidelines. See also in case C-88/03, *Portugal v Commission,* paras. 100–105.

[927] The Commission's Guidelines establish a period of implementation, usually 6 to 7 years. The first EEAG from 2001 to 2008, the second EEAG from 2008 to 2014, the third EEAG from 2014 to 2020 (prolonged until 2021), and the last CEEAG from 2022 to 2027.

interplay between the EU and the Member States.[928] In another way, however, the Commission's State aid Guidelines spur the legal debate concerning their use and that of other soft laws as a form of integration of EU law.[929]

The CEEAG includes climate as a subject and aligns the State aid control system with the European Green Deal.[930] The CEEAG is explicit on the view that the integration occurs through a trade-off between the negative impact on competition and the benefits to the environment. It states that the CEEAG applies "to State aid granted to facilitate the development of economic activities in a manner that improves environmental protection."[931] Consequently, although the use of soft laws to regulate fiscal measures is questionable, the CEEAG deals with the issue of conflict between the negative effect in the functioning of the internal market resulting from the granting of State aid and the protection of the environment. Hence, it integrates the environmental protection requirements mandated in Article 11 of the TFEU.

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[928] See in C-409/00, *Spain v Commission*, paragraph 95, applying the principles of legal certainty and legitimate expectation. In the case, C-325/85, *Ireland v Commission*, paragraph 18, the Court of Justice held that "… Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, so that those concerned may know precisely the extent of the obligations which they impose on them." In case C-585/13 P, *Europäisch-Iranische Handelsbank v Council*, paragraph 95, the Court explains the principle of legitimate expectation related to the Commission's soft laws binding effects on the Commission.

[929] See for instance, Cini, M., (2001) "The soft law approach: Commission rule-making in the EU's state aid regime."

[930] See section 1, *Introduction,* para. 1 of the CEEAG.

[931] In section 2, subsection 2.1, para. 12 of the CEEAG. In the previous Guidelines, the Commission declared that "the general objective 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" (in section 3, recital 30 of the 2014 CEEG). In section 1, paras. 9–10, the CEEAG stated the following view. "9. It is generally accepted that competitive markets tend to bring about efficient results in terms of prices, output and use of resources. However, State intervention may be necessary to facilitate the development of certain economic activities that would not develop at all or would not develop at the same pace or under the same conditions in the absence of aid. The intervention thereby contributes to smart, sustainable and inclusive growth. 10. In the context of environmental protection, environmental externalities, information imperfections and coordination failures mean that the costs and benefits of an economic activity might not fully be taken into account by market participants when taking consumption, investment and production decisions, in spite of regulatory interventions. Those market failures, that is to say, situations in which markets, if left to their own devices, are unlikely to produce efficient outcomes, do not lead to optimal welfare for consumers and society at large, resulting in insufficient levels of environmental protection in relation to the economic activities conducted in the absence of State support."

The CEEAG is the framework for assessing compatibility when the GBER is not applicable.[932] Now, moving away from the CEEAG, the GBER is another type of law applicable to fiscal measures that do not follow the special legislative procedure and is also issued by the Commission.[933] However, it does have a legal prescription of the TFEU in Article 109 and Article 108(4). Hence, the Commission use of the GBER to regulate automatic compatible aid measures is not problematic.

The current GBER regime was recently amended[934] aligning it with the latest Guidelines on the subject, the CEEAG, concerning the regime for compatible aid. However, only the GBER exempts the Member States from the notification procedure and the standing-still clause established in Article 108(3) TFEU. Consequently, both laws (the GBER and the CEEAG) regulate the integration of environmental protection into Article 107(3) TFEU similarly in general terms.[935] The classification of a State aid measure as compatible aid is therefore conditioned to the CEEAG regime when it falls outside the scope of the GBER. However, the Commission's classification of

[932] Section 1, para 6, and subsection 2.2, para. 16 of the CEEAG, and in case C-143/99, *Adria-Wien Pipeline GmbH*, para. 31, where the Court of Justice even cites the Commission's 1994 CEEG as legal reference for the compatibility assessment.

[933] Based on Article 109 of the TFEU the Council gives the Commission power to issue the GBER through Article 108(4) of the TFEU.

[934] In 2008, the Commission passed the first regulation on the subject of State aid for *environmental protection* and energy: the General Block Exemption Regulation, the GBER (Commission Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty).The first GBER formally and explicitly integrated environmental protection at the compatibility level, thereby creating a State aid control system less burdensome for the Member States. It relieved them of the notification requirement laid down by Article 108(3). Then, in 2014, the Commission replaced the first GBER with the second one (Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty). The latter was twice amended and extended by the Commission. The first amendment is in force until 31 December 2023 (Commission Regulation 2020/972 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014). The second amendment is in force until 31 December 2026 (Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, C/2023/4278 OJ L 167, 30.6.2023, p. 1–90).Even though the cutting date for this text is 31 May 2023, I refer to the changes of this last Regulation since I became aware of them before its publication. However, that cutting date is still valid for scholarly input about it.

[935] In section 7.3 I discuss such similarities and in section 7.4 I discuss where they differ.

a State aid measure as compatible aid under Article 107(3)[936] requires that the measure also comply with relevant primary and secondary EU law, as well as with the general principles of EU law.[937] In Figure 3, we can see how the GBER and the CEEAG constitute the regime of the State aid control system:

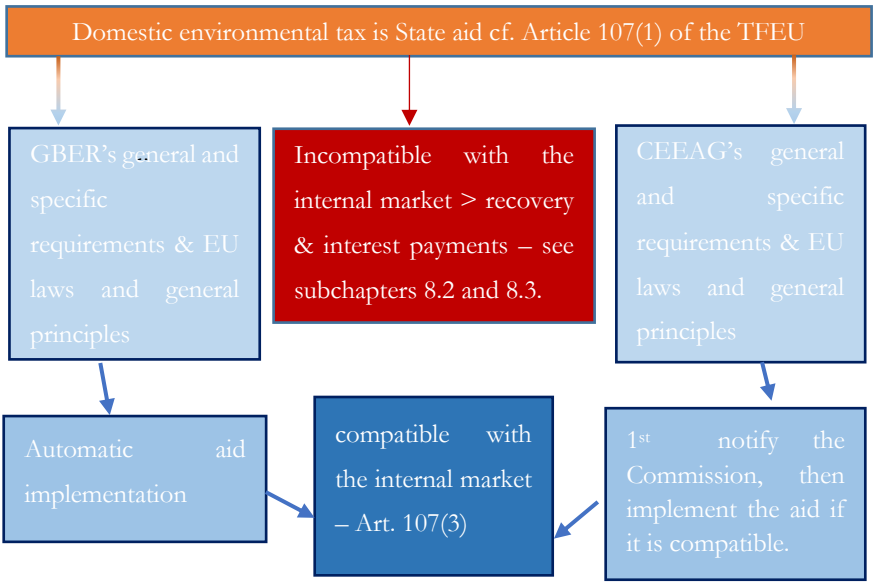

Figure 3: The regime of the State aid control system, with the GBER and CEEAG for the assessment for compatibility.

6.2.3. Legal status of the Commission's Notices

The Commission's Notices are also relevant to the discussion in this subchapter. They have formed part of the Commission's State aid legal framework for nearly two decades.[938] As in the case of the Guidelines, the Court of Justice accepts the use of Notices for the Commission's State aid

[936] Based on Article 108(3) of the TFEU.
[937] See discussion in section 7.2 Incompatible Aid.
[938] For instance, the Commission Notice on the application of the State aid rules to measures relating to direct business taxation from 1998 and the Commission Notice on the definition of the relevant market for the purposes of Community competition law, among others.

decisions, which means they are also legal sources for the integration (or not) of environmental protection requirements.

In the *Commission v Gibraltar* case, the Court of Justice explained that the Commission is not allowed to diverge from its Notices when doing an assessment of State aid.[939] This prohibition arises from the principle of equal treatment.[940] However, the Court left unexplained how the principle of equal treatment would have such an effect on the Commission in cases where it departs from the Notice in question.[941] Hence, my conclusion is as follows. When the Commission issues a Notice, it communicates how it understands certain subjects to the Member States. The Member States, aware of the Commission's opinion through the contents of the Notice, expect such an opinion in the case of a State aid notification or investigation. So, when the Commission proceeds on the basis of the contents of the Notice in one decision but not in another, it may be treating the Member States differently in the two cases. Consequently, the Commission may be breaching the principle of equal treatment when adopts a position different from the one stated in the Notice.[942] Moreover, it acts contradicting its understanding and not as the Member States expected from its Notice, thereby breaching another principle, namely the principle of legitimate expectation.

The Notices and the Guidelines legally bind the Commission to their contents. As a legal effect, this binding safeguards the principles of equal treatment and of protection of legitimate expectations concerning the rules used in such investigations or notification procedures.[943] Like the Guidelines, the Commission's Notices do not follow a legislative procedure. They are a document prepared by the Commission, usually gathering several case laws on different aspects of the State aid control system. The Commission usually includes its future agenda and new understandings on matters not discussed judicially at EU courts in its Notices.[944] This has occasioned intense debate

[939] In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para. 128.
[940] *Ibid idem.*
[941] *Ibid,* paras. 129–134.
[942] *Ibid idem.*
[943] In joined cases C-106/09 P and C-107/09 P, *Commission v Gibraltar,* para., paras. 123–134.
[944] For instance, the Commission states its role in the State aid control system with the following view. "Given that the notion of State aid is an objective and legal concept defined directly by the Treaty, this Notice clarifies the Commission's understanding of Article 107(1) of the Treaty, as interpreted by the Court of Justice and the General Court ('the Union Courts'). On issues that have not yet been considered by the Union Courts, the Commission will set out how it considers that the notion of State aid should be construed. The views set out in this

among scholars concerning the limits of the Commission's leeway and the extent of the Member States' tax discretion. Below, I discuss a specific circumstance which the Commission brings up in the Notice on the notion of State aid.

6.2.4. Application of the Commission's Notices

The Commission explained the following position concerning the second step of the *selective advantage* condition. A derogation from the normal regime can occur even if the measure aims has an environmental protection objective, provided it is seeking an external policy objective.[945] In such cases, the environmental protection aim is not a priority and does not influence the tax structure. Consequently, the State aid tax treatment is unjustifiable.[946] The Commission stated the following in the subsequent paragraph of the Notice.:

> *The structure of certain special-purpose levies (and, in particular, their tax bases), such as environmental and health taxes imposed to discourage certain activities or products that have an adverse effect on the environment or human health, will normally integrate the policy objectives pursued. In such cases, a differentiated treatment for activities or products whose situation is different from the situation of those activities or products which are subject to the tax as regards the intrinsic objective pursued, does not constitute a derogation.*[947]

The Commission did not base the above position on any case law. It simply clarified that environmental taxes imposed on undesired environmental activities would not meet the selectivity part of the State aid condition prescribed in Article 107(1). This position considers activities with a harmful environmental impact not to be comparable to activities that lack a similar

Notice are without prejudice to the interpretation of the notion of State aid by the Union Courts; the primary reference for interpreting the Treaty is always the case–law of the Union Courts." In para. 3 of the Notice on the notion of State aid.

945 In para. 135 of the Notice on the notion of State aid.

946 *Ibid idem.*

947 *Ibid*, in para. 136.

effect. It emphasized the tax base as one of the most critical components of the design of the environmental tax. This position aligns with the conclusion of Chapter 5 about the environmental impact of activities as a parameter.[948] Thus, when the environmental tax has an environmental impact as a tax base in connection with the objective of protecting the environment from that harm, it does not confer a selective-advantage tax treatment and so does not qualify as State aid.

Considering, for instance, an environmental tax that seeks to mitigate climate change. To achieve this aim, it can use greenhouse gas emissions per ton from a particular sector of interest as a tax base. The activities from the sector excluded from the scope of the tax – i.e., which are not taxed – are not in a comparable situation provided their emission is insignificant. However, this position is problematic. Discouraging a harmful activity or encouraging a good practice can have a similar design in a tax. Lawmakers can discourage harmful activity by levying a tax not previously imposed on the environmental impact generated by the activity. Based on the Notice in question, the tax can be general. Lawmakers can also encourage a good practice, by excluding it from the scope of the tax.[949] They can also use the environmental impact or lack thereof as a tax base. However, the GBER and the CEEAG regulate tax advantages that has incentive effects as compatible aid.[950] Lawmakers should therefore be careful about using the environmental impact of activities as a tax base for discouraging or encouraging such, especially when rules and requirements set out in the GBER or the CEEAG cover the subject.

Before the Notice on the notion of State aid, the Commission's State aid hard and soft laws were not explicit about the possibility of environmental taxes that do not meet the *selective advantage* condition. In the statement quoted above, the Commission made clear that it integrates environmental protection into its interpretation of the *selective advantage* condition.

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[948] In section 4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings.

[949] As discussed in Chapter 5, particularly in section 4.2.4. The second parameter for assessing material selectivity: Exclusion from the scope of the tax.

[950] The Swedish case with the excise on motor fuels, discussed in section 1.3.3 (see Box 1: The Swedish excises on motor fuels – a case of compatible aid). The Swedish excise scheme aims to discourage fossil fuels and encourage sustainable biofuels both as a source of motor fuels, and yet, it is compatible aid and not a general measure.

6.3. General Conditions Set Out in the GBER and the CEEAG

6.3.1. Overview of the GBER and the CEEAG

The current GBER has been in force since 2014. It was due to expire at the end of 2020. However, the Commission decided to prolong it until 31 December 2026, after two extensions and substantial amendments.[951] The last amendment modernized the GBER and aligned it with the European Green Deal and the European Digital Agenda.[952] In this subchapter, I discuss conditions set out in the GBER that may prescribe environmental protection requirements for environmental taxes as compatible aid or as a general measure (when environmental protection is an aim, for example). NB: the latest amendment to the GBER put an end to the discrepancy between the GBER and the CEEAG with regard to the conditions reviewed here, so I am also referring to the CEEAG in this discussion. In this way, I can avoid repeating certain arguments.

Implicit in the GBER's automatic system of compatible aid is the responsibility of the Member States to comply with its provisions.[953] Interestingly, the last amendment to the GBER excluded aid for production of nuclear energy from its scope.[954] Now aid measures undertaken by a Member State must be assessed under the CEEAG, since the Commission cannot classify them as incompatible aid solely because of their evident

[951] In Recital 5 of Commission Regulation 2020/972 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments, and in Recital 2 Regulation EU/2023/1315.
[952] In Recital 4 of Regulation EU/2023/1315.
[953] In recital 29 of the un-amended GBER. See also, in Werner, P., and Verouden, V., (2017), "EU state aid control: law and economics," p. 15.
[954] In Article 1(3)(a-b) of the GBER (amended) about the GBER's scope to fisheries, aquaculture, and agriculture. Article 1(6) of the GBER (amended) excludes aid for the production of nuclear energy from section 7 concerning aid for environmental protection. In section 8.2 discussion, the fact that the Commission excluded from the GBER's scope aid for the production of nuclear energy simply means that this type of aid cannot be exempted from the notification procedure of Article 108(3) of the TFEU. They must be then assessed based on the CEEAG. The Commission is not allowed to classify this type of aid as incompatible with the internal market unless the EU changes the Euratom.

impact on environmental and human health.[955] Despite this, the amended GBER extends the reach of aid measures that the Commission considers important for the EU's environmental and climate targets.[956]

Depending on the type of aid, the thresholds and specific requirements vary.[957] The GBER has various classifications for different types of *aid for environmental protection*,[958] with specific requirements and special regimes for each classification. I discuss this further in subchapter 7.4.

All of the aid measures covered by the GBER and the CEEAG[959] must involve (i) an objective of common interest (e.g., environmental protection)[960]

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[955] Such incompatibility would require a change in the Euratom. See discussion in this regard in subchapter 7.2. Incompatible Aid.

[956] For instance, farther reaching aid for hydrogen in different circumstances, in Recitals 17 and 18, Article 2(102b and 102c) of the GBER (amended). Or, investment aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation, in Article 45 of the GBER (amended).

[957] See Articles 1 and 4(1) of the GBER (amended), which essentially increased the threshold values of the aids that fall within the GBER's scope.

[958] Amended by Regulation EU/2023/1315, Article 1(29) to (45), the types of aid for environmental protection covered by the GBER are the following. Investment aid for environmental protection, including decarbonization (Article 36). Investment aid for recharging or refueling infrastructure (Article 36a). Investment aid for the acquisition of clean vehicles or zero-emission vehicles and for the retrofitting of vehicles (Article 36b). Investment aid for energy efficiency measures other than in buildings (Article 38). Investment aid for energy efficiency measures in buildings (Article 38a). Investment aid for energy efficiency projects in buildings (Article 39). Investment aid for the promotion of energy from renewable sources, of renewable hydrogen and of high-efficiency cogeneration (Article 41). Operating aid for the promotion of electricity from renewable sources (Article 42). Operating aid for the promotion of energy from renewable sources and of renewable hydrogen in small projects and renewable energy communities (Article 43). Aid in the form of reductions in taxes under Directive 2003/96/EC (Article 44). Aid in the form of reductions in environmental taxes or parafiscal levies (Article 44a). Investment aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation (Article 45). Investment aid for energy efficient district heating and/or cooling (Article 46). Investment aid for resource efficiency and for supporting the transition towards a circular economy (Article 47). Investment aid for energy infrastructure (Article 48). Aid for studies and consultancy services on environmental protection and energy matters (Article 49).

[959] In the CEEAG, they are all listed in section 3 about *Compatibility assessment under Article 107(3), point (c) of the Treaty*.

[960] Recital (3) of the GBER (amended) establishes a general 10% increase of the aid amount covered by the GBER, stating that such change will "not lead to competition distortion contrary to the common interest."

and (ii) an incentive effect;[961] they must also be (iii) appropriate,[962] (iv) proportionate,[963] (v) transparent,[964] and (vi) subject to control and reevaluation by the Commission;[965] and (vii) they must not impact trading conditions in a manner contrary to the common interest.[966]

The CEEAG, published in 2022, sought to modernize the rules on State aid and to align them with the EU Green Deal and the "Fit for 55" package.[967] It will be in force until 31 December 2027.[968] The Member States have until 31 December 2023 to amend their existing aid schemes to in accordance with its

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961 See the following section 7.3.2 discussion about tax advantages having incentive effects. Article 6(2) of the GBER (not amended) establishes the following conditions to consider the aid as having an incentive effect. "Aid shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts. The application for the aid shall contain at least the following information: (a) undertaking's name and size; (b) description of the project, including its start and end dates; (c) location of the project; (d) list of project costs; (e) type of aid (grant, loan, guarantee, repayable advance, equity injection or other) and amount of public funding needed for the project;"

962 Before the amendment, Recital 22 of the GBER established the following view about aid proportionality and appropriateness. "With a view to ensuring that aid is proportionate and limited to the amount necessary, maximum aid amounts should, whenever possible, be defined in terms of aid intensities in relation to a set of eligible costs. Where the maximum aid intensity cannot be set, because eligible costs cannot be identified or in order to provide simpler instruments for small amounts, maximum aid amounts defined in nominal terms should be set out in order to ensure proportionality of aid measures. The aid intensity and the maximum aid amounts should be fixed, in the light of the Commission's experience, at a level that minimises distortions of competition in the aided sector while appropriately addressing the market failure or cohesion issue. For regional investment aid, the aid intensity should comply with the allowable aid intensities under the regional aid maps."

963 *Ibid idem.* In Recital 17 of GBER (amended) states the following view. ".(…). In light of the experience gained by the Commission regarding State aid measures supporting clean mobility, it is appropriate to introduce specific compatibility conditions to ensure that the aid is proportionate and does not unduly distort competition by shifting demand away from cleaner alternatives."

964 Article 5(1) of the GBER (not amended) establishes that only transparent aid measures are covered by the Regulation. Now, Recital 1 of the amended GBER starts by stating the relevance of transparency in the State aid control system: "Transparency of State aid is essential for the correct application of Treaty rules and leads to better compliance, greater accountability, peer review and ultimately more effective public spending. (…)"

965 Articles 10 to 12 of the GBER establish general aspects of the monitoring system. Note that only Article 11 of the GBER was amended.

966For instance, before the amendment Recital 13 of the GBER stated that "aid in favour of a beneficiary which is subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market should be excluded from the scope of this Regulation, with the exception of aid schemes to make good the damage caused by certain natural disasters." This example of aid would adversely affects trading conditions contrary to the common interest.

967 In Recitals 1 and 2 of the CEEAG.

968 In section 8, about *Revision,* para. 469

provisions.[969] The CEEAG covers thirteen different types of aid.[970] One of them, termed *Aid in the form of reductions in taxes or parafiscal levies*, establishes the regime for compatible aid in the form of environmental taxes.

The Commission is very clear in the CEEAG about the trade-off it aims to achieve by allowing State aid measures for climate, environmental protection, and energy.[971] It recommends that the Member States comply with the EU's environmental laws and involve the public in their decision-making regarding State aid on the subject.[972] However, individuals and organizations (e.g., NGOs and non-competing companies) do not have *locus standi* to challenge the Commission's State aid decisions in EU courts.[973] Despite this, the CEEAG recommends that the Member States offer individuals the opportunity to challenge, in their national courts, the lawfulness of aid measures in connection with EU environmental laws.[974] This advice shows

[969] In section 7, about *Applicability,* para. 469(a) of the CEEAG.
[970] They are listed in subsection 2.2., about *Aid measures covered by these guidelines,* para. 16 (a) to (n), from which (c) and (d) are both under the subsection 4.3 concerning *Aid for clean mobility.*
[971] In section 1, about *Introduction*, paras. 7-10 of the CEEAG, which states the following. "7. (…) Any reference to 'environmental protection' in these guidelines should be understood as a reference to environmental protection, including climate protection. 8. Under Article 107(3), point (c) of the Treaty, an aid measure may be declared compatible with the internal market provided that two conditions, one positive, one negative, are fulfilled. The positive condition is that the aid must facilitate the development of an economic activity. The negative condition is that the aid must not adversely affect trading conditions to an extent contrary to the common interest. 9. It is generally accepted that competitive markets tend to bring about efficient results in terms of prices, output and use of resources. However, State intervention may be necessary to facilitate the development of certain economic activities that would not develop at all or would not develop at the same pace or under the same conditions in the absence of aid. The intervention thereby contributes to smart, sustainable and inclusive growth. 10.In the context of environmental protection, environmental externalities, information imperfections and coordination failures mean that the costs and benefits of an economic activity might not fully be taken into account by market participants when taking consumption, investment and production decisions, in spite of regulatory interventions. Those market failures, that is to say, situations in which markets, if left to their own devices, are unlikely to produce efficient outcomes, do not lead to optimal welfare for consumers and society at large, resulting in insufficient levels of environmental protection in relation to the economic activities conducted in the absence of State support."
[972] In section 1, about *Introduction*, para. 11 stating the following view. "Member State authorities should ensure that the aid measure, the conditions attached to it, the procedures for adopting it and the supported activity do not contravene Union environmental law. Member State authorities should also ensure that the public concerned has the opportunity to be consulted in decision-making on aids. Finally, individuals and organisations should be given the opportunity to challenge the aid or measures implementing the aid before national courts where they can adduce evidence that the Union environmental laws are not complied with."
[973] See discussion in subchapter 7.2 about Incompatible aid.
[974] In section 1, about *Introduction*, para. 11.

the Commission's awareness of multiple State aid problems, including procedural ones. When it comes to the general content of the GBER and the CEEAG that may involve environmental protection requirements, I discuss the following in this subchapter:[975]

1. Environmental tax as a general concept, in section 6.3.2;[976]
2. Environmental protection as a general concept, in section 6.3.3;
3. Union standard and minimum Union tax level as general concepts, in section 6.3.4;
4. Evaluation plan as a general concept, in section 6.3.5.

6.3.2. Environmental tax

The GBER and the CEEAG define environmental taxes as follows:

> *[The term] "environmental tax or parafiscal levy" means a tax or a levy applied on a specific tax base, products, or services that have an apparent negative effect on the environment or which seeks to charge certain activities, goods, or services so that the environmental costs may be included in their price or so that producers and consumers are oriented towards activities which better respect the environment.*[977]

With this updated conceptualization of environmental taxes and parafiscal levies, the amended GBER uses the same exact definition as the CEEAG.

[975] Recalling what I explained din the introduction. Lawmakers could legislate on an environmental tax taking the view that it is State aid, and thereby comply with the GBER to ensure its automatic imposition and subject it to the Commission's monitoring system. Alternatively, they could use the GBER as a legal reference establishing minimum standards for their general environmental tax that aims higher levels than the GBER. The same logic applies for the use of the CEEAG.

[976] See also subchapter 2.4.

[977] In Article 2(119) of the GBER (amended). In subsection 2.4, about *Definitions,* para.19 (40) of the CEEAG.

From this definition, I can extract three alternative requirements that environmental taxes – in a broad sense, including parafiscal levies – must fulfill.[978] Taxes of the following type qualify:

a) "A tax with a specific tax base that has a clear negative effect on the environment";
b) "[a tax] which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price";
c) "[a tax] which seeks to tax certain activities, goods or services so that producers and consumers are oriented towards activities which better respect the environment."

In (a), the tax base is a proxy for the *clear negative effect of the activities on the environment*. Hence, depending on how lawmakers evaluate the negative economic effect, the tax is connected to a greater or to a lesser degree with the actual environmental damage. This design feature is seen as penalizing polluters but not necessarily protecting the environment. This view can change, however, if the revenues raised are actually used to reduce the societal burden of environmental damage.[979]

Pitrone notes that the words "negative effect on the environment" relate to the "deterioration … of free environmental goods or a reduction of the supply of such goods," and that such an effect "must be a tolerable environmental deterioration, possibly reversible and reparable."[980] However, she explains, when the deterioration is irreversible and permanent, other instruments than taxes should be used: e.g., sanctions and prohibitions on the activities that have such effects.[981] Pitrone also contends that, in order to reach a conclusion about the "clear" impact on the environment, evidence is

[978] About this broad definition, see again discussion in section 2.7 Environmental Taxes Overlapping the Concept of *Aid*.
[979] See, in Pitrone, F. (2014), *Environmental Taxation: A Legal Perspective*, p. 60.
[980] *Ibid idem.*
[981] *Ibid idem.*

required, such as a scientific assessment of the impact of the undertakings on the environment.[982]

If there is no connection between the tax designed according to the GBER's and CEEAG's first approach and the *de facto* environmental protection effect, the environmental rationale is weakened. One way to strengthen the environmental rationale of such a tax is to earmark the revenues raised by it for remedying the environmental impact and societal costs of such activities.[983] The Court of Justice seems to consider this feature to be evidence of the *environmental* rationale and objective of the tax, as discussed in Chapter 5 in connection with the KernbrStG, *ANGED*, and *UNESA* cases.[984] It bears noting, however, that domestic legislators are not obliged by any EU law to earmark the revenues of environmental taxes. Taxes (and not fees) impose no such obligation on governments to use the revenues for a particular reason due to their budgetary nature.[985] Besides, it may be that such revenues are not at all connected to the environmental damage caused by the activities or products taxed. The tax may also be unable to address the exact pollution that is in question. For instance, a tax on greenhouse gas emissions will not be imposed on the molecule that gave cause to that tax imposition.

The GBER's and CEEAG's second approach (b) to environmental taxes establishes "a tax which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price." This approach seeks to ensure that the activities or products internalize the costs of the environmental pollution to which they give rise. This represents an

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[982] *Ibid idem.*

[983] García, E. G. and Roch, M. T. S. (2016), "Environment and Taxation: State Intervention from a Theoretical Point of View," pp. 37-64 discussion, in special, p. 63. Also, D. Soares, C. A. (2012), "Earmarking revenues from environmentally related taxes," where she discusses effectiveness and efficiency of earmarking environmental taxes, particularly in pp. 110-113.

[984] See in cases C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück*, C-233/16 to C-237/16, *ANGED,* and joined cases C-105/18 to 113/18, *UNESA*. The Court of Justice also discussed the effects of allocating the revenues raised by a tax to meet its environmental purposes and how the revenue allocation (earmarking) could create a direct between the tax's *de jure and de facto* environmental effects. In case C-82/12, *Transportes Jordi Besora SL v Generalitat Catalunya*, paragraphs 30-32.

[985] Määttä discusses the differences between taxes and charges relating to governmental obligations. He explained that "taxes are unrequired payments in which benefits provided by governments to taxpayers are not normally in proportion to their payment. Charges are paid by individuals and companies to authorities in return for services received." In Määttä, K. (2005), *Environmental taxes: an introductory analysis,* p. 17. He exemplifies the charges on waste management to cover the costs of the municipal service to manage waste and goes on to discuss the nuances between environmental taxes and charges.

implementation of the polluter pays principle (PPP). The amended GBER and the CEEAG clarify that the PPP means that "the costs of measures to deal with pollution should be borne by the polluter who causes the pollution."[986]

Neither the GBER nor the CEEAG define "environmental costs." However, the meaning is implicit in the definition of the PPP and in approach (b) above. The amended GBER and the CEEAG state that the definition of "pollution" is set out in Article 3(2) of Directive EU/2010/75.[987] "Pollutant" is now defined in both laws with reference to Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment.[988] In practice, more comprehensive definitions of "pollution" and "pollutant" serve as inspiration for efforts by lawmakers to address environmental issues. The "polluter" in approach (b) is the taxpayer. The GBER and the CEEAG define "polluter" similarly:[989]

> *[S]omeone who directly or indirectly damages the environment or who creates the condition to such damage.*[990]

This definition concerns who should pay environmental taxes that seek to internalize the environmental costs of various activities or products. Thus, the GBER may restrict lawmakers' tax discretion in respect of their choices of taxpayers. However, the GBER's approach (b) is not necessarily a matter of compatible aid. In Chapter 5, I discuss the parameter of general

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986 Also Article 2(122) of the GBER (not amended) defines the PPP as mentioned in Recital 20 of the amended GBER. In subsection 2.4, about *Definitions,* para.19 (58) of the CEEAG.

987 In Article 2(123b) of the GBER (amended) and in subsection 2.4, about *Definitions,* para.19(57) of the CEEAG condition such definition to Article 3(2) of Directive EU/2010/75, which states the following view. "'[p]ollution' means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment;"

988 In Article 2(123a) of the GBER (amended) and in subsection 2.4, about *Definitions,* para.19(55) of the CEEAG states that the definition o "pollutant" is prescribed in Article 2(1) of the Regulation EU/2020/852 that states the following view. "'[p]ollutant' means a substance, vibration, heat, noise, light or other contaminant present in air, water or land which may be harmful to human health or the environment, which may result in damage to material property, or which may impair or interfere with amenities and other legitimate uses of the environment;"

989 However, the CEEAG refers to the definition of Annex, point 3 of the Council Recommendation 75/436/Euratom, ECSC, EEC, and the GBER does not.

990 In Article 2(125) of the GBER (not amended) and in subsection 2.4, about *Definitions,* para.19(56) of the CEEAG.

environmental taxes according to which the tax base and the distribution of the tax burden among taxpayers is based on their environmental impact. In my view, such a tax can be an implementation of the PPP if there is a link between the tax burden and the cost of the pollution. Pace Rodi and Ashiabor, the PPP is not a legal principle justifying selective treatment, but rather a tax feature that is either general or selective.[991] The conclusion depends on the tax structure that lawmakers choose.

Also, the GBER's definition of an *environmental tax* in (b) mentions three different categories of taxpayer as polluters. First, "activities": e.g., the extraction of natural resources. Second, "goods": e.g., cars or the parts of a car. I understand definition as regarding methods of producing of or transporting goods that require the use of natural resources and energy and that emit pollution. Third, "services" (e.g., transport) that are connected with the supply of services, and which require environmental resources and energy and pollute the environment in order to render the service. In the case of indirect taxes, however, the taxpayers-polluters are not just the specific agents that give rise to the pollution; they also include the final consumers who pay for the tax passed along in the production or supply chain. Thus, the 'polluter' definition of the GBER of a "polluter" as someone "indirectly" damages the environment includes these consumers and taxpayers of indirect taxes.

Finally, only implementing the PPP does not halt the environmental damage,[992] or guarantee that the measure addresses the actual polluter.[993] By itself, therefore, the measure may not suffice to ensure *de facto* environmental protection.

However, if a tax succeeds in changing polluting behavior, it can protect the environment substantially. The last GBER definition of an environmental tax – (c) – is in line with this view.[994] It concerns the effectiveness of environmental taxes as a regulatory instrument: i.e., their capacity to regulate the conduct of taxpayers with regard to the environmental issue targeted by

[991] Cf. Rodi, M., and Ashiabor, H. (2014), "Legal authority to enact environmental taxes," p. 74.
[992] See, in Pitrone, F. (2014), *Environmental Taxation: A Legal Perspective*.
[993] For instance, in case of indirect taxes.
[994] Recalling it, (c) "a tax … which seeks to tax certain activities, goods or services … so that producers and consumers are oriented towards activities which better respect the environment".

the tax legislator.[995] If environmental taxes are capable of changing behavior that depletes natural resources or gives rise to other kinds of ecological damage, then they may help protect the environment.

Considering, for example, a tax that aims to discourage consumers from consuming meat, because of the greenhouse gas emissions connected with cattle breeding, deforestation, and the burning of large areas to turn them into pasture. Assuming that the tax, an excise duty, is levied on all meat sources bred by undertakings the primary or secondary economic activity of which is to produce meat for consumption. Also, assuming that meat consumption falls by 35 percent after three years, and by 55 percent after five (which is approximately what the Member State imposing the tax expected). By reducing meat consumption, such a tax successfully changes behavior and probably increases environmental protection. However, the impact is only substantial if meat producers must reduce their production because of the change in meat consumption – and if consumers do not shift from eating meat to eating something else with a comparable environmental impact. Or even, if producers do not sell the meat to another market (e.g., in Asia instead of Europe).[996] Finally, such a meat excise raises progressively less revenue over time.[997]

This last design feature is the only one among the three that can ensure *de facto* environmental protection.[998] This objective and effect are also features of a general tax. Thus, what makes an environmental tax State aid or general is mostly its selectivity effect – i.e., how it distributes the tax burden among comparable taxpayers.[999] Consequently, the GBER's and CEEAG's definition of environmental taxes can be useful for designing such taxes as general or as compatible aid.

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[995] See, in this regard, Määttä, K. (2005), *Environmental taxes: an introductory analysis*, p. 37.
[996] The environmental problem evasion to other countries is an issue that can compromise the overall environmental protection effect of the tax, even though it is not the domestic tax legislator problem. It requires global coordination to avoid such evasions.
[997] Note that such hypothetical meat excise duty would have to comply with the Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.
[998] See again in this regard Pitrone, F., (2015), "Designing "Environmental Taxes": Input from the Court of Justice of the European Union".
[999] As discussed in Chapter 5.

Compatible aid for environmental protection must have an incentive effect towards an environmental aim.[1000] Article 6, paragraph 4 of the unamended GBER states the following two conditions for considering tax advantages to have an incentive effect:

> *4. […], measures in the form of tax advantages shall be deemed to have an incentive effect if the following conditions are fulfilled:*
>
> *(a) the measure establishes a right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and*
>
> *(b) the measure has been adopted and is in force before work on the aided project or activity has started, except in the case of fiscal successor.*[1001]

Based on the above, the first condition (a) restricts the selective effect of the measure, since some case of selective treatment would not meet this objective condition.[1002] The second condition (b) forbids lawmakers to enact an environmental tax to strengthen the competitive position of its beneficiaries, except in the case of a fiscal successor. The aid in question – the Swedish excise on motor fuels (see again Box 1: The Swedish excises on motor fuels – a case of compatible aid) – has been prolonged and altered over time.

6.3.3. Environmental protection

The GBER and the CEEAG define environmental protection as follows:

> *"'[E]nvironmental protection' means any action or activity designed to reduce or prevent pollution, negative environmental*

[1000] In Article 6(1) of the GBER (not amended).
[1001] Article 2(2) of the GBER (not amended) defines 'fiscal successor' with the following view. "'fiscal successor scheme' means a scheme in the form of tax advantages which constitutes an amended version of a previously existing scheme in the form of tax advantages and which replaces it."
[1002] See again discussion in subchapter 4.2. 4.2. The First Step: Identification or Determination of the Tax Regime.

impacts or other damage to physical surroundings (including to air, water and soil), ecosystems or natural resources by human activities, including to mitigate climate change, to reduce the risk of such damage, to protect and restore biodiversity or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy and other techniques to reduce greenhouse gas emissions and other pollutants, as well as to shift to circular economy models to reduce the use of primary materials and increase efficiencies. It also covers actions that reinforce adaptive capacity and minimise vulnerability to climate impacts."[1003]

Based on the above, this definition of *environmental protection* concerns particular issues. Before the amendment of the GBER, the definition was broader.[1004] The current approach highlights the effect that environmental protective measures must achieve, as it set outs clear targets. However, as discuss later in section 7.2. Incompatible Aid, an aid should be classified as compatible if it complies with primary and secondary EU laws on the subject or is based on general principles of EU law. Consequently, the GBER's definition of environmental protection is more illustrative than comprehensive.

Before it is levied, moreover, lawmakers can only forecast the effectiveness of an environmental tax. Once a Member State has imposed such a tax, it should control its substantive effects over a certain period, and then adjust it if needed. The following section is relevant in this regard, because it concerns Union standards for securing a degree of environmental effectiveness.

[1003] In Article 2(101) of the GBER (amended) and in subsection 2.4, about *Definitions,* para.19 (39) of the CEEAG.

[1004] Compare with the previous version that stated the following view. "'[e]nvironmental protection' means 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;"

6.3.4. Union standard and Union minimum tax level

The GBER and the CEEAG also define a "Union standard" as meaning:

> *"(a) a mandatory Union standard setting the levels to be attained in environmental terms by individual undertakings, excluding standards or targets set at Union level which are binding for Member States but not for individual undertakings; or*
>
> *(b) the obligation to use the best available techniques (BAT), as defined in Directive 2010/75/EU of the European Parliament and of the Council (*19), and to ensure that emission levels do not exceed those that would be achieved when applying BAT; where emission levels associated with the BAT have been defined in implementing acts adopted under Directive 2010/75/EU or under other applicable directives, those levels will be applicable for the purposes of this Regulation; where those levels are expressed as a range, the limit for which the BAT is first achieved for the undertaking concerned will be applicable;"*[1005]

As can be seen from the above, the GBER and the CEEAG specify two alternative meanings for a *Union standard*. The first alternative (a) concerns a mandatory Union standard, which covers all possibilities that are not established in (b). This, however, is under the condition that they are standards for undertakings and not for the Member States.

Unfortunately, this means that life-cycle assessment (LCA) (also called life-cycle perspective or approach) that is becoming more like an EU standard than a recommendation is not a Union standard in this sense.[1006] However,

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[1005] In Article 2(102) of the GBER (amended) and in subsection 2.4, about *Definitions,* para.19 (88) of the CEEAG.

[1006] For instance, the Directive 2018/852 on packaging and packaging waste states in Recital (6) and (7) the following view about life-cycle perspective. "(6) Member States should put in place adequate incentives for the application of the waste hierarchy including economic instruments and other measures. Such measures should aim at minimising the environmental impacts of packaging and packaging waste from a life-cycle perspective, taking into account, where appropriate, the benefits of using bio-based materials and materials suitable for multiple recycling (…). (7) Fostering a sustainable bio-economy can contribute to decreasing the Union's dependence on imported raw materials. Bio-based recyclable packaging and

lawmakers can use LCA to determine when undertakings meet Union standards. Alternatively, lawmakers can use LCA to estimate environmental footprint of undertakings, which is critical for the determination of beneficiaries. "Individual undertakings," as I understand it, are the beneficiaries of the aid.

The second alternative (b) refers to the use of "best available techniques" (BAT) to ensure that emissions respect the limits of pollutants allowed by secondary EU law on the subject. Unlike the first (a) definition, which can include any standard, the second (b) definition is specific to the BAT as defined in Directive EU/2010/75. Hence, the qualification of a State aid measure as compatible aid requires that the measure meet the Union standard on the subject of the aid. Lawmakers can thus avoid the State aid qualification if they comply with EU standards concerning the LCA and BAT and aim at higher levels than the specific targets for environmental protection. This is because a general measure cannot have a lower or similar environmental protection effect than a compatible aid measure, because the latter concerns a trade-off of values. In the assessment of compatibility, such a trade-off is about gaining environmental protection at a certain level, while it compromises the level playing field of the internal market at a level the Commission considers acceptable. As Blauberger clarifies, this balancing

compostable biodegradable packaging could represent an opportunity to promote renewable sources for the production of packaging, where shown to be beneficial from a life-cycle perspective." The Directive on the promotion of clean and energy-efficient road transport vehicles states in Recital 24 the following view. "Life-cycle costing is an important tool for contracting authorities and contracting entities to cover energy and environmental costs during the life-cycle of a vehicle, including the cost of greenhouse gas emissions and other pollutant emissions on the basis of a relevant methodology to determine their monetary value. Given the scarce use of the methodology for the calculation of operational lifetime costs under Directive 2009/33/EC and the information provided by contracting authorities and contracting entities on the use of own methodologies tailored to their specific circumstances and needs, no mandatory methodology should be required to be used, but contracting authorities and contracting entities should be able to choose any life-cycle costing methodology in order to support their procurement processes on the basis of the most economically advantageous tender ('MEAT') criteria as described in Article 67 of Directive 2014/24/EU and Article 82 of Directive 2014/25/EU, taking into account cost-effectiveness over the lifetime of the vehicle, as well as environmental and social aspects". Also, in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *the EU Biodiversity Strategy for 2030*, COM(2020) 380 final, in section 3.3.3 about *Measuring and integrating the value of nature,* which includes life-cycle approaches and natural capital accounting as measures to the estimate environmental footprint of products and organizations. See scholar input about this trend in Sala, S., *et al.,* (2021), "*The evolution of life cycle assessment in European policies over three decades*."

(which I call a *trade-off*) ensures the consistency of the EU system with other policies.[1007]

The same logic would apply if the EU had set minimum tax levels, which it has not.[1008] To date, the definition of the "*Union minimum tax level*" in the GBER and CEEAG only applies to taxes implementing the Energy Taxation Directive (ETD).[1009] Except in regard to the ETD, the Member States remain free to decide on their environmental tax levels, since the EU has not harmonized any other law except the ETD.

6.3.5. Evaluation plan

An evaluation plan is mandatory for aid that involves large sums. The CEEAG requires an evaluation plan for large aid measures that fall outside the GBER's scope because they are above the GBER's thresholds.[1010] The Commission accepts large-scale aid without notification procedure for a short period (6 months).[1011] After this period, the Commission will assess the effectiveness of the aid and decide whether to extend it based on the evaluation plan.[1012] The evaluation plan is critical for the Commission's assessment.[1013] The GBER defines the terms as follows:

[1007] In Blauberger, M., (2009), *"*Compliance with rules of negative integration: European state aid control in the new member states*"*, p. 3.

[1008] See discussion in section 2.6 EU Environmental Taxes: Legislative Possibilities and EU Aims.

[1009] In Article 2(120) of the GBER (not amended) and in subsection 2.4, about *Definitions,* para.19 (89) of the CEEAG state the following view. "'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 (1);"

[1010] *Ibid*, p. 14. In the CEEAG, section 5, about *Evaluation,* para. 462 states: "In case of aid schemes excluded from the scope of a block exemption regulation exclusively on the grounds of their large budget, the Commission will assess their compatibility solely on the basis of the evaluation plan."

[1011] In Article 1(2)(a) of the GBER (amended).

[1012] *Ibid idem.*

[1013] In Recital 8 of the non-amended GBER clarifies the following view about the evaluation plan relevance. "In view of the greater potential impact of large schemes on trade and

> *[The term] "evaluation plan" means a document containing at least the following minimum elements: the objectives of the aid scheme to be evaluated, the evaluation questions, the result indicators, the envisaged methodology to conduct the evaluation, the data collection requirements, the proposed timing of the evaluation including the date of submission of the final evaluation report, the description of the independent body conducting the evaluation or the criteria that will be used for its selection and the modalities for ensuring the publicity of the evaluation;*[1014]

The CEEAG takes a clearer approach to defining the term. Its definition lists seven requirements.[1015] It also clarifies why the Commission requires such a

competition, aid schemes with an average annual State aid budget exceeding a threshold based on an absolute value should in principle be subject to State aid evaluation. The evaluation should aim at verifying whether the assumptions and conditions underlying the compatibility of the scheme have been achieved, as well as the effectiveness of the aid measure in the light of its general and specific objectives and should provide indications on the impact of the scheme on competition and trade. In order to ensure equal treatment, State aid evaluation should be carried out on the basis of an evaluation plan approved by the Commission. While such plan should normally be drawn up at the moment of the design of the scheme and approved in time for the scheme to enter into force, this may not be possible in all cases. Therefore, in order not to delay their entry into force, this Regulation will apply to such schemes for a maximum period of six months. The Commission may decide to extend this period, upon approval of the evaluation plan. To this end, the evaluation plan should be notified to the Commission within 20 working days following the entry into force of the scheme. The Commission can also exceptionally decide that an evaluation is not necessary given the specificities of the case. The Commission should receive from the Member State the necessary information to be able to carry out the assessment of the evaluation plan and request additional information without undue delay allowing the Member State to complete the missing elements for the Commission to take a decision. In view of the novelty of this process, the Commission will provide, in a separate document, a detailed guidance on the procedure applicable during the 6 months period for the approval of the evaluation plan and the relevant templates through which the evaluation plans will have to be submitted. Alterations of schemes subject to evaluation, other than modifications which cannot affect the compatibility of the aid scheme under this Regulation or cannot significantly affect the content of the approved evaluation plan, should be assessed taking account of the outcome of such evaluation and should be excluded from the scope of this Regulation. The alterations such as purely formal modifications, administrative modifications or alterations carried out within the framework of the EU co-financed measures should not, in principle, be considered as significantly affecting the content of the approved evaluation plan".

1014 In Article 2(16) of the GBER (not amended).

1015 Based on the CEEAG, which is more comprehensive in this regard, conditioning the evaluation plan to the Commission Staff Working Document, Common Methodology for State Aid Evaluation. In the CEEAG, section 2.4, about *Definitions,* para. 41 states the following: 'evaluation plan' means a document covering one or more aid schemes and containing at least the following minimum aspects: (a) the objectives to be evaluated, (b) the evaluation questions, (c) the result indicators, (d) the envisaged method to conduct the evaluation, (e) the data collection requirements, (f) the proposed timing of the evaluation including the date of

plan. First, such a plan is required due to the impact of large-scale aid on the internal market if it is not well-designed. Second, a plan is needed in order to maximize efficiency gains connected to the large budget involved. Finally, a plan is necessary for an evaluation of data based on the size of the aid involving different kinds of beneficiaries. Section (5) of the CEEAG establishes a regime for the evaluation plan,[1016] since large-scale aid measures are assessed solely on the basis of their evaluation plan.[1017] Below, I discuss seven elements of the evaluation plan.[1018]

1. *Objectives of the aid scheme to be evaluated*: the goals must be set out clearly and transparently, so that the Commission can grasp the logic and effects of the aid.[1019]
2. *Evaluation questions*: the plan must clarify (a) the direct impacts and (b) the indirect impacts of the aid on undertakings (especially beneficiaries), and show the (c) proportionality and appropriateness of the aid.[1020]
3. *Result indicators:* the plan should quantify the results to be achieved by the aid.[1021]
4. *The method(s) for conducting the evaluation*: the plan should clarify what method was used to assess the impact of the aid (the so-called "causal impact"), and explain its appropriateness. The document states that

submission of the interim and the final evaluation reports, (g) the description of the independent body that will carry out the evaluation or the criteria that will be used for its selection and the modalities for making the evaluation publicly available; In the CEEAG, section 5, about *Evaluation,* para. 460 states that the evaluation plan must comply with the Commission's "common methodological principles" established in the Commission Staff Working Document, Common Methodology for State Aid Evaluation.

[1016] In section 5, about *Evaluation,* paras. 455–463.

[1017] In section 5, about *Evaluation,* para. 462.

[1018] Based on the Commission Staff Working Document, Common Methodology for State Aid Evaluation, pp. 6-14.

[1019] *Ibid,* p. 6. It should include "the needs and problems the scheme intends to address, the target beneficiaries and investments, its general and specific objectives, and the expected impact." Including which assumptions were taken concerning "external factors that might affect the scheme".

[1020] *Ibid,* in pp. 6-7.

[1021] *Ibid*, p. 7. It also establishes that the indicators should be explained regarding their relevance. It also refers to the Annex II of that document which provides a non-exhaustive list of results indicators as exemplification of direct and indirect impact of the aid.

the "causal impact" is "the difference between the outcome with the aid and the outcome in the absence of the aid."[1022]

5. *Data collection requirements*: the plan should show that it has used the best possible sources and that it has sufficient data for the impact assessment.[1023]
6. *Timeline of the evaluation*: the plan should show the timeframe by which it was carried out, including all assessment steps.[1024]
7. *Description of the independent body conducting the evaluation*: this description should show that the evaluator was independent and had the expertise required for the assessment. The working paper explains that "the evaluation of the impact of the State aid scheme should be objective, rigorous, impartial and transparent."[1025]

It is important to stress that the Commission Staff Working Document is a working document. Yet it establishes conditions for the evaluation plan that are critical for the Commission's assessment of the impact of the aid. The evaluation plan is a legal requirement that large-scale aid benefit the GBER's automatic implementation system. Thus, this document is formally a soft law, but materially it is legally binding on the Member States regarding their compliance with the GBER in this regard. In my view, the evaluation plan shows lawmakers' awareness of the measure's impact on competition, the environment, and transparency. These aspects are relevant both for compatible aid and for general measures.

[1022] *Ibid,* pp. 7-10.
[1023] *Ibid*, pp. 10-11.
[1024] *Ibid,* "An evaluation plan should provide information on the precise timeline of the evaluation, which will be set in accordance with the approved duration of the scheme, and should include milestones, i.e. for collecting the data, carrying out the evaluation and submitting the final report. The timeline could vary according to the scheme and should therefore be discussed and agreed with the Commission on a case-by-case basis. Those involved in the management of schemes are advised to facilitate informal discussion on the content of the plan before submitting their official notification to the Commission.".
[1025] *Ibid,* p. 12.

6.4. The Specific Legal Requirements of the GBER and CEEAG for Environmental Taxes

6.4.1. Initial remarks

I discuss the special regime for environmental taxes established by the GBER and the CEEAG, and how lawmakers can use such minimum standards to legislate compatible aid and even general taxes. This discussion may help fulfill my research purpose, in the sense of explaining the minimum standards set by these laws, even for general measures (with higher levels).

6.4.2. The GBER's special regime for environmental taxes

After the last amendment of the GBER, the special regime[1026] for environmental taxes is set out in the new Article 44a, for Aid in the form of reductions in environmental taxes or parafiscal levies, as follows.

> *1. Aid schemes in the form of reductions in environmental taxes or parafiscal levies 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. This Article shall not apply to reductions in taxes or levies on energy products and electricity, defined in Article 2 of Directive 2003/96/EC.*
>
> *2. Aid in the form of reductions in environmental taxes or parafiscal levies shall be compatible only where the reduction allows to achieve a higher level of environmental protection by including in the scope of the environmental tax or levy*

[1026] See paragraph 1 of Article 44a of the amended GBER.

undertakings that would not be able to pursue their economic activities without the reduction.

3. Only those undertakings that would not be able to pursue their economic activities without the reduction are eligible for aid. For the purposes of this Article, this is considered the case for undertakings whose production costs would substantially increase due to the environmental tax or parafiscal levy without the reduction and which are not able to pass that increase on to customers. The increase in the production costs shall be calculated as a proportion of the gross value added for each sector or category of beneficiaries.

4. The beneficiaries shall be selected on the basis of transparent, non-discriminatory and objective criteria. The aid shall be granted in the same way to all eligible undertakings operating in the same sector of economic activity that are in the same or similar factual situation in respect of the objectives of the aid measure.

5. The gross grant equivalent of the aid shall not exceed 80 % of the nominal rate of the tax or levy.

6. Aid schemes in the form of reductions in environmental taxes or parafiscal levies may be based on a reduction of the applicable tax rate or on the payment of a fixed compensation amount or on a combination of these mechanisms."[1027]

Prior to the amendment, environmental taxes were implicit in several of the GBER's specific classifications of aid for environmental protection. Sometimes environmental taxes (due to their tax credits, advantages, exemptions, reductions, etc.) have been classified as investment aid, and at other times as operating aid.[1028] Now, after the amendment, environmental

[1027] After the Regulation EU/2023/1315 amendment, Article 1(42).

[1028] For instance, the Commission published a sheet called General Block Exemption Regulation (GBER) Frequently Asked Question, in which questions and answers about Articles 36 to 58 are available for consultation since March 2016. In paragraph 179, the Commission answered a question about Article 41 of the GBER (about investment aid for the promotion of energy from renewable sources). The question and answer were: "Can credit tax be granted as investment aid? Investment aid for the promotion of energy from renewable sources should be, in line with Article 41(5) only granted to new installations. It should be granted and paid out before the installations start to operate. Aid that is paid out in

taxes shall follow the specific provisions of Article 44a quoted above, unless their objective and effect fit better in the classification for operating or investment aid. The main differences regarding the classification are the varying specific requirements and the thresholds regarding the amount of the aid. Thus, depending on the classification, the automatic system of the GBER may allow larger aid sums.[1029]

From the standpoint of tax law, as I see it, Article 44a of the amended GBER contains three problematic conditions – in paragraphs 3, 5, and 6. Paragraph 3 above restricts lawmakers' discretion regarding the distribution of the tax burden among taxpayers. Hence, it limits the scope of the selective effect of the tax advantage. Paragraph 5 (with its "shall"), seems to limit the tax benefits to no more than an 80% reduction of the normal tax burden. Thus, it also restricts lawmakers' discretion to choose the distribution of the tax burden. Finally, paragraph 6 sets a less restrict condition (with its "may") concerning the possibility of a tax reduction or rebate from the normal tax rate. Hence, this paragraph suggests how the lawmakers are to confer the tax advantage.

From a tax law perspective, the Commission does not have the power under Article 108(4) TFEU to limit lawmakers' discretion on the choice of taxpayers, tax rates, or tax advantages. From a State aid perspective, however, this position is less problematic. Under Article 108(4), the Commission has the power to regulate the conditions of compatible aid that can be automatically implemented without the notification procedure set out in Article 108(3). Thus, establishing which selectivity and advantage effects of

tranches, during a certain period of time after the installations have started to operate, in different forms (including tax credits) is usually not considered investment aid, but operating aid, even if it is meant to cover (also) investment costs. Thus, tax credits would fit into operating aid concept, and not investment aid under Article 41 of the GBER. Despite that, in the case SA.45184 (2016/N), Italy, Evaluation plan of the tax credit scheme for regional investment aid in Southern Italy, the Commission considered a tax credit as part of a regional investment aid. The S.A. 44328, Netherlands, *Aanwijzingsregeling willekeurige afschrijving en investeringsaftrek milieu-investeringen* 2009 (Designation scheme arbitrary depreciation and investment deduction for environmental investments 2009), seems to be about tax advantage and exemptions to: investment aid enabling undertakings to go beyond Union standards for environmental protection or increase the level of environmental protection in the absence of Union standards (Article 36 of the GBER); investment aid for remediation of contaminated sites (Article 45 of the GBER); and, investment aid for waste recycling and reutilization (Article 47 of the GBER).

[1029] See Article 4(1) points (s-z) about investment aid and operating aid for different purposes with different thresholds in the non-amended GBER by Regulation EU/2023/1315.

taxes are compatible with the internal market is not as problematic from a State aid perspective as it is from a tax law perspective.

While paragraph 2 quoted above seems to establish that environmental taxes must reach a substantial environmental protection effect at a higher level (my guess from the EU minimum standards). However, the relevant Recital of the amended GBER may contradict this. According to Recital 22 of Regulation EU/2023/1315, "in some circumstances, reductions in environmental taxes or parafiscal levies can indirectly contribute to a higher level of environmental protection." The words "indirectly contribute" are very vague, especially in reference to effectiveness at achieving specific environmental or climate targets. *What might an indirect benefit of a higher level of environmental protection be?* Unfortunately, I cannot answer this question. Perhaps this is just an unfortunate explanation that got included in the Recital – as an "inheritance" from the previous GBERs that regulated energy and environmental taxes.[1030] Energy taxes were regarded as having such indirect benefits for the environment. [1031] Despite this, the GBER's specific condition in Article 44a, paragraph 2, and its definitions relevant to environmental taxes – *environmental protection* and *environmental taxes* – lead to a different conclusion.[1032] The tax must achieve environmental protection at a higher level than the EU to be classified as compatible aid.

Without a direct environmental protection objective, the tax will not have a strong environmental rationale within its structure. For example, the tax burden will not be based on the comparative environmental impact of undertakings that are taxed normally and those that receive tax exemptions. Thus, the tax loses the environmental protection requirements that would ensure its general status.[1033] Hence, an energy tax that prioritizes an energy objective (e.g., ensuring the supply of energy) over a concern with environmental protection seems more likely to be classified as compatible aid than as a general tax. However, the State aid control system should not rule

[1030] See input in about the issue of direct and indirect impact on the environment in Pitrone, F., (2015), "*Designing 'Environmental Taxes': Input from the Court of Justice of the European Union*," and Ezcurra, M. V., (2013), "*State Aids and Energy Taxes: Towards a Coherent Reference Framework*."
[1031] Before, the non-amended GBER states that environmental taxes containing tax reductions to energy products and electricity, covered by the Energy Tax Directive, indirectly benefit the environment. In recital 64 of the GBER.
[1032] See discussion in section 6.3.3. Environmental protection.
[1033] See discussion in Chapter 4 about the environmental impact as a parameter for general environmental taxes.

out the possibility of lawmakers' enacting general energy (environmental) taxes, mainly when lawmakers use the following rationale. The environmental impact of the energy sources determines the relative tax burden of different energy producers alongside the amount of energy produced in kilowatts/hours. This way, lawmakers can directly connect the energy tax with the environmental protection objective.

Finally, Article 44a, paragraph 4 shows that it is extremely difficult to separate a general environmental tax from a compatible aid. A non-discriminatory and objective tax might not even be selective. If it is not selective, then it is general, and it is not conditioned on the regime established by the GBER or the CEEAG. Consequently, the conditions set out in paragraph 4 can only apply to cases of *de facto* selectivity, or to cases where leaving certain sectors outside the scope of the tax does not make any sense.[1034]

6.4.3. The CEEAG's special regime for environmental taxes

The CEEAG does not consider that aid has an incentive effect when it covers the costs of adaptation to EU standards – but instead only when the aid aims beyond such standards.[1035] The CEEAG establishes general requirements regarding the incentive effect[1036] and specific requirements for *aid in the form of reductions in environmental taxes and parafiscal levies.*[1037] The special regime

[1034] See discussion in sections 4.2.4. The second parameter for assessing material selectivity: Exclusion from the scope of the tax and 4.3.3.3. De facto selective – discriminatory.
[1035] In section 3, para. 32 of the CEEAG, the Commission states what follows in this regard: "The Commission considers that aid granted merely to cover the cost of adapting to Union standards has, in principle, no incentive effect. As a general rule, only aid to go beyond Union standards can have an incentive effect. However, in cases where the relevant Union standard has already been adopted but is not yet in force, aid can have an incentive effect if it incentivises the investment to be implemented and finalised at least 18 months before the standard enters into force, unless otherwise indicated in the Sections 4.1 to 4.13. In order not to discourage Member States from setting mandatory national standards that are more stringent or ambitious than the corresponding Union standards, aid measures may have an incentive effect irrespective of the presence of such national standards. The same is true of aid granted in the presence of mandatory national standards adopted in the absence of Union standards."
[1036] In subsection 3.1.2 about *Incentive effect* of the CEEAG.
[1037] In section 4.7.1 of the CEEAG.

divides environmental taxes into two different types.[1038] One type penalizes behavior that harms the environment and encourages undertakings and consumers to make "greener" choices. The other pushes undertakings to adopt more environmentally friendly practices.

The CEEAG establishes the environmental tax rationale for those instruments that penalize harm to the environment.[1039] The most relevant aspects of these instruments are listed below.[1040]

1. The costs of environmental externalities (harm) from the behavior must be internalized. Since it is the behavior which is targeted through the tax imposition, the costs are passed on to the final consumers, as it is the case of indirect taxes.
2. The internalization of costs should discourage the behavior tackled by the tax, thereby increasing the level of environmental protection (the effect).
3. The internalization of costs should correspond to the total costs of the environmental issue addressed (e.g., CO_2 emission). The implicit message here is that the internalization should not be partial.
4. The tax burden should be distributed among taxpayers based on their environmentally harmful behavior.
5. Tax reductions might reduce the environmental effectiveness of the tax, although they are needed when the beneficiaries would not be in a competitive situation without the aid.

[1038] *Ibid,* in para. 292 states the following description of the two regimes. "Section 4.7 covers aid in the area of environmental protection in the form of reduction in taxes or parafiscal levies. It is structured in two sub-sections, each of them having a distinct logic. Section 4.7.1 tackles taxes or levies which sanction environmentally harmful behaviour and therefore aim to direct undertakings and consumers towards more environmentally-friendly choices. Under Section 4.7.2, Member States may choose to encourage, by means of targeted reductions in taxes or levies, undertakings to change or adapt their behaviour by engaging in more environmentally-friendly projects or activities."
[1039] *Ibid,* in para. 293.
[1040] Based on para. 293.

6. The competitive disadvantage of the beneficiaries must be genuine to the extent that, without the tax reductions (aid), the environmental tax would not be feasible.

In my view, aspects 1-4 are also the rationale for general taxes that seek environmental protection through the internalization of environmental externalities; and the last two are the ones that characterize the tax as State aid. I now focus on the last two. The tax reductions are consciously granted to the undertakings based on their competitive situation, even if this compromises the environmental rationale for the tax. Lawmakers that want to avoid a compatible aid classification should refrain from this type of rationale for tax reductions. Instead, they should have the environmental impact of the activities as a requirement for tax reductions, as discussed in Chapter 4. However, this last point is tricky. It upholds competitive values at the cost of the environmental effectiveness of the tax. From an environmental protection point of view, such as the precautionary principle, this type of approach can be harmful. For instance, nuclear power producers might be beneficiaries of such aid. However, from an economic perspective and perhaps even a social one, State aid for nuclear power might be needed at times, such as during an energy crisis. Hence, given the trade-off required in this last situation, it seems logical that it occurs at the level of compatible aid.

The follow-up paragraph of the CEEAG reinforces the above conclusion.[1041] It establishes the selective effect of the tax advantage as compatible aid based on the beneficiaries' economic risk due to the imposition of the tax. According to the CEEAG, selective tax treatment for beneficiaries due to their economic risk can ensure "a higher general level of contribution to the environmental taxes."[1042] It seems the Commission takes the view that, when the tax puts undertakings at economic risk, their tax burden to can be reduced

[1041] *Ibid,* in para. 294 of the CEEAG that states the following view. "Where environmental taxes or parafiscal levies could not be enforced without putting the economic activities of certain undertakings at risk, granting a more favourable treatment to some undertakings may allow to achieve a higher general level of contribution to the environmental taxes or parafiscal levies. Accordingly, in some circumstances, reductions in environmental taxes or levies can indirectly contribute to a higher level of environmental protection. However, they should not undermine the overall objective of the environmental tax or parafiscal levy to discourage environmentally harmful behaviour and/or increase the cost of such behaviour where satisfactory alternatives are not available."
[1042] *Ibid idem.*

so as to minimize that negative impact – even if the tax thereby compromises its environmental effectiveness. Hence, the Commission's view that taxes might have indirect environmental protection effects. Finally, lawmakers should also consider whether the undertakings being taxed for their environmental harm have access to satisfactory alternatives. If not, they too should be granted tax reductions to reduce the negative economic impact. Hence, taxes levied to internalize environmental costs (i.e., to penalize undesired behavior) might be compatible aid, even when they prioritize undertakings for the following reasons: (1) The negative economic impact on their market position, or (2) no satisfactory alternatives to the undesired behavior are available on the market.

These two rationales cannot ensure the general status of environmental taxes, because they affect the environmental effectiveness of such taxes. However, the Commission establishes that the aid must ensure that the level of environmental protection is higher than without the aid.[1043] Thus, some protection is still ensured. However, this type of rationale does not ensure a general status, since this tax has a weak connection to the environmental protection objective and effect. The above discussion points to certain rationales that lawmakers should avoid if they want to secure the environmental effectiveness of their tax and thereby its general status. Finally, the CEEAG also lays down particular conditions for this type of aid in respect of the following issues: (1) distortions of competition and trade, which must be minimized;[1044] (2) necessity;[1045] (3) appropriateness;[1046] and (4) proportionality.[1047]

Considering the use of environmental taxes to incentivize activities that increase the level of environmental protection through tax reductions.[1048] The

[1043] The CEEAG in para. 295 establishes two cumulative conditions to consider the selective effect of the tax advantage as compatible aid: "(a) the reductions are targeted at the undertakings most affected by the environmental tax or levy that would not be able to pursue their economic activities in a sustainable manner without the reduction; (b) the level of environmental protection actually achieved by implementing the reductions is higher than the one that would be achieved without the implementation of these reductions." In para. 296, the CEEAG establishes the information the Member State must provide concerning the market situation."

[1044] In paras. 297–300 of the CEEAG.

[1045] In paras. 301–303 of the CEEAG.

[1046] In paras. 304–306 of the CEEAG.

[1047] In paras. 307–309 of the CEEAG.

[1048] In para. 310 of the CEEAG states the following rationale description. "Member States may consider incentivising undertakings to engage in projects or activities that increase the level of

CEEAG cross-refers to projects and activities that fall within the scope of other sections.[1049] Depending on the subject, the specific conditions fall in one regime or another.[1050] Moreover, the (i) incentive effect,[1051] (ii) proportionality,[1052] and (iii) the avoidance of undue negative effects on competition and trade[1053] also cross-refer to other sections, making an analysis of these questions too extensive for our purposes here.

6.5. Summary

Below, I summarize the most relevant findings of this Chapter 6.

Currently, the recently amended GBER and the CEEAG, forms the compatible aid legal regime. The Commission's laws and State aid decisions directly influence the interplay between the EU and the Member States from the top down and the integration of environmental protection thereto.

In subchapter 6.2, I have discussed the dual role of the Commission in the State aid control system and stressed the relevance of lawmakers not underestimating its effect on their tax discretion. Article 108 TFEU grants the Commission far-reaching leeway in the control and monitoring of State aid measures. It may seem contradictory that the body that legislates is also the body that adopts legally binding decisions applying the laws it has legislated.

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environmental protection by means of reductions in taxes or parafiscal levies. Where such reductions aim at incentivising the beneficiaries to undertake projects or activities resulting in less pollution or consumption of resources, the Commission will assess the measures in the light of the requirements set out in Section 4.7.2."

[1049] In para. 311 of the CEEAG. The aid scope it regulates in the for of environmental taxes and reductions are: section 4.2 Aid for the improvement of the energy and environmental performance of buildings; section 4.3 Aid for clean mobility; section 4.4 Aid for resource efficiency and for supporting the transition towards a circular economy; section 4.5 Aid for the prevention or the reduction of pollution other than from greenhouse gases; section 4.6 Aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation.

[1050] In paras. 310–324 of the CEEAG.

[1051] See cross-references stipulated in para. 314 of the CEEAG.

[1052] See cross-references stipulated in para. 319 of the CEEAG.

[1053] See cross-references stipulated in paras. 321 and 324 of the CEEAG.

Yet this dual role is not at odds with Article 108, which grants the Commission such powers while requiring the Member States to cooperate in providing all information needed. Furthermore, the Commission's leeway is so extensive that it could be seen as "back door" for dealing with sensitive issues that have not been dealt with successfully by legislative means at the EU level.[1054] For instance, the lack of environmental taxation at the EU level furnishes a reason to spur the negative integration of environmental taxes through the State aid control system.

Moreover, the Commission also makes its State aid agenda clear and known by the Member States when it enacts laws that state its own opinion on specific issues and which are not based on EU Courts' case law. Consequently, Member States should not underestimate the contents of these laws, even if the Commission establishes positions that could have the effect of harmonization through Guidelines (the CEEAG). The Court of Justice practice has long accepted the Guidelines use as setting out the compatible aid regime.[1055]

The discussion in subchapter 6.3 about conditions prescribed in the GBER and the CEEAG throws some light on a possible bottom-up approach (and answer the second research question). I analyze the substance of these laws' conditions as possible environmental protection requirements for designing environmental taxes as general measures or compatible aid. For instance, the description of "environmental taxes" as altering undesired behavior is an effect that can secure the general status of such a tax, since it ensures substantive environmental protection.[1056] This is especially the case if the tax burden is distributed according to the environmental impact of the activities in question.

[1054] In Garben, S. (2015) "Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers," p. 63, and In Gormsen, L. L., & Mifsud-Bonnici, C., (2017), "Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax," p. 6.

[1055] I also discussed this view in section 1.3.4. An overview of the EU case law on State aid concerning environmental protection as a value of the system.

[1056] Based on the discussion in section Environmental tax.

The GBER and the CCEAG now define "environmental protection,"[1057] the "polluter pays principle,"[1058] "polluters,"[1059] and "pollutant"[1060] more comprehensively than their previous versions did. Now they state the Commission's view (or the applicable EU law on the subject) of the most relevant issues to be addressed by legislators when they design State measures like environmental taxes.

Large-scale aid measures must have an evaluation plan that assesses their impact on the market. Such an assessment also shows lawmakers' awareness of the trade-off they make when enacting environmental taxes in respect of environmental protection and the distortion of competition. An evaluation plan is also relevant for general taxes, since it assesses the measures' actual effect or potential impact, thereby demonstrating lawmakers' awareness of such outcomes.

The EU has no environmental taxes currently, so there are no minimum EU tax levels that must be complied with, except the ETD.[1061] The Commission is clear that just meeting the EU's minimum environmental standards does not suffice as a rule to for achieving compatibility status.[1062] The Member States are legally bound by EU laws on the environment that sets minimum standards. Thus, the compatible-aid regime is allowed on the basis that environmental taxes reach above those standards, but at the cost of distorting competition. This regime becomes clearer when we analyze rules specific to the GBER and the CEEAG in connection with environmentally motivated tax reductions. Environmental taxes that penalize undesired behavior but grant tax advantages to undertakings due to the negative impact of such taxes on their economic position serve to compromise environmental effectiveness. They are examples of the kind of rationale that lawmakers should avoid when designing environmental taxes.

When legislating on environmental taxes, lawmakers can only forecast the effect in terms of environmental protection. However, they should aim for a higher level of environmental protection than that established by the Union

[1057] Based on the discussion in section 6.3.3. Environmental protection.
[1058] Based on the discussion in section 6.3.2. Environmental tax.
[1059] *Ibid idem.*
[1060] *Ibid idem.*
[1061] Based on the discussion of section 6.3.4. Union standard and Union minimum tax level."
[1062] *Ibid idem.*

in its secondary laws and in the GBER and the CEEAG.[1063] This way, they may be able to avoid a breach of Article 107(1) TFEU. However, that depends on the logic by which the tax burden is distributed among taxpayers. If it is distributed according to the logic of environmental protection, then the aid is likely general. If it strikes a balance between that logic concerns over competition, then it is likely a question of compatible or incompatible aid.

Finally, it is strategic to use the Commission's laws, in particular the GBER and the CEEAG, to benchmark the levels that domestic environmental taxes must at least comply with (and ideally exceed). In a State aid investigation of the tax, the Commission would be bound by its own laws. That is, it cannot contradict itself, especially when the Member State concerned achieves higher levels of environmental protection than are required by the Commission's own laws. Moreover, when lawmakers adopt a more stringent approach than the EU in general, the State aid control system should not become a legal barrier. Addressing environmental issues promptly should be understood as less costly for society than trying to remedy the damage later on, especially in connection with losses – in terms of biodiversity, human health, cultural heritage, etc. – that do not translate readily into economic proxies.[1064]

[1063] Based on the discussion of sections 6.3.4. Union standard and Union minimum tax level and section 6.4.3. The CEEAG's special regime for environmental taxes.
[1064] See discussion in subchapter 3.5.

7. Further Integrating Environmental Protection Into Other (Formal and Informal) Parts of the System

7.1. Introduction and Outline

In this chapter, I analyze five other forms of integration of environmental protection into the State aid control system. Since they diverse from each other, I explain how they relate to my research problems, purposes, and question in the outline that follows.

This chapter consists of seven subchapters. The first (7.1) is introductory; the last (7.7) summarizes the chapter's findings. In subchapter 7.2, I discuss the issue of integrating environmental protection when an environmental tax breaches Article 107(1) and Article 107(3), thereby failing to meet the legal requirements necessary to qualify as compatible aid. In this examination, I clarify the legal rationale concerning the classification of incompatible aid (which relates to the first research problem and purpose) and also analyze the possibility of increasing integration at this level (related to the second research problem and purpose). I provide answers to the first research question regarding what elements environmental taxes cannot present as means to circumvent the classification of the aid as incompatible.[1065] Additionally, I provide answers to the second research question by discussing the changes the EU legislators need to make within the EU system to ensure coherence with the EU aim to protect the environment.[1066]

In subchapter 7.3, I discuss that the impossibility of recovering incompatible aid could be a cause of a substantial lack of integration of environmental protection at this level. I examine how the procedural laws on recovery makes this process complex (related to the first problem, purpose and question) and

[1065] *In what circumstances do environmental taxes breach the EU's State aid laws, namely Article 107(3), and other laws, thereby subjecting taxes enacted by the Member States to the EU's State aid control system?*
[1066] *How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?*

even potentially impact the integration of environmental protection at this level (related to the second problem, purpose and question).

In subchapter, 7.4, I discuss the issue of who has the procedural right, the *locus standi,* to be part of the State aid notification procedure or to be a party to a judicial action to annul a State aid decision by the Commission (related to the first problem, purpose and question). The possibility (or lack thereof) of being part of the State aid notification procedure or of the judicial action also influences the integration (or lack thereof) of environmental protection into the State aid control system (related to the second problem, purpose and question).

In subchapter 7.5, I discuss the situation where the Member States choose to notify the Commission not because of obligation under Article 108(3) to provide notification of State aid measures, but rather to solve lawmakers' doubts about whether their environmental tax amounts to State aid in the first place (related to the second research problem, purpose and question). Thus, when a Member State adopts a precautionary approach in the State aid control system, in the sense calculating that "it is better to be safe than sorry," the Commission resolves the doubt by scrutinizing the environmental tax, thereby integrating environmental protection (or not) into its interpretation of the State aid conditions.

Subchapter 7.6 reviews an informal way of integrating environmental protection during Member States' legislative process concerning environmental taxes through lawmakers' learning from other countries' State aid problems. Since this subchapter is not about any law (or interpretation thereof) in the State aid control system, it offers an analysis of the practical effects of the State aid control system on the Member States' lawmakers, whereby the lawmakers of a particular country learn from the laws (and consequences thereof) in other countries (related to the second problem, purpose and question).[1067]

[1067] See in this regard, Gilardi, F. and Wasserfallen, F. (2019), "The politics of policy diffusion," p. 1.247.

7.2. Incompatible Aid

In this section, I discuss the issue of integration of environmental protection when the environmental taxes breach Article 107(1) and Article 107(3), and the Commission classifies them as incompatible aid.[1068] Since I mainly discuss this third level of integration in this section, I answer aspects of the first research question adapted to this part of the research.[1069] Thus, I investigate whether the substantive environmental content of State aid measures breach Article 107, or if any other legal issue generates non-compliance situation. To answer the first research question, I focus directly on the issue of compatibility.

The theoretical foundation of this breach is that Article 11 integrates environmental protection into the interpretation of the State aid rules according to Article 107(3), which is the leading legal reference for State aid for environmental protection.[1070] When a domestic measure breaches Article 107(1) and Article 107(3), this should be because the measure in question does not offer the minimum level of environmental protection desired. So, *what defines such a minimum level of environmental protection?*

Perhaps the first logical answer that non-lawyers would give to this question would be: scientific evidence on the environmental matter dealt with by the measure – i.e., the environmental impact of the activities in question. However, the answer to this question is constricted to the EU laws on the

[1068] The legal effects are, briefly, that the Member State cannot levy the environmental tax notified according to Article 108(3) of the TFEU, or the Member State is obliged to withdraw the environmental tax imposition, recover the amount of aid granted to the *beneficiaries* of the tax with interest payments. See procedural aspects in this regard, at the Council Regulation 1589/2015/EU laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification). The *beneficiaries* of the aid are the economic activities that receive financial help from the State. This concept is further discussed in Chapter 5 about the *selective advantage* condition. Also, as already explained, it is the Commission the EU institution responsible for the qualification of State aid measures as compatible or incompatible, as established in Article 108(1-3) of the TFEU.

[1069] The first research question adapted to this section is what follows. *In what circumstances do Member States' environmental taxes breach Article 107(1and Article 107(3)?*

[1070] See input in Nowag, J. (2016), *Environmental Integration in Competition and Free-Movement Laws*, pp. 114–117 concerning environmental integration at Article 107(2) of the TFEU level, but mostly focusing on Article 107(3) of the TFEU level in pp. 182–201, integration via non-breach to that paragraph.

environmental issue addressed. The Commission is obliged to classify a measure as incompatible aid when it conflicts with the following:

i. Other Treaty provisions.[1071]
ii. The general principles of EU law (e.g., the principle of equal treatment or non-discrimination),[1072] including environmental principles (e.g., the precautionary principle, the polluter-pays principle, the principle of sustainability, and the principle of protection of the environment).[1073]
iii. Secondary EU laws on the environmental matter that the State measure deals with,[1074] or with other issues (e.g., the coordination of procurement procedures set out in Directive 2004/17/EC).[1075]

It would seem logical that a compatibility decision cannot be contrary to the Treaties or to the general principles of EU law. From the point of view of EU law, however, it is questionable whether secondary EU laws on the environment and other matters (mentioned in iii above) can have such an effect on fiscal measures that are outside the scope and reach of such laws. The EU must follow the special legislative procedures laid down by Article 113, Article 115, Article 192(2), or Article 194(3) to approve secondary laws having binding effects on fiscal matters. However, the EU environmental laws enacted through Article 114, Article 192(1), or Article 194(3), followed an ordinary legislative procedure which should not be applicable to fiscal measures, such as environmental taxes. Despite this, the Court of Justice does not seem to limit the scope of the latter laws regarding their effects on the environmental issue addressed by the tax.

In the UNESA case, a preliminary ruling that concerned a tax on hydroelectricity producers across different autonomous regions in Spain, Spain's national court asked the Court of Justice whether the polluter-pays principle enunciated in the Water Framework Directive (EC/2000/60) precluded the imposition of the tax in question.[1076] The Court of Justice analyzed the tax, implicitly showing that the EU's secondary laws on the

[1071] In case C-204/97, *Portugal v Commission,* para. 41, and case C-156/98, *Germany v Commission,* para. 78.
[1072] In case C-390/06, *Nuova Agricast Srl v Ministero delle Attività Produttive,* para. 51.
[1073] In case C-594/18 P, *Austria v Commission,* para. 46.
[1074] See to this effect para. 43 of the judgment in case C-594/18 P, *Austria v Commission.*
[1075] In case C-594/18 P, *Austria v Commission,* paras. 631–695.
[1076] In joined cases C-105/18 to C-113/18, *UNESA,* para. 27.

environment enacted through Article 192(1) of the TFEU (such as the Water Framework Directive) have a binding effect on Member States' taxes.[1077] The Court of Justice granted some binding effect of the Water Framework Directive (an ordinary secondary EU law) on the tax in question, however, not regarding the essential characteristics and structure of such a tax.[1078]

The issue of compatibility arises when current scientific evidence shows that certain practices are no longer optimal from the standpoint of environmental protection, because they pose risks that are too serious (as in the case of nuclear power) – yet where the practices in question are legally permitted nonetheless. In such cases, EU case law shows that "the precautionary principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability" can be the reason why a State aid measure is not to be classified as incompatible aid.[1079] However, these legal principles will not uphold another rule that leaves the issue addressed by the aid to the discretion of the Member States. For instance, Article 194(1) sets out objectives for the energy market, but it does not address the issue of what energy sources are used. That remains at the discretion of the Member States.[1080] Consequently, the EU courts do not

[1077] *Ibid, paras. 28,* 31–45, implicitly when the Court of Justice analyzed if the tax would conflict with that Directive, concluding it did not.
[1078] *Ibid idem.*
[1079] In case C-594/18 P, *Austria v Commission,* para. 46, where the Court of Justice stated the following view. "The General Court therefore wrongly rejected, in paragraph 517 of the judgment under appeal, the Republic of Austria's argument that the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant on the ground that such an interpretation would be contrary to Article 106a(3) of the Euratom Treaty." Before this paragraph 46, the Court of Justice discussed in paragraphs 40–45, Austria's argument about Article 106a(3) of the Euratom Treaty not dealing with environmental protection and those legal principles, which means that the EU law on the environment (Article 37 of the Charter, Article 11 of the TFEU, Directive 2011/92/EU) applies to case.
[1080] *Ibid,* paras. 48–49, where the Court of Justice stated the following position about Article 194(1) of the TFEU. "(48) First, Article 194(1)(a) and (b) TFEU provides that, in the context of the establishment and functioning of the internal market, Union policy on energy aims to ensure the functioning of the energy market and security of energy supply in the Union. The Court has already observed that Article 194(1)(b) TFEU identifies security of energy supply in the European Union as one of the fundamental objectives of EU policy in the field of energy (see judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 156). Second, the second subparagraph of Article 194(2) TFEU provides that the measures adopted by the European Parliament and the Council are not to affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, and does not preclude that choice from being nuclear energy. (49) Thus, since the

accept the argument that State aid for nuclear power is contrary to any of the Union's primary and secondary laws, or to any of the general principles of EU law.

Austria lost two cases in connection herewith. One was at the end of 2020, when the Court of Justice issued a ruling in an annulment proceeding, in which Austria had challenged a Commission State aid decision that had found State aid for the construction of a nuclear power station in the UK to be compatible aid.[1081] Although the measure in question was not a tax, Austria sought an annulment of the Commission's judgment regarding the compatibility of the aid, to the effect that aiding the construction of a nuclear power plant is not an objective of common interest.[1082] The Court found that Article 107(3)(c) "does not make the compatibility of aid dependent on its pursuing an objective of common interest," but rather on its complying with EU law.[1083] It thus rejected the appeal, on the basis that nuclear power is not contrary to EU law. In this sense, Article 194 maintains the competence of the Member States regarding energy sources.[1084]

Then, in November 2022, Austria lost another case. The General Court rejected Austria's annulment proceeding concerning a Commission decision that classified State aid for the development of two new nuclear reactors in Hungary as compatible aid.[1085] Austria, supported by Luxembourg, sought to annul the decision regarding the compatibility of the aid, on the understanding that it violated general principles of EU law, as well as Directive 2014/25 on procurement by entities operating in water, energy, transport, and postal services.[1086] This case differed from the previous one, because the issue of compatibility was the link between the type of the aid

choice of nuclear energy is, under those provisions of the FEU Treaty, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, recalled in paragraph 33 of the present judgment, do not conflict, so that, contrary to the Republic of Austria's contentions, the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant."

[1081] In case C-594/18 P, *Austria v Commission,* para. 2.

[1082] *Ibid,* para 14.

[1083] *Ibid,* para. 39.

[1084] *Ibid,* paras. 48–49.

[1085] In case T-101/18, *Austria v Commission,* paras. 2–10. To the time of this writing (31 May 2023), this ruling is only published in French and German, so I used an online translator program to read the case (DeepL Translator).

[1086] *Ibid,* para. 20.

and the purpose of the aid.[1087] The General Court dismissed the case, on the grounds that the purpose of the aid did not contravene EU law.[1088]

Nicolaides' reflection on the substance of this last case fits the discussion here perfectly. He writes that "advocates of State aid policy that incorporates a mandatory environmental impact assessment would be legally wrong, even if they would be morally right or could be proven right by a social welfare analysis."[1089] In my view, Nicolaides is simply pointing out the limits of Article 11.

Even when scientific evidence shows that an economic practice has a significant adverse impact on the environment, Article 11 will not come to the rescue. It will not forbid the measure as incompatible aid (1) if EU laws on the subject leave the matter to the discretion of the Member States, or (2) if said laws do not expressly forbid the measure. Thus, when either or both of these circumstances obtain, scientific findings on environmental issues can fail to have any impact. The integration required by Article 11 is restricted to the formal aspects of EU law. That is, the fact that an activity is harmful to the environment is not considered in itself to constitute sufficient reason to integrate environmental protection.

[1087] *Ibid,* para. 25, where the General Court explained the following. "According to this case law, it follows that if the aid measure in question is indissolubly linked to the purpose of the aid, its compliance with provisions other than those relating to State aid will be assessed by the Commission under the procedure provided for in Article 108 TFEU, and this assessment may result in a declaration that the aid in question is incompatible with the internal market. On the other hand, if the measure in question can be detached from the purpose of the aid, the Commission is not required to assess its compliance with provisions other than those relating to State aid under that procedure." Translated with www.DeepL.com/Translator (free version).

[1088] *Ibid,* paras. 25–32.

[1089] Nicolaides, P., (2023), "The Link between State Aid and Environmental Provisions of EU Law," last accessed 10 May 2023, available at https://www.lexxion.eu/stateaidpost/the-link-between-state-aid-and-environmental-provisions-of-eu-law/.

7.3. Recovery of Incompatible Aid

In this subchapter, I discuss some general aspects of the recovery of incompatible aid, and I analyze its impact on the integration of environmental protection.[1090] State aid in place, which is classified as incompatible with the internal market must be to be abolished and recovered unless so doing is contrary to a general principle of Union law.[1091] The beneficiaries of the incompatible aid shall pay for the recovery of the aid granted,[1092] including interest payments (subject to a limitation period of ten years).[1093] The aim of the recovery is to restore, promptly and effectively, the competition levels of the internal market that had gotten distorted as a result of the incompatible aid.[1094] (It is not, accordingly, a penalty.[1095]) The Court of Justice explained:

> *"[I]t should be recalled that recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision. This must result in the actual recovery of the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid […]. By repaying, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored […].* [1096]

The term *unlawful aid* in the quote above refers to a breach of EU State aid law in a general sense, not to aid that breaches the obligation to notify.[1097] This clarification is necessary, because un-notified aid can be considered compatible with the internal market in a later analysis.[1098] As seen in the quote

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[1090] See, discussion in section 7.2. Incompatible Aid.
[1091] According to Article 16(1) of the Regulation 1589/2015. See also in section 7.2.
[1092] In Article 16(1) of the Regulation 1589/2015.
[1093] In Articles 16(1) and (2) and 17 of the Regulation 1589/2015.
[1094] In recitals 24 to 26 of the Preamble of the Regulation 1589/2015.
[1095] C-75/97, *Belgium* v *Commission*, para. 65.
[1096] In case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, para. 39.
[1097] See in this regard footnote 250.
[1098] See in this regard case C-301/87, *France v Commission,* para. 21, p. 357.

above, the Court understands that, when the beneficiaries of the incompatible aid pay for the aid recovery,[1099] their payment serves to restore the competition levels of the market *quo ante*: "returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the aid measure in question having been granted."[1100]

Within the framework of the State aid control system, the Member State that had granted the incompatible aid is responsible for recovering it, promptly and effectively,[1101] in response to the Commission's decision[1102] and in accordance with the procedures set out in its national law.[1103] However, the latter is subject to the condition that it enable "the immediate and effective execution of that decision, a condition which reflects the requirements of the principle of effectiveness."[1104]

The Commission is not required to assess the specific amount of aid to be recovered, but it must provide information sufficient to enable the Member State concerned to calculate the recovery value.[1105] The recovery of incompatible aid is a significant legal effect of the State aid control system, and it directly affects the interplay between the EU and the Member States in various ways.

[1099] I call "incompatible aid" instead of "unlawful aid" as mentioned in the quote to not confuse the different circumstances that these terms entails, as pointed out by Gormsen, L.L., & Mifsud-Bonnici, C., 2017, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax,* pp. 3-4. See also footnote 250.

[1100] In case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, para. 117, and in case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, para. 42.

[1101] In the preamble recitals 24 and 25 and Article 16(1) of the Regulation 2015/1589. See also, joined cases C-102/21 and C-103/21, *KW* (C-102/21), *SG* (C-103/21) *v Autonome Provinz Bozen,* paras. 44–48. The Court understood that Article 108(3) of the TFEU have a direct effect on the Member States, and thereby legally binds the national authority to recover the aid, concerning the part of the aid uncovered that did not meet the GBER requirements, and thereby breached Article 108(3) of the TFEU. See input about this case in Nicolaides, P., 2022, *Member States Must Recover of their Own Initiative Illegally Granted Aid,* last accessed 15 November 2023, available at https://www.lexxion.eu/stateaidpost/member-states-must-recover-of-their-own-initiative-illegally-granted-aid/.

[1102] In Article 16(2) of the Regulation 1589/2015.

[1103] In case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, para. 40.

[1104] *Ibid idem;* also, in case C-529/09, *Commission v Spain,* para. 92.

[1105] See, for instance, in joined cases T-755/15 and T-759/15, *Luxembourg, Ireland, Fiat Chrysler Finance Europe v Commission,* paras. 424–429, and case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, para. 41.

The obligation of the beneficiaries to pay for the unlawful State aid (together with interest) disregards any economic or social impact of such recovery – e.g., bankruptcy or loss of jobs.[1106] Workers at the beneficiaries of the aid may thus be negatively affected, if the recovery of the aid comes at the cost of the solvency of the businesses where they work.

The Court of Justice developed two equally relevant legal avenues that can result in the non-recovery of aid. The first way is when the Member State concerned calculates the recovery, based on the Commission's State aid decision, it finds that no aid had been granted.[1107] The Court had clarified in previous cases concerning incompatible aid in the form of tax advantages that the "recovery of aid means that the transactions actually carried out by the recipients of the aid in question must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid."[1108] In this case, implementing a national rule to avoid double taxation (not considered incompatible aid), while calculating the corporate tax due in that State with deduction or accreditation of the tax paid abroad on the same corporate income, could lead to zero income tax.[1109] The Court clarified that the recovery may result in zero owed, or in a lower amount than the one estimated by the Commission, because the recovery of tax advantages is calculated based on the national tax regime not considered incompatible aid.[1110] In a concrete case, a mechanism of double taxation avoidance considered general (not State aid) could lead to such zero taxation.

[1106] See, for instance, similar understanding in the case C-404/97, *Commission v Portugal*, paragraph 52, and case C-372/97, *Italy v Commission*, paragraph 105.

[1107] In paras. 36 and 37 of the case C-69/13, *Mediaset SpA v Ministero dello Sviluppo economico***.**

[1108] In case C-148/04, *Unicredito Italiano*, para. 119; the latter was quoted in joined cases C-164/15 P and C-165/15 P, *Commission v Aer Lingus Ltd*, *Ryanair Designated Activity Company, Ireland,* para. 93.

[1109] See in this regard, case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, paras. 39 to 53. See commentary to the referred case in Nicolaides, P., (2022), "Recovery of Incompatible Aid and the Application of General Provisions for the Avoidance of Double Taxation," last accessed 14 November 2022, available at https://www.lexxion.eu/en/stateaidpost/recovery-of-incompatible-aid-and-the-application-of-general-provisions-for-the-avoidance-of-double-taxation/.

[1110] In case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, particularly in paragraph 52, the Court stated: "As was pointed out in paragraph 39 of the present judgment, the Member State in question must actually recover the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid. While it is true that such a requirement necessarily implies that a Member State cannot circumvent the scope of a Commission decision by adopting compensatory measures intended to render ineffective the consequences of that decision, it cannot prevent the recipients of the aid in question from

The second was, as stated in Article 16(1) of Regulation 1589/2015: "The Commission shall not require recovery of the aid if this would be contrary to *a general principle of Union law*." So, what *general principles of Union law* are acceptable in State aid cases on taxation?

On 21 December 2016, the Court of Justice ruled on an appeal concerning Ireland's flight tax on passengers (an indirect tax). The Court found it to be incompatible aid, and ruled that the aid be recovered. In the appeal, the Commission sought a reversal of the General Court's decision to annul the part of the Commission's State aid decision that required recovery of the aid. In the General Court's view, recovery was impossible in this case, because the airlines could not retroactively charge the passengers who were the actual taxpayers;[1111] and the Commission had failed to demonstrate certain requisites for sustaining the recovery order.[1112] *Ryanair and Aer Lingus* argued that setting aside the General Court's ruling concerning the impossibility of recovering the aid would infringe on the principles of proportionality and equal pay. The Court of Justice rejected the argument that recovering the aid violated either the principle of proportionality[1113] or that of equal pay.[1114] Neither principle, the Court averred, relieved the beneficiaries of the need to pay for recovery of the aid (which, as an indirect tax, was essentially passed on to the final consumers).

Before the recent appeal ruling of the Court of Justice on Luxembourg's unlawful State aid to *Fiat Chrysler Finance Europé* (FFT) – in the form of tax rulings that accepted FFT's transfer pricing transactions[1115] – scholars

relying, at the recovery stage, on the deductions and reliefs provided for by domestic law if it is established, having regard to the operations actually carried out, that they were in fact entitled to benefit from them on the date of those operations."

[1111] In T-473/12, *Aer Lingus Ltd, Ireland v Commission,* in para. 115. See further the General Court recovery position in paras. 114–128 thereof; and in T-500/12, *Ryanair Ltd, Aer Lingus Ltd., Ireland v Commission*, in para. 146. See further the General Court recovery position in paras. 145–153.

[1112] For instance, in case T-500/12, *Ryanair Ltd, Aer Lingus Ltd., Ireland v Commission*, para. 145, the General Court understood that the Commission did not show how the recovery of 8 euros (the difference between the two flat rates of 2 euros and 10 euros) would reestablish the *status quo ante*, or even, the Commission did not show that the economic advantage was enjoyed by the airlines (in para 147).

[1113] In joined cases C-164/15 and C-165/15 P, *Aer Lingus Ltd, Ryanair Ltd, Ireland v Commission*, para. 116.

[1114] *Ibid*, paras. 117.

[1115] Judgement dated from 8 November 2022, in joined cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission.*

discussed the impossibility of recovering incompatible aid based on the principles of legal certainty, legitimate expectations, and proportionality.[1116] In essence, they discussed these principles' infringement through the Commission's subtle and unexpected framing of tax rulings as State aid.[1117] After the Court of Justice delivered the appeal ruling that annulled the Commission's State aid decision about Luxembourg, the general principle of EU law that solved the legal issue was thought to be the principle of legality, albeit at the level of Article 107(1).[1118] The Court stressed that the arm's length principle (ALP) solely concerned the tax discretion of the Member States, because the EU had not harmonized the laws of the Member States on direct tax matters concerning the ALP. Thus, the ALP could not be used in the way that the Commission used it (i.e., to classify the measure as State aid).[1119] The

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[1116] In Gormsen, L. L., & Mifsud-Bonnici, C., 2017, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax*. The cases of reference to Gormsen, L. L., & Mifsud-Bonnici, C were the Commission negative State aid decisions on tax rulings that reduced corporate income taxation through the acceptance of transfer pricing values–methods, in particular to Apple, Starbucks, Fiat, and McDonalds. See in Commission, Press release: "State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)," Brussels, 11 June 2014, last accessed 15 November 2022, available at http://europa.eu/rapid/press-release_IP-14-663_en.htm . In SA.38374 (2014/NN - 2014/C) State aid implemented by the Netherlands to Starbucks. See decisions in SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple; SA.38374 **(**2014/C ex 2014/NN) implemented by the Netherlands to Starbucks; SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat; SA. 38945 (2015/C) (ex 2015/NN) Luxembourg *Alleged aid to McDonald's*.

[1117] In Gormsen, L. L., & Mifsud-Bonnici, C., 2017, "Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax," p. 2.

[1118] In joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europé, Ireland, Luxembourg v Commission*, para. 97.

[1119] *Ibid,* paras. 94-95, from which in the last paragraph the Court of Justice stated the following view. "(95) Moreover, even assuming that there is a certain consensus in the field of international taxation that transactions between economically linked companies, in particular intra-group transactions, must be assessed for tax purposes as if they had been concluded between economically independent companies, and that, therefore, many national tax authorities are guided by the OECD Guidelines in the preparation and control of transfer prices, (…), it is only the national provisions that are relevant for the purposes of analysing whether particular transactions must be examined in the light of the arm's length principle and, if so, whether or not transfer prices, which form the basis of a taxpayer's taxable income and its allocation among the States concerned, deviate from an arm's length outcome. Parameters and rules external to the national tax system at issue cannot therefore be taken into account in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, unless that national tax system makes explicit reference to them. (96) This finding is an expression of the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, requiring that any

Court discussed the principle of legality regarding the non-fulfillment of the selectivity effect because the Commission had applied rules outside the national tax law. The question thus remains open.

Based on the State aid praxis relating to the possibility of not recovering incompatible aid, I now consider the circumstance where incompatible aid for environmental protection is not recovered. First and foremost, aid for environmental protection is only regarded as incompatible with the internal market if it fails to meet the requirements set out in the GBER or the CEEAG, or if it is contrary to primary and secondary EU laws or to general principles of EU law.[1120] Thus, such aid does not meet the minimum environmental protection requirements set out in those legal references. Consequently, the impossibility of recovering incompatible aid for environmental protection can affect the integration at this level. However, such an effect will only occur if the recovery of incompatible aid for environmental protection can serve to protect the environment.

Since the recovery of incompatible aid is a measure for re-establishing the *status quo* prior to the granting of the aid,[1121] a tax that fails to meet the EU's minimum environmental standards may be assumed to harm the environment. For instance, the non-recovery of tax benefits for energy sources that are harmful to the environment has such an impact, due to the lack of economic and legal consequences for the aid. Thus, non-recovery in such circumstances can result in a lack of integration of environmental protection into the State aid control system.

7.4. Locus Standi

When it comes to the legal debate about the *locus standi,* i.e., the right of individuals or other entities to challenge the Commission's State aid decisions

obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable …)."

[1120] See this discussion in the previous subchapter 7.2. Incompatible Aid.

[1121] In case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*, para. 117, and in case C-705/20, *Fossil (Gibraltar) Ltd v Commission*, para. 42.

in EU Courts, Article 263 (fourth paragraph) of the TFEU establishes the procedure of interest. It sets out the following *locus standi* rule for persons:

> *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.* [1122]

However, it is the *Plaumann* ruling that benchmarks this issue and forms the legal foundation for the discussion concerning Article 263 (fourth paragraph) TFEU, particularly regarding what the Article describes as "direct and individual concern."[1123] This discussion contributes to this purpose of this thesis, since it analyzes the possibility of further integrating environmental protection into Article 263 (paragraph four) as the procedural law for challenging State aid decisions judicially. Given the nature of this legal discussion (i.e., about procedural law), it only indirectly answers the second research question, since it does not deal with the issue of integration into the State aid rules that qualify State measure as State aid that is compatible or incompatible with the internal market.[1124] Below, I discuss the *Plaumann* case law on the "direct and individual concern" set out in Article 263 (fourth paragraph) TFEU. The Court of Justice took the following view on this issue:

> *Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*[1125]

First and foremost, environmental issues do not fit within the view that they individually concern one person ("peculiar … or differentiated from all other persons"), since their negative effects on the environment are widespread,

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[1122] Article 263, in the fourth paragraph of the TFEU states the following rule.
[1123] In case C-25/62, *Plaumann v Commission*.
[1124] Recalling the second research question: *How can lawmakers and the EU (institutions) influence the further integration of environmental protection requirements, established in Article 11 of the TFEU, into Article 107 of the TFEU limited to environmental taxes?*
[1125] In case C-25/62, *Plaumann., v Commission*, p. 96.

sometimes beyond the borders of the Member States or even the EU.[1126] Hence, the *Plaumann* case law has a narrow approach concerning the "individually concerned" qualification,[1127] particularly for environmental issues.[1128] Consequently, as the case law stands, it does not integrate Article 11 TFEU into the interpretation of "individually concerned" in Article 263 (fourth paragraph).

One legal scholar has analyzed the Court of Justice's development of the *Plaumann* doctrine in different cases, noting that the clarifications regarding "individually concerned… focused on the rights of specific economic actors."[1129] Hence, environmental actors are excluded from its scope. Lünenbürger *et al.* criticize that the Aarhus Convention's[1130] express exclusion the Commission's State aid decisions as "administrative acts," which means this Convention did not ensure that NGOs could challenge the Commission's State aid decisions when they negatively impacted the environment.[1131] On the narrow view set out in *Plaumann*, no person, no NGO, and no non-competing company can be considered a directly affected economic actor and thus be granted *locus standi* under Article 263 (fourth paragraph). This applies even if their economic interests and circumstance are directly connected to

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[1126] See discussion about this perspective in section Environmental Effectiveness of the Tax.

[1127] In Zengerling, C., (2013), "*Greening International Jurisprudence – Environmental NGOs before International Courts, Tribunal, and Compliance Committees*," p. 138, explains that the so-called "Plaumann test" requires that (1) the person (individually concerned) is the addressee of the decision in question, or (2) it affects a person in such a way that it becomes distinctive from others.

[1128] Compliance Committee, (2011), "Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union," adopted on 14 April 2021, last accessed 31 May 2023, available at https://unece.org/DAM/env/pp/compliance/C2008-32/Findings/C32Findings27April2011.pdf, point 86 stated the following criticism concerning the Plaumann test. "(…). The consequences of applying the *Plaumann* test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ."

[1129] In van Wolferen, M., (2016), "*The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework*," p. 919.

[1130] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13–19.

[1131] In Lünenbürger, S., et al, (2020), "Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State aid," p. 422. See also similar input in In Zengerling, C., (2013), "Greening International Jurisprudence – Environmental NGOs before International Courts, Tribunal, and Compliance Committees," p. 138.

the environmental impact of all sorts of actions, including State actions scrutinized by the Commission.[1132] Hence, the narrow interpretation of "individually concerned" as a prerequisite of the *locus standi* established in Article 263 (fourth paragraph) disregards the adverse economic effects (e.g., the societal costs of dealing with environmental issues) that a State measure inflicts on everyone by harming the environment.[1133]

Due to this procedural limitation, the Commission's approval of State measures that fail to integrate environmental protection becomes final, unless a competitor challenges it judicially.[1134] For example, when the Commission refrains from raising any State aid objections or classifies the measure as compatible aid, the measure can negatively impact the environment and thereby disrupt the level playing field on the internal market.[1135]

The *British Aggregates Association* (*BAA*) case discussed in this thesis is a perfect example here.[1136] The Commission decided not to raise any State aid objections concerning the environmental levy on aggregates that formally exempted certain materials. It considered that it was integrating environmental protection into Article 107(1) in order to avoid breaching this rule, concluding that the measure was not State aid.

However, as *BAA* argued, the Commission decision allowed a fiscal regime that negatively impacted the environment and distorted competition between undertakings. *BAA* was a representative of competitors that sought the judicial annulment of that decision not to raise State aid objections, which the Court of Justice accepted.[1137] Although the *BAA*'s *locus standi* was due to its representation of several competitors directly affected by an unlawful State aid measure (qualified by the General Court in the retrial),[1138] it challenged a

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[1132] See, for instance, discussion in case T-585/93, and its appeal in case C-321/95 P, *Greenpeace and Others v Commission* about Greenpeace lack of *locus standi* as the Court of Justice considered it indirectly affected, in case C-321/95 P, paras. 27–31.
[1133] See again discussion in section Environmental damage: a societal costs.
[1134] In In case C-78/03 P, *Commission v Germany and Aktionsgemeinschaft Recht und Elgentum eV,* para 21. See also in Nicolaides, P., (2015), "State Aid Uncovered – Critical analysis of developments in State aid 2014," p. 121.
[1135] As discussed in Chapter 1, the functioning and the existence of the internal market depend on the environment to provide resources for the activities' development.
[1136] See section 4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings, among others.
[1137] In case C-487/06 P, *British Aggregates Association.*
[1138] In case T-210/02 RENV, *British Aggregates Association,* paras. 91–92.

Commission "harmful" decision. It perpetuated an instance of anti-competitive selective tax treatment,[1139] as well as a lack of integration of environmental protection into the assessment of State aid.[1140] However, if *BAA* had not taken the stand, or if each competitor it represented had taken the stand singularly, then no NGO or individual or non-competing company would have been able to seek annulment of the decision. The latter parties lacked *locus standi* since the Court's narrow interpretation of "directly and individually concerned" safeguards economic values solely related to the parties' competition position and disregards environmental concerns related to everyone.[1141] In its strict definition of the term "interested party," Council Regulation EU/2015/1589 resembles the *Plaumann* doctrine:

> *[The term] "interested party" [refers to] any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.*[1142]

Historically, the EU and the global market have aided (with public and private capital) fossil fuels and activities that harm the environment, causing environmental problems, behaviors, and patterns that we all (as a global community) must deal with (e.g., climate change). Accordingly, the above-mentioned procedural limitation within the State aid control system presents a real problem. In practice, the entire EU relies on competitors that are directly affected and individually concerned to take the stand and challenge such "harmful" State aid decisions judicially.

Interestingly, when the Commission takes environmentally "harmful" State aid decisions – i.e., when they inflict harm on the environment even though

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[1139] In case T-210/02, *British Aggregates Association,* paras. 45–69.

[1140] The environmental levy in question did not employ a logical, coherent, and consistent environmental rationale. *Ibid*, paras.128 to 132 and 195, that set aside the General Court ruling in T-210/02, *British Aggregates Association,* that dismissed the action sought by British Aggregates Association. See this discussion in Chapter 5, where I analyze the integration of environmental protection in this case.

[1141] In van Wolferen, M., (2016), "The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework," p. 918, the author discusses the wording of Article 263 of the TFEU and the Court of Justice's role to review legality acts, such as the Commission State aid decisions, from a historical analysis of "individual concern" to grant *locus standi* to NGOs, companies, and individuals, stressing its economic concerns.

[1142] In Article 1(h) of the Regulation EU/2015/1589.

they were subjected to the State aid control system – they may become final, because of *locus standi* limitation within the EU legal system. Yet, such a procedural limitation is not considered incoherent or inconsistent with the need to protect the environment as a general EU aim, established in Article 11 TFEU, nor a breach of Article 37 of the EU Charter. Theoretically, the narrow possibility of questioning the Commission's environmentally "bad" State aid decisions is a procedural limitation that fails to integrate the environmental protection prescribed in Article 11 into the interpretation of Article 263 (fourth paragraph). Hence, there is a formal inconsistency between Article 263 and Article 11, resulting in a lack of integration of environmental protection at this level. Consequently, this procedural part of the EU legal system is inconsistent with Article 11.[1143]

NGOs do not have *locus standi* rights to question the Commission's environmentally "bad" State aid decisions, because the Court of Justice does not consider them to be "directly and individually concerned" over the negative impact on the environment or the negative economic impact of environmental harm as a societal burden that State measures can cause when they are allowed by the Commission.[1144] Companies that actively invest their capital in developing their activities in accordance with environmental ethics and practices cannot claim they are "directly and individually concerned," even though they have been socially and politically encouraged to transition their business models to sustainable, circular, and other environmentally friendly approaches. The entire EU benefits when private companies adopt such green/eco/sustainable/circular/etc. business models. Procedurally, however, these companies are not "directly and individually concerned," so they not have the right to take part in a judicial action at the EU level.

Environmental protection as an EU public interest does not substantially change the Court narrow interpretation of Article 263 (fourth paragraph).[1145] The Court has expanded the right of NGOs, individuals, and non-competing companies to challenge State actions that impact the environment through

[1143] As already discussed in subchapter 7.2. Incompatible Aid, the Commission cannot forbid State aid measures when they comply with EU law, even though they cause environmental harm.
[1144] In case C-78/03 P, *Commission v Germany and Aktionsgemeinschaft Recht und Elgentum eV,* para 21.
[1145] Article 37 of the EU Charter. In van Wolferen, M., (2016), "The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework," pp. 916–919.

the judicial avenue in the country that granted the measure.[1146] The national court of the Member State in question may then refer the matter to the Court of Justice as a preliminary ruling under Article 267 TFEU.[1147] This avenue is indirect; and before a preliminary ruling is referred to the Court of Justice, the plaintiff must meet the procedural requirements of the Member State concerned to discuss the measure as State aid that harms the environment.[1148]

Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment implements the Aarhus Convention.[1149] The Directive and ensures the *locus standi* rights of individuals and entities at the national court level, conditional on the legal procedures of the Member State concerned.[1150] However, national courts can only interpret the State aid conditions to classify the measure as State aid when the Commission has not decided on the issue.[1151] This was not the case in the *BAA* case, discussed above. Thus, NGOs, individuals, and companies that are not directly impacted by economically the Commission's decision not to raise State aid objections cannot do anything to prevent such an environmentally "bad" decision. They must rely on competitors that are directly affected and individually concerned from an economic standpoint to challenge the decision judicially, as in the *BAA* case.

[1146] In case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening.*

[1147] Based on the case C-321/95 P, *Greenpeace and Others v Commission*, para. 33.

[1148] See in Zengerling, C., (2013), "*Greening International Jurisprudence – Environmental NGOs before International Courts, Tribunal, and Compliance Committees,* p. 67 about the preliminary ruling as being an indirect legal avenue.

[1149] OJ L 26, 28.1.2012, p. 1–21.

[1150] See Recital 21 and Article 11 (4) and (5) of the Directive 2011/92/EU. For instance, in Article 11(4) of the Directive 2011/92/EU, the judicial review of acts that impact the environment may be conditioned to the Member State regime of administratively reviewing those acts before the judicial review. See also the Court of Justice interpretation of the previous Directive 85/337/EEC, repealed by the current Directive 2011/92/EU, in case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening,* where the Court of Justice develops the "public concerned" to have a farther-reaching public interest coverage on the judicial national system to reduce causes of direct action. See input in this regard in van Wolferen, M., (2016), "*The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework*," p. 929.

[1151] See case C-78/76, *Firma Steinike und Weinlig, Hamburg v Germany,* paras. 14–15, p. 610. The Court of Justice clarified that the National Court must "refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional." In case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH, Ryanair Ltd*, para. 41. See also in case C-314/85, *Foto-Frost, Ammerbek and Hauptzollamt Lübeck-Ost,* para. 20, and the Commission Notice on the Enforcement of State Aid Rules by National Courts, para. 45.

Finally, one must wonder why the integration of environmental protection prescribed by Article 11 does not affect the interpretation of Article 263 (fourth paragraph) in the latest rulings. One legal scholar, van Wolferen, concludes – after analyzing the Court's case law concerning *locus standi* from that article – that the Court will only change its (narrow) interpretation if the TFEU is redrafted.[1152] Until then, I expect State aid procedural law under Article 263 (fourth paragraph) to result in a lack of integration of the environmental protection prescribed by Article 11, inasmuch as persons and entities directly affected and individually concerned from an economic/environmental/competition perspective to challenge the Commission's State aid decisions judicially when the Member State's measure harms the environment.

7.5. Notification Procedure: "Better to Safe than Sorry"

One way the State aid control system can influence the integration of environmental protection is through the fear felt by domestic lawmakers that their environmental tax may qualify as State aid. In such a case, lawmakers' choice to notify the Commission – in order to verify that their environmental tax does not qualify as State aid – may lead to changes in its design. When a Member State notifies the Commission, namely, there is an exchange of information between the two concerning the potential effects of the environmental tax in terms of State aid. Article 108(3) TFEU establishes this obligation to notify, as well as the so-called *standstill clause*, which requires the Member State to wait until the final decision before implementing the policy.[1153]

[1152] The scholar van Wolferen M., (2016), "The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework," p. 930.

[1153] Article 108(3) of the TFEU also states: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision." Even when the Commission delivers a State aid decision or a decision not to raise any State aid objections, the Member State concerned can only ensure that that decision is final if no interested party seeks a judicial remedy to annul this decision at the General Court.

The notification procedure naturally delays the imposition of an environmental tax. Information must be exchanged, corroborating documentation must be provided, questions raised by the Commission must be clarified, and time must be allocated for analysis of the documents during the Commission's working hours. The Commission may then respond in any number of ways: e.g., it may refrain from raising objections; it may allow the measure as State aid compatible with the internal market; it may call for changes in the design of the tax; and so on.[1154]

In the *British Aggregates* case, a decision by the Commission – not to raise any State aid objectives to an environmental levy on virgin aggregates – was annulled.[1155] As the discussion surrounding this case shows, the levy had no proper rationale regarding the environmental impact of the materials exempted.[1156] In the course of the notification procedure, the Commission deemed the levy to be a general measure (i.e., not to be State aid). The General Court, however, classified it as State aid in its retrial of the case.[1157] Thus, the notification procedure failed to ensure the levy's compliance with the State aid laws.

Now suppose that, during this exchange of information, the Member State concerned had made changes in the design of its tax in order to comply with Article 107(1), but had ended up breaching it anyway. The Commission's suggestions, based on Article 108 TFEU, might then have altered vital aspects of the tax. Obviously, such changes can be either beneficial or detrimental from an environmental point of view. But either way, depending on the circumstances of the case and what the Commission suggests, the notification procedure can furnish a formal administrative means by which the Commission does or does not integrate environmental protection requirements into its suggestions. Additionally, the Member State might

[1154] See in Article 108(2) of the TFEU.
[1155] See in case T-210/02, *British Aggregates Association v Commission, U.K.*, in paras. 13-25, and follow-up cases, C-487/06 P, T-210/02 RENV, T-210/02 RENV-DEPT, and C-487/06 P, *British Aggregates Association v Commission, U.K.* in Chapter 4, e.g., in section 4.3.3.2. Environmental impact adds an extra layer to the circle of comparable undertakings, among others.
[1156] See for instance in section 4.3.3. Parameters for the determination of the circle of comparable undertakings.
[1157] In case T-210/02 RENV.

follow the Commission's suggestion simply to avoid the undesired State aid outcome (compatible or incompatible aid).

7.6. Comparative Learning through Policy Diffusion

It is well-known that Member State lawmakers seek to learn from the experiences of other countries with environmental taxes.[1158] They observe, learn, research, and exchange information with the civil servants involved in their countries' legislative procedure, among other actions connected with such comparative learning. Thus, if an environmental tax imposed by another Member State was classified as State aid, prompting control and supervision by the EU, lawmakers may fear that the same thing will happen in their case. In view of this common practice of learning from the experiences of other countries, I expect to see this approach used as an informal yet pragmatic way of integrating (or not) environmental protection into the design of environmental taxes.

For instance, a Member State that judicially challenges the State aid decision by the Commission and is unable to get the outcome reversed in the last tier Court (the Court of Justice) sets a bar for other Member States on the issue since that case becomes case law. Other Member States that have or that plan taxes similar to those classified as incompatible aid or as compatible aid may adjust the design features of their taxes, so as to escape the same classification. This comparative learning creates a bottom-up effect of informal integration (or lack thereof) of environmental protection in matters of taxation. The conclusion regarding the integration or lack thereof depends on the case. I subsequently discuss an example of comparative learning that led to a poorly designed environmental tax s.

In this case Swedish legislators, who were planning an aviation tax,[1159] looked at Ireland's negative experience, which had resulted in a State aid intervention

[1158] In Gilardi, F. and Wasserfallen, F. (2019) "The politics of policy diffusion," p. 1.247.
[1159] *Lag (2017:1200) om skatt på flygresor* (Law SFS 2017:1200) on tax on flights.

in connection with the design of the tax.[1160] As I see it, Swedish legislators missed a crucial aspect of the Irish flight tax when they used it as a benchmark case. The tax in question, namely, was never about tackling harmful emissions from the aviation sector. Rather, Ireland's tax was fiscal and anti-competitive.[1161] It was not intended to protect the environment.

In 2017, Swedish legislators introduced an aviation tax, in hopes of reducing air travel and thereby tackling climate change.[1162] Calculated per passenger, it has three different rates, according to passengers' destination. The first rate, amounting to 62 SEK (approx. 6 EUR), is for flights within the EU.[1163] The second, which comes to 260 SEK (approx. 26 EUR), is for flights outside the EU of less than 6,000 kilometers. The third and last rate, amounting to 416 SEK (approx. 41 EUR), is for flights outside the EU of more than 6,000 kilometers.[1164] The tax exempts infants, working aircraft staff, passengers transferring or in transit, passengers that suffer technical disturbances during their journey, and certain regions within Sweden (in the north of the country). The airlines collect the tax from their passengers and pay it to the Swedish government.[1165] See Table 6 below:

Table 6: Swedish flight tax imposition, intra-EU and international

Taxable event/ Flight distance	Within EU	Outside EU < 6,000 km	Outside EU > 6,000 km
Tax rates Flat: 1, 2, 3 levels	62 SEK/ 6€	260 SEK/ 26€	416SEK/ 41€

From a State aid point of view, the occurrence of two tax rates and of two taxable events can have a selective effect. In the first situation, airlines can use

[1160] For reference, see the annulment cases T-473/12 and T-500/12, respectively, *Aer Lingus Ltd, and Ryanair Designated Activity Company v Commission*, and in the appeal in joined cases C-164/15 P, and C-165/15 P, *Aer Lingus Ltd and Ryanair Designated Activity Company v Commission.*
[1161] In case T-473/12, *Aer Lingus Ltd, Ireland v Commission,* para. 54, and in case T-500/12, *Ryanair Designated Activity Company, Ireland v Commission*, para. 79 about the fiscal purpose to raise revenues, and anti-competitive as a result of being incompatible aid, or even contravening the free movement to provide services.
[1162] See, in Lind, Y., (2021), "Designing Aviation Taxes Within the EU–Chartering Ongoing Challenges and Proposing Future Solutions," p. 819.
[1163] Today, 31 May 2023, the tax is SEK 69, nearly 7 euros.
[1164] See, in Lind, Y., (2021), "Designing Aviation Taxes Within the EU–Chartering Ongoing Challenges and Proposing Future Solutions," p. 821.
[1165] *Ibid*, pp. 820-823.

the *transferring or in transit* provision to escape the tax imposition, by booking tickets with a final destination outside the EU and long hours between connecting flights. In the second situation, as Lind has noted, the exemption for northern Sweden is likely an instance of un-notified State aid, mainly because it is domestic airlines that operate these regional flights.[1166] Indeed, as Lind argues, State aid in this case is likely compatible with the internal market, since the northern part of Sweden is geographically large with a low density of population and activities, making access to it by other means of transport burdensome (the journeys are long and the road conditions are challenging).[1167] The cost of such flights, moreover, make them unattractive to airlines in the absence of State aid. For example, the distance from Stockholm to Kiruna, in the north of Sweden, is approximately 1,300 kilometers.[1168] Now, I examine the relationship between the objective of the Swedish tax and its structure.

When the Swedish legislators set a flat rate of 62 SEK for all intra-EU flights, they avoided the State aid discussion that Ireland underwent with a flight tax that had two different flat rates. No undertaking, therefore, bears a tax burden different from that faced by any of its competitors. Conditions of competition and trade on the internal market are thus left undisturbed. From a State aid perspective, the flat tax rate for all intra-EU flights is therefore general (i.e., it is not State aid). The purpose of the Swedish tax is to encourage passengers to opt for other means of transport when they are available and efficient, thereby reducing flight miles and minimizing emissions.

The Court of Justice stated that an action may also qualify as State aid when it has "an adverse effect on the competitive situation of an operator in other ways too, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid."[1169] The critical point here is that the Swedish flight tax, particularly in view of its flat rate for intra-EU flights, does not seem to affect the conditions faced by specific airlines; instead it impacts all of them. Its exemptions – for infants, working aircraft staff, passengers transferring or in transit, and passengers that suffer technical disturbances during their journey – are neutral as between different airlines. Suppose, however, that the exemption for

[1166] *Ibid*, p. 822–823. Sweden did not notify the Commission before imposing such taxes.
[1167] *Ibid idem.*
[1168] *Ibid idem.*
[1169] In case C-487/06 P, *British Aggregates*, paragraph 53.

passengers transferring or in transit means in practice that only local airlines operating regionally and making arrangements in their itineraries benefit from this possibility. In that case the exemption would be masking State aid to domestic airlines.

Now, shifting the focus of this discussion to the objective, structure, and effect of the tax. The objective of the Swedish tax does not seem to have any logical, coherent, and consistent connection with the distribution of the tax burden, which is levied at the same rate on all intra-EU flights and still results in reduced emissions.[1170] Faber and Huigen criticize flat rates as follows:

> *Taxes have an impact on demand, so aviation ticket taxes will, by reducing demand for aviation, also reduce its environmental impacts. However, a ticket tax with a single rate is a rather blunt way to internalise externalities as it does not take the actual environmental impacts of a passenger on a specific flight into account. If taxes were differentiated with regards to the environmental impact, the transport system would become more efficient and an additional incentive to reduce the impacts would be provided.* [1171]

The Swedish tax may have avoided the State aid issue by compromising its environmental aims and thereby lessening its effects. The result of the comparative learning is thus a fiscal tax far from the original aim. According to Brännlund, the EU ETS undermines the intended impact of the Swedish tax:

> *However, it should be noted that a tax on air travel from a Swedish airport to another airport in Sweden or the EU contributes very little, or nothing at all, to reduced global carbon dioxide emissions. The reason for this is that emissions from air traffic within the EU are included in the EU ETS trading system, and for flights within the EEA, companies must buy and*

[1170] See also the input of other policy instruments to tackle flight emissions in Mayer, B., Ding, Z., (2022) "Climate Change Mitigation in the Aviation Sector: A Critical Overview of National and International Initiatives," Cambridge University Press, last accessed 21 January 2023, available at *https://doi.org/10.1017/S204710252200019X*. There, the authors listed six examples (on pp. 13–21), from which the flight tax on passengers is one, on pp. 18–19.
[1171] Faber, J. and Huigen, T. (2018) "A study on aviation tickets taxes," p. 4.

> *submit emission permits that correspond to carbon dioxide emissions. In practice, this means that if the tax causes an airline to reduce the number of its flights within Sweden or to EU or EES countries, more emissions permits will be transferred to other flights within the same area or to other emission sources within EU ETS. The total number of emissions permits in a given period will remain constant and unchanged, which means that global carbon dioxide emissions will also remain unchanged, despite fewer flights from Swedish soil. You may now argue that aviation should face tougher regulation than that stipulated by EU ETS due to the high-altitude effect. The problem is, again, that reduced high-altitude effects in Sweden may result in increased high-altitude effects elsewhere, due to EU ETS.*[1172]

Such a shift of passengers is not a problem that domestic legislation can solve. Tax competition between neighboring Member States can only be tackled at the level of the Union. The lack of positive harmonization at the EU level of flight excises[1173] damages the functioning of the internal market. Emissions are just shifted from one country to another, and they remain the same overall. The result is perverse and surely unintended. That is to say, the fear felt by domestic lawmakers that their flight tax may be caught up by the State aid control system prompts them to design their tax in such a way as to avoid State aid intervention – but at the cost of voiding the entire point of the tax: namely, to enhance environmental protection.

The Commission acknowledges the impact of the aviation sector on the environment. Aviation, it states, "is one of the fastest-growing sources of greenhouse gas emissions."[1174] It has accordingly proposed to review the Energy Taxation Directive (ETD), with an eye to eliminating its exemption for aviation fuels.[1175] At the time of writing, however, the ETD remains

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[1172] In Brännlund, R. (2018), "Greenwash? - An analysis of the efficiency of Swedish environmental taxes," p. 30.

[1173] Through Article 113 of the TFEU

[1174] The information is available at the Commission's website, concerning the EU Climate Action to reduce aviation emissions. See in Commission, EU Climate Action, "Reducing emissions from aviation."

[1175] In Article 14(2) of the ETD. In Commission, Smarter taxation for the EU: Proposal for a revision of the Energy Tax Directive, COM(2011) 168 final, p. 11, and in the European Parliament, 2022, "Revision of the Energy Taxation Directive: Fit for 55 package." Briefing EU Legislation in Progress, pp.1–8, p. 3 criticizes the current ETD approach of exempting such fuels as not contributing to the EU's climate objectives.

unchanged in this regard. An excise duty on flights is needed at the EU level in order to tackle the shift of air passengers and emissions between Member States. In practice, the special legislative procedure prescribed by Article 113 TFEU may pose a crucial political difficulty here.

However, notwithstanding the shifting-about of air passengers and emissions, the Swedish tax will be successful if higher flight prices prompt large numbers of passengers to travel instead by train,[1176] or by other low-carbon means of transport.[1177] Finally, the two flat rates applied to international flights fall outside the scope of the State aid system, because that market is international. Thus, any effects on competition and trade occur not within the EU but rather internationally, and the two rates are unconnected to the actual emissions of different flights.[1178]

7.7. Summary

I have analyzed three formal and two informal actions that have an impact on the integration of environmental protection into the State aid control system. They impact the interplay between the EU and the Member States in different ways than what I lifted in Chapters 3 through 6. I summarize these five actions below, and I reflect on some aspects of the findings of each section. As explained in the introduction, these discussions in themselves represent answers to the first second research question, as well as a fulfillment of the first and second purposes I address in this thesis regarding the system

[1176] See, for instance, the economic study conducted by Stråle, J., (2021), titled "The Effects of the Swedish Aviation Tax on Demand and Price of International Air Travel", where the author concluded that the slight decrease in flights could be because of passengers' awareness as a result of the tax imposition, and even, a "Greta-effect," p. 25.

[1177] For instance, Brännlund (*ibid* footnote 1172) discussed the research concerning the effects of carbon emissions from aviation fuel versus from motor fuels of cars, concluding in p. 32 "that 1 tonne of fuel used for the flight have a 50 per cent larger climate effect than if the same amount of fuel is used by a car. This in turn means that an optimal carbon dioxide tax for the flight should be 50 per cent higher than the optimal carbon dioxide tax on the ground. Overall, one can say that there are reasons for controlling or taxing aviation's carbon dioxide emissions, perhaps to an even greater extent than land-based emission sources."

[1178] Not applicable to US and Turkey, which makes even less sense from an environmental protection perspective.

complexity and the integration of environmental protection thereto in connection with environmental taxes.

In subchapter 7.2, I analyzed the legal source of the EU system that ensures a total breach Article 107 (paragraphs 1 and 3) of the TFEU and the classification of the measure as incompatible aid. My conclusion was that, in one situation, environmental protection is not integrated at this third level. A State aid measure will not be considered incompatible with the internal market – even though it may have an adverse effect on the environment – if the environmental issue addressed by the tax is regulated by primary EU laws, by secondary (environmental) EU laws, or as a general principle of EU law. For example, the case of State aid for developing nuclear power plants or the activity itself cannot be classified as incompatible aid because of its adverse impact on the environment, while the Euratom allows it. Thus, neither the precautionary principle, nor other principles of EU environmental law, nor the scientific evidence that nuclear power produces radioactive waste that is extremely harmful to human health and to the environment, will override the Euratom.

I noted in subchapter 7.3 that, in cases where incompatible aid cannot be recovered and the beneficiaries of the aid harm the environment, a legal regime is perpetuated wherein environmental costs are not internalized. In this case, it is not only the internal market that suffers the consequences. Society does so too, through the economic burden it must bear to remedy the environmental damage.

In subchapter 7.4, I discussed the *locus standi* issue, particularly the right (or sooner lack thereof) of non-competing companies to challenge the Commission's State aid decisions judicially when the beneficiaries' activities harm the environment. I concluded that this procedural limitation results in a lack of integration environmental of protection, because it does not grant the possibility of e.g., NGOs' taking the stand to challenge the Commission's environmentally "bad" decisions on State aid. The British Aggregates Association case is a good example of such a "bad" decision. Although scholars seem to perceive the Court of Justice as intentionally interpreting Article 263 (fourth paragraph) narrowly to strengthen the judicial system of the national courts as part of the EU (as an interpreter of the TFEU's provisions and with the possibility of submitting preliminary rulings), there is one element here that falls into a gap. When the Commission decides not to

raise State aid objections, and competitors do not challenge it judicially, non-competing companies are unable to challenge it in any national court once the measure is implemented. The latter court cannot decide on any State aid matter that has already been decided by the Commission; consequently, the preliminary ruling system fails to safeguard environmental concerns in such cases. I contend, however, that EU courts should perceive any person, legal or private, as directly and individually affected by a State aid decisions that result in environmental damage, because environmental issues concern everyone. One scholar suggests, however, that the Court will only change its narrow interpretation if the TEFU is redrafted. Until then, Article 263 (fourth paragraph) is a procedural law that limits the integration of environmental protection into the State aid control system, and whereupon it is incoherent and inconsistent with the general aims set out in Article 11 of the TFEU.

In subchapter 7.5, I discussed the active choice of Member States' lawmakers' to notify the Commission when they want to ensure that their environmental tax is a general measure and not State aid. This rationale is not what Article 108(3) of the TFEU establishes as a notification obligation. Instead of using this procedure only when they plan to grant a State aid, they use it as a way to increase legal certainty concerning the status of their environmental tax as general and not as State aid. Because of such common praxis, it is implicit in the notification system for measures that are not State aid that the Member States are uncertain and insecure concerning the effects of their environmental tax in terms of State aid. It is also implicitly understood that the lawmakers call their tax discretion into question due to the possible breach of EU law. This is why they act according to the motto "it is better to be safe than sorry". Moreover, the notification procedure often leads to the lawmakers, after having received a comment from the Commission to alter the design of their environmental tax. They rely on that EU institution's opinion and interpretation of the State aid conditions for the environmental tax in question. I argue however that, depending on the changes the Member States adopt after such an exchange of information, the Commission's interpretation of the State aid conditions may increase or decrease the integration of environmental protection. The Commission, namely, does not always "know better" about the State aid effects of environmental taxes. In fact, EU courts have annulled many State aid decisions by the Commission, which is part of the reason why lawmakers are so uncertain concerning the status of their tax measure as general. This last reflection concerning

notification of what the Member States believe to be a general measure concerns the substantive changes they make only because the Commission advises them to do so. Such changes can compromise the essence of the environmental tax and the bottom-up impact it may spur in the interpretation of the State aid condition (in case of a scrutinization).

In subchapter 7.6, I discussed the possibility of Member State lawmakers' learning from each other's experiences concerning the design of environmental taxes and previous conflicts with State aid rules. Policy diffusion of this kind is not a formal way of harmonizing the environmental tax laws of the different Member States, but it may have such an effect if lawmakers choose to legislate similar taxes domestically. Such an approach may enable them to increase or decrease the integration of environmental protection from a bottom-up perspective, according to their priorities. The Nordic countries, for instance, have similar energy and carbon excises on motor fuels; and these are vital instruments for achieving a green transition in their transport sectors, although – as compatible aid – said taxes partially breach State aid rules.[1179] The integration (or lack thereof) of environmental protection through taxation by the Member States depends on the priorities of domestic lawmakers where such taxes are concerned. Suppose they are primarily concerned about avoiding a classification of their taxes as State aid. This could compromise the environmental rationale and effectiveness of their taxes, as the analysis of the Swedish flight tax shows. However, instead of "playing," lawmakers can avoid a conflict between their environmental taxes and Article 107(1) by adopting an environmental objective primarily, and consistently and coherently implementing it in the structure of their tax, thereby ensuring its effectiveness.

[1179] See reflection concerning the Energy Taxation Directive and the proposal of a recast RETD, which could change these taxes' status from compatible aid to general measures in section 2.6 EU Environmental Taxes: Legislative Possibilities and EU Aims.

8. Final Reflections

The idea of writing a thesis about environmental taxes from a State aid perspective has greatly appealed to me. The catastrophes caused by climate change and other environmental issues worldwide require effective actions by individuals, institutions, and countries. Within the EU, Member States must adapt their legal systems, including their tax systems, to achieve environmental targets (e.g., economic circularity, green transition, etc.) within specific timeframes. Simultaneously, Member States must ensure that these actions do not breach the rules governing the functioning of the internal market, such as the rules on State aid that are explored in this thesis. The idea of analyzing environmental taxes from a State aid perspective became appealing to me because the State aid control system is complex for non-experts (my first research problem), and these rules should be flexible enough to integrate environmental protection (my second research problem).

With these two research problems in mind, I have formulated two research purposes for this thesis. The first purpose is to clarify the complexities of the State aid control system for lawmakers.[1180] This will enable them to design environmental taxes with a deeper awareness of their potential State aid classification and to influence the interpretation of the rules on State aid from the bottom up. To ensure I would reach this purpose, I framed the following research question (the first research question): In what circumstances do Member States' environmental taxes breach the EU's State aid laws (e.g., Article 107(1), complementary laws to Article 107(3), and other laws)?[1181]

The second research purpose is to identify and pinpoint potential inconsistencies in the State aid control system concerning the integration of environmental protection requirements when Member States implement (or plan to implement) environmental taxes.[1182] This purpose is about providing insights to lawmakers, EU courts and Commission and contributing to scholarly research in this field regarding the issue of integration of environmental protection within this system in relation to environmental

[1180] See again subchapters 1.1 and 1.3.
[1181] See again subchapter 1.5. Research Questions in More Detail.
[1182] See again subchapters 1.1. and 1.3.

taxes. To ensure I would reach this purpose, I framed the following research question (the second research question): How, where environmental taxes are concerned, can lawmakers (and even the Commission and EU courts) integrate or further integrate environmental protection requirements (values) into the State aid control system?[1183]

Below, I summarize the main findings I reached with this thesis.

First and foremost, regarding my reflections on the theoretical framework selected for conducting this research, I have a particular thought concerning my choice, specifically after the analysis presented in Chapter 5 regarding the *selective advantage* condition. In that section, I examined the integration of environmental protection into the *selective advantage* condition, where it is evident that the proportionality and equal treatment principles are deeply ingrained into that condition. These principles relate to the proportion of the tax burden distribution to undertakings-taxpayers in respect of their environmental impact. However, he equal treatment principle is basically what the selectivity stands for in respect of comparable undertakings–taxpayers.

When I explained the integration principle in section 1.4 to describe the theoretical framework of this thesis, I mentioned that Jans and Vedder understand that in case of a conflict between the protection of the environment and the functioning of the internal market, only the proportionality and equal treatment would solve the conflict, and not the integration principle itself.[1184] So my final reflection here is that the general parameter found in Chapter 5 concerning the environmental impact is the proportionality and equal treatment principles flexibility to take in values of environmental protection.

As shown in section 1.3.4, the Court of Justice rulings referred to the integration of environmental protection requirements to justify the conflict between the protection of the environmental and the protection of the internal market from State aid.[1185] In these cases, the Court classified the environmental taxes as State aid because of that conflict. However, as the

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[1183] *Ibid idem.*

[1184] See footnote 142.

[1185] In cases C-143/99, *Adria-Wien Pipelines GmbH,* C-159/01, *Netherland v Commission,* C-487/06 P, *British Aggregates Association,* and C-279/08 P, *Commission v Netherlands.*

analysis in Chapter 5 showed, these cases did not use *environmental impact* as logic for the tax burden distribution among the taxpayers, and consequently, they could be a mere example of anti-competitive taxes hidden under a fake environmental excuse. In the more recent case law though,[1186] in which the Court of Justice did not classify environmental taxes as State aid, the non-fulfillment of the selectivity condition was based on the environmental impact of undertakings from the perspectives of equal treatment and proportionality principles that are the legal pillars of the selective prohibition. So, my conclusion about the issue regarding the integration principle is what follows.

When the Member States enact measures to protect the environment, the possible case of environmental taxes, the analysis of the selective effect of that tax must integrate Article 11. That is, follow the theoretical view that Article 11 has a normative meaning. In this case, it also becomes a part of the interpretation of the selective (advantage) condition, meaning it becomes integrated into the interpretation of the equal treatment and proportionality principles inherent in that condition. Notably, the equal treatment principle without the integration principle of Article 11 stays as a solely economic non-discriminatory principle. In such case, I consider that all cases having a threshold, where the tax levied based on the environmental impact of undertakings above the threshold would be selective because it excluded economically comparable taxpayers.[1187] However, they were not considered even comparable undertakings because of the environmental impact assumption of the tax became the parameter to differentiate economically-environmentally undertakings from each other. Hence, my view of the integration principle changing the interpretation of the equal treatment and proportionality principles.[1188] However, it seems that the proportionality principle discussion is less thorough in the *KernbrStG* and *ANGED* cases since they were preliminary rulings, and thereby would be sotheing left for the national courts.

Considering the arguments about earmarking revenues from environmental taxes (that would function more like fees), this aspect would only be relevant from the integration principle perspective in connection with the effects-

[1186] In cases C-5/14, *Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück,* C-233/16, C-234/16 and C-235/16, C-236/16 and C-237/16, *ANGED.*
[1187] *Ibid idem.*
[1188] Particularly in cases C-233/16, C-234/16 and C-235/16, C-236/16 and C-237/16, *ANGED.*

based approach of Article 107(1). The latter Article approach ensures that actual protection of the environment avoids breach of the prohibition on State aid. Furthermore, the earmarking revenue could be even a combination of the polluter pays principle set out in Article 191(2) of the TFEU into Article 107(1) integrating Article 11, through the latter Article naturally invoking this cornerstone environmental principle as being one of the *requirements*.

However, Jans and Vedder perspective about the equal treatment and proportionality principles being the only way to solve a conflict between the protection of the environment and the functioning of the internal market (the negative impact of State aid could justify why the integration of environmental protection requirements does not occur in the interpretation of the State aid conditions (discussed in Chapters 3 and 5). However, it seems that the *Iberpotash* case, discussed in Chapter 3, contradicts this view. The acceptance of potential or concrete risk of environmental damage as a situation of fulfillment of through State resources condition requires that an economic accountability the environment. Such accountability is, in my view, an integration of Article 11 into the economic rationale of that condition because it considers the environment as a value to protect by economic means, where environmental damage (at a risk or concrete level) costs to society. However, it could be that in this case, environmental damage is seen as a commodity protected because of its economic values.

Regarding the research findings in chapters 3, 4, and 5 in respect of the second research problem and purpose they were diverse. The "granted by a Member State or through State resources" condition, analyzed in Chapter 3, do not – as they are interpreted by EU courts today – serve to promote any integration of environmental protection. However, this situation could change. I proposed that lawmakers point out that their environmental taxes save public resources, by showing how addressing environmental problems sooner rather than later results in savings for the commonwealth. This includes savings in public resources that defy measurement in economic terms: e.g., cultural heritage and biodiversity. This proposal concerns the rationale that lawmakers can adopt for their tax law, which will then have to be included in the interpretation of the "through State resources" condition. This is due to the fact that the interpretation of Article 107(1) is done on a case-by-case basis. Hence, the interpretation of Article 107(1) must include the legal rationale for

the tax law in question, while also integrating environmental protection as an effect of Article 11.

In Chapter 4, I concluded from an analysis of EU courts' case law that the integration of environmental protection into Article 107(1) is mainly possible through the interpretation of the selective-advantage condition. This integration through interpretation appears to avoid conflict with that article, provided that the environmental tax imposes a proportionate distribution of the tax burden among taxpayers in respect of their environmental impact. When lawmakers earmark the revenues raised by the environmental tax, they can also ensure that their tax avoids conflict with the State aid rules. However, this is a choice they should freely exercise in accordance with their tax discretion – not as an effect of any interpretation of Article 107(1).

In Chapter 5, when I analyzed the *competition and trade* conditions, I concluded that environmental protection is not integrated into their interpretation – but that it could be. Their analysis proceeds on the basis of establishing the circumstances of the relevant market where the State measure generates its effects. I suggested that environmental protection values should be included as values of the market analyzed; otherwise, a sole focus on economic concerns will keep determining how the measure affects intra-EU *competition and trade*. Hence, perpetrating a lack of integration thereof.

In Chapter 6, I discussed the laws complementary to State aid that integrate environmental protection at a secondary level – i.e., in the case of compatible aid. These laws establish minimum standards for Member States' environmental taxes as compatible aid. However, they can also be used as a reference by lawmakers who wish to enact environmental taxes that do not conflict with Article 107(1) – i.e., that are not State aid. In this sense, lawmakers should aim at much higher levels of environmental protection than the ones set out in the EU's laws (mainly the GBER and the CEEAG). They should also avoid certain specific features (discussed therein) in their planned tax if they want it to secure general status.

In chapter 7, I addressed various factors influencing the integration of environmental protection into the State aid control system. In my analysis of the classification of incompatible aid (in subchapter 7.2), I concluded that, unless the EU changes its laws, the Commission cannot prohibit State aid measures even when they clearly pose a risk to the environment. For instance,

the recent conflict between Russia and Ukraine highlighted the vulnerability of the EU's nuclear plants to potential attacks that could leading to significant environmental and health consequences. Nevertheless, the Euratom still allows nuclear power, preventing the Commission from forbidding State aid to this sector.

The recovery of incompatible aid (discussed in subchapter 7.3) could potentially undermine environmental protection if incompatible aid that harms the environment cannot be recovered. In subchapter 7.4, I examined the *locus standi* rights to challenge the Commission's State aid decisions in Eu court. *Locus standi* is strictly limited to directly affected undertakings. Such a stringent and limited approach reflects a lack of integration of environmental protection into EU procedural laws for challenging State aid decisions.

In subchapter 7.5, I explored how lawmakers notify the Commission due to their uncertainty about whether their environmental taxes qualify as State aid. I pointed out that this notification process could alter the substance of environmental taxes in terms of their effectiveness because, when the Commission advises changes, lawmakers are more likely to implement them. Additionally, in subchapter 7.6, I highlighted that lawmakers learn from each other's mistakes on State aid matters, leading to potential developments. For example, in Sweden, when lawmakers introduced a flight tax, they learned from Ireland's experience with a passenger flight tax (with two flat rates) classified as incompatible aid. They missed the point that Ireland's tax was never about addressing the environmental impact of flights, which was the initial intention of the Swedish lawmakers. Nevertheless, it is understandable that lawmakers are cautious about implementing a similar tax to a previously incompatible aid.

Hopefully the discussion about the State aid control system in thesis offers helpful advice to lawmakers in urging them not to be unduly hesitant to enact environmental taxes that were deemed to be State aid in other cases. Instead, lawmakers can conclude from this thesis that they should incorporate environmental protection objectives into the design of their environmental taxes, thereby spurring a bottom-up change in the interpretation of Article 107(1) as an effect of Article 11.

When it comes to throwing light on *what to expect* from the EU's institutions in the future, the following seems logical to me, now that I have spent many

years on this research. We can expect the Union's institutions (mainly the Commission and the Court of Justice) to become more receptive to environmental protection values as a natural and necessary alignment between the EU's legal system, its environmental aims, and the State aid control system. But we can also expect, if the Member States continue to block Union-level environmental taxes (which require unanimity on the Council), that the State aid control system becomes the most prominent legal recourse at the EU level for addressing tax competition between the Member States.

Finally, considering that the closer we get to the 2030 and 2050 climate targets, the more effective (as well as more austere) the measures will have to be in order to reach these targets, as compared with the measures imposed so far. I therefore hope this thesis can be useful for clarifying what lawmakers "should and should not do" when enacting environmental taxes, when it comes to the possible effects thereof in terms of State aid. Moreover, lawmakers should not be fearful of addressing activities not yet taxed due to the State aid control system. Mining operations, cannabis production and trade, and various practices clearly linked to a loss of biodiversity – these activities and many others could be a fit subject for environmental taxes aimed at protecting the environment and promoting human health. However, all such taxes might also end up being classified State aid measures – if lawmakers repeat past mistakes instead of learning from them.

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