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# State Aids and Environmental Protection: Time for Promoting the Polluter-Pays Principle<sup>1</sup>

*Nicolas de Sadeleer\**

## **Abstract**

The prohibition of State aids under Article 107 TFEU did not prevent the Commission to develop its own vision of a well-tailored State aid policy regarding the protection of the environment. However, granting of State aids to undertakings is likely to impinge both positively and negatively on environmental policies. Moreover, State aids are not only distorting competition, but they may also run counter the polluter pays principle enshrined in Article 192(2) TFEU. It is the aim of this article to explore some of the key issues arising in the implementation of Treaty provisions and secondary law. Particular attention is drawn to the allocation of emission allowances free of charge and to tax exemption regimes.

## **1. Introductory remarks**

Although they still occupy a marginal place, State aids in the environmental domain nonetheless constitute one of the spearheads of national environmental protection policies and of the fight against global warming, as is shown by the diverse nature of the initiatives taken in this area. First, given the costs of the investments borne by the private sector in order to comply

with environmental regulations, the public authorities are inclined to give financial assistance to their undertakings. The EU lawmaker may even authorise the granting of such aids in order to compensate for costs incurred by the implementation of harmonised standards.<sup>2</sup> Second, State aids can also be granted with a view to encouraging undertakings at the forefront of technological innovation in pollution abatement. Since there is no let-up in the expansion of environmental policy into new areas, such as renewable energy and eco-products, State aids have become more widespread. Containing both 'positive' (subsidies, loans, direct investments, etc.) and 'negative' (tax relief, preferential tariffs, tax remission, exemption from the obligation to pay fines or other pecuniary penalties, guarantees, etc.) measures<sup>3</sup>, they may come in extremely varied forms. This complex and evolving situation inevitably calls for a nuanced approach.

Whilst State aids appear to be a not insignificant asset for ensuring the success of a public environmental protection policy, a number of subsidies are also likely to hamper the environ-

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\* Professor of EU law, Saint Louis University. Jean Monnet Chair Holder. Guest Professor at Lund and at UCL. [www.desadeleer.eu](http://www.desadeleer.eu)

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<sup>2</sup> The EU lawmaker may authorize Member States to grant State aids with the aim of compensating costs incurred from environmental obligations. For instance, in virtue of Article 10a(6) of ETS Directive 2003/87/EC, Member States may adopt financial measures in favour of sectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to compensate for those costs. Such financial measures have to be granted in accordance with State aids rules.

<sup>3</sup> Case C-126/01 *GEMO* [2003] ECR I-4397, para. 28.

mental policy. In this connection, a few examples will suffice. Typical in this respect is the Common Fisheries Policy (CFP). The basic condition for the success of its reform is the reduction of overcapacity in fishing fleets which is still supported by subsidies. Needless to say that these overcapacities create economic pressure to set fishing quotas at levels which are too high from an ecological point of view and lead to illegal fishing activities.<sup>4</sup> Another case in point is the over-allocation of emissions allowances. In 2006, Member States over-allocated the green house gases (GHG) allowances free of charge to a number of major polluters. On one hand, this led to a collapse of the price of these allowances and imperilled the whole trading scheme; on the other, the windfalls profits caused significant distortions of competition.<sup>5</sup>

Be that as it may, some of these State aids may benefit national undertakings to the detriment of their competitors and, for this reason, undermine the system of free and non distorted competition required in particular under Article 107 TFEU. They may also sit awkwardly alongside the polluter pays principle, enshrined in Article 192(2) TFEU, which requires polluting undertakings to bear the costs of their pollution reduction investments.<sup>6</sup>

In order for an environmental measure to be considered to breach Article 107 TFEU, it is necessary to provide evidence, first, that it amounts to a State aid as defined by this provision, and which does not fall under any of the exceptions listed in paragraphs 2 and 3. One is struck by the

great legal uncertainty which still reigns regarding both the concept of State aids as well as the issue of their compatibility with the provisions of the Treaty.

The first section of this article is dedicated to substantives rules whilst the second deals briefly with procedural rules. Since this study will be limited to a commentary on the different arrangements for environmentally friendly aids,<sup>7</sup> the general rules will not be analysed. For these issues, readers are invited to consult the more general studies dedicated to controls over State aids.

Finally, where it is necessary to control the conduct of States and not those of undertakings, the decentralisation of powers from the Commission towards the national authorities is more difficult to assure than it is when implementing Articles 101–102 TFEU.<sup>8</sup>

<sup>4</sup> SRU, *Fischbestände nachhaltig bewirtschaften. Zur Reform der Gemeinsamen Fischereipolitik*, n° 16 (Berlin, 2011).

<sup>5</sup> Due to this over-allocation, the price of the allowances fell in a month from almost 30 Euros to 12 Euros. E.g. J. de Sepibus, 'Scarcity and Allocation of Allowances in the EU Emissions Trading Scheme – A Legal Analysis' 32 (2007) *NCCR Trade Working Paper*, 36.

<sup>6</sup> N. de Sadeleer, *Environmental Principles* (Oxford, Oxford University Press, 2002) 21–60.

<sup>7</sup> G. van Calster, 'Greening the EC's State Aid and Tax Regimes' (2000) 21 *ECLR* 294; H. Vedder, *Competition Law & Environmental Protection in Europe. Towards Sustainability* (Groeningen, Europa Law Publishing, 2003) 478; A. Alexis, 'Protection de l'environnement: la mise en application du principe du pollueur-payeur' (2003–2004) 4 *RAE-LEA* 629–640; J. de Sepibus, *Die Umweltschutzsubvention im Gemeinschaftsrecht* (Bern, Peter Lang, 2003); G. Facenna, 'State Aid and Environmental Protection' in A. Biondi, P. Eeckhout, J. Flynn (eds.), *The Law of State Aid in the European Union* (Oxford, Oxford University Press, 2004) 245–264; A. Kliemann, 'Aid for Environmental Protection', in M.S. Rydelsky (ed.), *The EC State Aid Regime. Distortive Effects of State Aid on Competition and Trade* (London, Cameron & May, 2006) 315–346; A. Winterstein and B. Tranholm Schwarz, 'Helping to Combat Climate Change: New State Aid Guidelines for Environmental Protection' (2008) 2 *Competition Policy Newsletter* 12–20; E. Kuetenicova and A. Seinen, « Environmental Aid », in W. Medrer, N. Pesariand M. Van Hoof (ed.), *EU Competition Law*, vol. 4, State aids, 2008; U. Soltesz and F. Schaltz, 'State Aid for Environmental Protection. The Commission's new Guidelines and the new General Block Exemption Regulation' 6:2 (2009) *JEELP* 141–170; N. de Sadeleer, *Commentaire Mégret. Environnement et marche intérieur* (Brussels, ULB Press, 2009) 503–526; P. Thieffry, *Droit de l'environnement de l'UE*, 2<sup>nd</sup> ed. (Brussels, Bruylant, 2011) 963–1047.

<sup>8</sup> Although the former Article 81 EC (Article 101 TFEU) has been subject to a centralised control regime since 1962, the difficulties and costs of these entailed by these

## 2. Substantive conditions

### 2.1 Introductory remarks

Before deciding on the compatibility of aid with Treaty State aid provisions, the Commission has to clarify if State aid is involved. Given that the definition of a State aid is by no means straightforward, this is a rather challenging task. In fact, Article 107 TFEU does not provide any definition of the concept of a State aid. Moreover, the measures falling under this provision are not identified with reference to their form, their objectives or the activities to which they apply. According to settled case law, in order to be classified as a State aid, a measure must satisfy four conditions.<sup>9</sup> For the sake of clarity, the prerequisites set out by the Court of Justice are examined in a slightly different order:

- an advantage must be conferred on the recipient of the aid measure;
- the advantage must be of state origin;
- the aid must have a selective nature;
- and finally, the aid must be liable to affect trade between the Member States.

These different conditions often end up becoming entangled with one another, which stresses the evolutionary and pragmatic nature of the concept of a State aid. On the one hand, the EU

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procedural arrangements spurred the Council to replace them with a regime of decentralised controls. See Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ 1/1. Thereafter, the agreements, decisions and concerted practices covered by Article 101(1) TFEU could be authorised without any requirement for a prior decision by the Commission, as was the case under the terms of regulation n°17 implementing Articles 85 and 86 of the EC Treaty.

<sup>9</sup> Case C-142/87 *Belgium v Commission* ('*Tubemeuse*') [1990] ECR I-959, para. 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, para. 20; Case C-482/99 *Stardust* [2002] ECR I-4397, para. 68; and Case C-280/00 *Altmark* [2002] ECR I-7747, para. 74; and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, para. 32.

courts are careful to ensure that the concept of State aid is sufficiently broad, whilst on the other hand they also seek to constrain it out of legal certainty concerns.

### 2.2 First condition: advantage conferred on the recipient

#### 2.2.1 Introductory comments

First, the recipients of State aids must be undertakings and not private persons. Accordingly, a tax relief granted to private persons purchasing automotive vehicles equipped with catalytic exhaust pipes would not fall within the ambit of Article 107 TFEU.<sup>10</sup>

Second, in order to amount to a State aid, the measure must create an advantage for its beneficiary. It is thus necessary to establish 'whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions'.<sup>11</sup> Against this background, the notion of advantage has been very broadly interpreted. It is wider than that of subsidy. Accordingly, any measure which, in different forms, reduces the burdens that normally apply to a company budget amounts to an advantage for the purposes of Article 107(1) TFEU.

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<sup>10</sup> E. Garbitz and V. Zacker, 'Scope for Action by the EC Member States for the Improvement of Environmental Protection under EEC Law: the Example of Environmental Taxes and Subsidies' (1989) *CML Rev.* 429. The Commission, for its part, intervening according to ancient Article 88 EC (Article 108 TFEU), carried out a searched analysis of the German and Dutch fiscal exemptions for 'clean' cars. It finally raised no objection against the implementation of those measures. See 15<sup>th</sup> Annual Report on Competition Policy, nb. 224 and 225. The question arose as to whether an environmental tax exemption on international flight granted to the transfer passengers using Schipol airport and not to other passengers using Dutch airports was deemed to be a State aid granted to that specific airport. The Dutch Supreme Court doubted whether the advantage granted to transit passengers could also lead to a factual advantage for the airlines or Schipol airport. See HR, 4 October 2009, LjN BI3451

<sup>11</sup> Case C-301/87 *SFEI* [1996] ECR I-3547, para. 60.

On the other hand, the granting of relief from abnormal burdens relating to the provision of a service of general economic interest pursuant to Article 106 TFEU does not create an advantage for the recipient undertaking, since the compensation does not exceed the real cost of the service including a reasonable profit.<sup>12</sup> By way of illustration, 'the consideration for the services performed by the collection of disposal undertakings' does not constitute a State aid, which means that a levy on the sale of certain goods, the revenue from which is used to indemnify undertakings collecting and/or recycling waste oils, cannot be regarded as financing a State aid.<sup>13</sup>

The following measures have been qualified as State aid within the meaning of Article 107 TFEU:

- The selling of a plot of land to a private undertaking by a public undertaking, when the purchase price would not have been obtained by the buyer under normal market conditions.<sup>14</sup>
- The tendering for a contract aiming at increasing the capacities of newspaper waste recycling plant that has for effect of conferring an advantage on the bidder, on the account that the authorities are not intervening as private investors.<sup>15</sup>

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<sup>12</sup> Compensation granted to undertakings entrusted with the operation of SGEI are falling outside the scope of Article 107 TFEU on the grounds that such compensation does not represent an advantage. However, four conditions must be fulfilled. See Case C-280/00 *Altmark* [2002] ECR I-7747, paras. 89–93.

<sup>13</sup> Case 240/83 *Association de défense des brûleurs d'huiles usagées* [1985] ECR I-531, para. 18. As regard the compensation approach, see opinion AG Jacobs in Case C-126/01 *GEMO* [2003], seen above, para. 97 and following.

<sup>14</sup> See Joined Cases T-127, 129 & 148/99 *Diputación Foral de Álava e.a. v Commission* [2002] ECR II-1275, para. 73; and Case T-274/01 *Valmont Nederland v Commission* [2004] ECR II-3145, para. 45.

<sup>15</sup> Commission Decision 2003/814/EC of 23 July 2003 on the State aid C 61/2002 which the United Kingdom is planning to implement for a newsprint reprocessing capacity support under the WRAP programme [2003] OJ L 314/26.

### 2.2.2 Undertakings' liability to bear the environmental costs

As far as environmental measures are concerned, in order to ascertain whether a recipient undertaking receives an advantage, the Commission takes into consideration the polluter pays principle, which makes it possible to assess liability for the costs generated by the pollution concerned. Following the Commission's reasoning, in *Gemo*, a case regarding the financing by slaughterhouses of operators collecting and disposing of animal carcasses and slaughterhouse waste, Advocate General Jacobs took the view that 'a given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs'.<sup>16</sup> Without referring to this environmental principle, the Court of Justice ruled, that the disposal of such waste had to be 'considered to be an inherent cost of the economic activities of farmers and slaughterhouses'.<sup>17</sup> As a result, an advantage was granted to these undertakings.

Furthermore, the granting of exemptions from certain regulatory obligations or their financing may for this reason fall within the ambit of Article 107 TFEU. Accordingly, the Commission has concluded in various cases that by financing costs which would normally fall on the recipient undertaking, the public authorities have granted it a State aid. For example, where the authorities decide to finance the elimination of industrial dust emitted by an undertaking, they are granting

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<sup>16</sup> Opinion AG Jacobs in Case C-126/01 *GEMO* [2003], above, para. 69.

<sup>17</sup> Case C-126/01 *GEMO* [2003], seen above, para. 31. AG Jacobs had considered that 'the provision free of charge of a collection and disposal service for dangerous animal waste [was relieving the] ... farmers and slaughterhouses of an economic burden which would normally, in accordance with the polluter-pays principle, have to be borne by those undertakings'. See Opinion AG Jacobs in Case C-126/01 *GEMO* [2003], above, para. 64).

it an aid because this decision has the effect of exempting the undertaking concerned from the costs relating to the elimination of its waste.<sup>18</sup> In fact, under the terms of the polluter pays principle, the producer of the waste is responsible for its disposal and recycling. The intervention by a public authority in favour of an undertaking will in this case be tantamount to an economic advantage for the latter and, accordingly, must be classified as a State aid within the meaning of Article 107 TFEU. Similarly, a steel producer cannot be released from its obligation to manage its waste and to recycle industrial dust.<sup>19</sup>

### 2.2.3 Granting of tradable emission rights

Last, the question arises as to whether the granting of tradable emission rights entails an advantage. Account must be made of the fact that some emission rights are granted for free (grandfathering) whereas others are sold or auctioned. An egregious example would be the European Trading Scheme (ETS). During the two first phases (2005–2007 and 2008–2012), ETS Directive 2003/87/EC<sup>20</sup> allowed the Member States to auction off a limited amount of allowances (5 to 10 pc). As a result, 90 to 95 % of the allowances were granted free of charge.<sup>21</sup> Although allowances to

emit GHG will be auctioned from 2013,<sup>22</sup> the ETS Directive 2003/87/EC still provides for derogations.<sup>23</sup> Where these commodities are granted for free, sold or auctioned, the undertakings can trade during a specific period in intangible assets representing a market value. It follows that the undertakings enjoy the advantage of being able to monetise the economic value of the allowance. Admittedly, there is increasingly support for the view that where the distribution of these allowances involves grandfathering or where there are sold by State authorities below market price, there is an advantage for the recipient undertaking: ‘the advantage flows essentially from the fact that the state has handed out for free something that is tradable’.<sup>24</sup> In its 2008 guidelines discussed below, the Commission is taking the view that ‘tradable permit schemes may involve State aid in various ways, for example, when Member States grant permits and allowances below their market value and this is imputable to Member States’.<sup>25</sup>

In this respect the Dutch NOx trading scheme is a good case in point.<sup>26</sup> In the framework of the NOx national emission ceiling established by Directive 2011/81, the Netherlands set a cap-and-trade scheme for 250 of its largest and most polluting facilities. According to this scheme, these undertakings had to comply with

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<sup>18</sup> Commission Decision 1999/227/ECSC of 29 July 1998 on aid granted by the Land of Lower Saxony (Germany) to *Georgsmarienhütte GmbH* [1997] OJ C 323/4.

<sup>19</sup> *Ibid.*

<sup>20</sup> Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ 2003 L 275, 32.

<sup>21</sup> However, the Commission did not request formal notification of the National Allocation Plans (NAP) as State aids under Article 108(3) TFEU. In assessing the validity of the plans under Directive 2003/87/EC, the Commission reminded the applicant Member States that it was not excluded that their NPAs were implying State aid. See the letter of the Commission of 17 March 2004 quoted in Case T-387/04 *EnBW Energie Baden-Württemberg AG* [2007] ECR II-1201. See also Commission Decision on the first French NAP C(2004) 3982/7 final, Decision on the first Polish NAP C(2005) 549 final. It must be noted that

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the Commission has never opened a formal State aid investigation.

<sup>22</sup> See Article 10/1/EC Directive 2003/87/EC and preamble to Directive 2009/29/EC, recital 19.

<sup>23</sup> Pursuant to Article 10c(1) of the Directive, certain Member States are allowed to grant to installations for electricity production allowances free of charge until 2020. See Communication from the Commission – Guidance document on the optional application of Article 10c of Directive 2003/87/EC, OJ C 99/9, 2011.

<sup>24</sup> Jans and Vedder, *European Environmental Law*, 4<sup>th</sup> ed. (Groeningen, Europa Law Pub., 2011) 321.

<sup>25</sup> Paras. 55 and 139. See also, European Commission, Guidelines on Certain State Aid Measures in the context of greenhouse gas emission allowance trading scheme post - 2012, OJ C 158/4, 2012.

<sup>26</sup> Case C-279/08 P *Commission v Netherlands* [2011] nyr.

a specific emission abatement standard either by reducing its own emissions either by purchasing emission allowances from other undertakings. In case an undertaking exceeded the national emission standard, it was required to compensate for the surplus the following year. In other words, the national scheme authorised the undertakings to trade between themselves in emission allowances. In contrast with other national schemes, the quantity of tradable allowances was not laid in advance on the grounds that they were awarded according to the additional reduction the undertakings could achieve in relation to the national standard. In an infringement proceeding brought by the Commission against Netherlands, the question arose as to whether the tradability of the emission allowances constituted an advantage for the undertakings subject to the scheme.

Taking the view that the national authorities were conferring on these tradable allowances a market value, both the General Court and the Court of Justice held that the measure had to be regarded as 'an economic advantage which the recipient undertaking could not have obtained under normal market conditions'.<sup>27</sup> The argument that the allowances were mitigating the efforts undertaken by the undertakings to attain the national emission standard was rejected on the grounds that 'the costs of reducing those emissions fall within the charges to which the budget of the undertaking is normally subject'.<sup>28</sup>

As a matter of fact, the mere existence of windfall profits militate against the negation of any economic advantage conferred on the recipient undertaking.<sup>29</sup>

<sup>27</sup> Case T-233/04 *Netherlands v Commission* [2008] ECR II-591, para. 63; and Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 91.

<sup>28</sup> Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 89.

<sup>29</sup> J. de Sepibus, 'The EU Emissions Trading Scheme put to the Test of State Aid Rules' 34 (2007) *NCCR Trade Working Paper*, 12.

## 2.3 Second condition: State resources

### 2.3.1 Introductory comments

For to be classified as a State aid within the meaning of Article 107 TFEU, the advantage must, first, be granted 'directly or indirectly through state resources and, second, be imputable to the State'.<sup>30</sup> These conditions are cumulative. Accordingly, the concept of 'aid' is defined in particularly broad terms in that it applies to all forms of assistance granted by a Member State or through State resources in any form whatsoever. By way of illustration, the following measures have been considered to involve the transfer of public resources and, accordingly, to fall within the ambit of Article 107 TFEU:

- the levy applied in order to finance the operations of a national manure bank on Dutch pig breeders which produced more manure than they could use;<sup>31</sup>
- the management of animal waste provided free of charge by private undertakings for farmers and slaughterhouses, as 'the organisation of that service originates with the public authorities'.<sup>32</sup>

Moreover, the distinction made between 'aid granted by Member State' and aid granted 'through State resources' does signify that State aids may be granted by all levels of government, as well as public and private bodies in which the Member State exercises a decisive influence.<sup>33</sup> As far as environmental policy is concerned, measures taken by local authorities as well as environ-

<sup>30</sup> Case C-482/99 *Stardust* [2002] ECR I-4397, para. 24; and Case C-126/01 *GEMO* [2003] above, para. 24.

<sup>31</sup> Commission Decision 92/316/EEC of 11 March 1992 concerning aid envisaged by the Netherlands Government in favour of an environmentally-sound disposal of manure [1992] OJ L 170/34.

<sup>32</sup> Case C-126/01 *GEMO* [2003] above, para. 26.

<sup>33</sup> Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, para. 58; and Case C-222/07 *UTECA* [2009] ECR I-1407, para. 34.

mental agencies are caught by article 107 TFEU inasmuch they concern public resources.

This condition is not always fulfilled. For instance, subsidies awarded to an undertaking with a view to covering the costs incurred by the clean-up of contaminated soils does not involve a transfer of State resource, inasmuch as the undertaking is bound to reimburse the sum to the State.<sup>34</sup> By the same token, the obligation to pay a charge for each car that is registered for the first time in the Netherlands in order to finance a private undertaking in charge of collecting and recycling car wrecks and founded by a voluntary agreement between undertakings that was rendered compulsory by the Netherland public authorities, does not involve a transfer of public resources. First, it is a legal obligation, and, second, the payment of the charge is voluntary because manufacturers and importers may obtain exemption if they ensure themselves the recycling of the car wrecks.<sup>35</sup> Given that only private undertakings were involved in the scheme, the benefits were not granted out state resources. Conversely, when they favour some recycling undertakings, the charges paid by commercial undertakings relating to their vehicles may be considered as state resources and, thus, State aids.

### 2.3.2 *Emission trading scheme and transfer of State resources*

Much ink has been spilled over the question as to whether the gratuitous allocation of allowances is tantamount to a transfer of State resources.

As a starting point for analysis of this challenging question it must be stressed that the

measure must be imputable to the Member State. The fact that an EU act, such as the ETS Directive, was obliging Member States to allocate GHG emission allowances free of charge did not prevent the allocation from being qualified a State aid inasmuch as the national authority was endowed with sufficient room for manoeuvre. Given that the ETS directive offered the national authorities much discretion during the two first phases of the scheme (2005–2008, 2008–2012), this condition was easily fulfilled.<sup>36</sup>

Secondly, the advantage must be granted ‘directly or indirectly through state resources’. On the account that the proceeds resulting from the sale of allowances did not constitute a foregoing of revenues for the Member States, several commentators have been arguing that this was not the case.<sup>37</sup> However, the view taken by these authors can no longer be sustained. Indeed, it is settled case law that the advantages granted to certain undertakings entailing ‘an additional burden for the public authorities in the form of an exemption from the obligation to pay fines or other pecuniary penalties’ are falling within the ambit of Article 107 TFEU.<sup>38</sup> It therefore follows that a national cap-and-trade scheme offering free of charge the possibility to the undertakings covered by it to trade in emission allowances in order to avoid the payment of fines and conferring on these allowances the character of tradable intangible assets confers an advantage granted through State resources.<sup>39</sup> In effect, the State could have sold such allowances or put them up

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<sup>34</sup> Commission Decision 1999/272/EC of 9 December 1998 on the measure planned by Austria for the clean-up of the *Kiener Deponie Bachmanning* landfill [1999] OJ L 109/51.

<sup>35</sup> Commission Decision 2002/204/EC of 30 October 2001 on the waste disposal system for car wrecks implemented by the Netherlands [2002] OJ L 68/18.

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<sup>36</sup> J. de Sepibus, ‘The EU Emissions Trading Scheme’, above, 7–8.

<sup>37</sup> C. Schweer and L. Bernhard, ‘Emissionshander und EG-Beihilfenrechts’ 7(2004) *RdE* 153–180.

<sup>38</sup> Case C-295/97 *Piaggio* [1999] ECR I-3735, para. 42.

<sup>39</sup> Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 106.

for an auction.<sup>40</sup> Thus, there is a transfer of State resources in the form of loss of State resources.

Similarly, the fact that a Member State does not take advantage of the possibility granted to it under secondary legislation to auction off GHG emissions allowances is attributable to the state and financed out of the public purse.<sup>41</sup> As is clear from the following example, by deciding not to sell allowances to installations for electricity production, the State is depriving itself of revenues that it could earn, were it to auction them.<sup>42</sup> On the other hand, where allowances are sold at market price, there is no transfer of State resources.

However, the issuance free of charge of green certificates does not entail the transfer of State resources insofar as these certificates merely acknowledge that green electricity has been produced by the recipient undertaking.<sup>43</sup>

### 2.3.3 *The foregoing of State resources is inherent to the environmental regulation*

Nevertheless, as will become clear from the following examples, it is not always easy to distinguish between a State aid and a classical regulatory measure. Indeed, measures which do not entail direct or indirect financial burdens for the State do not normally fall within the concept of

a State aid, even where they represent an advantage for the undertakings concerned. Typical in this respect is the *Preussen Elektra* case.<sup>44</sup> The Court of Justice has found that, even though it gives some economic advantage to the producers of this type of electricity, and entails a diminution in tax receipts for the State, that last consequence was an inherent feature of such a legislative provision. Accordingly, the obligation to purchase electricity produced from renewable sources at minimum prices does not involve any direct or indirect transfer of state resources to electricity production companies.<sup>45</sup> Hence, there was not a direct connection between the German measure at issue and the possible loss of revenue.<sup>46</sup> Accordingly, the German arrangements were not involving a transfer of State resources.

The opposite solution prevails where there is a sufficiently direct connection between the measure and the foregoing of State revenue. For instance, where the State has with respect to an ETS the choice between allocating allowances free of charge (grandfathering) or selling or auctioning them, the foregoing of resources cannot be considered as inherent 'to the instrument designed to regulate the emissions of pollutants'.<sup>47</sup>

### 2.3.4 *Failure to implement environmental law*

Insufficient attention has been hitherto given to the fact that environmental law suffers from the reticence of the authorities charged with applying it. All too often their indifference, negligence, incompetence, or even resignation, prevail over their obligations to apply the mandatory rules contained both in international law as well as sec-

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<sup>40</sup> AG Mengozzi Opinion in Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 87.

<sup>41</sup> The Commission acts along the same line: see J. de Sepibus, 'The European Emission Trading Scheme put to the test of State Aid Rules' (2009) 17/4 *Environmental Liability* 126; P. Thieffry, above, 769.

<sup>42</sup> Pursuant to Article 10c(1) of the ETS Directive, certain Member States are allowed to grant to installations for electricity production allowances free of charge until 2020. Thus, these Member States are not required to use the option of transitional allocation. Accordingly, the Commission is taking the view that these allowances fall within the ambit of Article 107 TFEU. See Communication from the Commission-Guidance document on the optional application of Article 10c of Directive 2003/87/EC.

<sup>43</sup> Commission Decision of 25 July 2001 on green certificate in the Belgian electricity sector, N° 550/2000.

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<sup>44</sup> Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, para 85.

<sup>45</sup> *Ibid.*, paras. 54 & 59.

<sup>46</sup> See Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 111.

<sup>47</sup> Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 111; opinion AG Mengozzi in Case C-279/08 P, above, para. 92.

ondary EU law. These shortcomings give national undertakings advantages that are sometimes considerable, as the latter may not incorporate in accordance with the polluter-pays principle environmental externalities into the price of their goods and services. However, in the absence of a transfer of State resources, these shortcomings fall beyond the definition of a State aid.<sup>48</sup>

## 2.3 Third condition: selectivity

### 2.3.1 Environmental measures and selectivity

Though they might comply with the two conditions described above, State measures will not amount to State aids within the meaning of the Treaty where they are not selective. In fact, in order for a State measure to be considered equivalent to a State aid, it is further necessary that it favours ‘certain undertakings or the production of certain goods’, rather than indiscriminately benefit all undertakings situated within the Member State.<sup>49</sup> This criterion reflects the thinking that the more an aid measure is selective, the more it is likely to distort competition.

The following arrangements fulfil the prerequisites for selectivity:

- The granting of a rebate on a tax on the consumption of energy solely to undertakings manufacturing goods constitutes a selective

advantage likely to lead to the qualification of State aid.<sup>50</sup> In fact, a tax scheme establishing distinctions between manufacturing undertakings and undertakings furnishing services is not justified inasmuch as the consumption of energy by those sectors is harmful to the environment.<sup>51</sup>

- The measure aiming at facilitating the replacement of industrial vehicles by new vehicles is deemed to be selective when it is targeted at certain undertakings in particular SMEs, ‘albeit that they are not limited in number’.<sup>52</sup> ‘... The exclusion of undertakings that are not SMEs from the benefit of the Spanish Plan cannot be justified on the basis of the nature and scheme of the system of which it forms part’.<sup>53</sup>
- The fact that the free collection of animal waste is essentially benefiting farmers and slaughterhouses underlines the fact that it does not constitute an arrangement of a general nature.<sup>54</sup>

### 2.3.2 General measures of economic policy and selective measures

Selective State aids stand in opposition to so-called general measures of economic policy which are not aiming at favouring specific products or sectors, but all undertakings in national territory, without distinction. These general measures cannot constitute State aid<sup>55</sup> provided they are justified by the nature of the general structure of the system under which they fall. In effect, an economic benefit granted to an undertaking constitutes State aid only if, by display-

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<sup>48</sup> Thus, in a case where the Spanish authorities hadn’t required a producer of synthetic fibers to implement waste management standards, the Commission dismissed a complaint according to which these shortcomings were tantamount to a State aid. Given that there was any a transfer of State resources, the Commission ruled that Article 107 TFEU was inapplicable. [1998] OJ C 49/2.

<sup>49</sup> The reference geographical framework is not necessarily the national geographical framework when a measure is taken by a sub-state entity enjoying both an institutional, procedural and economical and financial autonomy as far as its autonomous powers are concerned. See Case C-88/03 *Portugal v. Commission* [2006]; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja e. a.* [2008]; and Joined Cases T-211 & 215/04 *Government of Gibraltar v Commission* [2008].

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<sup>50</sup> Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paras. 43 to 53.

<sup>51</sup> *Ibid.*, para. 52.

<sup>52</sup> Case C-351/98 *Spain v Commission* [2002] ECR I-8031, para. 40.

<sup>53</sup> Para. 41.

<sup>54</sup> Case C-126/01 *GEMO* [2003], seen above, para. 38.

<sup>55</sup> Case C-143/99 *Adria-Wien Pipeline* [2001], above, para. 35; Cases T-55/99 *CETM v. Commission* [2000] ECR II-3207, para. 40.

ing a degree of selectivity, it is such as to favour certain undertakings or the production of certain goods.

However, the criterion of selectivity is fulfilled where the administration called upon to apply arrangements of general nature disposes of a certain discretionary power with regard to the application of the regulatory measure, and where this discretionary power had the effect of favouring certain undertakings or the production of certain goods.<sup>56</sup>

That being said, the dividing line between measures which may constitute public subsidies, on the one hand, and measures forming part of a State's general system, on the other, may sometimes be difficult to draw.<sup>57</sup> As far as environmental policy is concerned, the distinction between general and selective measures proves to be particularly delicate. For example, the financing of a waste incinerator or a landfill by the public authorities will not particularly benefit any given undertaking. However, if it appears that an undertaking would be favoured by such infrastructure due to the fact that it would be the principal beneficiary, the prerequisite of selectivity would be met. This example shows how difficult it is to trace the dividing line between investments in public infrastructure and State aid.

In this regard the following question arises: must arrangements applicable to all industrial sectors, which are not *de iure* selective, but which *de facto* apply to a limited number of sectors, be considered as falling under Article 107(1) TFEU? The Netherlands NO<sub>x</sub> trading scheme case offers valuable insights into this issue.<sup>58</sup> The question arose as to whether the national cap-and-trade

scheme granting free allowances to 250 large polluting facilities was favouring a certain group of undertakings within the meaning of Article 107 TFEU. The 250 recipient undertakings were subject to the cap-and-trade scheme on the account that their thermal capacity was more than 20 MWth whereas the smaller undertakings were bound to comply with emission ceilings without having the possibility to take part in this trading scheme.

The General Court held that the measure was not selective for the following reasons: 'the beneficiary undertakings are determined in accordance with the nature and general scheme of the system, on the basis of their significant emissions of NO<sub>x</sub> and of the specific reduction standard to which they are subject' and that 'ecological considerations justify distinguishing undertakings which emit large quantities of NO<sub>x</sub> from other undertakings'.<sup>59</sup> Furthermore, the General Court held that 'that objective criterion is furthermore in conformity with the goal of the measure, that is, the protection of the environment and with the internal logic of the system'.<sup>60</sup>

However, the Court of Justice objected this reasoning. It held that: 'Article [107(1) TFEU] does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. Even if environmental protection constitutes one of the essential objectives of the [EU], the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article [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

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<sup>56</sup> Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava e.a. v Commission* [2002] ECR II-1385, paras. 23, 31 & 35.

<sup>57</sup> Opinion AG R. Jarabo Colomer in Case C-280/00 *Italy v Commission* [1999] ECR I-2981, para. 27.

<sup>58</sup> Case C-279/08P *Commission v Netherlands* [2011], above.

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<sup>59</sup> Case T-233/04 *Netherlands v Commission* [2008] above, para. 99.

<sup>60</sup> *Ibid.*

assessed pursuant to Article [107(3) TFEU].<sup>61</sup> In particular, the Court stressed that the fact that all national facilities were subject to emission reduction obligations was not sufficient enough to obliterate the differentiation introduced by the national authorities between the 250 large polluting plants and the other plants.<sup>62</sup> In addition, the Court considered that the quantitative criterion to select the 250 major plants could not be regarded as inherent to the general scheme to reduce industrial atmospheric pollution.<sup>63</sup>

### 2.3.3 Environmental taxes and selectivity

By definition, the arrangements governing State aids (articles 107 and 108 TFEU) and those governing distortions resulting from different treatment under tax law (articles 28, 30 et 110 TFEU) do not cover identical terrain.<sup>64</sup> Despite the existence of these two different regimes, tax regulation is nonetheless liable to fall under the scope of the arrangements governing State aids. In other words, the fact that a tax measure complies with the requirements of provisions governing the free movement of goods does not however imply that it will be lawful under the terms of Article 107 TFEU.

Needless to say that the application of this provision to environmental taxation<sup>65</sup> is a particularly delicate issue when the revenue from the taxation is generally allocated to public bodies which have the task of assisting undertakings

in complying with their obligations under environmental law, or even in complying with more stringent environmental standards. Moreover, with a view to promoting more environmentally friendly economic innovation, eco-taxation provides for distinctions between different categories of goods or services in accordance with environmental considerations, which generally manifest themselves in the form of exemptions which may benefit certain categories of undertakings or the production of certain goods. What is more, exemptions from environmental taxes may be granted to polluting undertakings sometimes in order to permit them to absorb the shock of new tax arrangements, and at other times in order to remain competitive compared to foreign undertakings which are not subject to the same fiscal constraints.<sup>66</sup> Accordingly, the adoption of new tax arrangements, especially with reference to the fight against climate change, may disadvantage certain categories of undertaking such as steelworks that are confronted with strong international competition. Last but not least, exemptions are also granted with a view to enticing undertakings to develop less polluting technologies.

The question over whether tax exemption arrangements have the effect of favouring 'certain undertakings or the production of certain goods' arose repeatedly when the first national regimes to fight global warming were adopted. The climate change tax in the United Kingdom provided for an exemption in favour of a certain number of economic operators which used certain technology, which created an advantage for them over other users which were forced to buy electricity taxed on the basis of environmental considerations. The British authorities stipulated that the exceptional arrangements applied to all

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<sup>61</sup> Case C-279/08 P *Commission v Netherlands* [2011] nyr, para. 75.

<sup>62</sup> Para. 76.

<sup>63</sup> Para. 76; opinion AG Mengozzi, para. 55.

<sup>64</sup> Opinion AG Geelhoed in Case C-174/02 *Streekgewest* [2005] ECR I-85, para. 28.

<sup>65</sup> An environmental tax has been defined by the Commission as a tax whose base has a negative effect on the environment or which seeks to tax certain activities, goods or services so that environmental costs may be included in the price. See Article 17(10) of the General Block Exemption Regulation No 800/2008 and para. 40 of the 2008 Guidelines on environmental aids.

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<sup>66</sup> In this connection, the Austrian energy tax at issue in Case C-143/99 *Adria-Wien Pipeline* is a good case in point.

undertakings which used the said technology, regardless of the extent of their exploitation or the economic sectors. Having concluded that these criteria were objective, the Commission found that the exemption was justified with regard to the general structure of the system into which it was incorporated.<sup>67</sup>

It follows that whenever the environmental tax reductions or exemptions are inherent in the logic of the national tax system, they fall outside the scope of Article 107(1) TFEU, provided that the conditions examined above are not satisfied. This may be illustrated by the following example. The Danish lawmaker has exempted undertakings covered by the EU ETS from the carbon tax on fuel consumption for production purposes.<sup>68</sup> Whereas the Danish authorities argued that the exemption was inherent in the logic of the ETS, the Commission took the view that the proposed exemption was deviating from the logic of the system of reference that was the energy tax system and not the Danish ETS. The logic of that system was to tax each energy product consumed. As a result, the selectivity of the proposed exemption could not be justified by the nature and logic of the tax system.<sup>69</sup>

The national authorities must in any case take particular care to ensure that the tax exemptions or reductions do not have the effect of benefiting certain companies to the detriment of their competitors and, therefore, satisfy the criterion of specificity which is one of the prerequisites for the application of Article 107(1) TFEU.

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<sup>67</sup> Commission Decision to open the proceeding concerning aid C 18/2001-Climate change [2001] OJ C 185/03/22.

<sup>68</sup> Commission Decision 2009/972/EC of 17 June 2009 on aid scheme C 41/06 which Denmark is planning to implement for refunding the CO<sub>2</sub> tax on quota-regulated fuel consumption in industry (C(2009) 4517), para. 44. See S. Hoe, 'Regulering af CO<sub>2</sub> med afgifter og kvoter – en dobbeltregulering?' 2 (2011) *Nordic Environmental Law Journal* 87.

<sup>69</sup> Para. 45.

The position of the Court of Justice on this question in *Adria-Wien Pipeline* and *British Aggregates* is instructive.

In *Adria-Wien Pipeline*, the Court of Justice was called upon to examine a partial exemption from the payment of an environmental tax on the consumption of natural gas and electricity by undertakings, which had not been granted only to undertakings producing tangible goods. This case is without doubt of interest. The Court held that the granting of benefits to undertakings the principal activity of which consisted in the manufacture of tangible goods was not justified by the nature or the general structure of the contested taxation system. Since the consumption of energy by the sector of undertakings producing tangible goods was also damaging for the environment as that of undertakings providing services, the environmental considerations underlying the tax arrangements did not justify a different treatment of these two sectors.<sup>70</sup> The Court did not accept the argument by the Austrian government, which was inspired by the idea of maintaining the competitiveness of undertakings producing tangible goods, according to which the partial reimbursement of the environmental taxes concerned only to those undertakings was justified by the fact that they had been proportionally more affected than the others by the said taxes.<sup>71</sup> Moreover, it is irrelevant whether the situation of the recipient of the measure has improved or worsened compared to the previous state of the law or, by contrast, has not changed through time.<sup>72</sup> It is only neces-

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<sup>70</sup> Case C-143/99 *Adria-Wien Pipeline et Wietersdorfer & Peggauer Zementwerke* [2001], seen above, para. 52. See V. Golfinopoulos, 'Concept of selectivity Criterion in State Aid definition Following the *Adria-Wien* Judgment – Measures justified by the Nature or General Scheme of a System' (2003) 10 *ECLR* 543.

<sup>71</sup> Case C-143/99 *Adria-Wien Pipeline* [2001], above, para. 44.

<sup>72</sup> Para. 41.

sary to verify whether the State measure has the effect of favouring 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU.<sup>73</sup> Only a measure which is justified by the nature or general structure of the system into which it is incorporated will not satisfy the requirement of selectivity.<sup>74</sup>

In *British Aggregates*, the General Court departed from that reasoning. The question arose as to whether an environmental tax on aggregates providing for an exemption in favour of aggregates produced from waste from the extraction of minerals created a selective advantage. The General Court held that the tax break was not selective. In particular, the General Court took care to underscore the margin of appreciation of the State: the Member States were free, when weighing up the different interests in play, to define their priorities in the area of environmental protection and accordingly to determine the goods and services which they decide to subject to this eco-tax.<sup>75</sup> Moreover, the General Court justified this reasoning in view of the integration clause contained in the old Article 6 EC (Article 11 TFEU).<sup>76</sup> As a result, the fact that such a levy

does not apply to all similar activities which have a comparable impact on the environment does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage.<sup>77</sup>

This 'highly innovative' reasoning<sup>78</sup> has however been objected to by the Court of Justice which found that the General Court had misconstrued Article 107(1) TFEU.<sup>79</sup> According to the Court of Justice, this approach ended up cancelling out the effects of the aid measure having regard to the goal pursued by the tax arrangements, namely 'the environmental objective'. This went against the traditional interpretation given to this provision of the Treaty, which did not *distinguish between measures of State intervention by reference to their causes or aims but defined them in relation to their effects*.<sup>80</sup>

As a result, the General Court's approach excluded that the selectivity of the non-imposition of an environmental tax on operators in comparable situations could be assessed in the light of the objective being pursued by the tax authority, independently of the effects of the fiscal measure in question.<sup>81</sup> Moreover, 'the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article [107(1) TFEU]'.<sup>82</sup> Besides, as AG Mengozzi underlined, 'neither the compe-

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<sup>73</sup> In his opinion, AG Misho took the view that the reimbursement rules favouring the manufacturing sector but discriminating the services sector did not constitute a State aid on the grounds that this scheme at issue was part of 'a new general system of ecology taxes which from the moment of its conception was based on the principle that the primary and secondary sectors of the national economy could not reasonably be taxed proportionately to the whole of their electricity and gas consumption'. See Opinion AG Misho in Case C-143/99 *Adria Wien Pipeline* [2001], seen above, para. 42. The objectivity of the criteria of the tax perception and the reimbursement's subordination to criteria established by the legislature and not by administrative authorities attested, according to him, to the existence of an overall system of energy taxation (para. 43).

<sup>74</sup> Case C-143/99 *Adria-Wien Pipeline* [2001], above, para. 42.

<sup>75</sup> Case T-210/02 *British Aggregates v Commission* [2006] ECR II-2789, para. 86.

<sup>76</sup> Para. 117.

<sup>77</sup> Para. 115.

<sup>78</sup> Opinion AG Mengozzi in Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, para. 96.

<sup>79</sup> Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, para. 86.

<sup>80</sup> Case C-241/94 *France v Commission* [1996] ECR I-4551, para. 21; Case C-342/96 *Spain v. Commission* [1999] ECR I-2459, para. 23; and Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para. 46. See also Case C-279/08 P *Commission v Netherlands* [2011], above, para. 75.

<sup>81</sup> Case C-487/06 P *British Aggregates v Commission* [2008], above, para. 87.

<sup>82</sup> Para. 92.

tence enjoyed by the Member States in matters relating to taxation or the environment, nor the principle laid down by Article [11 TFEU] of the integration of environmental protection requirements into the definition and implementation of Community policies, justifies the wholesale removal of public measures that could distort competition from the ambit of the supervisory power conferred on the Commission by the Treaty rules on State aid'.<sup>83</sup>

It is thus settled case law that the environmental integration clause enshrined in Article 11 TFEU<sup>84</sup> should lead the Commission to take into account environmental goals pursued by the national lawmaker not when classifying the measure but exclusively when assessing its compatibility with paragraph 3 of Article 107 TFEU.<sup>85</sup>

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<sup>83</sup> Opinion AG Mengozzi in Case C-487/06 P *British Aggregates v Commission* [2008], above, para. 102; Opinion AG Mengozzi in Case C-279/08 P *Netherlands v Commission* [2008] above, para. 63.

<sup>84</sup> Article 11 TFEU requires that: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. By the same token, Article 37 EUCHR asserts the requirement to integrate a "high level" of environmental protection into the different EU policies and actions. Also known as the principle of integration, this clause is called upon to play a key role, not only due to the fact that it makes it possible to avoid interferences and contradictions between competing policies, but also because it may enhance sustainable development in favouring the implementation of more global, more coherent and more effective policies. See M. Wessmaier, 'The Integration of Environmental Protection as General Rule for Interpretating Law' (2001) *CMLR* 159–177; N. D'Hondt, *Integration of Environmental Protection into other European EU Policies. Legal Theory and Practice* (Groeningen, Europa Law Publishing, 2003); D. Grimmeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?' (2000) *EELR* 207–218; W. Lafferty and E. Hovden, 'Environmental Policy Integration: Towards an Analytical Framework', 3 *Environmental Politics* (2003) 1–22; N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' *NJIL* 81 (2012) 39–74

<sup>85</sup> Case C-487/06 P *British Aggregates v Commission* [2008], seen above, para. 92; opinion AG Mengozzi in

Another environmental tax case deserves attention. EFTA authority claimed that under the Norwegian electricity tax system several tax exemptions were selective in nature on the grounds that they favoured within the meaning of Article 61(1) EEA manufacturing and mining industries compared to the service sector and the building sector. The aid in question could not be justified on the basis of the nature or general scheme of the tax system since the exemption of the sectors that consume the most electricity was running counter to the aim of the electricity tax, namely to ensure a more efficient use of electric power. The EFTA Court dismissed the applicants' arguments that the tax exemption was non-selective.<sup>86</sup>

By contrast, both the Commission and the General Court held that the criterion of selectivity was not fulfilled in the following situations:

- where a Member State grants tax breaks on all products which are less polluting and takes care to avoid discriminating against foreign products,<sup>87</sup>
- when Germany applied the general regime of tax exemption to the arrangements put in place by German nuclear power stations for the purpose of the disposal of their radioactive waste and the permanent closure of their plants, and did not benefit the operators of these nuclear power stations compared to other subjects liable to pay the tax, which meant that the arrangements applied did not satisfy this condition;<sup>88</sup>

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Case C-487/06 P *British Aggregates v Commission* [2008], para. 102.

<sup>86</sup> Joined Cases E-5/04, E-6/04, and E-7/04 – *Fesil ASA and Finnjord Smelteverk AS* (Case E-5/04), *Prosessindustriens Landsforening and others* (Case E-6/04), *The Kingdom of Norway* (Case E-7/04) v *EFTA Surveillance Authority* [2005], EFTA Court Report 2005, p. 117, paras. 76–87.

<sup>87</sup> Commission Communication of 26 March 1997 on environmental taxes and charges in the Single Market [1997] OJ C 224/6.

<sup>88</sup> Case T-92/02 *Stadtwerke Schwäbisch Hall v Commission* [2006] ECR II-11, paras. 43 to 53.

- finally, when the Netherlands planned tax measures in favour of non polluting cars which complied with EU standards in advance, since these measures were granted independently of the origin of the vehicles.<sup>89</sup>

However, even if the regime of exemptions is considered to amount to a State aid, nothing prevents the Commission from approving it. Indeed, both the 2008 guidelines on State aid for environmental protection<sup>90</sup> as well as the in the Commission General Block Exemption Regulation No. 800/2008 (hereafter GBER)<sup>91</sup> accept that environmental tax reductions or exemptions may be compatible with Article 107 (3)(c) TFEU. Such exceptions, which must be of a temporary nature, must however be necessary and proportional.<sup>92</sup>

#### 2.4.3 Hypothecation of the tax for the State aid

It is also important to consider the hypothecation of the tax for the state aid.

In the *SWNB* and *Pape* cases,<sup>93</sup> the plaintiffs challenged the legality of environmental taxes to which they had been subject, claiming that they were intended to finance a State aid. In these two cases, the Court of Justice found that only the taxes which ‘constitute the method of financing an aid measure, so that they form an integral part of that measure’ suffer the same fate as the aid

measure itself. Indeed, for a tax, or part of a tax, to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules.<sup>94</sup> It follows that these criteria are not satisfied where the revenue from the environmental tax is not allocated to a group of taxpayers.

In *Pape*, the Court of Justice held that since the national legislation at issue left to the authorities the decision over how to distribute the revenue from the tax on waste, there was no ‘hypothecation’ between the ecological tax and the aid considered.<sup>95</sup> Similarly, in *SWNB*, the fact that the revenue from a tax on waste did not have any impact on the level of aid granted in a sector under the form of a tax exemption should lead the national courts to conclude that there was no ‘hypothecation’.<sup>96</sup> To conclude with, the fact that the fiscal advantage resulting from the exemption is balanced out by an increase in the tax is not sufficient in order to establish the existence of a hypothecation.

#### 2.5 Fourth condition: negative impact on trade between Member States

Finally, for the State measure at issue to be considered as State aid, it must be liable to affect trade between Member States. In particular, it is

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<sup>89</sup> 20<sup>th</sup> Annual Report on Competition Policy, nb. 199 and following.

<sup>90</sup> Paras. 151 to 160 of the 2008 Guidelines.

<sup>91</sup> 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 [2008] OJ L 214/3.

<sup>92</sup> Paras. 155, 157 to 159.

<sup>93</sup> Case C-174/02 *Streekgewest* [2005], seen above, para. 25; Case C-175/02 *Pape* [2005] ECR I-127, para. 15. See M. Dony, *Commentaire Mégret. Contrôle des aides d’Etat* (Brussels, ULB Press, 2008) 395–396, nb. 726 and 727. See also Commission Decision 98/384/EC of 21 January 1998 on aid granted by the Netherlands to a hydrogen peroxide works in Delfzijl [1998] OJ L 171/36.

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<sup>94</sup> Case C-174/02 *Streekgewest* [2005], above, para. 26. According to AG Geelhoed, ‘indicative of the existence of such a link are the following criteria: the extent to which the aid measure concerned is financed from the revenue of the levy and is thus dependent; the extent to which the revenue from the levy is intended solely for the specific aid measure; the extent, apparent from the legislation concerned, of the binding nature of the link between the revenue from the levy and its specific earmarking as an aid measure; the extent to which and the manner in which the combination of the levy and aid measure influences competition in the (sub)sector or business sphere concerned’. See Opinion in Case C-174/02 *Streekgewest* [2005], seen above, para. 35).

<sup>95</sup> Case C-175/02 *Pape* [2004], seen above, para. 16.

<sup>96</sup> Case C-174/02 *Streekgewest* [2005], seen above, paras. 28 and 29.

still necessary to establish that this benefit has a negative impact on competition as well as on the free movement of goods. Needless to say that these two conditions are inextricably linked.

The Commission tends to regard the first condition as having been fulfilled automatically.<sup>97</sup> Indeed, when aid granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.<sup>98</sup> By way of illustration, due to the fact that it reduces the cost of products, a waste management measure 'appears to be an economic advantage liable to distort competition'.<sup>99</sup> The second condition regarding the impact on intra-Community trade is also easily fulfilled.<sup>100</sup> For instance, the Court of Justice held that a French measure exempting the costs of carcass disposal to be borne neither by farmers nor by slaughterhouses constitutes an advantage for national exports and affects intra-Community trade.<sup>101</sup>

Two exceptions should however be mentioned. The Commission has found that trade between the Member States is not affected where the beneficiaries are public or private bodies providing local or regional public services which have not been opened up to competition with

transporters established in other Member States. In effect, given the absence of liberalisation of a specific type of transport, the beneficiaries do not compete with transporters in other Member States.<sup>102</sup> Accordingly, the State aid in question cannot affect trade between the Member States unless the beneficiary transport undertakings are in competition with foreign undertakings. Besides, under the terms of Regulation 1998/2006,<sup>103</sup> so-called *de minimis* aids, which do not exceed 200,000 Euros over a period of three years and are granted to the same undertaking, do not fulfil the prerequisite affecting competition or trade.

### 3 Exemptions

#### 3.1 Introductory remarks

The prohibition in principle of State aids is neither absolute nor unconditional and is subject to numerous exceptions. In this regard, the absence from Treaty law of express exceptions for environmental protection State aids has not prevented the emergence of an administrative praxis favourable to the granting of these types of aids on the basis of Article 87(2) and (3) EC, which has now become Article 107 TFEU.<sup>104</sup> Whereas paragraph 2 lists certain categories of aid which are deemed to be compatible with the internal market, paragraph 3 lists other categories which may be considered to be compatible with Article 107 TFEU.

Article 107 (2)(b) TFEU sets out the aids 'to make good the damage caused by natural disasters or exceptional occurrence'. Given that these aids are characterised by a solidarity approach, they are for this reason fully admissible. In principle, aids relating to environmental matters

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<sup>97</sup> Commission Decision of 26 November 2003 on the aid scheme which Italy (Region of Piedmont) is planning to implement for the reduction of airborne pollution in its territory [2006] OJ L 32/82.

<sup>98</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para. 11, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, para. 84

<sup>99</sup> Case *GEMO* [2003], seen above, para 33.

<sup>100</sup> Opinion AG Jacobs in Case C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, para. 33. See also Commission Decision on the second German NAP of 29 November 2006, para. 2.2. Where Member States decide to grandfather allowances to installations for electricity production, Article 10c(3), 10c(5) e), 10c(6) of the ETS Directive sets out a number of requirements to avoid distortions of competition.

<sup>101</sup> Case *GEMO* [2003], seen above, paras. 42–43.

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<sup>102</sup> Commission Decision 98/693/EC of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles Plan Renove Industrial [1998] OJ L 329/23.

<sup>103</sup> [2006] OJ L 379/5.

<sup>104</sup> Case *Adria-Wien Pipeline* [2001], seen above, para. 31.

do not fall under this paragraph. However, the granting of an aid under the terms of this provision should be possible where the public authorities have to deal with far-reaching changes to ecosystems caused by a natural disaster or exceptional occurrence (drought, fires, wide-scale pollution, reduction of fishing resources, etc.).<sup>105</sup> For instance, floods occurring in Netherlands – likely to increase with climate change – gave rise to aids falling within the ambit of that paragraph.<sup>106</sup>

By contrast, paragraphs b) and c) of Article 107(3) TFEU contain two grounds for exemption that are likely to be much more relevant for environmental aids. These paragraphs run as follows: (b) ‘aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State’; (c) ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’.

Under the terms of paragraph b), concerted actions by different Member States as part of the fight against a common threat, such as environmental pollution, were accepted until 2001 by the Commission. Since 2001, State aids can always be admitted on the basis of paragraph 3(b), in exceptional circumstances, provided that they respect conditions such as the ‘exemplary’ and ‘substantive’ contribution of an ‘important project of common European interest which are an envi-

ronmental priority’.<sup>107</sup> However, the mere fact that investments may have been able to establish the use of a new technology does not necessarily mean that the project is in the general interest.<sup>108</sup>

When applying paragraph c) which grants it a broad margin of appreciation, the Commission has adopted various guidelines setting out the criteria for the compatibility of certain environmental aids and which have accordingly been used as a basis for its practice. Thus this paragraph has operated since 1994 as the legal basis for the adoption of a range of Commission guidelines.<sup>109</sup> By accordingly specifying the categories of State aids that are compatible with Article 107 TFEU, the Commission has established a quasi-regulatory competence.

It is also important to point out that the incorrect application of the obligations stemming from secondary environmental legislation does not prevent the Commission from assessing the compatibility of the contested aid with Article 107 TFEU. Thus the General Court did not uphold the argument by four operators of hotels which challenged the granting of a state aid to a competitor on the grounds that it misconstrued directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. Indeed, where an infringement of that directive ‘is liable, in an appropriate case, to proceedings for a declaration that the Member State has failed to fulfil its obligations under [Article 258 TFEU]’, it cannot constitute a serious difficulty as regards the Commission’s assessment of the compatibility of the disputed aid with the common market.<sup>110</sup>

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<sup>105</sup> Until now, the Commission hasn’t accepted yet that State aids granted in response to sensitive modifications of the natural environment may be allowed in accordance with Article 107(2) b) TFEU. See Commission Decision 108/C 291/05 [1998] OJ C 291/4, p. 11.

<sup>106</sup> XXIVth Competition Report, para. 354.

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<sup>107</sup> Paras. 147–150 of the 2008 Guidelines state that this exemption applies as a secondary ground.

<sup>108</sup> Joined Cases 62 & 72/87 *Glaverbel v Commission* [1988] ECR I-1595, paras. 22 and 25.

<sup>109</sup> Para. 12 of the 2008 Guidelines.

<sup>110</sup> Case T-158/99 *Thermenhotel Stoiser Frans v Commission* [2004] ECR II-1, para. 159.

In accordance with its 2005 action plan on State aids,<sup>111</sup> the Commission has concluded that State aids should not be granted other than with a view to achieving an objective of common interest, correcting market failures or favouring social and regional cohesion, or even sustainable development. These aids must accordingly create adequate incentives that are proportional to their objectives and distort competition as little as possible.<sup>112</sup> This 2005 action plan resulted in a remodelling of the control exercised by the Commission: first, it led to the adoption in 2008 of new guidelines on environmental aids decidedly more complete than the previous ones; secondly, it resulted in the inclusion by the Commission of numerous criteria relating to environmental protection aids in the Commission General Block Exemption Regulation No. 800/2008 (GBER).<sup>113</sup> As a result, national authorities have to assess whether their aid measures aiming at improving the environment are likely to be justified under one of the heads of the 2008 guidelines or be exempted of notification in accordance with the provisions of the GBER.<sup>114</sup> Hierarchically superior, the GBER will be examined before the guidelines. In addition, special emphasis will be placed on the legal nature of these two instruments.

<sup>111</sup> 'State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009' COM (2005) 107 final, paras. 45 and 46.

<sup>112</sup> Paras. 10 and 11 of the 2005 Action Plan.

<sup>113</sup> 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 [2008] OJ L 214/3.

<sup>114</sup> Articles 17 to 25 of the GBER. On that subject, see: E. Kuetenicova and A. Seinen, 'Environmental Aid', in W. Medrer, N. Pesari et M. Van Hoof (eds.), *EU Competition Law*, 2008/4, State aids, para. 4.394; U. Soltesz and F. Schaltz, 'State Aid for Environmental Protection. The Commission's new Guidelines and the new General Block Exemption Regulation' (2009) 6/2 *JEELP* 141–170; P. Thieffry, above, 781 to 833.

### 3.2 General Block Exemption Regulation

In order to guarantee effective oversight over the granting of State aids and to simplify administrative management, without however weakening the Commission's control, the Council<sup>115</sup> has in 1998 granted the Commission the power to issue regulations declaring certain categories of horizontal aids compatible with the internal market and to exempt them from the notification requirement provided for under Article 108 (3) TFEU.

On the basis of the experience which it obtained thanks to the previous environmental guidelines,<sup>116</sup> the Commission has incorporated several categories of environmental protection aids into its regulation No. 800/2008.<sup>117</sup> Consolidating the previous systems of block exemptions into one instrument, the GBER, for the first time, contains a cluster of exemptions in the environmental field. Accordingly, the GBER exempts from the notification requirement investment aid for environmental protection of 7.5 millions Euro per undertaking per investment project.<sup>118</sup> There is a clear advantage: not being subject to the standstill obligation,<sup>119</sup> the aid measures can

<sup>115</sup> Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L 142/1. The Commission, when it adopts regulations exempting categories of aid, must specify the purpose of the aid, the categories of beneficiaries and thresholds limiting the exempted aid, the conditions governing the cumulation of aid and the conditions of monitoring. See recital 6.

<sup>116</sup> Recital 3 to the GBER.

<sup>117</sup> Articles 17 to 25 of the GBER. On that subject, see: E. Kuetenicova and A. Seinen, 'Environmental Aid', in W. Medrer, N. Pesari and M. Van Hoof (eds.), *EU Competition Law*, 2008/4, State aids, para. 4.394; U. Soltesz and F. Schaltz, 'State Aid for Environmental Protection. The Commission's new Guidelines and the new General Block Exemption Regulation' (2009) 6:2 *JEELP* 141–170; P. Thieffry, seen above, 988.

<sup>118</sup> Articles 3 and 6(1) b).

<sup>119</sup> Article 108(3) TFEU and Article 3 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down

be implemented immediately. In contrast to the 2008 guidelines, as discussed below, operating aid does not fall within the scope of the regulation.

The essential utility of these new arrangements consists in the reduction of the administrative burden of the Commission, which is no longer required to exercise prior control pursuant to Article 108(3) TFEU over aid regimes that are compatible with the criteria specified in the GBER.<sup>120</sup> By contrast, State aids which are not covered by this regulation remain subject to the notification requirement provided for under Article 108(3) TFEU,<sup>121</sup> irrespective of whether they comply with the conditions specified under the 2008 guidelines.

Finally, the GBER varies the distribution of competences between the Commission and the national courts, as the latter may henceforth verify directly whether the State aids satisfy the criteria of compatibility as laid down by the Commission and whether they may in consequence be granted without prior notification to the latter.<sup>122</sup>

### 3.3 2008 Environmental Guidelines

#### 3.3.1 General considerations as regards State aids guidelines

Given the vagueness of the Treaty provisions on State aids and the initial unwillingness of the Council to enact secondary legislation with the aim of fleshing out the exemption criteria, the Commission has made a virtue out of a necessity and developed exemption criteria through a flurry of soft law instruments.<sup>123</sup> Since the start of the

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detailed rules for the application of Article 93 of the EC Treaty, OJ 1989 L83/1.

<sup>120</sup> Article 3.

<sup>121</sup> Articles 108(1) TFEU and Article 2(1) of Council Regulation (EC) No 659/1999.

<sup>122</sup> J.-P. Képenne, 'Révolution dans le système communautaire de contrôle des aides d'Etat' (1998) 2 *RMUE* 136.

<sup>123</sup> M. Blauberger, *From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law* (Dis-

1970s, the Commission has become aware that it will not be able to eliminate State aids completely. Resolutely pragmatic, it has delineated the scope of the exceptions through a succession of guidelines the object of which is to simplify the task of Member States wishing to provide assistance to their undertakings. Where it uses the technique of the guidelines, the Commission must respect the following obligations: first the guidelines may not in any way derogate from Treaty provisions;<sup>124</sup> secondly, the Commission is bound by the general rules which it has adopted, and may not set them aside in individual cases. Reference to the guidelines amounts to a proper statement of reasons.<sup>125</sup>

Since 1974, various guidelines have been issued in the field of environmental law as well as to increase legal certainty and the transparency of the decision-making.<sup>126</sup> Whilst the first guidelines<sup>127</sup> authorised the granting of 'aid to promote the execution of an important project of common European interest', pursuant to the old Article 92(3)(b) of the EEC Treaty, they were replaced by a series of guidelines (respectively in 1994,<sup>128</sup> 2001<sup>129</sup> and 2008<sup>130</sup>) which based the new exemption regimes on Article 87(3)(c) EC ('aids to facilitate the development of certain economic activities or of certain economic areas') which has

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cussion Paper 08/4, Max Planck Institute for the Study of Societies, 2008) 6.

<sup>124</sup> Case C-382/99 *Netherlands v. Commission* [2002] ECR I-5163, para. 24; Case C-310/85 *Deufil v Commission* [1987] ECR I-901, para. 22; and Case T-214/95 *Het Vlaams Gewest v Commission* [1998] ECR II-717, para. 79.

<sup>125</sup> Case T-288/97 *Frituli Venezia Giulia v Commission* [2001] ECR II-1169, para. 72.

<sup>126</sup> Para. 12 of the 2008 Guidelines.

<sup>127</sup> Doc. SEC (74) 4264.

<sup>128</sup> Community guidelines on State aid for environmental protection [1994] OJ C 72/1.

<sup>129</sup> Community guidelines on State aid for environmental protection [2001] OJ C 37. See M. Dony, *Contrôle des aides d'Etat*, above, 249–258.

<sup>130</sup> Community guidelines on State aid for environmental protection [2008] OJ C 82/1.

now become Article 107 TFEU. Moreover, whilst the 1974 guidelines were transitional, it quickly became apparent that the elimination of aids was nothing other than pie in the sky. Moreover, the Commission progressively expanded the scope of the exceptions.

In contrast to the GBER, the guidelines do not exempt the national authorities from the requirement to notify aids to the Commission, even where they are compatible with their requirements. That said, the Member States will find useful indications in the guidelines regarding the criteria which the EU executive will apply when examining an aid. Accordingly, when the criteria established by the guidelines are respected, the aid planned will be viewed favourably by the Commission.

Finally, nothing prevents the Commission from examining and, where appropriate, approving aids which exceed the thresholds provided for under the guidelines on the basis of Article 107 (3)(c) TFEU, 'unless it has explicitly adopted a position on the question concerned in its guidelines'.<sup>131</sup> The Commission must therefore take into account the fact that environmental protection constitutes an essential objective of the EU and that environmental concerns must be incorporated into other policies in accordance with Article 11 TFEU.<sup>132</sup>

### 3.3.2 *Content of the 2008 Guidelines*

In force since 1 April 2008, the new 2008 guidelines replace the 2001 guidelines and will be in force until 31<sup>st</sup> December 2014. As discussed above, they are complemented by the GBER. Thus they are one of the spearheads of the policy to combat pollution and global warming. They

stipulate that aids will 'primarily be justified' on the basis of Article 107 (3)(c) TFEU.<sup>133</sup>

Until the end of 2014, the granting of State aids which do not fall within the scope of the GBER will therefore have to be assessed by the Commission with reference to the criteria laid down in these guidelines. Since it applies to all State aids intended to assure environmental protection in all sectors governed by the Treaty,<sup>134</sup> including those which are subject to specific EU rules on state aid (SME), the field of application of these guidelines is particularly broad. Accordingly, the Commission may examine an aid with reference to several provisions of EU law, even if it means applying to it the more favourable arrangements.

A 'standard' examination is required for State aid measures for amounts below a certain threshold (chapter 3) whilst a more detailed examination is required for aids above that threshold (chapter 5). Indeed, as regard aid measures likely to entail a higher risk of completion distortion, further scrutiny appears to be necessary.

The following aids are subjected to a close examination:

- investment aid: where the aid amount exceeds EUR 7.5 million for one undertaking;
- operating aid for energy saving: where the aid amount exceeds EUR 5 million per undertaking for five years;
- operating aid for the production of renewable electricity and/or combined production of renewable heat: the aid is granted to renewable electricity installations in sites where the resulting renewable electricity generation capacity exceeds 125 MW;
- operating aid for the production of biofuel: when the aid is granted to a biofuel produc-

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<sup>131</sup> Case T-375/03 *Fachvereinigung Mineralfaserindustrie v Commission* [2007] ECR II-121, para. 143.

<sup>132</sup> Para. 142.

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<sup>133</sup> Para. 12.

<sup>134</sup> Para. 59.

tion installation in sites where the resulting production exceeds 150 000 t per year;

- operating aid for cogeneration: where aid is granted to cogeneration installation with the resulting cogeneration electricity capacity exceeding 200 MW. Aid for the production of heat from cogeneration will be assessed in the context of notification based on electricity capacity.

The 2008 guidelines build on the results of the previous guidelines.<sup>135</sup> As hinted as above, an undertaking does not have an incentive to go beyond mandatory standards if the cost of doing so exceeds the benefit for the undertaking. Admittedly, State aid may be an incentive to improve environmental protection. Conversely, aid to assist undertakings to comply with EU standards already in force should not be authorised on the grounds that such aid would not lead to a higher level of environmental protection.<sup>136</sup> Since 1994, the Commission has only accepted aids to investment which comply with new mandatory standards or other new legal obligations.<sup>137</sup> Aids

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<sup>135</sup> The previous guidelines allowed State aids aiming at adapting listed installations to new environmental standards. The General Court set out criteria distinguishing the adaptation of old installations from their replacement by new ones. See Case T-150/95 *U.K. Steel Association v Commission* [1997] ECR II-1433. Besides, the General Court held that an aid awarded to an Italian steel mill was not compatible with the 1992 guidelines, which laid down as a condition of eligibility for aid that the investment must bring the plant into conformity with new standards. In this case, the plant at issue was operated according existing standards and the investment had no connection with the entering into force of new standards. Inasmuch as those standards were neither new nor binding, the undertaking was not entitled to rely on the 1992 guidelines. See Case T-176/01 *Ferriere Nord v Commission* [2004] ECR II-3931, paras. 123–125.

<sup>136</sup> Para. 45 of the 2008 Guidelines

<sup>137</sup> The absence of clarity in the judicial qualification of the aid as an operating aid or an aid for investment may lead the Court of Justice to annul the Commission decision for lack of statement of reasons. See Case C-351/98 *Commission v Spain* [2002] ECR I-8031, paras. 81 & 82; and

for investment in new installations are in principle prohibited on the grounds that they run contrary to the polluter pays principle.<sup>138</sup> Similarly, according to the provisions of the GBER, operating aid is not in principle authorised.<sup>139</sup>

Even though the 2008 guidelines essentially concerns investment aids, the guidelines provide for several exemption regimes in favour of operating aid on energy efficiency grounds,<sup>140</sup> renewable energy<sup>141</sup> and cogeneration.<sup>142</sup> These aids, which do not fall under the GBER, must therefore be assessed in accordance with the criteria laid down in the 2008 guidelines.

Investment aids may be granted up to a gross amount equal to 50 % of eligible costs,<sup>143</sup> which may be increased depending on the size of the undertaking.<sup>144</sup> The calculation of the amount of the aid is based on the supplementary environmental investment costs rather than on the total cost of the investments.

In addition in virtue of both the GBER and the 2008 Guidelines, small and medium-sized undertakings are entitled to obtain increased level of aid.<sup>145</sup>

### 3.3.3 Categories of environmental State aids covered by the GBER and the 2008 Guidelines

The 2008 Guidelines list twelve categories of aid measures, some of which are not covered by the GBER. Moreover, the intensity of the maximum

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Case C-409/00 *Commission v Spain* [2003] ECR I-1487, paras. 96 to 99.

<sup>138</sup> As for the Environmental Guidelines 'it is essential that aid be classified as aid for investment or operating aid in order to determine whether it may be authorized under those Guidelines'. See Case C-351/98 *Commission v Spain* [2002], above, para. 77.

<sup>139</sup> Para. 73.

<sup>140</sup> Paras. 99 and following.

<sup>141</sup> Para. 107.

<sup>142</sup> Para. 119.

<sup>143</sup> Para. 76.

<sup>144</sup> Paras. 77 to 79.

<sup>145</sup> Para. 79 of the 2008 Guidelines and Article 18(4)(2) GBER.

aid is higher concerning the aids covered by the 2008 Guidelines than for those referred to in the GBER.<sup>146</sup> The following table lists the different categories of aids as well as their regulatory bases.

degradation and will transfer responsibility of these onto society. As a result, the polluter would be relieved to bear the burden of paying the costs of his pollution. The TFEU provides no guidance

Categories of aids	Provisions
Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards	Paras. 73 to 84 of the Guidelines; Article 18 GBER.
Aid for the acquisition of new transport vehicles	Paras. 85 to 86 of the Guidelines; Article 19 GBER.
Aid for early adaptation to future Community standards for SMEs	Paras. 73 to 84 of the Guidelines; Article 20 GBER. The GBER is only applying to SMEs.
Aid for environmental studies	Paras. 91 to 93 of the Guidelines; Article 24 GBER.
Environmental aid for energy saving measures	Paras. 94 to 100 of the Guidelines; Article 21 GBER. The GBER only covers investment aids and not operating aids.
Environmental aid for the promotion of energy from renewable energy sources	Paras. 101 to 111 of the Guidelines; Article 23 GBER. The GBER only covers investment aids and not operating aids.
Environmental investment aid for high-efficiency cogeneration	Paras. 112 to 125 of the Guidelines; Article 22 GBER.
Aid for waste management	Paras. 126 to 131 of the Guidelines.
Aid for the remediation of contaminated sites	Paras. 132 to 134 of the Guidelines.
Aid for the relocation of undertakings	Paras. 135 to 138 of the Guidelines
Aid involved in tradable permit schemes	Paras. 139 to 141 of the Guidelines
Aid in the form of reductions or of exemptions from environmental taxes	Paras. 151 to 159 of the Guidelines; Article 25 GBER. The GBER only applies to tax reductions harmonized at the European level.

### 3.3.4 Consistency of environmental State aids with the polluter pays principle

At first sight, State aids run counter not only to competition law but also to a principle at the heart of environmental policy, the polluter pays principle. In fact, thanks to the granting of aid to cover investments to combat pollution, the recipient undertaking will not incorporate into its costs the externalities relating to environmental

for resolving this conflict. However, there are some reasons to consider that granting State aids is likely to be compatible with the polluter pays principle for the following reasons.

Firstly, an over zealous application of this environmental principle is not acceptable. Indeed, since 1975, the Commission has recognised the difficulties in an immediate and wholesale application of this principle.<sup>147</sup> Recognising the

<sup>146</sup> Recital 49 to the GBER.

<sup>147</sup> In its 75/436/Euratom, ECSC, EEC: Council Recom-

limits to which this principle is subject, the Commission accepts that the principle does not prevent the granting of State aids.<sup>148</sup>

Secondly, certain categories of aids make it possible to rectify market failures,<sup>149</sup> where the market does not allow for the incorporation of negative externalities into the price of goods and services. This affirmative action will prevent the best pupils from being penalised. For example, given the competitive advantage which the producers of energy from fuel or coal gain over the producers of energy from renewable sources, there will be a case for the public authorities to correct this failure. In this regard, tax regimes favourable to undertakings which develop more environmentally friendly production methods are compatible with the polluter pays principle.<sup>150</sup> Similarly, State aids which satisfy the criteria contained in the 2008 guidelines or the GBER are considered to be compatible with the polluter pays principle.<sup>151</sup>

Thirdly, the ability to grant State aids may also permit the Member States to adopt standards that are more stringent than EU standards by lowering unsustainable burdens incumbent upon certain undertakings.<sup>152</sup>

This does not however mean that any form of aid may be admitted, quite the opposite. Since under the terms of the polluter pays principle the internalisation of the costs of pollution must be

granted priority, State aids may only be granted sparingly, and especially as incentives for the undertaking to make additional investments which permit it to go beyond mandatory standards, or to invest in renewable energies.<sup>153</sup> The granting of aids is nothing but a 'last resort', an 'alternative',<sup>154</sup> or a 'second-best option'<sup>155</sup> since the polluter pays principle remains the rule.<sup>156</sup> Some aids are certainly incompatible with this principle. This is the case for aids intended to offer a breath of fresh air for undertakings in order to facilitate their adaptation to new standards, or in order to remain competitive internationally. They serve no purpose in the fight against pollution.<sup>157</sup> By the same token, where allowances are granted free of charge with a view to helping undertakings to meet environmental standards, they are deprived of any incentive effect.

What is more, where the Commission seeks to reconcile competition policy with environmental policy in the light of the polluter pays principle, the 2008 guidelines and the GBER will only accept State aids that are capable of being justified by the need to apply more stringent environmental protection standards than those provided for under EU law or, where no standards have been adopted by the Union, that are likely to increase the level of protection resulting from the activities of the undertaking.<sup>158,159</sup> The aids must therefore have an incentive effect.<sup>160</sup>

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mendment of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters (OJ L 194 1975, 1), the Council had already recognized that the granting of State aids was deemed to be a transitory.

<sup>148</sup> Paras. 6 to 9 of the 2008 Guidelines.

<sup>149</sup> Para. 24 of the 2008 Guidelines.

<sup>150</sup> This is the position adopted by the Commission. See M. Stoczkiewicz, *seen above*, 185–186.

<sup>151</sup> S.V. Budlong, 'Article 130r(2) and the Permissibility of State aids for Environmental Compliance in the EC' (1992) *Columbia Journal of Transnational Law* 465; M. Stoczkiewicz, 'The polluter pays principle and State aid for environmental Protection' (2009) 6/2 *JEELP* 171–196.

<sup>152</sup> Para. 26 of the 2008 Guidelines.

<sup>153</sup> Para. 43 of the 2008 Guidelines

<sup>154</sup> See para. 166 of the 23<sup>th</sup> Annual Report on Competition Policy, as well as para. 1.4 of the 1994 Guidelines.

<sup>155</sup> Para. 24 of the 2008 Guidelines.

<sup>156</sup> *Ibid.*

<sup>157</sup> See for instance the illustrations given by the Commission in para. 36 of the 2008 Guidelines.

<sup>158</sup> Paras. 43 & 74 of the 2008 Guidelines and Articles 18 and 19 GBER.

<sup>159</sup> For an example of aid allowing to go beyond the level of protection set out in the national legislation, see Commission Decision 98/251/EC of 21 May 1997 on the proposal of Austria to award aid to the *Hoffmann-La Roche* company [1998] OJ L 103/28.

<sup>160</sup> Paras. 27 to 29 of the 2008 Guidelines.

Accordingly, they cannot guarantee activities the economic viability of which offers cause for concern. This means that the aids cannot cover investments designed to permit undertakings to deal with the costs resulting from bringing their operations into line with existing EU environmental provisions.<sup>161,162</sup>

The role played by the polluter-pays principle has been underlined in *GEMO* by Advocate general Jacobs:

‘In its State aid practice the Commission uses the polluter-pays principle for two distinct purposes, namely (a) to determine whether a measure constitutes State aid within the meaning of [Article 107(1) and (b) TFEU] to decide whether a given aid may be declared compatible with the Treaty under [Article 107(3) TFEU].

In the first context, that of [Article 107(1) TFEU], the principle is used as an analytical tool to allocate responsibility according to economic criteria for the costs entailed by the pollution in question. A given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs.

In the second context, that of [Article 107(3) TFEU], the polluter-pays principle is used by contrast in a prescriptive way as a policy criterion. It is relied on to argue that the costs of environmental protection should as a matter

of sound environmental and State aid policy ultimately be borne by the polluters themselves rather than by States’.<sup>163</sup>

To conclude with, the polluter pays principle therefore provides a standard for analysis which makes it possible to determine on whom the costs fall in order to establish whether a given measure constitutes a State aid pursuant to Article 107 (1) TFEU. A State measure which relieves those actors of those costs is thus to be regarded as an economic advantage capable of constituting State aid.<sup>164</sup>

### *3.3.5 Consistency of environmental State aids with the proportionality principle*

It is not sufficient that an aid has positive environmental effects in order to be justified or exempted pursuant either the 2008 Guidelines or the GBER. The proportionality principle requires that a subsidy cannot be higher than the level necessary in order to achieve the environmental protection goals pursued. When national authorities invoke environmental protection considerations, they must therefore establish the necessary link between the restriction placed on competition and the goal of protecting the environment. This means that an aid will be struck down where a measure of a different nature, which would have had less of an impact on trade or on competition, could have been adopted. The 2008 guidelines place particular emphasis on the proportionality of the aid, since it must ‘be limited to the minimum needed to achieve the protection sought’.<sup>165</sup> As a result, all economic benefits which the in-

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<sup>161</sup> Para. 75 of the 2008 Guidelines.

<sup>162</sup> Thus, when the aid granted to an undertaking has for effect to allow the authorities to abide by environmental obligations stemming from EU secondary law, notably regarding the recycling of packaging waste, it is not granted with a view to exceeding the standards applying to the recipient undertaking. In that case, the incentive criterion set out in the 2001 Guidelines was not respected. See Commission Decision 2003/814/EC of 23 July 2003 on the State aid C 61/2002 which the United Kingdom is planning to implement for a newsprint reprocessing capacity support under the WRAP programme, para. 119 [2003] OJ L 314/26).

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<sup>163</sup> Opinion AG Jacobs in Case C-126/01 *GEMO* [2003], seen above, paras. 68 to 70.

<sup>164</sup> Paras. 71 & 72.

<sup>165</sup> Para. 30 and following of the 2008 Guidelines. See also para. 20 of the 2005 State aid action plan, according to which the positive impact of an aid depends on whether it is proportionate in the sense that the expected change in behaviour could not be achieved with less aid.

vestment entails must be in principle extracted from the extra net costs.<sup>166</sup>

As is shown by the following cases, proportionality has always been playing a decisive role in leading the Commission to limit the anti-competitive effects of these aids to a bare minimum.

In order to encourage the disposal of surplus manure in an ecological manner, the Dutch government sought to establish a regime of aids,<sup>167</sup> consisting in the financing the construction and exploitation of treatment facilities for this organic waste by the 'national manure bank'.<sup>168</sup> These arrangements, which were intended to encourage producers of manure to deliver their excess waste to the national bank rather than to dispose of it in the environment were to be totally financed by revenue from a levy paid by pig breeders which produced an excess of manure. The Commission observed that the intervention of the national bank would permit manure processing facilities to be built more quickly and, for this reason, could reinforce the competitive position of intensive breeding in the Netherlands. Moreover, since the processing of excess manure would lead to the production of solid organic fertiliser, the aid concerned was also likely to favour the competitive position of manure processing undertakings compared to the producers of organic and chemical fertilisers. The Commission concluded that the aid concerned could only be regarded as compatible with the common

market pursuant to the old Article 92(3)(c) EEC (Article 107(3)(c) TFEU), provided that it did not exceed the fixed costs consisting in the administrative and construction costs and the costs for the maintenance of the storage infrastructure by the Dutch bank and provided that it did not last longer than an initial period of two years. All operating aid for installations was therefore considered to be prohibited.

Similarly, the Commission concluded that an initiative taken in order to assist a paper manufacturer in order to transfer its production site with a view to reducing its impact on the local environment could not benefit from an exemption from the prohibition on the granting State aids due in particular to the absence of any requirement for such an aid in order to achieve the objective pursued.<sup>169</sup>

By the same token, it found that a Walloon regional regulation which provided for the granting of aids not only to undertakings which installed new less polluting equipment – the recycling and recovery of waste were eligible – but also to the producers of this equipment was manifestly disproportionate to the objectives which it was supposed to pursue.<sup>170</sup> In 1989 it opposed the granting of a measure of aid by the French Air Quality Agency to industries which carried out investment into desulphurisation on the grounds that, due to its importance, it could have anti-competitive effects.<sup>171</sup>

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<sup>166</sup> Para. 31 of the 2008 Guidelines.

<sup>167</sup> Commission Decision 92/316/EEC of 11 March 1992 concerning aid envisaged by the Netherlands Government in favour of an environmentally-sound disposal of manure, [1992] OJ L 170/34.

<sup>168</sup> The Commission had, at first, exempted in virtue of Article 92(3) c) EC the aids necessary to the construction of the first installations of disposal of manure. See Commission Communication on the basis of Article 93(2) EC, addressed to other Member States and interested third parties, concerning aid envisaged by the Netherlands Government in favour of attempts projects of the disposal of manure [1991] OJ C 82/3.

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<sup>169</sup> Commission Decision 93/564/EEC of 22 July 1993 concerning aid the Italian Government intends to grant to Cartiere del Garda [1993] OJ L 273/51.

<sup>170</sup> Commission Communication on the basis of Article 93, para. 2, EC, addressed to other Member States and interested third parties, concerning the environmental investment aids [1994] OJ C 100/5. The proceeding was closed after a modification of the regulation of the Walloon Region.

<sup>171</sup> 21<sup>st</sup> Annual Report on Competition Policy (1990), n° 198.

The Commission finally found that an aid seeking to subsidise the production of newspaper which could have been exempted under the terms of Article 107 (3)(c) TFEU did not satisfy the prerequisites of necessity and proportionality, since the investments appeared to be disproportionate compared to the objective of recycling waste.<sup>172</sup> In this case, the financing of a paper recycling plant did not appear to be proportionate on the grounds that it did not result in a reduction in the quantity of waste deposited in landfill, but that it encouraged the use of recycled paper for the production of newspapers.

On the other hand, the Commission has shown greater flexibility when the anti-competitive effects of an aid do not prove to be disproportionate. Accordingly, in February 1990 the Commission approved the granting of tax relief to Danish undertakings which used at least 50 % of recycled material as raw materials for their production. This relief was justified by the fact that the undertakings using recycled material produced quantities of waste decidedly greater than undertakings which used non recycled materials and for this reason ended up being penalised by the tax on waste disposal.<sup>173</sup> The Commission also adopted a more pragmatic approach when approving temporary relief from environmental taxation arrangements which was necessary in order to prevent national undertakings from being disadvantaged on the international market.<sup>174</sup>

For the chemical industry, the Commission found that investments intended not to combat ecological damage but to prevent catastrophic

occurrences and to guarantee the safety of adjacent residence could not be subsidised insofar as they amounted to an essential element of the activity of the undertakings concerned.<sup>175</sup>

## 4 Procedural Standards

### 4.1 Introductory comments

Article 108 TFEU, as well as Council Regulation No 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 EC<sup>176</sup>, regulate the control procedure for State aids which is operated by the Commission. In contrast to the new arrangements for applying Article 101 TFEU, the Commission continues to be notified of all plans to grant aid,<sup>177</sup> the application of which must moreover be suspended pending its ruling on them. As discussed above, the existence of guidelines specifically dedicated to aid does not relieve the States of their obligation to notify all of their aid arrangements. By contrast, aid falling within the scope of application of the GBER is not subject to the notification requirement.

The Member States are subject to precise obligations in order to facilitate the task of the Commission and to prevent the latter from being confronted with a *fait accompli*. After the notification stage, the Member State has every interest in informing the Commission of the environmental justifications capable of rendering its aid compatible with the common market.<sup>178</sup> If the Commis-

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<sup>172</sup> Commission Decision 2003/814/EC of 23 July 2003, *WRAP programme*, seen above, paras. 188 & 189.

<sup>173</sup> 23<sup>rd</sup> Annual Report on Competition Policy (1993), p. 283, n° 420.

<sup>174</sup> Commission Decision 92/411/ECSC of 31 July 1992 on the granting of aid to steel undertakings by the Danish and Dutch Governments, [1992] OJ L 223/28.

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<sup>175</sup> Commission Decision 98/251/EC of 21 May 1997 on the proposal of Austria to award aid to the *Hoffmann-La Roche* company [1998] OJ L 103/28, para. II, C, b), and Commission Decision 98/384/EC of 21 January 1998 on aid granted by the Netherlands to a hydrogen peroxide works in Delfzijl [1998] OJ L 171/36, para. VI, C.

<sup>176</sup> [1999] OJ L 83/1. Since the adoption of this regulation, Article 93 EC has become Article 88 EC then Article 108 TFEU.

<sup>177</sup> See Article 9 GBER.

<sup>178</sup> Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, para. 81.

sion considers the aid planned to be incompatible with the internal market, it initiates a control procedure which may lead to the adoption of a decision ordering the suspension or modification of the contested aid. If the Member State does not comply with this decision within the term set, the Commission or any Member State may refer the matter to the Court of Justice.<sup>179</sup>

Competitor undertakings of the beneficiaries of the aid may formulate observations when the Commission initiates the Article 107(2) TFEU procedure. With regard to such actions, the Court of Justice has consolidated the status of competitors by granting them the right to challenge a refusal by the Commission to initiate the Article 107 (2) TFEU procedure against new aids.<sup>180</sup> Moreover, the Court has recognised the direct effect of Article 108 (3) TFEU, last sentence. This means that applicants may rely on this provision before the national courts and that the latter may, where applicable, apply it. Whilst the national courts may punish violations of the obligation of prior notification to the Commission, they cannot on the other hand declare the aid as such to be incompatible with the internal market, a decision which falls exclusively to the Commission.

#### 4.2 'Parties concerned' within the meaning of Article 108 (2) TFEU

The following question has also been subject to debate. In order to qualify as 'parties concerned' within the meaning of Article 108 (2) TFEU, must the competitive position on the market of third parties be affected by the granting of the aid concerned?

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<sup>179</sup> Article 23(1) of Council Regulation No 659/1999/EC.

<sup>180</sup> Case C-157/01 *Danske Bunsvoignmaend v Commission* [2004], para. 41. It must be noted that undertakings may face an uphill battle when challenging Commission decisions taken within the framework of EU ETS and not pursuant to Article 4(3) of Regulation N° 659/1999. See in Case T-387/04 *EnBW Energie Baden-Württemberg AG* [2007] above, para. 41.

In a judgment of 16 September 1998, the General Court did not recognise this status to an undertaking which complained that the aid concerned entailed an increase in taxes on waste which it was obliged to pay. The Court found that it had to pay this tax in its objective capacity as the producer of waste on the same grounds as any other operator in the same situation, which meant that it could not argue that the aids concerned affected its competitive position on the market. The Court added that to follow the applicant's reasoning would amount to recognising that any taxpayer is a party concerned within the meaning of Article 108(2) TFEU.<sup>181</sup> On the other hand, tax relief granted to undertakings which are current or potential customers of the applicant directly affects its competitive position on the market, with the result that it has the status of a party concerned.<sup>182</sup>

As regards a levy on waste accompanied with some exonerations assuming the character of State aids, the Court of Justice judged that Article 108(3) TFEU, had to be interpreted 'as meaning that it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure'<sup>183</sup>. In that way, the Court adopted an extensive conception of the interest on which persons liable to a tax may rely. Even though they are not affected by the distortion of the competition, the persons liable to environmental tax can invoke the direct effect of Article 108(3) TFEU. They will not have to demonstrate that they were affected by the aid.

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<sup>181</sup> Case T-188/95 *Waterleiding Maatschappij Noord-West Brabant* [1998] ECR II-3713, paras. 67 & 68.

<sup>182</sup> Para. 80.

<sup>183</sup> Case C-174/02 *Streekgeweest* [2005] ECR I-85, para. 21.

## 5 Concluding remarks

Although environmental and competition policy have hitherto been able to evolve in perfect independence, the former thanks to an intense regulatory approach and the latter through the case law of the Commission and the Court of Justice, the interactions between the two have recently become intense and have been dogged by controversy.

On the one hand, environmental law is by nature likely to increase competition between undertakings, which must express in monetary terms the environmental costs resulting from their activities. A strict application of the environmental regulations should lead first to the disappearance of economic operators which are not able to respect the new environmental requirements and, secondly, should encourage other undertakings to equip themselves with less polluting production techniques. Only the most competitive operators, and hence the least polluting, will therefore remain present on the market, with the risk of creating oligopolies. What is more, the continued granting of State aids is controversial since they are not entirely compatible with the polluter pays principle, which the principle of integration rightly has the effect of extending to competition law.

On the other hand however, the interaction between the two policies may also be detrimental to the conservation of natural resources. In fact, competition law may indeed challenge investments made by undertakings seeking to pursue an environmental policy since, in accordance with Article 107 TFEU, they may not in principle benefit from State aids.

Through its influence, both negative and positive, on the development of competition law,

the integration clause may to a certain extent alleviate these tensions. Accordingly, State aids which represent a threat to the protection of the environment must be prohibited by the Commission, even if they comply with competition law requirements. By contrast, State aids which are manifestly beneficial for the environment should be more easily accepted where their anti-competitive effects are not disproportionate.

Given the broad scope of the notion of State aids, a number of environmental measures are likely to fall within the ambit of the prohibition laid down in Article 107 TFEU. That did not prevent the Commission to develop its own vision of a well tailored State aid policy regarding the protection of the environment. The broad criteria laid down in paragraph 3 have been fleshed out into a complex cluster of soft law instruments (guidelines) and hard law (GBER). The Guidelines criteria do not deprive the Commission to play a key role in weighing the positive environmental impacts of the national measure against the potential negative effects for competition and trade. Through this balancing test, the Commission is called on to assess whether the aid is appropriate and necessary to attain the objective of common interest. The incentive effect of the aid is taken into consideration. Needless to say that the thresholds laid down by the Commission influence significantly national environmental policies.

Be that as it may, competition law will not resolve the problems of pollution on its own, as it is nothing more than an instrument in the service of environmental policy.