



DYNAMIX

Decoupling growth from resource use
and environmental impacts

Legal assessment of policy mixes



Deliverable D5.4 Report on governance
assessment: Legal assessment

FINAL REPORT

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LIST OF ABBREVIATIONS

| | |
|-------|---|
| AEUV | Vertrag über die Arbeitsweise der Europäischen Union (see TFEU) |
| AoA | Agreement on Agriculture |
| APEC | Asia-Pacific Economic Cooperation |
| ASCM | Agreement on Subsidies and Countervailing Measures |
| BAM | Border Adjustment Measure |
| BTA | Border Tax Adjustment or Border Tax Agreement |
| CAP | Common Agricultural Policy |
| CEN | Comité Européen de Normalisation (European Committee for Standardisation) |
| COM | Commission |
| DSB | Dispute Settlement Body |
| DSR | Dispute Settlement Reports |
| EAFRD | European Agricultural Fund for Rural Development |
| EAGF | European Agricultural Policy Fund |
| EC | European Communities |
| EEC | European Economic Community |
| ECJ | European Court of Justice |
| ECR | European Court Reports |
| e.g. | example given |
| EGA | Environmental Goods Agreement |
| ELV | End-of Life Vehicle |
| EPR | Extended Producer Responsibility |
| ETI | Extra-territorial Income Exclusion |
| ETS | Emissions Trading System |
| EU | European Union |
| EUV | Vertrag über die Europäische Union |
| FAZ | Frankfurter Allgemeine Zeitung |
| FSC | Foreign Sales Corporations |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| ibid. | <i>ibidem</i> (at the same place) |

| | |
|--------|--|
| i.e. | <i>id est</i> (that is to say) |
| IMPEL | European Union Network for the Implementation and Enforcement of Environmental Law |
| ISO | International Organisation for Standardisation |
| LULUCF | Land Use, Land Use Changes and Forestry |
| MEA | Multilateral Environmental Agreement |
| MFN | Most-Favoured Nation |
| MS | Member State |
| NECD | National Emissions Ceilings Directive |
| NPRP | Non-Product Related Process |
| NT | National Treatment |
| para. | Paragraph |
| PPM | Process and Production Method |
| RECP | Resource Efficiency and Cleaner Production |
| TBT | Technical Barriers to Trade |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TRIS | Technical Regulations Information System |
| TRIMS | Trade-related Investment Measures |
| TRIPS | Trade-related aspects of Intellectual Property |
| TTIP | Transatlantic Trade and Investment Partnership |
| TV | Television |
| RMC | Raw material consumption |
| SPS | Sanitary and Phytosanitary |
| UK | United Kingdom |
| US | United States |
| VAT | Value Added Tax |
| WP | Work Package |
| WTO | World Trade Organisation |

Executive summary

The legal assessment aims to provide a first estimate of the legal feasibility and implementability of the selected instruments of the policy mixes. This is followed by suggestions for possible adjustments in the formulation and design of the instruments as well as the policy mixes.

The instruments are therefore first analysed on their compatibility with relevant *status quo* provisions in international treaties and agreements as well as relevant stipulations of the European Treaties with a focus on competition and trade law as these provisions are obstacles potentially interfering with or counteracting the policy mix set-up for achieving decoupling.

It has to be taken into account, however, that on the one hand *ex-ante* legal assessments of policy mixes face difficulties mainly due to open questions regarding the exact design of the instruments. Additionally, summarising results of assessments of individual instruments is uncommon in legal practice and leads to generalisations that could distort the image when it comes to the individual instruments. On the other hand the law system, especially the material law, is subject to constant changes and adaptations on the basis of the political guidelines as well as court decisions. Therefore, depending on the importance of an instrument for the achievement of the overall objective of absolute decoupling, it is advisable to adhere to this instrument even if it might be incompatible with current legislation.

This said, the compatibility checks indicate that:

All selected instruments of the *metals policy mix* seem to be compatible with WTO-law. This policy mix in general makes use of categories of instruments that have at least partly established predecessors on the EU-level and the international level. This basis adds to the compatibility of a further development and extension of the instruments with WTO-law. With respect to EU-law, however, the measures that use some kind of tax as the principal instrument seem to cause feasibility problems. This is due to the fact that a harmonisation of tax on the EU-level needs a unanimous vote of the Council. Besides this, the tax needs to be necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition, which is doubtful with regard to some of the instruments and thus still needs to be proved in the further description of the instruments.

Regarding the *land-use policy mix* some of the chosen measures of the production side imply a mix of product standards/technical regulation, subsidisation and taxation. This adds to the complexity of the compatibility check and leads to some pointers for revision. With regard to the consumption side the funding of the measures still needs to be clarified – at least two out of the three measures, however, seem to be compatible with WTO-law. The intended exemption within the third measure (VAT on meat) complicates the compatibility check. With the exception of the VAT on meat products, the proposed measures do not raise immediate concerns in view of EU-law.

The picture is uneven with regard to the measures under the *overarching policy mix*: While some of the measures (especially those establishing voluntary systems) do not even have a connecting point with WTO-law, others raise several questions on the compatibility with WTO-

law. Further clarifications are partly needed to make up the legal assessment. In view of EU-law the measures in general do not raise immediate concerns with the exception of the circular economy tax trio and the feebate scheme.

Based on the results of the compatibility checks and by adding the results of the general reflections on implementability of legal provisions the following pointers for revision are identified:

With respect to *all three policy mixes* it is recommended to put each one of the instruments into the overall context and explain its importance for reaching the overall target of reducing the consumption of virgin metals in the EU by 80 % compared to 2010 levels, measured as tons of RMC in the general description of the instrument, well knowing that this can only be founded once the environmental ex-ante assessments and modellings are completed.

If the protection of human health and the environment as well as the reduction or conservation of energy resources is part of the targets this should be explicitly mentioned, as this is of utmost importance when it comes to the justification of the instruments.

Additionally, consideration should be given to the question if the objectives could be reached through (multilateral) environmental agreements. At least negotiations for multilateral environmental agreements should be sought, especially when it comes to planned global standards, in order to prevent the allegation of unpredictable behaviour in conflict with the WTO transparency principle. In general, WTO members should provide as much information as possible about the environmental policies they may take, when these can have a significant impact on trade. This is mostly done by notifying the WTO secretariat of planned measures.

The use of Border Adjustment Measures (BAMs) might be a suitable instrument to target importing countries with less stringent measures especially to prevent leakage but also competitive disadvantages of the domestic industry. The environmental and economic effectiveness of BAMs as well as their compatibility with WTO-law, however, are highly disputed.

With respect to EU-law it is important to check if the instrument does fall within scope of harmonised EU legislation (such as for example the VAT Directive). Only if this is not the case a measure might be relied on Article 36 TFEU to justify deviations from (harmonised) EU legislation. Besides this, any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation requires a unanimous vote by the Council, constituting an obstacle to the instruments' adoptions. Additionally, it is necessary to prove that the instrument is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

As the TFEU and the TEU aim for a high level but not the highest possible level of environmental protection and Union policies must adhere to certain principles such as the precautionary principle but not to a principled priority of environmental and climate issues a change of the EU primary law might also be an alternative. This, however, might imply a time-consuming and complex procedure.

With respect to the instrument choice it is not possible to give a general advice either for the instrument Directive or Regulation on the EU-level. It is, however, important to ensure effective tools to monitor and measure progress with regard to the overall objectives. Besides, the criteria guaranteeing an effective enforcement should be included.

Similar to WTO-law, it is advisable and often required to notify the EU Commission of any planned measures that could affect trade law (such as subsidies, etc.).

1 Introduction

Policy mixes need to fit within the already existing arena of specific polities, i.e. the existing constitutions and treaties on both, the EU- and the international level. The analysis thus looks into the legal links between the proposed policy mixes and relevant provisions in international treaties and agreements as well as relevant stipulations of the EU Treaties that affect the implementation of the proposed policy mixes, such as trade and competition law. These provisions (“barriers”) are obstacles potentially interfering with or counteracting the policy mix set-up for achieving decoupling.

The aim is to identify and assess if there are any particular barriers, focusing on the following questions:

- What are the legal barriers?
- How important are they?
- Are these barriers “outweighed” by the objectives of the selected instruments of the policy mixes?
- Can the barriers be eliminated or reduced, for example through adjusting the policy mixes?

Another particular barrier in the field of environmental protection is lack of enforcement. This is strongly linked with the implementability of legal provisions. Thus, general advice regarding enforceability and implementability is provided.

2 Approach and methodology

The legal assessment aims to provide an assessment of the legal feasibility of the selected instruments of the policy mixes based on the status quo of the international and European legal provisions.

2.1 What does legal assessment and statutory interpretation mean? How is it done?

The legal assessment encompasses the following steps:

- Identification of the legal barriers;
- Legal assessment of these barriers with regard to the selected instruments of the policy mixes, that means:
 - o Importance in legal hierarchy (which provision is of higher precedence?);
 - o Applicability;
 - o Compatibility check;
 - o Exemptions from as well as justifications of breaches of provisions’ content for example for environmental protection or human health reasons;

- Check of consistency of the identified barriers with provisions that guarantee a protection of the environment, human rights, etc. and thus can be interpreted as contributing to improved resource efficiency:
 - o If such provisions do exist it has to be checked consecutively which of the provisions are of a higher precedence, the provisions guaranteeing for a free trade etc. or those aiming directly or indirectly at resource efficiency.
- If necessary: Adaptation of the design of the instruments of the policy mixes on the basis of the assessment.

Especially in the case that the relevant provisions are ambiguous, the legislative history, the grammatical coherence, the systematic and the purpose of the relevant provisions are to be analysed (statutory interpretation).

2.2 Challenges and ways to overcome them

The ex-ante legal assessment constitutes a challenge per se as legal assessments in general are done ex-post (work of judges). This is because the needed level of detail for the legal assessment is high; even the check if an instrument is covered by legal provisions needs in-depth information about the objectives, character and design as well as the impacts of the instrument – information that is at least partly not available due to the nature of future instruments. The approach therefore is the following: In case a clear statement is very difficult or even impossible the assessment result is indicated as uncertain and the missing information as well as ideas for a change in the design of the instrument are part of the conclusions and pointers for revision chapter.

Another challenge is the necessity of summarising results of the legal assessments of the single instruments in order to allow for an overall statement about the policy mix, especially if the results from compatibility checks with WTO- and EU-law differ. The approach here is to classify the overall assessment result of the policy mix as uncertain by pointing to assessments of the single instruments and adding ideas for changes in the design of the instruments in the pointers for revision chapter.

With respect to the compatibility with EU-law it is decisive if the instrument is to be introduced by an act of the EU or of a single Member State or a group of Member States owing to the division of powers between the EU and the Member States. However, a decision is not always possible because it depends on the respective political situation, the majorities, etc. Indications on the less problematic way to design the instrument with respect to the EU-Member States competencies are given in the assessment, however, pointing out that these competencies might change in the future.

2.3 Re-Classification of policy instruments under WTO- and EU-Law

In general, WTO- and EU-law differentiate between the following categories of measures:

- Taxes;
- Subsidies;
- Technical regulation and product/production standards;
- Other (especially voluntary measures).

The legal assessment consequently uses these categories as starting point under which the instruments are analysed on their compatibility with WTO- and EU-law. The single instruments that have been chosen out of the policy mixes are attributed to the category that characterises the instrument most - by adding compatibility checks with the other agreements if necessary.

2.4 General introduction to relevant instruments under WTO-Law

2.4.1 Taxes

GATT/WTO rules recognise that internal taxation, including direct taxation (for the differentiation between direct and indirect taxes *infra*), can have economic effects that are similar, if not equivalent, to tariff and non-tariff border measures as well as production and export subsidies and thus on international trade and investment flows. This recognition is reflected in several of the multilateral agreements reached at the conclusion of the Uruguay Round in December 1993, specifically the Agreement on Subsidies and Countervailing Measures (SCM), Agriculture (AoA), Trade-related Investment Measures (TRIMS), and Services (GATS). Taxes therefore have to be checked on their compatibility with these agreements besides GATT.

Definition

There is no general legal definition in the WTO legislation for the term ‘tax’. Therefore, the scope of the terms ‘internal taxes’ and ‘other internal charges of any kind’ can only be described by stating the Appellate Body’s decisions in different cases.¹

The SCM Agreement, however, provides definitions for direct and indirect tax measures under this agreement (see Annex I Illustrative list of export subsidies (e) Footnote 58) that can be drawn on in the general context. The term ‘direct taxes’ shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property. The term ‘indirect taxes’ shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.

The GATS relates to direct and indirect taxation measures. Art. XXVIII (o) GATS provides a legal definition of the term ‘direct taxes’: all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

Direct and indirect taxes

WTO-law considers both indirect and direct taxes. Until 2002, it was commonly accepted that there was no or little scope for coverage of direct taxes by the GATT 1947 because such taxes did not relate sufficiently to products. However, the “ruling by the WTO's Dispute

¹ This technique is used by the WTO in its “Understanding on Interpretation of Article III GATT”, available at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_02_e.htm#article3

Settlement Body against the United States concerning the latter's Foreign Sales Corporations and Extraterritorial Income Exclusion Act (FSC/ETI) scheme [in 2002 (WTO DSB 2002)], confirmed [...] that, generally speaking, direct as well as indirect taxes (including tariffs), are subject to WTO rules, notwithstanding efforts by tax authorities to secure specific exemptions for certain direct tax measures in these agreements".²

Compatibility with WTO legislation

The purpose of relevant WTO legislation "is to avoid protectionism in the application of internal tax and regulatory measures". It shall ensure that internal measures are "not applied to imported or domestic products so as to afford protection to domestic production".³ The most important principles in this context are the national treatment (NT) principle and the Most-Favoured Nation (MFN) principle that are enshrined in all main WTO agreements (GATT, GATS, TRIPS) and also in the Technical Barriers to Trade Agreement (TBT), the Agreement on Agriculture (AoA) and the Agreement on Trade-related Investment Measures (TRIMS).

The NT principle requires all

parties to accord treatment to imported products no less favourable than that accorded to like products of national origin.

This principle is enshrined in Article III of the GATT 1947 (and incorporated by reference in GATT 1994); Article 17 of the General Agreement on Trade in Services (GATS); and in Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The aim of this trade rule is to prevent internal taxes or other regulations from being used as a substitute for tariff protection.

Article III (4) GATT states that

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]"

Members of the WTO are, however, "free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III GATT or any of the other commitments they have made in the WTO Agreement" (*Japan — Alcoholic Beverages II*).

² The Panel states: "... (I)n this connection, we can see no specification or limitation in the text of Article III:4 concerning the type of advantages linked to the measure under examination under Article III:4 of the GATT 1994. Thus, nothing in the plain language of the provision specifically excludes requirements conditioning access to income tax measures from the scope of application of Article III." This ruling reconfirmed the traditional distinction under multilateral trade rules between direct and indirect taxes, especially with respect to how such taxes should be treated under the subsidy and border tax adjustment rules of the WTO."

³ Appellate Body in *Japan — Alcoholic Beverages*: "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production".

The MFN principle as laid down in Article I GATT 1994 stipulates that concessions accorded to one country's goods should be granted to those of all countries. The MFN principle ensures import neutrality as far as goods are concerned. Article I (1) GATT states that

"[...] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

The term 'like products' and PPMs

The term 'like product' was never defined in law. As many trade measures intended to protect the environment are in need to discriminate physically like products based on the environmental impacts associated with the production methods and the processes used its specific legal formulation is crucial. The Working Party on Border Tax Adjustments recommended a case-by-case examination of problems arising from the interpretation of this term and defined four criteria for the 'likeness' of products (WTO Decisions, Reports, etc. of the 16th Sessions, Review Pursuant to Article XVI:5. Geneva (1997), para. 18):

- The properties, nature and quality of the products;
- The end-uses of the products;
- Consumers' tastes and habits; and
- The tariff classification of the products.

In the Asbestos Case (EC – Asbestos 2001) these criteria were also used by the Appellate Body in order to define the 'likeness' of products. Evidence on each of the four criteria should be examined and then weighted together with any other evidence in order to determine whether a product could be regarded as 'like'.

In the EC – Asbestos Case, however, the 'unlikeness' of the products is ascertained for essentially different products that are only potential substitutes in certain circumstances. Products deemed to be like products would generally be expected to have similar health effects such that trade restrictions would stand or fall under Article XX (b) GATT⁴ (see Chapter Justifications/Exemptions).

2.4.2 Subsidies

WTO-law in general "follows a non-subsidisation approach, there are, however, detailed rules on the different types of national subsidies. These rules include Article XVI GATT and the ASCM".⁵

Article XVI GATT states that

⁴ Read, Robert (2005): Process and Production Methods and the Regulation of International Trade, in: The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States, 239-266 (262).

⁵ Dröge, Susanne et al. (2004): National climate change policies and WTO law: a case study of Germany's new policies, World Trade Review (2004), 3:2, 161-187 (180).

“[I]f any contracting party grants or maintains any subsidies, including any form of income or price support, which operates directly or indirectly to increase exports of any product form, or to reduce imports of any product into, its territory, it shall notify the contracting parties [...]”.

Definition

According to the ASCM a subsidy can either be a benefit-conferring financial contribution from public funds or a benefit-conferring price or income support.⁶

Article 1 ASCM states:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)(1);

(footnote original) 1 In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2 ASCM defines a specific subsidy as follows:

Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

⁶ Ibid.

Exemptions

The AoA established rules concerning the acceptability of subsidisation practices, such as ‘green’ subsidies (‘green box’) that have “no, or minimal trade-distorting effects or effects on production” and do not have the “effect of providing price support to producers” and are thus exempt from reduction commitments. Such commitments do apply for ‘amber’ subsidies, which include certain direct payments under production-limiting programmes (‘amber box’).⁷

They also “include government services such as research, disease control, infrastructure and food security as well as payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes”.⁸

Also permitted, is “other support on a small scale (‘de minimis’) when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10 % or less for developing countries)”.⁹

2.4.3 Technical regulation and product/production standards

General introduction

Product standards as well as technical regulations are understood by the WTO as technical barriers to trade.

The TBT Agreement, negotiated during the Uruguay Round is an integral part of the WTO Agreement.¹⁰ It aims “to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade”. It, however, “recognizes countries’ rights to adopt the standards they consider appropriate”.¹¹ In order to enhance implementation of the transparency provisions of the Technical Barriers to Trade Agreement, an Information Management System¹² was set up.

Definition

The terms ‘technical regulations’ and ‘standards’ are legally defined in Annex 1 of the TBT for the purpose of this Agreement:

- ‘Technical regulation’: *Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.*
- ‘Standard’: *Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include*

⁷Daly, Michael (2000): Some Taxing Issues for the World Trade Organization, Canadian Tax Journal, Vol. 48, 2000, 1053-1077(1059), Fn. 11.

⁸https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm

⁹https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm

¹⁰https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm

¹¹https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm

¹²<http://tbtims.wto.org/>

or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

One of the differences between them thus lies in compliance. While the technical regulations are by nature mandatory, conformity with standards is voluntary.¹³ Non-compliance with a standard therefore does not lead to non-allowance on the market but to possible negative impacts on the product's market share resulting from not meeting local standards.

According to the WTO, “technical regulations and standards set out specific characteristics of a product – such as size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale”. In some cases, it proved more appropriate to impose restrictions on the production rather than the product and its characteristics. “The TBT makes allowance for both approaches in the way it defines technical regulations and standards”.¹⁴

“The application of standards on the [domestic] level is not in conflict with WTO-law as long as it does not discriminate against imported like products”.¹⁵

2.4.4 Relationship between WTO agreements and provisions

The principle of single undertaking means that all WTO provisions are simultaneously and cumulatively applicable, and they should all be interpreted harmoniously within a single treaty, viewed as a whole.¹⁶

There are, however, some exceptions. With regard to the relationship between Article III GATT and ASCM these agreements serve different purposes and do not mutually exclude each other. In practice, the principle of judicial economy is applied. That means that the WTO Panel or the Appellate Body is not adjudicating upon a certain rule if they have already stated that the measure of a contracting party is indeed in breach of WTO-law and that the additional declaration is not required to decide on the case.

With regard to the relationship between GATT and TBT policy instruments have to be checked on compatibility with TBT first as this is the specific regulation (*lex specialis derogat lex generalis*-rule). Article III GATT only has to be checked if the policy instrument does include internal taxes or changes in addition to the product standards or technical regulations.

2.4.5 Justifications/Exemptions

Exemptions from the basic principles, such as the NT and the MFN principle, can be made for “measures necessary [...] for the protection of human, animal or plant life or health, or the environment [...]”, which must not lead to “arbitrary or unjustifiable” discrimination between the WTO members.

¹³<http://uae.smetoolkit.org/uae/en/content/en/54922/Technical-Regulations-and-Standards>

¹⁴https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm

¹⁵Biermann, Frank et al. (2003): The Polluter Pays Principle under WTO Law: The Case of National Energy Policy Instruments, Umweltbundesamt.

¹⁶Marceau, Gabrielle, Joel P. Trachtmann (2014): A map of the World Trade Organization Law of domestic regulation of goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. *Journal of World Trade* 2014 (357).

In detail, Article XX GATT contains the following exhaustive list of exemptions:

„Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

....

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;”

...

It has to be demonstrated by the defending party that the measure in question (i) falls under at least one of the listed ten exceptions, and (ii) satisfies the requirements of the preamble of Article XX, i.e. is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade” cumulatively.¹⁷

With respect to Article XX (g) it is essential that the Appellate Body in US – Shrimp (Appellate Body Report, paras. 127, 135, 143-145) applied the following three-step approach:

- (1) The measure at issue is “a measure concerned with the conservation of ‘exhaustible natural resources’ within the meaning of Article XX (g);
- (2) “Article XX (g) requires that the measure sought to be justified be one which ‘relat[es] to’ the conservation of exhaustible natural resources”; and
- (3) The measure at issue is “a measure made effective in conjunction with restrictions on domestic production or consumption”.

Objects of protection

Concerning Article XX (b) the panel and the parties in the US – Gasoline case (Panel Report, para. 621) agreed that “the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX (b)”.

¹⁷ According to the panel in the EC – Asbestos case (Panel Report, para. 8.167) it shall be examined first whether the measure falls within the scope of paragraph (b) of Article XX. If it does, it shall be considered whether, in its application, the measure satisfies the conditions of the introductory clause of Article XX. See also US – Shrimp (Article 21.5.), Panel Report, paras. 5.27-5.28.

In the US – Shrimp Case the Appellate Body (Appellate Body Report, paras. 128 and 131) clarified that the text of Article XX (g) was not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources and that living species, which are in principle ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.

Necessity test under Article XX (b) and (d)

Paragraphs (b) and (d) of Article XX require that the measures must be necessary either “to protect human, animal or plant life or health” or to “secure compliance with laws or regulations”. In the Thailand – Cigarettes case (Panel Report, para. 74) the panel concluded that the term necessary had the same meaning under these paragraphs, pursuing the same objective that is “to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable”. In the Korea – Various Measures on Beef case (Appellate Body Report, para. 164) the Appellate Body itemised the necessity test as follows: 1) situations where the claim may be that a measure is indispensable, i.e. where the measure is the only available and 2) situations where the measure is not indispensable entailing a “... process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation and the accompanying impact of the law or regulation on imports or exports”. In the EC - Asbestos case (Appellate Body Report, para. 172) the Appellate Body recalled these findings and stated that the “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept, as “necessary”, measures designed to achieve those objectives.

“Relating to...” and “... in conjunction with restrictions on domestic production or consumption” under Article XX (g)

In the Canada – Salmon and Herring case (Panel Report, para. 4.6) the panel noted that: “... while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource as ‘relating to’ conservation within the meaning of Article XX (g)”. With respect to the expression “in conjunction with” the panel stated that a “... trade measure could (...) only be considered to be made effective ‘in conjunction with’ product restrictions if it was primarily aimed at rendering effective these restrictions”. In the US – Gasoline case (Appellate Body Report, DSR 1996, p. 19) the Appellate Body concluded that “[t]he clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources”. Interestingly the Appellate Body stated that the relevant clause to its belief was not intended to establish an empirical ‘effects test’ emphasizing *inter alia* that “... in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable”.

Prevention of abuse of the exceptions through the preamble – a means of arbitrary or unjustifiable discrimination?

In the EC – Asbestos case the panel stated that the *application* of the measure in question must be examined in order to determine whether the discrimination was arbitrary or unjustifiable. As part of the process of determining if the measure was an unjustifiable discrimination the Appellate Body in the US – Shrimp case (Appellate Body, paras. 161-166) addressed the issue of international negotiations, putting forward that the failure of the US to engage the Members exporting shrimp to the US, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members “... bears heavily in any appraisal of justifiable or unjustifiable discrimination”. This can be interpreted as an obligation of each Member to enter into negotiations and make serious good faith efforts to reach an agreement before resorting to unilateral measures (see also US – Shrimp (Article 21.5), Panel Report, para. 5.67). The Appellate Body further considered that the lack of flexibility in taking into account the different situations in different countries amounted to unjustifiable discrimination.

Disguised restriction of international trade?

The question if a measure represents a disguised restriction on international trade has been examined in detail in the EC – Asbestos case (Panel Report, para. 8.236): In accordance with the approach defined in Article 31 of the Vienna Convention the panel notes that the verb ‘to disguise’ implies an intention. Accordingly, a restriction which formally meets the requirements of Article XX (b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.

Successively, three criteria have been introduced by panels and the Appellate Body in order to determine whether a measure is a disguise restriction on international trade:

- (i) The publicity test – considering as decisive if the measure has been publicly announced as a trade measure (US – Canadian Tuna case, Panel Report, para. 4.8),
- (ii) The consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination (EC – Asbestos case, Panel Report, para. 8.234), and
- (iii) The examination of ‘the design, architecture and revealing structure’ of the measure at issue (EC – Asbestos case, Panel Report, para. 8.236).

The TBT Agreement contains a specific provision with regard to *inter alia* environmental protection. Article 2.2 TBT reads as follows:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.”

Thus, a key element of the TBT is regulatory proportionality; that any such import regulations – for example, packaging and labeling requirements – should not be more trade-restrictive ‘than is necessary ... taking into account the risks non-conformity would create’ (Article 5:1:2 of the TBT Agreement). Again, any such measures must be applied in a manner consistent with WTO principles.

2.5 General introduction to relevant instruments under EU-Law

2.5.1 Taxes

Definition

There is no explicit and general definition of the term “tax” in the TFEU and other European legislation.

Direct and indirect taxes

Tax policy in the EU “consists of two components: direct taxation, which remains the sole responsibility of Member States, and indirect taxation, which affects free movement of goods and the freedom to provide services”.¹⁸

“Taxes on the revenue of undertakings (firms, companies, businesses) and private individuals, which are not incorporated in cost prices or selling prices and the rate of which is often progressive, may be regarded as direct taxes. The two important categories of direct taxes are income tax and capital gains tax”. The TFEU does not deal with direct taxes and does not call for their harmonisation or even coordination. With regard to direct taxation, Member States and the Commission (in its Communication of 19 December 2006 to the Council, the European Parliament and the European Economic and Social Committee – Co-ordinating Member States’ direct tax systems in the Internal market [COM(2006) 823 final¹⁹]), however, have taken measures to prevent tax avoidance and double taxation.

“Indirect taxes are those on turnover, production or consumption of goods and services - regarded as components of cost prices and selling prices - which are collected without regard to the realisation of profits, but which are deductible when determining profits”.²⁰ The harmonisation of these indirect taxes is seen to be necessary in order to avoid obstacles to trade and to free competition as well as to make the removal of fiscal frontiers possible.²¹

Compatibility with European legislation

In contrast to product standards, the EU has been very reluctant in expressing the need of across the board harmonisation of Member States’ tax systems. Provided that the Member States respect EU regulation, they are free to choose the tax systems that they consider appropriate.²² However, in order to strengthen the Internal Market, tax obstacles to all forms of cross-border economic activity shall be eliminated.²³ A minimal standard of harmonised

¹⁸ http://europa.eu/legislation_summaries/taxation/index_en.htm

¹⁹ http://europa.eu/legislation_summaries/taxation/l31058_en.htm

²⁰ http://www.europedia.moussis.eu/books/Book_2/5/14/02/?all=1, 14.2.

²¹ http://www.europedia.moussis.eu/books/Book_2/5/14/03/?all=1, 14.3.

²² *Ibid.*

²³ http://ec.europa.eu/taxation_customs/resources/documents/taxation/com%282006%29823_en.pdf

taxes exists today. One example is the VAT regulation that sets out a minimum rate of VAT to be applied in Member States. The activities such as the joint actions for officials of tax authorities and the common training initiatives under the programme Fiscalis 2020 are supposed to strengthen the functioning of the taxation systems in the internal market by strengthening the transparency of taxation regulations.

According to the wide understanding of the term ‘subsidy’, the instrument of tax relief or supportive tax schemes, are likely to be understood as a subsidies in the European sense. In order to comply with European legislation, the tax scheme needs to be set up according to Article 107 ff. TFEU. In this respect reference is made to the paragraph regarding subsidies.

Article 110 TFEU states that “no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products” and moreover, “no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products”. Article 110 TFEU is originally based on Article III (2) GATT.

Overlaps

“The substantive test according to Article 110 TFEU is comprehensive. It takes precedence over the rules governing quantitative restrictions. Notwithstanding, a simultaneous application of Article 107 (1) and Article 110 TFEU, which prohibits state aid, is possible”.²⁴

“In relation to Article 34 TFEU Article 110 TFEU is considered as *lex specialis*, which means that cases covered by Article 110 TFEU exclude the application of Article 34 TFEU”²⁵ (see for example ECJ, Case C-134/07 *Kawala* [2007] ECR-I 10703).

2.5.2 Subsidies

Definition

In the TFEU Title VII, Chapter 1, Section 2 refers to aid granted by states. Article 107 TFEU describes subsidies as

any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

In order to facilitate an easy, more transparent and coherent application of the term ‘subsidy’, a Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU was drafted in January 2014.²⁶ “Considering that the notion of State aid is an objective and legal concept defined directly by the Treaty, the Commission aimed to clarify how it understands the Treaty

²⁴Cottier, Thomas et al. (2014): *Differential Taxation of Electricity: Assessing the Compatibility with WTO Law, EU Law and the Swiss-EEC Free Trade Agreement*, April 2014.

²⁵https://books.google.de/books?id=44Z6BAAAQBAJ&pg=PA2784&lpg=PA2784&dq=is+considered+a+s+lex+specialis,+which+means+that+cases+covered+by&source=bl&ots=Zf7f9S_MXF&sig=NExkSqP2pxFYziwYKyNZeedLONQ&hl=en&sa=X&ei=K_MkVaieJYP8aLuVgfAN&ved=0CCEQ6AEwAA#v=onepage&q=is%20considered%20as%20lex%20specialis%2C%20which%20means%20that%20cases%20covered%20by&f=false.

²⁶http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf

provisions, in line with the EU case-law, without prejudice to the interpretation of the Court of Justice of the European Union”.²⁷ In the modernisation and promotion process of the European subsidy scheme, the Guidelines on environmental and energy aid for 2014-2020²⁸ form another important contribution.

Compatibility with European legislation

In these Guidelines on environmental and energy aid for 2014-2020, “the Commission sets out the conditions under which aid for energy and environment may be considered compatible with the internal market on the basis of Art. 107 (3) (b) and 107 (3) (c) of the Treaty”.²⁹ In general, the European subsidy legislation does not include an absolute prohibition of subsidies, but makes subsidies subject to control by the Commission according to Article 108 TFEU. Article 107 (2) TFEU forms a legal exception to the prohibition of state aids as laid down in Article 107 (1) TFEU. Additionally, Article 107 (3) TFEU codifies discretionary exceptions to the prohibition.

Method of assessment

“The four cumulative criteria included in Article 107 TFEU are the following:

- (1) There must be an advantage conferred on an undertaking;
- (2) which is
 - (i) granted by the State and
 - (ii) through its resources;
- (3) which favours certain undertakings or the production of certain goods, in other words, the aid must be selective;
- (4) and the aid must be
 - (i) liable to distort competition and
 - (ii) affect interstate trade.”³⁰

Overlaps

The “qualification of a state measure as state aid under Article 107 TFEU does not automatically preclude the scrutiny of an aid scheme in relation to other EU rules, such as Articles 34–36 TFEU”³¹ (see for example ECJ Case C-234/99, *Nygård* [2002] ECR I-3657, paragraph 56; ECJ Case C-351/88 *Laboratori Bruneau* [1991] ECR I-3641, paragraph 7). “At the same time, the mere fact that a state aid measure as such affects intra-EU trade is in itself

²⁷ *Ibid.*

²⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628%2801%29&from=EN>

²⁹ European Commission (2013): Paper of the Services of DG Competition containing draft Guidelines on environmental and energy aid for 2014-2020.

³⁰ Tanskanen, Tuulia (2013): The Permissibility of Indirect Environmental Taxes and Derogations Thereof in Light of the Cumulative Criteria for State Aid in Article 107(1) TFEU.

³¹ European Commission (2010): Free movement of goods. Guide to the application of Treaty provisions governing the free movement of goods, page 33.

not sufficient to qualify the measure simultaneously as a measure having equivalent effect under Article 34 TFEU”.³²

2.5.3 Technical regulation and product standards

Definitions

The terms ‘product’, ‘service’, ‘technical specification’, ‘other requirement’, ‘rule on services’, ‘standard’, ‘technical regulations’ are legally defined in Art. 1 of the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998.³³

‘Standards’ and ‘technical regulations’ are again differentiated by compliance. It follows the system set out in the TBT Agreement. In Article 1 (11) of the Directive, ‘technical regulation’ is described as

technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

Compatibility with European legislation

European legislation aims to ensure “a consistent, high level of protection for the health and safety of consumers. Products placed on the market in the internal market are subject to general safety requirements”.³⁴ National product standards on the other hand can contravene European standards and the free movement of goods (Article 34 TFEU). Therefore, many of the different national environmental product standards were harmonised in order to prevent barriers to trade. As a result, the implementation of national product standards depends on the harmonisation of the standards in that field.

Similar to the TBT approach of the WTO, the European Commission works actively on the prevention of new barriers to trade through the management of the notification procedure. The procedure sets up a notification obligation for the Member States.³⁵ The Member States have to notify to the Commission their draft technical regulations related to all products and to Information Society services, mainly in the non-harmonised areas. The draft texts and their translations are made available to Member States and the public through TRIS (Technical

³²European Commission (2010): Free movement of goods. Guide to the application of Treaty provisions governing the free movement of goods, page 33.

³³<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998L0034:20070101:EN:PDF>

³⁴http://europa.eu/legislation_summaries/consumers/consumer_information/l21253_en.htm

³⁵Guide to the procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services: http://ec.europa.eu/enterprise/policies/single-market-goods/files/brochure-guide-procedure/2003_2121_en.pdf

Regulations Information System³⁶). The Commission is also engaged in the TBT notification procedure.

Justifications/Exemptions

Article 36 TFEU lists the defences that could be used by Member States to justify national measures that impede cross-border trade:

The provisions of Articles 34 to 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The case-law of the European Court of Justice³⁷ additionally provides for so-called mandatory requirements (e.g. environmental protection) on which a Member State may also rely to defend national measures.³⁸

Any measure must respect the principle of proportionality, that is the measures adopted have to be proportionate, i.e. restricted to what is necessary to attain the legitimate aims. Furthermore, measures at issue have to be well-founded - providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information.³⁹

The burden of proof in justifying the measures adopted according to Article 36 TFEU lies with the Member State, but when a Member State provides convincing justifications it is then for the Commission to show that the measures taken are not appropriate in that particular case.⁴⁰

Article 36 TFEU cannot be relied on to justify deviations from harmonised EU legislation.⁴¹ On the other hand, where there is no EU harmonisation, it is up to Member States to define their own levels of protection. In the case of partial harmonisation, the harmonising legislation itself quite often explicitly authorises Member States to maintain or adopt stricter measures provided they are compatible with the Treaty. In such cases the Court will have to evaluate the provisions in question under Article 36 TFEU.⁴²

Even if a measure is justifiable under one of the Article 36 TFEU derogations, it must not “[...] constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”. As the Court of Justice has stated, “[...] the function of the second sentence of Article 36 is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as to create

³⁶<http://ec.europa.eu/enterprise/tris/en/>

³⁷ECJ, Case 302/86 Commission v Denmark [1988] ECR 4607, paragraph 8.

³⁸European Commission (2010): Free movement of goods. Guide to the application of Treaty provisions governing the free movement of goods, page 26.

³⁹ECJ, Case C-270/02 Commission v Italy [2004] ECR 1559; Case C-319/05 Commission v Germany [2007] ECR I-9811.

⁴⁰ECJ, Case C-55/99 Commission v France [2000] ECR I-11499.

⁴¹ECJ, Case C-473/98 Toolex [2000] ECR I-5681; Case 5/77 Tedeschi v Denkavit [1977] ECR 1555.

⁴²European Commission (2010): Free movement of goods. Guide to the application of Treaty provisions governing the free movement of goods, page 26.

discrimination in respect of goods originating in other Member States or indirectly to protect certain national products”.⁴³

The Court of Justice has ruled that “the health and life of humans rank first among the property or interests protected by Article 36 and it is for Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure, and in particular how strict the checks to be carried out are to be”.⁴⁴

2.6 Implementability and enforceability

The implementability and enforceability of legal provisions are very important when it comes to the effectiveness of policy instruments. While formal admissibility questions of the proposed policy instruments (such as the competence of the EU to act or consent requirements) are part of the compatibility check in this chapter a more general overview is given in order to provide a preliminary guidance on the choice of the appropriate legal instrument.

The legal *implementability* can be defined as:⁴⁵

- On the one hand the suitability of the legislation for the purpose of its practical application by competent authorities in the national states, taking into account the possible need for transposition into national law and for application through individual administrative decisions, as well as the infrastructure and resources needed in order to enable competent authorities to perform all their obligations under EU-/WTO-law and to take the necessary implementing decisions.
- On the other hand the suitability of the legislation in terms of the definition of the obligations of the regulated target group in the national states and of the feasibility for these individual addressees of the legislation to spontaneously comply with their obligations as defined.

Enforceability is defined as ensuring obedience to the laws and refers to the suitability of the legislation in terms of the ability of the competent authorities to use legal and administrative means at their disposal under domestic law to encourage or, in the event of wilful non-compliance, compel individual addressees to comply with their obligations under the legislation (for example with police actions and court proceedings etc).⁴⁶

Criteria guaranteeing an effective enforcement thus are primarily:

- Right entity to enforce the act (enforcement power);
- Right instrument to enforce the act;
- Effective reporting and sanctioning and
- Well-designed, clear, fair, transparent, effective and easily accessible remedies that enjoy public confidence for citizens.

⁴³ECJ, Case 34/79 Henn and Darby [1979] ECR 3795, paragraph 21, as well as Joined Cases C-1/90 and C-176/90 Aragonese de Publicidad Exterior and Publivia [1991] ECR I-4151, paragraph 20.

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

⁴⁵In details see IMPEL Project (2006).

⁴⁶See IMPEL Project (2006).

These criteria should be observed in any case when drafting the design of the policy instruments.⁴⁷

Border Tax Adjustments and Border Adjustment Measures

Mechanisms that could ease the enforceability and implementability of environmental policy instruments are border adjustment measures (BAM) or – in case of using taxes – border-tax adjustments (BTA). Border Adjustment is referring to a range of measures taken at the border to compensate or adjust for added costs imposed by regulatory policies. BTA refer more explicitly to taxes imposed at the border on imported goods so as to match the domestically imposed taxes on like products or inputs.⁴⁸ BTAs are explicitly allowed by the GATT provided that the tax imposed on imports is no greater than the domestic tax and the rebate of tax on export is no greater than the tax previously paid (see Article III (2) GATT). However, there is still uncertainty if BAM or BTA can only be based on the physical composition of the end product or if the adjustment measures can also be imposed on substances used in the production process, for example on the energy used in the production.⁴⁹

Even if assumed that different production methods could render products ‘unlike’, the challenge is to design BAMs or BTAs in a way that imposes identical burdens on imported and domestic products and therefore comply with material provisions of the GATT, i.e. in particular Article III (2) and Article I. Besides this, Article XX GATT requires negotiations between trade partners before introducing a BTA.

⁴⁷On the EU level the EU Commission according to Article 17 TFEU is required to ensure the application of the Treaties and of measures adopted by the institutions pursuant to them and shall oversee the application of Union law under the control of the Court of Justice of the European Union. If not all Member States live up to their obligations, problems arise since the environmental policy became part of EU law in order to create a level playing field for all Member States as well as to protect human health and the environment itself.

⁴⁸Coetzee, Kim (2010): Briefing paper – Border Carbon Adjustments.

⁴⁹For more details see Meyer-Ohlendorf et al. (2009).

3 Summary of compatibility with WTO- and EU-law per policy mix

3.1 Compatibility with WTO-law

3.1.1 Metals policy mix

The materials tax has the nature of an indirect tax. The first industrial use of the materials shall be taxed. This tax is to be qualified as an internal tax under the WTO-regime as it is planned to be implemented in each individual EU MS. No breach of the national treatment principle (Article III GATT) can be detected as the materials tax will be levied on the use of material regardless of where it is produced. It is levied on imported as well as domestic materials without making any difference. The tax on imported materials aims at no more than compensating for the extra cost that the material tax imposes on the domestic production of (simple) products. It must be guaranteed, however, that these costs are calculated correctly.⁵⁰

A breach of the most-favoured-nation principle (Article I GATT), however, is questionable as the tax is not levied on exported materials (first industrial use of the materials) and exported simple products will get the tax money back in order not to distort the competitiveness of domestic material production outside the EU. But according to the provisions of Article XVI GATT and the provisions of Annexes I - III ASCM, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Green fiscal reform: Internalisation of external environmental costs

This instrument comprises an indirect tax linked to resource extraction and pollution. The resource use can vary with the processes and production methods. Already existing taxes and fees are to be gradually expanded to further pollutants, resources, activities, sectors and countries until, in 2050, they cover the full scope of emissions and extracted resources in Europe.

Reverse discrimination has to be discussed as the instrument does not foresee any exemptions with regard to activities/emissions related products or production processes for products that are exported. However, states essentially have the sovereign right under WTO-law to treat their own products and nationals in a less favourable manner than with which they treat imported products and aliens. The instrument seems to be compatible with WTO-law.

⁵⁰For more details see Meyer-Ohlendorf, Nils and Christiane Gerstetter (2009): Trade and Climate Change - Triggers or Barriers for Climate Friendly Technology Transfer and Development? p. 34 ff.

Increased spending on research and development in EU-27 for recycling and material efficiency

The AoA is applicable with regard to this instrument. The subsidisation, however, seems to be acceptable as the subsidies have “no, or minimal trade-distorting effects or effects on production” and do not have the “effect of providing price support to producers” and are thus exempt from reduction commitments. The exemptions include government services such as research, disease control, infrastructure and food security as well as payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes. The instrument thus seems to be compatible with WTO-law.

Promotion of sharing systems

The ASCM is applicable as the promotion can be characterised as a subsidy in the sense of Articles 1, 2 ASCM: The instrument foresees public funding in all options at least at the beginning collected as part of the local and national income tax on households. The foreseen measures are also specific in the sense of Article 16 (1) ASCM as they address operators of public sharing systems only. As the participation in this system and the receipt of subsidies respectively shall be open to foreign companies too, this instrument does not seem to cause adverse effects to the interests of another Member, such as injury to the domestic industry of another Member.

Product standards

As the products that are not in conformity with the requirements will not be allowed at the EU market the instrument has the character of a technical regulation under the TBT. The product standards are planned to be developed as international standards within the framework ISO – a recognised body under the TBT. If this does not work out it is planned to develop EU-wide standards within the framework of the CEN – which is a recognised body under the TBT also. According to Article 2 (9) (2) TBT the standards/technical regulations have to be notified to the Secretariat at a draft stage. Then a conformity assessment procedure will start.

As the design of the instrument foresees to address both products of national origin and imported products without making any difference based on the provenience of the product the non-discrimination principle (Article 2 (1) TBT) should not be infringed. The instrument thus seems to be compatible with WTO-law – it has to be notified to the Secretariat in the draft stage though.

3.1.2 Land-use policy mix

Stronger and more effective environmental and climate dimension for EU land management in the CAP

As the support is planned to be made directly to farmers and will not stimulate production (direct payment of environmental programme) the subsidisation seems to be acceptable under WTO-law and specifically the AoA.

Revised emissions levels in the NECD and additional measures for better management of the nitrogen cycle on farmland

The AoA and the ASCM are applicable as subsidies are to be provided under the Rural Development Programmes for farmers to invest in better nitrogen management. There is a key role for more targeted subsidies to farmers to address the key barriers to the most beneficial but costly investments, e.g. slurry storage. However, the planned subsidisation seems to be compatible with these agreements as direct payments under environmental and regional assistance programmes are in general compatible with the AoA. The planned subsidies do neither cause adverse effects to the interests of another Member, such as injury to the domestic industry of another Member nor a serious prejudice (see Article 6 ASCM) to the interest of another Member.

However, the compatibility of the fertilizer tax with the GATT is questionable, mainly because relevant information on the design of the instrument is missing and is very difficult to be determined in advance. The question arises, if this element could be resigned (see also Chapter on pointers for revision).

Regulation for LULUCF

The TBT agreement is not applicable as the regulation is not primarily related to products. As subsidies will probably be the main mechanism chosen for the support of the measure the AoA and the ASCM are applicable. However, more information is needed in order to legally assess the regulation, especially with regard to the criteria of the subsidisation as well as the subsidisation proceedings and addressees (see Chapter on Pointers for revision).

Strengthened pesticide reduction targets under the Pesticides Directive, and provision of guidance to farmers on integrated pest management

The TBT agreement is not applicable as the instrument does not target products. The AoA and the ASCM, however, are applicable. The subsidisation seems to be compatible with WTO-law as direct payments under environmental and regional assistance programmes are in general compatible with the AoA. The planned subsidies do neither cause adverse effects to the interests of another Member, such as injury to the domestic industry of another Member nor a serious prejudice (see Art. 6 ASCM) to the interest of another Member.

With regard to the taxation elements (volume tax on active ingredients in pesticides placed on the market) compatibility with GATT is questionable – more information is needed for the legal assessment, especially with regard to the treatment of imported and exported pesticides (see Pointers for revision Chapter).

Targeted information campaign to influence food behaviour towards reducing food waste and changing diets

The measures seem to be compatible with WTO-law. The campaign could be funded by the EU (e.g. through LIFE+ funds) or through the revenue generated from VAT on meat products. The first funding phase for the LIFE+ programme has passed, but it would be possible to apply for funding under the second funding phase (LIFE+ sub-programme for Environment, including as priorities areas environment and resource efficiency, nature and biodiversity, and governance and information).

Development of food redistribution programmes/food donation

The voluntary programmes seem to be compatible with WTO-law or rather WTO-law is not applicable. Regarding the funding of the instrument the approach is to abandon VAT on donated food (rather than valuing donated food at zero) and to use corporate tax credits for donated food. According to the Council Directive 2006/112/EC14 (VAT Directive), food donations are taxable. The taxable amount is the purchase price at the moment of the donation adjusted to the state of those goods at the time when the donation takes place (Article 74). The European Commission, however, recommends setting “fairly low or even close to zero” the value of foodstuffs close to their ‘best before’ date or which cannot be sold due to their external appearance. Most of the examined MS do not impose VAT when food is donated to food banks and charities, if certain conditions are fulfilled. It is important to note that the imposition of VAT on food donation in some MS is a difficult area. Terminology in legal texts vary such that the value of food may be considered low or zero at time of donation, VAT may be ‘abandoned’, or ‘exempted’. This issue is both controversial and lacks clarity.⁵¹

Value added tax on meat products

The VAT on meat products is an indirect tax as well as a tax on consumption and production. The national-treatment principle does not seem to be infringed as domestic products as well as imports are taxed without making any difference. Exported meat, however, is not subject to the tax. According to the provisions of Article XVI GATT and the provisions of Annexes I - III ASCM, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

The exemptions for certain types of meat products that promote environmental protection, however, are highly questionable with regard to WTO-law. The question arises whether the types of meat products that promote environmental protection can be considered as being ‘unlike’ to the other types of meat and thus a different treatment compatible with WTO-law, especially Article I (1) GATT (MFN principle). According to settled WTO case-law the relevant products have to be examined case-by-case on the basis of four criteria:

- The properties, nature and quality of the products;
- The end-uses of the products;
- Consumers’ tastes and habits; and
- The tariff classification of the products.

It is at least difficult to provide evidence on each of the four criteria, especially due to the (still) existing vagueness of the classification of the types of meat products that promote environmental protection. However, even if the types of meat would be considered as being ‘like’, the exemptions still could be justified under Article XX (b) or (g) GATT. Specific instrument description issues would need to be respected (see Chapter on pointers for revision).

⁵¹BIO Intelligence Service (2014): Comparative Study on EU Member States’ legislation and practices on food donation. Available at: http://www.eesc.europa.eu/resources/docs/comparative-study-on-eu-member-states-legislation-and-practices-on-food-donation_finalreport_010714.pdf

3.1.3 Overarching policy mix

Taxes on the extraction and imports of selected virgin materials and on landfilled and incinerated waste

The foreseen taxes are internal taxes and belong to the category of indirect taxes. As the taxes are not affecting imported products or domestic products so as to afford protection to domestic products the national treatment principle (Article III GATT) seems to be not infringed.

The ASCM seems to be not applicable to the tax trio as the category of 'inputs' is not included in the measure ("inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product." – see Annex II footnote 61 ASCM).

EU-wide introduction of feebate schemes for selected products categories

First of all the applicability of the GATT depends on the characterisation of the schemes: The charge and the rebate can be qualified as taxes or a similar instrument (charge) and subsidies. As the feebate schemes shall be introduced at MS level based on a common EU level framework the category of an internal tax/charge is also met. The national treatment principle is not affected as the taxes/charges are not affecting imported products or domestic products so as to afford protection to domestic products. The point-of-sale of these products should be the one where the bonus on a given product is granted and the malus is collected, which is the case in a whole range of Bonus-Malus schemes in use (National Energy Policy Institute, 2013). This would ensure that domestic production and imports were treated equally; and that EU exports did not face a price disadvantage. This instrument seems to be compatible with WTO-law.

Reduced VAT for the most environmentally advantageous products and services

The reduced VAT for the most environmentally advantageous products and services seems to fulfil the criteria of a subsidy within the meaning of Articles 1, 2 ASCM. However, 'specificity' could be denied if the legislation, on which the granting authority bases its operations, would establish objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, and if the eligibility is automatic and the criteria and conditions are strictly adhered to. The question arises if these requirements could be fulfilled in the design of the instrument (see Chapter on pointers for revision).

The TBT-Agreement seems to be not applicable as the European label serves only as a basis but no new technical regulation/product standards are part of the instrument.

The applicability of the GATS/GATT is questionable as the reduced VAT rate of 6 % for the most environmentally advantageous or least resource intensive has effects on products and on services across a wider range of products and activities.

Boosting extended producer responsibility

EPR schemes have to be checked on their compatibility with the TBT Agreement and GATT; and - depending on the funding - also the ASCM. As the foreseen instrument will be based on the already existing EU-wide schemes and be extended to further products the compatibility

with WTO-law in general seems to be given. As the EPR scheme is meant to be self-financed from PROs and the fees they collect from their members there should not be any state subsidisation involved; the scheme seems to be compatible with the ASCM also.

Based on the national treatment principle it has to be ensured that the 'like' products are not singled out for discriminatory treatment based on their source of origin.

Skill enhancement programme

As individuals are not subject to protection under the WTO-regulations WTO-law is not applicable.

Enabling shift from consumption to leisure

As no connecting points to WTO-law have been detected WTO-law seems to be not applicable to this instrument.

Step-by-step restriction of advertising and marketing

Restrictions of (TV-)advertising and marketing can be qualified as measures having equivalent effect to quantitative restrictions on imports which are forbidden under the GATS (advertising) and GATT (marketing). This applies "to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges." The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'. However, only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself, are not allowed. Some views have been expressed that restrictions of advertising should be scheduled as measures covered by the market access obligation under GATS Article XVI. However, others prefer the view that such measures should be covered by Article VI GATS, regarding domestic regulations, or Article XIV, regarding health-related exceptions, and thus need not be scheduled.⁵² At least tobacco advertising restrictions have been adopted for public health purposes by Members without a violation of specific commitments for trade in advertising services. Tobacco advertising restrictions would be GATT-consistent so long as they meet tests for national treatment, so that Article XX (b) GATT defence may not even be necessary (see Ruling in the Thailand-Cigarettes case). The national treatment principle is complied with as advertising from all origins, within and beyond EU, shall be tackled without making any difference.

Local currencies for labour-based services

No connecting points to WTO-law have been detected, WTO-law seems to be not applicable to this instrument.

⁵²See for restrictions on tobacco advertising: Lin, Tsai-Yu (2006). Addressing the Issue of Trade in Services and Public Health in the Case of Tobacco. Are the FCTC Restrictions on Tobacco Advertising Inconsistent with the GATS? The Journal of World Investment and Trade 2006 [545-561].

3.2 Compatibility with EU-Law

3.2.1 Metals policy mix

Materials tax

The materials tax is a value-based tax on all materials that are used in the EU and aims to reduce material use in the EU. It applies to both imported and domestic materials (first industrial use) to ensure that it does not distort the competitiveness of the EU-wide material production. Furthermore, products aimed for export are exempt from the tax to avoid a distortion of the competitiveness of domestic material production. Until 2030, the tax should be implemented in individual Member States; subsequently, an EU-wide introduction could be considered.⁵³ The materials tax would constitute an indirect tax.

Whether or not secondary EU legislation exists, Member States' tax systems and tax treaties must in any event respect the fundamental Treaty principles on the free movement of workers, services and capital and the freedom of establishment (Articles 45, 49, 56 and 63 TFEU) and the principle of non-discrimination.

Introduced at Member State level, the instrument may not violate Article 110 TFEU. According to this Article, “[n]o Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.” In addition, “no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.” These criteria do not seem to be met as the materials tax applies to imported and domestic materials alike.

At EU level, any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation would be subject to Article 113 TFEU (*and* Articles 191f. TFEU⁵⁴). Generally, “[t]he power to levy taxes is central to the sovereignty of the Member States”; “[p]rovided that the Member States comply with EU rules, each is free to choose the tax system it considers most appropriate.”⁵⁵ Harmonisation of indirect taxes at EU level would require a unanimous vote by the Council.⁵⁶ Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted. Apart from the fact that the unanimity requirement constitutes an obstacle to the instrument’s adoption, it does not seem that the measure is “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.” Leaving that aside, as far as the additional requirements in Article 191 TFEU are concerned, it seems as if the conditions set out therein could be met.

The “prudent and rational utilisation of natural resources” is one of the EU’s environmental objectives (see Article 191 (1) TFEU) and the instrument would be covered by the (shared)

⁵³Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 6.4.2.

⁵⁴Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 7.

⁵⁵European Parliament (2014) General tax policy. Fact Sheets on the European Union, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.11.1.html.

⁵⁶See Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

competence: pursuant to Article 4 (2) (e) TFEU, the EU shares competence with the Member States in the area environment. As the instrument would presumably be deemed to be “primarily of a fiscal nature”, Article 192 (2) TFEU would be applicable: “By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: (a) provisions primarily of a fiscal nature [...]”

If all these conditions are met, the measure does not seem to raise concerns in view of EU law. However, the unanimity requirements and the further criteria of Article 113 TFEU affect the instrument’s feasibility.

Green fiscal reform: Internalisation of external environmental costs

The internalisation of external environmental costs entails a “gradual increase in taxes and fees on emissions and natural resources until 100 % of the estimated environmental costs are internalised.”⁵⁷ The taxes and fees apply to the use of natural resources (raw materials, energy and water) and the production of emissions. The words ‘taxes’ and ‘fees’ are used synonymously: “[...] policy-makers will choose to use the word that fits best in their political context.”⁵⁸ The instrument should be deployed at Member State level at least until 2030.

The internalisation of external environmental costs would constitute an indirect tax.

It seems that the policy instrument should be assessed differentiating its respective focus on 1) natural resources, and 2) emissions.

As a starting point, however, it is also clear that the choice of terms – i.e. ‘taxes’ or ‘fees’ – does not affect the measure’s nature as such. The application of Article 110 TFEU, for example, does not depend on the denotation used.⁵⁹ Pursuant to Article 110 TFEU, “[n]o Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.” According to the Court of Justice, the reference to ‘products’ is subject to a wide approach⁶⁰, so that the use of natural resources could be covered by this provision. The description of the instrument does not indicate that the further requirement “in excess of that imposed directly or indirectly on similar domestic products” would be met as the taxation would apply to all Member States equally and is not levied by individual Member States.

At EU level, harmonisation efforts would be subject to Article 113 TFEU (*and* Articles 191 f. TFEU⁶¹). Harmonisation would require a unanimous vote by the Council.⁶² Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted.

⁵⁷ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 6.4.1.

⁵⁸ Ibid.

⁵⁹ Cp. Waldhoff, in: Calliess/Ruffert, EUV-AEUV, Art. 110 AEUV, para. 10.

⁶⁰ Cp. Waldhoff, in: Calliess/Ruffert, EUV-AEUV, Art. 110 AEUV, para. 9.

⁶¹ Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 7.

⁶² See Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

As far as the instrument's focus on emissions is concerned, it requires further evaluation how the instrument would fit in with or affect the EU Emissions Trading System (EU ETS) and, for example, the Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Emissions Trading Directive) given that these Directives already regulate the production of emissions.

Increased spending on research and development in EU-27 for recycling and material efficiency

The instrument aims to increase recycling and material efficiency through improved technology, systems and knowledge.⁶³

The instrument should be deployed at all levels, although it is assumed that the "greatest impact will probably be at the EU level through Horizon 2020 and future research frameworks and in Member States through national research funding."⁶⁴

As far as the instrument's research focus is concerned, first of all the competence rule in Article 4 (3) TFEU should be taken into account. According to Article 4 (3) TFEU, "the Union shall have competence to carry out activities, in particular to define and implement programmes" in "the areas of research, technological development and space"; "however, the exercise of that competence shall not result in Member States being prevented from exercising theirs".

The measures are intended to be deployed at EU level and thus the state aid rules do not seem to be directly applicable. For "advantages to be capable of being categorised as aid within the meaning of Article [110 TFEU], they must, inter alia, be imputable to the State [...]." If, however, EU Law imposes a clear and precise obligation on the Member State, a measure carried out "in accordance with [...] obligations stemming from the Treaty" "is not imputable to the [...] State, but in actual fact stems from an act of the Community legislature."⁶⁵

Assuming that the 'deployment' at EU level would impose such a clear and precise obligation, the implementing national measure would not be imputable to the State and thus not constitute aid within the meaning of Article 107 TFEU.

Promotion of sharing systems

Under this instrument, sharing systems for cars, bicycles, tools, and equipment are established by local authorities or through economic support to private initiatives.⁶⁶ There are different implementation options, which can also be combined: a scheme for sharing of cars, bicycles, tools, and equipment is set up by local authorities; the setting up of private sharing systems through funding of part of the investment cost is supported by local authorities; private sharing systems are supported by national authorities, either through deductions in

⁶³Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 6.4.4.

⁶⁴Ibid.

⁶⁵Judgment of the Court of First Instance (First Chamber, extended composition) of 5 April 2006, Deutsche Bahn AG v Commission of the European Communities, Case T-351/02, paras. 101-102.

⁶⁶Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 6.4.3.

income tax to consumers for the renting costs, or through a differentiation in VAT between goods and services.⁶⁷

The measure could constitute a subsidy. If the amount that a single undertaking receives over any period of three years does not exceed EUR 200,000, it can be assumed that it does not distort or threaten competition. Depending on the amount granted, it could thus be covered by the de-minimis-rule according to which “[i]t is appropriate to maintain the ceiling of EUR 200 000 as the amount of de minimis aid that a single undertaking may receive per Member State over any period of three years. That ceiling remains necessary to ensure that any measure falling under this Regulation can be deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition.”⁶⁸

If it exceeds this threshold, the Guidelines on environmental and energy aid for 2014-2020⁶⁹ could apply. The Guidelines highlight a number of measures that may be compatible with the internal market under Article 107 (3) (c) TFEU. One of these is “aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards (including aid for the acquisition of new transport vehicles)”. Environmental protection is defined in the Guidelines as “any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary’s own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy” (emphasis added). Assuming that the highlighted element “lead to more efficient use of natural resources” is fulfilled by the measure, the instrument could be deemed compatible with the internal market under Article 107 (3) (c) TFEU “if, on the basis of the common assessment principles set out in this Chapter, it leads to an increased contribution to the Union environmental or energy objectives without adversely affecting trading conditions to an extent contrary to the common interest.”⁷⁰ The term ‘natural resources’ is not specified in the Guidelines; in addition, it needs to be assessed whether the instrument’s features aim for an ‘efficient use’ of the resource. Depending on the aid amount, the subsidy would need to be notified.⁷¹

Product standards

The products standards instrument aims for the “development of standards for specific metals products and metals components that regulate the design.”⁷² The instrument should be deployed at the EU level (or globally).

⁶⁷ Ibid.

⁶⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, para. 3.

⁶⁹ European Commission (2014): Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, (2014/C 200/01), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628%2801%29&from=EN>.

⁷⁰ European Commission (2014): Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, (2014/C 200/01), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628%2801%29&from=EN>, para. 23.

⁷¹ European Commission (2014): Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, (2014/C 200/01), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628%2801%29&from=EN>, para. 20f.

⁷² Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 6.4.5.

National product standards can interfere with the EU rules on free movement of goods. In that respect “[i]t must be observed that by virtue of settled case-law the prohibition of quantitative restrictions and of all measures having equivalent effect, laid down in [Article 34 TFEU], applies not only to national measures but also to measures adopted by the Community institutions (see Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15, *Meyhui*, paragraph 11, Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, paragraph 27, and *Arnold André*, paragraph 57).⁷³

Pursuant to Article 34 TFEU (Free movement of goods) “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

The design of the measure does not indicate that there would be a quantitative restriction. It could, however, constitute a measure “having equivalent effect”. The *Dassonville* ruling determined that “[a]ll trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”⁷⁴ Generally, the measure’s design can be assumed to meet this criterion. This starting point is, however, limited by the *Keck* jurisprudence according to which “national provisions restricting or prohibiting certain selling arrangements [do not] hinder trade between Member States, [...] so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products.”⁷⁵

In this case it can be assumed that the *Keck* requirements are met as the national measure would presumably affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Thus, it seems that Article 34 TFEU would not be applicable. If the *Keck* criteria are not met, it is possible that the restriction of the free movement of goods in accordance with Article 34 TFEU could be justified in line with the *Cassis de Dijon* ruling which states that some restrictions can be justified. This concerns requirements that “serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.” Protection of the environment is assumed to be such a requirement given that it “constitutes one of the Community’s essential objectives.”⁷⁶ The measure would, nonetheless, have to be deemed proportionate and may not “constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States” (see Article 36 TFEU, which does not seem to be the case here).

⁷³ Judgment of the Court (Grand Chamber), 12 July 2005, Joined Cases C-154/04 and C-155/04 – *Alliance for Natural Health and Others*, paragraph 47; see also *Oppermann, Thomas, Claus Dieter Classen and Martin Nettesheim* (2011): *Europarecht. Ein Studienbuch*, 2011, p. 394, para. 7.

⁷⁴ Judgment of the Court of 11 July 1974, *Procureur du Roi v Benoît and Gustave Dassonville*. Case 8/74 of 11 July 1974.

⁷⁵ Judgment of the Court of 24 November 1993, Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases C-267/91 and C-268/91.

⁷⁶ Judgment of the Court of 20 September 1988, *Commission of the European Communities v Kingdom of Denmark*, Case 302/86.

Overall, especially in light of the Keck criteria and assuming that the measure would apply in a non-discriminatory manner, it does not seem to breach Article 34 TFEU.

3.2.2 Land-use policy mix

Value added tax on meat products

Under this instrument, an indirect tax, national governments would be required “to implement and enforce the tax measure” and “[r]elevant actors from the meat industry would need to comply with VAT regulation by applying VAT to their meat products.” The instrument “is best deployed at the EU level.”⁷⁷

Accordingly, at EU level, any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation would be subject to Article 113 TFEU. Harmonisation would require a unanimous vote by the Council⁷⁸, which is unlikely due to the expected resistance of some Member States.⁷⁹ Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted. The unanimity requirement constitutes an obstacle to the instrument’s adoption as it does not seem that the measure is “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.” The instrument’s feasibility is thus doubtful.

Stronger and more effective environmental and climate dimension for EU land management in the CAP

The instrument stronger and more effective environmental and climate dimension for EU land management in the CAP “contributes to achieving the policy mix targets for biodiversity, soil quality and water quality through targeted implementation of the CAP measures.”⁸⁰

The instrument would be deployed at Member State and regional level for the 2014 to 2020 period and at EU and Member State plus regional level for the post 2020 period and subsequent policy reforms.

The actions would be “financed through the Common Agricultural Policy funds (the European Agricultural Guarantee Fund EAGF and the European Agricultural Fund for Rural Development EAFRD), and Member State co-financing for rural development.”⁸¹

⁷⁷ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.5.6.

⁷⁸ Cp. also Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

⁷⁹ Adamowski, Jaroslaw (2014): Romania plans to cut VAT on meat to 9%, <http://www.globalmeatnews.com/Industry-Markets/Romania-plans-to-cut-VAT-on-meat-to-9>; Spiegel Online (2013): Klimaschutz: Schweden wollen europaweite Steuer auf Fleisch, <http://www.spiegel.de/wirtschaft/service/schweden-will-eu-weite-steuer-auf-fleisch-a-879794.html>; Finanzen Heute: Droht Europa die Einführung einer Fleisch-Steuer?, <http://www.finanzen-heute.de/droht-europa-die-einfuehrung-einer-fleisch-steuer/>.

⁸⁰ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.1.

⁸¹ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.1.

Article 4 (2) (d) TFEU recognises that competence is shared between the Union and the Member States in the field of agriculture.⁸² The CAP is thus “an area in which competence is shared between the EU and the Member States. Under Article 39 [TFEU], its aims are to ensure reasonable prices for Europe’s consumers and fair incomes for farmers, in particular through the common organisation of agricultural markets and by ensuring compliance with the principles adopted at the Stresa Conference in 1958, namely single prices, financial solidarity and Community preference.”⁸³ Besides these priority objectives, the EU legislator may, however, also consider other EU policy objectives.⁸⁴ The decision-making procedure would be subject to Article 43 (2) TFEU: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40 (1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.”

Given that the measures are intended to be deployed at EU level, the state aid rules do not seem to be directly applicable. For “advantages to be capable of being categorised as aid within the meaning of Article [110 TFEU], they must, inter alia, be imputable to the State [...]” If, however, EU Law imposes a clear and precise obligation on the Member State, a measure carried out “in accordance with [...] obligations stemming from the Treaty” “is not imputable to the [...] State, but in actual fact stems from an act of the Community legislature.”⁸⁵ Any implementing national measure would thus not be imputable to the State and not constitute aid within the meaning of Article 107 TFEU. Accordingly, the measure does not raise immediate concerns in view of EU law.

Revised emissions levels in the NECD and additional measures for better management of the nitrogen cycle on farmland

The instrument revised emissions levels in the National Emissions Ceilings Directive (NECD)⁸⁶ and additional measures for better management of the nitrogen cycle on farmland “aims to establish revised emissions levels in the NECD to reduce eutrophication; and implement measures for better management of the nitrogen cycle on farmland (higher

⁸²European Parliament: The common agricultural policy (CAP) and the Treaty, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuld=FTU_5.2.1.html.

⁸³Europa: Common agricultural policy (CAP), http://europa.eu/legislation_summaries/glossary/agricultural_policy_en.htm; Article 39(1) TFEU: “1. The objectives of the common agricultural policy shall be: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices.”

⁸⁴Thiele, in: Calliess/Ruffert, EUV-AEUV, Art. 39 AEUV, para. 14.

⁸⁵Judgment of the Court of First Instance (First Chamber, extended composition) of 5 April 2006, Deutsche Bahn AG v Commission of the European Communities, Case T-351/02, paras. 101-102.

⁸⁶National Emission Ceilings Directive 2001/81/EC; see for details also European Commission: Revision of the National Emission Ceilings Directive, http://ec.europa.eu/environment/air/pollutants/rev_nec_dir.htm.

fertiliser use efficiency, improved crop and manure management that reduce emissions, low-protein animal feeding, improved manure storage).⁸⁷

The NECD was adopted on the basis of the EU competence resulting from Article 175 Treaty establishing the European Community (now Article 192 TFEU). A revision of emission levels would be subject to the legislative procedure as set out in Article 192 (2) TFEU.⁸⁸

Subsidies are provided to farmers under Rural Development Programmes; the subsidies are financed half by EU funds and half by Member State public funding.⁸⁹ The instrument should be deployed primarily at the level of the Rural Development Programmes (in some cases this is national, in some Member States it is regional) and of the River Basin Management Plans (local).

Given that the measures are intended to be deployed at EU level, the state aid rules do not seem to be directly applicable (see above, Increased spending on research and development in EU-27 for recycling and material efficiency and Stronger and more effective environmental and climate dimension for EU land management in the CAP). For “advantages to be capable of being categorised as aid within the meaning of Article [110 TFEU], they must, inter alia, be imputable to the State [...]” If, however, EU Law imposes a clear and precise obligation on the Member State, a measure carried out “in accordance with [...] obligations stemming from the Treaty” “is not imputable to the [...] State, but in actual fact stems from an act of the Community legislature.”⁹⁰ Any implementing national measure would thus not be imputable to the State and not constitute aid within the meaning of Article 107 TFEU. Accordingly, the measure does not raise immediate concerns in view of EU law.

Regulation for LULUCF

The Regulation for LULUCF would set “targets for carbon emissions and removals related to forest management, cropland management, grazing land management and revegetation, ensuring that this incorporates protection of farmed semi-natural habitats.”⁹¹

“Decision No 529/2013/EU of the European Parliament and of the Council of 21 May 2013 on accounting rules on greenhouse gas emissions and removals resulting from activities relating to land use, land-use change and forestry and on information concerning actions relating to those activities” stipulates that “all land use should be considered in a holistic manner and LULUCF should be addressed within the Union’s climate policy.” Also the European Council Conclusions of October 2014⁹² state that “[p]olicy on how to include Land Use, Land Use Change and Forestry into the 2030 greenhouse gas mitigation framework will be established

⁸⁷ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.2.

⁸⁸ Article 192(1) TFEU: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.”

⁸⁹ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.2.

⁹⁰ Judgment of the Court of First Instance (First Chamber, extended composition) of 5 April 2006, Deutsche Bahn AG v Commission of the European Communities, Case T-351/02, paras. 101-102.

⁹¹ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.4.

⁹² European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 6.

as soon as technical conditions allow and in any case before 2020.” A Consultation on addressing greenhouse gas emissions from agriculture and LULUCF in the context of the 2030 EU climate and energy framework is ongoing.⁹³ Decision No 529/2013/EU has regard in particular to Article 192 (1) TFEU. Under this competence norm, the EU could potentially proceed to introduce a Regulation for LULUCF as suggested. The principles of proportionality and subsidiarity would, however, also have to be observed. Article 5(3) TEU states that “[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” Furthermore, Article 5 (4) TEU (principle of proportionality) states that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

The European Commission has recently set out a timetable for “Legislative proposals on the Effort-Sharing Decision and the inclusion of Land Use, Land Use Change and Forestry (LULUCF) into the 2030 Climate and Energy Framework”. The Annex to the “Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy” indicates that this will take place in 2016.⁹⁴

Strengthened pesticide reduction targets under the Pesticides Directive, and provision of guidance to farmers on integrated pest management

The instrument’s design aims to strengthen existing Member State National Action Plans under the Sustainable Use Directive through more demanding requirements in terms of reduced use of pesticides, and improved pest management.⁹⁵

The instrument would be deployed at the EU level, “with some flexibility allowed on Member States’ implementation decisions.”⁹⁶

Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides is based on Article 175 Treaty establishing the European Community (now Article 192 TFEU). Under Article 192 TFEU, the EU could potentially proceed to introduce the measure as suggested. The principles of proportionality (Article 5 (4) TEU) and subsidiarity (Article 5 (3) TEU) would, however, also have to be observed. Assuming that this is the case, the suggested measure does not raise immediate concerns in view of EU law.

Overall, the instrument does not raise immediate concerns in view of EU law. Looking at the recent commitment expressed at EU level, its feasibility appears to be relatively high.

⁹³ Consultation on addressing greenhouse gas emissions from agriculture and LULUCF in the context of the 2030 EU climate and energy framework, http://ec.europa.eu/clima/consultations/articles/0026_en.htm.

⁹⁴ European Commission (2015): Energy Union Package, Annex. Roadmap for the Energy Union to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 80 final Annex 1, p. 4.

⁹⁵ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.5.

⁹⁶ Ibid.

Promotion of “Payment for Ecosystem Services” programmes

The instrument encourages the establishment of Payment for Ecosystem Services “programmes aiming at reducing the environmental impact of agricultural activities and financed by private actors (e.g. water companies, tourist operators)”. Public authorities will offer “1) fiscal incentives and 2) support, including mediation, control activities, and also, when appropriate, guarantees to ensure a long term planning (e.g. guaranteeing the payment even in case the company goes bankrupt or cannot afford to pay).”⁹⁷

The fiscal incentives would take the form of tax reliefs on payments for ecosystem services; they would be employed at the Member State level.

Targeted information campaign to influence food behaviour towards reducing food waste and changing diets

The instrument “is an awareness campaign that aims to encourage and achieve reduction in food waste and change in diets.”⁹⁸ It could be deployed at all levels (local/MS/EU level). A preliminary assessment does not raise concerns in view of EU law.

Development of food redistribution programmes/food donation

The instrument “aims to reduce the generation of food waste through the development of food redistribution programmes.” It should be deployed at Member State level.⁹⁹

The design of the measure would need to take account of, for example, food safety and hygiene requirements set out in EU law, including Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, and Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs or Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.¹⁰⁰

Provided that these requirements are met, the measure does not raise immediate concerns in view of EU law.

⁹⁷ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 5.4.3.

⁹⁸ Ibid., 5.5.4.

⁹⁹ Ibid., 5.5.5.

¹⁰⁰ Deloitte (2014): Comparative Study on EU Member States’ legislation and practices on food donation, final report, June 2014, <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-eu-food-donations>.

3.2.3 Overarching policy mix

Taxes on the extraction and imports of selected virgin materials and on landfilled and incinerated waste

The ‘circular economy tax trio’ would be a “combination of a virgin materials tax (based on UK’s aggregates tax, the Swedish gravel tax and the Danish tax on raw materials), a landfill tax (UK) as well a waste incineration and landfill tax (Sweden and Denmark) would pursue three objectives simultaneously: (a) reducing raw virgin resources extraction; (b) encouraging recycling/making recycling more profitable; (c) internalizing externalities linked to (1) the extraction/transportation of raw materials (2) landfilling and incineration.”¹⁰¹

It would be introduced in all EU Member States. The virgin materials tax will target virgin raw materials’ suppliers and importers, the landfilling tax will have to be paid by all waste producers who choose to discard their waste using landfill sites and the incineration tax will be paid by the incineration plants.¹⁰² The instrument should be a Europe-wide tax trio and levied/collected by authorities in each EU Member State.

At EU level, any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation would be subject to Article 113 TFEU (*and* Articles 191 f. TFEU¹⁰³). Harmonisation would require a unanimous vote by the Council.¹⁰⁴ Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted.

The “prudent and rational utilisation of natural resources” is one of the EU’s environmental objectives (see Article 191(1) TFEU). As the instrument would presumably be deemed to be “primarily of a fiscal nature”, Article 192 (2) TFEU would be applicable: “By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: (a) provisions primarily of a fiscal nature [...]”

Pursuant to Article 110 TFEU, “[n]o Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.” These criteria do not seem to be met as it applies to imported and domestic materials alike.

EU-wide introduction of feebate schemes for selected products categories

This instrument aims “to develop at EU level a common framework for the introduction of bonus-malus schemes across the EU”.¹⁰⁵ The instrument is meant to provide a financial

¹⁰¹ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 4.4.1.

¹⁰² Ibid.

¹⁰³ Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 7.

¹⁰⁴ See Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

¹⁰⁵ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 4.4.2.

incentive for the purchase of low-emitting, environmental friendly products and charge a fee for high-emissions and highly resource use appliances.¹⁰⁶

The instrument combines two elements: it implements a tax for less environmental products and a rebate or subsidy for more efficient products.

The tax element of the measure would be an indirect tax. Generally, “[t]he power to levy taxes is central to the sovereignty of the Member States”; “[p]rovided that the Member States comply with EU rules, each is free to choose the tax system it considers most appropriate.”¹⁰⁷ Harmonisation would require a unanimous vote by the Council.¹⁰⁸ Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted. Apart from the fact that the unanimity requirement constitutes an obstacle to the instrument’s adoption, it does not seem that the measure is “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.” Leaving that aside, as far as the additional requirements in Article 191 TFEU are concerned, it seems as if the conditions set out therein could be met. The “prudent and rational utilisation of natural resources” is one of the EU’s environmental objectives (see Article 191(1) TFEU) and the instrument would be covered by the (shared) competence: pursuant to Article 4 (2) (e) TFEU, the EU shares competence with the Member States in the area environment. As the instrument would presumably be deemed to be “primarily of a fiscal nature”, Article 192 (2) TFEU would be applicable: “By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: (a) provisions primarily of a fiscal nature [...]” If all these conditions are met, the measure does not seem to raise concerns in view of EU law. However, the unanimity requirement and the further criteria of Article 113 TFEU affect the instrument’s feasibility.

As far as the subsidy element is concerned there remain doubts how this instrument will be designed.

Reduced VAT for the most environmentally advantageous products and services

The instrument “involves a reduced VAT rate (therefore applying at point of sale, with no impact on exports) of 6 % for the most environmentally advantageous or least resource intensive products and services across a wider range of products and activities.”¹⁰⁹

It is suggested that the “measure would be introduced (i.e. adopted) at European level but implemented at Member State level.”¹¹⁰

¹⁰⁶Ibid.

¹⁰⁷European Parliament (2014): General tax policy. Fact Sheets on the European Union, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuid=FTU_5.11.1.html.

¹⁰⁸See Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

¹⁰⁹Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, “Final public report on pathways and policy mixes” of the DYNAMIX project, 4.4.3.

¹¹⁰Ibid.

The measure would be an indirect tax (reduction). Generally, “[t]he power to levy taxes is central to the sovereignty of the Member States”; “[p]rovided that the Member States comply with EU rules, each is free to choose the tax system it considers most appropriate.”¹¹¹ According to a recent ECJ judgment¹¹² Member States may vary VAT rates on certain products under the EU VAT directive, but there are tight restrictions on these derogations as laid down in the Directive.

Adopted at EU level, the measure would be subject to Article 113 TFEU (*and* Articles 191 f. TFEU¹¹³). Tax harmonisation would require a unanimous vote by the Council.¹¹⁴ Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU). Recourse to Article 115 TFEU (approximation of laws) is not permitted. Apart from the fact that the unanimity requirement constitutes an obstacle to the instrument’s adoption, it does not seem that the measure is “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.” In contrast, adopted at Member State level, the measure could, potentially, have a greater prospect of success, given that the Member States’ discretion in the area of indirect taxation is rather large. A Member State introducing such reduced tax rates would merely have to meet certain minimum requirements. The main EU legislative text on VAT is the VAT Directive (2006/112/EC).¹¹⁵ Pursuant to Article 97(1) Directive 2006/112/EC, “the standard rate may not be less than 15 %.” The Council extended the 15% minimum VAT standard rate until the end of 2015.¹¹⁶ Reduced tax rates “may not be less than 5 %” (Article 99 (1) Directive 2006/112/EC).¹¹⁷ Thus, as long as these minimum tax levels are maintained and the measure does not breach Article 110 TFEU, a provisional assessment of the measure does not result in concerns as far as EU law is concerned.

Boosting extended producer responsibility

Enhanced producer responsibility shall be further optimised through a revision of the Waste Electrical and Electronic Equipment directive (WEEE) (renewed Directive 2012/19/EU), the End-of-Life Vehicle (ELV) directive (Directive 2000/53/EC), the Packaging and Packaging

¹¹¹European Parliament (2014): General tax policy. Fact Sheets on the European Union, http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.11.1.html.

¹¹²Judgment of 4 June, Case C-161-14, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164731&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375450>

¹¹³Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 7.

¹¹⁴See Waldhoff/Kahl, in: Calliess/Ruffert, EUV-AEUV, Art. 113 AEUV, para. 6; EurActiv (2010): FAZ: EU-Kommission plant Rohstoff-Steuer, 2010, <http://www.euractiv.de/binnenmarkt-und-wettbewerb/artikel/faz-eu-kommission-plant-rohstoff-steuer-003518>.

¹¹⁵European Parliament (2014): Fact Sheets on the European Union, Indirect taxation: Value added tax (VAT), http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.11.4.html; see Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

¹¹⁶European Parliament (2014): Fact Sheets on the European Union, Indirect taxation: Value added tax (VAT), http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.11.4.html.

¹¹⁷See also Bahn-Walkowiak, Bettina, Henning Wilts, Raimund Bleischwitz, Joachim Sanden (2010): Differenzierte Mehrwertsteuersätze zur Förderung eines ressourceneffizienteren Konsums, Meilenstein zu AS3.2: Maßnahmenvorschläge zur Ressourcenpolitik zur Gestaltung der Rahmenbedingungen.

Waste Directive (Directive 2005/20/EC amending Directive 94/62/EC) and the Battery and accumulators Directive (Directive 2006/66/EC).¹¹⁸

The proposed measures/revisions need to be covered by the corresponding competence. Article 5(2) TEU states that “[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” Here, the instrument would be covered by the (shared) competence: pursuant to Article 4 (2) (e) TFEU, the EU shares competence with the Member States in the area environment. This means that both the EU and the Member States may act in that field. Article 2 (2) TFEU specifies that “[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence” while “[t]he Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.” According to Article 192 (1) TFEU “[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.” These objectives are “preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.” The intended measures could be deemed to contribute to the objectives “preserving, protecting and improving the quality of the environment” and/or “prudent and rational utilisation of natural resources”. Thus, revisions of the mentioned Directives would presumably be covered by the EU’s environmental competence pursuant to Article 192 (1) TFEU and the suggested measures do not raise immediate concerns in view of EU law.

Skill enhancement programme

The instrument would mainstream resource efficiency aspects into relevant academic and vocational curricula and training for professionals.¹¹⁹

Given the competition risks involved, it is important to ensure that there are no artificial barriers to entry for students and/or professionals coming from other Member States.

If this aspect is respected and provided that the measure does not introduce discriminatory treatment, the measure does not raise immediate concerns in view of EU law (e.g. Article 49 TFEU, Right of Establishment).

Enabling shift from consumption to leisure

The instrument “aims at exploring policies to encourage reduced working hours (either in form of part - time or as sabbaticals).”¹²⁰ This measure does not raise immediate concerns in view of EU law given that it has an exploratory character and no direct requirements would ensue before 2030.

¹¹⁸ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 4.4.4.

¹¹⁹ Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 4.4.5.

¹²⁰ Ibid., 4.4.7.

Step-by-step restriction of advertising and marketing

The instrument introduces step-by-step restrictions on advertisement. Its purpose is to have an impact on consumption patterns. It would first be introduced at the national level.

The measure can be assessed in light of Article 34 TFEU, which prohibits “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” Considering the Dassonville judgement, a step-by-step restriction on advertisement could be deemed to constitute a measure having an effect equivalent to quantitative restrictions and thus covered by Article 34 TFEU. However, the design does not indicate that there would be any kind of discrimination of non-domestic products. Thus, in light of the Keck ruling, it can be assumed that the instrument would not breach Article 34 TFEU: “national provisions restricting or prohibiting certain selling arrangements [do not] hinder trade between Member States, [...] so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products.”¹²¹ In this case it can be assumed that the Keck requirements are met as the national measure would presumably affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

The measure can also be examined in the light of the freedom to provide services as set out in Article 56 TFEU. Advertising and marketing services affected by this instrument could be covered by the definition provided in Article 57 (2) TFEU according to which “services” shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.” However, considering what has been said above in the context of Article 34 TFEU and taking the Keck ruling into account, the lack of discriminatory selling arrangements presumably rules out the possibility of a breach of Article 56 TFEU.

Thus, as long as the design does not entail differential treatment of domestic products and of those from other Member States, it does not raise immediate concerns in view of EU law.

Local currencies for labour-based services

The instrument aims to expand “the use of alternative local currencies within communities for labour-based services. The alternative currency is initially distributed within the community, and then traded for local services negotiated in prices based on the currency. These services can include, for example, haircuts, cleaning, gardening, hosting, cake-baking, vegetable growing, chicken and egg rearing, child-care, care for the elderly, chauffeuring, public space improvements, equipment and auto repairs. As these trades are untaxed, this serves to make

¹²¹Judgment of the Court of 24 November 1993, Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases C-267/91 and C-268/91.

the local services more affordable, compared to products. The parts of the services that require material goods would be paid for in the usual currency.¹²²

The local currency instrument is a voluntary system and should be decided on the local community level (incl. the municipality).¹²³

Due to its voluntary nature, the measure's design does not raise immediate concerns in view of EU law.

¹²² Ekvall, Tomas, Maria Elander et al. (2015): Development of DYNAMIX Policy Mixes, Deliverable D4.2, "Final public report on pathways and policy mixes" of the DYNAMIX project, 4.4.6.

¹²³ Ibid.

4 Summary of compatibility with WTO- and EU-law across all policy mixes

4.1 Summary of compatibility with WTO-law

4.1.1 Metals policy mix

All chosen instruments seem to be compatible with WTO-law. The policy mix in general makes use of categories of instruments that have at least partly established predecessors on the EU-level and the international level. This basis adds to the compatibility of a further development and extension of the instruments with WTO-law.

4.1.2 Land-use policy mix

With regard to the production side some of the chosen measures imply a mix of product standards/technical regulation, subsidisation and taxation. This adds to the complexity of the compatibility check and in some cases the necessity of at least one of the elements to the overall functioning of the measure should be checked. From a legal analysis point of view it could make sense to try to use the measures that generate revenues (e.g. taxes) to co-finance the other measures in order to form a consistent policy mix.

With regard to the consumption side the funding of the measures still needs to be clarified – at least two out of the three measures, however, seem to be compatible with WTO-law. The intended exemption within the third measure (VAT on meat) complicates the compatibility – the design of the instrument should be adapted.

4.1.3 Overarching policy mix

The picture is mixed with regard to these partly innovative measures: While some of the measures (especially those establishing voluntary systems) do not even have a connecting point with WTO-law, others raise several questions on the compatibility with WTO-law. Further clarifications are partly needed to make up the legal assessment. From a legal analysis point of view it could make sense to try to use the measures that generate revenues (e.g. taxes) to co-finance the other measures in order to form a consistent policy mix.

4.2 Summary of compatibility with EU-Law

4.2.1 Metals policy mix

The measures under this policy mix seem to cause compatibility problems with EU-law with the exception of the increased spending on research and development in EU-27 for recycling and material efficiency.

The main reason for these compatibility problems is the use of some kind of tax as the principal instrument. A harmonisation of tax on the EU-level needs a unanimous vote of the Council. Besides this the tax needs to be “necessary to ensure the establishment and the

functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU), which is doubtful and still needs to be discussed.

4.2.2 Land-use policy mix

The measures under the land-use policy mix do not raise immediate concerns in view of EU law with the exception of the VAT on meat products.

Regarding the VAT on meat products especially the unanimous vote by the Council required for any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation is unlikely due to the expected resistance of some Member States. Furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU), which is doubtful and still needs to be discussed. Recourse to Article 115 TFEU (approximation of laws) is not permitted.

4.2.3 Overarching policy mix

The measures under this mix in general do not raise immediate concerns in view of EU law with the exception of the circular economy tax trio and the feebate schemes.

The introduction of the circular tax would require a unanimous vote by the Council and furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU) which still needs to be discussed.

Regarding the feebate schemes the unanimity requirement for the taxation element and the further criteria of Article 113 TFEU affect the instrument’s feasibility. As far as the subsidy element is concerned there remain doubts how this instrument will be designed.

5 Pointers for revision/refining of policy mixes

In this chapter hints are given on how the single instruments as well as the policy mixes in total could be revised or refined based on the results of the compatibility checks and the implementability and enforcement issues.

5.1 General remarks

In general it would be beneficial to add (further) information on the overall targets for 2030 and 2050 as well as the overall connection in which the instrument shall fulfil its function. Additionally the objectives of the single instruments and measures should be described as detailed as possible, keeping in mind that the higher-ranking and the more threatened the objectives being intended to protect (for example human health), the more promising the legitimation of an instrument under the WTO- as well as the EU-law regime even if trade distortions would be affirmed. However, a clear interrelation between the measure and the objectives is necessary and should be described in detail.

When drafting the description of the instrument, the handling of imports and exports should always be addressed keeping in mind that under WTO-law as well as under EU-law the instrument must not be "... applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" (Article XX GATT) or not "... constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Article 36 TFEU), respectively.

With respect to the international level consideration should always be given to the question if the objectives could be reached through (multilateral) environmental agreements on the international level. In general under WTO-law "[...] using the provisions of an international environmental agreement is better than one country trying on its own to change other countries' environmental policies."¹²⁴ At least negotiations for multilateral environmental agreements should be sought in order to prevent the allegation of unpredictable behavior in conflict with the WTO transparency principle. In general, WTO members should provide as much information as possible about the environmental policies they may take, when these can have a significant impact on trade. This is mostly done by notifying the WTO.

The use of Border Adjustment Measures (BAMs) might be a suitable instrument to target importing countries with less stringent measures especially to prevent leakage but also competitive disadvantages of the domestic industry. The environmental and economic effectiveness of BAMs as well as their compatibility with WTO-law, however, are highly disputed.¹²⁵

¹²⁴ WTO (2015): Understanding the WTO. The environment: a specific concern, p. 66 with reference to the shrimp-turtle and the dolphin-tune cases.

¹²⁵ See for example: Barrett, John, Robin Vanner, Marco Sakai, Anne Owen (2012). GHG emissions embodied in trade - Is Border Adjustment an appropriate and effective response? Centre for Low Carbon Futures, Report no. 010, June 2012, p. 20 f.; Meyer-Ohlendorf, Nils, Christian Pitschas and Benjamin Görlach (2010): Emissions trading – proposals for further development with special focus

With respect to EU-law it is important to check if the instrument does fall within scope of harmonized EU legislation (such as for example the VAT Directive). Only if this is not the case a measure might be relied on Article 36 TFEU to justify deviations from (harmonised) EU legislation.

With respect to the instrument choice it is not possible to give a general advice either for the instrument Directive or Regulation. It is, however, important to ensure effective tools to monitor and measure progress with regard to the overall objectives. Besides the criteria guaranteeing an effective enforcement (see Chapter 2.6) should be included.

As the TFEU and the TEU aim for a high level but not the highest possible level of environmental protection (cp. Article 11 TFEU, but also Article 3 (3) TEU or Article 191 (2) TFEU) and Union policies must adhere to certain principles such as the precautionary principle (cp. also Article 191(2) TFEU) but not to a principled priority of environmental and climate issues¹²⁶ a change of the EU primary law might also be an alternative. This, however, might imply a time-consuming and complex procedure.

Similar to WTO-law it is advisable and often required to notify the EU Commission of any planned measures that could affect trade law (such as subsidies, etc.).

5.2 Metals policy mix

When it comes to the *materials tax* the addition of a sketch of the value added chain could help to understand the logic of the instrument especially with regard to imports and exports. This might also emphasise the argument that the import duty will not distort the competition but rather level the ground since the tax is also levied on domestically produced materials. In order to ensure compatibility with WTO-law the Member State is advised to inform the WTO panel of the planned instrument at an early stage, the best option being entering into multilateral environmental agreements with the WTO members.

At EU level, however, any harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation requires a unanimous vote by the Council, constituting an obstacle to the instrument's adoption. Additionally it is necessary to prove that the instrument is "necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

As the *internalisation of external environmental costs* is classed rather as a principle or an objective than an instrument the choice of another subtitle is proposed. Especially with respect to the instrument's focus on emissions further evaluation is needed how the instrument would fit in with or affect the EU Emissions Trading System (EU ETS) and, for example, the Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community given that these Directives already regulate the output of emissions.

on measures in energy-intensive industrial sectors, p. 56 ff. and 67 ff.; Ekardt, Felix, Andrea Schmeichel (2008): Border Adjustments, WTO Law, and Climate Protection, Critical Issues in Environmental Taxation 2008, p. 737;

¹²⁶For more details see Bausch, Camilla et al. (2014): European governance and the low-carbon pathway: Analysis of challenges and opportunities arising from overlaps between climate and energy policy as well as from centralisation of climate policies. CECILIA2050 WP4 Deliverable 4.2. Berlin: Ecologic Institute, p. 34 f.

The *increased spending on research and development in EU-27 for recycling and material efficiency* should be accompanied by an EU strategy for dematerialisation and supported by the establishment of fora for communication – like has already been described in the presentation of the instrument.

With respect to the implementation of the *promotion of sharing systems* as well as the financing of the instrument a decision between the different options would be needed in order to assess its legal compatibility in greater detail. Especially the public support through a differentiation in VAT between goods and services could lead to compatibility problems with WTO- and EU-law. In the further design of the instrument it is advisable to emphasise the contents that would contribute to a compatibility with the internal market under Article 107 (3) (c) TFEU as laid down in the Guidelines on environmental and energy aid for 2014-2020, for example “aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards (including aid for the acquisition of new transport vehicles)” leading to a “more efficient use of natural resources without adversely affecting trading conditions to an extent contrary to the common interest.” Depending on the aid amount, a subsidy would need to be notified to the Commission.

The *product standards* should indeed be deployed at the international level for example in the form of ISO standards. At least corresponding negotiations should be conducted in order to allow for the necessary predictability of the instrument deployed at EU level in case the global deployment should fail. It could also be tried to reach at least minimum product standards in the form of ISO standards and then deploy stricter standards at EU level on the basis of Article XX GATT. As such, ISO has no status as a multilateral agreement given that it is an industry-dominated body that agrees international specifications and performance norms. These ISO norms are generally minimum threshold international standards and not guidelines for setting acceptable national levels of public health risk. It would be good then to add more details on the environmental objectives of the instruments.

In addition to this it should be clearly worked out in the design of the instrument that the single provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

5.3 Land-use policy mix

Similar to advice for the metals policy mix it is recommendable to put each one of the measures into the overall context and explain its importance for reaching the overall targets related to biodiversity, soil functionality, water quantity/quality, food consumption and food waste from households in the description of the instrument. If the protection of human health and the environment as is part of the targets this should be explicitly mentioned, as this is of utmost importance when it comes to the justification of the instruments.

A description of the potential cumulative effects of the instruments as well as a possible combination of the instruments in order to address land consumption and production within a well-balanced instruments mix in addition to the general introduction of the single measures would be helpful.

Within the description of the *stronger and more effective environmental and climate dimension for EU land management in the CAP* it should be clarified that the subsidisation within the programme is not meant to stimulate production but to increase compliance with

environmental standards. Besides this enforcement issues could be addressed in more detail by listing possible measures to guarantee an effective enforcement of the CAP.

With regard to the *revised emissions levels in the NECD and additional measures for better management of the nitrogen cycle on farmland* it is advised to point out that the planned subsidies do neither cause adverse effects to the interests of another Member, such as injury to the domestic industry of another Member nor a serious prejudice to the interest of another Member. Namely when it comes to the planned fertilizer tax more information should be added regarding the design of the taxation, especially if imports/exports will be taxed in the same way as domestic products. As far as the EU level is concerned the instrument should be designed in a way to be categorised as a measure carried out in accordance with obligations stemming from the Treaty and thus not constituting aid within the meaning of Article 107 TFEU.

With respect to the *regulation for LULUCF* it should be clarified how the instrument will be integrated in the already existing policies, e.g. if it is to be implemented as a regulation or as a revision of the already existing Decision No 529/2013/EU of 21 May 2013 on accounting rules on greenhouse gas emissions and removals resulting from activities relating to land use, land-use change and forestry and on information concerning actions relating to those activities. This is important in view of the principles of proportionality and subsidiarity. Additionally, more information is needed especially with regard to the criteria of the subsidisation as well as the subsidisation proceedings and addressees in order to legally assess the instrument.

While the subsidisation element within the *strengthened pesticide reduction targets under the Pesticides Directive, and provision of guidance to farmers on integrated pest management* seems to be compatible with WTO-law, more information is needed for the legal assessment of the taxation element (volume tax on active ingredients in pesticides placed on the market), especially with regard to the treatment of imported and exported pesticides.

The *promotion of 'Payment for Ecosystem Services' programmes* should be clearly linked with one or more other instruments as it is meant to be complementary to other kinds of environmental policies based on regulatory instruments or public subsidies. This should then be added to the description of the instrument.

The *targeted information campaign to influence food behaviour towards reducing food waste and changing diets* should be clearly linked with one or more other instruments, especially if the revenues would be generated from one of or more of these instruments. This should then be added to the description of the instrument.

With regard to the *development of food redistribution programmes/food donation* it should be clarified how the instrument will be coordinated with the already existing policies on the EU level, e.g. the Council Directive 2006/112/EC14 (VAT Directive), the Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Regulation (EC) No 853/2004 on the hygiene of foodstuffs and Regulation (EU) No 1169/2011 on the provision of food information to consumers.

The description of the *value added tax on meat products* should be supplemented with on the one hand a specification of the types of meat products that promote environmental protection and on the other hand regarding the objectives of the exception, as well as scientific proof of benefits for human health, protection of exhaustible resources, etc. Besides this with respect to the EU level it would be needed to explain why the tax harmonisation is necessary to

ensure the establishment and the functioning of the internal market and to avoid distortion of competition (see Article 113 TFEU).

5.4 Overarching policy mix

Similar to the advice for the metals and the land use policy mixes it is recommendable to put each one of the measures into the overall context and explain its importance for reaching the overall objectives for 2030 and 2050 in the description of the instruments. If the protection of human health and the environment is part of the targets this should be explicitly mentioned, as this is of utmost importance when it comes to the justification of the instruments.

A description of the potential cumulative effects as well as the synergies of the instruments and a possible combination of the instruments within a well-balanced instruments mix in addition to the general introduction of the single measures is recommended.

Regarding the *circular economy tax trio* similar to the materials tax the addition of a sketch of the value added chain could help to understand the logic of the instrument especially with regard to imports and exports. Raw materials that are exported will not be exempt from the virgin materials tax; and the tax will not be levied on imports. It is advised to inform the WTO panel of the planned instrument at an early stage, the best option being entering into multilateral environmental agreements with the WTO members. The introduction of the circular economy tax trio would require a unanimous vote by the Council at the EU level and furthermore, it would need to be “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition” (Article 113 TFEU) – a point that should be addressed in the description of the instrument.

With respect to the *EU-wide introduction of feebate schemes for selected products categories* it is advised to clearly highlight that domestic production and imports are to be treated equally and that EU exports will not face a price disadvantage. As far as the subsidy element is concerned more information on the design of the instrument is needed for a legal assessment.

With regard to the subsidisation element within the *reduced VAT for the most environmentally advantageous products and services* the establishment of objective criteria or conditions on which the granting authority bases its operations governing the eligibility for, and the amount of, the subsidy is needed. Besides this the eligibility should be automatic and the criteria and conditions strictly adhered to. Apart from the fact that on the EU level the unanimity requirement constitutes an obstacle to the instrument’s adoption, it does not seem that the measure is “necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.” In contrast, adopted at Member State level, the measure could, potentially, have a greater prospect of success, given that the Member States’ discretion in the area of indirect taxation is rather large. The restrictions to variations of the VAT rates as laid down in a recent ECJ judgment¹²⁷ should, however, be taken into account.

¹²⁷Judgment of 4 June 2015, Case C-161-14, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164731&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375450>

As the *boosting extended producer responsibility* scheme shall be accompanied by the introduction of appropriate product standards, similar to the advice made regarding product standards under the metals policy mix, at least negotiations on international standards should be conducted in order to allow for the necessary predictability of the instrument. In addition to this it should be clearly worked out in the design of the instrument that the single provisions apply to all relevant product manufacturers operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Based on the national treatment principle it has to be ensured that the 'like' products are not singled out for discriminatory treatment based on their source of origin.

In the further design of the *skill enhancement programme* it should be ensured that students and professionals coming from other Member States are treated in a non-discriminatory way with regard to nationals.

The *enabling shift from consumption to leisure* instrument is kept open when it comes to single instruments that should be implemented. This makes a legal assessment very difficult. However, with its exploratory character, it does not raise immediate concerns in view of WTO- and EU-law.

As long as the design of the *step-by-step restriction of advertising and marketing* does not entail differential treatment of domestic products and of those from other Member States, it does not raise immediate concerns in view of WTO- and EU-law. As the measure is kept open only very general advice can be given. The national treatment principle seems to be complied with as advertising from all origins, within and beyond EU, shall be tackled without making any difference. International as well as EU law on misrepresentative claims to strengthen the commercial and environmental value associated with developing an environmentally beneficial product or service should be taken into account.

As long as the *local currencies for labour-based services* is a voluntary system the measure's design does not raise immediate concerns in view of EU law. However, as the measure is kept open only very general advice can be given.

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