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Proposal for a

COUNCIL DECISION

authorising Germany to apply a reduced rate of electricity tax to electricity directly provided to vessels at berth in a port ("shore-side electricity") in accordance with Article 19 of Directive 2003/96/EC

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Taxation of energy products and electricity in the Union is governed by Council Directive 2003/96/EC¹ (hereafter referred to as the “Energy Taxation Directive” or the “Directive”).

Pursuant to Article 19(1) of the Directive, in addition to the provisions foreseen 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 Germany to apply a reduced rate of electricity tax to 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.

The request and its general context

By letter dated 27 December 2010, the German authorities informed the Commission that they intended to apply a reduced rate at the level of the EU minimum rate, i.e. 0,50 €/MWh, of electricity tax to shore-side electricity. Supplementary information was received from Germany on 11 January 2011.

Germany has requested for the reduction to be granted for an indeterminate period.

With the requested measure Germany 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 of vessels lying at berth in a port. Currently shore-side electricity has to be taxed at the general rate of the electricity tax, which is 20,50 €/MWh. On the other hand, Member States have to exempt electricity generated on board ships for navigation within Community waters according to Article 14(1)(c) of the Energy Taxation Directive and may do so in the case of electricity produced on board ships for navigation on inland waterways according to Article 15(1)(f).

Germany would like to apply a reduced rate of 0,50 €/MWh to shore-side electricity, thereby respecting the minimum rate of taxation for electricity as laid down in Directive 2003/96/EC. The reduced rate of electricity taxation is to apply to all supplies of shore-side electricity in both Community waters as well as inland waterways, with the exception of private pleasure crafts.

With the tax reduction Germany wants to give 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 CO₂ emissions. The application of a reduced tax rate would improve the competitive situation of shore-side electricity relative to the burning of bunker fuels on board, which is fully tax exempt.

¹ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for taxation of energy products and electricity, OJ L 283 of 31.10.2003 p. 51

Germany considers that this measure is in line with Commission recommendation 2006/339/EC² on the promotion of shore-side electricity for use by ships at berth in EU ports and with the Commission Communication "Strategic goals and recommendations for the EU's maritime transport policy until 2018" (COM(2009)8)³.

Arguments of the German authorities concerning the impact of the measure on the internal market

The German authorities say that the measure would not affect the proper functioning of the internal market and would not lead to a distortion of competition. They argue that the beneficiaries, ship operators which will receive shore-side electricity taxed at the minimum level provided for in Directive 2003/96/EC, will not actually receive an economic advantage because these operators currently generate their own electricity on board and because this electricity is exempted from taxation. According to the German authorities substitution of own generation on board by shore-side electricity taxed at the applicable minimum level would not lead to an overall cost advantage.

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 Articles 14(1)(c) and 15(1)(f).

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 German 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 Germany 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 advantages⁴. It is noted that electricity supplied to vessels at berth is currently taxed at 20,50 €/MWh in Germany. The requested reduction would thus lead to an additional incentive for the use of this technology equal to 20 €/MWh and therefore contribute to the stated policy objective.

The Commission also notes that an important obstacle to a more widespread use of shore-side electricity is currently the almost total absence of the necessary onshore infrastructure in ports

² 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).

³ 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.

⁴ Cf. note 2 above.

and that therefore additional initiatives addressing in particular the built-up of this infrastructure are likely to be necessary to achieve the policy objective of the tax exemption in question. In this regard, it is noted that from June 2011 on, Member States will have an unconditional obligation to meet air quality standards for relevant pollutants like particulate matter⁵. 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 with these problems the use of shore-side electricity will be encouraged as one part of the overall air quality strategy.

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 COM(2007)575 on an integrated maritime policy and the accompanying Commission staff working paper⁶, which announce that this objective will be taken up in the context of a revision of Directive 2003/96/EC. However, the purpose of Article 19 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 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 might also, to a limited extent, lead to a reduction of CO₂ emissions, although the significance of this effect will depend on the source of the electricity to be provided to the vessels via the onshore grid⁷.

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

⁵ 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).

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An Integrated Maritime Policy for the European Union of 10.10.2007, COM (2007) 575 final and Commission staff working document – Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An Integrated Maritime Policy for the European Union of 10.10.2007, SEC (2007) 1278.

⁷ At an earlier occasion, the Commission has estimated that switching to shore-side electricity will lead to an average reduction in CO₂ emissions of 50%, cf. footnote 2. However, the impact of the measure in question may differ considerably from this average value as it depends crucially on the carbon intensity of the relevant market area and the exact time when the additional electricity demand will occur.

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 Germany to apply a reduced rate of taxation.

As regards electricity consumed by vessels at berth in ports along inland waterways, and contrary to the situation obtaining in maritime ports, exemption of the electricity produced on board is merely optional for Member States (Article 15(1)(f)). Therefore, no legal obstacle would prevent Member States from treating equally shore-side electricity and on-board generation in ports along inland waterways. However, the option offered by Article 15(1)(f) of the Directive not to tax electricity generated on board is again to be explained by considerations of practicability on the part of the legislator and at the same time closely linked to the optional tax advantages for the purposes of navigation on inland waterways. The majority of Member States, among which Germany, have decided not to tax fuels used for these purposes. As far as the Rhine and its tributaries are concerned, this tax exemption is furthermore enshrined in an international agreement⁸, which Germany has ratified. It is also considered impractical to tax separately the input fuel used for the generation of electricity on board [cf. Article 21(5), third subparagraph, of Directive 2003/96/EC] because this would presuppose, at the very least, a distinction between the fuel used for the generation of electricity and for navigation. Finally, in deciding whether to extend the tax exemption applicable to maritime shipping to fuels used for navigation on inland waterways, Member States will take into consideration a number of aspects, including wider objectives of national transport policy such as environmental considerations, which may lead them not to tax fuels used for these purposes.

It is therefore considered justified, at the present stage, to extend the possibility to exempt shore-side electricity to ports in inland waterways.

Internal market and fair competition

From the point of view of the internal market and fair competition the measure requested would reduce the existing 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 reiterated that there are currently very few vessels which use shore-side electricity on a commercial basis. Second, even if the measure will provide shipping companies with an advantage in the sense that they will be able to purchase electricity at lower costs compared to companies operating in other sectors, the examined measure is not expected to alter significantly the competitive situation within the shipping sector. Although precise cost projections depend crucially on the development of the oil price and are therefore very difficult, the available evidence would confirm the statement made by Germany 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 generation⁹ and would therefore not, in any event, represent a significant competitive benefit

⁸ Cf. article 1 of the Agreement of 16 May 1952 between the Rhine riparian States and Belgium on the customs and fiscal treatment of gasoil used as a ship's supply in the navigation of the Rhine (Bundesgesetzblatt 1953, part II, p. 531).

⁹ Cf. European Commission Directorate General Environment, Service Contract Ship Emissions: Assignment, Abatement and Market-based Instruments, Task 2a – Shore-Side Electricity, August 2005,

on vessel operators using shore-side 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 Germany will respect the minimum level of taxation prescribed by Directive 2003/96/EC.

Concerning competition between ports, 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.

Finally, it can be added that the timeframe for which it is proposed to authorize the application of a reduced tax rate is sufficiently short to make it unlikely that the analysis conducted in the two preceding paragraphs will change before the date of expiry.

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. This objective has to be reconciled, though, with the need to review the position obtaining in Germany in due time and the need not to undermine future developments of the existing legal framework. In the latter regard, it should be borne in mind that the Commission has proposed a revision of Directive 2003/96/EC on 13 April 2011¹⁰ with a view to bringing it more closely in line with the objectives of energy and environment policies and in particular the climate change objectives for the period after 2013. This proposal also contains a provision requiring Member States to exempt shore-side electricity from taxation until 31 December 2020 (draft Article 14(1)(e)). Under these circumstances, it appears appropriate to grant the authorisation requested for a period of three years, subject however to the entry into application of general provisions in the matter, at a point in time earlier than the expiry thus foreseen.

State aid rules

The tax rate of 0,50 €/MWh envisaged by the German authorities respects the minimum level of taxation pursuant to Article 10 of Directive 2003/96/EC. The measure therefore falls under the so-called General Block Exemption Regulation (Regulation (EC) No 800/2008)¹¹ and is, by consequence, exempt from the prior notification requirement.

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).

¹⁰ Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM (2011) 169/3.

¹¹ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008.

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

Consultation of interested parties

This proposal is based on a request made by Germany 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

The proposal aims at authorising Germany to derogate from the general provisions of Council Directive 2003/96/EC and to apply a reduced rate of 0,50 €/MWh electricity tax to electricity directly provided to vessels at berth in a port.

Legal basis

Article 19 of Council Directive 2003/96/EC.

Subsidiarity principle

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, the exercise by Member States of their competences in this field is strictly circumscribed and limited by existing EU law. Pursuant to Article 19 of Directive 2003/96/EC, only the Council is empowered to authorise a Member State to introduce further exemptions or reductions within the meaning of that provision. Member States cannot substitute themselves for the Council.

The proposal therefore respects the principle of subsidiarity.

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 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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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 electricity¹², and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letter of 27 December 2010, Germany sought the 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 of Directive 2003/96/EC.
- (2) With the tax reduction it intends to apply, Germany aims at promoting a more widespread use of shore-side electricity as an environmentally less harmful way for ships to satisfy their electricity needs while lying at berth in ports as compared to the burning of bunker fuels on board the vessels.
- (3) In so far as the use of shore-side electricity avoids emissions of air pollutants associated with the burning of bunker fuels on board the vessels at berth, it contributes to an improvement of local air quality in port cities. The measure is therefore expected to contribute to the EU's environmental and health policy objectives.
- (4) Allowing Germany to apply a reduced rate of electricity taxation to shore-side electricity does not go beyond what is necessary to achieve the above mentioned objective, since on-board generation will remain the more competitive alternative in most cases. For the same reason, and because of the current relatively low degree of market penetration of the technology, 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.

¹² OJ L 283, 31.10.2003, p. 51.

- (5) It follows from Article 19(2) of Directive 2003/96/EC that each authorisation granted under that provision must be strictly limited in time. Given the need for a period long enough in order not to discourage port operators from making the necessary investments, but also the need to review the position obtaining in Germany in due time and the need not to undermine future developments of the existing legal framework, it is appropriate to grant the authorisation requested for a period of three years, subject however to the entry into application of general provisions in the matter, at a point in time earlier than the expiry thus foreseen,

HAS ADOPTED THIS DECISION:

Article 1

Germany is hereby 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 its publication in the Official Journal of the European Union. It shall cease to apply three years thereafter.

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

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

*For the Council
The President*