Jean Monnet Working Paper Series
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Environment and Internal Market

Vol. 2013/6

THE ROLES PLAYED BY THE POLLUTER PAYS PRINCIPLE IN STATE AID LAW

by

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Published on http://www.tradevenvironment.eu

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Introduction

The polluter pays principle (hereinafter 'the PPP') is a fundamental rule whose formulation inspires sympathy but whose content, scope and implications overwhelm its comprehension by common sense. This principle is based upon the theory of externalities according to which social costs linked to industrial pollution must be integrated into production costs instead of being passed on to the collectivity.[1] This internalisation requirement is supposed to compel polluters to pay for pollution prevention and control measures and for environmental damages they cause without any subsidisation from government or society.[2] However, markets left to their own devices cannot guarantee such an allocation of costs since a rational company has absolutely no incentive to take these externalities into account when deciding upon its level and techniques of production, the result of such a market failure being sometimes the need for public intervention.[3] Ultimately the internalisation process is meant to make eco-friendly production methods less financially burdensome and hence more attractive than traditional techniques.[4]

Although the pioneering document regarding the PPP is an OECD Council Recommendation adopted in 1972,[5] the role of the PPP in EU law cannot be overlooked. The signs of it being one of the cornerstones of EU environmental policy are essentially the pieces of secondary legislation[6] and soft law[7] implementing it, the EU courts referring thereto in their judgments[8] and, above all, Article

[1] M Prieur, *Droit de l'environnement* (6th edn Dalloz, Paris 2011) 175; SC Budlong, 'Article 130r(2) and the permissibility of State aids for environmental compliance in the EC' (1992) 30 Colum J Transnat'l L 455; P Sands *e.a.*, *Principles of international environmental law* (3rd edn CUP, Cambridge 2012) 228.

[2] E Woerdman *e.a.*, 'Emissions trading and the polluter-pays principle: do polluters pay under grandfathering?' (2008) 2 Rev L & Econ 572 ; JR Nash, 'Too much market? Conflict between tradable pollution allowances and the "polluter pays" principle' (2000) 2 Harvard Envtl L Rev 3.

[3] QC Quigley, *European State aid law and policy* (2nd edn Hart Publishing, Oxford 2009) 271 & 272; S Kingston, 'Integrating environmental protection and EC competition law: why competition isn't special?' [2010] ELJ 781; X, 'Revised Guidelines on State aid for the environment adopted' [2008] EU Focus 34.

[4] G Facenna, 'State aid and environmental protection' in A Biondi *e.a.* (eds), *The law of State aid in the European Union* (OUP, Oxford 2004) 246.

[5] Organisation for Economic Co-operation and Development (Council) 'Recommendation on guiding principles concerning international economic aspects of environmental policies' (26 May 1972) C(72)128 [1972 OECD Recommendation], para 4: 'The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment'.

[6] See for example Directive (EC) 2008/98 of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3, art 15(1); Directive (EC) 2006/12 of 5 April 2006 on waste [2006] OJ L114/9, art 15; Directive (EC) 2004/35 of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, art 1; Directive (EC) 2000/60 of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1, art 9(1)(1). See also M Humphreys, 'The polluter pays principle in transport policy' (2001) 5 EL Rev 453.

[7] See Commission (EC), 'Community Guidelines on State aid for environmental protection' [2008] OJ C82/1 [2008 Guidelines].

191(2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') which reads as follow:

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source *and that the polluter should pay*.[9]

The PPP is also present in other EU spheres. For decades, environmental policies have indeed been relying not only upon regulation and administrative mechanisms but also upon economic and financial instruments such as subsidies and tax incentives, which competition law could not be indifferent to.[10] In comparison with antitrust, State aid law pays all the more attention to the PPP insofar as the latter was originally understood as a mere prohibition of aid to polluters.[11] In his opinion in *GEMO*, Advocate General Jacobs masterly explains how helpful the PPP can be in the process of State aid decision making:

> In its State aid practice the Commission uses the polluter-pays principle for two distinct purposes, namely (a) to determine whether a measure constitutes State aid within the meaning of Article [107(1) TFEU] and (b) to decide whether a given aid may be declared compatible with the Treaty under Article [107(3) TFEU].
>
> In the first context, that of Article [107(1) TFEU], the principle is used as an analytical tool to allocate responsibility according to economic criteria for the costs entailed by the pollution in question. A given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs.
>
> In the second context, that of Article [107(3) TFEU], the polluter-pays principle is used by contrast in a prescriptive way as a policy criterion. It is relied on to assert that the costs of environmental protection *should* as a matter of sound environmental and State aid policy ultimately be borne by the polluters themselves rather than by States.[12]

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[8] Case C-254/08 *Futura Immobiliare v Casoria* [2009] ECR I-6995, paras 52 & 55; Case T-2010/02 *British Aggregates v Commission* [2006] ECR II-2789 [*British Aggregates*], para 137; Case C-293/97 *The Queen v Secretary of State for the Environment* [1999] ECR I-2603, para 52; Case 172/82 *Syndicat national des fabricants raffineurs d'huile de graissage v Inter-Huiles* [1983] ECR 555, para 18.

[9] Emphasis added.

[10] L Idot, 'Droit de la concurrence et protection de l'environnement. La relation doit-elle évoluer?' (2012) 3 Concurrences 2; C Markus, 'Environmental aid in the European electricity market: veni, vidi, vici?' (2002) 9 IELTR 237; Sands *e.a.* (n 1) 232; N De Sadeleer, *Environnement et marché intérieur* (Editions de l'Université de Bruxelles, Brussels, 2010) 503.

[11] Idot (n 10) 10; E De Sabran-Pontevès, *Les transcriptions juridiques du principe pollueur-payeur* (Presses universitaires d'Aix-Marseille, Aix-en-Provence 2007) 65.

[12] Opinion AG Jacobs in case C-126/01 *Ministère de l'Économie, des Finances et de l'Industrie v GEMO* [2003] ECR I-13769 [*GEMO*], paras 68 to 70.

That being said, the question arises whether there is a contradiction between the implementation of a principle forbidding assistance to polluters and the possibility for environmental aid to be approved. This issue, to be sure, calls for a nuanced approach which admits derogations from the PPP, the most important being support to undertakings which voluntarily seek to reduce environmental harm to a greater extent than required by the law in force. Likewise subsidisation may be legitimate where the polluter is not able to internalise social costs due to the structure of the market.

This paper hence demonstrates that, as framed by the EU and the OECD, the PPP is not irreconcilable with some categories of aid being granted to polluting industries. It is divided into two main parts: first, it examines the role of the PPP in the qualification phase as it can be used, on the one hand, as an analytical tool to know whether a measure confers an advantage upon the recipients and whether state resources are involved, and, on the other hand, as a ground of justification within the context of the selectivity question; then, it analyses in the light of EU soft law and jurisprudence whether the approval of certain aid under the most relevant treaty provisions, *i.e.* Article 107(3)(b) and (c) TFEU, is consistent with the PPP.

Unlike most studies on this subject, this essay does not deal with the history of EU environmental law, nor with the technical issue of what costs and what benefits shall be taken into account to determine the responsibility of the polluter, nor with the calculation of the permitted aid intensities, nor with the difference between operating and investment aid.

I. The role of the PPP in the qualification phase

To begin with, it is worth recalling that Article 107(1) TFEU provides that

> Save as otherwise provided in the Treaties, 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.

As interpreted by the Court of Justice of the European Union (hereinafter 'the Court of Justice' or 'the ECJ'), this provision requires that four criteria be cumulatively satisfied for a measure to qualify as aid:[13]

> [F]irst, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.[14]

The European Commission's decisions give to understand that the PPP is predominantly utilized within the context of the first and third conditions, although, for the sake of clarity and logic, the latter is examined before the former.

In passing, note has to be taken that environmental aids receive treatment identical to that received by other types of aid: it is indeed settled case law that only the effects of the measures matter in the qualification phase,[15] their causes and aims being taken into account in the compatibility assessment.[16]

A. The aid must confer a selective advantage upon the recipient

1. First element: advantage

From the word 'favouring' it stems that the recipient must be conferred an economic advantage upon.[17] In this regard, the Commission uses the PPP as an analytical tool in order to assess the undertaking's liability for the social costs generated by pollution and to determine whether the measure at issue relieves this undertaking from its duty to bear those costs,[18] bearing in mind that such a relief from the responsibility imposed by the PPP can take many other forms than the granting of a subsidy.[19] The Commission assumes that the costs to be borne by the polluter are

[13] Case C-142/87 *Belgium v Commission* [1990] ECR I-959, para 25.
[14] Case C-280/00 *Altmark Trans v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747, para 75.
[15] Case 73/79 *Italy v Commission* [1979] ECR 3837 [*Italy v Commission*], para 13.
[16] Case C-143/99 *Adria-Wien Pipeline v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365 [*Adria-Wien*], para 31.
[17] M Aldestam, *EC State aid rules applied to taxes – Analysis of the selectivity criterion* (Iustus Förlag, Uppsala 2005) 63.
[18] Opinion AG Jacobs in *GEMO*, para 69 ; N De Sadeleer, 'State aids and environmental protection: time for promoting the polluter-pays principle' (2012) 1 Nordic Envtl L J 6; A Kliemann, 'Aid for environmental protection' in MS Rydelsky (ed), *The EC state aid regime. Distortive effects of State aid on competition and trade* (Cameron & May, London 2006) 319.
[19] De Sadeleer, 'State aids and environmental protection: time for promoting the polluter-pays principle' (n 18) 6; L Rubini, 'The "elusive frontier": regulation under EC State aid law' (2009) 3 EStAL 277 & 278.

those necessary for him to bring his activity in line with EU environmental legislation: consequently where this burden is alleviated by public intervention, an economic advantage is bestowed upon him.[20]

This application of the PPP illustrates its function of economic integration; that is, according to the neo-liberal philosophy on which this function rests, public authorities shall avoid providing polluting industries with financial assistance inasmuch as it may bring about significant distortions of trade and competition and *ipso facto* run counter the ideal of a level playing field between competitors.[21]

In the field of waste management, the Court of Justice has held in *GEMO* that

> The disposal of animal carcasses and slaughterhouse waste must be considered to be an inherent cost of the economic activities of farmers and slaughterhouses; […] therefore, intervention by the public authorities intended to relieve farmers and slaughterhouses of that financial burden appears to be an economic advantage liable to distort competition.[22]

Similarly, the Commission has ruled in *Georgsmarienhütte* that

> According to [EU] law, applying the polluter-pays principle, the producer and/or owner of waste is responsible for ensuring its environmentally acceptable disposal or recycling. The responsibility of the polluter is in principle an obligation to act and not simply to pay. The polluter may, of course, instruct a qualified third person to carry out the necessary disposal on his behalf and pay that third person for the services provided.[23]

Respecting tradable emission rights, the system under which they are granted – *i.e.* whether they are sold, auctioned or given for free according to the grandfathering system – might be of relevance to know whether some undertakings are unduly favoured. Indeed, as the Commission said,[24] a scheme allowing authorities to allocate pollution permits without any consideration or below their market price is caught by Article 107(1) TFEU.[25]

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[20] De Sabran-Pontevès (n 11) 101; Commission Decision 1999/282/EC *Kiener Deponie Bachmanning* [1999] L109/51 [*Kiener Deponie Bachmanning*], para 5.3.

[21] N De Sadeleer, *Environmental principles. From political slogans to legal rules* (OUP, Oxford 2002) 34. See Council (EC), 'Declaration of 22 November 1973 on the programme of action of the European Communities on the environment' [1973] OJ C112/1, title II, para 5.

[22] *GEMO*, para 31 et 33. See also A Theo Seinen, 'Waste treatment, recycling and State aid' (2002) 1 Competition Policy Newsletter 87.

[23] Commission Decision 1999/227/ECSC *Georgsmarienhütte* OJ L83/72, part VI.

[24] 2008 Guidelines, para 55.

[25] JH Jans & HHB Vedder, *European environmental law* (Europa Law Publishing, Groningen 2012) 321; 2008 Guidelines, para 139.

Under the grandfathering system, each firm receives free of charge an amount of allowances determined according to its past emissions, with the result that the highest polluters are frequently granted more rights than the lowest ones, and that both are in a position to generate profits from their subsequent selling.[26] Such an arrangement seems contrary to the PPP in that it constitutes an outright subsidisation of pollution.[27] Some authors nevertheless suggest that grandfathered allowances have an opportunity cost since the firms could sell them instead of using them: this cost is equal to the price of the allowances and its inclusion in the price of the produced goods would bring to the conclusion that grandfathering ensures internalisation of negative externalities, does not favour the beneficiaries and is therefore consistent with the PPP.[28] Despite this rather theoretical assertion, they eventually acknowledge that auctioning is the most appropriate way of granting permits in accordance with the PPP.[29]

The Commission also inclines to sustain auctioning on the grounds that, first, polluters would be simply paying for pollution rights which they have an equal and fair chance to acquire, and, second, it enables authorities to raise revenues with which they could fund *inter alia* research and development and energy efficiency investments.[30]

2. Second element: selectivity

In a nutshell, the selectivity criterion can be summarised as

> [W]hether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article [107(1)] of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.
> According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity.[31]

[26] G Catti De Gasperi, 'Making State aid control "greener": the EU emissions trading system and its compatibility with Article 107 TFEU' (2010) 4 EStAL 788 & 789.
[27] Nash (n 2) 13.
[28] Woerdman *e.a.* (n 2) 586.
[29] *Ibid.*
[30] Commission (EC) 'Green Paper on greenhouse gas emissions trading within the European Union' COM (2000) 87 final, 8 March 2000, para 7.2.2.
[31] *Adria-Wien*, paras 41 & 42.

It has been argued that the PPP could be invoked to justify a differential treatment and as a result avoid falling within the ambit of Article 107 TFEU.[32] Concretely speaking, the PPP might constitute a general principle underlying a fiscal regime intended to generate incentives to adopt an environmentally friendly behaviour or to inflict on the polluter a burden corresponding to its share in environmental degradation;[33] this is a prerequisite for finding the general scheme of the system.[34] Next, it would have to be asked whether the measure at issue derogates from the general taxation system and whether it could be justified by environmental concerns.[35] Lastly, the proportionality of the measure, its necessity and its consistency vis-à-vis its alleged objectives would have to be looked into.[36]

In *British Aggregates*, the ECJ said that Member States are not free to set priorities in the field of environmental protection and to determine which goods and/or services shall be subjected to an environmental levy with the result that the latter does not apply to all activities which have a similar impact on the environment.[37]

It follows that if a tax system is presented by the domestic legislator as implementing the PPP and aiming to force polluting firms to bear the costs of the pollution they cause by creating more burdensome fiscal constraints, it must show a satisfactory coherence. In other words, the target cannot be selected according to criteria which do not pertain to the substance whose emissions are to be reduced.

Cap and trade schemes provide quite interesting examples too. In *Netherlands v Commission*, a system had been established under which rights were gratuitously allocated to 250 large polluting facilities, *i.e.* facilities whose total installed thermal capacity exceeded 20 MWth, whilst smaller ones were imposed emission ceilings and were excluded from this scheme. The then Court of First Instance ruled that the selectivity condition was not fulfilled on the grounds that undertakings were distinguished according to ecological considerations and that the beneficiaries were *ipso facto* selected in accordance with the nature and general scheme of the system.[38] However, this judgment has been subsequently quashed by the ECJ, which, applying its effects-based methodology, held that the need to take environmental objectives into account does not allow excluding selective

[32] B Kurcz, 'How selective is selectivity? A few thoughts on regional selectivity' (2007) 2 CLJ 316.
[33] L Rubini, *The definition of subsidy and State aid. WTO and EC law in comparative perspective* (OUP, Oxford 2009) 308.
[34] C Golfinopoulos, 'Concept of selectivity criterion in State aid definition following the *Adria-Wien* judgment – measures justified by the "nature or general scheme of a system"' (2003) 10 ECLR 547.
[35] Rubini, *The definition of subsidy and State aid. WTO and EC law in comparative perspective* (n 33) 308.
[36] *Ibid* 309.
[37] *British Aggregates*, para 86. See also *Adria-Wein*, para 52: 'For another thing, the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment'.
[38] Case T-233/04 *Netherlands v Commission* [2008] ECR II-591, para 99.

measures from the scope of Article 107(1) TFEU.[39] More importantly, it said that a differentiation based upon a purely quantitative criterion – *in casu* the total installed thermal capacity – cannot be regarded as inherent to a scheme aiming at reducing industrial pollution.[40] *A contrario*, a differentiation based upon the level of emissions of the substance which is the object of the permits might probably have been justified by the nature of the scheme.

In summary, for the selectivity condition not to be fulfilled, the elements of differentiation set out by the measure at issue must be directly connected to the targeted activity or practice.

C. The aid must be granted by the State or through State resources

Article 107(1) TFEU stipulates that the aid must be granted by a Member State or through State resources in any form whatsoever. This has been interpreted by the Court of Justice as requiring that the aid be granted directly or indirectly – that is, 'by a public or private body designated or established by the State'[41] – through State resources and be imputable to the State.[42]

Without entering at length in this issue, it is worthy of note that jurisprudence pertaining to environmental aid seems to rely implicitly upon the redistribution aspect of the PPP; that is, the costs of pollution prevention and control must not be ultimately borne by authorities but by the polluter, and if authorities incur any expenditures, they must be compensated for by the polluter returning to them a portion of its profits.[43] Albeit inextricably linked to the advantage condition, this 'equity'[44] – or 'weak'[45] – conception of the PPP consists of a rule of distribution of burdens between public and private monies: it may consequently be useful to know whether authorities forgo some of their resources in aid of the polluter.

There is thus aid where the State assists an undertaking to carry out clean-up measures and the subsidies are not repaid.[46] Likewise, the Court of Justice has held that, under the grandfathering system, the tradability of emission allowances is liable to entail an additional burden and even an indirect loss for the State inasmuch as an undertaking exceeding the pollution ceilings can buy

[39] Case C-279/08 *Netherlands v Commission* [2011] ECR I-7671, para 75.
[40] *Ibid* para 76.
[41] Case C-379/98 *PreussenElektra v Schhleswag* [2001] ECR I-2099, para 58.
[42] Case C-482/99 *France v Commission* [2002] ECR I-4397, para 24.
[43] N De Sadeleer, 'The polluter-pays principle in EU law – Bold case law and poor harmonisation' [2012] Teischrift Hans-Christian Bugge 405; De Sadeleer, *Environmental principles. From political slogans to legal rules* (n 2) 35.
[44] M Stoczkiewicz, 'The polluter pays principle and State aid for environmental protection' (2009) 6 JEEPL 176.
[45] Woerdman *e.a.* (n 2) 574.
[46] See *Kiener Deponie Bachmanning*.

allowances from other firms instead of paying pecuniary penalties.[47] By not auctioning those rights, authorities hence deprive themselves of revenues which they could actually raise.[48]

II. The tension between the PPP and the recognition that certain aid may be acceptable

This chapter deals with the tension between the PPP and the recognition enshrined in Article 107(3) TFEU that certain aid *may* be compatible with the internal market. From the practice of the Commission and of the EU courts and from soft law documents it follows that the most relevant exemptions are those provided for by letters (b) and (c), namely:

> (b) [A]id to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
> (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
> […].

At first glance, these provisions sit awkwardly alongside a rigorous interpretation of the PPP, according to which any assistance to polluting industries shall be banned regardless of whether it might serve environmental protection objectives. Hence, the question arises whether the implementation of the PPP is intrinsically incompatible with Article 107(3)(b) and (c) even though the latter reflects a certain economic realism.[49]

The following developments are divided into four parts: first, the Commission's discretion is briefly analysed through the prism of the PPP; second, it is demonstrated that the PPP allows as a matter of principle for government intervention in some situations; third, it is seen how Article 107(3)(b) can be invoked to have environmental aid approved without being at odds with the PPP; fourth, the same investigation is carried out regarding Article 107(3)(c).

[47] *Netherlands v Commission*, para 106.
[48] *Ibid* paras 107 & 111.
[49] R Romi, *Droit international et européen de l'environnement* (Montchrestien, Paris 2005) 67.

A. The Commission's discretion and its limits

By using the word 'may', Article 107(3) TFEU bestows on the Commission a wide margin of discretion by virtue of which it can carry out political, economic and social assessments in an EU context.[50] So far as environmental aid is concerned, the Commission is expected to find an ideal but complex balance between economic integration and environmental protection,[51] knowing that none of these objectives can be *a priori* placed ahead of the other.[52] In this respect, needless to say that the proportionality test is of key importance for assessing the impact of a measure on environmental and economic policies.[53]

Nonetheless, that margin of discretion is restricted by some elements. First of all, even if a measure falls within the scope of Article 107(3), it cannot be approved if it violates other provisions of primary or secondary law.[54] Somehow this might guarantee that the PPP is not breached since it is now embodied in secondary legislation and, admittedly as an abstractly formulated pillar of EU environmental policy, in the TFEU. Second, environmental aid cannot be deemed compatible with the internal market if environmental protection is not its primary goal and effect.[55] Third, the Commission has published Guidelines and enacted General Block Exemption Regulations[56] about environmental aid. Despite both being fraught with illustrations of the PPP and although measures deemed compatible with the internal market under them are very likely to be compatible with the PPP too, the latter is not looked into as it provides for exemptions from the notification obligation[57] and not for cases where aid *may* be approved.

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[50] Case T-239/94 *Association des Aciéries Européennes Indépendantes v Commission* [1997] ECR II-1839, para 93; Case C-730/79 *Philip Morris Holland v Commission* [1980] ECR I-2671, paras 17 & 24.
[51] S Kingston, *Greening EU competition law and policy* (CUP, Cambridge 2012) 427; 2008 Guidelines, paras 15 to 17.
[52] O Lomas, 'Environmental protection, environmental conflict and the European Community' (1988) 3 McGill L J 514; U Soltész & F Schatz, 'State aid for environmental protection. The Commission's new Guidelines and the new General Block Exemption Regulation' (2009) 6 JEEPL 153; 2008 Guidelines, para 6. See Commission (EC), 'State aid action plan. Less and better targeted State aid: a roadmap for State aid reform 2005-2009' COM (2005) 107 final, 7 June 2005 [2005 SAAP].
[53] G Van Calster, 'Greening the EC's State aid and tax regimes' (2000) 21 ECLR 229.
[54] Case C-134/91 *Kerafina-Keramische-und Finanz Holding v Greece* [1992] ECR I-5699, para 20; *Italy v Commission*, para 11.
[55] Case C-351/98 *Spain v Commission* [2002] ECR I-8031, para 78.
[56] Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty [2008] OJ L214/3 [GBER].
[57] GBER, art 3.

B. The acceptance of derogations

Given that the PPP has been at the outset formulated and developed by OECD Recommendations, the latter should be treated as the most reliable and pure exegesis of the principle. In addition, EU environmental aid policy has almost always followed in the footsteps of the OECD.[58]

Since 1975, EU institutions have recognised that a rigid interpretation of the PPP was neither acceptable nor tenable and that aid might be sometimes of help to serve Union's environmental and economic objectives.[59] Indeed, such a position would have prevented any aid from being granted to polluting undertakings, with the consequence that EU law would have renounced the possibility of applying Article 107(3) TFEU to environmental aids.[60]

By espousing this position, EU law does not betray the PPP by any means. Indeed, as long ago as in 1972, the OECD has admitted the existence of derogations provided that 'they do not lead to significant distortions in international trade and investment'.[61] Furthermore, the paragraph quoted above[62] does not advocate a total internalisation of negative externalities but instead sets out requirements based upon the pollution levels considered relevant by the lawmaker.[63] It is accordingly forbidden to grant aid to the polluter in order for him to reduce its emissions to the extent imposed by authorities,[64] whereas the legitimacy of government assistance to more ambitious companies is not called into question whatsoever.[65] The OECD 1974 Recommendation accepts compliance aid only where extremely strict control regimes have been established and could create socioeconomic problems in the absence of such aid.[66]

It is worth noting that, since the PPP is indissociable from the proportionality test, competition should not be excessively affected: aid is indeed approved if and only if 'the same result could not be reached with less aid'.[67] Furthermore, aid to polluters is to be granted sparingly as it is no more than a 'second-best option', the obligation for the polluter to pay remaining the rule.[68]

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[58] N De Sadeleer, 'Le producteur confronté au principe du pollueur payeur' in P Thieffry (ed) *La responsabilité retrospective du producteur* (Bruylant, Brussels 2012) 35.
[59] See Recommendation (Euratom, ECSC, EEC) 75/436 of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters [1975] OJ L194/1.
[60] De Sabran-Pontevès (n 11) 91.
[61] 1972 OECD Recommendation, para 5.
[62] See n 5.
[63] U Kettlewell, 'The answer to global pollution? A critical examination of the problems and potential of the polluter-pays principle' (1992) 2 Colo J Int'l Envtl L & Pol'y 433.
[64] O Vicha, 'The polluter-pays principle in OECD recommendations and its application in international and EC/EU law' (2011) 2 CYIL 59 & 60.
[65] See 2008 Guidelines, para 45.
[66] Organisation for Economic Co-operation and Development (Council) 'Recommendation on the implementation of the polluter-pays principle' (14 November 1974) C(74)223 [1974 OECD Recommendation], point II.
[67] 2008 Guidelines, para 30.
[68] *Ibid* para 24.

C. The PPP and Article 107(3) TFEU

1. Article 107(3)(b): the outmoded exemption

So far as Article 107(3)(b) TFEU is concerned, an argument could be put forward to the effect that environmental protection is a major European objective and that the more serious the pollution avoided by the measure, the more likely the measure is to be approved.[69] In its Guidelines, the Commission sets out conditions to be met for a measure to be approved under (b): first, it must concern a specific and clearly defined project; second, this project must be in the common European interest, *i.e.* it has to contribute 'in a concrete, exemplary and identifiable manner to the [EU] interest in the field of environmental protection', the achieved advantage having to benefit the Union as a whole; third, the aid must be 'necessary and presents an incentive for the execution of the project, which must involve a high level of risk'; fourth, the project must be substantial in size and produce significant environmental effects.[70] In reality, this derogation is relied upon only in exceptional circumstances[71] and should accordingly not generate more hope and confidence than it actually carries.

On the other hand, one might contend that without any state assistance, the process of compliance with environmental standards may cause a serious disturbance to the European or domestic economy and would thus call for public intervention.[72] It has indeed been admitted in the past by the EU and the OECD that newly adopted environmental regulation might be highly costly and disrupt potentially fragile sectors.[73] Nevertheless, the Commission now interprets this condition as requiring that serious disturbance affect the economy of the State as a whole[74] and be serious in comparison with the situation of the EU.[75] This is of course a very narrow reading of Article 107(b)(3) and makes a positive decision on those grounds quite unlikely.

[69] SC Budlong (n 1) 452.
[70] 2008 Guidelines, para 147.
[71] De Sadeleer, 'State aids and environmental protection: time for promoting the polluter-pays principle' (n 18) 19.
[72] Budlong (n 1) 452.
[73] Budlong (n 1) 445; Council (EC), 'Declaration of 22 November 1973 on the programme of action of the European Communities on the environment' [1973] OJ C112/1, title II, para 5; 1974 OECD Recommendation, point II, para 2.
[74] Joined cases T-132/96 and T-143/96 *Freistaat Sachsen v Commission* [1999] ECR II-3663, para 168.
[75] Commission Decision 84/508/EEC *Producer of polypropylene fiber and yarn* [1984] OJ L283/42.

2. Article 107(3)(c): the redeeming virtue

In the current state of law, Article 107(3)(c) TFEU is the most relevant provision for a measure to be deemed compatible with the internal market. It is almost always read in conjunction with the 2008 Guidelines but can come directly into play where a situation is not covered by the Guidelines.[76] It appears that three categories of aid can be caught by Article 107(3)(c), namely aid for environmental overzealousness, aid compensating for market failures, and other types of aid, *i.e.* aid for relocation of undertakings, aid for making environmental damage good and fiscal advantages. This division is made for the sake of clarity but it goes without saying that, to a variable extent, all of them are supposed to tackle a market failure and to promote environmentally friendly conducts.

a. The 'premium for environmental excellence'[77]

In its 2008 Guidelines, the Commission lists measures which might be approved under (c) on the grounds that they support environmental excellence. The most eloquent derogation is of course 'aid for undertakings which go beyond [EU] standards or which increase the level of environmental protection in the absence of [EU] standards'.[78] Indeed, a rational firm has no incentive to go beyond legal requirements for the reason that the costs of such action presumably exceed its benefits:[79] it is therefore incumbent upon Member States to create tailored incentives.[80] By the same token, the Commission favourably treats aid for the acquisition of clean transport vehicles,[81] 'aid for early adaptation to future [EU] standards'[82] and aid for environmental studies carried out in order to go further than EU environmental law.[83]

The Commission also addresses the issue of emission trading schemes by declaring that it will never approve any over-allocation of permits.[84] Where such schemes fall within the ambit of Article

[76] Kliemann (n 18) 325.
[77] C London, 'Concurrence et environnement: une entente écologiquement rationnelle?' (2003) 2 RTDE 279 [in French].
[78] 2008 Guidelines, point 1.5.1.
[79] *Ibid* para 43.
[80] *Ibid*.
[81] 2008 Guidelines, para 44.
[82] *Ibid* point 1.5.3.
[83] *Ibid* point 1.5.4.
[84] *Ibid* paras 55 & 56.

107(1) TFEU, their approval depends on whether they are necessary, proportional and set up in such a way that they go beyond EU standards.[85]

The common denominator of these exemptions is the idea of going beyond what is legally required. Given how financially demanding it is, an undertaking willing to reach such levels of environmental protection would inevitably suffer a strong competitive disadvantage which could precisely make State aid quite useful provided that it is limited to the amount necessary to attain the relevant goals:[86] this satisfies the proportionality test and fits with the PPP – or at least constitutes a legitimate derogation thereto.[87]

According to the Guidelines, the legal benchmark beyond which it can be talked about environmental excellence is constituted by the applicable EU standard, which is defined as

> (i) a mandatory [EU] standard setting the levels to be attained in environmental terms by individual undertakings, or
> (ii) the obligation under Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control to use the best available techniques as set out in the most recent relevant information published by the Commission pursuant to Article 16(2) of the Directive.[88]

Only mandatory standards, as opposed to voluntary, can be relied upon, irrespective of hypothetically more stringent domestic standards and of the mere existence of national rules where the EU has remained silent.[89] It is worth mentioning that aid for compliance with standards adopted but not yet in force is not compatible with the internal market.[90] Such an interpretation of the PPP makes its substance and its scope as unstable and as evolutionary as European environmental law given that every reform of the latter would make the legal benchmark move.

Two observations should be made about this category of exemptions. First, they seem to illustrate the preventive side of the PPP in that they concern aid which 'encourages[s] the polluter to take the necessary measures to reduce the pollution he is causing as cheaply as possible'.[91] Second, the PPP is here interpreted in a rather narrow way as it is not touched upon financial liability for meeting requirements provided for by EU environmental law.[92]

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[85] *Ibid* paras 140 & 141.
[86] De Sabran-Pontevès (n 11) 103; Quigley QC (n 3) 272 ; A Winterstein & B Tranholm Schwarz, 'Helping to combat climate change: new State aid guidelines for environmentak protection' (2008) 2 Competition Policy Newsletter 14 & 15; 2008 Guidelines, paras 27 to 29.
[87] De Sabran-Pontevès (n 11) 104 ; Stoczkiewicz (n 44) 196.
[88] 2008 Guidelines, para 70(3).
[89] 2008 Guidelines, para 74(a). *Contra* Commission (EC), 'Community Guidelines on State aid for environmental protection' [2001] OJ C37/3, para 40.
[90] 2008 Guidelines, para 75.
[91] De Sadeleer, *Environmental principles. From political slogans to legal rules* (n 2) 36.
[92] Stoczkiewicz (n 44) 173.

b. The rectification of market failures

Aids incentivising undertakings to reach precise objectives in terms of energy savings and reduction of greenhouse gas emissions are compatible with the internal market on condition that the incurred expenditures are not compulsory or profitable to the undertaking,[93] which reminds the logic of the previous section. Similarly, the Commission approves aid for renewable energy, *i.e.* assistance provided with a view to encouraging companies to increase the portion of such energy in their overall energy production to the extent that it costs more than traditional energy sources such as fuel or coal.[94] As they equally serve the objective of reducing energy consumption, cogeneration and district heating receive the same treatment.[95]

Respecting waste management, the Commission accepts aid measures where they help achieve specific environmental targets, do not distort secondary material markets and comply with the PPP,[96] which prohibits any indirect relief from a burden that should borne by the recipient under EU law or that should be considered as a normal cost,[97] the aim being probably to avoid favouring companies which transfer their waste for disposal.[98]

The purpose of these exemptions is not limited to internalising negative externalities but extends to supporting the generation of positive externalities.[99] In addition, the Commission thereby gets to grips with the market failure stemming from the impossibility for undertakings to integrate certain negative externalities into the price of the goods they produce.[100] Indeed, environmentally friendly techniques frequently provide industries using them with a competitive disadvantage over more polluting ones.[101] State aid could thus be regarded as a positive discrimination tool ensuring fair competition[102] and implementing the PPP.[103]

[93] 2008 Guidelines, para 47.
[94] *Ibid* para 48.
[95] *Ibid* para 51.
[96] *Ibid* para 52.
[97] *Ibid* para 127, b).
[98] Stoczkiewicz (n 44) 187.
[99] P Thieffry, *Droit de l'environnement de l'Union européenne* (Bruylant, Brussels 2011) 246.
[100] De Sadeleer, 'State aids and environmental protection: time for promoting the polluter-pays principle' (n 18) 25. See also 2008 Guidelines, paras 7, 16 & 24; 2005 SAAP, para 10.
[101] De Sadeleer, 'State aids and environmental protection: time for promoting the polluter-pays principle' (n 18) 25.
[102] Stoczkiewicz (n 44) 186; L Hancher *e.a.*, *EU State aids* (4th edn Sweet & Maxwell, London 2012) 148.
[103] Stoczkiewicz (n 44) 185; De Sadeleer, *Environnement et marché intérieur* (n 10) 522.

c. Other types of aid

Relocation of polluting undertakings to areas where the risk of serious harm would be alleviated or where less negative externalities would be produced can also constitute a legitimate justification.[104]

Where an environmental damage occurs and the polluter cannot be identified, the Commission approves aid to those companies which undertake to remediate a contaminated site if the costs of this operation are higher than the additional value it provides the site with.[105] This derogation reflects the curative aspect of the PPP in that, when the regenerative capacity of an ecosystem is seriously compromised, the polluter should be held liable and make the harm he caused good.[106] However, where he cannot be identified, no undertaking would have any reasonable interest in cleaning up the concerned site: that is why state assistance making such initiative profitable in the long run is quite understandable.

Respecting environmental taxation, the Commission does not seem to be at odds with targeted tax rebates, concessions and exemptions since they could enable Member States to impose higher taxes to other categories of undertakings.[107] Externalities could be better internalised if more pressure was put on sectors whose behaviour is particularly worrying provided that the necessity and proportionality conditions are met. The former is presumed fulfilled if the beneficiary still pays the minimum level required by EU Directives; otherwise, the impact of the national tax and the possibility to pass on its costs to consumers and to reduce profit margins will be taken into account.[108] On the other hand, the proportionality of the measure depends on whether the beneficiaries can further reduce their consumption or emission, pay a part of the domestic tax or enter into environmental agreement in order to reduce pollution.[109]

Conclusion

This essay tries to investigate as deeply as possible the role of the PPP in EU State aid law. It is first shown that this principle is of key relevance in the qualification phase: the Commission indeed relies upon its function of economic integration within the context of the advantage condition; the

[104] 2008 Guidelines, para 54.
[105] *Ibid* para 53.
[106] De Sadeleer, *Environmental principles. From political slogans to legal rules* (n 2) 37.
[107] 2008 Guidelines, para 57.
[108] *Ibid*.
[109] *Ibid*.

Member State can invoke the PPP as a policy tool justifying an allegedly selective measure and hence precluding the application of Article 107(1) TFEU; lastly, the redistributive side of the principle seems to come into play when the Commission is wondering whether the aid at issue involves the foregoing of State resources.

In the second chapter, it is submitted that, as formulated by the OECD and the EU, the PPP accepts in certain situations that public authorities to assist polluting firms, especially where such intervention illustrates the preventive function of the PPP by making environmentally friendly initiatives attractive, and where the aid belongs to a dynamic aiming at ensuring a level playing field between competitors on markets suffering from failures.

From the above it follows that, instead of interpreting the PPP in an irrationally broad way, *i.e.* obliging the polluter to bear all the social costs generated by its activity, and hence creating a conflict between the principle and Article 107(1) TFEU, the Commission, the General Court and the ECJ have integrated the PPP into the framework of Article 107 TFEU by conferring thereon the double role of analytical tool and policy element. This conciliation of environmental objectives and competition law was probably the best compromise which could be found.

Be it as it may, numerous intriguing issues remain to be analysed and answered. For example, when it is asked whether a firm has gone beyond environmental legislation, should the rules adopted by standardisation bodies be taken into consideration? These standards are indeed not binding but sometimes much more technical, precise and harmonised than EU directives.[110] Also, to what extent should the PPP be relevant and explicitly relied upon within the context of EU regional policy? What to think about the obsolescence of Article 107(3)(b) TFEU knowing that some tax rebates or exemptions are meant to mitigate transitorily the burden created by new environmental standards? Should the interpretation of Article 101(3) TFEU be revised in order for antitrust law to be as green as State aid law? All these questions of course deserve a specific attention and should probably be addressed by the Commission in its next Guidelines and by the EU courts in their future judgments.

[110] See for example B Lange, *Implementing EU pollution control: law and integration* (OUP, Oxford 2008); Thieffry (n 99); De Sadeleer, *Environnement et marché intérieur* (n 10) 265 to 290 ; D Misonne, 'La directive relative aux émissions industrielles et le nouveau régime IPPC' (2012) 4 Aménagement & Environnement 134.

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