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Sir,

Subject: State aid SA.37320 (2014/NN) – Poland - Exemption from excise duty on certain use of gas products

1. PROCEDURE

- (1) By electronic notification dated 5 September 2013, Poland notified, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), a scheme on exemption from excise duty tax.
- (2) By letters dated 4 November 2013, 7 March 2014 and 23 July 2014, the Commission requested additional clarifications from the Polish authorities, to which replies were provided respectively on 7 January 2014, 4 April 2014 and 12 August 2014. The case was subject to a discussion between the Commission and the Polish authorities in a meeting held on 3 December 2013.

2. DESCRIPTION OF THE MEASURE

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- (3) The Polish authorities notified, for legal certainty, an exemption from the excise duty payment concerning the use of gas products¹ in mineralogical, electrolytic and metallurgical processes and for chemical reduction.
- (4) The legal basis of the measure is the Act of 27 September 2013 on amendments to the law of on excise duty (*ustawa z dnia 27 września 2013 r. o zmianie ustawy o podatku akcyzowym*).
- (5) The beneficiaries are companies using mineralogical, electrolytic and metallurgical processes and chemical reduction. In practice the following sectors of production are involved: iron and steel, glass industry, construction and ceramic products. The number of beneficiaries is estimated at 1237 entities.
- (6) The overall budget of the measure amounts to PLN 390 million (approx. EUR 95 million). The aid takes the form of a tax exemption.
- (7) The measure was put into effect on 1 November 2013 and has the duration of 6 years. It can be cumulated with other aid received from other local, regional and national or Community schemes.
- (8) According to the Polish system of excise duty, the use of energy products, including gas products, is subject to taxation. The Polish authorities have explained that, as a principle, the taxation applies to each use of energy products for heating or fuel purposes.² The measure under investigation concerns a tax exemption on the use of gas products which is not considered to be for heating or fuel purposes. This concerns in particular the use of gas products in mineralogical, electrolytic and metallurgical processes and for chemical reduction and is laid down in Article 31b. 1. 4) and Article 31b. 4. 1) of the law on excise duty.
- (9) The Polish authorities have defined mineralogical processes in line with the classification in the NACE nomenclature under code DI 26 “*manufacture of other non-metallic mineral products*”, cf. Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community.³
- (10) As regards the use of energy products in electrolytic and metallurgical processes and for chemical reduction, the Polish authorities refer to the provisions of the Energy Taxation Directive (ETD)⁴ concerning the so-called

¹ As defined in Article 2 (1) (1b) of the law on excise duty, Dz. U. 2014, poz. 752.

² Poland applied an exemption from the excise duty for natural gas used for heating purposes until 31 October 2013. This was in line with Article 15 of the Energy Taxation Directive, according to which certain exemptions or reductions are allowed, *inter alia*, for natural gas in Member States in which the share of natural gas in final energy consumption is less than 15% in 2000 (cf. Article 15(1)(g) ETD). As of 1 November 2013, gas products used for heating purposes are subject to the Polish excise duty.

³ OJ L 293, 24.10.1990, p. 1, as amended.

⁴ 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.

"dual use". Pursuant to Article 2(4)(b) second indent of the ETD, an energy product is put to dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes is considered to be dual use⁵.

- (11) In the processes subject to the investigation, gas products are used, in line with terminology in ETD, for chemical reduction, in electrolytic, metallurgical and mineralogical processes. This includes in particular processes where the energy of the gas product is necessary for a reaction or serves to break down other products.
- (12) Finally, the above exemption from the excise duty is granted automatically and does not have any elements of discretion of the tax authorities.

3. ASSESSMENT OF THE EXISTENCE OF STATE AID

- (13) Article 107 (1) TFEU provides that *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market”*.
- (14) Forgone tax revenues constitute state resources. By means of a relief from a tax burden that other companies in Poland have to bear, the measure confers an advantage to the beneficiaries. This advantage has a potential to distort competition and affect trading conditions in the European Economic Area (EEA), since the beneficiaries of the measure compete with other companies across EEA. However, tax reliefs only fall within the scope of Article 107(1) TFEU, if they cannot be justified by the nature or general logic of the reference tax regime.
- (15) In assessing whether the tax exemption under investigation constitutes state aid, the Commission has to consider whether the effects of the measure are selective insofar as it favours certain undertaking or the production of certain goods. The Commission notes that the exemption from the excise duty concerning the use of gas products in mineralogical, electrolytic and metallurgical processes and for chemical reduction benefits only certain undertakings and certain sectors (see point (5) above).
- (16) Furthermore, the Commission has to assess whether the measure is justified by the nature and logic of the reference system of taxation. The reference tax regime in this case is the Polish excise duty on energy products used for heating or fuel purposes.
- (17) The objective of the Polish system of excise duty is to tax energy products, including gas products, when they are used for heating or fuel purposes. The

⁵ Mineralogical processes are not considered to be dual use.

Commission notes that it is thus within the logic and nature of the reference tax regime not to levy a tax on energy products used for non-heating or non-fuel purposes.

- (18) In the field of energy taxation, Member States are free to determine the logic of their tax system, provided that result is in compliance with the ETD. Poland has expressly stated that the aim of the measure under investigation was to bring the Polish tax system in line with the provisions of the ETD.
- (19) According to the ETD, *[e]nergy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. (...)*⁶ Thus energy products are taxed when used for heating or fuel purposes. However, energy products put to dual use and used in mineralogical processes remain outside the scope of the ETD. Article 2(4)(b) second indent of the ETD provides that an energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. Dual use is also the use of energy products for chemical reduction and in electrolytic and metallurgical processes.
- (20) In the case at hand, gas products used in mineralogical, electrolytic and metallurgical processes and for chemical reduction are exempted from the excise duty. In line with the provisions of ETD, the use of gas products in mineralogical processes and in dual use is not deemed to be the use as motor fuel or heating fuel. The Commission notes that the tax exemption is limited to the use of gas products within mineralogical, electrolytic and metallurgical processes and for chemical reduction and corresponds to the processes of dual use and mineralogical processes within the meaning of ETD. Any gas products used for heating in these processes, within the meaning of ETD, constitutes a core part of the chemical reduction, mineralogical, electrolytic and metallurgical processes in question and would not be used outside these processes.
- (21) Thus, the exemption from taxation of such use of gas products remains within the nature and logic of the Polish excise duty system and is consistent with the provisions of the ETD.
- (22) The Polish authorities have also confirmed that all companies in a similar legal and factual situation are treated in the same way and that the Polish tax authorities do not exercise any discretionary power with regard to the application of the tax exemption under assessment. In any case, the tax exemption is only applied for the dual use of gas products and in mineralogical, processes. Such exemptions do not contradict the ETD as they fall outside its scope of application. However, this decision is without prejudice to the scope of application of the ETD. In particular it does not allow the Polish authorities to extend the tax exemption to uses of gas products in the production processes if such uses do not represent dual use or if gas

⁶ See Article 22 of the Energy Taxation Directive

products are not used in a mineralogical process, as defined by the ETD. Therefore this decision does not prevent the Commission from taking action to require Poland to comply with the ETD or prejudge its analysis on the scope of application of the Directive.

- (23) Bearing in mind the above, the Commission concludes that Poland has established a national energy tax system with the purpose to tax the consumption of energy products when used for heating or fuel purposes. Gas products used in mineralogical processes or put to dual use including uses in electrolytic and metallurgical processes or for chemical reduction is not considered to be used for heating or fuel purposes and is therefore not subject to taxation. This exemption from taxation does not contradict the provisions of ETD. The Commission considers that the tax exemption under investigation, insofar as it applies to gas products put to dual use, non-fuel use or gas products used in mineralogical processes, is in the nature and logic of the national tax system and thus, does not constitute state aid within the meaning of Article 107(1) TFEU.

4. CONCLUSION

The Commission has accordingly decided that the measure does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, insofar as the measure exempts from excise duty gas products put to dual use, non-fuel use or gas products used in mineralogical processes and such uses are excluded from the scope of application of Directive 2003/96/EC.

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Your request should be sent by e-mail to Stateaidgreffe@ec.europa.eu or by registered letter to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 BRUSSELS
Belgium

Please mention the name and number of the case in all correspondence.

Yours faithfully,

For the Commission

Joaquin ALMUNIA
Vice-President