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PROPOSAL

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To:	Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION authorising Portugal to apply reduced rates of excise duty to gas oil and unleaded petrol used as motor fuels, in accordance with Article 19 of Directive 2003/96/EC

Delegations will find attached document COM(2022) 408 final.

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2022/0251 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Portugal to apply reduced rates of excise duty to gas oil and unleaded petrol used as motor fuels, 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 European 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[1] (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 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.

Portugal is seeking authorisation to apply a temporary reduction of the national tax rates for gas oil and unleaded petrol used as motor fuels[2], below the minimum levels of taxation laid down in Article 7 of the Directive and Table A of Annex I to the Directive.

The requested period of validity is until 31 December 2022, which is within the maximum period allowed by Article 19(2) of the Energy Taxation Directive.

By letter dated 2 May 2022, the Portuguese authorities informed the Commission of their intention to apply the temporary measure. Additional information was provided on 11 and 23 May 2022, and on 8 June 2022.

According to the Portuguese authorities, the aim of the measure is to mitigate the high retail fuel prices associated with the consumption of motor fuels[3], resulting from the current geopolitical developments, and directly affecting both households and companies.

As regards energy prices and their trend, according to the figures provided by the Portuguese authorities, from the start of the year, prices (before taxes) have substantially risen for gas oil and for the most consumed type of unleaded petrol (*gasolina 95*)[4].

The table below provided by the Portuguese authorities shows the average end-of-month retail price together with the price components for each month from January to May 2022.

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1 OJ L 283, 31.10.2003, p. 51–70.

2 Gas oil, CN codes 2710 19 43 to 2710 19 48, and unleaded petrol, CN codes 2710 12 41, 2710 12 45 and 2710 12 49.

3 In Portugal, 6.4 million people have a driving licence.

4 Comparison done using DGEG (*Direção Geral de Energia e Geologia*) prices, from 21 February 2022 until 30 May 2022.

							Taxes				EUR /liters
Product	Date	CIF	Unload and storage	Biofuel incorporation	Gross margin	Price before taxes	ISP	CO2	CSR	VAT	Retail selling price (PVP)
Gas oil	31-01-22	0.619	0.006	0.112	0.071	0.807	0.333	0.059	0.111	0.301	1.612
	28-02-22	0.647	0.006	0.111	0.094	0.858	0.333	0.059	0.111	0.313	1.675
	28-03-22	0.982	0.006	0.069	0.099	1.156	0.296	0.059	0.111	0.373	1.995
	25-04-22	0.915	0.006	0.069	0.110	1.099	0.296	0.059	0.111	0.360	1.926
	30-05-22	0.945	0.006	0.104	0.061	1.116	0.168	0.059	0.111	0.335	1.789
Unleaded petrol	31-01-22	0.580	0.006	0.108	0.087	0.781	0.507	0.054	0.087	0.329	1.758
	28-02-22	0.633	0.006	0.106	0.096	0.841	0.507	0.054	0.087	0.343	1.832
	28-03-22	0.810	0.006	0.066	0.134	1.016	0.490	0.054	0.087	0.379	2.027
	25-04-22	0.780	0.006	0.075	0.113	0.974	0.490	0.054	0.087	0.369	1.975
	30-05-22	1.012	0.006	0.104	0.081	1.203	0.331	0.054	0.087	0.384	2.055

According to Portugal, the excise duty appears to be the only price component on which it is possible to intervene to reduce retail prices in the short term. Hence, in its view, the derogation is necessary to remedy the current spike in energy prices in Portugal.

Indeed, according to the Portuguese authorities, it is not possible to reduce the **first two price components** in the table above (i.e. *international prices for brent and oil derivatives (CIF)* and *unload and storage costs*) because they are determined by the competitive forces of supply and demand in international markets.

As regards the **third price component** in the table above (*biofuel incorporation costs*)[5], according to the Portuguese authorities, reducing or suspending the biofuel incorporation targets would have the following negative impacts:

(i) missing the relevant RED II[6] targets (thus raising greenhouse gas emissions by increasing the fossil component in fuels);

(ii) damaging the biofuel industry and the animal feed production industry; and

(iii) increasing energy dependence due to greater use of imported fossil fuels.

Therefore, in Portugal's view, it does not seem reasonable or appropriate to change the biofuel incorporation targets, especially for diesel. Additionally, the weight of biofuel incorporation in the PVP[7] of fuels (gasoline and diesel) is less than 4%[8].

As regards the **fourth price component** in the table above (*gross margin*), in addition to other policy measures, the Portuguese government and the national energy regulator have already put in place periodic monitoring and public disclosure of price trends, notably in view

[5] At national level, Decree Law 117/2010 of 2 October 2010, in its current wording, lays down a mandatory incorporation target for biofuels of 11%.

[6] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82) (Renewable Energy Directive II).

[7] *Preço de Venda ao Público* (retail price).

[8] According to data from the latest fuel market bulletin published by *Entidade Reguladora dos Serviços Energéticos*.

of an excise duty reduction, to check if fuel sellers pass on the full reduction to final consumers. From 1 June 2022 onwards, they have also put in place a mechanism to limit commercial margins, following a proposal of the regulator, whenever these margins exceed efficient levels or historic margins.

Finally, the government is currently reducing **excise duty**[9] in a flexible way, based on market behaviour and fuel prices. This may result in tax rates lower than the minima set at EU level. This mechanism, in the form of 'yo-yo rates', substantially aims to counter fluctuations in consumer prices[10].

Additionally, in that context, gross margins, in particular on gas oil, are falling short considering the Directive's minimum levels of taxation.

In light of the foregoing, the Portuguese authorities consider that because of the current socio-economic circumstances, the system provided for in Article 19 of the Directive must be applied to allow tax reductions below the minima stipulated in the Directive.

If, for example (based on price trends observed so far), prices (before taxes) increase by 35% for gas oil and by 50% for unleaded petrol, using the above-mentioned flexible rate, Portugal would need to reduce the taxation level to EUR 278/1 000 litres for gas oil and EUR 357/1 000 litres for unleaded petrol. This would fall below the minimum rates laid down in the Directive.

Given the current level of uncertainty and the market variables, the Portuguese authorities are unable to estimate the prices for the next 6 months. Based on the previously mentioned price increase assumptions, they would reduce the tax rate for gas oil to EUR 270/1 000 litres and for unleaded petrol to EUR 350/1 000 litres. Both rates would fall below the minima laid down in Article 7 of the Directive and Table A of Annex I to the Directive, of EUR 330/1 000 litres and EUR 359/1 000 litres respectively.

The table below shows the estimations provided by the Portuguese authorities.

[9] Referred to in the table above as ISP (*Imposto sobre os Produtos Petrolíferos*), CO_2 and CSR (*Contribuição de Serviço Rodoviàrio*).

[10] The weekly revision of excise duties consists of a reduction by an amount deemed equivalent to a theoretical reduction of the rate of value added tax (VAT) on road fuel from 23% (normal rate) to 13% (higher reduced rate), ultimately returning the extraordinary amount of VAT collected due to the increase of the market price of the concerned products.

Hypothetical scenarios

Product	Date	Monthly variation	Price before taxes	ISP	CO2	CSR	VAT	PVP	VAT rate	Fixed fiscal burden
Gas oil	30-06-22	35%	1.506	0.122	0.054	0.087	0.407	2.176	23%	0.670 Gas oil
	31-07-22	-10%	1.356	0.121	0.059	0.111	0.379	2.026	23%	0.848 Unleaded petrol
	31-08-22	-10%	1.220	0.146	0.059	0.111	0.353	1.890		
	30-09-22	-10%	1.098	0.169	0.059	0.111	0.331	1.768		
	31-10-22	-10%	0.988	0.190	0.059	0.111	0.310	1.658		
Unleaded petrol	30-06-22	50%	1.804	0.210	0.054	0.087	0.496	2.652		
	31-07-22	-10%	1.624	0.244	0.054	0.087	0.462	2.471		
	31-08-22	-10%	1.461	0.274	0.054	0.087	0.432	2.309		
	30-09-22	-10%	1.315	0.302	0.054	0.087	0.404	2.163		
	31-10-22	-10%	1.184	0.326	0.054	0.087	0.380	2.031		

Finally, as highlighted by the Portuguese authorities, energy products will not be taxed differently depending on the location of the headquarters or the nationality of either the supplier or the consumer, and any consumer may have access to this type of products.

The budget impact cannot be quantified at this stage, as it will depend on fuel prices.

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

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 requested tax reduction, which is to be applied for a limited period of time, the Portuguese authorities intend to mitigate the exceptionally high retail prices of fuels, and ultimately reduce the social and economic impacts of the present exceptional geopolitical situation affecting both households and companies.

The tax reduction would allow beneficiaries to be charged national excise duty rates that can fall below the EU minimum tax rates provided for in the Energy Taxation Directive. In the present exceptional geopolitical situation, this would be of relevance to the social cohesion policy considerations. However, based on the above-mentioned mechanism, the reduction of the excise duty would depend on the relevant fuel prices.

The possibility to introduce such a tax reduction can be envisaged under Article 19 of the Directive since its purpose is to allow Member States to introduce further exemptions or reductions for specific policy considerations.

The limited period of validity of the authorisation, until 31 December 2022, is within the maximum period allowed by Article 19(2) of the Energy Taxation Directive, laying down, for this type of measure, a maximum period of 6 years, with the possibility of renewal.

However, the derogation should not undermine the future adoption by the Council of a legal act based on a Commission proposal for amendment of the Energy Taxation Directive[11].

State aid rules

The temporary tax reduction envisaged by the Portuguese authorities can fall below the minimum levels of taxation as laid down in Article 7 of the Directive and Table A of Annex I to the Directive.

The present proposal is without prejudice to any assessment of the Portuguese measure under State aid rules. Moreover, the proposal for a Council implementing decision does not prejudge the Member State's obligation to ensure compliance with State aid rules.

- **Consistency with other Union policies**

Each request for derogation under Article 19 of the Energy Taxation Directive must be examined by the Commission taking into account the proper functioning of the internal market, the need to ensure fair competition and EU health, environment, energy and transport policies.

According to the Portuguese authorities, the envisaged tax reduction should partially alleviate the social and economic burden of the Portuguese population due to the recent price increase resulting also from the conflict in Ukraine. Indeed, the particular geopolitical situation, coupled with a high market price of crude oil, which is likely to further rise in the upcoming months, translates into higher costs for the Portuguese households and businesses.

As a result of this exceptional situation, the requested temporary measure is not likely to affect intra-EU trade. Given its limited effects and limited duration, the measure should not distort competition or hinder the functioning of the internal market.

As underlined in the RePowerEU Communication[12], while focusing on vulnerable households and businesses, the Commission invites Member States to adopt measures incentivising energy savings and reducing fossil fuels consumption. Nonetheless, given its short duration and the current exceptional circumstances linked to the geopolitical situation coupled with an exceptionally high market price of oil, the requested derogation seems adequate and proportionate. The measure takes account also of the need to balance the specific policy objectives listed in Article 19 of the Energy Taxation Directive, and notably the EU's environmental policy, with the imperative emergency to ensure energy affordability for businesses and households.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 19 of Council Directive 2003/96/EC.

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[11] Proposal for a Council directive restructuring the Union framework for the taxation of energy products and electricity (recast), 14.7.2021, 563 final 2021/0213 (CNS).

[12] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *REPowerEU: Joint European Action for more affordable, secure and sustainable energy* (COM(2022) 108 final, 8.3.2022).

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

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, 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 reductions do not exceed what is necessary to attain the objective in question.

The requested authorisation is for a limited period of time, until 31 December 2022.

- **Choice of the instrument**

The instrument proposed is a 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 Portugal and concerns this Member State only.

- **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.

- **Regulatory fitness and simplification**

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

- **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 European 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 time. The applicable tax rates can fall below the minimum levels of taxation set by the Energy Taxation Directive. The measure can be evaluated in case of a request for a renewal after the validity period has expired.

- **Explanatory documents (for directives)**

The proposal does not require explanatory documents on the transposition.

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

Article 1 stipulates that Portugal will be allowed to apply reduced taxation rates to gas oil and unleaded petrol used as motor fuels, below the minimum levels of taxation.

Article 2 stipulates that the authorisation requested is granted until 31 December 2022, as requested by Portugal, within the maximum period of 6 years allowed by the Directive.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity[1], and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By letter dated 2 May 2022, Portugal requested authorisation to apply reduced rates of excise duty to gas oil and unleaded petrol used as motor fuels pursuant to Article 19 of Directive 2003/96/EC, which can fall below the minimum levels of taxation referred to in Article 7 of that Directive. Additional information and clarifications in support of the request were provided by the Portuguese authorities on 11 and 23 May 2022, as well as on 8 June 2022. The authorisation was requested to apply until 31 December 2022.

(2) According to the Portuguese authorities, the application of a reduced tax rate aims at mitigating the social and economic impacts of high retail prices of fuels resulting from the geopolitical situation, and directly affecting both households and companies. This measure aims to meet the daily needs associated with the consumption of motor fuels, by contributing to reduce the impact of the increase of retail prices.

(3) The requested authorisation is not likely to distort competition or hinder the proper functioning of the internal market. Given its short duration and the exceptional circumstances linked to the geopolitical situation coupled with an exceptionally high market prices of crude oil, the requested authorisation is considered to be adequate and proportionate. The authorisation balances the specific policy objectives referred to in Article 19(1) of Directive 2003/96/EC, and notably the Union’s environmental policy, with the imperative emergency to ensure energy affordability for businesses and households. The tax reduction would partially offset the increased energy costs and is not cumulative with any other type of tax reductions.

(4) Portugal should therefore be authorised to apply reduced rates of excise duty to gas oil and unleaded petrol used as motor fuels, as requested.

(5) Pursuant to Article 19(2) of Directive 2003/96/EC, each authorisation granted under that provision is to be strictly limited in time. However, in order not to undermine future general developments of the existing legal framework, it is appropriate to provide that, should the Council, acting on the basis of Article 113 or any other

[1] OJ L 283, 31.10.2003, p. 51.

relevant provision of the Treaty on the Functioning of the European Union, introduce a modified general system for the taxation of energy products and electricity to which this authorisation would not be adapted, this authorisation should cease to apply on the day on which those general rules become applicable.

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

HAS ADOPTED THIS DECISION:

Article 1

Portugal is authorised to apply reduced rates of excise duty to gas oil and unleaded petrol used as motor fuels, below the relevant minimum levels of taxation referred to in Article 7 of Directive 2003/96/EC.

Article 2

This Decision shall apply until 31 December 2022.

However, should the Council, acting on the basis of Article 113 or any other relevant provision of the Treaty on the Functioning of the European Union, introduce a modified general system for the taxation of energy products and electricity to which the authorisation granted in Article 1 of this Decision would not be adapted, this Decision shall expire on the day on which those general rules become applicable.

Article 3

This Decision is addressed to the Portuguese Republic.

Done at Brussels,

For the Council
The President