

EXPLORING THE IMPACT OF EU LAW ON ENERGY AND ENVIRONMENTAL TAXATION

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1. Introduction: Contextualisation

The integration of environmental considerations into tax law is a fairly recent issue within the European Union (EU). While tax policies, with the removal of customs duties, were one of the starting points of the European harmonisation process, environmental policies were not initially included as part of the common policies developed at the European Economic Community (EEC) level.¹ However, in the early 1970s, the Commission and the Council of the European Communities made it clear that environmental action was part of the Community's policy areas, describing environmental protection as "both a guarantee of and a prerequisite for a harmonious development of economic activities throughout the Community".² Although the EU's environmental and tax policies were originally largely detached from each other, the Commission almost immediately established links between its work in the fields of environmental protection and taxation. For example, in 1972, the Commission suggested that its work on the polluter-pays principle could play a role in the harmonisation process in the field of taxation.³ Moreover, in the context of the harmonisation of indirect taxes, the Commission explicitly stated that the harmonisation of excise duties should not be seen as an "obstacle" to the adoption of Community-wide environmental taxes, if such taxes were considered necessary in the future.⁴

The situation evolved in the mid-1980s with the formalisation of the environmental dimension of the EEC in the Single European Act (SEA), which added an Environmental Title to the EEC Treaty.⁵ This new title established the polluter-pays principle as one of

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¹ On the history of EU Environmental law, see Christian Hey, "EU Environmental Policies: A Short history of the policy strategies", in S. Scheuer (ed.), *EU Environmental Policy Handbook* (2005 European Environmental Bureau), pp. 17-30, available at <https://pdfs.semanticscholar.org/445e/f8210932ca2b848b8d8b0d46072b592d97ae.pdf>.

² Commission of the European Communities, Communication from the Commission to the Council on a European Communities' programme concerning the environment, 22 March 1972, SEC(72) 666, p. 12. See also Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20 December 1973, pp. 1-53.

³ Commission of the European Communities, SEC(72) 666, *supra* n. 2, p. 37: "(...) studies on ways of financing pollution control should facilitate the more general work on the harmonization of taxes and fiscal systems which the Commission has in hand".

⁴ Commission of the European Communities, Proposals for harmonizing consumer taxes other than VAT, COM (72) 225 final, 23 February 1972, pp. 10-11.

⁵ Title VII, inserting articles 130R, 130S, 130T.

the guiding principles of European environmental action.⁶ Moreover, the SEA introduced what is known as the “integration clause” (now article 11 of the Treaty on the Functioning of the European Union, TFEU), which calls for the integration of environmental protection requirements in all EU policies, including tax law.⁷ In 1990, the European Environmental Agency (EEA) was established. The Agency issued a first report on environmental taxation as part of the EU’s environmental policy a few years later.⁸ Around the same time, the EU adopted its first directive on the taxation of mineral oils.⁹ However, in the years that followed, Member States could not reach an agreement on the European Commission’s proposal to adopt a CO₂ tax.¹⁰ So far, the EU has been unable to introduce any EU-wide taxes aimed at internalising CO₂ emissions. Moreover, it failed to make existing directives on energy taxation more environmentally-friendly.¹¹ Consequently, within the EU, environmental taxation is primarily a matter dealt with at the level of the Member States.

The main objective of this chapter is to explore how EU law has shaped the use of environmental tax measures – including environmental taxes and environmentally-driven taxes and tax incentives - in the EU, drawing on existing legal literature surrounding the topic. The tax measures analysed in this chapter include any type of taxes on polluting products and polluting activities.¹² Pollution is to be understood in a wide sense, including visual pollution caused by satellite dishes.¹³ Such a broad definition of environmental taxes does not guarantee that these taxes genuinely pursue environmental objectives and are designed in accordance with environmental principles. For example, taxes on energy products will qualify as “environmental taxes”, even when they are primarily aimed at raising revenue or impose preferential tax rates on highly polluting domestic energy sources in order to favour domestic energy producers. In order to distinguish between (1) tax measures that are described as “environmental taxes” for the mere reason that their tax base is a polluting substance or activity and (2) tax measures that genuinely aim at environmental protection and are designed accordingly, this chapter uses the concept of “environmentally-driven taxes” or “environmentally-driven tax incentives” in order to refer to the latter.

This chapter shows that EU law has shaped – and continues to shape - the development of environmental tax measures at both EU and Member State level. Firstly, at the EU

⁶ According to article 130R of the EEC Treaty (now 191, § 2 of the TFEU), “(...) environmental damage should as a priority be rectified at source, and (...) the polluter should pay”. On the polluter-pays principle and, more generally, on the development of environmental taxation in the EU, see Pietro Mastellone, “The Emergence and Enforcement of Green Taxes in the European Union – Part 2” (2014) 54(12) *European Taxation*, section 3.3.

⁷ On the role of article 11 of the TFEU, see Beate Sjøfjell, “The Legal Significance of Article 11 TFEU for EU Institutions and Member States”, in B. Sjøfjell & A. Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (2015 Routledge), pp. 51-72. See also article 37 of the Charter of Fundamental Rights of the European Union.

⁸ EEA first report on environmental tax measures was issued in 1996: EEA, “Environmental Taxes – Implementation and Environmental Effectiveness, Environmental issue report No1, 21 July 1996, available at <https://www.eea.europa.eu/publications/92-9167-000-6#tab-related-publications>. The latest report has been published in 2016: EEA, “Environmental Taxation and EU environmental policies”, EEA Report No. 17, 6 September 2016, available at <https://www.eea.europa.eu/publications/environmental-taxation-and-eu-environmental-policies>.

⁹ Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, O.J. L 316, 31 October 1992, pp. 12-15; Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils, O.J. L 316, 31 October 1992, pp. 19-20.

¹⁰ Commission of the European Communities, Proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy, Brussels, 30 June 1992, COM(92) 226 final.

¹¹ See section 2.1.

¹² Such an approach is similar to the one underlying the statistical definition of environmental tax measures (section 3.4).

¹³ A tax on satellite dishes is discussed in section 3.2.2.

level, the EU's institutional framework has actually inhibited the harmonisation of environmentally-driven taxes.¹⁴ An analysis of the historical development of EU provisions surrounding energy taxation illustrates this point (*sections 2.1. & 2.2*). So far, the energy taxation directive remains largely disconnected from the EU's climate policy, including the EU Emissions Trading Scheme (*section 2.3*). Secondly, EU substantive law has had an ambiguous impact on Member States' environmental tax policy (*section 3*). On the one hand, EU substantive law has been interpreted by the EU Court of Justice in a way that encourages Member States to adopt environmental tax measures that are environmentally-driven and structured accordingly. Indeed, the environmental purpose of Member States' tax measures seems to play a positive role in the assessment of their compatibility with EU law, including State aid provisions (*section 3.1*), the fundamental freedoms (*section 3.2*) and the energy taxation directive (*section 3.3*). On the other hand, in some instances, EU law strictly limits Member States' ability to adopt environmentally-driven tax measures.¹⁵ Moreover, EU secondary law disregards the purpose of environmental taxes in order to classify them for statistical purposes (*section 3.4*).

The broad picture that emerges from the analysis of existing legislation, case-law and literature highlights that institutional and substantive EU law has shaped the use of environmental tax measures in a way that does not ensure the alignment of these taxes with the EU's and Member States' environmental and climate ambitions. Therefore, the last section of this chapter suggests new areas of research, which could improve the consistency of environmental tax policy at both EU and Member State levels (*section 4*).

2. The lack of consistency between the EU's energy tax policy & its climate objectives

The lack of consistency between the EU's energy tax policy and its climate commitments can be explained by looking at the legislative history of the directive on the taxation of energy products and electricity (*section 2.1*). This historical perspective indicates that the Commission intended to integrate environmental and climate considerations into its energy tax policy. However, the EU's institutional framework prevented the alignment of the energy tax directive with the EU's environmental and climate objectives (*section 2.2*). Consequently, EU law lacks clear rules as to the interaction of its energy tax policy with its climate policies, in particular the EU Emissions Trading System (EU ETS) directive (*section 2.3*).¹⁶

2.1. Historical overview

¹⁴ Among the authors who have underlined the role of institutional rules on the underdevelopment of environmental tax policy at the EU level, see Nicolas de Sadeleer, "Case Note. Court of Justice of the European Union Preliminary Ruling – Excise Duty on Certain Beverage Packaging: Case C-198/14 (*Valev Visnapuu*)" (2016) 25(2) Review of European Community and International Environmental Law 261-267, p. 262; Stefan Speck, "The Design of Carbon and Broad-Based Energy Taxes in European Countries" (2008) 10 Vermont Journal of Environmental Law 31-59, pp. 33-34.

¹⁵ See, for example, the *Braathens* case, which is discussed in *section 3.3.2*.

¹⁶ The energy taxation directive also, logically, interacts with Member States' national energy tax policy. This interaction is analysed in *section 3.3.1*.

The general legal framework surrounding excise duties on energy products was adopted in 1992.¹⁷ The initial goal of the Commission was by no means to pursue environmental goals.¹⁸ Rather, the alleged objective of the harmonisation of energy taxes - first introduced for mineral oils¹⁹ - was to ensure the proper functioning of the internal market by removing fiscal barriers and avoiding potential distortions caused by different rate levels between Member States.²⁰ Indeed, in absence of fiscal barriers, the existence of different excise rate levels could encourage consumers to purchase energy products in the Member States with the lowest excise rates (the so-called phenomenon of “cross-border fuel tourism”).²¹

The Commission first proposed the establishment of common rates of taxation on mineral oil.²² These common rates were supposed to be defined by means of a mathematical method based on the arithmetic or weighted average of the rates applied in the Member States, which the Commission described as “the simplest possible approach”.²³ In the end, this approach was nevertheless replaced by “a more flexible” one, which did not require Member States to fully harmonise their rate levels.²⁴ Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils required Member States to apply rates equal to or above the minimum rates of taxation laid down in the directive.²⁵ To set the minimum rates of taxation, the Commission committed to taking into consideration other policies, including energy, transport and environmental policies.²⁶ Yet, the minimum rates were mostly established on the basis of the rates imposed by Member States at the time. These rates were not directly linked to environmental factors. They were mainly influenced by a variety of historical factors, including revenue considerations, practicability and ensuring a “competitive balance” between different types of mineral oils with similar use.²⁷

Together with the directive on the approximation of rates, the Commission adopted a directive on the harmonisation of the structure of excise duties on mineral oils (Directive 92/81/EEC), which laid down common definitions for mineral oil products, obligatory

¹⁷ The Commission issued a first draft framework directive on excise duties in 1972. See Ben J.M. Terra & Peter J. Wattel, Chapter 7 “Excises and Energy Taxation”, *European Tax Law* (2012 Wolters Kluwer), p. 464.

¹⁸ In 1992, a task force convened by the Commission to analyse the “implications of the environmental issues arising from the completion of the Internal Market and other developments within the Community” even considered that the proposals for fiscal harmonization would, for certain countries, “cause (...) environmental problems, particularly with regard to air pollution” (Task Force Report on the Environment and the Internal Market, The Environment Dimension, 1992, at page 2.6.2).

¹⁹ Council Directive 92/81/EEC, *supra* n. 9, pp. 12-15; Council Directive 92/82/EE, *supra* n. 9, pp. 19-20.

²⁰ See Commission of the European Communities (1972), Proposals for harmonizing consumer taxes other than VAT, *supra* n. 4, p. 6; Commission of the European Communities, Completion of the internal market: approximation of internal market: approximation of indirect tax rates and harmonization of indirect tax structure. Global Communication from the Commission, Brussels, 26 August 1987, COM(87) 320 final/2, at pp. 16-17. See also Speck, *supra* n. 14, at pp. 32-35.

²¹ A literature review on the phenomenon of cross-border shopping can be found in Andrés Leal, Julio López-Laborda & Fernando Rodrigo, “Cross-Border Shopping: A Survey” (2010) 16 Int. Adv. Econ. Res. 135-148.

²² See Commission of the European Communities, Proposal for a Council Directive on the approximation of the rates of excise duty on mineral oils, Brussels, 21 August 1987, COM(87) 327 Final.

²³ *Ibid.*, point 7 of the explanatory memorandum.

²⁴ Commission of the European Communities, Amended proposal for a Council Directive on the approximation of the rates of excise duty on mineral oils, Brussels, 19 December 1989, COM(89) 526 final, pp. 3-4.

²⁵ Council Directive 92/82/EE, *supra* n. 9, pp. 19-20. Although the Commission’s plan was to use the minimum rates as a gradual step towards the alignments of tax rates, this plan was never realised (Commission of the European Communities, Amended proposal, *supra* n. 24).

²⁶ Commission of the European Communities, Amended proposal, *supra* n. 24, pp. 3-4. See also Commission of the European Communities, Completion of the internal market and approximation of indirect taxes, Brussels, 14 June 1989, COM(89) 260 final, p. 11. For example, the Commission justifies the adoption of a differential rate in favour of unleaded petrol by reference to environmental considerations (p. 6).

²⁷ Commission of the European Communities, Amended proposal, *supra* n. 24.

and optional reduced rates and exemptions.²⁸ According to the Commission, exemption provisions were defined, taking due account of “the predominant current practices and also of consistency with established policies in other fields (generally, transport, environment and energy)”.²⁹ Nevertheless, as for the directive on the approximation of rates, Directive 92/81/EEC is not fully consistent with environmental considerations. For example, the directive provided for the exemption of “mineral oils supplied for use as fuels for the purpose of air navigations other than private pleasure flying”.³⁰

Although directives on the taxation of mineral oils lacked consistency with environmental considerations, this does not mean the Commission was sceptical about or disinterested in environmental taxes in the early 1990s. On the contrary, the Commission had envisaged the adoption of a European-wide CO₂ tax to be applied in parallel with the directives on the taxation of mineral oils.³¹ This tax – aimed at preventing and reducing atmospheric pollution – was supposed to rely on two main components: the CO₂ emissions of the fossil energy sources and the calorific value of non-renewable energy (fossil and non-fossil) sources.³² The proposal ultimately failed. Member States were unable to reach unanimity, as required by the EU treaties for the adoption of taxes, including environmental tax measures (former articles 99 and 130S of the Treaty establishing the European Economic Community, now articles 113, 192, §2 of the TFEU).³³

In 2003, the energy taxation directive (Directive 2003/96/EC) replaced the directives adopted in the 1990s on the taxation of mineral oils (directive 92/81/EEC on the harmonisation of the structure excise duties on mineral oils and directive 92/82/EEC on the approximation of the rates). The energy taxation directive follows a similar logic as the 1992 directives but its scope is broader. It provides for harmonised minimum levels of taxation of motor fuels, heating fuels and electricity.³⁴ It should be read in combination with Directive 2008/118/EC, which defines the general arrangements for excise duties in the EU (the so-called “general arrangements directive”).³⁵ Directive 2008/118/EC harmonises the conditions for the chargeability of excise duties (time and place), the conditions under which exemptions apply, the conditions for reimbursement, the requirements under which excise goods move under suspension of duty, etc.

Although the energy taxation directive contains explicit references to environmental objectives, including references to the EU’s climate commitments, it is – similar to the 1992 directives on the taxation of mineral oils – characterised by a lack of any systematic

²⁸ Council Directive 92/81/EE, *supra* n. 9.

²⁹ See Commission of the European Communities, Proposals for a Council Directive on the harmonization of the structures of excise duties on mineral oils, 7 November 1990, COM(90) 434 final, p. 12.

³⁰ Article 8, §1, b) of Directive 92/81/EEC. According to the Commission’s proposal, this was consistent with the Community transport policy (Commission of the European Communities, COM(90) 434 final, p. 14).

³¹ Commission of the European Communities (1992), *supra* n. 10. See p. 7, point 2 (“Incorporation in the existing tax framework”). See also article 1, para. 1 of the proposed tax on CO₂ and energy.

³² *Ibid.*, p. 10, point 1.

³³ Before the Maastricht Treaty came into force, article 130S (now 192 TFEU) also required unanimity for the adoption of environmental measures.

³⁴ The Directive has been justified by reference to the need to ensure the proper functioning of the internal market. See i.a. recitals (2), (3) and (4) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31 October 2003, pp. 51-70.

³⁵ Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 14 January 2009, pp. 12-30.

link with environmental and climate considerations.³⁶ The minimum prescribed levels of taxation vary according to the type of fuels (e.g. leaded or unleaded petrol, gas oil, kerosene, LPG, natural gas, electricity, coal), their use (i.e. motor or heating fuel, business or non-business use) and specific purpose (e.g. agricultural, public works, vehicles intended for use off public roadways). In some instances, the minimum levels of taxation can even be said to frustrate environmental objectives. For example, if a Member State were to decide to follow the minimum levels of taxation to design its energy tax policy, highly polluting energy sources (such as coal) could be subject to a lower tax burden than less polluting ones.³⁷ Moreover, some energy uses – including highly polluting ones (e.g. energy use for mineralogical processes, which includes the cement industry) are excluded from the scope of the directive.³⁸ Under certain conditions, Member States are authorised to apply differentiated rates (e.g. based on product quality or quantitative consumption levels³⁹), tax reductions (e.g. in favour of energy-intensive businesses⁴⁰) or exemptions (e.g. to electricity of solar origin⁴¹). While some of these provisions can be justified on environmental grounds (such as the exemption for solar electricity), others are difficult to reconcile with environmental goals or are only justifiable under specific circumstances. For example, the option for Member States to grant favourable treatment to energy-intensive businesses can only be justified on environmental grounds under the assumption that, in the absence of such favourable provisions, these businesses would relocate to other jurisdictions, where lower environmental standards apply, which would negatively impact pollution levels on a global scale.⁴²

In 2011, the Commission proposed a revision of the energy taxation directive. The key idea was to modify the basis for excise duties' minimum rate levels by linking them to similar components as envisaged for the harmonised CO₂ tax in 1992: the reference CO₂ emission factors and the net calorific value of the energy products and electricity.⁴³ Despite the positive impact that this proposal would have had on the consistency of Union tax and climate policy⁴⁴, the Commission was unsuccessful in convincing all Member States and, in 2015, withdrew its proposal.⁴⁵

Many of the observations that the Commission made twenty years ago are still valid today: “(...) a number of Member States have already introduced, or are planning to

³⁶ Directive 2003/96/EC, *supra* n. 34, recital 6 (that refers to the integration clause; article 6 TEC, now article 11 TFEU) and recital 7 (that refers to the EU's commitments in the context of the United Nations Framework Convention on Climate Change and the Kyoto Protocol). See also the – even more explicit – references to environmental policy objectives in the 1997 Commission's Proposal (Commission of the European Communities, Proposal for a Council Directive restructuring the Community Framework for the Taxation of Energy Products, 12 March 1997, COM(97) 30 final).

³⁷ The Commission underlined this issue in its 2011 proposal to reform the energy taxation directive (p. 3: “(...) some products are favoured over others, the most favourable treatment being reserved to coal”). See Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, Brussels, 13 April 2011, COM(2011) 169 final.

³⁸ Jolanda van Eijndthoven, “Energy Taxation at the European Level: What does it do for the Environment and Sustainability?” (2011) 6 EC Tax Review 283, at p. 285. See Art. 2, para. 4 of Directive 2003/96/EC, *supra* n. 34.

³⁹ Directive 2003/96/EC, *supra* n. 34, Art. 5.

⁴⁰ *Ibid.*, Art. 17.

⁴¹ *Ibid.*, Art. 15.

⁴² This phenomenon is usually referred to as “carbon leakage” in the literature.

⁴³ Proposal for a Council Directive amending Directive 2003/96/EC, *supra* n. 37.

⁴⁴ Jacqueline Cottrel and Kai Schlagelmilch, “Everyone's a Winner with the New Energy Tax Directive” (2012), 22 Int'l Tax Rev. 55.

⁴⁵ Withdrawal of Commission Proposals, List of Withdrawn proposals, 7 March 2015, JO C 80, pp. 17-23. The Commission has launched a new evaluation of the energy taxation directive in 2017. See https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-4224148_en.

introduce, taxes on carbon dioxide emissions and the use of energy; (...) a harmonized approach is needed to ensure the functioning of the internal market”.⁴⁶ One of the only – yet not negligible – changes since 1992 was the adoption of a Directive introducing a European Emissions Trading Scheme in 2003 in order to mitigate greenhouse gas emissions within the EU.⁴⁷ To a certain extent, taking into account the wider EU involvement in the fight against climate change, the absence of environmental criteria in the energy taxation directive has become more paradoxical than ever.⁴⁸

2.2. The role of the EU’s institutional framework

EU institutional rules have shaped the form and the substance of the EU’s energy and climate policy. More specifically, voting requirements have had a strong impact on the absence of EU climate *tax* policy.⁴⁹ Indeed, as unanimity is required for the adoption of tax measures, the environmental dimension of EU tax law has remained underdeveloped in the absence of consensus among Member States on the need to “green” the taxation of energy products. According to the Commission, this EU inaction in the field of energy taxation illustrates that, in some instances, the unanimity requirement has had “a detrimental effect on the EU’s wider policy priorities”.⁵⁰

At the same time, less restrictive voting requirements may have had an impact on the adoption of other EU (*non-fiscal*) market-based climate policy instruments. Following the failure of its proposal for a harmonised CO₂ tax, the Commission proposed the establishment of a scheme for greenhouse gas emission allowance trading. This scheme – usually referred to as the EU ETS – was adopted on the basis of article 175(1) of the Treaty establishing the European Community (now article 192 TFEU), which is the legal basis for the EU’s environmental action.⁵¹ This environmental legal basis has less restrictive voting requirements than the ones that apply for the adoption of tax provisions. Indeed, since the Maastricht treaty, qualified majority generally applies for the adoption of environmental provisions, apart from a few exceptions where the unanimity requirement remains, including for environmental measures that are “primarily of a fiscal nature” (article 192, §2(a) of the TFEU).⁵² The same exception

⁴⁶ Commission of the European Communities (1992), *supra* n. 10, at p. 25 (recitals of the proposal).

⁴⁷ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25 October 2003, pp. 32-46.

⁴⁸ The lack of environmental considerations in the EU Energy taxation directive has been criticised by legal scholars who argue that further harmonisation is needed, so as to align the Directive with the EU commitments in terms of climate change. See Adriano Di Pietro, “The Research”, in *La fiscalità ambientale in Europa e per l’Europa* (2016 Cacucci Editore), p. 20; Marta Villar Ezcurra, “State Aids and Taxation in the Energy Sector: Looking for a New Approach”, in: Marta Villar Ezcurra (ed.), *State Aids, Taxation and the Energy Sector* (2017 Thomson Reuters Aranzadi), pp. 37-55, at pp. 45-48.

⁴⁹ See Speck, *supra* n. 14, pp. 33-34.

⁵⁰ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Towards a more efficient and democratic decision making in EU tax policy, 15 January 2019, COM(2019) 8 final, p. 5.

⁵¹ See Directive 2003/87/EC, *supra* n. 47. Around 45% of EU greenhouse gas emissions are covered by the scheme (https://ec.europa.eu/clima/policies/ets_en).

⁵² Unless the passerelle clause is used (article 192, §2, paragraph 2 of the TFEU). On the interpretation of the terms “primarily of a fiscal nature”, see Roland Ismer & Manuel Haussner, “Inclusion of Consumption into the EU ETS: The Legal Basis under European Union Law” (2016) 25(1) Review of European Community & International Environmental Law 69-80; Stefan E. Weishaar, “Carbon Taxes at EU Level. Introduction Issues and Barriers” (2018) 556 WIFO Working Papers, pp. 2-5; Stefan E. Weishaar, “Fault lines between fees and taxes: legal obstacles for linking”, in: L. Kreiser, M.S. Andersen, B. Egelund Olsen, S. Speck, J.E. Milne & H. Ashiabor (eds.), *Carbon Pricing: design, experience and issues* (2015) 15 Critical Issues in Environmental Taxation, pp. 32-45. See also AG Léger, Opinion in *Kingdom of Spain v. Council of the European Union*, C-36/98, 16 May 2000, paras. 93-95.

applies in the field of the EU's energy policy: unanimity is required for the adoption of energy measures that are "primarily of a fiscal nature" (article 194, §3 of the TFEU).

The different voting requirements that apply to the adoption of environmental taxes and other (non-fiscal) market-based measures raise both policy and legal issues. From a policy perspective, one can regret that voting requirements may influence policy choice, such as that made in favour of the EU ETS over the adoption of a CO₂ tax. Indeed, institutional rules and voting requirements do not provide good policy reasons to favour one measure over another. From a legal perspective, the question arises as to whether market-based measures such as the EU ETS, which has been adopted on the basis of qualified majority voting requirements, are effectively different from tax measures.

In the case *Air Transport Association of America and Others*, the Court of Justice referred to two features of the EU ETS in order to distinguish it from a tax. Firstly, the Court considered that the scheme is not aimed at generating public revenue.⁵³ Secondly, the Court pointed to the fact that the EU ETS does not establish a tax base and tax rate, which implies that the amounts to be collected cannot be determined in advance.⁵⁴ Advocate General Kokott also underlined this feature of the scheme. In her Opinion, she described the EU ETS as a "market-based measure", under which a large percentage of emissions allowances was supplied free of charge and the price of the remaining allowances was not determined in advance.⁵⁵

While these features initially characterised the EU ETS, the situation has now evolved. The proportion of emissions allocated for free is being gradually reduced. Moreover, the price of allowances may no longer be "undetermined" given the recent adoption of measures to improve their price stability.⁵⁶ Despite these new features, which, arguably, bring the EU ETS closer to a tax measure, it is unlikely that the Court of Justice will ever reclassify the EU ETS to a measure that is primarily of a fiscal nature. Such a decision could have an explosive effect on the European legal order. If the EU ETS were characterised as a tax, the EU ETS directive would no longer have a valid legal basis under EU law. No action for annulment could be directly brought against the EU ETS directive given that the time limit for such an action has elapsed (article 263, §6 of the TFEU). However, such an action could be brought against any new European act being adopted on the basis of article 192 of the TFEU in order to further amend the EU ETS Directive (articles 263 and 264 of the TFEU).⁵⁷ Moreover, as in the case *Air Transport Association of America and Others*, the validity of the EU ETS Directive could be assessed by the Court of Justice in the context of a preliminary ruling (article 267 of the TFEU).

⁵³ CJEU, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*, 21 December 2011, C-366/10, para. 143.

⁵⁴ *Ibid.*

⁵⁵ AG Kokott, Opinion in *Air Transport Association of America and Others*, C-366/10, 6 October 2011, paras. 214-215.

⁵⁶ E.g. the use of stability measures such as back-loading (namely the delaying of the auctioning of allowances) and the use of a market stability reserve (allowing the placing of a percentage of allowances into a reserve). In the case *Republic of Poland v. European Parliament, Council of the European Union* (21 June 2018, C-5/16), the Court of Justice rejected Poland's claim that decision 2015/1814 (establishing the market stability reserve) should not have been adopted on the basis of article 192, §1 because it infringed this provision read in conjunction with article 192, §2(c) of the TFEU. On this issue, see Weishaar (2015), *supra* n. 52, p. 41.

⁵⁷ See CJEU, C-5/16, *supra* n. 56.

2.3. The potential overlap with the EU ETS Directive

Institutional rules have shaped European energy policy, leading to the adoption of directives on energy taxation that are largely detached from the EU's directives aimed at mitigating climate change, in particular the EU ETS Directive.⁵⁸

This is problematic as the lack of organised interaction between these directives can make it hard – if not impossible – for Member States to implement the energy taxation directive in a way that is in line with their climate commitments, without creating a double economic burden on certain economic actors. For example, energy-using installations that fall under the scope of the EU ETS Directive could be required to submit allowances to cover their greenhouse gas emissions and, simultaneously, a tax could be imposed on their use of energy products and electricity. In this example, both energy taxes implementing the energy taxation directive and domestic legislation implementing the EU ETS directive could be aimed at achieving the same climate objective, namely the internalisation of greenhouse gas emissions. From this perspective, the two directives could be described as “overlapping instruments”.⁵⁹ At the same time, the two directives seem to suffer from the same weaknesses, allowing some sectors not to be subject to any of the two directives.⁶⁰ For example, the international aviation sector largely falls out of the scope of the two directives.⁶¹

In 2011, the Commission suggested better coordination of the energy taxation directive with the EU ETS.⁶² The idea was to tax CO₂ emissions in a broad way while making sure that activities subject to the EU ETS would benefit from an exemption.⁶³ Moreover, preferential treatment would have been granted to enterprises exposed to a significant risk of carbon leakage, as already established under the EU ETS directive.⁶⁴ However, since the proposal failed, the interaction between the EU ETS and the energy taxation directive remains unclear, which is problematic in terms of legal certainty.

⁵⁸ Similarly, the EU ETS Directive does not clarify its interaction with the energy taxation directive. It only contains some references as to its interaction with energy taxes. See recitals 23, 24 and article 30, para. 2(e) of Directive 2003/87/EC, as initially adopted and para. 7 of the explanatory memorandum of the proposal for a directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ C 75E, 26 March 2002, COM/2001/0581 final, pp. 33-44.

⁵⁹ Claudia Dias Soares, “Energy tax treatment of undertakings covered by emissions trading” (2007) 4 EC Tax Review 184, at p. 185. See also point 1.4 of the explanatory memorandum of the Proposal for a Council Directive amending Directive 2003/96/EC, *supra* n. 37 (“(...) taxes on energy are levied under the energy taxation directive in the same way whether or not, in a particular case, the limitation of CO₂ emissions is ensured through the EU ETS. As a result, mechanisms of Union law intended to limit such emissions may overlap in certain cases and may be completely missing in others”). The lack of co-ordination is described in the impact assessment accompanying document to the 2011 proposal (SEC(2011) 409 final (point 2.2.4.)). See also Pasquale Pistone & Inaki Bilbao Estrada, “Tax Incentives in the EU Energy Sector: General versus Selective Measures”, in: Marta Villar Ezcurra (ed.), *State Aids, Taxation and the Energy Sector* (2017 Thomson Reuters Aranzadi), pp. 215-216 and p. 219.

⁶⁰ Van Eijndthoven describes this phenomenon as a “double dip” (van Eijndthoven, *supra* n. 38, at p. 287).

⁶¹ The application of the EU ETS directive to international aviation has been the main point of discussion of the case *Air Transport Association of America and Others* (*supra* n. 55). Although aviation has been integrated into the EU ETS, the application of the directive on international aviation has been suspended (see, i.a., Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, O.J. L 350, 29 December 2017, pp. 7-14). On the taxation of the aviation sector in the EU, see CE Delft, *Taxing aviation fuels in the EU*, November 2018, available at https://www.transportenvironment.org/sites/te/files/publications/2019_02_CE_Delft_Taxing_Aviation_Fuels_EU.pdf.

⁶² Proposal for a Council Directive amending Directive 2003/96/EC, *supra* n. 37, para. 2 of the explanatory memorandum (legal elements of the proposals): “The set of amendments will ensure that the ETD complements Directive 2003/87/EC seamlessly, as regards the need for a price signal attached to CO₂ emissions (...), while avoiding overlaps between the EU emission trading scheme, on the one hand, and taxation serving the same purpose, on the other (...).”

⁶³ Proposal for a Council Directive amending Directive 2003/96/EC, *supra* n. 37, point 3.2 of the explanatory memorandum (legal elements of the proposals). See the proposed amendments to article 14 (proposed article 14(1)(d)).

⁶⁴ *Ibid*, point 3.8 of the explanatory memorandum (legal elements of the proposals).

Unilateral attempts by Member States to enhance the consistency between the two directives are not free of constraints. In principle, they are supposed to respect the requirements of both directives. Moreover, EU State aid law adds an additional layer of constraint on Member States willing to release from taxation sectors that are also subject to the EU ETS or *vice versa* (section 3.1).⁶⁵ Fiscal aid schemes in the form of the reduction of energy taxes are, in principle, compatible with EU State aid law when the beneficiaries pay at least the minimum tax levels referred to in the energy taxation directive.⁶⁶ However, given that energy taxes - in particular carbon taxes - and the EU ETS may have broadly equivalent effects, Member States may prefer to grant exemptions or reductions below the minimum levels of taxation (by relying on provisions in the energy taxation directive that allow them to do so⁶⁷). The Commission will then use a different approach to assess the compatibility of fiscal aid with State aid law, taking into account the necessity and proportionality of the aid measure.⁶⁸

3. The contradictory effects of EU law on Member States' environmental tax policy

Environmental taxation has a strong national dimension within the EU. This strong national dimension explains that the potential conflicts and frictions between Member States' environmental tax policies and EU primary and secondary law lie at the core of the legal issues surrounding environmental taxation under EU law. Member States are, in principle, free to develop their own environmental tax policy, but they should - as for the adoption of any other tax measures - do so in compliance with EU law.⁶⁹

This section gives an overview of how EU law, including primary and secondary legislation, and their interpretation by the Court have influenced Member States' environmental tax policies. In terms of secondary law provisions, this chapter is limited to analysis of the impact of the energy taxation directive and the general arrangements directive (section 3.3). It should, however, be noted that other EU law provisions can also restrict Member States' ability to adopt environmental or traditional taxes. For example, domestic taxes on heavy goods vehicles need to comply with the provision of the directive on the charging of heavy goods vehicles for the use of certain

⁶⁵ See Daniel Boeshertz, "Community state aid policy and energy taxation" (2003) 4 EC Tax Review; Cécile Brokelind, "Les droits d'accise sur l'énergie en Suède" (2016) 3 Revue européenne et internationale de droit fiscal 329, pp. 333-335 (referring to the State aid Case C 42/2003); Mikael Skou Andersen, "Reflections on the Scandinavian Model: Some Insights into Energy-Related Taxes in Denmark and Sweden" (2015) 55(6) European Taxation, point 7 ("Exemptions and State Aid Issues").

⁶⁶ Article 44 of the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26 June 2014, pp. 1-78. See also Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28 June 2014, pp. 1-55 (hereafter the "2014 Guidelines"), para. 173. For a concrete example, see, Commission Decision of 17 June 2009 on aid scheme C 41/06 (ex N318/A/04) which Denmark is planning to implement for refunding the CO₂ tax on quota-regulated fuel consumption in industry (notified under document C(2009) 4517, 23 December 2009, OJ L 345/18 paras. 63, 65, 68). This conditional decision of the Commission corresponds to the proposed amendments to article 17 of the energy taxation directive (COM(2011)169): energy-intensive businesses may benefit from tax reductions "provided the minimum level of taxation prescribed in this [the energy Taxation] Directive are respected on average for each business".

⁶⁷ See, e.g., article 17, §2 to 4 of Directive 2003/96/EC, *supra* n. 34.

⁶⁸ See Commission Decision of 17 June 2009 on aid scheme C 41/06. In footnote 31, the Commission explicitly refused to rule on the possibility to meet the requirement of article 17(4) of the energy taxation directive through the EU ETS. The 2014 Guidelines now further clarify how the Commission should assess the interaction between carbon taxes and the EU ETS under EU State aid law (see paras. 179-180).

⁶⁹ Certain cases include questions of compliance with both EU primary and secondary law provisions (state aid, free movement of goods and the energy taxation directive). See, e.g., the *Kernkraftwerke Lippe-Ems GmbH v. Hauptzollamt Osnabrück*, 4 June 2015, C-5/14).

infrastructures.⁷⁰ Other directives also impact Member States' domestic environmental tax measures. For example, the Court has been asked to rule on the compatibility of a waste tax with the waste directive (directive 2006/12/EC, now replaced by Directive 2008/98/EC)⁷¹, of an excise tax on certain beverage packaging with the directive on packaging and packaging waste (directive 94/62/EC)⁷² and of domestic environmental measures with the VAT directives⁷³. The Court also recently ruled on the compatibility of an 80% tax imposed by the Slovak Republic on the greenhouse gas emission allowances allocated free of charge with the EU ETS directive.⁷⁴

The case-law of the Court of Justice indicates that the alleged environmental purpose of a tax measure does not prevent it from being found incompatible with EU primary law.⁷⁵ Nevertheless, the environmental objective of a tax measure can positively affect its assessment. The Court seems to distinguish between environmental taxes that are not designed in accordance with environmental principles and taxes that are genuinely environmentally-driven.⁷⁶ If they are selective or discriminatory, the former are less likely to be justified under EU State aid law (*section 3.1*) or the fundamental freedoms provisions (*section 3.2*).⁷⁷ From this perspective, EU law seems to encourage Member States to align the design of their environmental tax measures with environmental considerations. However, EU law also seems to have another - somewhat contradictory – effect on Member States' energy and environmental taxes. EU law sometimes prevents Member States from adopting genuine environmentally-driven tax measures. Moreover, the European regulation on environmental economic accounts defines environmental taxes in a way which is largely disconnected from their environmental purpose. As long as a Member State imposes a tax on polluting products or activities, this tax will be classified as “environmental” for EU statistical purposes, regardless of the fact that its purpose and design may not be environmentally-driven. (*section 3.4*).

3.1. The EU's State aid law

Potential conflicts between domestic environmental tax measures and State aid provisions are not uncommon. Many environmental tax measures distinguish between economic actors, for example between more and less polluting economic actors or between those requiring temporary relief from environmental taxes to remain competitive and those who can stand the cost of these taxes. Such a differentiated way of taxing economic actors could easily be likened to a form of fiscal State aid, by which a Member State distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.⁷⁸

⁷⁰ Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ L 187, 20 July 1999, pp. 42-50).

⁷¹ CJEU, *Futura Immobiliare srl Hotel Futura, Meeting Hotel, Hotel Blanc, Hotel Clyton, Business srl v. Comune di Casoria*, 16 July 2009, C-254/08.

⁷² CJEU, *Valev Visnapuu v. Kihlakunnansyyttäjä, Suomen Valtio – Tullihallitus*, 12 November 2015, C-198/14.

⁷³ See, for example, CJEU, *Commission of the European Communities v. French Republic*, 14 June 2001, C-40/00, para. 21.

⁷⁴ CJEU, *PPC Power a.s. v. Finančné riaditeľstvo Slovenskej republiky, Daňový úrad pre vybrané daňové subjekty*, 12 April 2018, C-302/17.

⁷⁵ *Infra*. See, for example, the *British Aggregates* case mentioned in *section 3.1*.

⁷⁶ *Infra* (*section 3.1*).

⁷⁷ *Infra* (*sections 3.1 and 3.2*).

⁷⁸ On this topic, see Estela Ferreiro Serret, “Taxes with Environmental Purposes and State Aid Law: The Relevance of the Design of the Tax in Order to Justify Their Selectivity”, in: Pasquale Pistone & Marta Villar Ezcurra, *Energy taxation, environmental protection and state aids: tracing the path from divergence to convergence* (IBFD 2016), pp. 245-270.

Although the Commission and the Court consider the environmental character of a tax in assessing its compatibility with EU State aid law, the environmental objective of a selective tax measure does not exclude it from State aid control.⁷⁹ In the case *British Aggregates*, concerning an environmental levy imposed on certain materials within the aggregates sector, the Court of Justice underlined that the environmental purpose of a tax measure could not automatically lead to the conclusion that the levy on aggregates was not selective.⁸⁰ In its decision, the Court of Justice stated as follows:

*“(…) 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 87(1) EC [now 107§1 TFEU] (...), 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 87(3) EC [now 107§3 TFEU]”.*⁸¹

In other words, if an environmental levy is imposed on certain sectors and not on others that have a similar environmental impact, the selective character of the measure cannot be disregarded.⁸² Consequently, the designing of environmental tax measures in a way that is consistent with their environmental objective is a key component of their compatibility with EU State aid law.

The case *Adria-Wien Pipeline* also illustrates this point.⁸³ This case concerned an Austrian energy tax regime, which provided for a tax rebate for certain undertakings, namely manufacturing enterprises. The Court considered that the regime constituted State aid and rejected the ecological considerations put forward by the Austrian Government. According to the Court, the Austrian regime was inconsistent as the tax rebates were granted only to manufacturing enterprises, even though their energy consumption was “equally damaging to the environment” as those enterprises supplying services.⁸⁴

In addition to the case law of the Court on environmental fiscal aid, Member States can rely on the regulations and guidelines of the Commission to determine whether their preferential environmental tax measures comply with EU State aid law.⁸⁵ The

Ferreiro provides a detailed analysis of most of the cases *British Aggregates* and *Adria-Wien Pipeline*. The Court considers that the concept of aid does not encompass “differential treatment of undertakings in the application of charges, where that differential treatment flows from the nature and general scheme of the system of charges in question” (CJEU, *Kingdom of Spain v. Commission of the European Communities*, 26 September 2002, C-351/98, paras. 42-43, referred to in the opinion of AG Tizzano, joined cases C-393/04 & C-41/05, *Air Liquide Industries Belgium SA v. Ville de Seraing and Air Liquide Industries Belgium SA v. Province de Liège*, footnote 14).

⁷⁹ See CJEU, *British Aggregates Associations v. Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, 22 December 2008, C-487/06 P, para. 92. See also CJEU, *European Commission v. Kingdom of the Netherlands*, 8 September 2011, C-279/08 P, para. 75. Note that this case did not concern a tax measure but an emission trading scheme for nitrogen oxides.

⁸⁰ CJEU, *British Aggregates*, *supra* n. 79, para. 87.

⁸¹ *Ibid.*, para. 92. Similarly, see General Court, *Republic of Austria v. European Commission*, 11 December 2014, T-251/11, para. 118.

⁸² *Ibid.*, paras. 86-87. See also the decision of the General Court (General Court, *British Aggregates Association v. European Commission*, 7 March 2012, T-210/02 RENV, in particular paras. 88-90).

⁸³ CJEU, *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH and Finanzlandsdirektion für Kärnten*, 8 November 2001, C-143/99.

⁸⁴ *Ibid.*, para. 52.

⁸⁵ The first guidelines were issued in 1994 (Community guidelines on State aid for environmental protection, OJ L C 72/, 10 March 1994, pp. 3-9). New guidelines were issued in 2001 (Community guidelines on State aid for environmental

“Environmental and Energy State Aid Guidelines” (EEAG) provides for the conditions under which several aid measures, including aid in the form of reductions in or exemption from harmonised and non-harmonised environmental taxes, may be considered compatible with the internal market.⁸⁶ Moreover, the “General Block Exemption Regulation” (GBER) sets out the requirements under which certain categories of State aid, including aid in the form of a reduction of an environmental tax under the energy taxation directive (2003/96/EC), may be exempted from the notification procedure.⁸⁷ Both the GBER and the EEAG define the concept of environmental tax as follows:

*“‘environmental tax’ means a tax with a specific tax base that has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment”*⁸⁸

This definition is broad: it refers to both an objective criterion (namely the tax base) and a purposive criterion (namely the purpose of the tax).⁸⁹ It has been criticised for leading to legal uncertainty (due to its broad character) and for its potentially detrimental impact on the internal market (as it could facilitate the adoption of distortive aid measures).⁹⁰ The impact of this definition on the assessment of aid in the form of the reduction of energy taxes under the GBER is unclear. Indeed, the GBER exempts and deems compatible with the internal market “aid schemes in the form of reductions in *environmental* taxes under Directive 2003/96/EC”.⁹¹ Therefore, the question arises as to how to apply the definition of the concept of “environmental taxes” in the case of tax reductions that fall under the energy taxation directive. The case law of the Court seems to suggest that the reference to environmental taxes in the GBER is tautological: all taxes falling under the energy taxation directive would, *de facto*, be assimilated into “environmental taxes”.⁹² If so, the shortcut made in the GBER could be criticised as it facilitates the adoption of potentially distortive aid schemes with no guarantee that an environmental objective is pursued.⁹³ However, if the reference to “environmental taxes” is not tautological, Member States - and aid beneficiaries - would face legal uncertainty when they grant aid in the form of reductions in energy taxes under the energy taxation

protection, 3 February 2001, OJ L C 37, pp. 3-15), in 2008 (Community guidelines on State aid for environmental protection, OJ C 82, 1 April 2008, pp. 1-33) and 2014 (Commission 2014 Guidelines, *supra* n. 66). The Commission included environmental protection in its exemption regulation for the first time in 2008 (Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), OJ L 214, 9 August 2008, pp. 3-47). This regulation was replaced in 2014 (Commission Regulation (EU) No 651/2014, *supra* n. 66).

⁸⁶ Section 3.7. of the Commission 2014 Guidelines, *supra* n. 66.

⁸⁷ Commission Regulation (EU) No 651/2014, *supra* n. 66.

⁸⁸ *Ibid.*, Art. 2, point (119) and Art. 1.13 (15) of the Commission 2014 Guidelines, *supra* n. 66.

⁸⁹ Villar Ezcurra, *supra* n. 48, at p. 50. See also Marta Villar Ezcurra & Federica Pitrone, “The Concept of “Environmental Taxes” in the Energy Sector: Possible Solutions in a State Aid Context”, in Marta Villar Ezcurra (ed.), *State Aids, Taxation and the Energy Sector* (2017 Thomson Reuters Aranzadi), pp. 193-224, at p. 198.

⁹⁰ See Phedon Nicolaides, “In Search of Economically Rational Environmental State Aid: The Case of Exemption from Environmental Taxes” (2014) *European Competition Journal* 155, at p. 157; Nicolas de Sadeleer, “State Aids and Environmental Protection: Time for Promoting the Polluter-Pays Principle” (2012) 1 *Nordisk miljörättslig tidskrift* 3-30.

⁹¹ Art. 44 of Commission Regulation (EU) No 651/2014, *supra* n. 66.

⁹² See CJEU, *Dilly's Wellnesshotel GmbH v. Finanzamt Linz*, 21 July 2016, C-493/14. See also Opinion of AG Wahl, 17 Marc 2016, para. 73 to 86. Note that this case discussed the former GBER (namely Commission Regulation No 800/2008). See also Joachim Englisch, “Energy Tax Incentives and the GBER Regime”, in Marta Villar Ezcurra (ed.), *State Aids, Taxation and the Energy Sector* (2017 Thomson Reuters Aranzadi), pp. 283-296, at p. 288; Villar Ezcurra & Pitrone, *supra* n. 89, at p. 201.

⁹³ See Englisch, *supra* n. 92, at pp. 291-292.

directive.⁹⁴ Villar argues that the Commission should review the GBER and the EEAG to enhance the consistency between EU energy, tax and State aid policies.⁹⁵

3.2. The EU's customs union, non-discrimination and free movement provisions

Conflicts between Member States' environmental tax policy and EU law do not only arise in the context of State aid law, but also in the context of the customs union and the EU's non-discrimination provision and the free movement of goods (3.2.1). A few cases also concern the free movement of services (3.2.2), capital (3.2.3) and persons (3.2.4).

3.2.1. The customs union, EU non-discrimination and free movement of goods provisions

Many cases concerning environmental taxes imposed on products have been analysed under article 30 of the TFEU (on customs duties and charges having equivalent effects) and article 110 of the TFEU (on fiscal barriers to trade in goods). The analysis provided in this section focuses only on the cases where the environmental character of the taxes under dispute has been explicitly discussed by the Court.⁹⁶ This case law highlights that environmental protection is not an excuse to violate the customs union or discriminate against products from other Member States. As stated by Advocate General Sharpston in the *Tatu* case:

"(...) where the tax concerned is discriminatory in nature, the fact that the purpose of and reason for the tax may be environmental in nature or seek to reduce pollution has no bearing on any finding of infringement. Measures to improve environmental conditions are, of course, to be encouraged. But they must not be enacted in a way which gives rise to discrimination against imported products".⁹⁷

In other words, environmental considerations cannot justify a discriminatory tax. However, EU law does not prevent Member States from distinguishing between products that, at first sight, look similar, on the basis of environmental grounds (e.g. by imposing higher taxes on products that are more polluting or have been produced in a

⁹⁴ Villar Ezcurra, *supra* n. 48, at p. 30.

⁹⁵ See i.a. Marta Villar Ezcurra, "The Concept of Environmental Tax in a State Aid Context When a Fiscal Energy Measure Is Concerned" (2017) 16(1) Eur. St. Aid L.Q., 11-24.

⁹⁶ For a broader overview of the case law, see Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014), pp. 241-259; Nicolas de Sadeleer, "Environmental Regulatory Autonomy and the Free Movement of Goods" (2013) 1 Jean Monnet Working Paper Series – Environmental and Internal Market, available at www.tradeenvironment.eu; Nicolas de Sadeleer, "La fiscalité environnementale à l'épreuve du droit du marché intérieur. De l'imposition différenciée de l'énergie renouvelable à celle des terres contaminées", in Edoardo Traversa et al (eds.), *Les Dialogues de la fiscalité – Anno 2013* (2013) Larcier, pp. 79-127. See also Daniel Deak, "Environmental Tax Harmonization and Competition-Centred Legal Practice of EU CJ" (2017) 6 EC Tax Review 303, at pp. 307-316. With regard to the interaction between environmental tax measures and the customs union provision, see CJEU, *Commission of the European Communities v. Italian Republic*, 21 Jun 2007, C-173/05. This case concerned an Italian environmental tax on methane gas from Algeria. According to the Court, this tax amounted to a "charge having equivalent effect to customs duties". Consequently, it was prohibited irrespective of its purpose (para. 42). See also *Carbonati Apuani Srl v. Comune di Carrara*, 9 September 2004, C-72/03 (in particular the reference to the environmental objective of the tax in the conclusions of the AG Poiares Maduro).

⁹⁷ CJEU, *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei, Direcția Generală a Finanțelor Publice Sibiu, Administrația Finanțelor Publice Sibiu, Administrația Fondului pentru Mediu and Ministerul Mediului*, 27 January 2011, C-402/09, Opinion AG Sharpston, 27 January 2011, para. 38. The *Tatu* case concerned the taxation of second-hand vehicles. Many other cases regarding taxes on second-hand vehicles have been analysed by the Court. See, a.o., CJEU, *Fazenda Pública, Ministério Público and Américo João Nundes Tadeu*, 9 March 1995, C-345/93; CEU, *Ministério Público, António Gomes valente and Fazenda Pública*, 22 February 2001, C-393/98; CJEU, *Harald Weigel, Ingrid Weigel and Finanzlandesdirektion für Vorarlberg*, 29 April 2004, C-387/01; CJEU, *Dariusz Krawczyński v. Dyrektor Izby Celnej w Białymstoku*, 17 July 2008, C-426/07; CJEU, X, 19 December 2013, C-437/12; CJEU, *Mihai Manea v. Instituția Prefecturală județul Brașov — Serviciul Public Comunitar Regim de Permise de Conducere și Înmatriculare a Vehiculelor*, 14 April 2015, C-76/14.

more polluting way).⁹⁸ Such differentiation between allegedly “like” products should not automatically be found “discriminatory in nature”.

The *Outokumpu Oy* case illustrates this point.⁹⁹ The Court was asked to rule on the compatibility of a tax imposed in Finland on electricity. This tax was designed as an excise duty imposed both on domestically and imported electricity. The method to define the tax rate was dependent on whether the electricity was produced in Finland or was imported. Where the tax rate on domestically produced electricity was determined on environmental grounds (namely the method of production of the electricity), imported electricity was subject to a flat rate. The Court considered that the tax was discriminatory because it could lead, “if only in certain cases, to higher taxation being imposed on imported electricity”.¹⁰⁰ Nevertheless, the Court explicitly stated that article 110 of the TFEU does not preclude Member States from adopting differentiated taxes on environmental grounds, so long as they do not discriminate against imported products.¹⁰¹ In practice, the Court’s reasoning implies that Finland would have been allowed to maintain its environmental tax if importers had been able to give evidence of their production methods so as to benefit from the same tax rate as domestic producers.¹⁰²

Such a conclusion is not an obvious one. It is usually argued that article III:2 of the General Agreement on Tariffs and Trade (which is a provision similar to article 110 of the TFEU in WTO law) has been interpreted in a more restrictive way, excluding the possibility of using production methods as a criterion to differentiate between “like” products on environmental grounds.¹⁰³ In contrast, the Court of Justice interprets the free movement of goods provisions in a way that gives Member States some leeway in the adoption of environmentally-driven tax measures. If Member States consistently pursue an environmental objective through their tax system, their environmental tax is likely to be found in compliance with article 110 of the TFEU. However, if the objective of protecting the environment could have been achieved “more completely and consistently” by designing the environmental tax in a way that would not favour

⁹⁸ On this point, see de Sadeleer, *EU Environmental Law and the Internal Market*, *supra* n. 96, p. 253. De Sadeleer takes a more nuanced view considering that “the Court has not yet settled the matter (...)”.

⁹⁹ CJEU, *Outokumpu Oy*, 2 April 1998, C-213/96. See also the *Chemical Farmaceutici* and *Vinal* case, in which the Court found that an Italian tax that distinguished between synthetic alcohol and alcohol produced by fermentation was not incompatible with article 95 of the EEC Treaty (now 110 TFEU). The Italian tax favoured alcohol being manufactured from agricultural products over alcohol being processed from ethylene (see CJEU, *Chemical Farmaceutici SpA v DAF Spa*, 14 January 1981, C-140/79, paras. 14-16 and CJEU, *SpA Vinal and SpA Orbat*, 14 January 1981, C-46/80, paras. 12-14).

¹⁰⁰ CJEU, C-213/96, *supra*, n. 99, para. 41. *Contra*, see the conclusions of AG Jacobs (C-213/96, 13 November 1997).

¹⁰¹ CJEU, C-213/96, *supra*, n. 99, para. 31. See also CJEU, *Commission v. Italian Republic*, 8 January 1980, C-21/79, para. 15; CJEU, *Stadtgemeinde Frohnleiten, Gemeindebetriebe Frohnleiten GmbH v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*, 8 November 2007, C-221/06, para. 56 & 71; CJEU, C-402/09, *supra* n. Opinion AG Sharpston, 27 January 2011, para. 38.

¹⁰² CJEU, C-213/96, *supra*, n. 99, para. 39: “(...) the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method”. See also CJEU, C-221/06, *supra* n. 101: “(...) that legislation does not even give the importer the opportunity of adducing that proof in order to qualify for the exemption applicable to waste from disused hazardous sites or suspected contaminated sites in Austria”. See also CJEU, C-198/14, *supra* n. 72, particular para. 63.

¹⁰³ See Paul Demaret & Raoul Stewardson, “Border tax adjustments under GATT and EC law and general implications for environmental taxes” (1994) 28(4) *Journal of World Trade* 5-66; Geert Van Calster, “Topsy-turvy: the European Court of Justice and Border (energy) Tax Adjustments – Should the WTO follow suit?”, in: Janet Milne, Kurt Deketelaere, Larry Kreiser, Hope Ashiabor (eds.), *Critical Issues in environmental taxation: international and comparative perspectives* (OUP 2003), 311- 341.

domestic over imported products, the Court is likely to consider that the tax infringes article 110 TFEU.¹⁰⁴

3.2.2. *The free movement of services*

The Court follows a similar reasoning as it does in cases of discrimination against imported products in the context of the freedom to provide services (article 56 of the TFEU). In the case *Presidente del Consiglio dei Ministri*, the Court discussed the compatibility of a tax imposed on stopovers for tourist purposes by aircraft used for the private transport of persons or by recreational craft.¹⁰⁵ The Court considered that this tax constituted a restriction on the freedom to provide services, which could not be justified on environmental grounds because the tax on stopovers introduced a distinction between persons that was unrelated to the alleged environmental objective of the tax.¹⁰⁶ Indeed, only operators whose tax domicile was located outside the territory of Sardegna were subject to the tax. The Court's reasoning underlines the inconsistency of the Region of Sardegna's arguments. To be justified, it is important that the environmental tax measure "genuinely reflect[s] a concern to attain [its alleged environmental objective] in a consistent and systematic manner".¹⁰⁷

However, even an environmentally-driven tax may violate article 56 of the TFEU if it is found disproportionate. In the case *De Coster*, the Court of Justice was asked to give a preliminary ruling on a Belgian municipal tax on satellite dishes, which was supposed to protect the urban environment by mitigating the visual – aesthetic - pollution caused by satellite dishes.¹⁰⁸ The Court considered that this tax was liable to impede the activities of broadcasting and television transmissions operators in Member States other than Belgium.¹⁰⁹ This could not be justified by the need to protect the urban environment as the tax exceeded what was "necessary".¹¹⁰ According to the Court, this objective could have been achieved with less restrictive methods, such as, for example, the adoption of requirements regarding the size of satellite dishes.¹¹¹

The Court also referred to the proportionality test in the case *Commission v. Ireland*, concerning an Irish registration tax. According to the Commission, this tax violated article 56 of the TFEU by "imped[ing] the provision and receipt of leasing and hiring services disproportionately" for two main reasons.¹¹² Firstly, the tax had to be paid in advance, in full, regardless of the duration of the proposed use of the vehicle in Ireland, which could lead to a cash-flow disadvantage.¹¹³ Secondly, an administration charge of

¹⁰⁴ CJEU, *Tatu*, C-402/09, *supra* n. 97, para. 60; CJEU, *Iulian Nisipeanu v. Direcția Generală a Finanțelor Publice Gorj, Administrația Finanțelor Publice Tîrgu Cărbunestî, Administrația Fondului pentru Mediu*, 7 July 2011, C-263/10, para. 28. In relation to these two cases, *see also* the case *Nicula* concerning the system aimed at providing refund of the incompatible environmental taxes discussed in the *Tatu and Nisipeanu* cases (CJEU, *Ilie Nicolae Nicula v. Administrația Finanțelor Publice a Municipiului Sibiu, Administrația Fondului pentru Mediu*, 14 October 2014, C-331/13). The Court uses a similar reasoning in cases concerning measures having equivalent effects (*see* CJEU, *Commission v. Kingdom of Denmark*, 20 September 1988, C-302/86).

¹⁰⁵ CJEU, *Presidente del Consiglni dei Ministri v. Regione Sardegna*, 17 November 2009, C-169/08. *See also* the opinion of AG Kokott, 2 July 2009, in particular paras. 74 to 76.

¹⁰⁶ *Ibid.*, para. 45.

¹⁰⁷ *Ibid.*, para. 42.

¹⁰⁸ CJEU, *François De Coster and Collège des bourgmestre et échevins de Watermael-Boitsfort*, 29 November 2001, C-17/00.

¹⁰⁹ *Ibid.*, para. 35.

¹¹⁰ *Ibid.*, para. 35.

¹¹¹ *Ibid.*, para. 38.

¹¹² CJEU, *European Commission v. Ireland*, 19 September 2017, C-552/15, para. 43

¹¹³ *Ibid.*, para. 44

500 euros had to be paid in order to obtain a partial refund of the tax if the vehicle was removed from Ireland.¹¹⁴ The Court underlined that the tax, which imposed a rate of taxation depending on the level of CO₂ emissions, was “appropriate” to protect the environment since it discouraged the “rental or leasing of vehicles with heavy fuel consumption”.¹¹⁵ However, the Court considered that both the requirement to pay the full amount of the tax and the administration charge were disproportionate.¹¹⁶

3.2.3. *The freedom of establishment and free movement of capital*

There is very limited case-law on environmental tax measures under the freedom of establishment (article 49 of the TFEU) and the free movement of capital (article 63 of the TFEU). The few cases that have been analysed under these provisions give some indication as to whether Member States may limit preferential tax provisions to certain estates for environmental, cultural or historical reasons.

In the *Q* case, the Court considered that article 63 of the TFEU did not preclude a Dutch tax exemption in respect of the gift of certain properties deemed to form part of the natural, cultural and historical heritage of the Netherlands.¹¹⁷ The Court referred to the objective of the legislation and, on that basis, considered that a taxpayer making a gift of a property situated outside of the Netherlands was, in principle, not in a comparable situation to a taxpayer who make a gift of a property situated in the Netherlands.¹¹⁸ The Court nevertheless made clear that gifting of properties located outside of the Netherlands should also be considered for tax exemption as soon as it can be established that they form part of the “cultural and historical heritage” of the Netherlands.¹¹⁹ The Court reached a similar conclusion in the *X* case under article 49 of the TFEU, concerning an income tax deduction that was only granted in respect of costs relating to listed historic buildings.¹²⁰

The Court followed a similar reasoning in the case *Huijbrechts*, concerning a Flemish tax exemption on real property regarded as woodland in respect of the inheritance tax.¹²¹ According to the Flemish Code of Taxation, such tax exemption was granted under the condition that the woodland was subject to a sustainable management plan established in accordance with criteria defined by the Flemish legislation. The Court recognised that the allocation of the tax advantage was subject to environmental conditions.¹²² However, in so far as the exemption was limited to forest or woodland located in the Flemish Region of Belgium, the Court considered that article 63 of the TFEU had to be interpreted as precluding such a preferential tax measure.¹²³ The Court referred to the “cross-border character of the environmental issue” addressed by the Flemish tax

¹¹⁴ *Ibid.*, para. 45.

¹¹⁵ *Ibid.*, para. 97.

¹¹⁶ *Ibid.*, paras. 99, 108 & 123.

¹¹⁷ CJEU, *Staatssecretaris van Economische Zaken, Staatssecretaris van Financiën v. Q*, 18 December 2014, C-133/13. The Court did not insist on the objective of the legislation to protect the “natural” heritage of the Netherlands. However, AG Kokott analysed this objective in details in her Opinion (*see* paras. 43- 47).

¹¹⁸ *Ibid.*, para. 27.

¹¹⁹ *Ibid.*, paras. 28-29.

¹²⁰ CJEU, *Staatssecretaris van Financiën v. X*, 18 december 2014, C-87/13.

¹²¹ CJEU, *Vlaams Gewest, Vlaams Gewest v. Johannes Huijbrechts*, 22 November 2018, C-679/17.

¹²² *Ibid.*, para. 33.

¹²³ *Ibid.* paras. 34 & 43.

regime, suggesting that the territorial limitation of the Flemish tax measure could not be reconciled with its environmental objective. The Court stated as follows:

*“(…) in so far as enjoyment of the tax exemption is also conditional on the forest or woodland inherited being in the territory of the Flemish Region of the Kingdom of Belgium, the exemption is not an appropriate measure for attaining the objectives it pursues, since sustainable management of a wooded area situated on the adjoining territories of two Member States, such as that at issue in the main proceedings, is a cross-border environmental issue that cannot be confined to the territory of one of those Member States alone or a part of it.”*¹²⁴

The Court seems to fully reject the territorial limitation of the tax exemption with regard to countries bordering on the Flemish territory. It is not clear, however, whether woodland located in non-neighbouring Member States could be excluded from the tax exemption under article 63 of the TFEU.¹²⁵ As for non-member third countries, the Court indicates that Member States could legitimately deny a tax advantage on the ground that they cannot obtain the necessary information from non-member third countries to assess whether the conditions for receiving the tax advantage have been met.¹²⁶

When read together, the *Q*, *X* and *Huijbrechts* cases have interesting implications from the perspective of environmental tax policy. They suggest that Member States are free to adopt tax exemptions or reductions in respect to gift, income or inheritance taxes in order to protect their country's natural heritage, even when these exemptions and reductions mostly benefit immovable properties located within their territory. Yet, the three cases also make clear that Member States should ensure that they do not explicitly limit these tax advantages to properties exclusively located within their territory.

3.2.4. *The free movement of persons*

Very few cases involving environmental tax measures and charges concern the free movement of persons. One exception is the *Gottwald* case, in which the Court was asked to rule on an Austrian annual toll disc, which was issued free of charge to disabled persons who were resident or ordinarily resident in Austria.¹²⁷ The Court considered that such a toll disc system did not amount to a discrimination prohibited under article 12 of the TEC (now article 18 of the TFEU) as those who regularly travelled to Austria for professional or personal reasons could also be granted the toll disc free of charge. The Court referred to the objective of the measure, namely the promotion of mobility and integration of disabled persons and the wish to ensure a connection between Austrian society and the beneficiary of the benefit.¹²⁸ According to the Court, the requirement related to the residence of the beneficiaries was a suitable criterion to “establish the existence of a connection” between the beneficiaries and Austrian society.¹²⁹

¹²⁴ *Ibid.*, para. 34.

¹²⁵ The preliminary ruling does not discuss this specific issue.

¹²⁶ *Ibid.*, para. 42.

¹²⁷ CJEU, *Arthur Gottwald v. Bezirkskshauptmannschaft Bregenz*, 1 October 2009, C-103/08.

¹²⁸ *Ibid.*, para. 32.

¹²⁹ *Ibid.*, para. 36.

Although, in the *Gottwald* case, the legal issue was unrelated to the environmental character of the tax, it is worth analysing this case for two main reasons. First, an annual toll disc can be seen as an economic measure aimed at internalising the pollution costs generated by road transportation. Second, the reasoning of the *Gottwald* case could be relied upon in order to design specific tax exemption in respect of environmental taxes.

3.3. The EU's energy taxation directive and the general arrangement directive

The energy taxation directive and the general arrangement directive necessarily interact with Member States' energy tax legislation, as Member States are supposed to implement the directives into their domestic legislation. Questions therefore arise as to the scope of application of these directives and the extent to which they prevent Member States from adopting new environmental tax measures.¹³⁰

3.3.1. The energy taxation directive

The Court of Justice clarified different aspects of the energy taxation directive, including the energy uses and forms to which it applies and the types of taxes that fall under its scope.

Firstly, the Court of Justice has been asked to clarify the types of energy products to which the energy taxation directive applies. For example, in the *Kernkraftwerke* case, the Court had to determine whether a Member State was allowed to impose a tax on nuclear fuels used for the commercial production of electricity under the energy taxation directive.¹³¹ The Court underlined that the directive only applied to an exhaustive list of products, which did not include the nuclear fuel being taxed.¹³² Similarly, in the *Elecdedy Carcelen* case, the Court found that the directive did not preclude a Member State from levying a tax on wind turbines designed to produce electricity.¹³³ In the *Fendt* case, the Court clarified that the directive mainly applied to energy products used as motor and heating fuels.¹³⁴ Therefore, Member States remain free to tax the consumption of lubricating oils which are “intended for use, offered for sale or used other than as motor fuels or as heating fuels”.¹³⁵

¹³⁰ As of 1997, the European Commission issued a communication in order to clarify the legal framework surrounding the adoption of “environmental taxes and charges” by Member States, including the 1992 directive on the taxation on mineral products and EU State aid law (Commission of the European Communities, Communication from the Commission, *Environmental Taxes and Charges in the Single Market*, 26 March 1997, COM(97) 9 final).

¹³¹ CJEU, C-5/14, *supra* n. 69, para. 48. See also CJEU, OKG AB v. Skatteverket, 1 October 2015, C-606/13 (concerning a tax on the thermal power of a nuclear reactor).

¹³² CJEU, C-5/14, *supra* n. 69, paras. 47-48.

¹³³ CJEU, *Elecdedy Carcelen SA, Energías Eólicas de Cuenca SA, Ibernova Promociones SAU, Iberdrola Renovables Castilla La Mancha SA v. Comunidad Autónoma de Castilla-La Mancha*, 20 September 2017, joined cases C-215/16 to C-221/16, paras. 42-54. The Court pointed to the fact that the levy was not “dependent on the consumption of electricity”. This case also clarifies the scope of application of the two directives. See also article 1, § 3 of Directive 2008/118/EC, *supra* n. 35 (“Member States may levy taxes on (a) products other than excise goods”).

¹³⁴ CJEU, *Fendt Italiana Srl v. Agenzia Dogane – Ufficio Dogane di Trento*, 5 July 2007, Joined cases C-145/06 and C-146/06, para. 35. On the interaction between Directive 92/83/EEC and Directive 2003/96/EC, *supra* n. 34, see CJEU, *Evroetil AD v Direktor na Agencija ‘Mitnitsi’*, 21 December 2011, C-503/10 (this case concerned bioethanol). On the interpretation of article 21, § 3 of the directive (regarding the consumption of energy products within the curtilage of an establishment producing energy products), see CJEU, *Koppers Denmark ApS v. Skatteministeriet*, 6 June 2018, C-49/17.

¹³⁵ CJEU, Joined cases C-145/06 and C-146/06, *supra* n. 134, paras. 37-38 and 43-45. The Court also analysed the terms “dual use” in its case law on the scope of the energy taxation directive (see, e.g., CJEU, *X v. Voorzitter van het managementteam van het onderdeel Belastingdienst-Z van de rijksbelastingdienst*, 2 October 2014, C-426/12).

Secondly, the Court has ruled on the scope of the directive in terms of the types of instruments that could qualify as “taxes” on energy products and electricity. In the *IRCCS – Fondazione Santa Lucia* case, the Court considered that a pricing mechanism on electricity could qualify as an indirect tax falling under the scope of the energy taxation directive.¹³⁶ The Court recalled the approach it had advocated in its earlier case-law: “the nature of a tax, duty or charge must be determined by the Court, under EU law, according to the objective characteristics by which it is levied, irrespective of its classification under national law”.¹³⁷ The Court then referred to some of the fiscal characteristics of Italian electricity charges, highlighting their obligatory nature, the existence of a monitoring mechanism to guarantee compliance and the allocation of the revenue to objectives of general interest.¹³⁸ Ultimately, the assimilation of the Italian pricing mechanism to a tax falling under the scope of the directive had no consequences, as the Italian measures did not seem to violate the directive.

3.3.2. The general arrangements directive

The general arrangements directive also influences the types of environmental tax measures that Member States have been able to adopt. Indeed, the directive contains a provision (article 1, §2 of the directive, which replaced article 3, §2 of Directive 92/12/EEC) that defines the extent to which Member States are allowed to levy “other indirect taxes for specific purposes”.¹³⁹ In other words, to be allowed to adopt taxes on products that fall under the scope of the excise directives, Member States will need to prove that their taxes pursue a “specific purpose”, for example, the specific purpose of protecting the environment. Consequently, the interpretation of the term “specific purposes” is key to determining whether Member States can introduce additional environmentally-driven levies on energy products and electricity.

The Court clarified what should qualify as an indirect tax levied for “specific purposes” in the case *Transportes Jordi Besora*.¹⁴⁰ This case concerned the compatibility of a Spanish tax on retail sales of certain hydrocarbons with article 3, §2 of Directive 92/12/EEC. The Court, following the Opinion of Advocate General Wahl, considered that the allocation of tax revenue to environmental purposes was not sufficient to prove that a tax was aimed at an objective “other than a purely budgetary objective”.¹⁴¹ According to the Court, “In order to be regarded as pursuing a specific purpose (...), a tax (...) must (...) itself be directed at protecting health and the environment”.¹⁴² In other

¹³⁶ CJEU, *Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) – Fondazione Santa Lucia c. Cassa Conguaglio per il settore elettrico, Ministero dello Sviluppo economico, Ministero dell'Economia e delle Finanze, Autorità per l'energia elettrica e il gas*, 18 January 2017, C-189/15. See also, *contra*, the conclusions of AG Campos Sánchez-Bordona in this case and in the case C-103/07 (paras. 27-36).

¹³⁷ CJEU, C-189/15, *supra* n. 136, para. 29.

¹³⁸ *Ibid.*, para. 33-34.

¹³⁹ This provision states as follows:

“Member States may levy other indirect taxes on excise goods *for specific purposes*, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions”.

¹⁴⁰ CJEU, *Transportes Jordi Besora SL v. Generalitat de Catalunya*, 27 February 2014, C-82/12.

¹⁴¹ Opinion of AG Wahl in the case *Transportes Jordi Besora SL v. Generalitat de Catalunya*, 24 October 2013, C-82/12, para. 30 (and paras. 23 and 29). See also paras. 38-39 of the Court's decision, *supra* n. 140.

¹⁴² CJEU, C-82/12, *supra* n. 140, paras. 23, 29 and 30.

words, the Court emphasised the role of the structure of the tax to be qualified as pursuing a “specific purpose”:

*“(…) a tax (...) could be regarded as being itself directed at protecting the environment and, therefore at pursuing a specific purpose within the meaning of Article 3(2) of Directive 92/12 only if it were designed, so far as concerns its structure, and particularly the taxable item or the rate of tax, in such a way as to dissuade taxpayers from using mineral oils or to encourage the use of other products that are less harmful to the environment”.*¹⁴³

According to Pitrone, the reasoning of the Court indicates that, in this context, an “environmental tax” will not merely be defined by reference to its tax base or its environmental objective as stated by the legislator.¹⁴⁴ The definition of the Court goes beyond the objective approach to environmental taxation that prevails for statistical purposes (section 3.3.4). This partly corresponds to the way environmentally-driven taxes have been defined in this chapter.

The Court reached a similar conclusion in a later case concerning a local Estonian sales tax on liquid fuel.¹⁴⁵ Although this tax was allocated to the financing of public transport in Tallinn, the Court could not find a direct link between the use of the tax revenue and its environmental (and public health) purposes.¹⁴⁶ The Court emphasises that the tax should have been “designed, so far as its structure is concerned, in such a way as to deter taxpayers from using this fuel or to encourage them to adopt a behaviour whose impact would be less damaging to the environment or public health than that which they would adopt in the absence of the tax”.¹⁴⁷ Consequently, the Court found that article 1, §2 of Directive 2008/118/EC did not permit the adoption of a tax such as the Tallinn City retail sales tax on liquid fuel.

Although the reasoning of the Court might seem to limit Member States’ ability to adopt environmental taxes, it could also be interpreted as a way to encourage Member States to adopt genuine environmentally-driven taxes, namely taxes whose design demonstrates a clear link with environmental objectives. The case *Messer France* further clarifies this approach of the Court.¹⁴⁸ In this case, the Court considered that a French service tax on public electricity could be classified as a “another indirect tax” under article 3, §2 of Directive 92/12/EEC with regard to its environmental objective. According to the Court, the French tax was “itself directed at achieving an environmental objective” because it encouraged “the production of electricity from renewable sources and cogeneration by contributing to its financing”.¹⁴⁹ This case is particularly interesting because the revenue of the French tax was not allocated only to the promotion of green electricity but also to administrative and social purposes. With respect to these other

¹⁴³ *Ibid.*, para. 32.

¹⁴⁴ Federica Pitrone, “Defining “Environmental Taxes”: Input from the Court of Justice of the European Union” (2015) *Bulletin for International Taxation* 58, p. 63.

¹⁴⁵ CJEU, *Tallinna Ettevõtlusamet v Statoil Fuel & Retail Eesti AS*, 5 mars 2015, C-553/13.

¹⁴⁶ *Ibid.*, para. 45.

¹⁴⁷ *Ibid.*, para. 46.

¹⁴⁸ CJEU, *Messer France SAS v. Premier Ministre, Commission de régulation de l’énergie, Ministre de l’Economie et des Finances, Ministre de l’Environnement, de l’Energie et de la Mer*, 25 July 2018, C-103/17.

¹⁴⁹ *Ibid.*, para. 45 and referring to the opinion of the AG Campos Sánchez-Bordona who considered that there had to be « sufficient link between the use of the proceeds of the tax and the specific purpose of promoting green energy » (para. 71).

objectives, the Court considered that the tax could not be regarded as “another indirect tax”.¹⁵⁰ According to the Court, the predetermined allocation of revenue from an indirect tax is not a sufficient element to prove that the tax is directed at achieving its specific purpose.¹⁵¹

Finally, even when Member States are willing to adopt genuine environmentally-driven taxes, past case-law suggests that they could be prevented from doing so if the energy taxation directive provide for exemptions. In the *Braathens* case, the Court was asked to rule on the possibility of Sweden adopting an environmental tax on domestic commercial aviation, despite the exemption provided for under Directive 92/81/EEC (which has been repealed and replaced by the energy taxation directive).¹⁵² According to the Court, the exemption provision in Directive 92/81/EEC precluded Member States from imposing other indirect taxes for specific purposes on aviation fuel.¹⁵³ The Court argued that Member States could not rely on article 3, §2 of Directive 92/12/EEC as it would be contrary to the rationale of the exemption provisions. If Member States were allowed to adopt taxes similar to excise duties on the products covered by the exemption, this provision would be rendered “entirely ineffective”.¹⁵⁴ Moreover, the Court dismissed the argument related to the environmental character of the tax, considering that a tax on polluting emissions is not to be distinguished from a tax on fuel consumption.¹⁵⁵ Consequently, the Court found that the ecological tax fell under Directive 92/81/EEC and was therefore subject to the exemption.

The way the Court of Justice interpreted the horizontal directive in the *Braathens* case affects Member States’ abilities to develop the environmental dimension of their energy tax systems.¹⁵⁶ It is uncertain, though, that the Court would adopt a similar reasoning under Directive 2008/118/EC.¹⁵⁷ Article 1, §2 of Directive 2008/118/EC is worded very similarly to article 3, 2 of Directive 92/12/EEC, except for the final part of the new provision, which refers to the exemption provisions. Article 1, §2 of Directive 2008/118/EC now seems to allow Member States to adopt indirect taxes for specific purposes, even when exemptions apply.¹⁵⁸ If so, the question arises as to how to reconcile such an interpretation of article 1, §2 of the general arrangements directive with the

¹⁵⁰ *Ibid.*, para. 54.

¹⁵¹ *Ibid.*, paras. 38-39 (according to the Court, such predetermined allocation is “merely a matter of internal organisation of the budget of a Member State”).

¹⁵² CJEU, *Braathens Sverige AB and Riksskatteverket*, 10 June 1999, C-346/97. See also CJEU, *Commission of the European Communities v. Italian Republic*, 25 September 2003, C-437/01, para. 33. Note that a similar question arose in subsequent cases under Directive 2008/118/EC (*supra* n. 35) and Directive 2003/96/EC (*supra* n. 34): see, among others, CJEU, C-5/14, *supra* n. 69, para. 40.

¹⁵³ CJEU, *Braathens*, C-346/97, *supra* n. 152, paras. 24-26.

¹⁵⁴ *Ibid.*, para. 24. See also recital 4 of Directive 2008/118/EC (*supra* n.35) that refers to the need “not to jeopardise the useful effect of Community rules relating to indirect taxes”. In the same line of thought, see the conclusions of AG Fennelly, in particular paras. 20-25.

¹⁵⁵ *Ibid.*, para. 22-23. References to the argument related to the environmental nature of the tax are found in para. 21 and 22.

¹⁵⁶ Compare with the opinion of AG Fennelly who came to the conclusion that the tax was, in principle contrary to art. 8, para. 1, b) of directive 92/81/EE, “unless it is shown that those calculations ensure that the tax genuinely and significantly advance an environmental object of encouraging the use of less polluting aircraft” (para. 29).

¹⁵⁷ The main difference between article 3, §2 of Directive 92/12/EEC and article 1, §2 of Directive 2008/118/EC (*supra* n.35) lies in the end of the sentence: the words “but not including the provisions on exemptions” have been added in the latest directive. See *Terra & Wattel*, *supra* n. 4, pp.471-472. Note that Directive 2003/96/EC (*supra* n. 34) contains a provision (article 14, §1, a), which authorises Member States to tax, for reasons of environmental protection, certain uses of energy products although they should normally have been exempted. On the interpretation of this provision, see CJEU, *Cristal Union v. Ministre de l’Economie et des Finances*, 7 March 2018, C-31/17.

¹⁵⁸ The language of the new provision is, however, not completely unambiguous and the case-law does not offer much support. See the Opinion of AG Szpunar in the case *Kernkraftwerke Lippe-Ems GmbH* (CJEU, C-5/14, *supra* n. 69, para. 46-47), which could be interpreted as a confirmation of the *Braathens* case.

Braathens case, in which the Court referred to the need to preserve the effectiveness of the exemption provisions found in the energy taxation directive.

3.4. The EU's regulation on environmental economic accounts

Since 2011, EU Member States have been required to collect, compile and evaluate data on environmentally related taxes under a common framework established at the EU level.¹⁵⁹ Member States should transmit these data on a yearly basis to Eurostat, which is then required to produce estimates for the EU as a whole.¹⁶⁰

This requirement to produce statistics on environmental taxes is justified by the important role played by data in supporting well informed decision-making in the field of environmental taxation.¹⁶¹ In this context, the EU and other organisations, including the OECD, the IMF and the World Bank have chosen to define environmental taxes in an objective way.¹⁶² Their definition had to be sufficiently clear and precise as to allow countries to identify, classify and compare different types of environmental taxes.¹⁶³ It reads as follows:

*“A tax falls in the category environmental if the tax base is a physical unit (or a proxy for it) of something that has a proven specific negative impact on the environment, when used or released”.*¹⁶⁴

This definition is still largely used today to refer to “environmental taxes” or “environmentally related taxes” for statistical purposes.¹⁶⁵ Usually, environmental (related) taxes are divided into three or four categories: energy taxes, transport taxes, pollution taxes and resource taxes.¹⁶⁶ As explained above, among these categories, energy taxes - which include taxes on energy products used for both stationary and transport purposes - have been partially harmonised at the EU level (*section 2.I*).

Although this objective definition of environmental taxes makes it easier to gather data for statistical purposes, it neither guarantees that the tax ultimately pursues an

¹⁵⁹ Regulation (EU) No 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts, OJ L 192, 22 July 2011, p. 1, see art. 1 & 2.

¹⁶⁰ *Ibid.*, Annex II, section 2.

¹⁶¹ Several studies have been published based on Eurostat data. See, e.g., Study on assessing the environmental fiscal reform potential for the EU28, Final Report prepared for the European Commission, 2016, available at https://ieep.eu/uploads/articles/attachments/1e49147b-9e5e-47a7-b3e8-8707751a3b2c/Study_on_assessing_the_environmental_fiscal_reform_potential_for_the_EU28.pdf?v=63664509933.

¹⁶² See European Commission, “Environmental taxes – A statistical guide”, 2001, available at <https://ec.europa.eu/eurostat/documents/3859598/5854341/KS-39-01-077-DE.PDF/fd3246ba-a709-46fb-9b58-6d097bef82fb?version=1.0>, p. 9: “The tax base was seen as the only objective basis for identifying environmental taxes for the purpose of international comparisons”. On the historical development of environmental indicators in the EU, see Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Directions for the EU on Environmental Indicators and Green National Accounting. The Integration of Environmental and Economic Information Systems, 21 December 1994, COM(94) 670 final.

¹⁶³ Lorenz Jarass & Gustav M. Obermair, “Manual: Statistics on Environmental Taxes”, commissioned by European Commission, 28 July 1996, available at <http://www.jarass.com/atw-forschung.de/dat/pub/0000/ecommission.pdf>.

¹⁶⁴ *Ibid.* See also the OECD Glossary of statistical terms, available at <https://stats.oecd.org/glossary/detail.asp?ID=6437>. The same

¹⁶⁵ On the different meanings of these terms, see European Commission, “Environmental taxes – A statistical guide”, 2001, *supra* n. 162. See also Art. 2, (2) of Regulation (EU) No 691/2011, *supra* n. 159.

¹⁶⁶ See Annex II (Module for environmentally related taxes by economic activity), section 3 of Regulation (EU) No 691/2011, *supra* n. 159. Transport taxes include tax on the ownership and use of motor vehicles; pollution and resources taxes include taxes on the extraction of raw materials; tax on emissions to air and water, tax on noise and waste management (see Eurostat, Environmental taxes – detailed analysis, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Environmental_taxes_-_detailed_analysis (consulted 15 January 2018)).

environmental goal nor that it has a positive environmental effect.¹⁶⁷ Consequently, a more purposive approach to environmental taxation is sometimes preferred. Under this approach, taxes should be referred to as “environmental” only when they effectively pursue an environmental objective (which correspond to the concept of “environmentally-driven taxes” used in this chapter). For example, the UK government issued its own definition of environmental taxes in 2012. To qualify as “environmental” measures, taxes have to meet three conditions aimed at ensuring that they foster environmental protection.¹⁶⁸ Such purposive definition has the advantage of emphasising the role of environmental taxes, as a way to help internalise environmental costs.

In any case, statistics about environmental tax measures - both when defined objectively and purposively - should be read with care. Countries that derive significant revenues from taxes that are classified as “environmental” for statistical purposes are not necessarily the ones with the highest level of environmental protection. They could be the ones with the highest taxes on energy products or the ones with the highest energy consumption. In contrast, countries that derive few revenues from environmental tax measures or do not have many environmental tax measures in their tax system, may be among the most advanced in terms of environmental protection. Low level of environmental tax measures may indicate that these countries have preferred to adopt regulatory instruments over environmental tax measures. Alternatively, this could suggest that environmentally-driven taxes have been effective and are no longer needed. Indeed, such taxes aimed at discouraging polluting activities become meaningless as soon as the polluting activities have been replaced by more environmentally-friendly ones.

4. Conclusion: Challenges ahead and unexplored legal issues

The impact of EU law on the development of environmental and energy taxation within the EU, at both Member State and Union level, has received increasing attention over the last three decades. However, since this research area is still relatively new, many questions and challenges remain.

A first challenge that could be considered for further research concerns the fact that environmental tax policies in the EU do not always rely on environmental considerations. Moreover, in some instances, non-environmental tax policies clash with environmental objectives, leading to further inconsistencies in Member States’ tax systems. As has been pointed out above, the EU’s energy tax policy is largely disconnected from the EU’s climate commitments. This could potentially be analysed as a violation of the integration clause (article 11 of the TFEU).¹⁶⁹ Similarly, Member States’ tax policies are characterised by a lack of consistency. Many Member States claim that they want to increase environmental tax measures but their tax system is still

¹⁶⁷ The General Court suggested the opposite in the case *British Aggregates Association*, 13 September 2006, T-210/02, para. 114 (“An environmental levy is thus an autonomous fiscal measure which is characterised by its *environmental objective* and its specific tax base”, emphasis added).

¹⁶⁸ UK Government Press release, “Definition of environmental tax”, available at <https://www.gov.uk/government/news/definition-of-environmental-tax-published>. Reference to this definition was made in the European Commission, United Kingdom Country Report, Staff Working Document, The EU Environmental Implementation Review, 3 February 2012, SWD(2017) 59 final.

¹⁶⁹ Although one of the recitals of the energy taxation directive explicitly refers to article 6 of the Treaty establishing the European Community (now article 11 of the TFEU), the argument could be made that the directive does not meet the requirements of integration clause (see recital 6 of Directive 2003/96/EC, *supra* n. 34).

characterised by environmentally harmful tax subsidies (e.g. preferential tax treatment for company cars).¹⁷⁰ The question arises as to whether harmonisation is possible with respect to those preferential regimes. If not, one could investigate whether and how EU primary law - such as State aid law - could be a venue to limit the possibility of Member States adopting preferential tax measures in favour of polluting products or behaviours.¹⁷¹

A second and related challenge pertains to the question of whether and how environmental tax measures can be part of a policy mix that ensures a certain balance between environmental goals and other economic and social policy objectives that are part of the EU's policy agenda. The past case-law of the Court of Justice on environmental tax measures illustrates that these goals are not always easy to reconcile.¹⁷² Environmental tax measures may amount to new fiscal barriers, affect energy supply in the EU, hamper the EU's competitiveness and lead to social inequality (since the polluter-pays principle is not necessarily in line with the ability-to-pay principle).¹⁷³ Some authors argue that the coherence between these objectives should be enhanced, whereas others suggest that environmental tax measures should primarily aim at environmental protection, while other objectives can be pursued through different policy instruments.¹⁷⁴ Further research could help clarify the debate by analysing the case-law and future legal developments in the light of these various objectives. Research projects should consider both substantive and institutional solutions. Enhancing the dialogue between EU institutions dealing with tax, trade, climate, energy and environmental matters could be one way forward. Researchers could also analyse the role of the EU Semester in strengthening the interaction between social, economic and environmental policies and developing green fiscal reforms at the EU level.¹⁷⁵ Finally, researchers could look into the role of environmental tax measures as a way to foster the EU's international action on climate change, for example through the inclusion of environmental taxation in the EU's external tax strategy.¹⁷⁶

A third challenge concerns the blurred line between the regulatory and fiscal nature of environmental tax measures. In most countries, specific institutional rules and procedural guarantees generally apply to the adoption of taxes. Therefore, the classification of environmental tax measures as "fiscal measures" or "regulations" can have significant repercussions on the future development of environmental taxation. This question has largely been discussed at Member State level in light of the

¹⁷⁰ See the references to this challenge in the Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28 December 2013, pp. 171-200, para. 84. See the report provided by the Institute for European Environmental Policy and others to the European Commission on "Reforming Environmentally Harmful Subsidies", 19 March 2007, available at http://ec.europa.eu/environment/enveco/others/pdf/ehs_report.pdf.

¹⁷¹ A similar issue has been analysed by Farah & Cima under WTO Law (Paolo D. Farah & Elena Cima, "Energy Trade and WTO: Implications for Renewable Energy and the OPEC Cartel" (2013) 16(3) Journal of International Economic Law 707-740).

¹⁷² See sections 3.2. and 3.3. as to the tensions between environmental protection and internal market objectives.

¹⁷³ On the interaction between the polluters-pay principle and the ability-to-pay principle, see Alice Pirlot, *Environmental Border Tax Adjustments and International Trade Law* (2017 EE), p. 277.

¹⁷⁴ See, i.a. Nicolas de Sadeleer, "Regulatory autonomy ...", *supra* n. 96; Deak, *supra* n. 96, pp. 315-316.

¹⁷⁵ See the work of the "Greening the European Semester" Expert Group established in 2013 (European Commission, DG Environment, European Semester, Expert Group, available at http://ec.europa.eu/environment/integration/green_semester/expert_group_en.htm).

¹⁷⁶ On the use of environmental tax measures in a cross-border context, see Pirlot, *supra* n. 173. See also European Parliament resolution of 14 March 2019 on climate change – a European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy in accordance with the Paris Agreement, 2019/2582(RSP), Strasbourg, P8_TA-PROV(2019)0217.

constitutional limits that apply to the adoption of taxes in comparison to other instruments.¹⁷⁷ At the EU level, this question has not been analysed to the same extent.¹⁷⁸ Given the practical consequences that can derive from the distinction between taxes and other non-fiscal instruments, additional research would be welcome. If environmental tax measures are not “primarily of fiscal nature”, harmonisation would not be subject to the unanimity requirement. Moreover, the regulatory nature of environmental tax measures could affect their analysis under the free movement provisions. Indeed, the Court does not apply the exact same tests to analyse fiscal and non-fiscal measures.¹⁷⁹ Researchers could further analyse the distinction between taxes and other market-based instruments, taking into consideration the strong regulatory nature of environmental *tax measures*, which distinguishes them from traditional taxes. Such analysis would not only serve to better understand the impact of EU law on environmental tax policy, it would also shed new light on how procedural and substantive EU law treats traditional taxes differently from regulatory measures. In this context, researchers could consider the Commission’s recent proposal for a transitional move towards qualified majority voting, including for the adoption of tax measures used to “implement an environmentally friendly energy policy”.¹⁸⁰

Finally, a fourth challenge that needs further attention concerns the future role that EU law could have on the adoption of new, alternative, models of environmental tax measures. Beyond climate change and energy policies, environmental tax measures can be used to pursue a variety of objectives that are part of the EU’s and Member States’ environmental agenda, such as the transition towards a circular economy or the promotion of the United Nations Sustainable Development Goals (SDGs).¹⁸¹ For example, researchers could look at new ways to achieve sustainable modes of transportation¹⁸², remove competition between Member States related to the taxation of fuels¹⁸³, fund the ecological transition through taxation¹⁸⁴, alleviate the potential regressive impact of environmental tax measures¹⁸⁵ or green up VAT¹⁸⁶ and other types

¹⁷⁷ See Bruno Peeters, *The concept of tax* (2008) IBFD EATLP International Tax Series.

¹⁷⁸ *Ibid.* The 2005 EATLP Congress discussed the concept of tax from the perspective of the Member States but also from other viewpoints (EU law, OECD Model and WTO law). See the CJEU, C-189/15, *supra* n. 136, as mentioned in section 3.3.1. In the context of environmental tax measures, the main legal issue that has been analysed concerns the fiscal nature of the EU ETS (see Weishaar (2015), *supra* n. 52). In contrast, the non-fiscal nature of environmental tax measures has not yet been subject to detailed analyses.

¹⁷⁹ On this topic, see Niels Bammens, *The Principle of Non-Discrimination in International and European Tax Law* (IBFD 2013), in particular chapter 13.

¹⁸⁰ European Commission, *supra* n. 50, pp. 9-11. One way to implement this move would be to use the “passerelle” clauses, which provide for the possibility to move away from the unanimity voting requirement (articles 48, §7 of the TEU and article 192, §2, second paragraph of the TFEU).

¹⁸¹ Circular economy is one of the priorities of the 2017 Annual Growth Survey (http://ec.europa.eu/environment/integration/green_semester/about_en.htm).

¹⁸² See European Commission, Proposal for a Council Directive on passenger car related taxes, 5 July 2005, COM(2005) 261 final. This proposal has been withdrawn in 2015. See also European Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee, “Strengthening the Single Market by removing cross-border tax obstacles for passenger cars, 14 December 2012, COM(2012) 756 final; Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, 20 July 1999, OJ L 187, 42-50.

¹⁸³ See the proposal of Charles McLure to an apportionment-based system (Charles E. McLure, “Rationalizing EU Taxation of Commercial Motor Fuel: Harmonized Rates Versus Apportionment – Technological Considerations” (2008) Bulletin for International Taxation 121-128).

¹⁸⁴ See the reference to a “carbon tax-based own resource” in the Monti Report on Own Resources (High Level Group on Own Resources, “Future Financing of the EU”, Final report and recommendations of the High-Level Group on Own Resources, December 2016).

¹⁸⁵ On the regressivity of environmental tax measures, see Katri Kosonen, “Regressivity in environmental taxation: myth or reality?” (2012) 32 Taxation Papers, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/taxation_paper_32_en.pdf.

¹⁸⁶ See, a.o. Camillo De Camillis & Malgorzata Goralczyk, “Towards stronger measures for sustainable consumption and production policies: proposal of a new fiscal framework based on a life cycle approach” (2013) 18 International Journal

of taxes¹⁸⁷. Alternative solutions should be tested against EU primary and secondary law but also against international law, including WTO law as well as bilateral and regional trade, investment, energy and environmental agreements.¹⁸⁸

For each of these challenges, researchers could benefit from a comparative approach.¹⁸⁹ By comparing Member States' domestic environmental tax measures, one could get a better idea of where harmonisation is needed and/or feasible.¹⁹⁰ Innovative ideas for environmental tax reforms could also emerge from comparing EU and third countries' environmental tax frameworks.¹⁹¹ Aside from comparative methods, researchers would benefit from trans- and interdisciplinary approaches.¹⁹² Environmental taxation is a research area at the crossroads between law and economics.¹⁹³ Strengthening the discussion between legal scholars and economists is certainly key to fostering the understanding and development of EU environmental tax law.

of Life Cycle Assessment 263–272; Han Kogels, “Would VAT Be an Effective Instrument for Supporting the Environment?” (2012) *International VAL Monitor* 172–173; Charles E. McLure, “Could VAT Techniques Be Used To Implement Border Carbon Adjustments? Illustration of VATs and VATCATs – Expanded Version” (2012) 66(8) *Bulletin for International Taxation*. See also the study made by Copenhagen Economics (Copenhagen Economics, “Reduced VAT for Environmentally Friendly Products”, Final Report, DG Taxud, 19 December 2008); Charlène-A. Herbain, “Les taux réduits de la taxe sur la valeur ajoutée applicables à l'énergie” (2016) 3 *Revue européenne et internationale de droit fiscal*, pp. 319–328 (commenting on the following case : CJEU, 4 June, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, C-161/14).

¹⁸⁷ See John Snape & Jeremy de Souza, *Environmental Taxation Law. Policy, Contexts and Practice* (2006 Ashgate), pp. 465 – 475 (on the greening of employee and business taxes).

¹⁸⁸ See e.g. the approach taken by Cottier et al. in their legal opinion on differentiated taxes on electricity: Thomas Cottier et al., “Differential Taxation of Electricity: Assessing the Compatibility with WTO Law, EU Law and the Swiss-EEC Free Trade Agreement”, 18 April 2014, available at <https://www.wti.org/research/publications/735/differential-taxation-of-electricity-assessing-the-compatibility-with-wto-law-eu-law-and-the-swiss-eeec-free-trade-agreement/>.

¹⁸⁹ Thunis provides an excellent short overview of the role of comparative methods in legal studies in X. Thunis, “Comparer: de la réaction spontanée à l'outil méthodique” (2006) 66 (1-2) *Annales de Droit de Louvain*, pp. 25–39.

¹⁹⁰ Such approach has already been used by researchers in the past. See e.g. the book edited by Adriano Di Pietro (*op. cit.*) and the one edited by Anuschka Bakker (Anuschka Bakker (ed.), *Tax and the Environment: A World of Possibilities* (2009 IBFD). The EU Commission commissioned various studies on the potential of environmental tax reform in the EU and in EU Member States. Many of them are compiled on the Website of the European Parliament Research Service Blog, available at <https://epthinktank.eu/2015/07/14/environmental-taxation-in-the-eu/>. See e.g. the Study commissioned by the Commission on “Environmental Fiscal Reform Potential in 12 EU Member States” (Dominic Hogg et al.), 28 February 2014, available at http://ec.europa.eu/environment/integration/green_semester/pdf/EFRR-Final%20Report.pdf

¹⁹¹ One could certainly find inspiration in the research done by Janet Milne, one of the most distinguished legal scholars in the field of environmental taxation. See, e.g., Janet E. Milne, “Energy Tax Incentives in the United States: A Comparative Perspective on State Aid” (2017) *Eur. St. Aid L.Q.* 34 (2017), pp. 34 – 45.

¹⁹² See Janet E. Milne & Mikael Skou Andersen, “The Future agenda for environmental taxation research”, in Janet E. Milne & Mikael Skou Andersen (eds.), *Handbook of Research on Environmental Taxation* (EE 2012), pp. 487–488.

¹⁹³ Some of the chapters of the Mirrlees Review offer an excellent overview of the economic issues surrounding the adoption of environmental tax measures (chapter 5 of the first volume titled *Dimension of Tax Design* and chapters 10 and 11 of the second volume titled *Tax by Design*).