Energy taxation and state aid
The Netherlands: energy tax exemption for energy intensive end-users

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In November 2003, the Dutch authorities notified a fiscal State aid measure called ‘Energy Tax Exemption for Energy Intensive End-users’. The Dutch regulatory energy tax is a tax on natural gas and electricity consumption, introduced in 1996. The purpose of a regulatory energy tax is to tax energy consumption in order to reduce carbon dioxide (CO₂) emissions and to promote energy saving (1). In addition, the regulating energy tax contributes to the shift of taxation on labour and business profits to indirect taxation deemed necessary by the Dutch authorities.

The regulatory energy tax contains a degressive rate structure for gas and electricity. Up to an annual consumption of 5,000 m³ and 10,000 kWh, respectively, rates of 0.1285 and 0.0639, respectively, apply in 2003. When consumption is beyond these levels, lower rates apply. In 2003, a zero-rate applied to annual consumption exceeding 1 million m³ gas and 10 million kWh electricity.

Council Directive 2003/96/EC of 27 October 2003 on the restructuring of the Community framework for the taxation of energy products and electricity (2), hereinafter Energy Taxes Directive, was to be transposed into Dutch legislation from 1 January 2004. As a result of the new Energy Taxes Directive, electricity consumption by business users exceeding 10 million kWh would also have to be taxed. The introduction of a minimum rate for consumption exceeding 10 million kWh would lead to an additional tax burden for a group of energy-intensive businesses, who are already engaged in energy use reduction through various energy agreements with the Dutch authorities. Therefore, the Dutch authorities proposed to introduce a tax exemption scheme, which was subject to State aid notification.

The tax exemption scheme will serve as a compensation for 206 undertakings for the energy saving commitments that follow from their energy agreements. In addition, some undertakings that will be faced with an increased tax burden do not yet participate in the energy agreements. The tax exemption scheme could provide an incentive to start or join an energy agreement in the future for these companies.

The duration of the notified scheme is until 31 December 2006, i.e. 3 years. If the minimum tax level of the Energy Taxes Directive would be transposed into the regulatory energy tax, the notified tax exemption scheme is subject to strict conditions. The tax exemption scheme will only apply to undertakings that have concluded agreements with the Dutch authorities in the context of the Benchmark Energy Savings Covenants (BMEs) or long-term agreements (MJAs), hereinafter the energy agreements. In these energy agreements participating companies undertake to take energy saving measures. Participants in the BMEs must be among the best of the world in the field of energy efficiency as soon as possible, but not later than 2012. Participants in the MJAs have concluded agreements per sector as regards the energy efficiency percentages to be realized. Undertakings are allowed to sign either a BME or a MJA. The duration of all energy agreements is until 2012. More than 1000 Dutch companies have already signed such energy agreements with the Dutch authorities. However, not all of these companies will make use of the tax exemption scheme, as e.g. not all of these companies exceed electricity consumption of more than 10 million kWh per year. The Netherlands Bureau for Economic Policy Analysis (CPB) has calculated the CO₂ reduction effects of a possible introduction of the Community minimum rates above 10 million kWh at 0.13 Mton in 2010. The effects resulting from the BMEs and MJAs are approximately 7 Mton in 2012 (3).

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(1) By decision dated 22 December 1998 (OJ C 88, 30.3.99), the Commission decided that the Dutch regulatory energy tax did not constitute aid within the meaning of Article 87(1) of the EC Treaty.


(3) The prognosis for CO₂ emissions prevented by Dutch industry on the basis of the BMEs amounts to 5.6 Mton CO₂ per annum in 2012 in the BMEs. This is supplemented by 1.3 Mton of CO₂ emissions per annum prevented by the MJAs.
Dutch authorities estimate the additional annual tax revenue for the level beyond 10 million kWh at approximately €8 million. As a result of the tax exemption scheme the Dutch authorities will suffer annual foregone tax revenues of €7 million. In other words, 1 million energy tax will be levied beyond 10 million kWh, namely on these companies that did not sign an energy agreement. The total budget of the notified measure is therefore €21 million.

**Application of the State aid rules**

First of all the Commission concluded that the Dutch energy agreements can be regarded as agreements between national authorities and energy intensive industries within the meaning of the Energy Taxes Directive. Next, the Commission noted that the beneficiaries of the notified scheme are a group of large, energy intensive companies in certain identified sectors. The advantage they receive through a tax exemption is funded through foregone tax revenues, i.e. State resources. The measure is selective as only certain undertakings will benefit from the scheme. Furthermore, the financial assistance provided to the recipient companies will strengthen their position, which may possibly lead to a change in market conditions. Such strengthening of the position of the relevant firms as compared with other firms competing with them within the Community must be regarded as affecting trade and potentially distorting competition. Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement are therefore applicable.

Also, according to Article 26(2) of the aforementioned Energy Taxes Directive, measures such as tax exemptions, tax reductions, tax differentiation and tax refunds within the meaning of this Directive might constitute State aid and in those cases have to be notified to the Commission pursuant to Article 88(3) of the Treaty.

The purpose of the notified aid scheme is to contribute to the protection of the environment. The aid measure is therefore assessed by the Commission in the light of the Community guidelines on State aid for environmental protection (1), hereinafter the environmental guidelines. According to point 49(b) of the environmental guidelines, the Commission may take the view that a tax exemption to certain firms on a tax that is to be levied as the result of a Community Directive is compatible with Article 87(1) of the EC Treaty, when the tax exemption is authorised by the directive in question. Furthermore, point 49(b) states that the tax exemption must be necessary and it must not be disproportionate in the light of the Community objectives pursued. The Commission will be especially concerned to ensure that any such exemption is strictly limited in time. In order to assess the necessity and proportionality of the tax exemption, the Commission applied the substantive criteria of point 51(1) of the environmental guidelines.

By virtue of point 51(1)(a), first subparagraph, tax exemption decisions covering a 10-year period with no degressivity may be justified where a Member State makes a tax reduction subject to the conclusion of voluntary agreements between the Member State involved and the favoured undertakings on achieving environmental protection during the period for which the exemptions apply. Such agreements or undertakings may relate, among other things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure. The substance of the agreements must be negotiated by each Member State and will be assessed by the Commission when the aid projects are notified to it. Member States must ensure strict monitoring of the commitments entered into by the firms or associations of firms. The agreements concluded between a Member State and the firms concerned must stipulate the penalty arrangements applicable if the commitments are not met. The Commission noted that the energy agreements of the notified measure are in accordance with the substantive criteria of point 51(1) of the environmental guidelines. Thus, the conditions set out in point 49(b) of the environmental guidelines on the necessity and proportionality of the tax exemption were fully met. Therefore the tax exemption scheme was considered compatible with the common market in accordance with Article 87(3)(c) of the EC Treaty.

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(1) OJ C 37, 3.2.2001, p. 3.