

**Legal dimensions of recycling  
income from EU ETS  
Allowance auctions**

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**Angus Johnston**

*Faculty of Law and Trinity Hall*

*University of Cambridge*

# Legal Dimensions – Overview

1. Possible ways of ‘recycling’ auction income
2. Relevant legal principles
3. Summary

# **1. Possible ways of ‘recycling’ auction income**

- (1) Reduction of personal income tax;**
- (2) Reduction of corporate tax rates;**
- (3) Sector-specific reduction of corporate tax;**
- (4) Reduction in other taxes;**
- (5) Subsidies for:**
  - (a) innovation, R&D;**
  - (b) diffusion of new technologies.**

## **2. Relevant legal principles (1)**

**EC law contains provisions that regulate:**

- **Customs duties;**
- **Internal indirect taxation;**
- **Some national direct taxation (as a potential restriction on free movement);**
- **State aids.**

## 2. Relevant legal principles (2):

### Prohibition on imposing Customs Duties

- **Customs duties between Member States and measures having equivalent effect are prohibited under EC law (Article 25 EC).**
- **‘Measures having equivalent effect’?**

“Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier ... constitutes a CHEE ... even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with the domestic product”.

## 2. Relevant legal principles (3): Prohibition on imposing Customs Duties

- See Joined Cases C-78 to 83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847:

“... If the advantages stemming from the use of the proceeds of the charge in question **fully offset the burden borne by the domestic product** when it is placed on the market, that charge constitutes a charge having an effect equivalent to customs duties, contrary to Article [25] *et seq.* of the Treaty. If, on the other hand, those advantages only **partly offset the burden borne by domestic products**, the charge in question is subject to Article [90] of the Treaty. In the latter case, the charge would be incompatible with Article [90] of the Treaty and is therefore prohibited to the extent to which it discriminates against imported products, that is to say to the extent to which it partially offsets the burden borne by the taxed domestic product”.

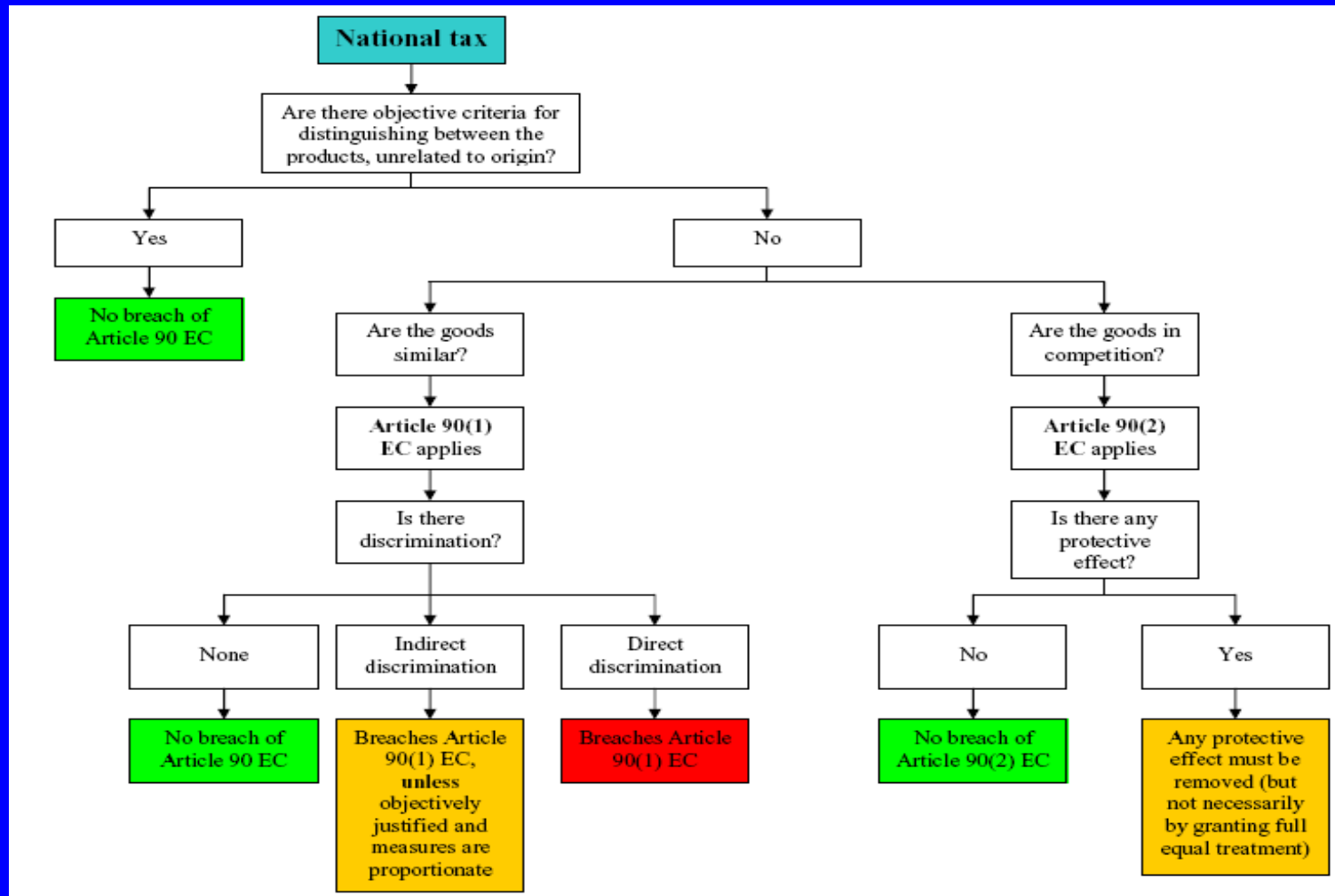
## 2. Relevant legal principles (4)



Matt, *The Daily Telegraph*, 10  
January 2007

# 2. Relevant legal principles (5)

## Rules on Indirect Internal Taxation (Article 90 EC)





## 2. Relevant legal principles (6)

### Rules on Indirect Internal Taxation

- **Application of the EC rules on internal taxation in practice in the energy sector:**
  - unlike Article 28 EC, there is no explicit Treaty derogation that covers even directly discriminatory restrictive provisions of national law;
  - but there is the opportunity to justify *indirectly* discriminatory national measures, or to claim that the relevant good is distinguishable from the favoured national good on grounds other than its mere origin.
- **See the case of *Outokumpu* (1998): a good illustration of the potential reach of the EC law rules here.**

# 2. Relevant legal principles (7)

## EC State Aid Law

**Under Article 87(1) EC, if it can be established that:**

- an ‘advantage’ has been conferred
- which was granted by the State or through State resources
- which distorts or threatens to distort competition
- by favouring certain undertakings or the production of certain goods or services (i.e. a ‘selectivity’ criterion)
- and which affects or may affect trade between EC Member States.

**... then the proposed scheme involves State aid, which must be notified to the Commission and which will require justification on grounds accepted under the EC Treaty, if it is to be permitted.**

## 2. Relevant legal principles (8)

### EC State Aid Law

- Justifications for the grant of State aid:
  - (i) General Commission approach to aid for environmental purposes;
  - (ii) Legal basis for possible environmental purposes as justifications – Article 87(3)(c) EC:

‘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’.

## 2. Relevant legal principles (9)

### EC State Aid Law

- **Specific environmental purposes in the Commission's Guidelines:**
  - **Investment aid, with levels specific to investments in energy (Guidelines, paras. 30-32);**
  - **Operating aid, for:**
    - **Energy-saving (paras. 42-46);**
    - **Tax reductions or exemptions (paras. 47-53);**
    - **Renewable energy sources (paras. 54-65) and CHP (paras. 66-67).**

# 3. Summary

- 1. Corporate tax rate reductions could raise issues of customs duties, discriminatory or protective internal taxation and State aids;**
- 2. Subsidy programmes clearly raise State aid considerations and need careful justification to ensure legal compatibility.**
- 3. Detailed and robust conclusions of legal analysis can only be drawn with regard to detailed and concrete proposals for auction revenue recycling schemes: an iterative developmental process will be required.**