COMMISSION DECISION

of 17 June 2009

on aid scheme C 41/06 (ex N 318/A/04) which Denmark is planning to implement for refunding the CO_2 tax on quota-regulated fuel consumption in industry

(notified under document C(2009) 4517)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2009/972/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the first subparagraph of Article 88(2) cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 20 July 2004, registered at the Commission on 22 July 2004 (SG/A/7988), the Danish authorities notified the measure described below to the Commission.

(2) By letters of 13 September 2004 and 14 December 2004, the Commission asked for additional information, which was received by letters of 14 October 2004, registered on 18 October 2004 (A/37970), and of 15 March 2005, registered 15 March 2005 (SG/A/2724).

(3) Following a meeting with DG Competition and DG Taxation and Customs Union on 27 April 2005, the Danish authorities requested more time to complement their notification by letter of 12 May 2005, registered 17 May 2005 (A/33975).

(4) After a few changes to the measure, the case was further discussed in meetings between representatives of the Commission and of the Danish authorities held on 12 October 2005, on 15 December 2005 and on 21 February 2006.

(5) By letter of 10 July 2006, registered 11 July 2006 (A/35577), the Danish authorities informed the Commission that they considered the notification complete and asked the Commission to continue the preliminary examination of the measure in the form that it was presented at the meeting of 12 October 2005.

(6) By letter dated 26 September 2006, the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(7) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the proposed measure.

(8) By letter dated 24 November 2006, registered 27 November 2006 (A/39579) the Danish Government submitted its observations on the opening of the procedure.

(9) The Commission received observations from the following third parties: the Swedish Government (8 December 2006, A/40067), Novo Nordisk (8 December 2006, A/40027), Novozymes (11 December 2006, A/40089) and Dansk Industri (12 December 2006, A/40147). It forwarded them to the Danish authorities, which was given the opportunity to react. The comments by the Danish Government were received by letter dated 5 February 2007, registered the same day (A/31115).

(10) On 12 September 2007, there was a meeting between the Cabinet of Ms Kroes and the Danish Tax Minister Kristian Jensen. In that meeting, it was agreed to await the adoption of the new Community Guidelines on State aid for Environmental Protection before taking a decision on the proposed tax relief.

(11) By letter of 14 May 2008, the Commission asked for information with respect to the rules on exemptions from environmental taxes under the new Community guidelines on State aid for Environmental Protection [3]. Denmark replied by letter dated 22 July 2008 (A/15183) with a supplement (A/15244).

(12) The information request, as well as the reply, was communicated to the third parties who had commented on the opening of the formal investigation procedure. Following the submission to third parties, observations were received from Dansk Industri (6 October 2008, A/20427), Novo Nordisk (7 October 2008, A/20550), Novozymes (8 October 2008, A/20739) and the Swedish Government (15 October 2008, A/21433).

[1] OJ C 274, 10.11.2006, p. 25.

[2] See footnote 1.

[3] OJ C 82, 1.4.2008, p. 1.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Background

(13) A tax on CO_2 emissions was introduced in Denmark in 1992 and is levied on energy products and electricity. The tax takes the form of a consumption tax and currently amounts to DKK 90 per tonne of CO_2 emitted. The objective of the CO_2 tax is mainly to discourage emissions of CO_2. The tax rate for each fuel is related to the carbon content of the energy product ([4]). In addition, an energy tax has been collected since 1977.

(14) As regards the energy tax, ordinary households and certain parts of the service sector pay the full tax, while all other VAT-registered companies are fully exempted from the tax. With respect to the CO_2 tax, ordinary households and certain parts of the service sector pay the full tax, while a special business rate applies to other VAT-registered companies. That so-called business rate was approved by the Commission in November 2005 ([5]). For energy used in certain 'heavy processes' ([6]) businesses get a further reduction from the general business tax rate. The lower tax rate for such processes was last approved by the Commission in September 2005 ([7]). The approval was based on the fact that the beneficiaries still paid the CO_2 tax in order to respect the Community minimum taxation levels, which are set out by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ([8]) (hereafter referred to as the Energy Taxation Directive). In addition, certain energy-intensive companies have concluded voluntary energy-saving agreements with the Danish government. In compensation for achieving their goals under those agreements, they receive a further reduction of the CO_2 tax, which was last approved by the Commission in April 2003 ([9]).

(15) In accordance with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ([10]) (hereafter referred to as the Emission Trading Directive), the EU Emission Trading System (hereinafter referred to as the EU ETS) entered into force on 1 January 2005. As a consequence, the operator of an installation covered by that directive must hold allowances for its greenhouse gas emissions. The allowances are either allocated to the operator for free at the beginning of each trading period or bought by the operator in auction and/or on the market. In the first trading period (1.1.2005 until 31.12.2007), Member States were obliged to allocate at least 95 % of the allowances for free. Denmark chose to auction the remaining 5 % allowances in open auctions. For the second trading period (1.1.2008 until 31.12.2012), Member States had the option to auction 10 % of the allowances. Denmark chose to allocate all allowances for free ([11]).

2.2. The notified scheme

(16) By the notified scheme, the Danish authorities propose that energy-intensive businesses ([12]) covered by the EU ETS would get a full exemption (by refunding) from the CO_2 tax. Other businesses covered by the EU ETS would pay a CO_2 tax corresponding to 50 % of the minimum tax levels. According to the Danish authorities, all businesses presently regulated by the EU ETS are energy intensive as defined in the Energy Taxation Directive. In consequence, the fuel consumption of the entire EU ETS-regulated process in industry would be eligible for refunding in full of the CO_2 tax if the notified measure were approved.

(17) The notified exemption applies only to the fuel (mineral oil products, gas and coal) used in business covered by the EU ETS. It does not cover electricity and heat consumption and, in addition, it does not concern fuel used for room heating and hot water.

(18) The legal basis for the proposed exemptions is Act No 464 of 9 June 2004.

(19) All industrial activities which are covered by the Emission Trading Directive, with the exception of electricity and heat production, are proposed to be fully or partially exempted from the CO_2 tax for their use of fuel as described above. The number of beneficiaries is foreseen to be about 85 production processes spread out among some 120 production units.

(20) The Danish authorities have estimated the annual loss of tax revenue due to this measure to be about DKK 30 million (about EUR 4 million). However, in their letter of 22 July 2008, the Danish authorities indicate that the budget of the scheme will be below that estimate.

([4]) The tax rate for electricity is based on the carbon content of coal since most power stations in Denmark are coal-fired.

([5]) State aid case NN 75/04 (OJ C 275, 8.11.2005, p. 4).

([6]) The definition used for identifying such 'heavy processes' is production processes where a CO_2 tax of DKK 50/tonne CO_2 represents more than 3 % of the added value in the business and more than 1 % of the value of the production. Both of these criteria have to be fulfilled.

([7]) State aid case N 317/A/04 (OJ C 226, 15.9.2005, p. 6).

([8]) OJ L 283, 31.10.2003, p. 51.

([9]) State aid case N 540/02 (OJ C 78, 1.4.2003, p. 3).

([10]) OJ L 275, 25.10.2003, p. 32.

([11]) However, potential surplus allowances from the new entrants reserve and allowances left over from discontinued installations may be subject to auctioning.

([12]) In this category, Denmark includes businesses where the national tax payable amounts to at least 0,5 % of the added value and industry defined as 'heavy process' pursuant to the Danish Act on CO_2 (see footnote 4).

(21) The Danish authorities adopted the legal basis for the proposed scheme in 2004, but have ensured that they will only implement it if the Commission authorises it. If so, it will apply as from 1 January 2005. The duration of the scheme is not limited, but if it is approved, the Danish authorities have undertaken to re-notify it after 10 years.

3. GROUNDS FOR OPENING THE FORMAL INVESTIGATION PROCEDURE IN ARTICLE 88(2)

(22) In its decision to open the formal investigation procedure, the Commission found that the measure is funded by State resources. It applies only to companies covered by the EU ETS and relieves these companies from costs that they would otherwise bear from their operating budget, i.e. the measure gives an economic advantage to these companies. The Commission doubted that the selectivity of the measure was justified by the nature and structure of the tax system. The beneficiaries are active in markets that are open for competition and trade between Member States. The measure can, thus, distort competition and affect trade on the internal market. Therefore, the Commission took the view that the measure could constitute State aid.

(23) The Commission queried whether the measure could be found compatible with the then applicable Community Guidelines on State aid for Environmental Protection ([13]) (EAG 2001), since the tax paid by the firms under the proposed scheme would be below the minimum levels of the Energy Taxation Directive, without the beneficiaries entering into any voluntary commitments or agreements to undertake measures that go beyond the fulfilment of a harmonised EU obligation.

(24) The Commission examined whether the potential aid could be found compatible with the common market under Article 87(3)(c) of the EC Treaty based on the alleged need to eliminate the double regulation. In this context, the Commission pointed out that the national CO_2 taxes are counted towards the national level of energy taxation for the purpose of complying with the Energy Taxation Directive. Therefore, the proposed tax relief could distort competition on the internal market, since it would increase tax differentiation in an area where taxes have been harmonised at Community level. Furthermore, it could run against the 'polluter-pays' principle to grant CO_2 tax relief to all companies participating in the EU ETS, since it would include companies that have received emission allowances for free. The Commission invited Denmark to submit information on the mechanism in order to ensure that the existence and amount of a possible extra burden on top of the CO_2 tax could be established at the level of each individual company, and that only companies that actually suffered from such a burden would benefit from the tax exemptions. The Commission noted, however, that it could go against the environmental logic to grant relief only to those companies that have to buy additional allowances, since this could favour those who did not limit their pollution.

4. COMMENTS FROM INTERESTED PARTIES

(25) The Swedish authorities stated that the Commission should make a comprehensive, economic as well as legal, analysis of the notified tax relief. They referred to the arguments submitted in their own notification of a similar case ([14]) on which the Commission had also opened the formal investigation procedure.

(26) Dansk Industri argued that it should be specified, first, that the measure does not constitute State aid and, secondly, that it is compatible with Article 87(3)(c) of the EC Treaty. In this context, it should be kept in mind that Dansk Industri has to pay CO_2 tax, energy tax, SO_2 tax and a price supplement which is administrated by Energinet.dk and distributed to producers of green electricity. Therefore, Danish companies pay much more for their energy consumption than their European and international competitors.

(27) According to Novo Nordisk A/S, their annual tax saving under the proposed measure will be DKK 200 000. The company claims that such saving will not be able to distort competition, particularly as, under the emission quota system, they have to spend approximately DKK 400 000 in order to achieve lower CO_2 emissions. They refer to the *de minimis* rules which allow them to receive aid up to EUR 200 000 (ca. DKK 1,5 million) over a period of 3 years. As regards compliance with the Energy Taxation Directive, Novo Nordisk referred to the fact that they use energy from combined heat and power production and, thus, can be allowed an exemption or reduction of the tax in accordance with Article 15(1)(c) of the Directive. Furthermore, they are energy-intensive and the costs they have for their energy consumption (the tax in question plus costs for cutting CO_2 emissions) are in total higher than the Community minima. Novo Nordisk further referred to point 7 of the preamble of the Energy Taxation Directive, which states that energy taxation can be one instrument to reach the Kyoto Protocol objectives (i.e. the same objective as for the EU ETS) and concludes that in this case, there is double regulation. Finally, as regards the proposal by the Commission to assess the potential burden at the level of each beneficiary, Novo Nordisk pointed out that such an approach would lead to serious difficulties with allocation to the correct period, etc., inter alia, because the time of purchase of the allowances does not necessarily have to reflect the time of consumption of the energy.

([13]) OJ C 37, 3.2.2001, p. 3.

([14]) State aid case C 46/06 (OJ C 55, 28.2.2008, p. 27).

(28) Novozymes A/S commented that, in connection with its production of enzymes, it produces electricity and heating at industrial combined heat and power installations. Its production is considered as a heavy process, which means that it is subject to a tax of between DKK 3 and 25 per tonne CO_2 of the used fuels. It is also covered by the EU ETS. Novozymes' comments are identical to those submitted by Novo Nordisk.

5. COMMENTS FROM DENMARK

There is no selective advantage

(29) The Danish authorities argue, with reference to the judgment of the Court of 16 May 2000 in Case C-83/98 P (*France* v *Ladbroke Racing and Commission* ([15])), that there is no selective advantage in the case at hand. The Court has established in several cases ([16]) that in the situation where a scheme is of a general economic-political or social-political character and does not favour certain activities or business sectors, the scheme falls outside of the scope of Article 87(1) of the EC Treaty. In the *Adria-Wien* judgment, an energy tax relief provided undertakings producing goods with an economic advantage in comparison with those in the service sector, despite the fact that undertakings in the service sector can also be relatively large energy consumers. The Danish authorities argue that the scheme in question does not provide an advantage for a specific group of businesses, but consists in a tax relief for all businesses in the same legal and factual situation ([17]). This is why the Danish authorities consider that the proposed scheme falls outside of the scope of Article 87(1) of the EC Treaty.

(30) Moreover, they refer to the conclusion of the Court in *Adria-Wien* that a scheme which fairly certainly constitutes an advantage for the recipient, but which is justified by the character or structure of the system, does not fulfil the selectivity criteria. In the case at hand, after the introduction of the EU ETS, the Danish authorities take the view that the tax no longer has an environmental value. Since the purpose of the tax can no longer be fulfilled or is reduced, it is in the logic and nature of the tax system to exempt the undertakings concerned from the tax.

(31) Both the EU ETS allowances and the CO_2 tax are cost-effective market-based instruments with the objective to reduce CO_2 emissions when consuming energy. Both instruments lead to an increase of the marginal cost of energy consumption, even if the allowances are distributed for free. Allowances, as well as taxes, result in higher production costs. The total CO_2 emissions are limited to the total amount of allowances. If one undertaking therefore, for example due to taxes, reduces its emissions, it will provide scope for other undertakings to increase their emissions. Under the double regulation the tax is therefore no longer a cost-effective steering instrument. It has no additional environmental effect, but only an additional financial burden for the undertakings in question. Therefore, the Danish authorities take the view that the scheme at hand is in the nature and logic of the tax system.

The proposed scheme is in line with the 2001 Environmental Aid Guidelines

(32) First, the Danish authorities point out that the EAG 2001 are only so-called soft law containing criteria for the State aid assessment by the Commission. At the time of the notification and of the decision of the Commission to open the formal investigation procedure under Article 88(2) of the EC Treaty, the relevant applicable guidelines were contained in the EAG 2001. These guidelines cannot be deemed to contain criteria for assessing schemes like the one in question, since they entered into force more than two years before the Emission Trading Directive and the Energy Taxation Directive were adopted. Therefore, the Danish authorities find that the Commission's interpretation of voluntary agreements and commitments in point 51(1)(a) is too strict, in particular since the second paragraph of that point states that the provisions also apply where a Member State makes a tax reduction subject to conditions that have the same effect as agreements or commitments in the nature of voluntary agreements. The Danish authorities take the view that the EU ETS results in the same effects as those that would have been achieved under voluntary agreements or with the CO_2 tax.

The proposed scheme can be approved on the basis of Article 87(3)(c) of the EC Treaty

(33) If the Commission does not find the scheme compatible with the EAG 2001, it is the opinion of the Danish authorities that it can instead be approved directly on the basis of Article 87(3)(c) of the EC Treaty due to the fact that the situation has changed considerably since the adoption of the Energy Taxation Directive and the EU ETS Directive, and the undertakings concerned are now subject to double regulation.

([15]) ECR II-3271, whereby the Court of First Instance's judgment of 27 January 1998 in Case T-67/94 [1998] ECR II-1, was confirmed.

([16]) See, for example, the judgment by the Court of 17 June 1999 in Case C-75/97, *Belgium* v *Commission* [1999] ECR I-3671, and of 8 November 2001 in Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* v *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

([17]) In this context, Denmark refers to the judgment by the Court of 29 April 2004 in Case C-308/01, *GIL Insurance et al.*, ECR I-4777, in particular point 68.

(34) Denmark has referred to a Commission Staff Working Paper ([18]) drawn up in the context of the adoption of the Energy Taxation Directive. In that paper, the Commission stated that a CO_2 tax exemption, granted in favour of companies which would be subject to the Community emissions trading scheme, might not constitute State aid since imposing both a CO_2 tax and an emissions cap could lead to a form of double taxation which needs to be avoided. Moreover, in its minutes ([19]) concerning the Directive the Council undertook, on the basis of a proposal from the Commission, to examine positively tax measures which will accompany the implementation of the EU ETS, particularly in order to avoid double taxation cases.

The proposed schemes is in line with the Energy Taxation Directive

(35) In its decision to open the formal investigation procedure, the Commission asked the Danish government to submit information showing that the scheme would lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard community minimum rate had been observed. The Danish authorities claim that such information was already apparent from their comparison between the price of allowances and the Community minima. At the time of the comments made by Denmark, the price of allowances was EUR 13 per tonne CO_2, while the Community minima recalculated into EUR per tonne CO_2 were 1,55 for coal and coke, 6,66 for gas oil and 2,64 for natural gas. A CO_2 allowance price of EUR 13 per tonne creates, thus, an essentially greater economic incentive to reduce emissions than the tax would have done. In accordance with the Danish National Allocation Plan for 2005-2007, the quota-regulated industry in Denmark is allocated allowances at a level which is 7,1 % below what the CO_2 emissions would have been in a 'business as usual' situation (including taxes and voluntary agreements) for the same period.

6. ASSESSMENT OF THE PROPOSED MEASURE

6.1. Existence of State aid

(36) According to Article 87(1) of the EC Treaty, 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, in so far as it affects trade between Member States shall be incompatible with the common market.

(37) The proposed measure results in a loss of State revenue and is, thus, financed by Denmark through State resources. The beneficiaries are active on markets where there is competition and trade between Member States and, therefore, the measure has the potential of distorting competition and affecting trade between Member States. In order to determine whether the proposed measure is caught by Article 87(1), the question is thus whether it provides a selective economic advantage to the beneficiaries or not.

(38) The Danish authorities argue that the proposed tax relief does not confer a selective advantage on the beneficiaries, since it covers all undertakings that are legally and factually in the same situation, namely those who are the subject of double regulation. Should it be assumed, however, that it is a case of selective advantage, the Danish authorities find this justified by the nature and structure of the system. This is because the CO_2 tax and the EU ETS have the same objective, i.e. to reduce CO_2 emissions. Since the EU ETS was introduced the CO_2 tax no longer serves any environmental purpose. For companies covered by the EU ETS, the CO_2 tax is therefore not an effective instrument for reducing the overall CO_2 emissions, but merely an extra economic burden.

(39) The Commission notes that it was established in the *Adria-Wien* judgment ([20]) that 'the only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'. There is recent case-law ([21]) on the interpretation of advantage and selectivity. The Gibraltar judgment offered a standard State aid analysis for tax cases ([22]). The Court of First Instance held that such an analysis should consist of: (1) the identification of the system of reference; (2) the determination of the derogation from that system of reference; and (3) the possibility of justification of the derogation by the nature or structure of the system.

([18]) Commission Staff Working Paper of 24 October 2002 (SEC(2002) 1142).

([19]) Council minutes of 3 April 2003, 8084/03 ADD 1, FISC 59.

([20]) See footnote 16.

([21]) Judgment by the Court of First Instance of 10 April 2008 in Case T-233/04, *Netherlands* v *Commission* ('the NOx-judgment'), [2008] ECR II-591, judgment of 22 December 2008 in Case C-487/06 P, *the British Aggregates Association* v *Commission*, ECR number not available, and judgment of 18 December 2008 in joined Cases T-211/04 and T-215/04, *Gibraltar* v *Commission* ('the Gibraltar judgment'), ECR number not available.

([22]) The Commission has appealed the Gibraltar judgment, but the appeal does not concern the fact that the analysis must normally contain the three points mentioned.

(40) As regards the notion of selective advantage, the Commission thus first has to identify the system of reference. In the case at hand, the Commission considers, in line with the standard analysis, the system of reference to be the existing general energy tax system (including all taxes levied on the consumption of each energy product, i.e. CO_2 tax and electricity tax). This is in line with Article 4(2) of the Energy Taxation Directive, according to which all indirect taxes on the same energy product can be added together for the purpose of meeting the Community minimum levels of taxation. Furthermore, in 2004 Denmark presented the two taxes together as part of the national energy tax system in order to demonstrate compliance with the Energy Taxation Directive and to justify for State aid purposes the tax exemption from the electricity tax ([23]). By relieving the beneficiaries of a financial burden which would otherwise have been part of their production costs, the scheme clearly favours the beneficiaries compared to the non-exempted firms and thereby derogates from the system of reference. The Danish authorities argue that the analysis of whether there is a selective advantage should take into account that the beneficiaries have a burden under the EU ETS. The Commission notes that the energy tax system has only partially the same objective as the EU ETS. Whereas the EU ETS aims exclusively at reducing CO_2 emissions, the energy tax system also has other objectives, such as promoting energy efficiency and collecting revenue for the State. In addition, there are important differences in the functioning of a tax and of an allowance system (for example, the EU ETS does not always result in an actual cost to be paid by each beneficiary for every energy unit consumed). Against that background, the Commission does not share Denmark's view that the CO_2 tax and the EU ETS together should be regarded as the reference system.

(41) In the NOx judgment, the Court of First Instance found that there was no selectivity, because the advantage (the allocation of free emission permits) was only provided to undertakings which had an obligation under the same scheme and could therefore not be considered to be in the same legal and factual situation as undertakings outside the scheme ([24]). The Commission finds that the situation in the NOx case is different from the one at hand. In the NOx case, the granting of the advantage (i.e. the free NOx trading allowances) was subject to the beneficiaries falling under the emission ceiling of the same system. In the case at hand, though, it is proposed to provide a relief from a CO_2 tax which is normally to be paid by all energy consumers. The reason for the relief will be that the beneficiaries are covered by another (non-tax) system. In the Commission's view this case is therefore more similar to the situation in the abovementioned *Adria-Wien* judgment, where the Court of Justice ruled that there was indeed a selective advantage because the energy tax relief favoured certain undertakings or the production of certain goods in comparison with other undertakings which were in a legal and factual situation that was comparable in the light of the objective pursued by the tax in question.

(42) According to the Commission's notice on the application of the State aid rules to measures relating to direct business taxation ([25]), tax measures of a purely technical nature (such as avoiding double taxation) are in principle regarded as general measures ([26]). As mentioned above, there are important differences between a tax and the EU ETS. The latter can therefore not be considered as taxation in the meaning of the notice.

(43) For these reasons, the Commission finds that the tax relief per se grants a selective advantage within the meaning of Article 87(1) EC.

(44) As regards the logic of the system, the Commission notes again that the energy tax system has only partially the same objective as the EU ETS. In this case, the system of reference is the energy tax system. The logic of that system is to tax each energy product consumed and the proposed relief from the tax is not in line with that logic. In this context, Denmark argues that the double regulation increases companies' marginal costs without reducing overall CO_2 emissions. The Commission considers, however, that argument relevant only as regards the compatibility of potential State aid, in particular with reference to the proportionality of State aid. This is because the effects of the EU ETS are not part of the reference system for the definition of State aid. Anyway, even if the Commission were to include EU ETS in the reference system, not all activities which generate emissions and a corresponding obligation to surrender emission allowances pursuant to the EU ETS would be covered by the proposed CO_2 tax relief ([27]). That would deviate from the general logic claimed by Denmark and the relief would therefore not be fully in keeping with the logic of the system.

(45) The Commission therefore does not find that the selectivity of the proposed exemption was justified by the nature and logic of the tax system.

([23]) See footnote 5.

([24]) It should be noted that the NOx judgment has been appealed by the Commission for its findings on selectivity.

([25]) OJ C 384, 10.12.1998, p. 3.

([26]) See point 13, first indent, of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

([27]) For example, heat and electricity production is covered by the EU ETS but not by the tax relief.

(46) Classifying the notified measure as State aid is in line with established Commission practice, under which exemptions or reductions from environmental taxes normally are regarded as State aid. In particular, the Commission considered as State aid schemes where CO_2 tax reductions were introduced for companies covered by the EU ETS ([28]).

(47) The Commission, thus, concludes that the notified measure constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

6.2. Compatibility with Article 87(3)(c) of the EC Treaty

(48) Since the decision to open the formal investigation procedure was taken, new Community Guidelines on State aid for Environmental Protection ([29]) (EAG 2008) have been adopted. According to point 204 of the EAG 2008, the Commission will apply the new guidelines to all notified aid measures in respect of which it is called upon to take a decision after the guidelines are published, even where the schemes were notified prior to their publication. However, point 68 of the EAG 2008 states that, at the time of the drafting of the guidelines, the Commission had not gathered sufficient experience in assessing the compatibility of reductions of environmental taxes where the companies in question participate in tradable permit schemes and it was, therefore, at the time of the adoption of the EAG 2008, too early to provide general guidance thereon. The assessment of such cases will therefore be made on the basis of Article 87(3)(c) EC. When assessing environmental cases which are not covered by the EAG, the Commission normally takes inspiration from the criteria set up in the guidelines. In this case, there are criteria for assessing reductions of and exemptions from energy taxes and it would be inconsistent not at least to take inspiration from these, in particular when assessing whether the aid is necessary and proportionate.

(49) First, when assessing the compliance of State aid with the EC Treaty, the Commission has to consider the positive impact of the aid measure in question in reaching an objective of common interest (for example, a higher level of environmental protection) against its potentially negative side effects on trade and competition. In this case, it is difficult to establish whether there is an environmental benefit from introducing the proposed scheme. While the objectives of the EU ETS and the CO_2 tax are to achieve a higher level of environmental protection, the objective of the tax relief per se is to relieve companies of a tax burden. The effect of the proposed measure is, thus, that the beneficiaries obtain a competitive advantage which in itself cannot be considered to be an objective of common interest. This does, however, not exclude that there can be a direct environmental benefit stemming from the fact that the reduction enables the introduction or maintenance of higher tax levels than the Community minima for other undertakings ([30]).

(50) Second, point 152 of the EAG 2008 states that in order to be approved under Article 87 of the EC Treaty, reductions and exemptions from harmonised taxes must be compatible with the relevant Community legislation. The requirement of respect of tax directives was also confirmed in case-law by the judgment of the Court of First Instance of 27 September 2001 in Case T-184/97, *BP Chemicals* v *Commission* ([31]). In cases like this, which concerns a relief from the CO_2 tax, this means primarily respect of the Energy Taxation Directive. According to that directive, the tax levels have to respect a certain Community minimum level for each energy product and electricity. The minimum levels are specified in Annex I of the directive. As mentioned above, according to Article 4(2) of the Energy Taxation Directive, the minimum levels can be reached by adding all charges levied in respect of all indirect taxes (except for VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of consumption. According to Article 17(4) of the same directive, businesses that benefit from a level of taxation below the Community minima shall enter into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives broadly equivalent to what would have been achieved if the Community minima would have been observed. In its decision to open the formal investigation procedure, the Commission invited Denmark to submit further information to support its claim that the EU ETS has a broadly equivalent effect to the tax. Denmark has not submitted additional information on that issue. Given the price level of the EU ETS allowances in comparison with the Community minimum levels, it can nevertheless not be excluded that the effects of the EU ETS are broadly equivalent to what would have been achieved under the CO_2 tax ([32]).

(51) Denmark has referred to the Green Paper on market-based instruments for environment and related policy purposes ([33]), which the Commission presented as a starting

([28]) For example, Joint State aid cases C 44/04 and C 47/04 (OJ C 268, 27.9.2006, p. 19) (Slovenia), and State aid case N 22/08 (OJ C 184, 22.7.2008, p. 5) (Sweden).

([29]) OJ C 82, 1.4.2008, p. 1.

([30]) See point 57 of the EAG 2008.

([31]) ECR II-3145.

([32]) In view of the analysis below (recital 52 et seq.), the question whether Article 17(4) of the Energy Taxation Directive extends to the tradable permit scheme under the EU ETS or whether, for the purposes of this provision, the operators in question have to enter into schemes separate therefrom and which are not obligatory under Community law, can be left open.

([33]) Green Paper on market-based instrument for environment and related policy purposes (COM(2007) 140 final) (SEC(2007) 388).

point for the revision of the Energy Taxation Directive ([34]). In this context, it should be noted that the Green Paper is a reflection document inviting a debate on the options of a policy before the preparation of proposals, i.e. it is not a binding act. In the Green paper, the Commission acknowledges the fact that the EU ETS and the Energy Taxation Directive, at least to some extent, target the same objective and states that overlaps should be avoided. With respect to energy taxation, that paper also raises the issue of multiple objectives behind energy taxation and suggests a split of energy taxation into a CO_2 component and an energy-related component. Logically, the CO_2 component should not apply to installations under the EU ETS. Given that, in Denmark, the companies under the EU ETS are already exempted from the energy tax, they would pay no tax at all on the energy consumed in their production processes if the proposed measure was approved. Therefore, the Commission does not find that the measure proposed by Denmark is in line with the ideas of the abovementioned Green Paper.

(52) If the relevant Community legislation were complied with, the principle behind the State aid rules on reductions of and exemptions from environmental taxes is to accept situations where the Community tax levels are respected, while taking a stricter approach in situations where the beneficiaries would be below the level playing field set by the minimum levels. This means that tax reliefs where the Community minima are respected can be approved without further analysis, while, on the contrary, tax reliefs going below these minima are regarded to be particularly distortive and the Commission therefore analyses in detail the necessity and proportionality of such aid. For this analysis, the Commission relies on information received from the Member States.

(53) As regards the necessity of the aid, the Commission should according to point 158 of the EAG 2008 assess (1) whether the choice of beneficiaries is based on objective and transparent criteria, (2) whether there is a substantial increase in production costs and, if so, (3) whether this increase can be passed on to consumers without leading to important sales reductions (this can be proven by estimates of product price elasticity, lost sales and/or reduced profits for the companies or sectors concerned).

(54) In the case at hand, the beneficiaries are indeed selected on the basis of objective and transparent criteria, namely the participation in the EU ETS. As regards the second criteria, at least for the time being, all concerned companies are energy-intensive within the meaning of Article 17(1) of the Energy Taxation Directive, so these criteria can be presumed to be fulfilled. Information on decreasing turnovers and/or market shares of the concerned beneficiaries would have been valuable indications that the measure is necessary. However, Denmark has not submitted that information. Instead, Denmark has submitted a list of all beneficiaries specifying their CO_2 emissions for 2005, 2006 and 2007. Some of them have decreased their emissions during the three-year period, while others instead have increased emissions during that period. The largest beneficiaries would be in the cement industry (where the tax base is approx. 2,8 million tonnes CO_2 emissions per year), in the sugar industry (0,2 million tonnes per year) and in the oil refineries (0,1 million tonnes per year). Denmark has, thus, not proven that the fact that the two systems have been applicable in parallel has led to a substantial increase in production costs which cannot be passed on to the consumers without important sales reductions.

(55) The Commission can, therefore, not conclude that the proposed scheme is necessary.

(56) With respect to the question of proportionality, each beneficiary must according to point 159 of the EAG 2008 fulfil one of the following criteria: (1) It must pay a proportion of the national tax which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiaries can benefit at most from a reduction corresponding to the increase in production costs from the tax, using the best performing technique and which cannot be passed on to customers; (2) it must pay at least 20 % of the national tax unless a lower rate can be justified; or (3) it can enter into agreements with the Member State whereby they commit themselves to achieve environmental objectives with the same effect as what would be achieved under points 1 or 2 or if the Community minima were applied.

(57) In the case at hand, the Danish authorities have replied that they do not have the information on best performing technique and this is anyway not a requirement under the proposed measure. The second criterion is not fulfilled and paying 20 % of the national tax would in their case anyway lead to a tax rate which is far above the Community minima. As regards the third criterion, some of the beneficiaries already have voluntary agreements under which they are allowed to pay a rate lower than the Community minima. The idea under this measure would be to replace such agreements with the EU ETS. The EU ETS is in place independently of the proposed tax measure and, therefore, there is no additional effort required by Denmark in return for the proposed tax relief.

([34]) Revision of the Energy Taxation Directive is part of the Commission's legislative and work programme.

(58) In its decision to open the formal investigation procedure, the Commission invited Denmark to submit information on mechanisms that might be envisaged by the Danish authorities in order to ensure that exemptions would be granted only to those individual companies who have net costs from the EU ETS participation, and only covered these net costs. Such information could have given an indication whether the aid is proportionate, although the environmental logic of such an approach could be questioned, since companies that had to buy emission permits because they did not reduce their pollution would be favoured. In any event, the Danish authorities have neither demonstrated nor guaranteed that the exemptions would be limited to companies who have paid for emission allowances ([35]).

(59) Consequently, it has not been proven by the Danish authorities that the proposed aid is proportionate.

(60) As regards distortion of competition, companies in Denmark which are not covered by the EU ETS, as well as companies in other Member States, either respect the level playing field set by the Community minima or comply with the rules specified in the EAG 2008. Therefore, the proposed exemption would increase competitiveness for EU ETS companies operating in Denmark and would, thus, unnecessarily distort competition with companies in other Member States.

(61) Against that background, the Commission finds, based on the spirit of the EAG 2008, that the measure at hand cannot be regarded as compatible with Article 87(3)(c) of the EC Treaty.

(62) Following the opening of the formal investigation procedure, the Commission received comments from third parties referring to the fact that the amounts of the exemptions or reductions in most cases are below the thresholds set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid ([36]) (hereafter referred to as the '*de minimis* regulation'). If the Danish authorities would commit to ensuring that the *de minimis* rules were complied with in all cases, the aid measure would be deemed not to meet the criteria of Article 87(1) and could, thus, be implemented without being notified to the Commission.

([35]) According to the comments by third parties (two Danish companies), such an approach would lead to serious problems with allocation to the correct period, etc., which is due, inter alia, to the fact that the time of the purchase of the allowances does not necessarily have to reflect the time of the energy consumption.

([36]) OJ L 379, 28.12.2006, p. 5.

(63) As the Commission pointed out in its decision to open the formal investigation procedure, the proposed scheme could be declared compatible with the common market if the harmonised minimum levels of the Energy Taxation Directive were respected. The concerns of the Commission in the same decision regarding the respect of the polluter-pays principle would also be removed if the beneficiaries would pay the Community minima. In fact, energy tax reductions down to the Community minima are covered by Article 25 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General Block Exemption Regulation) ([37]) and, thus, do not have to be notified to the Commission.

(64) Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([38]) sets out that the Commission can close the formal investigation procedure by means of a positive decision with conditions subject to which an aid may be considered compatible with the common market. The compliance with such conditions shall be closely monitored.

(65) The Commission considers in the case at hand, that the aid can be authorised as long as the beneficiaries still pay at least the Community minimum tax levels applicable for each energy source, be it in the form of the CO_2 tax or in the form of another energy tax. However, the Commission finds that, if the tax relief goes below these minima, the aid is incompatible with the EC Treaty and cannot therefore be implemented.

(66) Under the conditions set out above, it is furthermore clear that the notified scheme would respect the Energy Taxation Directive and more particularly Article 17(1)(a) thereof. Indeed, all the beneficiaries are energy intensive within the meaning of this provision, and the minimum levels of taxation set out in the Directive are respected.

7. **CONCLUSION**

(67) The Commission finds that the proposed scheme 'Modification of the CO_2 tax on quota-regulated fuel consumption in industry' constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(68) Provided that all beneficiaries still pay a tax on each energy source which respects the Community minimum tax levels, the aid is declared compatible with Article 87(3)(c) of the EC Treaty.

(69) The part of the proposed scheme which leads to a tax level below the harmonised minima is incompatible with the EC Treaty,

([37]) OJ L 214, 9.8.2008, p. 3.

([38]) OJ L 83, 27.3.1999, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

As the proposed Danish scheme (Act No 464 of 9 June 2004) does not fall under Regulation (EC) No 1998/2006, it constitutes State aid which is only compatible with the common market under the condition that the concerned beneficiaries pay a tax on their respective energy consumption corresponding to at least the Community minimum taxation levels set out in Annex I of Directive 2003/96/EC.

If Denmark wishes to implement the aid measure, it shall be amended accordingly.

Article 2

Denmark shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 17 June 2009.

For the Commission
Neelie KROES
Member of the Commission