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Energy Taxation, Environmental Protection and State Aids

Tracing the Path from Divergence to Convergence

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Chapter 13

The System of State Aid for Environmental Protection: Internal Rules and European Principles

Caterina Verrigni

13.1. Foreword

Recently, innovations were made in the Community's system of compatible State aid. The European Commission established new Guidelines that specifically refer to environmental protection.

It is worth mentioning in this context that there is a general rule, which is also a prohibition, pursuant to article 107 of the Treaty on the Functioning of the European Union (TFEU). This rule is advisory in nature, aims to guarantee free and undistorted competition, and involves every field of law. Member States are prohibited from setting measures which may compromise the functioning of the single market, such as tax measures.[1]

By virtue of this prohibition, we should consider the compatibility of environmental tax advantages with European law – since implementing advantages for non-fiscal purposes, like environmental protection, may in theory create distortions on the European market, due to their nature.

Therefore, it is worth analysing, very briefly, the relationships between the advantages and the general limits imposed by the provisions of the TFEU, by investigating some specific local situations that were declared unlawful by the European Court of Justice (ECJ). After briefly analysing the Union's statutory constraints on possible environmental tax advantages, we will focus on the discipline of State aid in the field of environmental protection.

1. Additionally, thanks to the arguments adduced by the European Court of Justice case law, the incompatibility of the measures referred to will be assessed by analysing their economic effects, which have become the benchmark for the purposes of the measures, which are judicially deemed worthy of protection by the national legislator. For information about the general profiles on State aid and environmental protection, *see* Pignatone, *Agevolazioni su imposte ambientali ed aiuti di stato*, in *Agevolazioni fiscali e aiuti di stato* pp. 747-754 (Ingrosso & Tesauro eds., Jovene 2009); Alfano, *Agevolazioni fiscali in materia ambientale e vincoli dell'Unione europea*, Rass. trib., p. 328 et seq. (2011).

Internal tax breaks frequently conflict with the discipline of aids, with the actual risk of being declared unlawful by the European legal system. More specifically, the Commission has established ad hoc regulations on environmental aids, which set the goals and the methods for the control of the compatibility of national rules with European constraints: The Member States have a wider scope to ease companies' access to credit, resulting in stronger competitiveness and, at the same time, promoting sustainable development. The above-mentioned discipline expressly recalls the European principle of proportionality, which, stated in absolute terms by the provisions of the Treaty of Lisbon, also functions as a magnifier through which the compatibility of the aforementioned advantages could be verified.

Multiple interests related to environmental management decisions make the need for finding delicate balance points among different needs clear, needs which are equally protected and guaranteed at all levels of government. It is necessary to balance all the interests and by creating an ad hoc system of tax advantages, designed to promote a more efficient use of energy resources or the adoption of technologies related to renewables, a significant contribution can be made. It would therefore seem useful to give a picture of the institution in terms of national cases in order to verify its compatibility with European regulations.

13.2. The environmental issue: Guidelines and innovations in European regulations

Since the 1990s, the Commission has constantly monitored State aid granted for environmental protection and recognizes three main categories of measures: (i) operating aid granted for waste management and energy saving, which is allowed if national laws are more stringent than the European ones or if national laws, where European laws are lacking, cause a temporary loss of competitiveness at a national level; (ii) aid to SMEs for environmental advisory/consultancy services, which are granted, for example, pursuant to EC Regulation 70/2011; and (iii) investment aid granted for the construction of buildings, systems and equipment aimed at removing or reducing pollution and polluting agents, or to adjusting the production methods to environmental protection needs.

State aid can also be in the form of tax reliefs or exemptions, which are actual temporary derogations in favour of certain enterprises that are experiencing a temporary loss of international competitiveness. These measures can be taken at the community or national level. In the first case, the

Member State can generally apply a rate that is higher than the minimum European rate and allow some enterprises to pay the minimum rate, or it can generally apply the minimum European rate and grant actual exemptions to the enterprises receiving aid. In the second case, these types of derogations are not generally acceptable, because they do not comply with article 107 of the TFEU; their admissibility should be assessed case by case and special attention should be paid to the limitation in time of the derogation and the actual pursuit of environmental protection goals. The ECJ has specified several times that also regarding the environment, said purpose cannot be protected contrary to other tax principles of the Union.

The environmental protection goal was included in several provisions through which an aiding purpose is pursued. First of all, the European environmental policies are regulated by Title XX, articles 191-193 of the TFEU.[2] Additionally, Directive 2004/35/EC by the Parliament and the Council, dated 21 April 2004, on environmental liability with regard to the prevention and remedying of environmental damage, established a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage; such principle is also the basis of the so-called "White Paper on environmental liability".[3] The 2014-2020 Commission guidance is based on the polluter-pays principle, as well as on the need to promote the achievement of the Union's energy and climate goals, by promoting the growth of cross-barrier energy flows and guaranteeing lower energy costs to European enterprises and consumers.

It is also necessary to consider the guidelines on energy efficiency and related environmental aspects contained in the Energy Charter Treaty (signed by the European Union with Decision 98/181/EC of 23 September 1997), as well as European policies for the environment implemented through various programmes of action. This includes, in particular, the sixth,[4] which was conceived as the environmental pillar of the EU strategy for sustainable

2. For the essential legal literature on environmental taxation, *see* Picciaredda & Selicato, *I tributi e l'ambiente* (Giuffrè 1996); Verrigni, *La rilevanza del principio comunitario "chi inquina paga" nei tribute ambientali*, Rass. trib., p. 1614 et seq. (2003); Rosembuj, *El impuesto ambiental* p. 148 (El fisco 2009); Villar Ezcurra, *Sviluppo sostenibile e fiscalità ambientale*, Riv. dir. trib. Int., p. 351 (2012); Alfano, *Tributi ambientali. Profili interni ed europei* (Giappichelli 2012); Dorigo & Mastellone eds., *La fiscalità per l'ambiente. Attualità e prospettive della tassazione ambientale* (Aracne 2013).

3. COM(2000) 66 final of 9 Feb. 2000. The document examines how to optimally configure a European system for liability related to environmental damages which implements the "polluter-pays" principle.

4. The Sixth Community Environment Action Programme, entitled *Environment 2010: Our Future, Our Choice*, COM(2001) 31 final – notes that, to meet the environmental

development and which aims to operate in four areas of action, including climate change; nature and biodiversity; environment and health; as well as sustainable management of natural resources and waste.

In April 2008, the Commission approved a communication containing the European guidelines on State aid for environmental protection,[5] which introduced many key points for analysis on said issues – e.g. energy, which is a priority, especially the development of renewable sources – as it outlined a number of tax interventions. The Commission guidelines, explained in the communication of April 2008, were later confirmed by Regulation (EC) 800/2008 dated 6 August 2008, which gathers all the exemption regulations divided by category, except for the *de minimis* aid, and provides for the different aids that Member States can grant without prior notification to the Commission.

Recently, the Commission has adopted a new regulation (651/2014), on 17 June 2014, which repealed, valid from 1 July 2014, the regulation dated 6 August 2008, 800/2008 (also known as GBER – General Block Exemption Regulation). The new legislative instrument, which states some categories of aid compatible with the internal market pursuant to articles 107 and 108 of the TFEU, shall be applicable until 31 December 2020. Its main goal is to allow (for the period 2014-2020) a better definition of the priorities of activities that implement State aid rules and to simplify increased transparency, effective assessment and control of compliance with State aid rules both at a national and EU level, respecting the institutional competences of the European Union and the other 28 Member States.

In fact, the Council (EC) Regulation 994/98 authorizes the Commission to declare that, under certain conditions, some categories may be exempted from the notification obligation. As far as it concerns the environment, the regulation makes it easier for the authorities to grant a significant number of aid measures in favour of environmental protection or the fight against

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challenges, it is necessary to overcome the mere legislative approach and adopt a strategic approach, which will have to use various instruments and measures to influence decisions taken in the business field, in the sphere of consumers and public administrations.

5. European Commission, *Community guidelines on State aid for environmental protection* (2008/C 82/01), OJ 82, 1 Apr. 2008, pp. 1-33. The Commission has identified a number of measures for which State aid may be compatible with the internal market. In particular: aid to enterprises to increase the level of environmental protection beyond the thresholds set by community regulations or in lack of community regulations; aid for the purchase of new means of transport to increase the level of environmental protection; aid to environmental studies; aid for energy saving; aid in favour of renewable energy sources; aid for waste management, etc.

climate change, including aid aimed at promoting investments in energy saving and renewable energy sources and aid in the form of environmental tax reliefs.[6] On this basis, the European Commission has instituted a specific regulation which stipulates that it must be determined how certain advantages can be granted which do not conflict with the principle of free competition, in order to favour the environment and sustainable development without disproportionate effects on competition and economic growth.

The current GBER, established through Regulation 651/2014, has reiterated the purposes and eased the use of the advantages existing for the matters considered therein, by declaring certain categories of aid compatible with the common market. As for the specific types of compatible aid in favour of environmental protection, the compatibility threshold set consists of tax reliefs that must comply with the provisions of Directive 2003/96/EC on energy taxation; additionally, it is specified that beneficiaries still have to pay at least the Community minimum tax level.

13.3. The principle of proportionality

The Community Guidelines of 2008 specifically refers to the proportionality of environmental aid, also considering the selectivity level of the measure. Through case law,[7] the principle of proportionality has become a general principle also within the legal systems of the Member States and is applied to measures they adopt in compliance with the obligations set by the Union, as well as to those provisions that establish derogations in

6. The other categories covered by the exemption from notification are those of aid to small and medium enterprises (SMEs), aid to research and development, aid to employment and training and aid in compliance with the chart approved by the European Commission addressed to each Member State regarding regional aid. For more information, *see* Tenuta, *Deroghe al principio di incompatibilità*, in *Aiuti di stato in materia fiscale* (Salvini ed., Cedam 2007); Pepe & Tozza, *Le deroghe al divieto di aiuti di stato*, in *Agevolazioni fiscali e aiuti di stato*, cit., p. 255.

7. The ECJ has frequently been called on to decide on this principle, both in relation to legislative and administrative measures adopted by the Commission, and to Member States' internal measures for the transposition of the European obligations. Many rulings were about environmental protection and taxation. CGE 18 Dec. 1997, consolidated actions C-286/94, C-340/95, C-401/95 and C-47/96, in Racc. 2000, 7013; CGE 22 June 2000, action C-318/98, in Racc. 2000, I-4785, point 46; CGE 14 Apr. 2005, action C-6/03, in Racc. 2005, I-02753, with note by Gratani, *Misure nazionali ambientali di protezione rafforzata e principio di proporzionalità*, Riv. giur. amb., p. 523 (2005). For the most authoritative legal literature references, *see* Pistone, *Presunzioni assolute, discrezionalità dell'amministrazione finanziaria e principio di proporzionalità in materia tributaria secondo la Corte di Giustizia*, Riv. dir. trib., III, p. 91 (1999); Del Federico, *Tutela del contribuente ed integrazione giuridica europea* p. 29 (Giuffrè 2010).

favour of the Member States, in relation to the Treaty's fundamental freedoms.[8] Regarding the environment, aid is considered proportionate only if it would not have been possible to achieve the same results with less aid; in other words, the aid must be limited to the minimum necessary to achieve the level of protection desired. In the case of aid in the form of tax reliefs on or exemptions from environmental taxes and of tradable permits, the proportionality must be ensured by subjecting the granting of reliefs or exemptions to requirements and criteria which guarantee that the beneficiary does not receive excessive advantages over his/her competitors: again, the criteria here is that the selectivity of the measure is limited to what is strictly necessary.

The most problematic aspect is the existence of discrimination in the measures adopted: it is essential to know that such measures favour certain enterprises or productions compared to others that are in a comparable legal and factual situation, in accordance with the objective pursued by the measure concerned. This aspect is based on a dual analysis; on the one hand, it is necessary to verify the existence of the so-called material selectivity of the advantage and, on the other, it is necessary to determine whether the selectivity is justified by the nature or general structure of the reference tax system. According to the Court of Justice, the analysis of the selectivity of a measure is always based on the specificities and design of the individual tax.

Proportionality functions as a limit to state intervention – it needs to be thoughtfully integrated into the framework of reference, thereby allowing the balancing of all the interests involved. If we look at positive law, in general, in the case of aid granted by a Member State, the European Commission has to ensure that there are no violations of the provisions contained in article 107 of the TFEU, which aims to protect competition among enterprises. The Commission analyses the advantages, provided for in all legal systems, and focuses on specific aid schemes in order to prevent any

8. The principle of proportionality entered into European law by German law, thanks to the mechanism used by the ECJ, to develop the general principles not explicitly contained in the written rules, using comparative law and the application of notions and concepts of the Member State's common legal traditions. Since the early seventies, the Court has made proportionality a general principle of Community law and a reference point for the syndicatability of the acts forwarded to it, as well as an interpretative criterion of primary Community law. In this context, case law has repeatedly stated that measures involving a restriction on a fundamental freedom must be proportionate, that is, appropriate to ensure the achievement of the scope which they pursue, without going beyond what is necessary for that purpose (in this regard, ECJ 10 Mar. 2009, Case C-169/07; ECJ 8 Sept. 2009, Case C-42/07; ECJ 6 Oct. 2009, Case C-153/08; ECJ 9 Aug. 2010, Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07).

possible distortion in competition. For the purpose of proportionality, the Commission considers that the amount of the aid should be lower than the eligible investment. The aid can be equal to the whole investment only if it is granted through a truly competitive tender procedure, based on clear, transparent and non-discriminatory criteria, that actually guarantees that the aid is limited to the time necessary to achieve the environmental benefit. This is because under such circumstances it can be assumed that the respective bids reflect all possible benefits that might flow from the additional investment.

13.4. Italy's perspective on non-harmonized taxes

Regarding the internal system and non-harmonized taxes, several cases involving an alleged environmental purpose were declared unlawful by the ECJ. We are referring to the so-called taxes on marble and luxury.[9] In chronological order, the first case was about a particular type of tax in the municipality of Carrara charged on products exported from the municipal area.[10] The tax was applied, with different rates based on the value of the rock, on all the marble extracted from Carrara pits, regardless of the final destination; an exception was made for marble processed in the plants located in Carrara and some neighbouring communes, to which exemptions and advantages were applied based on the fact that the products were intended for industrial use or processing in the district. The ECJ declared it unlawful since it was a charge having an effect equivalent to customs duties.

It is worth mentioning that by charges having the equivalent effect of customs duties, any pecuniary charge is meant that, regardless of its name and structure, is either directly or indirectly connected to the exportation of a product, with the consequent increase in its cost. This involves any charge levied unilaterally by a state on the goods crossing a frontier causing their price to rise, both when said charge is applied when the goods physically cross the frontier and when said increase occurs later. It is an absolute prohibition: The free competition scheme must not be distorted, regardless of the State's potential profit, the real discriminatory or protectionist effects, the purpose they were established for or the destination of the proceeds deriving from it.

9. For all the cases, *see* the accurate reconstruction by Fichera, *Federalismo fiscale e Unione Europea*, Rass. trib., p. 1545 (2010).

10. CGE, 9 Sept. 2004, action C-72/03, in Riv. dir. trib., III, p. 57 (2005), with note by Alfano, *Tasse di effetto equivalente e libera circolazione delle merci all'interno del territorio dello stato membro*, Riv. Dir. Trib., (2005); Carinci, *Autonomia tributaria delle Regioni e vincoli del Trattato dell'Unione Europea*, Rass. trib., p. 1228 (2004).

In this special case, it is necessary to consider that, in the different legal systems, there are local taxes that are potentially in conflict with the principle of free movement, which are not considered charges having equivalent effect, as their amount represents the remuneration of a service provided to the operator which paid the charge itself. For these cases, the Court has established the principle of non-equivalence to custom duties: in certain cases, the provision of an actual service may lead to a proportionate consideration provided that a number of conditions established by a national judge exist. Another possible derogation is when the charge is levied both on the national and the imported products: Member States are free to set internal duties, provided that, generally, they do not cause distortion to the single market and do not turn into forms of protection or support for their own products.

The municipality of Carrara tried to defend this charge claiming that there was an ecological purpose behind it, which would have to be used to cover the costs caused by the marble industry to the territory and the environment: according to the municipality, tax revenues would be used to build and fix roads and harbours, to adopt environmental protection measures, support cultural initiatives and, finally, provide welfare services to the workers of this industry. The ECJ held that in this case there was neither causality between the tax charged and the environmental regeneration works made by the marble industry nor any return in terms of services to the subjects liable to pay the tax; the Court confirmed that in any case, neither the purpose, either social, environmental, cultural or other, nor the allocation of the proceeds can justify instituting a tax in conflict with the fiscal principle of the Union.

The same violation was claimed in relation to the well-known Sardinian luxury tax issue[11] the unlawfulness of which was grounded precisely on the violation of State aid laws. The Regional Law 4, dated 11 May 2006, introduced a regional tax on capital gains on buildings used as second property, a regional tax on second property used for holidays and a regional tax on

11. Following the Constitutional Court's order for reference to the Court of Justice, *see* Del Federico, *I tribute sardi sul turismo dichiarati incostituzionali*, Fin loc., p. 21-30 (2008); the comments gathered in: Ficari ed., *L'autonomia tributaria delle Regioni e degli Enti locali tra Corte Costituzionale (sentenza n. 102/2008 e ordinanza n. 103/2008) e disegno di legge delega. Un contributo giuridico al dibattito sul federalismo fiscale*, Quaderni della Riv. dir. trib. (Milano 2009). Following the sentence by the Court of Justice dated 17 Nov. 2009, action C-169/08, *see* Carinci, *L'imposta sugli scali della Regione Sardegna: ulteriori indicazioni dalla Corte di Giustizia sui limiti comunitari all'autonomia tributaria regionale*, Rass. trib., p. 278 (2010); Stevanato, *Tributi regionali e vincoli comunitari: prove di federalismo fiscale*, Dialoghi tributari, p. 213 (2010).

aircrafts and pleasure boats; the law provided for separate treatments by virtue of the tax domicile and residence in Sardinia.

The Constitutional Court was called to pronounce on the issue and through sentence 102 dated 4 February 2008 declared articles 2 and 3 of Law 4/2006 unconstitutional; for the first time in the Italian legal system, through order 103 it referred to the ECJ ex-article 234 of the EC Treaty (now 267 of the TFEU), requesting the ECJ to give a preliminary ruling on the compatibility of the tax with the EC Treaty laws. The ECJ declared the Sardinian tax on aircrafts and leisure boats unlawful, citing the reason as State aid violating article 87(1) of the EC Treaty towards the enterprises that run their business and have their tax domicile on the territory of the Region; the significant tax advantage for Sardinian enterprises is such that it distorts free competition. The ECJ has also underlined that neither environmental protection purposes nor insularity may be valid reasons to justify a limitation in the freedom of providing services, which are to be justified only by reasons of public order, public security or public health.

The regional tax on ports and airports may have been considered a tax aimed at hitting similar ability to pay, by selecting the flow of tourism to which the tax should be applied according to the method used by the visitors to get to the island – also considering that the above-mentioned boats allow passenger accommodation. However, the ECJ held that, even though the reasons claimed by the Sardinia Region to justify the regional tax may be deemed legitimate, they cannot justify the methods through which they are applied, due to the objective difference of treatment towards the entrepreneurs having their tax domicile outside the regional area, who are the only ones who pay said tax. This conflicted with the ECJ's approach, according to which regardless of the existence of a legitimate purpose that corresponds to overriding reasons relating to the public interest, limitations of the fundamental freedoms guaranteed by the EC Treaty can only be justified if the measure in question is appropriate to achieve the pursued goal and if it does not exceed what is necessary to achieve that goal. Therefore, in this case, private aircrafts and leisure boats calling at Sardinia cause environmental pollution regardless of where said aircrafts and leisure boats come from and, in particular, have no connection whatsoever with the tax domicile of their owners. Non-residents' aircrafts and boats contribute to damaging the environmental resources as much as residents' aircrafts and leisure boats do. Therefore, the restriction to the free provision of services, as follows from the tax regulations dealt with in the main action, cannot be justified by environmental protection reasons. This is because the application of the regional

tax on stopovers instituted by that regulation is based on the differentiation between people, which has no link with the environmental purpose.

Unlike the case just discussed, the ECJ, with the judgment of 13 July 1989 in *Enicehm Base v. Comune Cinisello Balsamo* (Case C-380/87), considered legitimate a municipality's decision which banned the supply of bags and other non-biodegradable containers to consumers for removal of the purchased goods, and the sale or distribution of plastic bags, except for those intended for the transfer of waste. According to the Court, the fact that Directive 75/442 does not prohibit the sale or use of any product did not preclude Member States from making such prohibitions to protect the environment. From the content of article 3 of the Directive, it follows that the Directive is aimed at, among other things, promoting national measures to prevent the production of waste; for this reason, restricting or prohibiting the sale or use of some products, such as non-biodegradable containers, was considered to contribute to this goal. In that case, then, recognized as having an environmental purpose, the Court proposed the harmonization of the various Member States rules on waste disposal in order, firstly, to avoid barriers to intra-Community trade and unequal conditions of competition and, secondly, to help achieve the European Union's objectives in the field of protection of health and environment.

In the field of non-harmonized taxes, in order to push the remediation of areas of national interest, the legislator set forth a form of tax incentive: a tax credit is to be granted to those enterprises that perform environmental remediation actions on areas of national interest.

This measure was enacted by article 4(2-10) and (14), of Law Decree 145 of 2013, in favour of those enterprises that sign planning agreements (referred to in article 252-bis of Legislative Decree 152 of 2006) about the implementation of safety and remediation measures of the areas of national interest. The credit is granted for the tax year 2014 and 2015 for the acquisition of new capital goods used in production units in the polluted areas of national interest, located in the areas falling under the derogations provided for in article 107(3)(a) and (c), of the TFEU, or in the remaining areas if they are related to small and medium enterprises. In light of the European regulations, tax incentives granted to support the remediation of polluted areas must comply with the provisions of the European Commission on State aid to productive investments. This is one of the cases where the abovementioned measures may be exempted from the obligation of preliminary notification to the European Commission by virtue of article 108(3) of the TFEU, as they fall under the scope of the GBER 651/2014. In fact, although

keeping the State aid nature, in that case the particular advantage would be considered eligible and, indeed, appropriate (*see* articles 17-25, section 4, of the GBER).

13.5. Harmonized taxes

Regarding harmonized taxes, it is worth mentioning that the EU Member States are reluctant to transfer their sovereignty on environmental issues, which leads to difficulty in harmonization of the related fiscal instruments. However, over time, significant results have been achieved.

Environmental needs have been met especially in the field of excise duties. An important goal was achieved through Directive 2003/96/EC. After a long process, significant results in terms of environmental protection and sustainable development have been achieved.

Directive 2003/96/EC – restructuring the Community energy product and electricity taxation framework – article 15 provides for the possibility of the Member States to apply, under fiscal control, total or partial tax exemptions or reductions on renewable energy products and the like.[12] For this reason, article 21(9) of Legislative Decree 504/1995 (Excise Consolidating Act) went beyond the traditional rigidities resulting from the product's chemical composition. Considering the intended use and usage of the product, it recognized the possibility to apply excise duties through environmental policies with reduced rates on the products having low impact (e.g., vegetable oils for the production of electrical energy or energy produced from teleheating through the cogeneration system).[13] This made it possible to apply favourable excise duties to energy products and electricity coming

12. According to art. 14 of Directive 2003/96/EC, Member States can exempt from taxation certain products having low polluting potential and have the right to apply higher rates on the energy products having significant environmental impact. On said regulations, *see* Salvini, *Questioni attuali sulla fiscalità del settore energetico*, Rass. trib., p. 1670 (2007); Verrigni, *La direttiva 2003/96/CE sulla tassazione dell'energia ed il suo tardivo recepimento nell'ordinamento italiano*, Dir. prat. trib. Int., p. 735 et seq. (2007); Baez Moreno & Ruiz Almendral, *La tributación mínima sobre la energía en la Unión Europea: entre las exigencias del mercado único y los principios de justicia tributaria*, Noticias de la Unión Europea, p. 37 (2007).

13. On this profile, *see* Elia, *La disciplina fiscale dell'olio vegetale chimicamente non modificato per la produzione di energia elettrica: riflessioni in merito al rapporto tra diritto nazionale e comunitario*, Dir. prat. trib., II, p. 605 (2010); Cerioni, *Accisa agevolata per il teleriscaldamento prodotto con il sistema della cogenerazione*, Corr. trib., p. 858 (2010).

from renewable sources. These advantages are aimed precisely at encouraging production through innovative technologies.

The instrument used is exemptions applied to some renewable or similar energy products, such as: biogas, diesel fuel stabilized emulsions or heavy fuel oil with water, animal and vegetable oils and fats, bioethanol derived from products of agricultural origin, biodiesel, etc. In fact, for all the products above, the excise duty is often applied with much lower rates compared to those regularly applied to fossil fuels which they normally replace.[14]

Additionally, the European legal system provides the opportunity to apply total or partial exemptions or reductions to the level of taxation on electrical energy, provided it is of solar, wind, wave or geothermal origin, of hydraulic origin produced by hydroelectric plants, generated by biomass or methane emitted from abandoned coal mines, etc.

However, in this field the national legal system has implemented only some tax advantages provided for by the Community Directive. In particular, the following was decided: (i) exemption from taxation for electrical energy produced through plants fuelled by renewables, having power of up to 20kW and through biogas-fuelled generators (article 52(2)(a) of Legislative Decree 504/1995); (ii) exemption for self-produced electrical energy through systems fuelled by renewables having more than 20kW of power and consumed in facilities other than houses (article 52(3)(b), Legislative Decree 504/1995).

However, through this Directive, the taxation impact on all energy products, including coal, natural gas and electricity, in the Member States cannot be lower than the minimum levels provided for by Europe, thus sensibly reducing potential competition distortions. In 2011, upon the Council's express request (COM(2008) 30 final), the Commission proposed a review of the Directive above in order to adjust it to the new goals in environmental protection. That proposal aims at achieving a number of goals:

- ensuring equal treatment to all energy sources in order to create equal conditions for consumers;

14. For a deeper look at the discipline applicable to the above-mentioned products, *see* Galdi & Vannozzi, *Le accise relative ai prodotti energetici rinnovabili o assimilati*, in *Energie alternative e rinnovabili* p. 625 (Bonardi & Patrignani eds., Ipsoa 2013); De Maio, *Politiche di incentivazione fiscale ed energie rinnovabili*, in *Il Governo dell'energia dopo Fukushima. Indirizzi europei ed evoluzione delle politiche nazionali*, p. 315 et seq. (Esi 2013).; Puri, *La produzione dell'energia tra tributi ambientali ed agevolazioni fiscali*, Dir. prat. trib., p. 309 et seq. (2014).

- creating a proper taxation framework for renewable resources; and
- coordinating the CO_2 taxation system, avoiding overlapping with the ETS (Emission Trading System).

The proposal is currently in the middle of the process.

Therefore, considering the wide possibility allowed by the Community provisions to push the development of energy production systems powered by renewable resources, we should hope that in the future incentives may increase, also in order to remove the difference in tax treatments applied to said activities in other European tax systems.

13.6. Conclusion

Starting with the introduction of article 174 of the TFEU, which made the "polluter-pays" principle one of the cornerstones of the Community's environmental policy, Europe's role in environmental issues, especially on which tax instruments can be used for environmental protection purposes, has been more and more pervasive. However, so far the European Union has used non-binding recommendations and acts, not forcing Member States to actually raise their awareness. At present, the picture seems to be evolving. It would be desirable for the environmental tax system to finally shift away from a typically national level, as it is still too firmly linked to the single national legal systems. These are in turn affected by cyclical environmentalist drives and sudden retreats, resulting in a chaotic and incoherent overproduction of taxes, of which the environmental purpose is a secondary aspect, mostly.

Europe's increasing influence on national legal systems has produced some significant results. In Italy, this was confirmed by article 15 of Law 23, dated 11 March 2014, which delegates the review of the legal system to the Government and expressly refers to European environmental principles: "In consideration of sustainable development and green economy policies adopted by the European Union, the Government is delegated to introduce new forms of taxation through legislative decrees under article 1, in compliance with the existing taxation at a regional and local level and in accordance with the principle of fiscal neutrality, with the aim of orienting the market towards sustainable ways of consumption and production".

Regarding harmonized taxes, it can be observed that the fiscal system in general disregards the environmental issue, despite the existence of some

taxes that stand out for their environmental orientation. Just consider that among all the problems that are commonly identified under environmental protection (polluting emissions, polluting products, consumption of scarce environmental resources), the waste issue was almost the only one that the Italian tax legislator took under consideration, and which was only recently acted upon by implementing taxes charged on several polluting emissions.

Regarding excise duties, the implementation of Community Directive 2003/96/EC resulted in the review of the Excise Consolidating Act, which subjects to excise duties not only mineral oils and natural gas but also the other energy products, including electric energy. In this sector, it was decided to exempt taxes from or enhance the consumption of products, rather than productions, resulting from non-fossil fuels. This, at least in the case of exemptions, causes the excise on these products to become an actual environmental tax, which affects the consumption of a certain product by reason of its polluting effect.

The future of the European Union's common environmental policy also depends on its sustainability by the Member States and their enterprises, from a perspective of global competition: on the one hand, increased difficulties for the budgets of Member States to finance renewable energy, on the other, European firms are required to comply with a series of procedural and substantive requirements that represent an obstacle to their competitiveness in the international context. This is especially problematic in comparison with some countries, such as China and India, which base their growth on dumping arising from a failure to respect rules which are essential for the European Union, in terms both of environmental protection and the rights of workers.

In order to create a model of development that respects the environment and nature, tax leverage is an extremely important tool, thanks to its undoubted efficacy in influencing the behaviour of economic role players. For this reason, the purpose of environmental protection cannot be defended when it is in conflict with other EU principles (financial and fiscal interests), but, then again, it is necessary to apply the principles set out by the ECJ in moderation, since the current system of State aid is a tool that makes it difficult to implement an effective policy of tax incentives for clean energy and renewables.