



# Legal assessment of policy mixes

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 looked 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 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.

## Method

The legal assessment encompasses the following steps:

1. Identification of the legal barriers;
2. Legal assessment of these barriers with regard to the selected instruments of the policy mixes;
3. 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;
4. 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; and
5. If necessary: Adaptation of the design of the instruments of the policy mixes on the basis of the assessment.

## Discussion

With respect to *all three policy mixes* it is recommended to explicitly mention if the instrument contributes to the protection of human health and the environment or to conservation of energy resources - 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 (e.g. 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' adoption.

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.

## Results

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.

## References (selection)

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