Eco-tax reliefs for companies in Denmark, Finland and Sweden after the Court ruling in Adria-Wien Pipeline GmbH case

Madeleine INFELDT, Directorate-General Competition, unit G-2

Several Member States have introduced eco-taxes on energy products in order to reduce the consumption of energy, and thereby also the emissions of greenhouse gases into the atmosphere. Although there is an environmental objective behind these taxes, most Member States consider a tax relief to be necessary for those consumers that consume the most energy — mainly the manufacturing industry — and for which the tax burden would otherwise be too important. A balance is struck between achieving an environmental benefit through the tax and protecting the international competitiveness of energy intensive industrial companies.

The eco-tax systems in Denmark, Finland and Sweden are two-tier systems, with a general tax reduction for a relatively large number of companies, and targeted, higher, reductions for companies whose energy intensity exceeds certain thresholds. In the case of Finland and Sweden, the Commission has so far only scrutinised these latter tax reliefs, which clearly ‘favour certain undertakings’.

However, on 8 November 2001, the Court of Justice decided on case C-143/99 Adria-Wien Pipeline GmbH (1), which concerned the energy tax reliefs in Austria. In Austria, only undertakings whose activity is shown to consist primarily in the production of goods are eligible for the energy tax reliefs. The Austrian Constitutional Court referred to the Court of Justice the question whether such a delimitation of the beneficiaries rendered the measure selective within the meaning of Article 87(1) EC. In the affirmative, the Court was asked whether such a legislative measure would be regarded as State aid even if it applied to all undertakings, regardless of their activity.

The Court decided, in particular, that national measures providing for energy tax reliefs which only apply to undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid. The Court also stated that a measure, which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity.

Following this Court ruling, the Commission reviewed the corresponding measures in force in Denmark (2), Finland (3) and Sweden (4).

Denmark

The Danish 10% CO₂ tax relief has been notified to the Commission before, and approved as a general measure. It has been considered not to favour certain undertakings, since available to all VAT-registered companies. The Commission reassessed the tax relief in the light of the Court’s ruling and decided that it could still be considered to constitute a general measure. The VAT-criterion as a basis for determining eligible companies is wide and does not per se exclude companies in e.g. the service sectors. The objective of the Danish authorities when applying the VAT-criterion is also to make a distinction between consumers who mainly use energy for heating and hot water (i.e. who have a ‘household type’ of consumption) and consumers who also use energy for other purposes. In order to come closer to the objective, an adjustment is made so that certain types of VAT-registered companies are not eligible for the relief for the reason that they are considered only to have a household type of energy consumption. Some service activities are to be found among those excluded from the tax relief, but since they meet the criterion, their exclusion is in the ‘nature or general scheme of the system’, and not such as to render the measure selective.

Finland

In Finland, there are two different energy tax rates on the consumption of electricity. Industrial

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(1) European Court Reports [2001] page I-08365.
companies and professionally managed greenhouse companies pay a lower rate than other electricity consumers. This differentiation was introduced in 1997, but was not notified to the Commission. Following the Court ruling, the Commission investigated the measure on its own initiative. On 2 August 2002, it decided that the measure was indeed selective, since strictly limited to industrial companies and greenhouse companies, and that it constituted State aid.

According to the current Community guidelines on State aid for environmental protection, environmental aid should be assessed under the guidelines in force when the aid was granted. In this case, therefore, the aid had to be assessed under the 1994 Community guidelines on State aid for environmental protection (1) for the period 1 April 1997—2 February 2001. The aid was found to be compatible with the common market, because the circumstances of the granting of the aid were in line with those accepted under the Commission’s practice at that time. With respect to the aid granted to industrial companies as from 3 February 2001, the Commission applied the rules applicable to operating aid in the form of tax reductions or exemptions in the current environmental guidelines (2). The tax relief was found to be clearly compatible with these rules, since it was introduced at the same time as the tax on electricity consumption itself, and since companies still pay a significant part of the tax. The aid was therefore approved for a 10-year period as regards industrial companies, and, in order to avoid discrimination between sectors, also with regard to professionally managed greenhouse companies.

**Sweden**

The general reduction of the CO$_2$ tax paid on fuels used for heating in the production processes of the manufacturing industry was introduced in 1993. The Commission concluded that the measure was specific, since companies in the service sectors are not eligible. However, the tax relief was introduced in 1993, i.e. before Sweden joined the European Economic Area and later the European Union, and was not increased until 1 January 2001. Before that date, it therefore constituted existing aid.

Formally, the aid had to be assessed under the 1994 environmental guidelines for the period 1 January—2 February 2001, and for the same reasons as in the Finnish case, it was found to be compatible with the common market. The main assessment, for a 10-year period starting 3 February 2001, was made under the current environmental guidelines. Point 52 provides that where an existing tax is increased significantly, and where the Member State concerned takes the view that derogations are needed for certain firms, the conditions set out in point 51.1 as regards new taxes are applicable by analogy. In this case, the general tax relief for the manufacturing industry was increased significantly on 1 January 2001 and on 1 January 2002. The Commission therefore considered that the condition on which it can accept that a relief from a tax is needed for certain firms was fulfilled. Companies have always had to pay at least 25% of the tax (disregarding any other tax relief they may benefit from). Therefore, an approval was given for a 10-year period, as the general reduction of the CO$_2$ tax will not exceed 75% in the future either.

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(1) OJ C 72, 10.3.1994, p. 3.
(2) OJ C 37, 3.2.2001, p. 3.