Chapter 13

Tax Reliefs and Free Emission Allowances: Alternatives for Better Coordination and Efficiency. A European Law Study between Regulations and Case Law

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SUMMARY: I. INTRODUCTION. II. THE TAX NATURE OF THE ETS. III. THE GIFT TAX ON FREE ALLOWANCES. IV. THE COMPATIBILITY OF THE ALLOCATION CRITERIA (FREE OR AUCTIONING ALLOCATION) WITH STATE AID RULES. V. THE COURT OF JUSTICE PERSPECTIVE. VI. A REPRESENTATIVE ITALIAN CASE LAW. THE PRICE REDUCTION ON FUEL CONSUMPTION INTRODUCED BY FRIULI VENEZIA GIULIA – ITALY. VII. CONCLUSIONS.

I. INTRODUCTION

Through the establishment of a European market in greenhouse gas emission allowances (hereinafter, EU Emissions Trading System or EU ETS), Directive 2003/87[2] aims to contribute, in a cost-effective way,

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2. 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. Amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, OJ L 275, 25.10.2003, 32-46.

to the greenhouse gas emission target commitments of the European Community and its Member States under the Kyoto Protocol[3].

The EU ETS is based on the «cap and trade» principle. The overall volume of greenhouse gases (listed in Annex II) that can be emitted each year by the sectors covered by the system (see Annex I to Directive 2003/87) is subject to a cap set at the EU level. Within this Europe-wide cap, companies receive or buy emission allowances which they can trade.

The system was first introduced in 2005, and has undergone several changes since then. The implementation of the system has been divided up into distinct trading periods over time, known as phases. The starting phase covers the first three-year period (2005-2007), followed by the second phase running from 2008 to 2012, which coincided with the first commitment period of the Kyoto Protocol. The current phase of the EU ETS began in 2013 and will last until 2020.

The ETS works as follows: the EU ETS legislation, in particular Directive 2003/87 as amended by Directive 2008/101, creates allowances which are essentially rights to emit GHG emissions equivalent to the global warming potential of 1 tonne of CO_2 equivalent (tCO_2e). The level of the cap determines the number of allowances available in the whole system. The cap is designed to decrease annually from 2013, reducing the number of allowances available to businesses covered by the EU ETS by 1.74% per year. This allows companies to slowly adjust in order to meet the increasingly ambitious overall target for emissions reductions.

Each year, a proportion of the allowances are given to certain participants for free (for example, in sectors exposed to a significant risk of carbon leakage – meaning that if they pay the full cost of all the pollution allowances they need, production (and pollution) could shift to countries with less ambitious emissions reduction action), while the rest are sold, mostly through auctions. In fact, at the end of a year, the participants must return an allowance for every tonne of CO_2e they emit during that year. If a participant has insufficient allowances, then it must either take measures to reduce its emissions or buy more allowances from auctions on the market or from other participants who have reduced their emissions and hold surplus allowances.

In phases 1 and 2 of the EU ETS most allowances were given out to participants for free by each Member State in accordance with the rules set out in the Benchmarking Decision («for the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances

3. The Kyoto Protocol only entered into force on 16 February 2005. Therefore, the Directive 2003/87 was not, as such, aimed at achieving EU's Kyoto commitments.

free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge»[4]). In phase 3 auctioning is the default method of allocation, although free allocations are still handed out, mainly to the industry sector.

The main problems that arise from the study of the ETS system and its legislation concerning the relationship between energy taxes and free emissions allowance are the following:

– The tax nature of the ETS;

– The gift tax on free allowances;

– The compatibility of the allocation criteria (free or auctioning allocation) with the State aid rules.

Each of these issues can be solved thorough the analysis of ECJ case-law.

II. THE TAX NATURE OF THE ETS

On the one hand, we have to investigate the legal nature of emissions allowances.

The High Court of England and Wales, in the Case n. HC10C00532 between Armstrong DLW GMBH and Winnington Networks Ltd of 11 January 2012[5], considered these emissions allowances as a right and not as an obligation, stating as follows:

> *«(..) the holder of an EUA has a "right" which he or she can enforce by way of civil action. It is not a "right" (in the Hohfeldian sense) to which there is a correlative obligation vested in another person. It does not give the holder a "right" to emit CO_2 in this sense. Rather it represents at most a permission (or liberty in the Hohfeldian sense) or an exemption from a prohibition or fine. But for the entitlement to the EUA, the holder would either be prohibited from emitting CO_2 beyond a certain level or at least would be required to pay a fine if he did so. In this way, the holding of the EUA exempts the holder from the payment or that fine»* (para. 48).

At the same time, EUA (*European Emissions Allowance*) should be considered «intangible» property because, firstly, it confers an entitlement on the holder to exemption from a fine; secondly, it is an exemption which is transferable; thirdly the EUA is an exemption which has value. Allowances have value because there is a limited or capped supply and

4. See Article 10 of the Directive 2003/87/EC: «*For the three-year period beginning 1 January 2005 Member States shall allocate at least 95 % of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90 % of the allowances free of charge*».
5. *http://www.bailii.org/ew/cases/EWHC/Ch/2012/10.pdf*

there is demand for them from those participants for whom the cost of making reductions are higher than for other participants.

About the tax nature of these allowances, the EU ETS qualifies as a non-fiscal measure and, as such, cannot be considered as constituting «fees, dues or other charges» prohibited *inter alia* by article 15 of the Chicago Convention.

In the Case-366/10, the Advocate General Kokott rejected the notion that the obligation to buy emissions allowances is a tax or charge and construed it rather as a special type go «regulation»:

> *«It would be unusual, to put it mildly, to describe as a charge or tax the purchase price paid for an emission allowance, which is based on supply and demand according to free market forces, notwithstanding the fact that the Member States do have a certain discretion regarding the use to be made of revenues generated (Article 3d(4) of Directive 2003/87)»* (par. 216)[6].

The Advocate General explained as follows:

> *«Charges are levied as consideration for a public service used. The amount is set unilaterally by a public body and can be determined in advance. Other charges too, especially taxes, are fixed unilaterally by a public body and laid down according to certain predetermined criteria, such as the tax rate and basis of assessment»* (par. 214).

According to this conclusion, the emissions allowances have not a tax nature because charges and taxes generally are determined by State authority and not by the market; they do not provide title while the holding of emission allowances does.

The ECJ implicitly confirmed this view when holding that the requirement imposed on aircraft operators to buy emission allowances is not a tax or charge on fuel loads. The Court stated as follows:

> *«Unlike a duty, tax, fee or charge on fuel consumption, the scheme introduced by Directive 2003/87 as amended by Directive 2008/101, apart from the fact that it is not intended to generate revenue for the public authorities, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed for all the flights carried out in a calendar year»* (para. 143)[7].

According to the Court of Justice,

> «*In the light of all those considerations, it cannot be asserted that Directive 2008/101 involves a form of obligatory levy in favour of the public authorities that might be regarded as constituting a customs duty, tax, fee or charge on fuel held or consumed by aircraft operators»* (para. 145).

6. Opinion of AG Kokott of 6 October 2011, in Case C-366/10, *Air Transport Association of America and Others v Secretary of State of Energy and Climate Change* (EU:C:2011:637).
7. Case C-366/10, *Air Transport Association of America and Others vs. Secretary of State of Energy and Climate Change*, Judgment of 21 December 2011 (EU:C:2011:864).

While there are some different opinions as to whether or not the auctioning of allowances generates revenue accruing to the State[8], the central point made by both the Advocate General and the ECJ is that the EU's scheme does not have a fiscal nature because the «price» paid for an allowance is not fixed by the State in advance, but depends on free market forces[9].

ECJ's reasoning is not fully persuasive, especially from the point of view of the public expenditure nature of the scheme. First of all, regarding the auctioning of allowances, bought from public authorities, the fundamental condition that the revenue is used to finance public expenditures does *prima facie* exist[10]: the Directive leaves the MS free to determine the use of revenues generated from the auctioning, but it recommends to allocate at least the 50% of such revenues to the environmental aims listed in Article 10, para. 3 of the Directive. So, we can say that emissions allowances are compulsory payments and the revenue accrues directly to the Government budget and may be allocated to particular purposes.

The reasoning of the Court related to the lack of a basis of assessment and a rate defined in advance, is more convincing but these elements are not essential requirements of the notion of tax. The *quantum* is not defined in advance but it is definable, as the European Legislator settles rules and criteria in order to identify the price of an allowance and as there is a causal connection between levy and environmental degradation and the tax basis is a physical unit of a substance for which there is a scientific evidence that its use negatively affects the environment.

Another reason to exclude the fiscal nature of the ETS is the adoption of the Directive through the co–decision procedure[11]. It is a serious and valid argument but it is formal because the procedure does not affect the juridical substance of the phenomenon. We can therefore conclude that the ETS is an hybrid and multipurpose mechanism, with a *latu sensu* tax function[12]. In fact, it has first of all an environmental purpose, but its

8. See Meltzer, *Climate change and trade*, 130; Maruyama, *Climate change and the WTO*, 695.
9. Meltzer, *Climate change and trade*, 130 does not address this point.
10. L Del Federico-S Giorgi, «The coordination of Energy taxes and ETS via tax exemptions: the compatibility test in the context of free and /or auctioning allowances and TFEU rules» in P Pistone, M Villar Ezcurra (eds.), *Energy Taxation, Environmental Protection and State Aids, Tracing the Path from divergence to Convergence* (*IBFD* 2016), 341-363.
11. A Antón Antón-I Bilbao Estrada, «State Aid and the EU Council Directive 2003/96/EC: The Case for Argumenting the Environmental Component» in C Dias Soares*et al* (eds.), *Critical Issues in Environmental Taxation. International and Comparative Perspectives,* Vol. VIII, (Oxford U. Press 2010), 448.
12. In this sense see L Del Federico-S Giorgi, *The coordination of Energy taxes and ETS* (n 9): «To answer the question is ETS a tax?, let us assume that it cannot be considered as such (in the strict sense) but that its functions is comparable».

public nature still exists and justify the tax nature: allowances bought through auction from public authorities satisfy the condition of revenue functionalization to public expenditure. The charges have characteristics similar to taxes: the compulsory and synallagmatic nature, which responds to the theory of benefit, the fact that they are intended to finance government expenditure. So we can conclude for the tax function of the ETS allowances.

III. THE GIFT TAX ON FREE ALLOWANCES

The second question concerns the payment of a tax on the free allocation of greenhouse gas emission allowances.

In a recent ECJ case[13], in proceedings between *ŠKO-ENERGO s.r.o.* («ŠKO-ENERGO») and the *Odvolací finanční ředitelství* («Tax Appeal Board»), the request was for a preliminary ruling concerning the interpretation of Article 10 of Directive 2003/87/EC (entitled «*Method of allocation*»), which provides as follows:

> «*For the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge*».

In 2011 and 2012, the Czech legislation imposed a gift tax, at the rate of 32%, on electricity producers' acquisition of free-of-charge allowances. The revenue from that tax was intended to support operators of photovoltaic power stations. In an action before the Czech courts, ŠKO-ENERGO, a Czech electricity producer liable to that tax, is disputing the compatibility of the tax with the directive. The *Nejvyšší správní soud* (Supreme Administrative Court of the Czech Republic), hearing an appeal in the case, has asked the Court of Justice whether such a tax is permitted by the directive:

> «*Must Article 10 [of Directive 2003/87] be interpreted as preventing the application of provisions of national law which make the allocation free of charge of emission allowances in the relevant period subject to gift tax*?» (par. 16).

The Court stated that neither Article 10 of Directive 2003/87 nor any other provision of the directive concerns the use of those emission allowances or expressly restricts the right of Member States to adopt measures which may

13. Causa C-43/14, *ŠKO-ENERGO s.r.o. v Odvolací finanční čeditelství*, Judgment of 26 February 2015 (EU:C:2015:120). See M J Rovira Daudí, *The Gift Tax and the Free Allocation of Emission Allowances: a commentary on the European Court of Justice's judgment of 26 February 2015*, in *Analysis GA&P*, March 2015.

affect the economic implications of using such allowances[14]. Consequently, Member States are free, as a rule, to adopt economic policy measures, such as price controls on the markets for certain essential goods or resources, determining the manner in which the value of the emission allowances allocated free of charge to producers is to be passed on to consumers[15]. Nevertheless, the adoption of such measures must not neutralize the principle that emission allowances are allocated free of charge; nor may it undermine the objectives pursued by Directive 2003/87 (ECJ, Iberdrola, par. 30). In this regard, the allocation 'free of charge' under Article 10 of Directive 2003/87 precludes not only the direct fixing of a price for the allocation of emission allowances but also the subsequent levying of a charge in respect of their allocation (ECJ, Iberdrola, par. 31). In this case, the gift tax at issue in the main proceedings is levied at a rate of 32% on greenhouse gas emission allowances acquired free of charge for electricity production obtained by the combustion of fuels, with the exception of cogeneration. The Court of Justice stated as follows:

> *«Thus a measure such as that at issue in the main proceedings, which applies only to the allocation of emission allowances and not to their use, and in a specific sector, and during a limited period corresponding in part to that during which the EU legislature has temporarily established the principle that allowances should be allocated almost entirely free of charge, constitutes a charge in respect of the allocation free of charge of greenhouse gas emission allowances which is incompatible with the requirement laid down by Directive 2003/87 that allowances should be allocated free of charge»* (par. 24).

Furthermore, such a tax pursues objectives different from those of Directive 2003/87 and cannot be regarded as a more stringent protective measure for the purposes of Article 193 of the Treaty on the Functioning of the European Union (hereafter «TFEU»)[16].

In response to the Czech Government's contention that the tax, in practice, is levied on less than 10% of the total value of the greenhouse gas emission allowances allocated by that Member State, the ECJ responded not only that the free of charge principle does not refer to the value of allowances, but also that the limitation to 10% of the number of allowances

14. Joined cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, *Iberdrola SA and Others v Administración del Estado*, Judgment of 17 October 2013 (EU:C:2013:660), para. 28.
15. Joined cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11 (n 13), para. 29.
16. See, by analogy, Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, Judgment of 14 April 2005 (EU:C:2005:222), paras. 49 and 52, and case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia*, Judgment of 21 July 2011(EU:C:2011:502), para. 50.

which may be allocated for consideration should be assessed from the point of view of operators in each of the sectors concerned and not in relation to all the allowances allocated by the Member State. Accordingly, the imposition of a gift tax such as that at issue in the main proceedings is precluded if it does not respect the 10% ceiling on the allocation of emission allowances for consideration, which is a matter for the referring court to determine. So the ECJ concludes that:

> *«Article 10 of 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 must be interpreted as precluding the imposition of a gift tax such as that at issue in the main proceedings if it does not respect the 10% ceiling on the allocation of emission allowances for consideration laid down in that article, which is a matter for the referring court to determine».*

IV. THE COMPATIBILITY OF THE ALLOCATION CRITERIA (FREE OR AUCTIONING ALLOCATION) WITH STATE AID RULES

The last issue concerns the compatibility of the free allocation allowance with State aid rules. For this question it is useful to search for Commission State aid decisions when approving the National Allocation Plans (hereinafter «NAPs») submitted by the various Member States under the EU ETS.

There are four cumulative conditions set out in Article 107(1) TFEU (i.e. ex Article 87(1) of the EC Treaty), that define state aid – the transfer of state resources, the provision of an economic advantage, the selectivity of beneficiary undertakings, and the effect on competition and trade[17].

There is a general rule that any state aid that fulfils the said criteria will be declared to be incompatible with the Single European Market. Exceptions apply for particular types of aid that are or may be allowed in accordance with Articles 107(2) and 107(3) of the TFEU.

As the current Directive makes clear, the EU ETS does not itself operate as an exemption from the State aid rules in the Treaty and so Commission decisions concerning the application of any future EU ETS must also respect the procedural and substantive conditions of EC State aids law. So Member States must notify State aid and await the approval of the European Commission before implementing it. The control of state aid

17. For a more detailed description, EC Commission Vademecum Community Rules on State Aid, 2007 version, *http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_2007_en.pdf* (25.10.2008). Some authors split the last criterion into two separate ones, see, e.g., M Skou Andersen, *Revision of Environmental Guidelines* [2008] 17 (1) EELR 25.

is carried out by the Commission which may approve the aid, declare it incompatible with the common market or set additional conditions for compatibility. The ETS Directive allows only for the auctioning of 5% and 10% of the total allocation for the first and second trading period, respectively. Denmark[18] and Sweden[19] had previously notified the Commission about their intention to grant a total exemption of energy taxes for EU ETS installations. The aim of the relief was to avoid the double burdening of undertakings with carbon taxes and a CO_2 emission trading scheme based on the same environmental objective, with a potential substantial effect on their competitiveness. However, the Energy Taxation Directive allowed for such tax exemptions only under specific conditions and subject to notification as state aid. The Commission disagreed with the double burden argument. In its view, the objective of the Energy Taxation Directive is not only environmental protection but at the same time the harmonization of excise taxes that contribute to the proper functioning of the Single Market. Consequently, Sweden withdrew its notification in August 2007[20] while the Danish case ended with a solution of compromise, allowing the exemption under the condition that the concerned beneficiaries paid a tax on their respective energy consumption, corresponding to at least the Community minimum taxation levels set in Directive 2003/96/EC[21].

Therefore, there are good points for using similar solutions in order to coordinate the system of energy taxation with the ETS, when unilaterally introduced by Member States[22]. Therefore the measures to coordinate ETS with energy taxation –such as exemptions or tax credits– must be tested in order to identify the most environment-oriented solution.

V. THE COURT OF JUSTICE PERSPECTIVE

It is stated above that in order to achieve the objectives of environmental protection, increasingly integrated into the supranational legislation,

18. See State aid No C 41/2006 – Modification of the CO_2 tax for quota-regulated fuel consumption in the industry, OJ C 274 of 10.11.2006.
19. See State aid No C 46/2006 – CO_2 tax relief for EU ETS participants, OJ C 297/29 of 7.12.2006.
20. A new scheme with a CO_2 tax reduction was notified in January 2008, see State aid N-22/2008 (Sweden), OJ C 184 of 22.6.2008.
21. European Commission, Decision of 17 June 2009 on the State aid C 21/08 (ex N 864/06) which Germany is planning to implement in favour of Sovello AG, OJ: JOL_2009_237_R_0015_01.
22. Of course the conclusions would be different in the case in which it was a European measure e.g. the EU Commission proposal of 13 April 2011, see L Del Federico – S Giorgi, *The coordination of Energy taxes and ETS* (n 9).

Member States, at various levels of government, have different fiscal schemes, characterised, amongst other things, by different tax reliefs designed to encourage operators to adopt behaviours compliant with the aim of environmental protection, favouring energy production with lower environmental impact[23].

The European «polluter pays» principle is the leading principle for States aiming to establish environmental taxes. Next to energy taxation, harmonized at European level, it is relevant to examine the system of eco-friendly tax reliefs in light of State aid rules; these tax reliefs are permitted only if they respect the principles of non-discrimination and proportionality[24].

Tax advantages in the energy sector (designed, for example, to promote a more efficient use of energy resources or the adoption of technologies related to renewables) could create distortions in the European market. Therefore, it is essential to analyse the compatibility of these measures with the limits and prohibitions generally imposed by the Treaty's tax provisions[25].

Tax advantages introduced by Member States could often be declared incompatible State aid because they do not respect the selectivity criterion, the principle of equal treatment between companies and the competition[26] principle.

23. The new Commission Regulation (EC) No 651/2014, adopted on June, 17, 2014, makes easier for the authorities to grant a significant number of aid measures in favour of the environmental protection or the fight against climate change: among these, there are aid aimed at promoting investments in energy saving and renewable energy sources and aid in the form of environmental tax reliefs. For more information, see Tenuta, «Deroghe al principio di incompatibilità» in L Salvini (ed.), *Aiuti di Stato in materia fiscal* (Cedam, 2007); G Pepe and C Tozza, *Le deroghe al divieto di aiuti di Stato*, 255; M Villar Ezcurra, *State Aids and Energy Taxes: towards a coherent reference framework,* (2013) Intertax 341; A Hansson & C Brokelind, *Tax incentives, tax expenditures theories in R & D: the case of Sweden,* (2014) World tax journal 168; C Verrigni, «The system of State aid for environmental protection: internal rules and European principles, in Energy taxation, environmental protection and State aids» in P Pistone, M Villar Ezcurra (eds.), *Energy taxation, environmental protection and State aid,* (IBFD 2016), 289-302.

24. In the Community guidelines on State aid for environmental protection (No 2008/C 82/01), OJ 1 April 2008, No. 82, 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.

25. P Puri, «La produzione dell'energia tra tribute ambientali e agevolazioni fiscali» (2014) Diritto e pratica tributaria 309.

26. L Calzolari, «La selettività degli aiuti di Stato e il principio di parità di trattamento delle imprese nella recente giurisprudenza della Corte di Giustizia» (2015) Diritto del commercio internazionale 481.

The analysis of Court of Justice case law shows that State aid rules aim to prevent the adoption by Member States of measures favouring certain companies or the production of certain goods over others. After having established the selectivity of the tax measure, it is necessary to assess whether the selectivity can be justified by the nature and the structure of the framework in which that decision is included[27].

On this basis, the Court of Justice declared a serie of energy tax reliefs incompatible with the State aid rule.

a) In its Judgment of 2 April 1998 (Case C-213/96, *Outokumpu*), the Court considered that the first paragraph of article 95 EC Treaty precludes the adoption of an excise duty on domestic electricity at rates which vary according to its method of production, while imported electricity is taxed, regardless of its method of production, at a flat rate, which, although lower than the highest rate applicable to domestic electricity, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

b) In its Judgment of 8 November 2011 (Case C-143/99, *Adria Wien Pipeline*), the Court of Justice had to assess whether there was a State aid in case of a partial rebate of energy taxes on natural gas and electricity provided by Austrian law only for companies that produced material goods with the ultimate goal of preserving their competitiveness. The Court considered that the benefit for companies producing goods in comparison to those providing services was not justified by the nature or the overall structure of the tax system. Particularly, it was found to be State aid, based on three reason. First, businesses that provide services could be great consumers of energy in the same way as those producing material goods. Second, the regime was not temporary but permanent and, therefore, could not allow enterprises producing goods to gradually adapt to the new regime. Finally, the environmental objectives could not be used to justify the different treatment between companies because energy consumption was harmful for the environment, regardless of the sector of activity.

c) In the Judgment of 17 July 2014 (Case C-553/12, *DEI*), the Court found that the measure by which Greece granted to a company of the electricity market rights on the lignite deposits in which there were more

27. Thanks to the arguments adduced by the Court of Justice case law, the incompatibility of said measures shall be assessed through the analysis of their economic effects, which became the benchmark with the purposes of the measures, which are judicially deemed worth of protection by the national legislator. For information about the general profiles on State aid and environmental protection, see R Pignatone, *Agevolazioni su imposte ambientali ed aiuti di Stato,* in M Ingrosso and F Tesauro (eds.), *Agevolazioni fiscali e aiuti di Stato,* (Jovene 2009) 747; R Alfano, «Agevolazioni fiscali in materia ambientale e vincoli dell'Unione europea» (2011) Rassegna tributaria, 328.

than half of such material reserve, refusing other operators requests for similar permits, was contrary to articles 106 and 102 TFEU. Since lignite is the cheapest fuel used in the power plants, the privileged access to this raw material in the upstream market extraction strengthened the firm's position on the downstream market for the production of energy, creating a difference in treatment and hindering the access of potential competitors.

d) In the judgment of 11 December 2014 (Case T-251/11, *Austria / Commission*), the General Court of the European Union said that the partial exemption of energy excise duty, related to the obligation to buy green electricity, which Austria tried to grant to energy-intensive companies, was a prohibited State aid. In this case, the partial exemption was selective because it introduced differentiations between companies which were, in terms of the objective pursued, in a similar situation of fact and law.

e) The Court of Justice also ruled on a specific Italian case, declaring unlawful the tax measure because it had been issued in light of an environmental objective, only. The reference is the judgment of 21 June 2007 (Case C-173/05) concerning the «tax on gas pipelines» of the Sicilia Region (Article 6 of the Sicilian Regional Law, 1 March 2002, n. 2, which reformulated Article 5 of the Regional Law 3 May 2001, n. 6). The tax was a fixed levy on the specific activities of transportation and marketing of gas. This law would have to raise revenue finance investments in order to reduce and prevent potential environmental damage caused by pipelines located in the Sicilian Region. According to the Court, it was unlawful because the supposed environmental purpose, external or internal to the structure of taxes, cannot itself justify the introduction of a tax having an equivalent effect to the one of a customs duty, since the fundamental European principles, including the environmental one[28], cannot be affected by the regional needs.

Unlike the above-mentioned cases, there have been judgments in which the potential non-compliance of the tax relief has been justified in the light of the important purpose of environmental protection.

For example, in the Judgment of 13 March 2001 (Case C-379/98, *PreussenElektra*), the Court considered that the German tax legislation which imposed private suppliers to purchase electricity produced from renewable sources in their geographical area at minimum prices higher

28. For further information, see R Alfano, «Il tributo regionale sul passaggio del gas metano attraverso il territorio della regione Sicilia: cronaca di una morte annunciata» (2007) Rivista di diritto tributario 328; E La Scala, «Il carattere ambientale di un tribute non prevale sul divieto di introdurre tasse ad effetto equivalente ai dazi doganali» (2007) Rassegna tributaria 1317.

than the market value was compatible with EU law. In this case, the State aid discipline was considered less important than the need to promote the use of renewable energy sources which are able to reduce the greenhouse gas emissions, one of the main causes of climate change which the European Commission and the Member States want to fight.

Following the same spirit, in the Judgment of 4 June 2014 (Case C-5/14, *Kernkraftwerke Lippe-Ems GmbH*), the Court had to analyse whether the tax on the use of nuclear fuel for the production of commercial electricity, introduced by Germany, was to be considered a State aid. This tax was introduced for a limited period of time in order to create new revenue necessary to rehabilitate the mining site of Axis II, where radioactive waste, arising from the use of nuclear fuel, was stored. According to the Court, the tax was not a selective measure since the electricity production which did not use nuclear fuel, in relation with the objective pursued by that regime, was not in a legal and factual situation similar to the electricity production that used nuclear fuel, since only the latter generated radioactive waste. Moreover, it could not be considered as a tax having an equivalent effect to a customs duty as it was applied not because the nuclear fuel crossed a border, but because it was used for the commercial production of electricity, without distinction with regard to the fuel's origin. In addition, the revenue was intended to finance the clean-up costs for the damage caused by the specific activities subject to taxation.

VI. A REPRESENTATIVE ITALIAN CASE LAW. THE PRICE REDUCTION ON FUEL CONSUMPTION INTRODUCED BY FRIULI VENEZIA GIULIA – ITALY

In relation to tax benefits in the field of the energy, a case law, that raised the interest of the legal literature, involved an Italian Constitutional Court's decision[29].

The judgment discusses the constitutionality of Article 3 of Friuli Venezia Giulia Regional Law, 11 August 2010, n. 14 concerning reductions in fuel consumer prices, suspected both of reducing excise duty in violation of EU law (specifically with Directive 2003/96/EC establishing a harmonized minimum level of excise duty on a European basis) and of introducing a public aid to businesses.

The law provides a price reduction for fuel purchases made by private citizens residing in the region, and these grants are paid directly by the

29. Constituzional Court, 4 June 2011, n. 185.

operator of the service station recognising a corresponding reduction in fuel price, with subsequent reimbursement, from the Chambers of Commerce to the same manager, of the grants provided to consumers (beneficiaries of subsidy). In practice, the regional grant offers a «discount» on the price of fuel supplied to the pump.

According to the Italian Constitutional Court, the law should not be assimilated to a reduction of the excise duty (levied at the uniform rate throughout the region), but a reduction of the fuel's pump price without affecting the tax components of the said price. It is an independent benefit provided downstream of the taxation mechanism, because the taxpayer is the owner of the tax warehouse from which the fuel is extracted for consumption.

From an EU law perspective, however, the measure presents two critical issues. First, it can be seen as a waiver of a portion of the excise duty revenue[30]. Moreover, the reduction in fuel prices (even though qualified by law as a «grant» paid to consumers) results, in fact, in an indirect benefit for economic operators and for the entire production chain, since it can create a fuel consumption's increase connected with the simultaneous reduction of private's supply from distributors located across the border.

The measure, in fact, reduces the purchase price of the good and, thus, orients the choices of the public, leading to a commercial advantage in favour of the concerned enterprises that they could not achieve under normal market conditions[31].

30. The Council Directive 2003/96/EC –restructured the Community energy product and electricity taxation framework– Article 15 provides for the possibility for the member States to apply, under fiscal control, total or partial tax exemptions or reductions on renewable energy products. For more information, see L Salvini, «Questioni attuali sulla fiscalità del settore energetico» (2007) Rassegna tributaria 1670; C Verrigni, «La direttiva 2003/96/CE sulla tassazione dell'energia ed il suo tradivo recepimento nell'ordinamento italiano» (2007) Diritto e pratica tributaria internazionale 735; A Baez Moreno and V Ruiz Almendral, «La tributación mínima sobre la energía en la Unión Europea: entre las exigencias del Mercado único y los principios de justicia tributaria» (2007) Noticias de la Unión Europea 37; F Pitrone, «Defining "Environmental Taxes": imput from the Court of Justice of the European Union» (2015) Bull. Intl. Tax n 58.

31. For a detailed analysis of this issue, see D Stevanato, "Contributi pubblici al consumo di beni soggetti ad accisa e agevolazioni fiscali «indirette», (2011) Dialoghi tributari; R Amadeo, «Il contributo al consumo di carburante del Friuli Venezia Giulia e la questione dei "beneficiari effettivi" di aiuti pubblici alle imprese» (2011) Dialoghi tributari.

VII. CONCLUSIONS

Subsidies in the energy sector are strategic for the operation of the European market because they may encourage sustainable development, but they can also distort competition.

The matter is closely linked to European State aid rules, governed by Articles 107 and following of the TFEU, regarding the exercise of free and undistorted competition[32].

The approach emerging from the Court of Justice case law is mainly based on an economic reasoning. This means that fiscal measures, compatible with the principles and values of the constitutions and the legal traditions of the single Member States, could be classified as a state aid, because of economic data only –the tax reduction for certain activities or enterprises– regardless the of other considerations[33].

Tax reliefs in the energy sector, like any other type of environmental reliefs, must respect the European principles of proportionality and non-discrimination. As highlighted by the Court of Justice, these principles represent clear limits.

In general, all the tax reliefs that give beneficiaries a selective advantage in comparison to companies of the same or other sectors, could be declared incompatible with State aid law. Consequently, after having established the selective nature of the measure, it is necessary to assess whether it can be justified by the nature or the general scheme of the reference tax system.

32. For a reconstruction of the state aid rule, see R. Miceli, «La metamorfosi del divieto di aiuti di Stato nella materia tributaria» (2015) Rivista di diritto tributario 31.
33. R. Alfano, *Agevolazioni fiscali in materia ambientale e vincoli dell'Unione europea*, supra.

PART III

EU Energy Taxation System: A Critical Analysis in Light of Competitiveness and Environmental Protection Objectives