

State Aid for Environmental Protection: Review of the Environmental Guidelines and Relevant Practice

1. Introduction

The Community Guidelines on state aid for environmental protection¹ (Environmental Guidelines) constitute the third Guidelines on this subject since 1994. Their aim is to make the Community's policy with respect to state aid for environmental protection more transparent.

In 1973 a declaration of the Council of the European Communities and the representatives of the governments of the member states adopted the 'polluter pays' principle. It stipulates that the entity responsible for environmental pollution must bear the environmental costs. It also implies that environmental costs should be internalised – they should be included in the company's production costs.

The environmental Guidelines promote the 'polluter pays' principle and the internalisation of costs and they acknowledge that the granting of state aid is, in principle, not compatible with these concepts. Nevertheless, they may authorise the granting of state aid, in the form of investment or operating aid, in cases where the aid gives firms an incentive to invest in environmental protection.²

2. Existence of State Aid

According to Article 87 (1) EC member states are not allowed to grant state aid to undertakings. Since the concept of state aid is "objective", the intention, or the aim of the granting authority do not matter for the determination of the nature of a measure. The only decisive factors are, whether there is;

- Transfer of state resources.
- Economic advantage: the aid reduces the costs normally borne in the budgets of the beneficiary undertakings.
- Selectivity: The aid favours certain undertakings or the production of certain goods.
- Distortion of competition.
- Affection of trade between the member states.

A transfer of state resources takes place if the aid uses funds that belong to, or are controlled and imputed to public authorities. In this way, the Court found in *van der*

¹ OJ C 37, 3.2.2001, p.3.

² At first state aid could also be justified as a "*temporary second-best solution*" in circumstances in which firms did not yet have the possibility to internalise all costs. The Commission, however, has come to the conclusion that since the adoption of the first Environmental Guidelines several changes have taken place which do no longer justify this kind of aid. According to the Commission, firms, for example, have had enough time to gradually apply the 'polluter pays' principle.

*Kooy*³ the fact that the state held 50% of the shares of a private company, and that it had the power to approve tariffs imposed by the company to be sufficient to prove the existence of a transfer of state resources. It was not prepared, however, to classify the purchase at a fixed minimum price of electricity produced from renewable energy sources by private electricity supply undertakings as a 'direct or indirect transfer of state resources'. Even though it involved an obligation imposed on the private suppliers by national legislation.⁴

In cases involving environmental measures, the polluter pays principle plays an important role in determining whether the measure confers an economic advantage on the beneficiary. This is the case, if it relieves the undertaking concerned from costs which on the basis of the polluter pays principle have to be borne by the undertaking itself.⁵

On this note, the Commission argued that the introduction of a waste disposal system for paper and carton did not constitute state aid. This conclusion was, *i.a.*, based on the fact that the costs for the collection and recycling of old paper and cardboard from private households no costs which should normally be borne by the producer or first recipient of the paper and cardboard. Therefore, the measure did not confer an advantage on them since they were not relieved from costs which normally should be borne by these entities.⁶

With respect to the third criterion the Court of Justice acknowledges that a measure which creates an advantage for the recipient does not constitute state aid if "*by the nature or general scheme of the system of which it is part does not fulfil [the] condition of selectivity*".⁷ A measure cannot be qualified as general simply because it applies to a large number of undertakings or because the undertakings belong to various or large sectors.⁸

Since all of the above-mentioned criteria are cumulative a measure cannot be classified as state aid until it has also been established that can distort competition. This will, for example, be the case where the advantage, which is conferred upon the beneficiary by the measure, allows the undertaking to enter a certain market and, consequently, influencing the structure of this market.⁹

However, not only must it be shown that competition can be distorted but also that the measure can affect trade between the member states. In a decision concerning a reduction of the excise duty on biofuels the Commission argued that the fact that biofuels could be substituted by fossil fuels, which are traded intensively on the international market, was

³ Joined Cases C-67, 68 and 70/85, *van der Kooy*, [1988] ECR, I-00219.

⁴ Case C-379/98, *Preussen Elektra AG*, [2001] ECR, I-2099, Paras.54-67.

⁵ Opinion of Advocate General Jacobs in Case C-126/01, *GEMO*, delivered on 30 April 2002, Paras. 67-69.

⁶ Commission Decision NN 87/00 of 20 June 2001, Netherlands – "*Afvalverijderingssysteem voor papier en karton*".

⁷ Case C-173/73, *Italy v. Commission*, [1974] ECR 709, Para.33.

⁸ Case C-143/99, *Adria-Wien Pipeline*, [2001] ECR, I-8365, Para.48.

⁹ E.g. Commission Decision N 318/2005 of 20 October 2005, United Kingdom – *Wave and Tidal Stream Energy Demonstration*.

enough to prove that the said reduction could have a negative affect on trade between member states.¹⁰

Once a measure fulfils the criteria enumerated in Article 87 (1) EC, it constitutes state aid and can, in principle, not be authorised. Nevertheless, pursuant to Article 87 (2) and (3) certain state aid is or may be authorised

3. Basis for Exemption for Environmental Aid Measures (Points 72-73)

Generally, Article 87 (3) (c) EC is the basis for the authorisation of aid fulfilling the conditions set out in the Environmental Guidelines but, aid can also be authorised pursuant to Article 87 (3) (b), and thus at a higher rate, if it can be shown that;

- the aid is necessary for environmental projects of common European interest, and
- it concerns a “*specific, well defined and qualitatively important*” project which makes “*exemplary and clearly identifiable contribution to the common European interest*”.

4. Scope (Point 6 -7)

In principle, any aid, in any sector – with the exception of agriculture – which aims at the protection of the environment is covered by the Environmental Guidelines. This is subject to some restrictions. Aid for environmental R&D and environmental training falls within the scope of respectively the Community framework for research and development and the Commission Regulation on training aid.

The Guidelines do not apply to stranded costs in electricity production, nor do they cover the design or production of means of transport which consume fewer natural resources, and the improvement on the safety or hygiene within plants or other production units.

5. Permissible Aid

5.1. **Investment Aid**

5.1.1. *General Conditions* (Points 28-29)

In the Guidelines and in its decisions, the Commission frequently stresses the need for the aid to give rise to an incentive to the beneficiary to adopt environment-friendly techniques or to buy environmental friendly machinery. The effect of the aid must be to encourage the beneficiary to do something which it would normally not do were it not for the protection of the environment.

In a case concerning Italian aid, the Commission did not authorise investment aid for a new environment-friendly plant. It argued that the undertaking was only driven by

¹⁰ Commission Decision N 334/2005 of 23 December 2005, Belgium – “*Verlaging van het accijnstarief voor biobrandstoffen*”.

economic considerations and that the environmental benefits were “*a necessary consequence of the firm’s choice of production process*” and that a new plant was normally always more environment- friendly than an old plant.¹¹ The Decision was upheld by the Court of First Instance which stated that what matters is not “*whether the investment brings environmental improvement or whether it goes beyond existing environmental standards, but, primarily (...) whether it was carried out in order to bring improvements*”, and whether “*the same economic performance could be obtained from less costly but more harmful equipment*.”¹²

The incentive is also lacking if a company merely adjusts itself to new or existing Community standards. Here, the company simply complies with mandatory Community rules, and, in if the company is not an SME, it cannot be granted investment aid.

The situation is different if a company makes an investment in environmental protection which goes further than existing community standards, if it brings itself in line with more stringent national standards or, if it makes the investment in the absence of Community standards. The fact that in all of these cases the environment will be better protected, either because the level of protection is higher than the level required by Community standards or because there are simply no Community standards, is a reason for the Commission to authorise investment aid.

It should be noted that aid for compliance with more stringent national standards or with national standards in the absence of Community standards is only authorised if the firm complies with these standards “*by the final date laid down in the relevant national measures*”. Moreover, where Community standards have been adopted but are not yet in force, a member state can no longer grant state aid for investment for improvements on Community standards or for investment which is undertaken in the absence of such standards, where these improvements “*merely bring companies into line*” with the adopted Community standards.

Finally, the Commission has argued that point 29 of the Guidelines has to be interpreted in the sense that only aid which is granted for investments which intend to ameliorate the beneficiary’s own environmental record is covered by the Guidelines. It does not cover

¹¹ Commission Decision 2001/829/EC of 28 March 2001, Italy – *State aid to Ferriere Nord SpA*, OJ L 310, 28.11.2001, p.22.

¹² Case T-176/01, *Ferriere Nord SpA*, Judgement of 18 November 2004, Paras.151-152. See also, Commission Decision N 527/2002 of 2 April 2003, Greece – *Aid to design, construct, test and operate a pipeline for transport of aircraft fuel to the new airport of Athens*, where the Commission classified the project in question as a general investment project despite of the fact that it was also environment-friendly. According to the Commission no additional cost for the protection of the environment could be identified.

aid which aims at improving the member state's environmental record¹³ nor does it concern aid which reduces the pollution caused by other undertakings.¹⁴

5.1.1.1. Investment in Energy (Points 30-32)

The Commission attaches special importance to investments in energy saving, in renewable sources of energy (being one of the Community's environmental priorities) and, under certain conditions, in the combined production of electric power and heat. It, therefore, deems them to be "*equivalent to investments to promote environmental protection*" and authorises member states to grant a certain amount of investment aid.

5.1.1.2. Rehabilitation of Polluted Sites and Relocation of Firms

5.1.1.2.1. Polluted Industrial Sites¹⁵ (Point 38)

One of the key principles of the Community's environmental policy is the 'polluter pays' principle according to which the cost for environmental pollution should be borne by the person responsible for the pollution. Accordingly, state aid for the rehabilitation of a polluted industrial site may only be granted in case the person responsible for the pollution¹⁶ cannot be identified or cannot be made to bear the costs.

In principal, the "polluter" is to be identified on the basis of national law. This is, however, without prejudice to Community law. In April 2004 the Council and the Parliament adopted a directive on environmental liability which lays down specific rules about the preventive and remedial actions to be taken by the person responsible for the pollution.¹⁷

5.1.1.2.2. Relocation of Firms (Point 39)

The costs for the relocation of firms to new sites can not be subsidised. The Commission does not consider this activity to fall within the definition of environmental protection.

¹³ Commission Decision 2004/317/EC of 11 November 2003, United Kingdom – *State aid under the WRAP environmental grant funding and WRAP lease guarantee funding*; OJ L 102, 7.4.2004, p.59. See also Commission Decision N 135/2005 of 5 July 2005, United Kingdom – *Infrastructure grant programme*; Commission Decision N 570/2004 of 5 July 2005, Germany – "*Förderung von Investitionen für den Aufbau einer Kreislaufwirtschaftsinfrastruktur*".

¹⁴ Commission Decision 2005/170/EC of 16 June 2004, Germany, Netherlands, Belgium – *Aid for the construction of a propylene pipeline between Rotterdam, Antwerp and the Ruhr area*, OJ L 56, 2.3.2005, p.15.

¹⁵ E.g. Commission Decision N 85/2005 of 27 July 2005, Netherlands – "*Bodemsanering van vervuilde bedrijfstreinen*".

¹⁶ The 'person responsible for the pollution' is the person who is "*liable under the law applicable in each member state, without prejudice to the adoption of Community rules in the matter*".

¹⁷ Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p.56.

When the beneficiary is a firm established in an urban or in a Natura 2000¹⁸ designated area where it lawfully carries out an activity that creates major pollution and, on account of this location, must relocate to a more suitable area, state aid may be justified when both of the following criteria are satisfied:

- a) The relocation has been ordered by administrative or judicial decision on grounds of environmental protection.
- b) The firm must comply with the strictest environmental standards applicable in the new region where it is located.

5.1.2. *Types of Investment* (Point 36)

Aid may be granted for investments:

- in land, where the investment is “*strictly necessary in order to meet environmental objectives*”;
- in buildings, plant and equipment, with the intention of reducing or eliminating pollution and nuisances;
- to adapt production methods in order to protect the environment;

Investment in technology transfer through the acquisition of operating licences or patented and non-patented know-how may also qualify if it is a depreciable asset which has been purchased on market terms “*from a firm in which the acquirer has no power of direct or indirect control*”. Moreover, as long as the intangible asset is not out of date, “*it must be included in the assets of the firm, and remain in the establishment of the recipient of the aid and be used there for at least five years.*” In case a sale takes place before the end of these five years, “*the yield from the sale must be deducted from the eligible costs and all or part of the amount of aid must, where appropriate, be reimbursed*”.

5.1.3. *Eligible Costs* (Point 37)

As a general rule, only the extra investment costs which are “*necessary to meet the environmental objectives*” can qualify as eligible costs. This implies that the Commission “*will take account of objective and transparent methods of calculation*” in cases where these costs cannot be easily identified.

Furthermore, the Guidelines also require the benefits which derive from the investment to be deducted from the eligible costs. This includes “*any increase in capacity, cost savings engendered during the first five years of the life of the investment and additional ancillary production during that five-year period*”.

Consequently, the eligible costs equal the extra costs for the investment costs. They are calculated as follows:

¹⁸ Natura 2000 areas are the areas which are covered by Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive), OJ L 206, 22.7.1992, p.7, and Council Directive 79/409/EEC on the conservation of wild birds (Birds Directive), OJ L 103, 25.4.1979, p.1.

Extra Costs = Total Costs – Reference Costs – Benefits

Investment	Eligible costs
Renewable energy	Extra costs borne by the firm compared with a conventional power plant with the same capacity in terms of the effective production of energy. ¹⁹
New Community standards (SME)	Additional investments needed to attain the level of environmental protection required by those standards.
National standards (no EC standards)	Additional investments needed to attain the level of environmental protection required by those standards.
More stringent national standards / voluntary improvement on EC standards	Additional investments needed to attain a level of environmental protection higher than the level required by the Community standards.
Absence of standards	Investment costs necessary to achieve higher level of environmental protection than that which the firm or firms in question would achieve in the absence of any environmental aid.
Relocation of firms	(costs for the removal and for new investments connected to the removal + possible penalties to be paid in case certain contracts have to be terminated early) – (returns from sale or rent of the plant or the abandoned land + compensation for the expropriation or any other compensation + gains from increased capacity)
Rehabilitation of polluted sites	Cost of work – increase in value of the land.

5.1.4. *Aid Intensity*

5.1.4.1. General (Points 28-32, 35, 38-39)

Investment	Aid intensity	Bonus for SMEs
Improvement on EC standards / Absence of EC standards and national standards / More stringent national standards / National standards in absence of EC	30% gross of eligible costs	+ 10%

¹⁹ Since point 37 of the Guidelines describes the eligible costs in the case of renewable energy as ‘normally’ being this type of extra costs, the Commission sometimes accepts other kinds of extra costs to be considered as eligible costs. See Commission Decision N 11/2005 of 3 May 2005, United Kingdom – *Photovoltaic demonstration programme*.

standards		
New EC standards – SME	15% gross of eligible costs ²⁰	
Energy saving / Combined production of electric power and heat.	40% of eligible costs	+ 10%
Renewable energy	40% of eligible costs or up to 100% where it can be shown to be necessary ²¹ and where no further support is granted for the installation in question.	+ 10%
Renewable energy installations serving all the needs of an entire community	40% + 10% of eligible costs	+ 10%
Rehabilitation of polluted sites	100% + 15% of the cost of the work	
Relocation of firms	30% gross of eligible costs	+ 10%

5.1.4.2. Assisted Regions (Points 33-34)

Additional aid to promote regional development may be granted to a firm which is located in a region which is eligible for national regional aid.

The aid intensity in these regions is:

- the basic rate for environmental investment aid²² + 5% gross in Article 87 (3) (c) regions²³; or
- the basic rate for environmental investment aid + 10% gross in Article 87 (3) (a) regions; or
- the regional aid rate + 10% gross.

5.2. Operating Aid

5.2.1. Waste Management and Energy Saving (Points 42-46)

Aid for waste management must comply with the classification of the principles of waste management to be found in the Community strategy for waste management.²⁴ This means that the waste must be managed in a responsible manner. In a decision concerning an exemption from the UK's Climate Change Levy in respect of coalmines the Commission, for example, argued that methane from abandoned coalmines was an unavoidable waste

²⁰ For a period of three years from the adoption of new compulsory Community standards.

²¹ The Commission takes the view that an aid intensity of 100% may be necessary where the beneficiary can prove that he will not get any private funding for his investment if he does not receive aid amounting to 100% of the eligible costs, Commission Decision N 175/b/2005 of 6 September 2005, Germany – “Förderung von Demonstrationsvorhaben zur energetischen Nutzung nachwachsender Rohstoffe”.

²² see point 4.1.4.1.

²³ E.g. Commission Decision N 56/2003 of 10 December 2003, Germany – “Ad-hoc Umweltbeihilfe zugunsten von Villeroy & Boch”.

²⁴ COM(96) 399 final, 30.7.1996.

gas which could only be re-used for electricity production. It therefore concluded that extracting this gas for the production of electricity qualified as responsible waste management.²⁵

Operating aid may only be granted where such aid is “*absolutely necessary*”, limited to compensating for the difference between the extra production costs and the market prices of the relevant products or services, and temporary. The aid may be granted for a period of five years.

These are the general rules under which operating aid may be granted. They also apply in case operating aid in the form of tax reductions or exemptions does not fulfil the conditions which the Guidelines set for the granting of these types of aid. Moreover, in cases concerning operating aid for renewable energy or the combined production of electric power and heat a member state may opt to grant the aid in accordance with these rules.

As an exception to the ‘polluter pays’ principle, operating aid for the treatment of industrial aid may be regarded as necessary where firms temporarily lose international competitiveness because of the introduction of national standards in the absence of Community standards or of national standards which are more stringent than the existing Community standards.

5.2.2. Tax Reductions or Exemptions²⁶ (Points 47-53)

Temporary exemptions from taxes which are levied with the aim of environmental protection are in general considered to be operating aid, and therefore incompatible with the EC Treaty. However, since such taxes may cause a firm to lose temporarily international competitiveness, the Commission is prepared to authorise this aid under certain conditions.

Tax reductions or exemptions may be granted in the following cases:

- The national tax is levied in the absence of a Community directive: justification for a temporary exemption may be given where it enables firms having difficulties to adapt rapidly to the newly imposed tax to comply with the new situation.
- The introduction of the national tax is the result of a Community tax:
 - o Where the tax rate is higher than the minimum rate laid down in the Community directive and the exemption granted does not result in firms paying a tax which is lower to the Community minimum rate, a temporary exemption may be justified.
 - o Where the tax rate is equal to the Community minimum rate and where an exemption would, therefore, result in a tax which is below the Community

²⁵ Commission Decision 2004/50/EC of 17 September 2003, United Kingdom – *Exemption from the Climate Change Levy which the United Kingdom is planning to implement in respect of coalmine methane*, OJ L 10, 16.1.2004, p.54.

²⁶ See Table 1.

minimum rate the exemption cannot be justified unless it is authorised by the directive and considered to be “*necessary and (...) not disproportionate in the light of the Community objectives pursued*” (An exemption can only be granted for a five-year period. The aid intensity can amount to 100 % of the extra cost where it is ‘degressive’ and to 50% of the extra costs where it is ‘non-degressive’).

Furthermore, in cases where the exemption decision concerns a non-degressive reduction which is granted for a ten-year period, point 51.1 of the Guidelines requires the conclusion of a conditional agreement between the member state and the beneficiary or of voluntary agreements between firms laying down environmental protection objectives which are assessed by the Commission upon notification of the aid project and which contain penalties for non-commitment. The conclusion of such agreements can only be avoided where the tax reduction is higher than the Community minimum or where, in the absence of a Community tax, the beneficiaries must pay ‘a significant proportion’ of the new national tax. Although there is no further indication in the Guidelines as to the meaning of ‘a significant proportion’ some clues can be found in Commission decision. In various decisions the Commission authorised a tax reduction where the beneficiary still had to pay 20% or the full rate.²⁷ With respect to a Swedish aid scheme for the exemption from the energy tax, the Commission was prepared to regard the respect of the minimum rates of a Community tax which had not yet entered into force, as “*equal to a significant proportion of the national tax*”.²⁸

These rules apply to:

- New taxes introduced in the absence of a Community tax or new taxes which exceed the existing Community tax;
- Existing taxes if this tax has “*an appreciable positive*” environmental protection impact and if the derogations in question were already decided on at the moment of adoption of the tax or become necessary because of “*a significant change in economic conditions*” causing the firm to be placed in a “*particularly difficult competitive situation*”. The Commission links the latter requirement to the increase in costs resulting from the change in economic conditions in that it requires that the reduction should not exceed the increase in costs and that the reduction can only be applied as long as the increase in costs lasts;
- Significant increases in an existing tax; and
- Derogations from taxes, which encourage the development of processes for producing electric power from conventional energy sources having a very much higher efficiency than conventional production processes, and which grant a ten-year non-degressive reduction (The conditions of point 51.1 do not have to be complied with where the exemption is only given for a period of five year).

²⁷ Commission Decision N2/04 of 7 May 2004, United Kingdom – *Aggregates Levy-Northern Ireland exemption*; Commission Decision N499/2001 of 13 February 2002, Germany – “*Fortführung der ökologischen Steuerreform nach dem 31.März 2002*”.

²⁸ Commission Decision 2005/468/EC of 30 June 2004, Sweden – *Aid scheme for an exemption from the tax on energy from 1 January 2002 to 30 June 2004*, OJ L165, 25.6.2005.

In all other cases of tax reduction the member states may only grant aid in accordance with the Guideline's general rules on operating aid.²⁹

5.2.3. Renewable Energy Sources (Points 54-65)

Since the encouragement of renewable energy sources is a Community policy and since they are sometimes in a disadvantaged position in their competition with conventional sources, the Guidelines contain four ways in which member states may grant operating aid which covers the difference in production cost of renewable energy and the market price for the energy in question.

At any rate, the operating aid should only cover the difference between the cost for the production of the energy from renewable energy sources and its market price.

According to the first option, the member state can decide to grant aid for plant depreciation. As a consequence, aid for any further energy produced may not be granted, and a fair return on capital will only be allowed if the member state can demonstrate that this is "*indispensable given the poor competitiveness of certain renewable energy sources*". Moreover, any investment aid which the beneficiary received for the new plant must also be taken into account, and a special treatment may be authorised in case the operating aid is granted for biomass.³⁰

A member state may also choose to use market mechanisms like green certificates or tenders. If these mechanisms are considered to be state aid, the member state must be able to demonstrate that the measure is necessary for the viability of the renewable energy, that there is no overcompensation, and that it does not discourage the producers of renewable energy to become more competitive. Authorisation will only be granted for a ten years period.

If the third option is used, the aid will be calculated on the basis of the avoided external costs and it may not exceed EUR 0,05 per kWh. The calculation consist in the difference between the external cost which the producer of renewable energy makes without paying them and the external costs which are produced but not paid by producers of non-renewable energy.

Since the third option can only be used where it is certain that the aid will result in an actual, overall increase in the use of renewable energy sources to the detriment of non-

²⁹ In Commission Decision 2005/565/EC of 9 March 2004, OJ L 190, 22.7.2005, Austria - *Aid scheme for a refund from the energy taxes on natural gas and electricity in 2002 and 2003, i.a.*, assessed the compatibility of a new derogation from an existing aid. It came to the conclusion that neither was the information submitted by Austria sufficient to determine whether the conditions of point 51.2 of the Guidelines were fulfilled nor had Austria significantly increased the tax as required for the application of point 52 of the Guidelines. Therefore, Austria could only grant these tax exemptions in accordance with the general rules on operating aid.

³⁰ See for example Commission Decision N 318/2005 of 20 October 2005, United Kingdom – *Wave and Tidal Stream Energy Demonstration*.

renewable sources, the Guidelines require the aid to be granted under a scheme which gives an equal treatment to firms in the renewable energy sector, does not discriminate between firms producing the same renewable energy. Every five years the scheme will be re-examined by the Commission.

Finally, the fourth option allows operating aid to be granted in the same way as in the case of waste management and energy saving.

5.2.4. *Operating aid for the combined production of electric power and heat* (Points 66-67)

A member state may grant operating aid for the combined production of electric power and heat in the same ways as for renewable energies if the production costs for this power and heat exceed the market price and, if the measure benefits the environment because:

- the 'conversion efficiency'³¹ is particularly high,
- it allows the reduction of energy consumption, or
- it concerns a less environmental damaging production process.

Where the combined production of electric power and heat is destined for the industry, operating aid will only be authorised if the costs for the production³² of one unit of energy through the use of this technique is higher than the market price of one unit of conventional energy.

6. Cumulating Aid (Point 74)

Cumulating aid covered by the Environmental Guidelines with other types of aid is only allowed where this does not result in an aid intensity which is higher than the aid intensity allowed by the guidelines. If the purposes of the aid are different and if they involve the same eligible cost, the most favourable aid ceiling will be applied.

Moreover, for the application of the aid ceilings it does not matter whether the aid is financed in part from Community resources. The ceilings apply to aid from all sources. In cases where various guidelines can be applied the most favourable ceiling may apply.

7. The Future

In 2007 a revision of the Guidelines will take place. In preparation of this revision the European Commission published a Questionnaire. It, *inter alia*, contains questions concerning the scope of the Guidelines, the application of the polluter pays principle, the

³¹ The Guidelines define the 'conversion efficiency' as "*the ratio between the quantity of primary energy used to produce a secondary form of energy and the quantity of secondary energy actually produced*" ("*electric energy produced + thermal energy produced/energy used*").

³² Plants and normal return on capital may be included in the production costs. Gains in terms of heat production must be deduced.

possible introduction of a block exemption regulation for environmental aid and the so-called ‘refined economic approach’.

In the member state’s responses to this Questionnaire concerns were raised about several issues, some of which will be mentioned here.

First, the current Guidelines only apply to cases where the investment improves the beneficiary’s own environmental record. Some member states argue that it might be sometimes more effective to support investments which environmental benefits are more far reaching.

Second, the Questionnaire proposes to use the ‘balancing test’ more clearly in the future and to justify the new draft Guidelines on the basis of a ‘refined economic approach’. According to the United Kingdom the purpose of the environmental state aid should be taken more into account. Since it is granted “*the achievement of environmental gains which would not be spontaneously undertaken the market or to incentives the earlier implementation of such gains*” these gains should play a bigger role in examining the compatibility of an environmental aid.³³

Another point concerns the way of calculating the eligible costs. Austria support’s the view that costs should be calculated on the basis of the ‘avoided external costs’ principle, which can already be used in connection to the calculation of operating costs. It also argues, the fact that the Guidelines only allow for the voluntary additional costs to be eligible leads to a situation where an undertaking which wishes to improve its environmental record still ends up with higher costs than an undertaking which only has to carry the burdens imposed by the Community.³⁴

8. Conclusion

Once the Commission has established that an environmental measure constitutes state aid, the aid may be exempted on the basis of Article 87 (3) (b) or (c) and the Environmental Guidelines.

The Guidelines only authorise investment aid if it gives rise to a real incentive to improve the beneficiary’s own environmental protection record. If this is the case, investment aid may be granted for firms improving on Community standards, investments in energy, the relocation of firms, the rehabilitation of polluted industrial sites, and for energy saving.

Although, in principle, operating aid is not authorised under the Community’s state aid regime, it can be exempted under the Environmental Guidelines. Generally, this kind of aid should not be granted for a period longer than five years unless it concerns certain tax

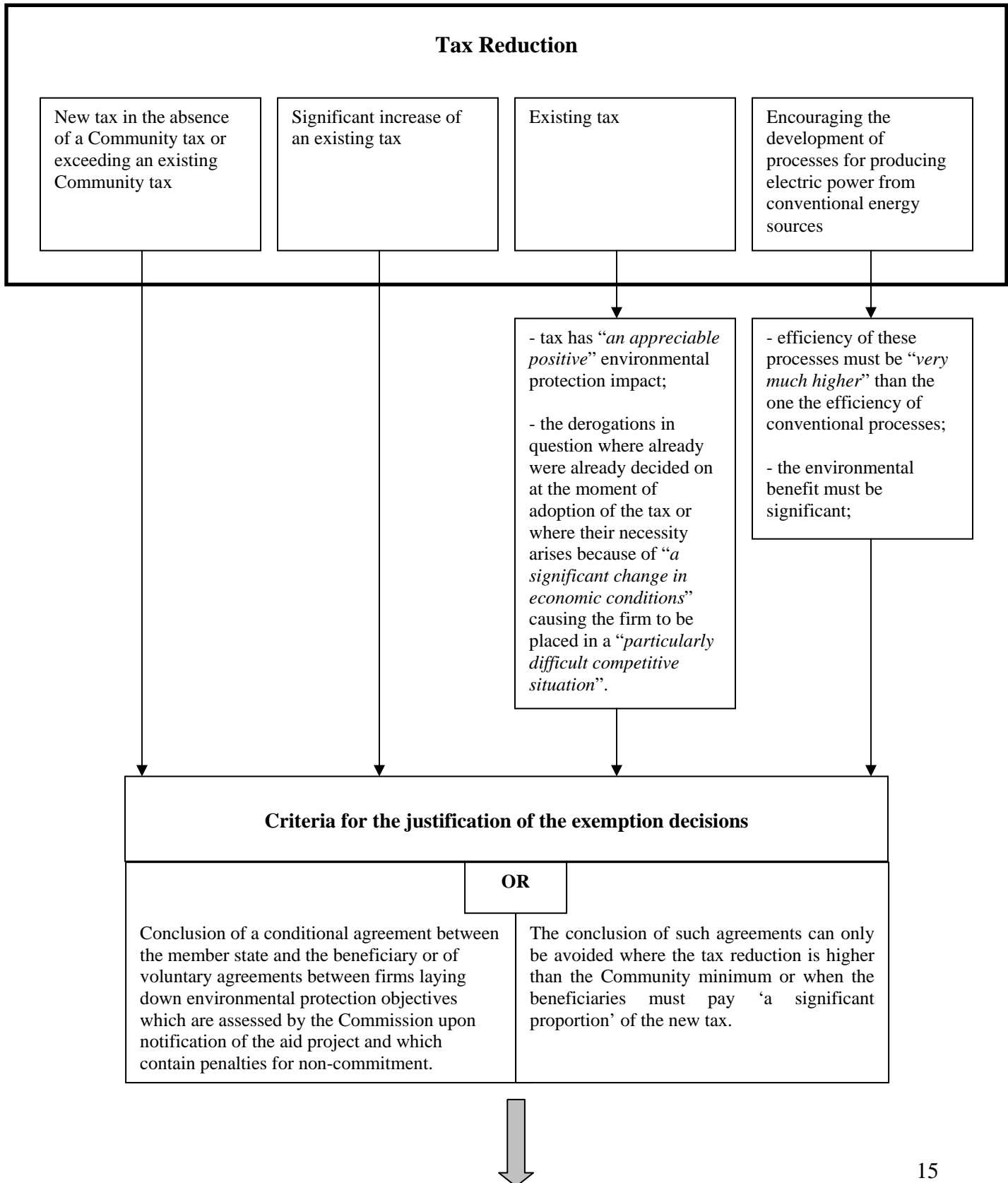
³³ UK Government response to the European Commission Questionnaire on the review of the current Community Guidelines on state aid for environmental protection.

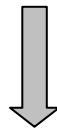
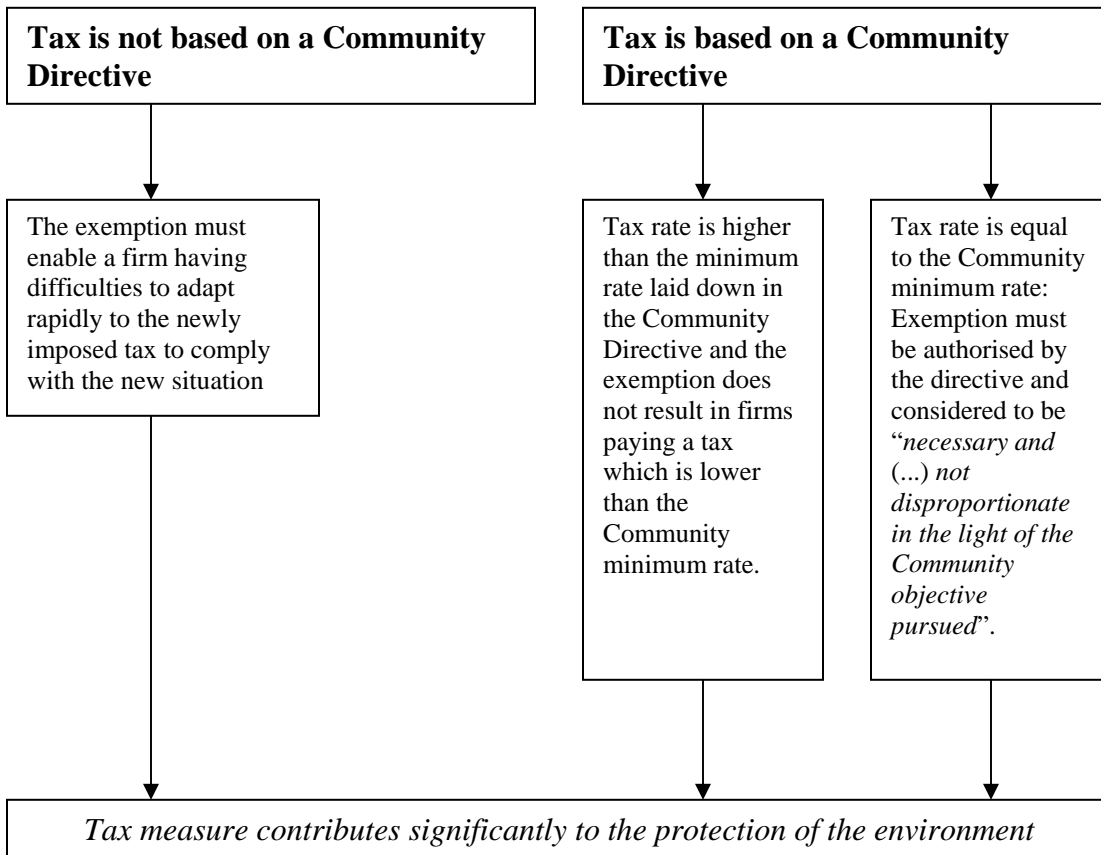
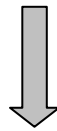
³⁴ Austrian response to the European Commission Questionnaire on the review of the current Community Guidelines on state aid for environmental protection.

reductions or exemptions, renewable energy sources or the combined production of electricity and heat.

Maria Kleis
Research Assistant

Table 1
CRITERIA FOR NON-DEGRESSIVE TAX REDUCTIONS COVERING A TEN-YEAR PERIOD





Exemption or reduction can be justified