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**Subject: State Aid SA.45862 (2018/N) – Ireland  
Irish tax on Sugar Sweetened Drinks**

Sir, /Madam,

**1. PROCEDURE**

- (1) After pre-notification contacts, on 2 February 2018, Ireland notified to the Commission its plan to introduce the Sugar Sweetened Drinks Tax (respectively "SSD" and "SSD tax") laid down by Sections 35 to 47 of the Finance Act 2017 ("the Act").
- (2) The Finance Bill 2017 was signed into law on 25 December 2017, but the provisions introducing the Sugar Sweetened Drinks Tax are subject to a commencement order.

**2. DETAILED DESCRIPTION OF THE MEASURE**

- (3) According to the Finance Bill Explanatory Memo, the provisions laying down the SSD tax *"give effect to the Budget Day announcement by making provision for the introduction of a tax on sugar sweetened beverages"*. This tax *"will be charged on the first supply of sugar sweetened drinks made in the State and will apply to sugar sweetened drinks with a sugar content of 5 grams or more but less than 8 grams per 100ml at a rate of 20c per litre. A second rate will apply for drinks with a sugar content of 8 grams or above at 30c per litre."*

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- (4) The relevant provisions of the Sugar Sweetened Drinks Tax are summed up in the following recitals.
- (5) According to Section 36 of the Act ("Charging and rates of sugar sweetened drinks tax"):

*"Subject to the provisions of this Chapter and any regulations made under it, a duty of excise, to be known as sugar sweetened drinks tax, shall be charged, levied and paid at the rates specified in Schedule 4 on each sugar sweetened drink, with a sugar content of 5 grams or more per 100 millilitres, supplied in the State by a supplier."*

- (6) According to Section 37 ("Liability to pay sugar sweetened drinks tax "):

*"Tax shall be charged at the time the sugar sweetened drink is first supplied in the State by a supplier and that supplier shall be accountable for and liable to pay the tax charged."*

- (7) According to Section 37 ("Commencement"):

*"This Chapter comes into operation on such day as the Minister for Finance may appoint by order."*

- (8) The rate of the SSD tax is fixed according to Schedule 4, as mentioned in Section 36:

Sugar content	Rate of the tax (without VAT)
At least 5 grams per 100 millilitres but less than 8 grams per 100 millilitres	€16.26 per hectolitre
8 grams or more per 100 millilitres	€24.39 per hectolitre

- (9) Section 35 ("Interpretation") provides definitions of the concepts used in the Act:

*"“added sugar” means (a) sugar, or (b) substances containing sugar, except for juices, that is or are combined with other ingredients in the production or manufacture of prepacked ready to consume sugar sweetened drinks or prepacked concentrated sugar sweetened drinks;"*

*"“food supplement” has the meaning assigned to it by the European Communities (Food Supplements) Regulations 2007 (S.I. No. 506 of 2007);"*

*"“juice” means any fruit or vegetable juice falling within CN Code heading 2009 that does not contain added sugar;"*

*"“sugar” has the meaning assigned to it by Annex 1 of Regulation (EU) No. 1169/2011 on the provision of food information to consumers;"<sup>1</sup>*

*"“sugar content” means the number of grams of sugar per 100 millilitres of sugar sweetened drink in ready to consume form;"*

*"“sugar sweetened drink” means—*

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<sup>1</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending and repealing certain EU acts defines 'sugars' in its Annex I, point 8.

*(a) a prepacked, ready to consume beverage, containing added sugar and which falls within CN Code headings 2009 and 2202 except for beverages falling within CN Code subheadings 2202 91 00, 2202 99 11, 2202 99 15, 2202 99 91, 2202 99 95, 2202 99 99 and alcohol free wines falling within CN Code subheading 2202 99 19, other than—*

*(i) food supplements, or*

*(ii) products exempted by the European Union (Provision of Food Information to Consumers) (Amendment) (No. 2) Regulations 2016 (S.I. No. 559 of 2016) from requirements to provide specific food information on labels, packaging or accompanying documentation,*

*(b) a prepacked, concentrated substance in liquid or solid form, containing added sugar, which requires preparation before consumption by the final consumer and which, after such preparation, has the same characteristics as beverages referred to in paragraph (a), other than—*

*(i) food supplements, or*

*(ii) products exempted by the European Union (Provision of Food Information to Consumers) (Amendment) (No. 2) Regulations 2016 (S.I. No. 559 of 2016) from requirements to provide specific food information on labels, packaging or accompanying documentation, or*

*(c) a beverage prepared from a substance referred to in paragraph (b) and which is ready to consume;"*

- (10) As results from these provisions, the sugar sweetened drinks tax will be paid by suppliers of certain products included in specific CN Codes (subdivisions to the combined nomenclature of the European Communities referred to in Article 1 of Council Regulation (EEC) No. 2658/87<sup>2</sup>), if these products contain added sugar and their sugar content is above or equal to 5 grams or more per 100 millilitres.
- (11) The SSD tax essentially targets water based and juice based beverages with added sugar and an overall sugar content above a certain level. However, certain products falling under the CN headings otherwise covered by the tax are explicitly exempted (drinks entailing dairy, soja drinks and cereals/seeds/nuts drinks, non-alcoholic beer/wine). Moreover, the bill also explicitly exempts food supplements and certain products exempted from food labelling requirements.
- (12) The Irish authorities notified the measure for reasons of legal certainty. They consider that the measure does not constitute State aid, the scope and the design of the tax being justified in the light of its health objectives and administrative manageability reasons. In the event that the Commission would find the measure to be aid, they also consider that the measure is compatible with the TFEU and the internal market.
- (13) In the notification, the Irish authorities formally committed to subject to the tax a series of otherwise exempted sugary drinks (drinks containing milk, soja drinks, cereals/nuts/seeds drinks) if they do not contain a minimum amount of calcium (119 milligrams per 100 millilitres).

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<sup>2</sup> See Article 1 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L256, 7.9.1987, p.1

### 3. ASSESSMENT OF THE MEASURE

- (14) By virtue of Article 107(1) of the Treaty of the Functioning of the European Union ("TFEU") *"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."*
- (15) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

#### 3.1. Advantage to undertakings

- (16) An advantage, within the meaning of Article 107(1) of the TFEU, is any economic benefit, which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.
- (17) The precise form of the measure is irrelevant in establishing whether it confers an economic advantage on the undertaking. Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens (such as taxes) can also constitute an advantage. The latter is a broad category, which comprises any mitigation of charges normally included in the budget of an undertaking<sup>3</sup>. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities. This covers in particular situations where some operators do not have to bear costs that other comparable operators normally have to bear in a given legal order.
- (18) In that regard, the fact that certain products are not subject to the SSD tax (e.g. beverages with no added sugar, dairy-based drinks, etc.) may involve an advantage for their producers. This means that these products and their producers, which are undertakings providing goods (products for human consumption) on the market, may benefit from an economic advantage in the form of a relief from the tax burden potentially arising from the tax.
- (19) The question whether the tax burden arising from the SSD tax, which is not a general tax but a special-purpose levy, is a "normal cost" that any product has to bear or a "charge normally included in the budget of an undertaking" amounts to assessing the comparability of the products in the light of the objective of the levy. This will be dealt with in the selectivity part of the present decision (see below).

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<sup>3</sup> Judgment of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy v Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 36.

### 3.2. State resources and imputability to the State

- (20) Only advantages granted directly or indirectly through State resources and based on a decision imputable to the State can constitute State aid within the meaning of Article 107(1) TFEU<sup>4</sup>.
- (21) The scope of the SSD tax and its design are the result of a legislative act and are as such imputable to the Irish State.
- (22) A shortfall in tax revenue due to exemptions or reductions in taxes granted by the Member State fulfils the affectation of State resources requirement of Article 107(1) TFEU<sup>5</sup>.

### 3.3. Distortion of competition and effect on trade

- (23) A distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition<sup>6</sup>. The Union Courts have also ruled that "*where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.*"<sup>7</sup>
- (24) Production of beverages is a liberalised sector. Many stakeholders involved in the public consultation carried out by the Irish authorities explained that cross-border trade is important<sup>8</sup>. Any selective advantage to some of these producers would therefore be liable to affect competition and cross-border trade.

### 3.4. Selectivity

- (25) To fall within the scope of Article 107(1) of the Treaty, a measure must "favour certain undertakings or the production of certain goods". Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

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<sup>4</sup> Judgment of the Court of 24 January 1978, C-82/77, *Van Tiggele*, ECLI:EU:C:1978:10, paragraphs 25 and 26; Judgment of the Court of 12 December 1996, T-358/94, *Air France v Commission*, ECLI:EU:T:1996:194, paragraph 63.

<sup>5</sup> Judgment of the Court of 15 March 1994, C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, paragraph 14.

<sup>6</sup> Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraphs 141 to 147; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415.

<sup>7</sup> Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66.

<sup>8</sup> <http://www.finance.gov.ie/updates/submissions-to-the-sugar-tax-consultation/> One of the questions asked by the Irish authorities was "*Are you involved in any export or re-export trade in soft drink or SSD and if so, do you see any difficulties posed to those transactions?*".

- (26) The selectivity of measures mitigating the normal charges of undertakings is normally assessed by means of a three-step analysis<sup>9</sup>. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is *prima facie* selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system.

#### 3.4.1. *Prima facie* selectivity

##### 3.4.1.1. Identification of the reference system

- (27) The reference system constitutes the benchmark against which the selectivity of a measure is assessed. It is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective.
- (28) In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. The same applies to special-purpose (stand-alone) levies, such as levies on certain products or activities having a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and provided the boundaries of the levy have not been designed in a clearly arbitrary or biased way<sup>10</sup> — so as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levy in question —, the reference system is, in principle, the levy itself.
- (29) The SSD tax constitutes a special-purpose (stand-alone) levy on certain products having a negative impact on health. It is not a general tax on products: it does not form part of a wider taxation system where all products would be taxed.
- (30) According to the Finance Act 2017, the measure at stake is a tax on sugar sweetened drinks, defined as products containing added sugar and falling within certain headings of the Combined Nomenclature (CN)<sup>11</sup>. The scope of the tax will essentially cover water-based sugary drinks (soft drinks) and juices (fruit and vegetable juices) containing added sugar with an overall sugar content exceeding 5 grams of sugar per 100 ml.

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<sup>9</sup> See, for example, Joined Cases C 20/15 P and C 21/15 P, *Commission v World Duty Free Group*, EU:C:2016:981, paras 53-95; Case C-279/08 P, *Commission v Netherlands (NOx)*, EU:C:2011:551; Case C-143/99, *Adria-Wien Pipeline*, EU: C: 2001:598, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others*, EU:C:2011:550 and EU:C:2010:411, Case C-308/01, *GIL Insurance*, EU:C:2004:252 and EU:C:2003:481

<sup>10</sup> Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 et seq.

<sup>11</sup> See Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256, 7.9.1987, p. 1–675.

- (31) As explained by the Irish authorities, the SSD tax is one of a suite of measures being implemented as part of an overarching policy framework, to tackle obesity in adults and children. Indeed, childhood obesity in Ireland is high and 60% of adults are overweight or obese<sup>12</sup>.
- (32) The World Health Organization (WHO) recommends limiting consumption of sugary drinks as part of a strategy to tackle obesity and defines sugary drinks as "beverages containing added caloric sweeteners, such as sucrose, high-fructose corn syrup, or fruit-juice concentrates. These include, but are not limited to, carbonates, fruit drinks, sports drinks, energy and vitamin water drinks, sweetened iced tea, and lemonade".<sup>13</sup> The introduction of the tax and its design (scope of products targeted by it) would therefore seem consistent with WHO policy recommendations.
- (33) According to the European Food Safety Authority (EFSA), there is some evidence that high intakes of sugars in the form of sugar sweetened beverages might contribute to weight gain and the relationship of patterns of consumption of sugar-containing foods to dental caries, weight gain and micronutrient intake should be considered when establishing nutrient goals for populations and recommendations for individuals and when developing food-based dietary guidelines.<sup>14</sup>
- (34) Ireland has high levels of consumption of SSD, higher rates of consumption amongst children and young people and higher rates of consumption amongst the obese and more disadvantaged. In Ireland SSD alone contribute 5% of the total energy intake in the diet of children. For some consumers, this can be as much as 13-14% of the energy intake. Ireland explained that, through the proposed tax on SSD, the government is attempting to reduce the levels of free sugars and rebalance the sources of energy in the diet so that people's diets are better aligned with the Healthy Eating Guidelines and Food Pyramid<sup>15</sup>. The latter for example underline the importance of consuming certain products (dairy products entailing calcium for instance) and the need to limit the consumption of certain other products like alcohol<sup>16</sup>.
- (35) Moreover, Ireland underlined that the measure aims at tackling overconsumption of added-sugar beverages. The measure is designed to take out only free (so called empty) calories from the diet<sup>17</sup>. In that regard, Ireland explained that this public health measure is not aimed at eliminating all sugars in people's diet (the human body requires sources of energy) but is rather trying to achieve a balance in the sources of

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<sup>12</sup> Working paper, Introducing a Tax on Sugar Sweetened Drinks - Health Rationale, Options and Recommendations (Annex I).

<sup>13</sup> WHO: Fiscal Policies for Diet and Prevention of Noncommunicable Diseases, 2015. See <http://www.who.int/dietphysicalactivity/publications/fiscal-policies-diet-prevention/en/>

<sup>14</sup> European Food Safety Authority: Scientific Opinion on Dietary Reference Values for carbohydrates and dietary fibre. EFSA Journal 2010; 8(3):1462 [77 pp.]. EFSA Journal 2010; 8(3):1462; EFSA: Scientific Opinion relating to the setting of nutrient profiles for foods bearing nutrition and health claims. EFSA Journal 2008, 644, 1-44.

<sup>15</sup> See <http://www.healthyireland.ie/health-initiatives/heg/> and <https://www.hse.ie/eng/about/who/healthwellbeing/our-priority-programmes/heal/healthy-eating-guidelines/>

<sup>16</sup> See Healthy Food for Life, The Food Pyramid Guide, "Alcohol is not needed for health and is not recommended for young people under 18 years, pregnant or breastfeeding women."

<sup>17</sup> According to Ireland, studies show that 82% of children consume SSD regularly, on average they consume 328 ml per day and that contributed 26% of total sugar intake. WHO recommends that the total energy intake from free sugars should be less than 5%.

energy in line with WHO recommendations according to which the level of energy derived from free sugars should be of the order of 5%. Sugar should thus be consumed only in reasonable quantities and only overconsumption of sugar is dangerous. The objective of the tax is thus to target certain sugary products (water-based sugar-sweetened drinks like sodas and juices) the overconsumption of which is particularly dangerous for health in case of high intake levels.

- (36) More generally, sugar sweetened drinks have been identified by the Member States among the food categories that commonly represent major sources of added sugars in people's diet.<sup>18</sup> The taxed products are "*deemed to have low or no nutritional value and negligible satiety*" and high energy density. Ireland explained in that regard that consumers can drink large volumes of the targeted products – and thus sugar and calories – without feeling "satiated" so that these products induce overconsumption of sugar, contrary to other products containing sugar. Given this low satiating effect, the targeted products contribute disproportionately to the sugar intake and to sugar-induced health issues.
- (37) Ireland also underlined that these negative effects for health (linked with the sugar content and the low satiety) are not outweighed by any important other benefits for health, so that the taxed products are (overall) particularly dangerous for health in general in case of high intake levels (in relation to their sugar content and their lack of contribution to a healthy diet more generally). Focusing the tax on these products would thus seem relevant from a health point of view.
- (38) While the tax aims at steering consumers away from obesity inducing products, Ireland also explained that the tax aims at incentivising manufacturers to reformulate the taxed products in order to reduce their added sugar content. The Irish authorities officially announced their plans to tax sugar sweetened drinks well in advance – it was part of the May 2016 Programme for a Partnership Government<sup>19</sup> and confirmed by the Finance Minister on 11 October 2016<sup>20</sup> – in order to let producers time to reformulate their products. Focussing the scope of the tax on products containing added sugar is a valid objective from a health point of view since adding sugar does not provide any health benefits and can be reduced by reformulating products. If sugar is consumed in excess, the first solution would be to reduce the amounts of added sugar.
- (39) In conclusion, the Commission understands that the tax targets water-based sugary drinks (soft drinks) and juices (fruit and vegetable juices) containing added sugar with an overall sugar content exceeding 5 grams of sugar per 100 ml (with a progressive scale of two steps), in order to achieve the following aims:
- to foster the reformulation and disincentivise the consumption (by raising sale prices) of products which are specifically harmful and dangerous for health because of their high added-sugar content

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<sup>18</sup> EU framework for national initiatives on selected nutrients, Annex II: Added sugars [https://ec.europa.eu/health/sites/health/files/nutrition\\_physical\\_activity/docs/added\\_sugars\\_en.pdf](https://ec.europa.eu/health/sites/health/files/nutrition_physical_activity/docs/added_sugars_en.pdf)

<sup>19</sup> [https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme\\_for\\_Partnership\\_Government.pdf](https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf)

<sup>20</sup> Budget 2017: speech of Michael Noonan. <https://www.irishtimes.com/business/economy/budget-2017-full-text-of-michael-noonan-s-speech-1.2825311>



- which, at the same time, lack satiating effect or an inherent limit of consumption);
  - while respecting other health objectives following from the Healthy Eating Guidelines and Food Pyramid and the objective of combatting alcoholism.
- (40) In the light of these objectives, the main features of the tax (taxation of water-based and juice based sugary drinks, with added sugar and an overall content of sugar above a certain level) are assessed below. The Commission notes that the objectives pursued by the tax are related primarily to public health and it is permissible in this context to pursue several public health objectives at the same time with the same measure.
- (41) As Ireland notes, the consumption of sugar-sweetened drinks is linked with sugar related health issues in numerous studies<sup>21</sup>.
- (42) In the light of their components (mainly water and sugar in addition to flavour), water-based sugary drinks included in CN heading 2002 have no (or a very limited) satiating effect and no other or very low benefits for health so that taxing them is in line with the objective[s] of the tax. This is consistent with the official Irish dietary guidelines which do not recommend any servings of these drinks<sup>22</sup>.
- (43) Juices (heading CN 2009) with added sugar also have no (or a very limited) satiating effect. Ireland explained that processing fruits and vegetables to produce juice excludes fibre (responsible for satiation) to a large extent, so that juices lack a satiating effect. Juices with added sugar are therefore *similar or at least very close* to water-based soft drinks in that regard and it is consistent to tax them because they also lead to overconsumption of sugar and contribute disproportionately to the sugar intake. According to the Irish authorities, although juices with added sugar have some benefits for health<sup>23</sup>, these benefits are low compared to the negative effects arising from added sugar. This is confirmed by the Irish dietary guidelines which only recommend juices (even pure juices) in limited quantities (one serving a day) in view of their high level of free sugars (naturally occurring but bad for health in high quantities) and only as a second best replacement for fruit and vegetables, in light of the low consumption of fruit and vegetables in Ireland.
- (44) Therefore, the focus of the SSD tax (and its taxable event) is the taxation of high added-sugar content, while preserving other health objectives (as mentioned at recital (39) above). Within this reference system, any product containing added sugar would

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<sup>21</sup> See de Ruyter JC et. al. *A trial of sugar-free or sugar sweetened beverages and body weight in children*, New England Journal of Medicine, doi: 10.1056/NEJMoa1203034. *Taxes on sugary drinks: Why do it?* WHO, 2016. *Fiscal Policies for Diet and Prevention of Non-communicable Diseases*, Technical Meeting Report, 5-6 May 2015, Geneva; WHO & Together Let's Beat NCDs. *Evidence that a tax on sugar sweetened beverages reduces the obesity rate: a meta-analysis*, Cabrera Escobar MA et. al. BMC Public Health 2013 Nov 13;13:1072. doi: 10.1186/1471-2485-13-1072. See also the recommendation issued by the WHO in October 2016 to tax sugary drinks in *Fiscal policies for diet and the prevention of non-communicable diseases*, WHO, 2016.

<sup>22</sup> "Sugar sweetened drinks are on the Top Shelf of the Food Pyramid which includes a range of high fat, sugar and salt foods and drinks. There are no recommended servings from this shelf because they are not needed for health. Therefore, It is intended to apply the tax to all water based drinks with added sugar as these products are deemed to have low or no nutritional value and no satiety and the Department of Health advocate limiting consumption to a maximum once or twice per week".

<sup>23</sup> Ireland explained that "While fruit juice with added sugars may provide vitamin C in some juices (for example citrus fruits and blackcurrant juice) it provides mainly calories or energy from the added sugars".

be in comparable situation to the drinks that are subject to the tax (*prima facie* selectivity). The added sugar content should therefore be the benchmark for assessing whether there is *prima facie* discrimination by not taxing certain products. However, as will be examined below, exclusions related to other health objectives explained above and summarised at recital (39), which were taken into account when designing the SSD tax, can be considered justified under the logic of the system, which aims at improving public health. Other bases for a possible justification inherent to the tax system can be, for instance, the need to fight fraud or tax evasion, administrative manageability, the principle of tax neutrality or the need to avoid double taxation (recital (60)).

- (45) The levy does not appear to have been designed in a clearly arbitrary or biased way, so as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levy in question<sup>24</sup>. The overall design of the tax is justified, taking into account the objectives it pursues.
- (46) The Commission considers that the reference system should comprise *prima facie* all products with added sugar content, - i.e. also those products that are not taxed by the SSD tax - , and examines whether the non-taxation of those other products can be justified within the logic of the reference system.

#### 3.4.1.2. Comparable products in light of the objectives of the reference system

- (47) As mentioned above, since the primary aim of the SSD tax is to tax added sugar, any product that has added sugar would be in a comparable situation to the drinks that are subject to the tax. Excluding from the scope of the tax products containing added sugar would therefore be *prima facie* selective. Taking into account the primary objective of the SSD tax, the following product categories appear not to be in a comparable factual and legal situation to the products subject to the SSD tax:
- products not containing added sugar
  - artificial sweeteners; and
  - food supplements.

##### 3.4.1.2.1. Non-taxation of sugary products not containing added sugar

- (48) Only products with added sugar (sugar sweetened drinks) are subject to the tax, while products containing only naturally occurring sugar (without added sugar), like pure juices, are not.
- (49) In the light of the objectives mentioned in recital (39), products containing only naturally occurring sugar do not seem to be in a comparable situation as products containing added sugar subject to the tax. Manufacturers can directly reduce the amount of added sugar in their products for example by replacing sugar with sweeteners or even reducing the sweet taste. The amount of added sugar is directly controlled by producers, while this is less straightforward for naturally occurring

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<sup>24</sup> Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 et seq.

sugar. In addition, naturally occurring sugars are in many cases not linked to health concerns<sup>25</sup> while added sugars (free sugars) are<sup>26</sup>. Moreover, added sugar does not provide any health benefits while naturally occurring sugars are present in products which generally have other health benefits. This is in line with health policy developed at EU level, according to which reducing added sugar in water-based beverages could be the most effective way of reducing energy density<sup>27</sup>. Sugary products not containing added sugar are therefore not in a comparable situation as products containing added sugar in the light of the objective of the tax mentioned in recital (39) above.

- (50) The non-taxation of sugary products is therefore not *prima facie* selective.

#### 3.4.1.2.2. Non-taxation of artificial sweeteners

- (51) The SSD tax only takes into account the sugar content of drinks and covers drinks containing added sugar, not the presence of artificial sweeteners.
- (52) The Irish authorities consider that "*available evidence on health impacts is not currently sufficient to include artificial sweeteners*"<sup>28</sup> in the scope of the tax. At European level, the EFSA published in December 2013 its first full risk assessment of aspartame, the main artificial sweetener. The opinion concludes that "*aspartame and its breakdown products are safe for general population (including infants, children and pregnant women)*"<sup>29</sup>. At the same time, the EFSA acknowledges that certain studies tend to demonstrate some level of risk<sup>30</sup>.
- (53) To the extent that there is at this stage no clear and unequivocal scientific evidence of the perils related to artificial sweeteners, the Commission considers that it is the responsibility of the Member States to decide whether it is appropriate to disincentivise the consumption of artificial sweeteners or not.

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<sup>25</sup> There is "no reported evidence of adverse effects of consumption" of sugars naturally present in milk <http://www.who.int/mediacentre/news/releases/2015/sugar-guideline/en/>

<sup>26</sup> WHO guidelines recommend that, to prevent obesity and tooth decay, adults and children reduce their consumption of free sugars (added sugar corresponds generally to free sugars): <http://apps.who.int/iris/bitstream/10665/260253/1/WHO-NMH-PND-16.5Rev.1-eng.pdf?ua=1>

<sup>27</sup> See EU Framework for National Initiatives on Selected Nutrients" agreed by the High Level Group on Nutrition and Physical activity (led by the Commission) on 3 February 2011 with an Annex II on added sugars of December 2015: "*Reducing added sugars could be the most effective way of reducing energy density for some products, particularly for products with high water and low fat content.*"

<sup>28</sup> Ireland mentioned scientific work to support this reasoning: de Ruyter, J. C., Olthof, M. R., Seidell, J. C & Katan, M. B. (2012). *A trial of sugar-free or sugar sweetened beverages and body weight in children*. New England Journal of Medicine; DOI: 10.1056/NEJMoa1203034; Hu FB & Malik VS, *Sugar - sweetened beverages and risk of obesity and type 2 diabetes: epidemiological evidence* *Physiol Behav* 2010; 100:47-54

<sup>29</sup> <http://www.efsa.europa.eu/en/topics/topic/aspartame>

<sup>30</sup> The EFSA mentions the following: "*In 2010, two studies on possible health risks related to the consumption of artificial sweeteners were published, namely a carcinogenicity study in mice exposed to aspartame through feed conducted by the ERF (Soffritti et al. 2010), and an epidemiological study on the association between intakes of artificially sweetened soft drinks and increased incidence of preterm delivery (Halldorsson et al.). In a February 2011 statement, EFSA concluded that the two studies do not give reason to reconsider previous safety assessments of aspartame or of other sweeteners currently authorised in the EU.*"

(54) Given the lack of clear and unequivocal evidence of the perils related to artificial sweeteners, while there is sufficient evidence regarding the negative effect of sugar for health, sugar and artificial sweeteners are not in a comparable situation in the light of the objective of the tax.

(55) The non-taxation of artificial sweeteners is therefore not *prima facie* selective.

#### 3.4.1.2.3. Non-taxation of food supplements

(56) The notified measure explicitly exempts from the tax "food supplements" within the meaning of the Irish Regulations 2007 (S.I. No. 506 of 2007)<sup>31</sup>.

(57) According to Article 4(1) of these Regulations, "*only vitamins and minerals [...] may be used in the manufacture of food supplements*". The Irish authorities thus explained that sugar or added sugar may not be used in food supplements. Ireland also confirmed that this provision was for administrative clarity and that it does not constitute a real derogation. To the extent that food supplements do not contain added sugar, these products are not comparable to the taxed products in the light of the objective of the tax.

(58) The non-taxation of food supplements is therefore not *prima facie* selective.

#### 3.4.2. Justification by the logic of the tax system

(59) In the light of the primary objective of the SSD tax, which is to tax products containing added sugar, the following products (containing added sugar) appear to be in comparable factual and legal situation to the products subject to the SSD tax and their non-taxation seems therefore *prima facie* selective:

- Products (beverages) with added sugar but containing (overall) less than 5 grams of sugar per 100 millilitres;
- Food products (solid food) containing added sugar;
- Dairy-based drinks containing added sugar;
- Certain drinks with added sugar containing dairy;
- Soja drinks and cereals/seeds/nuts drinks containing added sugar;
- Alcoholic drinks containing added sugar;
- Alcohol free beer and wine containing added sugar;
- Products with added sugar but exempted from food labelling requirements.

(60) Although the non-taxation of products containing added sugar is *prima facie* selective, such exclusions, if related to other public health objectives that the Irish legislator validly pursues, can be justified under the general logic of the system, which aims at improving public health as mentioned above. Other bases for a possible justification inherent to the tax system can be, for instance, the need to fight fraud or tax evasion, administrative manageability, the principle of tax neutrality or the need to avoid double taxation.

(61) Each of the product categories is analysed below.

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<sup>31</sup> Irish measure giving further effect to Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ L 183, 12.07.2002, p. 51) and to Commission Directive 2006/37/EC of 30 March 2006 amending Annex II to Directive 2002/46/EC (OJ L 94, 01.04.2006, p. 32).

3.4.2.1. Non taxation of sugary products containing less than 5 grams of sugar per 100 millilitres

- (62) Products containing added sugar, but less than (overall) 5 grams of sugar per 100 millilitres are not taxed under the SSD tax, are in a comparable situation to product containing higher concentration of sugar. Their non-taxation by the SSD tax is therefore *prima facie* selective.
- (63) These products have however by definition a limited overall sugar content. Ireland explained that sugar is not *per se* bad for health and that it is indeed necessary, but should be consumed only in reasonable quantities. The exempted products are thus not liable to create the same damage for health as products containing higher proportions of sugar, and their non-taxation is justified in the light of the health objectives of the tax mentioned in recital (39).
- (64) Also, the derogation for products containing less than 5 grams of sugar per 100 millilitres creates a progressive tax structure (no taxation under 5 grams of sugar per 100 millilitres, taxation under two different rates above that threshold)<sup>32</sup>. This progressive structure of the tax is justified in the light of the reformulation objective of the tax. In order to provide a clear reformulation objective to SSD producers, drinks containing less than 5 grams of sugar per 100 millilitres are tax exempted (subject to a zero tax rate) while drinks containing more than 5 grams of sugar per 100 millilitres are taxed.
- (65) The threshold of 5 grams of sugar per 100 millilitres is used in similar taxes on sugary drinks in other countries. It is also related to the EU guidelines for claims related to sugar<sup>33</sup> which use this threshold to define food which is "low in sugar". Regarding drinks, the 5 grams threshold is generally used because it roughly corresponds to the amount of naturally occurring sugar in milk<sup>34</sup>. Also regarding drinks, the 5 grams threshold corresponds to the double of the 2.5 grams threshold referred to in the EU guidelines for claims related to sugar, which suggests that Ireland justifiably aims at tackling the issue step by step<sup>35</sup>.
- (66) This feature is therefore consistent with the objectives of the tax mentioned in recital (39) and justified by the logic of the tax system.

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<sup>32</sup> The measure has three rates progressively increasing in relation to the volume of the drink. The three brackets and corresponding tax rates are (i) below a sugar content of 5 grams per 100ml at a rate of 0c per litre; (ii) with sugar content of 5 grams or more but less than 8 grams per 100ml at a rate of 20c per litre; and (iii) with a sugar content of 8 grams or above at 30c per litre. Taking as reference the amount of sugar (not the volume of the drink), the effective tax rate (in € per gram of sugar) is also progressive if one compares the products included in the first bracket (below 5 grams per 100 ml) to the products included in the two upper brackets (above 5 grams per 100 ml).

<sup>33</sup> See [https://ec.europa.eu/food/safety/labelling\\_nutrition/claims/nutrition\\_claims\\_en](https://ec.europa.eu/food/safety/labelling_nutrition/claims/nutrition_claims_en) and <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32006R1924>

<sup>34</sup> Which is deemed to have no adverse effects on health. See <http://www.who.int/mediacentre/news/releases/2015/sugar-guideline/en/> "no reported evidence of adverse effects of consumption" of sugars naturally present in milk

<sup>35</sup> Ireland explained that, after the tax has been imposed and a review of the impacts on consumption and reformulation has taken place, the Irish authorities ultimately intend to reduce the thresholds, thereby ensuring continued progressive reformulation.

### 3.4.2.2. Non taxation of solid food containing added sugar

- (67) The measure only taxes drinks or substances meant to be diluted in order to form a beverage. Solid food containing sugar is not taxed even if it contains (added) sugar, which is *prima facie* selective.
- (68) The Irish authorities however evidenced that the solid form suppresses appetite more than sugars in liquid form, which indicates "greater satiety" for solid rather than liquid products<sup>36</sup>, thus preventing overconsumption. It may be noted that Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods<sup>37</sup> provides that the conditions of use for the nutrition claim "low sugars" are no more than 5 g of sugars per 100 g for solids and no more than 2.5 g of sugars per 100 ml for liquids.
- (69) The non-taxation of solid food is therefore justified in the light of the health objectives of the tax mentioned in recital (39), in particular the health objective to foster the reformulation of products that are disproportionately harmful for health because of their important added sugar content, their lack of satiating effect and the absence of other health benefits.

### 3.4.2.3. Non taxation of dairy-based drinks containing added sugar

- (70) The tax does not cover milk or milk-based drinks like buttermilk or yogurt-drinks although these products can contain added sugar.<sup>38</sup> The non-taxation of these drinks that contain added sugar is *prima facie* selective.
- (71) The Irish authorities explained that dairy-based drinks have a higher satiation effect than the taxed drinks, because of their protein content<sup>39</sup>, which prevents excessive

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<sup>36</sup> Ireland provided scientific evidence to support this view. Mourao et. al. in the International Journal of Obesity (2007) showed that "regardless of the predominant energy source, the beverage food form elicited a weaker compensatory dietary response than the matched solid food form". (DOI: 10.1038/sj.ijo.0803667). This view was supported by Cassady et. al. (2012) when they showed that "oral liquid and perceived gastric liquid preloads elicited greater postprandial hunger and lower fullness sensation". (American Journal of Clinical Nutrition DOI: 10.3945/ajcn.111.025437). A similar finding was made by Akhavan (Int J Obes. 2011 .35(4):562-9) who demonstrated that there is greater satiety after consuming solid forms of sugars and protein rather than liquid forms. See also Cees de Graaf, *Why Liquid energy results in overconsumption*. Proc. Nutr Soc. 2011, 70(2), 162-170; Pan A, Hu FB. *Effects of carbohydrates on satiety: differences between liquid and solid food*. Current Opinion in Clinical Nutrition and Metabolic Care. 2011; 14(4):385-90.

<sup>37</sup> OJ L 404 of 30.12.2006, p. 9–25.

<sup>38</sup> See the relevant subheadings of CN headings 0402 (milk and cream, concentrated or containing added sugar or other sweetening matter), 0403 (buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa) and possibly 0404 (whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included).

<sup>39</sup> Ireland mentioned in that regard several studies showing that dairy based drinks provide a higher satiety value than fruit juice based drinks. *Effect of Dairy Proteins on Appetite, Energy Expenditure, Body Weight, and Composition: a Review of the Evidence from Controlled Clinical Trials* (Adv. Nutr. 4: 418- 438, 2013). *Dose-dependent satiating effect of whey relative to casein or soy* (Physiology & Behavior. 2009 Mar 23;96(4-5):675-82). *Pre- and within-meal effects of fluid dairy products on appetite, food intake, glycemia, and regulatory hormones in children* (Appl Physiol Nutr Metab. 2017 Mar;42(3):302-310.). *Skim milk*

consumption. In addition, Ireland further argued that these products contain nutrients (proteins, calcium<sup>40</sup>) and vitamins (vitamins D, A, B12) that are important for health, especially bone and teeth health<sup>41</sup>. The official Irish dietary guidelines recommend consumption of dairy products<sup>42</sup>.

- (72) The exemption for these products is justified in the light of the health objectives mentioned in recital (39), in particular the need to comply with other health objectives imposed by the Healthy Eating Guidelines and Food Pyramid (and therefore not to hamper the consumption of dairy products which are important for a balanced diet). Given that dairy-based drinks are more satiating than the taxed products, their non-taxation is also justified by this objective difference which has significance in view of the overall logic (health objectives) pursued by the system.

#### 3.4.2.4. Non taxation of certain drinks with added sugar containing dairy

- (73) The explicit exemption currently laid down by the notified measure for CN headings 2202 99 91, 2202 99 95 and 2202 99 99 covers certain beverages containing fat obtained from dairy products<sup>43</sup>. To the extent that such products contain added sugar, their non-taxation is *prima facie* selective.
- (74) As mentioned above, the Irish authorities explained that dairy products have a higher satiation effect and contain nutrients and vitamins that are important for health, which constitutes a justification by the logic of the tax system for the reasons mentioned in recitals (71) and (72) above.
- (75) But the assessment whether the non-taxation of the concerned products (CN headings 2202 99 91, 2202 99 95 and 2202 99 99) can be justified depends on the amount of milk (or dairy products) included in the drinks concerned because it is the milk/dairy product content that is responsible for the satiating effect and the other health benefits mentioned above.
- (76) The Irish authorities formally committed to subject to the tax drinks of CN headings 2202 99 91, 2202 99 95 and 2202 99 99 which do not have a sufficient level of satiation and of other health benefits. In order to benefit from the tax exemption,

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*compared with a fruit drink acutely reduces appetite and energy intake in overweight men and women* (Am J Clin Nutr. 2009 Jul;90(1):70-5.).

<sup>40</sup> According to Ireland, products included in this category contain at least 119 mg of calcium per 100 ml.

<sup>41</sup> Milk, cheese and yogurt provide calcium needed for healthy bones and teeth. They also provide good quality protein for growth and repair. They also supply Vitamins D, A, B12 and Riboflavin. The important nutrients and micronutrients that milk and dairy products provide, e.g. calcium, protein and Vitamin D are essential for a healthy diet at all ages, with calcium and Vitamin D providing protective health benefits in particular to bone health.

"Calcium found in dairy foods is important for bone health and especially during the teenage growth spurt. Vitamin D helps absorb calcium better." See *Healthy Food for Life, Your guide to Milk, yogurt and cheese*, Department of Health/Health Service Executive 2016.

<sup>42</sup> The Irish Food Pyramid recommends consumption of milk, cheese and yogurt and yogurt drinks in different amounts depending on age with 3 daily servings for adults and 5 daily servings for children aged 9 to 18.

<sup>43</sup> The term dairy products means here products listed in CN headings 0401 to 0404: milk and cream, buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whey and products consisting of natural milk constituents not elsewhere specified or included.

drinks containing milk will have to contain a minimum amount of calcium (119 milligrams per 100 millilitres). This will ensure that such drinks are very close to milk (which has a similar calcium content). This threshold also corresponds to twice the "significant amount" of calcium as defined by EU law<sup>44</sup> and therefore would qualify for a nutrition claim "high in calcium". This will ensure that only products with a higher satiating effect and containing other nutrients important for health will be exempted from the tax.

- (77) To the extent that they comply with the additional requirement which the Irish authorities committed to impose, the non-taxation of drinks covered by CN headings 2202 99 91, 2202 99 95 and 2202 99 99 is justified by the logic of the tax system.

#### 3.4.2.5. Non-taxation of soja drinks and cereals/seeds/nuts drinks containing added sugar

- (78) The notified measure currently also explicitly exempts soya-based beverages with a protein content of 2,8 % or more by weight (CN 2202 99 11) and soya-based beverages with a protein content of less than 2,8 % by weight; beverages based on nuts, cereals or seeds (CN 2202 99 15). To the extent that such products contain added sugar, their non-taxation is *prima facie* selective.

- (79) Also for these drinks, the Irish authorities formally committed to only exempt from the tax the ones containing the same minimum amount of calcium (119 milligrams per 100 millilitres). As explained above, to the extent that soja drinks and cereals/seeds/nuts drinks also comply with the additional requirement which the Irish authorities committed to impose, their non-taxation is justified by the logic of the tax system. Since they contain proteins, it also seems that these products are more satiating than the taxed products, so that their non-taxation is also justified by this objective difference which has significance in view of the overall logic (health objectives) pursued by the system.

#### 3.4.2.6. Non taxation of alcoholic drinks containing added sugar

- (80) The SSD tax does not cover alcoholic products containing added sugar. To the extent alcoholic drinks contain added sugar, their non-taxation is *prima facie* selective taking into account the primary objective of the SSD tax. According to the Irish authorities, these products are already heavily taxed under the excise duties on alcohol which pursue, *inter alia*, the objective to account for the public health costs of alcoholic products, including obesity related costs. The negative effects on health of excessive consumption of these beverages would therefore already be tackled by means of other, specific to these beverages, taxes.
- (81) The Commission agrees that excise duties on alcohol and alcoholic beverages also pursue in part a health objective.

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<sup>44</sup> See Annex of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (JO L 404 of 30.12.2006, p. 9–25) and Annex XIII (A) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (JO L 304 of 22.11.2011, p. 18–63).



- (82) In this context, it is worthwhile noting also that the effects of alcohol on the willingness to drink are close to the effects of satiety, thus generally preventing overconsumption. Consumption of alcohol limits the overall volume of the consumed alcoholic drinks<sup>45</sup>.
- (83) Therefore, the Commission concludes that the exclusion of alcoholic products is justified by the logic of the reference system.
- (84) Moreover, Directive 2008/118<sup>46</sup> concerning the general arrangements for excise duty provides that Member States may levy other indirect taxes on excise goods, but only if such taxes fulfil certain conditions<sup>47</sup>. Since the envisaged measure presents the characteristics of a progressive tax<sup>48</sup>, and this is different from the structure of excise duty or VAT, one could put in question that the measure at stake genuinely satisfies the condition concerning compliance with the rules regarding the calculation of excise duty or VAT (Article 1 (2) of Council Directive 2008/118/EC). Therefore, the exclusion of such products from the SSD tax appears justified also to avoid any possible risk in this respect.

#### 3.4.2.7. Non-taxation of alcohol free beer and wine containing added sugar

- (85) The notified measure explicitly exempts non-alcoholic beer (CN 2202 91 00) and non-alcoholic wine (a part of CN 2202 99 19). To the extent that such products contain added sugar, their non-taxation is *prima facie* selective.
- (86) Ireland explained that, in the light of its goal to reduce alcohol consumption, it does not wish to introduce any further barrier on close substitutes to alcoholic products like alcohol free wines and beers because this would hinder the consumption of alcohol-free alternative products. In that regard, the exemption of alcohol free beer and wine, which constitute (more) direct substitutes to beer and wine (with alcohol) appears to be justified in the light of the health objectives mentioned in recital (39), in particular the need to comply with the other health objective to tackle alcoholism.

#### 3.4.2.8. Non-taxation of certain products containing added sugar but exempted from food labelling requirements

- (87) The notified measure explicitly exempts products exempted by the European Union (Provision of Food Information to Consumers) (Amendment) (No. 2) Regulations

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<sup>45</sup> See *Interaction of TRH and CCK in the satiation of alcohol intake*, Paul J Kulkosky, Valarie J Wise, Sara S Brandt, Kathryn J Chavez, *Physiology & Behavior* Volume 82, Issue 1, August 2004, Pages 53-56. <https://www.ncbi.nlm.nih.gov/pubmed/15234590>, <https://www.sciencedirect.com/science/article/pii/S0031938404001799?via%3Dihub>

<sup>46</sup> Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 14.1.2009, p. 12–30.

<sup>47</sup> See Article 1 (2) of Council Directive 2008/118/EC: “Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.”

<sup>48</sup> See recital (64).

2016 (S.I. No. 559 of 2016)<sup>49</sup> from requirements to provide specific food information on labels, packaging or accompanying documentation.

- (88) According to the Irish authorities, this exemption covers "small producers" who supply directly to consumers or local establishments and have an annual production of 13 000 litres (or 26 000 units) or less per annum.
- (89) In the light of the health objective of the tax, these products and producers are however in the same factual and legal situation as the taxed products and producers subject to the tax. This exemption is therefore *prima facie* selective.
- (90) The Irish authorities consider that this exemption is justified by reasons of administrative manageability. The volume threshold used by the Irish authorities (13 000 litres or 26 000 units) is indeed the same as the one used in the framework of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (FIC Regulation).
- (91) This Regulation lays down that "*food, including handcrafted food, directly supplied by the manufacturer of small quantities of products to the final consumer or to local retail establishments directly supplying the final consumer*" is exempted from the requirement of the mandatory nutrition declaration (point 19 of Annex V). The justification for the exemptions laid down by Annex V to the Regulation is "*to avoid unnecessary burdens on food business operators*" (recital 39). By analogy with the reasoning laid down in that Regulation and in the light of the health objective of the tax and the limited impact on health of that exemption (since the individual volumes covered are limited<sup>50</sup>), the exemption seems indeed justified by the nature or general scheme of the system of reference.
- (92) Moreover, the Commission notes the Irish authorities' commitment (with regard to this exemption) to comply with the requirements laid down by the *de minimis* Regulation<sup>51</sup>, to keep this exemption under close review and to ensure that it is correctly applied. Therefore, the exclusion from the scope of the tax of certain products exempted from food labelling requirements would in any event not meet the conditions to be qualified as aid in the sense of Article 107(1) TFEU.

#### 3.4.2.9. Structure of the tax for products containing more than 5 grams of sugar in 100 millilitres – existence of two different rates depending on the sugar content

- (93) The tax consists in an amount (in EUR) to pay per volume of the drink. This amount is higher for sweeter drinks (€16.26 per hectolitre if the sugar content is above 5 grams (but below 8 grams) of sugar in 100 millilitres; €24.39 per hectolitre if the

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<sup>49</sup> Irish measure giving further effect to Commission Regulation (EC) No. 1169/2011 of 25 October 2011 (OJ L 304, 22.11.2011, p. 18)

<sup>50</sup> Ireland also explained that, in 2014, over 84% of soft drinks sold by retailers in Ireland were accounted for by just 26 companies, which evidences that the exemption for small retailers does not cover a significant part of the targeted products.

<sup>51</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1–8 and Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis aid* in the agriculture sector, JO L 352, 24.12.2013, p. 9–17.

sugar content is above 8 grams of sugar in 100 millilitres). The fact that the same volume of drinks can be taxed differently (depending on the concentration of sugar) does not involve selectivity. This is because, in the light of the health objective of the tax, the sugar content is relevant and not the volume. It is therefore justified to impose overall a heavier tax burden on products with a higher sugar content compared to the same volume of a less sweet drink (as long as the same amount of sugar is taxed the same).

- (94) On the other hand, the variation of the effective tax per gram of sugar within each tier does not seem in line with the logic of the tax. Indeed, within each tier, the effective tax burden (amount of tax per gram of sugar) decreases with the increase of sugar content from about 0.3 €cent / g of sugar at the beginning of the tier to about 0.2 €cent / g of sugar at the end of the tier. This difference of treatment can be regarded as *prima facie* selective.
- (95) In order for the effective tax rate (amount of tax per gram of sugar) to remain constant within a tier, there would have to be an infinite number of tiers (and rates) or a linear tax based on the exact sugar content. For simplification reasons (administrative efficiency), it can however be accepted to have a reduced number of tiers and rates, ensuring that the variation of the effective tax rate within one tier (inherent to this system) will remain limited. This structure also is likely to achieve the objective of the tax which is reformulation and changing consumer behaviour<sup>52</sup>. Simpler application of the tax can also achieve better acceptance and implementation among the population.
- (96) The effective tax for both tiers range from around 0.20 to 0.30 €cent per gram of sugar. There is therefore no significant difference in the effective taxation and the existing difference is justified, for administrative efficiency reasons, by the logic of the tax system.

### **3.5. Conclusion on the existence of aid**

- (97) In the light of the above, the overall design of the tax, the explicit derogations from it and its structure do not involve a selective advantage to certain products or undertakings and thus do not involve State aid.

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<sup>52</sup> See Food taxes and their impact on competitiveness in the agri-food sector, Final report for DG Enterprise and Industry, Ecorys, 12 July 2014: "*As such with ad valorem taxes there is no incentive for manufacturers to adjust ingredients, while a specific tax provides a stronger incentive to reformulate products as manufacturers may be able to lower the impact a tax has on their cost by reducing or removing the taxed ingredient.*" (p. 31) The Irish tax is a "specific tax" since its tax rate takes into account the sugar content (while an ad valorem tax only focusses on the weight/volume of the product). The report also states that "*Overall, empirical (ex post) and modelling (ex ante) literature finds that an increase in the price of a good, resulting from introduction or increase of a tax, is associated with a reduction in consumption of the taxed product*" (p. 33).

**4. CONCLUSION**

The Commission has accordingly decided that, given the commitments made by the Irish authorities, the notified measure does not constitute aid.

Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission