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Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Denmark to apply, in accordance with Article 19 of Directive 2003/96/EC, a reduced rate of taxation on electricity directly provided to vessels at berth in a port

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Taxation of energy products and electricity in the Union is governed by Council Directive 2003/96/EC (hereafter referred to as the 'Energy Taxation Directive' or the 'Directive').

Pursuant to Article 19(1) of the Directive, in addition to the provisions laid down in particular in its Articles 5, 15 and 17, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions in the level of taxation for specific policy considerations.

The objective of this proposal is to allow Denmark to apply a reduced rate of taxation on electricity directly provided to vessels at berth in a port (hereafter referred to as 'shore-side electricity'). This exemption is meant to give an economic incentive to the use of shore-side electricity in order to reduce air pollution in port cities and improve local air quality for the health benefit of inhabitants.

The aim of the measure to be applied by Denmark is also to reduce the environmental impact of maritime transport.

The request and its general context

By letter dated 2 July 2014, the Danish authorities informed the Commission of their intention to apply a tax reduction to electricity directly provided to vessels, other than private pleasure craft, at berth in a port. Upon the request of the Commission, Denmark provided additional information on 13 November 2014 and on 23 February 2015. With the requested measure Denmark wants to give an incentive for the use of shore-side electricity which is considered a less polluting alternative to the generation of electricity on board vessels lying at berth in a port.

The intention of the Danish authorities is to apply a reduced rate of DKK 4 (app. EUR 0.54) ([1]) per MWh of electricity tax to shore-side electricity. This tax rate will be above the minimum rate of taxation for electricity for business use as laid down in Directive 2003/96/EC. The national rate of taxation currently applicable to shore-side electricity is DKK 878 ([2]) (app. EUR 117.95) per MWh which is the national rate of taxation of electricity for non-business use.

On the other hand, Article 14(1)(c) of the Energy Taxation Directive obliges Member States to exempt energy products used as fuel for the purposes of navigation within EU waters, other than private pleasure craft. This exemption covers also the energy products used to produce electricity on board ships at berth in ports. Member States may also exempt energy products used by ships, other than private pleasure craft, for navigation on inland waterways according to Article 15(1)(f) thereof which also covers the production of electricity on board. However the latter provision has no relevance to Denmark's request as at present it has no inland waterways.

Thus in most cases the system of taxation based on the Energy Taxation Directive does not affect the costs of producing electricity on board a ship at berth in a port even though such production could have negative health and environmental effects by deteriorating air quality and increasing noise levels in ports.

([1]) All calculations are based on the exchange rate on 1 October 2014, i.e. DKK 7.4437 for EUR 1. Cf. OJ C 344 of 2.10.2014.

([2]) The level of taxation of electricity is the one applicable in January 2015 (cf. http://ec.europa.eu/taxation_customs/taxation/excise_duties/energy_products/rates/index_en.htm).

Denmark intends to apply the reduced rate of electricity taxation to all supplies of shore-side electricity of at least 380 volts to vessels used for commercial shipping of at least 400 gross tonnage. The Danish authorities claim that even with these restrictions to the scope of the measure the absolute majority of vessels used in international traffic and larger vessels used in national traffic are covered by the tax reduction. These are the vessels considered to be responsible for the largest part of emissions caused by the running of auxiliary motors on board while berthed in ports.

The Danish authorities have informed the Commission that they expect that the tax reduction will result in annual tax expenditures of approximately DKK 15 million (EUR 2 million). This assumption is based on the estimated electricity consumption by cruise and cargo ships in Danish ports in 2008 which stood at approximately 33 000 MWh (of which 17 000 used in cruise ships). The calculations assume that this consumption has not changed in the meantime and that not all vessels will use shore-side electricity in the future. The Danish authorities indicate that this estimate should be considered with caution as this is a new scheme in Denmark, and there is no basis for comparison with similar schemes. At present the ports in Denmark do not provide shore-side electricity facilities. Also, vessels will be free to choose whether to buy shore-side electricity.

The Danish authorities acknowledge that the measure constitutes State aid in favour of owners of ships used for commercial shipping, which may qualify as block exempted aid under Article 44 of the Commission Regulation 651/2014/EU ([3]).

Denmark requested the authorisation to be granted for a period of six years, which is the maximum period indicated in Article 19(2) of the Directive.

Denmark considers that this measure is in line with Commission recommendation 2006/339/EC on the promotion of shore-side electricity for use by ships at berth in Union ports ([4]) and with the Commission Communication Strategic goals and recommendations for the EU's maritime transport policy until 2018 ([5]). In this regard, it should be noted that from June 2011 on, Member States have an unconditional obligation to meet air quality standards for relevant pollutants like particulate matter ([6]). This obligation requires them to find solutions to problems such as ship emissions at berth in ports where this is relevant and it is conceivable that in ports where these problems exist the use of shore-side electricity will be encouraged as one element of the overall air quality strategy.

With the tax reduction Denmark wants to provide an incentive for vessel operators to use shore-side electricity in order to reduce airborne emissions and noise from vessels at berth as well as CO_2 emissions. The application of a reduced tax rate would strengthen the competitiveness of shore-side electricity relative to the burning of bunker fuels on board, which is fully tax exempt.

([3]) Commission Regulation 651/2014/EU declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, pp. 1–78).

([4]) Commission Recommendation 2006/339/EC of 8 May 2006 on the promotion of shore-side electricity for use by ships at berth in Community ports (OJ L 125, 12.5.2006).

([5]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final of 21 January 2009.

([6]) Cf. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ L 152 of 11.6.2008).

Existing provisions in the area of the proposal

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, in particular Article 14(1)(c).

Assessment of the measure under Article 19 of Directive 2003/96/EC

Specific policy considerations

Article 19(1), first subparagraph, of the Directive reads as follows:

> *'In addition to the provisions set out in the previous Articles, in particular in Articles 5, 15 and 17, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations.'*

By means of the tax reduction in question the Danish authorities pursue the objective to promote an environmentally less harmful way for ships to satisfy their electricity needs while lying at berth in ports and thereby to improve local air quality. As Denmark has pointed out, the Commission has in fact already recommended the use of shore-side electricity as an alternative to the generation of electricity on board the vessels at berth and thereby recognised its environmental advantages ([7]). Currently electricity supplied to vessels at berth would be taxed at DKK 878 (app. EUR 117.95) per MWh. The requested exemption would thus lead to an additional incentive for the use of this technology equal to DKK 874 or app. EUR 117.41 per MWh and therefore contribute to the stated policy objective.

As regards the nature of the policy objective pursued the Commission would point out that the promotion of shore-side electricity is in fact a common policy objective that should be pursued by the Union as a whole. This is stated clearly in the Commission Communication on an integrated maritime policy ([8]) and the accompanying Commission staff working document ([9]). The Commission suggested shore-side electricity provided to ships while at berth in ports to be exempted from energy taxation for a period of eight years in its proposal for revision of the Energy Taxation Directive ([10]).

However the Commission proposal was not adopted by the Council and in 2015 the Commission withdrew it ([11]). Currently the only possibility to introduce a favourable tax treatment to shore-side electricity is provided by Article 19. Its purpose is to react to specific circumstances in individual Member States that are not reflected in the Directive itself. A derogation on the basis of Article 19 which pursues the policy objective of promoting shore-side electricity can therefore only be granted as a transitional measure before this objective has been addressed by the Council in the context of a revision of Directive 2003/96/EC.

Consistency with the other policies and objectives of the Union

The requested measure concerns mainly the EU's environmental policy. To the extent that it will help to reduce the burning of bunker fuels on board the vessels in ports the measure will in fact contribute to the objective of improving local air quality. The measure is also likely to lead to a reduction of CO_2 emissions to the extent that the electricity mix from the onshore grid is less carbon intensive than the electricity produced on board by burning bunker fuels, due to higher system efficiency and the difference in input fuels used. In this context it can be noted that the average electricity mix in the relevant market area is considerably less carbon-

([7]) Cf. note 4 above.
([8]) COM(2007) 575 final of 10 October 2007.
([9]) SEC(2007) 1283 final of 10 October 2007.
([10]) COM(2011) 169 final of 13 April 2011.
([11]) OJ C 80, 7.3.2015, pp. 17-23.

intensive than the EU average. Although the carbon intensity of additional electricity supplied is usually higher than the one of the average electricity mix and highly dependent on the time of day when the additional demand occurs, CO_2 reductions resulting from the measure should remain relatively significant ([12]).

The measure is in line with Directive 2014/94/EU on the deployment of alternative fuels infrastructure ([13]) which addresses the issue of installing shore-side electricity supply facilities in ports where there is demand for such facilities and the costs are not disproportionate to the benefits, including environmental benefits.

It has to be recalled at this point that one important reason for the unfavourable competitive position of shore-side electricity lies in the fact that the alternative, i.e. electricity produced on board the vessels while in maritime ports, currently enjoys a full net tax exemption: not only is the bunker fuel burnt for generating the electricity exempt from taxation, which corresponds to the normal position under Article 14(1)(a) of Directive 2003/96/EC, but also the electricity produced on board the vessels is itself exempt (cf. Article 14(1)(c) of Directive 2003/96/EC). Although the latter exemption could as such be considered difficult to reconcile with the environmental objectives of the Union, it mirrors considerations of practicability. In fact, taxation of the electricity produced on board would require a declaration by the ship owner – often established in a third country – or operator of the amount of electricity consumed. The declaration would furthermore have to determine the share of the electricity consumed in the territorial waters of the Member State where the tax is due. It would create a huge administrative burden for ship-owners to have to make such declarations for every Member States whose territorial waters are concerned. Under these circumstances it can be justified not to penalize the less-polluting alternative of shore-side electricity by allowing Denmark to apply a reduced rate of taxation.

Internal market and fair competition

From the point of view of the internal market and fair competition the measure only reduces the existing tax distortion between two competing sources of electricity for boats at berth, i.e. on board generation and shore-side electricity, caused by the tax exemption for bunker fuels.

As regards competition between vessel operators, it first has to be mentioned that there are currently very few vessels which use shore-side electricity on a commercial basis. Significant distortions in competition could therefore only arise between vessels benefitting from the measure requested by changing to shore-side electricity and others that would continue to use on-board generation. Although precise cost projections depend crucially on the development of the oil price and are therefore very difficult, the latest available assessments indicate that overall even a full tax exemption would in most cases not reduce operational costs of shore-side electricity below the costs of on-board generation ([14]) and would therefore not, in any event, represent a significant competitive benefit for vessel operators using shore-side

([12]) The combined share of renewables for the NordPool electricity mix for 2012 was 69.8 % (cf. 'http://www.nordpoolspot.com/Global/Download%20Center/TSO/Nordic-production-split_2004-2012.pdf'). However, both nuclear and hydropower, which accounts for most of the renewables generation in the NordPool in general, are mainly used as base load whereas peak load is more carbon intensive on average. It should be noted also that Denmark relied on conventional thermal power for app. 42 % of the electricity produced in 2012, but wind power is providing an increasing part of the energy supply.

([13]) Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure (OJ L 307, 28.10.2014, pp. 1–20).

([14]) Cf. European Commission Directorate General Environment, Service Contract Ship Emissions: Assignment, Abatement and Market-based Instruments, Task 2a – Shore-Side Electricity, August 2005, http://ec.europa.eu/environment/air/pdf/task2_shoreside.pdf. The cost analysis is carried out for the three ports of Gothenburg (Sweden), Juneau and Long Beach (USA).

electricity as opposed to those using on-board generation. In the present case, a significant distortion of the above mentioned kind can all the less be expected since Denmark will respect the minimum level of taxation prescribed by Directive 2003/96/EC for electricity for business use. Furthermore, Denmark intends to limit the tax advantage to vessels with a gross tonnage of at least 400 as well as to supplies of shore-side electricity of at least 380 volts. Thus the measure will target those vessels with significant on-board generation while limiting the overall number of beneficiaries. The threshold values have been set at a relatively low level. Conversely, it can reasonably be assumed that vessels that might be excluded from the tax benefit through the threshold values will rather be national than from other EU countries and that the threshold values will therefore in any case not lead to a more advantageous tax treatment of national economic actors over their competitors from other EU Member States.

Concerning competition between ports, the Danish authorities have stated that they consider as negligible any potential impact on trade between Member States which could result if vessels alter their routes because of the possibility to consume shore-side electricity at a reduced tax rate. In a situation where, as stated above, the use of shore-side electricity is, at least in the short term, unlikely to become more economic than on-board generation in spite of the tax reduction, this tax reduction for shore-side electricity is also unlikely to significantly distort competition between ports by inducing vessels to change their itinerary according to the availability of this option.

The timeframe for which it is proposed to authorize the application of a reduced tax rate is similar to the timeframe in the Commission proposal of eight years for the tax exemption for shore-side electricity. It is unlikely that the analysis conducted in the two preceding paragraphs will change before the date of expiry of the measure.

Period of application of the measure and development of the EU framework on Energy Taxation

In principle, the period of application of the derogation should be long enough in order not to discourage port operators from making the necessary investments. It should be noted that the scale of the tax measure in question is limited compared to the Commission proposal for revision of the Energy Taxation Directive which envisages an obligatory exemption for shore-side electricity for a period of eight years after its entry into effect. Still the derogation should not undermine future developments of the existing legal framework and should take into account the possible adoption by the Council of a legal act based on the Commission proposal for amendment of the Energy Taxation Directive. Under these circumstances, it appears appropriate to grant the authorisation requested for the maximum period of six years allowed by the Directive, subject however to the entry into application of general provisions in the matter, at a point in time earlier than the expiry thus foreseen. This period of time will provide legal certainty to ship and port operators which have to plan their investments in shore-side electricity facilities or on-board equipment.

State aid rules

On the basis of the relevant exchange rate of 1 October 2014 as published in the Official Journal of the European Union ([15]), the reduced tax rate of DKK 4 per MWh envisaged by the Danish authorities is above the EU minimum level of taxation for electricity for business use pursuant to Article 10 of Directive 2003/96/EC. The measure thus seems to fall under Article 44 of Commission Regulation 651/2014/EU, which stipulates the conditions under which aid in the form of reductions in environmental taxes under Directive 2003/96/EC can be exempted from the State aid notification requirements. However it cannot be established at

([15]) Cf. note 1 above.

this stage whether all the conditions set in this Regulation are fulfilled and the proposal for a Council Implementing Decision does not prejudge the Member State's obligation to ensure compliance with State aid rules, in particular, in case of exempted aid, the Commission Regulation 651/2014/EU..

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

This proposal is based on a request made by Denmark and concerns only this Member State.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

This proposal concerns an authorisation for an individual Member State upon its own request.

3. LEGAL ELEMENTS OF THE PROPOSAL

Subsidiarity principle

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The field of indirect taxation covered by Article 113 TFEU is not in itself within the exclusive competence of the European Union within the meaning of Article 3 TFEU. However, pursuant to Article 19 of Directive 2003/96/EC, the Council has been granted an exclusive competence, as a matter of secondary law, to authorise a Member State to introduce further exemptions or reductions within the meaning of that provision. Member States cannot therefore substitute themselves for the Council. As a result, the principle of subsidiarity is not applicable to the present implementing decision. In any event, since this act is not a draft legislative act, it should not be transmitted to national Parliaments pursuant to Protocol No 2 to the Treaties for review of compliance with the subsidiarity principle.

Proportionality principle

The proposal respects the principle of proportionality. The tax reduction does not exceed what is necessary to attain the objective in question (cf. the considerations on the internal market and fair competition aspects, above).

Choice of instruments

Instrument(s) proposed: Council Implementing Decision.

Article 19 of Directive 2003/96 makes provision for this type of measure only.

4. BUDGETARY IMPLICATION

The measure does not impose any financial or administrative burden on the Union. The proposal therefore has no impact on the budget of the Union.

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authorising Denmark to apply, in accordance with Article 19 of Directive 2003/96/EC, a reduced rate of taxation on electricity directly provided to vessels at berth in a port

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([1]), and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By letter of 2 July 2014, Denmark sought authorisation to apply a reduced rate of electricity tax to electricity directly provided to vessels at berth in a port ('shore-side electricity') pursuant to Article 19(1) of Directive 2003/96/EC. Upon the request of the Commission, Denmark provided additional information on 13 November 2014 and on 23 February 2015.

(2) With the tax reduction it intends to apply, Denmark aims at promoting the use of shore-side electricity. The use of such electricity is considered to be an environmentally less harmful way to satisfy the electricity needs of vessels lying at berth in ports, compared with the burning of bunker fuels by those vessels.

(3) In so far as the use of shore-side electricity avoids emissions of air pollutants originating from the burning of bunker fuels by vessels at berth, it contributes to an improvement of local air quality in port cities. Under the specific conditions of the electricity generation structure in the region concerned, i.e. the Nordic electricity market including Denmark, Finland, Sweden and Norway, the use of electricity from the onshore grid instead of electricity generated by burning bunker fuels on board is furthermore expected to reduce CO_2 emissions. The measure is therefore expected to contribute to the environmental, health and climate policy objectives of the Union.

(4) Denmark explicitly requested that the tax reduction not be applied to electricity directly supplied to private pleasure craft at berth in a port.

(5) Allowing Denmark to apply a reduced rate of electricity taxation to shore-side electricity does not go beyond what is necessary to increase the use of shore-side electricity, since on-board generation of electricity will remain the more competitive alternative in most cases. For the same reason, and because the technology is currently not available in Denmark, the measure is unlikely to lead to significant distortions in competition during its lifetime and will thus not negatively affect the proper functioning of the internal market.

([1]) OJ L 283, 31.10.2003, p. 51.

(6) In accordance with Article 19(2) of Directive 2003/96/EC each authorisation granted under that provision must be strictly limited in time. In order to ensure that the authorisation period is sufficiently long so as not to discourage port operators from making the necessary investments, it is appropriate to grant the authorisation requested for a period of six years subject however to the entry into application of general provisions on the matter that may be adopted under Article 113 TFEU, prior to the anticipated expiration of the authorisation period.

(7) This decision is without prejudice to the application of the Union rules regarding State aid,

HAS ADOPTED THIS DECISION:

Article 1

Denmark is authorised to apply a reduced rate of electricity taxation to electricity directly supplied to vessels berthed in ports, other than private pleasure craft, provided that the minimum levels of taxation pursuant to Article 10 of Directive 2003/96/EC are respected.

Article 2

This Decision shall apply from the 20th day following that of its publication in the Official Journal of the European Union.

It shall cease to apply six years thereafter.

However, should the Council, acting on the basis of Article 113 of the Treaty, provide for general rules on tax advantages for shore-side electricity, this Decision shall expire on the day on which those general rules become applicable.

Article 3

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels,

For the Council
The President