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2018/0287 (NLE)

Proposal for a

**COUNCIL IMPLEMENTING DECISION**

**authorising Spain to apply a reduced rate of excise duty to electricity directly provided to vessels at berth in a port, in accordance with Article 19 of Directive 2003/96/EC**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

Taxation of energy products and electricity in the Union is governed by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity<sup>1</sup> (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 Spain to apply a reduced rate of excise duty to electricity directly provided to vessels at berth in a port (hereafter referred to as 'shore-side electricity'). This reduction is meant to create an economic incentive for the deployment and 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 Spain is also to reduce the environmental impact of maritime transport.

By letter dated 12 April 2018, the Spanish authorities informed the Commission of their intention to apply a reduced rate of EUR 0.50 per MWh of electricity tax to shore-side electricity from 1 July 2018 for a period of 6 years. This tax rate is equal to the minimum rate of taxation for electricity for business use as laid down in Directive 2003/96/EC.

With the requested measure Spain wants to create 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. Currently, Spain applies an *ad valorem* excise duty on electricity of 5.11269632 % on the final price, including all taxes and fees except excise duties and value added tax. The Spanish legislation also requires that the minimum levels laid down in Article 10(1) and Table C of Annex I to the Directive are respected, i.e. that a specific excise duty of EUR 0.50 per MWh for business use and EUR 1 per MWh for non-business use of electricity is levied where the *ad valorem* excise duty would result in a lower tax liability.

Currently shore-side electricity is taxed at the general rate of 5.11269632 % levied on the price of electricity. The Spanish authorities estimate the price of electricity excluding excise duties and value added tax at around EUR 170 per MWh and the tax rate on shore-side electricity, expressed in EUR per MWh is approximately EUR 8.69. The Commission's analysis of the electricity market in the EU suggests that on average the prices of electricity for the industrial sector in Spain are lower<sup>2</sup>. Either way, the actual excise duty due per MWh for shore-side electricity at present is above EUR 0.50.

On the other hand, according to Article 14(1)(c) of the Energy Taxation Directive Member States have to exempt energy products used to produce electricity on board ships at berth in

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<sup>1</sup> OJ L 283, 31.10.2003, p. 51

<sup>2</sup> Cf. COM(2016) 769 final of 13 November 2016.

ports and may also do so in the case of electricity produced on board ships for navigation on inland waterways according to Article 15(1)(f) of the Directive.

Spanish authorities have indicated that the tax reduction would apply to all ships other than private pleasure craft<sup>3</sup>, meaning that all ships involved in commercial navigation, regardless of size or flag, will benefit from the tax reduction.

The Spanish authorities have informed the Commission that at present there are no shore-side electricity facilities in place at the Spanish ports and the tax expenditures from the measure are difficult to estimate. The Spanish authorities also indicate that there will be no obligation for vessels to use shore-side electricity. Their calculations suggest that the tax reduction should result in maximum annual tax expenditures of approximately EUR 150 000. This result is based on estimated total number of commercial ships that could be supplied with shore-side electricity of 2 700, electricity consumption by ships in Spanish ports of approximately 20 000 MWh per year and an electricity price of EUR 170 per MWh including all taxes and fees except excise duties and value added tax.

Spain requested the authorisation to be granted for a period of 6 years, which is the maximum period indicated in Article 19(2) of the Directive, starting from 1 July 2018.

With the tax reduction Spain wants to provide an incentive for vessel operators to use shore-side electricity in order to reduce airborne emissions and noise from the combustion of fuels by vessels at berth as well as CO<sub>2</sub> 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 tax exempt.

- **Consistency with existing policy provisions in the policy area**

Taxation of electricity is governed by Directive 2003/96/EC, in particular Article 10. Article 14(1)(c) provides for an obligatory tax exemption for electricity produced on board a craft. Articles 5, 15 and 17 provide for the possibility for Member States to apply tax differentiations, including exemptions and reductions, to certain uses of electricity. However, as such, these provisions do not provide for reduced taxation of shore-side electricity.

The measure constitutes State aid and falls within the ambit of the EU legislation on this subject matter, in particular Commission Regulation 651/2014/EU<sup>4</sup>.

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

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 Spanish 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. The Commission has already

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<sup>3</sup> The term ‘private pleasure craft’ is defined in Article 14(1)(c), second subparagraph of Directive 2003/96/EC.

<sup>4</sup> 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).

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<sup>5</sup>. Currently electricity supplied to vessels at berth would be taxed at approximately EUR 8.69 per MWh. The requested tax reduction would thus lead to an additional incentive for the use of this technology approximately equal to EUR 8 per MWh and therefore contribute to the stated policy objective.

The possibility to introduce a favourable tax treatment to shore-side electricity can be envisaged under Article 19 of the Directive since its purpose is to allow Member States to introduce further exemption or reductions for specific policy considerations.

Spain has requested that the measure should apply for the maximum period allowed by Article 19(2), i.e. 6 years. 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 in shore-side electricity facilities. Six years will provide the maximum possible legal certainty also to ship operators which have to plan their investments in on-board equipment.

#### *State aid rules*

The reduced tax rate of EUR 0.50 per MWh envisaged by the Spanish authorities is equal to 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 this stage whether all the conditions set in this Regulation are fulfilled and the proposal for a Council implementing decision does not prejudice the Member State's obligation to ensure compliance with State aid rules, in particular, in case of exempted aid, falling under Commission Regulation 651/2014/EU.

- **Consistency with other Union policies**

#### *Environment and climate change policy*

The requested measure concerns mainly the EU's environment 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. In its Article 13, Directive 2008/50/EC on Ambient Air Quality<sup>6</sup> requires Member States to ensure that the levels of several air pollutants are kept below the limit values established in the Directive. This obligation requires Member States 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.

The measure is also likely to lead to a reduction of CO<sub>2</sub> emissions to the extent that the electricity mix from the onshore grid, due to higher system efficiency and the difference in input fuels used, is less carbon intensive than the electricity produced on board by burning bunker fuels. In this context it can be noted that according to the Spanish authorities, since the sources of energy provided by the electricity network are partially renewables (38 % in 2015

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<sup>5</sup> 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).

<sup>6</sup> 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, 11.6.2008, p 1).

and increasing, with an estimation of around 90-100 % in 2050), they expect that the use of shore-side electricity will lead to greenhouse gas emissions reductions in Spain. 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<sub>2</sub> reductions resulting from the measure could be relatively significant.

### *Energy policy*

The measure is in line with Directive 2014/94/EU on the deployment of alternative fuels infrastructure<sup>7</sup> 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 also been recognised as an objective of common interest for the granting of State aid under Article 107(1) of TFEU<sup>8</sup>.

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 situation 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 Spain to apply a reduced rate of taxation.

### *Transport policy*

The 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<sup>9</sup> and with the Commission Communication Strategic goals and recommendations for the EU's maritime transport policy<sup>10</sup>.

### *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

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<sup>7</sup> 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).

<sup>8</sup> C(2014) 2231 final of 9 April 2014.

<sup>9</sup> 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).

<sup>10</sup> 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.

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<sup>11</sup> and would therefore not, in any event, represent a significant competitive benefit for 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 Spain will respect the minimum level of taxation prescribed by Directive 2003/96/EC for electricity for business use. Furthermore, access to shore-side electricity will be available for the ships concerned regardless of their flag without leading to a more advantageous tax treatment of national economic operators over their competitors from other EU Member States.

Concerning competition between ports, it can be expected that 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, will be negligible. 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 8 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.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

Article 19 of Council Directive 2003/96/EC.

- **Subsidiarity (for non-exclusive competence)**

The field of indirect taxation covered by Article 113 of TFEU is not in itself within the exclusive competence of the European Union within the meaning of Article 3 of 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**

The proposal respects the principle of proportionality. The tax reduction does not exceed what is necessary to attain the objective in question.

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<sup>11</sup> 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](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).

- **Choice of the instrument**

Instrument proposed: Council implementing decision.

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

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

The measure does not require the evaluation of existing legislation.

- **Stakeholder consultations**

This proposal is based on a request made by Spain 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 and does not require an impact assessment.

The information provided by Spain suggests that the measure will have a limited impact on tax revenues and the excise duty rate for shore-side electricity will still be above the minimum level of taxation set in Directive 2003/96/EC. Spain expects the measure to have a positive impact on the achievement of its environmental goals and in particular the improvement of local air quality in port cities.

- **Regulatory fitness and simplification**

The measure does not provide for a simplification. It is the result of the request made by Spain and concerns only this Member State.

- **Fundamental rights**

The measure has no bearing on fundamental rights.

### **4. BUDGETARY IMPLICATIONS**

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.

### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

An implementation plan is not necessary. This proposal concerns an authorisation for a tax reduction for an individual Member State upon its own request. It is provided for a limited period of six years. The tax rate that will apply will be equal to the minimum level of taxation set by the Energy Taxation Directive. The measure can be evaluated in case of a request for a renewal after the six-year period has expired.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 stipulates that Spain will be allowed to apply a reduced rate of excise duty on electricity directly supplied to vessels berthed in Spanish ports. The tax rate must not be less than EUR 0.50 per MWh, i.e. the minimum level of taxation for electricity for business use set by the Directive. It will not be possible to supply electricity at a reduced rate to private pleasure craft as defined in Article 14(1)(c), second subparagraph of Directive 2003/96/EC.

Article 2 stipulates that the authorisation requested is granted with effect from the date of its notification for the maximum period allowed by the Directive of 6 years, as requested by Spain.

Proposal for a

## **COUNCIL IMPLEMENTING DECISION**

**authorising Spain to apply a reduced rate of excise duty to electricity directly provided to vessels at berth in a port, in accordance with Article 19 of Directive 2003/96/EC**

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<sup>1</sup>, and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letter of 12 April 2018, Spain sought authorisation to apply a reduced rate of excise duty to electricity directly provided to vessels at berth in a port ('shore-side electricity') pursuant to Article 19(1) of Directive 2003/96/EC.
- (2) With the reduction in the excise duty that it intends to apply, Spain aims to promote 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) Insofar 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 in local air quality in port cities. Under the specific conditions of the electricity generation structure in Spain, the use of electricity from the onshore grid instead of electricity generated by burning bunker fuels on board is furthermore expected to reduce CO<sub>2</sub> emissions. The measure is therefore expected to contribute to the environmental, health and climate policy objectives of the Union.
- (4) Allowing Spain to apply a reduced rate of excise duty 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 Spain, 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.
- (5) In accordance with Article 19(2) of Directive 2003/96/EC each authorisation granted under that provision is to 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 general provisions on the matter that may be adopted under Article 113 of the Treaty on the Functioning of the European Union

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<sup>1</sup> OJ L 283, 31.10.2003, p. 51.

(TFEU) and that become applicable prior to the anticipated expiration of the authorisation period..

- (6) This Decision is without prejudice to the application of Union rules regarding State aid,

HAS ADOPTED THIS DECISION:

*Article 1*

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

*Article 2*

This Decision shall take effect on the date of its notification. It shall expire six 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 expire on the day on which those general rules become applicable.

*Article 3*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels,

*For the Council  
The President*