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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	24 May 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 267 final
Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION authorising Poland to apply reduced rates of excise duty to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, in accordance with Article 19 of Directive 2003/96/EC

Delegations will find attached document COM(2023) 267 final.

Encl.: COM(2023) 267 final

EUROPEAN
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Brussels, 24.5.2023
COM(2023) 267 final

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Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising Poland to apply reduced rates of excise duty to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, in accordance with Article 19 of Directive 2003/96/EC

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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.

Poland is seeking an authorisation to apply a temporary reduction to the national tax rates for heavy fuel oil, natural gas, coal, and coke, used as heating fuels, below the minimum levels of taxation laid down in Article 9 of the Directive and in Table C of Annex I to the Directive.

The requested period of validity is limited to 6 months and is within the maximum period allowed by Article 19(2) of the Energy Taxation Directive.

By a letter dated 3 January 2023, the Polish authorities informed the Commission about their intention to apply that temporary measure from 1 January 2023 to 30 June 2023. The Polish authorities provided additional information on 15 February 2023.

The request for a derogation concerns the application of reduced taxation rates to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, in accordance with Article 19 of Directive 2003/96/EC. The social and economic situation caused by high inflation as well as the rising prices of energy products represent a serious problem for Polish society. At the same time, the rules of Directive 2003/96/EC concerning the annual revision of national tax rates expressed in national currencies other than the euro would require Poland to increase its national tax rates for the products in question.

The Polish authorities pointed out that the annual update of the minimum rates expressed in national currencies for Member States that have not adopted the euro, required on the basis of Article 13 of the Directive, in combination with the temporarily high – and unfavourable – euro-zloty (EUR/PLN) exchange rate on the first working day of October 2022, would require an increase in the levels of taxation applicable to the products concerned[2].

Although the exchange rate of the zloty since then has returned to a more favourable level, the procedure of Article 13 does not take that into consideration, and therefore the only way for Poland to maintain constant levels of taxation for the energy products concerned would be by means of a request for a derogation. Without this derogation, it would be necessary to increase the levels of taxation applicable to those products.

The objective of the Polish request is to mitigate the negative impact potentially deriving from such an increase by maintaining the relevant national tax rates at their current levels, below

[1] OJ L 283, 31.10.2003, pp. 51-70.

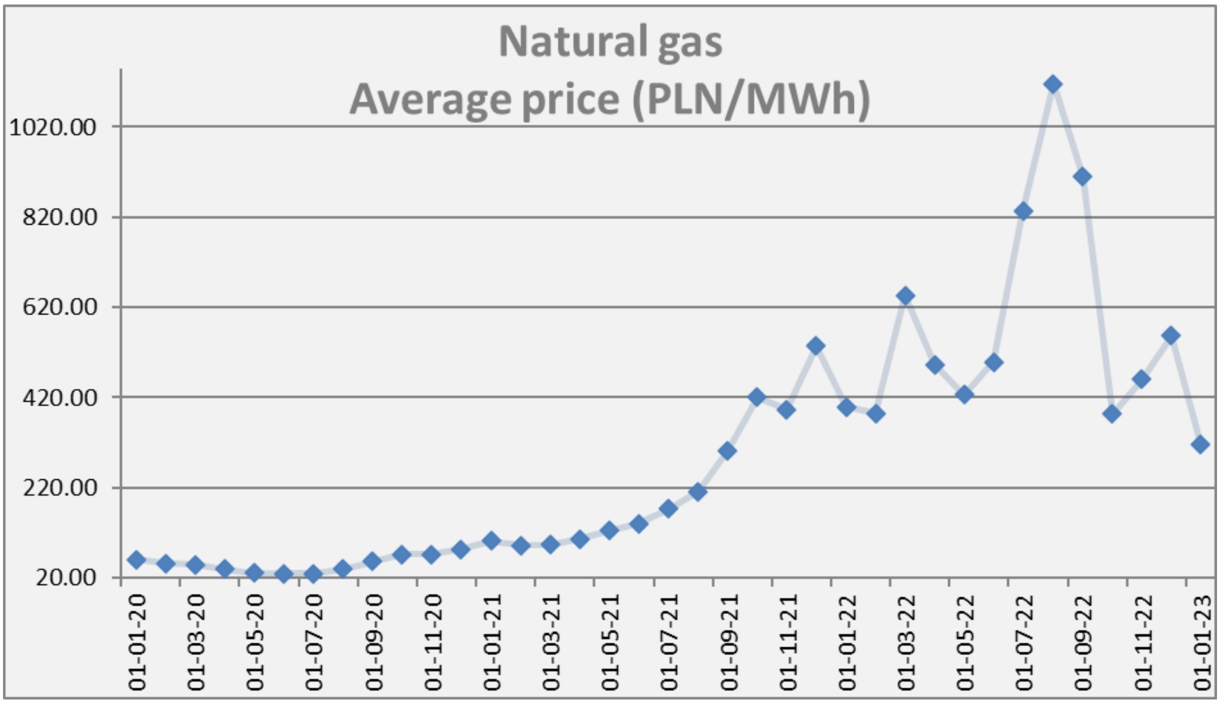
[2] In 2023, the exchange rate of PLN 4.8320 to the euro applies for excise-duty purposes (in 2022, this was equivalent to PLN 4.5826 to the euro).

the relevant minimum taxation levels laid down in the Directive. That would correspond to a reduction in the national tax rates expressed in euro compared to the minimum rates, resulting from the exchange-rate difference after annual adjustment carried out in accordance with Article 13 of the Directive. This non-indexation of national rates would also be applied to other energy products intended for heating purposes within the meaning of Article 2(3) of the same Directive.

Poland highlighted the importance of such a derogation due to the negative impact of the sharp increase in the price of energy, which is one of the consequences of the Russian invasion of Ukraine. Along with rampant inflation, the Polish authorities underlined that this situation directly affects both households and companies. In that respect, Poland specified that a reduction in the rate of excise duty would be available to all consumers purchasing heating fuels covered by the derogation request[3].

According to the information contained in the below charts provided by the Polish authorities, there was a substantial increase in 2022 in the prices of the energy products covered by the derogation request.

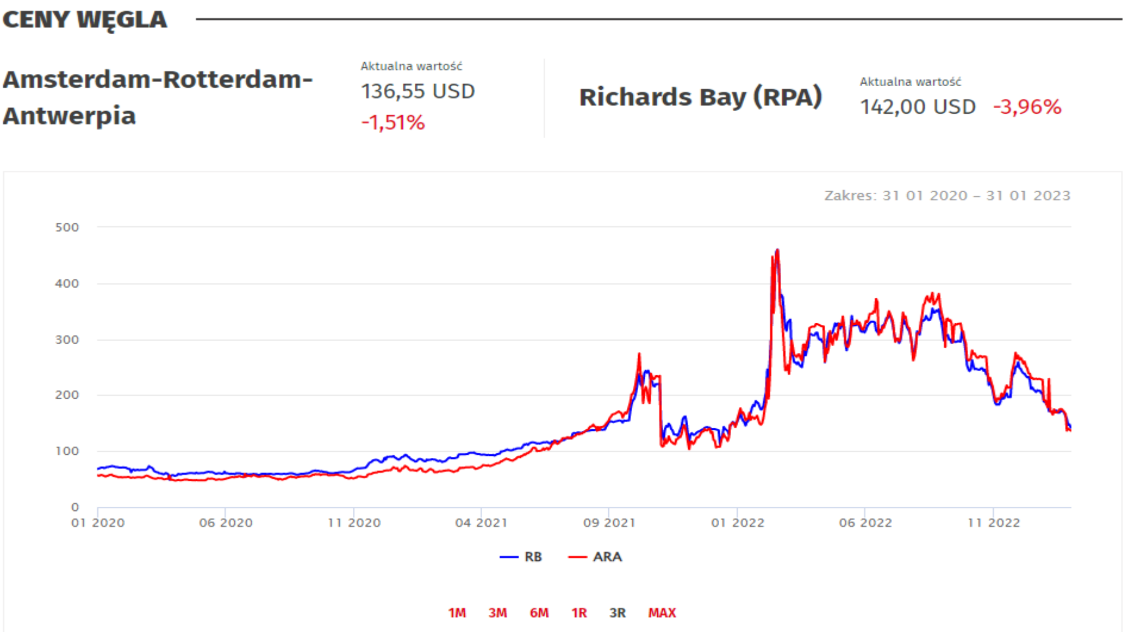
Chart 1 – Average price for natural gas (2020-2023)[4]



[3] According to national estimates, the number of direct beneficiaries has been calculated at approximately 6 600 taxpayers in Poland, mainly entrepreneurs (of which 6 200 are taxpayers submitting declarations on coal products).

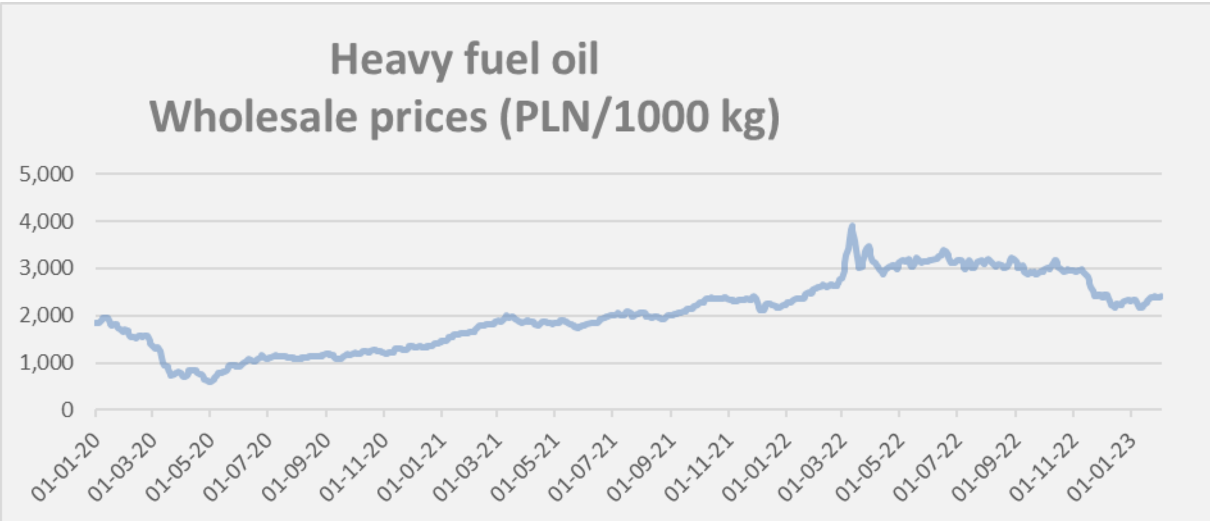
[4] Data on natural gas on the Polish Power Exchange (TGE).

Chart 2 – Spot price of coal in USD (2020-2022)[5]



According to the Polish authorities, the charts above illustrate the trends in historical coal and gas prices in the relevant wholesale markets, including the increase in prices in 2022 related to the effects of Russia's aggression against Ukraine.

Chart 3 – Wholesale prices for heavy fuel oil[6]



In addition to data on energy prices, the Polish authorities also provided the below table which compares the minimum levels of taxation as applicable under the Directive for each energy product covered by their request, together with the corresponding rates currently in force in Poland (January 2023). They emphasised that the excise-duty rates on heating fuels apply without distinction to both individual households and commercial customers.

5 Coal data based on the ARA Amsterdam-Rotterdam-Antwerp and Richards Bay (South Africa) markets.

6 Based on data on ORLEN wholesale prices.

Energy product	EU minima (EUR)	EUR/ PLN (2023)	EU minima in 2023 (PLN)	Excise duty in 2022 (PLN)	Excise duty in 2023 without changing the excise duty rate (EUR)	Difference between the EU minima and the actual taxation (PLN)	Difference between the EU minima and the actual taxation (EUR)	Change of the EU minima in relation to actual taxation (%)
Heavy fuel oil *(in PLN per 1 000 kg)*	15	4.832	72.48	69	14.2798	3.48	0.72	5.04
Natural gas *(in PLN per gigajoule gross calorific value)*	0.3	4.832	1.45	1.38	0.2856	0.07	0.01	5.04
Coal and coke *(in PLN per gigajoule gross calorific value)*	0.3	4.832	1.45	1.38	0.2856	0.07	0.01	5.04

In light of the above table, according to the Polish authorities, the difference between the minimum levels of taxation as laid down in the Directive and the Polish rates, corresponds to 5.04% for all the energy products covered by their request.

According to Poland, the excise duty appears to be the price component on which it is possible to intervene in the short term, in order to alleviate the undesirable effects of the annual adjustment carried out in accordance with Article 13 of the Directive.

To support their request, the Polish authorities also provided the Commission with the charts below, presenting: (i) the exchange rate as applicable on the first working day of each month in 2022 (chart 4); (ii) changes in this exchange rate in October 2022 (chart 5); and (iii) the average monthly exchange rate for 2022 (chart 6).

Chart 4 – EUR/PLN exchange rate on the first working day of each month (2022)

Chart 5 – EUR/PLN exchange rate in October (2022)

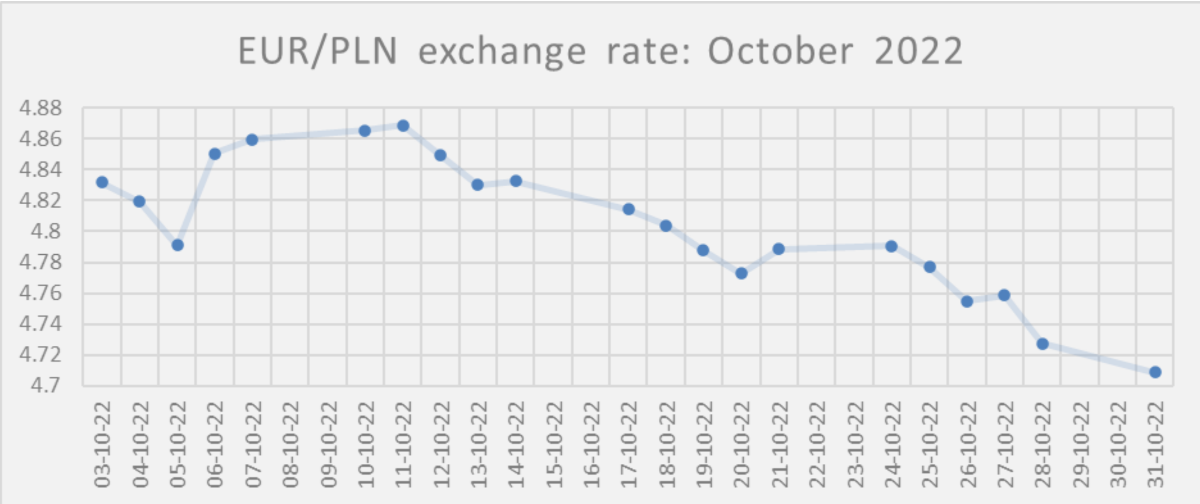
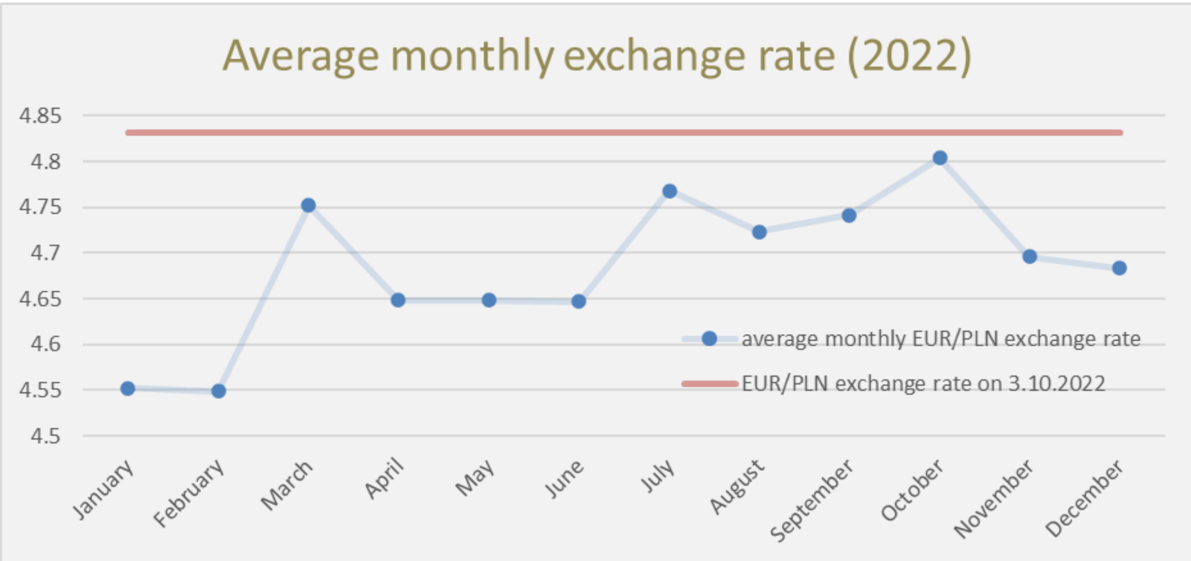


Chart 6 – Average monthly EUR/PLN exchange rate (2022)



In light of the information presented in the above charts, the Polish authorities stressed that using October 2022[7] as a reference for the annual adjustment in accordance with Article 13 of the Directive had a negative impact for Poland. To give further evidence of this adverse effect, they presented the below example emphasising that the excise-duty rates for the energy products covered by their request would have been within the minimum levels, as laid down in the Directive, if the annual adjustment had been based on the exchange rate as it stood in January 2022.

Energy products covered by the request	**EU minimum levels of taxation (in euro)**	**Excise-duty rate (in Polish zloty)**	**Tax rate based on average monthly EUR/PLN exchange rate in January 2022**	**Rate 2023**
Coal and coke (per gigajoule gross calorific value)	0.3	1.38	0.3 * 4.55 ≈ 1.37	No change needed
Natural gas (per gigajoule gross calorific value)	0.3	1.38	0.3 * 4.55 ≈ 1.37	No change needed
Heavy fuel oil (per 1 000 kg)	15	69	15 * 4.55 ≈ 68	No change needed

The Polish authorities also sent relevant information on the projected values of basic macroeconomic indicators for the years 2021-2026[8]. These indicate that the forecast EUR/PLN exchange rate in 2023 will be PLN 4.6470 to the euro (average). Therefore, according to their estimates, a monthly distribution of the forecast amount, i.e. PLN 4.6470, should be assumed until the end of 2023.

The Polish authorities considered that it was difficult to estimate the effect on the budget of the change in the rates of excise duty on the energy products covered. However, they confirmed that since the correction of the rates is minor, it should not have a significant

[7] On the first working day of October 2022, the said value was the highest for the year 2022 and amounted to PLN 4.832 to the euro.

[8] Based on daily energy prices on the Polish Power Exchange (TGE). Prices expressed in PLN/MWh; TGeBase day-ahead prices.

impact on budget revenues, especially since high prices of energy carriers generate higher budget revenues from VAT[9].

The budgetary implications for the period covered by the derogation request is estimated at PLN 9.2 million. The table below, provided by the Polish authorities, presents in this respect the budgetary implications for each of the energy products concerned.

Energy product	**Budgetary implications for the first half of 2023 (PLN million)**
Heavy fuel oil and other fuels used for heating	2.4
Natural gas and other gas fuels used for heating	4.8
Coal and coke	2.0

The derogation therefore appears necessary according to the Polish authorities.

At the end of the period covered by the derogation request, Poland plans to increase the excise-duty rates for the above-mentioned products so that they meet the EU minimum levels of taxation. At the same time, they do not exclude the possibility of applying for an extension to the derogation.

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

Article 13(1) requires that for Member States that have not adopted the euro, the value of the euro in national currencies to be applied to the value of the levels of taxation must be fixed once a year. The rates to be applied must be those obtaining on the first working day of October and published in the Official Journal of the European Union and will have effect from 1 January of the following calendar year.

Article 13(2) states that *"Member States may maintain the amounts of taxation in force at the time of the annual adjustment provided for in paragraph 1 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 increase in the relevant Polish national rates pursuant to Article 13(1) of the Directive would have been just over the 5% tolerance permitted under Article 13(2) of the same Directive.

[9] According to their estimates, for recipients who do not benefit from excise-tax exemptions (most of the entities using coal and natural gas for heating purposes are exempt from excise duty in accordance with Article 15(1)(h) of the Directive, e.g. households or energy-intensive business), the change means an increase in costs: in the case of **heavy fuel oil** by approx. 0.4 PLN/kg (approx. 0.5 PLN/kg with VAT), in the case of **coal** by approx. 1.67 PLN/tonne (2 PLN/tonne with VAT), and in the case of group E high-methane **natural gas** by approx. 0.2 PLN/cubic metre (0.27 PLN/kg/m^3 including VAT).

By asking for a derogation to allow the non-indexation of its national rates, the Polish authorities are asking for a very small (less than 1 percentage point) temporary increase in the tolerance level applicable to the annual adjustment of rates for a limited period.

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 derogation, limited in time, the Polish authorities intend to mitigate the negative impact that would result from an increase in the levels of taxation due to an unfavourably high euro-zloty exchange rate in application of Article 13 of the Directive. That reduction would correspond to the amount resulting from the exchange-rate difference after annual adjustment carried out in accordance with Article 13 of the Directive.

Poland considers that the temporary measure should partially alleviate the social and economic burden that Polish households and companies are enduring in the present geopolitical context. The Polish authorities pointed out in this respect that the tax reduction would be beneficial for the sellers of the covered energy products, as well as their consumers. In the current context, that would be of relevance to considerations of social-cohesion policy.

The possibility of introducing such a tax reduction can be permitted 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 6 months 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 to amend the Energy Taxation Directive[10].

State aid rules

The temporary tax reduction envisaged by the Polish authorities falls under the relevant minimum levels of taxation as laid down in the Directive.

The present proposal does not affect any assessment of the Polish 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: (i) the proper functioning of the single market; (ii) the need to ensure fair competition; and (iii) EU policies on health, environment, energy and transport.

[10] 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).

According to the Polish authorities, the objective of this tax reduction is to partially alleviate the social and economic burden the Polish population would face in the event of a tax increase due to the unfavourable euro-zloty exchange rate, coupled with rampant inflation affecting both households and businesses, partly due to the recent price increase resulting from the conflict in Ukraine.

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

As underlined in the RePowerEU Communication[11], while focusing on vulnerable households and businesses, the Commission invites Member States to adopt measures incentivising energy savings and reducing the consumption of fossil fuels. Nonetheless, given its short duration and the current exceptional circumstances linked to the geopolitical situation, the requested derogation seems appropriate and proportionate. The measure also takes account 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 of ensuring energy affordability for businesses and households.

Under these circumstances and given that the measure is temporary and limited in scope, it appears appropriate to grant the authorisation as requested.

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 TFEU is not in itself within the exclusive competence of the European Union within the meaning of Article 3 TFEU.

However, under 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 sent 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 tax reductions are applicable during a limited six-month period.

• Choice of the instrument

The instrument proposed is a Council implementing decision.

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[11] 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).

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 Poland 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 Poland 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. The 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 6 months.

The applicable tax rates will be below the minimum levels of taxation set by the Energy Taxation Directive.

The measure can be evaluated if there is 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 Poland will be allowed to apply reduced taxation rates to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, below the minimum levels of taxation.

Article 2 stipulates that the authorisation requested is granted for 6 months, as requested by Poland, 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[12], and in particular Article 19 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By letter of 3 January 2023, Poland requested authorisation to apply reduced rates of excise duty to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, pursuant to Article 19 of Directive 2003/96/EC. Additional information and clarifications in support of the request were provided by the Polish authorities on 15 February 2023. The authorisation was requested for a period of 6 months from 1 January 2023 until 30 June 2023.

(2) According to the Polish authorities, the application of a reduced tax rate aims at mitigating the negative impact that would have been caused by an increase in the level of taxation due to an unfavourably high euro-zloty exchange rate, in accordance with Article 13 of the Directive. This reduction would correspond to the amount resulting from the exchange-rate difference after the annual adjustment carried out in accordance with Article 13 of the Directive. The reduction would render the applicable tax rate below the relevant minimum levels of taxation referred to in Article 9 of the Directive.

(3) The requested authorisation is not likely to distort competition or hinder the proper functioning of the single market. Given its short duration and the exceptional circumstances linked to the geopolitical situation, the requested authorisation is considered appropriate and proportionate. The authorisation balances out the specific policy considerations referred to in Article 19(1) of Directive 2003/96/EC, and notably the Union's environmental policy, with the need of ensuring 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) Poland should therefore be authorised to apply reduced rates of excise duty to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, as requested.

(5) In accordance with Article 19(2) of Directive 2003/96/EC, each authorisation granted under that provision is to be strictly limited in time. However, in order not to

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

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 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) In order to ensure a smooth tackling of the adverse effects for consumers of energy products, it should be ensured that Poland may apply the tax reduction, as requested, with effect from 1 January 2023.

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

HAS ADOPTED THIS DECISION:

Article 1

Poland is authorised to apply reduced rates of excise duty to heavy fuel oil, natural gas, coal, and coke, used as heating fuels, below the relevant minimum levels of taxation referred to in Article 9 of Directive 2003/96/EC.

Article 2

This Decision shall apply from 1 January 2023 until 30 June 2023.

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 such system becomes applicable.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels,

For the Council
The President