

# The Polluter Pays Principle and the EU State Aid Law for Environmental Protection

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## Abstract

The "Polluter Pays Principle" (PPP) -cornerstone of the international as well as the European environmental law- presents a complicated and multifaceted nature as instrument of environmental protection. Hence, it constitutes the background for several instruments of European environmental policy such as the environmental responsibility, the environmental taxes and the "green fees", the control of State aids, the system of "tradable permits", the regulation concerning the "Eurovignette". Particularly, with regards to the State aids in the environmental area the PPP has a very crucial role in the framework of the policy developed on this issue by the European Commission. In general, given that the PPP provides for that the polluting undertakings shall bear the costs of their pollution reduction investments, it is clear at first glance that this principle imposes a general prohibition of granting State aids for compliance with the environmental regulations in order not to distort the competition and the function of the internal market. However, the analysis of the EU Guidelines on State Aids for environmental protection, the practice of decisions of the European Commission as well as the judgments of the Court of Justice of the European Union reveal a different -broader approach- of the PPP. Through the thorough study and interpretation of the abovementioned material, the aim of this paper is, firstly, to confirm via jurisprudential examples the multidimensional content of the PPP and, secondly, to explore its dynamic role at the crossroads of the EU economic law regulations (State Aids) and the EU framework for environmental protection.

**Keywords:** polluter pays principle, state aid, environmental protection, European Commission Guidelines

## 1. Introduction

Given that the environmental protection is placed at the crossroads of international and national law and at the intersection of administrative, civil as well as criminal law it seems inevitable to deal with overlaps and mutual intermingling of the different rules and legal areas especially due to the complicated nature of environmental problems<sup>1</sup>. Moreover, the rapidly growing ecological crisis in combination with an increasing quantity of the produced environmental rules underlines the urgent need for efficient and common environmental principles throughout EU seeking to overcome factual complexity, scientific ambiguities as well as interdisciplinary regulations' fluidity concerning the environmental protection.

This aim is accomplished by the article 191(2) TFEU, which proclaims a cluster of principles, including the PPP that constitute the foundation of the EU environmental policy. Although clear definition of them was not given, their indeterminate nature has not hampered their binding character and their legal effects, since they are increasingly being (i) articulated in secondary EU legislation<sup>2</sup> and (ii) used by the CJEU to interpret the normative content of substantive provisions of EU environmental legislation<sup>3</sup>. Besides, their amorphous formulation in relation with their flexible content designates them as guiding principles of EU environmental law-making. In this vein, the PPP forms the background for several EU secondary legislations and plays a very important role within the European Commission's practice of controlling State aid for environmental objectives. Concerning particularly the EU State Aids Law, the core rules in this area have been placed since 1957 Treaty of Rome. However, the content of this EU policy has changed over the time and is currently designated to result in less, but better targeted aid in order to boost the European economy. The fundamental point of the EU State Aid regime consists in prohibiting as incompatible with the internal Market the allocation of an aid by individual EU Member States to industrial and commercial undertakings. Nevertheless, this prohibition is not absolute and there are a number of areas where State aids are seen as necessary and fair<sup>4</sup>. Therefore, a complex set of EU State aid rules is designated to ensure which aids and under which conditions can be considered compatible with

<sup>1</sup>J. H. Jans, H. H. B. Vedder, *European Environmental Law - After Lisbon*, 4th Edition, Europa Law Publishing, 2012, p. 40-41.

<sup>2</sup>Indicatively, Article 9(1) of the Directive 2000/60/EC (polluter pays principle), Article 1 of the Directive 2001/42/EC (sustainable development), Recital 30 and Articles 4(2) and 14(1) of the Directive 2008/98/EC (precautionary principle and sustainability).

<sup>3</sup>E. Fisher, B. Lange, E. Scotford. *Environmental Law - Text Cases and Materials*, (Oxford, 2013), p. 416.

<sup>4</sup>A. Biondi, *Some Reflections on the Notion of "State Resources"* in *European Community State Aid Law*, (Fordham International Law Journal, vol. 30, Issue: 5, 2006), p. 1429.

the needs of the Internal Market.

In this framework, the aim of this paper is to highlight the interface between the PPP, which belongs to the normative basis of the EU environmental policy and law and with some simplification it is called non-subsidization principle<sup>1</sup> and the EU State aid law based on the practice of decisions of the European Commission and the judgements of the ECJ.

## 2. The PPP as legal instrument of environmental protection

### 2.1. *The origins of the PPP*

The PPP originates from the economic theory of the "*internalization of externalities*", which imposes on the polluters the social costs borne by public authorities responsible for inspecting, monitoring and controlling pollution. By the same token, the PPP encapsulates the setting up of a system of charges by which the polluters (the persons who generated the pollution by their products or services) bear the financial burden of the public policy to protect the environment<sup>2</sup>. However, despite its initial economic background, the PPP started gradually acquiring legal expressions and finally was recognized as pillar of the EU's environmental law and policy.

In particular<sup>3</sup>, it was first mentioned in the recommendation of the OECD of 1972 and reaffirmed in the recommendation of 1974. According to these texts, the main role of the PPP consisted in allocating "*the costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment*". Moreover, the polluter should bear the expense of carrying out the measures "*decided by public authorities to ensure that the environment is in an acceptable state*". In terms of the EU Law, the PPP is set out in a Communication from the European Commission to the Council in 1975 regarding cost allocation and action by public authorities on environmental matters. Furthermore, the PPP recurred in all subsequent Environmental Action Programs and in the EC Guidelines related to State aids for environmental protection. In the framework of the primary EU legislation the PPP is consolidated in article 191(2) of the TFEU, whilst in secondary EU legislation appears in several directives. Through the lens of international law the PPP is enshrined in the Principle 16 of the Declaration of Rio in 1992.

### 2.2. *The content of the PPP*

Concerning the functions of the PPP, since its first appearance in 1972, it is today understood in a much broader sense, not only covering pollution prevention and control measures but also covering liability<sup>4</sup>. Also, the field of application of PPP has been extended in recent years from pollution control at the source towards control of product impacts during their whole life cycle. Moreover, the preventive function of the PPP is based on the assumption that the polluters will reduce environmental risks by investing in appropriate risk management measures as soon as the costs which they will have to bear are higher than the benefits anticipated from continuing pollution. Finally, the PPP has a curative function, which means that the polluter has to bear the clean-up costs for damage already occurred<sup>5</sup>.

In this framework of EU secondary legislation, a twofold interpretation of the PPP is identified: the efficiency interpretation and the equity interpretation. The efficiency interpretation is essentially economic in nature pertaining to an internalization of the environmental costs. The equity interpretation is considered to be an extension of the basic form of the principle, which pertains to a fair distribution of costs, between the polluter and the victim (or the victimized society)<sup>6</sup>.

As to implement the PPP within the EU environmental law, there exists a broad range of instruments that can be classified into three main categories: command and control law, economic instruments and voluntary approaches, provided by "soft law". Namely, the Environmental Liability Directive, the green taxes, the "tradable permits" system, the regulation concerning "Eurovignette".

### 2.3. *The PPP in the CJEU Case Law*

Despite the graspable slogan formulation of the PPP, its implementation turns out to be baffling since the principle itself does not elucidate who is the polluter, and which costs should bear. Given that the PPP does not constitute a responsibility principle but a principle of imputation of the environmental costs<sup>7</sup>, its role is not

<sup>1</sup>M. Stoczkiewicz, The polluter pays principle and State aid for environmental protection, (JEEPL 6.2, 2009), p.171.

<sup>2</sup>N. de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, (Oxford University Press, 2002), p.31.

<sup>3</sup>M. Munir, History and Evolution of the Polluter Pays Principle: How an economic idea became a legal principle?, (Social Science Research Network, 2013).

<sup>4</sup>R. Schmidt, W. Kahl, K.-F. Gärditz, Umweltrecht, (C.H. Beck, 9. Auflage, 2014), p. 120-121.

<sup>5</sup>N. de Sadeleer, EU Environmental Law and the Internal Market, (Oxford University Press, 2014), p. 59, L. Krämer, EC Environmental Law, (6th edition, London: Sweet & Maxwell, 2007), p. 76.

<sup>6</sup>O. Peiffert, La contribution de la Cour de justice de l'Union européenne à la définition du principe pollueur payeur, (RTD Eur., 2012), p. 2-3

<sup>7</sup>C. Larroumet, La responsabilité civile en matière d'environnement. Le projet de Convention du Conseil de l'Europe et le

consisted in giving answers to these questions, but in functioning as a general instrument of environmental protection that is used both by the policy maker and the administration in order to determine the responsible polluter and the amount of the cost of the prevention or remediation of the environmental damage. In this framework, the PPP has been involved as an interpretative tool in various ECJ cases aiming at enlightening vague provisions of different EU Directives as well as clarifying its ambiguous aspects concerning two main issues: i. the identification of the polluter via the research of an adequate causal link and ii. the determination of the cost that the polluter should pay.

With regard to the identification of the polluter the condition that should be certainly fulfilled is the establishment of a causal link between the damage and the behavior or the activity of the polluter. Particularly, according to the PPP only the person who has contributed to the pollution<sup>1</sup> that lead in the final environmental harm<sup>2</sup> can be charged with the burden of remedying it. However, given that it is not always easy to determine who has certainly contributed to the pollution, the ECJ applying the PPP to waste liability cases relating to the clean-up of sites polluted by hydrocarbons<sup>3</sup> held that the liability can be channeled along the production chain of the waste provided that the conduct of these parts has given rise to the pollution<sup>4</sup>. Moreover, following this extended approach concerning the imputation of the cost for the pollution the ECJ ruled that in situations of scientific uncertainty regarding the causal contribution of the polluter to the final harmful effect, it is consistent with PPP to attribute the liability via taxes based on plausible evidence<sup>5</sup>.

Namely, the ECJ held that there is no breach of the PPP when the waste management charges are calculated on the basis of the economic activity or the surface area of the undertaking, instead of the amount of waste produced and collected, when this is based on objective criteria and it is impossible to verify the exact contribution of the polluter<sup>6</sup>. As a result, national authorities are endowed with "broad discretion" when determining the manner in which an environmental charge must be calculated adopting a position that enriches the PPP with a precautionary aspect<sup>7</sup>. Although the PPP does not preclude, *per se*, the adoption of such taxes or does not impose on Member States any specific method of financing the cost of pollution, it has been stressed by the ECJ that it must be ensured that through the imposition of these measures the levy is actually reimbursed by the holders of the waste<sup>8</sup> and that the abovementioned method should be unconditional and sufficiently precise to have direct effects<sup>9</sup>.

With respect to the determination of the environmental costs that should be imputed to the responsible polluter, the PPP encapsulates a double dimension. According to the *ex ante* approach the polluter is obliged to assume the costs for the prevention and control of the pollution (basically via regulation or taxes), whilst by the *ex post* approach the polluter is charged also with cost for the reparation and the compensation of the incurred damages<sup>10</sup>. In this framework, the ECJ in the *van de Walle* and *Commune de Mesquer* cases referred to "*the cost of elimination of the waste*"<sup>11</sup>, whereas a more extended version of the costs is reflected in the *Pontina Ambiente* case, where in that levy is also included "*financial penalties imposed on the operator of a landfill site for late payment of such a levy*"<sup>12</sup>. In any case, these charges should be in proportion to the damage the polluters have caused<sup>13</sup>.

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livre vert de la Commission des Communautés européennes, (Recueil Dalloz Sirey, 1994), p. 101-102.

<sup>1</sup>For example, C-254/08 *Futura Immobiliare srl Hotel Futura v. Comune di Casoria* [2009] 3 CMLR 45, par 45; C-378/08 *Raffinerie Mediteranee (ERG) v. Ministero dello Sviluppo* [2010] 3 CMLR, paras 57 and 67.

<sup>2</sup>C-1/03 *Paul Van de Walle* [2004] ECR I-7613, para. 60.

<sup>3</sup>C-1/03 and C-188/07 *Mesquer* [2009] ECR I-4501.

<sup>4</sup>Pursuant to the PPP the ECJ ruled that in the *Commune de Mesquer* case apart from the shipowner (principal responsible) the producer of heavy fuel oil as well as the seller and the oil tanker charterer could be held liable, on the ground that they could be deemed to have contributed in some way to the causal chain which led to the shipwreck (paras 74-78). Respectively, in the *van de Walle* case it was concluded that an oil company selling hydrocarbons to the manager of a petrol station can, under certain circumstances, be considered to be the holder of the land contaminated by hydrocarbons that accidentally leak from the station's storage tanks (paras. 59-60).

<sup>5</sup>C-254/08, para. 52.

<sup>6</sup>C-254/08, paras. 53-57.

<sup>7</sup>J. Monien, *Prinzipien als Wegbereiter eines globalen Umweltrechts? Das Nachhaltigkeits-, Vorsorge- und Verursacherprinzip im Mehrebenensystem*, (Nomos, 2014), p. 374.

<sup>8</sup>C-172/08 *Pontina Ambiente* [2010] ECR I-1175, para. 38.

<sup>9</sup>C-97/11 *Amia SpA* [2012] OJ C200/2, paras 35 and 37.

<sup>10</sup> J. Monien, *Prinzipien als Wegbereiter eines globalen Umweltrechts? Das Nachhaltigkeits-, Vorsorge- und Verursacherprinzip im Mehrebenensystem Op.Cit.*, p. 353; A. Bleeker, *Does the polluter pay? The Polluter-Pays-Principle in the Case Law of the European Court of Justice*, (European Energy and Environmental Law Review, vol. 18, 2009), p. 291-292.

<sup>11</sup>Case C-1/03 paras. 42-53, Case C-188/07 paras. 49-63.

<sup>12</sup>Case C-172/08 paras. 39-40.

<sup>13</sup>Case C-293/97 *Standley* [1999] ECR I-2603, paras. 51-52, Case C-254/08 paras. 64-67.

### 3. The framework of the EU State Aids Law

#### 3.1. The general prohibitions of State aid (Art. 107(1) TFEU)

The legal framework that governs the legality and compatibility of the State aids consists of articles 107-109 TFEU and a large number of secondary measures and guidelines. According to the highly contested definition given on the Art. 107(1) TFEU, an economic measure can be identified as State aid, if it fulfills a number of conditions set by the EU legislator aiming at the establishment and maintenance of a system of free and undistorted competition. In particular, an economic intervention can be defined as state aid and, therefore, as prohibited, if it is about an intervention i. by the member state or through state resources, ii. that gives the recipient an economic advantage, iii. has a selective character and iv. affects trade and restriction of the competition.

The first criterion is considered to be very broad, since the demanded involvement of the state resources can be very widely established. In particular, this can include regional as well as central government<sup>1</sup>, whereas it is not suffice that the measure constituting aid was taken by a public undertaking. It has to be shown that the state actually exercised control over the undertaking and was involved in the adoption of the measure<sup>2</sup>. Additionally, in cases where the funds are in the hands of a company where the state is a shareholder, it should be investigated whether the State is responsible for an investment made by the company on the basis of the degree of control the state has in the company's activities<sup>3</sup>.

Pertaining to the advantage conferred on the recipient the Commission has provided an illustrative list of types of aid such as direct subsidies, tax exemptions, exemption from parafiscal charges, preferential interest rates, favorable loan guarantees, indemnities against losses and preferential terms for public ordering<sup>4</sup>. Based on this enumeration it is to be figured out that the concept of aid does not cover only positive benefits, but it includes also intervention that mitigate the charges an undertaking would normally bear<sup>5</sup>.

Furthermore, the ECJ in order to determine whether the Member State's intervention confers an advantage examines if under "normal market conditions" that undertaking would have secured a comparable advantage<sup>6</sup>. According to this technique, which is known as "private sector test", it is to be identified if the measures taken by the State constitute an economically rational investment that would have been taken by a private investor<sup>7</sup>. However, there are practical difficulties in applying this test, and in many cases, the Commission has been criticized for failing take into account all the evidence<sup>8</sup>.

With respect to the selectivity of the contentious economic measure it should be underlined that in the light of the case law regarding this condition, general measures of economic policy, such as an interest-rate reduction, while benefiting industrial sales, will not in themselves classified as aid<sup>9</sup>. In this framework, it can be mentioned as example, firstly, the geographical selectivity<sup>10</sup> and, secondly, the material selectivity<sup>11</sup>. According to a significant approach developed in the wake of ECJ judgements although a measure can be initially assessed as selective, this selectivity can be finally acceptable if it is justified by the general scheme of the economic measure<sup>12</sup>.

Finally, the last requirement concerning the effect on trade and the restriction of competition seems to be unproblematic. The relatively small amount of the aid, or the relatively small size of the recipient undertaking, does not exclude the possibility that EU trade might be affected<sup>13</sup>. In any case it is not necessary for the Commission to prove that trade will be affected; it is sufficient to show that trade might be affected<sup>14</sup>.

At a procedural level, within the framework set out in the TFEU and Council Regulations made under

<sup>1</sup>C-323/82 *Intermills*, [1984] ECR 03809, par. 98, T-227,229, 265, 266 and 270/01 *Territoria Histórico de Ávala and others v. Commission*, 9 September 2009.

<sup>2</sup>T-442/03 *SIC-Sociedade Independente de Comunicação, SA v. Commission* [2008] ECR II-1161.

<sup>3</sup>C-482/99 *France v. Commission* [2002] ECR I-4397

<sup>4</sup>P. Graig, G. de Búrca, *EU Law – Text, Cases and Materials*, (5th Edition, Oxford, 2015), p. 1088.

<sup>5</sup>C-222/04 *Ministero dell'Economia e della Finanze v. Cassa di Risparmio di Firenze SpA* [2006] ECR I-289, par. 131; C-393/04 and 41/05 *Air Liquide SA v. Province de Liège* [2006] ECR I-5293 ECR I-5293.

<sup>6</sup>C-342/96 *Spain v. Commission* [1999] ECR I-02459, para. 412.

<sup>7</sup>For example, loans and terms of the loans.

<sup>8</sup>C-483/99 *Commission v. France* [2002] ECR I-04781 and Case T-98/00 *Linde v Commission* [2002] ECR II-03961.

<sup>9</sup>C-143/99 *Adria-Wien Pipeline GmbH* [2001] ECR I-8365, par. 35.

<sup>10</sup>Cases that refers to decision of local governments to take specific measures designed to benefit the business of this region only, C- 88/03 *Portugal v Commission* [2006] ECR I-7115.

<sup>11</sup>This covers measures that apply to the whole territory of a Member State, but only to certain types of undertakings. Indicatively, the condition of selectivity I fulfilled in cases of measures that benefit only small or only large undertakings, as well as measures benefiting only certain manufacturers. Cases C-409/00 *Spain v. Commission* [2003] ECR I-01487 and C-222/04 *Casa di Risparmio di Firenze and others* [2006] ECR I-00289.

<sup>12</sup>C-173/73 *Italy v. Commission* [1974] ECR 709, para. 33.

<sup>13</sup>C-142/87 *Re Tubemeuse: Belgium v Commission* [1990] ECR I-959, par. 43.

<sup>14</sup>T-211/05 *Italy v Commission*, 4 Sept. 2009, para. 151-155.

Art. 108 TFEU, the European Commission has a key role in reviewing existing aid and in deciding on plans to grant or alter aid. In exceptional circumstances, the Council may decide that aid is compatible with the Internal Market and thereby block the Commission action. Namely, once a measure is found to be a State aid, then the Member State must notify it to the Commission and wait for approval. Subsequently, the Commission may determine that the aid cannot be given or may only be granted if modified, and the Member State must report to the Commission on the implementation of the aid anew. In general, the Commission as well as the courts play, a very crucial role concerning the delimitation of the state aid.

### **3.2. The provision of derogations to the general prohibition (Art. 107(2) & (3) TFEU)**

Not all State aid is incompatible with the internal market, defined as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. However, it is recognized that State aid may in certain circumstances be necessary for a well-functioning and fairly-run economy. Hence, there are a number of recognized exemptions. Three categories of aid are deemed to be compatible with the Internal Market in line with the Art. 107(2) TFEU. Namely, a. aid having a social character, granted to individual consumers, provided that it is granted without discrimination related to the origin of the products concerned, b. aid to make good the damage caused by natural disasters or exceptional circumstances and c. aid granted to certain areas of the Federal Republic of Germany affected by the former division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

Other categories of aid may be considered to be compatible with the Internal Market according to the Art. 107(3) TFEU: a. aid to promote the economic development of areas where there is an abnormally low standard of living or serious unemployment and of regions referred to in Art. 349 TFEU, in view of their structural, economic and social situation, b. aid 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, d. aid to promote culture and heritage conservation where it does not affect trading conditions and competition in the Union to an extent that this is contrary to the common interest and e. such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

## **4. The role of the PPP in the State Aids Law for environmental protection**

### **4.1 Conflict between the PPP and the State Aids Law (?)**

According to the main obligation deriving from the PPP, the polluters shall pay for the pollution prevention and control measures and for environmental damages they cause (internalization of environmental damages) without any subsidization from government or society<sup>1</sup>. However, given the high cost of these environmental measures a rational company has absolutely no incentive to take these externalities into account when deciding upon its level and techniques of production. In this framework, the counterweight to the abovementioned failure of the market is the need for public intervention. Consequently, in contrast to the initial approach of the PPP only as a mere prohibition of aid to polluters<sup>2</sup>, the fruitful role of the PPP in the scope of State aid control was aptly defined by Advocate General Jacobs in his opinion in the case GEMO:

*“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 the Article 87(1) EC and (b) to decide whether a given aid may be declared compatible with the Treaty under Art. 87(3) EC. In its first context, that of the Art. 87(1) EC, the principle is used as an analytical tool to allocate responsibility according to economic criteria for the cost 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 primarily responsibility to bear the costs. In its second context, that of the Art. 87(3) EC, the PPP is used by contrast in a prescriptive way as a policy criterion. It is relied on to argue 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 the State”<sup>3</sup>.*

It is clear that the contribution of the PPP to the EU State law is very important. This is emphatically confirmed by the Guidelines of the European Commission regarding State aid for environmental protection. The Commission –being responsible for the control and monitoring of the State aids across EU- issued several acts with no binding nature on State aids for environmental protection in order to ensure legal certainty, unify

<sup>1</sup>J. R. Nash, Too much market? Conflict between tradable pollution allowances and “the polluter pays” principle, (2 Harvard Environmental Law Review, 2000,) p. 3.

<sup>2</sup>E. de Sabran Pontevès, Les transcriptions juridiques du principe pollueur-payeur, (Presses universitaires d’Aix-Marseille, Aix-en-Provence, 2007), p. 65.

<sup>3</sup>Opinion of AG Jacobs in Case C-126/01 *Ministre de l’économie, des finances et de l’industrie v. GEMO*, [2003], ECR I-13769, par. 68-70.

practices and limit the scope of its own discretion<sup>1</sup>. In 1994, the Commission adopted the first Community Guidelines on State aid for Environmental Protection<sup>2</sup>, followed by the Guidelines of 2001<sup>3</sup>, and then the Guidelines of 2008<sup>4</sup>. At present, the Guidelines on State aid for environmental protection and energy 2014-2020 are in effect<sup>5</sup>.

All these texts refer explicitly to the PPP by underlying that the target situation is the situation where the PPP would be fully implemented and the entire environmental costs would be internalized<sup>6</sup>. In this sense, State aids and the PPP seem to have a contradictory relation. Nevertheless, the Commission stated that the primary objective of State aid control in the field of environmental protection is to ensure that the aid awarded improves the level of environmental protection, which would not be possible without this aid, and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking into account the PPP.

Therefore, in the current state of law, it appears that certain categories of aid can be considered compatible with the internal market in the light of the provision of the Art. 107(3)(c) as well as of the aforementioned Guidelines<sup>7</sup>. First of all, it is about “aid for undertakings which go beyond [EU] standards or which increase the level of environmental protection in the absence of [EU] standards”<sup>8</sup>. This provision seems to be reasonable 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<sup>9</sup>. Moreover, aids aiming at the rectification of market failures by incentivizing undertakings to reach precise objectives in terms of energy savings a reduction of greenhouse gas emissions are compatible with the internal market on the condition that the incurred expenditures are not compulsory or profitable to the undertakings<sup>10</sup>.

#### 4.2. The recognition of certain acceptable environmental state aids

As already mentioned above there are a number of state aids that can be considered either consistent with the PPP or justified exemptions from it. Indicatively, aids that comply directly with the PPP aim at resolving a market failure (resulting from the absence of internalization of environmental costs in certain production types) by supporting the production of more environmentally sound but more expensive substitutes<sup>11</sup>. For example, aid for renewable energy sources<sup>12</sup> or aid for environmentally friendly biofuels<sup>13</sup>, since under the existing traditional energy generation sector the PPP cannot be fully implemented<sup>14</sup>.

Moreover, regarding the aids for achieving higher level of environmental protection in this category fall into aids for meeting more stringent environmental standards or improving level of environmental protection in the case where EU standards are absent<sup>15</sup>, aids for the acquisition of transport vehicles which go beyond community standards<sup>16</sup> as well as aids for early adaptation to future community standards<sup>17</sup>. Furthermore, in the scope of the acceptable aids for not being in contrast to the PPP fall into the following cases: aid for the relocation of undertakings, aid involved in tradable permit schemes and the aid in the form of reductions or exemptions from environmental taxes<sup>18</sup>.

In particular, as far as the first case is concerned the granted aid intended to encourage undertakings to prevent negative externalities by relocating plants which generate substantial pollution levels to the areas where

<sup>1</sup>U. Soltész, F. Schatz, State Aid for Environmental Protection. The Commission’s new Guidelines and the new General Block Exemption Regulation, (JEEPL, 6.2., 2009), p. 150-151.

<sup>2</sup>OJ C 72, 10.03.1994.

<sup>3</sup>OJ C 37, 3.02.2001.

<sup>4</sup>OJ C 82/1, 01.04.2008.

<sup>5</sup>OJ C 200/01, 28.06.2014.

<sup>6</sup>H. Vedder, Competition Law and Environmental Protection in Europe; Towards Sustainability?, (Europa Law Publishing, Groningen, 2003), p. 301.

<sup>7</sup>C. London, Concurrence et environnement: une entente écologiquement rationnelle?, (2 RTDE, 2003) p. 279.

<sup>8</sup>2008 Guidelines, point 1.5.1.

<sup>9</sup>M. Stoczkiewicz, The polluter pays principle and State aid for environmental protection, *Op.Cit.*, p. 196.

<sup>10</sup>Guidelines 2008, para. 47.

<sup>11</sup>M. Stoczkiewicz, The polluter pays principle and State aid for environmental protection, *Op.Cit.*, p. 185.

<sup>12</sup>Commission Decision State aid N 458/2006-Germany. Modification of the aid scheme “Aid for the use of renewable energies”, C(2006)4234.

<sup>13</sup>Commission Decision State aid N 418/2006-United Kingdom. Renewable Transport Fuel Obligation (RTFO), C(2007)8.

<sup>14</sup>See also, Commission Decision State aid N 271/2006-Denmark. Tax relief for Supply of Surplus Heating, C(2006)6591, points 2.1 and 4.

<sup>15</sup>2008 Guidelines, section 3.1.1 (73)-(84).

<sup>16</sup>2008 Guidelines, section 3.1.1 (85)-(86).

<sup>17</sup>2008 Guidelines, section 3.1.1 (87)-(90).

<sup>18</sup>M. Stoczkiewicz, The polluter pays principle and State aid for environmental protection, *Op.Cit.*, p. 190.

such pollution would have less harmful impacts on the environment, thus reducing external costs<sup>1</sup>. An indicative example of aids in the framework of tradable permit schemes is given by the case *Netherlands v. Commission*, which pertains to a system which allocated gratuitously rights to 250 large polluting facilities, whilst smaller ones were imposed emission ceilings and were excluded from this scheme. Although in the opinion of the Court of First Instance this measure was not considered to be a State aid, 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<sup>2</sup>, the ECJ held to the contrary. Namely, it elucidated that a differentiation based upon purely quantitative criterion –*in casu* the total installed thermal capacity- cannot be regarded as inherent to a scheme aiming at reducing industrial pollution<sup>3</sup>.

Finally, reductions or exemptions from environmental taxes on certain activities, which may allow for the adoption of higher taxes increasing the general level of the internalization of external costs should be in consistency with PPP, which constitute a general principle underlying a fiscal regime intended to generate incentives to adopt an environmental friendly behavior or to inflict on the polluter a burden corresponding to its share in environmental degradation<sup>4</sup>. Accordingly, in the case *British Aggregates* in particular, the ECJ held that Member States are not free to set priorities in the field of environmental protection and to determine which goals 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<sup>5</sup>.

## 5. Conclusion

This paper tried to shed light to the role of the PPP in the EU State Aid law. Despite the apparent contradiction of these two concepts it has been proved that the area of environmental protection constitutes a field of compromise and fruitful coexistence. The crucial decision of the Commission as well as of the General Court and the ECJ to interpret broadly the PPP contributed to its integration as analytical tool and policy element into the framework of Art. 107 TFEU. This conciliation between the imperatives of the PPP and the competition law seems to ensure with the most efficient way the environmental protection.

Based on the aforementioned nuanced approach of the PPP it is undeniable that some categories of aids being granted to polluting industries are not incompatible with its content. In this context, the PPP acquires a double function: on the one hand, it imposes that the polluter is financially liable for meeting the requirements applicable under the existing environmental legislation. This is carried out via the prohibition of the subsidization of undertakings for environmental purposes. On the other hand, the PPP also has a significant effect on the practice of the European Commission regarding the control of the State aids by functioning as a crucial criterion at the qualification phase of a State aid<sup>6</sup>. Hence, the function of the PPP in the framework of State Aids Law delineates its role as a link between EU economic law and EU environmental law. The interplay of these EU legal areas in the light of the aggravation of environmental problems seems to be the appropriate way to fulfill the need for more efficient environmental policy measures.

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<sup>1</sup>2008 Guidelines, section 1.5.10 (54).

<sup>2</sup>T-233/04 *Netherlands v Commission* [2008] ECR II-591, para. 99.

<sup>3</sup>C-279/08 *Netherlands v Commission* [2011] ECR I-7671, para. 75.

<sup>4</sup>L. Rubini, The definition of subsidy and State aid. WTO and EC Law in comparative perspective, (Oxford University Press, 2009), p. 308.

<sup>5</sup>C-487/06 P *British Aggregates v. Commission* [2008] ECR I-10515, para. 86.

<sup>6</sup>M. Stoczkiwicz, The polluter pays principle and State aid for environmental protection, *Op.Cit.*, p. 184.

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