Asymmetric Tax Measures and EU State Aid Law

The "Special Solidarity Levy" on Greek Producers of Electricity from Renewable Energy Sources

*Phedon Nicolaides and Antonis Metaxas**

I. Introduction

A tax is a burden, not an advantage. For this reason, a tax normally does not fall within the scope of Article 107(1) TFEU. The tax-related measures that constitute State aid are those that lighten the burden of taxation, such as reductions of tax rates, exemptions from tax liability or write-offs of tax debt.

The purpose of this article is to show how the levying of a tax on some but not all producers of similar products can also constitute State aid. This is possible where the narrow base of the tax confers an advantage on those producers who are not formally subject to the tax but normally would have to pay the tax too because they produce a competing (or even a very similar) product. The article will explain why a tax with a narrow base – an asymmetric tax – creates effects which are equivalent to exemption from a tax with wide base and then apply this reasoning to a Greek tax measure concerning renewable energy sources.

We analyse the Greek measure in order to demonstrate, first, how our reasoning relates to an actual case and, second, how difficult it can be for Member States not to infringe State aid rules when exercising the large discretion they enjoy in tax matters. The typical argument advanced by Member States when they defend their tax autonomy is that they should be free to use tax instruments to pursue otherwise legitimate policy objectives such as environmental protection. For this reason we also demonstrate that the Greek measure is based on weak and rather contradictory logic, since the overall aim of the measure justifies a broad rather than narrow tax base.

Indeed, we will argue that whether a tax measure has a too narrow base very much depends on the overall aim of the measure itself. Unlike the typical tax aid which is always an exception or deviation from a wider tax, an asymmetric tax is a stand-alone measure. It is not an exception from a wider tax. But this creates a problem. Article 107(1) TFEU applies only to measures which are selective. It would appear not to cover stand-alone measures such as asymmetric taxes. We will draw on recent case law, most prominently the judgments in "British Aggregates", to show that while the selectivity of a typical tax measure stems from the fact that it is an exception, the selectivity of an asymmetric tax has to be inferred from its own aims.

The structure of the article is as follows. In the next section, we define more precisely the nature of asymmetric taxes and explain their likely effects on competitors. Then we review the Greek taxes on renewable sources of energy so that the reader can appreciate the complexity of asymmetric taxes. In the third section we show that the Greek measure constitutes State aid and explain that it is unlikely to be compatible with the internal market. Then, in the concluding section, we draw a number of implications of the previous analysis for the tax autonomy of Member States.

II. What is an Asymmetric Tax and How it affects Competition

In any market, irrespective of whether it is perfectly competitive or monopolised, what consumers pay for a product is exactly the same as what is earned by the sellers. A tax introduces a "wedge" between the price paid by the consumers or users of the taxed

* Dr. Nicolaides is "Jan Tinbergen" Professor at the College of Europe, Bruges. Dr. Metaxas is Faculty Member, Chair of European Law in the University of Athens, Visiting Professor of Energy Law, and Chairman of the Hellenic State aid Institute (www.stateaid.gr).

product and the price received by the sellers of that product. That wedge is the revenue accruing to the government. In other words, if t is the tax rate, Pc is the price paid by consumers, Ps is the price received by sellers, then for each unit that is sold, Pc = Ps + t. The total revenue, R, accruing to the government is R = tQ, where Q is the total amount sold after tax. Alternatively, R = (Pc – Ps)Q.

A tax is always shared between consumers and producers. Before the tax, Pc and Ps were identical. Let P* be the price before tax. After the tax, Pc and Ps diverge from P*. The extent to which they diverge from P* depends on how elastic [how steep or responsive] are the demand and supply, respectively, of the tax product. For example, a tax on petrol is largely borne by consumers whose demand for fuel is very inelastic.

Whether a consumer is willing to buy a taxed product is determined by the availability of other products which can be used for the same purpose. For example, a high tax on pencils in red casings will have little effect, if any, on consumers because they will immediately switch to pencils in casings with different colours or switch to pens altogether.

The possibility of consumers switching from taxed to untaxed products, of course, also affects sellers, both of taxed and untaxed products. Those whose products are taxed will lose customers and those who products are not taxed will gain customers. Depending on competitive conditions, the former will reduce their prices, while the latter will increase them. Therefore, a tax can affect directly the prices of products which are formally taxed and indirectly the prices of products which are not formally taxed! The extent of this indirect effect depends on the degree of substitutability between taxed and non-taxed products. In the case of electricity, which is exactly the same irrespective of whether it is produced from fossil fuels or the sun or wind, there is perfect substitutability.

An asymmetric tax is a tax on some but not all products [or producers] which can substitute one for another. While a tax on refrigerators will not affect the price of bicycles, a tax on close substitutes will affect competition between tax and non-taxed products precisely because it is too narrow. Because the base of an asymmetric tax is narrower than the universe of products which are substitutable, it distorts competition between them.

It follows that a tax on producers of electricity from renewable sources provides a clear advantage to producers of electricity from fossil fuels. The tax distorts competition between the two groups of producers exactly in the same way as an exemption for conventional electricity producers from a general tax on electricity from all energy sources.

We recognise that State aid law may not follow this economic logic. Therefore, in section IV we will show that the Greek measure is selective, and therefore distortionary, because the base of the tax is narrower than the scope of its stated objectives.

III. The Provisions of Law 4093/2012 and the Imposition of "Solidarity Tax Contribution" on RES Producers

The Greek legislation on Renewable Energy Sources (RES) has recently been revised. The Greek Parliament adopted in November 2012 Law 4093/2012[1] and in May 2013 Law 4152/2013,[2] both of which introduced significant retroactive changes to the relevant regulatory framework. Furthermore, a series of Ministerial Decisions[3] revised the feed-in-tariff regime, complementing in this way a series of important regulatory changes adversely affecting the RES sector and in particular the photovoltaic (PV) sector in Greece.

The cornerstone of the new legislative provisions is the introduction by Law 4093/2012 (Article 1 para. I.2) of a tax levy which is imposed on the turnover of Renewable Energy Sources producers and covers the years 2012–2014. The purpose of this article is to argue that this tax levy is in fact a (selective) State aid measure within the meaning of Article 107(1) TFEU.

The adopted tax measure has a retroactive effect in the sense that it did not exist, nor was it known at the time of the conclusion of the Power Purchase Agreements between the RES producers and the competent Energy Market Operator (LAGIE S.A.) and of the launching and financing of the relevant investments. This tax, apart from violating the normative substance of a series of sector-specific provisions of EU energy law and policy principles, constitutes a

1 Government's Gazette A 222/12.11.2012.

2 Government's Gazette A 107/09.05.2013.

3 Υ.Α.Π.Ε./Φ1/2301/οικ.16933 and Υ.Α.Π.Ε./Φ1/1288/9011.

State aid measure that benefits the local fossil fuel energy producers[4] as well as energy suppliers and categories of other RES producers excluded from the levy. The fact that this aid measure has not been notified to the EU Commission prior to its implementation renders it illegal according to Article 108(3) TFEU. In the rest of this section, we review in more detail the features of the measure in question.

Law 4093/2012 (Article 1 para. I.2) provides that a special tax, a so-called "solidarity contribution", is imposed on electricity producers from Renewable Energy Sources and Cogeneration of Heat and Power of High Efficiency (CHP). The tax is calculated according to the sale price of electricity, during the period 01.07.2012 to 30.06.2014, and refers to both operating RES stations as well as to those operating in trial mode, which will be connected thereafter.

The tax is calculated as a percentage of the price for electricity injected to the System or the Grid by the Producer, before taxes, and amounts to:

- Twenty five per cent (25 %) for PV stations placed into trial operation or connected to the System or the Grid by 31.12.2011.
- Thirty per cent (30 %) for PV stations placed into trial operation or connected to the System or the Grid after 01.01.2012. The compensation for the energy produced is calculated based on the reference value (Feed in Tariff), as provided for in Article 27A of Law 3734/2009,[5] as applicable, corresponding to a month prior to February 2012.
- Twenty seven per cent (27 %) for PV stations placed into trial operation or connected to the System or the Grid after 01.01.2012. The compensation for the energy produced is calculated based on the reference value (Feed in Tariff), as provided for in Article 27A of Law 3734/2009, as applicable, corresponding to the period between February 2012 and August 9, 2012.
- Ten per cent (10 %) for the remaining RES and C.H.P. stations.

Following a decision of the Minister for Environment, Energy and Climate Change, the aforementioned contribution payment obligation may be extended for one more year after the initial two-year period.[6]

The above mentioned special tax is not imposed on PV stations, for which the compensation for the energy produced is calculated based on the reference value (FiT), as provided for in the table presented in Article 27A of L. 3734/2009, which corresponds to a date later than 9 August 2012. It has to be noted that for this category of PV stations, the reference value had been already seriously reduced due to the Ministerial Decision.[7] The special tax was also not imposed on PV stations included in the Special Program for Development of Photovoltaic Systems on Buildings.

The amounts corresponding to the above mentioned contribution are calculated and withheld during each reckoning by either the Operator of Electricity Market (LAGIE S.A.) or, in the case of non-interconnected islands, the Operator of the Greek Electricity Distribution Grid (DEDDIE S.A.) and constitute revenues of the RES Special Account provided for in Article 40 of Law 2773/1999.[8]

Since the publication of Law 4093/2012 in the Government Gazette, both the Operator of Electricity Market (LAGIE S.A.) and the Operator of the Greek Electricity Distribution Grid (DEDDIE S.A.) have proceeded to apply the tax by reducing the price they pay to RES producers. Furthermore, it is worth noting that RES producers are paid the respective amounts corresponding to the invoices they send to LAGIE and DEDDIE with a delay of at least five months, which incidentally is the regular delay in payments made by the Market Operator, in clear breach of its contractual obligations towards the RES producers. In the meantime, RES electricity producers are led to an economic dead end, as they are oblig-

4 Given the strong interrelation of all market players in the Greek Energy Market caused, inter alia, by a series of structural and regulatory distortions, de facto benefited from the selective nature of the contested "solidarity levy" are also energy suppliers as well as categories of other RES producers excluded from the levy. For a scientific proof of these structural distortions see the findings in the independent academic survey conducted by Prof. Kapros (2011), The Special RES Levy: Analysis and Predictions (www.eletaen.gr/drupal/sites/default/files/meleti_emp.pdf) as well as the findings of the study drafted by the Foundation for Economic & Industrial Research (IOBE) (2011), Report on the Impact and Necessary Adaptions for a Large Scale Penetration of RES in Electricity Production.

5 Government's Gazette A 8/28.01.2009

6 Furthermore, according to Law 4152/2013 adopted by the Hellenic Parliament in May 2013, the calculation of the tax is amended and as a result, the so called "special solidarity levy" was further increased reaching up to 42 % of the turnover of businesses active in the production of energy from photovoltaics. As a result the taxation scale is no longer the one provided by Law 4093/2012, which included the abovementioned measures and taxes. The new framework involves taxes of 34 %, 37 %, 40 % and 42 % of the revenues of PV producers.

7 Y.A.Π.Ε./Φ1/2301/οικ.16933/09.08.2012.

8 Government's Gazette A 286/22.12.1999.

ed to pay the respective VAT charges out of their own resources in order not to risk penal charges that can apply if VAT payments are delayed.

IV. Basic Features of the Wholesale Electricity Market in Greece

In Greece, renewable energy generation is mainly promoted through a guaranteed feed-in tariff system, the main rules for the application of which were set by Law 3468/2006.[9] According to the provision of Article 5 para. 2 of Law 3851/2010,[10] amending the provision of Article 13 para. 1 of Law 3468/2006, energy produced from RES or CHP or through a Hybrid Station, which is absorbed by the System or by the Network, is charged on a monthly basis. Specifically regarding energy produced by photovoltaic stations, it is calculated according to the table included in Article 27A para. 4 of Law 3734/2009. The prices of the relevant table may be modified by a decision of the Minister of Environment, Energy and Climate Change following an opinion by the competent Regulatory Authority for Energy (RAE). Pursuant to this provision, the competent Minister of Environment, Energy and Climate Change has issued a Ministerial Decision,[11] which was amended by a decision of the Deputy Minister of Environment, Energy and Climate Change,[12] significantly reducing the guaranteed prices.

According to Article 143 of Law 4001/2011,[13] the Operator of Electricity Market (LAGIE) and the Electricity Transmission Grid Operator (DEDDIE) collect the amounts paid to RES electricity producers from a Special Account (so called "RES Special Account"), which was created pursuant to Article 40 of Law 2773/1999 and which is being administered by LAGIE.

As far as the financial sources of this Special Account are concerned, these include: (i) the amounts paid by the electricity producers and supply license holders through the procedure laid down in Articles 120 and 105 of Law 4001/2011, corresponding to the energy included in the transmission system and distribution grid situated on the mainland and the interconnected islands, according to Law 3851/2010. (ii) The amounts paid by the Suppliers on the Non-Interconnected Islands for the power absorbed on these islands' systems and produced from units referred to in Article 129 para. 2 of Law 3851/2010. (iii) The Special Levy for the Reduction of Greenhouse Gases (SLRGG), which varies among different categories of customer, and which is paid by every electricity consumer in the country. The methodology for the calculation of this levy per kWh is set on an annual basis, through a decree issued by the Minister of Energy and Climate Change, following RAE's opinion (Article 39 para. 3 Law 4062/2012[14]). The methodology includes factors that differentiate the SLRGG among different consumers' categories, so that the fees charged balance the financial consequences among the consumers' categories. Its pricing is based on RES production cost minus the System Marginal Price (SMP), which corresponds to the general electricity production cost in Greece. If this difference is found to be in the positive, as it is presently, it constitutes a deficit, which is paid proportionally by all consumers through their electricity bills. Thereafter, the amount corresponding to the SLRGG is transferred to the RES Special Account managed by the Operator of Electricity Market, which in this way covers the above-mentioned deficit. This account is exclusively intended to cover the cost difference between the higher feed-in tariff paid to RES producers and the SMP paid to LAGIE. This means that the receivables of the Special Account should equal the total RES costs that LAGIE must pay to all RES producers for the total amount of energy generated by their RES and co-generation power plants for high-efficiency heat and energy in Greece (mainland and non-interconnected islands) at the feed-in tariff which applies under their power purchase agreement.

Moreover, the lignite fired units are burdened with a special levy of 2 Euros per MWh of energy produced. This special levy, which is being calculated and collected pursuant to the provisions of the Ministerial Decision Δ5/Β/ΟΙΚ.3982[15] is also included in the Special Account's resources. Additionally, according to Article 39 of Law 4062/2012, the revenues accrued from the auctioning of the undistributed greenhouse gases emission rights for the period 2013–2015

9 Government's Gazette A' 129/27.06.2006.

10 Government's Gazette A 85/04.06.2010.

11 Y.A.Π.Ε./Φ1/οικ.2262/31.1.2012.

12 Ministerial Decision Y.A.Π.Ε./Φ1/2301/οικ.16933/09.08.2012.

13 Government's Gazette A 179/22.08.2011.

14 Government's Gazette A 70/30.03.2012.

15 Official Government Gazette B' 342/ 16.02.2012.

will also be transferred to the RES Special Account, established pursuant to Article 40 of Law 2773/1999.

V. Constitutive Elements of State Aid and the Applicability of Article 107(1) TFEU to the Tax on RES Producers

The measure in question involves, as already mentioned, a tax on producers of electricity generated by Renewable Energy Sources. Article 107(1) TFEU prohibits, in principle, any public measure that constitutes State aid and applies to any public measure, irrespective of the form. Therefore, tax charges, as such, do not fall within the scope of Article 107(1) TFEU as these constitute an additional burden on taxable undertakings or activities. In this sense, they do not confer an advantage by alleviating or reducing normal costs. However, it may be that tax charges fall within the scope of Article 107(1) TFEU when they are "hypothecated" to State aid;[16] but – as will be shown further on – this is not the case with respect to the RES tax in question. Article 107(1) TFEU does apply to tax exemptions, tax derogations, tax reductions and other forms of favourable tax treatment, irrespective of the aim of the tax.[17]

"Solidarity"; this is the ostensible objective of the contested RES tax. The Court of Justice has held on numerous occasions that the objective of public measures is not sufficient so as to exclude them from the scope of Article 107(1) TFEU.[18] This is because Article 107(1) TFEU applies to public measures, not according to their objectives, but according to their effects.[19]

A public measure is classified as State aid when the following four effects are shown to hold and namely, when (a) the measure transfers State resources, (b) confers an advantage, (c) this advantage is selective and (d) is capable of affecting trade between Member States and distorting competition.[20] As far as the so-called "special solidarity levy" is concerned, the following analysis proves that it meets all these preconditions.

1. Granted by the State or through State Resources

According to Article 107(1), only aid granted by a Member State or through State resources falls under the basic prohibition. As this criterion has been interpreted by the case law of the CEU, two conditions have to be met in order for a measure to be classified as State aid, namely the advantage must be granted directly or indirectly through State resources and secondly the measure must be imputable to the State.[21] Referring to the case in question, the RES tax has been imposed by Law 4093/2012 and the revenue from the RES tax comes under the control of the State. Furthermore, the revenue is collected by the Electricity Market Operator, LAGIE, and the Distribution Grid Operator, DEDDIE, and credited to the RES Special Account, set up and regulated by Law no. 2773/1999, which is managed by LAGIE. The RES Special Account is a fund very similar to the funds which have been found to come under the control of the State in cases concerning surcharges on electricity.[22] LAGIE[23] and DEDDIE are also controlled by the State (the latter as far as its duties regarding the Non Interconnected Grid Administration are concerned) and their duties with respect to the RES Special Account are mandated by Law 4001/2011 (Articles 118 para. 2 and 129 para. 2). Therefore, it can be rightly inferred that the funds managed by these undertakings do come under the influence of the State, which can exercise its dominant influence, and thus they constitute 'State resources'.[24] Furthermore, a number of relevant indicators reveal that the measure is also imputable to the State: More precisely, the public na-

16 C-266/04, *Nazairdis*; C-526/04, *Laboratoires Boiron* , para. 45: *"for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid"*.

17 C-487/06 P, *British Aggregates v Commission* [2008], ECR I-10515; C-279/08 P, *Commission v Netherlands* [2011], ECR I-07671. See further *Nicolaides/Rusu*, The Concept of Selectivity: An ever wider scope?, EStAL 2012, 791.

18 C-241/94, *France v Commission* [1996], ECR I-04551; C-342/96, *Spain v Commission* [1999] ECR I-02459; C-75/97, *Belgium v Commission* [1999], ECR I-03671

19 C-56/93, *Belgium v Commission* [1996] ECR I-00723; C-241/94, *France v Commission*, op.cit.; C-75/97, *Belgium v Commission*, op. cit.; C-409/00, *Spain v Commission* [2003] ECR I-01487

20 See *Metaxas*, in: Hellenic State aid Institute (ed.), "EU State aid Law: The Basic Normative Texts – Commented Edition" (In Greek), Nomiki Bibliothiki, 2011, pp. 4–6.

21 C-482/99, *France v Commission (Stardust Marine)* paras. 24 and 51.

22 C-206/06, *Essent* [2008], ECR I-05497;

23 LAGIE is a company 100% owned by the Greek State, whose share cannot be reduced to less than 51%, as stipulated by Ar. 16 of Law 2773/1999.

24 C-482/99, *(Stardust Marine)*, para 38.

ture of the intermediate bodies (LAGIE and DEDDIE), the fact that the relevant charge has been imposed by law and that it can be used by the designated undertakings for no other purpose than that provided for by the Law.[25]

Therefore, since the RES tax is not imposed on other categories of electricity producers (i.e. electricity producers from fossil fuels) but only to the selected RES producers, the State forgoes potential revenue and according to standard practice, the forgoing of tax revenue is equivalent to "consumption" of State resources.[26]

2. Economic Advantage

Article 107(1) TFEU applies to aid in any form and includes advantages that encompass not only grants, subsidies, loans or guarantees actually given by the State, but also anything owed to the State, which the latter fails to receive or collect, such as taxes.[27] As it will be seen in the present case, the substantiation of the "economic advantage" precondition can be fulfilled even with measures that do not directly grant a benefit but indirectly reduce an economic burden that a specific undertaking would normally have to bear from its budget.[28] In this terms, it can be observed that producers of electricity from fossil fuels are not burdened with the RES tax and therefore are "granted" an advantage in relation to their competitors – RES electricity producers.

3. Distortion of Competition

For a State aid measure to be caught under Article 107(1) TFEU, it must "*distort or threaten to distort competition*" and have an "*effect on trade between Member States*". The conditions under which competition is distorted and trade between Member States is affected for the purposes[29] of Article 107(1) TFEU are, as a general rule, inextricably linked. Therefore, if aid is found to distort competition then it will be almost inevitably found to have an effect on trade.

The test defined by the Commission and the EU Courts so as to determine the effect on competition and trade is not strict and, in that sense, any measure that distorts or even threatens to distort the conditions of competition between undertakings may fall under the scope of Article 107(1) TFEU.[30] When examining the effect on trade and distortion of competition, it has to be noted, that since electricity is traded across Member States,[31] it cannot be excluded that trade between Member States may be affected.[32] Moreover, it cannot be excluded that there can be an indirect effect on trade because thousands of Greek undertakings use non-taxed electricity produced from fossil fuels as input into their operations. Electricity produced from fossil fuels accounts for more than 80 % of total electricity consumption in Greece.[33] It follows that competition between producers of electricity which are not subject to the tax or undertakings which use non-taxed electricity and their competitors in intra-EU trade is distorted.

4. Selectivity: The RES Tax as a Selective Measure

In order to determine whether a measure is selective,[34] it is necessary to establish that, within the con-

25 Ibid, para 58. C-206/06 *Essent*, para 72.

26 T-67/94, *Ladbroke v Commission* [1998], ECR II-00001; C-66/02, *Italy v Commission* [2005], ECR I-10901.

27 *Nicolaides/Kekelekis/Kleis*, "State aid Policy in the European Community: Principles and Practice", International Competition Law Series, KLUWER Law Int, Second edition, pp. 21, 22.

28 C-6/97, *Italy v Commission*, [1999], ECR I-02981; C-487/06 P, *British Aggregates v Commission*, op.cit.

29 See GC, judgment of 4 April 2001, T-288/97, *Regione Autonoma Friuli Venezia Giulia v Commission*, paras 49–50, [2001] ECR II-01169.

30 *Nicolaides/Kekelekis/Kleis*, "State aid Policy in the European Community: Principles and Practice", International Competition Law Series, KLUWER Law Int., Second edition, p. 40, *Metaxas*, Grundfragen des europäischen Beihilferechts: Beihilfebegriff-Aufsichtsverfahren-Rechtsschutz-möglichkeiten für Konkurrenten des Beihilfeempfängers, Nomos Verlag, Baden-Baden and Ant. N. Sakkoulas, Athens-Komotini, 2003, pp. 62–71.

31 C-379/98, *Preussen Elektra* [2001], ECR I-02099.

32 See *Metaxas*, "The Concept of State aid according to Article 87(1) EC: Compensatory Public Measures in favour of Undertakings entrusted with the Operation of Services of General Economic Interest and the EC Control Mechanism of State aid" (in Greek), Ant. N. Sakkoulas Publishers 2003 pp. 8–15., p.)taxas, in: An ever wider she Concept of Selectivity: An ever wider Scopet that is caused by a series structural distortion.

33 For a similar analysis of indirect effect on trade see Commission Decision SA.21918 on electricity tariffs in France, OJ C 398, 22/12/12.

34 Cf. for instance *Bacon*, The Definition of State aid, in Bacon (Ed.), European Community Law of State aid, OUP, 2010, p. 24; *Plender*, Definition of Aid, in Biondi/Eeckhout/Flynn (Eds.), The Law of State aid in the European Union, OUP, 2005, p. 4 f.; *Metaxas*, Selectivity of Asymmetrical Tax Measures and Distortion of Competition in the Telecoms Sector. An Analysis on the Legality of the Duty imposed in Greece on Mobile Network Operators' Subscribers under EU State aid Rules, EStAL 4, 2010, pp. 771–783.

text of a particular legal system, that measure confers an advantage to certain undertakings in comparison with others which are in a comparable legal or factual situation.[35] Assessing the selectivity of a tax[36] measure usually involves a three step analysis. The first step concerns the identification of the 'normal' or general tax regime of reference which would have applied in the absence of the measure under investigation. This first step actually involves the establishment of the scope and provisions of the "normal" tax system which applies to undertakings and constitutes a reference system.[37] To this point it is interesting to note that in *Paint Graphos*, a judgment delivered only a few weeks before the one in *Gibraltar*, the Court of justice still stressed that "[i]n order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned [...]".[38] Under the second step of the analysis, it must be determined whether the measure constitutes a derogation from the 'normal' regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation. If this comparison reveals that the companies benefitting from the derogation actually pay less tax than they would have paid otherwise (e.g. the lower rate), it can be assumed that the measure constitutes State aid. Even so, the Member State concerned can rebut this presumption in the third step of the analysis by showing that the derogation is objectively justified 'by the nature or general scheme' of the tax system. They can do this by explaining that the measure results directly from the basic or guiding principles of its tax system.[39]

Furthermore, well-established case-law stipulates that Article 107(1) TFEU does not apply to public measures which, despite the fact that they differentiate between undertakings and which seem, therefore, prima facie selective, that differentiation arises from the nature or the overall structure of the system of which they form part.[40]

When examining the selectivity conditions and proceeding with the above mentioned three step analysis for the contested RES tax measure, the conclusion is reached that the reference system is not well defined, as the case at hand is an ad-hoc tax measure imposed by Law 4093/2012 for the purpose of "solidarity". However, Law 4093/2012 stipulates that the proceeds from the tax will be credited to the "RES Special Account", established, as previously mentioned, by Law 2773/1999. The RES Special Account compensates RES producers for the difference between the SMP and the feed-in tariff. It can be inferred, therefore, that the "solidarity" intended by the RES tax is "solidarity" with the RES Special Account, and it is needed in order to reduce the budgetary deficit of the RES Special Account.

Although, terminology issues ("solidarity contribution") and intentions linked with the adoption of a State measure are, as already mentioned, absolutely irrelevant as regards its legal categorization as a State aid for which only its effects are crucial, it must be concluded, that if the aim of the tax is to strengthen solidarity with the RES Special Account, then the tax should have applied to all operators. This conclusion is drawn by the fact that the remuneration mechanisms of all electricity producers and the interdependence of various structural distortions of the Greek electricity market have a joint contribution to the formation of the existing deficit in the RES Special Account. Although this cannot be further ana-

35 C-143/99, *Adria-Wien Pipeline* [2001] ECR I-8365; C-409/00, *Spain v Commission*, op.cit; C-88/03 *Portugal v Commission* [2006], ECR I-07115; C-428/06, *UGT-Rioja* [2008], ECR I-06747; C-487/06 P, *British Aggregates v Commission*, op.cit.

36 For a comprehensive analysis of the notion of selectivity in fiscal aid cases, see *Rossi-Maccanico*, "State aid Review of Business Tax Measures", ESTAL 2007, pp. 215–230; *Micheau*, "Tax Selectivity in State aid Review: A Debatable Case Practice", EC Tax Review, 2008, pp. 276–284; Da Cruz Vilaca, Material and Geographic Selectivity in State aid – Recent Developments, EStAL 2009, pp. 443–451.

37 The three-step test as implemented in cases C 487/06 P, *British Aggregates v Commission*; C-279/08P, *Commission v Netherlands*; C-106/09 P, *Commission v Gibraltar*, n.y.p.

38 Joined cases C-78/80 to 80/08, *Paint Graphos et al*. (fn. 10) para. 49, [2011], n.y.p. On this difference cf. *Quigley*, Direct Taxation and State aid: Recent Development Concerning the Notion of Selectivity, INTERTAX, 2012-2, p. 112 at p. 117.

39 *Van der Woude/Olza Moren*. Overview of the Case Law in State aid Matters: June 2011 to June 2012, EStAL 2, 2013.

40 C-143/99, *Adria-Wien Pipeline*, op.cit.; C-88/03 *Portugal v Commission*, op.cit.; C 487/06 P, *British Aggregates v Commission*, op.cit. In particular in case C 487/06 P, *British Aggregates v Commission*, it has to be noted that according to the opinion of the Advocate-General in, para. 82, "*it is clear from the case-law that the question whether the selectivity condition is satisfied must be assessed on a case-by-case basis, in order to ascertain whether or not, in the light of its nature, scope, method of implementation and effects, the measure in question involves advantages accruing exclusively to certain undertakings or certain sectors. If it is established that an advantage of that nature exists, even action in the form of refraining from imposing a new tax on certain economic operators may constitute aid within the meaning of Article 107(1) TFEU*".

lyzed here at length, since it involves the necessity of further analysis of peculiarities of the regulatory framework and market structure of the Greek Energy Market, it must be noted that this finding is shown and proven by a number of independent expert academic studies which conclude that as long as the methodology used in Greece to calculate the SMP remains unchanged, the problem of the systemic deficit of the so called "RES Account" of the Greek Market Operator will remain unsolved.[41]

In any case, since the scope of the reference system for the RES tax should extend to all electricity operators, then it must be inferred that the system differentiates between undertakings which are in the same legal or factual situation. This differentiation is arbitrary because it is not based on any objective distinction between electricity undertakings. The RES Special Account was established in the context of the Greek policy of promoting the production of electricity from renewable resources and reducing greenhouse gas emissions. Since producers of electricity from conventional fossil sources contribute to greenhouse gas emissions as well, they too are in a comparable legal or factual situation and should have also been subject to the RES tax. There is no objective reason for their exclusion. The fact that the existing budgetary deficit in the RES Special Account is equally attributable to all electricity producers is further supported by the imposition of the levy of 2 €/MWh on the lignite energy producers and the inclusion of this income in the RES Special Account's resources. The admittance that lignite energy producers are equally responsible for the creation of the budgetary deficit is an admissible explanation for the imposition of the "2 Euro levy".

Even if it cannot be established, a priori, which undertakings should contribute to the solidarity aims of the RES tax and therefore it cannot be defined which undertakings should be subject to the tax and which should be excluded, it can still be shown that the tax in its application differentiates between undertakings which are in comparable factual situation because they are competitively interlinked.[42] Electricity produced from fossil fuels is indistinguishable from electricity produced from renewable resources. Electricity from one source is a perfect substitute for electricity from any other source. For this reason electricity producers are in the same factual situation irrespective of how they generate their electricity.

As the Court of Justice stressed in case *Commission v Gibraltar*,[43] a public measure is classified as State aid in relation to its effects and irrespective of the "techniques used". This is especially pertinent to the case at hand where the Greek State has chosen to impose an ad-hoc tax on certain electricity producers. Although Member States enjoy tax autonomy in deciding the tax base and rates, they must always do so in compliance with the rules of State aid.[44]

In other words, the fact that the non-taxation of electricity produced from conventional sources is not in the form of derogation from a broader tax is irrelevant for the purpose of determining the selectivity of a tax with a narrow base, such as that of the RES tax. The crucial issue is whether the taxation of electricity from renewable sources places electricity from conventional sources in an advantageous position by asymmetrically imposing a tax burden that allegedly aims to target the systemic deficit of the Special RES Account. This is the effect that is determinant of selectivity and based on the legal argumentation provided the answer has to be in the affirmative, as electricity produced from different sources is indistinguishable.

It now remains to be examined whether the differentiation implicit in the RES tax can be justified

41 See Kapros, (2011), The Special RES Levy: Analysis and Predictions (www.eletaen.gr/drupal/sites/default/files/meleti_emp.pdf); Foundation for Economic & Industrial Research (IOBE) (2011) Report on the Impact and Necessary Adaption for a Large Scale Penetration of RES in Electricity Production.

42 In case T-210/02 RENV, *British Aggregates v Commission*, para. 72, the General Court established that certain types of non-taxed aggregate products were in a comparable situation as other types of taxed aggregate products because of "*a potential link in terms of competition or of substitutability between the various aggregates as regards their use or commercial exploitation*".

43 C-106/09 P, *Commission v Gibraltar*: The Court of Justice in the "Gibraltar" case explained that the "*case-law does not make the classification of a tax system as 'selective' conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings.*"
"*Such an interpretation of the selectivity criterion would require … that in order for a tax system to be classifiable as 'selective' it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact.*" [paras. 91 and 92].

44 C-88/03, *Portugal v Commission*, op.cit.; C-487/06 P, *British Aggregates v Commission*, op.cit.

on the basis of nature or structure of the reference tax system. Nothing in Law 4093/2012 indicates that the exclusion of electricity generated from fossil fuels can follow from the nature of the contested RES tax. On the contrary, the aim of strengthening solidarity with the RES Special Account would require that the tax is levied on all producers whose remuneration mechanisms affect the budgetary deficit of the RES Special Account. Moreover from an environmental perspective that is predominant in the European RES support policies, since the very purpose of the RES Special Account is to internalize the environmental costs of conventionally produced electricity, it would follow that it must be the producers of electricity from fossil fuels who should be making additional contributions to cover the deficit.

VI. Incompatibility with the Internal Market, the RES Normative Framework and Energy Policy Goals

Although it is not the intention of this analysis to extensively elaborate on the issue of possible compatibility of the contested State aid (tax levy) with the internal Market, it is established in the case law of EU Courts that in order for a State aid to be considered compatible it must not infringe any other provision in the Treaties or secondary legislation.[45] The RES tax, however, apart from the above analyzed State aid issues, does not conform to EU Law, while it is also incompatible with the basic normative cornerstones of EU Energy Policy.

Besides constituting a selective State aid measure, the tax measure in question is obviously contradictory to basic principles of EU Energy Policy on RES development. The European Commission has repeatedly criticized the application of retroactive measures and has highlighted the negative effects that such measures may have on promoting investment in RES in the context of reaching EU Energy and Environment Policy targets in 2020. It has even been considering the balancing of greenhouse gas emissions allowances as a means to recharge investment in the RES. The imposition of this tax measure on the gross revenues of all already operating RES projects in Greece (apart from those for which the reference value of energy sold taken into account for the Power Purchase Agreement is being calculated according to the one in force after 09.08.2012) is moving in the opposite direction from the aforementioned EU Energy policy goals not only as regards existing investments but also considering the negative effect it will surely have on potential future investments in this field. Retroactive tax measures adopted at a later stage and affecting already existing investments are the worse signs for future investments. The EU Commission must take this perspective well into account when considering the compatibility of this kind of retroactive measures adopted by Member States.

Moreover, the European Parliament and Council have repeatedly stressed (both in Directive 2009/28/EC[46] and the relevant Position Paper[47]) the importance of retaining a stable investment environment for RES and the need for energy prices to reflect the external costs of energy production and consumption, "including, as appropriate, environmental, social and health care costs".

Additionally, the Commission, in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled "Renewable Energy: A major Player in the European Energy Market" of 6 June 2012, criticises policies that hinder investment in renewables and in particular, policies that continue to subsidize fossil fuels, which, according to it, should be phased out. In view of the complementarity of climate and renewable energy policies, a well functioning carbon market is deemed to be necessary, together with "properly designed energy taxes to give investors clear and strong incentives in low carbon technologies and their development". Further on, the Commission considers that the retroactive changes suddenly imposed on support schemes, despite the fact that they are often triggered by unexpectedly high growth, which rapidly increases expenditure rendering them not sustainable in the short term, undermine investor confidence in the sector.

45 C-78/03 P, *Commission v ARE* [2005], ECR I-10737; C-390/06, *Nuova Agricast* [2008], ECR I-02577.

46 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

47 COM (2012) 271 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Renewable Energy: a major player in the European energy market. Brussels, 6.6.2012

VII. Conclusions: What should Member States Do?

In this article we examine the State aid implications of asymmetric taxes – i.e. taxes with narrow base – and consider how State aid rules apply to an actual example of asymmetric taxation in Greece. We conclude that the Greek RES tax is a selective measure that falls within the prohibition of Article 107(1) TFEU. This is because it is selective and confers an advantage to the producers of electricity from fossil fuels. There is no objective reason for the differentiation between electricity produced from renewable sources and electricity produced from conventional sources: Electricity from these different sources is indistinguishable and therefore the various electricity producers are in the "same legal or factual situation" as this notion has been interpreted in the recent case law of EU Courts.

We argue that the exclusion of the producers of electricity from fossil fuels cannot be justified on economic grounds, nor does it follow legally from the nature or structure of the Greek tax system. The tax creates in this way significant imbalances because its imposition only on RES producers amounts up to 42 % of their turnover.

Since the tax has not been notified for prior authorisation by the Commission, it is in breach of Article 108(3) TFEU and thus illegal. The State aid granted by the RES tax seems further to be incompatible with the internal market, as it constitutes operating aid that does not comply with any of the provisions of Article 107(2) or (3), nor with the requirements of the Regional Aid Guidelines[48] or the Environmental Aid Guidelines.[49]

The Greek case provides a very good example of what Member States should and should not do. Taxes always distort competition. The extent of distortion is greater, the higher the degree of substitutability between products, the stronger the competition between producers. The first lesson to be drawn is that Member States must always take into account the potential for distortion of competition. Taxes with wider base cause less distortion and are less likely to be found to constitute State aid because they do not tax some competitors.

But, one may retort, what if the policy objective of a Member State is precisely to distort competition between similar products? For example, what if a Member State wants to stimulate the utilisation of, say, gas or oil when they are not used as sources of energy but rather as inputs in chemical processes or wants to stimulate the cleaning up of environment from waste by-products? In fact both of these examples are real: see exemption from energy taxes of dual products, N 820/2006, Germany; and exemption from a waste tax for dredging sludge, N574/2004, the Netherlands.

The case law does allow such policies. Member States have to be explicit as to what they seek to achieve and then justify the narrow base of their tax or a tax exemption by showing how it derives from the aims, or as EU courts have said, from the "logic and nature of the tax system". A tax that aims to penalise the generation of CO_2 should not apply to oil or gas when their use does not involve the production of energy that creates CO_2. Similarly, a tax on waste that harms the environment should not apply to activities which remove waste from the environment.

In conclusion, both State aid law and economics indicate that Member States have to be explicit about where they draw the boundaries of a tax.

48 Guidelines on National Regional Aid for 2007–2013, 2006/C 54/08 of 4.3.2006.

49 Community Guidelines on State aid for Environmental Protection, Notice from the Commission 2008/C 82/01 of 1.4.2008.