Competition Law and Environmental Protection in Europe; Towards Sustainability?
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Citation for published version (APA):
Groningen: Europa Law Publishing

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13.1 Introduction

The last stone in the fortress that should protect the common market from distortions of competition is the prohibition on state aids. Technically speaking, Article 87(1), by contrast with Articles 81 and 82, does not prohibit anything but confines itself to stating that the aid shall be incompatible with the common market. Nevertheless we shall be speaking of the prohibition on state aids. This prohibition is to be found in Article 87 EC. The structure of Article 87 closely resembles that of the other Treaty competition provisions: a broadly formulated prohibition in the first paragraph together with a number of exempt and exemptible forms of state aid in the second and third paragraphs. Below, we will first look at the scope of the prohibition. After that we shall turn our attention to the various means by which state aids may nonetheless be legalised. In the Course of this we shall look at the application of Article 87 and the various exemptions in an environmental context. No particular attention will be paid to the procedural issues involved in Article 87 and 88 EC.

Since the Community is becoming increasingly active as an institution that grants subsidies and distributes large funds, we shall also be addressing the issue of state aid control and Community subsidies and aids. Finally, much of the Commission's policy with regard to state aids in the environmental field has been codified in the form of so-called guidelines. Most recently such Guidelines in the field of environmental protection have been published in 2001. Below, we will look at the 2001 Environmental aid Guidelines as well as its predecessors in considerable detail.

13.2 Article 87(1) – the prohibition of state aids

The first paragraph of Article 87 prohibits any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods insofar as trade between the member states is affected. Essentially five elements can be identified in this definition. Firstly, there needs to be aid in any form whatsoever. Secondly, it must be granted by a member state or through state resources. Thirdly, it is necessary that such aid threatens to distort or actually distorts competition by, and this is the fourth element, favouring certain firms or the production of certain goods. According to the fifth element, trade between member states must be affected. Below, we shall address these five elements.

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13.2.1 The Concept of an 'Aid'

With regard to the first element it should be noted that the EC Treaty nowhere defines the concept of an 'aid'. Completely in line with this, the Court has consistently refused to define the concept of an aid and has adopted an effects-based approach in the light of the objective of Article 87. This is nothing more than the application within Article 87(1) of the functional approach that we have identified as characteristic for the entire body of EC competition law. Effect, and not form, is what counts, as the Court states in the Deufil case:

'Article 92 [Now Article 87] does not therefore distinguish between the measures of state intervention concerned by reference to their causes or their aims but defines them in relation to their effects [...]'..

The objective of Article 87 is to attain and maintain a level playing field throughout the common market. This effects-based approach together with this objective has constantly been the Court's starting point for the analysis of state measures under Article 87(1). As, however, an unmitigated effects-based approach would bring nearly every state measure within the scope of the state aid rules, the Court has identified the latter four of the five criteria mentioned above to consequently limit the scope of the concept of an aid. Therefore, the exercise undertaken by the Court appears to start from the premise that the effects bring a state measure within the scope of Article 87(1) whereas any of the last four elements can be used to distinguish state measures outside the scope of Article 87 from 'state aids'. Examples of the different types of state measure that have been held by the Commission or Court to constitute state aids can be found in the literature. The most obvious example of a state aid is the subsidy. It should, however, be remembered that the concept of state aid encompasses that of and is much wider than the concept of a subsidy. In accordance with the effects-based approach, the Court has consistently held that:

'In determining whether a State measure constitutes aid, it is necessary, according to settled case-law, to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions'.

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Basically, the effects based approach to state aids encompasses all measures whereby member states give resources or procure advantages for firms to further the attainment of the objectives of the state.\(^6\) Taken to its limits, this effects-based approach would include, for example, government provided education since that will benefit the firms established in that member state because they can rely on a well-trained workforce for the education of which they did not have to pay. Clearly, the unconditional effects-based approach is not appropriate and this is where the last four criteria of the five identified above come into play. Furthermore, we should point out that the advantage must be granted to an undertaking. The remarks that were made above with regard to the concept of an undertaking therefore also apply within the context of Article 87. Thus Article 87 applies to all entities performing an economic activity irrespective of whether they are private undertakings or public undertakings within the meaning of Article 86 EC. Vice versa, Article 87 does not apply to advantages granted to entities that do not qualify as undertakings.

### 13.2.2 Aid granted through state resources

As regards the second element: ‘aid granted by a member state or through state resources in any form whatsoever’. This element is striking because of its wide scope. A first question to arise from this wide scope concerned the alternative character of, on the one hand, ‘aid granted by a member state (hereafter referred to as the first branch)’ and, on the other, ‘through state resources in any form whatsoever (hereafter referred to as the second branch)’.

The alternative character could be taken to mean that the first branch concerned the state measures whereby funds would actually be transferred from the state to other parties whereas the second branch could practically concern any measure whereby the state exerts its influence to confer an advantage on other parties without a transfer of public funds being necessary. This view of the alternativity of the branches would greatly extend Article 87(1)’s scope. However, the Court, in *PreussenElektra*, chose interpret the alternativity contained in Article 87(1) in a different manner.

The *PreussenElektra* case concerned the German *Stromeinspeisungsgesetz* according to which regional electricity distribution companies were required to buy and feed into their grid all the renewable electricity produced in the region for which they were responsible.\(^8\) Not only were these regional distribution companies obliged to purchase the green electricity, they also had to pay

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the generators a minimum price that was higher than the economic value of the electricity. As the German legislator envisaged that the purchase obligation together with the minimum price requirement could bring certain regional distribution companies into financial trouble, the so-called ‘hardship clause’ was introduced. According to this hardship clause, the upstream network operator must compensate the extra costs resulting from the purchase obligation and the minimum price to be paid if the total amount of green electricity purchased by the regional distributor exceeds 5 per cent of the total output of this regional distributor. A closer look at the full name of the case will immediately reveal to anyone who has ever been to the northern part of Germany why this case came to the Court. The regional distributor, Schleswag, operates in the Bundesland of Schleswig-Holstein an area of Germany that is known for the fact that it is rather windy. As a result of this, Schleswag reached the 5 per cent threshold in April 1998 and requested compensation pursuant to the hardship clause from its upstream network operator PreussenElektra. The compatibility of the Stromeinspeisungsgesetz with Article 87 has been uncertain from its very inception onwards. This was so because the obligation to purchase all renewable electricity at a fixed minimum price that is higher than the economic value obviously confers an advantage on the producers of the renewable electricity. In the national proceedings between Schleswag and PreussenElektra with regard to the compensation, the latter therefore called into question the compatibility of the Stromeinspeisungsgesetz with Article 87.

The Court, after concluding that the preliminary questions were admissible, immediately recognised that the obligation to purchase renewable electricity at a fixed minimum price flowing from the Stromeinspeisungsgesetz undeniably conferred upon the producers of renewable electricity an economic advantage, addressed the alternative issue identified above and quickly resolved it in accordance with its own well-established case law. According to the Court the

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9 Ibid., opinion of A-G Jacobs, para. 16, 17.
10 Ibid., para. 54.
11 However, Baquer Cruz & Castillo de la Torre consider that the Court was concerned with defining the concept of ‘State resources’ rather than with the requirement of financing from public funds: Baquer Cruz & Castillo de la Torre 2001, p. 492. It is submitted that this distinction between the concept of state resources (as an element of Article 87(1)) and the requirement of a transfer of public funds, is flawed. Public funds or ‘State resources’ necessarily involve a transfer of private funds to the public authorities (through taxation). What distinguishes private from public funds is therefore the presence of government control over these funds. In principle a state can exercise influence over all (private and public) funds in a member state (and this is what the German government in PreussenElektra had done on a very limited basis through the Stromeinspeisungsgesetz). The Court therefore appears to implicitly recognise that government control over funds is a useless criterion that will take it down a blind alley (just as accepting the reasoning that a deterioration in economic results will lead to a decrease in tax
alternative nature of the two branches serves only to bring within the meaning of Article 87(1) those measures whereby the state grants aid directly as well as those schemes whereby the member states grant aid through private institutions. In either case, it is required that there is a direct or indirect transfer of funds from the state to the undertakings.\(^\text{12}\) Since the advantage to the renewable electricity producers was paid by the electricity distribution companies and the network operators (through the compensation mechanism), no public funds were transferred and, as a consequence, the measure falls outside the scope of Article 87(1).\(^\text{13}\) It is worthwhile to point at the fact that the Court explicitly recalled the fact that the electricity companies concerned were both completely privately owned.\(^\text{14}\)

Furthermore, the Court refused to enlarge the scope of Article 87 in light of the fact that the purchase obligation in connection with the minimum price will most probably result in a deterioration of the economic results of the undertakings that are under the purchase obligation and therefore reduce government income from taxes.\(^\text{15}\) Normally, reductions or exemptions from taxation schemes will constitute state aid. In this case, however, the Court held that the reduction of tax income was inherent in the \textit{Stromeinspeisungsgesetz} and could not constitute a means to transfer public funds to firms. Finally, the Court rejected a proposal by the Commission to establish a useful effect rule (see chapter 11 above) for state aids. The Court's reasoning in this respect is submitted to be far from convincing but the fact remains that as the law stands a transfer of public funds is necessary for a measure to come within Article 87's ambit.\(^\text{16}\)

Despite this narrow reading of the element that aid must be granted through state resources, the Court's judgment in \textit{PreussenElektra} should not be taken to mean that Article 87(1) now has its wings clipped. Basically, the focus has been shifted away from the question whether or not a transfer of public funds is necessary to the question of what constitute 'public funds'. This concept coincides to a large degree with that of the 'state'. The concept of the state is very broad and encompasses lower authorities as well. Furthermore, all bodies, income and therefore a transfer of public funds, would have, para. 62 of the judgment). Instead, the Court addresses the formalistic (and therefore usable) criterion of whether or not there was a transfer of public funds. We should, however, note that the Court has accepted the control-criterion with regard to the entity responsible for distributing the aid: Case C-482/99, \textit{France v. Commission} (Stardust Marine), [2002] ECR I-4397.

\(^{12}\) \textit{Ibid.}, para. 58.

\(^{13}\) \textit{Ibid.}, paras. 59, 60.


\(^{15}\) \textit{Ibid.}, para 62.

\(^{16}\) See for a critical analysis of the Court's reasoning with regard to the useful effect rule for state aids: Vedder 2001B, p. 152-153 and Baquero Cruz & Castillo de la Torre 2001, p. 495.
whether public or private, that are under the control of the state also fall within the ambit of Article 87(1). In Van der Kooy, for example, the Court considered that preferential tariffs for gas charged by the private company Gasunie constituted aid. The fact that the Netherlands authorities held 50 per cent of the shares (the other half was held by private parties) and had a 50 per cent representation in the supervisory board together with the possibility for the authorities to veto tariff decisions, was sufficient for the Court. Furthermore, this wide concept of the state is also helpful in understanding the Court’s case law with regard to so-called parafiscal charges. These are charges that are paid by private parties to a private institution that has been appointed by an act of a public authority. The fact that such funds are fed with charges levied from private parties (mostly the undertakings that benefit from the fund) does not detract from these funds being considered state resources. What matters is the fact that such funds, though administered by private entities, are set up by the public authorities and are under control by these authorities. The interesting question is of course what amount of control is required for the funds administered by such a private entity to constitute state resources? In the Italian Textiles case, the Court has addressed this issue and held that

‘The argument that the contested reduction is not a ‘state aid’, because the loss of revenue resulting from it is made good through funds accruing from contributions paid to the unemployment insurance fund, cannot be accepted.

‘As the funds in question are financed through compulsory contributions imposed by state legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as state resources within the meaning of article 92 [Now Article 87], even if they are administered by institutions distinct from the public authorities.’

From this essentially two requirements may be distilled. Firstly, the entity must be funded by compulsory contributions imposed by legislation. Secondly, the management by the entity of the funds must take place in accordance with the provisions of the legislation. The later Commission v. France case added the

17 See, with regard to the concept 'state resources' and the imputability to the state of grants by companies that are a subsidiary of a state controlled undertaking, Case C-482/99, Stardust Marine, [2002] ECR 1-4397.
21 Case 173/73, Italy v. Commission (Italian textiles), [1974] ECR 709, para. 16.
22 Schina, however, identifies four requirements: Schina 1987, p. 21.
requirement, that albeit implicitly could perhaps already be found in *Italian Textiles*, the grant of the funds must be subject to approval by the public authorities. From these cases it may be concluded that purely private funds can constitute state resources even if they are not actually collected by the state but where such funds remain in the private sphere (i.e. administered by a private entity) if the three requirements mentioned above are fulfilled. This has important consequences for the Dutch practice of declaring removal fees to be generally binding. Such removal fees are paid by the producers and, ultimately, the consumers into a private fund set up by the industry. The government is as such not involved in the setting up of this fund. However, industry may ask the Environment Minister to declare such a removal fee generally binding. The question may then be asked whether there is an element of state aid involved. Prior to the act declaring the removal fee to be generally binding no state aid is involved simply because there is no government involvement in either the collection of the removal fees or the distribution of the funds. After the removal fee has been declared generally binding, it could be said that there now is a pervasive government influence on the collection of the fees. However, the fund itself still decides on the way in which the funds are spent. In our opinion, the environmental regulations in place do not contain the precise conditions for the management and apportioning of the funds. Furthermore, specific decisions on the grant of the funds are not subject to government approval. Thus the last two requirements are not satisfied and therefore these funds do not constitute state resources the administration of which must take place in accordance with Article 87. This has been confirmed in the *Dutch Car Wrecks* case. This case concerned the scheme that was voluntarily set up by the industry in order to ensure the environmentally friendly disposal of car wrecks and afterwards declared generally binding by the Environment Minister. The system is financed through a €45 levy that has to be paid into a fund for every new car that is registered. The fund is managed by a private entity set up as part of the voluntary agreement. From this fund, so-called recycling premiums are paid to the dismantling companies. According to the Commission, the fund, even after the scheme had been declared generally binding, does not involve state resources.

Yet another element of the concept of state resources concerns taxation. Money that is owed to the state or has come under the control of the state will

24 See further: Vedder 2002, p. 33 et seq.
25 This case was mentioned in a press release: IP/01/1518 and in the Commission’s Competition Policy Newsletter 2002, Nr. 2, p. 87 et seq.
26 Strangely enough the Commission appears to consider that ‘the levy has a voluntary or at least an optional character’. This would appear to contradict the fact that the scheme has been declared generally binding.
constitute state resources. As a result, not collecting certain taxes may very well be state aid. Similarly, granting exemptions or rebates from taxes is also likely to fall within the scope of Article 87(1). This, of course, is of great importance with regard to the member states’ energy taxation schemes. Almost invariably the putting into place of such schemes goes hand in hand with the granting of exemptions for the energy intensive industries with a view to maintaining competitiveness. Such reductions and exemptions are likely to constitute state aids. Whether this is the case will depend on, inter alia, the selectivity of the reductions or exemptions granted. We shall come back to this when looking closer at the fourth requirement. Finally, it is submitted that state resources will also include Community resources if the member state can decide freely on the use of such funds. If, however, the state merely passes Community funds through to the actual beneficiaries without any real discretion on the part of the state, the funds will constitute Community funds and, as a consequence, their distribution will not constitute the granting of aid.\(^{27}\)

This brings us to the question of to what extent the Community is bound by Article 87? Firstly, can the funds distributed by the Commission be seen as state aids within the meaning of Article 87(1)? In our opinion, Community funds do not fall under Article 87(1) sec. The wording of Article 87(1) is simply too clear to be interpreted in such a way as to include ‘Community aid’. However, it is submitted that the principle of loyalty to the Community, enshrined in Article 10 EC, may come to the rescue here. Article 10 has been applied by the Court with regard to a Community institution (the Commission) in the Zwartveld case.\(^{28}\) The Court held that Community institutions must also be loyal to their Treaty obligations. Through Article 2 in connection with Article 3(1)(g) of the Treaty, the Community, and thus, inter alia, the Commission, is obliged not to distort competition. Even though there is no Court ruling that has ever confirmed this reasoning, the Commission and Council do seem to consider themselves under an obligation not to distort competition. Thus the Community funds that can be used for environmental purposes all contain clauses designed to ensure that competition is not distorted as a result of the Community funds.\(^{29}\) Furthermore, in the group exemption Regulation for aid to small and medium-sized enterprises, the Commission expressly recognises that Community funds may also have an impact on competition and intra-Community trade so that such funds must also be taken into account when determining if an aid is


\(^{28}\) Case C-2/88 Imm, J. J. Zwartveld et al. (Zwartveld) [1990] ECR I-3365, paras. 15-17.

\(^{29}\) See further: Jans, Sevenster & Vedder 2000, p. 400, 401 and 633 et seq.
compatible with the common market or not. In practice, the Commission will now check whether European subsidies give rise to a distortion of competition.

13.2.3 Distortion of competition

The third element requires that such aid threatens to distort or actually distorts competition. It could be said that any aid will necessarily distort competition since it places one firm or a group of firms at a competitive advantage compared to the other firms that do not receive such aid. Initially, the Commission appeared to take this stance. The Court has, however, on later occasions demanded some analysis of the market to show that competition is distorted or, in the case of aid that has not yet been granted, likely to be distorted. This market analysis does not have to be as detailed as that pursuant to Article 81, 82 and the Merger Regulation.

Now that we have set out the extent to which a distortion of competition needs to be investigated and demonstrated let us turn our attention to the substantive test that is used to determine whether there is a distortion of competition. The Court has set out its approach in this respect in the Italian Textiles case. In this case the Court proposed to look at the competitive situation before and after the state measure and compare the two:

' [...] the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure in issue. This position is the result of numerous factors having varying effects on production costs in the different member states [...] unilateral modification of a particular factor of the cost of

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31 Cf. the answer given by Mr. Monti, Commissioner for Competition Policy, on written question E-1680/99 by MEP Von Wogau, OJ 2000 C 170 E/73.
32 Hancher, Ottervanger & Slot 1999, p. 36.
34 Cf. Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372/5, footnote 1, where the Commission indicates that the approach to market definition set out in the Notice is not of primary interest in state aid cases. Cf. e.g. Case T-55/99, Confederación Española de Transporte de Mercancías v. Commission (Plan Renove Industrial), [2000] ECR II-3207, paras. 102-105.
production in a given sector of the economy of a member state may have the effect of disturbing the existing equilibrium'.

The wording of the test thus proposed by the Court leaves no room for a *de minimis* rule according to which the 'existing equilibrium' will not be appreciably distorted by an aid that is *de minimis*.\(^7\) However, a number of questions are still left unanswered by this test. For one, could it be argued that a government measure that merely compensates for the deterioration of the competitive position of the national industry as a result of new (environmental) standards does not distort competition and therefore falls outside the scope of Article 87(1)? Tempting as it may seem to argue the opposite, the answer should nevertheless be in the negative. The Court has consistently held that, as far as Community law is concerned, member states are, put bluntly, free to allow the competitive position of their national industry to deteriorate.\(^8\) Furthermore, the Court has also held that a distortion of competition in one member state does not compensate a distortion in another. Member states are therefore not free to grant state aid simply because another member state does the same.\(^9\) Similarly, the mere fact that a measure only serves to bring certain costs in one member state in line with the (lower) costs in other member states will not keep it from constituting state aid.\(^10\) On the other hand, an investment by a public authority that could also have been done by a private investor acting according to the principles of a market economy will not constitute a state aid.\(^11\) According to the Court, it is necessary to determine whether\(^12\)

*‘in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size [...], having regard in particular to the information available and foreseeable developments at the date of those contributions.’*

This test is based is based on the premise that any investment made under market conditions, whether by a public authority or by a private investor, does not constitute state aid. The further assumption is that any private investor will

\(^7\) We shall look closer at the concept of *de minimis* in connection with Article 87(1) in paragraph 13.2.5 infra.

\(^8\) Case C-11/92, The Queen v. Secretary of State for Health, ex parte Gallaher Ltd et al. (Gallaher), [1993] ECR I-3545, paras. 18-22.


\(^11\) This is the so-called Market Economy Investor principle. See, for a case in which this principle is applied: Case C-482/99, Stardust Marine, [2002] ECR II-4397, paras. 68 et seq.

\(^12\) Ibid., para. 70.
act economically rational in deciding whether or not to invest whereas public authorities are considered to also base their decision on non-economic (political) factors. It is submitted that in today's market, where sustainable banking is becoming more important, the market economy investor principle should not rely purely on the economic rationality but also take into account factors related to the sustainable development. In the current market where the 'three P's\(^4^4\) play an increasingly important role in corporate governance and sustainable investments in the Netherlands have increased by €760 million to well over €6 billion, environmental protection requirements can no longer be juxtaposed to economically rational behaviour.

Moreover, in the recent Adria-Wien case, the Court has held that Austrian legislation pursuant to which rebates were granted from an eco-taxation scheme to firms manufacturing goods, constituted a state aid precisely because it sought 'to preserve the competitiveness of the manufacturing sector, in particular within the Community'.\(^4^5\)

What, then, should we think of governments that pay damages for unlawful acts by those governments or the situation where a government pays for a service provided to it? With regard to the former, the Court has held in Asteris that damages that governments must pay to compensate for damage caused by the governments to individuals do not constitute state aid.\(^4^6\) As regards the latter, in ADBHU, the Court addressed the question of indemnities for services provided by waste oil collection and disposal companies.\(^4^7\) In that case it was argued that the provisions of the Waste oils directive that provide for the possibility of paying indemnities to such companies were contrary to Article 87. The Court held that:\(^4^8\)

'In that respect the Commission and the Council, in their observations, rightly argue that the indemnities do not constitute aid within the meaning of articles [87] et seq. of the [EC] Treaty, but rather consideration for the services performed by the collection or disposal undertakings.

It is also important to note that according to the second paragraph of article 13 of the Directive 'the amount of these indemnities must be such as not to cause any significant distortion of competition or to give rise to artificial patterns of trade in the products'.

\(^4^1\) Ibid., para. 71.
\(^4^2\) This refers to 'Planet, people and profit' as the new management maxim.
\(^4^3\) Case C-143/99, Adria-Wien, [2001] ECR 1-8365, para. 54.
\(^4^5\) Case 240/83, Procureur de la République v. Association de Défense des Brûleurs d’Huiles Usagées (ADBHU), [1985] ECR 531, paras. 16 et seq.
\(^4^6\) Ibid., paras. 18 & 19.
Therefore, payment for services rendered will not constitute state aid as long as there is no overcompensation. This reasoning seems to have been behind the Commission's decision in the Danish Waste Tyres case as well. The case concerned a levy imposed on all new or rerubbered tyres that were manufactured in or imported to Denmark. The proceeds of this tax will be used to compensate the collection companies' extra costs incurred in collecting the waste tyres and transporting them to a rubber-powder plant. The Commission was of the opinion that the tax only constituted remuneration for a service delivered by the collection companies and therefore did not constitute state aid. Similarly, the Commission concluded that compensation paid by the Danish government to waste oils collection companies as part of the implementation of the Waste oils Directive was only a remuneration for services.

The Court has addressed this issue most recently in the Ferring case. This case involved a preliminary reference on the compatibility of a French system a taxation whereby only wholesale sales from 'laboratories' were taxed whereas similar sales from wholesale pharmacists were not taxed. The idea behind the tax was apparently to compensate the extra costs that such pharmacists faced compared to the laboratories because of the special obligations upon them to always keep a minimum stock. According to the Court such a tax did not constitute a state aid simply because laboratories were treated differently from wholesale pharmacists if this difference in treatment was 'objectively justified by reasons related to the logic of the system'. The Court then repeated the objective of the French legislation, which was to compensate the extra costs. After that the Court reiterated and applied its standard case law with regard to Article 87(1) only to come to the conclusion that the tax exemption constituted state aid leaving aside the obligation to keep a minimum stock. Then, the Court shifted its attention to the minimum stock requirement resting upon the wholesale pharmacists. The Court concluded, while referring to the ADBHU case, that insofar as the tax advantage only compensates the extra costs resulting from the service that they provide to the public, it did not constitute state aid. Moreover, the Court reiterated that, provided that the tax exemption does not exceed the costs resulting from the minimum stock obligation, no real advantage would be conferred upon the wholesale pharmacists because the only effect of the tax is to put the laboratories and the pharmacists on an equal competitive footing.

49 Commission XXIVth Competition Report (1994), para. 388 (p. 193) and Annex II section 2.14 (p. 532 & 533)
51 Case C-53/00, Ferring, [2001] ECR I-9067.
52 Ibid., para. 17.
53 Ibid., para. 19.
54 Ibid., para. 22.
55 Ibid., para. 27.
A related though slightly different question is whether compensation for lawful acts by the government qualifies as aid. In the Netherlands and in many other member states it is commonly accepted that disproportionate costs arising from government actions with regard to a company or a sector of the industry can be compensated. Sections 15.20 and 15.21 of the Environmental management act (Wet milieubeheer) provide for the possibility of a compensation of costs that 'cannot reasonably remain the permit holder's sole responsibility'. The local authorities that are responsible for the permit give such compensation. However, the Environment Minister can in turn compensate these local authorities. The rather general criterion of 'costs that cannot reasonably be borne by the permit holder' is elaborated in a circular letter by the Environment Minister. Whether the hands and feet sufficiently limits the amount of discretion for the selectivity requirement to no longer be met, will be examined in general below in paragraph 13.2.4.

Could it be said that in cases where companies' extra costs resulting from stricter environmental legislation are compensated, that compensation is actually a remuneration for a service provided in the form of a higher level of environmental protection? It is submitted that in such cases there is no service as there was in ADBHU or Danish Waste Tyres. For this to be successfully argued, it would have to be established that achieving a high level of environmental protection is solely the government's task. Only then could it possibly be said that a service is performed for the government for which remuneration should take place. However, in accordance with the polluter pays principle, (financial) responsibility for the environment rests with the polluter. Therefore, as a rule, compensation for costs resulting from environmental requirements imposed by the member states will not fall outside the scope of Article 87(1) as remuneration.

The only exception to this rule can also be traced back to the polluter pays principle. In cases where the polluter no longer exists or cannot be held responsible, compensation of the costs by the government will not constitute state aid. It could be said that in such cases the government is indeed the only party that can be considered responsible for the environment. This occurs primarily with regard to soil pollution. With regard to the rehabilitation of industrial sites the

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56 See with regard to this issue: Jans 2000, p. 298. He appears to consider that the issue turns on the degree of discretion that the authorities have in their decision to grant compensation. The degree of discretion, however, appears rather to relate to the selectivity requirement and will as such be addressed in paragraph 13.2.4 infra.

57 The Dutch text speaks of '[..] kosten die redelijkerwijze niet of niet geheel voor rekening van de vergunninghouder behoren te blijven'.

Commission has stated in general that compensation for such costs in cases where the polluter cannot be identified or cannot be called to account, will not constitute state aid. In the *Kiener Deponie Bachmanning* case the Commission recognised that the contribution by the Austrian government to the rehabilitation of an old landfill site did not constitute state aid with regard to the firm that was responsible for the pollution. The polluter, Kieba, had gone into insolvency and was being liquidated. As such, it could neither be held responsible nor receive an advantage.

13.2.4 Selectivity

The fourth element demands that the measure must favour certain firms or the production of certain goods. This is often referred to as the selectivity requirement. This element is closely connected to the third element, that competition be distorted, and is helpful to distinguish general measures from state aids. If, for example, a member state decides to lower corporate tax rates across the board then such a measure will not benefit a select group of undertakings and will therefore fall outside the scope of Article 87. Should, however, the effect of such a seemingly general measure of economic policy be that there is a benefit to one group of firms, the measure will constitute (sectoral) aid.

The distinction between general measures and general aid schemes hinges on the criteria that are used and the discretion that the authorities have in their decisions with regard to the actual grant of the aid. If such criteria are general and not related to a specific branch of industry or a specific company the measure is likely to fall outside Article 87. Similarly, if there is no discretion in the administration of the scheme (i.e. the application of the criteria), the measure will not constitute an aid. The Court has addressed the issue of selectivity in the *DMT* case.

'It follows from the wording of Article 92(1) [Now Article 87(1)] of the Treaty that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body

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61 D'Sa 1998, p. 82 et seq., Hancher, Ottervanger & Slot 1999, p. 29 et seq.
64 Ibid., see notably the opinion A-G Warner at p. 603.
granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature. [Emphasis added]

Therefore, discretion on the part of the authorities that grant the aid, can be seen as a major factor leading to selectivity. However, as the Adria-Wien case shows, even seemingly general systems of taxation that confer no discretion with regard to exemptions may be considered to fulfil the selectivity criterion. Adria-Wien concerned the compatibility with Article 87 of an Austrian eco-taxation scheme whereby electricity and natural gas consumption were taxed. Interestingly, the tax law envisaged, upon application, a rebate for firms 'whose activity can be shown to consist primarily in the production of goods'. The question of selectivity did not prove to be straightforward to answer in this case as is evidenced by the fact that the opinion and judgment diverge in this regard. With regard to the national judge's second question of whether an ecology tax that allows for a rebate for all undertakings concerned constitutes state aid, the Advocate-General and Court agree on the answer to be given. Both come to the conclusion that such a measure does not fulfil the selectivity requirement and therefore does not constitute aid within the meaning of Article 87.

The first question asked by the national judge concerns the situation where the tax rebate is granted only to undertakings that are primarily involved in the manufacture of goods. Whether or not the selectivity requirement was met here, was the subject of a diverging opinion by the Advocate-General and Court. According to the Advocate-General the main question in this regard was whether the rebate amounted to a derogation from the standard application of the system. The Commission, having set out the Court's standard case law with regard to rebates from taxation and social security schemes, considered this to be the case. Advocate-General Mischo, however, did not consider there to be a derogation from the general rule. Citing the Danish and Austrian governments, he contends that the Austrian scheme amounts to a new general ecology tax which, from its outset on, followed the principle that the primary and secondary sectors of the economy should not be disproportionately taxed. Mischo considers that the Austrian eco-tax is based on objective criteria and does not leave any discretion to the administration as regards the rebate. Therefore, he concludes that the scheme in its totality, rebates and all, constitutes the normal legal situation so that there cannot be said to be a derogation. The Commission relies

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68 Ibid., Opinion of A-G Mischo, para. 42.
on the Court's judgment in Maribel bis/ter\(^{69}\) to come to the conclusion that the mere fact that a scheme applies to a large number of diverse industries does not make it a general scheme.\(^{70}\) The Advocate-General recognises the Commission's point in this respect but goes on to hold that, in his mind, the rebates still do not constitute a derogation from the normal rules. He does this by pointing to the proposed directive for the taxation of energy products. According to Mischo, the Commission's involvement in this proposal shows that the Commission accepts that not all undertakings should be taxed an equal amount under an eco-taxation scheme.\(^{71}\) However, he immediately recognises that the criterion adopted by the Commission in its proposal does not distinguish between different sectors of industry but rather turns on the energy consumption of an individual firm. Nevertheless, the Advocate-General is of the opinion that the criterion for a rebate adopted in the Austrian taxation scheme is valid and does not constitute a derogation.\(^{72}\) In this respect, and not so much in connection with the selectivity requirement, the Advocate-General goes on to consider that a distortion of competition or an effect on intra-community trade do not seem very likely in view of the fact that the tax amounts to only 0.35 per cent of the net production value.\(^{73}\)

The Court, however, did consider the tax rebate for firms that primarily produce goods as a derogation. To come to this conclusion the Court first repeated its standard case law according to which any advantage provided by the state can constitute a state aid.\(^{74}\) After that the Court focuses the attention on the issue of selectivity and repeats the arguments brought forward by the Danish and Austrian authorities.\(^{75}\) The Court first repeats its reasoning from the Maribel bis/ter case. Secondly, the Court notes the fact that a justification for the difference in treatment for firms that are primarily active in the production of goods is nowhere to be found in the Austrian legislation. The Court concludes by stating that\(^{76}\)

'[...] the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.

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\(^{69}\) Case C-75/97, Belgium v. Commission (Maribel bis/ter), [1999] ECR I-3671.


\(^{71}\) Ibid., Opinion of A-G Mischo, paras. 53-56.

\(^{72}\) Ibid., Opinion of A-G Mischo, para. 61.

\(^{73}\) Ibid., Opinion of A-G Mischo, paras. 65-80.

\(^{74}\) Ibid., paras. 38-41.

\(^{75}\) Ibid., paras. 43-47.

\(^{76}\) Ibid., paras. 52 & 53.
It follows from the foregoing considerations that, although objective, the criterion applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid."

The conclusion must therefore be that objective criteria for a rebates or exemptions, even when they do not leave any discretionary room for authorities, will not suffice to take such rebates or exemptions ousted the scope of Article 87(1). For this to occur such criteria must be justified by the nature or general scheme of the legislation.

However, the ill fate that thus befell the Austrian eco-taxation scheme should not have to bleaken the prospects for tax differentiation in other eco-taxation schemes. Indeed, the Court's *obiter dictum* shows that it considers that the rebates were actually intended to preserve the competitiveness of the Austrian *vis a vis* its European competitors.27 If the Court has identified this as the rationale, then its reluctance to allow this measure to fall outside the scope of Article 87 is perfectly understandable. As was mentioned above, this ruling does not rule out tax differentiation in eco-taxation schemes completely.

Consider, for example, an eco-taxation scheme that taxes energy use but where a rebate is granted for gas appliances that emit less carbon dioxide. It is submitted that such a tax would be justified, in the Courts words, 'by the nature of the legislation'. Even though an advantage would be granted, it would follow from the general nature of the system, which is to encourage environmental protection and therefore not constitute state aid. The Court's case law therefore starts to remind one of the 'inherent restrictions-approach' that can be identified in other areas of Community law as well.28

### 13.2.5 Affecting intra-community trade

Pursuant to the fifth element, trade between member states must be affected. Above, we have seen that the court will demand some market analysis from the Commission in order to show that competition was or is likely to be distorted. With regard to the connected requirement of an effect on intra-community trade, the Court has adopted an approach the logic of which seems reminiscent of that in the *VCH* case. According to the Court state aid will readily affect intra-community trade because:29

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28 Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL* et al. (Deliège) [2000] *ECR* 1-2549, para. 69. See further, *supra*, paragraph 8.4.2.4.
'When state aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid.'

This type of per se reasoning by the Court seems can still be seen in the Court's case law. In the Adria-Wien case, the Advocate-General explicitly doubted whether the measure in question, given that it amounted to 0.35 per cent of the net value only, could possibly distort competition or affect trade between member states. The Court did not address the issue but simply came to the conclusion that the measure constituted a state aid within the meaning of Article 87(1). This ruling shows that the Court still has not adopted a \textit{de minimis} rule with regard to Article 87.\textsuperscript{80}

What then, are we to think of the fact that the Commission has a long-standing policy in this field and, moreover, the fact that the Commission has recently issued a \textit{de minimis} Regulation\textsuperscript{81} The \textit{De minimis} Regulation was adopted pursuant to Article 2 of the so-called Enabling Regulation\textsuperscript{82} that was itself adopted on the basis of Article 89 EC. According to Article 89, the Council may lay down appropriate regulations for the application of Articles 87 and 88 EC. Therefore, it can now be said the \textit{De minimis} Regulation now has a clear legal basis.

If all the five requirements of Article 87(1) are fulfilled, a measure will constitute state aid and be considered 'incompatible with the common market'. However, as with any prohibition in the Treaty, there are also exceptions to the incompatibility with the common market prescribed in Article 87(1). These are to be found in the second and third paragraph of Article 87.

\textbf{13.3 Exempted and exemptible aid – Article 87(2) and (3)}

Even if a measure constitutes an aid within the meaning of Article 87 all is not lost since Article 87(2) and (3) contain a number of types of aid that are compatible or may be considered to be compatible with the common market. The difference between compatibility in the second paragraph and the fact that the third paragraph speaks of 'may be considered to be compatible' denotes an important difference with regard to the discretion that the Commission has in applying the two paragraphs. With regard to the second paragraph, the Commission can, basically, only decide whether or not a state measure falls within the wording of one three types of state aid mentioned there. If this is the

\textsuperscript{80} Cf. Hancher, Ottervanger & Slot 1999, p. 38.


\textsuperscript{82} Regulation 6994/98 On the Application of Articles 92 and 93 of the Treaty Establishing the European Community to Certain Categories of Horizontal State Aid, OJ 1998 L 142/1.
case, the measure shall be compatible with no room for discretion on the part of
the Commission. With regard to the third paragraph things are different in that
the Commission has a wide margin of discretion in deciding whether or not one
of the four exemptions listed there indeed applies to a state aid scheme.83 Below,
we shall look closer at the exemption for aid having a social character (Article
87(2)(a)) and aid granted to compensate the damage caused by natural disasters
(Article 87(2)(b)) because these may be applicable in an environmental context.

With regard to the second paragraph, we will not consider the exemption for
aid granted to certain areas of Germany affected by the division of the Country
(Article 87(2)(c) for the simple reason that, following the reunification of
Germany, this provision has lost much of its meaning.84 For similar reasons we
shall only be addressing the ‘European interest exemption’ (Article 87(3)(b)) and
sectoral aid exemption (Article 87(3)(c)) of the four types of exemption listed in
the third paragraph. Pursuant to Article 87(3)(e), the Council may exempt other
forms of aid. As this provision has seen only very limited use to this day and it is
not foreseeable that it will be used in an environmental context, we will not look
at this provision.85

13.3.1 Aid having a social character – Article 87(2)(a)

With regard to Article 87(2)(a) there is precious little case law.86 To our knowledge this provision has, to this date, been invoked only once in a
case before the Court. In that case, Benedetti v. Munari, the Court was unable
to address the issue in great depth because the referring judge had neglected to
provide the necessary details.87 Similarly, Advocate-General Reischl made only
a few fairly general comments on the issue in that case. It has been considered
on the basis of Benedetti v. Munari that Article 87(2)(a) requires that the aid
must benefit the consumers and not the firms that supply the consumers.88 It
is submitted that this already follows from the clear wording of Article 87(2)(a)
whereas the judgment is not particularly conducive in this respect.

Pivotal to this provision is the concept of ‘aid having a social character’. We
would submit that the word ‘social’ relates only to the fact that the aid must be
granted to individual consumers and does not serve to indicate or limit the scope

85 See, with regard to Article 87(3)(e): Hancher, Ottervanger & Slot 1999, p. 80.
86 As is evidenced by the fact that Hancher, Ottervanger & Slot devote less than a page to it, Hancher, Ottervanger & Slot 1999, p. 70. In similar vain D’sa takes one page to address this provision, D’Sa 1998, p. 129.
88 Hancher, Ottervanger & Slot 1999, p. 70.
of the objectives of the aid measures. Thus, it relates more to the means than to objectives of the national measures. Environmental goals will therefore not take a state aid outside the scope of this provision as is evidenced by the Commission's practice with regard to this provision.

The only proviso with regard to Article 87(2)(a) is that such must be granted without discrimination as to origin of the products concerned. The Commission has applied this proviso in two early decisions concerning a Dutch and a German scheme designed to lower the costs of flour.\textsuperscript{89} According to the Commission, the schemes at hand were aimed at increasing the consumption of nationally produced flour and therefore fell foul of Article 87(2)(a).

However, despite its relative obscurity in the Court's case law, the Commission has used Article 87(2)(a) in a number of environmental cases. In the German Catalytic converter case, the scheme at hand gave a tax exemption to consumers that bought cars with catalytic converters. This tax reduction was aimed to make purchase of such a car more attractive and thereby encourage environmental protection. The Commission was of the opinion that this measure qualified under Article 87(2)(a) provided that it did not result in discrimination contrary to Article 28 EC.

In its XXIVth Competition Report the Commission paid closer attention to the concept of discrimination. The Commission comes to the conclusion that is should be taken to mean that there may be no discrimination as to the origin of the supplier rather than that there should not be any distinction between the product for which the aid is given and competing products.\textsuperscript{90}

In such a case it may be wondered whether there is a state aid in the first place. If the term 'individual consumers' is taken to exclude individuals that perform an economic activity (i.e. one-man undertakings), then it is hard to see any advantage being granted to a specific firm. This would appear to be the stance taken by the Commission in its 1994 Guidelines on State Aid for Environmental Protection (1994 Guidelines).\textsuperscript{91} In paragraph 3.5 of these Guidelines the Commission states that measures that encourage the purchase of environmentally friendly products will not constitute aid in the first place because they do not confer a 'tangible financial benefit' upon one or more undertakings.


\textsuperscript{90} Hancher, Ottervanger & Slot 1999, p. 70.

13.3.2 Aid to compensate damage caused by natural disasters – Article 87(2)(b)

It may be doubted whether Article 87(2)(b) can in the first place be used to grant environmental aid. It is submitted that as such this is not the case. The wording of this provision makes it clear beyond doubt that only the aid to make good the damage caused by natural disasters or exceptional circumstances can fall within Article 87(2)(b). All aid that serves another objective, such as to further develop a region after it has been struck by a natural disaster will fall outside its scope. Similarly, aid to prevent the (re) occurrence of a natural disaster will probably fall outside the scope of Article 87(2)(b).

Therefore, the importance of the exemption for natural disasters for the environmental context is limited at best. Environmental considerations may even play a negative role in this respect. Consider, for example, flooding as a natural disaster. It is common ground that many floods are at least partly the result of extensive alterations of the environment in the upstream regions of rivers. Excessive logging and the development of entire mountain ranges into ski slopes, for example, will greatly reduce the capacity of these mountainsides to absorb water and hence increase the risk of floods in downstream areas. A correct application of the polluter pays principle would mean that the costs resulting from floods should, save faults by the downstream authorities, be borne by the persons responsible for the alteration of the upstream environment. It is recognised that this approach is not devoid of practical problems. However, the Water Framework Directive with its river basin management approach may be helpful in this respect.

13.3.3 Aid for important projects of common European interest – Article 87(3)(b)

Of the two objectives for aid schemes mentioned in Article 87(3)(b), we will only be paying attention to aid that is granted ‘to promote the execution of an important project of common European interest’. Certainly, answering the question whether a project is important or not involves great deal of discretion and therefore we will leave this issue as it is.

A second question is what constitutes a project of ‘common European interest’. The fact that a project needs to be of common European interest indi-

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93 See for a list of examples of such disasters: Community Guidelines for State aid in the agriculture sector, OJ 2000 C 28/2, section 11.2.2 at p. 14.
cates that it has to be transnational in nature. This can be so because several member states are involved in it or because the project addresses a transnational problem. Of course, this is where environmental protection enters the picture since the environment and its protection are typically transboundary affairs.

This view has been confirmed in the *Glaverbel* case. This case concerned a Belgian scheme according to which investment aid would be granted to a Belgian glass producer, Glaverbel, for the improvement of a production line. As a result of these improvements, energy use and working condition would be ameliorated. This case arose from an action for annulment of the Commission's decision prohibiting the implementation of the aid scheme. The applicants based their case in part in the fact that the aid would promote an important project of common European interest since Glaverbel participated in an ESPRIT project concerning the design of thin-layer photovoltaic cells. The Commission considered in its decision that

'A project may not be described as being of common European interest for the purposes of Article 87(3)(b) unless it forms part of a transnational European programme supported jointly by a number of governments of the member states, or arises from concerted action by a number of member states to combat a common threat such as environmental pollution'.

The Court was of the opinion that the Commission had not committed a manifest error of assessment in adopting this policy. How, then are we to understand the Commission's refusal to allow aid to be granted to Glaverbel who participated in a joint European project that was meant to combat a common threat? To answer this question we will probably have to look at the facts of the case. The Advocate-General qualifies the reasoning employed by Glaverbel to show that it could qualify for the common European interest exemption, as terse. Indeed, the connection between the aid and the improvement of the environmental situation through a transnational action does not, to say the least, immediately become clear. Moreover, as far as the Court was concerned, the only result of the Belgian aid measure would be to enable the use of a new production method, which in itself was insufficient for the measure to fulfil the criteria for an exemption pursuant to Article 87(3)(b). The Court considered this to be all the more so if, as was the case, the products would have to be sold on a saturated market.

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13.4 The Guidelines on state aid for environmental protection

When, in the 1970's, the Commission was faced with the increasing use of environmental subsidies, the Commission considered it necessary to provide some guidance as to its position on the role of environmental concerns in the rules on state aid. The Commission appears to have always done this from the twofold perspective of the polluter pays principle and the need to ensure undistorted competition. In Part I of this research we have already addressed the general issues arising from the trilateral relation between the polluter pays principle, distortions of competition and environmental protection. With regard to state aids the following can be said. As the Commission saw it and still sees it, the end-situation should be one where the polluter pays principle is fully applied and all environmental costs are completely internalised. State aids run directly counter to this internalisation by transferring part of the environmental costs. The Commission thus recognised the importance of regulating environmental aids from both an environmental and a competition point of view.

This recognition resulted in nine paragraphs in the Fourth Annual Competition Report (1974) in which the Commission set out its stance with regard to environmental subsidies. Back then, the Commission optimistically considered a transitional period of six years, i.e. until 31 December 1980, sufficient to ensure the full implementation of the polluter pays principle while at the same time recognising the enormous changes that would have to take place throughout society. The Commission thus distinguished between, on the one hand, its stance towards environmental aid during the transitional period and, on the other hand, its policy with regard to such aid granted after the transitional period or during the transitional period but not fulfilling the requirements (the so-called general principles). According to the Commission, during the transitional period, state aid would qualify for an exemption under Article 87(3)(b) EC as aid necessary for the execution of 'important projects of common European interest' provided that three requirements were fulfilled. Firstly, the aid would have to be necessitated by new major obligations relating to environmental protection. Secondly, the aid would have to be granted for the financing of additional investments in plants already in operation. Thirdly, the Commission specified a degressive maximum aid percentage (45 per cent in the years 1975-1976, 30 per cent in the years 1977-1978 and 15 per cent in the years 1979-1980).

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101 This section is based on an Article that appeared in the (2001) ECLR 365-373.
103 Ibid., paras. 176-183.
104 Ibid., paras 178 & 181.
105 Ibid., para 181.
Interestingly, the Commission has thus only specified a framework for the assessment of environmental investment aid. Operating aid granted because of environmental considerations is therefore outside the scope of these guidelines.

For environmental aid exceeding the limits set out above, the Commission provided the Member States with principles of general application.\textsuperscript{106} Again, the Commission only addresses the issue of investment aid. The basic tenor of these general principles is one according to which environmental aid exceeding the limits of the guidelines is to be granted even more sparsely. Basically, such aid is only to be granted in cases where sudden major changes in environmental obligations are of such a magnitude that going concerns are faced with difficulties that would threaten the equilibrium in a certain region or industry. Importantly, these general principles allow for an exception to this strict rule in situations where international competition was such as seriously to handicap the firms that would have to abide to the new environmental standards.\textsuperscript{107} Such aid would qualify for an exemption pursuant to Article 87(3)(a) or (c).\textsuperscript{108}

In 1980 the Commission's assertion that a six-year transitional period should suffice to implement the polluter pays principle was indeed proven to have been overly optimistic. The economic recession that had set in just after 1974 and the fact that harmonisation of environmental legislation on a European level proceeded not as fast as had been hoped, forced the Commission into an additional transitional period.\textsuperscript{109} Accordingly, environmental aids would be allowed for another six-year transitional period this time until 31 December 1986. Such aids were exempted under Article 87(3)(b) provided that they were for investments aimed at the implementation of new environmental standards, did not exceed 15 per cent and were granted only for the adaptation of plants already in operation for two years before the entry into force of the new standards.\textsuperscript{110}

Furthermore, the Commission specified a reporting obligation. The Guidelines remained silent with regard to environmental operating aids.

Finally, in 1986 the Commission realised that its transitional approach was no longer warranted.\textsuperscript{111} The need to protect the environment as well as the need to avoid distortions of competition was there to stay. The criteria set out in the 1980 Guidelines were to be applied for the period of the Fourth Environmental Action Programme until 1992. However, the Commission reserved the right to alter its stance with regard to environmental aids on the basis of the outcomes of a review of the application of the polluter pays principle. Following two temporary prolongations of the 1980 Guidelines, 1994 saw the publication of a new set of guidelines.

\textsuperscript{106} Ibid., para. 182.
\textsuperscript{107} Ibid. at p. 105.
\textsuperscript{108} The Commission stated this only in the Xth. Competition Report (1980), para. 223.
\textsuperscript{110} Ibid., para. 226.
A first striking feature when comparing the 1994 Guidelines with the previous guidelines is the much more comprehensive character of the former. For the first time, the Commission gave its opinion not only on investment aids but also on environmental operating aids and horizontal measures. All in all, the rules governing environmental aids appeared to have become much more precise which should not come as a surprise since the Commission has gained quite a lot more experience in the mean time. Generally, the 1994 Guidelines allowed for 15 per cent investment aid for adaptation to new standards for all existing firms. Firms undertaking environmental protection in the absence of Community measures or going beyond what is required could be granted 30 per cent investment aid. With regard to operating aid, the Guidelines did not provide much guidance other than indicating the Commission's general stance that such aids will not easily be exempted. More specifically no rate or period over which aid could be granted, was indicated. The legal basis for the exemptions was changed from Article 87(3)(b) into 87(3)(c) as the Commission considered environmental aid as 'aid to facilitate the development of certain activities [...] where such aid does not adversely affect trading conditions to an extent contrary to the common interest'. However, the Commission explicitly allowed for the possibility of exempting state aid schemes at higher rates that contribute to important projects of common European interest.

The 1994 Guidelines were to be reviewed in 1996. This review has not resulted in any changes. According to paragraph 4.3 the Guidelines were to expire on 31 December 1999. On 22 December 1999 their validity was extended until 30 June 2000. This half-year, however, proved insufficient and on 28 June 2000 a further extension was granted until 31 December 2000.

In the meantime, the Environment Council provided an interesting insight into the dynamics involved in drafting such Guidelines. The conclusions of the 2278th. and 2295th. meeting of the environment council both contained a paragraph basically stating that the Commission had to take more account of (national) environmental considerations. Interestingly, the Commission at one point considered 1 January 2001 a feasible date for the new Guidelines to enter into force whereas later on the date of 1 July 2001 was named.

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114 Ibid., para. 3.6.
115 Ibid., para. 3.7.
116 To be found on the internet: <http://ue.eu.int/newsroom/>.
117 Conclusions of the 2278th. Environment Council meeting, to be found on the internet: <http://ue.eu.int/newsroom/>.
118 Answer by Monti to written question P-0441/00 by Breyer, OJ 2000 C 303E/194.
Moreover, in 1998 the Council adopted Regulation 994/98 enabling the Commission to adopt group exemption regulations in the field of state aids.\(^{18}\) Interestingly, Article 1(1) sub (a) under (iii) explicitly allowed for a Commission group exemption regulation for state aids in the field of environmental protection. Particularly in the light of this explicit reference in the enabling Regulation it could be wondered whether the delays were caused by difficulties encountered in drafting such a regulation.\(^{19}\) February 2001, however, saw the publication of Guidelines instead of a group exemption regulation. Why the Commission's (extensive) experience with environmental aids did not result in the adoption of a group exemption regulation\(^{20}\) is somewhat obscure. A good guess would seem to be the dynamic nature of the matter involved. The environment, and as a result, environmental protection has not stopped providing us with new challenges. The 2001 Environmental aid Guidelines, for example, devote considerable attention to carbon dioxide reductions in the wake of the Kyoto Protocol.\(^{121}\) Climate change as an environmental problem was still largely unknown in 1994. In this respect it can be doubted whether a group exemption will ever be the right tool.

### 13.5 The 2001 Environmental aid Guidelines

When looking at the 2001 Environmental aid Guidelines themselves, a first impression is that they have become even more precise and encompassing than the 1994 Guidelines. In a total of 11 chapters (numbered A-K) and 12 pages and one annex the Commission gives guidance with regard to environmental state aids. Below, we will analyse the 2001 Environmental aid Guidelines chapter by chapter.

#### 13.5.1 Introductory chapters

In an introduction (chapter A) the two main principles vis-à-vis environmental aids are set out. On the one hand, the integration principle laid down in Article 6 EC according to which environmental considerations must be

\(^{18}\) Regulation No. 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid, OJ 1998 L 142/1.

\(^{19}\) See: Jans, Sevenster & Vedder 2000, p. 416 et seq.


\(^{121}\) Communication from the Commission on EU policies and measures to reduce greenhouse gas emissions: Towards a European Climate Change Programme (ECCP), COM (2000) 88.
integrated into the Commissions policy on state aids, and, on the other hand, the polluter pays principle. On the basis of these two principles the Commission comes to the conclusion that environmental aids may only be allowed where they are necessary to bring about environmental protection and sustainable development without having disproportionate effects on competition and economic growth. This last addition, that the aid should not have a disproportionate effect on economic growth, is somewhat odd and appears to be new when compared with the 1994 Guidelines.

In the third chapter (C), this general policy brief is further substantiated. Again the integration and polluter pays principles are abundantly (and, it might be added, not always that clearly) referred to. The bottom line, however, is that whereas the granting of state aids is at odds with the polluter pays principle, such aid may nonetheless be justified in two instances. Firstly, where not all costs can be internalised and the aid is therefore to be seen as a temporary second-best solution on the ground that it provides an incentive for firms to adapt to standards. Secondly, aids may be used as incentive for firms to protect the environment either in the absence of standards, or to go beyond what is required by standards. However, since 1994 much has changed and the Commission no longer considers that the granting of aid can be justified by the absence of internalisation. In practice, this comes down to a prohibition of aids granted for investments that merely aim at facilitating firms to comply with new or existing standards (with an exception for SMEs). Aids encouraging firms to go further than Community standards may of course still be granted. With regard to the energy sector the Commission sets out its approach in a special paragraph. In this paragraph some attention is devoted to the problem of reductions or exemptions in eco-taxation schemes. Such reductions constitute operating aid but may be considered necessary for the acceptability and thus adoption or continuation of eco-taxation schemes. Subject to certain conditions exemptions or reductions in eco-taxation schemes may be allowed for a period of 10 years. Furthermore, the Commission reiterates its positive stance with regard to measures to promote renewable energy and the combined production of heat and energy.

The second chapter (B) contains the definitions and sets out the scope of the Guidelines. The definitions generally sound familiar in their wide-ranging wording. An interesting example of a 'dynamic reference' may be found in the definition of renewable energy sources. This definition is linked to that in a Commission proposal for a directive. As regards the scope, there are a number

\[\text{\textsuperscript{122} 2001 Environmental aid Guidelines, OJ 2001 C 37/3, para. 5.}\]
\[\text{\textsuperscript{123} Ibid., para. 23.}\]
\[\text{\textsuperscript{124} Ibid., para. 24.}\]
\[\text{\textsuperscript{125} Ibid., footnote 7.}\]
of changes compared with the 1994 Guidelines. Whereas aid for environmental training fell within the scope of the 1994 Guidelines, the 2001 Environmental aid Guidelines do not apply to such aid. The 1994 Guidelines still apply to the steel industry. This is the result of the reference in Article 3 of Decision 2496/96/ECSC (the Sixth Steel Aid Code). Paradoxically, the Sixth Steel Aid Code was intended to bring the regime for the steel sector more into line with that for the other sectors of the economy. For the moment, however, the result appears to be exactly the opposite. It is expected that the 2001 Environmental aid Guidelines will apply from the expiry of the ECSC Treaty (on 22 July 2002) onwards.

Chapter E contains the general conditions for authorising environmental aid. Reminiscent of the 1994 Guidelines, the Commission has divided its policy in three areas: investment aid, aid for horizontal measures and operating aid.

### 13.5.2 Investment aid

With regard to investment aids (paragraph E.1), the notion of 'eligible costs' is particularly important as the aid intensity for investment aid is described as a percentage of these costs. Eligible costs, according to paragraph 37 of the Guidelines, need to be strictly confined to the extra investment costs necessary to reach the environmental goals. This is particularly important in those cases where the investment will result not only in improved environmental protection but also in an increase in production. In that case, the benefits that result from the increase in production capacity, cost savings during five years following the investment and additional ancillary production will have to be detracted from the eligible costs. With regard to the use of renewable energy, eligible costs are those extra costs compared to the situation where it would have used conventionally produced energy. Logically, eligible costs for investments going beyond Community standards will not include the costs for complying with these standards. Moreover, such investments must lead to actual improvements in the environmental performance and not just constitute general investments that any responsible company should do. In, for example, the Hoffman-La Roche (Orlistat) case the Austrian government argued that aid for pharmaceutical giant Hoffman-La Roche was in conformity with the 1994 Guidelines. This aid was granted for, firstly, measures aiming to reduce the risk of accidents and the effects of such accidents and, secondly, measures aiming to reduce emissions to the air and water. The Commission, however,

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126 Ibid., para. 7.
130 Ibid., on p. 33.
only considered the aid for measures to combat water and air pollution to be justified on the basis of the Guidelines. The aid that was granted with a view to reducing the risk of a serious accident was considered to be general investment.131

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<td>Adaptation of SMEs to new standards</td>
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<tr>
<td>• Improve on Community standards</td>
<td>30 %</td>
<td>+10 % for SMEs</td>
<td></td>
</tr>
<tr>
<td>• Investments in absence of Community standards</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Investments to comply with national standards going beyond Community standards</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Energy saving measures</td>
<td>40 %</td>
<td>+10 % for SMEs</td>
<td></td>
</tr>
<tr>
<td>Combined production of heat and electricity</td>
<td>40 %</td>
<td>+10 % for SMEs</td>
<td></td>
</tr>
<tr>
<td>Promotion of renewable sources of energy</td>
<td>40 %</td>
<td>+10 % when they serve the needs of an entire Community + 10 % for SMEs</td>
<td>Up to 100 % can allowed in which case no further aid may be granted</td>
</tr>
<tr>
<td>Land rehabilitation</td>
<td>100 %, plus 15 % of the cost of the work</td>
<td></td>
<td>If identifiable and able to bear the costs, the polluter should pay and no aid may be granted</td>
</tr>
<tr>
<td>Relocation of firms</td>
<td>30 %</td>
<td>+10 % for SMEs</td>
<td>• Only when relocating from an urban area or Natura 2000 where the activity was lawfully carried out, • the relocation was ordered by a public authority on environmental grounds, and the strictest standards apply in the new location</td>
</tr>
</tbody>
</table>

131 Ibid., pp. 34 & 35.
On top of the aid intensities shown in the table above, an extra bonus for assisted regions is allowed. In these regions the maximum aid intensity is either the rate (including bonuses identified above) following from the table plus an extra 5 per cent for 'Article 87(3)(c)-regions' or an extra 10 per cent for 'Article 87(3)(a)-regions' or, if this is higher, the regional aid rate plus 10 per cent.

A number of interesting things may be noted with regard to the framework set out above. Firstly, with regard to the possibility of granting aid to SMEs for the adaptation to new Community standards it may be interesting to note that reference is made to the date of adoption of new Community standards. Taking into account the fact that the overwhelming majority of European environmental standards is laid down in the form of directives, use of the date of adoption as reference date would appear problematic. The date of adoption invariably is earlier than the date of publication and, a fortiori, the date of entry into force. Moreover, the deadline for implementation of Directives is likely to be even later. As a result, SMEs may receive aid for the adaptation to standards that have not been transposed in national law or that may not even have entered into force. Furthermore, the result of this would seem to be that SMEs have to pay even greater attention to the activities of 'Brussels', a task for which they would generally seem to be ill-equipped. Secondly, the Kyoto Protocol has certainly resulted in a very favourable position of the Commission with regard to energy related investments. However, only renewable energy installations that serve the need of an entire community qualify for an extra 10 per cent bonus. Installations for the combined production of power and heat, on the contrary, seem unable to qualify for such a bonus. Irrespective of this, all the bonuses can add up quite nicely and, interestingly, it may be wondered what the maximum aid intensity would be for an SME running an installation for the combined production of heat and power using renewable sources of energy while serving the needs of an entire community in an assisted region (an altogether no so improbable combination). Thirdly, the Guidelines provide clear and (relatively) unambiguous guidance in cases concerning land rehabilitation and plant relocation. This is most certainly a step forward compared with the Commission’s essentially case-by-case approach in this respect under the 1994 Guidelines. Above, we have noted that in cases where the person responsible for the pollution cannot be identified or held responsible, government funding for the rehabilitation may not constitute aid in the first place. In the 2001 Environmental aid Guidelines, the Commission appears to have taken another approach and considers that such funding will constitute state aid. However, as the Commission allows 100 per cent of the eligible costs plus 15 per cent of the costs of the work to be funded, the differ-

13 See, for example, Article 6 of the proposal for a directive on waste electronical and electrical equipment. OJ 2000 C 365 E/184 which lists 31 December 2005 as the date by which certain recovery targets must have been met by producers.
rence is primarily a procedural one. The aid will be allowed just as it would be in cases where the polluter could not be held responsible, but the authorities will have to notify the aid. Of particular practical importance is the fact that the Commission leaves the decision on whether or not persons are responsible for the pollution, to the national legislature and judiciary. Thus, the Guidelines leave ample scope for serious distortions of competition through differences in regimes according to which polluters can be held responsible.

With regard to energy related investments (energy saving, combined production and renewable energy) the Commission’s policy has also become clearer. Investment aid in these areas is now subject to clear rules whereas under the 1994 Guidelines such aid was treated under the category of investments exceeding standards or where no standards exist. Finally, under the 2001 Environmental aid Guidelines only SMEs can qualify for investment aid for adapting to compulsory standards whereas under the 1994 Guidelines large firms could qualify as well.

13.5.3 Aid for horizontal measures

The chapter on aid for horizontal measures (paragraph E.2) has become substantially more concise compared to the 1994 Guidelines. The basic approach in the 1994 Guidelines, however, was that such measures do not constitute aid in the first place. Despite this considerable narrowing of the chapter on aid for horizontal measures, SMEs are still in for a treat. According to the Commission ‘advisory/consultancy services play an important part in helping SMEs to make progress in environmental protection’. On this ground, aid may be granted in accordance with Regulation 70/2001. All European SMEs are therefore well advised to get some consultancy service in order to stay up to date with the environmental developments in Europe.

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133 2001 Environmental aid Guidelines, OJ 2001 C 37/3, para. 38, where it is stated that ‘By ‘person responsible for the pollution’ is meant the person liable under the law applicable in each Member State [...]’.
135 See. For example, Commission Decision in case N 114/2000, France – Régime d’aides à la gestion des énergies renouvelables, to be found in the State Aid Register. <http://europa.eu.int/comm/competition/state_aid/register/>
138 See above, with regard to investment aid for SMEs.
13.5.4 Operating aid

Operating aid (paragraph E.3) represents in many respects the most interesting category of aid because of its almost *per se* prohibited nature. Since the adoption of the 1994 Guidelines, the Commission has been confronted with a number of eco-taxation schemes where operating aid was granted through reductions or exemptions from eco-taxes. Furthermore, numerous schemes granting operating aid for renewable energy sources have come along since then. The experience gathered with these cases is now laid down in the Guidelines.

The Commission deals firstly with operating aid for waste management and energy saving. Operating aid is allowed only where it is shown to be absolutely necessary. Moreover, it should be limited to the extra production costs when compared to market prices. Finally the aid should be temporary and, in principle, degressive. Operating aid for the management of industrial waste may only be granted where the national standards abided by are more stringent than Community standards or where no Community standards exist so that the competitive position is jeopardised. Apparently, operating aid may not be granted for firms voluntarily going beyond what is required by national or Community standards. The fact that the majority of the more detailed rules in this paragraph concern aid for waste management whereas aid for energy saving is left in the dark, perhaps signals a conceptual difficulty encountered by this reader. Energy saving would, generally, seem to involve measures targeting the loss of energy during a process (by adding extra insulation) or measures aimed at making the whole process more energy efficient (by, for example, lowering the temperature at which process takes place). Such measures would seem to ‘pay themselves back’ because of the lower energy consumption. In this respect, investment aid for the extra investments in the form of extra insulation seems perfectly understandable. Operating aid, however, is a different story altogether. If a new, more energy efficient, installation indeed involves higher operating costs, then it may be wondered what these costs are made up of? If these involve, for example, more or different raw materials or more personnel, shouldn’t the environmental impact of these factors be taken into account in determining the net environmental benefit? The Commission could certainly have provided a bit more guidance on this point. In any case, the bottom line is that operating aid may be granted for five years only and in a ‘degressive’ and a ‘non-degressive’ manner. In the case of degressive aid, the intensity should drop from 100 per cent to zero in a linear fashion over five years whereas the non-degressive variant allows for a 50 per cent aid throughout the five-year period.

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139 Case C-288/96, Germany v. Commission, 2000 [ECR] I-8237, paras. 77 & 78
141 Ibid., paras. 45 and 46.
With regard to reductions or exemptions from eco-taxation schemes, the Commission considers it appropriate to distinguish between national taxation schemes and those taxation schemes that have a Community origin. In the case of purely national taxation schemes, temporary reductions may be allowed. In cases involving taxation schemes having a Community origin, a distinction is made between two cases. Firstly, where the national taxation scheme involves rates higher than the minimum Community rates and the reduction results in a rate that is at least equal to the minimum Community rate, the temporary reduction may be allowed. Secondly, in cases where the national reduction brings the tax rate below the minimum Community rate two things may happen. Firstly, if the rate below the minimum rate prescribed by the Community taxation scheme, is not allowed by the Community scheme, the reduction will be deemed to constitute prohibited aid. Secondly, if this lower rate is allowed by the Community measure, the reduction may be considered compatible with Article 87 on strict grounds. This seems to be the aftermath of the Court's judgment in the French Biofuels case.

On a general level, the Commission wants to ascertain that the reductions do not undermine the scheme's objectives. To this end it has formulated a number of criteria that need to be satisfied before such operating aid may be allowed. For new taxation schemes, non-degressive reductions lasting for ten years may be allowed in either of two cases. In the first case the tax reductions must be conditional on the conclusion of agreements between firms and the public authorities or voluntary agreements between firms laying down environmental protection objectives. In the second case, no agreements or commitments are necessary provided that (for taxes having a Community origin) the tax level after reduction is higher than the Community minimum or (for purely national taxation schemes) the tax level results in the firms still paying 'a significant proportion of the national tax'. With regard to the voluntary agreements referred to above, it may be noted that such agreements may fall within the scope of Article 81 EC. Accordingly, both the tax reduction and the voluntary agreement may have to be notified to the Commission. The provisions for reductions from new taxes apply by analogy to significant increases in existing tax schemes. For existing taxation schemes, a non-degressive ten-year reduction can be allowed only when

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144 Ibid., para. 49.
145 Case T-184/97, BP Chemical v. Commission (French Biofuels), [2000] ECR I-3145, paras. 62-80. See also the recent invitation to submit comments the case underlying this dispute, OJ 2001 C 60/4.
147 Ibid., para. 51.1 (b).
the scheme had an appreciable positive environmental impact and the reduction was already decided on at the time of the adoption of the tax or has since then become necessary as a result of ‘a significant change in economic conditions’. In relation to the latter situation, the Commission stipulates that the reduction may not exceed the increase in costs resulting from the change in economic conditions. Operating aid in the form of tax reductions may also be given to installations that use conventional (i.e. non-renewable) energy sources to create electric power when their efficiency is ‘very much higher’ than that of conventional processes. Provided, of course, that there is an environmental benefit, a five-year non-degressive reduction may be granted. A ten-year reduction needs to satisfy the tests identified above in general.

Paragraph 53 of the English language version is somewhat mysterious. It concerns tax reductions in cases where the tax has not been harmonised in which case it of course makes no sense to stipulate that express authorisation be obtained from the Commission. However, the Dutch, French and German versions all concern the situation of a tax reduction concerning a tax that has indeed been harmonised at Community level. In that case long-term reductions resulting in a level that is equal to or lower than the Community minimum are not justified. In any case the derogation from the Community minimum needs to be expressly authorised.

These fairly complex rules have in the meantime been applied by the Commission in the case concerning the UK Climate change levy. In that case the Commission considered the compatibility with the 2001 Environmental aid Guidelines of a number of exemptions from this levy on energy carriers (Gas, Electricity, Coal and Liquefied petroleum gas). With regard to the exemption for dual use fuels (which covers cases where the energy carrier is not used as a fuel) the Commission considered that the aid might be incompatible with the 2001 Environmental aid Guidelines. In this respect the Commission points out that the exemption benefits certain processes that give rise to considerable CO2 emissions whilst the exemption is not temporary nor made conditional on the conclusion of an agreement. Finally, the Commission considered that the UK authorities had not shown that the exempted firms must nevertheless pay a significant proportion of the levy.

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150 Furthermore, the Commission considers that ‘once there is no longer any increase in costs, the reduction must no longer apply’. Taken literally, this would seem to mean that the reduction is no longer allowed when the costs are not increasing irrespective of the fact that they may still be higher.

151 Invitation to submit comments concerning case C 18/2001, UK Climate change levy, OJ 2001 C 185/22.

See also, with regard to the sectors governed by the ECSC Treaty: case C 19/2001, OJ 2001 C 191/3, where the Commission applied the 1991 Guidelines which continue to apply with regard to the Steel Aid Code.

152 Ibid., at p. 40.
For the production of renewable energy, operating aid is allowed to cover the difference between the market price for energy and the costs for producing energy from renewable sources. The Commission distinguishes four options or instruments for granting operating aid for renewable energy production.

The first option recognises that renewable energy generally requires large investments. Under the first option aid may be granted for plant depreciation to compensate the difference between the production costs of renewable energy and the market price of the power concerned. If this option is used, no aid may be granted for further energy produced but a fair return on capital is allowed.

Because of the generally smaller investments but higher running costs, biomass installations may even receive operating aid exceeding the investments provided that the total costs after depreciation are still above the market price. No limit for the duration of this type of aid is given.

Option two concerns the use of market mechanisms such as, for example, the so-called 'green certificates'. In this case, the producers of renewable energy benefit from, firstly, a guaranteed demand and, secondly, a price higher than the market price. Such aid may only be granted for a period of ten years when it is necessary to ensure the viability of the production, does not result in overcompensation and does not remove the incentive for renewable energy producers to become more competitive.

Under the third option aid may be granted on the basis of the 'external costs avoided' compared to the situation where the same amount of energy was produced conventionally. The external costs avoided consist of the difference between, on the one hand, the external costs produced but not paid by the producers of renewable energy and, on the other hand, the external costs produced and not paid by conventional producers. The aid calculated according to this method may not surpass the ceiling of 5 Eurocents per kilowatt-hour. Any aid granted according to this option and exceeding the amount that could be granted following the first option must be reinvested in the production of renewable energy. Furthermore, aid granted according to the third option must result in the increase of the production of renewable energy and not just a transfer of the market shares between the different methods of producing renewable energy. This probably reflects the increasing concern with regard to wind energy. This is at the moment the cheapest and therefore most profitable method of producing renewable energy. The system whereby aids are granted should therefore not result in the increased production of wind energy to the detriment of, for example, biomass installations. In this respect the scheme

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13 See also on state aid for renewable energy: Delvaux 2003, p. 108 et seq.
15 Cf. the concerns voiced by the Commission in its invitation to submit comments concerning Case C-63/99 Stromeinspeisungsgesetz, OJ 1999 C 306/19.
whereby the aid is granted must treat the firms producing renewable energy on the same footing while there may be no discrimination between firms producing the same form of renewable energy. Finally, the scheme must be re-examined every five years.

Option four allows Member States to grant aid in accordance with the standard rules on operating aid (i.e. for five years and degressive from 100 per cent to nil or 50 per cent in a non-degressive manner).

Following the judgment of the Court in the *PreussenElektra case*, Member States may very well prefer the fifth option that was applied by the German government.\textsuperscript{156} As may be recalled, in the German system, electricity supply firms were obliged to purchase all the renewable energy produced in their region and to pay a compensation fee for this. According to the Court, this scheme, although it very obviously confers a benefit on the producers of renewable energy, does not constitute state aid in the meaning of Article 87.

Installations for the combined production of heat and energy for civilian use may be granted operating aid using the four options identified above provided that the installations produce an environmental benefit because of their high efficiency.\textsuperscript{157} Such operating aid may only be granted when the costs for the production of electricity or heat are higher than the market price. For the combined production of heat and energy destined for industrial use aid may be granted only when the costs of production for one unit of energy are higher than the market price for one unit of energy. A normal return on capital may be included in the unit costs of production but gains resulting in the use of the produced heat must be deducted from these costs. It is taken that the term 'energy' (in the unit costs) is used to encompass both electricity and heat. That, however, would seem to be hard to reconcile with the fact that only the profit resulting from the internal use of heat must be deducted from the costs as the electrical energy produced may equally well be used internally.

13.5.5 Miscellaneous aspects

As has been seen, the Kyoto Protocol has played an important role throughout the Guidelines. In Chapter F, the Commission indicates that certain measures adopted to reach the reductions in CO2 emissions may constitute aid. The Commission leaves it at this and provides no guidance with regard to the competition policy vis a vis these Kyoto-measures.

Just as under the 1994 Guidelines, the legal basis for the exemption is Article 87(3)(c) whereas aid may be granted at higher rates for important projects of common European interest as foreseen in Article 87(3)(b).\textsuperscript{158} The maximum aid

\textsuperscript{156} Supra, paragraph 13.2.2.

\textsuperscript{157} 2001 Environmental aid Guidelines, OJ 2001 C 37/3, para. 66.

\textsuperscript{158} Ibid., para. 72 and 73.
intensities identified above apply for overlapping aid from different sources.\(^{159}\)

Chapter I contains the 'appropriate measures' within the meaning of Article 88(1) EC. Accordingly, Member States are to notify state aid schemes where the eligible costs exceed 25 million Euros and where the aid exceeds 5 million Euros.

According to chapter J the Guidelines apply from the date of their publication on and will be withdrawn on 31 December 2007. Instead of a fixed date for a review, the Commission has now chosen to opt for a more flexible system whereby it can amend the Guidelines at any time following consultation of the Member States. The Commission will apply the new Guidelines to notified aid from the moment of the publication of the Guidelines on. With regard to non-notified aid, the Commission will apply the Guidelines in force on the moment that the aid was granted.

Chapter K concerns the application of the integration principle by the Commission with regard to state aids. The Commission will consider how it can best take environmental considerations into account in other Guidelines or frameworks. Moreover, the Commission considers the possibility of asking Member States to provide an environmental impact assessment with the notification of certain aid schemes. Below we will be looking more closely at Commission practice in this area.

### 13.6 The role of environmental considerations in other sectors and Guidelines

As was mentioned above, the Commission has stated in the final chapter of the 2001 Environmental aid Guidelines that it considers itself under an obligation to integrate environmental considerations into the other Guidelines and frameworks as well.\(^{160}\) Indeed, it has done this even before the 2001 Environmental aid Guidelines were published. In the Community Guidelines for State aid in the agriculture sector, dating from 2000, the Commission has devoted an entire chapter to environmental aid in this sector.\(^{161}\) However, as far as we have been able to ascertain, the Agricultural aid Guidelines are, as far as the detail is concerned, unique in this respect. In the Community Guidelines on State aid in the maritime sector, for example, the Commission has limited itself to referring to the Environmental aid Guidelines\(^{62}\) and making one general remark in the chapter concerning investments.\(^{163}\) In the mean time,

\(^{159}\) *Ibid.*, para. 74.

\(^{160}\) See further on the integration of environmental concerns in other policy areas of the EC: Dhondt 2003.


\(^{162}\) Community Guidelines on State aid to the maritime sector. OJ 1997 C 205/5, chapter 7.

\(^{163}\) *Ibid.*. chapter 5.
however, the 2001 Environmental aid Guidelines have replaced many of the old sectoral frameworks.\textsuperscript{164} This is, as far as, for example, aid to the maritime sector is concerned evidenced by the \textit{Italian oil tanker} case.\textsuperscript{165} This case concerned an Italian aid scheme designed to speed up the replacement of old single hull tankers with newer single hull or double hull tankers. The Commission considered the compatibility of this scheme with its 2001 Environmental aid Guidelines and expressed its doubts in this regard. Other sectoral regimes governing at activities that will also have a very large environmental impact, such as the fisheries sector, only address the issue of environmental aids rather succinctly.\textsuperscript{166} Indeed, the 1997 Guidelines on aid to the fisheries sector explicitly allow for aid for an activity of which the environmental impact can hardly be called positive. In section 2.1.3.1 these Guidelines state that aid for

'advertising media to invite consumers to buy a given product, may be regarded as being compatible with the common market provided that it relates to one or more of the following schemes:

\begin{itemize}
  \item [(c)] \textit{generic advertising for fish in general or publicity:}
  \begin{itemize}
    \item for species which have rarely or never been used for human consumption, which are not subject to quantitative catch restrictions and catches of which could be increased'.
  \end{itemize}
\end{itemize}

It may be wondered whether it is such a good idea to move on to new species now that the traditional species' stocks have been depleted. Moreover, it may be doubted whether the provisos that these species should not be subject to catch restrictions and that catches could be increased, would be sufficient to ensure that not yet another species of fish is wiped out. Fortunately, this provision has been scrapped from the 2001 version of these Guidelines.\textsuperscript{167} Furthermore, these Guidelines dedicate slightly more attention to the environmental aspects involved in fishing.\textsuperscript{168}

As was already mentioned, the Agricultural aid Guidelines contain by far the most elaborate rules on environmental state aid in that sector. Chapter 5 of the Agricultural aid Guidelines follows the same lines that the 2001 Environmental aid Guidelines do. The Commission distinguishes between a number of aid methods and objectives. With regard to investment aid, the Commission states that it is unnecessary to provide further rules since the particularities

\textsuperscript{164} 2001 Environmental aid Guidelines, OJ 2001 C 37/3, para. 7.
\textsuperscript{165} Invitation to submit comments concerning case C 97/2001, \textit{Scraping and renewal of the Italian oil tanker fleet} (Italian oil tanker), OJ 2002 C 50/7.
\textsuperscript{166} Community Guidelines for the examination of State aid to fisheries and aquaculture, OJ 1997 C 100/12.
\textsuperscript{167} Community Guidelines for the examination of State aid to fisheries and aquaculture, OJ 2001 C 19/7.
\textsuperscript{168} \textit{Ibid.}, para. 1.2 at p. 8, paras. 2.1.2.1 and 2.1.3.2 at p. 9 and para. 2.5 at p. 11.

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of environmental investment aids have already been taken into account in the general chapter on agricultural investment aids. Section 5.3 contains rules on state aids for so-called agri-environmental commitments. Such commitments are governed by Articles 22 - 24 of the Rural Development Regulation and aim to protect the environment and maintain the countryside. Farmers who have entered into such commitments may receive support. According to section 5.4 aid may be granted to farmers in areas that are subject to environmental restrictions arising from the implementation of Community environmental law. Such aid may cover the costs incurred and income foregone insofar as there is no overcompensation. With regard to operating aids, the Commission repeats its strict stance according to which such aids will only exceptionally be allowed. The rules in this respect show as great resemblance to those laid down in the 2001 Environmental aid Guidelines in that such operating aid must be temporary and degressive.

We have started this chapter with the observation that the Commission, in the 2001 Environmental aid Guidelines, considers itself under an obligation to integrate environmental concerns into its state aids policy in every sector. Indeed, the Commission did not express this thought for the first time in the 2001 Environmental aid Guidelines. Interestingly, the Agricultural aid Guidelines contain a similar 'integration-provision' to that to be found in chapter K of the 2001 Environmental aid Guidelines. In section 3.9 the Commission cites article 6 EC to come to the conclusion that it covers both the competition as well as the agricultural policy of the Community. On the basis of this the Commission states that particular attention must be given to environmental issues even in cases even in cases where the aid schemes are not specifically concerned with environmental issues. In this respect the Commission states that it will be necessary to show that the effects of certain aid schemes do not run counter to Community environmental protection legislation or otherwise cause environmental damage. Just as in the 2001 Environmental aid Guidelines, the Commission states that notifications 'should in the future contain an assessment of the expected environmental impact of the activity aided'. This brings us to a more general question in how far environmental considerations may play a negative role in the process of the application of the state aid rules.

171 Agricultural aid Guidelines, OJ 2000 C 28/2, para 5.5.1.
172 Ibid., para. 5.5.2. Note, however, that the Commission does not require aids to offset the extra costs for certain more environmentally friendly products to be degressive, ibid., para. 5.5.3
173 Supra, para. 13.5.5.
In other words: to what extent can a negative environmental impact assessment, like the ones mentioned above, actually allow or even oblige the Commission to declare the aid incompatible with the common market even though from a competition perspective there are no objections? The wording of Article 87 appears at first sight not to allow for such a negative role. Above, we have also concluded that much the same holds true with regard to nearly all the other Treaty provisions in the field of competition law. However, as we have also seen, Article 6's influence is far-going in that it puts the Commission under an obligation to at least consider the environmental impact of the decisions it takes. The criterion that state aid is incompatible with the common market may function as a useful starting point for our question. The fact that aid is declared incompatible with the common market already indicates the objective of Article 87, which is to bring about and maintain the common market. The common market, as was also shown above, exists not only of an area where there is free movement but is itself also the subject of a number of well-defined environmental objectives as can be seen in Articles 2 and 3 EC. Indeed, this reasoning may have underlined the Commission's potentially far-going statements in the Agricultural aid Guidelines where it held that:\footnote{Agricultural aid Guidelines, OJ 2000 C 28/2, para. 5.1.3.}

‘All environmental aid schemes in the agricultural sector should be compatible with the objectives of Community environmental policy. In particular, aid schemes which fail to give sufficient priority to the elimination of pollution at source, or to the correct application of the polluter pays principle cannot be considered compatible with the common interest, and therefore cannot be authorised by the Commission.’

Immediately, we should note that this statement is largely qualified by the fact that it applies to environmental aid schemes only. However, the closing statement, and in particular the fact that it refers to the common interest, seems potentially powerful. This reasoning is clearly capable of being applied outside the agricultural sector and with regard to all other aids. Unfortunately, a similar statement, even with the limited scope (applying to environmental aid only) it has in the Agricultural aid Guidelines, did not make it into the 2001 Environmental aid Guidelines. It is submitted that the Commission has the possibility to refuse authorisation of aid schemes that run counter to Community environmental law or environmental protection requirements in general just as it considers itself under an obligation to not fund environmentally damaging projects with Community funds.