



State Aids, Taxation and the Energy Sector

Marta Villar Ezcurra
Editor

THOMSON REUTERS PROVIEW™
eBOOK INCLUDED

THOMSON REUTERS
ARANZADI

Contents

	<i>Pages</i>
FOREWORD	23
PIET JAN SLOT	
INTRODUCTION	25

PART I

THE ENERGY SECTOR IN THE EU: SOME PRELIMINARY PREMISES

CHAPTER 1

STATE AIDS AND TAXATION IN THE ENERGY SECTOR: LOOKING FOR A NEW APPROACH	37
MARTA VILLAR EZCURRA	
I. Introduction	37
II. Towards a better coordination of EU Energy and Tax policies	39
III. The need to redefine State aids, taxation and the energy sector EU law	42
1. Considerations on the Energy Taxation Directive	45
2. Considerations on the General Block Exemption Regulation	48
3. Considerations on the Guidelines on State aid for environmental protection and energy (EEAG)	48
4. Some references to landmark cases in the energy tax field	50
IV. Concluding remarks	54

	<u>Pages</u>	
CHAPTER 2		
EU ENERGY MARKET AND REGULATORY OVERVIEW		
COMPETITIVENESS	57	
VICENTE LÓPEZ-IBOR MAYOR		
I. Introductory remarks: The «old-new cost of non-EU» in the energy sector	57	I.
II. The reasoning behind the EU energy integration and its basic regulatory principles in the first European Directives	62	II.
III. Harmonization rules and enforcement procedures in the energy internal market regulation	67	
IV. The need for Energy legal consolidation at EU level	70	III.
V. A special mention to the deregulatory implementation in the natural gas sector	74	IV.
VI. State aid, energy efficiency and competitiveness	78	
VII. Conclusions	78	V.
CHAPTER 3		
ENERGY IN THE PRISM OF MULTILEVEL GLOBAL GOVERNANCE	83	
GIUSEPPE F. FERRARI		
I. Introduction	83	C.
II. Trade and environment as a legal basis for the transfer of energy sovereignty	83	E.
III. Shared competences in the EU	86	
1. <i>Competition and the market: energy packages for an incomplete liberalization of the energy market</i>	88	I.
2. <i>Environment and energy policies in the EU: towards an «integrated approach»</i>	90	II.
3. <i>Renewables energy between burden sharing and state aids</i>	92	III.
IV. From a «top-down» to a «bottom-up» energy governance	94	

CONTENTS

	<i>Pages</i>
CHAPTER 4	
INCENTIVES ON RENEWABLES IN A STATE AID CONTEXT	95
<name></name>	
I. Introduction	95
II. The 2009 Renewable Energy Directive	96
1. <i>Background</i>	96
2. <i>Mandatory targets</i>	97
3. <i>Administrative barriers</i>	97
4. <i>Guarantees of Origin</i>	97
5. <i>Balance</i>	98
III. Support schemes and the creation of a truly competitive electricity market	98
IV. Court cases in relation with renewable energy and incentives	99
V. The future of incentives to renewable energy within the European Union	102
1. <i>Renewable energy within the context of the Energy Union</i>	102
2. <i>Towards support schemes that are compatible with competition</i>	103
3. <i>The need of stable frameworks</i>	105
CHAPTER 5	
ENERGY TAXES, ENERGY PRICES AND COMPETITIVENESS ...	109
<name></name>	
I. Introduction	109
II. Electricity prices in the European Union	110
III. Electricity prices, taxes and emissions trading	112
1. <i>Data description and methodology</i>	114
2. <i>Analysis and findings</i>	116

STATE AIDS, TAXATION AND THE ENERGY SECTOR

	<i>Pages</i>
IV. Competitiveness	118
V. Concluding remarks	120
CHAPTER 6	
THE TRANSPORT SECTOR, TAXATION AND STATE AID PROBLEMS	123
VIOLETA RUIZ ALMENDRAL	
I. Introduction: the transport sector in the EU and its environmental impact	123
II. The case for environmental subsidies and taxes on road transportation	125
III. State aid constraints for measures (taxes or subsidies) affecting transport	135
IV. Conclusions: unexploited leeway in the establishment of environmental tax and subsidies	141
CHAPTER 7	
THE PROMOTION OF BIOFUELS AND STATE AID PROBLEMS	143
ÁLVARO ANTÓN ANTÓN	
ESTELA FERREIRO SERRET	
I. Introduction	143
II. Legal Framework surrounding the Promotion of Biofuels in the EU	145
III. Main Support Schemes for the Promotion of Biofuels in the EU: Tax Exemptions and Supply Obligations	147
1. <i>Main Support Schemes</i>	147
2. <i>EU Member States' experience</i>	148
IV. The 2014 New State Aid Limits for the Introduction of Tax Exemptions for the Promotion of Biofuels and its Joint Application with Supply Obligations	150
1. <i>The General Principle of Prohibition of State Aids and its Exceptions</i>	150

CONTENTS

	<i>Pages</i>
2. <i>The 2014 Limits for the Promotion of Biofuels through Tax Exemptions</i>	151
a. Tax Exemptions for the Promotion of Biofuels: the Existence of State Aid	151
b. The Compatibility of Tax Exemptions for the Promotion of Biofuels: New Limits from 2014	153
3. <i>The Joint Application of Tax Exemptions and Supply Obligations</i>	156
a. The Existence of State Aid in the Form of Supply Obligations	156
b. Limits to the Compatibility of the Joint Application of the Two Support Systems	158
V. Conclusions	160
 CHAPTER 8	
TAX INCENTIVE SCHEMES IN THE EUROPEAN ENERGY ELECTRICITY SECTOR	161
LUIS M. CAZORLA PRIETO	
I. Climate change challenges and the role of tax incentive schemes	161
1. <i>Introduction</i>	161
2. <i>2020 climate and energy package</i>	162
3. <i>2030 climate and energy package</i>	163
4. <i>Conclusion</i>	164
II. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for taxation of energy products and electricity	164
III. Support schemes: special reference to tax incentives	166
1. <i>Introduction</i>	166
2. <i>Tax incentive schemes and State aids</i>	166
3. <i>General block exemption regulation</i>	167
IV. Guidelines on environmental and energy state aid for 2014–2020	169
1. <i>Introduction</i>	169

STATE AIDS, TAXATION AND THE ENERGY SECTOR

	<i>Pages</i>
2. <i>Main objectives</i>	171
3. <i>Aid in the form of reductions in or exemptions from environmental taxes</i>	171
4. <i>Harmonized environmental taxes</i>	172
5. <i>Non-harmonized environmental taxes and specific situations of harmonized taxes</i>	172
V. <i>Final remark</i>	174

PART II

STATE AID AND KEY LEGAL CONCEPTS: LOOKING FOR A COMMON UNDERSTANDING

CHAPTER 9

LEGAL BASIS OF THE FISCAL STATE AID REGULATION IN THE ENERGY SECTOR	177
---	-----

ENRIQUE FONSECA CAPDEVILA

I. Introduction	177
II. Legislative powers	178
III. Policies involved in the regulation of the State aid regime for energy taxation reliefs	180
IV. Legal regulation of State aid in the form of tax reliefs on energy taxes	187
V. Conclusions	192

CHAPTER 10

THE CONCEPT OF «ENVIRONMENTAL TAXES» IN THE ENERGY SECTOR: POSSIBLE SOLUTIONS IN A STATE AID CONTEXT	193
--	-----

MARTA VILLAR EZCURRA

FEDERICA PITRONE

I. Introduction	193
II. The concepts of «environmental tax» and «energy tax»	194

CONTENTS

	<i>Pages</i>
1. The concept of «environmental tax»	194
2. The concept of «energy tax»	196
III. The definition of «environmental tax» enshrined in the GBER and in the 2014 guidelines. A critical analysis	198
1. Energy taxes typology within the GBER and the EEAG framework	202
2. The need to change conceptual current patterns	203
IV. Other approach in a state aid context	203
1. Separate guidelines and/or GBER rules for tax benefits in energy taxes	204
2. Justification of a special treatment for energy taxes based on EU policies different from environmental policies	205
V. Conclusions	207

CHAPTER 11

TAX INCENTIVES IN THE EU ENERGY SECTOR: GENERAL VERSUS SELECTIVE MEASURES	209
PASQUALE PISTONE	
IÑAKI BILBAO ESTRADA	
I. Introduction	209
II. Role of tax reliefs in the EU energy policy	211
1. Tax reliefs with an incentive effect for the taxpayer to increase the level of environmental protection	211
2. Tax reliefs to maintain the level of international competitiveness of European business	214
3. Tax reliefs to coordinate different environmental policy instruments (sustainability and competitiveness)	215
III. Some problems from the application of EU State aid rules	217
1. Selective or general measures?	217
2. Non-justification by the nature of the system of environmental tax incentives included in energy taxes: the need for change ...	218
IV. The compatibility of State aids with an environmental purpose	220

STATE AIDS, TAXATION AND THE ENERGY SECTOR

	<u>Pages</u>
1. <i>The exemption from mandatory notification: the GBER 2014</i>	221
2. <i>The compatibility of some environmental aids under the European Commission discretion: Guidelines on State aid for Environmental Protection</i>	222
V. Conclusions	223

CHAPTER 12

THE ROLE OF THE PPP IN A STATE AID CONTEXT	225
---	-----

PEDRO M. HERRERA MOLINA

JOSÉ A. ROZAS VALDÉS

I. Outline	225
II. Structure of the analysis	228
1. <i>Environmental taxation</i>	228
2. <i>Specific scheme of the tax measure</i>	229
III. Set of principles	230
IV. Set of rules	232
V. A different meaning of the PPP for non-harmonized and harmonized energy taxes?	235
VI. Proposals for alternative approaches and Recommendations	241

CHAPTER 13

TAX RELIEFS AND FREE EMISSION ALLOWANCES: ALTERNATIVES FOR BETTER COORDINATION AND EFFICIENCY. A EUROPEAN LAW STUDY BETWEEN REGULATIONS AND CASE LAW	245
---	-----

CONCETTA RICCI

CATERINA VERRIGNI

I. Introduction	245
II. The tax nature of the ETS	247
III. The Gift tax on free allowances	250
IV. The compatibility of the allocation criteria (free or auctioning allocation) with State aid rules	252

CONTENTS

	<i>Pages</i>
V. The Court of Justice Perspective	253
VI. A representative Italian case law. The price reduction on fuel consumption introduced by Friuli Venezia Giulia – Italy	257
VII. Conclusions	259

PART III

EU ENERGY TAXATION SYSTEM: A CRITICAL ANALYSIS IN LIGHT OF COMPETITIVENESS AND ENVIRONMENTAL PROTECTION OBJECTIVES

CHAPTER 14

MINIMUM RATES IN THE ENERGY TAXATION DIRECTIVE AND IN THE EUROPEAN UNION COURT OF JUSTICE CASE LAW

263

ÁLVARO J. DEL BLANCO GARCÍA

CRISTINA GARCÍA-HERRERA BLANCO

SÉBASTIEN WOLFF

I. Introduction	263
II. Historical background of the Energy Taxation Directive	264
III. General framework for mineral oils, natural gas and electricity taxation	265
IV. Current minimum tax rates of excise duties	267
1. <i>Minimum rates for motor fuels</i>	267
2. <i>Minimum rates for motor fuels used for commercial and industrial use</i>	269
3. <i>Minimum rates for heating and electricity</i>	270
V. Minimum tax rates proposed in the 2011 EC proposal to reform the Energy Taxation Directive and discussion	273
VI. European Union Court of Justice case-law and the minimum level of taxation	275
VII. Conclusion	279

STATE AIDS, TAXATION AND THE ENERGY SECTOR

	<i>Pages</i>
CHAPTER 15	
ENERGY TAX INCENTIVES AND THE GBER REGIME	283
JOACHIM ENGLISCH	
I. Introduction	283
II. The status quo of energy tax incentives under the GBER ...	285
III. A critical analysis in the light of the nature of energy tax relief measures	290
IV. Conclusions	295
CHAPTER 16	
STATE AID FOR ECO-FRIENDLY ENERGY SOURCES: THE BALANCING TEST APPLIED TO ENERGY TAXES	297
LORENZO DEL FEDERICO	
SILVIA GIORGI	
I. Introduction	297
II. «Balancing» the condition of State resources	299
III. Balancing advantages, selectivity and proportionality	302
IV. Conclusions	309
CHAPTER 17	
ENVIRONMENTAL PROTECTION, COMPETITIVENESS AND COMPETITION: WHICH BALANCE UNDER STATE AID RULES	311
JERÓNIMO MAILLO GONZÁLEZ-ORÚS	
I. Introduction	311
II. Defining the aims under the EU State Aid control instruments	312
1. <i>Environmental protection</i>	312
2. <i>Competition, trade and competitiveness</i>	314
III. The balancing test. A right balance? Coordination with other legal instruments	316
IV. Concluding remarks and policy recommendations	320

CONTENTS

	<i>Pages</i>
CHAPTER 18	
EU EMISSION TRADING SYSTEM, COMPETITIVENESS AND TAXES ON THE ENERGY SECTOR	323
JUSTO CORTI VARELA	
I. Introduction	323
II. Impact on competitiveness related to electricity prices	325
III. Impact on competitiveness of energy-intensive industrial sectors	326
IV. «Energy efficiency» and «Environmental Innovation»: A balance for competitiveness and environmental protection	328
V. Coordination with other environmental instruments: EU ETS as an element of an environmental tax system	329
VI. Regulatory asymmetries intra-EU and extra-EU: «carbon leakage»	330
VII. Concluding remarks and recommendations	332

PART IV

LOOKING BEYOND THE EU: A COMPARATIVE ANALYSIS AND THE INTERNATIONAL FRAMEWORK

CHAPTER 19

ENERGY TAX INCENTIVES, THE US COMMERCE CLAUSE AND EU STATE AID: COMMON GROUND, DIFFERENT CONTOURS	337
JANET E. MILNE	
I. Setting the Comparative Framework	338
II. The Federal Constitution's Dormant Commerce Clause: An Introduction	340
III. The Dormant Commerce Clause and State Taxes	342
IV. The Dormant Commerce Clause and State Tax Expenditures	344

STATE AIDS, TAXATION AND THE ENERGY SECTOR

	<i>Pages</i>
V. Implications for State Energy Tax Expenditures	349
VI. Comparison with EU State Aid Rules	352
VII. Conclusion	356

CHAPTER 20

ENERGY TAXATION AND THE COMPETITION LAW CONSTRAINTS IN CHINA	357
---	-----

YAN XU

I. Introduction	357
II. The Making of Tax Law and Policy	360
III. Tax Incentives and the Protection of the Environment and Energy	363
1. <i>Tax Incentives on Energy</i>	364
2. <i>Legal Constraints on Environmental Tax Incentives</i>	366
3. <i>Local Tax Incentives on Energy: Some Examples</i>	367
IV. Competition Law Constraints on the Use of Tax Incentives	369
V. Conclusion	373

CHAPTER 21

TAX INCENTIVES AND ENERGY TAXATION IN BRAZIL AND THE MERCOSUR	375
--	-----

MARCOS ANDRÉ VINHAS CATÃO

I. Tax incentives in Brazil and the Mercosur (Southern Common Market): general characteristics and distinctions	375
II. Tax incentives and State aids on environmental matters	380
1. <i>Specific measures</i>	382
2. <i>Tax Competition (so-called tax and war) among Brazilian states regarding tax incentives and environmental issues</i>	384
3. <i>Ecological State VAT (ICMS)</i>	385
III. Conclusions	387

CONTENTS

Pages

CHAPTER 22

THE MISSING LINK IN AN INTERNATIONAL FRAMEWORK FOR CARBON PRICING: BORDER ADJUSTMENT WITH TAXES OR ALLOWANCES	389
MIKAEL SKOU ANDERSEN	
I. Introduction	389
II. Carbon pricing – state of the art and recent developments ...	391
III. Prospective border arrangements for carbon pricing	393
IV. The future of carbon pricing	396
V. Final Remarks: The diplomacy of border carbon adjustment	399

CHAPTER 23

WTO LAW AND STATE AID LAW ON ENERGY TAX RELIEFS: COMMON GROUNDS AND DIFFERENCES	401
ALICE PIRLOT	
I. Introduction	401
II. Preliminary section: energy tax reliefs under EU and WTO law	402
1. <i>Energy tax reliefs: a broad definition</i>	402
2. <i>Legal framework surrounding energy tax reliefs in EU and WTO law</i>	403
2.1. EU common rules on energy taxation vs. the absence of specific rules in WTO law	403
2.2. Energy tax reliefs under the scrutiny of EU and WTO law	404
III. Comparison	406
1. <i>Overview of the main features of the two regimes</i>	406
2. <i>Comparison of the two regimes in light of the specific case of energy tax reliefs</i>	408
2.1. Presumption of compatibility for some energy tax reliefs under EU law (those covered by the ETD) vs. the expired category of non-actionable subsidies ...	409

STATE AIDS, TAXATION AND THE ENERGY SECTOR

Pages

2.2. State aid and subsidy vs. environmental policy-driven tax measures: how do EU and WTO law integrate larger environmental considerations?	410
IV. Conclusion	413

LIST OF CONTRIBUTORS	415
----------------------------	-----