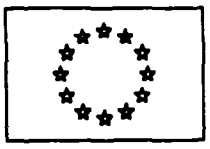

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.03.1997
COM(97) 9 final

COMMUNICATION FROM THE COMMISSION

Environmental Taxes and Charges in the Single Market

FOREWORD

The Commission has several times given its support to an increased use of fiscal instruments to make environmental policy more efficient and cost-effective. Most of these instruments are implemented at Member State level. This Communication is presented in order to support these activites, and ensure that the environmental taxes and charges are used in a way compatible with Community legislation.

The Communication is a first step in the Commission's treatment of the use of environmental taxes by the Member States. It aims to explain the existing legal framework for the use of environmental taxes and charges by Member States within the framework of the single market. It also aims to clarify both the possibilities and constraints for Member States to act in this field. This Communication will not discuss the advantages and disadvantages in terms of economic efficiency and environmental effectiveness of using environmental levies at Member States level. Nevertheless, it will provide Member States with a view of the legal obligations in question, which have to be considered, when environmental levies and charges are designed. It shows that there is considerable room for action by the Member States to implement fiscal instruments, while respecting Treaty obligations.

Environmental taxes and charges are increasingly used in the Member States. This opens up the scope for a more cost-effective environmental policy. Environmental taxes and charges can be an appropriate way of implementing the "polluter pays" principle, by including the environmental costs in the price of goods or services. Fiscal instruments are considered as incentives for producers and consumers, steering choices towards more environmentally sustainable activities. The present use of environment taxes in the Member States is set out in an appendix to the Communication.

Obviously, these instruments should be used in a way which is compatible with Community law. In particular, competition, single market and taxation policies affect how environmental taxes and charges, and the resulting revenues, may be used. The legal framework basically aims to ensure that Member States do not distort competition by discriminating against products/services from other Member States. However, the detailed legal framework is quite complex, which is the reason why the Commission deems it important to clarify it in this Communication. The document also specifies the control measures existing in the Community, known as the rules of notification.

The Commission, in cooperation with all interested parties, intends to continue to explore the avenue of environmental levies and charges by :

i) Systematic collection of experience from Member States of the existing levies and charges.
ii) Systematic analysis of the environmental impact of the use of environmental taxes and charges within Member States.
iii) Systematic analysis of the impact of environmental taxes and charges on the internal market and the competitiveness of European industry

The results of this work will be used to draw policy conclusions on the further use of these instruments on Community and Member State levels.

CONTENTS

I. OBJECTIVES AND SCOPE OF THE COMMUNICATION

1. The Community Fifth Environmental Action Programme[1] and its 1996 review[2], present the broadening of the range of environmental policy instruments as one of its key priorities. On several occasions, the Community Institutions have called upon the Commission and the Member States to explore to a larger extent the potential of new environmental policy instruments, in particular of a fiscal nature. In December 1995 the European Council of Madrid concluded: "In order to exploit the job-creation potential of environmental protection, these (environmental) policies should - to a greater extent than at present - rely on market based instruments, including fiscal ones." The European Council of Florence of June 1996 sent a similar message[3] .

2. In order to reach environmental objectives, which are increasingly set in the context of framework legislation at EU level, Member States have, apart from measures harmonised at Community level, a multitude of economic, technical, and voluntary instruments at their disposal. Environmental taxes and charges form part of the range of environmental instruments and can be an appropriate way of implementing the polluter pays principle, by including the environmental costs in the price of a good or service. These instruments can thereby induce consumers and producers into environmentally more sustainable behaviour.

3. One of the purposes of environmental taxes and charges is to reach an environmental objective, and consequently, they should have an effect on the market. It is therefore important that the rate of an environmental tax or a charge is set at a correct level: a levy which is too low will not be able to fully correct a distortion on the market, while a levy which is too high replaces one distortion with another.

4. Revenues from environmental taxes and charges can be used to finance environmental protection activities. In some cases, these instruments can also provide large and stable revenues. They can then be used to decrease other taxes which are perceived as distorting the economy, such as labour taxes. Such an approach was proposed to the Member States in the

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1 OJ no C 138, 17.5.1993, p. 1.

2 COM (95) 647, 24. 01.1996

3 It requested the Council to submit to it a report on the development of the tax systems within the Union, "taking account of the need to create a tax environment that stimulates enterprise and the creation of jobs and promote a more efficient environmental policy".

Commission White paper "Growth, Competitiveness, and Employment"[4]; and endorsed by the European Council of Brussels in December 1993. This question is also dealt with in the Commission Report[5] "Taxation in the European Union, Report on the Development of Tax Systems", prepared for the European Council in Dublin, December 1996.

5. Environmental taxes and charges are being used in all EC/EEA Member States[6] and they also play an increasing role in environmental policy in the Central and Eastern European countries that have applied for EU membership. Where appropriate, Community-wide rules have been adopted to enable such taxes to be applied within the framework of the single market (e.g. taxation of mineral oils; see paragraph 23). On the other hand, in line with the principle of subsidiarity, an increasing number of national initiatives in the form of taxes and charges are being taken to deal with local environmental problems, which often also are more efficiently dealt with at that level.

6. The use of environmental taxes and charges and of their revenues impinges, directly or indirectly, on several areas of Community legislation other than environmental policy, and in particular on competition, single market and taxation policies. Many concrete cases have shown the importance of improving integration between these different areas of policy. In the agricultural sector, additional considerations might sometimes be required, due to the Community agricultural policy. The use of environmental taxes and charges may also affect obligations towards third countries, e.g. in the context of the WTO. Member States need to take account of all these linkages in order to ensure that national environmental taxes and charges are implemented in a way which is compatible with their WTO and Treaty obligations[7].

7. For the reasons set out above, the Commission deems it important to clarify the legal framework applicable for Member States wishing to introduce environmental taxes and charges. The framework is defined by the Treaty, secondary EC legislation, the jurisprudence

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4 COM (93) 700 final

5 COM (96) 546 , 22.10.1996

6 See further Appendix 1.

7 Although this document concerns aspects related to the single market, Member States should be aware that there may potentially be conflicts between what is permitted by EU and WTO rule, especially in the field of Border Tax Adjustments. See further Commission Communication on Trade and Environment, COM (96) 54 (OJ no C , 28.02.1996).

of the Court of Justice, as well as the decisions and legal steps the Commission has taken to put this legal framework into practice. The Commission also deems it important to highlight which further elements it may take into consideration when assessing national environmental taxes and charges. The objective of the document is, however, not to analyze the advantages and disadvantages in terms of economic and environmental efficiency of using environmental taxes and charges at Member State level. The information should provide useful guidelines for Member States in designing, implementing and evaluating such instruments. The aim is to ensure a balanced and efficient use of the instruments at Member State, regional or local level, and a transparent assessment by the Commission.

8. The Commission will keep the use of environmental taxes and charges at national level under review, having regard to the impact of such measures on the functioning of environmental policy, the single market and on European competitiveness, and other relevant policies such as energy policy. If a multiplication of different national solutions to similar problems become evident, or when environmental objectives can be reached in a more cost-effective way, the Commission will put forward new proposals at Community level despite the difficulties which arise because of the current unanimity requirements for the adoption of fiscal measures.

9. Chapter II of this Communication deals with the question of definitions and sets out the general legal context, while detailed guidelines are set out in Chapter III. It should be stressed that this Communication cannot provide definitive answers on future cases, and consequently, each individual case will have to be considered on its own merits.

II. DEFINITIONS AND LEGAL CONTEXT

a. Definitions

10. In the area of environmental taxation, different meanings are often given to similar terms in different Member States, and no precise definitions are offered by EU legislation. Nevertheless, it is important to stress that it is the characteristics and the effects of a measure which determines how it will be judged with respect to Community law and not the denominations used in the Member States. Accordingly, this Communication does not set out to define the various types of instruments used in Member States. The term "*taxes and charges*" should be understood to cover all compulsory, unrequited payments, whether the

revenue accrues directly to the Government budget or is destined for particular purposes (e.g. earmarking). In this Communication the word *levy* will be used to cover "taxes and charges" as defined above. Levies covered by more specific provisions in Community directives will fall under the legal context of respective directive.

11. One likely feature for a levy to be considered as *environmental* would be that the taxable base of the levy has a clear negative effect on the environment. However, a levy could also be regarded as environmental if it has a less clear, but nevertheless discernable positive environmental effect. One such example could be differentiations of any tax or charge based on environmental criteria, such as between leaded and unleaded gasoline. In general, it is up to the Member State to show the estimated environmental effect of the levy, if that would be needed in assessing its compatibility with Community law.

b. Different types of environmental levies

12. Experience has shown that environmental taxes and charges are very different in nature but can be divided into two main categories[8].

Emission levies involve payments that are directly related to the real or estimated pollution caused, whether emitted into air, water or on the soil, or due to the generation of noise. Existing examples are charges on emissions of NOx from large combustion plants, and charges on pollution to water from waste water treatment plants. Levies on the emission of noise exist in the field of aviation. In so far as these levies are applied to stationary sources (such as industrial plants) they will to a large extent fall outside the scope of this Communication, as the cost of paying them falls only on domestic producers[9].

Product levies are applied to raw materials and intermediate inputs such as fertilisers, pesticides, natural gravel, and ground water, and on final consumer products such as batteries, one way packaging, car tyres and plastic bags. Some product levies that have existed for many years, mainly in the field of energy, are increasingly regarded as contributing to the

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8 See further e.g. "Environmental Taxes; Implementation and Environmental Effectiveness", European Environmental Agency, 1996, and "Environmental Taxes in OECD Countries", OECD, 1995.

9 Exemptions from emission levies and the use of revenues from such levies may, however, fall under state aid rules (see further below).

integration between environmental and energy policies. Typical examples are taxes on gasoline, diesel and heating oils and electricity.

c. Legal context

13 The legal appraisal of environmental levies is complex since the instrument is comparatively new and developing and since the Treaty was not conceived with this type of environmental policy instrument in mind. The basic legal context surrounding environmental levies is given by the following articles:

- customs duties levied on intra Community trade, or charges having equivalent effect (Articles 9 - 12);
- quantitative restrictions on importations and exportations of goods between the Member States, or measures having equivalent effect (Articles 30 - 36);
- provisions on transport policy, that are less favourable in their effect on carriers of other Member States (Article 76).
- state aid creating distortions of competition affecting intra community trade (Articles 92 - 93);
- internal taxation discriminating against products of other Member States or otherwise protecting national production (Article 95) and legislation concerning excise duties and other forms of indirect taxation based on Article 99;
- Article 130r stating the objectives of Community environmental policy.

III. GUIDELINES

A GUIDELINES FOR THE USE OF ENVIRONMENTAL LEVIES

a. Environmental objective of the levy

14. Article 2 of the EC Treaty states that "sustainable and non-inflationary growth respecting the environment" is one of the main tasks of the Community. Article 130r states that Community policy on the environment shall contribute to preserving, protecting and improving the quality of the environment, protecting human health and prudent and rational utilisation of natural resources. The preventative aspect is a key principle as well as the

polluter pays principle and the precautionary principle. Furthermore it is stated that environmental protection requirements must be integrated into the definition and implementation of other policies. When introducing environmental levies Member States should provide a sound justification on the need to solve the environmental problems. Particular attention should be paid to the relation between these measures and the elements included in Article 130r of EC Treaty, Community environmental legislation and related jurisprudence, the Fifth Environmental Action Program[10], and international agreements to which the European Community has acceded.

b. Customs duties and charges having equivalent effect

15. According to Articles 9 to 12 of the EC Treaty, Member States shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect. Such customs duties in the strictest sense no longer exist between Member States. Nevertheless, the Court has decided that any pecuniary charge levied on products only because they cross a frontier has an equivalent effect to a customs duty. If a levy falls only on foreign products, it may therefore be regarded as equivalent to a customs duty. However, if such a levy is part of a general system of taxation of products, according to objective criteria without regard to the origin of the products, it will have to be examined on the basis of Article 95.

16. A general system of taxation under which a very large portion of national production is exempted may still be regarded as a charge having an effect equivalent to a customs duty. In this connection the Court has made it clear that it may be necessary to take into account the appropriation of the revenue from the levy. A levy applying to products of other Member States and domestic products according to the same criteria can therefore constitute a charge having an effect equivalent to customs duties, if the revenue is used to *fully* compensate domestic producers of the taxed products. However, using the revenue to support the consumers of the taxed products would not fall in this category, but would have to be judged according to state aid law (see paragraphs 33 - 34). A levy could be regarded as having an effect similar to customs duties, and illegal state aid, as it can be governed both by the provisions of Article 9-12 and by Article 92.

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[10] OJ no C 138, 17.5.1993, p. 1

c. Internal taxation

17. Article 95 aims at guaranteeing the neutrality of internal taxation by prohibiting discrimination against products of other Member States and protection of domestic products. The relevant jurisprudence developed by the Court of Justice is based on three main principles :

1) Member States are, subject to certain limits, in principle free to choose the system of taxation which they consider most suitable;

2) The system applied to domestic products constitutes the point of reference for determining whether products of other Member States are taxed more heavily than domestic products;

3) Article 95 is infringed if a product of another Member State is more heavily charged than a domestic product.

18. As regards the first point, the Court has consistently held[11] that Member States may differentiate levies between products, even if they are "similar". To be legal, such differentiation

1) must be based on objective criteria, such as the nature of the raw materials used or the production processes employed[12];

2) must pursue objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation; and

3) in addition, the detailed rules must be such as to avoid direct or indirect discrimination of products from other Member States or protection of competing domestic products.

The Court has pointed out that a levy cannot be considered discriminatory solely because only products of other Member States fall within the most heavily taxed category, if this results from the application of objective and not discriminatory criteria[13]. If, however, products of other Member States are , on the basis of arbitrary and/or discriminatory

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11 Judgement of 4 March 1986 Case C-106/84, Commission v. Denmark [1986] ECR 833 and judgement of 7 April 1987 Case C-196/85 Commission v. France [1987] ECR 1597.

12 Judgement of 14 January 1981, Case 46/80, SA Vinal v. Orbat [1981] ECR 77.

13 Judgement of 30 November 1995, Case C-113/94, Casarin [1995] ECR 4203.

conditions, excluded in advance and/or by definition from benefitting from a reduced rate of the levy, there would be a breach of Article 95[14].

19. As regards point 2, the system of taxation must be transparent, at least to the extent that it must be possible to determine objectively whether the burden falling on products of other Member States exceeds that falling on similar domestic products[15]. Moreover, the system must apply equally to domestic products and products of other Member States. In particular, according to the Court, to assess if Article 95 has been infringed, it is necessary to take into consideration :

- the rate of the levy,
- the provisions relating to the taxable base,
- the control systems for charging the levy, and
- the detailed rules for the collection of the levy.

The case law of the Court also points out that the mere fact that the tax is levied predominantly on imports is not enough to deem it discriminatory[16]. The decisive criterion is the actual financial burden of each levy falling on national products on the one hand and on products of other Member States on the other.

20. Article 95 does not give the Community a right to judge whether a levy in a Member State is excessively high in relation to its environmental objective[17]. Jurisprudence on Article 95 has confirmed the application of the criteria of proportionality, which involves balancing the gain for the environment with the potential impact on the single market, only for administrative control measures of the levy [18].

21. As regards point 3, in order to establish if Article 95, first paragraph, is infringed, the "similarity" between national and foreign products must be assessed. The Court has held that "similar products" are those that " have similar characteristics and meet the same needs from

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14 Judgement of 27 May 1981, Case 142 and 143/80, Salengo, [1981] ECR 1413 and Judgement of 3 July 1985, Case 277/83, Commission v Italy [1985] ECR 2049.

15 Judgements of 26 June 1991, Case C-152/89, Commission v Luxembourg [1991] ECR 3141 and Case C- 153/89, Commission v Belgium, [1991] ECR 3171.

16 Judgement of 16 December 1986, Case 200/85, Commission v Italy, [1986] ECR 3953.

17 Judgement of 5 April 1990, Case C-132/88, Commission v. Greece [1990] ECR 1567.

18 Judgement of 7 April 1987, Case 196/85 Commission v. France [1987] ECR 1597.

the point of view of consumers"[19]. In this context, it should be considered whether goods with the same function but with different environmental properties due to content or differences in production methods could be regarded as being different goods[20].

22. If the goods are not "similar", but still are at least partially or potentially competing with foreign products , the second paragraph of Article 95 requires that the levy must not have the effect of protecting domestic products[21]. In the assessment of this aspect, not only the actual situation but also the potential market for foreign products, if no protectionist measures were involved, should be taken into consideration. It is also necessary to take into account how the revenue from the levy is used. The Court ruled that when the revenue from a levy is used to *partly* offset the burden borne by domestic products, the charge constitutes discriminatory taxation within the meaning of Article 95 of the Treaty[22]. In addition, a levy could be regarded as being both discriminatory and illegal state aid, as it can be governed both by the provisions of the first paragraph of Article 95 and by Article 92[23] (see paragraphs 26 ff).

d. Secondary legislation on indirect taxation

23. Community legislation adopted under Article 99 contains
a) harmonised rules on tax structure and minimum rates for excise duties on mineral oils, tobacco and alcoholic beverages
b) other general provisions in directive 92/12/EEC, allowing Member States to introduce indirect taxes on products provided that those taxes do not give rise to border-crossing formalities in trade between Member States.

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19 Judgement of 7 May 1987, Commission v. Italy, Case 184/85 [1987] ECR 2013. In order to assess similarity, the Court considered whether products satisfy the same consumer needs and both legal and factual circumstances are relevant.

20 Under Council Regulation on a Community eco-label award scheme (EEC No 880/92 of 23/3 1992, OJ no L 99, 11.04.1992, p. 1.) , eco-labels can be awarded for products (e.g.paper) with the same function but with different ecological properties.

21 Judgements of 7 May 1987, Case 184/85, Commission v Italy, [1987] ECR 2013 and case 193/85, Co-frutta, [1987] ECR 2085.

22 Judgement of 16 December 1992, Case C-17/91, Georges Lornoy [1992] ECR 6523.

23 Judgement of 21 May 1980, Case 73/79, Commission v. Italy [1980] ECR 1533.

An important provision of Directive 92/81/EEC[24] is that in general, only one tax rate per product can be used. Directive 92/12/EEC[25] provides Member States with the possibility, within certain restrictions, to introduce other national taxes on mineral oils. Such taxes must comply with the rules applicable for excise duty and VAT [26]. Member States may request authorization from the Council to apply reduced tax rates or exemptions, e.g. for environmental reasons[27]. In addition, Member States have the right to apply reduced tax rates or tax exemptions on mineral oils used for specific purposes, for example, in the field of public transport and within the agriculture sector.

24. Directive 93/89/EEC[28], sets out framework conditions for the application of taxes , tolls and user charges (Eurovignette) on heavy goods vehicles in Member States. The Commission presented in July 1996 a proposal[29], based on Article 75, for replacing this Directive[30]. The proposal would allow road charges (annual vehicle taxes, tolls and user charges in general and in particular on sensitive routes) to be differentiated to take account of external costs. More generally, the Commission launched a debate on the use of economic instruments in the transport sector with its Green Paper "Towards fair and efficient pricing in transport: Policy options for

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24 Council Directive 92/81/EEC of 19 October 1992, on the harmonisation of the structures of excise duties on mineral oils (OJ no L 316, 31.10.1992, p.12).

25 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ no L 76, 23.03.1992, p.1).

26 Laid down in Directives 92/81/EEC of 19 October 1992, on the harmonisation of the structures of excise duties on mineral oils (OJ no L 316, 31.10.1992, p.12) and 92/82/EEC of 19 October 1992, on the approximation of the rates of excise duties on mineral oils (OJ no L 316, 31.10.1992, p.19).

27 So far some 70 derogations have been granted. Some derogations concern tax differentiation depending on environmental criteria of fuels such as reduced rates on environmentally improved diesel and on reformulated unleaded and leaded petrol. The Community wide stipulated tax differentiation between leaded and unleaded petrol has been created by treating the two different fuels as different products.

28 Directive 93/89/EEC (OJ no L 279, 12.11.1993).

29 Proposal for a Council Directive on the charging of heavy goods vehicles for the use of certain infrastructure, COM (96) 331, 10.7.1996.

30 The Court annulled the Directive on 5 July 1995 on grounds of procedural irregularities. The effects of the Directive are however to be maintained until legislation replacing the Directive is adopted.

internalizing the external costs of transport in the European Union.[31]" Further action to follow up the Green paper will be brought forward by the Commission later this year

25. The Directives 91/542/EEC[32], 93/59/EEC[33], 94/12/EC[34], adopted under Article 100a, concerning polluting emissions from motor vehicles contain specific frameworks for fiscal incentives related to the purchase of new vehicles. The system aims at allowing Member States to encourage marketing of new cleaner vehicles, while avoiding fiscal measures constituting de facto technical requirements other than those harmonised at Community level. These fiscal incentives are authorised provided that they respect the following principles:

- they must apply to all new vehicles in conformity with future emission limits foreseen in the Directives
- they must be phased out when the new emission limits become mandatory,
- they must be lower than the extra cost needed to meet these future emission standards,
- they have to be notified in due time to the Commission.

e. State aid

26. According to Article 92 of the Treaty, any aid granted by a Member State which distorts or threatens to distort competition shall be incompatible with the common market. As a general rule, an aid element contained in a levy system cannot be authorised by the Commission if other provisions of the Treaty are being infringed. Thus, it first has to be assured that an environmental levy does not run counter to these other provisions, in particular Articles 9, 12, 30-36 and 95. If an aid element does not run counter to these provisions, the aid may be deemed compatible with the common market as described below.

a) Existence of aid

27. Before deciding on the compatibility of aid with EC state aid provisions, the Commission has to clarify if aid is involved. Revenues from environmental levies constitute "state

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31 Com (95) 691 final

32 OJ no L 295, 25.10.1991, p.1.

33 OJ no L 186, 28.07.1993, p.21.

34 OJ no L 100, 19.04.1994, p.42.

resources". If such revenues are assigned to the general state budget, its future use does not come within the scope of this communication. If, on the other hand, the revenue is destined for a special purpose, state aid may be involved if certain enterprises or productions are favoured. Exemptions from product or emission levies also constitute state aid, even when these exemptions are necessary to prevent domestic firms from being placed at a disadvantage compared with their competitors in countries that do not have such levies.

b) Compatibility of aid with EC state aid provisions

Use of revenues

28. Article 92 paragraph 2 lays down categories of aid which *shall* be deemed compatible with the common market, while paragraph 3 specifies some categories of aid which *may* be deemed compatible with it. Article 93 gives provisions for a procedure in order for the Commission to assess state aid in the light of Article 92. The principles according to which aid schemes pursuing environmental objectives shall be assessed by the Commission are set out in the Community guidelines on State aid for environmental protection[35]. The assessment is normally made by weighing the adverse effects on competition with the benefits for the environment.

29. When assessing state aid cases the Commission takes into account both the origin and the use of revenue in order to get a complete picture. An analysis of the use of revenues in isolation, which did not take the origin into account, would give an incomplete figure as it would seem as if there was simply a distribution of public funds. To this effect the Court has stated that the Commission must take into consideration all those factors which directly or indirectly may be involved, including indirect aid, the financing of the aid and the connection between the financing and the amount to be distributed as aid[36].

30. In order to facilitate the assessment by the Commission, Member States are encouraged to state clearly how the revenues from the environmental levies are to be used. In all cases it is desirable that the criteria used are open, transparent, non-arbitrary and provide incentives for a desirable behaviour. The following are the most common ways of using revenue:

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35 OJ No C 72, 10.3.1994, p. 3.

36 Judgement of 25 June 1970, Case 47/69, France v Commission, [1970].

1) Support to environmental investments/activities

31. Examples of facts the Commission takes into account when assessing compatibility of support to environmental investments with EC state aid rules are:
- whether the revenue is spent in the same sector of economic activity as it was collected, or in a different sector, i.e. if any sector receives a net benefit,
- whether the activities financed by the proceeds of the levies can be provided on a normal commercial basis with a satisfactory result, or whether some form of aid is needed,
- whether the money paid to firms can be considered compensation for undertaking activities that they would otherwise not perform, and that are in the public interest,
- the intended duration of the measure,
- if the aid element is intended to be reduced over time[37].

2) Levies to finance systems for collection and disposal of dangerous products or substances

32. There is an increasing number of systems for the collection and disposal of products or substances which are harmful to the environment. Under those systems, the Member State normally imposes a levy on the sale of the products or substances concerned, with the proceeds being used to pay companies for the collection and disposal of the products after use[38].

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37 For aid to agricultural activities, the rules which apply can be found in regulation (EEC) no 2.078/92, O.J. no. L 215 of 30.07.1992, p.85.

38 The Commission have assessed and agreed to three such cases, namely a Danish scheme for the collection of environmentally harmful batteries (State aid case N 539/95), a Danish scheme for the collection and disposal of used car tyres (State aid case N 684/93, OJ no C 390, 31.12.1994, p.15) and a Dutch scheme for the collection and disposal of car wrecks (State aid case N 93/95 (ex N 182/95)).

The key elements in the Commission's assessment were the following:
(1) that the charge which finances the system is imposed on all importers/producers of the products concerned in a non-discriminatory way,
(2) that the payment to the collecting firms is based on normal commercial terms and
(3) that the systems do not allow, directly or indirectly, the collecting companies to sell the collected products below market price.
(4) that the systems should be open and transparent, and be economically efficient.

As these requirements were fulfilled, the Commission concluded that the aid was deemed compatible with state aid legislation and agreed to these collection and disposal systems

3) Redistribution to the collective that paid the levy

33. Redistribution of revenues from emission levies, only charged on domestic firms, to the collective that paid them would normally be uncontroversial, as long as the system follows general requirements on transparency and non-arbitrariness. Such systems should however avoid unjustifiably favouring a specific domestic sector.

34. Product levies can affect both domestic products and those of other Member States. If the revenues from product levies are used to *fully* offset the burden borne by domestic producers, the levy can be regarded as being a charge having equivalent effect to a customs duty. It would then, as described above, be prone to be prohibited under Art 12 of the Treaty (see paragraphs 15 - 16). If the revenues *partly* offset the burden borne by the domestic producers, the levy would have to be examined concerning discrimination under article 95 (see paragraph 22). The Commission has not raised objections in cases involving product levies, where the revenue has been intended to solve similar environmental problems as the levy itself, provided that the above mentioned problems did not arise[39].

Exemption rules favourable to domestic firms

35. As stated above, exemptions from emission or products levies may constitute state aid in the meaning of Art. 92(1) of the Treaty. Temporary relief from new *emission* levies may be authorized where it is necessary to offset losses in competitiveness, since emission levies usually only apply to domestic firms. To ensure that these reliefs do not distort competition unduly, and to give an incentive for the aid recipients to implement measures to reduce pollution, the Commission requires that the tax relief or compensation
- is temporary,
- does not provide the sector with a net benefit, and
- in principle, reduces over time[40].

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39 In two state aid cases; concerning control of seeds in France (State aid case N 693/91), and concerning a levy on pesticides in Denmark (State aid case N 416/95), the Commission decided that revenues collected by levies on both domestic products and those of other Member States may be used to address domestic environmental problems that are targeted by the levy. The requirement is that the revenue is distributed on the basis of objective criteria, and does not support the domestic producers of the levied products.

40 For these reasons, the Commission has, for example, accepted the Dutch (State aid case N 760/95) and Danish CO2/Energy tax schemes (State aid case N 459/95, OJ no C 324, 5.12.1995, p.9) as compatible with state aid rules.

36. Exemption rules on product levies are more sensitive, since such levies affect producers in other Member States. Such exemptions would first have to be examined according to discrimination and single market rules, and if accepted, then according to state aid law. In general, Member States are encouraged to ensure that

- the exemption rules are clearly described, open and transparent
- the expected time frame for the system is described
- the effects on concerned sectors analyzed
- the exemptions not give an undue advantage to domestic firms
- the envisaged effects both on domestic producers and importers of the concerned products and close substitutes is analyzed.

f. Quantitative restrictions and measures having equivalent effect

37. Under certain conditions set out below, a levy or some aspects of it may be assessed in light of Article 30, which prohibits all measures having equivalent effect to quantitative restrictions on imports. However, a measure with such an effect may be permitted under Articles 30-36, if it is judged necessary to reach the environmental objective, and if the effects on the internal market are considered to be proportionate to the environmental gain. It has to be emphasized that it is the *means* of protecting the environment, and not the environmental objective as such, which are subject to assessment under Article 30.

Applicability of Article 30

38. Article 30 of the Treaty does not normally apply when a levy falls under Articles 9, 12, 16, or 95 of the EC Treaty. However, it could apply in the following circumstances:

- when a levy is imposed on a product for which there is no similar or competing national production, and the levy is of such an amount that the free movement of the products may be impeded: the Court has, for example, indicated that if a registration tax is applied to new motor vehicles in a Member State where no such vehicles are manufactured, it may be examined under Article 30[41], or,

[41] Case 47/88, Commission v Denmark [1990] ECR 4509.

- when a levy is connected with certain conditions or factors which can be separated from those defining the operation of the levy system, these requirements may be considered as falling under Article 30. Such conditions or factors could concern how the products have to be labelled or presented. If, for example the levy regulation requires an economic operator to alter the form, size or designation of the product, or the label under which the product is lawfully marketed in another Member State[42], and if this modification is not necessary for the proper functioning and objective of the levy, the required modification may be assessed under Article 30[43]. Furthermore, in accordance with the jurisprudence of the Court of Justice concerning technical requirements, the conditions or factors referred to above may not channel trade in such a way that only certain traders can effect the imports of the products concerned, whereas others are prevented from doing so[44].

39. The Court has ruled that a measure, such as a deposit charged per bottle, as part of a recycling system for bottles, cannot in itself qualify as a fiscal measure, and may therefore be examined under Article 30[45].

Assessment criteria on Article 30

40. Case-law on the application of Article 30 is abundant concerning non-fiscal measures, but the Court has not yet assessed a fiscal measure on the basis of this provision. Useful guidance on the judgement of necessity and proportionality can, nevertheless, be obtained from the case law of the Court of Justice[46] in the area of non-fiscal measures, although, as mentioned above levies and technical regulation to some extent may have different roles to play in environmental policy.

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42 See e.g. Case 27/80 Fietje [1980] ECR 3839 and Case 94/82 Kikvorsch [1983] ECR 947.

43 The same line of reasoning was followed by the Court in the Case 74/76, Ianelli & Volpi [1977] ECR 557, concerning the relation between Articles 30 and 92.

44 Case 104/75, De Peijper [1976] ECR 613.

45 Judgement of 20 September 1988, Case 302/86, Commission v Kingdom of Denmark, Free movement of goods - containers for beer and soft drinks, "Danish bottle case" [1988] ECR 4607.

46 See also Article 3 of Commission Directive 70/50/CEE of 22 December 1969. In case 155/82 Commission v Belgium [1983] ECR 531, at p. 543, para. 12 etc., and in case 62/90 Commission v Germany [1992] ECR 2575, at p. 2605, para. 11 etc., the Court of Justice also applied the conditions for necessity and proportionality and found the national restrictions to the free movement of goods not justified on grounds of the protection of health and life of humans.

41. If Article 30 is applicable to the national measure, the protection of the environment is recognized as a so called "mandatory requirement" which may justify the measure[47] even if it would hinder the free movement of goods. In accordance with case law, the following conditions shall be met in order for such a measure to be justified for the protection of the environment:

- The measure must be non-discriminatory, i.e. applicable to domestic products and those of other Member States alike,
- It should be shown to be necessary in order to meet the environmental objective, by, inter alia, scientific evidence[48],
- The burden which the measure imposes should be proportionate in relation to the objective of protecting the environment[49], which implies that it should not create more trade obstacles than is necessary to fulfil the environmental objective and that no other measure is available which is less restrictive to trade.

42. The assessment of whether an environmental levy is necessary and proportionate to fulfil the objective of protecting the environment has to be made on a case-by-case basis. In practice the assessment will often depend on factors such as the level at which the levy is fixed, the environmental gain expected by the measure and the amount of the administrative and other relevant costs connected with the regulated activity. The assessment of the necessity and proportionality of the measure may also depend on factors such as culture and consumer behaviour.

B. GUIDELINES ON COMMUNITY CONTROL MECHANISMS

a. Notification requirements in the field of state aid

43. Member States have to inform the Commission, in sufficient time to enable it to submit comments, of any plans to grant or alter aid. However, notification is not required for aid coming under the de minimis rule[50]. The time required for the Commission to assess a case is

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47 Case Cassis de Dijon and Danish Bottle Case.

48 Case 304/84, Müller, [1986] ECR 1511 and Case 178/84, Commission v Germany, [1987] ECR 1227.

49 Case 227/82, Van Bennekom, [1983] ECR 3883.

50 See Commission notice on the de minimis rule for State aid, OJ no C 68 of 6.3.1996, p.9.

normally two months. However, if the Commission considers that any such plan is not compatible with the common market, having regard to Article 92, it initiates the procedure provided for in Article 93 paragraph 2. This full investigation procedure provides the Member State in question as well as other Member States and all other interested parties the opportunity to submit their views on the planned aid. The Member State concerned cannot put its proposed measures into effect until this procedure has resulted in a final decision (Article 93 (3) EC Treaty).

44. The full investigation procedure empowers the Commission to take a final decision on the compatibility of the aid. In cases of negative decisions, partly negative decisions or conditional decisions, the Commission orders the Member State concerned to comply with the decision within a stated period of time[51].

45. An aid scheme put into operation without respecting the notification requirements is illegal. The Commission may order the Member State to suspend the payment of the aid pending the outcome of the investigation. In cases of aid which has been put into effect prior to the Commission¢s decision and which the Commission declared incompatible, the final decision of the Commission usually orders the Member State concerned to recover the illegally granted aid, together with interest, from the beneficiaries. In the absence of compliance with the Commission decision, the Commission may refer the matter to the Court of Justice. The obligation for a Member State not to put its proposed measures into effect until a final Commission decision has *direct effect*, which means that a competitor to the firm benefitting from the aid could request a national court to take all appropriate measures in accordance with national law, including the suspension of further payments under the scheme, until the Commission has decided on the compatibility of the aid with the Treaty. Moreover, a national court might in its final judgement order the restitution of the aid which has been paid illegally[52] or award damages[53].

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51 For a detailed description of the procedures see: Guide to Procedures in State Aid Cases, in Competition Law in the European Communities, Volume IIA - Rules applicable to State aid, Section B-I, Brussels-Luxembourg 1995.

52 See Case C-39/94, Syndicat français de l'Express international (SFEI) and others v La Poste and others (not yet reported), paragraph 71.

53 See e.g. joined Cases C-6/90 and C-9/90, Andrea Francovich et al. v. Italy, [1990] ECR 5357, paragraph 35.

b. Notification requirements in the field of Directive 83/189/EEC and secondary Community environmental law

46. Directive 83/189/EEC[54] lays down a procedure for the provision of information in the field of technical standards and regulations. It requires prior notification by Member States of any technical regulations, including those "which are linked to fiscal or financial measures affecting the consumption of products by encouraging compliance with such technical specifications or other requirements". The prior notification is to be sent to the Commission, and via the Commission to the other Member States which can emit comments or a detailed opinion. The normal standstill period of three months provided for by this Directive does not apply to technical regulations related to fiscal measures, and the comments or detailed opinions of the Commission or the Member States "may concern only the aspect which may hinder trade and not the fiscal or financial aspects of the measure"[55]. This notification requirement does not prejudge the outcome of the assessment under Article 30 or Article 95.

47. Concerning other secondary Community environmental law, the same prior notification procedure as for Directive 83/189/EEC is provided for by Article 16 of Directive 94/62/EC on packaging and packaging waste. This Article covers measures that Member States intend to adopt in order to implement Directive 94/62/EC and states that a Member State may indicate that the notification is equally valid for Directive 83/189/EEC, if the proposed measure is also a technical matter within the meaning of that Directive. This so called 'one-shop' system, enables Member States to send only one notification to the Commission, covering both Directives.

48. In case a measure which is notifiable under these Directives is not notified, the Commission may open an infringement procedure under Article 169 of the EC Treaty and issue a letter of formal notice to the Member State. In such a case, the Member State concerned is asked to eliminate the measure from its national legal order; if the Member State wants to apply such a measure, it has to send a new draft to the Commission and to adopt it after the notification procedure.

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54 Council directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations - OJ no L 109, 26.04.1983, amended by: Directive 88/182/EEC of 22 March 1988, OJ no L 81, 26.03.1988 and Directive 94/10/EC of 23 March 1994, OJ no L 100, 19.04.1994.

55 Article 8.1 of the Directive.

c. Notification of national measures transposing Community Directives

49. Every Directive contains a provision requiring Member States to communicate the measures they have enacted in order to transpose it. This also applies to levies or other economic instruments, when directives contain provisions referring to economic instruments, such as Article 15 of Directive 75/439/EEC on waste oil. In case a law transposing a Directive is not notified to the Commission, an infringement procedure will be opened in accordance with Article 169 of the EC Treaty

d. Complaints and Commission's own initiative investigations

50. The Commission is frequently informed on aspects related to environmental levies through complaints from affected firms or from other Member States. In such cases, the Commission is obliged to investigate the matter as it has the institutional task to ensure a proper implementation of the Treaty and secondary legislation. It therefore has the right to take the initiative in investigating and requesting information from Member States on their use of environmental levies.

IV. CONCLUSION

51. The use of environmental taxes and charges is rapidly increasing in the Member States, in line with the 5th Environmental Action Programme and its recent review. The Commission supports this evolution, as it opens up the scope for a more cost-effective environmental policy. However, it also entails some potential conflicts with other aspects of Community Policy, in particular related to the single market. This Communication aims to guide Member States in order to ensure that national initiatives on environmental levies and charges are compatible with the existing Community Framework.

52. This Communication is a first step by the Commission in the treatment of environmental taxes and charges. It shows that there is considerable scope for action by the Member States to implement such instruments, which have shown to be particularly attractive in improving the efficiency of environmental policy. However, the Communication also underlines the importance of the legal framework related to the functioning of the single market which has to be respected by Member States when introducing environmental taxes and charges. In this context, the Commission will reflect on whether, in future examinations of levies introduced for environmental reasons, further attention should be given to the analysis of Article 30.

53. With the increased practical experience from the use of environmental taxes and charges in Member States, Commission experience of assessing these instruments, based on this Communication will also increase. With this information the Commission will examine the need for policy initiatives in order to ensure the achievement of essential Community objectives.

54. In order to assess the impact on the single market and on environmental policy, the Commission, plans to carry out an evaluation on economic and environmental implications of the use of these instruments and policy conclusions that can be drawn from this.

APPENDIX

Overview of environmentally-related taxes and charges in EU and EEA countries[1]

As of October 1996

Environmental Tax Measures	Aus-tria	Bel-gium	Den-mark	Fin-land	France	Ger-many	Greece	Ice-land	Ire-land	Italy	Liech-ten-stein	Lu-xem-bourg	NL	Nor-way	Portu-gal	Spain	Swe-den	U. K.
Motor Fuels																		
Leaded/Unleaded (Differential)	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Diesel (Quality differential)			●	●							●			●			●	
Carbon/Energy taxation			●	●									●	●			●	
Sulphur tax														●			●	
Other excise taxes																		
(other than VAT	●	●	●	●	●	●	●	●	●	●		●	●	●	●	●	●	●
Gasoline (quality differential)				●													●	
Other Energy Products																		
Other excise taxes	●	●	●	●	●	●	●		●	●		●	●	●		●	●	●
Carbon/Energy taxation	●		●	●									●	●			●	
Sulphur tax			●		●									●			●	
NOx charge					●												●	
Vehicle Related Taxation																		
Sales/Excise/Regist. tax diff. (cars)	●	●	●	●			●	●	●	●	●		●	●	●		●	
Road/Registration tax diff. (cars)	●	●	●			●		●	●	●			●	●		●	●	
Agricultural inputs																		
Fertilisers														●			●	
Pesticides			●	●										●			●	

Overview of environmentally-related taxes and charges in EU and EEA countries *(continued)*

As of October 1996

Environmental Tax Measures	Aus-tria	Bel-gium	Den-mark	Fin-land	France	Ger-many	Greece	Ice-land	Ire-land	Italy	Liech-ten-stein	Lu-xem-bourg	NL	Nor-way	Portu-gal	Spain	Swe-den	U. K.
Other goods																		
Batteries		●	●								●						●	
Plastic Carrier Bags			●					●			●							
Disposable containers		●		●				●			●			●				
Tires			●															
CFCs and/or halons			●															
Disposable razors		●																
Disposable cameras		●																
Lubricant Oil Charge				●										●				
Oil Pollution Charge				●														
Solvents			●															
Direct Tax Provisions																		
Env. Investments/Accelerated depreciation	●		●	●	●								●	●	●			
Employer-paid commuting expenses part of taxable income	●		●	●		●									●	●	●	●
Air transport																		
Noise charges		●			●	●							●	●				
Other Charges														●	●		●	

Overview of environmentally-related taxes and charges in EU and EEA countries *(continued)*

As of October 1996

Environmental Tax Measures	Aus-tria	Bel-gium	Den-mark	Fin-land	France	Ger-many	Greece	Ice-land	Ire-land	Italy	Liech-ten-stein	Lu-xem-bourg	NL	Nor-way	Portu-gal	Spain	Sweden	U. K.
Water Charges and Taxes																		
Water charges			●	●	●	●					●			●			●	●
Sewage charges			●	●		●		●			●		●	●	●	●	●	●
Water effluent charges			●		●	●							●		●			
Tax on groundwater extraction													●					
Manure charges													●					
Waste Disposal and Managm. Charges																		
Municipal waste charges			●	●	●	●		●			●		●	●	●	●	●	
Waste disposal charge	●	●	●	●	●	●			●	●	●		●	●	●	●		●
Hazardous waste charge	●	●		●	●	●		●			●			●	●			
Land fill tax or charge										●			●					●

Source: OECD (Implementation Strategies for Environmental Taxes) , 1996, updated

1) The objective of this table is to give an schematic overview of the use of environmental taxes and charges in different countries. The design, the structure, the rates etc. are different from country to country.

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