



EUROPEAN COMMISSION

Brussels,  
C (2015) ....

### ***Embargo VISTA illimité (\*)***

**Subject: State aid SA.33159 (2011/NN) – Denmark**  
**Taxation of saturated fat in certain food products sold in Denmark**

Sir,

The Commission wishes to inform Denmark that, having examined the information supplied by your authorities on the tax scheme referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union. ("TFEU")

#### **1. PROCEDURE**

- (1) On 9 June 2011 the Commission received a complaint regarding the Danish Act on taxation of saturated fat in certain food products, Law no. 247 of March 30 2011<sup>1</sup> (hereinafter '*the Act*'). The law entered into force on 1 October 2011 and was later abolished as of 1 January 2013.
- (2) The alleged State aid measures are in the form of exemptions from the tax on saturated fat (hereinafter "tax on saturated fat").
- (3) In order to seek further clarification, an information request was sent to Denmark on 4 July 2011. The Commission forwarded the original complaint to the Danish authorities and asked them to submit their own summary of the facts in order to address the claims made by the complainant within 20 working days or to notify the measure as State aid to the Commission for approval. Denmark asked for an extension of the deadline on 18 July 2011 which was granted until 31 August 2011. On 7 September 2011 Denmark

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<sup>1</sup> In Danish: *Lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven)*  
<https://www.retsinformation.dk/FORMS/R0710.aspx?id=136314>.

(\*) Ce timbre porte sur l'ensemble des documents qui composent le dossier

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submitted its response to the Commission's letter in which it presented its views on the issues raised by the complainant.

- (4) On 13 October 2011 the Commission forwarded Denmark's comments to the complainant. On 27 June, 28 July, 12 September and 15 November 2011 the complainant submitted additional information in support of his case.
- (5) On 14 December 2011 the Commission informed Denmark that, as the Act had entered into force on 1 October 2011 without having been notified pursuant to Article 108(3) of the Treaty, the measure would be treated as a case of potential non-notified aid.
- (6) On 13 March 2012 the complainant submitted further information in support of his complaint.
- (7) On 16 March 2012 a meeting was held between the Commission and Denmark. On 12 April 2012 the Commission forwarded the full complaint to the Danish authorities and asked them to address and clarify the issues put forward by the complainant. In case the Danish authorities would be of the opinion that the measure does not give rise to State aid concerns, they were asked to provide their own summary of the facts, as well as a substantiated reasoning as to why they do not consider the points raised by the complainant to give rise to State aid concerns. On 13 September 2012, after a request to extend the deadline for answering, Denmark replied to the Commission's letter of 12 April 2012.
- (8) On 30 October 2012 the Commission forwarded the Danish authorities' comments to the complainant. On 30 November 2012 the complainant submitted additional information in support of his complaint.
- (9) On 16 May 2013, after the Act ceased to be in force on 1 January 2013, a meeting was held between the Commission and the complainant.

## **2. DESCRIPTION**

### **2.1. Description of the tax scheme**

#### *2.1.1. Title*

- (10) Taxation of saturated fat in certain food products sold in Denmark.

#### *2.1.2. Objective*

- (11) According to the Danish authorities the objective of the tax scheme was the promotion of better diets in order to improve the health and mean life expectancy of the population in Denmark. This should be achieved by reducing the intake of saturated fat.

### 2.1.3. *Duration*

- (12) On 30 March 2011 the Danish Parliament adopted the Danish Act on taxation of saturated fat in certain food products, Law no. 247 of 30 March 2011. The Act entered into force on 1 October 2011.
- (13) Following further considerations of the Danish legislator, the Act was abolished by the Danish Parliament on 19 December 2012 and ceased to be in force on 1 January 2013.
- (14) The relevant period for the assessment of the possible State aid in the form of exemptions from the tax on saturated fat in Denmark is, therefore, for the purposes of this decision the period from 1 October 2011 until 31 December 2012.

### 2.1.4. *Legal Basis*

- (15) Lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven), lov nr 247 af 30/03/2011 ("*Danish Act on taxation of saturated fat in certain food products*").

### 2.1.5. *Estimated amount of the alleged aid*

- (16) The Danish authorities have not provided a calculation of the amount of the possible aid (the loss in tax income due to the exemptions from the tax).

### 2.1.6. *General provisions on taxation under the Act*

- (17) The Act levied a tax on the weight of saturated fat in the food products listed in article 1 of the Act (hereinafter: foodstuffs) and identified by the EU combined nomenclature code, if the saturated fat content in the foodstuffs exceeds 2.3% of the weight of the product. The foodstuffs listed were:
  - i. meat, according to table in Annex I to the Act;
  - ii. dairy products under codes 0401-0406;
  - iii. animal fat under codes 1501-1504 and 1516 which is melted off or extracted in another way;
  - iv. cooking oils and fats under codes 1507-1516;
  - v. margarine and other food products under code 1517;
  - vi. spreadable blended products under code 2106;
  - vii. other food products which, based on an overall evaluation of the characteristics and use of the food products and the way in which they are marketed, can be considered substitutes for or imitations of the products specified in points i-vi above.

- (18) According to article 2 of the Act, the tax was fixed at DKK 16 per kg of saturated fat in the respective foodstuff.
- (19) Article 3 of the Act defined operators liable to pay the tax as those who for commercial purposes
- (a) produce a taxable foodstuff in Denmark;
  - (b) receive a taxable foodstuff to Denmark from another EU country;
  - (c) import a taxable foodstuff to Denmark from a country outside the EU or from territories within the EU which are outside the fiscal territory of the EU, or
  - (d) sell a taxable foodstuff from another EU country in such a way that the foodstuff is directly or indirectly sent or transported by or on behalf of the seller to a non-commercial purchaser in Denmark (distance selling), if the entity is registered under section 47(2) of the VAT Act<sup>2</sup>.
- (20) Exempted from paying the tax were those entities with annual sales of taxable foodstuffs totalling DKK 50 000 (exclusive of tax) or less(Article 4(6) of the Act).
- (21) The amount of saturated fat in the foodstuffs listed in article 1 (2-7) of the Act can be determined based on:
- (a) the nutritional label, if the foodstuff has one and it lists the saturated fat content of the foodstuff,
  - (b) publically available food information which sets average standards for a number of foodstuffs. Publically available food information means the standards which are found in the Food Composition Databank<sup>3</sup>,
  - (c) a technical analysis of the foodstuff.
- (22) If the base amount on which the tax was to be paid could not be set using one of the above methods, the tax was to be paid based on the foodstuff's total fat content or ultimately on the foodstuff's net weight.

*2.1.7. Special provisions on taxation of imported food not listed in article 1 of the Act but which contain foodstuff(s) listed in article 1 of the Act*

- (23) According to article 8 of the Act, a coverage tax was to be paid on the constituents used in the production of food, where these constituents originate from any taxable foodstuff specified in Article 1 of the Act and where such food was received, imported or sold by distance selling in Denmark. The coverage tax was only imposed on food received, imported or sold by distance

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<sup>2</sup> Danish VAT Act [LBK no. 287 of 28/03/2011].

<sup>3</sup> See webpage [www.foodcomp.dk](http://www.foodcomp.dk).

selling in Denmark, as taxable foodstuff produced in Denmark could always be taxed in its "pure" form at the first point of sale/use and therefore there was no need for a coverage tax on food produced in Denmark.

- (24) According to article 12 of the Act, the tax basis was the weight of saturated fat in the constituents which originate from the taxable foodstuff specified in Article 1 and which were used in the production of food received, imported or sold by distance selling.
- (25) According to the second paragraph of Article 2, taxable parties had to be able to document the weight of saturated fat in the constituents used in the production of food and were, on request, to present a declaration thereof from the producer. For constituents subject to a coverage tax and specified in Article 1(1), i.e. meat, the tax basis is to be determined on the basis of the average rates provided for in Annex I.
- (26) For other constituents on which coverage tax was to be paid, the producer could, when issuing the producer declaration, make use of publicly available food product information, which provides average standards for the amount of saturated fat in specific foodstuffs, to determine the tax basis for the constituents subject to the coverage tax which were used in the production of the food.
- (27) Where the taxable person is unable to present the specified producer declaration, constituents other than those specified in article 1(1) of the Act will be subject to a coverage tax based on the total content of both saturated and unsaturated fat in the food product or, where such information can also not be provided, on the basis of the net weight of the food product.
- (28) In case the Danish Tax and Customs Administration found that the coverage tax calculated in accordance with article 12(2) would constitute a higher amount than the coverage tax calculated on the basis of the total fat content or the net weight, the Danish Tax and Customs Administration may determine the tax basis on an estimate.

*2.1.8. Exemptions from the general taxation rules and the 2.3% threshold (alleged aid measures)*

- (29) The Act contained six measures: five types of exemptions or preferential treatments from the general taxation rules and the 2.3% threshold. These measures are described below (sub-chapters 2.1.8.1.-2.1.8.6.).

2.1.8.1. Measure 1: Omission of certain food products from the list of food products in article 1 of the Act on which tax is levied

- (30) With regard to agricultural products, a non-exhaustive list of products which were not taxed because they were not listed in article 1 of the Act reads as follows:

- (a) eggs: eggs have an average saturated fat content of 2.6%<sup>4</sup> and the consumption of eggs contributes with 1% to the total intake of saturated fat in Denmark, the same amount as chicken and fish respectively;<sup>5</sup>
  - (b) nuts: the average saturated fat content is as follows for the following nuts: Coconut - 32%, walnut – 5.4%, hazelnut – 3.5% and almond – 3.1%;<sup>6</sup>
  - (c) seeds: the average saturated fat content is as follows for the following seeds: Sunflower seeds – 7.2%, sesame seeds – 6.7% and poppy seeds – 4.9%;<sup>7</sup>
  - (d) bread and grain: bread together with grain contribute to an intake of 6% of saturated fat in Denmark<sup>8</sup>;
  - (e) potatoes;
  - (f) vegetables;
  - (g) fruits;
  - (h) sugar;
  - (i) supplements, vitamins, and food additives according to Regulation (EC) No. 1333/2008<sup>9</sup>.
- (31) These products contribute to the intake of saturated fat in Denmark in accordance with the table below.

Product	Contribution to total intake of saturated fat
Milk	8%
Other milk products	8%
Cheese	14%
Bread and Grain	6%
Potatoes	1%
Vegetables	2%
Fruit	1%
Meat	18%
Poultry	1%
Fish	1%

<sup>4</sup> Danish Food Composition Databank ed. 7.01, operated by the National Food Institute – Technical University of Denmark (DTU), <http://www.foodcomp.dk>.

<sup>5</sup> According to the Danish industry organisation *Landbrug & Fødevarer* 68.1 million kilograms of eggs for human consumption were produced in Denmark and 76.7 million kilograms of eggs for human consumption were imported to Denmark in 2008.

<sup>6</sup> Danish Food Composition Databank ed. 7.01.

<sup>7</sup> Danish Food Composition Databank ed. 7.01.

<sup>8</sup> Danskernes kostvaner 2003-2008, DTU Fødevareinstituttet.

[http://orbit.dtu.dk/fedora/objects/orbit:113040/datastreams/file\\_9784886/content](http://orbit.dtu.dk/fedora/objects/orbit:113040/datastreams/file_9784886/content)

<sup>9</sup> OJ L354, 31.12.2008, p. 16.

Eggs	1%
Fat	32%
Sugar and candy	6%

Source: Danskernes kostvaner 2003-2008, DTU Fødevareinstituttet.

No information was provided with regards to the contribution of supplements, vitamins, and food additives to the intake of saturated fat. However, by calculating the combined contribution of the food products included in the list above, which results in 99%, it is possible to conclude that supplements, vitamins, and food additives contribute with less than 1%.

#### 2.1.8.2. Measure 2: Non-taxation of foodstuffs with saturated fat content not exceeding the 2.3% threshold

- (32) Article 1 of the Act explicitly states that tax is payable on the weight of saturated fat in the foodstuffs listed therein if the saturated fat content in the foodstuff product exceeds the 2.3% threshold by weight. This means that any foodstuff listed in article 1 of the Act, but which total saturated fat content by weight is 2.3% or less, is not taxed.
- (33) The level chosen, the 2.3% threshold was exactly that of full-cream milk in Denmark. Based on the information available at this stage, it would, therefore, appear that the most milk would be tax exempted<sup>10</sup>. In fact, the products that seem to have benefitted from this threshold were milk and other low fat dairy products, meat originating from certain animals and cuts of meat from other animals with low saturated fat content and the producers of these products. The Commission possesses very limited information on the meat sector and the meat industry in Denmark and to what extent meat products and cuts of meat fall under the 2.3% threshold. It is however clear from Annex I of the Act that certain animals and certain cuts will contain less than 2.3% of the saturated fat content and as a consequence, producers of such meat were beneficiaries. The Commission's understanding of the dairy sector and industry in Denmark is provided below.

#### *Dairy sector*

- (34) According to an estimate in the publication "Danskernes Kostvaner 2003-2008"<sup>11</sup> ("Dietary habits in Denmark 2003-2008") 16% of the Danish consumption of saturated fats stem from milk and other dairy products. According to an answer given by the Danish Ministry of Taxation to the Danish Parliamentary Tax Committee in conjunction with the hearing on the law proposal for a tax on saturated tax<sup>12</sup>, approximately half of that stems from milk and milk products with a saturated fat content below the 2.3% threshold. This implies that approximately 8% of the total consumption of saturated fat in Denmark stems from dairy products which were not taxed. No other product,

<sup>10</sup> See the reasoning to the draft Act, L 111 Forslag til lov om afgift af mættet fedt I visse fødevarer (fedafgiftsloven). 19.1.2011.

<sup>11</sup> Danskernes kostvaner 2003-2008, DTU Fødevareinstituttet.

<sup>12</sup> L 111 - Forslag til lov om afgift af mættet fedt i visse fødevarer (fedt-afgiftsloven), 28.02.2011, <http://www.ft.dk/samling/20101/lovforslag/1111/bilag/35/963185/index.htm>.

or group of products containing less than 2.3% saturated fat, seems to contribute to the same extent to the total consumption of saturated fat in Denmark.

*The dairy industry*

- (35) The Danish dairy industry consists of the international dairy group Arla Foods and 30 smaller dairy companies, together processing 4.7 billion kg of milk from a total of 61 production plants in Denmark. Cooperatively owned by Danish and Swedish milk producers, Arla Foods is Europe's largest dairy group. The Arla group processes more than 90% of the Danish milk pool. It also runs dairy operations in a number of other countries, with Arla UK plc as its biggest business. The remaining 30 Danish dairies are evenly distributed between cooperatively and privately owned companies. The small dairies typically specialise in various product areas within cheese, butter and liquid milk production. A large part of their production is exported by specialised exporters.<sup>13</sup>
- (36) The Danish market is, to a large extent, a market for domestic dairy production, where the domestic share of the market still accounts for approximately 75% and 80% for cheese and yoghurt respectively. For milk the figure is even greater, close to 95% according to one source<sup>14</sup>, with the market share of foreign milk remaining moderate.<sup>15</sup>
- (37) Exports of dairy products, in particular cheese, preserved milk products and butter, account for more than 20% of all Danish agricultural exports. The largest market for Danish dairy products is the other EU Member States.<sup>16</sup>

2.1.8.3. Measure 3: Exemption from paying the tax for entities whose annual sales of taxable foodstuffs total DKK 50,000 or less.

- (38) According to article 4(6) of the Act, entities with annual sales of taxable foodstuff of DKK 50,000 or less did not need to register in accordance with the Act and did not have to pay the tax.

2.1.8.4. Measure 4: Exemption of products not intended for human consumption, such as feed for animals.

- (39) Products not intended for human consumption, such as fuel and animal feed, were excluded from the scope of the Act as the objective of the tax was to contribute to the improvement of the diets of the Danish people.

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<sup>13</sup> <http://www.agricultureandfood.dk>.

<sup>14</sup> [www.europeanmilkboard.org](http://www.europeanmilkboard.org).

<sup>15</sup> <http://www.agricultureandfood.dk>.

<sup>16</sup> <http://www.agricultureandfood.dk>.

2.1.8.5. Measure 5: Differential treatment of domestic and imported products with regards to when and how the tax is levied

- (40) The Act also made certain differentiations in the treatment of undertakings depending on if it was a domestic producer (article 6(5) of the Act) or an importer (article 12(3) of the Act). A domestic product was taxed early on in the production chain and the producer was therefore able to pay taxes on the nutrition label much more easily as the product would not have been significantly processed than an importer who in many instances had to pay tax on a product much further down in the production chain when the products in general are more processed. As explained by the Danish authorities, the domestic producers normally only had to go one step back in the production line to find the necessary information on the presence and volume of the saturated fat of the foodstuff used in the given product (or could use analysis of the foodstuff before using it in the production). An importer on the other hand might have had to go back several steps in the production chain to receive the same information about the amount of saturated fat in the foodstuff and therefore was not able to analyse the foodstuff several steps back in the production line, without great difficulty. Actually to do this, would require requesting the undertaking who either produced the foodstuff or who bought the foodstuff to make the analysis.

2.1.8.6. Measure 6: The tax deferral and tax deduction regimes

- (41) Sub-measure 1: In accordance with article 4(2) of the Act, a Danish undertaking which produced food products using foodstuffs which are taxable under the Act for both the domestic market and for export could register as a stockist for the part of the production which it planned to export, based on the volume of products exported in the previous year. This meant it could, in accordance with article 5(1) of the Act, produce, process, store and buy taxable foodstuffs for this part of the production without paying the tax. For suppliers of domestically produced foodstuffs, to a Danish undertaking benefiting from article 5(1) of the Act, it was therefore always possible to sell their foodstuff going into the production for export without tax. For suppliers of imported foodstuff, it was only possible to sell the foodstuff going into the production for export without tax if the supplier himself fulfilled the conditions in article 4(3) third sentence of the Act.
- (42) Article 4(3) third sentence of the Act required that the supplier only conducted intermediate trading (i.e. he only sold to other undertakings registered as stockists according to the Act and not selling any products directly to resellers) and thereby was registered as a stockist. If the supplier did not fulfil this condition, he was registered as a consignee (i.e. someone who receives/imports taxable foodstuff or food products containing taxable foodstuff to Denmark from another EU country, a country outside of the EU or from areas located in the EU which are not included in the EU's fiscal territory) and then the undertaking in question, that bought the imported foodstuff from this supplier,

had to pay the tax at the time of purchase and then ask for a refund for the part that was exported in accordance with article 17(2) of the Act.

- (43) Sub-measure 2: According to article 17(1)(vi) of the Act, a Danish producer of taxable food products, registered as a stockist and who sold his products directly to a supermarket chain, paid the tax at the point of sale. If he offered a contract which stipulated that he would buy back any products which were not sold before the best before date, he had the right to deduct the tax on the products returned to him from his tax bill. An importer did not have the same possibility as he could not register as a stockist if he sold directly to retailers, cf. article 4(3) of the Act.
- (44) Sub-measure 3: Domestic undertakings which produced foodstuff subject to the tax could keep their stock tax exempt as, according to article 7(1) of the Act, they only paid the tax when they sold the foodstuff. Importers of foodstuffs on the other hand paid the tax when they purchased the foodstuff and not when they resold it, cf. article 7(3) of the Act.
- (45) Sub-measure 4: According to article 17(1) of the Act, an undertaking registered as a stockist did not have to pay taxes on foodstuff which were lost on account of burglary, fire, shipwreck or breakage or which were damaged, had become tainted or unfit for use for any other reason, while in stock or during transport to or from the stockist.
- (46) As confirmed by the Danish authorities, none of the provisions described in this section applies to the importers registered as consignee.

#### *2.1.9. Beneficiaries of the alleged aid measures*

- (47) Potential beneficiaries of the alleged aid measures, as described in part 2.1.8. above, could be producers of products which contain saturated fat but on which no tax was levied in the relevant period because either the product was not covered by the scope of the Act or it was explicitly exempted from its scope or producers which could take advantage of the preferential treatment of domestic products vis-à-vis imported products.

### **3. COMPLAINT**

- (48) On 9 June 2011 the Commission received a complaint regarding the Act. According to the complaint, the State aid was to be found in the form of exemptions from the tax for producers whose products were not covered by the Act or were explicitly exempted from the applicability of the Act.
- (49) In fact the complaint pointed out the following major State aid concerns in his complaint: (1) the threshold for taxation (above 2.3% of saturated fat), (2) the exemption of several food products from the scope of the Act (even though they contain more than 2.3% saturated fat), (3) and the differential treatment between domestic and non-domestic products/producers. These concerns are summarized below.

### **3.1. *Threshold for taxation (above 2.3% saturated fat)***

- (50) According to the complainant, certain dairy products (mainly milk) were the main taxable products that escaped taxation due to a saturated fat content of less than 2.3%. The complainant, therefore, argued that even though the 2.3% threshold was a transparent and objective criterion, it was selective in effect as it is only one group of products which fall within the criteria chosen. In addition, in Denmark there is mainly one major producer of milk products, named *Arla* (see para (35) above).
- (51) The complainant provided the Commission with data showing that according to the Danish government's own figures the food products falling below the 2.3% threshold make up around 8% of the saturated fat intake in Denmark.

### **3.2. *Exemption of several food products from the scope of the Act (even though they contain more than 2.3% saturated fat)***

- (52) The complainant identified several groups of food products which were not covered by the Act but which comprised products which contain levels of saturated fat above 2.3%. The complainant stated that according to the Danish government's figures the excluded food products would make up around 12% of the saturated fat intake in Denmark. The complainant has provided a list of excluded products, which was, however, not to be considered exhaustive:
- i. eggs: – up to 2.6% of saturated fat;
  - ii. fruit and vegetables – coconut (32%), hazelnut (3.5%), almond (3.1%), walnut (5.4%);
  - iii. potatoes;
  - iv. bread and corn – sesame seeds (6.7%), sunflower seeds (7.2%), poppy seeds (4.9%);
  - v. fish – certain fish contain up to 6% of saturated fat.

### **3.3. *Differentiation between domestic and non-domestic products***

- (53) As a third State aid concern, according to the complainant, since domestic products were always taxed in their purest form – in the form listed in article 1 of the Act, e.g. as a foodstuff: oil, butter, margarine, cream, piece of raw meat, etc., there was never the need for taxing domestic products using the so called coverage tax. Non-domestic products on the other hand had to be taxed by using the coverage tax.
- (54) For products which were taxed via the coverage tax, there was a cascade of possibilities for how to calculate the tax: the amount of saturated fat in the constituents used to produce the product, if this was not available, the total amount of fat in the constituents used to produce the product and if this was also not available, the net weight of the product itself.

- (55) According to the complainant the tax deferral and tax deduction regime established treated certain economic operators more favourably than other operators. It made it possible to defer tax otherwise due and to deduct certain costs or losses in the tax base. This possibility was granted to domestic producers only.
- (56) The main rule was that the reference tax period was each month and that taxation was due by the end of each month. However, according to article 4(1) of the Act, domestic producers of foodstuffs listed in article 1 of the Act gained registration status as "*oplagshaver*" (stockist).
- (57) Pursuant to article 5(1) of the Act, the domestic producers could process, store and import other taxable food products without having to pay the tax within the month of conclusion of these actions. According to article 7(1) of the Act, the domestic producers did not have to pay any tax prior to the month in which the food products left their facilities.
- (58) Accordingly, domestic producers could stock their food products and avoid or postpone taxation with a view of improving cash flow. Pursuant to article 17(1) of the Act, a domestic producer might furthermore deduct certain costs and losses from their tax base under the Act. This was the case for the cost of taxable food products which were damaged, lost, stolen or taken back from the customer upon reimbursement of the purchase price paid by the customer.
- (59) The right to deduct the value of the tax on food products taken back from the customer was, according to the complainant, of significant practical importance. Many food products are sold on a contractual arrangement that unsold food products shall be taken back when the use-by date has expired.
- (60) In comparison, undertakings importing the same or similar food products from other Member States or third countries did not have access to this regime. This was a result of the fact that the importing undertaking was granted the registration status of a "*consignee*" pursuant to article 4(3) of the Act. The preferential treatment was not extended to consignees and thus in general not to undertakings active in imports.
- (61) The complainant argues that the vast majority of importing undertakings would have had to register as a "*consignee*" as they would not have fulfilled or wanted to fulfil the condition required to register as a stockist, i.e. that they would only sell to other undertakings registered as stockist. Thus, importing undertakings would as a main rule and unlike the domestic producers not have the possibility to make any deductions in their tax base. Nor could these importing undertakings seek reimbursement from the Danish taxation authorities in the event that they incurred a loss e.g. as a result of having to take back overdue food products covered by the tax from their customers.

#### 4. PRELIMINARY ASSESSMENT OF THE SCHEME

(62) Article 6(1) of Council Regulation (EC) No 659/1999<sup>17</sup> of 22 March 1999 stipulates that the decision to initiate formal investigation procedure summarises the relevant issues of fact and law and includes a preliminary assessment of the Commission as to the aid character of the measure and sets out the doubts of the Commission regarding its compatibility with the internal market.

##### 4.1. Existence of aid within the meaning of Article 107(1) TFEU

(63) Article 107(1) TFEU stipulates that "*[s]ave as otherwise provided in the Treaties, 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 internal market*".

(64) The preliminary assessment by the Commission on the existence of aid within the meaning of article 107(1) of the TFEU will be carried out for the following measures: 1) omission of certain food products from the list of food products in article 1 of the Act on which the tax was to be levied, 2) non-taxation of foodstuffs with saturated fat content not exceeding 2.3%, 3) exemption from paying the tax for entities whose annual sales of taxable foodstuffs totalled DKK 50,000 or less, 4) exemption of products not intended for human consumption, such as feed for animals, 5) differential treatment of domestic and imported products with regards to when and how the tax was levied and 6) the tax deferral and tax deduction regimes.

##### 4.1.1. Aid granted by the State or through State resources

(65) Article 107(1) of the TFEU states that one of the conditions for an advantage to qualify as State aid is that it has to be granted by a Member State or through State resources in any form whatsoever. Although the exemption from the saturated fat tax does not involve a direct cash outflow for the State, it nevertheless directly affects the public budget as the State foregoes tax revenues to which it would otherwise be legally entitled.

(66) The tax on saturated fat is levied by Denmark on products sold in or intended for sale in Denmark in accordance with the Act. The alleged tax exemptions, the 2.3% threshold and preferential treatment of domestic products resulting from the Act are a result of the way the Act has been drafted and hence they are based on a decision imputable to Denmark and involve State resources, given that by applying the 2.3% threshold or granting tax exemptions or preferential treatment the Danish State forgoes revenues it would normally receive.<sup>18</sup>

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<sup>17</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 of the TFEU), OJ L 83 of 27.3.1999, p. 1.

<sup>18</sup> Commission's Direct Business Taxation Notice (98/C 384/03), point 10.

- (67) Consequently, the Commission considers that the measures resulting from the Act have been granted through State resources and are imputable to the State.

#### 4.1.2. Advantage and notion of undertaking

- (68) According to the case-law of the Courts, measures which, whatever their form, are likely directly or indirectly to favour certain products or undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid.<sup>19</sup>
- (69) The Commission preliminarily considers that the Act, by providing for the 2.3% threshold, tax exemptions for certain food products and preferential treatment of domestic products vis-à-vis imported products, appears to have favoured certain products, which could be regarded as constituting an economic advantage within the meaning of Article 107(1) TFEU. These concerns are based on the following considerations.

##### 4.1.2.1. Undertaking

- (70) Firstly, the beneficiaries under the measures were the natural and legal persons/other entities producing and selling certain products exempted from the general tax on saturated fat, falling under the 2.3% threshold or receiving preferential treatment under the Act.
- (71) The investigated tax reliefs exempted certain producers from a general obligation of paying tax on saturated fat and would thus appear to have constituted an advantage for those producers to the extent they can be considered as undertakings. The Court's general approach is functional in the sense that it focuses on the nature of the activity performed and not on the actors.<sup>20</sup> The only question is whether the entity is engaged in an economic activity. Economic activity is defined as offering goods and services on the market.<sup>21</sup> Among others, it appears from the information provided by the Danish authorities that the beneficiaries are indeed producers active on the market engaged in producing and selling their products. It cannot, therefore, be excluded at this stage that the natural persons and entities are to be considered as undertakings in the sense of 107(1) TFEU.

##### 4.1.2.2. Advantage

- (72) According to settled case-law<sup>22</sup>, the qualification of a measure as State aid does not depend on its form or its aims, but on its effects. It also follows from this

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<sup>19</sup> Judgment of the Court in Case C-280/00, *Altmark* [2003], paragraph 84, Case C-6/97, *Italian Republic v Commission* [1999] ECR I-2981, paragraph 16.

<sup>20</sup> Case C 41/90 *Hofner and Elser* [1991] ECR I-1979, para 21.

<sup>21</sup> Case 118/85, *Commission v Italy* [1987] ECR 2599, para 7 and case C-35/96, *Commission v Italy* [1998] ECR I- 3851, para 36; Joined cases C-1180/98 to C-184/98 *Pavlov* [2000] ECR, p. I-6451, para 74.

<sup>22</sup> See, for instance, Case C-173/73 *Italy v Commission* [1974] ECR 709, para 13; Case C-241/94 *France v Commission ('Kimberley-Clark')* [1996] ECR I-4551, para 20; Case C-480/98 *Spain v Commission* [2000] ECR I-8717, para. 16; and Case C-5/01 *Belgium v Commission ('Cockerill')* [2002] ECR I-11991, para 45.

case-law that the concept of an "*advantage*" also covers any tax exemption or deferral of the tax burden due.<sup>23</sup> In the same way, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to constitute aid.<sup>24</sup>

- (73) It appears from the information submitted by the Danish authorities that the effects of the tax reliefs foreseen by the investigated measures resulted in a relief for certain undertakings from the tax burden (savings on their tax bills) which they would otherwise have had to bear. Since the scheme seems to have favoured certain groups of undertakings (certain food producers) it could be concluded that the support in question gives them an advantage within the meaning of Article 107(1) TFEU.
- (74) Furthermore, it seems from the information provided by the Danish authorities (recitals (40) et seq.) that the Act envisaged certain preferential regimes for domestic food producers as compared to importers. The described system appears to constitute an advantage to the domestic producers within the meaning of Article 107(1) TFEU as they were put into a more favourable financial position compared to the undertakings importing the same type of products.
- (75) This is a result of the fact that the domestic producers were given a legal possibility to defer payment of their tax burden under the Act until the food products had left their stock. By implication, the domestic producers might have gained a certain cash-flow advantage.
- (76) This concern about an advantage given to the domestic producers is furthermore strengthened by the fact that the Danish legislator conceded in the accompanying preparatory legislative documents<sup>25</sup> that the aim and effect of the preferential regime was to enable the domestic producers to gain a cash flow advantage.<sup>26</sup> As confirmed by the Danish authorities (recital (45)), these deferral and tax deduction options were not available to undertakings importing the same type of food products and selling them on the same Danish markets.
- (77) Consequently, based on the settled case law of the Court of Justice<sup>27</sup>, the Commission preliminarily concludes that the contested preferential regime conferred an advantage, within the meaning of Article 107(1) TFEU, on

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<sup>23</sup> Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14.

<sup>24</sup> Judgment of the Court in Case C-355/00, *Freskot AE v Elliniko Dimosio* [2003] ECR I-5263, paragraph 83.

<sup>25</sup> L 111 - Forslag til lov om afgift af mættet fedt i visse fødevarer (fedt-afgiftsloven), 28.02.2011, Annex 3.

<sup>26</sup> Forslag til Lov om afgift af mættet fedt i visse fødevarer (Fedtafgiftsloven), September 2010 udkast, "Bemærkninger til lovforslaget", article 3.4.1. (Annex 3).

<sup>27</sup> See e.g. C-222/04, *Ministerio dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA*, paragraph 132.

domestic producers as compared to undertakings importing the same type of taxable products intended for sale on the same Danish markets.

#### 4.1.3. Selectivity

- (78) According to the case law of the Union Courts, as regards the selectivity of a tax measure, Article 107(1) TFEU requires the assessment of whether, under a particular legal regime, a national measure is such as to favour "*certain undertakings or the production of certain goods*" in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.<sup>28</sup> Hence, the Commission has to assess the material selectivity of a tax measure in three stages.
- (79) First, the common or "normal" regime under the applicable tax system has to be identified ("the system of reference"). Second, it will be assessed and determined whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from the system of reference inasmuch as the measure differentiates between economic operators who, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. If such derogations exist, meaning that the measure in question *prima facie* appears to be selective, in a third stage, it will be examined whether the differentiation results from the nature or general scheme of the tax system of which it forms part and could hence be justified. In this context, according to Union Courts' case law<sup>29</sup>, the Member State has to show whether the differentiations derive directly from the basic or guiding principles of the system of reference.

##### 4.1.3.1. System of reference

- (80) In its practice the Commission has acknowledged that special taxes, such as levies on certain products or activities with an impact on the environment or health, which do not in fact form part of a wider taxation system, constitute in themselves in principle a system of reference.<sup>30</sup> In the present case, the system of reference is the Danish tax system, and in particular the rules on taxation of saturated fat in foodstuffs. As described above (recital (17) et seq.), products containing saturated fat are in principle subject to the tax on saturated fat. In accordance with the applicable provisions of the Act, a tax of DKK 16 per kg of saturated fat in the respective foodstuff applies.

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<sup>28</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; Case C-487/06 P, *British Aggregates Association v. European Commission*, [2008] ECR I-10515, paragraph 82; Case T-210/02, *British Aggregates Association v. European Commission*, [2006] ECR II-02789.

<sup>29</sup> Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671, paragraph 62, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

<sup>30</sup> Case T-210/02 *RENV British Aggregates Association v Commission* [2012] ECR II-0000, paragraphs 49 and 50. Even if a levy is introduced in the national legal system to transpose an EU directive, that levy remains the system of reference.

#### 4.1.3.2. Derogation from the system of reference

- (81) The measures at issue are exemptions (tax reliefs or preferential treatments) from the tax on saturated fat granted to certain products/producers in Denmark in 2011 and 2012, the 2.3% threshold and preferential treatment of domestic producers. It appears that the measures (as listed in recitals (29) et seq.) from the tax on saturated fat provided for in the Act differentiated (i) between certain products (and therefore between certain producers/production activities) and (ii) between domestic producers and importers<sup>31</sup>. The differentiation favoured the production of certain products and domestic producers.
- (82) As described above in recital (17), as a rule a tax with a rate of DKK 16 per kg of saturated fat in the respective products is applied to most products containing saturated fat. Thus, it seems that all entities producing products containing saturated fat, including importers of the same or similar products, are in a comparable legal and factual situation. However, certain products are not subject to the tax on saturated fat.
- (83) In addition it has to be noted that domestic producers could benefit from certain preferential treatment and deductions under the tax regime compared to importers of the same or similar products. The measure appears to be selective also in this sense as it distinguishes between these two groups of undertakings.
- (84) This preliminary view of the Commission is based on the settled case law of the Court of Justice. In its ruling *CETM v Commission*<sup>32</sup> the Court of Justice accepted that *"the fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article [107(1) TFEU]"*.
- (85) Moreover, neither a large number of eligible undertakings (which can even include all undertakings of a certain sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State initiative constitutes a general measure of economic policy, if not all economic sectors can benefit from it. The fact that the scope of application of a measure is determined in an objective manner is not in itself sufficient to establish the general character of the measure and does not exclude selectivity<sup>33</sup>.
- (86) The measures thus appear to derogate from the system of reference, as only certain producers may benefit from them. Hence, at this stage the Commission considers that the measures *prima facie* constitute selective measures.

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<sup>31</sup> See the description of the six exemptions (measures) in recitals (29) et seq.

<sup>32</sup> Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 40.

<sup>33</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 48.

#### 4.1.3.3. Justification by the nature or general scheme of the system

- (87) According to the case law, the selective nature of a measure may be justified by *'the nature or general scheme of the system'*<sup>34</sup>. If so, the measure is not considered to be State aid within the meaning of Article 107(1) TFEU. Point 23 explains that this is the case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system.
- (88) Specific provisions that do not contain discretionary elements, allowing for example tax to be determined on a fixed basis (for example, in the agriculture or fisheries sectors), may be justified by the nature and general scheme of the system where, for example, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors; such provisions do not therefore constitute State aid.<sup>35</sup>
- (89) A justification of the fiscal measure in question on the basis of the nature or overall structure of the tax system constitutes an exception to the principle that State aid is prohibited and must, therefore, be interpreted strictly.<sup>36</sup> It falls to the Member State concerned to demonstrate that the derogation in question is justified by the general nature or overall structure (logic) of the tax system and that therefore it does not constitute State aid within the meaning of Article 107(1) TFEU.<sup>37</sup>
- (90) Similarly, such verification needs to be performed in cases concerning special purpose levies, where there are elements indicating that the boundaries of the levy 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 levies in question.<sup>38</sup> In this respect, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other hand, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.<sup>39</sup>
- (91) The justification of the measures at issue *'by the nature or overall structure of the system'* refers to the consistency of a specific tax measure with the internal logic of the tax system in general.<sup>40</sup> Thus, a specific tax measure which is justified by the internal logic of the tax system – such as e.g. the

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<sup>34</sup> Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671, paragraph 62, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365

<sup>35</sup> See conclusions in Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671, paragraph 62, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

<sup>36</sup> Judgement of 6 March 2002, *Diputación Foral de Álava e.a./Commission*, T-127/99, T-129/99 et T-148/99, ECR II-1275, para 250.

<sup>37</sup> Judgment of the Court of Justice of 6 September 2006, *Açores – Portugal v Commission*, case C-88/03.

<sup>38</sup> Case C-53/00 *Ferring*, [2001] ECR I-9067, para 20.

<sup>39</sup> Case C-88/03, *Açores – Portugal v Commission*, [2008] ECR II-103, para 81.

<sup>40</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para 39.

progressiveness of the tax which is justified by the system's aim of redistribution – will be outside the scope of Article 107(1) TFEU.<sup>41</sup>

(92) The objective pursued by the general reference system in question, i.e. the Danish tax on saturated fat, is to promote better diets and improve the health and mean life expectancy of the Danish population. Such an objective cannot, in the Commission's preliminary view, prevent the classification of the exemptions from the tax as State aid within the meaning of Article 107(1) TFEU. Moreover, with regard to the scope and structure of the exemptions from the general tax scheme, and a distinction among the taxable and non-taxable foodstuff products the Commission has doubts as to whether this system in general is in line with the alleged objectives as presented by Danish authorities. If that argument were accepted, it would be sufficient for public authorities to rely on the legitimacy of the objectives pursued by the adoption of an aid measure for the measure to be regarded as a general measure, outside the scope of Article 107(1) TFEU. However, that Treaty provision does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects.<sup>42</sup>

(93) As different types of exemptions from the general reference system have been identified (Section 2.1.8 above), the respective exemptions have to be examined separately as to their possible justifications.

*Measure 1: Omission of certain products from the list of food products in article 1 of the Act on which tax is levied (Section 2.1.8.1)*

(94) In accordance with the information available to the Commission at this time, several types of products are omitted from the list of food products on which the tax is levied.

(95) At this stage the Danish authorities have not provided any convincing arguments why certain products, albeit containing significant amounts of saturated fat, were not subject to the general tax on saturated fat.

(96) For eggs, the Danish authorities argue that the consumption of eggs only contributes with 1% to the total intake of saturated fat in Denmark and therefore cannot be considered a primary source of intake of saturated fat. In addition, eggs are rich in protein and a number of important vitamins and minerals. The same argument is then used for all the other food products containing saturated fat which are not listed in article 1 of the Act. According to the Danish authorities, the basic purpose of the bill is to improve the health of the Danish population and therefore these products can be excluded as their impact on the health of the Danish population is minimal.<sup>43</sup>

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<sup>41</sup> Cases T-529/08 to T-531/08, *Diputación Foral de Álava e.a./Commission*, [2009] ECR II-3029, para 164.

<sup>42</sup> Case C-241/94 *France v Commission* [1996] ECR I-4551, para 20, and *CETM v Commission*, para 53.

<sup>43</sup> Denmark's submission of 13.9.2012.

- (97) The exemption of supplements and vitamins is motivated by Regulation (EC) No. 1333/2008 and its definition of food additives.<sup>44</sup> The exemption of these products from the scope of the act is justified by the Danish government in the comments to the Act by the fact that they cannot be considered as independent food products.
- (98) At this stage and based on the information available, the Commission cannot accept this argument put forward by the Danish authorities. As shown in table provided for in recital (31) and in recital (52) certain foodstuff products (e.g. fish, milk<sup>45</sup> or bread and corn) contain significant amount of saturated fat exceeding the 2.3% threshold but are not taxed even if they (e.g. bread or milk) contribute to the significant intake of saturated fat in Denmark.<sup>46</sup> It would, therefore, seem rather logical and in line with the objectives of the taxation system as presented by the Danish authorities to impose the same levy on these foodstuff products as well.
- (99) Such arbitrary distinction between the taxable and non-taxable foodstuff products might lead to distortion of competition between substitutable products. Milk as non-taxed product competes to certain extend with milk powder (taxed product), fish (non-taxed) with meat. According to the information provided by the complainant, fish (non-taxed)<sup>47</sup> overall contributes to roughly equal intake of saturated fat than poultry which is, however, subject to the tax levy.
- (100) The Danish authorities have not yet provided any further information to oppose this argument and complainant's data presented to the Commission services.
- (101) The Commission's preliminary view is, therefore, that the non-taxable products from their characteristics point of view are in a similar factual and legal situation in the light of the intrinsic objective of the system of reference as the listed taxable products. At this stage no technical, legal or factual features or peculiarities of this group of products have been identified so that they could not be regarded as being in a comparable factual and legal situation.<sup>48</sup>
- (102) The Danish authorities are, therefore, requested to provide further information on which products are exempted from the tax and the necessary justification

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<sup>44</sup> Food additives are substances that are not normally consumed as food itself but are added to food intentionally for a technological purpose described in the Regulation, such as the preservation of food.

<sup>45</sup> According to the complainant's allegations, milk and other dairy products with a content of saturated fat below the 2.3% threshold of the saturated fat content are contributing to 5.7% of the total intake saturated fat in Denmark.

<sup>46</sup> According to the complainant's allegations which have not yet been rebutted by the Danish authorities, milk and milk products are in total the highest source of fat originating from saturated fat in Denmark.

<sup>47</sup> According to the data presented to the Commission by the complainant, several of the most popular fish for consumption by the Danes contain more than 2.3% saturated fats – e.g. mackerel, herring, halibut and salmon have a content of saturated fat around 5.7%, 3.5%, 3.3% and 2.4% respectively.

<sup>48</sup> See Court's reasoning in Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paragraph 61.

for a different treatment of undertakings producing the exempted products based on precise data and calculations.

*Measure 2: Exemption from taxation of food products with saturated fat content not exceeding the 2.3% threshold (Section 2.1.8.2)*

- (103) Based on the information provided by the complainant and by the Danish authorities, the Commission arrived at the preliminary conclusion that the exemption in question from taxation of food products with saturated fat content of less than 2.3 % foremost benefited the production of milk and other dairy products in which a very limited number of undertakings are active.
- (104) The Danish authorities provided certain information for the justification of the fixed minimum threshold. A general minimum threshold had to be put in place in order to minimise the number of low fat foodstuffs which are included in the tax while at the same time taking into account the nutritional recommendations<sup>49</sup> as to the recommended daily intake of fat originating from unsaturated fat.<sup>50</sup>
- (105) The Danish authorities claimed that this would not be a State aid concern, given that the threshold is general and applicable to all products with a saturated fat content not exceeding 2.3% saturated fat such as low fat cheese or low fat meat (turkey, rabbit, hare and specific cuts of other animals). They also argued that the setting of a minimum threshold is in line with the purpose of the Act and justified for administrative reasons.<sup>51</sup>
- (106) The Danish authorities explained that the 2.3% threshold implied that milk would not be taxed and that this was consistent with the dietary recommendations by health authorities<sup>52</sup> that small children should drink milk.<sup>53</sup> In a letter to the Commission, Denmark confirmed that the level had been chosen in order to exclude full milk and less fatty milk from taxation for the described health reason.<sup>54</sup>
- (107) The Commission notes, however, that, according to the commentary to the draft Act<sup>55</sup>, a Prevention Commission was set up in 2008 which in 2009 gave recommendations on how the Act could be improved. These recommendations also foresaw a tax on milk products. According to the complainant's calculations, milk and other dairy products with a content of saturated fat below the 2.3% threshold are contributing to 5.7% of the total intake saturated fat in Denmark. This might explain, in the view of the Commission, why the Prevention Commission might have originally recommended inclusion of all

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<sup>49</sup> However, no specific reference has been provided by Denmark.

<sup>50</sup> See the reasoning to the draft Act, L 111 Forslag til lov om afgift af mættet fedt i visse fødevarer (fedafgiftsloven). 19.1.2011.

<sup>51</sup> Denmark's submission of information of 7.9.2011.

<sup>52</sup> However, no specific reference has been provided by Denmark.

<sup>53</sup> See the general introduction to the draft Act, L 111 Forslag til lov om afgift af mættet fedt i visse fødevarer (fedafgiftsloven) of 19.1.2011.

<sup>54</sup> Denmark's submission of information of 7.9.2011.

<sup>55</sup> Forslag til Lov om afgift af mættet fedt i visse fødevarer (Fedafgiftsloven), September 2010 udkast, "Bemærkninger til lovforslaget", Bemærkninger til lovforslaget, point 2.

milk products into the list of taxed foodstuff products. It could, therefore, appear that even foodstuff products with a content of saturated fat below the 2.3% could significantly contribute to the total intake of saturated fat in Denmark if consumed in larger quantities than foodstuff products with the higher content of saturated fat.

- (108) The Commission's preliminary view is, therefore, that the non-taxed foodstuff products with a content of saturated fat below the 2.3% threshold (e.g. milk and other dairy products or low fat cheese) from their characteristics point of view are in a similar factual and legal situation in the light of the intrinsic objective of the system of reference as the listed taxed products. At this stage no technical, legal or factual features or peculiarities of this group of products have been identified so that they could not be regarded as being in a comparable factual and legal situation.<sup>56</sup> It would, therefore, appear that the exclusion of these products from the taxation constitutes State aid within the meaning of Article 107 TFEU.
- (109) With regard to the claim that the threshold mainly seems to benefit milk producers, the Danish authorities argued that it benefits many low saturated fat products as listed in recital (105).
- (110) While based on the available information it appears that the main beneficiaries of this exemption were milk producers, and possibly also meat producers, as their products would to the large extent escape the special taxation levy, it is still necessary to firmly establish which the main beneficiaries and the main benefitted sectors are, and what circumstances justify their exclusion from this taxation regime.
- (111) Denmark is, therefore, requested to provide necessary technical data and calculations to what extent the foodstuff products (broken down per product) with a saturated fat content not exceeding the 2.3% threshold (certain types of milk and milk products, low-fat cheese etc.) contribute to the total intake of saturated fat in Denmark.
- (112) Furthermore, Denmark shall provide an analysis of the milk and meat sectors with regard to the benefits arising from the application of the exemption to products with a saturated fat content not exceeding the 2.3% threshold. The analysis shall identify the proportion of undertakings active in these sectors and their products which benefitted from the exemption as compared to the benefitted undertakings from other sectors which produce food products. The analysis should also identify the monetary value of the tax base of products produced with a saturated fat content not exceeding 2.3% and the monetary value of the exemption received.
- (113) Moreover, the Danish authorities are requested to provide further details and the experts' recommendations based on which the threshold of 2.3% had been

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<sup>56</sup> See Court's reasoning in Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paragraph 61.

established. In addition to the expert statements, Denmark should explain why setting a threshold is the best way to meet these recommendations.

*Measure 3: Exemption from paying the tax for entities whose annual sales of taxable goods total DKK 50,000 or less (Section 2.1.8.3)*

- (114) According to the Danish authorities this exemption was set at the same level as that in the Danish VAT Act, which states that entities with an annual sale of taxable foodstuffs of DKK 50,000 or less do not have to register in accordance with the VAT Act and do not have to pay VAT. If these companies do not have to register for the purpose of paying VAT, they should not need to register for the purpose of paying tax in accordance with the saturated fat Act.
- (115) In the past the Commission has accepted in its decision practice justification of different treatment based on e.g. the need to take into account specific accounting requirements or administrative manageability. The Commission services do not at this stage possess any information which would allow it to assess whether or not the exemption which derogates from the general system of tax on saturated fat could be considered an inherent mechanism necessary for the functioning and effectiveness of the tax system. Based on the available information, the Commission has not identified so far any technical, legal or factual features or peculiarities of this group of undertakings (i.e. specific accounting requirements or administrative manageability of the tax, insignificant amount of tax) so that they could not be regarded as being in a comparable factual and legal situation with the group of the other undertakings producing the comparable taxed products.
- (116) The Danish authorities are, therefore, requested to provide further information on justifications of the different treatment of this group of undertakings.

*Measure 4: Exemption of products not intended for human consumption such as feed for animals (Section 2.1.8.4)*

- (117) The Commission services have considered the explanatory information provided by the Danish authorities. They argue that this group of undertakings producing products not intended for human consumption should not be subject to the tax given the fact that the very objective of the tax is the promotion of better diets and thereby improvement of the health of the Danish population. The Commission considers this exemption to be within the logic of the system and therefore not to constitute aid. Hence, the Commission services do not require any further information at this stage.

*Measure 5: Differential treatment of domestic and imported products with regard to when and how the tax is levied (Sections 2.1.8.5)*

- (118) Based on the preliminary analysis of the Act, it appears that the Act in certain cases would have levied a heavier administrative burden and additional costs on imported products compared to domestic products. Domestically produced products were taxed at an early stage, generally in their "pure form", i.e. as the foodstuffs listed in Article 1 of the Act. When this was not the case, it was at

least always possible for the purchaser of a domestic product subject to the tax to get accurate information from the producer on the saturated fat content.

- (119) For imported products, on the other hand, it would in most cases have been necessary to resort to the coverage tax when calculating the saturated fat content in the product that should be taxed. As described in section 2.1.5. above, the importer of a product has to be able to document the weight of the saturated fat in the constituents (i.e. foodstuff) used in the production of the product. In most cases it should be possible for the importer to make use of publically available food product information to determine the average saturated fat content of the constituents used in the production of the product and to determine the tax base. However, where this was not possible, the importer would have to pay the tax based on either the full amount of fat in the constituent or even the full weight of the final product.
- (120) In addition, when calculating the amount of saturated fat, it should have been based not on the saturated fat content of the finished product, but rather the saturated fat content of the constituents used for the production of the product.<sup>57</sup> Such information might have been very difficult to find out from the producers of the constituents for two reasons: (a) they did not actually know the exact amount because there are no legal requirements to provide such information, (b) they would not wish to provide such information as it was considered a company receipts secret.
- (121) The Danish authorities argue that they intended to place the tax as far back in the production chain as possible in order to place the administrative burden of the new tax on as few businesses as possible.<sup>58</sup> In the Commission preliminary view, the additional administrative burden for imported products when determining the tax base cannot be justified by the fact that the administrative burden for domestic producers has been reduced. In addition, the decision to tax the amount of saturated fat in the foodstuff used to produce a final product seems to go against the objective of the tax, to reduce the amount of saturated fat in the diets of the Danish people.
- (122) The Danish authorities also argue that the documentation that the importer had to provide was not more burdensome than the rules of labelling. It is the Commission's preliminary view that the content of the documentation required for tax purposes is actually different than the documentation required to fulfil the rules on labelling and that requiring two sets of documentation would double the administrative burden. For the purpose of labelling, it is the content of the end product that should be provided. For the documentation required for the tax on saturated fat it is the content of the constituents (foodstuff) used to produce the end product that should be provided.

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<sup>57</sup> To demonstrate the issue on a practical example, this means that it would not be taken into consideration how much saturated fat is actually in e.g. a doughnut, but how much was used to produce the doughnut, including the amount of oil used to deep fry the doughnut.

<sup>58</sup> Danish submission of information of 7.9.2011.

- (123) In the Commission's preliminary view, the taxation of domestic and imported products at different points in the food chain seems to discriminate against imported products. At this point in time, the Commission does not have a sufficient amount of information to draw a final conclusion on the matter. The Danish authorities are therefore requested to provide the necessary information about the practical implications of this two-fold procedures (for domestic and imported products) which would meet the concerns raised by the Commission in the preceding two paragraphs, upon which the Commission can take a decision.

*Measure 6: The tax deferral and tax deduction regimes (Sections 2.1.8.6)*

- (124) Based on the preliminary investigation, it appears that the Act differentiated between domestic producers and importers of the same or similar food producers with regard to certain aspects of the tax deferral and tax deduction regime. This could, in the Commission's preliminary view, have benefitted domestic producers vis-à-vis the importers as regards the available cash-flow (recital (76)). The main differences are summarized below.
- (125) Sub-measure 1: As described in recital (41) and (42), a Danish undertaking which produced products using taxable foodstuffs for both the domestic market and for export could produce, process, store and buy taxable foodstuffs for the part of the production going to export without paying the tax. Therefore, if it purchased taxable foodstuff for its production from domestic producers. These purchases were always tax-free. On the other hand, if purchased from importers, it would only be without tax if the importer fulfilled the specific conditions laid down in Article 4(3) third sentence of the Act, i.e. was only conducting intermediate trading.
- (126) Sub-measure 2: As described in recital (43), a domestic producer of taxable foodstuff products could conclude a delivery contract containing a clause according to which the producer buys back any products which were not sold before "*the best before date*". Under these conditions the producer could deduct the tax on the taxable products returned to him from his tax bill, thus improving his cash-flow. No such possibility was established for the importers.
- (127) Sub-measure 3: With regard to the time of payment of the tax it appears from recital (44) that domestic producers had to pay the tax at the time of sale (i.e. they were able to keep their stock tax exempted). On the contrary, importers had to pay the tax imposed on the taxable foodstuff products at the time of purchase in most cases (i.e. they were not able to keep their stock tax exempted until the moment of sale).
- (128) Sub-measure 4: As described in recital (45), a product produced in Denmark which was lost on account of burglary, fire, shipwreck or breakage or which got damaged, had become tainted or unfit for use for any other reason, while in stock or during transport to or from the stockist, was tax exempted, while a product imported to Denmark which encountered the same fate was not.

- (129) To date, the Danish authorities have not provided any justifying information explaining these differentiations. No technical, legal or factual features or peculiarities explaining the differentiation between the respective groups of undertakings have been identified during the Commission's preliminary investigation. Based on the available information they appear to be in a comparable factual and legal situation with regard to the fiscal and external objective pursued by the Act.<sup>59</sup>
- (130) The only difference identified to date appears to be that imported food products are produced in another EU Member State or outside the EU. Both groups of undertakings sell the same type of food products to Danish consumers. Danish consumers' health is affected equally by the food products bought from domestic producers as by the food products bought from importers from other countries. It is also apparent that both groups of undertakings are in competition.
- (131) Moreover, the levy is imposed on certain products containing saturated fat. Therefore, it must be determined, first, whether it amounts to a charge having equivalent effect to a customs duty within the meaning of Article 30 TFEU. If not, it will then be necessary to consider whether the levy constitutes a discriminatory internal taxation prohibited by Article 110 TFEU.<sup>60</sup>
- (132) The levy cannot be classified as a charge having equivalent effect to a customs duty on exports within the meaning of Article 30 TFEU because it is not charged on imported products only but rather on all products containing saturated fat regardless of their origin.<sup>61</sup>
- (133) A levy may be regarded as discriminatory internal taxation prohibited by Article 110 TFEU if a Member State imposes on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
- (134) As shown above, imported products do not have access to the same preferential tax deferral and tax deduction regime (recitals (41) et seq.). This resulted, as confirmed by the Danish authorities, in a cash flow advantage for domestic producers (recital (76)).
- (135) According to settled case law<sup>62</sup>, such differentiation in treatment cannot be understood as an integral part of a general taxation system which is systematically applied and charged under the same conditions on all products regardless of their origin. Therefore, the measure appears to discriminate

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<sup>59</sup> See Court's reasoning in Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paragraph 61.

<sup>60</sup> Judgment of the Court of 8 November 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten GmbH*, C-221/06, p. I-9664, paras 26-29, judgment of the Court of 11 March 1992, *Compagnie Commerciale de Louest*, joined cases C-78/90 to C-83/90, p. I-1873, para 23 et seq., judgment of the Court of 22 May 2003, *Freskot*, C-355/00, p. I-5263, para 40.

<sup>61</sup> *Ibid*, 42; judgment of the Court of 8 November 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten GmbH*, C-221/06, p. I-9664, paras 40-43.

<sup>62</sup> Judgment of the Court of 22 May 2003, *Freskot*, C-355/00, p. I-5263, para 35; judgment of the Court of 29 June 1999, *DMT*, case C-256/97, I-3913, paragraphs 18 et seq.

between imported products and national products, and might therefore be in contravention of the provisions laid down by Article 110 TFEU.<sup>63</sup>

- (136) Based on the available information, the exclusion of importing undertakings from the preferential tax deferral and tax deduction regime is also in no way logically needed in order to attain the objective of reducing the Danish consumers' consumption of food products containing saturated fats.

#### 4.1.3.4. Preliminary conclusions

- (137) At present, based on the available information provided by the Danish authorities (detailed in the preceding sections) on the objectives of the present scheme and on the nature of the Danish tax system, it appears that the measures (exemptions from the general tax on saturated fat, the favourable treatment for domestic producers and the 2.3% threshold) are not justified on the basis of the nature or general scheme of the system.
- (138) The arguments presented by the Danish authorities do not, at this stage, demonstrate that the measures (exemptions) are necessary for the functioning and effectiveness of the general system of the tax on saturated fat and that there would be a link between the alleged specific features of the measures and the tax relief granted for certain groups of producers only.
- (139) If Denmark considers that the tax exemptions do not constitute State aid, it is requested to demonstrate that the exemptions at issue were justified by the nature and general scheme of the system and, consequently, that it was not aid within the meaning of Article 107(1) TFEU.

#### 4.1.4. *Distortion of competition and effect on trade*

- (140) In order to be considered to fall under Article 107(1) TFEU the measure must affect competition and trade between Member States. When aid granted through State resources strengthens the position of an undertaking<sup>64</sup> compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.<sup>65</sup>
- (141) According to settled case-law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a

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<sup>63</sup> Judgment of the Court of 21 October 2003 in Joined cases C-261/01 and C-262/01, *Van Calster* [2003] ECR I-12249, paragraph 48.

<sup>64</sup> It derives from the case law that the concept of an undertaking comprises any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C 41/90, *Höfner and Elser*, [1991] ECR I-1978, para. 21.) Economic activity is defined as offering goods and services on the market (Case 118/85, *Commission v Italy*, [1987] ECR, para 7, and Case C-35/96, *Commission v Italy*, [1998] ECR I-3851, para 36; joined cases C-180/98 to C-184/98, *Pavlov*, [2000] ECR p. I-6451, para 74.).

<sup>65</sup> Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671, paragraph 11, and case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 17.

possible distortion of competition.<sup>66</sup> The above mentioned preliminary analysis of the Commission (recitals 72ff.) shows that certain undertakings producing products receive an advantage as their products were exempted from the tax levied on the weight of saturated fat in the food products. These undertakings were thus relieved from the tax burden which they would otherwise have had to bear. Moreover, certain measures described and analysed above (recitals (40) - (46) and (118) - (136)) seem to establish a preferential regime for domestic producers resulting in a cash flow advantage for them compared to the importers of the same foodstuff products.

- (142) Aid to an undertaking is likely to affect trade between Member States where that undertaking operates in a market open to intra-Union trade.<sup>67</sup> Based on this established EU Courts' case law the Commission have reviewed the available empirical data of the imports and exports of agricultural products in Denmark. It could be, accordingly, established that there is a substantial intra-Union trade in agricultural products.<sup>68</sup> Therefore, the present tax exemptions and preferential treatments are liable to affect trade between Member States. The mere fact that a common organisation of the market<sup>69</sup> exists for the products concerned by the exemptions and the preferential treatment confirms that any aid towards these products in one Member State is likely to affect trade between the Member States of the EU.
- (143) In the light of the above, the Commission takes the preliminary view that the conditions of Article 107(1) TFEU are fulfilled.
- (144) If Denmark disagrees that the tax exemptions could threaten to distort competition and could affect trade between Member States, it is requested to submit the necessary information demonstrating that the respective tax exemptions had no impact on competition between companies and/or were only of a local nature.

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<sup>66</sup> Judgment of the Court of 17 September 1980 in Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671.

<sup>67</sup> See in particular the judgment of the Court of 13 July 1988 in Case 102/87, *French Republic v Commission of the European Communities* [1988] ECR 4067.

<sup>68</sup> Denmark's intra-Union imports and exports of agricultural products in 2010 stood at €6 554 million and €8 589 million respectively. In 2011, the value of imported fish stock amounted to USD 3216,6 and the value of export to USD 4482,9 (in USD million); source: official statistics of the Food and Agricultural Organization of the United Nations, to be found under <http://www.fao.org/fishery/facp/DNK/en>. The volumes of imports of butter in Denmark amounted to 8.413 tonnes between January and July 2014; the volumes of imported milk powder amounted to 10.290 tonnes in the same period; the volumes of imported cheese amounted to 47.591 tonnes in the same period; source: Milk Market Observatory dated 14.10.2014, Eurostat (COMEXT) based on Export flow, to be found under [http://ec.europa.eu/agriculture/milk-market-observatory/pdf/eu-intra-trade\\_en.pdf](http://ec.europa.eu/agriculture/milk-market-observatory/pdf/eu-intra-trade_en.pdf). Only Germany and Sweden exported more than 40.000 tonnes of milk to Denmark in 2013, source Eurostat (COMEXT) extracted table dated 24.10.2014.

<sup>69</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671.

#### **4.2. Unlawfulness of the possible aid**

- (145) Denmark failed to notify to the Commission, in accordance with Article 108(3) TFEU, the tax exemptions or preferential treatment of domestic products stemming from the Act, before putting them into effect. Therefore, in case it would be definitively concluded that the tax exemptions and the preferential treatment of domestic products would constitute aid, they would be considered as new aids, not notified to the Commission, and for that reason, they would be unlawful in the sense of Article 1(f) of Council Regulation (EC) No 659/1999 as amended by Council Regulation (EU) No 734/2013 of 22 July 2013<sup>70</sup>.

#### **4.3. Compatibility under Article 107 (2) or (3) TFEU**

- (146) Having preliminarily concluded on the basis of the information submitted by the Danish authorities that, with the exception of the exemption for products not intended for human consumption which does not constitute aid, the exemptions from the tax on saturated fat appear to constitute State aid within the meaning of Article 107(1) TFEU for the undertakings benefiting from the aid, the Commission must assess whether such aid is compatible with the internal market. For this it is necessary to determine if any of the exceptions laid down in Article 107(2) and (3) of the TFEU could be applicable to the measure at hand.

##### *4.3.1. Article 107 (2) TFEU*

- (147) It appears that the exceptions under Article 107(2) TFEU cannot be applied in this case, as the aid is not aimed at the objectives listed therein.

##### *4.3.2. Article 107 (3) TFEU*

- (148) Under Article 107(3)(a) TFEU, an aid may be considered compatible with the internal market when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and the regions referred to in Article 349 of TFEU, in view of their structural economic and social situation. Since the present measure extends throughout Denmark it does not appear to be compatible under Article 107(3)(a) of the TFEU. Similarly the aid does not seem to fall under the exceptions laid down in Article 107(3)(b),(d) and (e) TFEU.
- (149) Article 107(3)(c) TFEU provides that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.
- (150) In this regard, on the basis of the information currently available, the Commission has formed a preliminary view that the investigated measures appear to constitute an operating aid which was simply meant to improve the financial situation of the beneficiaries. The Commission takes note of the fact that the Danish authorities have so far not proposed any legal basis (including

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<sup>70</sup> OJ L 204, 31.7.2013, p. 15.

Article 107(3)(c) TFEU) that would allow the Commission to declare the possible State Aid compatible with the internal market. Therefore, the Danish authorities are invited, along with the requested information on the respective measures in the preceding sections, to provide all necessary information on the compatibility grounds of the investigated measures.

## 5. CONCLUSION

- (151) Therefore, in accordance with Article 4(4) of Regulation (EC) No 659/1999, the Commission has decided to open the formal investigation procedure on all the measures provided for in the Act, with the exception of the exemption for products not intended for human consumption, which does not constitute State aid within the meaning of Article 107(1) TFEU.
- (152) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Denmark to submit its comments and to provide all such information as may help to assess the possible aid, within one month of the date of receipt of this letter. In addition to the specific request mentioned in the assessment part of the decision, the Danish authorities are specifically asked to provide information on the amounts of the alleged aid for 2011 and 2012. It requests the Danish authorities to forward a copy of this letter to the potential recipients of the aid immediately.
- (153) The Commission wishes to remind Denmark that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (154) The Commission informs Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. All such interested parties will be invited to submit their comments within one month of the date of such publication.

(155) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent via the secured e-mail system Public Key Infrastructure (PKI) to: [agri-state-aids-notifications@ec.europa.eu](mailto:agri-state-aids-notifications@ec.europa.eu).

Yours faithfully,  
For the Commission

Phil HOGAN  
Member of the Commission