



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.11.2006
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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

**in accordance with Article 19(1) of Council Directive 2003/96/EC
(operation of private pleasure craft)**

1. INTRODUCTION

In accordance with Article 19(1) of Council Directive 2003/96/EC¹ restructuring the Community framework for taxation of energy products and electricity (hereafter referred to as the "Energy Tax Directive" or the "Directive"), in addition to the provisions foreseen in the Directive, 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 tax exemptions or tax reductions for specific policy considerations.

The Commission shall examine the requests. Afterwards, it shall either present a proposal to the Council or, alternatively, shall inform the Council of the reasons why it has not proposed the authorisation of such a measure.

Within a broader framework of review of derogations expiring in the Energy Tax Directive by the end of 2006, Belgium, the United Kingdom and Malta submitted a request for authorisation to derogate from 2007 onwards from the provisions of the Energy Tax Directive for fuels used for navigation in private pleasure craft. These letters were registered with the Directorate General for Taxation and Customs Union².

The purpose of this communication is to inform the Council of the reasons why the Commission has not proposed such authorisations.

2. SUMMARY OF THE REQUEST

2.1. The Belgian request

Belgium would like to apply full tax exemption to gas oil supplied for use as fuel for private pleasure craft. The intended measure refers both to navigation within Community waters and inland waterways. The purpose of this measure is to promote the development of pleasure navigation and tourism and to facilitate private boat owners the use of the same station-services than for the navigation exempt under Energy Tax Directive.

The request does not foresee any date of termination.

2.2. The United Kingdom request

The United Kingdom would like to apply a reduce rate of taxation (in the amount of GBP 6.44 pence a litre) to gas oil used as fuel for private pleasure navigation within Community waters and inland waterways.

The objectives of the requests are to avoid costs of transition that would be caused by the expiry of the derogation. Furthermore, the United Kingdom explained that the derogation pursues also regional policy objectives.

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; Directive last amended by Directives 2004/74/EC and 2004/75/EC (OJ L 157 of 30 April 2004, p. 87 and p.100).

² Letters registered on 13 October 2006 (Belgium and Malta) and on 16 October (United Kingdom).

The United Kingdom maintains that there are minimal benefits from the standard tax treatment in comparison to the costs and other consequences associated with the expiry of the derogation, or that these costs would even be disproportionate compared to the benefits that might be achieved through standard tax treatment. The United Kingdom further points out insignificant revenue gain and the small benefit in terms of carbon emission saved associated with introduction of the general tax treatment. In particular, the United Kingdom highlights the compliance costs for the boat owners and fuel suppliers as well as the administrative costs and enforcement difficulties for the administration associated with the end of the derogation. The United Kingdom further claims disproportionate negative effects on both the boating sector and many small businesses associated with it. In addition, according to the United Kingdom, expiry of the derogation will raise health and safety issues by reducing the number of refuelling stations along the coasts.

In addition, the United Kingdom contends that the derogation pursues regional policy objectives, as the expiry of the derogation would adversely affect tourism-focused regeneration schemes in disadvantaged coastal areas of the UK that have received significant investment from EU Structural Funds. The United Kingdom outlines that economic decline in coastal regions is a result of dependence upon traditional industries, such as fishing and boatbuilding. Coastal areas have received substantial assistance from the EU Structural and Cohesion Funds to aid economic re-generation and diversification. The United Kingdom expressed concern over the possibility coastal re-generation in the UK (Scotland) might be undermined by the expiry of the derogation.

The request foresees a date of termination by 31 December 2011.

2.3. The Maltese request

Malta would like to apply full tax exemption to gas oil used as fuel by private pleasure sea craft for outbound voyages.

The purpose of the measure is to compensate the tourism sector for Malta's insularity and peripheral location at the extreme southern border of the European Union and for the strong competition from operators based in non-European countries which are not subject to Community excise legislation. Malta considers that the measure would not be detrimental to the proper functioning of the internal market nor result in distortions of competition, due to its geographical position and the rigorous controls in place to ensure the correct application of the measure. Furthermore, Malta underlines the importance of the derogation as a marketing tool to attract services like maintenance and repair works which are provided together with the supply of the exempt fuel. Finally, Malta stresses the importance of the activity for the tourism and the negative effects of the end of the derogation in the employment and growth in the sector.

The request foresees a date of termination by 31 December 2012

3. BACKGROUND TO THE REQUESTS

According to Article 14(1)(c) of the Energy Tax Directive, Member States shall exempt from taxation energy products supplied for use as fuel for the purpose of navigation within

Community waters (including fishing), other than private pleasure craft³. Traditionally, Member States may extend such exemption to navigation in inland waterways (currently contained in Article 15(1)(f)). These provisions were for the first time introduced into Community excise legislation in 1992⁴ and in both cases private pleasure navigation is explicitly excluded from them. As a result, the operation of private pleasure craft is subject to standard taxation according to national rates in compliance with the Directive, unless a particular derogation is available under Articles 18, 18a or 19 of the Directive.

The gradual phasing-out of the derogations in point, now contained in Articles 18 and 18a with annexes II and III to the Directive, was initiated by the Commission in its review of derogations undertaken in 2000 when it stated that these derogations should end with the forecasted entry into force of the Energy Tax Directive or, in any case, at the latest on 31 December 2002⁵. In the end, the derogations were extended until 31 December 2006 and were later incorporated into the Energy Tax Directive with the view to allow for their smooth phasing-out. The same termination date was chosen for Malta in the context of its accession to the Community (Article 18a and Annex III).

In its June 2006 Communication *Review of derogations in Annexes II and III of Council Directive 2003/96/EC that expire by the end of 2006* (hereafter referred to as "the 2006 Communication")⁶ the Commission stated that the favourable tax treatment of fuel used for the activity in point, compared to fuel used for comparable (transport or leisure) activities, should not be renewed. The Commission has at the same time invited the Member States in case they consider that for specific policy considerations a further derogation is still necessary, to submit a request in accordance with Article 19 of the Directive duly justifying the policy needs.

4. EVALUATION BY THE COMMISSION

The Commission considers that Belgium, the United Kingdom and Malta have to an important extent reiterated arguments already examined in the 2006 Communication (the expiry of the derogation will cause high compliance and administrative costs, risk of fraud and can negatively affect the development of the activity)⁷.

As mentioned in the 2006 Communication, the Council, acting unanimously under the procedure set out in Article 93 EC, has deliberately chosen, as a general regime, to subject fuel used in private pleasure craft to standard taxation. This choice reflects fundamentally the policies and interests listed in Article 19(1), third indent, of the Directive. These include the

³ Private pleasure craft is defined as "any craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities".

⁴ Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (OJ L 316 of 31.10.1992); Directive repealed together with Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils as from 31 December 2003 by means of Council Directive 2003/96/EC.

⁵ COM (2000) 678 of 15 November 2000.

⁶ COM(2006) 342 of 30 June 2006 *Review of derogations in Annexes II and III of Council Directive 2003/96/EC that expire by the end of 2006*.

⁷ Cf. the 2006 Communication, sub 2.2.2

proper functioning of the internal market, the need to ensure fair competition and Community, environment, energy and transport policies.

Against this background an authorisation under Article 19 should not be granted for reasons which are merely inherent in the switch from the derogation to standard taxation. This applies obviously to the administrative burdens and compliance and/or enforcement difficulties, including safety issues⁸ resulting from the change itself. It also applies, however to the general business consequences (for the sector, for associated businesses or tourism) that could follow from standard taxation of the activity in question, even in a longer term perspective. By definition, such general consequences do not correspond to the notion of specific policy considerations within the meaning of Article 19 of the Energy Tax Directive.

The interests and policies set out in Article 19 (1), third indent, equally oppose the granting of an authorisation by reference to the above mentioned grounds.

From the point of view of the **internal market and fair competition**, taxation should be as neutral as possible to avoid tax-induced behaviour within the Community without fiscal frontiers. The derogation granted to certain Member States does not affect this reasoning. It should be considered as aimed at overcoming initial difficulties encountered with the implementation of a new legislation. Taking into account that fuel used in private pleasure craft has, in principle, been taxable in the Community since 1993 and that Articles 18 and 18a of the Energy Tax Directive have put a clear time limit to the corresponding derogation within this Directive, those reasons of transitional nature do not justify, today, an authorisation under Article 19 of the Directive.

To the extent that any anticipated loss of business activity (as alleged by some of the Member States concerned by the derogation) would reflect corresponding gains of Member States applying standard taxation, this would confirm that reasons of fair competition plead against the granting of an authorisation under Article 19 of the Directive, which would perpetuate the distortion.

From the point of view of Community **environment, energy and transport policies** the Commission does not see any reason why the activity in point should be treated for tax purposes more favourably than comparable other (transport or leisure) activities. The purpose of energy taxation is not only to generate revenue, but it is increasingly considered as a useful tool for internalising the negative externalities related with energy consumption which are important elements of the above Community policies. At the same time, energy taxation has an incentive effect towards improvements in energy efficiency which again should apply also to the operation of private pleasure craft. Under this perspective, the mere incentive effect the tax exemption granted hitherto may have had on the development of private pleasure crafting cannot justify a further derogation from the general rules.

Finally, it is appropriate, in addition, to consider certain more specific arguments raised by some of the applicant Member States.

First of all the Commission has to reject the arguments presented by Malta. It is true that harmonised taxation may in certain cases have effects on competition with third countries. However, these have already been taken account by the Council within Article 14 of the

⁸ As regards environmental and safety aspects, these are dealt with in corresponding legislation. They are unrelated to the rules of the Energy Tax Directive.

Energy Tax Directive. In this regard, the Council has found that these aspects warrant so far an exemption in the case of commercial navigation, but not in the particular field concerned by the present communication, namely operation of private pleasure craft (cf. 23rd recital of the Energy Tax Directive). In addition, and quite apart from the competitive impact of the derogation on the development of the sector in other Member States in general, the Commission refers to the geographic location of Malta. In view of this, it cannot be excluded that the authorisation requested may distort competition with other Mediterranean destinations.

Secondly, with regards to the regional policy arguments put forward by the United Kingdom, the Commission would like to point out that the derogation for the United Kingdom has never been formally considered as an instrument of regional policy. In addition, the support provided by the Structural Funds was neither targeted, specifically, to the operation of private pleasure navigation, nor was it based on the premise that the United Kingdom could continue to derogate from the Energy Tax Directive.⁹

Finally, the Commission cannot accept the proportionality argument raised by the United Kingdom. This argument takes the temporary derogation granted under Article 18 as the starting point, which directly conflicts with the fact that the Community legislator set standard taxation as the starting point. This also puts into the right perspective a related argument made by the United Kingdom, namely that environmental benefits of a switch to standard taxation would be limited. The mere fact that the overall consumption through private navigation may not exceed certain limits simply means that the exemption is limited in reach. It does not mean that proportionality would require unequal treatment with comparable transport or leisure activities. Moreover, the fact that the implementation may require some extra effort cannot be decisive either. It is in the nature of tax administration that implementing costs may differ across the various fields, and this does imply specific policy considerations which would need to be taken into account in the context of Article 19 of the Directive.

5. CONCLUSION

All in all the Commission considers that Belgium, the United Kingdom and Malta have not presented any specific policy considerations that would justify their need to further derogate from the legislation enacted in the EU on unanimity at two occasions already and that would justify the existence of a fiscal measure that clearly contradicts several Community policies. The arguments put forward by the Member States concerned rather represent consequences of the existence of the derogation itself for a long period of time.

The Member States have had enough time to adjust to the new situation taking into account that this and similar derogations have been under discussion in the Community at least since 1996 and the Commission repeatedly insisted on the necessity to phase them out. This is equally valid for Malta in which case the time limit for the derogation under Article 18a of the Energy Tax Directive was fixed so as to coincide with the time limit fixed for similar derogations available at that time for some of the fifteen existing Member States.

⁹ Besides, the Commission notes that the figures available to it show significantly lower amounts of Structural Funds investment in tourism-related ventures for the purpose of coastal regeneration than those quoted by the United Kingdom.

Should the expiry of the derogation cause difficulties in very specific or particular circumstances and provided that they respect Community law in all respects¹⁰, the applicant Member States may adopt measures aimed at alleviating or mitigating problems of transition to the regime of standard taxation.

The Commission therefore concludes that the conditions set out in Article 19 are not fulfilled. On this basis, **the Commission does not propose the authorisations requested.**

¹⁰ Including, in particular, the Treaty rules on State aids.