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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION authorising Denmark to apply a reduced rate of taxation to electricity directly provided to vessels at berth in a port in accordance with Article 19 of Directive 2003/96/EC

Delegations will find attached document COM(2021) 211 final.

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COM(2021) 211 final

2021/0110 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Denmark to apply a reduced rate of taxation 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[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 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.

By virtue of Council Implementing Decision 2015/993/EU of 19 June 2015[2], Denmark was authorised to apply a reduced rate of taxation to electricity directly supplied to vessels, other than private pleasure craft[3], berthed in ports ('shore-side electricity').

The objective of this proposal is to extend that authorisation as requested by Denmark, given that the current derogation expires on 18 June 2021.

By letter dated 5 May 2020, the Danish authorities informed the Commission of their intention to prolong the current measure until 17 June 2027. Additional information was provided by letter dated 16 February 2021.

The intention of the Danish authorities is to continue to apply a reduced rate of 0.4 øre per KWh (app. EUR 0.535 per MWh [4]) of excise duty to shore-side electricity. At the time of the submission of the request proposed tax rate was in accordance with the minimum rate of taxation for electricity for business use as laid down in Directive 2003/96/EC. Article 13 of the Directive lays down a 5% tolerance limit for Member States that have not adopted the euro.

It is recalled that Article 13 of the Energy Taxation Directive obliges Member States to check once a year if the tax rates expressed in national currencies are in line with the minimum rates of the Directive. This exercise is done using the exchange rates published in the Official Journal of the European Union on the first working day of October. Member States may maintain the amounts of taxation in force at the time of the annual adjustment only if the conversion of the amounts of the level of taxation expressed in euro would result in an increase of less than 5% or EUR 5, whichever is the lower amount, in the level of taxation expressed in national currency.

The requested period of validity of the derogation is from 18 June 2021 until 17 June 2027, which is in continuity with the current derogation and within the maximum period allowed by Article 19 of the Energy Taxation Directive.

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1 OJ L 283, 31.10.2003, p. 51–70.

2 OJ L 159, 25.06.2015, p. 68–69.

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

4 All calculations are based on the exchange rate on 1 October 2019, i.e. DKK 7,4662 for EUR 1. Cf. OJ C 329/03 of 1.11.2019

The aim of reducing the tax is 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. The measure will reduce emissions of air pollutants from vessels lying at berth.

The reduction involves lowering the energy tax applicable to shore-side electricity from the otherwise applicable level of ore 89.2 øre per KWh (rate 2020) to 0.4 øre per KWh.

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 –and electricity produced- on board ships at berth in ports. They may also exempt electricity produced on board ships for navigation on inland waterways according to Article 15(1)(f) of the Directive. Denmark confirmed the transposition of that latter optional exemption.

Denmark intends to apply the reduced rate of taxation to all supplies of shore-side electricity of at least 380 V to vessels used for commercial shipping. The limit is considered appropriate by the Danish authorities so as to ensure that the absolute majority of vessels used in international traffic and larger vessels used in national traffic will be covered by the proposed reduction. Those are the vessels considered to be responsible for the largest part of emissions caused by the running of auxiliary motors on board while berthed in ports. The reduction does not apply when the ship is used for private purposes or when it is laid up or has been taken out of service on a long-term.

There is however no obligation for vessels to use shore-side electricity.

The Danish authorities consider that the measure is neutral with respect to competition, since it is available to all ships (except ships for private use) at berth in Danish ports.

The Danish authorities consider that the tax reduction applied to shore-side electricity does not create a significant competitive benefit for vessel operators using shore-side electricity as opposed to those using on board generation. Even a full exemption would in most cases not reduce the operational costs of shore-side electricity below the operational costs of on board generation.

The Danish authorities have informed the Commission that they expect that the tax reduction will result in annual tax expenditures of approximately DKK 15 million (EUR 2 million). The assumption is based on the estimated electricity consumption by cruise ships in Danish ports in 2008 of approximately 16.9 million KWh, which corresponds to an annual budgetary expenditure of DKK 15 million. The Danish authorities indicate that the statements for use of shore side electricity are subject to a great deal of uncertainty.

The measure is granted in the form of a tax relief reducing the tax burden on the electricity concerned.

- **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 energy products for navigation as well as 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[5].

Provisions under the Energy Taxation Directive

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 Danish 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 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].

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.

Denmark has requested that the measure applies 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 and electricity suppliers from continuing or starting to make the necessary investments in shore-side electricity facilities. This period will provide the legal certainty also to ship operators, which have to plan their investments in on-board equipment.

However, the derogation should not undermine future developments of the existing legal framework and should take into account the upcoming revision of the Energy Taxation Directive and a possible adoption by the Council of a legal act based on a Commission proposal for amendment of the Energy Taxation Directive. Such review follows the evaluation of the Energy Taxation Directive[7] and the Council Conclusions on the EU energy taxation framework from 28 November 2019[8]. In its Conclusions, the Council invited the Commission to analyse and evaluate possible options with a view to publishing in due course a proposal for the revision of the Energy Taxation Directive. It also called on the Commission to give particular consideration to the scope of the Directive, to minimum rates and to specific tax reductions and exemptions.

Under these circumstances, while it appears appropriate to grant the authorisation for the requested period, the validity of the derogation should be made subject to the entry into application of general provisions in the matter at a point in time earlier than June 2027.

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5 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. 1–78)

6 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).

7 SWD (2019) 329 final.

8 Council conclusions of 28 November 2019, 14608/19, FISC 458.

State aid rules

The reduced tax rate of 0.4 øre per KWh (app. EUR 0.535 per MWh[9]) envisaged by the Danish authorities was at the time of the submission of the request in accordance with the minimum rate of taxation for electricity for business use as laid down in 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 prejudge 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 and climate change policy. To the extent that it will help to reduce the burning of bunker fuels on board the vessels in ports, the measure will contribute to the objective of improving local air quality and reducing noise. In its Article 13, Directive 2008/50/EC on Ambient Air Quality[10] requires Member States to ensure that the levels of several air pollutants are kept below the limit values, target values and other air quality standards established in the Directive are respected. Those obligations require 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 is encouraged as one element of the overall air quality strategy. The use of shore-side electricity is also encouraged under Directive (EU) 2016/802[11] regulating the sulphur content in marine fuels. That would also contribute to comply with nitrogen deposition requirements pursuant to Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. In this regards, the Danish authorities expect that local emissions of air pollutants (NOx, SOx, PM10, PM2.5) from on-board electricity generation on cruise ships could be reduced significantly, and up to 90 %, given that some auxiliary power and back-up power systems cannot be turned off.

Energy policy

The measure is in line with Directive 2014/94/EU on the deployment of alternative fuels infrastructure[12], 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

[9] All calculations are based on the exchange rate on 1 October 2019, i.e. DKK 7.4662 for EUR 1. Cf. OJ C 329/03 of 1.11.2019

[10] 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).

[11] Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels (OJ L 132, 21.5.2016, p. 58–78).

[12] 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)

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[13].

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 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 Denmark 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[14] and with the Commission Communication Strategic goals and recommendations for the EU's maritime transport policy[15].

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.

The Danish authorities have not observed considerable changes in the ship owners' choice of ports linked to the availability of shore-side electricity facilities. Presently mainly ferries and fishing vessels make use of the shore-side electricity. In addition, the Danish authorities mention, that cargo ships use shore-side electricity to a certain extent, but especially when they are in port for a longer period of time. The Danish authorities mention, that there are not yet facilities in the Danish ports for large ships, such as cruises or container ship, that use shoreside electricity.

As the scheme will reduce ships' costs, it will affect trade between Member States. The impact is estimated as minimal, however, as passengers' wishes and the destination of cargoes will determine whether ships call in Danish ports.

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13 C (2014) 2231 final of 9 April 2014.

14 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)

15 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.

Furthermore, the Danish authorities consider the scheme as competition-neutral, because access to shore-side electricity will be open to all vessels that meet the above conditions and call in Danish ports regardless of their flag without leading to a more advantageous tax treatment of national economic operators over their competitors from other EU Member States.

The restriction to apply the reduced rate of taxation to supplies of shore-side electricity of at least 380 V to vessels could be regarded as a distortion of the market. However, in practice there is no supply of shore-side electricity of less than 380 Volt to commercial vessels, electricity of this voltage is only supplied to small pleasure crafts.

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 prolong the authorization to apply a reduced tax rate, unless there will be significant changes in the current framework and situation, makes it unlikely that the analysis conducted in the 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.

• 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 Denmark 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 Denmark suggests that the measure will have a limited impact on tax revenues. In more detail, an estimation of the tax expenditures from the measure, according to the Danish authorities, a loss of DKK 15 million per year is expected for the coming years.

For historic reasons a great number of the commercial ports in Denmark have provided shore-side electricity for vessels. The Danish authorities have observed that in the last few years, several ports have installed and are planning to install facilities for bigger vessels, such as ferries sailing in regular international and national routes. It is also the case for cruise ships in international traffic. Also, some Danish ports have established mobile shore power plants for cargo ships. Ferries and cruise ships require new infrastructure installations to provide enough power.

Denmark authorities estimate the measure to have a significant positive impact on the achievement of its environmental goals and in particular the improvement of air quality in accordance with Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The use of shore-side electricity has led to emission reductions of sulphur dioxide, nitric oxides, particulate matter and carbon oxides. The full potential of the measure has not been reached since costly equipment is needed both on quays and on the ships.

- **Regulatory fitness and simplification**

The measure does not provide for a simplification. It is the result of the request made by Denmark 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 until 17 June 2027. The applicable tax rate will have to be in accordance with 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 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 Denmark will be allowed to apply a reduced rate of electricity taxation to electricity directly supplied to vessels, other than private pleasure craft, berthed in Danish ports ('shore-side electricity'). The tax rate must be in line with 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 18 June 2021, in continuity with the current Council Implementing Decision 2015/993/EU, until 17 June 2027, within the maximum period of 6 years allowed by the Directive, as requested by Denmark.

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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 Council Implementing Decision 2015/993/EU[2], Denmark was authorised to apply a reduced rate of taxation to electricity directly provided to vessels, other than private pleasure craft, at berth in a port ('shore-side electricity') in accordance with Article 19 of Directive 2003/96/EC until 18 June 2021.

(2) By letter of 5 May 2020, Denmark sought authorisation to continue to apply a reduced rate of electricity tax to shore-side electricity pursuant to Article 19 of Directive 2003/96/EC. The Danish authorities provided additional information by letter dated 16 February 2020.

(3) With the reduced tax rate that it intends to apply, Denmark aims at further promoting 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 than the burning of bunker fuels by those vessels.

(4) Insofar as the use of shore-side electricity avoids emissions of air pollutants originating from the burning of bunker fuels, it contributes to an improvement to the local air quality in port cities and to noise reduction. A continued reduced rate of taxation to shore-side electricity is therefore expected to contribute to the environmental, health and climate policy objectives of the Union.

(5) Allowing Denmark to apply a continued reduced rate of taxation to shore-side electricity does not go beyond what is necessary to increase the use of such electricity, since on-board generation of electricity 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 reduced rate of taxation is unlikely to lead to significant distortions in competition during its period of validity and will thus not negatively affect the proper functioning of the internal market.

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

[2] Council Implementing Decision (EU) 2015/993 of 19 June 2015 authorising Denmark 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 (OJ L 159, 25.06.2015, p. 68).

(6) Each authorisation granted under Article 19(2) of Directive 2003/96/EC is to be strictly limited in time. In order to ensure that the authorisation period is sufficiently long so as not to discourage relevant economic operators from making the necessary investments, it is appropriate to grant the authorisation until 17 June 2027. However, the authorisation should cease to apply from the date of application of any general provisions on tax advantages for shore-side electricity adopted by the Council under Article 113 or any other relevant provision of the Treaty on the Functioning of the European Union, should such provisions become applicable prior to 17 June 2027.

(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, the authorisation requested should follow seamlessly on from the prior arrangements under Implementing Decision 2015/993/EU.

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision shall apply from 18 June 2021 until 17 June 2027.

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, 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 Kingdom of Denmark.

Done at Brussels,

For the Council
The President