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Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Germany to apply a reduced rate of taxation on 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

Taxation of energy products and electricity in the Union is governed by Council Directive 2003/96/EC ⁽¹⁾ (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

On 12 July 2011 the Council adopted Council Implementing Decision 2011/445/EU 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 ⁽²⁾. This Decision expires on 16 July 2014.

By letter dated 26 February 2014, the German authorities requested a new authorisation decision which will allow Germany to continue to apply the tax reduction. Germany has requested the reduction to be granted for six years.

With the requested measure Germany wants to continue to provide 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. If the measure is not authorised shore-side electricity will have to be taxed at the general national rate of the electricity tax, which is EUR 20.50 per MWh.

On the other hand, Article 14(1)(c) of the Energy Taxation Directive obliges Member States to exempt energy products used as fuel by ships for navigation within EU waters. 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 for navigation on inland waterways according to Article 15(1)(f) thereof which also covers the production of electricity on board. Thus in most cases the system of taxation based on the Energy Taxation Directive does not affect the costs for 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.

Germany would like to continue to apply a reduced rate of EUR 0,50 per 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 EU waters as well as inland waterways, with the exception of private pleasure crafts. According to the calculations of the German authorities for the three-year period of application of the measure, the average annual tax expenditure was approximately EUR 2.2 million. According to the Federal Government estimates, during the

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

⁽²⁾ OJ L 191, 22.07.2011, p. 22.

next six years this hypothetical budgetary expenditure can be expected to gradually increase to EUR 3-4 million per year.

With the tax reduction Germany wants to continue to provide an incentive for vessel operators to use shore-side electricity in order to reduce pollution from airborne emissions and noise from vessels at berth as well as CO₂ 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.

The German authorities informed the Commission that at present of all German sea ports, only the port of Lübeck has facilities to provide shore-side electricity of higher electrical load. Besides on-shore facilities, the port provides also ‘power barges’, i.e. floating installations for combined heat and power generation running on liquefied natural gas. The building of static shore-side electricity supply facilities in the port of Hamburg is planned for May 2014 and it includes equipping two cruise ship terminals with shore-side electricity facilities at the Altona terminal. There are also plans for providing power barges for the Hafencity terminal.

As regards inland ports, shore-side electricity facilities are more widespread and there are plans for further development.

Germany considers that this measure is in line with Commission Recommendation 2006/339/EC⁽³⁾ 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⁽⁴⁾. In this regard, it is noted that from June 2011 on, Member States have an unconditional obligation to meet air quality standards for relevant pollutants like particulate matter⁽⁵⁾. This 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 an overall air quality strategy.

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

The German authorities claim that the measure would not affect the proper functioning of the internal market and would not lead to a distortion of competition. Germany allows the tax advantage to be provided both as a reduced tax rate charged at supply and as a tax refund. In case of application of the reduction at supply, the electricity provider might not pass on or pass on only part of the tax advantage to the final consumer, i.e. the ship operator. Still according to the German authorities the tax advantage is normally passed on. But even in the cases where the tax reduction is fully passed on to the ship operators which receive shore-side electricity taxed at the minimum level provided for in Directive 2003/96/EC, they do not actually gain an economic advantage over operators generating their own electricity on board 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.

The German authorities informed the Commission that at this juncture they do not have figures on the number of ship operators using shore-side electricity facilities and cannot provide a full assessment of the trend of shore-side electricity use due to the short period of

⁽³⁾ 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).

⁽⁴⁾ COM(2009) 8 final of 21 January 2009.

⁽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).

application of the measure. On the basis of the available information they consider that there was a considerable increase in the use of shore-side electricity in particular for vessels at berth in ports situated on the inland waterways.

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 continue 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 advantages⁽⁶⁾. Without the measure electricity supplied to vessels at berth will have to be taxed at EUR 20.50 per MWh in Germany. The requested reduction represents an additional incentive for the use of this technology equal to EUR 20 per MWh and therefore contributes 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 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. According to the information provided by the German authorities, sea-going vessels demand facilities capable of supporting high electrical loads and at present only the port of Lübeck provides such facilities. There are plans to construct facilities in the port of Hamburg. Shore-side electricity facilities are available in higher numbers at the inland waterway ports where vessels normally have smaller electrical load requirements.

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 – An integrated maritime policy for the European Union⁽⁷⁾ and the accompanying Commission staff working document⁽⁸⁾. The measure is in line with the Commission proposal for a directive on the deployment of alternative fuels infrastructure which addresses the issue of installing shore-side electricity supply facilities in ports where this is cost-effective and presents environmental benefits⁽⁹⁾.

The Commission suggested shore-side electricity provided to ships while at berth in port to be exempted from energy taxation in its proposal for revision of the Energy Taxation

⁽⁶⁾ Cf. note 3 above.

⁽⁷⁾ COM(2007) 575 final of 10 October 2007.

⁽⁸⁾ SEC(2007) 1278 final of 10 October 2007.

⁽⁹⁾ COM(2013) 18 final of 24 January 2013.

Directive ⁽¹⁰⁾. However the Commission proposal has not been adopted yet by the Council. In the meantime economic operators in Germany and the German authorities should be provided with legal certainty as regards the tax measures applied for the purpose of promoting the use of shore-side electricity. Currently the only possibility to introduce a favourable tax treatment to shore-side electricity is provided by Article 19. However 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 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 ⁽¹¹⁾. To indicate the scale of the environmental problem, Germany gives the example of the port of Lübeck-Travemünde where ships account for 90 % of sulphur dioxide and around 80 % of nitrogen oxide emissions. The German authorities provide the following comparison, based on annual electricity consumption of 5 584 MWh, between the estimated annual emissions resulting from the use of shore-side electricity in the port of Lübeck and those from the use of marine gas oil, meeting sulphur content limits set in the EU Sulphur Directive ⁽¹²⁾, used to generate electricity on-board:

	NOx	SO ₂	CO ₂
Green electricity from hydropower	0.078 t	0.056 t	0 t
Marine gas oil	3.571 t	6.026 t	4251.9 t

Estimates provided by the Hamburg port authorities indicate that the planned shore-side electricity facilities should reduce on an annual basis emissions compared to the use of marine gas oil at the Altona terminal by about 39 t or by 74 % for NOx, about 1.1 t or 62 % for SO₂ and about 0.5 t or 5 % for fine particulate matter. Running these facilities with the normal German electricity mix should result in a reduction in CO₂ of approximately 1 050 t or 19 % per year. The planned supply of electricity from renewable sources could lead to a much bigger reduction of CO₂ emissions of 3 354 t per year, depending on the performance of the electricity generation facilities. The reduction in air pollutant emissions through the use of power barges running on liquefied natural gas supplying electricity for cruise liners at the Hafencity terminal should result in a reduction of 51 t or 73 % for NOx emissions. After deducting 5 t of annual NOx emissions from the barges the result in total is emission reduction of 46 t per year. Emissions should be reduced by 1.5 t or 58 % for SOx and 0.7 t or 48 % per year for fine particulate matter with no additional emissions from the power barges. CO₂ emissions should be reduced by 1 824 t or 26 % per year if liquefied natural gas were

⁽¹⁰⁾ COM(2011) 169 final of 13 April 2011.

⁽¹¹⁾ 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.

⁽¹²⁾ Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (OJ L 121, 11.05.1999, p. 13–18).

used instead of marine gas oil. Residual emissions from the auxiliary boiler (for on-board heat) have been taken into account in the estimations.

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 exempted 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 exempted (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 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 agreement⁽¹³⁾, which Germany has ratified. It is also considered impractical to tax separately the input fuel used for the generation of electricity on board⁽¹⁴⁾ 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 keep the possibility for Germany 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.

⁽¹³⁾ 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).

⁽¹⁴⁾ Cf. Article 21(5), third subparagraph, of Directive 2003/96/EC.

As regards competition between vessel operators, it first has to be reiterated that according to the information available to the Commission 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 information⁽¹⁵⁾ and the data provided by Germany 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 and would therefore not, in any event, represent a significant competitive benefit 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 economically feasible 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 German authorities stress that the use of shore-side electricity is restricted not only due to the lack of port facilities or the higher costs but also because of lack of internationally agreed technical standards for connecting vessels to the electricity grid.

Finally, it can be added that the timeframe for which it is proposed to authorize the application of a reduced tax rate reflects to a large extent the timeframe in the Commission proposal of eight years for the tax exemption for shore-side electricity.

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. In this particular case the period of application of the measure would have been prolonged and the scale of the tax reduction increased by 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. It will also allow the German authorities to collect more data for a future reassessment of the measure.

⁽¹⁵⁾ 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).

State aid rules

The tax rate of EUR 0.50 per MWh envisaged by the German authorities respects the minimum level of taxation pursuant to Article 10 of Directive 2003/96/EC. The measure thus fulfils one of the conditions laid down in Article 44 of Commission Regulation (EU) No 651/2014⁽¹⁶⁾, which stipulates the conditions under which such a measure is exempted from the State aid notification requirements. However it cannot be established at this stage whether all the conditions set in the Regulation are fulfilled and the proposal for a Council Implementing Decision does not prevent the Commission from requiring from Germany to comply with State aid rules.

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

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.

⁽¹⁶⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 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, p. 1).

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.

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Germany to apply a reduced rate of taxation on 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 ⁽¹⁾, and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By Council Implementing Decision 2011/445/EU Germany was authorised to apply a reduced rate of taxation to electricity directly provided to vessels at berth in a port ('shore-side electricity') in accordance with Article 19 of Directive 2003/96/EC until 16 July 2014.
- (2) By letter dated 26 February 2014, Germany sought the authorisation to continue to apply a reduced rate of electricity tax to shore-side electricity pursuant to Article 19 of Directive 2003/96/EC.
- (3) With the tax reduction it intends to apply, Germany aims at continuing the promotion of 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.
- (4) 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 environmental, health and climate policy objectives of the Union.
- (5) Allowing Germany 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 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.
- (6) 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 to allow for the proper evaluation of the measure, but also the need not to undermine future developments of the existing legal framework, it is appropriate to

⁽¹⁾ OJ L 283, 31.10.2003, p. 51.

grant the authorisation requested for a period of six 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.

- (7) In order to provide legal certainty to port and ship operators and to avoid a potential increase in the administrative burden for the distributors and redistributors of electricity which could result from changes to the rate of excise duty levied on shore-side electricity, it should be ensured that Germany can apply the existing specific tax reduction to which this Decision relates without interruption. The authorisation requested should therefore be granted with effect from 17 July 2014, following seamlessly on from the prior arrangements under Council Implementing Decision 2011/445/EU.
- (8) This decision is without prejudice to the application of the Union rules regarding State aid,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision shall take effect on the day of its notification.

It shall apply from 17 July 2014.

It shall expire on 16 July 2020.

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*