Exploring the Impact of European Union Law on Energy & Environmental Taxation

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Exploring the Impact of European Union Law on Energy & Environmental Taxation
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1. Introduction: Setting the context

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

The situation evolved in the mid-1980s with the formalisation of the environmental dimension of the EEC in the Single European Act (SEA), which added an Environmental Title to the EEC Treaty. This new title established the polluter-pays principle as one of the guiding principles of European environmental action. Moreover, the SEA introduced what is known as the “integration clause” (now article 11 of the Treaty on the Functioning of the European Union, TFEU), which calls for the integration of environmental protection requirements in all EU fields of taxation.

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


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

6. According to article 130R of the EEC Treaty (now 191, § 2 of the TFEU), “(…) environmental damage should as a priority be rectified at source, and (…) the polluter should pay”. On the polluter-pays principle and, more generally, on the development of environmental taxation in the EU, see Pietro Mastellone, “The Emergence and Enforcement of Green Taxes in the European Union – Part 2” (2014) 54(12) European Taxation, section 3.3.
policies, including tax law. In 1990, the European Environmental Agency (EEA) was established. The Agency issued a first report on environmental taxation as part of the EU’s environmental policy a few years later. Around the same time, the EU adopted its first directive on the taxation of mineral oils. However, in the following years, Member States could not reach an agreement on the European Commission’s proposal to adopt a CO2 tax. So far, the EU has been unable to introduce any EU-wide tax aimed at internalising CO2 emissions. Moreover, it failed to green up existing directives on energy taxation. Consequently, within the EU, environmental taxation is primarily a matter dealt with at the level of the Member States.

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

This chapter shows that EU law has shaped – and continue to shape - the development of environmental tax measures both at the level of the EU and at the level of the Member States. First, at the EU level, the EU’s institutional framework have turned out to be a drag on the harmonisation of environmentally-driven taxes. The analysis of the historical development of

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7 On the role of article 11 of the TFEU, see Beate Sjåfjell, “The Legal Significance of Article 11 TFEU for EU Institutions and Member States”, in B. Sjåfjell & A. Wiesbrock (eds), The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously (2015 Routledge), pp. 51-72. See also article 37 of the Charter of Fundamental Rights of the European Union.
11 See section 2.1.
12 Such an approach is similar to the one underlying the statistical definition of environmental tax measures (section 3.4).
13 A tax on satellite dishes is discussed in section 3.2.2.
14 Among the authors who have underlined the role of institutional rules on the underdevelopment of environmental tax policy at the EU level, see Nicolas de Sadeleer, “Case Note. Court of Justice of the European Union Preliminary Ruling – Excise Duty on Certain Beverage Packaging: Case C-198/14 (Valev Visnapuu)” (2016) 25(2) Review of European Community and
EU provisions surrounding energy taxation illustrates this point (sections 2.1. & 2.2). So far, the energy taxation directive remains largely disconnected from the EU’s climate policy, including the EU Emissions Trading Scheme (section 2.3). Second, EU substantive law has had an ambiguous impact on Member States’ environmental tax policy (section 3). On the one hand, EU substantive law has been interpreted by the Court of Justice of the EU in a way that encourages Member States to adopt environmental tax measures that are environmentally-driven and structured accordingly. Indeed, the environmental purpose of Member States’ tax measures seems to play a positive role in the assessment of their compatibility with EU law, including State aid provisions (section 3.1), the fundamental freedoms (section 3.2) and the energy taxation directive (section 3.3). On the other hand, in some instances, EU law strictly limits Member States’ ability to adopt environmentally-driven tax measures.\footnote{15} Moreover, EU secondary law disregards the purpose of environmental taxes in order to classify them for statistical purposes (section 3.4).

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

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

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

2.1. Historical overview

The general legal framework surrounding excise duties on energy products was adopted in 1992.\footnote{17} The initial goal of the Commission was by no means to pursue environmental goals.\footnote{18}
Rather, the alleged objective of the harmonisation of energy taxes - first introduced for mineral oils - was to ensure the proper functioning of the internal market by removing fiscal barriers and avoiding potential distortions caused by different rate levels between Member States. Indeed, in absence of fiscal barriers, the existence of different excise rate levels could encourage consumers to purchase energy products in the Member States with the lowest excise rates (the so-called phenomenon of “cross-border fuel tourism”).

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

Together with the directive on the approximation of rates, the Commission adopted a directive on the harmonisation of the structure of excise duties on mineral oils (Directive 92/81/EEC), which laid down common definitions for mineral oil products, obligatory and optional reduced rates and exemptions. According to the Commission, exemption provisions were defined, taking due account of “the predominant current practices and also of consistency with established policies in other fields (generally, transport, environment and energy)”.

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20 See Commission of the European Communities (1972), Proposals for harmonizing consumer taxes other than VAT, supra n. 4, p. 6; Commission of the European Communities, Completion of the internal market: approximation of internal market: approximation of indirect tax rates and harmonization of indirect tax structure. Global Communication from the Commission, Brussels, 26 August 1987, COM(87) 320 final, at pp. 16-17. See also Speck, supra n. 14, at pp. 32-35.
23 Ibid., point 7 of the explanatory memorandum.
25 Council Directive 92/82/EE, supra n. 9, pp. 19-20. Although the Commission’s plan was to use the minimum rates as a gradual step towards the alignments of tax rates, this plan was never realised (Commission of the European Communities, Amended proposal, supra n. 24).
26 Commission of the European Communities, Amended proposal, supra n. 24, pp. 3-4. See also Commission of the European Communities, Completion of the internal market and approximation of indirect taxes, Brussels, 14 June 1989, COM(89) 260 final, p. 11. For example, the Commission justifies the adoption of a differential rate in favour of unleaded petrol by reference to environmental considerations (p. 6).
27 Commission of the European Communities, Amended proposal, supra n. 24.
Nevertheless, as for the directive on the approximation of rates, Directive 92/81/EEC is not fully consistent with environmental considerations. For example, the directive provided for the exemption of “mineral oils supplied for use as fuels for the purpose of air navigations other than private pleasure flying”.  

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

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

Although the energy taxation directive contains explicit references to environmental objectives, including references to the EU’s climate commitments, it is – as the 1992 directives on the taxation of mineral oils – characterised by a lack of systematic link with environmental and climate considerations. The minimum prescribed levels of taxation vary according to the type

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30 Article 8, §1, b) of Directive 92/81/EEC. According to the Commission’s proposal, this was consistent with the Community transport policy (Commission of the European Communities, COM(90) 434 final, p. 14).
31 Commission of the European Communities (1992). supra n. 10. See p. 7, point 2 (“Incorporation in the existing tax framework”). See also article 1, para. 1 of the proposed tax on CO₂ and energy.
32 Ibid., p. 10, point 1.
33 Before the Maastricht Treaty came into force, article 130S (now 192 TFEU) also required unanimity for the adoption of environmental measures.
34 The Directive has also been justified by reference to the need to ensure the proper functioning of the internal market. See i.a. recitals (2), (3) and (4) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31 October 2003, pp. 51-70.
36 Directive 2003/96/EC, supra n. 34, recital 6 (that refers to the integration clause; article 6 TEC, now article 11 TFEU) and recital 7 (that refers to the EU’s commitments in the context of the United Nations Framework Convention on Climate Change and the Kyoto Protocol). See also the – even more explicit - references to environmental policy objectives in the 1997
of fuels (e.g. leaded or unleaded petrol, gas oil, kerosene, LPG, natural gas, electricity, coal), their use (i.e. motor or heating fuel, business or non-business use) and specific purpose (e.g. agricultural, public works, vehicles intended for use off the public roadway). In some instances, the minimum levels of taxation can even frustrate environmental objectives. For example, if a Member State were to decide to follow the minimum levels of taxation to design its energy tax policy, highly polluting energy sources (such as coal) could be subject to a lower tax burden than less polluting ones. Moreover, some energy uses – among which highly polluting ones (e.g. energy use for mineralogical processes, which includes the cement industry) – are excluded from the scope of the directive. Under certain conditions, Member States are authorised to apply differentiated rates (e.g. based on product quality or quantitative consumption levels), tax reductions (e.g. in favour of energy-intensive businesses) or exemptions (e.g. to electricity of solar origin). Where some of these provisions can be justified on environmental grounds (such as the exemption for solar electricity), some other are difficult to reconcile with environmental goals or are only justifiable under specific circumstances. For example, the possibility for Member States to grant favourable treatment granted to energy-intensive businesses can only be justified on environmental grounds under the assumption that, in absence of such favourable provisions, these businesses would relocate to other jurisdictions, where lower environmental standards apply, which would negatively impact pollution levels on a global scale.

In 2011, the Commission proposed to revise the energy taxation directive. The key ideas was to modify the basis for the excise duties’ minimum rate levels by linking them to similar components as the ones that had been envisaged for the harmonised CO\textsubscript{2} tax in 1992: the reference CO\textsubscript{2} emission factors and the net calorific value of the energy products and electricity. Despite the positive impact that this proposal would have had on the consistency of Union tax and climate policy, the Commission was unsuccessful in convincing all Member States and, in 2015, withdrew its proposal.

Many of the observations that the Commission made twenty years ago are still valid today: “(…) a number of Member States have already introduced, or are planning to introduce, taxes on carbon dioxide emissions and the use of energy; (…) a harmonized approach is needed to

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40 Ibid., Art. 17.

41 Ibid., Art. 15.

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


ensure the functioning of the internal market". One of the only – yet not negligible – changes since 1992 has been the adoption of a Directive introducing a European Emissions Trading Scheme in 2003 in order to mitigate greenhouse gas emissions within the EU. To a certain extent, with the wider EU involvement in the fight against climate change, the absence of environmental criteria in the energy taxation directive has become even more paradoxical than it used to be.

2.2. The role of the EU’s institutional framework

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

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

46 Commission of the European Communities (1992), supra n. 10, at p. 25 (recitals of the proposal).
49 See Speck, supra n. 14, pp. 33-34.
EU’s energy policy: unanimity is required for the adoption of energy measures that are “primarily of a fiscal nature” (article 194, §3 of the TFEU).

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

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

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

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⁵⁴ Ibid.


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

⁵⁷ See CJEU, C-5/16, supra n. 56.
Transport Association of America and Others, the validity of the EU ETS Directive could be assessed by the Court of Justice in the context of a preliminary ruling (article 267 of the TFEU).

2.3. The potential overlap with the EU ETS Directive

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

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

In 2011, the Commission suggested to better coordinate the energy taxation directive with the EU ETS.\(^62\) The idea was to tax CO\(_2\) emissions in a broad way while making sure that the

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

\(^{59}\) Claudia Dias Soares, “Energy tax treatment of undertakings covered by emissions trading” (2007) 4 EC Tax Review 184, at p. 185. See also point 1.4 of the explanatory memorandum of the Proposal for a Council Directive amending Directive 2003/96/EC, supra n. 37(“(…) taxes on energy are levied under the energy taxation directive in the same way whether or not, in a particular case, the limitation of CO\(_2\) emissions is ensured through the EU ETS. As a result, mechanisms of Union law intended to limit such emissions may overlap in certain cases and may be completely missing in others”). The lack of coordination is described in the impact assessment accompanying document to the 2011 proposal (SEC(2011) 409 final (point 2.2.4.). See also Pasquale Pistone & Inaki Bilbao Estrada, “Tax Incentives in the EU Energy Sector: General versus Selective Measures”, in: Marta Villar Ezcurra (ed.), State Aids, Taxation and the Energy Sector (2017 Thomson Reuters Aranzadi), pp. 215-216 and p. 219.

\(^{60}\) Van Eijndthoven describes this phenomenon as a “double dip” (Van Eijndthoven, supra n. 38, at p. 287).

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

\(^{62}\) Proposal for a Council Directive amending Directive 2003/96/EC, supra n. 37, para. 2 of the explanatory memorandum (legal elements of the proposals): “The set of amendments will ensure that the ETD complements Directive 2003/87/EC seamlessly, as regards the need for a price signal attached to CO\(_2\) emissions (…), while avoiding overlaps between the EU emission trading scheme, on the one hand, and taxation serving the same purpose, on the other (…)”.

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activities subject to the EU ETS would benefit from an exemption. Moreover, preferential treatment would have been granted to enterprises exposed to a significant risk of carbon leakage, as it is already done under the EU ETS directive. However, since the proposal failed, the interaction between the EU ETS and the energy taxation directive remains unclear, which is problematic in terms of legal certainty.

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

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

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

63 Proposal for a Council Directive amending Directive 2003/96/EC, supra n. 37, point 3.2 of the explanatory memorandum (legal elements of the proposals). See the proposed amendments to article 14 (proposed article 14(1)(d)).
64 Ibid, point 3.8 of the explanatory memorandum (legal elements of the proposals).
67 See, e.g., article 17, §2 to 4 of Directive 2003/96/EC, supra n. 34.
68 See Commission Decision of 17 June 2009 on aid scheme C 41/06. In footnote 31, the Commission explicitly refused to rule on the possibility to meet the requirement of article 17(4) of the energy taxation directive through the EU ETS. The 2014 Guidelines now further clarify how the Commission should assess the interaction between carbon taxes and the EU ETS under EU State aid law (see paras. 179-180).
69 Certain cases include questions of compliance with both EU primary and secondary law provisions (state aid, free movement of goods and the energy taxation directive). See, e.g., the Kernkraftwerke case (CJEU, Kernkraftwerke Lippe-EMS GmbH v. Hauptzollamt Osnabrück, 4 June 2015, C-5/14).
This section gives an overview of how EU law, including primary and secondary legislation, and their interpretation by the Court have influenced Member States’ environmental tax policy. In terms of secondary law provisions, this chapter is limited to the analysis of the impact of the energy taxation directive and the general arrangements directive (section 3.3). It should, however, be noted that other EU law provisions can also restrict Member States’ ability to adopt environmental or traditional taxes. For example, domestic taxes on heavy goods vehicles need to comply with the provision of the directive on the charging of heavy goods vehicles for the use of certain infrastructures. Other directives also impact Member States’ domestic environmental tax measures. For example, the Court has been asked to rule on the compatibility of a waste tax with the waste directive (Directive 2006/12/EC, now replaced by Directive 2008/98/EC) and of domestic environmental measures with the VAT directives. The Court also recently ruled on the compatibility of a 80% tax imposed by the Slovak Republic on the greenhouse gas emission allowances allocated free of charge with the EU ETS directive.

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

3.1. The EU’s State aid law

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73 See, for example, CJEU, Commission of the European Communities v. French Republic, 14 June 2001, C-40/00, para. 21
74 CJEU, PPC Power a.s. v. Finančné riaditeľstvo Slovenskej republiky, Daňový úrad pre vybrané daňové subjekty, 12 April 2018, C-302/17.
75 Infra. See, for example, the British Aggregates case mentioned in section 3.1.
76 Infra (section 3.1).
77 Infra (sections 3.1 and 3.2).
Potential conflicts between domestic environmental tax measures and State aid provisions are not uncommon. Many environmental tax measures distinguish between economic actors, for example between more and less polluting economic actors or between those who require temporary relief from environmental taxes to remain competitive and those who can stand the cost of these taxes. Such differentiated way of taxing economic actors could easily be assimilated to a form of fiscal State aid, by which a Member State distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.  

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

“(…) the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article 87(1) EC [now 107§1 TFEU] (…), as account may in any even usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC [now 107§3 TFEU].”

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

The case Adria-Wien Pipeline also illustrates this point. This case concerned an Austrian energy tax regime, which provided for a tax rebate to certain undertakings, namely manufacturing enterprises. The Court considered that the regime constituted State aid and

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78 On this topic, see Estela Ferreiro Serret, “Taxes with Environmental Purposes and State Aid Law: The Relevance of the Design of the Tax in Order to Justify Their Selectivity”, in: Pasquale Pistone & Marta Villar Ezcurra, Energy taxation, environmental protection and state aids: tracing the path from divergence to convergence (IBFD 2016), pp. 245-270. Ferreiro provides a detailed analysis of most of the cases British Aggregates and Adria-Wien Pipeline. The Court considers that the concept of aid does not encompass “differential treatment of undertakings in the application of charges, where that differential treatment flows from the nature and general scheme of the system of charges in question” (CJEU, Kingdom of Spain v. Commission of the European Communities, 26 September 2002, C-351/98, paras. 42-43, referred to in the opinion of AG Tizzano, joined cases C-393/04 & C-41/05, Air Liquide Industries Belgium SA v. Ville de Seraing and Air Liquide Industries Belgium SA v. Province de Liège, footnote 14).

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

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

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

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

rejected the ecological considerations put forward by the Austrian Government. According to the Court, the Austrian regime was inconsistent as the tax rebates were granted only to manufacturing enterprises, even though their energy consumption was “equally damaging to the environment” as enterprises supplying services.\textsuperscript{84}

In addition to the case law of the Court on environmental fiscal aid, Member States can rely on regulations and guidelines of the Commission to determine whether their preferential environmental tax measures comply with EU State aid law.\textsuperscript{85} The “Environmental and Energy State Aid Guidelines” (EEAG) provides for the conditions under which several aid measures, including aid in the form of reductions in or exemption from harmonised and non-harmonised environmental taxes, may be considered compatible with the internal market.\textsuperscript{86} Moreover, the “General Block Exemption Regulation” (GBER) sets out the requirements under which certain categories of State aid, including aid in the form of a reduction of an environmental tax under the energy taxation directive (2003/96/EC), may be exempted from the notification procedure.\textsuperscript{87} Both the GBER and the EEAG define the concept of environmental tax as follows:

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

This definition is broad: it refers to both an objective criterion (namely the tax base) and a purposive criterion (namely the purpose of the tax).\textsuperscript{89} It has been criticised for leading to legal uncertainty (due to its broad character) and for its potentially detrimental impact on the internal market (as it could facilitate the adoption of distortive aid measures).\textsuperscript{90} The impact of this definition on the assessment of aid in the form of reduction of energy taxes under the GBER is unclear. Indeed, the GBER exempts and deems compatible with the internal market “aid schemes in the form of reductions in environmental taxes under Directive 2003/96/EC”.\textsuperscript{91} Therefore, the question arises as to how to apply the definition of the concept of “environmental taxes” in the case of tax reductions that fall under the energy taxation directive. The case law of the Court seems to suggest that the reference to environmental taxes in the GBER is tautological: all taxes falling under the energy taxation directive would, \textit{de facto}, be assimilated

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\textsuperscript{84}Ibid., para. 52.
\textsuperscript{86}Section 3.7. of the Commission 2014 Guidelines, supra n. 66.
\textsuperscript{87}Commission Regulation (EU) No 651/2014, supra n. 66.
\textsuperscript{88}Ibid., Art. 2, point (119) and Art. 1.13 (15) of the Commission 2014 Guidelines, supra n. 66.
\textsuperscript{91}Art. 44 of Commission Regulation (EU) No 651/2014, supra n. 66.
\end{flushleft}
to “environmental taxes”. If so, the shortcut made in the GBER could be criticised as it facilitates the adoption of potentially distortive aid schemes with no guarantee that an environmental objective is pursued. However, if the reference to “environmental taxes” is not tautological, Member States - and aid beneficiaries - would face legal uncertainty when they grant aid in the form of reductions of energy taxes under the energy taxation directive. Villar argues that the Commission should review the GBER and the EEAG to enhance the consistency between EU energy, tax and State aid policies.

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

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

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

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

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

93 See Englis, supra n. 92, at pp. 291-292.
94 Villar Ezcurra, supra n. 48, at p. 30.
97 CJEU, Ioan Tatu v. Statul român prin Ministerul Finanţelor şi Economiei, Direcţia Generală a Finanţelor Publice Sibiu, Administraţia Finanţelor Publice Sibiu, Administraţia Fondului pentru Mediu şi Ministerul Mediului, 27 January 2011, C-
In other words, environmental considerations cannot justify a discriminatory tax. However, EU law does not prevent Member States from distinguishing between products that, at first sight, look similar, on the basis of environmental grounds (e.g. by imposing higher taxes on products that are more polluting or have been produced in a more polluting way). Such differentiation between allegedly “like” products should not automatically be found “discriminatory in nature”.

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

Such a conclusion is not an obvious one. It is usually argued that article III:2 of the General Agreement on Tariffs and Trade (which is a provision similar to article 110 of the TFEU in WTO law) has been interpreted in an more restrictive way, excluding the possibility to use production methods as a criterion to differentiate between “like” products on environmental grounds.

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98 See de Sadeleur, EU Environmental Law and the Internal Market, supra n. 96, p. 253. De Sadeleur takes a more nuanced view considering that “the Court has not yet settled the matter (…)”. 99 Outokumpu Oy, 2 April 1998, C-213/96. See also the Chemical Farmaceutici and Vinal case, in which the Court found that an Italian tax that distinguished between synthetic alcohol and alcohol produced by fermentation was not incompatible with article 95 of the EEC Treaty (now 110 TFEU). The Italian tax favoured alcohol being manufactured from agricultural products over alcohol being processed from ethylene (see CJEU, Chemical Farmaceutici SpA v DAF Spa, 14 January 1981, C-140/79, paras. 14-16 and CJEU, SpA Vinal and SpA Orbat, 14 January 1981, C-46/80, paras. 12-14). 100 CJEU, C-213/96, supra, n. 99, para. 41. Contra, see the conclusions of AG Jacobs (C-213/96, 13 November 1997). 101 CJEU, C-213/96, supra, n. 99, para. 31. See also CJEU, Commission v. Italian Republic, 8 January 1980, C-21/79, para. 15; CJEU, Stadtgemeinde Frohnleiten, Gemeindebetriebe Frohnleiten GmbH v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, 8 November 2007, C-221/06, para. 56 & 71; CJEU, C-402/09, supra n. Opinion AG Sharpston, 27 January 2011, para. 38. 102 CJEU, C-213/96, supra, n. 99, para. 39: “(…) the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method”. See also CJEU, C-221/06, supra n. 101: “(…) that legislation does not even give the importer the opportunity of adding that proof in order to qualify for the exemption applicable to waste from disused hazardous sites or suspected contaminated sites in Austria”. See also CJEU, C-198/14, supra n. 72, particular para. 63.
In contrast, the Court of Justice interprets the free movement of goods provisions in a way that gives Member States some leeway in the adoption of environmentally-driven tax measures. If Member States consistently pursue an environmental objective through their tax system, their environmental tax is likely to be found in compliance with article 110 of the TFEU. However, if the objective of protecting the environment could have been achieved “more completely and consistently” by designing the environmental tax in a way that would not favour domestic over imported products, the Court is likely to consider that the tax infringes article 110 TFEU.

3.2.2. The free movement of services

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

However, even an environmentally-driven tax may violate article 56 of the TFEU if it is found disproportionate. In the case De Coster, the Court of Justice was asked to give a preliminary ruling on a Belgian municipal tax on satellite dishes, which was supposed to protect the urban environment by mitigating the visual – aesthetic - pollution caused by satellite dishes. The Court considered that this tax was liable to impede more the activities of broadcasting and television transmissions operators in Member States other than Belgium. This could not be justified by the need to protect the urban environment as the tax exceeded what was

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

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

106 Ibid., para. 45.

107 Ibid., para. 42.

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

109 Ibid., para. 35.
“necessary”. According to the Court, this objective could have been achieved with less restrictive methods, such as for example the adoption of requirements regarding the size of satellite dishes.

The Court also referred to the proportionality test in the case *Commission v. Ireland*, concerning an Irish registration tax. According to the Commission, this tax violated article 56 of the TFEU by “imped[ing] the provision and receipt of leasing and hiring services disproportionately” for two main reasons. First, the tax had to be paid in advance, in full, regardless of the duration of the proposed use of the vehicle in Ireland, which could lead to a cash-flow disadvantage. Second, an administration charge of 500 euros had to be paid in order to obtain a partial refund of the tax in the hypothesis where the vehicle was removed from Ireland. The Court underlined that the tax, which imposed a rate of taxation depending on the level of CO$_2$ emissions, was “appropriate” to protect the environment since it discouraged the “rental or leasing of vehicles with heavy fuel consumption”. However, the Court considered that both the requirement to pay the full amount of the tax and the administration charge were disproportionate.

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

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

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

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112 CJEU, *European Commission v. Ireland*, 19 September 2017, C-552/15, para. 43
113 *Ibid.*, para. 44
117 CJEU, *Staatsecretaris van Economische Zaken, Staatssecretaris van Financiën v. Q*, 18 December 2014, C-133/13. The Court did not insist on the objective of the legislation to protect the “natural” heritage of the Netherlands. However, AG Kokott analysed this objective in details in her Opinion *(see paras. 43- 47).*
118 *Ibid.*, para. 27.
article 49 of the TFEU, concerning an income tax deduction that was only granted in respect of costs relating to listed historic buildings.\(^{120}\)

The Court followed a similar reasoning in the case *Huijbrechts*, concerning a Flemish tax exemption on real property regarded as woodland in respect of the inheritance tax.\(^{121}\) According to the Flemish Code of Taxation, such tax exemption was granted under the condition that the woodland was subject to a sustainable management plan established in accordance with criteria defined by the Flemish legislation. The Court recognised that the allocation of the tax advantage was subject to environmental conditions.\(^{122}\) However, in so far as the exemption was limited to forest or woodland located in the Flemish Region of Belgium, the Court considered that article 63 of the TFEU had to be interpreted as precluding such a preferential tax measure.\(^{123}\) The Court referred to the “cross-border character of the environmental issue” addressed by the Flemish tax regime, suggesting that the territorial limitation of the Flemish tax measure could not be reconciled with its environmental objective. The Court stated as follows:

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

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

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

### 3.2.4. The free movement of persons

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122 Ibid., para. 33.
123 Ibid. paras. 34 & 43.
124 Ibid., para. 34.
125 The preliminary ruling does not discuss this specific issue.
126 Ibid., para. 42.
Very few cases involving environmental tax measures and charges concern the free movement of persons. One exception is the *Gottwald* case, in which the Court was asked to rule on an Austrian annual toll disc, which was issued free of charge to disabled persons who were resident or ordinarily resident in Austria.\(^{127}\) The Court considered that such a toll disc system did not amount to a discrimination prohibited under article 12 of the TEC (now article 18 of the TFEU) as those who regularly travelled to Austria for professional or personal reasons could also be granted the toll disc free of charge. The Court referred to the objective of the measure, namely the promotion of mobility and integration of disabled persons and the wish to ensure that there is a connection between the Austrian society and the beneficiary of the benefit.\(^{128}\) According to the Court, the requirement related to the residence of the beneficiaries was a suitable criterion to “establish the existence of a connection” between the beneficiaries and the Austrian society.\(^ {129}\)

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

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

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

#### 3.3.1. The energy taxation directive

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

First, the Court of Justice has been asked to clarify the types of energy products to which the energy taxation directive applies. For example, in the *Kernkraftwerke* case, the Court had to determine whether a Member State was allowed to impose a tax on nuclear fuels used for the commercial production of electricity under the energy taxation directive.\(^ {131}\) The Court underlined that the directive only applied to an exhaustive list of products, which did not include

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\(^{128}\) *Ibid.*, para. 32.

\(^{129}\) *Ibid.*, para. 36.

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

\(^{131}\) CJEU, C-5/14, *supra* n. 69, para. 48. See also CJEU, OKG AB v. Skatteverket, 1 October 2015, C-606/13 (concerning a tax on the thermal power of a nuclear reactor).
the nuclear fuel being taxed. Similarly, in the Elecedes Carcelen case, the Court found that the directive did not preclude a Member State from levying a tax on wind turbines designed to produce electricity. In the Fendt case, the Court clarified that the directive mainly applied to energy products used as motor and heating fuels. Therefore, Member States remain free to tax the consumption of lubricating oils which are “intended for use, offered for sale or used other than as motor fuels or as heating fuels”.

Second, the Court has ruled on the scope of the directive in terms of the types of instruments that could qualify as “taxes” on energy products and electricity. In the IRCCS – Fondazione Santa Lucia case, the Court considered that a pricing mechanism on electricity could qualify as an indirect tax falling under the scope of the energy taxation directive. The Court recalled the approach it had advocated in its earlier case-law: “the nature of a tax, duty or charge must be determined by the Court, under EU law, according to the objective characteristics by which it is levied, irrespective of its classification under national law”. The Court then referred to some of the fiscal characteristics of the Italian electricity charges, highlighting their obligatory nature, the existence of a monitoring mechanism to guarantee compliance and the allocation of the revenue to objectives of general interest. Ultimately, the assimilation of the Italian pricing mechanism to a tax falling under the scope of the directive did not lead to consequences as the Italian measures did not seem to violate the directive.

3.3.2. The general arrangements directive

The general arrangements directive also influences the types of environmental tax measures that Member States have been able to adopt. Indeed, the directive contains a provision (article 1, § 2 of the directive, which replaced article 3, § 2 of Directive 92/12/EEC) that defines the extent to which Member States are allowed to levy “other indirect taxes for specific purposes”. In other words, to be allowed to adopt taxes on products that fall under the scope

132 CJEU, C-5/14, supra n. 69, paras. 47-48.
133 CJEU, Elecedes Carcelen SA, Energías Eólicas de Cuenca SA, Iberenova Promociones SAU, Iberdrola Renovables Castilla La Mancha SA v. Comunidad Autónoma de Castilla-La Mancha, 20 September 2017, joined cases C-215/16 to C-221/16, paras. 42-54. The Court pointed to the fact that the levy was not “dependent on the consumption of electricity”. This case also clarifies the scope of application of the two directives. See also article 1, § 3 of Directive 2008/118/EC, supra n. 35 (“Member States may levy taxes on (a) products other than excise goods”).
135 CJEU, Joined cases C-145/06 and C-146/06, supra n. 134, paras. 37-38 and 43-45. The Court also analysed the terms “dual use” in its case law on the scope of the energy taxation directive (see, e.g., CJEU, X v. Voorzitter van het managementteam van het onderdeel Belastingdienst-Z van de rijksebelastingdienst, 2 October 2014, C-426/12).
136 CJEU, Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) – Fondazione Santa Lucia c. Cassa Conguaglio per il settore elettrico, Ministero dello Sviluppo economico, Ministero dell’Economia e delle Finanze, Autorità per l’energia elettrica e il gas, 18 January 2017, C-189/15. See also, contra, the conclusions of AG Campos Sánchez-Bordona in this case and in the case C-103/07 (paras. 27-36).
137 CJEU, C-189/15, supra n. 136, para. 29.
138 Ibid., para. 33-34.
139 This provision states as follows: “Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far
of the excise directives, Member States will need to prove that their taxes pursue a “specific purpose”, for example the specific purpose of protecting the environment. Consequently, the interpretation of the terms “specific purposes” is key to determine whether Member States can introduce additional environmentally-driven levies on energy products and electricity.

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

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

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

The Court reached a similar conclusion in a later case concerning a local Estonian sales tax on liquid fuel. Although this tax was allocated to the financing of public transport in Tallinn, the Court could not find a direct link between the use of the tax revenue and its environmental (and public health) purposes. The Court emphasizes that the tax should have been “designed, so far as its structure is concerned, in such a way as to deter taxpayers from using this fuel or to encourage them to adopt a behaviour whose impact would be less damaging to the environment or public health than that which they would adopt in the absence of the tax”.

Consequently, the Court found that article 1, §2 of Directive 2008/118/EC did not permit the adoption of a tax such as the Tallinn City retail sales tax on liquid fuel.

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140 CJEU, Transportes Jordi Besora SL v. Generalitat de Catalunya, 27 February 2014, C-82/12.
141 Opinion of AG Wahl in the case Transportes Jordi Besora SL v. Generalitat de Catalunya, 24 October 2013, C-82/12, para. 30 (and paras. 23 and 29). See also paras. 38-39 of the Court’s decision, supra n. 140.
142 CJEU, C-82/12, supra n. 140, paras. 23, 29 and 30.
143 Ibid., para. 32.
146 Ibid., para. 45.
147 Ibid., para. 46.
Although the reasoning of the Court might seem to limit Member States’ ability to adopt environmental taxes, it could also be interpreted as a way to encourage Member States to adopt genuine environmentally-driven taxes, namely taxes whose design demonstrates a clear link with environmental objectives. The case Messer France further clarifies this approach of the Court. In this case, the Court considered that a French service tax on public electricity could be classified as a “another indirect tax” under article 3, §2 of Directive 92/12/EEC with regard to its environmental objective. According to the Court, the French tax was “itself directed at achieving an environmental objective” because it encouraged “the production of electricity from renewable sources and cogeneration by contributing to its financing”. This case is particularly interesting because the revenue of the French tax was not allocated only to the promotion of green electricity but also to administrative and social purposes. With regard to these other objectives, the Court considered that the tax could not be regarded as “another indirect tax”. According to the Court, the predetermined allocation of revenue from an indirect tax is not a sufficient element to prove that the tax is directed at achieving its specific purpose.

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

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149 Ibid., para. 45 and referring to the opinion of the AG Campos Sánchez-Bordona who considered that there had to be a sufficient link between the use of the proceeds of the tax and the specific purpose of promoting green energy » (para. 71).
150 Ibid., para. 54.
151 Ibid., paras. 38-39 (according to the Court, such predetermined allocation is “merely a matter of internal organisation of the budget of a Member State).
152 CJEU, Braathens Sverige AB and Riksskatteverket, 10 June 1999, C-346/97. See also CJEU, Commission of the European Communities v. Italian Republic, 25 September 2003, C-437/01, para. 33. Note that a similar question arose in subsequent cases under Directive 2008/118/EC (supra n. 35) and Directive 2003/96/EC (supra n. 34): see, among others, CJEU, C-5/14, supra n. 69, para. 40.
153 CJEU, Braathens, C-346/97, supra n. 152, paras. 24-26.
154 Ibid., para. 24. See also recital 4 of Directive 2008/118/EC (supra n.35) that refers to the need “not to jeopardise the useful effect of Community rules relating to indirect taxes”. In the same line of thought, see the conclusions of AG Fennelly, in particular paras. 20-25.
155 Ibid., para. 22-23. References to the argument related to the environmental nature of the tax are found in para. 21 and 22.
The way the Court of Justice interpreted the horizontal directive in the Braathens case affects Member States’ ability to develop the environmental dimension of their energy tax system.\textsuperscript{156} It is uncertain, though, that the Court would adopt a similar reasoning under Directive 2008/118/EC.\textsuperscript{157} Article 1, §2 of Directive 2008/118/EC has a very similar wording to article 3, 2 of Directive 92/12/EEC, except for the last part of the new provision that refers to the exemption provisions. Article 1, §2 of Directive 2008/118/EC now seems to allow Member States to adopt indirect taxes for specific purposes, even when exemptions apply.\textsuperscript{158} If so, the question arises as how to reconcile such interpretation of article 1, § 2 of the general arrangements directive with the Braathens case, in which the Court referred to the need to preserve the effectiveness of the exemption provisions to be found in the energy taxation directive.

3.4. The EU’s regulation on environmental economic accounts

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

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

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

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

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

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


\textsuperscript{160} Ibíd., Annex II, section 2.

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


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

This definition is still largely used today to refer to “environmental taxes” or “environmentally related taxes” for statistical purposes.165 Usually, environmental (related) taxes are divided into three or four categories: energy taxes, transport taxes, pollution taxes and resource taxes.166 As explained above, among these categories, energy taxes - which include taxes on energy products used for both stationary and transport purposes - have been partially harmonised at the EU level (section 2.1).

Although this objective definition of environmental taxes makes it easier to gather data for statistical purposes, it neither guarantees that the tax ultimately pursues an environmental goal nor that it has a positive environmental effect.167 Consequently, a more purposive approach to environmental taxation is sometimes preferred. Under this approach, taxes should be referred to as “environmental” only when they effectively pursue an environmental objective (which correspond to the concept of “environmentally-driven taxes” used in this chapter). For example, the UK government issued its own definition of environmental taxes in 2012. To qualify as “environmental” measures, taxes have to meet three conditions aimed at ensuring that they foster environmental protection.168 Such purposive definition has the advantage that it emphasises the role of environmental taxes, as a way to help internalising environmental costs.

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

164 Ibid. See also the OECD Glossary of statistical terms, available at https://stats.oecd.org/glossary/detail.asp?ID=6437. The same
165 On the different meanings of these terms, see European Commission, “Environmental taxes – A statistical guide”, 2001, supra n. 162. See also Art. 2, (2) of Regulation (EU) No 691/2011, supra n. 159.
166 See Annex II (Module for environmentally related taxes by economic activity), section 3 of Regulation (EU) No 691/2011, supra n. 159. Transport taxes include tax on the ownership and use of motor vehicles; pollution and resources taxes include taxes on the extraction of raw materials; tax on emissions to air and water, tax on noise and waste management (see Eurostat, Environmental taxes – detailed analysis, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Environmental_taxes_-_detailed_analysis (consulted 15 January 2018).
167 The General Court suggested the opposite in the case British Aggregates Association, 13 September 2006, T-210/02, para. 114 (“An environmental levy is thus an autonomous fiscal measure which is characterised by its environmental objective and its specific tax base”, emphasis added).
4. Conclusion: Challenges ahead and unexplored legal issues

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

A first challenge that could be considered for further research concerns the fact that environmental tax policies in the EU do not always rely on environmental considerations. Moreover, in some instances, non-environmental tax policies clashes with environmental objectives, which leads to even more inconsistencies in Member States’ tax system. As has been pointed above, the EU’s energy tax policy is largely disconnected from the EU’s climate commitments. This could potentially be analysed as a violation of the integration clause (article 11 of the TFEU).\(^{169}\) Similarly, Member States’ tax policy is characterised by a lack of consistency. Many member States claim that they want to increase the share of environmental tax measures in their policy mix while their tax system is still characterised by environmentally harmful tax subsidies (e.g. preferential tax treatment for company cars).\(^{170}\) The question arises as to whether harmonisation is possible with respect to those preferential regimes. If not, one could investigate whether and how EU primary law - such as State aid law - could be a venue to limit the possibility of Member States for adopting preferential tax measures in favour of polluting products or behaviours.\(^{171}\)

A second and related challenge pertains to the question of whether and how environmental tax measures can be part of a policy mix that ensures a certain balance between environmental goals and other economic and social policy objectives that are part of the EU’s policy agenda. The past case-law of the Court of Justice on environmental tax measures illustrates that these goals are not always easy to reconcile.\(^{172}\) Environmental tax measures may amount to new fiscal barriers, affect energy supply in the EU, hamper the EU’s competitiveness and lead to social inequality (since the polluter-pays principle is not necessarily in line with the ability-to-pay principle).\(^{173}\) Some authors argue that the coherence between these objectives should be enhanced, whereas others suggest that environmental tax measures should primarily aim at environmental protection, while other objectives can be pursued through different policy instruments.\(^{174}\) Further research could help clarify the debate by analysing the case-law and

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


\(^{172}\) See sections 3.2, and 3.3, as to the tensions between environmental protection and internal market objectives.

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

\(^{174}\) See, i.a. Nicolas de Sadeleer, “Regulatory autonomy . . .”, supra n. 96; Deak, supra n. 96, pp. 315-316.
future legal developments in the light of these various objectives. Research projects should consider both substantive and institutional solutions. Enhancing the dialogue between EU institutions dealing with tax, trade, climate, energy and environmental matters could be one way forward. Researchers could also analyse the role of the EU Semester in strengthening the interaction between social, economic and environmental policies and developing green fiscal reforms at the EU level. Finally, researchers could look into the role of environmental tax measures as a way to foster the EU’s international action on climate change, for example through the inclusion of environmental taxation in the EU’s external tax strategy.

A third challenge concerns the blurring line between the regulatory and fiscal nature of environmental tax measures. In most countries, specific institutional rules and procedural guarantees generally apply to the adoption of taxes. Therefore, the classification of environmental tax measures as “fiscal measures” or “regulations” can have significant repercussions on the future development of environmental taxation. This question has largely been discussed at the level of the Member States in light of the constitutional limits that apply to the adoption of taxes in comparison to other instruments. At the EU level, this question has not been analysed to the same extent. Given the practical consequences that can derive from the distinction between taxes and other non-fiscal instruments, additional research would be welcome. If environmental tax measures are not “primarily of fiscal nature”, harmonization would not be subject to the unanimity requirement. Moreover, the regulatory nature of environmental tax measures could affect their analysis under the free movement provisions. Indeed, the Court does not apply the exact same tests to analyse fiscal and non-fiscal measures. Researchers could further analyse the distinction between taxes and other market-based instruments, taking into consideration the strong regulatory nature of environmental tax measures, which distinguishes them from traditional taxes. Such analysis would not only serve to better understand the impact of EU law on environmental tax policy. It would also shed new light on how procedural and substantive EU law treats traditional taxes differently from regulatory measures. In this context, researchers could consider the recent Commission’s proposal for a transitional move towards qualified majority voting, including for the adoption of tax measures used to “implement an environmentally friendly energy policy”.

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


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


180 Ibid., pp. 9-11. One way to implement this move would be to use the “passerelle” clauses, which provide for the possibility to move away from the unanimity voting requirement (articles 48, §7 of the TEU and article 192, §2, second paragraph of the TFEU).
Finally, a fourth challenge that needs further attention concerns the future role that EU law could have on the adoption of new, alternative, models of environmental tax measures. Beyond climate change and energy policies, environmental tax measures can be used to pursue a variety of objectives that are part of the EU’s and Member States’ environmental agenda, such as the transition towards a circular economy or the promotion of the United Nations Sustainable Development Goals (SDGs).181 For example, researchers could look at new ways to achieve sustainable modes of transportation182, remove competition between Member States related to the taxation of fuels183, fund the ecological transition through taxation184, alleviate the potential regressive impact of environmental tax measures185 or green up VAT186 and other types of taxes187. Alternative solutions should be tested against EU primary and secondary law but also against international law, including WTO law as well as bilateral and regional trade, investment, energy and environmental agreements.188

For each of these challenges, researchers could benefit from a comparative approach.189 By comparing Member States’ domestic environmental tax measures, one could get a better idea of where harmonization is needed and/or feasible.190 Innovative ideas for environmental tax

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181 Circular economy is one of the priorities of the 2017 Annual Growth Survey (http://ec.europa.eu/environment/integration/green_semester/about_en.htm).
184 See the reference to a “carbon tax-based own resource” in the Monti Report on Own Resources (High Level Group on Own Resources, “Future Financing of the EU”, Final report and recommendations of the High-Level Group on Own Resources, December 2016).
reforms could also emerge from comparing the EU’s with third countries’ environmental tax framework.\textsuperscript{191} Aside from comparative methods, researchers would benefit from trans- and interdisciplinary approaches.\textsuperscript{192} Environmental taxation is a research area at the crossroads between law and economics.\textsuperscript{193} Strengthening the discussion between legal scholars and economists is certainly key to fostering the understanding and development of EU environmental tax law.

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


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