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Proposal for a

COUNCIL DECISION

authorising France to apply reduced levels of taxation to petrol and gas oil used as motor fuels 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 EU 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 France to continue to apply, within defined limits, differentiated levels of taxation to unleaded petrol and gas oil, with the exclusion of commercially used gas oil. This differentiation is meant to reflect the decentralisation of certain specific powers previously exercised by central government.

The request and its general context

Council Implementing Decision 2011/38/EU² (hereafter "Decision 2011/38/EU"), following up on Council Decision 2005/767/EC³ (hereafter "Decision 2005/767/EC"), authorised France to apply, until 31 December 2012, reduced levels of taxation to unleaded petrol and gas oil at regional level for the purposes of an administrative reform involving the decentralisation of certain specific powers previously exercised by central government.

Based on that Decision, France is currently applying a scheme that allows the French administrative regions to apply a reduced level of taxation to unleaded petrol and gas oil with the exception of commercially used gas oil. The tax in question is the *Taxe Intérieure sur les Produits Pétroliers* – Domestic Tax on Petroleum Products (TIPP), which is an excise duty.

By letter dated 10 February 2012, under Article 19 of the Directive, the French authorities requested the renewal of this scheme on identical terms, but for a period of six years from 1 January 2013 to 31 December 2018. Additional information and clarifications were provided by the French authorities on 24 May 2012 and 5 October 2012.

Operation of the measure

The French Customs Code fixes single maximum tax rates for unleaded petrol and gas oil.

The regions are allowed to reduce these rates with an amount that, as before, cannot exceed EUR 35,4 per 1 000 litres of unleaded petrol, including E10 fuel, and EUR 23,0 per 1 000 litres of gas oil throughout the derogation period. These amounts constitute the maximum revenue per 1 000 litres that accrues directly to the regions. Every year, the regional Councils decide the amount of the reduction by vote, proving the decision making autonomy of the regions and giving an incentive to improve the quality of their administration which cannot be achieved by a transfer from the national budget to the local budgets.

The level of taxation after reductions can never be lower than the EU minima set in Directive 2003/96/EC and no reduction would apply to gas oil for commercial use.

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).

² OJ L 19, 22.1.2011, p. 13.

³ OJ L 290, 4.11.2005, p. 25.

Control and movement measures for the products concerned

Central government would retain responsibility for collecting and controlling excise duty on gas oil and unleaded petrol, irrespective of the reductions adopted by the regions.

The products would be moved under duty-paid arrangements and the fuels would be taxed when released for consumption at the rate of duty in force in the region to which they are supplied.

To respond to the specific fraud risk identified (diversion of deliveries to benefit from tax differentials between two regions), the logistical chain would be supervised by means of prior identification of recipients by suppliers and notification of this information to the customs administration. The risk analysis indicates that recipients should be divided into three categories: end users with the capacity for bulk storage, service stations and distributors of duty-paid fuel. In the case of a domestic movement of fuel duty-paid, customs could verify the origin of the product and its region of destination. In cases of atypical routes or inexplicably long transport times, customs could investigate whether consignments had been diverted from the regional destination initially declared.

Arguments of France concerning the impact on the internal market and state aid aspects

The French authorities indicate that the measure would not affect the proper functioning of the internal market, in particular since the scope of the measure is confined to fuels for non-commercial use. Moreover, the variations between distribution networks in the retail price of fuel for non-commercial use are greater than the amount of variations that can result from the measure. According to the French authorities, no complaints about distortive effects of the measure have been received during its application.

As regards the exclusion from the scope of the measure of gas oil for commercial use, French or EU road hauliers who meet the conditions for partial refund of excise on gas oil for commercial use would be subject to the same rate of excise duty, irrespective of the region in which they bought the fuel. The planned arrangements would maintain the current refund procedure, completely offsetting the effects of the rate reductions decided on by the regions through equivalent reductions in the amount of the refund on gas oil for commercial use. The arrangements would not therefore distort competition in the transport sector or affect trade within the EU. They would not constitute a state aid, the French authorities submit, since road haulage companies would be subject to the same rate of excise duty on gas oil for commercial use irrespective of the region in which they bought it.

Arguments of France concerning the period of application of the measure

With regard to the duration of the arrangement, France stresses that to allow the policies pursued by the regions to apply for a certain length of time the derogation should be renewed for a period of six years. The three-year period set by Decision 2011/38/EU has proven particularly short and was justified only by the unusual nature of the measure and the concerns of Member States which feared that it might distort competition. Initially the measure in question was to accompany the move towards decentralisation in France. In this context, a period of application of three years is particularly short and unsuited to the objective pursued since such a timescale does not provide any clarity to the regions. Since none of the supposed difficulties associated with the measure has materialised, the French authorities therefore request a period of application of six years for the renewal of this derogation.

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.

According to Decision 2011/38/EU, the national measure in question fulfils this requirement. It follows from the Decision that the regional differentiation of rates, as part of a wider decentralisation policy, aims at the specific policy objective of increasing administrative effectiveness. It was considered that the possibility of regional differentiation offers regions an additional incentive to improve the quality of their administration in a transparent fashion. The same decision requires that the reductions be linked to the socio-economic conditions of the regions in which they were applied.

In this regard, the information supplied by France confirmed that a link can indeed be established between application of a regional rate below the national rate and the socio-economic conditions of the regions concerned.

During the period of application of Decision 2011/38/EU (2010, 2011 and 2012), respectively two (Poitou-Charentes and Corse), five (Ile-de-France, Poitou-Charentes, Rhone-Alps, Provence-Alps-Cote d'Azur and Corse) and three regions (Poitou-Charentes, Rhone-Alps and Corse) applied a downward tax differentiation.

Most of the regions which applied the downward adjustment reported GDP per capita below the national average. One of the regions in addition reported a higher unemployment rate compared to the average national level of unemployment.

It can therefore be concluded that the possibility to modulate the national rate downward seems to have offered the regional authorities the possibility to use the tax in question in a way adapted to the socio-economic circumstances prevalent in their territory.

Consistency with the other policies and objectives of the Union.

According to Article 19(1), third subparagraph, of the Directive, each request shall be examined taking into account, inter alia, the proper functioning of the internal market, the need to ensure fair competition and Community health, environment, energy and transport policies.

This examination has already been conducted at the occasion of the previous requests by France and which has led to the adoption of Decision 2005/767/EC and Decision 2011/38/EU. As stated in these Decisions, the general mechanics of the measure were found not to create any obstacles to intra-EU trade; at the same time a number of conditions were fixed in order to ensure that the application of the derogation would not lead to any problem with the functioning of the internal market and would not counteract the achievement of the EU's policy objectives especially in the fields of energy, climate change and environment.

For a possible renewal of the scheme as requested by France, the Commission therefore has to assess whether, in light of the conditions laid down in Article 1(2) and (3) of the previous decision, compliance with the objectives and policies set out in Article 19(1), third subparagraph, of the Directive, has been achieved during its application, so that the same can be predicted, in principle, for the period from 1 January 2013.

In this context, it has also to be verified whether the EU policy context has undergone a relevant change since the adoption of Decision 2011/38/EU or risks to undergo a future change material to the assessment.

Internal market and fair competition

The risk of competitive distortions was considered low as Decision 2005/767/EC and Decision 2011/38/EU set low maximum amounts for the reductions. Hence, the differentiation of duty rates between regions remains small and might not even exceed price differences between distribution networks. Moreover, commercially used gas oil is excluded from the application of the measure.

As for the levels of differentiation, a strict limit was set namely that the reductions are no greater than €35.4 per 1000 litres of unleaded petrol or €23.0 per 1000 litres of gas oil. This condition has been respected by France.

The experience gathered with the application of the derogation does not seem to raise doubts as to the assessment reached in 2005 and 2011. The Commission is not aware of any complaints about distortive effects of the measure on intra-EU trade.

No obstacles to the proper functioning of the internal market have been reported either as regards more particularly the circulation of the products in question in their capacity as products subject to excise duty.

As regards the State aid aspect, it should first be repeated that commercially used gas oil is excluded from the measure. However, as far as other business users not falling under the definition of Article 7(3) of the Energy Taxation Directive benefiting from the reduced rates are concerned, or to the extent that competition on the level of producers of oil products is affected, the measure might constitute State aid in accordance with Article 107(1) of the TFEU. Provided that the reduced rates are above the EU minima, to the extent the measure would constitute State aid, it would be covered by Article 25 of Regulation 800/2008/EC⁴ (the "General Block Exemption Regulation") and would thus be considered compatible with the internal market. However, as the period of validity of the General Block Exemption Regulation ends on 31 December 2013 any aid inherent in the measure would need to be notified to the Commission under State aid rules, in case the Commission would not have adopted a new Regulation comparable to the General Block Exemption Regulation or in case such new Regulation would not contain a rule equivalent to the present Article 25.

Union energy, climate change and environment policies

Taxes on energy products have the effect of lowering the demand for these products and therefore also reduce emissions related to their consumption. The Commission therefore has to assess whether the reduction of rates applied in certain regions does not lead to an increase in fuel consumption (and thus related emissions) that would be in contradiction with the objectives quoted above.

Decision 2011/38/EC noted that the introduction of the possibility for a downward adjustment of rates was accompanied by an increase in the underlying national rate in France. It concluded that it was unlikely that the overall effect of the new scheme would be a reduced incentive for fuel efficiency since the application of the derogation did not allow regions to go below the rate in force on national level before the introduction of the scheme. Decision 2011/38/EC also concluded that there was little risk that the regional variations would lead to differences in retail prices that would induce traffic detours as the level of differentiation was low and these were superseded by differences in retail prices among distribution networks. It was therefore expected that the measure would not, in principle, come into contradiction with EU energy, climate change and environment policy.

⁴ Commission Regulation (EC) No 800/2008/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3.

No new elements regarding these matters have come to the Commission's attention, and the assessment referred to remains valid.

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

The Commission proposal of 13 April 2011 for a revision of the Energy Taxation Directive⁵ provides for a permanent derogation that would allow France, within certain limits, to apply differentiated levels of taxation at the level of the French regions. Hence, the Commission is of the view that the period of application of a new Council Decision should be limited to three years and shall, in any case, expire on the day on which those modified rules become applicable.

Independently from the above, it should also be recalled that, according to the above mentioned proposal energy taxation would be split into two components. This system would be different from the one of Directive 2003/96/EC as it currently stands and on which the present authorisation is based. It is important not to undermine such future general developments of the existing legal framework. Consequently, it is also appropriate to provide that, should the Council, acting on the basis of Article 113 of the Treaty, introduce a modified general system for the taxation of energy products to which the present authorisation would not be adapted, this Decision shall expire on the day on which those modified rules become applicable.

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

Consultation of interested parties

This proposal is based on a request made by France 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 France to derogate from the general provisions of Council Directive 2003/96/EC and to apply, within defined limits, differentiated levels of taxation to gas oil and unleaded petrol.

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 Community within the meaning of Article 3 TFEU.

However, the exercise by Member States of their concurrent 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.

⁵ COM(2011)169

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.

Choice of instruments

Instrument 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 and administrative burden on the EU. The proposal therefore has no impact on the EU budget.

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THE COUNCIL 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 electricity⁶, and in particular Article 19(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Council Implementing Decision 2011/38/EU (hereafter "Decision 2011/38/EU") authorises France to apply, for a period of three years, differentiated levels of taxation to gas oil and unleaded petrol for the purposes of an administrative reform involving the decentralisation of certain specific powers previously exercised by central government. Decision 2011/38/EU expires on 31 December 2012.
- (2) By letter dated 10 February 2012, France requested authorisation to continue to apply differentiated rates of taxation under the same conditions for a further six years after 31 December 2012.
- (3) Decision 2011/38/EC was adopted on the basis that the measure requested by France met the requirements set out in Article 19 of Directive 2003/96/EC, allowing tax exemption or reduction, but no tax increase, for specific policy reasons. In particular, it was considered that the measure would not hinder the proper functioning of the internal market. It was also considered that it was in conformity with the relevant Community policies.
- (4) The national measure is part of a policy designed to increase administrative effectiveness by improving the quality and reducing the cost of public services, as well as a policy of subsidiarity. It offers regions an additional incentive to improve the quality of their administration in a transparent fashion. In this respect, Decision 2011/38/EU requires that the reductions be linked to the socio-economic circumstances of the regions in which they are applied. Consequently, a number of regions with either lower than average GDP or higher than average unemployment have applied lower rates. Overall, the national measure is based on specific policy considerations.
- (5) The tight limits set for the reduction of rates on a regional basis as well as the exclusion of gas oil used for commercial purposes from the measure imply that the risk of competitive distortions in the internal market is very low. Moreover, the application of the measure so far has shown a strong tendency on behalf of regions to

⁶ OJ L 283, 31.10.2003, p. 51.

levy the maximum rate allowable, which has further decreased any potential for competitive distortions.

- (6) No obstacles to the proper functioning of the internal market have been reported as regards, more particularly, the circulation of the products in question in their capacity as products subject to excise duty.
- (7) When originally requested, the national measure had been preceded by a tax increase equal to the margin for regional reductions. Against this background and in light of the conditions of the authorisation as well as experience gathered, the national measure does not, at this stage, appear to be in conflict with EU energy and climate change policies.
- (8) It follows from Article 19(2) of Directive 2003/96/EC that each authorisation granted under this Article must be strictly limited in time. Moreover, the Commission proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity⁷ provides for a permanent rule allowing France, within certain limits, to apply differentiated levels of taxation at the level of the French regions. It is therefore appropriate to limit the period of application of this Decision to three years and to stipulate that, in any event, this Decision expires once the said permanent rule becomes applicable. Moreover, in order not to undermine future general developments of the existing legal framework, it is also important to provide that, should the Council introduce a modified general system for the taxation of energy products to which the present authorisation would not be adapted, this Decision shall expire on the day on which the rules on this modified system become applicable.
- (9) It should be ensured that France can apply the specific reduction to which this Decision relates seamlessly following on from the situation existing before 1 January 2013, under Decision 2011/38/EU. The authorisation requested should therefore be granted with effect from 1 January 2013.
- (10) This Decision is without prejudice to the application of the Union rules regarding State aid,

HAS ADOPTED THIS DECISION:

Article 1

1. France is hereby authorised to apply reduced rates of taxation to unleaded petrol and gas oil used as motor fuel. Gas oil for commercial use within the meaning of Article 7(2) of Directive 2003/96/EC shall not be eligible for any such reductions.
2. Administrative regions may be permitted to apply differentiated reductions provided the following conditions are fulfilled:
 - (a) the reductions are no greater than EUR 35,4 per 1 000 litres of unleaded petrol or EUR 23,0 per 1 000 litres of gas oil;
 - (b) the reductions are no greater than the difference between the levels of taxation of gas oil for non-commercial use and gas oil for commercial use;
 - (c) the reductions are linked to the objective socio-economic conditions of the regions in which they are applied.

⁷ COM(2011)169 of 13 April 2011.

- (d) the application of regional reductions does not have the effect of granting a region a competitive advantage in intra-Union trade.
3. The reduced rates must comply with the requirements of Directive 2003/96/EC, and in particular the minimum rates laid down in Article 7

Article 2

This Decision shall be applicable from 1 January 2013 and shall expire on 31 December 2015.

However, this Decision shall expire on the day one of the following modifications to Directive 2003/96EC becomes applicable:

- the general system for the taxation of energy products is modified in a manner to which the present authorisation is not adapted;
- France is authorised to apply differentiated levels of taxation at the level of the French regions.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels,

*For the Council
The President*