



**Technical and legal aspects of Council
Directive 2003/96/EC of 27 October 2003
restructuring the Community framework for
the taxation of energy products and
electricity**

Final report

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EXECUTIVE SUMMARY¹

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity² (hereinafter also referred to as “the Directive” or “the ETD”) harmonized energy taxation across the EU as from 1 January 2004. The ETD lays down the rules on taxation of energy products and electricity, aiming to ensure that the Single Market operates smoothly and to avoid double taxation or any distortion of trade and competition between energy sources and energy consumers and suppliers. More precisely, the Directive sets minimum levels of taxation for energy products used as motor or heating fuel and for electricity, and defines what exemptions are allowed and under which conditions.

The political agreement resulting the adoption of the ETD in 2003 has proven its merits. Since the introduction of the Directive, however, the energy landscape and corresponding needs have changed, and the underlying policy goals have evolved. Moreover, the text of the ETD has been subject of discussion between Member States and between Member States and economic operators. The abundant case law from the EU Court of Justice indicates a lack of clarity of some of the ETD provisions.

This study aims to analyse the technical and legal aspects of the Directive and to identify the potential weaknesses and problems resulting from its implementation by the Member States and from its concrete application by economic operators. The study was designed around six pillars, against which all the provisions of the Directive have been assessed, where relevant. These research questions focus on:

1. the clarity and consistency of the provisions;
2. harmonisation and the extent to which the measures ensure the smooth functioning of the single market, and avoid distortion of trade and competition between energy sources and between energy consumers and suppliers;
3. the current needs of Member States and economic operators, also taking due account to the technological developments;
4. the administrative burden;
5. the coherence with other policy instruments, and in particular with State aid rules;
6. the possible impact on revenues from taxes in case provisions of the Directive are modified.

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² O.J. L. 283/51, 31 October 2003; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02003L0096-20040501.

In conducting the study, the authors used a methodological approach based on various data collection tools, hereby guaranteeing both the broad involvement of all interested parties as well as the in-depth contribution of targeted subject-matter experts. As such, the analysis identifies the weaknesses or differences in the transposition, interpretation and practical application of the ETD provisions in all Member States, based on information collected via:

- general surveys to excise administration in 28 Member States;
- a general questionnaire for economic operators;
- interviews with the European Commission and selected EU stakeholders;
- interviews with Member States' tax administrations and economic operators in eight Member States selected for fieldwork³, whereby particular attention was given to six relevant economic sectors⁴;
- a questionnaire to the Deloitte network present in the eight selected Member States; and
- desk research, to confront and triangulate the information collected via the above primary sources with data available in the literature.

The responses from all stakeholders adequately covered the different products and sectors, a diversified variety of Member States, and a balanced distribution between small and large economic operators.

The study primarily focusses on the first research question, concerning the clarity and consistency of the provisions of the ETD. The analysis shows that the current Directive is suboptimal when it comes to clarity, structure and wording. The Member States, the European Commission, the European Court of Justice, and the economic operators adhere to different views on the interpretation and application of a number of ETD provisions. The lack of clarity in the wording and structure of the Directive could create problems for the Member States, which in return potentially results in either wrongful use of the provisions by Member States (and consequently economic operators), differences in implementation between the Member States, or the lack of interest in and application of the provision and the policies behind it. The lack of clarity thus has a direct impact on the achievement of the policy objectives pursued by the ETD. A number of causes for the divergent views between actors involved have been identified, such as the absence or the lack of clarity of the definitions and concepts used, the practical inapplicability of certain provisions, difficult readability of the Directive, or the lack of alignment with other policy instruments.

The second research question of the study aims at assessing the effect of the ETD on the functioning of the Single Market. The Single Market refers to the EU as one territory without any internal borders or regulatory obstacles to the free movement of goods and services. In this context, it is observed that the ETD's full potential for harmonization in terms of the realization of the Single Market cannot be reached. Analysing the practical application of the ETD, the current framework is both inconsistently implemented and applied, and

³ Belgium, Denmark, Germany, Italy, Poland, Portugal, Spain and Sweden.

⁴ Chemical industry, combined heat and power generation, refineries and biofuels, maritime transport, aviation transport, and agriculture.

incomplete, leaving room for distortions of that Single Market. The inconsistent implementation and application results from the different interpretations given to the ETD that were observed under the first research question. The lack of clarity and of precise definitions leads to the inconsistent application of the rules, even where they are imperative for all the Member States, and in turn provokes distortion of trade and competition between products, suppliers and consumers. The harmonized framework on energy taxation is also incomplete. A considerable gap in the harmonization between the EU Member States persists because of the option that is left to Member States to apply or not certain reductions or exemptions, and by the broad discretion left to them in the way they apply and control the exemptions and reductions. Next thereto, the fact that the ETD provisions do not apply to some (uses of) products, and that certain provisions allow Member States to define for themselves some chargeability conditions ultimately result in set of rules with an undefined – and consequently, non-harmonized – material scope of application.

The third research question relates to the relevance of ETD provisions in terms of the current needs of Member States and economic operators. In particular, the research question aims to establish whether the ETD is in line with the technological developments that have arisen since 2003. In this regard, the developments in the energy market, energy systems, environmental and other policies and technology maturity levels have rendered the implementation and application of the ETD more complex and not entirely in line with the need of tax authorities and economic operators. The ETD is a static instrument in a dynamic environment. The fact that the ETD consists of certain outdated provisions having to deal with new products, and taking into account new technologies and changes in behaviour, the ETD does not provide for a sufficient answer to the current needs, considering its position in the broader EU tax and energy policy. Also, changed policy in the area of customs, in particular regarding the Combined Nomenclature, and in the area of excises (introduction of Directive 2008/118/EC) have made the current ETD outdated.

As regard the administrative burden, which is analysed under the fourth research question, the (reporting) obligations for the Member States and economic operators following directly from the ETD are limited. This follows from the limited harmonization in the form of a directive itself: the Member States retain the discretion to organise the concrete application, to carry out the fiscal control and to impose ‘proportionate’ administrative burdens relating to audits, application procedures, reimbursement procedures, etc. It is acknowledged that considerable differences exist between the Member States, which lead to practical difficulties and transactional costs for economic operators active in different Member States or moving within the Single Market. These difficulties are due to the discrepancies between the national systems and follow from the nature of the current system. Moreover, the proportionate character of the administrative burden imposed on the economic operators could be questioned for some of the Member States.

The relationship between the ETD provisions and other policy instruments is analysed in the fifth research question. It is observed in the study that other EU instruments – such as the Horizontal Excise Directive or instruments that also form part of the wider EU energy policy – are linked to and scoped by the ETD, and vice versa. This is not always coherently reflected in

the wording and structure of those instruments, however. When it comes to State aid rules, these can become a focal point of conflict. Whereas the State aid rules are amended more regularly, the ETD has not changed since its adoption in 2003. As a result, both sets of rules have become incompatible in some aspects, whereby the initial discretion provided to the Member States in the ETD cannot be exercised in practice due to the State aid framework.

On the basis of the above conclusions, the study enumerates a number of general recommendations as follows:

1. provide for more clarity through common definitions / guidance and through improving the wording and structure to ensure a common understanding and application of the ETD (clarity);
2. the ETD should reflect the political consensus not to distort the Single Market and should not leave room for counterproductive national policy (subsidiarity / harmonization);
3. align with other policy instruments where possible, both when it comes to the concepts (definitions) and the objectives (alignment);
4. develop a flexible system to ensure an adequate response to the current and future energy/legal landscape (modernization).

A modification to the harmonized framework – be it through a legal change, a soft law change (e.g. guidance) or otherwise – could result in a shift of energy taxation revenues (upward or downward, depending on the changes implemented), and in a (relative) shift from energy taxation to other taxes or vice versa. It is clear that energy taxation plays an important role in terms of revenue collection for Member States. Touching upon the structure and rates of taxation is therefore a sensible equilibrium to find. The actual financial impact of a proposed change to the current harmonized framework on energy taxation is very difficult to estimate. Indeed, a number of factors require assessment, in particular the direct effect on the tax revenue (change in energy tax revenue related to the modification), the indirect effect on the tax revenue (change in overall tax revenue, e.g. VAT revenue, related to the modification), the change in compliance costs (businesses), the change in monitoring costs (authorities). Also when it comes to assessing the impact on energy taxation as a standalone – even though this matter is to be framed within the broader framework of both energy costs and taxation in general – the assessment of the impact of a proposed reform remains highly complex. At the time of this study, potential modifications to the ETD are insufficiently clear, and insufficient data is available to make a full fledged revenue impact analysis of these modifications. However when undertaking future action, any policy measure considered by the Commission should be carefully evaluated against the financial impact.

KURZFASSUNG⁵

Die Richtlinie 2003/96/EG des Rates vom 27. Oktober 2003 über die Restrukturierung des gemeinschaftlichen Rahmens für die Besteuerung von Energieprodukten und Elektrizität⁶ (im Folgenden auch „die Richtlinie“ oder „die ETD“ genannt) harmonisierte die Energiebesteuerung innerhalb der EU mit Wirkung vom 1. Januar 2004. Die ETD legt die Regeln in Bezug auf die Besteuerung von Energieprodukten und Elektrizität dar und zielt darauf ab sicherzustellen, dass der Binnenmarkt reibungslos funktioniert und Doppelbesteuerung oder Verzerrung des Handels und Wettbewerbs zwischen Energiequellen und Energieverbrauchern und -lieferanten vermieden wird. Genauer gesagt legt die Richtlinie ein Mindestbesteuerungsniveau für Energieprodukte fest, die als Kraft- oder Heizstoff sowie für Strom verwendet werden und definiert, welche Freistellungen erlaubt sind und unter welchen Bedingungen.

Die in der Einführung der ETD in 2003 resultierende politische Vereinbarung hat sich bewährt. Seit der Einführung der Richtlinie haben sich die Energielandschaft sowie die entsprechenden Bedürfnisse geändert und die zugrundeliegenden Politikziele haben sich weiterentwickelt. Zudem wurde der Text der ETD einer Diskussion zwischen Mitgliedsstaaten und zwischen Mitgliedsstaaten und Wirtschaftsbeteiligten unterworfen. Das reichlich vorhandene Fallrecht des EU-Gerichtshofes weist auf eine mangelnde Deutlichkeit einiger der ETD-Bestimmungen hin.

Diese Studie zielt darauf ab, die technischen und rechtlichen Aspekte der Richtlinie zu analysieren und die aus ihrer Implementierung durch die Mitgliedsstaaten und ihrer konkreten Anwendung durch Wirtschaftsbeteiligte resultierenden potenziellen Schwächen und Probleme zu identifizieren. Die Studie fußt auf sechs Säulen, gegen die gegebenenfalls alle Bestimmungen der Richtlinie bewertet werden. Diese Forschungsfragen fokussieren sich auf:

1. die Deutlichkeit und Konsistenz der Bestimmungen;
2. die Harmonisierung und den Umfang, in dem die Maßnahmen das reibungslose Funktionieren des Binnenmarktes sicherstellen und auf die Vermeidung einer Verzerrung des Handels und Wettbewerbs zwischen Energiequellen und zwischen Energieverbrauchern und Lieferanten;
3. die aktuellen Bedürfnisse der Mitgliedsstaaten und Wirtschaftsbeteiligten, die die technologischen Entwicklungen gebührend berücksichtigen;
4. den Verwaltungsaufwand;
5. die Kohärenz mit anderen politischen Instrumenten und insbesondere mit Beihilfenvorschriften;

⁵ Die in diesem Bericht dargelegten Informationen und Ansichten sind die des/der Verfasser/s und reflektieren nicht unbedingt die offizielle Meinung der Kommission. Die Kommission gibt keine Garantie für die Genauigkeit der in dieser Studie enthaltenen Daten. Weder die Kommission noch im Auftrag der Kommission handelnde Personen dürfen verantwortlich dafür gemacht werden, wie die hierin enthaltenen Informationen verwendet werden.

⁶ O.J. L 283/51, 31. Oktober 2003; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02003L0096-20040501.

6. die möglichen Auswirkungen auf Umsätze aus Steuern, falls Bestimmungen der Richtlinie modifiziert werden.

Bei der Durchführung der Studie wandten die Verfasser einen methodischen Ansatz basierend auf verschiedenen Datenerfassungstools an und garantierten hiermit sowohl die breite Beteiligung aller interessierten Parteien sowie die fundierten Beiträge zielgerichteter Experten. Als solches identifiziert die Analyse die Schwächen oder Unterschiede in der Transposition, Auslegung und praktischen Anwendung der ETD-Bestimmungen in allen Mitgliedsstaaten auf der Grundlage von Informationen, die wie folgt eingeholt werden:

- allgemeine Umfragen zur Beseitigung der Administration in 28 Mitgliedsstaaten;
- einen allgemeinen Fragebogen für Wirtschaftsbeteiligte;
- Interviews mit der Europäischen Kommission und ausgewählten EU-Stakeholdern;
- Interviews mit den Steuerverwaltungen und Wirtschaftsbeteiligten in acht Mitgliedsstaaten, die zur Feldforschung ausgewählt wurden⁷, wobei sechs relevanten Wirtschaftssektoren besondere Aufmerksamkeit geschenkt wurde⁸;
- Ein Fragebogen an das in acht ausgewählten Mitgliedsstaaten vorhandene Deloitte-Netzwerk; und
- Schreibtischstudien, um die über die obigen Primärquellen erfassten Informationen mit in der Literatur verfügbaren Daten zu konfrontieren und zu triangulieren.

Die Antworten aller Stakeholder haben die verschiedenen Produkte und Sektoren, eine vielfältige Vielzahl an Mitgliedsstaaten sowie eine ausgewogene Verteilung zwischen kleinen und großen Wirtschaftsbeteiligten angemessen abgedeckt.

Die Studie fokussiert sich hauptsächlich auf die erste Forschungsfrage, die die Deutlichkeit und Konsistenz der Bestimmungen der ETD betrifft. Die Analyse zeigt, dass die aktuelle Richtlinie suboptimal ist, wenn es um Deutlichkeit, Struktur und Wortlaut geht. Die Mitgliedsstaaten, die Europäische Kommission, der Europäische Gerichtshof und die Wirtschaftsbeteiligten bleiben bei unterschiedlichen Ansichten in Bezug auf die Auslegung und Anwendung einer Reihe von ETD-Bestimmungen. Die mangelnde Deutlichkeit im Wortlaut und der Struktur der Richtlinie könnte Probleme für die Mitgliedsstaaten schaffen, die wiederum entweder in der Zweckentfremdung der Bestimmungen durch Mitgliedsstaaten (und folglich der Wirtschaftsbeteiligten), in Unterschieden in der Implementierung zwischen den Mitgliedsstaaten oder in mangelndem Interesse an der Anwendung der Bestimmung und Richtlinien hinter ihr resultieren. Die mangelnde Deutlichkeit hat somit direkte Auswirkungen auf die Erreichung der Ziele der Richtlinie, die

⁷ Belgien, Dänemark, Deutschland, Italien, Polen, Portugal, Spanien und Schweden.

⁸ Chemische Industrie, Kraft-Wärme-Kopplung, Raffinerien und Bio-Kraftstoffe, Seeverkehr, Flugverkehr und Landwirtschaft.

von der ETD verfolgt werden. Eine Reihe von Ursachen für die unterschiedlichen Ansichten zwischen den beteiligten Akteuren wurde identifiziert, wie fehlende oder mangelnde Deutlichkeit der verwendeten Definitionen und Begriffe, die praktische Anwendbarkeit bestimmter Bestimmungen, die schwierige Lesbarkeit der Richtlinie oder die fehlende Ausrichtung mit anderen politischen Instrumenten.

Die zweite Forschungsfrage der Studie zielt auf die Bewertung der Auswirkungen der ETD auf die Funktion des Binnenmarktes ab. Der Binnenmarkt bezeichnet die EU als ein Gebiet ohne Binnengrenzen oder regulatorische Hürden für den freien Verkehr von Waren und Dienstleistungen. In diesem Zusammenhang wird beobachtet, dass das vollständige Potenzial der ETD zur Harmonisierung in Bezug auf die Realisierung des Binnenmarktes nicht erreicht werden kann. Bei der Analyse der praktischen Anwendung der ETD ist der aktuelle Rahmen sowohl inkonsistent implementiert als auch angewandt, sowie unvollständig und lässt Raum für Verzerrungen dieses Binnenmarktes. Die inkonsistente Implementierung und Anwendung resultiert aus den verschiedenen Auslegungen der ETD, die unter der ersten Forschungsfrage beobachtet wurden. Die mangelnde Eindeutigkeit und fehlenden präzisen Definitionen führen zur inkonsistenten Anwendung der Regeln, selbst wenn sie für alle Mitgliedsstaaten zwingend sind, und provoziert wiederum die Verzerrung des Handels und Wettbewerbs zwischen Produkten, Lieferanten und Verbrauchern. Der harmonisierte Rahmen in Bezug auf die Energiebesteuerung ist ebenfalls unvollständig. Eine große Diskrepanz in der Harmonisierung zwischen den EU-Mitgliedsstaaten besteht fort, da den Mitgliedsstaaten die Option offen gehalten wird, bestimmte Ermäßigungen oder Befreiungen anzuwenden und durch das weite Ermessen, das ihnen bei der Anwendung und Kontrolle der Ermäßigungen und Befreiungen gewährt wird. Daneben resultiert die Tatsache, dass die ETD-Bestimmungen auf einige (Verwendungen der) Produkte keine Anwendung finden und dass gewisse Bestimmungen den Mitgliedsstaaten erlauben, für sich selbst einige Anrechenbarkeitsbedingungen zu definieren, schließlich in einem Regelwerk mit einem undefinierten - und folglich nicht harmonisierten - sachlichen Anwendungsbereich.

Die dritte Forschungsfrage bezieht sich auf die Relevanz von ETD-Bestimmungen in Bezug auf die aktuellen Bedürfnisse von Mitgliedsstaaten und Wirtschaftsbeteiligten. Insbesondere zielt die Forschungsfrage darauf ab festzulegen, ob die ETD im Einklang mit den technologischen Entwicklungen steht, die sich seit 2003 ergeben haben. In dieser Hinsicht haben die Entwicklungen im Energiemarkt, in den Energiesystemen, in Umwelt- und sonstigen Richtlinien und Technikreifegraden die Implementierung und Anwendung der ETD komplexer und nicht gänzlich in Übereinstimmung mit dem Bedarf von Steuerbehörden und Wirtschaftsbeteiligten gemacht. Die ETD ist ein statisches Instrument in einem dynamischen Umfeld. Die Tatsache, dass die ETD aus bestimmten überholten Bestimmungen besteht, die mit neuen Produkten und neuen Technologien und Verhaltensänderungen umgehen müssen, bietet die ETD keine ausreichende Antwort auf die derzeitigen Bedürfnisse unter Berücksichtigung ihrer Position in der breiteren EU-Steuer- und Energiepolitik. Zudem hat eine geänderte Politik im Zollbereich, insbesondere in Bezug auf die Kombinierte Nomenklatur und im Verbrauchssteuerbereich (Einführung der Richtlinie 2008/118/EG) in einer Veraltung der aktuellen ETD resultiert.

In puncto Verwaltungsaufwand, der unter der vierten Forschungsfrage analysiert wird, sind die (Berichterstattungs)-Verpflichtungen für die Mitgliedsstaaten und Wirtschaftsbeteiligten, die direkt aus der ETD folgen, begrenzt. Dies ergibt sich aus der begrenzten Harmonisierung in der Form einer Richtlinie selbst: es liegt weiterhin im Ermessen der Mitgliedsstaaten, die konkrete Anwendung zu organisieren, die steuerliche Kontrolle auszuüben und „proportionalen“ Verwaltungsaufwand in Bezug auf Audits, Anwendungsverfahren, Rückerstattungsverfahren usw. zu verhängen. Es ist anerkannt, dass erhebliche Unterschiede zwischen den Mitgliedsstaaten existieren, die zu praktischen Schwierigkeiten und Transaktionskosten für Wirtschaftsbeteiligte führen, die in verschiedenen Mitgliedsstaaten aktiv sind oder sich innerhalb des Binnenmarktes bewegen. Diese Schwierigkeiten sind auf die Diskrepanzen zwischen den nationalen Systemen zurückzuführen und folgen aus der Art des derzeitigen Systems. Zudem könnte der anteilmäßige Charakter des den Wirtschaftsbeteiligten auferlegten Verwaltungsaufwands für einige der Mitgliedsstaaten in Frage gestellt werden.

Die Beziehung zwischen den ETD-Bestimmungen und sonstigen politischen Instrumenten wird in der fünften Forschungsfrage analysiert. Aus der Studie geht hervor, dass andere EU-Instrumente - wie die Horizontale Verbrauchssteuerrichtlinie oder Instrumente, die ebenfalls Bestandteil der breiteren EU-Energiepolitik sind - mit der ETD verbunden sind oder in deren Umfang liegen und umgekehrt. Das wird allerdings nicht immer kohärent im Wortlaut und in der Struktur dieser Instrumente reflektiert. Wenn es um Beihilfevorschriften geht, können diese zum Schwerpunkt eines Konfliktes werden. Während die Beihilfevorschriften regelmäßiger geändert werden, hat sich die ETD seit ihrer Einführung 2003 nicht geändert. Folglich sind beide Regelwerke in manchen Aspekten inkompatibel geworden, wobei das den Mitgliedsstaaten in der ETD anfänglich gewährte Ermessen in der Praxis aufgrund des Beihilferahmens nicht ausgeübt werden kann.

Auf der Grundlage der obigen Schlussfolgerungen, zählt die Studie eine Reihe von allgemeinen Empfehlungen wie folgt auf:

1. Bereitstellung von mehr Deutlichkeit durch allgemeingültige Definitionen / Leitfäden und durch Verbesserung des Wortlauts und der Struktur, um ein gemeinsames Verständnis und eine gemeinsame Anwendung der ETD sicherzustellen (Deutlichkeit);
2. Die ETD sollte reflektieren, dass der politische Konsens nicht den Binnenmarkt verzerrt und sie sollte keinen Raum für kontraproduktive Nationalpolitik lassen (Subsidiarität / Harmonisierung);
3. Angleichung an andere politische Instrumente, wo möglich, wenn es um die Konzepte (Definitionen) und die Ziele (Ausrichtung) geht;
4. Entwicklung eines flexiblen Systems, um eine angemessene Reaktion auf die derzeitige und künftige Energie-/Rechtslandschaft (Modernisierung) sicherzustellen.

Eine Modifizierung des harmonisierten Rahmens - sei es durch eine rechtliche Änderung, eine sanfte Gesetzesänderung (z. B. Leitfaden) oder anderweitig - könnte in einer Verschiebung der Energiebesteuerungseinnahmen (abhängig von den implementierten

Änderungen nach oben oder unten) und in einer (relativen) Verschiebung der Energiebesteuerung zu anderen Steuern oder umgekehrt resultieren. Es ist klar, dass die Energiebesteuerung eine wichtige Rolle im Hinblick auf die Einnahmenerhebung für Mitgliedsstaaten spielt. Beim kurzen Eingehen auf die Struktur und die Steuersätze ist deshalb ein sinnvolles Gleichgewicht zu finden. Die tatsächlichen finanziellen Auswirkungen einer vorgeschlagenen Änderung am derzeitigen harmonisierten Rahmen für Energiebesteuerung sind sehr schwer abzuschätzen. Tatsächlich bedarf eine Reihe von Faktoren einer Bewertung, insbesondere die direkten Auswirkungen auf die Steuereinnahmen (Änderung in den Energiesteuereinnahmen in Bezug auf die Modifikation), die indirekten Auswirkungen auf die Steuereinnahmen (Änderungen in den gesamten Steuereinnahmen, z. B. USt.-Einnahmen in Bezug auf die Modifikation), die Änderung in den Compliance-Kosten (Unternehmen), die Änderung in den Überwachungskosten (Behörden). Auch wenn es um die unabhängige Bewertung der Auswirkungen auf die Energiebesteuerung geht - auch wenn diese Angelegenheit in den breiteren Rahmen sowohl der Energiekosten als auch Besteuerung im Allgemeinen einzurahmen ist - bleibt die Bewertung der Auswirkungen einer vorgeschlagenen Reform hochkomplex. Zum Zeitpunkt dieser Studie sind die potenziellen Modifikationen an der ETD unzureichend klar, und es stehen nicht genügend Daten zur Verfügung, um eine vollwertige Wirkungsanalyse dieser Modifikationen vorzunehmen. Bei der Ergreifung künftiger Maßnahmen allerdings, sollte jede von der Kommission in Betracht gezogene politische Maßnahme sorgfältig gegen die finanziellen Auswirkungen bewertet werden.

RÉSUMÉ ANALYTIQUE⁹

La directive 2003/96/CE du Conseil du 27 octobre 2003 restructurant le cadre communautaire de taxation des produits énergétiques et de l'électricité¹⁰ (ci-après également dénommée "la directive" ou "la DTE") a harmonisé la taxation de l'énergie dans l'UE à partir du 1^{er} janvier 2004. La DTE fixe les règles relatives à la taxation des produits énergétiques et de l'électricité, afin d'assurer le bon fonctionnement du marché unique et d'éviter la double imposition ou toute distorsion des échanges et de la concurrence entre les sources d'énergie et les consommateurs et fournisseurs d'énergie. Plus précisément, la directive fixe des niveaux minima de taxation pour les produits énergétiques utilisés comme carburant ou combustible de chauffage et pour l'électricité, et définit les exonérations autorisées et les conditions dans lesquelles elles le sont.

L'accord politique qui a suivi l'adoption de la DTE en 2003 a fait ses preuves. Depuis l'introduction de la directive, cependant, le paysage énergétique et les besoins correspondants ont changé et les objectifs politiques sous-jacents ont évolué. En outre, le texte de la DTE a fait l'objet de discussions entre les États membres et entre les États membres et les opérateurs économiques. La jurisprudence abondante de la Cour de justice de l'UE indique un manque de clarté de certaines dispositions de la directive sur la taxe de l'énergie.

Cette étude vise à analyser les aspects techniques et juridiques de la directive et à identifier les faiblesses et les problèmes potentiels résultant de sa mise en œuvre par les États membres et de son application concrète par les opérateurs économiques. L'étude a été conçue autour de six piliers, sur la base desquels toutes les dispositions de la directive ont été évaluées, le cas échéant. Ces questions de recherche sont axées sur :

1. la clarté et la cohérence des dispositions ;
2. l'harmonisation et la mesure dans laquelle les mesures garantissent le bon fonctionnement du marché unique et évitent les distorsions des échanges et de la concurrence entre les sources d'énergie et entre les consommateurs et les fournisseurs d'énergie ;
3. les besoins actuels des États membres et des opérateurs économiques, compte tenu également de l'évolution technologique ;
4. la charge administrative ;
5. la cohérence avec d'autres instruments politiques, et en particulier avec les règles en matière d'aides d'État ;
6. l'impact possible sur les recettes fiscales en cas de modification des dispositions de la directive.

⁹ Les informations et les opinions exprimées dans le présent rapport sont celles de l'auteur ou des auteurs et ne reflètent pas nécessairement l'opinion officielle de la Commission. La Commission ne garantit pas l'exactitude des données incluses dans cette étude. Ni la Commission ni aucune personne agissant au nom de la Commission ne peut être tenue responsable de l'utilisation qui peut être faite des informations qu'elle contient.

¹⁰ JO. L. 283/51, 31 octobre 2003; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02003L0096-20040501.

Dans la conduite de l'étude, les auteurs ont utilisé une approche méthodologique basée sur divers outils de collecte de données, garantissant ainsi à la fois la large participation de toutes les parties intéressées et la contribution en profondeur d'experts en la matière. En tant que telle, l'analyse identifie les faiblesses ou les différences dans la transposition, l'interprétation et l'application pratique des dispositions de la DTE dans tous les États membres, sur la base des informations collectées via :

- des enquêtes générales pour l'administration des accises dans 28 États membres ;
- un questionnaire général à l'intention des opérateurs économiques ;
- des entretiens avec la Commission européenne et certaines parties prenantes de l'UE ;
- des entretiens avec les administrations fiscales et les opérateurs économiques des États membres dans huit États membres sélectionnés pour le travail sur le terrain¹¹, une attention particulière ayant été accordée à six secteurs économiques pertinents¹² ;
- un questionnaire au réseau Deloitte présent dans les huit États membres sélectionnés ; et
- la recherche documentaire, pour confronter et trianguler l'information recueillie par l'intermédiaire des sources primaires susmentionnées avec les données disponibles dans la littérature.

Les réponses de toutes les parties prenantes ont couvert de manière adéquate les différents produits et secteurs, une variété diversifiée d'États membres et une répartition équilibrée entre petits et grands opérateurs économiques.

L'étude se concentre principalement sur la première question de recherche, qui concerne la clarté et la cohérence des dispositions de la DTE. L'analyse montre que la directive actuelle est sous-optimale en termes de clarté, de structure et de formulation. Les États membres, la Commission européenne, la Cour de justice des Communautés européennes et les opérateurs économiques ont des points de vue différents sur l'interprétation et l'application d'un certain nombre de dispositions de la DTE. Le manque de clarté dans la formulation et la structure de la directive pourrait créer des problèmes pour les États membres, ce qui pourrait entraîner soit une utilisation abusive des dispositions par les États membres (et par conséquent les opérateurs économiques), soit des différences de mise en œuvre entre les États membres, soit le manque d'intérêt et d'application de la disposition et des politiques qui la sous-tendent. Le manque de clarté a donc un impact direct sur la réalisation des objectifs politiques poursuivis par la DTE. Un certain nombre de causes des divergences de vues entre les acteurs concernés ont été identifiées, telles que l'absence ou le manque de clarté des définitions et des concepts utilisés, l'inapplicabilité pratique de certaines

¹¹ Belgique, Danemark, Allemagne, Italie, Pologne, Portugal, Espagne et Suède.

¹² Industrie chimique, production combinée de chaleur et d'électricité, raffineries et biocarburants, transport maritime, transport aérien et agriculture.

dispositions, la lisibilité difficile de la directive ou le manque d'alignement avec d'autres instruments politiques.

La deuxième question de recherche de l'étude vise à évaluer l'effet de la DTE sur le fonctionnement du marché unique. Le marché unique désigne l'UE comme un territoire unique, sans frontières intérieures ni obstacles réglementaires à la libre circulation des biens et des services. Dans ce contexte, il est observé que le plein potentiel d'harmonisation de la DTE en termes de réalisation du marché unique ne peut être atteint. Si l'on analyse l'application pratique de la DTE, le cadre actuel est à la fois mis en œuvre et appliqué de manière incohérente et incomplète, ce qui laisse la place à des distorsions de ce marché unique. L'incohérence de la mise en œuvre et de l'application résulte des différentes interprétations données à la DTE qui ont été observées sous la première question de recherche. Le manque de clarté et de définitions précises conduit à une application incohérente des règles, même lorsqu'elles sont impératives pour tous les États membres, et provoque à son tour une distorsion des échanges et de la concurrence entre les produits, les fournisseurs et les consommateurs. Le cadre harmonisé sur la taxation de l'énergie est également incomplet. Un écart considérable dans l'harmonisation entre les États membres de l'UE persiste en raison de l'option laissée aux États membres d'appliquer ou non certaines réductions ou exemptions, et du large pouvoir discrétionnaire qui leur est laissé dans la manière dont ils appliquent et contrôlent les exemptions et les réductions. En outre, le fait que les dispositions de la DTE ne s'appliquent pas à certains produits (ou utilisations de produits) et que certaines dispositions permettent aux États membres de définir eux-mêmes certaines conditions d'exigibilité se traduit finalement par un ensemble de règles dont le champ d'application matériel n'est pas défini et n'est dès lors pas harmonisé.

La troisième question de recherche concerne la pertinence des dispositions de la DTE par rapport aux besoins actuels des États membres et des opérateurs économiques. En particulier, la question de recherche vise à établir si la DTE est en phase avec les développements technologiques survenus depuis 2003. À cet égard, l'évolution du marché de l'énergie, des systèmes énergétiques, des politiques environnementales et autres et des niveaux de maturité technologique ont rendu la mise en œuvre et l'application de la directive plus complexes et ne correspondent pas entièrement aux besoins des autorités fiscales et des opérateurs économiques. La DTE est un instrument statique dans un environnement dynamique. Le fait que la DTE consiste en certaines dispositions dépassées qui doivent prendre en compte de nouveaux produits, et compte tenu des nouvelles technologies et des changements de comportement, la DTE n'apporte pas une réponse suffisante aux besoins actuels, eu égard à sa position dans la politique fiscale et énergétique de l'UE au sens large. En outre, le changement de politique dans le domaine des douanes, en particulier en ce qui concerne la nomenclature combinée, et dans le domaine des accises (introduction de la directive 2008/118/CE) ont rendu la DTE actuelle obsolète.

En ce qui concerne la charge administrative, qui est analysée dans le cadre de la quatrième question de recherche, les obligations (d'information) des États membres et des opérateurs économiques découlant directement de la DTE sont limitées. Cette limitation est la conséquence de l'harmonisation limitée sous la forme d'une directive à proprement parler :

les États membres conservent le pouvoir discrétionnaire d'organiser l'application concrète, d'effectuer le contrôle fiscal et d'imposer des charges administratives « proportionnées » liées aux audits, aux procédures de demande, aux procédures de remboursement, etc. Il est reconnu qu'il existe des différences considérables entre les États membres, ce qui entraîne des difficultés pratiques et des coûts de transaction pour les opérateurs économiques actifs dans différents États membres ou se déplaçant à l'intérieur du marché unique. Ces difficultés sont dues aux divergences entre les systèmes nationaux et découlent de la nature du système actuel. En outre, le caractère proportionné de la charge administrative imposée aux opérateurs économiques pourrait être remis en question pour certains États membres.

La relation entre les dispositions de la DTE et les autres instruments politiques est analysée dans la cinquième question de recherche. Il est observé dans l'étude que d'autres instruments de l'UE - tels que la directive horizontale sur les accises ou des instruments qui font également partie de la politique énergétique de l'UE au sens large - sont liés à la DTE et sont pris en compte par la DTE, et vice versa. Ce lien ne se reflète toutefois pas toujours de manière cohérente dans la formulation et la structure de ces instruments. Lorsqu'il s'agit des règles en matière d'aides d'État, celles-ci peuvent devenir un point central de conflit. Alors que les règles relatives aux aides d'État sont modifiées plus régulièrement, la DTE n'a pas changé depuis son adoption en 2003. En conséquence, les deux ensembles de règles sont devenus incompatibles à certains égards, de sorte que le pouvoir discrétionnaire initial accordé aux États membres dans la DTE ne peut être exercé dans la pratique en raison de l'encadrement des aides d'État.

Sur la base des conclusions ci-dessus, l'étude énumère un certain nombre de recommandations générales comme suit:

1. assurer une plus grande clarté grâce à des définitions / orientations communes et à l'amélioration de la formulation et de la structure afin d'assurer une compréhension et une application communes de la DTE (clarté) ;
2. la DTE devrait refléter le consensus politique de ne pas fausser le marché unique et ne devrait pas laisser la place à une politique nationale contre-productive (subsidiarité / harmonisation) ;
3. s'aligner sur d'autres instruments politiques dans la mesure du possible, tant en ce qui concerne les concepts (définitions) que les objectifs (alignement) ;
4. développer un système flexible pour assurer une réponse adéquate au paysage énergétique et juridique actuel et futur (modernisation).

Une modification du cadre harmonisé - qu'il s'agisse d'un changement juridique, d'un changement de législation non contraignante (par exemple des orientations) ou autre - pourrait entraîner un déplacement des recettes de la taxation de l'énergie (à la hausse ou à la baisse, selon les changements mis en œuvre) et un déplacement (relatif) de la taxation de l'énergie vers d'autres taxes ou vice versa. Il est clair que la taxation de l'énergie joue un rôle important en termes de perception des recettes pour les États membres. Toucher à la structure et aux taux d'imposition est donc un équilibre raisonnable à trouver. L'impact financier réel d'un changement proposé au cadre harmonisé actuel sur la taxation de l'énergie est très difficile à estimer. En effet, un certain nombre de facteurs doivent être

évalués, en particulier l'effet direct sur les recettes fiscales (changement dans les recettes fiscales liées à la modification), l'effet indirect sur les recettes fiscales (changement dans les recettes fiscales globales, par exemple les recettes de TVA, liées à la modification), le changement dans les coûts de mise en conformité (entreprises), le changement dans les coûts de surveillance (autorités). De même, lorsqu'il s'agit d'évaluer l'impact sur la taxation de l'énergie en tant que telle - même si cette question doit s'inscrire dans le cadre plus large des coûts de l'énergie et de la taxation en général – l'évaluation de l'impact d'une réforme proposée reste très complexe. Au moment de la présente étude, les modifications potentielles de la DTE ne sont pas suffisamment claires et les données disponibles sont insuffisantes pour effectuer une analyse complète de l'impact de ces modifications. Toutefois, pour l'avenir, toute mesure politique envisagée par la Commission devrait être soigneusement évaluée par rapport à l'impact financier.

ABSTRACT

The study aims at analysing the technical and legal aspects of the Energy Taxation Directive (2003/96), and at identifying the potential weaknesses and problems resulting from its implementation by the Member States and from its concrete application by economic operators. The study is construed around six pillars, against which all the provisions of the Directive have been assessed:

1. the clarity and consistency of the provisions;
2. harmonisation and the extent to which the measures ensure the smooth functioning of the single market, and avoid distortion of trade and competition between energy sources and between energy consumers and suppliers;
3. the current needs of Member States and economic operators, also taking due account to the technological developments;
4. the administrative burden;
5. the coherence with other policy instruments, and in particular with State aid rules;
6. the possible impact on revenues from taxes in case provisions of the Directive are modified.

The final section of the study presents the main conclusions and formulates key recommendations for potential future modifications and updates of the Directive.

ZUSAMMENFASSUNG

Die Studie zielt darauf ab, die technischen und rechtlichen Aspekte der Richtlinie (2003/96) über die Energiebesteuerung zu analysieren und die aus ihrer Implementierung durch die Mitgliedsstaaten und ihrer konkreten Anwendung durch Wirtschaftsbeteiligte resultierenden potenziellen Schwächen und Probleme zu identifizieren. Die Studie fußt auf sechs Säulen, gegen die alle Bestimmungen der Richtlinie bewertet werden.

1. die Deutlichkeit und Konsistenz der Bestimmungen;
2. Harmonisierung und der Umfang, in dem die Maßnahmen das reibungslose Funktionieren des Binnenmarktes sicherstellen und Vermeidung einer Verzerrung des Handels und Wettbewerbs zwischen Energiequellen und zwischen Energieverbrauchern und Lieferanten;
3. die aktuellen Bedürfnisse der Mitgliedsstaaten und Wirtschaftsbeteiligten, die die technologischen Entwicklungen gebührend berücksichtigen;
4. der Verwaltungsaufwand;
5. die Kohärenz mit anderen politischen Instrumenten und insbesondere mit Beihilfevorschriften;
6. die möglichen Auswirkungen auf Umsätze aus Steuern, falls Bestimmungen der Richtlinie modifiziert werden.

Im letzten Abschnitt der Studie werden die wichtigsten Schlussfolgerungen präsentiert und Schlüsselempfehlungen für potenzielle künftige Modifikationen und Aktualisierungen der Richtlinie formuliert.

RÉSUMÉ

L'étude vise à analyser les aspects techniques et juridiques de la directive sur la taxation de l'énergie (2003/96) et à identifier les faiblesses et les problèmes potentiels résultant de sa mise en œuvre par les États membres et de son application concrète par les opérateurs économiques. L'étude s'articule autour de six piliers par rapport auxquels toutes les dispositions de la directive ont été évaluées :

1. la clarté et la cohérence des dispositions ;
2. l'harmonisation et la mesure dans laquelle les mesures garantissent le bon fonctionnement du marché unique et évitent toute distorsion des échanges et de la concurrence entre les sources d'énergie et entre les consommateurs et les fournisseurs d'énergie ;
3. les besoins actuels des États membres et des opérateurs économiques, compte tenu également de l'évolution technologique ;
4. la charge administrative ;
5. la cohérence avec d'autres instruments politiques, et en particulier avec les règles en matière d'aides d'État ;
6. l'impact possible sur les recettes fiscales en cas de modification des dispositions de la directive.

La dernière partie de l'étude présente les principales conclusions et formule des recommandations essentielles pour d'éventuelles modifications et mises à jour futures de la directive.

Table of Contents

1	Introduction.....	1
1.1	Purpose of the document	1
1.2	Structure of the document	1
2	Context and understanding.....	2
2.1	Taxation of energy products and electricity at EU level	2
2.1.1	Legal background	3
2.1.2	Policy background	4
2.1.3	Proposal for a reform	10
2.2	Structure of the Directive	11
3	Approach and methodology.....	13
3.1	Overall approach: the Analytical Framework	13
3.1.1	General research questions	15
3.1.2	Detailed research questions.....	17
3.2	Our methodological approach	19
3.2.1	Data collection tools.....	21
3.2.2	Analysis and recommendations	25
4	Key findings	28
4.1	Outline.....	28
4.2	Research question 1.....	28
4.2.1	Missing or unclear definitions of concepts used.....	29
4.2.2	Practical issues with the implementation of certain provisions	39
4.2.3	Difficult readability of the ETD	44
4.2.4	Alignment with other policy objectives	45
4.2.5	Entitlement to exemptions/ reductions.....	46
4.3	Research question 2.....	47
4.3.1	Discretionary definition of the conditions establishing the chargeable event....	48
4.3.2	Discretionary application of exemptions and reductions	49
4.3.3	Different procedures for the application of exemptions and reductions.....	49
4.3.4	Lack of clarity and definitions in the ETD	50
4.3.5	Uncertainty in the application of the control and movement provisions	51
4.4	Research question 3.....	52
4.4.1	A static instrument in a fast developing environment.....	53

4.4.2 Outdated provisions and new products.....	55
4.4.3 New technologies and changes in behaviour	56
4.5 Research question 4.....	57
4.5.1 Data collection and limitation of the evaluation	58
4.5.2 ETD and administrative provisions.....	65
4.5.3 Declaration and payment of excises	68
4.5.4 Excise reductions and exemptions	73
4.5.5 Storage and production of excise products	83
4.5.6 Movement of excise products.....	87
4.6 Research question 5.....	99
4.6.1 State aid and energy taxation	99
4.6.2 Key issues	102
4.7 Research question 6.....	102
5 Conclusions and recommendations	105
5.1 Conclusions	105
5.2 Recommendations	1
Annex A - Analytical Framework.....	6
Annex B - Findings per Article.....	50
B.1 Article 1	50
B.2 Article 2	61
Article 2(1) – Defining ‘energy products’	61
Article 2(2) – Electricity	67
Article 2(3) – Equivalent products.....	68
Article 2(4) – Delineating the scope of the ETD	74
Article 2(5) – Updating CN codes used to describe ‘energy products’	88
B.3 Article 3	92
B.4 Article 4	92
B.5 Article 5	101
B.6 Article 6	104
B.7 Article 7	106
Article 7(1).....	106
Article 7(2).....	107
Article 7(3).....	112
Article 7(4).....	113

B.8 Article 8	116
Article 8(1).....	116
Article 8(2).....	118
B.9 Article 9	121
Article 9(2).....	121
B.10 Article 10	123
Article 10(2).....	123
B.11 Article 11	125
Article 11(1).....	125
Article 11(2).....	126
Article 11(3).....	127
Article 11(4).....	127
B.12 Article 12	128
Article 12(1).....	130
Article 12 (2).....	132
B.13 Article 13	134
B.14 Article 14	135
Article 14(1)(a).....	136
Article 14(1)(b)	140
Article 14(1)(c).....	146
B.15 Article 15	154
Article 15(1)(a).....	157
Article 15(1)(b)	159
Article 15(1)(c).....	163
Article 15(1)(d)	167
Article 15(1)(e)	169
Article 15(1)(f)	170
Article 15(1)(h)	174
Article 15(1)(i).....	177
Article 15(1)(j).....	177
Article 15(1)(k).....	179
Article 15(1)(l).....	180
Article 15(2).....	180
Article 15(3).....	181

B.16 Article 16	193
B.17 Article 17	198
Article 17(1).....	199
Article 17(2).....	203
Article 17(3).....	204
Article 17(4).....	205
B.18 Article 20	207
B.19 Article 21	215
Article 21(1).....	215
Article 21(2).....	216
Article 21(3).....	217
Article 21(4).....	222
Article 21(5).....	223
Article 21(6).....	230
B.20 Article 22	232
B.21 Article 23	233
B.22 Article 24	234
Article 24(1).....	235
Article 24(2).....	237
Annex C - References.....	241
Publications and reports	241
Legislation.....	241
ECJ Rulings	249
Bibliography.....	253
Annex D - Surveys	256
Survey on Energy Taxation Directive (ETD) - Member States	256
Survey on Energy Taxation Directive (ETD) – Economic Operators.....	276

Table of Figures

Figure 1 - Total environmental tax revenue EU-28 (2002 - 2015)	8
Figure 2 - Total environmental tax revenue EU-28 (2015).....	8
Figure 3 - Approach to the study.....	19
Figure 4 - Member States' issues with regard to the definition of 'energy product'	30

Figure 5 - Economic Operators' issues with regard to the definition of 'energy product'	31
Figure 6 - Use of 'equivalent products'	32
Figure 7 - Reasoning ECJ Kronos Titan: Interpretation Article 2(3) ETD	32
Figure 8 - Taxation of products used as motor fuel and heating fuel in Member States	33
Figure 9 - Dual use.....	35
Figure 10 - Member States' interpretation of Article 2(4).....	41
Figure 11 - Member States' application of derogations for environmental policies.....	41
Figure 12 - Share of Energy taxation on GDP and total tax revenues.....	79
Figure 13 - Overview of the possible excise treatment for the release for consumption under the ETD	85
Figure 14 - Distinction between 'energy products', 'taxable products' and 'products' in Member States.....	137
Figure 15 - Problems with regard to the use of wordings ('energy products', 'taxable products', 'products')	138
Figure 16 - Taxable products covered by the ETD fall within scope of Directive 2008/118/EC	144
Figure 17 - Member States' issues with regard to the definition of 'energy product'	147
Figure 18 - Economic Operators'' issues with regard to the definition of 'energy product' .	148
Figure 19 - Member States' levying national duty on nuclear fuel used for the commercial production of electricity.....	151
Figure 20 - Member States adding products to the ETD.....	152
Figure 21 - Economic Operators using products subject to excise taxation for which the tax rate is not specified	154
Figure 22 - Member States experiencing problems with the identification of the equivalent product	155
Figure 23 - Economic Operator experiencing problems with the identification of the equivalent product	155
Figure 24 - Scope of Article 2(4)	161
Figure 25 - Issues with scope of Article 2(4) for Member States	161
Figure 26 - Issues with scope of Article 2(4) for Economic Operators.....	161
Figure 27 - Uncertainties on application of 'energy product' definition	164
Figure 28 - Interpretation of 'dual use' of natural gas	166
Figure 29 - Interpretation of 'dual use' of energy product used for heating.....	166
Figure 30 - Regime when electricity accounts for more than 50 % of the cost of a product	170
Figure 31 - Clarity of the definition for 'cost of a product' in the ETD.....	171
Figure 32 - Views on yearly update of CN codes.....	174

Figure 33 - Views on delegating powers for yearly update of CN codes	175
Figure 34 - Differentiated rates of taxation	188
Figure 35 - Economic Operators benefiting from lower excise tax rates based on these industrial and commercial purposes.....	204
Figure 36 - Tax base for electricity in the Member States	215
Figure 37 - Measuring units for taxation levels in the Member States	215
Figure 38 - Problems in currency conversion calculation	220
Figure 39 - Exemptions in Article 14(1) and administrative difficulty	221
Figure 40 - Economic operators benefiting from exemption or a reduced rate.....	222
Figure 41 - Member States impose taxation for reasons of environmental policy	224
Figure 42 - Difficulties with the definition of the terms 'used to produce electricity' or 'used to maintain the ability to produce electricity	225
Figure 43 - Difficulties wih the application of the exemption on the basis of Article 14(1)(a)	225
Figure 44 - Exemption of excise duties paid on aircraft fuel.....	230
Figure 45 - Issues with the application of the exemption on the basis of Article 14(1)(b)....	231
Figure 46 - Issues with the application of the exemption on the basis of Article 14(1)(c)	238
Figure 47 - Calculation of tax base for cogeneration in Sweden	250
Figure 48 - Applicability of the exemption or reduction for the use of fuel on inland waterways	256
Figure 49 - Taxation of fuel for agricultural use in 10 Member States	261
Figure 50 - Necessity for a definition for 'insignificant' and 'mixed use'	262
Figure 51 - Taxation of fuel for agricultural use in 10 Member States	268
Figure 52 - Contractors benefiting from lower excise rates on the use of fuel	269
Figure 53 - Contractors benefiting from zero tariff on motor fuel	270
Figure 54 - Application of agricultural exemptions and reduction	271
Figure 55 - Uncertainties in the application of agricultural exemptions and reduction.....	271
Figure 56 - Satisfaction with application of agricultural exemptions and reduction and administrative conditions.....	272
Figure 57 - Application of a reduced rate on excise duties on the basis of Article 16 ETD? .	281
Figure 58 - Member States limiting the scope of the term 'business use'	288
Figure 59 - Views delegating powers for the yearly update of CN codes	294
Figure 60 - Interpretation of the term 'control and movement provisions of Directive 92/12/EEC'	299
Figure 61 - Bilateral or multilateral agreements resulting in dispensation of some or all of the control measures set out in Directive 2008/118/EC.....	299

Figure 62 - Bilateral agreements and Economic Operators	300
Figure 63 - Issues with the definition of the term "curtilage"	304
Figure 64 - Issues with the application of that exclusion from the chargeable event.....	305
Figure 65 - Scope of Article 21(5).....	311
Figure 66 - Application of exemption granted to 'small producers'	313
Figure 67 - Definition of 'electricity distributor'	315
Figure 68 - Application of possibility to adapt tax when rates are changing.....	318
Figure 69 - Harmonisation at EU level.....	319

Table of Tables

Table 1 - Overview of the Analytical Framework.....	13
Table 2 - Overview of detailed research questions with link to general research questions..	17
Table 3 - Data collection tools.....	21
Table 4 - Coverage of sectors per fieldwork in Member States.....	23
Table 5 - Overview of research question 1	29
Table 6 - Overview of research question 2	47
Table 7 - Overview of research question 3	52
Table 8 - Overview of research question 4	57
Table 9 - Administrative burden in the production and trade of energy products and electricity.....	59
Table 10 - Overview of research question 5	90
Table 11 - Overview of research question 6	93
Table 12 - Equivalent products of products used as heating or motor fuel in selected Member States.....	72
Table 13 - Definitions of 'dual use' in selected Member States	81
Table 14 - Definitions of 'metallurgical process' in selected Member States.....	82
Table 15 - Definitions of 'mineralogical processes' in selected Member States	86

1 Introduction

This section provides an overview of the purpose and structure of the Final Report.

1.1 Purpose of the document

This document serves as the Final Report for the Study on the “Technical and legal aspects of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity”.

1.2 Structure of the document

The document is structured as follows:

- **Section 2:** Context and Understanding;
- **Section 3:** Approach and Methodology;
- **Section 4:** Key findings;
- **Section 5:** Conclusions;
- **Section 6:** Recommendations.

In addition, the document includes the following annexes:

- **Annex A:** Analytical Framework;
- **Annex B:** Findings per Article;
- **Annex C:** References;
- **Annex D:** Surveys.

2 Context and understanding

This section provides an overview of the political context and case law developments related to the Energy Taxation Directive. It also highlights issues related to the horizontal excise Directive.

The consumption of energy products and electricity is of particular importance for the EU Member States' budgets. Upon today, the current EU framework for excise duties on energy products has led to the convergence of the national legislations, but still shows a number of structural failures. These failures relate in particular to the single market and the creation of a level playing field, to the objectives of protecting the environment, and to the intra-Union movement of energy products.

2.1 Taxation of energy products and electricity at EU level

The Treaty on the European Union¹³ (**TEU**) – together with the Treaty on the Functioning of the European Union (**TFEU**) – has significantly expanded the mission and objectives of the Union. Whereas the prior constitutional instruments focused on economic objectives, today, the EU works for the sustainable development of Europe based on multiple economic objectives (balanced economic growth, price stability, a highly competitive market economy) but also objectives of a different nature (social, environmental, technical, and scientific)¹⁴. The internal market concept had to be adapted from a negative definition (protection rights – avoid hindering the free circulation) to a positive definition, facilitating the achievement of the said objectives.

As a consequence, the excise framework on energy products and electricity should:

- Eliminate all tax discriminations and ensure the proper functioning of the internal market;
- Serve the realisation of all objectives laid down in the Treaties¹⁵ and relating to the realization of the internal market¹⁶;
- Avoid distortion of competition¹⁷.

¹³ <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT> (Accessed: [12/01/2018]).

¹⁴ Article 3, §3 TEU and Article 26, §2 TFEU.

¹⁵ Article 3, §3 TEU and Article 26, §2 TFEU.

¹⁶ Article 113 TFEU.

2.1.1 Legal background

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity¹⁸ (**ETD**) defines the fiscal structures and the levels of taxation to be imposed on energy products and electricity. The ETD was based on a Proposal for a Council Directive restructuring the Community framework for the taxation of energy products¹⁹. Following the introduction of the ETD, Directives 92/81/EEC²⁰ on the harmonization of the structures of excise duties on mineral oils and 92/82/EEC²¹ on the approximation of the rates of excise duties on mineral oils were repealed as from 31 December 2003²². The absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils was considered to potentially adversely affect the proper functioning of the internal market of the EU²³.

The ETD entered into force as of the day of publication in the Official Journal of the European Union, *i.e.* 31 October 2003. The Member States were to comply with the requirements laid down in the Directive by 1 January 2004.

The ETD is in its entirety based on Article 113 of the TFEU:

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

The ETD was amended through Council Directive 2004/74/EC²⁴ and Council Directive 2004/75/EC²⁵, both adopted on 29 April 2004. Both Directives amend the ETD as regards the

¹⁷ Article 113 TFEU.

¹⁸ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, *OJ. L.* 283/51, 31 October 2003; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02003L0096-20040501 (Accessed: [12/01/2018]).

¹⁹ Proposal for a Council Directive restructuring the Community framework for the taxation of energy products, COM (97) 30, *OJ. C.* 139, 6 May 1997; eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.1997.139.01.0014.01.ENG&toc=OJ:C:1997:139:TOC (Accessed: [12/01/2018]).

²⁰ Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils, *OJ. L.* 316/12, 31 October 1992; eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31992L0081 (Accessed: [12/01/2018]).

²¹ Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils, *OJ. L.* 316/19, 31 October 1992; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0082 (Accessed: [12/01/2018]).

²² Article 30 ETD.

²³ Introductory clause 2 to the ETD.

²⁴ Council Directive 2004/74/EC of 29 April 2004 amending Directive 2003/96/EC as regards the possibility for certain Member States to apply, in respect of energy products and electricity, temporary exemptions or reductions in the levels of taxation, *OJ. L.* 157/87, 30 April 2004; eur-lex.europa.eu/eli/dir/2004/74/oi (Accessed: [12/01/2018]).

possibility for new EU Member States to apply temporary exemptions or reductions in the levels of taxation. Whereas the former Directive relates to the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, the latter Directive relates to Cyprus. The Treaty of Accession of Bulgaria and Romania to the EU also provided for arrangements and specific measures for these two new Member States regarding the implementation and application of the ETD. All temporary provisions have expired.

2.1.2 Policy background

The ETD can be considered to serve following objectives, in particular:

- Creating of a common energy market to ensure the proper functioning of the internal market²⁶;
- Protecting the environment and achieving international commitment in this regard²⁷;
- Budgetary considerations;
- Promoting the EU economy by maintaining / improving the competitiveness of EU companies²⁸; and
- Redirecting fiscal policy to combat unemployment.

Over the years, the relevance of the specific policy objectives may have changed (e.g. changing mobility, new technologies, increased importance of environmental policy ... result in different needs). Such change could only be adhered to through amending the current Directive.

Creation of a common energy market to ensure the proper functioning of the internal market

The 1997 ETD Proposal modernized the EU system for the taxation of mineral oils extending the scope to all energy products, with a view to improving the functioning of the internal market. In the explanatory memorandum to the 1997 ETD Proposal, the European Commission stated²⁹:

The present proposal fits into an overall political context. It does not introduce a new tax, but aims to establish a new Community framework for taxation of energy products which

²⁵ Council Directive 2004/75/EC of 29 April 2004 amending Directive 2003/96/EC as regards the possibility for Cyprus to apply, in respect of energy products and electricity, temporary exemptions or reductions in the levels of taxation, *OJ. L.* 195/31, 2 June 2004; [eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0075R\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0075R(01)) (Accessed: [12/01/2018]).

²⁶ Recitals 2, 3, 4, 8, 15, 24 and 26 ETD.

²⁷ Recitals 6, 11, 12, 28 and 19 ETD.

²⁸ Recitals 8, 15 and 23 ETD.

²⁹ Explanatory Memorandum to the Proposal for a Council Directive Restructuring the Community Framework for the Taxation of Energy Products, COM (97) 30 final, 12 March 1997; aei.pitt.edu/3522/1/3522.pdf (Accessed: [12/01/2018]).

makes it possible to restructure national tax systems and to better attain national objectives of employment, environment, transport, and energy policy, while respecting a key Community achievement: the Single Market.

The Member States agreed that the Single Market must be the common basis for all policies involving the taxation of energy products, and the Community system must be an efficient instrument at the service of the Member States. It was considered that the predecessors of the ETD – Council Directives 92/81/EEC and 92/82/EEC on the taxation of mineral oils – did not meet these objectives. Until the introduction of the ETD, the system of taxation of the Union only applied to mineral oils and related to excises. With other energy products than mineral oils and other taxes than excises remaining out of the scope of the system, the common basis derived from the Single Market was only partial.

- As the common basis was only partial, the internal market was affected by the proliferation of national taxes, differing widely in their application. This also undermined the liberalisation of the energy markets.
- Furthermore, the lack of harmonisation of national tax rates for the taxation of energy products lead to distortions due to excessive tax competition. Member States refrained from imposing taxation on other products than mineral oils, out of fear for the product not being taxed in a neighbouring country and consequently, potentially causing the relocation of consumption. This was deemed to be a cause of concern, because of its “*potential negative effects, particularly on tax revenues of Member States, on the efficient allocation of economic resources within the EU, and on competitiveness and employment*”³⁰.
- The lack of harmonization was considered to cause distortions on the market and affect the choices of consumers and firms. Recital 2 of the ETD concludes that “*the absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils may adversely affect the proper functioning of the internal market*”. Recital 4 of the ETD reads “*appreciable differences in the national levels of energy taxation applied by Member States could prove detrimental to the proper functioning of the internal market*”.

The ETD aimed to tackle these fragmentation issues. Furthermore, the EU Member States should ensure non-discrimination in taxation in order to prevent distortions in the internal market³¹. In this regard, there is a necessity of mutual information and coordination of Member States’ taxes to tackle discrimination between directly competing products facing different tax regimes.

The essential ETD purpose of establishing and ensuring the proper functioning of the internal market in the field of energy taxation, thereby avoiding distortion of competition, is

³⁰ Report on the Development of Tax Systems, COM (96) 546, 22 October 1996; [aei.pitt.edu/38300/1/COM_\(96\)_546_final.pdf](http://aei.pitt.edu/38300/1/COM_(96)_546_final.pdf) (Accessed: [12/01/2018]).

³¹ Articles 34 – 36 and 110 of the TFEU.

also found in the legal basis of the Directive, Article 113 TFEU (former Article 93 of the Treaty Establishing the European Community (**TEC**)):

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

Harmonising energy taxation through the ETD meant that energy tax competition between Member States was considered harmful and needed to be reduced. This ultimately aimed at strengthening the internal market by tackling the negative effects of the relocation of consumption.

Protection of the environment and achievement of international commitment in this regard

In the preamble of the ETD, it is recognised that, in accordance with Article 6 TEC, environmental protection requirements must be integrated into the definition and implementation of other Community policies, such as the energy taxation framework. Energy prices are seen as a key element of the Community environmental policy. The taxation of energy products and electricity was also deemed as one of the instruments available to achieve the Kyoto Protocol, the EU being a party to the UN Framework Convention on Climate Change.

By affecting the price of goods, taxation is considered an economic instrument which can be deployed to encourage a more balanced use of scarce natural resources and to internalise the external costs of their use³². Environmentally related taxes serve as an incentive for behavioural change and are consequently considered as an efficient economic instrument for environmental protection. Indeed, energy taxation is generally considered to be a part of *environmental taxes*, which can be considered as taxes whose tax base is a (proxy of a) physical unit of something that has a proven, specific negative impact on the environment³³. The majority of revenue from environmental taxes stems from energy taxation. The structure of environmental taxation has changed considerably since 2004, with energy taxes accounting for approximately 77% of environmental tax revenues in the EU-28 in 2015³⁴.

³² Report on the Development of Tax Systems, COM (96) 546, 22 October 1996; [aei.pitt.edu/38300/1/COM_\(96\)_546_final.pdf](http://aei.pitt.edu/38300/1/COM_(96)_546_final.pdf) (Accessed: [12/01/2018]).

³³ Regulation (EU) No 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts, OJ. L. 192, 22 July 2017; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011R0691-20140616> (Accessed: [12/01/2018]).

³⁴ Major differences exist between the EU Member States, however. http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2016/econ_analysis_report_2016.pdf; http://ec.europa.eu/eurostat/statistics-explained/index.php/Environmental_tax_statistics#Environmental_taxes_in_the_EU (Accessed: [12/01/2018]).

By reducing tax competition through the harmonization of energy taxation in the Union, the race to the bottom – or at least, Member States refraining from introducing new taxation or increasing existing tax burdens out of fear for relocation of consumption – concerning energy taxation was halted. Member States regained tax sovereignty, allowing them to exercise their freedom to manoeuvre their national policies in the field of environmental policy. Furthermore, with the introduction of the ETD, the Member States retained sovereignty to apply a CO₂ tax (even though some legal limitations under the ETD apply), as expressed by a number of Member States at the moment of introduction of the Directive.

The Member States aimed to integrate environmental policy into the ETD, next to a number of other policy objectives. To this end, the environment was considered, e.g. in the reductions / exemptions or in the achievement of environmental policy objectives by the EU Member States. At the same time, other policy objectives (such as ensuring competitiveness among energy products / within the EU economy) might interfere with the aims related to environmental policy.

E.g. recital 14 of the ETD reads: "The minimum levels of taxation should reflect the competitive position of the different energy products and electricity. It would be advisable in this connection to base the calculation of these minimum levels as far as possible on the energy content of the products. However, this method should not be applied to motor fuels."

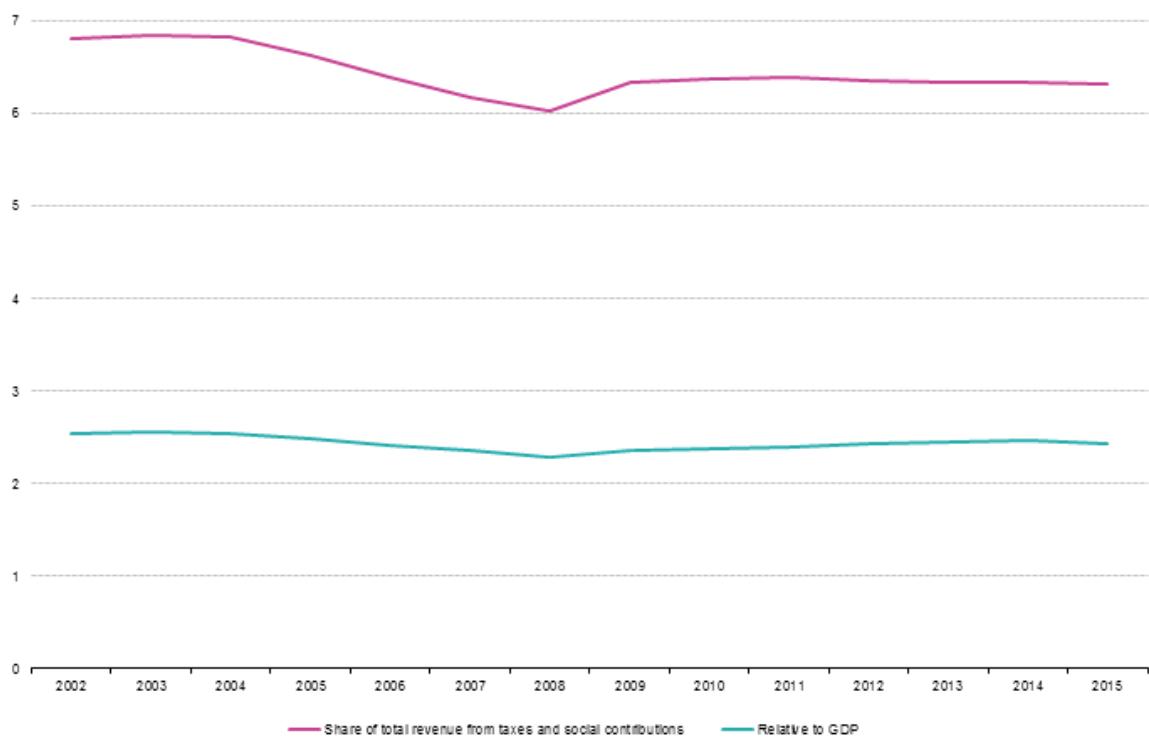
Environmental policy considerations were taken into account when introducing the ETD. However, these policy goals are limited, and set off against other policy considerations regarding e.g. competitiveness.

Budgetary considerations

Next to the other aims, also budgetary considerations are an important aspect of the ETD, affecting a considerable amount of the Member States' tax revenue. Energy taxes make up around 17% of the implicit tax rate on consumption, mostly composed of excise duties on mineral oils³⁵. Considering the total government revenue from environmental taxes in the EU-28 in 2015 amounted to almost 360 billion euros, of which 77% is represented by energy taxation, the budgetary impact of these taxes cannot be underestimated.

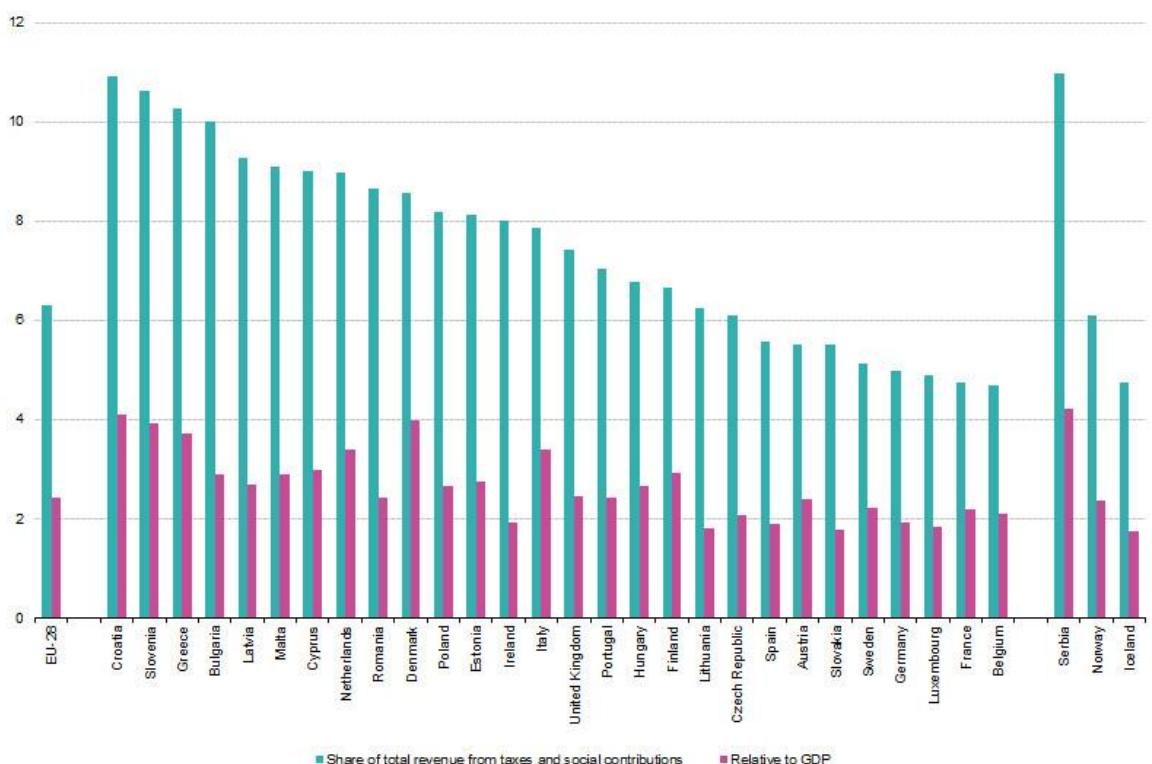
³⁵http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2016/econ_analysis_report_2016.pdf (Accessed: [12/01/2018]).

Figure 1 - Total environmental tax revenue EU-28 (2002 - 2015)



Source : Eurostat, Environmental tax statistics

Figure 2 - Total environmental tax revenue EU-28 (2015)



Source: Eurostat, Environmental tax statistics

Promotion of the EU economy by maintaining / improving the competitiveness of EU companies

The harmonization of energy taxation in the Union aimed for the introduction of a more level playing field in the European Union as regards competition. Firms operating in the internal market were confronted with disparities between Member States in the tax treatment of energy products, potentially influencing their competitiveness.

In order not to affect the competitiveness of Union businesses vis-à-vis third countries, the ETD provides for measures to reduce the tax burden on energy-intensive firms. In this regard, improving energy efficiency was also considered to enhance the competitiveness of Union businesses in the long term. Benefits from reductions of taxation on labour were also considered to contribute to the competitiveness.

The ETD aimed at reducing existing disparities in energy taxation in the European Union by establishing a level playing field in the internal market. This should contribute to the competitiveness of companies operating in the internal market.

Redirection of fiscal policy to combat unemployment

Next to providing the Member States with a coherent framework encouraging them to adopt appropriate measures, the European Commission aimed with the 1997 ETD Proposal to orient in a pro-employment manner those policy choices which lied within the Community's competence³⁶. The Proposal was to be seen in the context of the political process initiated by the European Commission's *Confidence Pact for Employment*, refocusing fiscal policy towards combating unemployment, whilst respecting internal market principles.

By reducing statutory charges on labour at the same time as introducing the new common system of taxing energy products, the ETD also encouraged the Member States to respect the objective of fiscal neutrality. Hence, the ETD was a policy tool in view of reversing the trend towards imposing the burden of taxation on employment, as it would allow Member States to find suitable and sufficient budgetary compensation to offset revenue losses subsequent to a reduction of the tax burden on employment³⁷. The Directive was considered an opportunity for the Member States to restructure taxation in a direction that is more favourable to labour, turning the long term trends in taxation, which are unfavourable to labour.

By reducing tax competition, the ETD harmonization allowed the Member States to introduce a shift in taxation from labour to energy.

³⁶ Explanatory Memorandum to the Proposal for a Council Directive Restructuring The Community Framework for the Taxation of Energy Products, COM (97) 30 final, 12 March 1997; aei.pitt.edu/3522/1/3522.pdf (Accessed: [12/01/2018]).

³⁷ Report on the Development of Tax Systems, COM (96) 546, 22 October 1996; [aei.pitt.edu/38300/1/COM_\(96\)_546_final.pdf](http://aei.pitt.edu/38300/1/COM_(96)_546_final.pdf) (Accessed: [12/01/2018]).

2.1.3 Proposal for a reform

The European Commission presented a proposal to modernise the ETD in 2011³⁸. The ETD was considered not to be consistent with the policy framework of demanding, legally binding climate and energy targets in the EU and was deemed to contain several shortcomings from the perspective of the functioning of the internal market³⁹.

In particular, the proposal aimed to tackle the following problems:

i. on the minimum levels of taxation

As most of the minimum rates of the ETD are based on the volume of energy products consumed and do not reflect the energy content or the CO₂ emissions of the energy products, energy is inefficiently used and the internal market is distorted. Taxation in accordance with the ETD would incentivise energy use contradictory to the EU energy and climate goals. The current minimum rates would also discriminate against renewables which are taxed at the rate of the corresponding conventional fuel, even if the energy content of the latter is higher.

ii. lack of coordination with the EU Emission Trading system Directive⁴⁰

Both the EU Emission Trading system (ETS) and a CO₂ tax levied by the Member States on the basis of the ETD aim for the cost-efficient reductions in greenhouse gases for a specific set of activities. The scope of both instruments is different however, leaving some operators consuming energy covered by both instruments, while others are left outside the scope of both regulatory frameworks. Again, this leads to efficiency losses and distortions in the internal market.

iii. special treatment of certain energy consumers

The ETD contains two provisions allowing for special treatment of certain energy consumers, in particular Article 9(2) ETD – allowing Belgium, Luxembourg and Denmark to apply levels of taxation for heating gas oil below the minimum level of taxation – and Article 15(3) ETD – allowing Member States to apply a level of

³⁸ Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 0169 final; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0169> (Accessed: [12/01/2018]).

³⁹ Commission Staff Working Paper, *Impact Assessment – Accompanying document to the Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity*, COM(2011) 169; http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/sec_2011_409_impact_assessment_part1_en.pdf; http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/sec_2011_409_impact_assessment_part2_en.pdf (Accessed: [12/01/2018]).

⁴⁰ Directive 2003/87/EC of the European Parliament and 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, OJ. L. 275/32, 25 October 2003; eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0087 (Accessed: [12/01/2018]).

taxation down to zero to energy products and electricity used for agricultural, horticultural or piscicultural works and in forestry.

The 2011 revision was proposed along the following objectives:

- i. *ensure consistent treatment of energy sources in the ETD and therefore create a real level playing field between different energy consumers*

The EU would set a minimum rate for taxation based on energy and CO₂ content, with an equal taxation for competing products. Actual tax rates would be the same for competing products.

- ii. *provide an adapted taxation framework for renewable energies*

Taxation of motor fuels, heating fuels and electricity would be based on the energy content of the product and the CO₂ emissions. This would result in an increase of taxation of more polluting products and the promotion of cleaner energy. Due to the current taxation based on volume, ethanol is effectively the most heavily taxed energy product whereas coal is currently the least taxed energy source.

- iii. *provide a framework for the use of CO₂ taxation in areas where the EU ETS Directive does not apply and avoid overlaps between both instruments leading to losses in cost-efficiency*

Businesses covered by the ETS system would not be covered by taxation through the ETD. This way, all competing businesses would be covered either by the ETS or the ETD, without risking double taxation.

The 2011 proposed revision of the ETD did not muster unanimous support of the EU Member States and was withdrawn by the European Commission in 2015, following the unsuccessful negotiations in the Council; however the European Parliament and the Economic and Social Committee issued a positive opinion.

2.2 Structure of the Directive

The ETD Directive is structured as follows:

- **Article 1** requires the Member States to impose taxation on energy products and electricity in accordance with the Directive.
- **Article 2** lays down what is understood as ‘energy products’ and ‘electricity’.
- **Article 3** establishes the link with Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC. Directive 2008/118/EC establishes common arrangements for products subject to excise duty – among which energy products and electricity covered by the ETD – in order to guarantee their free circulation and therefore the proper functioning of the internal market of the EU.

- **Articles 4 to 13** relate to the duties and charges imposed by the Member States.
- **Articles 14 to 19** relate to exemptions and reduced rates.
- **Article 20** lays down which energy products are covered by the control and movement provisions of Directive 2008/118/EC, with **Article 21** providing for further rules on the chargeable events referred to in Directive 2008/118/EC. For e.g. natural gas and electricity, particular rules on the chargeable event are laid down in the latter provision.
- **Article 22** determines that when taxation rates are changed, stocks of energy products already released for consumption may be subject to an increase in / reduction of tax. **Article 23** allows for Member States to refund amounts of taxation already paid on contaminated or accidentally mixed energy products, sent back to a tax warehouse for recycling. In accordance with **Article 24**, energy products released for consumption in a Member State and captured in standard tanks of commercial motor vehicles, will not be subject to taxation in any other EU Member State.
- **Articles 25 and 26** relate to the obligations of Member States to inform the European Commission on the measures taken for the implementation of the Directive. **Article 27** determines that the European Commission shall be assisted by the Commission on Excise Duties. The ETD entered into force and was implemented in accordance with **Articles 28 to 31**.

3 Approach and methodology

This section details the approach and methodology adopted for this study.

3.1 Overall approach: the Analytical Framework

The approach adopted for this Study is based on the six general research questions provided in the Terms of Reference and the detailed research questions pertaining to a number of Articles of the ETD to be examined.

The Analytical Framework presented in Annex A links the analysis of the implementation of the relevant Articles of the ETD with the research questions. This approach enabled the formulation of recommendations or options for improvement consistent with the problems identified. Furthermore, the Analytical Framework provides the methodological basis for the development of the data collection tools (i.e., questionnaires, interview guidelines and desk research) used during the Study.

The Analytical Framework links the general with the detailed research questions in an overall comprehensive and consistent framework, which also includes:

- A number of judgement criteria that allows us to elaborate the answers;
- For each criterion, a number of (qualitative and if available quantitative) indicators that give us tangible elements to build our judgement, and for each set of indicators;
- For each criterion, the possible source of information that could be used (i.e., strategic interviews (with Commission's DGs and other EU stakeholders), Deloitte network consultation, general survey to the Member States, general survey to the economic operators, specific interviews with the Member States, and economic operators during fieldwork, and desk research).

The table below provides an overview of the Analytical Framework.

Table 1 - Overview of the Analytical Framework

General research questions	Categories	Detailed research questions (Article of ETD)
1. Are the provisions of Directive 2003/96/EC clear enough to achieve the objectives of the Directive?	1 <i>Clarity/Wording/Content</i>	= 1, 2(1), 2(3), 2(4)(b), 2(5), 2(6), 3, 4(2), 5, 6, 7(2), 7(3), 7(4), 8, 9(2), 10(2), 11(1-2), 11(3), 11(4), 12(1), 12(2), 13, 14(1)(a), 14(1)(b), 14(1)(c), 15(1), 15(1)(a), 15(1)(b), 15(1)(c), 15(1)(d), 15(1)(e),
Can inconsistencies of references and definitions and overlaps of provisions be identified?		

General research questions	Categories	Detailed research questions (Article of ETD)
Should the existing provisions of the ETD be streamlined or clarified and if so, in which way?		15(1)(f), 15(1)(h), 15(1)(i), 15(1)(j), 15(1)(k), 15(2), 15(3), 16, 16(1), 16(3), 16(5), 16(6), 17(1)(a), 17(1)(b), 17(2-3-4), 20(1), 20(2), 20(3), 21(3), 21(5), 21(6), 23, 24, 25(1), 25(2)
2. To what extent the measures ensure that the single market operates smoothly and avoids double taxation or any distortion of trade and competition between energy sources and energy consumers and suppliers?	2 = Single Market (effectiveness)	2(3), 2(4), 8, 10(2), 11(1-2), 12(1), 15(1)(d), 14(1)(a), 14(1)(b), 14(1)(c), 15(1)(e), 15(1)(h), 15(1)(i), 21(5)
To what extent do the different national interpretations of these provisions undermine harmonisation and distort competition in the single market?		
3. To what extent does the scope of the ETD still match the current needs of Member States and economic operators?	3 = Matching current needs/technological developments (relevance)	8, 5 (third indent), 14(1)(a), 15(1)(b), 16(3), 21(3)
To what extent are the provisions of the ETD in line with the technological developments?		
If weaknesses are identified, how could they be addressed in the most effective way?		
4. Did the provisions of the ETD lead to any considerable administrative burden for the Member States and/or the economic operators?	4 = Administrative burden – Quantitative analysis (efficiency)	2(3), 14(1)(a), (c), 17, 15(1)(a), (c), (k), 21(5)
If yes, what and how big are the burdens and what could be done to reduce them?		
5. Are there provisions contradicting other policy instruments and in particular State aid rules?	5 = (non) Matching other policy instruments + State aid rules (coherence)	17 (consistency with State aid rules), 15(1)a, 15(1)f, 15(3), 16(1), 21(3)
Are any obstacles arising from the outdated provisions of the ETD in other policy areas and if so, in which policy areas and what are those obstacles?		

General research questions	Categories	Detailed research questions (Article of ETD)
How could the contradictions and obstacles be remedied?		
6. In case of proposed solutions/options, what would be their impact on revenues from energy taxes?	<i>6 = Impact on revenue of taxes</i>	1, 2(1), 2(3), 2(4)(b), 3, 7(2), 10(2), 11(1-2), 15(1)(b), 15(1)(d), 15(1)(e), 15(1)(h), 15(1)(l), 16(3), 21(5)

Besides the article-by-article analysis, a more general, comprehensive analysis was performed in order to assess the overall functioning of the ETD.

The research questions drove the data collection process, allowing us to produce evidence-based conclusions and recommendations.

Based on the combination of different data sources and types of analysis, the Study outlines an implementation overview covering the level, extent and way of implementation of various aspects the ETD across Member States.

In the following sub-sections, we provide further details on the approach to the general and detailed research questions.

3.1.1 General research questions

Answers to the research questions reflect the views and positions of both Member States' authorities and economic operators active in diverse sectors concerned by the Directive. At the same time, on a high-level basis, the Study assesses the possible impact the current Directive, and in particular its national implementations and interpretations, can have on aforementioned stakeholders.

The Study primarily focuses on the first general research question, addressing identification of national implementations and the existence of discrepancies in that respect. Most detailed questions relate to the need for more clarity in wording and content. An assessment of the extent to which the objectives of the ETD have been met was also performed under this question. A combination of desk research, questionnaires and interviews was used to answer this research question.

The second general research question aims at assessing the effect of the ETD on the functioning of the Single Market. Fieldwork and questionnaires were used to identify whether distortions remain at national level and to come up with concrete examples and quantifiable data (both from primary and secondary sources), where available, to strengthen the analysis.

The research questions under point three was answered through consultation of Member States' authorities and economic operators. A mapping of the current energy landscape, identifying the current needs of stakeholders, technological developments and their relationship to the Energy Taxation Directive was carried out. Where possible, suggestions for addressing potential issues spotted were made.

In order to answer the research questions under point four, the Study team conducted a high-level analysis of administrative burden deriving from certain aspects of the Directive identified as potentially burdensome and other aspects highlighted in open questions.

It was our understanding that the largest share of the administrative burden for economic operators would be generated by national implementation requirements (including Article 2(3), 2(4), 17, 5, 14(1) 15(1)(a), 21(5)) rather than by reporting obligations derived directly from the ETD⁴¹. Our analysis therefore focused on the understanding of the obligations for economic operators deriving from the national implementation of the ETD in the eight Member States selected for fieldwork.

Our initial intention was to quantify the administrative burden using a Standard Cost Model (SCM)-based approach. For this purpose, we conducted interviews with economic operators, tax advisors (i.e. the Deloitte network) and tax administrations in the eight Member States, to collect data about the full-time equivalent (FTE) necessary to comply and the additional one-off and recurring costs (e.g. external fees, IT systems, licences, certifications, etc.). The figures obtained had to be subject to expert assessment and validation and were compared to estimates available in literature (to the extent they are applicable) to obtain more reliable results. Considering the large differences in national implementations of the ETD and the limited number of interviews that it was possible to carry out in the timeframe of the study⁴², it was intended to present the results of this analysis per Member State rather than per sector or at EU level, as extrapolations at EU level of national results would not have led to sound results.

However, extensive interviews with both Member States and economic operators did not provide the level of detailed information needed to carry out this type of analysis. The anecdotal evidence collected has been reported.

To tackle the issues relating to question number five, the Study made an assessment of specific articles of the ETD against specific EU legislation referred to and provided by the Commission, and against the ECJ case law addressing the ETD. In addition, evidence of contradicting provisions was identified in the selected Member States. Where relevant, the Study indicates which provisions of the Directive should be revised in order to be aligned with legislation in other policy areas.

⁴¹ These reporting obligations (derived from Articles 20(3), 26 and 28) were likely to be relatively small. They led essentially to national requirements for registration of economic operators with the excise administration.

⁴² Indeed, the timeframe only allowed to interview one or two businesses in each of the eight Member States selected for the fieldwork.

As the Study may contribute to the reflection on the possible adoption of legislative or other measures for better achievement of the aims of the ETD, where relevant, it formulates options and recommendations for future policy. In order to answer the general research question six, the Study briefly elaborates in a qualitative way on the potential impact each of the proposed options could have on Member State revenues from energy taxes. It relies to the extent possible on quantitative indicators such as quantifications of magnitude. The data relied upon for the quantitative assessment was provided by the European Commission and the individual EU Member States.

3.1.2 Detailed research questions

As mentioned above, the assessment also revolves around a more detailed research questions directly linked to ETD provisions (as detailed in Terms of Reference and further clarified with the Commission during the kick-off meeting and subsequent meetings).

We have identified the detailed questions (per article) which build and feed into each general research question, as illustrated in the table below. For the sake of concision, the table does not include the complete detailed questions but indicates the article to which they refer to (as per the Terms of Reference).

Table 2 - Overview of detailed research questions with link to general research questions

Article	General research question						Article	General research question					
	1	2	3	4	5	6		1	2	3	4	5	6
Art. 1	✓					✓	Art. 15(1)(d)	✓	✓				✓
Art. 2(1)	✓					✓	Art. 15(1)(e)	✓	✓				✓
Art. 2(3)	✓	✓		✓		✓	Art. 15(1)(f)	✓			✓		
Art. 2(4)(b)	✓	✓				✓	Art. 15(1)(h)	✓	✓				✓
Art. 2(5)	✓						Art. 15(1)(i)	✓					
Art. 2(6)	✓						Art. 15(1)(j)	✓					
Art. 3	✓					✓	Art. 15(1)(k)	✓					
Art. 4(2)	✓						Art. 15(1)(l)		✓				✓
Art. 5	✓		✓	✓			Art. 15(2)	✓					
Art. 6	✓						Art. 15(3)	✓				✓	

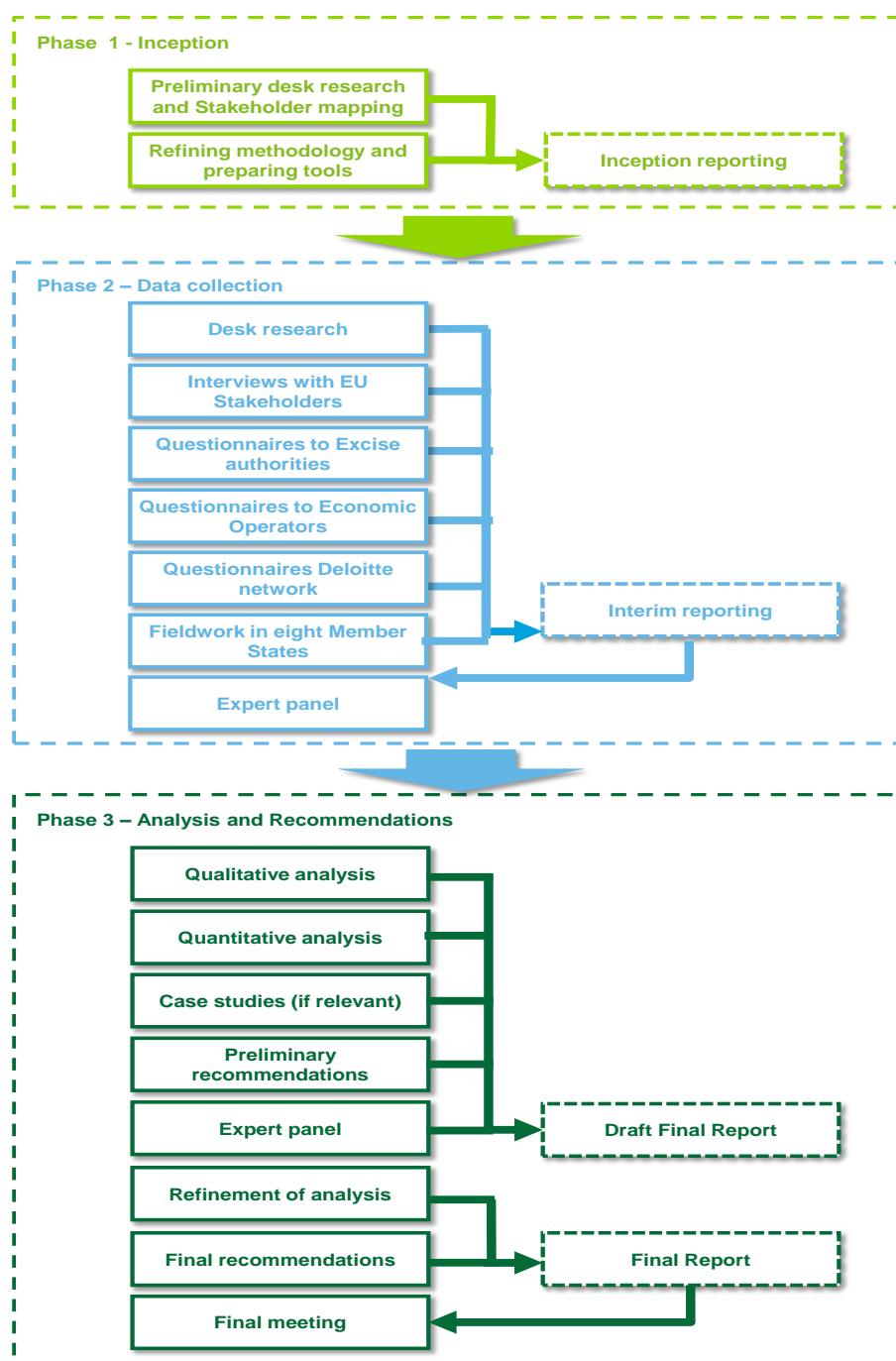
Article	General research question					
	1	2	3	4	5	6
Art. 7(2)	✓					✓
Art. 7(3)	✓					
Art. 7(4)	✓					
Art. 8	✓		✓			
Art. 9(2)	✓					
Art. 10(2)	✓	✓				✓
Art. 11(1-2)	✓	✓				✓
Art. 11(3)	✓					
Art. 11(4)	✓					
Art. 12(1)	✓	✓				
Art. 12(2)	✓					
Art. 13	✓					
Art. 14(1)(a)	✓	✓	✓			
Art. 14(1)(b)	✓	✓				
Art. 14(1)(c)	✓	✓				
Art. 15(1)	✓					
Art. 15(1)(a)	✓				✓	
Art. 15(1)(b)	✓		✓			✓
Art. 15(1)(c)	✓					

Article	General research question					
	1	2	3	4	5	6
Art. 16	✓					
Art. 16(1)	✓				✓	
Art. 16(3)	✓		✓			✓
Art. 16(4)						
Art. 16(5)	✓					
Art. 16(6)	✓				✓	
Art. 17(1)(a)	✓			✓	✓	
Art. 17(1)(b)	✓			✓	✓	
Art. 17(2-3-4)	✓			✓	✓	
Art. 20(1)	✓				✓	
Art. 20(2)	✓					
Art. 20(3)	✓					
Art. 21(3)	✓					
Art. 21(5)	✓	✓	✓	✓	✓	✓
Art. 21(6)	✓					
Art. 23	✓					
Art. 24	✓					
Art. 25(1)	✓					
Art. 25(2)	✓					

3.2 Our methodological approach

This section presents the methodological approach used to carry out the inception, data collection and analysis and recommendations phases of this Study. The figure below provides an overview of the approach adopted to carry out this assignment.

Figure 3 - Approach to the study



Source: Deloitte elaboration

Particular attention was given to six relevant economic sectors identified with the Commission:

- Chemical industry;
- Combined heat and power generation;
- Refineries and biofuels;
- Maritime transport;
- Aviation transport;
- Agriculture (incl. forestry and marine aquaculture).

The study analyses the background, impact of the ETD and implications of relevant EU case law issued by the European Court of Justice since the implementation of the Directive in 2004, on the selected sectors. It also assessed the extent to which the Directive requires clarification and/or modification to be aligned with this case law. An overview of the relevant ECJ case law is provided in Annex C.

The study includes a mapping of specific ETD articles and relevant Court judgments in terms of their implementation in the 28 EU Member States. The analysis focuses, *inter alia*, on the interpretation of the ETD key provisions (in national legislation and guidelines) and the local implementation of discretionary exemptions and rate reductions foreseen in the Directive. This analysis identifies the differences in the transposition, interpretation and practical application of the ETD provisions in all Member States, based on information collected via general surveys to excise administration in 28 Member States, a general questionnaire for economic operators, and more in-depth information collected in the eight Member States selected for fieldwork via interviews with Member States' tax administrations and economic operators supported by our local network, and via a questionnaire to the Deloitte network. Information collected via these primary sources was confronted and triangulated with data available from desk research.

The analysis of secondary sources included earlier studies and reports on the ETD application and related topics, policy papers (from policy makers, international organisations and sectoral organisations) and available statistics and datasets in order to gain a better understanding of the topic from existing information for further analysis.

Situations for which it is not clear whether the ETD currently applies or should apply were also taken into account in the analysis where relevant, and especially in relation to the research questions on the matching of the ETD with current needs and technological developments and on the level of taxation and State aid rules⁴³.

We performed research on the position of economic operators vis-à-vis the ETD through a questionnaire, with specific questions for the sectors selected. As the Directive has a direct impact on a variety of industrial and other sectors, a targeted approach was applied. A

⁴³ Such questions are addressed by the general research question category 5, i.e. (non-)matching other policy instruments and State aid rules as presented in Table 1.

number of relevant sectors were identified in collaboration with the Commission and approached on the subjects of relevance to them, ensuring that all ETD provisions were covered. We gathered information on all industrial sectors but focused on the six industry sectors identified with the Commission.

A more detailed analysis followed, whereby a deeper analysis of the identified differences in the implementation of the ETD was performed for a sample of eight Member States (i.e., Belgium, Denmark, France, Germany, Italy, Poland, Sweden and Portugal).

The Deloitte expert network in the EU Member States was involved in the Study to verify and add to the information received from the surveys and gathered through desk research as well as support the core team in performing the fieldwork.

The study was conducted in such a way that the research questions mentioned in section 3 “Task and Methodology” of the Terms of Reference were assessed based on the following dual approach during phase 3, i.e., **analysis and recommendations**.

It consisted of both a general EU-wide analysis of the implementation of the ETD for all Member States and an in-depth, Member State specific analysis conducted for a selection of Member States in order to obtain more precise quantitative and qualitative elements via case studies.

The data and information collected via desk research, questionnaires for Member States tax authorities and economic operators (presented in Annex D), and interviews (with EU stakeholders and during fieldwork in Member States) is both quantitative and qualitative.

Below we provide a description of the tools used for collecting data and information relevant to the research questions and to elaborate the answers and recommendations/options to improve the functioning of the ETD.

3.2.1 Data collection tools

Hereunder we present the various tools that we used to conduct this assessment. These tools serve two purposes: on the one hand to ensure a large quantitative response and on the other hand to receive more in depth input from subject-matter expert.

Table 3 - Data collection tools

Research questions categories	Data collection tool			
	Desk Research	Interviews at EU level	Questionnaires to MSs/EOs	Fieldwork (interviews at national level)
1. Clarity/ Wording/ Content	✓	✓	✓	✓
2. Single Market	✓	✓		
3. Matching current needs/technological developments	✓	✓		✓
4. Administrative burden		✓	✓	✓
5. Matching with other policy instruments + State aid rules	✓	✓		
6. Impact on revenue from taxes1. Clarity/ Wording/ Content	✓		✓	✓

Desk research

The desk research focused on available literature and served the purpose of identifying relevant legislation, contextual elements, issues and existing studies as well as relevant and available high-level qualitative assessments and/or opinions on the taxation of energy. The list of references consulted for this Study are presented in Annex C.

Web-based surveys

Deloitte created two different web-based surveys, one for EU Member States and one for economic operators in the EU. The questions are provided in Annex D of this Report. The surveys were published on the Deloitte and European Commission websites and were promoted on LinkedIn and Twitter by both parties.

Deloitte disseminated the web-based survey for the economic operators in the following ways:

- Client mail distribution;
- Customs flash to client network;
- Distribution through other Member firms in eight selected Member States.

The web-based survey for the Member States was sent to the relevant contact persons of all EU Member State authorities.

The surveys consisted of mostly closed questions with some options to elaborate or clarify answers. With the use of these surveys Deloitte intended to include a maximum amount of empirical data from the Member States, relevant sectors and stakeholders to the study. By the time of the cut-off date (19 June), **24 out of 28 Member States** had filled out the survey.

Over 200 companies responded to the economic operator web-based survey. The respondents came from about 18 Members States with the biggest representation in Italy (around 45), Germany (around 40), Spain (around 25), France (around 20) and Belgium (around 15).

The sectors that are best represented in the survey are the **energy and resources sector and the manufacturing sector**, both with about 80 respondents. The remaining respondents mostly fall under the transport sector, agricultural sector or retail/wholesale.

Besides these quantitative data gathering tools, Deloitte also employed a number of methods in order to gain qualitative insights into the implementation and application of the ETD and potential complementary issues.

In-depth interviews

In each of the eight Member States selected for the fieldwork in accordance with the Commission, Deloitte Belgium connected with the local Deloitte network to conduct a series of in-depth interviews. The customs and excise authorities of all the eight Member States were interviewed about the implementation of the ETD in their Member State.

In each of the eight Member States, a number of in-depth interviews were conducted as well with economic operators which are constantly affected by the ETD. The goal was to have interviews with five economic operators in each selected Member States and active in one of the sectors mentioned above.

The sectors were also determined in mutual agreement between Deloitte and the Commission. The current result of our interview round can be found in the table below.

Table 4 - Coverage of sectors per fieldwork in Member States

Member State	Sector
Belgium	Refineries
	Refineries
	Chemical
	Cogeneration and biofuels
	Aviation
Denmark	Agriculture
	Maritime
France	/

Member State	Sector
Germany	Refineries
	Chemical
	Energy supply
	Electricity
	Refineries & maritime transport
Italy	Chemical
	Manufacturing
	Refineries
Poland	Cogeneration
	Electricity and gas
Portugal	Refineries and biofuels
	Chemical
	Agriculture
	Electricity and gas
	Refineries
Spain	Refineries
Sweden	Cogeneration
	Refineries
	Refineries and biofuels

A total of 29 interviews have been conducted with economic operators.

Interviews at EU level

Strategic interviews with the European Commission

Strategic interviews with the Commission were carried out in the inception phase allowed the study team to gain a more in-depth understanding of the current state of play of the implementation of the ETD provisions and of issues Member States and economic operators are facing. This input guided our work and allowed us to adapt our methodology in accordance. We also used these interviews to identify additional data sources.

Interviews with selected EU stakeholders

We also conducted six interviews by the time of the submission of this Report with business organisations active at EU level, both at general level and in the relevant economic sectors of economic activities.

These interviews allowed us to collect primary data on the status of the implementation and interpretation of the ETD in Member States and possible issues, as well as additional references. Furthermore, these interviews were used to gather contacts of national stakeholders in preparation of the fieldwork.

Expert panel

A workshop with a panel of 10 experts from the Commission and relevant organisations was organised on 12 June to present and discuss the initial assessment of the current implementation of the ETD Directive, and to identify additional sources and stakeholders for data collection.

A second workshop to discuss and validate the findings, preliminary conclusions and recommendations from the study has been organised on 12 September.

3.2.2 Analysis and recommendations

Combination of qualitative and quantitative analysis

The provision of a comprehensive analysis of the current situation of the implementation of the ETD Directive in Member States and the identification of viable solutions to seek improvements, require the combination of a set of different sources, stakeholders and research methods (both primary and secondary sources from all relevant stakeholders, qualitative and quantitative information).

The Analytical Framework highlights that most questions relate to qualitative data gathering and analysis as they aim to clarify or amend the wording of the said provisions. This holds in particular for the research questions addressing:

- Clarity/Wording/Content: i.e. Articles 1, 2(1), 2(3), 2(4)(b), 2(5), 2(6), 3, 4(2), 5, 6, 7(2), 7(3), 7(4), 8, 9(2), 10(2), 11(1-2), 11(3), 11(4), 12(1), 12(2), 13, 14(1)(a), 14(1)(b), 14(1)(c), 15(1), 15(1)(a), 15(1)(b), 15(1)(c), 15(1)(d), 15(1)(e), 15(1)(f), 15(1)(h), 15(1)(i), 15(1)(j), 15(1)(k), 15(2), 15(3), 16, 16(1), 16(3), 16(5), 16(6), 17(1)(a), 17(1)(b), 17(2-3-4), 20(1), 20(2), 20(3), 21(3), 21(5), 21(6), 23, 24, 25(1), 25(2);
- Matching current needs/technological developments: i.e. Articles 8, 5 (third indent), 14(1)(a), 15(1)(b), 16(3), 21(3);
- (non) Matching other policy instruments + State aid rules; Articles 17 (consistency with other EU policies and State aid rules), 15(1)(a), 15(1)(f), 15(3), 16(1), 21(3).

Therefore, the first focus of this Study was on qualitative analysis. The judgement criteria defined in the Analytical Framework provided the structure for this assessment.

However, some research questions ask for quantitative data and information to complement the qualitative assessment. This is the case in particular for those questions addressing:

- Single Market (distortion), i.e. Articles 2(3), 2(4), 8, 10(2), 11(1-2), 12(1), 15(1)(d), 14(1)(a), 14(1)(b), 14(1)(c), 15(1)(e), 15(1)h, 15(1)l, 21(5);
- Administrative burden, i.e. Articles 2(3), 14(1)(a), 14(1)(b), 14(1)(c), 15(1)(a), 15(1)(c), 15(1)(k), 15(3), 17, 15(1)a, 21(5); and
- Impact on revenue from taxes, i.e. Articles 1, 2(1), 2(3), 2(4)(b), 3, 7(2), 10(2), 11(1-2), 15(1)(b), 15(1)(d), 15(1)(e), 15(1)(h), 15(1)(l), 16(3), 21(5).

Therefore, we included questions for that purpose in the questionnaires and interview guides.

The assessment of possible distortions between economic operators as an effect of differences in the implementation of the ETD (impacts on the Single Market) was based on data and information collected via the questionnaires to economic operators (and their organisations at EU and/or sectoral level), available literature and studies and interviews with relevant stakeholders conducted during the fieldwork.

In order to estimate the administrative costs and burdens entailed by activities deriving from certain provisions of the ETD, we started from the ETD-related burdens imposed on economic operators, while focusing the analysis on the burdens imposed by the national implementation of the ETD (in addition to the pure ETD-related information obligations) in the eight Member States. The distinction between the information obligations deriving directly from the ETD and those stemming from the national implementation rules is crucial to fully assess the efficiency of the ETD and, if relevant, propose recommendations. We based our approach on the Standard Cost Model (SCM) methodology, and included requests for data on capital (e.g. IT systems, licences, etc.) and operational (e.g. advisory fees, IT system maintenance, storage space for documentation, etc.) expenditure related to such obligations, when applicable. Face-to-face interviews with economic operators and tax administrations in eight Member States were used to define and validate the list of information obligations derived from the implementation of the ETD, the frequency of such obligations, information on the personnel costs (i.e. FTE and hierarchical level of employees carrying out the different tasks) and on capital and operational expenditures related to such obligations, and to collect information on fiscal controls and audits⁴⁴. Considering the heterogeneity of the data (depending on e.g. sectors, size of the economic operators, etc.), we considered necessary to formulate a set of assumptions to finalise the analysis (e.g. frequency of certain obligations, share of IT costs attributable to the implementation of ETD, etc.). We aimed to validate these assumptions with the Commission and experts and available literature before proceeding with the analysis.

However, given the large differences of national frameworks and of administrative obligations for economic operators even within the same Member State (e.g. depending on

⁴⁴ In order to monetise data on FTE, we planned to use the available hourly earnings elaborated by Eurostat. See: http://ec.europa.eu/eurostat/web/products-datasets/-/earn_ses_hourly (Accessed: [12/01/2018]). The most recent figures date back to 2010, but given the economic crisis, figures are considered still quite accurate by the Commission's services consulted on the topic.

the size of the business), the collection of evidence was scattered. Interviewees were not able to provide information with the necessary level of detail to apply a SCM-like approach, even using assumptions. The anecdotal evidence collected is presented in the report.

The analysis of the impacts of the ETD implementation on Member States' tax revenues is based on a mix of desk research and direct sources (i.e. the questionnaires to Member States and interviews with relevant national authorities in the Member States selected for the fieldwork).

Secondary sources identified using desk research (i.e. previous studies and reports on the implementation of the ETD and related topics, policy papers, statistics and datasets) were crucial to understand the relevance of current taxation of energy products and electricity based on the ETD Directive on tax revenues in Member States, and to assess the impact of any future improvement suggested.

The Excise Duty Tables on energy products and electricity compiled by DG TAXUD provided an important starting point for the assessment of the current ETD implementation and of possible options for improvement.

4 Key findings

This section presents the key findings for each of the six general research questions.

4.1 Outline

This chapter presents the findings drawn from our data collection efforts. They are reported based on the six main research questions defined in the Terms of Reference for this study and are illustrated by relevant examples from specific Member States and economic sectors. The full details of the article by article analysis can be found in Annex B.

For each of the research question the following structure is applied:

- Presentation of the main research question;
- Short recap of the articles/sectors pertinent to the question;
- Indication of overall trends (with some examples, not necessarily in the textbox);
- Identification of notable exceptions/issues (with some examples, not necessarily in the textbox).

4.2 Research question 1

The study primarily focussed on Research question number 1, addressing identification of national implementations of the ETD, and the existence of discrepancies in that respect. Considering the detailed questions per article in the Terms of Reference, we noticed that most of these questions indeed relate to obtaining more clarity in wording and content. Further under this question, an assessment of the extent to which the objectives of the ETD have been met is performed. The objectives that the ETD aims to achieve are the following:

1. *creating of a common energy market to ensure the proper functioning of the internal market;*
2. *protecting the environment and achieving international commitment in this regard;*
3. *budgetary considerations;*
4. *promoting the EU economy by maintaining / improving the competitiveness of EU companies; and*
5. *redirecting fiscal policy to combat unemployment.*

Table 5 - Overview of research question 1

General research questions	Categories	Detailed research questions (Article of ETD)
1. Are the provisions of Directive 2003/96/EC clear enough to achieve the objectives of the Directive?	1 <i>Clarity/Wording/Content</i>	1, 2(1), 2(3), 2(4)(b), 2(5), 2(6), 3, 4(2), 5, 6, 7(2), 7(3), 7(4), 8, 9(2), 10(2), 11(1-2), 11(3), 11(4), 12(1), 12(2), 13, 14(1)(a), 14(1)(b), 14(1)(c), 15(1), 15(1)(a), 15(1)b, 15(1)(c), 15(1)(d), 15(1)(e), 15(1)(f), 15(1)h, 15(1)i, 15(1)j, 15(1)(k), 15(2), 15(3), 16, 16(1), 16(3), 16(5), 16(6), 17(1)(a), 17(1)(b), 17(2-3-4), 20(1), 20(2), 20(3), 21(3), 21(5), 21(6), 23, 24, 25(1), 25(2)
Can inconsistencies of references and definitions and overlaps of provisions be identified?		
Should the existing provisions of the ETD be streamlined or clarified and if so, in which way?		

We used a combination of desk research, questionnaires and interviews to answer this question. The first policy objective will be tackled extensively in research question 2.

From the research we derived that a significant number of provisions in the Directive are not clear to the Member States and to economic operators. The lack of clarity in the wording and structure of the Directive creates problems to the Member States, which in return resulted in either wrongful use of the provisions by Member States (and consequently economic operators), differences in implementation between the Member States, or the lack of interest in and application of the provision and the policies behind it. The lack of clarity has a direct impact on the achievement of the policy objectives pursued by the ETD. A number of causes for the lack of clarity in the provisions have been identified and are laid out here below, topic by topic. These conclusions are a summary of more substantiated findings which can be consulted in the article-by-article analysis in Annex B.

4.2.1 Missing or unclear definitions of concepts used

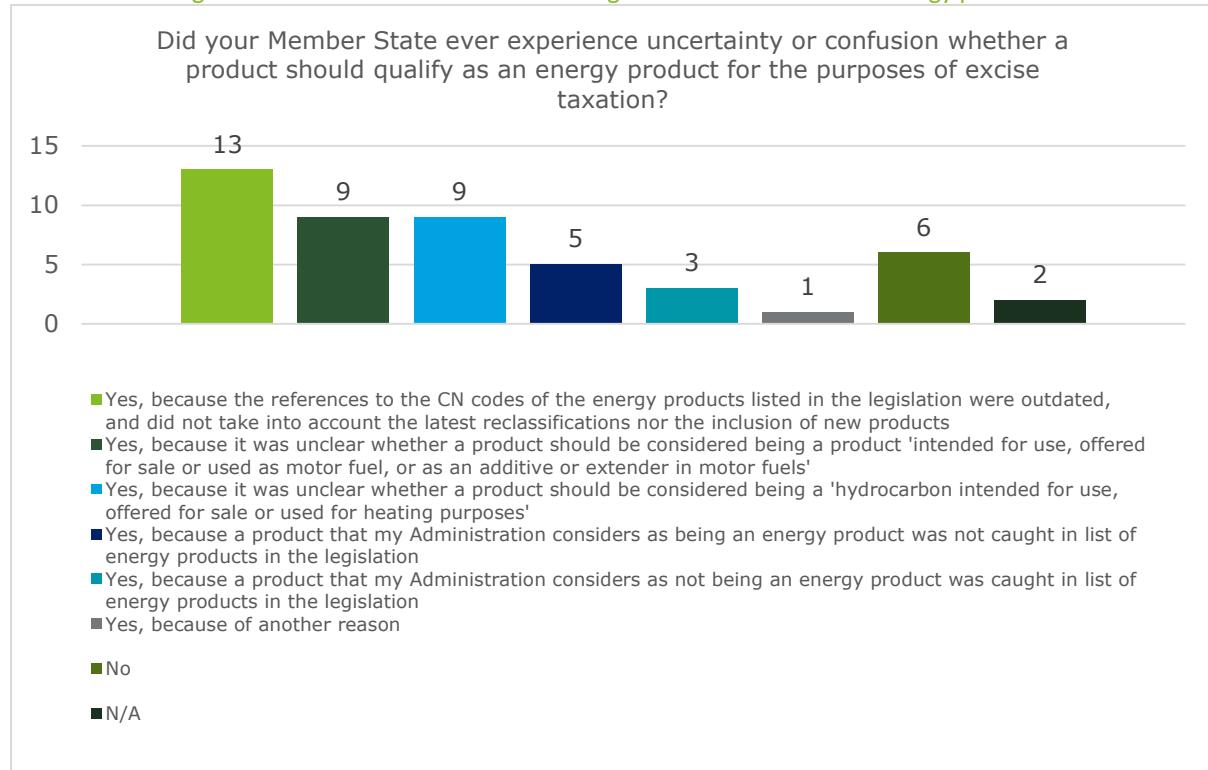
A number of provisions in the ETD touch upon specific concepts related to energy products and energy production or consumption. These concepts may lead to confusion when they are not defined at the EU level or when the wording is unclear. The existence of ambiguities and the complexity of some of the subjects covered by the ETD result in different interpretations and diverging practical applications of the ETD provisions.

Article 2(1) ETD

As confirmed by the ECJ, the European Commission, and the input received from the Member States and the economic operators, the wording of Article 2 ETD lacks clarity and precision.

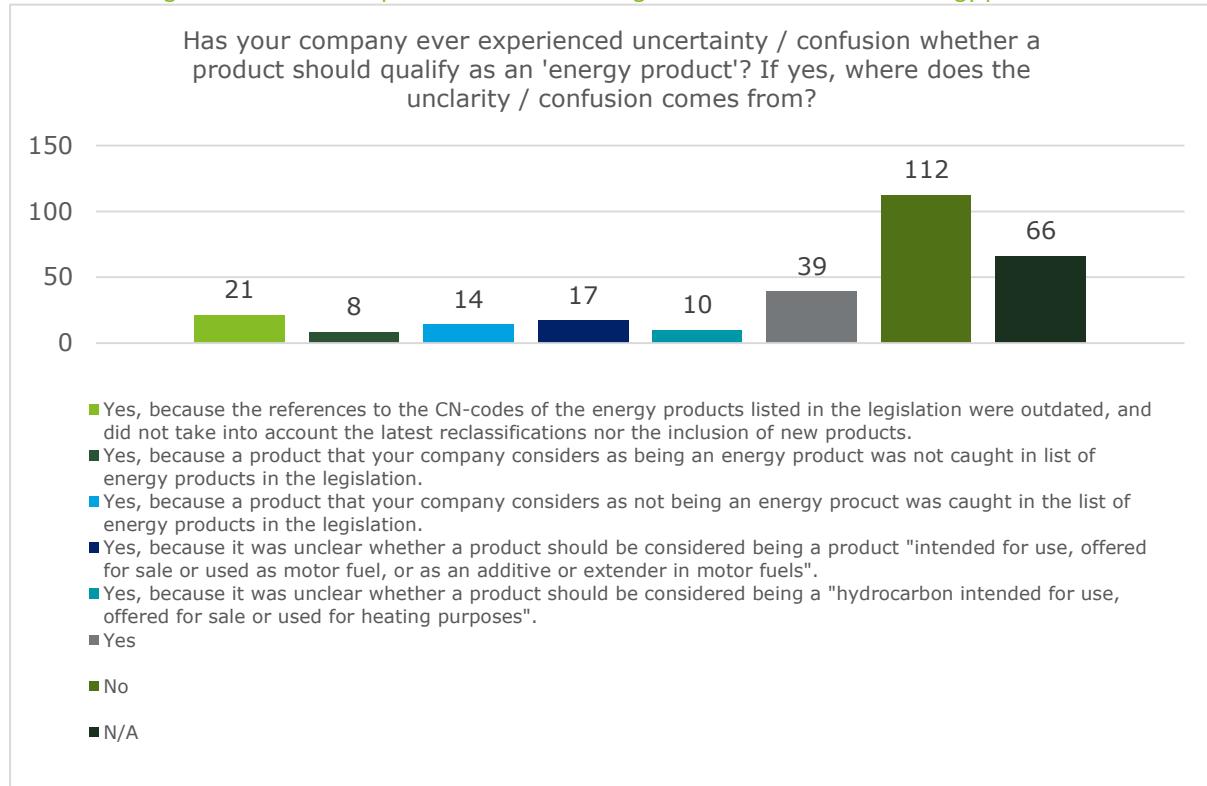
Both respondent Member States and economic operators confirm that the interpretation of the concept of '**energy product**', as expressed through the list of CN codes in Article 2(1), has been the cause of issues in practice.

Figure 4 - Member States' issues with regard to the definition of 'energy product'



Source: Survey to Member States

Figure 5 - Economic Operators' issues with regard to the definition of 'energy product'



Source: Survey to Economic Operators

The concept of 'energy products' is strictly defined in the ETD, with an exhaustive list of codes referring to the 2002 version of the Combined Nomenclature. **The current list of codes is outdated** (e.g. codes were split since then). Identifying the corresponding CN code in today's nomenclature requires considerable technical expertise. The procedure for a (mandatory) update of the list of codes in the Directive was never applied. The outdated list of codes causes problems for traders - both from a legal (lack of certainty) and from a practical (additional administrative burden) nature.

The list of products considered as 'energy products' in Article 2(1) ETD provides for clarity and legal certainty for the Member States' administrations and the economic operators, reason why several Member States indicate that other products (renewables such as power-to-liquid) should be added to the list.

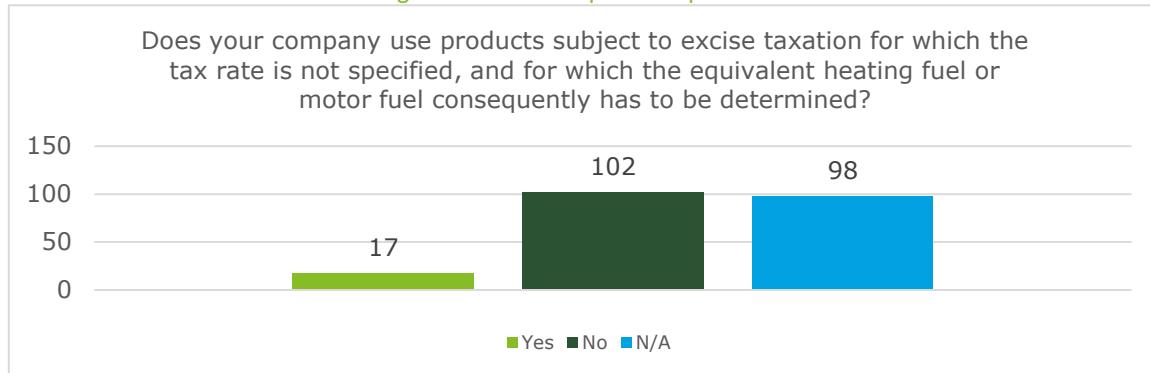
Article 2(3) ETD

Whereas all products used as motor fuel are taxable, for heating purposes only 'hydrocarbons' come into the scope of the Directive as an equivalent product. The lack of an EU definition of *hydrocarbons* and the different understanding of the term results in very different practical applications at a national level. Examples thereof can be found under the analysis of Article 2(3) ETD in Annex B.

Next thereto, Article 2(3) ETD is considered as a catch-all provision, encompassing **all products which are used as motor fuel and all hydrocarbons used as heating fuel, which are not already covered by the definition of 'energy product'**. As such, products not

covered by the list of Article 2(1) might – depending on their use – be taxed as an equivalent fuel.

Figure 6 - Use of 'equivalent products'

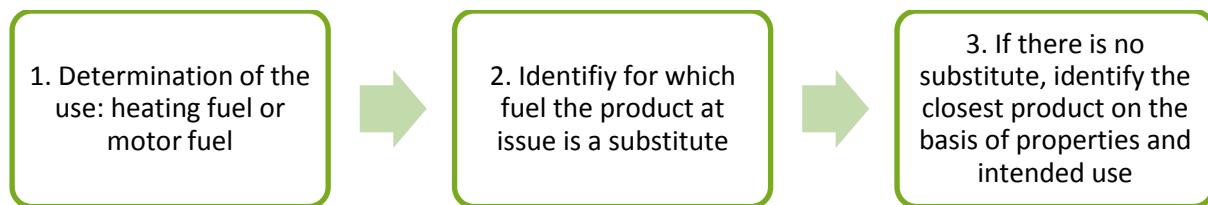


Source: Survey to Economic Operators

Economic operators mention e.g. the use of HVO, fuel oil, biofuel (used under experimental conditions), additives, waste oils, petroleum gases, gaseous hydrocarbons. For these products, the equivalent heating or motor fuel has to be determined.

Major issues arose in practice regarding the identification of the equivalent product, necessary for determination of the applicable tax rate, as reported by both the Member States and the economic operators. The different language versions of the ETD result in discrepancies in the interpretation of the ETD, requiring the ECJ to step in for the interpretation of the equivalence principle.

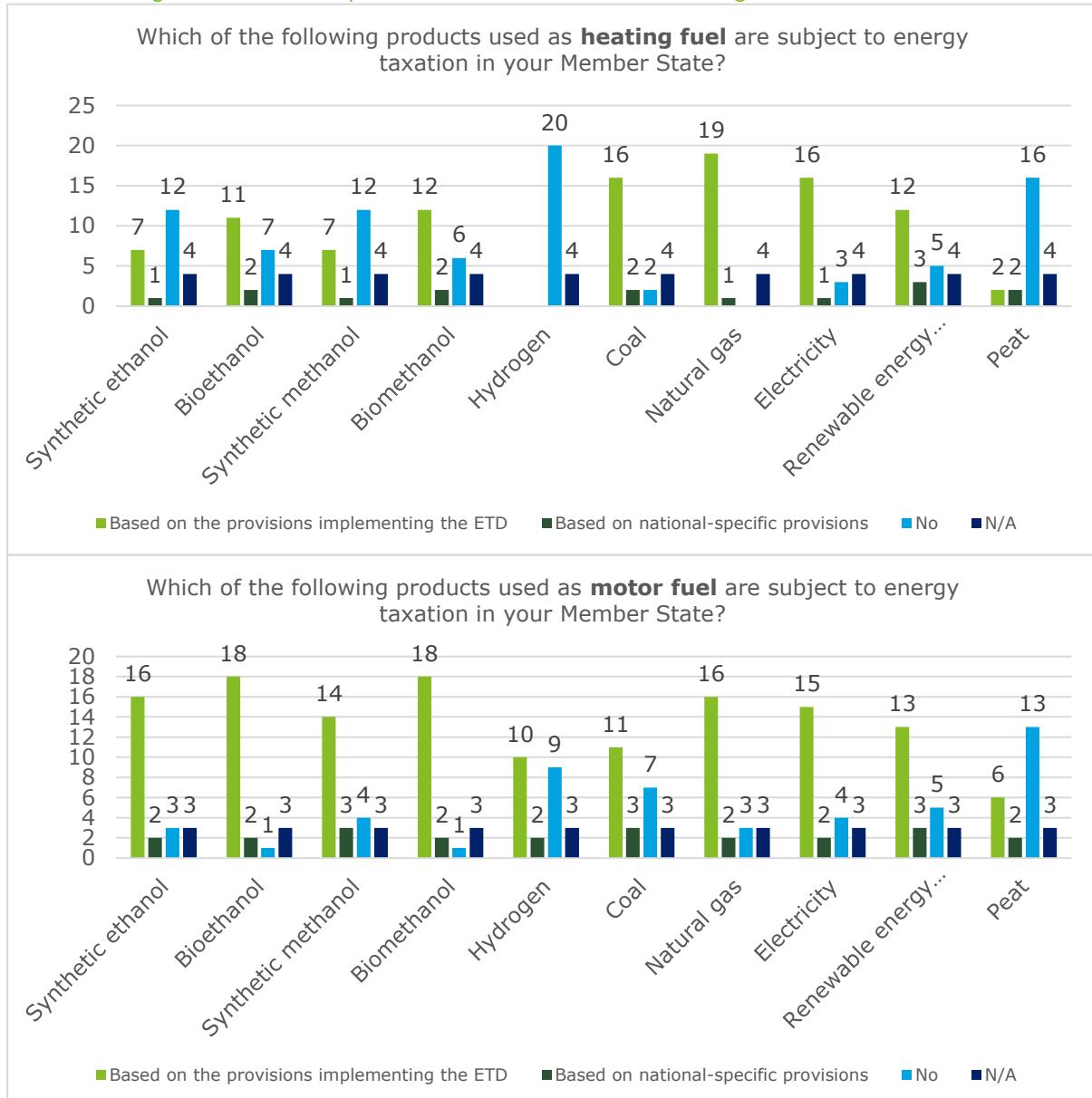
Figure 7 - Reasoning ECJ Kronos Titan: Interpretation Article 2(3) ETD



Source: ECJ Kronos Titan case

There is currently no common approach on which products are taxed and if so, on the determination against which rate they are to be taxed. The framework laid down in the ETD is approached differently by the Member States, despite intervention of the ECJ. Several Member States have issued interpretative guidance on a national level, indicating the need for a common approach at EU level. The same fuel, used for the same purpose and not subject to any exemption under the provisions of the ETD, may be taxed in one Member State and not taxed in another, because of this difference in the approach.

Figure 8 - Taxation of products used as motor fuel and heating fuel in Member States



Source: Survey to Member States

The equivalent fuels – covered under Article 2(3) ETD – refer to **the intended use of the product**, but this is not necessarily known and/or traceable by all actors in the supply chain.

Due to a lack of common approach and understanding by the Member States, and considering that the declaration will be filed by the economic operators, they may be incentivized to look for ‘tax optimization’, identifying the least taxed ‘equivalent’, ultimately affecting the tax revenues of the Member States.

Both Member States (decrease in tax revenue) and economic operators (administrative burden – e.g. identification of equivalent products, disputes with the authorities regarding the interpretation of concepts ...) are suffering from a lack of clarity and uniformity, preventing a more streamlined taxation across the Member States.

Additives for example which are intended to be added to motor fuels , even though they are not intended for use, offered for sale, or used as motor fuels themselves are taxable under the ETD according to the interpretation of the ECJ in the Afton and Jednostka cases. For many Member States this remains difficult to fathom, even after the judgment. This interpretation is further elaborated in the article-by article analysis under 2(3) ETD.

One of the issues, identified by respondents in the study, was the need to identify the intended use of a product at a relatively early point in the distribution chain, in order to decide on whether an excise duty needs to be collected and what the rate (motor or heating fuel) is (see also the section on Article 2(4) below). A refinery business in Germany indicated that when they sell petrochemicals, at the time of the sale they do not know the final use for that product yet, as it can be used for motor or heating fuel purposes but also for other chemical processes. As a solution they apply the rate for a motor fuel (e.g. a light oil) as equivalent rate. The refinery then sells the goods under suspension of duties and it will be their final customer who pays.

Article 2(4) ETD

The concepts defining which uses falling outside the scope of the ETD (Article 2(4)(b)ETD) are not defined in the ETD and they are **interpreted very differently** (either very broadly or very strictly), often putting outside the scope of application of EU tax rules processes which were not intended by the EU legislator.

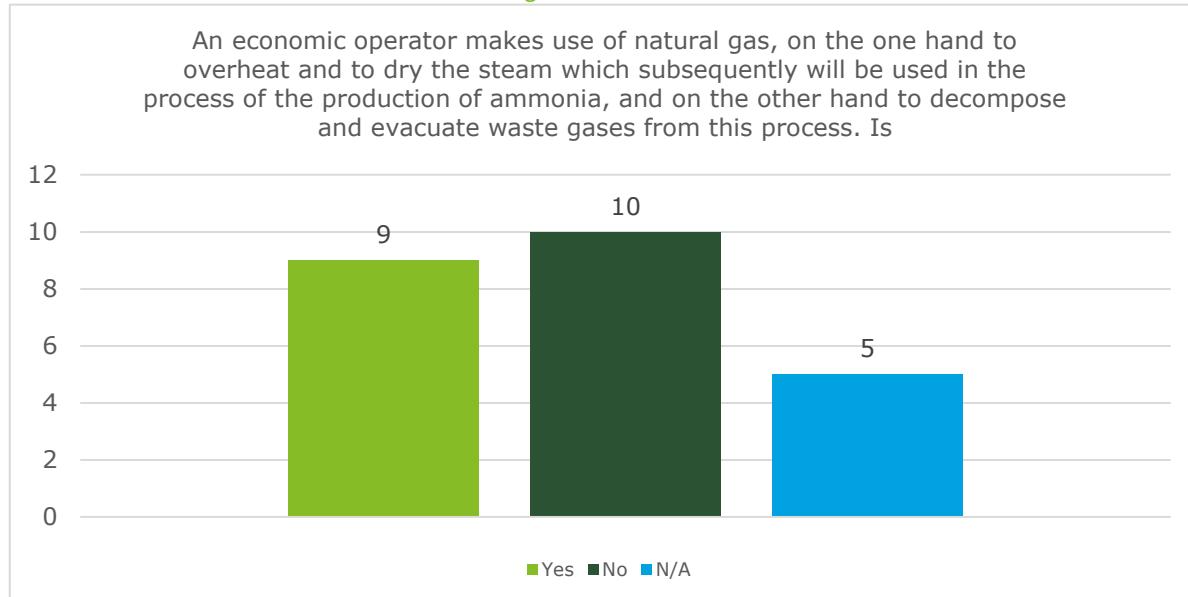
In some cases, the ECJ stepped in to give its own autonomous interpretation to these concepts. For example referring to the X case⁴⁵, the Court ruled that natural gas used for (1) the heating and drying of steam, which is subsequently used in the process of producing ammonia and (2) for the thermal decomposition and the drainage of the residual gases originating from this process, is not considered dual use, which is excluded from the scope of the ETD⁴⁶. The requests for preliminary rulings to the Court indicate that among the Member States, however, there are still **divergent views on the interpretation of 'dual use'** in this context.

The findings in these court cases do not always provide for more clarity to the Member States, rather on the contrary.

⁴⁵ ECJ C-426/12, X, ECLI:EU:C:2014:2247.

⁴⁶ ECJ C-529/14, YARA Brunsbüttel GmbH, ECLI:EU:C:2015:836.

Figure 9 - Dual use



Source: Survey to Member States

The criterion of intended use is also difficult to determine for producers who do not yet know the end-use. An example brought up by an economic operator in the fuels and refineries sector demonstrates the difficulty with butylene. The energy product is often used for the production of tires, and is in that sense not considered to be used for motor or heating fuel purposes. This results in a sale (the rules on release for consumption do not apply to a non-excise good) without payment of excise duties as the product becomes excluded from the scope of the ETD. That same product however is often used by refineries as an additive to be blended into gasoline, which makes the product subject to energy taxation. Suppliers of the product will often not know nor consider it to be used as motor fuel (or additive therein), but it is used as such for this purpose on a rather large scale. At that point butylene should be taxed in accordance with the ETD.

Article 7(2) ETD

The term '*propellant*' in Article 7(2) ETD is not defined and in some languages it is translated the same way as 'motor fuels'. Where the term '*propellant*' has a narrower scope than 'motor fuels', the risk is that this provision will be applied differently in different Member States, according to the language version that is looked at. Also the term '*propellant*' is used in the aerosol industry with a completely different meaning, causing confusion for some economic operators.

Article 14 ETD

Very different approaches in practice remain, even in the case of mandatory exemptions laid down at EU level in Article 14(1) ETD. Half of the respondent Member States (9 out of 18) indicate that they have faced (administrative) difficulties in the granting of the exemptions of Article 14(1) ETD. These difficulties relate not only to the applicability of Article 14(1)(a) ETD – and notably in the context of combined heat and power generation – but also in the scope of the exemptions in Article 14(1)(b) and 14(1)(c) ETD. In this regard

particular reference is made to the interpretation of private pleasure-flying and private pleasure craft and the ECJ case law relating thereto.

The reference to ‘energy products’, and not to ‘taxable products’ in this provision is also a source of diverging interpretation among Member States. Some apply an extensive interpretation of this term, even though the ECJ has already had the occasion to express the opposite view.

Article 15(1) ETD

The concepts ‘*environmentally-friendly products*’, ‘*cogeneration*’, ‘*environmentally-friendly cogenerators*’, ‘*household*’ and ‘*charitable organization*’ used in Article 15(1) are sources of ambiguity because they are not defined in the ETD. Comparison between Member states showed that the concepts are interpreted differently or that some member states choose not to apply exemptions related to these concepts because they were not sure how to. We refer to the article by article analysis for further details.

Article 17 ETD

The definition of ‘energy-intensive business’ in Article 17 ETD is considered too broad and difficult to apply in practice. The methodology for calculating of the percentages as set in the definition based on which establishment can be classified as an energy-intensive business for the purpose of exemption of electricity is seen as problematic. In practice, questions arise concerning the data that should be taken into the account to calculate these percentages. For example, should only be taken into account the cost of the electricity, or should the distribution fees also be included? Certain costs (overcharges on energy purchases to support renewable energy) are not taken into account in the ETD. The criterion related to costs provides economic operators with the possibility to restructure themselves in order to benefit from the reductions.

The term ‘*agreements, tradable permit schemes or equivalent arrangement leading the achievement of environmental objectives or increased energy efficiency*’ is not sufficiently defined to ensure harmonization. Indeed, it has been observed that Member States apply a completely different interpretation of the concept, which is sometimes linked to the Emission Trading system.

Article 20 ETD

Article 20 ETD identifies the products which are covered by the control and movement provisions of the Horizontal Excise Directive. The majority of the respondent Member States (15 out of 20) considers that **the current list of products covered in Article 20 ETD is inadequate** and that products should be removed and/or added.

The scope of the ‘*control and movement provisions*’ referred to by the ETD is not clear to all Member States. The control and movement provisions of Directive 2008/118/EC are only applied to a limited number of energy products. Some Member States and economic operators indicate to apply these provisions also to energy products and other taxable products not covered by Article 20 ETD, resulting in discrepancies between the Member

States. However, though this was not reported specifically, it is likely that these Member States only extend the scope of EMCS for internal movements (i.e. within their own Member State).

A problematic example given by many economic operators are lubricants. They are energy products which often need to be excluded from the scope of the ETD in accordance with Article 2(4) because they are not used as motor or heating fuel. They are also excluded from the Horizontal Excise Directive's control and movement provisions by Article 20(1) ETD. However fraud possibilities come to exist when an operator does decide to use lubricants as heating or motor fuels. In that case, the products become taxable under the ETD, but the control and movement provisions still don't apply, which means the operators themselves need to declare the goods for excise payment which will not always happen. In the balance, making these products subject to the control and movement provisions would mean additional administrative burden for a sector where the product is most often not used as a motor or heating fuel, and as such excluded from the ETD's field of application entirely.

Further, the scope of the 'movement and control provisions' referred to is not entirely clear. Do these for instance also cover the provisions regarding movement of excise duty paid product across Member States? The differences in interpretation could have a considerable effect on business practices. E.g. if a product is intended for use as heating fuel and it is not included in the list of Article 20(1) of the ETD or in an Commission implementing decision⁴⁷ some Member States would allow it to be transported to another Member State like a non-excise good without any special requirements, if they consider a broad definition of 'control and movement provisions'. However, other Member States could require the use of the duty-paid procedure. The mismatch in practices could create problems for legitimate business.

Article 21 (3 and 6) ETD

A confusion also applies under Article 21(3) ETD which defines the conditions under which the consumption of energy products within an establishment producing energy products is not considered to be a chargeable event. Recently, a Danish court requested the ECJ for a preliminary ruling on the following questions:

1. *Is Article 21(3) of Council Directive 2003/96/EC (1) of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the consumption of self-produced energy products for the production of other energy products is tax exempt in a situation such as that in the main proceedings, in which the energy products produced are not used as motor fuels or as heating fuels?*
2. *Is Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the Member States may restrict the scope of the*

⁴⁷ Cf. Commission Implementing Decision 2012/209/EU.

exemption so as to cover only consumption of an energy product used in the production of an equivalent energy product (i.e. an energy product which, like the energy product consumed, is also subject to tax)?'

The ECJ ruling on these question should allow to better define the exact meaning of Article 21(3) ETD.

Next thereto, the term '*curtilage*' in Article 21(3) ETD is unclear and gives rise to disputes according to the Member States and economic operators.

Case study refineries sector

Some economic operators illustrated their point: in case refinery facilities are imperatively required for the energy product production process, but are not producing energy products themselves (e.g. desulphuriser units), will they be considered to be within the curtilage of an establishment producing energy products?; or if there is an electricity storage in the curtilage of a power plant and the storage is used also for balancing of the grid purposes, will the "backload" of the electricity to the storage be regarded as a chargeable event? Economic operators thus also raise the difficulty to distinguish the activities that are or are not considered as part of the production process.

Article 21(6)(c) states that Member states need not treat as 'production of energy products' an operation consisting of mixing, outside a production establishment or a tax warehouse, energy products with other energy products or other materials. The provision seems to give Member states the choice to decide whether these mixing operations are to be treated as production or not. The refineries sector however would prefer to see that blending, which also requires highly technically advanced operations and which is in fact leading to the creation of a new energy product, is consistently considered as being 'production of energy products' on the EU level.

In addition, it was also observed that some situations can be ambiguous when considering whether they can be qualified as a '*production of energy product*'. We refer to the article by article analysis for further details.

Article 21(5) ETD

The lack of clear definitions of the terms '*registration*' and '*small producers*' in Article 21(5) ETD lead to different applications of the Directive and of the optional exemption or the choice by some Member States to not apply the exemption at all. We refer to the article by article analysis for further input in this regard.

Another source of ambiguity is the **definition of natural gas** in Article 21(5) ETD: Natural gas is an energy product typically used for motor or heating fuel purposes, making it subject to excise taxation under the ETD. Member States consider that LNG (Liquefied Natural Gas) and CNG (Compressed Natural Gas) should also become chargeable at the time of supply by the distributor or redistributor, as is prescribed in the provision for 'natural gas', considering that the provision makes no distinction between natural gas in liquid or gaseous form. The Commission services have confirmed this stance by indicating / confirming that 'natural gas'

is mentioned without its form in Article 21(5) ETD. LNG is also natural gas, merely in its liquefied form and should therefore be included in the scope. However the original idea behind the provision introducing a specific mechanism for natural gas was to take into account the specificities linked to its gaseous variety, which is transported via a network, grid or pipeline and which cannot be controlled during movement. Due to the fact that LNG falls under the scope of the article, intra-EU movements of LNG cannot result in a payment of excise duties in the Member state where the movement starts but only in the Member state of delivery 'at the time of supply by the distributor'.

Natural gas in gaseous form cannot be controlled during movement and Article 20(1) ETD excludes it from the control and movement provisions of Directive 2008/118/EC. Since LNG falls under the scope of 'natural gas' it is also excluded from Article 20(1) ETD and from EMCS.

As opposed to natural gas in gaseous form, LNG however can be transported by trucks or ships and standard control and movement provisions could perfectly be applied to the product. On the one hand the application of the control and movement provisions to LNG would make it easier for authorities to perform controls. On the other hand, whilst providing a clear regulatory framework for economic operators too, it may also cause additional burden and issues. When an operator turns LNG back into gaseous form (which is perfectly possible) in order to inject it into a network/pipeline, the product initially being subject to the control and movement provisions, would need to be excluded therefrom. Also the other way around, when going from gaseous to liquid form, the excise status (relating to control and movement provisions) would change.

Article 24(2) ETD

Case law on the definition of standard tank in Article 24(2) ETD has led to diverging interpretations. The ECJ ruled that the term 'standard tanks', referred to in the first indent of Article 24(2) ETD must be interpreted as not excluding tanks fixed permanently to commercial motor vehicles intended for the direct supply of fuel to those vehicles when the tanks have been fitted by a person other than the manufacturer, in so far as the tanks enable fuel to be used directly, both for the purpose of propulsion of the vehicles and, where appropriate, for the operation, during transport, of refrigeration systems and other systems⁴⁸. Member States do not all implement this case law though.

⁴⁸ ECJ C-152/13, *Holger Forstmann Transporte GmbH & Co. KG v Hauptzollamt Münster*, ECLI:EU:C:2014:2184.

4.2.2 Practical issues with the implementation of certain provisions

Different treatment for similar products

Following a preliminary ruling by the ECJ in the Lukoil case⁴⁹ back in 2015, the aromatic constituents were confirmed as the main criterion for the classification of mineral oils of CN headings 2707 and 2710 in the EU. However, within the EU, both Member States and market operators experienced difficulties due to the different methods applied to measure the aromatic constituents. They also indicate that insufficient clear guidelines on how to measure the aromatic constituents exist. As a result contradicting classification results are derived from the analysis between different Member States and even between different customs authorities in the same Member state, which results in a lot of uncertainty, especially in cross-border deliveries of bunker fuel.

The **consequences of the aromatic constituents analysis** are extensive, because the analysis either results in a classification under 2710 or a classification under 2707 (99), which has a different customs duty, excise and VAT impact. Important from an excise point of view is the fact that under one classification code (2710), goods are subjected to the control and movement provisions, but under the other code (2707 99) they are not. 2707 99 does not fall under Article 20(1) of the ETD and therefore these goods cannot be brought into a tax warehouse nor moved under EMCS. Practical problems occur when Member States have different opinions on the classification of the same product. Economic operators therefore pledged that some additional CN codes (2707 99) should be included in Article 20(1) ETD.

Another issue arises with DMA marine fuels (also fuels used for vessels), which are a grade of distillate fuel. The criterion for classification of these products is the distillation point. Similar to the criterion of aromatic constituents, the distillation point leads to many different analyses among Member States and customs authorities. Economic operators brought up that in some cases DMA marine fuels end up being classified as fuel oil and in other cases as gasoil. The same consequences as for bunker fuel regarding the application of control and movement persist.

Non excise goods subject to control and movement provisions

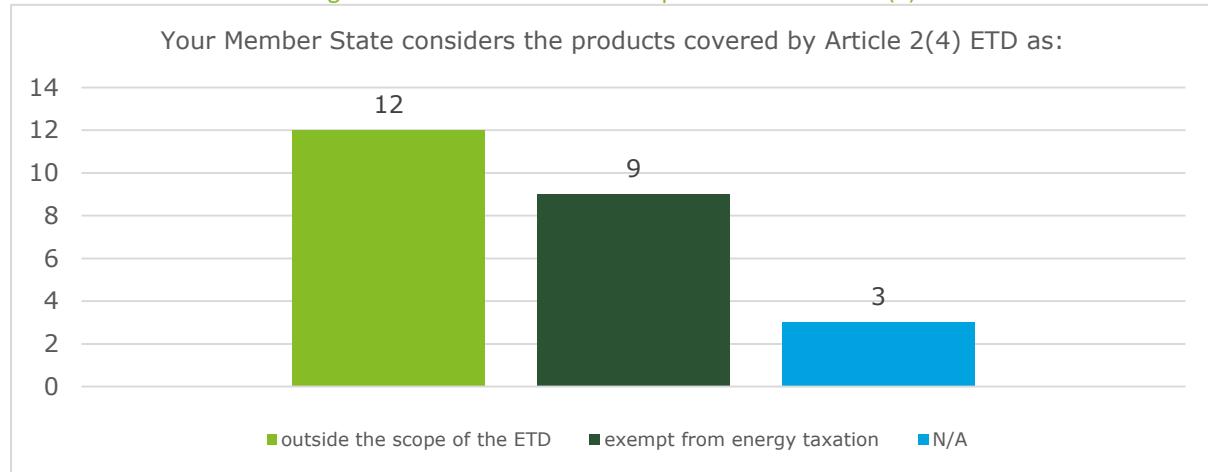
The exclusion of energy products from the ETD under Article 2(4) does not mean that these are not covered by harmonized excise duty arrangements according to the ECJ in the Fendt Italiana case. Examples are **toluene and xylene**. When these energy products are not used as motor or heating fuels they are excluded from the scope of the ETD and therefore not taxable products under the ETD. The fact that Article 20(1) ETD continues to apply to these non-taxable products (even though they are explicitly excluded from the field of application of the ETD) has raised a lot of uncertainty with regard to the application of control and movement provisions.

⁴⁹ ECJ C-330/13, *Lukoil*, ECLI:EU:C:2014:1757.

While in accordance with Article 20(1) ETD they still need to be kept in a tax warehouse and moved under the EMCS system, in principle these products cannot be released for consumption as no excise declaration for these goods can be made (they are out of scope of the ETD and the general provisions of the Horizontal Excise Directive). It would mean that no code for these products should exist in the national excise system.

Some Member States, Belgium for example, consider toluene and xylene as exempted excise products instead of 'out of scope' (even though they are not used as fuel) which makes it possible to release the products for consumption with an excise declaration following the movement under EMCS or the release from a tax warehouse.

Figure 10 - Member States' interpretation of Article 2(4)



Source: Survey to Member States

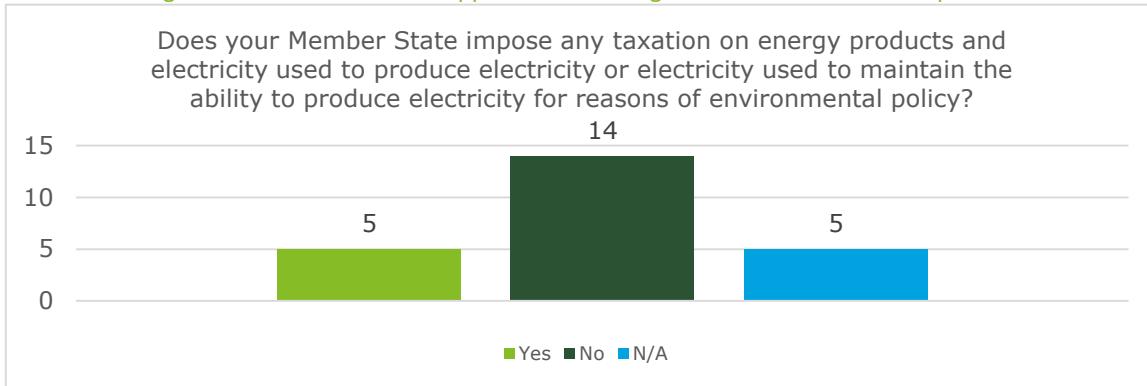
In Member States where no such solution exists, economic operators will have to declare these goods as destined for fuel purposes and possibly pay excise duties on them in order to make release for consumption possible. This provision creates a lot of confusion and is gives leeway to different interpretations.

Practical inapplicability of some provisions and lack of simplifications

The different subparagraphs of Article 14(1) and 15(1) ETD lack clarity, as demonstrated by the past and pending ECJ cases. Both the Member States and the economic operators report practical issues regarding the application of the exemptions.

Article 14(1)(a) foresees the mandatory exemption of energy products and electricity used to maintain the ability to produce electricity and it has created uncertainty among Member States. The same provision also provides for a derogation: Member States may, for reasons of environmental policy, subject these products to taxation. A limited number of Member States make use of that derogation.

Figure 11 - Member States' application of derogations for environmental policies



Source: Survey to Member States

Even if Member States are given the possibility to tax the input of this energy for reasons of environmental policy, this has proved to be hardly applicable in practice. The interplay with other policy instruments, in particular the Horizontal Excise Directive, has led to proceedings on national and EU levels because the scope of the aimed policy purposes (environmental policy) were sometimes used by analogy for other specific purposes. It has become unclear what exactly can be defined as a reason of environmental policy and a case is currently pending before the Dutch Supreme Court (see article by article analysis of Article 14(1)(a) ETD).

Another example is to be found in the concepts of 'private pleasure flying' and 'private pleasure craft' which are subject to ongoing discussions on a national and EU level. The case law of the ECJ regarding Articles 14(1)(b) and (c) – which still leaves considerable room for interpretation – is not unanimously supported by the Member States. Although the reasoning behind the case law is understood by the Member States (certain non-private use of energy products for flying or navigation can also fall within the concept of private use according to the ECJ – the exemption only applies when a service is supplied for consideration), the application differs in practice. The application of the exemption requires a case-by-case, movement-by-movement, assessment which makes it burdensome – or 'impossible' – to apply according to a number of Member States. Economic operators in the air navigation and maritime sector indicated that the scope of non-commercial purposes is unclear and they continue to apply the exemptions in the broadest possible way, using the argument that their core activities are of a commercial nature, whether or not an exempt purpose is identifiable for every single movement. However the ETD does not provide for simplifications in such situations, although the concept is used e.g. in Article 11(3) in cases of mixed use (business and non-business). Despite the analogy in the wording of paragraph (b) and (c) of Article 14(1) ETD, not all Member States apply the case law in the context of the one paragraph to situations relating to the other. From the purpose and wording of both provisions, however, it should be concluded that both paragraphs embody the same underlying principles.

Reference can also be made to another jurisprudence of the ECJ concerning Article 14(1) ETD. Article 14 (1)(a), (b) and (c) ETD refers to 'energy products' and not to 'taxable products'. According to the Court, since taxable products not covered by Article 2(1) ETD are

not covered by the term ‘energy products’ as such, they cannot all be considered to fall within the scope of the mandatory exemptions⁵⁰. The ECJ considers it impossible to apply the mandatory exemption *by analogy* to for example nuclear fuel used for the production of electricity and caught by a national tax⁵¹. Several Member States adhere to a different view, however (e.g. Belgium, Sweden, and Denmark).

Overlaps between Articles 14 and 15 ETD

A number of the mandatory exemptions laid down in Article 14(1) ETD have become the subject of discussion in relation to the optional exemptions foreseen in Article 15(1) ETD.

The mandatory exemption for energy products and electricity used to produce electricity and the optional exemption for energy products and electricity used for combined heat and power generation overlap.

Case study cogeneration sector

It should be clarified that the exemption/reduction of Article 15(1)(c) ETD only relates to the input that goes to the heat production⁵², not the electricity production which falls under Article 14(1)(a) ETD. Some Member States interpret this differently, they did not make the difference. Moreover, there is no definition laid down in the ETD of combined heat and power generation. A definition is provided in Swedish legislation (certain energy efficiency requirements must be met and the heat should be recovered. – C1, §10).

A company in Sweden with a CHP plant will be subject to taxation on the fuel which is allocated to heat production in the cogeneration, but through the application of Article 15(1)(c) the taxation is subject to a reduction. The reduction will also depend on whether the plant is within or outside the Emission Trading system. On the other hand, the fuel allocated to produce electricity in the cogeneration process is fully exempted.

Some exemptions under Article 15(1) ETD are in practice not seen as an option by Member States due to their wording which is similar under Article 14(1) ETD. This is the case for the optional exemption on energy products supplied for use as fuel for navigation on inland waterways other than in private pleasure craft and electricity produced on board a craft (Article 15(1)(f)) and the optional exemption on motor fuels used for dredging operations in navigable waterways and in ports (Article 15(1)(k)) when comparing them to the mandatory exemption under Article 14(1)(c) ETD. Even though theoretically no overlap between the provisions exist and they exist next to each other, in practice, Member States may interpret the term navigation on inland waterways and navigable waterways in some circumstances in the same way as the term community waters. The ECJ interpreted Community waters as any waters through which sea going vessels can reach a port. Hence navigation with vessels other than private pleasure craft as foreseen under Article 15(1) ETD and Article 14(1) ETD

⁵⁰ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

⁵¹ ECJ C-606/13, *OKG AB*, ECLI:EU:C:2015:636.

⁵² This statement is subject to verification by the ECJ in the pending Case C-31/17, *Sucrerie de Toury SA*.

are both interpreted as exempt forms of commercial navigation. The corresponding interpretation of inland waterways and Community waters causes a potential overlap between both exemptions, resulting in difficulties relating to their practical application. These comparisons are further studied under the Article by Article analysis of Article 15(1) ETD.

Conversions

The possibility for Member States to apply their own units for energy products and electricity under Article 12(1), and a differentiated tax base only for electricity under Article 10(2) is very open (leading to lack of clarity) and from the input and sources it seems that Member States use different systems to do the required conversion (different implementation) which may result in diverging results and a distortion of competition between Member States. The scale of the problem however needs to be considered also in the light of differences in national tax rates, which could have a bigger distortive effect. The use of different tax bases across Member States makes it difficult to compare taxation of electricity between Member States.

Lack of consistency in the use of the terms ‘energy products’, ‘taxable products’ and ‘products’)

Throughout the ETD, there is an **ambiguity in the wording between ‘energy products’, ‘taxable products’, and ‘products’**, ultimately affecting the scope of the provisions. The nature and purpose of the system may be different than what is expressed in the literal text of the Directive, or in the interpretation by the individual Member States. The reasoning behind the limitation of certain reductions / exemptions to energy products and electricity only, not covering equivalent products, does not follow from the Directive itself nor from the preparatory works, potentially suggesting an incautious wording. The use of different concepts (‘energy products’ vs. ‘equivalent products’) is not necessary for the underlying systematics to the Directive, allowing for a single concept.

Member States uphold different approaches towards the different use of the wording of ‘energy products’, ‘taxable products’, and ‘products’. Both strict views and different gradations of pragmatic approaches – not in line with the views of the ECJ – can be identified.

One could question the necessity of upholding the concept of ‘energy product’ in the ETD, as it neither determines whether a product is a taxable product under the ETD, nor whether it is subject to the control and movement provisions of the Horizontal Excise Directive. The reference to energy products in the Horizontal Excise Directive may also be perceived as problematic, as from a legal point of view it may be considered that non-energy products which are nevertheless taxable under the ETD, are not covered by the general provisions of the Horizontal Excise Directive, governing amongst others the declaration, payment and restitution of the excise duties involved. The only important function of the definition of energy products seems to be for their use as heating fuels, where products other than energy products are subject to the harmonised excise duty only if they are hydrocarbons.

A potential issue could also occur in the application of Article 21(3) for the tax exemption for the production of energy products which is also subject to divergent interpretations⁵³.

4.2.3 Difficult readability of the ETD

References to old instruments

The concept of ‘energy products’ is strictly defined in the ETD, with an exhaustive list of codes referring to the 2002 version of the Combined Nomenclature. The current list of codes is outdated (e.g. codes were split since then). Identifying the corresponding CN code in today’s nomenclature requires considerable technical expertise. The procedure for a (mandatory) update of the list of codes in the Directive was never applied. The outdated list of codes causes problems for traders - both from a legal (lack of certainty) and from a practical (additional administrative burden) nature. The use of a fixed list of CN codes is considered as a static reference, imposing on the Member States the obligation to at least formally adhere to the codes listed therein.

To counter this problem, certain Member States, like Denmark and Belgium, have implemented various degrees of dynamic references, such as reference to product names only and conversion tables. This may affect the application and scope of the ETD between Member States in practice, however.

The reference made in some instance to the old Directives 92/12/EEC and 92/82/EEC is another example. As a matter of fact, the ETD and the Horizontal Excise Directive are inextricably linked, however the references to the predecessors of Directive 2008/118/EC do not contribute to the readability of the ETD.

Outdated provisions

The text of Article 16 ETD is outdated and consists of superfluous sections. Referring to ‘products produced from biomass’, Article 16(1) consists of needless references to CN codes. Article 16(4) is outdated, Article 16(5) is close to being outdated and subparagraph 2 may have been kept by mistake when comparing the Commission proposal to the ETD.

Similarly, it should be observed that the transitional provision contained in Article 17(1) ETD, fifth paragraph to adapt the definition of ‘energy-intensive business’; as well as the definition of the word ‘production’ in Article 21(2) ETD have become obsolete, because the prescribed time-limits have long been run out, or due to the insertion of precisions in other texts.

⁵³ Cf. pending ECJ C-49/17, Koppers Denmark.

Illogical sequence of articles

In terms of readability, it has also been observed that the sequence of the articles render the text difficult to read, to the detriment of the general comprehension. As an example, the term 'business use' is mentioned in Article 5 ETD, but is only defined in Article 11 ETD.

Another example is the possibility to apply differentiated rates, which is diffused both over Article 5 ETD and Article 7 (2-4) ETD.

The same finding goes for the provisions defining the scope of application, which are spread over Articles 2 and 21 ETD.

Confusing formatting of the provisions

The formatting of the text can also be confusing. This can be illustrated in Article 2(4) ETD, where the sentence '*However, Article 20 shall apply to these energy products*' is placed, formatting-wise, under the indent on mineralogical processes. It is therefore not clear whether this provision is supposed to be applied to all the uses described under Article 2(4)(b) or not.

4.2.4 Alignment with other policy objectives

The biomass concept in the ETD is not aligned with the definitions laid down in other instruments, e.g. the renewables Directive and environmental aid guidelines. In particular, Article 16(3) ETD relating to the overcompensation calculations does not fit in the ETD, as it seems to be a measure relating to State aid. Moreover, the relevance of this provision can be questioned, as there is no overcompensation calculation or similar rule laid down in conjunction with other reductions and exemptions.

The term 'product quality' in Article 5 ETD needs to be clarified in the light of the environmentally-friendly character of a product. In that regard, different Member States' authorities, organisations and federations called into question the substance and merits of a provision allowing differentiated rates for specific uses, which have nothing to do with the achievement of environmental objectives, in a Directive taxing energy products.

The reduced rate for energy-intensive businesses, Article 17(1)(a) ETD, conflicts with environmental goals. Member States may apply a more restrictive approach but some Member States voice to bring this more in line with environmental goals.

It was questioned whether optional exemptions or reductions for renewable resources under Article 15(1)(b) ETD need to include other grounds as well which could serve environmental policy goals.

4.2.5 Entitlement to exemptions/ reductions

An issue that was pointed out with regard to Article 15(3) ETD is that the optional exemption applies to the actual farmers, but often not to contractors even though the Article refers to agricultural activity and not farmer. A number of agricultural activities are exempted for farmers, but when outsourced to these service providers it is not exempt any more. The exemption is made *ratione personae* and not *ratione materiae* on a national level even though the ETD talks about the agricultural activity.

The same goes for the mandatory exemption, under Article 21(3) ETD, for the energy products produced and subsequently consumed within the curtilage of an establishment producing energy products. If activities are outsourced because they are not part of the core business, will the third party participating in the production of the energy products benefit from the exemption?

Another, similar example exists for the activities conducted by energy intensive businesses in the chemical, metallurgical, mineralogical or other sectors, often benefiting from an exemption. If these outsource certain of their non-core activities to e.g. a non-energy intensive sub-contractor or to a sub-contractor active in a different sector, would it still be possible to apply the exemption for the energy products used in performing these activities? In essence, a clear alignment on exemptions, in particular whether they are made *ratione personae* and/or *ratione materiae* is currently missing in the ETD.

4.3 Research question 2

The second research question of the study aims at assessing the effect of the ETD on the functioning of the Single Market. The Single Market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services. In order to move freely, goods – and particularly in the context of this study, energy products and electricity – should not be obstructed by any internal borders, including what could be seen as ‘fiscal borders’. In this context, the excise regime on energy products and electricity should strive towards the elimination of any regulatory and fiscal obstacle (e.g.: double taxation) to the free movement of goods, and should avoid any distortion of competition.

Table 6 - Overview of research question 2

General research questions	Categories	Detailed research questions (Article of ETD)
2. To what extent the measures ensure that the single market operates smoothly and avoids double taxation or any distortion of trade and competition between energy sources and energy	2 = <i>Single Market (effectiveness)</i>	2(3), 2(4), 8, 10(2), 11(1-2), 12(1), 15(1)(d), 14(1)(a), 14(1)(b), 14(1)(c), 15(1)(e), 15(1)(h), 15(1)(l), 21(5)

General research questions	Categories	Detailed research questions (Article of ETD)
consumers and suppliers?		

Desk research and interviews have been used to identify whether distortions remain at national level and to come up with concrete examples to strengthen the analysis.

As indicated, in the context of the Single Market the excise regime on energy products and electricity should strive towards the elimination of any regulatory and fiscal obstacle to the free movement of goods, and should avoid any distortion of competition. However, the ETD fails, to some extent, to the realisation of these objectives.

As a preliminary remark, it should be observed that a lack of harmonisation is inherent to the basic systematics of the ETD. The ETD imposes minimum levels of taxation to the Member States. In other words, the Member States each have the flexibility to determine the taxation rates that will be applicable on their territory, which in itself is of a nature to impact the free movement of goods and the competition. It has been recognised though that such prejudice to the principles of a Single Market is unavoidable, on a territory that remains (economically) heterogeneous. This being said, and without upsetting the basic structure of the EU excise scheme that is based on minimum levels, the fact that these minimum levels of taxation have not been updated or indexed since the introduction of the ETD negatively impacts the Single Market. The effect of the minimum rates decreased over time, increasingly resulting in dispersed approaches by the Member States.

Other elements undermine harmonisation and have been recognised as obstacles to the free movement of goods and capitals when conducting the study.

4.3.1 Discretionary definition of the conditions establishing the chargeable event

One of the main ideas forming the foundation of fiscal harmonisation – in casu, harmonisation of excise duties – is that the correct functioning of the Single Market requires that the chargeability conditions are the same in all the Member States⁵⁴. The ETD, in its Article 21(3), (4) and (6) contravenes to that basic principle, because it leaves the definition of the chargeability conditions to the discretion of the Member States, stipulating that:

⁵⁴ Alex Ortega Ibanez, ‘Les défaillances du régime des droits d'accises européen sur les produits énergétiques’, *Journal de droit européen*, 2017, p. 48-50.

- Member States may consider the consumption of electricity and other energy products not produced within the curtilage of an establishment producing energy products, as well as the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity, as not giving rise to a chargeable event (Article 21(3) ETD).
These results make the divergence in the application of the provision apparent.
- Member States may provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled (Article 21(4) ETD); and
- Member States need not treat as production of energy products some defined operations (Article 21(6) ETD).

These provisions in which the Member States have the opportunity to define by themselves what constitutes, or not, a chargeable event, and thus, where the definition of the chargeable event is not imperatively defined in the same manner for all the Member States, are detrimental to the adequate functioning of the internal market.

It was investigated through a questionnaire whether aforementioned option is used by the Member States. The results indeed show the divergence in implementation of these provisions. As a direct consequence, this means that certain products and/or certain operations will be constituting a chargeable event in some Member States, but not in others. For the economic operators – notably from the energy and resources sector as these provisions (of Articles 21(3) and 21(6)) concern the production of energy products – it has to be observed that the conditions for a well-functioning internal market are not fulfilled. In identical situations, economic operators will be taxed or not depending on the localisation of their activities within the EU. Considering the average level of energy taxation in the EU, this provides a substantial advantage for the companies operating in Member States where there is no taxation, and in turn leads to distortions. Competition is thus potentially distorted by the fact that Member States retain a discretion for national ‘policy’ where this should not be the case. Differentiations in establishing the chargeable event do not serve any of the objectives of the ETD / harmonized energy taxation.

4.3.2 Discretionary application of exemptions and reductions

The determination of tax rates for excise taxation on energy products and electricity in Member States is based on / influenced by the fixing of minimum levels of taxation in the ETD. The mechanism of minimum rates provides flexibility to the Member States, still having different economic conditions, to define the appropriate level of taxation to apply on their territory. This excise scheme set up in the Directive also foresees for – mandatory and optional – tax exemptions and reductions.

Without calling into question the flexibility recognized to the Member States to apply tax exemptions and reductions, the optional nature of exemption and reduction provisions in Articles 15, 16 and 17 ETD is a detrimental element for the effective functioning of the internal market. It introduces a differentiation within the very structure of the excise taxation scheme on energy products and electricity. This differentiation in the structure of the ETD's energy taxation scheme, which objective is to bring additional harmonisation to the EU single market, results in a diversity of structures and procedures forming barriers economic operators have to face.

Some economic operators and Member States also voiced their scepticism on the mere principle of foreseeing optional exemptions and reductions. According to Article 3 of the Treaty on European Union, the internal market should work for the sustainable development of the EU, based on balanced economic growth and price stability, a highly competitive social market economy, and a high level of protection and improvement of the quality of the environment; and it should promote scientific and technological advance. Where an exemption or a reduction is a fiscal advantage given with a view to stimulate a certain behaviour serving one of these higher objectives shaping the internal market, it can be questioned why it should not apply to all Member States. The exact extent of the alleged distortive effects resulting from these optional exemptions/reductions cannot be quantified based on the collected evidence and would require further data collection and analysis.

4.3.3 Different procedures for the application of exemptions and reductions

Likewise, the options that are left to the discretion of the Member States in the way they apply and control the exemptions and reductions in the level of taxation as prescribed in the ETD have a negative impact on the realisation the single market objectives. Article 6 ETD stipulates that Member States are free to give effect to these measures either directly, by means of a differentiated rate, or by refunding all or part of the amount of taxation.

As a result, a multitude of national structures and procedures are implemented, to the detriment of the economic operators. The ETD, with this provision, paves the way for regulatory obstacles, making it burdensome, time-consuming and expensive for economic operators to be active, and apply the different rules, in multiple Member States.

This finding should be assessed in the light of the principles of subsidiarity and proportionality as defined in Article 5 of the Treaty on European Union, according to which the EU should not take action unless such action is more effective than action taken at national, regional or local level; and whenever action is taken by the EU, it should not go beyond what is necessary to achieve the objectives of the Treaties.

In application of these principles, and taking into account the observed difficulties created by the flexibility left to the Member States by Article 6 of the ETD in the way exemptions and reductions are applied, it can be questioned whether the proper functioning of the

single market would not be better achieved if this matter would be further harmonized at Union level.

4.3.4 Lack of clarity and definitions in the ETD

Under the first research question, it has been observed that the text of the ETD can be interpreted very differently by the Member States. The lack of clarity and of precise definitions has as a consequence that the rules, even where they are imperative for all the Member States, are applied inconsistently, and provoke distortion of trade and competition between products, suppliers and consumers.

For example, the difference in approach between the Member States when it comes to the application and differentiation of the concepts 'energy products', 'taxable products', and 'products' results in (i) discrepancies in the interpretation of the ETD on a national level and (ii) inconsistencies in application of the legal framework on energy taxation across the Member States. These inconsistencies do not serve the economic operators that have to deal with the lack of clarity, affect the functioning of the Single Market since a same product can receive a more favourable treatment in certain Member States than in others. Also the competitiveness within the EU as a whole, particularly for businesses operating in different Member States and facing the different approaches, is negatively influenced because of an unnecessary additional burden for those multinational companies having to apply the different approached existing.

The same conclusions can be drawn when it comes to the differences in interpretation and application of a.o. the terms 'dual use', 'hydrocarbons', 'environmentally-friendly' or 'high efficiency'.

Another resonant illustration has been given by Denmark. Denmark explained that some other Member States had a stricter interpretation of what has to be considered as 'energy products contained in a standard tank', which could lead to the payment of additional excise duties in these other Member States. As a consequence, and with a view to avoid double taxation in these situations, a refund mechanism has been established in Denmark, if tax has been levied after leaving the Danish territory.

In the same line, Article 21(5) ETD, which dictates that, where the delivery to consumption from electricity or natural gas takes place in a Member State where the distributor or redistributor is not established, the tax of the Member States of delivery shall be chargeable to a company that has to be registered in the Member State of delivery, received many different national interpretations and implementations. It was asked to the Member States' authorities when a company would be considered to be registered within the meaning of Article 21(5) ETD. The variety of responses shows that this part of the provision received many different national interpretations and implementations: some indicate that the distributor should notify the authorities; in other Member States, a company will be considered to be registered when it obtained a particular license; for others, it is considered

that the company should be recognized in the destination Member State as tax warehouse holder; for some, the registration depends on a VAT registration in that country; where other Member States consider it necessary to appoint a specific fiscal representative; or it can be even a combination of the previous mentioned requirements. Economic operators active in different Member States testified that the distribution of gas and electricity in other Member States was rendered extremely complicated, due to the different registration obligations. This issue is seen as an obstacle to extend the activities in other Member States, which indicates that the principles that underpin and govern the Internal Market are being harmed.

Another element impairing the free movement of goods is the ETD's subjective definition of what are to be considered as taxable products. Indeed, next to the products that are defined according to their customs classification in Article 2(1-2) ETD, 'any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels' and 'any other hydrocarbon intended for use, offered for sale or used for heating purposes' shall be taxed (Article 2(3) ETD). In this definition, there is no objective material criterion enabling to determine in advance when a product will be aimed for such a use, and this results in a lack of legal certainty. The ECJ recognized the ambiguity related to Article 2(3), first paragraph ETD in the *Afton* case⁵⁵, where it stated that "*it must indeed be admitted, as the Commission itself acknowledged at the hearing in reply to the Court's questions, that the wording of Article 2 of Directive 92/81 and Directive 2003/96 could be clearer and more precise*".

4.3.5 Uncertainty in the application of the control and movement provisions

Finally, it was noted that the well-functioning of the Single Market is undermined by the inconsistent application of the control and movement provisions applied to energy products.

The scope of (part of) the Horizontal Excise Directive, in particular the 'control and movement provisions of Directive 92/12/EEC', is limited by Article 20(1) ETD. This Article is a compromise provision, in the sense that energy products which are commonly not considered to be used as motor / heating fuel or whose transportation does not bear an inherent risk of fraud, should not be made subject to the control and movement provisions, and the burden linked thereto. Article 20 ETD makes sure that the strict conditions regarding storage and movement (warehouse keeper, guarantees, etc.) are not applied to all taxable products covered by the ETD. This makes sense, as additional burden should only be imposed when there is also a need to do so. In the same line of thinking, Member States referred to the fact that equivalent products are often used for other purposes than heating

⁵⁵ ECJ C-517/07, *Afton Chemical Limited*, ECLI:EU:C:2008:751.

or motor fuels. Automatically covering these products by the control and movement provisions of the Horizontal Excise Directive would bring a disproportionate burden for trade. Opinions however differ when it comes to the identification of the products that should be covered by the control and movement provisions. Whatever the viewpoint, it is important for the functioning of the Single Market that all Member States adhere to the same approach. However, in practice, different approaches have been adopted by the Member States, ultimately resulting in double taxation. We refer to the article by article section for further details in this respect.

Another inconsistent application of the control and movement provisions results from the ambiguity concerning their application to energy products that are excluded from the scope of the Energy Taxation Directive. Indeed, under the Directive, energy products as defined in Article 2(1) ETD can be excluded from the scope of application under Article 2(4) ETD – and are therefore not considered as taxable products –, for example when they are used for purposes other than as motor or as heating fuels. Nonetheless, some of these ‘non-taxable products’ remain subject to the control and movement provisions. As such, their movement within the territory of the Union should take place under the EMCS-system. The problem occurs when clearing the movement in the Member State of arrival: the clearance of the EMCS movement is achieved when the products are attributed their next excise treatment (e.g.: storage in a tax warehouse or release for consumption), which is in principle impossible for non-excise products. The Member States have thus all adopted their own practical solution. For the economic operators, this translates in additional administrative burden, or even in the payment of undue duties.

4.4 Research question 3

The third research question relates to the relevance of ETD provisions with regards to the current needs of Member States and economic operators. In particular, it aims to establish whether the ETD is in line with the technological developments which have arisen since 2003 and, if and where this is not the case, how such weaknesses could be addressed in the most effective way.

Table 7 - Overview of research question 3

General research questions	Categories	Detailed research questions (Article of ETD)
3. To what extent does the scope of the ETD still match the current needs of Member States and economic operators?	3 = Matching current needs/technological developments (relevance)	5, 8, 14(1)(a), 15(1)(b), 16(3), 21(5)
To what extent are the provisions of the ETD in line with the technological developments?		

General research questions	Categories	Detailed research questions (Article of ETD)
If weaknesses are identified, how could they be addressed in the most effective way?		

In order to reply to this question, a mapping of the current energy landscape, identifying the current needs of stakeholders, technological developments and their relationship to the Energy Taxation Directive was carried out. Where possible, suggestions for addressing potential issues spotted were formulated.

Most sources available have been used, including online surveys to tax authorities and businesses, interviews with EU stakeholders and in-depth interviews with businesses and tax authorities in Member States selected for fieldwork. The detailed analysis of the ETD articles relevant to this general research question can be found in Annex B.

All sectors included in the study were examined for this question, as the provisions examined apply to all sectors.

The ETD lays the basis for minimum harmonisation across Member States in the field of energy taxation. However, over the fourteen years since its introduction, developments in the energy market, energy systems, environmental policies and technology maturity levels have rendered its implementation more complex and not entirely in line with the need of tax authorities and economic operators, as further detailed below.

4.4.1 A static instrument in a fast developing environment

ETD provisions tends to create static rules ill-fitted for the on-going developments in the energy sector. Provisions in the fields of biomass and biofuels are examples of this.

The exemption or reduction for biomass foreseen in Articles 15(1) and 16 of the ETD was concluded in a different technological and political context. Nowadays, however, questions arise regarding the position of biofuels in the EU framework on energy taxation, also considering new policy objectives and needs.

Biofuels have gained importance over time (e.g. in Sweden currently approximately 18% of the energy content of all motor fuels comes from biofuels). However, at the time of drafting the ETD, biofuels were niche fuels. Consequently, the legal framework does not sufficiently take into account their growing weight in energy mixes nor the specificities of these fuels.

The Article states explicitly that '*the products produced from biomass*' are exempt, reason for which there is no need to name all the other codes. However, the notion of biomass in

the ETD is not aligned with the definitions laid down in other instruments, e.g. the renewables Directive⁵⁶ and environmental aid guidelines⁵⁷.

In particular, Article 16(3) relating to the overcompensation calculations does not fit in the ETD as it appears to be a measure relating to State aid.

It should also be noted that some biofuels are produced from waste: in these cases, the price of the '*raw material*' could be quite low, depending on market conditions. Moreover, the relevance of this provision can be questioned, as there is no overcompensation calculation or similar rule laid down in conjunction with other reductions / exemptions.

While overcompensation calculations are necessary for the application of the State aid framework, they are considered (together with the rules on State aid) as a hindrance by some of the Member States in order to implement their national environmental policy. In addition, these calculations are very burdensome for economic operators and the authorities, and the calculation highly depends on what is compared. At the time of drafting the ETD, the applicability of State aid rules on the exemptions laid down in harmonised Directives was unclear. Based on the analysis, the revision of the overcompensation calculations for biomass and of their interrelation with Stats aid rules clearly emerges as an element for consideration.

Moreover, Member States, in implementing Article 8(2), are not asking economic operators for the addition of supplementary industrial and commercial uses which may evolve alongside technological developments.

Several stakeholders insisted on the need to ensure the coherence of the ETD with other related Directives on EU climate and energy policy goals such as the Renewable Energy Directive⁵⁸ and the Emission Trading system Directive⁵⁹ in the light of technological and political developments in that field.

No clear consensus emerged however on the direction of such change. For example, the sustainability criteria create some ambiguity. Indeed, the ETD makes no difference between biofuels that are sustainable and those that are not (e.g. are food-based biofuels sustainable?), thus potentially providing for tax reductions for fuels that do not contribute to achieving the goals set by the climate change, environmental and energy policies of the

⁵⁶ Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ. L. 140, 5 June 2009. <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0028> (Accessed: [12/01/2018]).

⁵⁷ Communication from the Commission: Guidelines on State aid for environmental protection and energy 2014-2020, OJ. C. 200/01, 28 June 2014. [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01)) (Accessed: [12/01/2018]).

⁵⁸ Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ. L. 140, 5 June 2009; <http://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX%3A32009L0028> (Accessed: [12/01/2018]).

⁵⁹ Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ. L. 275, 25 October 2003; <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:32003L0087> (Accessed: [12/01/2018]).

EU. This explains why some economic operators are in favour of applying reduced rates or refunds to encourage the development of new generation biofuels, while others deem that incentives for new technologies can be discriminatory for other energy sources.

Member States authorities also underlined specific issues in that respect, for instance the question of whether environmental regulations should apply in defining which renewable sources should not be treated as environmentally friendly. It was argued that regulating this issue solely in tax regulations could be problematic.

4.4.2 Outdated provisions and new products

A number of ETD provisions have become outdated, especially as new energy products appear which are not included in the scope of the Directive. In particular, economic operators mentioned power-to-liquid, power-to-gas and specific non-bio fuels as relevant new products which are currently outside the scope of the Directive.

A major issue that emerged from inputs from economic operators is the alignment of the ETD Directive with updates in the Combined Nomenclature (CN). As the 2002 CN version is referred to in Article 2(1), the current list of codes is outdated (e.g. codes were split since then) because new products are coming up and the ETD should be updated in that regard. Identifying the correct CN code requires considerable technical expertise. Moreover, the concept of 'energy products' is strictly defined in the ETD, with an exhaustive list of codes referring to the 2002 version of the CN. The procedure for a (mandatory) update of the list of codes in the Directive was never applied. The outdated list of codes causes problems for economic operators – both from a legal (lack of certainty) and from a practical (additional administrative burden) nature – since they have to keep track of two codes: one for trading or customs purposes and one for excise purposes.

In some cases it is not easy to make a reference to the current classification especially for new biofuels and the new products and alternative resources that have come to exist or are gaining importance (e.g. power-to-liquid fuels, LNG, hydrogen, pellets). It was therefore suggested by economic operators to introduce a dynamic reference to current CN codes as per Council Regulation (EEC) No 2658/87 in the ETD. It could be argued that changes to this Regulation are adopted with qualified majority voting, whereas changes to the scope of the ETD require unanimity. On the other hand, the European Commission, following the advice of a Member State, can enlarge the list of energy products and electricity to which the control and movement provisions of the Horizontal Excise Directive apply following a qualified majority vote in the Committee on Excise Duty Horizontal Excise Directive under Article 20(2) of the ETD. It appears simpler to introduce some form of delegation to the European Commission for the update of the CN codes in the ETD. However, the Member States are less inclined to delegate powers to the Commission to include or remove energy products from Article 2(1), or to add them to the list in Article 20(1) ETD. This could be explained considering the practical impact of adding products to the ETD, whereas a mere

update of the ETD, at least as far as updates of the CN codes are concerned, is more of a formal nature.

Furthermore, the tariff classification concerning fuels does not match the criteria for new products of international product standards (ISO). It leads to a different situation from the point of view of the quality of the energy products. The problem also exists with lubricants, a generic classification which gathers many different products and refers to an energy product, but not an excise good. The ECJ has explicitly confirmed that under the ETD, Member States can levy a tax on the consumption of lubricating oils, where they are intended for use, offered for sale or used other than as motor fuels or heating fuels⁶⁰.

Article 3 of the ETD could be amended to the extent the provision's wording is outdated since it refers to 'mineral oils', as further detailed in the article analysis in Annex A. However the reference to non-harmonised taxes should be kept to avoid double taxation of energy products or electricity.

As further detailed in Annex B under Articles 15 and 16, Articles 15(1)(a) and 16(1), 16(4) and 16(5) are also outdated and consist of superfluous sections. In particular, Article 16(1) consists of needless references to CN codes as it refers to '*products produced from biomass*'.

Several stakeholders acknowledged the fact that the European Commission suggested interesting options to ensure the list of energy products referred to in the ETD is kept up-to-date.

4.4.3 New technologies and changes in behaviour

New technologies and needs are arising in the energy sector relating to e.g. energy efficient equipment (and incentives in this regard), waste-to-energy solutions, self-powered equipment, such as drones which are increasingly used in agriculture. Power-to-liquid, power-to-gas, liquid-bio-methane and methane from hydrogen were also mentioned by attendants to the workshop as potential new technologies and uses, which it was argued should receive the same treatment as biogas. The shift from fuels to electricity could come to represent a new input for contractors in electricity, as well as the own production of electricity through solar panels and wind. Wind turbines used to produce methane in a power-to-gas process could enable the large scale storage of energy, clean and indigenous production while using existing infrastructure (i.e. gas networks). As such, they would be considered as renewable energy as they contribute to reducing greenhouse gas emissions.

These may render an update of the ETD necessary in the view of some economic operators. Member State authorities also stated that the current (optional) exemption on private households' electricity production will not be sustainable in the future as technologies are improving and getting cheaper.

⁶⁰ ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

There were divided views however as to whether the introduction of a common definition and regulation on the storage of electricity was desirable. Several Member States authorities pointed out that this was not considered necessary given that there is currently no technology allowing such storage. Others indicated that there might be a need for an update, although not in Article 14 – see our detailed analysis of this Article in Annex – as there could be future problems, especially in terms of administrative burden, if electric cars were used as a means to even out differences in production.

Furthermore, in the view of certain Member States authorities, an additional ground for differentiation should thus be explicitly added to Article 5, depending on the renewable character of the taxable product. The French customs authorities underlined the need to align environmental and budgetary objectives. According to them, it could be envisaged to go further, so that the current measures would be clearly extended to ‘green products’. However, other stakeholders pointed out that taxing fossil fuels heavily and exempting green energies would create imbalances for consumers who do not have other alternative than using the former (given the current mainstream technology of environmental-friendly installations such as photovoltaics).

4.5 Research question 4

The fourth general research question relates to the administrative burden imposed by the ETD provisions on Member States and/or economic operators. In particular, it aims to understand whether such administrative burden stemming from the ETD exists, and if so, to what extent it does and whether there would be possible ways to reduce it.

Table 8 - Overview of research question 4

General research questions	Categories	Detailed research questions (Article of ETD)
4. Have they led to any considerable administrative burden for the Member States and/or the economic operators? If yes, what and how big are the burdens and what could be done to reduce them?	4 = Administrative burden	2(2), 2(3), 7, 14(1), 15(1), 15(3), 17, 21(5)

In order to answer this question, we had the ambition to examine not only the ETD provisions per se, but also their implementation in national contexts in the eight Member States selected for fieldwork. Next thereto, we have also framed the administrative burdens

stemming from the ETD with administrative burdens imposed by related legislation, in particular by Horizontal Directive 2008/118/EC.

In view of the comparison of the ETD's administrative burdens with those stemming from the Horizontal Directive 2008/118/EC, specific reference can be made to two Ramboll studies⁶¹, which have been used as key sources of information regarding the burdens deriving from this related legal instrument.

All sectors included in the study were examined for this question, as the provisions examined apply to all sectors.

4.5.1 Data collection and limitation of the evaluation

All the sources available have been used, including desk research, online surveys to both tax authorities and businesses, interviews with EU stakeholders and in-depth interviews with businesses, tax authorities and the Deloitte network of experts in Member States selected for fieldwork.

Specifically, reference can be made amongst other to the following data-collection efforts:

- Questions in the general survey for economic operators:

Certain energy products may be dispensed from the control and movement provisions on excise products, pursuant to bilateral arrangements between Member States. If the Member State from which your company operates has concluded such bilateral agreements, does your company make use of the simplification of the control and movement provisions on excise products? Does the procedure for benefitting from that simplification lead to considerable administrative burden ?

Electricity and natural gas become chargeable at the time of supply by the distributor or redistributor. An entity producing electricity for its own use is regarded as a distributor, however small producers may be exempted provided that they tax the energy products used for the production of that electricity. To your experience, does the procedure for being granted/requesting the exemption lead to considerable administrative burden ?

⁶¹ Ramboll Management Consulting & Europe Economics Research Ltd, *Evaluation of the current arrangements for the holding and moving of excise goods under excise duty suspension*, Final Report to Directorate-General for Taxation and the Customs Union (DG TAXUD) of the European Commission, 2015, ISBN 978-92-79-52850-7; Ramboll Management Consulting, *Evaluation of current arrangements for movements of excise goods released for consumption*, Final Report to Directorate-General for Taxation and the Customs Union (DG TAXUD) of the European Commission, 2015, ISBN 978-92-79-44022-9.

The ETD provides for several exemptions or reduced rates possibilities. The criteria for benefitting from an exemption or a reduction can be related to the origin, the use or the composition of the product, or even to the specific situation of the company that is consuming the products:

- *energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity*
- *energy products supplied for use as fuel for the purpose of air navigation other than private pleasure-flying*
- *energy products supplied for use as fuel for navigation within Union waters (including fishing), other than private pleasure craft, and electricity produced on board a craft*
- *energy products supplied for use as fuel for navigation on inland waterways (including fishing) other than in private pleasure craft, and electricity produced on board a craft*
- *energy products and electricity used in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources*
- *electricity of solar, wind, wave tidal or geothermal origin*
- *electricity of hydraulic origin produced in hydroelectric installations*
- *electricity generated from biomass or from products produced from biomass*
- *electricity generated from methane emitted by abandoned coalmines*
- *electricity generated from fuel cells*
- *energy products and electricity used for combined heat and power generation*
- *electricity produced from combined heat and power generation, provided that the combined generators are environmentally friendly*
- *energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus*
- *electricity, natural gas, coal and solid fuels used by households and/or by organisations recognised as charitable*
- *natural gas and LPG used as propellants*
- *motor fuels used in the field of the manufacture, development, testing and maintenance of aircrafts and ships*
- *motor fuels used for dredging operations in navigable waterways and in ports*
- *energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry*
- *energy products and electricity made up of, or containing soya-bean oils or animal or vegetable fats and oils*
- *energy products and electricity made up of, or containing mixtures of fatty acid esters of glycerol or mixtures of amines derived from dimerised fatty acids*
- *energy products and electricity made up of, or containing denatured ethyl alcohol and other spirits or methanol, which are not of synthetic origin*

- *energy products and electricity made up of, or containing fuel wood or wood charcoal*
- *energy products and electricity made up of, or containing water*
- *energy products used by energy-intensive businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency*
- *energy products used by businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency*

Whenever your company benefits from an exemption or a reduced rate of excise duties on one of these grounds, to your experience, does the procedure for being granted/requesting the exemption or de reduced rate lead to considerable administrative burden? Please explain.

Do you have any remaining remark or concern regarding the administrative burden linked with the application of (some provisions of) the legislation on excise taxation of energy products?

► Questions in the survey for Member States' authorities

In line with article 20 (3) ETD, certain energy products may be dispensed from the control and movement provisions on excise products, pursuant to bilateral arrangements between Member States. Did your Member State conclude any bilateral or multilateral agreements resulting in dispensation of some or all of the control measures set out in Directive 92/12/EEC (Directive 2008/118/EC)? Does the procedure for benefiting from that simplification lead to administrative burden?

The ETD provides for several exemptions or reduced rates possibilities in its articles 15, 16 and 17. The criteria for benefitting from an exemption or a reduction can be related to the origin, the use or the composition of the product, or even to the specific situation of the company that is consuming the products.

- *energy products and electricity used in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources*
- *electricity of solar, wind, wave tidal or geothermal origin*
- *electricity of hydraulic origin produced in hydroelectric installations*
- *electricity generated from biomass or from products produced from biomass*
- *electricity generated from methane emitted by abandoned coalmines*
- *electricity generated from fuel cells*
- *energy products and electricity used for combined heat and power generation*
- *electricity produced from combined heat and power generation, provided that the combined generators are environmentally friendly*

- *energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus*
- *energy products supplied for use as fuel for navigation on inland waterways (including fishing) other than in private pleasure craft, and electricity produced on board a craft*
- *electricity, natural gas, coal and solid fuels used by households and/or by organisations recognised as charitable*
- *natural gas and LPG used as propellants*
- *motor fuels used in the field of the manufacture, development, testing and maintenance of aircrafts and ships*
- *motor fuels used for dredging operations in navigable waterways and in ports*
- *energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry*
- *energy products and electricity made up of, or containing soya-bean oils or animal or vegetable fats and oils*
- *energy products and electricity made up of, or containing mixtures of fatty acid esters of glycerol or mixtures of amines derived from dimerised fatty acids, for their components produced from biomass*
- *energy products and electricity made up of, or containing denatured ethyl alcohol and other spirits or methanol, which are not of synthetic origin*
- *energy products and electricity produced from biomass, including products made up of, or containing fuel wood or wood charcoal*
- *energy products and electricity made up of, or containing water*
- *energy products used by energy-intensive businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency*
- *energy products used by businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency*

Whenever your Member State apply an exemption or a reduced rate of excise duties on one of the previous grounds, did the granting of these exemptions/reductions lead to any administrative difficulty for your Administration ? Please explain

Do you have any remaining remark or concern regarding the administrative burden linked with the application of (some provisions of) the legislation on excise taxation of energy products?

► Specific request for information from the Deloitte network

Dear colleagues,

We are currently finalizing the evaluation study on the technical and legal aspects of Directive 2003/96/EC (Energy Taxation Directive), for which you already provided some valuable support.

While working on our final report we gathered some additional comments from the European Commission for which we would require further input from your side. These comments concern the administrative burden for economic operators deriving from the ETD.

In particular, the administrative burden linked to the possible requirement to request an authorization, the exemption / recovery of excise duties and to other administrative obligations (maintaining / filing records, etc.) should be further depicted in the report.

Therefore, with this e-mail, we would like to ask you to fill in the below table with the following high-level additional information:

	Requesting authorization	Recovering duties	Other (E.g. maintaining stock records, information obligations, etc.)
Cogeneration	<ul style="list-style-type: none"> - Description of administrative process (authorization needed? How to apply (standard form available, etc.)?) - Estimation of time, effort and complexity 	<ul style="list-style-type: none"> - Description of administrative process (exemption upon purchase or refund procedure, how to apply (standard form available, etc.)?) - Estimation of time, effort and complexity 	<ul style="list-style-type: none"> - Description of administrative process (Records to be kept, reports to be filed, etc.) - Estimation of time, effort and complexity
Production of electricity			
Chemical reduction			
Air navigation			
Navigation on Community waters			
Agricultural, horticultural and piscicultural works			

It would be greatly appreciated if you could provide us with your answers as soon as possible to allow us to finalize our study and present the final report to the European Commission.

We thank you in advance for your efforts.

➤ Questions in the guidelines for the interviews with economic operators

Where your company would operate in different Member States, did you witness differences in the administrative burden to be complied with in the context of energy taxation? Please explain. Which elements were considered burdensome / problematic?

[Depending on the sector in which the economic operator was operating, the potentially applicable reductions / exemptions / exclusion from taxation were identified, and questions were tailored to the specific situation.] *Does your company benefit from that reduction/ exemption / exclusion from the chargeable event?*

What is the procedure to be granted that reduction / exemption / exclusion from the chargeable event? Please explain.

Has your company ever experienced problems with the application of that exemption?

Do you have any remaining remark or concern regarding the administrative burden linked with the application of (some provisions of) the legislation on excise taxation of energy products?

➤ Questions in the guidelines for the interviews with Member States' authorities

The interview guidelines for tax administrations were structured following an article-by-article approach. The questions concerning the administrative burden were mainly focussing on the provisions foreseeing for reduction or exemption possibilities. The guidelines contained general questions on the administrative burden deriving from defined articles, e.g.:

How is "fiscal control" organized in your country? In your opinion, does this provision lead to administrative burden that could not be justified?

Next thereto, more detailed questions were raised, e.g.:

Referring to Article 16(5) ETD, in your Member State, is it possible for an administrative authority to grant an exemption / reduction for taxation in accordance with Article 16(1) ETD to an economic operator for more than 1 year? If yes, who needs to obtain the authorization under a multiannual programme? What if the biofuel manufacturer is established outside the EU? What are the conditions for its application (e.g., is there a minimum percentage necessary of the products mentioned)?

Art. 17(1) allows Member States to apply tax reductions on the consumption of energy products by energy-intensive businesses, among other used for heating purposes. Does your Member State foresee in such reduction? If yes, how does your

Member State determine and assure that on average for each business, the EU minimum level of taxation is respected? Do you periodically assess the energy intensive nature of the business? If yes, how do you determine the existence of "the achievement of environmental protection objectives" or "improvements in energy efficiency"? In your Member State, how are "tradable permit schemes" defined/adopted? How do you assure that the measures businesses need to adhere to for application of the reduced rate (environmental permits, ...) are broadly equivalent to what would have been achieved if the standard Community excise duty rates would have been applied?

Referring to Article 21(5) ETD, please briefly describe the mechanism of appointing the responsible person for charging the excise duty on coal (who needs to be the registered company). Please briefly describe the registration procedure for the registered company delivering coal, coke or lignite.

➤ Plenary discussion during the Workshop dedicated to the administrative burden

However it must be noted that despite our best and repeated efforts to collect extensive data on this particular subject, we had to conclude that from both a qualitative and quantitative point of view, limited, and for some aspects no, data was effectively available at the side of the various stakeholders.

Firstly, as with all questionnaires, the findings of the survey of economic operators are based on the answers from a sample of the population of the stakeholders affected, and not on the answers given by the entire population. The design of the evaluation assumed that each stakeholder would present a view of the functioning of the directive from their own individual perspective. This should be seen not as a limitation of the evaluation, but as a characteristic of the analytical method which has allowed the functioning of the directive to be investigated from the viewpoints of all legitimate interests.

While perspectives and viewpoints are presented, the final conclusions are based on the triangulation of data from several sources and from different types of stakeholders, and have been subject to the interpretation and judgement of the authors of this study.

This underlines the general limitation of the survey, insofar as many questions captured the subjective perceptions of economic operators which do business in very specific economic conditions, rather than capturing objective facts.

On the other hand, other factors may be responsible for any errors in the results: for example, respondents may have been unable to answer a question accurately or unwilling to respond honestly. The former was mitigated by including the option "do not know"/"not applicable" or "other" as an option with most questions.

It is also important to consider that those economic operators who were most willing to invest time responding to the survey were those who were generally less satisfied with the provisions of the Directive, thus contributing to a more negative picture than would otherwise be apparent if the entire population had been sampled.

Moreover, in order to reduce the time spent completing the survey, respondents had the option not to give more detailed answers in the sections of the questionnaire which referred to the administrative burden. This means that even if an organisation reported to be suffering from unjustifiable administrative burden, it may have chosen not to give more details on the reasons for their unsatisfaction.

The interviews conducted with economic operators in the context of the administrative burden showed that the overall excise-related requirements (including those stemming from other legal provisions such as Directive 2008/118/EC, were subjectively perceived to be particularly burdensome. However, quantifying the time spent or the efforts needed in this context has not been possible. It should be noted that the economic operators interviewed as part of this study were ones which already accomplished all the licensing formalities and would thus no longer be able to quantify the onerous or burdensome entry criteria.

The desk research performed did not allow the authors of this study to map the administrative requirements as implemented by the different Member States for benefitting from excise exemptions or reductions. It appears that there is no alternative study available that analyses and compares the reduction/exemption regimes as applied by the Member States in implementing the Energy Taxation Directive.

The Deloitte network in the different Member States where the fieldwork had been conducted has been involved, in an attempt to obtain quantitative data on this particular topic. The feedback received confirmed the general concern gathered during the sites visits and the interviews, but did not permit to fuel the analysis with more objectivable data.

On the other hand, it was established that where anecdotal input on administrative burdens was provided, this often related to burdens stemming from national implementation and, even more so, stemming from the Directive 2008/118/EC's provisions.

Therefore, this section of the report limits itself to providing the insights which could be gained based on the scarce information collected, without having the ambition to provide a fully detailed analysis of the administrative burden subject.

4.5.2 ETD and administrative provisions

Our analysis showed that the different processes and obligations – and their possible impacts on administrative burdens for Member States and economic operators – related to the production and trade in energy products and electricity, are principally deriving from the

Directive 2008/118/EC (the Horizontal Excise Directive) and from the national legislation implementing it.

When put in perspective with the Horizontal Directive, and considering the limited number of statements stakeholders were able to share in this regard, the administrative burden imposed directly by the ETD can be assessed as rather limited. It is indeed true that in general the ETD does not define specific mechanisms or procedures for the application of its provisions. These depend on Member States' laws and administrative procedures. Article 6 of the ETD, for example, foresees different possibilities for the Member States to give effect to the exemptions / reductions laid down in the directive (directly, by means of a differentiated rate, or by refunding all or part of the amount of taxation). Moreover it does not allocate a further administrative approach to any of those exemptions or reductions. Therefore, in general administrative burden on Member States and/or businesses in view of the ETD rather relates to the ETD provisions' national application, and varies greatly among Member States.

In the table below, an overview of the key processes and obligations related to the production and trade in energy products and electricity is provided. In order to formulate an adequate reply to the administrative burden research question, each of these processes and obligations are analysed separately in terms of the administrative burden they generate for Member States and economic operators, each time with indication of the actual legislative source of the burden.

The analysis in the sections below has been enriched with Member State-specific practical examples and quantitative information to the extent possible, taking into consideration the limited data and information available.

Table 9 - Administrative burden in the production and trade of energy products and electricity

ADMINISTRATIVE BURDEN	For economic operators	For Member States	Source
Declaration and payment of excises			
Excise declaration	* Register for the use of the electronic declaration system * Prepare data for the declaration * File the declaration (electronically)	* Set up and maintain IT system * Control the correctness of declarations * Ensure all consumptions have been duly declared --> perform physical and document-based audits	National legislation Horizontal Directive Commission Regulation EMCS
Payment of duties	* Establish a payment method * Ensure continuous operability (E.g. provide for sufficient amount on bank account)	* Set up payment system * Control payment is made	National legislation
Respect of minimum rates	/	* Ensure compliance with EU minimum levels of taxation	Energy Taxation Directive (art. 4) National legislation
Excise classification	* Ensure that categorization of products is up to date * Inform on the categorization of taxable products not explicitly listed in the legislation	* Update the IT system with Combined Nomenclature changes	Energy Taxation Directive (art. 2) National legislation
Exemptions and reductions			
Provide direct tax exemption/reduction (in practice, based on licensing schemes)	* Prepare and submit request for licenses/authorizations	* Assess and issue licenses/authorizations	Energy Taxation Directive (Art. 6) National legislation
Request for a refund	* Prepare and submit request for refund	* Assess and grant refunds	Energy Taxation Directive (Art. 6) National legislation
Record keeping and reporting requirements (fiscal control)	* Ensure compliant record keeping	* Perform physical and document-based audits	Energy Taxation Directive (Art. 5, 14-18, 21) National legislation
State aid	/	* Verify that State aid rules are not breached	State aid rules (EU and national)
Movement			
<i>Under suspension - Operate EMCS</i>	* Register to the EMCS system	* Set up and maintain EMCS system	Horizontal Directive Commission Regulation EMCS
<i>Under suspension - Placing and release from goods in EMCS</i>	* Prepare the data and use EMCS to place and subsequently release the movement under suspension of goods	* Ensure the movement under suspension of goods is compliant --> perform physical and document-based audits	Horizontal Directive Commission Regulation EMCS National legislation
<i>Under suspension and duty-paid - Guarantee</i>	* Foresee a guarantee	* Calculate the amount of guarantee	Horizontal Directive National legislation
<i>Duty-paid - Request for a refund</i>	* Prepare and submit request for refund in case of MS movements of duty-paid goods	* Assess and grant refunds	Horizontal Directive National legislation
Storage and production			
Request for a license	* Prepare and submit request for licenses/authorizations	* Assess and issue licenses/authorizations	Horizontal Directive National legislation
Guarantee	* Foresee a guarantee	* Calculate the amount of guarantee * Ensure guarantee is in place	Horizontal Directive National legislation
Record keeping and reporting requirements	* Ensure compliant record keeping	* Perform physical and document-based audits	Horizontal Directive National legislation
Member States derogations			
Monitor MS derogations	/	* Introduce request for further exemptions or reductions for specific policy considerations	Energy Taxation Directive (art. 19) National legislation
Statistical reporting			
Report to the EU Commission	/	* Inform the EU Commission about the levels of taxation applied and about the exemptions, reductions, differentiations and tax refunds adopted	Energy Taxation Directive (art. 25 26) National legislation

4.5.3 Declaration and payment of excises

Introduction

The collection of excise duties relies on a declaration from the taxpayer indicating which volumes have been put into consumption within a well-defined period of time. Based on the declaration for consumption, authorities are able to calculate the tax amount, and request its payment.

Article 1 ETD dictates that Member States shall impose taxation on energy products and electricity in accordance with the Directive, which sets minimum levels of taxation in Articles 7-10 ETD. Next thereto, the Horizontal Directive defines the time and place of the chargeability of excise duty, as well as the person liable to pay the excise. However, both texts remain silent on how excises should be declared for consumption and paid. This responsibility is left to the discretion of Member States.

The national rules thus set up their own framework for the declaration for consumption and payment of the excises. This process will be paired with formalities, both at the side of the economic operators – for the preparation and the filing of the declaration, and for the (pre-)financing of the operations –, and of the Member States authorities, who need to process and control that all the obligations have been duly performed. In the Member States visited, electronic systems have replaced the old-fashioned paper-based approach. Setting up, utilizing, and maintaining the IT systems again represent an administrative cost.

Administrative burden

In general, the **tax administrations interviewed do not consider the administrative burden** relating to the declaration and payment of excises deriving from the ETD provisions, and in general from administrating taxation of energy, **as excessive**, especially when compared with the fiscal revenues they receive from excises on energy. Indeed, revenues from excises on energy represent a large share of tax revenues for Member States. Therefore, in their perspective, any procedure they implement for collecting, monitoring and controlling taxation and payment could be considered to be justified in the light of avoiding tax fraud and preserving fiscal revenues.

Notwithstanding, the practical implementation of the ETD provisions listed above encounters some difficulties from the side of Member States and the economic operators, mostly related to uncertainties in the understanding and interpretation of the ETD articles. Because the excise taxation of energy products and electricity is based on a system of declaration, the economic operators themselves have to declare the applicable tax rate. In particular, this applicable tax rate will be the result of the identification of the equivalent fuel (if no specific rate is determined in the ETD). Due to the lack of clarity which seems to exist in practice with regard to the implementation of Article 2(3), Member States adopt different definitions of what can be considered an ‘equivalent product’. Economic operators indicate to face a difficult task (especially when operating cross-border) and are confronted

with legal uncertainty. Member States use control measures to verify the correct taxation (such as audits), possibly leading to controversies and therefore costs for both tax authorities and economic operators, as economic operators have the incentive to identify the ‘equivalent product’ subject to the lowest taxation⁶².

Member States provide guidelines to the taxpayers in order to be able, as an economic operator, to determine the equivalent fuel. Different tools are used, e.g.:

- guidance in the preparatory works to the implementing acts (e.g. Sweden);
- general guidance through a publication of the tax authorities (e.g. Belgium – general publication on excises applying to energy products and electricity);
- specific guidance on the tax administration’s website (e.g. Sweden – dimethyl ether is considered as an equivalent for diesel);
- internal guidance within the tax administration (e.g. France – internal note on the *Kronos Titan* case law);
- *ad hoc* guidance provided upon request from a taxpayer or sector federation.

In Belgium however, the guidance publication merely repeats the rule that any product not subject to an excise tariff but used as motor or heating fuel, should be subjected to the excise rate of the equivalent fuel or energy product.

In Germany the determination is based on the characteristics and the (most likely linked) intended use. The intended use may be more legally binding. However, the characteristics are more clearly assigned while the intended use is difficult to define. Eventually, the action (how it is used) is decisive, therefore both the characteristics and the intended use are included in the determination. The intention has to be inquired. Since the determination is a decisive action, it is a difficult issue because the intention can possibly change. The example of petrol coke used as motor fuel was brought up in Germany and the taxation was based on the classification of the product by the final customer.

With the EU Membership of Sweden in 1995, a booklet was issued on energy taxation with the necessary guidance.

E.g. a vehicle with a petrol engine: fuels that can be used in such vehicle should be taxed according to petrol.

It is up to the tax authorities to decide whether the classification as equivalent product by the economic operator is performed correctly. The taxpayer will declare the amount to be paid, afterwards the authorities will perform checks. The taxpayers could also request for binding information in this regard.

For some fuels, general guidance is provided on the website of the tax authorities.

E.g. DME (dimethyl ether), an alternative fuel, is considered as an equivalent for diesel.

⁶² For more details, see detailed analysis of Article 2(3) in Annex B

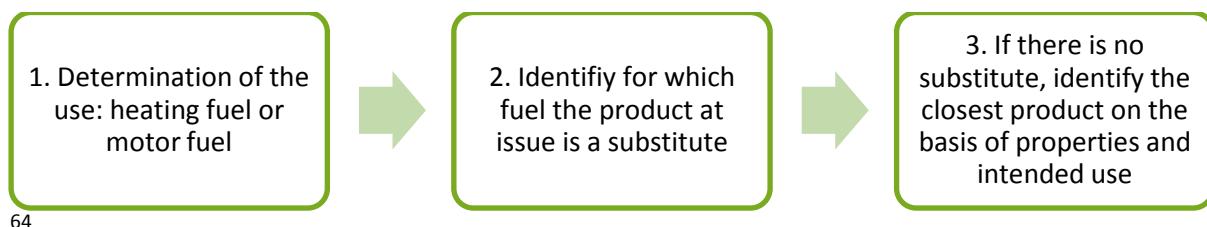
Other examples:

- petrol used as heating fuel → same rate as petrol used as motor fuel
- toluene used as heating fuel → LPG used as heating fuel
- biogas used as motor fuel → natural gas (not taxed)
- ethanol/methanol used as motor fuel → petrol

In Denmark, the method to apply equivalent tax rates proves to be an issue mostly for biofuels since taxation is carried out on the basis of energy content. Since most of the biofuels are used in diesel motors, the taxation rates are equivalent to the rate for diesel, but compared in terms of energy content of the fuels. Denmark has calculated the rate per litre and translated this into the amount of GJ per litre. As a consequence, taxation which is expressed in rate per GJ could also be translated back to rate per litre. Market operators who are in the capacity to measure the energy content will do so for taxation purposes, as they do not want to pay for the dirt and pollution in the fuel. Through samples, the energy content can be determined. Tax corrections can be carried out if the sample analysis shows that the energy content is lower than initially paid for.

Every fuel used as motor fuel is taxed at the high rate, unless an explicit derogation is provided for in Danish legislation. For farming purposes, such derogation is foreseen.

In France, the notion of equivalence is included in Article 265; §3 of the French Customs Code and in two *Bulletins Officiels Douanes* which apply the Kronos case-law⁶³. In addition, the French customs authorities distributed an internal note in 2015 to remind regional authorities about the application of this case law. Economic operators were not notified.



⁶⁴

French examples:

- *petrol used as heating fuel* → Article 265 of the Customs Code foresees the same taxation rate for petrol whatever its use (motor fuel or heating fuel), the principle of equivalence should not be applied in such case;
- *toluene used as heating fuel* → taxation follows the principle of equivalence⁶⁵;
- *biogas used as motor fuel* → taxation follows the principle of equivalence⁶⁶;

⁶³ See explanation under 4.2.1

⁶⁴ Joined Cases C-43/13 and C-44/13, Kronos Titan.

⁶⁵ Codes des douanes, Titre X, Chapitre Ier, Article 265, Tableau C. See:

https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=154BC25D069227E1EA55A88E7D5884F2.tpdila22v_2?idArticle=LEGIARTI000033816297&cidTexte=LEGITEXT000006071570&dateTexte=20170420 (Accessed: [12/01/2018]).

⁶⁶ Codes des douanes, Titre X, Chapitre Ier, Article 265, Tableau B. See:

- *ethanol and methanol used as motor fuel* → in accordance with Article 16 of the Directive, these products are submitted to the domestic tax on energy products consumption (TICPE) only when they are already incorporated to petrol, not when they are pure.

Economic operators in France need to determine themselves the taxation applied to their products with regard to taxable products listed in French regulations.

For Member States, another practical implementation deriving from the ETD and related to the perception of the tax, is that they must respect the minimum levels of taxation defined in the Energy Taxation Directive. Moreover, in line with Article 12 ETD, Member States are allowed to express their national levels of taxation in units other than those specified in the Directive, provided that the corresponding levels of taxation, following conversion into those units, are not below the minimum levels specified in the Directive.

Ensuring compliance with these minimum levels of taxation could be seen as an administrative burden. When asked, however, the Member States administrations ascertained having not had unjustifiable administrative burden to comply with these provisions:

- For the majority of the Member States, the initial calculations to ensure that the levels of taxation effectively applied respect the minimum levels specified in the Directive were made several years ago, with no noteworthy hurdles to overcome at the time;
- In many cases, the tax rates applied is higher than the minimum levels of taxation, a.o. because the EU minimum levels of taxation remained unchanged, while the excises rate applied generally increased in the Member States;
- It is not time-consuming to perform the calculations or the periodic verifications, and adapting a tax-rate in the IT applications is not too burdensome.

The administrative burden related to the declaration and payment of excise is not limited to the legal uncertainty, however. The recent energy tax reform in Germany shows that the burdens identified by the industry are stemming mainly from the national legislation – and e.g. the practical application of the requirement to file a tax return.

E.g. one of the biggest industry federations called for the abolishment of the monthly tax declaration for uses of petroleum coke (steel industry) and hydrocarbon waste (chemical industry) when these uses are tax exempt (and advocated the abolishment or annual reporting requirement instead).

E.g. a German federation supporting cogeneration efforts demanded not to extend the term of ‘electricity provider’ beyond what is necessary because the required license implies the obligation to file tax returns.

Special rules under Article 21(5) ETD for electricity, natural gas, coal, coke and lignite

Coal, coke and lignite

For coal, coke and lignite, the ETD envisages special rules on the chargeability of the excise duty, thus providing for a duty-suspension arrangement outside the EMCS (the latter employs tax warehousing with authorised economic operators). In this case, the ETD explicitly requires that the companies delivering the solid fuels and thus collecting the excise duty on behalf of the Member States must be registered. However the ETD also allows the registration to be circumvented by giving Member States the possibility to entrust the tax collection to a producer, trader, importer or a fiscal representative in place of the registered company. Furthermore, Member States are allowed to levy and collect excise duties according to national procedures.

A recent study suggest that the levels of the intra-EU movement of coal are low⁶⁷. Based on this finding the perceived risk of fraud relating to coal appeared to be relatively low, probably because of its high tonnage and limited movement within the EU.

The study identified a limited number of control measures. In the majority of Member States, it seemed that the excise duty became chargeable at the time the coal was supplied to the end-user or when the coal was used or consumed by coal traders or producers, and the tax was collected via regular declarations.

Out of 27, 15 Member States agreed or strongly agreed that the special regime for coal, electricity and natural gas met their needs in terms of minimising cost and reducing the risk of fraud, suggesting that the perception of the administrative burden created by the special arrangement was not considered as significant. However, it should be taken into consideration that the study focused on companies that had already been successful in registering and the lack of a broader investigation presents certain limitations to the interpretation of the information

A minority of Member States disagreed, explaining that many Member States apply various exceptions and different specific control procedures which can create challenges for the purposes of risk analysis and control; one Member State suggested including these products in the EMCS.

The arguments in favour of keeping the special scheme for coal, coke, lignite, electricity and natural gas were that the scheme meets the needs of the administration; the actual administration costs of monitoring the movement of these products would cost more than

⁶⁷ Ramboll Management Consulting, *Evaluation of current arrangements for the holding and moving of excise goods under excise duty suspension*, Publications Office of the European Union, Luxembourg, 2015.

the potential tax revenue, and that there was no specific risk of fraud perceived in connection with these products.

Natural gas and electricity

Natural gas is supplied in gaseous and in liquefied form (LNG). In either of these cases it is not subject to the control and movement provisions of Directive 2008/118/EC. Electricity is also not covered by the control and movement provisions, although this possibility is explicitly mentioned in Article 20(2) of the ETD.

Natural gas in gaseous state is normally transported by pipelines and the study indicates that the risk of losses is limited, as there are meters at various points to measure flows etc. However, LNG can be transported in lorries, ships, etc., increasing the potential risks for collecting the excise duty.

With movements of natural gas through pipelines, the entire distribution network is essentially treated like a tax warehouse, as Member States should normally levy tax at the time of supply and in accordance with national procedures. This is because natural gas is normally not stored in a 'classic' tax warehouse. In the classic system, the products must be kept in authorised warehouses, and pipelines are viewed as a means of transportation.

At last, a particular situation exists for economic operators active in the **cross-EU distribution of natural gas and electricity**. Based on Article 21(5) of the ETD, whenever the distributor is not established in the Member State of consumption the payment of energy taxes, and fulfilment of corresponding formalities, need to be taken care of by a company registered in the member State of delivery. Such registration can take various forms, inflicting various degrees of administrative burden. For instance in Belgium this provision requires the foreign economic operator (distributor) to either establish a legal entity in Belgium, or to appoint a local legal entity as its representative for excise purposes. It is then up to the local legal entity or representative to register (on behalf of the foreign entity) and to fulfil all formalities and payments. The procedure, requiring distributors to find a local partner / representative or establish a local legal entity themselves is considered a burdensome and costly hurdle for these distributors to engage in market activities in other Member States. However it was not possible to quantify the costs as such information was not provided by the participants in the study.

Due to its characteristics, electricity is difficult to store and it is normally transported via regulated grids. No participant in the study expressed any particular concerns about the special rules for the levying of the excise duty. This may be because the electricity producers and distributors were not specifically targeted for this study, but may also have other reasons. For one, distributors and redistributors (retail traders) of electricity typically have an office in the Member States where they operate. Furthermore excise duty on electricity

is normally charged by the person issuing the invoice to the consumer⁶⁸ and it is typically collected with other levies and taxes (e.g. VAT), which already require a particular setup.

These reasons suggest that there are no major issues related to the administrative burden stemming from the ETD for this particular product.

Nevertheless, consultation within the Deloitte network showed that electricity distributors are sometimes struggling with their particular excise-related obligations. Examples of areas causing administrative burden are the excise categorization of customers (and the license management related thereto), recovery of excise duties in case of non-payment by customers, filing of excise declarations, etc.

Further investigation on these perceived burdens might be required, especially also in case technologies related to the storage and transport of electricity are further developed and deployed. Although it must be noted that the latter was not raised as a potential issue by any of the participants in the study.

4.5.4 Excise reductions and exemptions

Introduction

The Energy Taxation Directive, in its Articles 14-17, foresees situations in which energy products and electricity must or can benefit from a duty reduction or exemption. According to Article 6 ETD, and in order to give effect to the exemptions or reductions in the level of taxation, Member States have the option to directly apply the reduced or zero-rate when the goods at stake are declared for consumption, provide for differentiated rates, or to proceed with a refund-mechanism whereby the excise tax amounts initially paid can, partially or totally, be paid back to the taxpayer. Only providing for a general framework, Article 6 nor any other ETD provision prescribes an approach to give effect to a specific exemption or reduction.

From the interviews with Member States authorities and economic operators, it appears that different options are effectively applied, depending from one Member State to another. The ETD wording ‘under fiscal control’ indicates a close and effective monitoring of the authorities, applying one of the options foreseen in Article 6.

The implementation of the specific requirements for benefitting from the reductions or the exemptions remains a national matter. For economic operators, these requirements typically include the granting of a license, whereby it is requested to furnish to the authorities detailed information about the intended activities and a prove that the conditions for benefitting from the favourable tax treatment are met; a pre-authorisation

⁶⁸ See Council document 13253/03 ADD I of 7 October 2003.

visit by the authorities; and detailed bookkeeping once an authorisation is received. On their side, authorities need to manage the issuance of licenses as well as the monitoring of their non-abusive use.

Administrative burden

Overall, Member States authorities are of the opinion that the procedures that they each have put in place for granting the exemption or reductions in the level of taxation are reasonable in terms of administrative burden. As pointed out above, in their perspective, any procedure they implement for authorising, monitoring and controlling taxation and exemptions is justified in the light of avoiding tax fraud and guaranteeing fiscal revenues. Only two Member States indicated having had problems in these processes, specifically in ambiguous situations, linked with the development of new technologies.

However, problems seem to arise upstream, when it comes to defining the exact situations that should be subjected to these procedures. In the case of mandatory exemptions laid down at EU level in Article 14(1) ETD, half of the respondent Member States (9 out of 18) indicate that they have faced administrative difficulties in defining the scope for the granting of the exemptions of Article 14(1) ETD. These difficulties relate not only to the applicability of Article 14(1)(a) ETD – and notably in the context of combined heat and power generation – but also in the scope of the exemptions in Article 14(1)(b) and 14(1)(c) ETD. The administrative burden thus derives from the lack of clarity and the diverging interpretation of certain provisions. Reference is made to the analysis developed under the first research question of this study for more details.

Next thereto, they indicated that **controls** can be burdensome for tax authorities. As mentioned previously, revenues from taxation represent a notable share of tax revenues, therefore Member States mobilise resources to verify that economic operators have not benefitted unduly from more favourable regimes.

Fiscal controls are usually performed as audits (often by customs authorities) and large companies tend to be audited frequently. According to the Member States interviewed, the identification of economic operators subject to audit depends on risk assessment profiles.

The methods used to verify the correct application of such provisions (and therefore of the correct levels of taxation) vary largely among Member States and sectors.

For instance, the application of total or partial exemptions or reductions of excise taxation on energy products **under Article 15(1)** provides a good example of how national procedures can vary.

- In **Denmark**, the fiscal control, which is required in order to apply the exemptions/reductions under Article 15 ETD, is carried out through a return, to be filed by the taxpayer who wants to benefit from an exemption / reduction. In certain situations, claiming the reduction / exemption is possible through the VAT return (implying a necessary VAT registration). For other situations, the energy taxation is dealt with

outside the VAT system. Regardless the VAT system, there is always a necessity to register or to apply on beforehand, prior to claiming the beneficial regime. The tax authorities always have access to the knowledge about the consumption (also allowing for controls in practice).

- The control in **France** is managed by customs authorities. It takes place a priori during the delivery of certificates and authorizations and a posteriori during check and reimbursement procedures. Every year, internal administrative guidelines define the declaration data checking policy based on a national and regional risk analysis. The effectiveness of this policy is also measured at term renewal.
- Fiscal control in **Poland** focuses on the monitoring of meeting the conditions for application of exemptions: registration of entities, record keeping requirements etc. Other tools for fiscal control are reviews and audits.
- Fiscal control in **Sweden** is organized through a warehouse keeper authorization, authorized trader system, reimbursement system to non-registered persons. Audits are carried out in order to make sure the legal requirements are met.

In addition, reimbursement procedures (where implemented) can be cumbersome and take several weeks to be processed upon presentation of documents by the economic operators. Indeed, reimbursements are expenses for tax authorities, therefore the reimbursement process is subject to detailed internal controls of eligibility before being finalised. Economic operators, in this regard, face the cashflow burden and the burden of presenting the necessary evidence to the authorities that they can benefit from the reduction or exemption.

An initial screening of the sources highlighted **large variations** in administrative burden for businesses not only across Member States, but also across the six economic sectors included in the study. This is consistent with the main finding, i.e. that the ETD is not the main cause of the administrative burden, as Member States are given freedom to set-up the administrative procedures for granting taxation exemptions and reductions. Specific sectors may call for targeted administrative burdens imposed on or by the Member States (e.g. different sectors may have the possibility to rely on different exemptions or reductions, causing different administrative burdens).

From the side of the economic operators, respondents were of different opinions on the burdensome character of the technical and legal requirements related to authorisations. The interviews conducted with economic operators in the context of the case studies showed a similar outcome. During the case studies, it proved to be difficult to collect data on the time spent and the number of employees involved in satisfying the authorisation requirements, since many operators had been established in the market for a long time and thus had no recollection of the authorisation process.

The majority of the problems related to the application of exemptions and reduction of taxation are linked to **uncertainties** in definitions, wording and interpretations of the ETD provisions, which have been analysed under research questions 1 and 2. It is resource-consuming to determine if, and under which exact conditions, the economic operator would be entitled to benefit from the reduction or the exemption. Several economic operators indicated having had to outsource the entire processes for requesting application of the beneficial schemes to specialized external consultants.

The impact of the legal uncertainty (in the interpretation and therefore in the application in Member States) arose for a number of the provisions of the ETD. For instance, the application of exemptions or reduced rates under Article 14 are often decided by Member States on a case-by-case, with no guarantee of a constant or uniform interpretation of the provisions. Such uncertainty represents a cost for economic operators, as they have to verify each time the possibility to apply the provision, with no guarantee of a uniform application across Member States or sectors. Any self-declared application of the exemption could, in the case of legal uncertainty, result in a rectification afterwards by the authorities and eventually to legal proceedings – adding to the administrative burden for both the economic operator and the Member State in question.

Also the application of tax reductions in favour of ‘energy-intensive’ businesses as per Article 17 has shown to be particularly complex, as discrepancies in the definition of ‘energy-intensive’ business exist. Businesses consulted during the case studies referred to uncertainties in the methodology for calculating the percentages of energy products and electricity with respect to the production value or national energy tax payable amount. In practice, questions arise concerning the data that should be used for such calculation. For instance, should only the cost of electricity be taken into account, or should the distribution fees be included? Any conservative application of a reduction / exemption could result in competitive disadvantages for the economic operator.

Furthermore, the application of partial or total exemptions under Article 15 of the ETD is characterised by differences among Member States in their understanding and interpretation of ‘pilot project’, so that often decisions on whether to grant or not such benefit are taken on a case-by-case basis, with increased uncertainty for economic operators⁶⁹.

Businesses also indicate issues of a **practical nature** causing administrative burden. Business federations in Germany indicated that businesses consider the administrative burden linked to the applications for refunds disproportionate if e.g. there is a requirement to file the applications for individual plants of the same legal entity and the refunds concern only small amounts. Others even disengage in the entire refund process – in some cases, a German electricity and gas association claimed, companies see it more beneficial to waive their right for a refund rather than to invest resources in claiming it (reporting requirements – like

⁶⁹ For more details, see detailed analysis of Article 15 in Annex B.

bookkeeping – and the considerable burden of proof were claimed as factors in that decision-making process). The national legislation did not foresee, in such case, in a simplified procedure for small amounts. This administrative burden solely derives from the national legislation, however, implementing EU legislation.

An example of practical complexity is also reflected in the refund possibility for gas oil under Article 7(2) ETD. This is potentially claimed by businesses located in a different Member State and, as the process is often not administratively optimized, requires them to comply with registration and reporting requirements in the local language. The reliance on service providers or consultants is, especially for smaller businesses, in that case vital to ensure the refund. A recent initiative of the Belgian government shows that the authorities are looking for the optimization of the often outdated procedures – by making use of automatic data exchange, digitization and pre-authorizations – both in the interest of the authorities and the businesses⁷⁰. Despite the fact that there is an excess administrative burden in the current process, there is also the existence of a minimum administrative burden stemming from the mere fact that an economic operator wants to benefit from a certain reduction, however (e.g. the fact that there is a request to be filed or a reporting obligation).

In many of the Member States analysed, **taxation exemptions and reductions are granted** to economic operators upon registration with the national tax authorities and subsequent authorisation to apply the more favourable regime. Overall, applying for such registration is not perceived as particularly burdensome by the businesses interviewed, even if the duration of such authorisations changes among Member States. For instance, in France the authorisation is valid for five years, while in Sweden businesses only have to apply once (additional periodic procedures are also required).

A large electricity group interviewed in Sweden has declared a limited administrative burden due to national legislation. All the companies of the group are registered, as transactions between registered companies do not trigger any taxable event (hence, no energy tax due), similar to a warehouse system.

The companies of the group file yearly declaration, as well as 10 to 15 monthly returns, and 5 to 10 yearly returns.

The group has a shared service centre that is responsible for all compliance (except for some municipal power companies) and which deals among other elements with the returns. Approximately 2 FTEs are employed for the returns regarding energy taxation only (1 FTE only for the energy tax compliance regarding the group's customers, 1 FTE is only filing declarations / reports / bookkeeping / payment regarding energy taxation). 1 additional FTE is taking care of legal issues regarding energy taxation.

There are no specific IT systems dedicated to the energy tax compliance as such. Most of the compliance (e.g., regarding the return to be filed) is linked to other systems, such as the very complicated fuel system which delivers tax reports as well. Similarly, no specific advisory costs are

⁷⁰ The statement on the Belgian legislative pre-draft in this regard explicitly refers to reducing the administrative burden.

accounted (consultants can be involved occasionally).

Most compliance costs follow from the ever changing laws: following up on the applicable regime (possibilities and obligations) is highly complex and difficult.

The **registration (and application for an exemption / reduction) with national tax authorities** can be of different types, and complemented by a set of very different requirements. Among the Member States analysed for this study, it was not possible to identify a guiding principle applied constantly across Member States or sectors of economic activities. On the contrary, large variations have been identified.

For instance, in Denmark, application for exemption or reduction under Article 15 is carried out through a periodic return (a prior registration or application is required), which can either be a VAT return (implying thus a necessary VAT registration) or outside of the VAT system, while in France only a preliminary authorisation is required (ex-post checks are carried out)⁷¹. In Belgium, the upfront registration requirement is applied very strictly, in the sense that no refund is granted to economic operators being entitled to an exemption / reduced rate, if for the period concerned the operator did not possess of the required license from the authorities, even though he can demonstrate that all material conditions for the application of the exemption / reduced rate were fulfilled.

Moreover, differences occur between economic operators active in different sectors too. For some, there is no registration obligation to register in order to benefit from a reduced rate or exemption (f.i. in the aviation and maritime sector, where the activity could follow from the company registration as such), whereas for others an upfront registration obligation does exist.

Analysis of the local situation in Poland with regard to the administrative process for economic operators to request authorizations, exemptions/recovery of excise duties and other obligations resulted in the below overview for each of the selected sectors in this study:

⁷¹ For more details, see detailed analysis of Article 15 in Annex B.

	Requesting authorization	Recovering duties	Other (E.g. maintaining stock records, information obligations, etc.)
Cogeneration	No excise duty authorization is required in order to produce heat and power in cogeneration. However, the licence may be required in this respect based on the energy law regulations.	Electricity, gas, coal, heating oil and energy products under CN 2901 10 00 used to produce heat and power in cogeneration may be exempt from excise duty. The application of the exemption may require meeting additional formal conditions.	Formal conditions for applying the exemptions are different for different products exempted and include etc.: <ul style="list-style-type: none"> • Attaching to the supplied products delivery documents; • Setting excise duty guarantee, • Indicating the legal basis for exemption in the contract for the supply of the exempted product. <p>Additionally, maintaining special stock records may be required.</p>
Production of electricity	No excise duty authorization is required in order to produce electricity. However, the licence may be required in this respect based on the energy law regulations.	Electricity, gas and coal used to produce electricity may be exempt from excise duty. The application of exemption may require meeting additional formal conditions.	Formal conditions for applying the exemptions are different for different products exempted and include etc.: <ul style="list-style-type: none"> • Attaching to the supplied products delivery documents, • Indicating the legal basis for exemption in the contract for the supply of the exempted product. <p>Additionally, maintaining special stock records may be required.</p>
Chemical reduction	N/A	Electricity, gas, coal and energy products under CN 2901 10 00 used in the process of chemical reduction may be exempt from excise duty. Application of exemption requires meeting additional formal conditions.	Formal conditions for applying the exemptions are different for different products exempted and include etc.: <ul style="list-style-type: none"> • Attaching to the supplied products delivery documents; • Setting excise duty guarantee, • Indicating the legal basis for exemption in the contract for the supply of the exempted product, • Submitting special statements to the authorities on the amount of the product used with exemption. <p>In case of the exemption of the electricity in the process of chemical reduction, the entity applying the exemption needs to be register as the excise duty taxpayer and maintain excise duty compliance (including submitting excise duty returns on the monthly basis and keeping excise duty register).</p>

Similarly, the **application of tax reductions as per Article 17** is perceived as particularly complex by some economic operators which are not energy-intensive, and which entered into agreements, tradable permit schemes or equivalent arrangements, depending on the complexity of national granting procedures in Member States. The notion itself of ‘agreements, tradable permit schemes or equivalent arrangements leading the achievement of environmental objectives or increased energy efficiency’ differs among Member States⁷².

In France, the existence of ‘the achievement of environmental protection objectives’ or ‘improvements in energy efficiency’ is determined by the Ministry of Environment. In Poland, the achievement of environmental protection objectives or the improvements in energy efficiency is assessed by implementation of environmental systems and certification (EU ETS, EMAS, ISO 14001:2004; ISO 50001:2011). Portugal implements different systems for SMEs and large economic operators: the Ministry of Economy is responsible for requirements applicable to SMEs while large businesses have to comply with the Emission Trading system (ETS)⁷³.

The agricultural sector provides a very clear example of how much ETD implementation procedures depend on national decisions and how this influences the administrative burden for economic operators.

Article 15(3) of the ETD allows Member States to apply an exemption or a reduced taxation level on energy products and electricity used for agricultural, horticultural or piscicultural works and in forestry⁷⁴.

⁷² For more details, see detailed analysis of Article 17 in Annex B.

⁷³ Ibid.

⁷⁴ For more details, see detailed analysis of Article 15(3) in Annex B.

The same general rules are applied differently by Member States. Differences exist in the scope of implementation (i.e. only farming or contractors as well), type of works (e.g. agricultural only, or forestry and others as well), in the implementation mechanism (e.g. via a refund or an exemption), in the requirements for applying the special regime (e.g. prior registration or authorisation, the types of fuels used, etc.).

11 out of 13 surveyed Member States grant a reduced tax rate on energy products and electricity used for agricultural purposes⁷⁵. Two Member States even apply a zero tariff for motor fuel used for agricultural purposes.

In some of the countries included in the analysis (i.e. France and Italy), the rules apply to all works carried out by a contractor. For most of the countries in scope the special rules apply to agricultural work (in Slovakia, Denmark, UK, Finland, Belgium, Italy, France and Germany). An almost equal amount of countries applies its special taxation rules on forestry works (Slovakia, UK, Finland, Belgium, Italy, France and Germany). France and Slovakia also apply the rules to transport and France applies the rules to rural works as well.

The administrative burdens differ very much according to the Member State involved. For instance, there could be only one type of fuel in scope (as in the Netherlands) or up to three (as in Italy), while the reporting obligations can be quite limited (invoices to the customer and refund form to submit to the tax authorities) or very numerous (e.g. declarations and reports to be submitted to tax authorities by both the contractor and the customer and several times per year).

Big operational inequalities also result from the fact whether a Member State allows an immediate exemption under some form or whether the administration works with a pre-financing system and a refund afterwards. In France for example, the refund system in combination with the heavy administrative burden leads to a situation where farmers do not even apply for a rebate anymore.

Another issue that is pointed out with regard to Article 15(3) ETD is that the optional exemption applies to the actual farmers, but often not to contractors even though the Article refers to agricultural activity and not farmer. A number of agricultural activities are exempted for farmers, but when outsourced to these service providers it is not exempt any more. The exemption is made *ratione personae* and not *ratione materiae* on a national level even though the ETD refers to agricultural activity.

This system is disadvantageous for SMEs since they tend to outsource more activities to contractors (because of the high cost of the machines) and therefore neither they nor their contractors get an excise exemption on the fuel, which results in higher prices and competitive disadvantage with respect to larger farmers.

⁷⁵ See CEETTAR survey in the article-by-article analysis for Article 15(3).

Contractors however are necessary. They are not considered to be farmers (non-agricultural businesses) by the Commission, since they are only providing services to farmers and not producing farming products themselves (Article 40 TEU).

But when the farmer wants to buy a machine and he or she is not subsidized, considering today's technology and in particular size and corresponding cost of machinery, the investment is often too heavy for individual farmers to carry.

The processes to apply the reduced tariff or exemption on energy products and electricity for agricultural use by contractors also differ between the different Member States.

- France:
 1. The fuel supplier supplies the contractor and invoices with excise duties included.
 2. The contractor works and invoices his customer (the farmer).
 3. The customer pays the contractor for the service.
 4. The contractor pays the excise duties and subsequently submits a form to the tax administration for the refund of a portion of the excise duties paid to the fuel supplier.

Afterwards the tax administration sends the contractor a refund.

- Spain:
 1. The fuel supplier supplied fuel to the contractor. Only if the contractor buys red diesel and only uses it for agricultural works can he ask for a refund on the excise duties which are included in the invoice issued by the fuel supplier.
 2. First the contractor will invoice the customer for his works and after the customer pays for his services, the contractor can submit a form to the tax administration for the refund of a portion of the reduced excise duties paid to the supplier.
 3. The refund request can be submitted once a year and on the condition that the contractor is inscribed in the national agricultural register.
 4. Afterwards the tax administration sends a refund.
- Germany:
 1. The fuel supplier supplies the contractor.
 2. The contractor provides the service for his customer and sends the invoice, passing on the excise duties to the customer. The contractor will also explicitly mention the fuel cost.
 3. The customer will pay the service and will need to send a refund form to the tax administration at the end of the year if he wishes to be refunded for the payment of excise duties.
- Netherlands:
 1. Fuel supplier supplies the contractor. The contractor subsequently provides the service and sends the invoice to the customer with excise duties included. In

Netherlands no reduction or exemption regime exists for agricultural use, so the customer ends up paying the service with the full amount of excise duties.

- Belgium:
 1. For agricultural purposes a fuel supplier will supply red fuel to the contractor. In order to benefit from a reduced excise rate the contractor needs to apply for an authorization beforehand.
 2. Once the authorization is granted, the contractor can buy red fuel from the supplier at a reduced excise rate on the condition that he provides the authorization to the supplier.
 3. The reduced rate is immediately applied and no refund a posteriori needs to be asked.
 4. Subsequently the contractor will perform his service to the customer and bill him.
- Italy:
 1. The fuel supplier supplies the contractor. Upon supply, the contractor needs to send a forward-looking statement to the regional tax administration.
 2. The regional tax administration will set a max level of users per type of work. If accepted, the administration will keep record of the forward looking statements.
 3. The contractor will provide his agricultural service, bill the customer for it and send a copy of that bill to the administration.
 4. The administration will also keep record of the bills. The customer pays the contractor for his service. In the meanwhile the contractor needs to keep record of the services provided per customer.
 5. At the end of the year the contractor fills in the tax form with evidences of the services provided.
 6. The administration will compare the statements and the invoices upon which it will grant a refund to either contractor or the customer.
- Denmark:
 1. In Denmark, green fuel is used for agricultural work and white fuel for rural work. Depending on the work of the contractor, the supplier will supply one of the two fuels.
 2. The contractor will provide his service with the fuel and bill the client with the cost of the excise duty.
 3. The client pays the services provided.
 4. Once a month the contractor sends a form to the tax administration.
 5. The tax administration sends a refund on the amount of excise paid for the fuel used for agricultural works to the contractor.
- Poland:

Only farmers have access to agricultural fuel for which the tax administration sends a refund after the pre-financing and use by the farmer. Contractors have no access to agricultural fuel and cannot ask for a refund based on their services.

Another administrative burden stems from the particular scope of certain reduced rates and exemptions. Economic operators in the maritime and aviation business face particular difficulties in differentiating exempt from non-exempt consumption of energy products.

Indeed, the excise treatment of the fuels they use would depend on the specific use of their aircraft / vessel. Particular focus exists on the private or commercial use. In practice situations will occur whereby one and the same aircraft / vessel is used for multiple purposes, some of which are taxable, and some of which are not. As these vehicles typically only possess of one single fuel tank / system and do not necessarily refuel after each operation (neither is their tank empty after each operation), it is particularly difficult, and burdensome to differentiate between usages, and give each of them an appropriate excise treatment.

A similar situation would apply to companies consuming fuels like natural gas for cogeneration purposes on the one hand and other purposes on the other hand.

In those cases where these companies have just one connection to the distribution grid, it is particularly burdensome for them, and their distributors, to assign appropriate volumes to each excise category (exempt or not).

The same would go for the split of fuels used in a cogeneration installation in the portion used for electricity production and the portion used for heat generation.

Finally, it can be seen that the complexity of the energy landscape under the ETD, with many different rates depending on the type of product, the type of user and the type of use; and with some users requiring registration and others not; makes it rather burdensome for economic operators in general to determine their excise position and fulfil their filing obligations in a compliant manner. Indeed, a landscape is created whereby a multitude of excise codes are created and whereby economic operators sometimes struggle to determine the appropriate tax regime to be applied / get the necessary registration documents to support the application of a particular tax regime. Moreover the existence of this multitude of taxation regimes requires declarants to submit rather extensive excise returns. An example here is Belgium, where in view of the products covered by the ETD alone over 850 individual excise codes exist. Typical examples of economic operators affected here are the distributors of mineral fuels, natural gas and electricity, who need to determine the appropriate regime and apply these codes when declaring their excise returns.

4.5.5 Storage and production of excise products

Introduction

The Horizontal Excise Directive stipulates that Each Member State determines its rules concerning the production, processing and holding of excise goods, but specifies that the production, processing and holding of excise goods, where the excise duty has not been paid, must take place in a tax warehouse.

The Directive further foresees that the opening and operation of a tax warehouse by an authorised warehousekeeper is subject to authorisation by the competent authorities of the Member State where the tax warehouse is situated. The authorisation is subject to the conditions that the authorities are entitled to lay down for the purposes of preventing any possible evasion or abuse, and the warehousekeeper is required to:

- (a) *provide, if necessary, a guarantee to cover the risk inherent in the production, processing and holding of excise goods;*
- (b) *comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;*
- (c) *keep, for each tax warehouse, accounts of stock and movements of excise goods;*
- (d) *enter into his tax warehouse and enter in his accounts at the end of their movement all excise goods moving under a duty suspension arrangement, except where Article 17(2) applies;*
- (e) *consent to all monitoring and stock checks.*

Administrative burden

For economic operators, the first step towards holding and processing excise duty goods under suspension is to obtain an authorisation. The number of authorised operators per Member State, per type of operator and per sector provides an overall picture of the stakeholders affected by the provisions regarding the holding and movement of excise duty goods under suspension.

The types of authorisation are defined in Directive 2008/118/EC. These definitions are intended to create a framework that is clear and consistent but also ensures that operators have an equal access to the market. Moreover, access to the market is determined by the conditions that need to be fulfilled in order to be granted a guarantee. Where these are difficult to meet, simplifying the requirements is a possible remedy.

A study suggests that the maximum number of registered economic operators within the EU amounted to 104,953 in March 2015⁷⁶. Combining both the qualitative and quantitative data in the context analysis makes it possible to identify some clear tendencies in the three sectors handling products which can be moved under duty suspension. The energy sector is characterised by specialised operators and evidence of greater concentration upstream in the value chain, while downstream the market becomes more fragmented, with a variety of types of involvement in wholesale, retail and distribution activities.

The same study also concluded that although similar types of technical, financial and legal requirements have to be fulfilled by economic operators in order to receive an authorisation as a warehouse keeper, the implementation of these requirements and of simplifications vary across the Member States, as authorisations remain a national matter. Still, across the Member States, respondents were of the opinion that the technical and legal requirements related to authorisation were not particularly burdensome. Of the different requirements, a few stood out in the survey of economic operators as being relatively more burdensome. These were the provision of a site map, the record-keeping requirements, and the requirements relating to systems of management and supervisory control. Neither of these is specific to the sector of energy products.

As for the economic requirements, questionnaires and interviews indicated that economic operators from all Member States considered guarantees to be an important burden and were concerned about them. Again, no specificities related to energy products were outlined in the case of establishing guarantees. The above-mentioned study concluded that guarantees are considered one of the most important burdens connected with authorisation, despite the fact that Member States allow for reductions of the rate of guarantee, while in some instances they even waive this requirement entirely. 25% of economic operators responding to the survey benefited either from a reduction of up to 75% of their guarantee or a waiver. Reductions or waivers are possible in 75% of the Member States. Overall operators considered guarantees to be an impediment to market entry confirming that they are a major burden, based on national rules.

The study also indicated considerable time needed for authorisations, i.e. around one month.

⁷⁶ Ramboll Management Consulting, *Evaluation of current arrangements for the holding and moving of excise goods under excise duty suspension*, Publications Office of the European Union, Luxembourg, 2015.

4.5.6 Movement of excise products

Introduction

Excise goods can be subject to a considerable tax burden which creates an incentive for tax fraud. In order to allow free movement of excise goods across the EU the EMCS, requiring the fulfilment of a number of administrative tasks by its users, was put in place. Whilst creating a certain level of administrative burden, compared to the situation that would exist without the availability of EMCS, the system could also be considered as a trade facilitation measure, which is demonstrated in particular in the case of energy products.

Article 20(1) of the ETD lists the energy products that are subject to the control and movement provisions of the Horizontal Excise Directive, leaving a number of energy products and also electricity outside the EMCS.

The Horizontal Excise Directive distinguishes between the holding and movement of excise goods under suspension of excise duty (Chapters IV) and the movement of excise goods after release for consumption (Chapter V). Each kind of movement has its own procedural rules.

Administrative burden

Movement and holding of excise goods under excise duty suspension

Tax warehouse

According to Article 17 of Directive 2008/118/EC, excise goods can be moved under a duty suspension arrangement within the territory of the Union from a tax warehouse to another tax warehouse, a registered consignee or a place where the excise goods leave the Union territory.

Reference is made to the section above dedicated to the storage and production of excise products for an analysis of the administrative burden linked with the obtention of authorizations and guarantees.

EMCS

Economic operators can use the EMCS to dispatch and/or receive consignments under suspension of excise duty. The EMCS was designed to provide a smooth transition to a paperless (electronic) environment, removing tax obstacles to the movement of excise duty goods across borders by minimising costs both for economic operators and for tax administrations⁷⁷.

⁷⁷ Ibid.

A study⁷⁸ investigated the costs for the setup of the EMCS and the findings suggest considerable differences in the costs, starting from EUR 3.3 million and reaching EUR 68 million depending on the Member State. In any case, it can be concluded that the costs were considerable for the sector of excise goods.

Also the study found that some particularly time-consuming activities were involved when implementing the requirements of Directive 2008/118/EC. Dealing with shortages and irregularities was the most frequent aspect identified as time-consuming by a number of Member States. The time-consuming issues identified included:

- Dealing with shortages, excesses and irregularities;
- Member States having a different understanding of the beginning, duration and completion of a transport process under duty suspension;
- Issues related to information exchange covered by EU Regulation 389/2012 (e.g. following the cancellation of an e-AD, or change of destination);
- Customer service: informing new customers about EMCS and its use;
- Customs and excise coordination.

The issues mentioned above are not specific only to the energy sector and the rules for those are in general not laid down in the ETD.

The study found that for economic operators, setting up the EMCS also gave rise to costs: the IT set-up and running costs of the EMCS were considered as particularly resource-intensive. The respondents also considered the costs of setting up the system to be the main disadvantage of the EMCS. Again, no specific rules related to energy products were identified in relation to these costs in the study, suggesting that these costs are of general nature and incurred for all excise goods subject to the control and movement provisions of Directive 2008/118/EC.

Some of the specific costs reported, included costs for micro-enterprises (between 1-9 employees), the set-up cost frequently appeared to be below EUR 500, although the majority of respondents in all size categories responded that they did not know the total set-up costs.

Only estimates were provided for the annual running costs that ranged widely from EUR 500 to EUR 10,000 for certain small businesses (between 10 and 50 employees).

Costs related to resource-intensive activities were also subject to the study which indicated that correction of errors in the e-AD and communication with the relevant tax or customs authorities were considered to be the most resource-intensive activities. Again these activities are part of the normal operation of trade in excise goods.

⁷⁸ Ibid.

Issues stemming from the interaction between the Horizontal Excise Directive and the ETD

Directive 2008/118/EC specifies in general which goods are subject to the movement and control provisions by means of reference to product-specific directives in the areas of alcohol and alcoholic beverages, manufactured tobacco, and – more importantly in the context of the current study – of energy products and electricity. However, for energy products and electricity the ETD stipulates the products for which the movement and control provisions apply, leaving electricity and a number of energy products outside the scope of application of these provisions. Furthermore, the ETD explicitly puts some energy products principally outside the scope of application of the EU excise duty legislation but it retains the application of the control and movement provisions for these products (e.g. toluene). A study on Directive 2008/118/EC⁷⁹ suggested that in practice, this means potential uncertainty as to which movement procedure should be used (e.g. EMCS, SAAD⁸⁰, no supervision) to oversee the movement of specific energy products. The Member States indicated that the existence of their mutually differing procedures can impede effective monitoring and control. The scope for differing national interpretations and subsequent variations in the treatment of products by Member States for excise purposes can lead to cases which increase the administrative burden for businesses when ensuring compliance.

Different scenarios apply to energy products and in some situations the practice of Member States differs, creating additional costs for businesses and tax authorities. However no specific information about the costs has been collected in this or other studies. The main reason appears to be the difficulty for economic operators to identify and quantify specific cost elements related to their overall trade in / use of energy products. Indeed, when being asked to quantify costs related to administrative burdens, respondents to the study all indicated that though they realize a certain cost exists, it would be impossible for them to single it out, and put a figure on it, as often this cost would be part of more general administrative overhead cost. As such, quantitative data on expenditure related to excise compliance requirements was not readily available to the respondents. Reference is made to the recent study mentioned above⁸¹ where this issue was given some consideration. Without going into the details of the issues related to the control and the intra-EU movement of some energy products, it can be deduced that the study concluded that the lack of clear rules has given rise to additional costs. The variations in the national treatment of particular products were explicitly mentioned as problematic by economic operators.

⁷⁹ Ibid.

⁸⁰ The simplified administrative accompanying document (SAAD) for the intra-EU movement of products subject to excise duty which have been released for consumption in the Member State of dispatch. The details for its content are laid down in Commission Regulation 3649/92/EEC.

⁸¹ Ramboll Management Consulting, *Evaluation of current arrangements for the holding and moving of excise goods under excise duty suspension*, Publications Office of the European Union, Luxembourg, 2015, pp. 94-100.

Export, import and movements within the territory of a single Member State

For the sake of completeness, movements related to export and import are also addressed in the current study. Whilst these topics were not specifically addressed during the interviews or in the surveys, in general the respondents which took part in the study did not raise concern about these movements, nor did they complain about complications related to the movements within the territory of a single Member State.

For import and export, the procedures for excise duty goods under suspension have to be coordinated with customs procedures. A study on the issue⁸² suggests that economic operators and Member States consider principally the export procedures to be more problematic.

Even though no specific issues related to energy products were reported in regard to export procedures, it is worth noting that recent case-law suggests that lack of clarity about the applicability of rules on excise duty and on export procedures do exist that are particular to energy products⁸³. This study has failed to identify any increases in administrative costs or burdens related to the lack of clarity. Nevertheless, this issue should be considered in relation to the question on the clarity of the ETD.

Movement of excise goods released for consumption

In addition to the possibility of transporting excise goods for the purpose of intra-EU trade under suspension of excise duty, the EU legislation provides for rules on transporting the goods after the excise duty has been paid in the Member State of dispatch. These rules are in place to ensure that double taxation is avoided and to confirm the right of the Member State of destination of the goods to tax and to allow the economic operator to be reimbursed the duty already paid in the Member State of dispatch.

Unlike what is the case for other excise goods, the possibility to use the duty suspension arrangement is not available to all energy products. Still, the energy products subject to the largest volumes of intra-EU trade can make use of the duty suspension arrangement, thus making the issue of duty paid movements of limited relevance for the analysis of administrative burdens imposed by the ETD.

Two main types of duty-paid procedures are envisaged in Directive 2008/118/EC: consignments between traders (B2B) and the distance selling of excise goods to a private individual in another Member State (B2C). The evaluation focuses on B2B consignments.

⁸² Ibid.

⁸³ See Case C-590/16, Commission v Greece.

Articles 33 and 34 of the Horizontal Directive set out the requirements for movements between traders (B2B), and stipulate that movements shall be covered by a simplified administrative accompanying document (SAAD).

The excise duty should be paid in the Member State of destination, at the rate imposed by that Member State (MS), and if relevant, the economic operator may then apply for reimbursement of the excise duty already paid upon release for consumption.

It is the Horizontal Excise Directive that requires that the person liable to pay the excise duty must:

- Declare the consignment to the administration in the Member State of destination and guarantee its payment, before the goods are dispatched,;
- Pay the excise duty in accordance with the procedure of the Member State of destination;
- Consent to any checks by the Member State of destination to ensure the goods have been received and the excise duty paid.

Again it is the Horizontal Directive that lays down the rules in case of losses and irregularities occurring during a movement of duty paid goods. A recent study found that even if the Horizontal Excise Directive sets out a number of common provisions regarding the control, holding and movement of goods released for consumption, there is still wide variation in the way Member States (MS) have formalised such provisions, especially in relation to the registration, reporting and payment procedures⁸⁴.

The Directive 2008/118/EC sets out the core requirements which must be fulfilled when moving goods within the EU which have been released for consumption. This includes declaration of the movement, payment of the excise duty and, if necessary, reimbursement. However Member States are entitled to further define the procedural requirements. The above-mentioned study identified the main national rules and procedures for duty-paid movements of excise goods⁸⁵.

While the Horizontal Directive sets out the core requirements for the administration of duty paid movements, it appears that the procedural flexibility permitted by the Horizontal Directive has led to wide variation in procedures. From the comparison of national procedures, is the above-mentioned study concluded that the administrative activities required by administrations can vary widely, particularly concerning procedures for declaring and paying of excise duties.

⁸⁴ Ramboll Management Consulting, *Evaluation of current arrangements for movements of excise goods released for consumption*, Publications Office of the European Union, Luxembourg, 2015.

⁸⁵ Ibid., pp. 22-24.

Evidence from the survey to economic operators also suggests that the variation can be an obstacle to trade between EU Member States. Of those respondents who answered that they had experienced difficulties with the current arrangements, 68% reported that variation in procedures made it difficult to know what to do.

Only three Member States were able to provide some approximate estimates on time spent to handle one average B2B movement. Overall it appeared that time spent on administration of duty paid movements is quite high, particularly related to the processing of paper.

Economic operators also found it difficult to assess how much time was involved in each of the activities necessary for handling a typical consignment. Those operators who were able to provide a time estimate, however, assessed that they generally spend between 30 minutes and one hour per movement, although some operators reported to spend up to eight hours per consignment.

According to economic operators engaged in B2B trade, well over half of the respondents have already chosen not to move their products within the EU due to the current arrangements. The main reasons for this decision is the high administrative burden and associated costs and unclear requirements/legal uncertainty. These survey results were widely supported by economic operators who were interviewed in the 12 Member States, with a large proportion of interviewees across Member States identifying in particular the following obstacles: the burden and time involved with filling out the paperwork/SAAD, familiarisation with the national rules and regulations and applying for reimbursement.

Moreover, economic operators mentioned that the requirement of having to use the duty paid procedure is burdensome in itself because of the fiscal liability in two Member States. The reimbursement procedure can cause problems related to cash flow.

It should be stated clearly that the requirements for intra-EU duty-paid movements of energy products would be covered by the same conclusions. The fact that the requirements are not established in the ETD itself does contribute to the problem by limiting the access to EMCS to only those energy products in Article 20(1). Even if the list of energy products that can use the duty suspension arrangement can be subject to enlargement by an implementing act on the basis of Article 20(2), it should be noted that this has only happened once⁸⁶.

Furthermore, the lack of clarity on the rules for moving energy products, intended for fuel use, which are not included in Article 20(1) of the ETD, makes it difficult to ascertain the importance of the problems associated with duty-paid movements for energy products. An example provided in the study *Evaluation of current arrangements for the holding and moving of excise goods under excise duty suspension* concerning movements of medium and

⁸⁶ Commission Implementing Decision 2012/209/EU of 20 April 2012 concerning the application of the control and movement provisions of Council Directive 2008/118/EC to certain additives, in accordance with Article 20(2) of Council Directive 2003/96/EC (OJ L 110, 24.4.2012, p. 41).

heavy mineral oils in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (CN code 2707 99 99)⁸⁷ shows that the lack of clarity in the ETD could potentially create additional administrative burden for some specific energy products that are occasionally used as fuel. However, the limited number of cases did not allow to quantify the scale of the problem.

4.6 Research question 5

The fifth research question relates to the relationship between the ETD provisions and other policy instruments, in particular State aid rules. In detail, this question focuses on whether there are obstacles arising from the outdated provisions of the ETD which are no longer in line with developments in other policy areas and how such contradictions and obstacles can be remedied.

Table 10 - Overview of research question 5

General research questions	Categories	Detailed research questions (Article of ETD)
5. Are there provisions contradicting other policy instruments and in particular State aid rules?	5 = State aid	15(1)(a), 15(1)(f), 15(3), 16(1), 16(6), 17(1)(a), 17(1)(b), 17(2), 17(3), 17(4), 20(1), 21(5)
Are any obstacles arising from the outdated provisions of the ETD in other policy areas? (If so, in which policy areas and what are those obstacles)?		
How could the contradictions and obstacles be remedied?		

State aid rules apply to all the sectors considered for this study, including for Article 15(3) which applies specifically to the agricultural sector and 15(1)(f) which applies specifically to fishing.

All the sources available have been used, including desk research, online surveys to both tax authorities and businesses, interviews with EU stakeholders and in-depth interviews with businesses and tax authorities in Member States selected for fieldwork.

⁸⁷ Ramboll Management Consulting, *Evaluation of current arrangements for the holding and moving of excise goods under excise duty suspension*, Publications Office of the European Union, Luxembourg, 2015, pp. 94-97.

4.6.1 State aid and energy taxation

Article 26(2) of the ETD provides that measures such as tax exemptions, tax reductions, tax differentiation and tax refunds within the meaning of this Directive might constitute State aid and in those cases have to be notified to the Commission. The traditional level of involvement of governments in energy production and supply is high, hence the rules on State aid are of particular importance in the context of energy taxation⁸⁸.

Any kind of tax measure that can benefit undertakings, also in the context of energy taxation, should be checked against a general prohibition of State aid laid down in Article 107(1) TFEU⁸⁹:

*Save 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.*⁹⁰

Article 107(2) and (3) TFEU provide for exemptions to the general prohibition of State aid. The second paragraph provides for aid that shall be compatible with the internal market (no discretion allowed), whereas the third paragraph provides for aid that may be considered to be compatible with the internal market. In this regard, the European Commission enjoys a large discretion, which involves assessments of an economic and social nature which must be made within a Union context⁹¹. In the field of energy, the European Commission assesses the compatibility of an aid measure under the European Commission's guidelines on State aid for environmental protection and energy 2014-2020.⁹²

⁸⁸ M.V. EZCURRA, "Energy Taxation and State Aid Law" in I. RICHELLE, W. SCHÖN and E. TRAVERSA, *State Aid Law and Business Taxation*, Springer Verlag, Berlin, 2016, 198.

⁸⁹ Treaty on the Functioning of the European Union; <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E107>.

⁹⁰ For guidance on the notion of aid, see the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2016.262.01.0001.01.ENG&toc=OJ:C:2016:262:TOC

⁹¹ See among others, ECJ C-189/91, *Petra Kirsammer-Hack*, ECLI:EU:C:1993:907; ECJ C-225/91, *Matra SA v. Commission*, ECLI:EU:C:1993:239; ECJ C-303/88, *Italian Republic v. Commission*, ECLI:EU:C:1991:136; ECJ C-248/84, *Germany v. Commission*, ECLI:EU:C:1987:437.

⁹² Communication from the Commission - Guidelines on State aid for environmental protection and energy 2014-2020, *Pb. C. 200/1, 28 June 2014;* [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0628\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0628(01)&from=EN).

The Council has granted the European Commission the power to adopt block exemptions in a number of areas, among others 'environmental protection'. The Commission used its competence to adopt the General Block Exemption Regulation (GBER).⁹³

Some tax incentives may not be considered as granted by the State if the Member State is under an obligation to implement it under Union law without any discretion.

The application of optional exemptions could be allowed by the ETD, but could nonetheless be considered as State aid and might have to be notified to the Commission, unless it falls under the GBER⁹⁴ or the de minimis Regulation⁹⁵.

Specifically in the context of the ETD and because of environmental concerns, the following aid is automatically allowed (Article 44 GBER), if (i) the beneficiaries at least pay the minimum tax level and (ii) the beneficiaries are not selected on the basis of arbitrary criteria⁹⁶:

1. *Aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (57) shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.*
2. *The beneficiaries of the tax reduction shall be selected on the basis of transparent and objective criteria and shall pay at least the respective minimum level of taxation set by Directive 2003/96/EC.*
3. *Aid schemes in the form of tax reductions shall be based on a reduction of the applicable environmental tax rate or on the payment of a fixed compensation amount or on a combination of these mechanisms.*
4. *Aid shall not be granted for biofuels which are subject to a supply or blending obligation.*

There is a need for reflection on the current provision allowing Member States to request country specific derogations under Article 19 and the clarification between the interplay

⁹³ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, *OJ. L.* 187/1, 26 June 2014; <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404295693570&uri=CELEX:32014R0651>.

⁹⁴ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, *OJ. L.* 187/1, 26 June 2014; <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404295693570&uri=CELEX:32014R0651>.

⁹⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid

⁹⁶ M.V. EZCURRA, "Energy Taxation and State Aid Law" in I. RICHELLE, W. SCHÖN and E. TRAVERSA, *State Aid Law and Business Taxation*, Springer Verlag, Berlin, 2016, 198.

with the relevant procedures for these policies, namely in accordance with Article 19(1) ETD, the Council “*acting unanimously on a proposal from the Commission, may authorise any Member State to introduce further exemptions or reductions for specific policy considerations*”. These policy considerations concern in particular the functioning of the internal market, fair competition and State aid, and the Union health, environment, energy and transport policies

Further introducing mandatory exemptions is deemed useful for both Member States and economic operators in the context of Article 21(3) of the ETD in order to achieve a level playing field between the Member States by further harmonisation and remove clearance under the State aid rules.

4.6.2 Key issues

The ETD has not changed since its adoption in 2003 due to the lack of agreement among the Member States. This may result in some of its provisions not being fully in line with developments in other policy areas. This is what transpires from the comments made by economic operators and Members States during discussions in the course of the work on the study. Alignment between the ETD and EU energy, transport, environment, climate change policies, as well as the State aid framework is necessary, as some respondents have noted inconsistencies. E.g. regarding Article 16(3) ETD, the tax schemes for biofuels are normally covered by State aid rules and the condition on overcompensation in this provision appears unnecessary. The lack of legislative changes in the ETD has however not affected the full implementation of State aid rules, which continue to be enforced by the Commission.

4.7 Research question 6

The sixth research question aims to understand the possible impact on revenues from taxes in the case of proposed solutions or options. The research question starts from the current ‘as is’ situation (i.e. the national laws under the ETD and the tax revenue for the Member States deriving from its application). The recommendations for change, which are outlined in the next chapter, are the following:

1. provide for more clarity through common definitions / guidance and through improving the wording and structure to ensure a common understanding and application of the ETD (**clarity**);
2. the ETD should reflect the political consensus not to distort the Single Market and should not leave counterproductive room for national policy (**subsidiarity / harmonization**);
3. align with other policy instruments where possible, both when it comes to the concepts and the objectives (**alignment**);

4. develop a flexible system to ensure an adequate response to the current and future energy landscape (**modernization**).

Table 11 - Overview of research question 6

General research questions	Categories	Detailed research questions (Article of ETD)
6. In case of proposed solutions/options, what would be their impact on revenues from energy taxes?	6 = Impact on revenue of taxes	1, 2(1), 2(3), 2(4)(b), 3, 7(2), 10(2), 11(1-2), 15(1)(b), 15(1)(d), 15(1)(e), 15(1)(h), 15(1)(l), 16(3), 21(5)

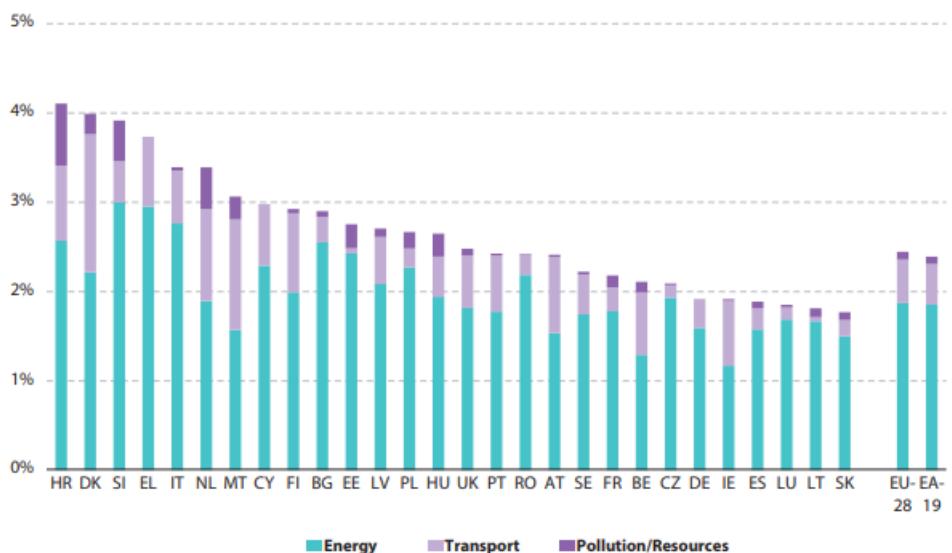
The budgetary function of energy taxes – even though considerable differences exist – is important for the Member States, as shown by the ETD policy objectives and the available data. Nonetheless, since the introduction of the ETD, the overall relevance of energy taxation for products and uses covered by the directive has decreased in most of the Member States (with the exception of e.g. Italy, demonstrating a considerable growth). Since also the trend in terms of % of GDP is generally downward (even though not always to the same extent as in terms of relative revenues), policy choices rather than macro-economic trends seem to be at least one of the explanations for this evolution. These preliminary and high level findings definitely deserve more in-depth investigation and analysis.

Figure 12 – Share of Energy taxation on GDP and total tax revenues



Energy taxation as % of GDP, 2015 – Source: Eurostat, taxation trends in Europe 2017⁹⁷

⁹⁷ With reference to data from DG Taxation and Customs Union;
https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2017.pdf



Energy taxation as % of environmental taxes, as % of GDP, 2015 – Source: Eurostat, taxation trends in Europe 2017⁹⁸

A modification to the harmonized framework – be it through a legal change, a soft law change (e.g. guidance) or otherwise – could result in a shift of energy taxation revenues (upward or downward, depending on the changes implemented), and in a (relative) shift from energy taxation to other taxes or vice versa. From the above graphs it appears clearly that energy taxation plays an important role in terms of revenue collection for Member States. Touching upon the structure and rates of taxation is therefore a sensible equilibrium to find. The roles and possibilities of energy taxation in this regard were shown by the policy objectives of the ETD, also making an attempt to redirect fiscal policy from labour to energy. The harmonized framework on energy taxation would reduce competition between the Member States (and the *race to the bottom* linked thereto), allowing the Member States to reduce the burden on labour costs.

The actual financial impact of a proposed change to the current harmonized framework on energy taxation is very difficult to estimate. Indeed, a number of factors require assessment, in particular the direct effect on the tax revenue (change in energy tax revenue related to the modification, the indirect effect on the tax revenue (change in overall tax revenue, e.g. VAT revenue, related to the modification), the change in compliance costs (businesses), the change in monitoring costs (authorities). Also when it comes to assessing the impact on energy taxation as a standalone – even though this matter is to be framed within the broader framework of both energy costs and taxation in general – the assessment of the impact of a proposed reform remains highly complex.

⁹⁸ With reference to data from DG Taxation and Customs Union;
https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2017.pdf

E.g. proposing to make one of the current optional exemptions a mandatory exemption. For some Member States this would not lead to any change, for others an exemption would be introduced, resulting in a raise in tax revenue from energy taxation (direct effect). However, also indirect effects may arise, resulting in e.g. a change in behaviour of the taxpayer concerned or the relocation of the business concerned outside the Member State in question, ultimately reducing the overall tax revenue from energy taxation (indirect effect).

E.g. proposing to provide clarity on the scope of the harmonized framework (Article 2(4) ETD) and the definition of its concepts, e.g. through guidance. This will result in changes in the Member States for particular practical cases, having to treat these cases in or out of scope of the ETD / exempt or non-exempt with application of the ETD, where the outcome may have been different before. Business will be affected, having to pay more or less taxes, but also benefiting from a common set of rules across the EU, which in turn leads to reduced administrative burdens.

Any modification to the current harmonized framework, and even the mere provision of guidance thereto, can be expected to result in changes in tax revenues for the Member States, even though the actual impact is likely to differ per Member State, and could go both directions (upward or downward). For each possible change, this impact should be assessed in order to ensure no unintended (indirect) effects are caused.

At the time of this study, potential modifications to the ETD are insufficiently clear, and insufficient data is available to make a full fledge revenue impact analysis of these modifications. However when undertaking future action, any policy measure considered by the Commission should be carefully evaluated against the financial impact criterion.

5 Conclusions and recommendations

This section presents the main conclusions of the study, and the key recommendations for possible modifications and updates of the ETD. The conclusions follow from the previous chapters and result in recommendations to improve the current harmonized framework of energy taxation. The recommendations are always to be considered in light of their political feasibility and their effectiveness (e.g. will Member States adhere to non-binding guidelines issued).

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (**ETD**) serves a number of policy objectives, in particular the creation of a common energy market to ensure the proper functioning of the internal market, the protection of the environment and achieving international commitments in this regard, safeguarding the budget revenues for the Member States, promoting the EU economy by maintaining and improving the competitiveness of EU companies. The primary goal of the harmonized energy taxation framework is to ensure that the Single Market runs smoothly and to prevent distortions in competition and trade within the EU (i.e. between energy sources and energy consumers and suppliers). Such distortions could result from considerable differences in national tax rates, which are not part of the analysis in the current Study though.

The aforementioned objectives reflect the expected effects of the ETD. In order to assess whether the current harmonized framework on energy taxation in the form of a directive allows to achieve these intended objectives / expected effects, this Study provides for a technical and legal analysis of the provisions of the ETD. The analysis has looked at the implementation and application of different provisions of the ETD and their conformity with the jurisprudence of the Court of Justice of the European Union. Potential weaknesses and specific technical problems have been identified and evaluated on the basis of an article-by-article analysis. At the same time, a more holistic approach was applied through the addressing of a number of general research questions.

5.1 Conclusions

The analysis leads to the following main conclusions:

- i. the current divergence in implementation and application of the ETD affects the effectiveness of the harmonized framework on energy taxation;
- ii. the full potential of the harmonization cannot be reached through the current ETD;
- iii. part of the broader EU energy policy, the harmonized framework on energy taxation would benefit from further integration;

- iv. the ETD does not meet the current needs in terms of compatibility with new products and technologies ;
- v. the current harmonized framework on energy taxation in itself does not involve disproportionate administrative burdens, due to the nature of the system.

CONCLUSION: The current divergence in implementation and application of the ETD affects the effectiveness of the harmonized framework on energy taxation

It follows from the analysis that the current instrument is suboptimal when it comes to clarity, structure and wording, and that the instrument is not sufficiently aligned with other policy instruments where it potentially could be. Currently, the Member States, the European Commission, the European Court of Justice, and the economic operators adhere to different views on the interpretation and application of the ETD. Such divergence in views should be avoided, particularly when there is (i) political agreement on the harmonized approach and (ii) where the divergence affects the effectiveness of the harmonized framework. Indeed, the realization of the policy objectives would benefit from a common view on the implementation and application of the ETD provisions.

The following causes for the divergent views between the actors involved have been identified:

1. different interpretation of the concepts of EU law laid down in the ETD, affecting the scope of the ETD;
2. different and complicated language stemming from the structure of the ETD;
3. different application of the ECJ case law on the ETD in the Member States;
4. discrepancies between the purpose and wording of the ETD;
5. lack of a consistency in the wording of the ETD;
6. outdated provisions, a.o. leading to involuntary exclusion of certain products and technologies from the legal scope;
7. inapplicability of some ETD provisions in practice;
8. outdated character of some sections / paragraphs of the ETD.

Divergence in understanding of the ETD leads to divergence in its application, not serving the objectives of the harmonized energy taxation framework. All actors could benefit from a common approach towards the existing ETD provisions. What has been left out of the harmonized framework can be considered not eligible for political agreement at the time of the introduction of the ETD. The topics that have resulted in harmonization, however, should be approached in the same way in order to allow the achievement of the policy objectives.

The different interpretations affect the effectiveness of the ETD, as follows *inter alia* from the extensive body of ECJ case law on the ETD and the fact that Member States issue unilateral measures to avoid double taxation (e.g. Denmark in the context of the exemption for fuels in standard tanks). A difference in implementation and application of the ETD leads to a difference in treatment of the economic operators across the Member States, resulting

in a direct (e.g. (non-)eligibility to benefit from a reduction or exemption) or indirect (e.g. increased compliance costs) financial impact.

Several causes of the difference in implementation and application of the ETD could be identified, in particular but not limited to the lack of understanding of the ETD, the use of energy taxation for the realization of national (conflicting) policies, or competitiveness across the Member States.

Tax authorities do not consider the administrative burden deriving from the implementation of the ETD as excessive, especially when compared with the fiscal revenues they receive from excises on energy. Economic operators face very diverse administrative burdens, which depend on how Member States implemented both mandatory and voluntary provisions in national legislation.

However, both tax authorities and economic operators face costs (from controversies, missing revenues, etc.) deriving from uncertainties in the definition and interpretation of notions of the ETD (as per the findings above).

CONCLUSION: The full potential of the harmonization cannot be reached through the current ETD

The primary goal of the harmonized energy taxation framework is to ensure that the Single Market runs smoothly and to prevent distortions in competition and trade within the EU. The harmonization of energy taxation through a directive is a political choice not to have a complete Single Market. Due to its current design, the ETD's full potential for harmonization in terms of the realization of the Single Market cannot be reached. Analysing the practical application of the ETD, the current framework is both (i) inconsistently implemented and applied and (ii) incomplete, leaving room for distortions of that Single Market.

i. *The harmonized framework on energy taxation is inconsistently implemented and applied*

The ETD, despite providing for a harmonized approach on particular elements of energy taxation, is differently implemented and applied across the Member States. Even if the ETD provides for a definition of a certain term (e.g. dual use), the application in practice varies widely given the lack of clarity, the difficult / highly technical practical application of that definition and the complex and diverse business reality. Also the lack of objective criteria in the catch-all provision of Article 2(3) ETD leads to a lack of clarity and different interpretations.

ii. *The harmonized framework on energy taxation is incomplete*

Being a directive which is limited in scope, the ETD does not provide for a uniform approach on energy taxation. After the initial mineral oils directives in the early '90s, a political agreement to go further was reached through the ETD. The merits of this step-up in the harmonization process cannot be underestimated. However considerable room is left to the Member States, because of out-of-scope products, uses and optional reductions / exemptions.

Member States have indicated that, contrary to their national policy, they are sometimes pushed to providing the optional exemption / reduction for competitive reasons (e.g. optional reduction for energy-intensive businesses). Furthermore, one could question to what extent the optional exemptions serve the achievement of the ETD policy objectives.

The Single Market can only function smoothly if the chargeability conditions are the same in all Member States, which is currently not the case. Articles 21(3), (4) and (6) ETD leave these conditions to the discretion of the Member States. Member States retain the discretion for national policy where this should not be the case. Differences in establishing the chargeable event do not serve any of the objectives of the ETD / harmonized energy taxation.

CONCLUSION: Part of the broader EU energy policy, the harmonized framework on energy taxation would benefit from further integration

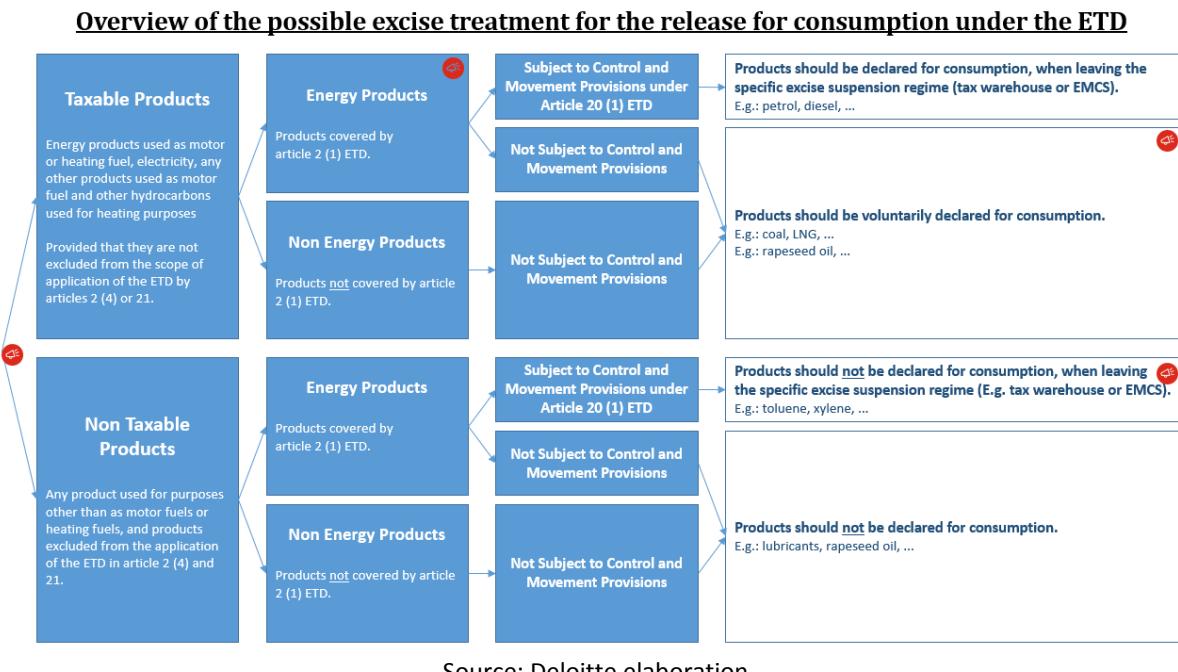
The EU energy policy is driven by three main objectives, in particular (i) secure energy supplies, (ii) ensure competitiveness among energy providers, and (iii) strive for sustainable energy consumption⁹⁹. It is apparent from the ETD's objectives that this instrument also forms part of the strategy pursuing these objectives and thus, together with other EU instruments, forms part of the wider EU energy policy.

Other EU instruments – such as the Horizontal Excise Directive – are linked to and scoped by the ETD (and vice versa), something which is not always coherently reflected in the wording and structure of those instruments. The figure below provides an overview of the different possible excise treatments a product could receive under the Energy Taxation Directive (ETD) when released for consumption. The ETD makes use of three distinction criteria to determine the applicable excise treatment:

- Is the product taxable or not?
- Is the product an energy product or not?
- Is the product subject to the control and movement provisions of Directive 2008/118/EC?

⁹⁹<https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union> (Accessed: [12/01/2018]).

Figure 13 - Overview of the possible excise treatment for the release for consumption under the ETD



Source: Deloitte elaboration

This overview render the following identified issues even more apparent:

- i. The determination whether a product is taxable or not a.o. depends on the intended use thereof. There is no objective material criterion enabling to determine in advance if a product will be aimed for a certain use, resulting in a lack of legal certainty. The ECJ recognized the ambiguity related to Article 2(3), first paragraph ETD in the *Afton Chemical* case¹⁰⁰, where it stated that "*it must indeed be admitted, as the Commission itself acknowledged at the hearing in reply to the Court's questions, that the wording of Article 2 of Directive 92/81 and Directive 2003/96 could be clearer and more precise*". Concretely, this thus means that the ultimate decision whether or not products should be declared for consumption and excise paid rest in a subjective appreciation.

This difficulty is even greater for products falling within CN codes 1507 to 1518; 2905 11 00; or 3824 90 99. If these products are intended for use as heating fuel or motor fuel, they will be considered as taxable energy products subject to the control and movement provisions of Directive 2008/118/EC. If, on the contrary, they are intended for another use, they will not qualify as taxable nor as energy products and the control and movement provisions of Directive 2008/118/EC will not apply. So one and the same product in certain cases needs to be controlled, and in other cases not, whereas it continues to have the same inherent characteristics and could irrespective of the supply chain and at any time be used as a motor or heating fuel. Also, where the intended use of these products would change at a certain point in time in the supply

¹⁰⁰ ECJ C-517/07, *Afton Chemical Limited*, ECLI:EU:C:2008:751.

chain, this will cause practical problems for the application of the ETD provisions. How can a product that was not subject to the control and movement provision suddenly be introduced in that specific excise suspension scheme? Or the other way round, how can a product that was subject to the control and movement provisions be withdrawn from that scheme, without making any excise declaration and without paying any excise duties?

- ii. As mentioned above, the ETD introduces a categorization in Article 2 (1) ETD based on an enumeration of products, which will qualify as ‘energy products’. However, it has to be recognized that this definition of ‘energy products’ has limited importance in practice. One theoretical purpose of this concept would be to identify which products could benefit from certain exemptions (only attributed to energy products and electricity). However in practice we see that many Member States do not make a distinction between energy products and other taxable products when applying the exemptions foreseen in their legislation. Further the concept does not give any indication on a product’s taxability nor on its subjugation to the control and movement provisions. Also, the use of the concept in the Horizontal Excise Directive causes issues in the sense that the general provisions of the latter directive (e.g. on payment of duties), at least from a legal – theoretical point of view, do not apply to other (non energy product) taxable products. Therefore, the concept of energy products could be considered obsolete and only adding unnecessary complexity and ambiguity to the text of the ETD. A clear definition of the taxable products – for example, encompassing all products used as motor fuels; and all hydrocarbons, eventually some other well-defined products, used as heating fuels – would suffice to set the material scope of the Energy Taxation Directive. Further provisions could then determine which of these products would be subject to the control and movement provisions of the Horizontal Excise Directive, and which ones not.
- iii. Some non-taxable products are subject to the control and movement provisions. This means that, until their release for consumption, they should remain under the supervision of the competent authorities, by applying the specific excise suspension scheme provided for in Directive 2008/118/EC. Technically, at the moment of release for consumption and in order to clear this excise suspension scheme, an excise declaration should be made. This is however problematic, as it is not possible to file an excise declaration for non-taxable products, which by definition cannot and should not be declared for excise purposes. A further problem exists in the fact that often these products will be released right away (after production), knowing that no duties are due and after release no further control measures apply. Question then remains how these products are to be treated when supplied from one Member State to another. It is unclear whether the control and movement provisions of Directive 2008/118/EC as referred to by the ETD also include the provisions for movement of products which were released for consumption before their movement.

- iv. At last, it is observed that some taxable products are not subject to the control and movement provision of Directive 2008/118/EC. Considering that these products are not subject to supervision, it is up to the economic operators to voluntarily declare them for consumption and pay the excises when applicable. For these products, the system is thus entirely based on the good-will contribution of the taxpayer. Even if there are no particular technical or administrative difficulties in this regard (which in practice do exist), the attention is drawn to the enhanced risk of non-compliance – be it by ignorance, negligence or intentionally – whereby excise would ultimately not be collected.

CONCLUSION: the ETD does not meet the current needs

Developments in the energy market, energy systems, environmental and other policies and technology maturity levels have rendered the implementation and application of the ETD more complex and not entirely in line with the need of tax authorities and economic operators. Being a directive, the ETD is a static instrument in a dynamic environment. Considering the ETD consists of outdated provisions having to deal with new products, and taking into account new technologies and changes in behaviour, the ETD does not provide for a sufficient answer to the current needs, considering its position in the broader EU tax and energy policy. Also, changed policy in the area of customs, in particular regarding the Combined Nomenclature, and in the area of excises (introduction of Directive 2008/118/EC) have made the current ETD outdated.

CONCLUSION: the current harmonized framework on energy taxation does not involve disproportionate administrative burdens, due to the nature of the system

Throughout the different processes in the production and the trade of energy products and electricity, an important administrative burden is imposed on both the Member States authorities and the economic operators.

However, the obligations for the Member States and economic operators following directly from the ETD are limited and do not involve a considerable administrative burden.

Most of the administrative burden derives either from the Horizontal Excise Directive, either from the national legislation. This follows from the limited harmonization through the directive. The Member States retain the discretion to organise fiscal control, the reduction / exemption system, etc. and impose ‘proportionate’ administrative burdens relating to audits, application procedures, reimbursement procedures, etc. in this regard.

Considerable differences exist between the Member States, leading to practical difficulties and transactional costs for economic operators active in different Member States or moving within the Single Market. These difficulties are due to the discrepancies between the national systems and follow from the nature of the current system. Moreover, the proportionate character of the administrative burdens could be questioned in a number of Member States, which currently have a highly demanding administrative system in place.

5.2 Recommendations

On the basis of the above conclusions, a number of general recommendations can be made as follows:

1. provide for more clarity through common definitions / guidance and through improving the wording and structure to ensure a common understanding and application of the ETD (**clarity**);
2. the ETD should reflect the political consensus not to distort the Single Market and should not leave room for counterproductive national policy (**subsidiarity / harmonization**);
3. align with other policy instruments where possible, both when it comes to the concepts (definitions) and the objectives (**alignment**);
4. develop a flexible system to ensure an adequate response to the current and future energy/legal landscape (**modernization**).

RECOMMENDATION 1: Provide for more clarity through common definitions / guidance and through improving the wording and structure to ensure a common understanding and application of the ETD

Both 'quick wins' and more structural approaches could be pursued in developing a more effective harmonized framework. The solutions range from (i) refraining from action, over (ii) issuing soft law guidance at EU level (guidance provided by the European Commission, after consultation with the Member States), to (iii) reshaping the current framework by redesigning current definitions and introducing additional definitions and guidance. Due to the technical nature of energy taxation, economic operators would benefit from practical guidance on how to approach the (implementation of the) ETD in practice (through type cases, e.g. explaining what is considered 'dual use', 'mineralogical procedures', use in the curtilages of an energy product producing entity, etc.; and what is not). When issuing this guidance, the European Commission should consider the ECJ case law developments and, where relevant and appropriate, extrapolate the conclusions embodied therein. For instance, where relevant, by incorporating the principles established by the ECJ in the ETD, contributing to the general knowledge amongst Member States and economic operators alike about these principles.

i. Improve the common understanding of the ETD

A number of tools are available to the European legislator to ensure a common approach, in particular introducing definitions in the ETD or Implementing or Delegated acts, and providing for separate interpretative guidance. The most appropriate tool will have to be assessed for each of the current causes of a lack of clarity, whereby it will also need to be assessed to what extent the tool is in line with the TFEU.

E.g. Article 2(3) ETD was clarified by the ECJ but still results in different outcomes in the different Member States. Article 2(4) ETD defines the scope of the directive

and contains a number of definitions, nonetheless still leading to differences in interpretation. This indicates there is further need for guidance through guidelines due to the highly technical and practical nature of the concept.

Currently, no definition is foreseen for e.g. ‘gas oil used as propellant’ in Article 7(2) ETD, ‘environmentally-friendly products’ in Article 14(1)(a); ‘environmentally-friendly cogenerators’, ‘household’ and ‘charitable organization’ in Article 15(1); ‘registration’, and ‘small producers’ in Article 21(5) ETD. The term ‘curtilage’ in Article 21(3) ETD is unclear and gives rise to disputes according to the Member States and economic operators. The terms need a definition on the EU level.

ii. Restructure the ETD to improve the readability

The readability of the ETD would benefit from a restructuring to ensure a logical and clear positioning of all provisions. This concerns both the structure of the Articles (e.g. the definition of business use in Article 11, which relates to Article 5; the provisions on reductions / exemptions could be grouped) and the structure within the articles itself (e.g. the structure of Article 2(4) ETD).

iii. Ensure a common approach across the Member States after an ECJ judgement

There is plenty of (pending) case law on the ETD, demonstrating both the importance of energy taxation for (some of) the market operators and the existence of plenty of issues regarding the current instrument. The outcome of the Court proceedings does not always result in a common interpretation / application afterwards, however, and is sometimes referred to as inapplicable in practice by the Member States. The European Commission should ensure a common approach towards the ECJ judgements by providing guidance on the understanding of the case law and scope the field of application of that case law, possibly extending the principles embodied in the case law to provisions of the ETD not scrutinized by the Court.

E.g. the case law in the context of the mandatory exemption for air navigation and sea navigation is not consistently applied by all Member States, either because of differing views on the scope of application or because the judgements are deemed inapplicable. This renders the ECJ judgements ineffective on the long term and could potentially even cause further discrepancies in interpretation.

iv. Ensure consistency in the wording

The wording is not consistently used throughout the directive, ultimately leading to interpretative issues and differences in application across the Member States. Member States often adhere to a pragmatic approach, which might contradict the strict wording of the directive.

E.g. ‘taxable products’, ‘energy products’, and ‘products’ are used throughout the directive. There is a major impact of the use of a different wording, considering the definition of ‘energy product’ in Article 2(1) ETD.

v. *Ensure that the ETD reflects the policy objectives*

Notwithstanding the existence of a clear legislative text, this is sometimes deemed to be applied differently by the actors involved due to a different intention of the legislator, thus avoiding unintended consequences.

E.g. the application of the exemptions in Articles 14 – 15 are sometimes limited to energy products and electricity, disregarding equivalent products. This would imply a difference in treatment of products that might be used for the same purpose. Most Member States tackle this by adhering to a pragmatic approach, applying the provisions to all taxable products, referring to the intention of the legislator, although this contradicts the view of the ECJ in the Kraftwerk Lippe-Ems case.

vi. *Ensure the practical feasibility of the ETD provisions*

Some of the ETD provisions are deemed inapplicable in practice by the Member States, reason for which the optional application is considered mandatory or the Member States apply the provisions intentionally differently. In such case, the solution could consist of redefining the scope of the provision, removing the provision, or making the optional provision mandatory.

E.g. the difference between navigation in inland waterways and in Community waters is deemed practically impossible to determine in practice by some Member States, or at a disproportionate cost. Likewise, ECJ case law could result in issues regarding the application of a provision (e.g. because of the costs related to such application).

vii. *Remove outdated sections and sections that are not used*

Several provisions are outdated, not / barely used or were left unintentionally in the text of the current directive. If not / barely used or left unintentionally in the text, the provisions should be removed. If outdated, these provisions should, depending on the intention of the legislator, be updated or removed.

E.g. Article 2(1) ETD refers to the 2002 CN codes. Article 3 ETD refers to mineral oils. Article 16(4) ETD seems partially unintended.

RECOMMENDATION 2: The ETD should reflect the political consensus not to distort the Single Market and should not leave counterproductive room for national policy

A consistent implementation and application of the harmonized framework of energy taxation should be maintained. As long as the harmonized framework is incomplete, however, distortions within the Single Market remain. Establishing a framework based on increased harmonization is subject to political willingness. Working with the current level of harmonization, the harmonized framework on energy taxation could be improved through the removal of national policy considerations that are counterproductive, in the sense that:

- i. provisions disadvantageously affect the Single Market (e.g. the current room to determine the chargeable event in Article 21);
- ii. provisions do not contribute to any of the policy objectives of the ETD (e.g. social policy considerations).

RECOMMENDATION 3: Align with other policy instruments where possible, both when it comes to the concepts and the objectives

Being part of the EU energy policy, the ETD should definitely not contradict any of the other policy instruments and should, where possible, be in line with the wording and objectives of those other instruments where relevant. The legal package relating to the EU energy policy contains *inter alia* the Renewables Directive, the Fuel Quality Directive¹⁰¹ and the Emission Trading system Directive.

E.g. the definition of biomass should be the same in the different legal instruments (i.e. the same as the definition in the Renewables Directive).

The harmonized energy taxation framework attempts to strike a balance between a number of, sometimes conflicting, policy objectives. Considerations of environmental policy (e.g. incentivising energy efficiency) could conflict with considerations of competitiveness (e.g. avoiding relocation of EU businesses). It should be considered that the ETD is not a standalone instrument and forms part of a broader energy and competition policy, thus reflecting those policy aims.

E.g. the reduced rate for energy-intensive businesses (Article 17(1)(a) ETD) allows Member States not to apply the polluter pays principle¹⁰².

Also, the Horizontal Excise Directive refers to the concepts of the ETD (e.g. defining the scope of the Horizontal Excise Directive) and vice versa (e.g. reference to the ‘control and movement provisions’). The difference in views between the Member States are

¹⁰¹ Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, *OJ L* 350, 28 December 1998, p. 58–68.

¹⁰² See Article 191(2) of the Treaty on the Functioning of the EU for the principle.

detrimental for the functioning of the internal market, particularly when it comes to the intra-Union movement of energy taxable goods.

RECOMMENDATION 4: Develop a flexible system to ensure an adequate response to the current and future energy landscape

The harmonized framework on energy taxation should allow responses to changes in the energy landscape, e.g. the introduction of new products or the shift in uses of products. The ETD is currently a static instrument in a dynamic environment. The static reference in Article 2(1) ETD, which is linked to the definition of the scope of the ETD as laid down in Article 1, does not provide for an adequate response to the described changes in the energy landscape. A periodical technical update would allow a system closely aligning to reality.

Annex A - Analytical Framework

In Annex A, the Analytical Framework for the research is provided. The Analytical Framework contains all questions to be answered throughout the Study and was conceived taking into consideration the Terms of Reference and Deloitte's interpretation of those Terms of Reference (as laid down in the Inception Report).

We assembled all the questions for our research. The first part consists of general questions referring to the six general research questions. Subsequently, questions are listed on an Article-by-article basis. Where relevant, the questions refer to the ECJ case law in green (this will be removed from the actual surveys, the respondents will not have access to those references).

For each question the area of content will be indicated with one of the following numbers and descriptions:

0. General
1. Clarity/wording/ content
2. Single Market
3. Matching current needs/ technological developments
4. Administrative burden
5. Matching with other policy instruments + State aid rules
6. Impact on revenue from taxes

All questions indicate for which part of the data collection they will be used:

- (Strategic) interviews
- Deloitte expert network
- Member State (general questions for the questionnaire)
- Member State (specific questions for the fieldwork)
- Economic operators (general questions for the questionnaire)
- Economic operators (specific questions for the fieldwork)
- Desk research

For the reader's convenience, this Annex is attached separately and not integrated in the Inception Report itself. The enclosed file contains both the Analytical Framework and the separate sets of questions per category, representing the individual questionnaires / interview guidelines.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
1	General	N/A				X	X				X	In your Member State, which legal instruments were used to implement Council Directive 2003/96/EC? Please provide a brief overview of the legal framework and a reference to the relevant legislation / guidelines.	Please explain.
2	Matching current needs/ technological developments	N/A			X		X					Do you think an improvement of the current ETD is necessary? (i.e., does the ETD meet the current needs)	Yes / No / If yes, which are in your view the main issues to be addressed?
3	Matching current needs/ technological developments	N/A							X			Do you think an improvement of energy taxation at an EU-level is necessary? (i.e., does the harmonization through the ETD meet the current needs)	Yes / No / If yes, which are in your view the main issues to be addressed?
4	General	N/A			X		X		X			When it comes to the interpretation of the Council Directive 2003/96/EC (ETD), do you consider it necessary to provide for more definitions of the terminology used in the Directive?	Yes / No / If yes, please provide some examples of current misunderstandings.
5	General	N/A			X	X					X	Did you encounter differences in interpretation of the Council Directive 2003/96/EC on Energy Taxation in its implementation or application by the Member States?	Yes / No / Not applicable - If yes, please elaborate on particular cases if possible.
6	General	N/A				X		X	X			Did you encounter / witness cases of double taxation with regard to energy taxation in cross-border, intra-EU situations?	Yes / No - If yes, please elaborate on the situation if possible.
7	General	N/A			X			X		X		Considering technological developments in particular (e.g., new ways of energy generation), does the ETD meet your current needs?	Yes / No / Not applicable - If no, please elaborate where the ETD does not meet your needs.
8	General	N/A				X	X					Please provide references to national case law/ administrative decisions on the ETD implementation (e.g., application of exemptions, scope of certain provisions, etc.)?	
9	General	N/A						X			X	Please provide national statistics on the following topics: - data (amount of taxation / product volumes / ...) with regard to the levied energy taxation falling within the scope of the ETD; - data (amount of taxation / product volumes / ...) with regard to the levied energy taxation falling outside the scope of the ETD; - volumes exempt from energy taxation.	If possible, please provide a brief English summary of the decision.
10	General	N/A			X	X			X	X		What is the name of your company/organisation?	(DG / DTT Network / Member State / company)
11	General	N/A			X	X			X	X		Which sector does your company/organisation operate in?	- Chemical industry - CHP

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
													- energy - Maritime transport (cargo and/or passenger) - Aviation transport (cargo and/or passenger) - Agriculture (incl. forestry and marine aquaculture) - Consulting - Other
12	General	N/A			X	X		X				Which function do you perform within your company/organisation?	- Strategy - Marketing - Operations; - Finance - Human resources - R&D
13	General	N/A			X	X	X					Please indicate the Member State your company/organisation is registered in:	Choice between 28 Member States
14	General	N/A						X	X			In the case your company/organisation is a private economic operator, please indicate all Member States in which you carry out your activities.	Choice between 28 Member States
15	General	N/A						X	X			Does your company/organisation perform activities through a branch or subsidiary in another country than the country of establishment?	Yes / No
16	General	N/A						X	X			How many employees (FTEs) did your company/organisation employ in 2015?	Multiple choice: - Less than 10 - 10 to 49 - 50 to 249 - 250 or more
17	General	N/A						X	X			What was the annual turnover of your company/organisation in 2015?	Multiple choice: - Up to EUR 2.000.000 - Between EUR 2.000.000 and EUR 10.000.000 - Between 10.000.000 and EUR 50.000.000 - Above 50.000.000 EUR
18	Clarity /	1	Scope		X	X						Which of the following products used as motor fuel are subject to energy taxation in your Member State:	Yes, based on the ETD / Yes, based on

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content											<ul style="list-style-type: none"> - synthetic ethanol - bioethanol - synthetic methanol - biomethanol - hydrogen - coal - natural gas - electricity - renewable energy products - other 	national policy / No Please explain.
19	Clarity / wording / content	1	Scope		X	x						Which of the following products used as heating fuel are subject to energy taxation in your Member State: <ul style="list-style-type: none"> - synthetic ethanol - bioethanol - synthetic methanol - biomethanol - hydrogen - coal - natural gas - electricity - renewable energy products - peat - other 	Yes, based on the ETD / Yes, based on national policy / No Please explain.
20	Clarity / wording / content	1	Scope		X	x					x	Does your Member State levy a national duty on nuclear fuels used for the commercial production of electricity?	<ul style="list-style-type: none"> - Yes, based on the ETD. - Yes, on the basis of national provisions, because nuclear fuels fall outside the scope of the ETD. - No, because the ETD provides for an exemption (Art. 14(1)(a) ETD). - No, because nuclear fuels fall outside the scope of the ETD. (C-5/14)
23	Single Market	N/A			X		X	X	X	X		Do you consider the ETD has reached its goal of creating a level playing field (by reducing differences in national levels of taxation) and enhancing the proper functioning of the EU internal market?	Yes / No - why (not)?
21	Clarity / wording / content	1	Scope			X	X	X				In Council Directive 2003/96/EC, reference is made to ""energy products"" (e.g., Article 1 ETD, Article 2(1) ETD), ""taxable products"" (e.g., Article 2(3), 15(1), 16(1) ETD) and ""products"" (e.g., Article 8(1) ETD).	Yes / No / If yes, please explain. Yes / No / If yes, please explain / Please provide us with case law if any.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												In your national provisions implementing ETD, is there a distinction made between ""energy products"" , ""taxable products"" and ""products""? Did you encounter any difficulties with regard to the use of this different wording (i.e. between ""energy products"", ""taxable products"" and ""products"")?	
22	Clarity / wording / content	1	Scope		X							Please provide us with an enumerative list of products which are considered taxable for energy taxation purposes in your Member State.	Please elaborate.
24	Clarity / wording / content	1	Scope			X	X					Council Directive 2008/118/EC concerning the general arrangements for excise duty refers in Article 1(1) to the treatment of energy products and electricity covered by the ETD. Does your Member State consider all taxable products (including those which are not energy products, e.g., hydrogen or synthetic methanol intended for use as motor fuel) covered by the ETD to fall within the scope of this reference in Directive 2008/118/EC? If you consider that not all products covered by the ETD are covered by Directive 2008/118/EEC, do you consider this an adequate approach? Please elaborate on the procedure to move products falling within the scope of the ETD but not within the scope of Council Directive 2008/118/EC (EMCS applies?).	Yes / No - why (not)? Yes / No / Not applicable - please explain. - No;
25	Clarity / wording / content	2(1)	Scope					X				Has your company/organisation ever experienced uncertainty/unclarity whether a product should qualify as an "energy product" for the purposes of the excise taxation on energy products and electricity?	- Yes, because the references to the CN-codes of the energy products listed in the legislation were outdated, and did not take into account the latest reclassifications nor the inclusion of new products; - Yes, because a product that your company considers as being an energy product was not caught in list of energy products in the legislation; - Yes, because a product that your company considers as not being an energy product was caught in the list of energy products in the legislation; - Yes, because it was unclear whether a product should be considered being a

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
													product ""intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels""; - Yes, because it was unclear whether a product should be considered being a ""hydrocarbon intended for use, offered for sale or used for heating purposes""; - Yes, because of a reason not mentioned in the above propositions (please explain).
27	Clarity / wording / content	2(1)	Scope			X	X		X			Did you encounter any difficulties due to the modifications in the combined nomenclature to which the ETD was not adapted? E.g., CN codes were split and new CN codes were added to the nomenclature: CN code 3824 90 99 was split into CN codes 2852, 3824 71 00 to 3924 88 00, 3824 99 86, 3824 99 92, 3824 99 93, 3824 99 96, 3826 00 10 and 3826 00 90.	Yes / No / If yes, please explain
28	Clarity / wording / content	2(1)	Scope		X		X					Do you consider it necessary to further add products to the ETD, in particular: - synthetic ethanol - synthetic methanol - hydrogen - environmentally friendly energy substances currently not covered - biofuel other than the fuels already covered by the concept of energy products (such as FAME)	Yes / No / If yes, please explain Yes / No / If yes, please explain
29	Impact on revenue from taxes	2(1)	Scope							X		What is the impact of reclassifications and of the clarification of classification rules for energy products, e.g., lubricating oils. What would be the impact of new products added to the list? (e.g., ethanol, methanol, hydrogen) What is the impact of the Lisbon Treaty changes on the update of the CN codes references.	
30	Clarity / wording / content	2(3)	Scope			X		X				In accordance with Article 2(3) ETD, any product intended for use, offered for sale or used as motor fuel, shall be taxed at the rate for the equivalent motor fuel. Any hydrocarbon, except for peat, intended for sale or used for heating purposes, shall be taxed at the rate of the equivalent energy product.	Yes / No / If yes, please explain. Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												Did you encounter any difficulties in practice when identifying the use of a product as motor fuel or heating fuel? Did you encounter any difficulties in practice when identifying the equivalent motor fuel / equivalent energy product?	
31	Clarity / wording / content	2(3)	Scope		X	X						In your Member State, what is considered to be "other hydrocarbons"? (as stipulated in Article 2(3), third subparagraph ETD)	Please explain.
32	Clarity / wording / content	2(3)	Scope		X				X			Is there any case law available in your Member State on the taxation of equivalent heating / motor fuel in accordance with Article 2(3) ETD?	Yes / No / If yes, please provide.
33	Clarity / wording / content	2(3)	Scope		X		X					Did your Member State lay down any rules / regulations / guidelines on how to determine the "equivalent motor fuel" / "equivalent energy product"?	Yes / No / If yes, please provide.
34	Clarity / wording / content	2(3)	Scope							X		Is there a need to stipulate rules for determining the "equivalent fuel" and the tax rates for excise goods for which there is no minimum level of taxation set in the ETD? (C-43/13 and C-44/13)	
35	Clarity / wording / content	2(3)	Scope				X		X	X		How does the tax administration / you as an economic operator determine the equivalent energy product for products not listed in Annex I of the ETD for this particular use referred to in Article 2(3) ETD: - petrol used as heating fuel; - toluene used as heating fuel; - biogas used as motor fuel; - ethanol and methanol used as motor fuel.	Please explain Please explain (C-43/13 and C-44/13 - Kronos Titan) Please explain Please explain
36	Clarity / wording / content	2(3)	Scope		X		X		X			Did you encounter any difficulties in practice with regard to the taxation of equivalent heating / motor fuel in accordance with Article 2 (3) ETD? (payment of excises, movement, moment as of which a product can be considered as being intended as engine or heating fuel, etc.)	Yes / No - why (not)?
37	Impact on revenue from taxes	2(3)	Scope				X					How would you estimate that an eventual difficulty in practice with regard to the taxation of equivalent products would affect the tax revenue in your Member State?	Yes / No - why (not)?
38	Clarity / wording /	2(3)	Scope		X		X			X		A company uses white spirit as heating fuel. At which energy taxation rate is this white spirit taxed in your Member State? How your Member State does determines this rate?	Please explain. (C-43/13 and C-44/13 - Kronos Titan)

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	content												
39	Clarity / wording / content	2(3)	Scope		X				X			Did your Member State lay down any rules / regulations / guidelines to identify the intended use of an energy product? E.g., mineral oils covered by CN code 2710 19 99.	Yes / No
40	Clarity / wording / content	2(3)	Scope						X			Does your company/organisation use products subject to excise taxation for which the tax rate is not specified, and for which the equivalent heating fuel or motor fuel consequently has to be determined? E.g. biogas, toluene, ethanol, petroleum coke etc.	Yes/ No / If yes, has your company ever experienced uncertainty on the identification of that equivalent product?
41	Clarity / wording / content	2(3)	Scope		X	X	X		X			If an economic operator mixes additives to motor fuel, which do not power the fuel but rather are consumed in the engine as part of the combustion process, are these additives subject in your Member State to energy taxation? (e.g., additives used as cleaning agent, anti foam or demulsifier)	Yes / No / No answer (C-517/07 - Afton)
42	Clarity / wording / content	2(3)	Scope		X	X			X			In your Member State, are there any circumstances under which additives are taxed independently from any tax imposed on equivalent motor fuels?	Yes / No / If yes, please explain (C-275/14 - Jednostka Innowacyjno-Wdrożeniowa Petrol)
43	Single market	2(3)	Scope		X							To what extent do the different interpretations of Article 2(3) ETD undermine harmonisation and distort competition in the single market?	Please explain.
44	Clarity / wording / content	2(4)b	Scope	Chemical Industry	X		X					According to the ETD, an energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. How is "dual use", as laid down in Article 2, (4) b, 2nd indent ETD, defined in your national legislation?	- Through the exact same wording as the ETD - Through a different wording as the ETD (please provide the definition in English) - This is not defined in national provisions
45	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X						Have you experienced uncertainties/unclarities concerning the definition of the term "principally"?	
46	Clarity / wording /	2(4)b	Scope	Chemical Industry	X		X					If no definition of ""dual use"" is laid down in national legislation, how is this term interpreted on a national level? (e.g., in guidelines, in case law, in practice)	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	content												
47	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X X				X		An energy product is used for heating purposes. During the heating process, gas that can be recycled is generated. Is the energy product considered as "dual used" in your Member State, and thus considered to fall outside the scope of the ETD?	Yes / No - why (not)? (C-426/12 - X)
48	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X X				X		An economic operator makes use of natural gas, on the one hand to overheat and to dry the steam which subsequently will be used in the process of the production of ammonia, and on the other hand to decompose and evacuate waste gases from this process. Is the natural considered as "dual used" in your Member State?	Yes / No - why (not)? (C-529/14 - YARA)
49	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X				X		In your Member State, when is electricity considered to be used "principally" for the purposes of chemical reduction and in electrolytic and metallurgical processes? (Article 2 (4) b, 3rd indent ETD) Please provide references to case law or guidelines, if any.	Please explain
50	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X X						Article 2 (4) ETD lists a number of products to which the ETD shall not apply, in particular: (a) output taxation of heat and the taxation of products falling within CN-codes 4401 and 4402; (b) following uses of energy products and electricity: - energy products used for purposes other than as motor fuels or as heating fuels; - dual use of energy products; - electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes; - electricity, when it accounts for more than 50% of the cost of a product; - mineralogical processes. Does your Member State: - considers these products to fall outside the scope of the ETD; - provides for an exemption of energy taxation for these products."	Yes / No / If yes: - does your MS impose national taxation on (some of) these products? - at which rate? Yes / No
51	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X	X			X		Does your Member State impose taxation on lubricating oils regardless of the use of those oils?	Yes / No / If no, please explain under which circumstances lubricating oils are taxed. (C-145/06 and C-146/06 - Fendt) (C-437/01 - COM v. Italy)
52	Clarity /	2(4)b	Scope	Chemical						X		Consider the following paragraphs of the Fendt Italiana case in light of this provision:	

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content			Industry								§43 Even though lubricating oils used other than as motor fuels or as heating fuels fall within the definition of 'energy products' for the purposes of Article 2(1)(b) of Directive 2003/96, they are explicitly excluded from the scope of that Directive by the first indent of Article 2(4)(b) thereof and therefore are not covered by the harmonised excise duty arrangements. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended by Council Directive 2004/75/EC of 29 April 2004, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides for the levying of a tax on the consumption of lubricating oils, where they are intended for use, offered for sale or used other than as motor fuels or as heating fuels.	
53	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X						Have you experienced uncertainties/unclarities concerning the definition of the term "metallurgical process"?	
54	Clarity / wording / content	2(4)b	Scope	Chemical Industry	X	X	X					In your Member State, how is a "metallurgical process" defined?	Please explain
55	Clarity / wording / content	2(4)b	Scope	Chemical Industry		X						Have you experienced uncertainties/unclarities concerning the definition of the term "mineralogical process"?	
56	Clarity / wording / content	2(4)b	Scope	Chemical Industry	X	X	X					In your Member State, is there a definition of the concept of a "mineralogical process"?	Yes / No / If yes, please provide an English version of the definition.
57	Clarity / wording / content	2(4)b	Scope	Chemical Industry	X	X						According to Article 2(4)(b) ETD, the Directive shall not apply to the use of electricity, when it accounts for more than 50% of the cost of a product. In your Member State, did you make use of that provision? If yes, did you encounter any difficulty in the understanding of and calculation of the "cost of a product"? (Article 2 (4) b, 4th indent)	Yes / No / If yes, please explain
58	Clarity / wording / content	2(4)b	Scope	Chemical Industry						X		What are the possible effects of the lack of clarity with regard to the term "cost of a product"?	

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59	Clarity / wording / content	2(4)b	Scope	Chemical Industry			X	X				Did you encounter difficulties in assessing whether products are in or out of the scope of the ETD?	Yes / No / If yes, explain. E.g., lubricating oils (CN code 2710 19 71 to 2710 19 99): how is the intended use declared / checked? - No; - Yes, because it was unclear whether a product is considered as having ""dual use""; - Yes, because it was unclear how to determine if electricity consumed accounted for more than 50 % of the cost of a product; - Yes, because it was unclear what activities could fall within the definition of ""metallurgical"" or ""mineralogical"" processes; - Yes, because of reason not mentioned in the above propositions (please explain).
60	Clarity / wording / content	2(4)b	Scope	Chemical Industry				X				Has your company/organisation ever experienced uncertainty whether a product should be excluded from the scope of application of the excise taxation on energy products and electricity?	
61	Clarity / wording / content	2(4)b	Scope	Chemical Industry					X			Has the situation, where a product is not taxed under the legislation on energy products and electricity but still considered as an excise product for control and movement purposes, been the source of uncertainties? E.g., toluene and xylene used as paint thinners in retail packages (canisters and bottles).	Yes/ No/ If yes, please explain
62	Single market	2(4)b	Scope	Chemical Industry	X					X		To what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain
63	Clarity / wording / content	2(4)b	Scope	Chemical Industry						X		To what extent is there a need for clarification and definition of the terms ""mineralogical"" and ""metallurgical""? How do these terms relate to production processes and establishments manufacturing such goods? How does Article 2(4)b ETD compare (in application and definition) to other provisions such as Articles 17 and 21(3) ETD?	
64	Impact on revenue from taxes	2(4)b	Scope	Chemical Industry		X				X		How would you estimate that the eventual lack of clarity of this provision could affect the tax revenue in your Member State?	Please explain

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
66	Clarity / wording / content	2(4)b	Scope			X						Would you be in favour of a delegation to the European Commission to modify the CN codes provided for in Article 2(1) ETD? If no such delegation is introduced, the modification of the provision would only be possible through a special legislative act requiring unanimity (cf. the Lisbon Treaty changes).	Yes / No - why (not)?
67	Clarity / wording / content	2(5)	Scope			X						In answering the previous question, which elements did you take most into account? - need for swift / efficient modification; - subsidiarity: the Commission is best placed to deal with the modification; - subsidiarity: the Member States are best placed to deal with the modification; - need for harmonization of energy policy; - other.	Yes / No Yes / No Yes / No Yes / No Please explain
68	Clarity / wording / content	2(5)	Scope							X		How do the Lisbon Treaty changes impact the course of action to modify / update the CN codes listed in the ETD?	
69	Clarity / wording / content	4(2)	Levels of taxation			X	X	X	X			"In your Member State, how do you distinguish direct taxes related to production of energy products and electricity (e.g., CIT or gross income tax) from indirect taxes? - for electricity - for energy products as referred to in Article 2(1) ETD Are these considered in the total level of energy taxation, and thus taken into account to assess whether the minimum level of taxation is reached?"	(C-346/97) Please explain Please explain Yes / No - why (not)?
70	Clarity / wording / content	4(2)	Levels of taxation			X	X		X			In your Member State, which indirect taxes are generally levied on goods falling within the ETD (please specify the type of tax, e.g., VAT / excise duties, and the rate)? - for electricity - for energy products as referred to in Article 2(1) ETD Are these considered in the total level of energy taxation, and thus taken into account to assess whether the minimum level of taxation is reached?	Please explain Please explain Yes / No - why (not)?
71	Clarity / wording / content	4(2)	Levels of taxation			X	X		X			In your Member State, which fees (e.g., stockpile fees) are generally levied on goods falling within the ETD? - for electricity - for energy products as referred to in Article 2(1) ETD	Please explain Please explain Yes / No - why (not)?

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												Are these considered in the total level of energy taxation, and thus taken into account to assess whether the minimum level of taxation is reached?	
72	Clarity / wording / content	4(2)	Levels of taxation		X							Did any discussion arise on national level regarding the "level of taxation" referred to in Article 4(2) ETD? (i.e., with regard to the interpretation of the concepts of "tax", "indirect" or "energy products and electricity")	Yes / No / If yes, please explain.
73	Clarity / wording / content	4(2)	Levels of taxation						X			Is clarification of Article 4(2) ETD in light of Articles 1(2) and 1(3)(a) Directive 2008/118/EC required?	Yes / No / If no, please explain.
74	Clarity / wording / content	4(2)	Levels of taxation		X							Please provide us with an English version of the national provision implementing Article 4(2) ETD. Please provide us with any national guidelines / case law in this context, if any.	
75	Clarity / wording / content	5	Levels of taxation	All	X	X						Article 5 ETD allows for the differentiation of taxation above EU minimum levels. Does your Member State differentiate in taxation between: <ul style="list-style-type: none">- Products of different quality?- Quantitative consumption levels (for electricity and energy products used for heating purposes)?- Products used for local public passenger transportation?- Products used for waste collection?- Products used for armed forces and public administration?- Products used for disabled people?- Products used for ambulances?- business and non-business use of energy products?	Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment. Yes / No / If yes, please explain the difference in treatment.
76	Impact on revenue from taxes	5	Levels of taxation		X				X			Please provide the actual tax rates per option: <ul style="list-style-type: none">- Products of different quality?- Quantitative consumption levels (for electricity and energy products used for heating purposes)?- Products used for local public passenger transportation?- Products used for waste collection?- Products used for armed forces and public administration?	Rates will be researched through the excise duty tables.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												- Products used for disabled people? - Products used for ambulances? - business and non-business use of energy products?	
77	Clarity / wording / content	5	Levels of taxation			X						Did you encounter any difficulties with regard to the interpretation of the terminology used in the list of cases laid down in Article 5 ETD? Did you encounter any difficulties in practice when applying a differentiated rate?	Yes / No / If yes, please explain. Yes / No / If yes, please explain.
78	Clarity / wording / content	5	Levels of taxation	All		X	X					If in your Member State a differentiation in taxation between products is made, how are the following terms defined in your Member State: - Quality? - Public passenger transportation? - Waste collection / public administration / disabled people / ambulances? - (non-) business use of energy products?	Not applicable / Please explain (provide legal provision if possible). Not applicable / Please explain (provide legal provision if possible). Not applicable / Please explain (provide legal provision if possible). Not applicable / Please explain (provide legal provision if possible).
79	Matching current needs / technological developments	5	Levels of taxation			X		X				Would you consider it relevant to include electricity used for transportation in the list laid down in Article 5 ETD? Consider in particular: - electricity used as propellant (e.g., also include electricity supplied to road charging stations); - differentiated rates based on the renewable character of the taxable product; - other means of transportation, e.g., public transportation in general (not limited to local transport).	Yes / No - why (not)? Yes / No - why (not)? Yes / No - why (not)?
80	Matching current needs / technological developments	5	Levels of taxation	All	X	X	X	X				Do you consider the list of available differentiations to be up-to-date? E.g., considering technological developments, social needs.	Yes / No / If no, please explain
81	Clarity / wording / content	5	Levels of taxation	All					X			Article 5 ETD allows for differentiated rates of taxation applied by the Member States (under fiscal control), in particular cases, i.e.: - linked to product quality; - depending on quantitative consumption levels for electricity and energy products used for heating purposes; - for use in local public passenger transport (incl. taxis), waste collection, armed forces and public administration, disabled people, ambulances;	Yes / No - differentiation linked to products quality - differentiation depending on the quantitative consumption levels for electricity and energy products used for heating purposes - differentiation linked to use by local

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												- between business and non-business use. Does your company/organisation benefit / suffer from a differentiated level of taxation in a Member State? If yes, based on what criteria does your company benefit from that lower excise tax rate? If yes, did you encounter any difficulties or uncertainty in practice when applying the differentiated rate?	public transport, waste collection, armed forces and public administration, disabled people, ambulances - differentiation between business and non-business use - differentiation between commercial and non-commercial use of gas oil used as propellant Yes / No / If yes, please explain.
82	Clarity / wording / content	6	Exemptions		X X							Does your Member State allow for any exemption / reduction: - directly? - by means of a differentiated rate? - by refunding all or part of the amount of taxation?	Yes / No / If yes, please elaborate on the type of product. Yes / No / If yes, please elaborate on the type of product. Yes / No / If yes, please elaborate on the type of product.
83	Clarity / wording / content	6	Exemptions		X X							In your Member State, what is considered a "direct" exemption / reduction?	Please explain / Not applicable.
84	Clarity / wording / content	6	Exemptions			X						Did you encounter any difficulties in the implementation of this provision on a national level?	Yes / No / If yes, please explain.
85	Clarity / wording / content	7(2)	Levels of taxation		X X							Does your Member State differentiate between commercial and non-commercial use of gas oil used as propellant on the basis of Article 7(2) ETD?	Yes / No
86	Clarity / wording / content	7(2)	Levels of taxation		X X							If yes, does your national legislation refer to "gas oil used as propellant" or to "gas oil used as motor fuel"?	gas oil used as propellant/as motorfuel
87	Clarity / wording / content	7(2)	Levels of taxation		X X							If yes, does the reduced rate also apply for stationary engines?	Yes / No
88	Clarity / wording / content	7(2)	Levels of taxation		X X							If yes, does your Member State apply the differentiation to all commercial vehicles, regardless of the Member State of registration? E.g., a truck registered in Germany, could it benefit from the reduced rate in France?	Yes / No

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
89	Clarity / wording / content	7(2)	Levels of taxation						X			Analysis of the different language versions ("gas oil used as propellant" vs. "gas oil used as motor fuel").	Yes / No / If yes, please explain
90	Clarity / wording / content	7(3)	Levels of taxation			X		X				In your Member State, were there additional guidelines issued on the interpretation of "commercial gas oil used as propellant", as laid down in Article 7(3) ETD?	
91	Clarity / wording / content	7(3)	Levels of taxation				X					Do you think improvement of the definition of "commercial gas oil used as propellant" is necessary?	Yes / No - why (not)?
92	Clarity / wording / content	7(3)	Levels of taxation		X			X			X	Would it be useful to include a definition of Heavy Duty Vehicles (HGV) in the ETD?	Yes / No - why (not)?
93	Clarity / wording / content	7(4)	Levels of taxation			X	X					In your Member State, is there a possibility to impose a tax rate below the national level of taxation in force on 01.01.2003, on the basis of Article 7(4) ETD? (i.e. if a particular system of road user charges is implemented)	Yes / No
95	Clarity / wording / content	8	Levels of taxation	Agriculture				X				Did you encounter any difficulties when implementing table B in annex I of the ETD?	Yes / No / If yes, please explain.
96	Matching current needs/ technological developments	8	Levels of taxation	Agriculture			X		X	X		The ETD lays down minimum levels of taxation applicable to motor fuels used for particular industrial and commercial purposes (Article 8 ETD). Do you consider the following uses of machineries as falling within the scope of Article 8 ETD (and thus the energy taxation on the motor fuels used should meet the minimum levels laid down in the ETD): - a tractor used both for transportation of goods and agricultural purposes at the same time; - a stationary motor of a crane on a ship (the motor has a separate fuel tank); - a stationary motor of a crane on a ship (the motor is fuelled through the tank of the ship).	Yes / No Yes / No Yes / No
97	Matching current needs/	8	Levels of taxation		X		X	X		X		Do you think the list of machineries mentioned in Article 8(2) ETD needs to be clarified? Do you think an update of the machineries mentioned in Article	Yes / No / If yes, please explain. Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	technological developments											8(2) ETD is needed?	
98	Clarity / wording / content	8	Levels of taxation			X	X					In your Member State, what is considered to be ""stationary motors""? Would a harmonized definition for ""stationary motors"" be helpful to ensure common application of the provision?	Please explain. Yes / No - why (not)?
99	Clarity / wording / content	8	Levels of taxation			X	X					Does your Member State distinguish between "piscicultural" and "aquacultural" works?	Yes / No / If no, please define / If yes, please explain the difference
100	Clarity / wording / content	8	Levels of taxation			X		X				In your Member State, are the following elements considered as ""plant and machinery used in construction, civil engineering and public works""? - construction crane; - concrete mixer; - concrete mixer in the form of a truck (combined use).	Yes / No / If no, why not? Yes / No / If no, why not? Yes / No / If no, why not?
101	Clarity / wording / content	8	Levels of taxation			X	X					In your Member State, how are "vehicles intended for use off the public roadway" identified?	Please explain
102	Clarity / wording / content	8	Levels of taxation	Agriculture				X	X			Does your company/organisation benefit from lower excise tax rates based on these industrial and commercial purposes?	Yes/ No
103	Clarity / wording / content	8	Levels of taxation	Agriculture					X			If yes, based on which industrial or commercial purpose does your company/organisation benefit from that lower excise tax rate?	- agricultural, horticultural or piscicultural works and in forestry; - stationary motors; - plant and machinery used in construction, civil engineering and public works; - vehicles intended for use of the public roadway or which have not been granted authorisation for use mainly on the public roadway.
104	Clarity / wording / content	8	Levels of taxation	Agriculture				X	X			Has your company/organisation ever experienced uncertainty on the applicability of these industrial and commercial purposes?	Yes / No / If yes, please explain.
105	Matching current needs/ technological developments	8	Levels of taxation	Agriculture	X	X	X	X	X			If yes, is there according to you a technological development of the machineries mentioned that required an update?	Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
106	Single market	8	Levels of taxation	Agriculture	X			X		X	X	To what extent do the different interpretations of Art. 8 ETD undermine harmonisation and distort competition in the single market?	Please explain.
107	Clarity / wording / content	9(2)	Levels of taxation			X	X					Is your Member State authorized to continue to apply a reduced rate of 10 EUR per 1.000 litres for heating gas oil?	Yes / No
108	Clarity / wording / content	9(2)	Levels of taxation			X	X					If yes, in your Member State, what is considered a "monitoring charge"?	Please explain
109	Clarity / wording / content	9(2)	Levels of taxation				X					Do you consider the reduced rate to be useful? Should such reduced rate be maintained?	Yes / No - why (not)?
110	Clarity / wording / content	9(2)	Levels of taxation					X				Do you consider it necessary to allow for a further reduced rate related to other charges than monitoring charges?	Yes / No / If yes, please explain.
111	Clarity / wording / content	10(2)	Levels of taxation			X	X					Is the taxable base for electricity the price for electricity in your Member State?	Yes / No
112	Clarity / wording / content	10(2)	Levels of taxation			X	X					If the taxable base relates to the electricity used (quantity based), how is the taxable base determined: - based on Megawatt hours (MWh); - based on Giga Joules (GJ); - other.	Yes / No Yes / No Please explain.
113	Clarity / wording / content	10(2)	Levels of taxation								X	Did any Member State encounter any difficulties to define the taxable base, with respect to Directive 2008/118/EC? Article 1(2) of this Directive allows for Member States to levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned. (check preparatory works)	Yes / No / If yes, please explain.
114	Single market	10(2)	Levels of taxation		X							To what extent do the different interpretations of Art. 10(2) ETD undermine harmonisation and distort competition in the single market?	Please explain.
115	Impact on revenue from	10(2)	Levels of taxation		X	X		X				Have you encountered any distortionary effects on the electricity market as a consequence of the possibility for Member States to	

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	taxes											freely choose the tax base?	Yes/ No/ If yes, please explain.
116	Clarity / wording / content	11(1-2)	Levels of taxation	All	X	X						Article 11 ETD provides for a definition of "business use". Did you encounter any difficulties in your Member State with regard to the interpretation of "business use"?	Yes / No / If yes, please explain
117	Clarity / wording / content	11(1-2)	Levels of taxation	All	X				X			If yes, thanks for providing us with a brief description of any case law in this respect.	
118	Clarity / wording / content	11(1-2)	Levels of taxation	All	X	X						Have you experienced any problem with the definition of "business use"?	Please explain.
119	Clarity / wording / content	11(1-2)	Levels of taxation	All	X		X					In your Member State, how do you determine whether activities of states, regional and local government authorities and other bodies governed by public law are considered as "a business" (i.e., how do you determine whether there are possibly significant distortions of competition)?	Please explain.
120	Clarity / wording / content	11(1-2)	Levels of taxation	All	X	X						Does your Member State consider public schools, public transportation or public health services to be business entities?	Yes/ No - why (not)?
121	Impact on revenue from taxes	11(1-2)	Levels of taxation	All	X				X			How would you estimate that limiting "business use" would affect the tax revenue in your Member State?	Increase in revenue / decrease in revenue / No answer
122	Single market	11(1-2)	Levels of taxation	All	X				X			To what extent do the different national implementations of this provision (cf. option to reduce the scope) undermine harmonisation and distort competition in the single market?	Please explain.
123	Clarity / wording / content	11(3)	Levels of taxation	All			X					Do you encounter any difficulties in practice when determining the proportion of business and non-business use in the hypothesis of mixed use?	Yes / No / If yes, please explain.
124	Clarity / wording / content	11(3)	Levels of taxation	All	X		X					In your Member State, when is the use considered "insignificant" and thus not taken into account? Please provide some practical examples.	Please explain.
126	Clarity / wording / content	11(3)	Levels of taxation	All		X						Have you experienced any problem with the definition of "insignificant"? EU definition required?	
127	Clarity / wording / content	11(4)	Levels of taxation	All	X	X						Did your Member State limit the scope of the term "business use"?	Yes / No / If yes, how?
128	Clarity /	12(1)	Levels of		X	X						Did your Member State make use of Article 12 (1) ETD, i.e., does	Yes / No

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content		taxation									your Member State express national levels of taxation in units other than those specified in Articles 7 to 10 ETD?	
129	Clarity / wording / content	12(1)	Levels of taxation		X	X			X			If yes, how did / do you ensure that the levels of taxation are not below the minimum levels of taxation specified in the ETD? (E.g., biofuels measures in GJ, coal measured in tonnes, biogas measured in cubic meters, etc.)	Please explain
130	Single market	12(1)	Levels of taxation		X		X			X		Do you consider the standard set at the minimum level of taxation to be a sufficient guarantee not to distort the internal market?	Yes / No
131	Single market	12(1)	Levels of taxation		X		X					Do you consider it important that Member States retain the discretion to express their national levels of taxation in other units than laid down in the ETD?	Yes / No
132	Single market	12(1)	Levels of taxation		X		X					Do you think further harmonization is necessary in order to ensure a level playing field throughout the Union?	Yes / No
133	Single market	12(1)	Levels of taxation							X		The potential differences in the level of taxation resulting from the use of different physical units used to express quantity, does this affect the single market (distortionary effects)? Is there a link with Article 5 ETD?	
134	Clarity / wording / content	12(2)	Levels of taxation			X	X					In the Council document 13253/03 ADD 1 FISC 139, the Council states that in calculating the tax level, Member States need not adjust the quantity according to the temperature of each transaction, but may adopt simplified national procedures to take account of variations in temperature. In your Member State, how do you ensure the calculation of taxation if the energy / taxable product has a temperature different than 15° C (for volume based rates)? Did your Member State adopt a simplified national procedure to take into account variations in temperature? (cf. Council Doc 13253/03 ADD) Do you make use of the references ISO 91/1 - 1982 or any subsequent revision?	Please explain. Yes / No / If yes, please explain. Yes / No
135	Clarity / wording / content	12(2)	Levels of taxation				X					Do you consider it necessary to provide for harmonization on the measurement of taxable products for which no minimum level of taxation is set in the ETD?	Yes / No
136	Clarity / wording / content	12(2)	Levels of taxation					X				Do the volumes of (some of) the energy products and electricity consumed by your company/organisation need to be converted into another measurement unit in order to calculate the excise duties?	Yes / No
137	Clarity /	12(2)	Levels of					X				If yes, has your company/organisation ever experienced	Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content		taxation									uncertainty on the conversion calculation to be performed?	
138	Clarity / wording / content	12(2)	Levels of taxation								X	Does Article 12(2) ETD provide sufficient guidance to ensure the stability of the level of taxation for liquid fuels in different weather conditions? Are common implementing rules on the recalculation of the temperature necessary?	
139	Clarity / wording / content	13	Levels of taxation			X	X					Do you think the term for updating the exchange rate is adequate?	Yes / No
140	Clarity / wording / content	13	Levels of taxation			X	X					If no, should the term be: - longer - shorter	Yes / No Yes / No
141	Clarity / wording / content	13	Levels of taxation			X	X					Did your Member State ever maintain the amount of taxation in force at the time of the annual adjustment of the exchange rate in accordance with Art. 13(2) ETD?	Yes / No
142	Clarity / wording / content	13	Levels of taxation			X	X		X			Did you encounter any issues in practice with regard to the conversion calculation to be performed?	Yes/ No / No answer - why (not)?
143	Administrative burden	14	Exemptions			X	X	X	X	X		In your opinion, does this provision lead to administrative burden that could not be justified?	Yes / No / If yes, please explain.
144	Clarity / wording / content	14(1) a	Exemptions			X	X					Does your Member State impose any taxation on energy products and electricity used to produce electricity or electricity used to maintain the ability to produce electricity for reasons of environmental policy? If yes, what is this taxation composed of? If yes, under which circumstances? If yes, at which rate? If yes, how is the taxable base determined? Does this include private / home production of electricity?	Yes / No Please explain. Please explain. Please explain. Yes / No
145	Clarity / wording / content	14(1) a	Exemptions			X						What are the conditions laid down in your Member State to ensure the correct and straightforward application of the exemption laid down in Article 14(1)a ETD?	Please explain
146	Clarity / wording / content	14(1) a	Exemptions								X	If yes, do these taxes comply with the requirements laid down in Article 1(2) of Council Directive 2008/118/EC?	Yes / No / If no, please explain
147	Clarity / wording /	14(1) a	Exemptions			X	X					Do your national legal instruments contain a definition of "energy products and electricity used to produce electricity"?	Yes / No / If yes, please provide the definition.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	content												
148	Clarity / wording / content	14(1) a	Exemptions			X	X					Do your national legal instruments contain a definition of "electricity used to maintain the ability to produce electricity"?	Yes / No / If yes, please provide the definition.
149	Clarity / wording / content	14(1) a	Exemptions			X						Is there any case law available in your Member State on the concepts of "energy products and electricity used to produce electricity" or "electricity used to maintain the ability to produce electricity"?	Yes / No / If yes, please provide a brief description of the case.
150	Matching current needs / technological developments	14(1) a	Exemptions		X			X		X		In the light of developing technologies, do you consider it necessary to introduce a common definition and regulation on storage of electricity?	Yes/ No - why (not)?
151	Clarity / wording / content	14(1) a	Exemptions						X			Has your company/organisation ever experienced uncertainty on the scope of the exemption of 14(1)(a) ETD?	Yes/ No / If yes, please explain
152	Single market	14(1) a	Exemptions		X							In your opinion, to what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain
153	Matching current needs/ technological developments	14(1) a	Exemptions		X				X			Is there according to you a technological development that requires an update of this exemption/reduced rate provision? Consider e.g., self-powered equipment such as objects powered by solar batteries.	Yes/ No/ If yes, please explain
154	Clarity / wording / content	14(1) a	Exemptions								X	Analysis of case law: - C-606/13 - T-251/11 - C-262/12	
155	Clarity / wording / content	14(1) b	Exemptions	Aviation		X						What are the conditions laid down in your Member State to ensure the correct and straightforward application of the exemption laid down in Article 14(1)b ETD?	Please explain
156	Clarity / wording / content	14(1) b	Exemptions	Aviation		X		X		X		Did your Member State issue guidance on the interpretation of the concept of ""private pleasure flying""? Is there any case law available on the interpretation of this concept?	Yes / No / If yes, please explain. Yes / No / If yes, please provide a brief description of the case.
157	Clarity / wording / content	14(1) b	Exemptions	Aviation		X	X			X	X	Please provide input from your Member State's position on the following cases: Consider an aircraft owned by a company in your Member State. The company uses the aircraft for the carriage of its personnel to clients or trade fairs. Do you allow for an exemption for the excise	Yes / No - why (not)? Yes / No - why (not)? (C-79/10 - Systeme Helmholtz)

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												duties paid on the aircraft fuel? Consider an aircraft owned by an airline company. The aircraft is flown to a maintenance facility. Do you allow for an exemption for the excise duties paid on the aircraft fuel for the trip to the maintenance facility?	
158	Clarity / wording / content	14(1) b	Exemptions	Aviation		X		X		X		Do you provide for an exemption on national level for fuel consumed by an aircraft during flights to and from an aircraft maintenance facility?	Yes / No
159	Clarity / wording / content	14(1) b	Exemptions	Aviation						X		In accordance with Article 14(1)b ETD, Member States shall exempt from energy taxation energy products supplied for use as fuel for the purpose of air navigation other than private pleasure flying. Did you encounter any issues in the application of this exemption?	Yes/ No / If yes, please explain
160	Single market	14(1) b	Exemptions	Aviation	X							To what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain
161	Clarity / wording / content	14(1) c	Exemptions	Maritime		X						What are the conditions laid down in your Member State to ensure the correct and straightforward application of the exemption laid down in Article 14(1)c ETD?	Please explain
162	Clarity / wording / content	14(1) c	Exemptions	Maritime		X		X				Did your Member State issue guidance on the interpretation of the concept of ""private pleasure craft""? Is there any case law available on the interpretation of this concept? (C-151/16)	Yes / No / If yes, please explain. Yes / No / If yes, please provide a brief description of the case.
163	Clarity / wording / content	14(1) c	Exemptions	Maritime		X		X		X		Do you consider all movements of cargo ships with the ability to tank big volumes as falling within the scope of a movement for "commercial purposes"?	Yes / No / If no, please elaborate
164	Clarity / wording / content	14(1) c	Exemptions	Maritime		X		X		X	X	In your Member State, are all uses of vessels in Community waters other than the use for pleasure considered to be included in the use of vessels for purposes of navigation? (e.g., a vessel used to carry out burials on high seas) A hopper dredger performs operations of pumping and discharge of materials. Are manoeuvres carried out during the performance of these activities considered as ""navigation in Community waters"", resulting in an exemption from energy taxation for fuel used during those activities? Consider the same hopper dredger, permanently equipped with digging equipment. The digging equipment can be operated separately from the dredger and has a separate motor and fuel	Yes / No / If no, please elaborate. (C-389/02 - Deutsche See-Bestattungs-Genossenschaft) Yes / No / If no, please elaborate. (C-391/05 - Jan De Nul) Yes / No - why (not)? (C-505/10 - Sea Fighter)

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												tank. Are the fuels used for the digging equipment exempt from energy taxation? Consider the same hopper dredger, permanently equipped with digging equipment. The digging equipment can be operated separately from the dredger but makes use of the dredger's motor and fuel tank. Are the fuels used for the digging equipment exempt from energy taxation? Consider energy products supplied as fuel for a ship to be used in navigation within the EU waters with the objective, not involving direct consideration, of sailing that ship under its own power from the place where it was built to a port in another Member State for the purpose of taking on its first commercial cargo. Are these energy products supplied as fuel exempt from energy taxation in your Member State?	Yes / No - why (not)? (C-505/10 - Sea Fighter) Yes / No - why (not)? (C-151/16 - UAB)
165	Clarity / wording / content	14(1) c	Exemptions	Maritime	X	X	X	X				Is it necessary for the cargo on the vessel to be for sale in order for the craft to be considered as a vessel navigating for commercial purposes?	Yes / No
166	Clarity / wording / content	14(1) c	Exemptions	Maritime						X		When implementing the exemption for energy products supplied for use as fuel for the purposes of navigation within Community waters other than private pleasure craft, how was the link made with: - Art. 24 ETD; - Art. 33 Directive 2008/118/EC; - The Euromarker Directive.	
167	Clarity / wording / content	14(1) c	Exemptions	Maritime	X	X	X	X				In your Member State, how is "fishing" defined? - e.g., chartering a yacht for fishing; crane on a craft used for fishing (i.e., more generally, stationary on-board motors / similar on-board equipment)	Please elaborate
168	Clarity / wording / content	14(1) c	Exemptions	Maritime				X	X			Has your company/organisation ever experienced uncertainty on the scope of the exemption?	Yes / No / If yes, please explain.
169	Single market	14(1) c	Exemptions	Maritime	X					X		To what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain
170	Clarity / wording / content	15 and 16	Exemptions	All		X	X	X				Does your Member State apply these exemptions or reductions?	
173	Clarity /	15	Exemptions		X	X						In your Member State, did you encounter any difficulties	Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content	and 16										implementing and applying these provisions?	
173	Clarity / wording / content	15(1)	Exemptions			X		X				In your Member State, is there a difference made between reductions and (partial) exemptions?	Yes / No
174	Clarity / wording / content	15(1)	Exemptions			X		X				How is "fiscal control" organized in your country?	Please explain
175	Clarity / wording / content	15(1)	Exemptions			X		X				Are the exemptions applied to all taxable products falling within the scope of the ETD, or are they limited to the "energy products" referred to in Article 2(1) ETD?	Please explain
176	Clarity / wording / content	15(1)	Exemptions			X		X				Should certain exemptions be abolished or limited in scope?	Yes / No / If yes, please explain.
177	Clarity / wording / content	15(1)	Exemptions			X		X				Is the distinction between the optional exemption under Article 15(1)f - fuel for navigation on inland water ways - and the mandatory exemption under Article 14(1)c - fuel for the purposes of navigation within Community waters- clear? (C-391/05)	Yes / No / Please explain.
179	Clarity / wording / content	15(1) a	Exemptions			X		X				In your Member State, how is a product determined as "environmentally-friendly"? E.g., gearbox linked with satellite navigation	Please explain.
180	Clarity / wording / content	15(1) a	Exemptions			X		X				In your Member State, what is considered to be a "pilot project"?	Please explain.
182	Clarity / wording / content	15(1) a	Exemptions			X		X				When implementing this provision, did your Member State take into account other EU or national environmental policies?	Yes / No / If yes, please explain.
184	Clarity / wording / content	15(1) a	Exemptions				X					Problem with definition of "environmentally-friendly"	
185	Clarity / wording / content	15(1) a	Exemptions				X					Problem with definition of "pilot projects"	
186	Clarity / wording / content	15(1) a	Exemptions							X		Is Article 15(1)a ETD consistent with other provisions of the ETD?	

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
187	Matching with other policy instruments + State Aid rules	15(1) a	Exemptions		X						X	Is this provision contradicting other policy instruments, and in particular State Aid rules?	Please explain.
188	Clarity / wording / content	15(1) b	Exemptions			X		X				Did you encounter any difficulties (e.g., from a competition perspective) with regard to electricity originating from renewable resources not falling within the scope of Article 15(1)b ETD? (consider for example renewable fuels that are not biofuels)	Yes / No / If yes, please explain.
189	Clarity / wording / content	15(1) b	Exemptions			X					X	Is there any case law available in your Member State on the determination of the origin of renewable electricity? (cf. Article 15(1)b ETD)	Yes / No / If yes, please provide a brief description of the case.
190	Matching current needs/ technological developments	15(1) b	Exemptions		X	X		X		X		Not all electricity originating from a renewable source (solar, wind, wave, tidal, geothermal, hydraulic, biomass, methane) can be considered beneficial for the environment. Is there a need to introduce a system on EU level to exclude electricity from renewable sources from the reduction / exemption possibility, if this electricity has proven to be harmful for the environment? How could such system look like?	Yes / No - why (not)? Please explain.
191	Clarity / wording / content	15(1) b	Exemptions								X	Has your company/organisation encountered any competitive disadvantage because of the application of exemptions on certain types of electricity from renewable sources?	Yes / No / If yes, please explain.
192	Impact on revenue from taxes	15(1) b	Exemptions			X					X	How would you estimate that a system to exclude electricity from renewable sources from the reduction/exemption could affect the tax revenue in your Member State?	Please explain.
193	Clarity / wording / content	15(1) c	Exemptions	Cogeneration	X	X				X		Would you be in favour of a restriction of the scope to cogeneration of energy which is also environmentally-friendly?	Yes / No
194	Administrative burden	15(1) c	Exemptions	Cogeneration		X	X		X			In your opinion, does this provision lead to administrative burden that could not be justified?	Yes / No / If yes, please explain.
195	Clarity / wording / content	15(1)	Exemptions	Cogeneration			X	X		X		Would you be in favor of a common EU definition of "environmentally-friendly"?	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
		d											
196	Clarity / wording / content	15(1) d	Exemptions	Cogeneration		X	X	X				In your Member State, is the exemption / reduction linked to a national definition of: A. ""environmentally-friendly"" cogeneration? B. ""high efficiency"" cogeneration?	Yes / No Yes / No
197	Clarity / wording / content	15(1) d	Exemptions	Cogeneration		X		X				If yes to A, how is "environmentally-friendly cogeneration" defined in your Member State?	Please explain.
198	Clarity / wording / content	15(1) d	Exemptions	Cogeneration		X		X				If yes to B, how is "high efficiency cogeneration" defined in your Member State?	Please explain.
199	Clarity / wording / content	15(1) d	Exemptions	Cogeneration			X	X				Would you be in favour of a common definition of "high efficiency cogeneration"?	Yes / No
200	Clarity / wording / content	15(1) d	Exemptions	Cogeneration				X				If yes, would you agree on the definition as laid down in Article 2(34) Directive 2012/27/EU (with reference to Annex II to the Directive)?	Yes / No
201	Clarity / wording / content	15(1) d	Exemptions	Cogeneration		X		X		X		In your Member State, is the exemption restricted to own use or is the exemption broader?	Please explain.
202	Impact on revenue from taxes	15(1) d	Exemptions	Cogeneration					X			Has your company/organisation encountered any competitive disadvantage because of the different national definitions?	Yes / No / If yes, please explain.
203	Single market	15(1) d	Exemptions	Cogeneration	X							In your opinion, to what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain
204	Clarity / wording / content	15(1) e	Exemptions				X			X		Should the specific references to ""rail, metro, tram and trolley bus"" be extended to other means of transportation? If yes, which means of transportation? E.g.: means of transportation running on batteries; hybrids operating with internal combustion engines and electric engines with batteries	Yes / No / If no, please explain. Please explain.
205	Single market	15(1)	Exemptions		X							To what extent do the different interpretations of this provision	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
		e										undermine harmonisation and distort competition in the single market?	
206	Clarity / wording / content	15(1) f	Exemptions	Maritime		X X X						In your Member State, how is "inland waterways" defined?	Please explain.
207	Clarity / wording / content	15(1) f	Exemptions	Maritime		X X X						In your Member State, are lakes included in "inland waterways"?	Yes / No (CED 372 REV1)
208	Clarity / wording / content	15(1) f	Exemptions	Maritime		X	X	X		X		In your Member State, is any commercial navigation in all inland waters considered to be eligible for exemption / reduction of taxation?	Yes / No / If no, please explain.
209	Clarity / wording / content	15(1) f	Exemptions	Maritime					X X			As a company/organisation, did you encounter any uncertainties because there is a lack of a general definition for inland waterways?	Yes/ No / If yes, please explain.
210	Matching with other policy instruments + State Aid rules	15(1) f	Exemptions	Maritime	X						X	Is this provision contradicting other policy instruments, and in particular State Aid rules?	Please explain.
211	Clarity / wording / content	15(1) f	Exemptions	Maritime							X	Analysis of: - C-391/05 and opinion AG; - Euromarker Directive.	
212	Clarity / wording / content	15(1) h	Exemptions			X X X						In your Member State, is the exemption / reduction applicable for: - electricity - natural gas - coal - solid fuels	Yes / No Yes / No Yes / No Yes / No
213	Clarity / wording / content	15(1) h	Exemptions				X					Do you consider it necessary for the Member States to be able to limit the scope to some of the energy products mentioned (i.e., one or several of the following: electricity, natural gas, coal and solid fuels)?	Yes / No
214	Clarity / wording /	15(1) h	Exemptions			X	X					In your Member State, how do you make sure that only households can benefit from the exemption / reduction?	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	content												
215	Clarity / wording / content	15(1) h	Exemptions			X	X	X				In your Member State, how is "use by households" defined? Is the exemption / reduction limited to certain households?	Please explain.
216	Clarity / wording / content	15(1) h	Exemptions			X		X				In your Member State, is the exemption / reduction for charitable organisations limited to use for the purpose of non-business activities?	Yes / No
217	Clarity / wording / content	15(1) h	Exemptions			X		X				With regard to charitable organisations, how do you differ between business and non-business use?	Please explain.
218	Clarity / wording / content	15(1) h	Exemptions			X	X	X				In your Member State, how is "charitable organisation" defined?	Please explain.
219	Clarity / wording / content	15(1) h	Exemptions			X	X	X				In your Member State, when is the use considered "insignificant" and thus not taken into account?	Please explain.
220	Clarity / wording / content	15(1) h	Exemptions							X		Is the implementation of "mixed use" and "insignificant use" aligned with the implementation of Article 11(3) ETD?	Yes / No
221	Impact on revenue from taxes	15(1) h	Exemptions				X	X				Would you be in favour of an extension of the scope of the exemption / reduction to other forms of energy products than electricity, natural gas, coal and solid fuels?	Yes / No / If no, please explain (e.g., fraud issues).
222	Clarity / wording / content	15(1) h	Exemptions			X		X				How is the exemption / reduction for charitable organizations enforced in your Member State?	Please explain.
223	Single market	15(1) h	Exemptions		X							In your opinion, to what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single market?	Please explain.
224	Clarity / wording / content	15(1) i	Exemptions			X	X	X				Does your national legislation refer to "used as propellant" or to "used as motor fuel"?	Please explain.
225	Clarity /	15(1)	Exemptions		X		X					Is the use of LPG / natural gas for stationary motors eligible for	Yes / No

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content	i										exemption / reduction under the national provision implementing Article 15(1)i ETD?	
225	Clarity / wording / content	15(1) i	Exemptions			X						Are the following products covered by an exemption / reduction in your Member State? - CNG - propane - butane	Yes / No
227	Clarity / wording / content	15(1) i	Exemptions							X		Analysis of the different language versions.	
229	Clarity / wording / content	15(1) j	Exemptions							X		Analysis in light of the CoJ jurisprudence, particularly on Article 14(1)b and 14(1)c ETD.	
230	Single market	15(1) k	Exemptions			X	X					Is there an exemption / reduction in place for motor fuels used by a crane on a ship, e.g., used for dredging operations in navigable waterways and ports?	Yes / No
231	Clarity / wording / content	15(1) k	Exemptions							X		Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to motor fuels used for dredging operations in navigable waterways and in ports (Article 15(1)k ETD). Do you benefit from any such exemption / reduction in a Member State? If yes, is this exemption / reduction allowed for fuels supplied in a tank which also contains fuels for different uses? (i.e. single tank, e.g., also used for fuels for a crane on a vessel) If yes, did you encounter any issues in practice? (e.g., requirement to split according to use, use of simplification rules)	Yes / No Yes / No Yes / No / If yes, please explain.
232	Clarity / wording / content	15(1) k	Exemptions							X		Analysis of C-391/05 and opinion AG.	
233	Impact on revenue from taxes	15(1) l	Exemptions			X	X					What was the reason on a national level to allow for a reduction / exemption for products falling within CN code 2705 used for heating purposes?	Please explain.
234	Single market	15(1) l	Exemptions		X							To what extent do the different interpretations of this provision undermine harmonisation and distort competition in the single	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												market?	
235	Clarity / wording / content	15(2)	Exemptions		X				X			In your Member State, is there a refund possible to the producer of some or all of the amount of tax paid by the consumer on electricity produced in accordance with Article 15(1)b ETD?	Yes / No
236	Clarity / wording / content	15(3)	Exemptions		X	X			X			In your Member State, is there a level of zero taxation foreseen for energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry?	Yes / No - please elaborate.
237	Clarity / wording / content	15(3)	Exemptions		X		X					Do you consider it necessary to include aquacultural works other than piscicultural works eligible for zero taxation?	Yes / No
238	Clarity / wording / content	15(3)	Exemptions							X		Analysis of definitions in other areas of EU legislation: - Article 3(1)a Council Directive 2006/88/EC - Article 3(d) Council Regulation 1198/2006/EC	
239	Matching with other policy instruments + State Aid rules	15(3)	Exemptions		X					X		Is this provision contradicting other policy instruments, and in particular State Aid rules?	Please explain
240	Clarity / wording / content	15 and 16	Exemptions						X	X		Does your company/organisation benefit from an exemption or a reduced rate of excise duties on one of the following grounds (tick the box): <ul style="list-style-type: none">- Energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity;- Energy products supplied for use as fuel for the purpose of air navigation other than private pleasure-flying;- Energy products supplied for use as fuel for navigation within Union waters (including fishing), other than private pleasure craft, and electricity produced on board a craft;- Energy products supplied for use as fuel for navigation on inland waterways (including fishing), other than in private pleasure craft, and electricity produced on board a craft;- Energy products and electricity used in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources;- Electricity of solar, wind, wave tidal or geothermal origin;- Electricity of hydraulic origin produced in hydroelectric	

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												installations; - Electricity generated from biomass or from products produced from biomass; - Electricity generated from methane emitted by abandoned coalmines; - Electricity generated from fuel cells; - Energy products and electricity used for combined heat and power generation; - Electricity produced from combined heat and power generation, provided that the combined generators are environmentally friendly; - Energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus; - Electricity, natural gas, coal and solid fuels used by households and/or by organisations recognised as charitable; - Natural gas and LPG used as propellants; - Motor fuels used in the field of the manufacture, development, testing and maintenance of aircrafts and ships; - Motor fuels used for dredging operations in navigable waterways and in ports; - Energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry; - Energy products and electricity made up of, or containing soya-bean oils or animal or vegetable fats and oils; - Energy products and electricity made up of, or containing mixtures of fatty acid esters of glycerol or mixtures of amines derived from dimerised fatty acids; - Energy products and electricity made up of, or containing denatured ethyl alcohol and other spirits or methanol, which are not of synthetic origin; - Energy products and electricity made up of, or containing fuel wood or wood charcoal; - Energy products and electricity made up of, or containing water; - Energy products used by energy-intensive businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency; - Energy products used by businesses which entered into	

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency.	
241	Clarity / wording / content	15 and 16	Exemptions						X	X		Whenever a box is ticked: Has your company/organisation ever experienced uncertainty concerning the applicability of that exemption/reduced rate?	Yes / No / If yes, please explain.
242	Matching current needs / technological developments	15 and 16	Exemptions				X		X	X		Whenever a box is ticked: Is there according to you a technological development that requires an update of this exemption/ reduced rate provision?	Yes / No / If yes, please explain.
243	Clarity / wording / content	15 and 16	Exemptions				X		X	X		Whenever a box is ticked: To your experience, does the procedure for being granted / requesting the exemption or the reduced rate lead to administrative burden that could not be justified?	Yes / No / If yes, please explain.
244	Clarity / wording / content	16	Exemptions	Chemical Industry		X		X				What are the conditions for its application (e.g., is there a minimum percentage necessary of the products mentioned)?	Please explain.
245	Clarity / wording / content	16	Exemptions	Chemical Industry			X	X				Do you believe the list with products referred to in Article 16 ETD is still up to date / relevant? Should the list be expanded / limited, e.g., considering existing blending obligation?"	Yes / No Yes / No
246	Clarity / wording / content	16	Exemptions			X		X				In your Member State, is the definition of "biomass" laid down in any national provision / guideline?	Yes / No / If yes, please provide an English version of the definition.
247	Clarity / wording / content	16	Exemptions								X	If yes, does this definition correspond with: - the definition provided by Article 16(1) ETD? - the definition laid down in Article 2(e) Directive 2009/28/EC? - other parameters Analysis of the definition in Article 2(e) Directive 2009/28/EC.	Yes / No Yes / No Please explain.
248	Clarity / wording / content	16	Exemptions				X					Do you consider it necessary that the ETD definition of "biomass" is updated?	Yes / No - why (not)?
249	Impact on revenue from	16(1)	Exemptions			X	X					In your Member State, is there a reduced rate foreseen for taxable products containing water? (CN codes 2201 and 2851 00 10)	Yes / No

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	taxes												
250	Impact on revenue from taxes	16	Exemptions			X	X					Do you consider it necessary to provide for a reduced rate for taxable product containing additives other than water, which do not contribute to the improvement of the energy of the fuel but serve other functions (e.g., lubricants in two-stroke engines)?	Yes / No
252	Clarity / wording / content	16	Exemptions	Refineries and biofuels		X		X				Are the exemptions applied to all taxable products falling within the scope of the ETD, or are they limited to the "energy products" referred to in Article 2(1) ETD? E.g., a non-energy product used as motor fuel.	Please explain.
253	Matching with other policy instruments + State Aid rules	16	Exemptions		X					X		Is this provision contradicting other policy instruments, and in particular State Aid rules?	Please explain.
254	Clarity / wording / content	16(3)	Exemptions	Refineries and biofuels		X		X				In your Member State, if a reduced rate or exemption exists, is it adjusted and how is the adjustment of the exemption / reduction applied to take account of changes in raw material prices?	Please elaborate.
255	Impact on revenue from taxes	16(3)	Exemptions	Refineries and biofuels			X			X		Would you be in favour to impose further modifications to the exemption / reduction, to also take into account production costs (next to raw material prices)?	Yes / No
256	Clarity / wording / content	16(5)	Exemptions	Refineries and biofuels	X							Please elaborate on the background to this provision (what is meant by this provision)?	Please explain
257	Clarity / wording / content	16(5)	Exemptions	Refineries and biofuels	X		X		X			In your Member State, is it possible for an administrative authority to grant an exemption / reduction for taxation in accordance with Article 16(1) ETD to an economic operator for more than one year?	Yes / No
258	Clarity / wording / content	16(5)	Exemptions	Refineries and biofuels	X	X		X				If yes, who needs to obtain the authorization under a multiannual programme? What if the biofuel manufacturer is established outside the EU?	- The blender - The biofuel manufacturer Please explain.
260	Clarity / wording / content	16(5)	Exemptions	Refineries and biofuels	X						X	Analysis of the relevance of Article 16(5), par. 2 ETD.	
261	Clarity /	16(6)	Exemptions	Refineries and biofuels							X	Analysis of the relevance of Article 16(6) ETD.	Please explain

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content												
262	Clarity / wording / content	16(6)	Exemptions	Refineries and biofuels					X			Analysis in light of existing EU legislation (i.e., Fuel Quality Directive and Renewables Directive).	
263	Clarity / wording / content	16(6)	Exemptions	Refineries and biofuels	X							Do you have the communications from the MS on application of reductions under Article 16? Please provide copies of the latest versions.	Please explain
264	Clarity / wording / content	17(1) a	Exemptions	All		X	X			X		In your Member State, do electricity consumers have to pay electricity network costs / charges on the individual consumption? If yes, are industries characterised by their intensive energy consumption, allowed for a reduction of the payment in respect of those costs/charges? If yes, is such reduction considered a ""tax reduction"" in terms of Article 17 ETD and thus linked to the conditions laid down in that provision?	Yes / No Yes / No Yes / No (C-189/15 - Fondazione Santa Lucia)
265	Clarity / wording / content	17(1) a	Exemptions	All		X	X					In your Member State, how is "each business" defined?	Please explain.
266	Clarity / wording / content	17(1) a	Exemptions	All		X	X					Do you consider this provision to be sufficiently clear?	Yes / No / If no, please explain.
267	Clarity / wording / content	17(1) a	Exemptions	All		X		X				In case a reduced rate under Article 17 ETD is foreseen in your Member State, how do you as a Member State determine and assure that on average for each business, the EU minimum level of taxation is respected?	Please explain.
268	Clarity / wording / content	17(1) a	Exemptions	All		X				X		In your Member State, is there any case law available on the application of this provision?	Yes / No / If yes, please provide a brief description.
269	Clarity / wording / content	17(1) a	Exemptions	All		X		X				Since Article 17 ETD explicitly refers to "energy products", does this mean that other taxable products falling within the scope of the ETD are not exempt / no reduced rate can apply for them? (e.g., non-energy products intended to be used as motor fuel)	Please explain.
270	Clarity /	17(1)	Exemptions	All							X	Comparison of language versions.	Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content	a											
271	Clarity / wording / content	17(1) a	Exemptions	All		X	X	X		X		Art. 17(1) allows Member States to apply tax reductions on the consumption of energy products by energy-intensive businesses, among other used for heating purposes. Does your Member State foresee in such reduction?	Yes / No / If yes, please elaborate on the way this reduction is implemented.
272	Clarity / wording / content	17(1) a	Exemptions	All				X				If yes, how does your Member State determine and assure that on average for each business, the EU minimum level of taxation is respected?	Yes / No / If yes, please elaborate on the modalities of the reassessment.
273	Clarity / wording / content	17(1) a	Exemptions	All		X	X			X		Did you encounter any difficulties in practice when applying the reduction?	Yes / No / If yes, please explain.
274	Administrative burden	17(1) a	Exemptions	All		X		X				Do you periodically assess the energy intensive nature of the business?	
275	Matching with other policy instruments + State Aid rules	17(1) a	Exemptions	All	X						X	Is this provision contradicting other policy instruments, and in particular State Aid rules?	Please explain.
276	Administrative burden	17(1) a	Exemptions	All	X	X	X		X			Does the reduction lead to administrative burden that could not be justified?	Please explain.
277	Clarity / wording / content	17(1) b	Exemptions	All		X	X					Does your Member State allow for tax reductions related to agreements / permit schemes (or equivalent) leading to the achievement of environmental protection objectives or improvements in energy efficiency?	Yes / No
278	Clarity / wording / content	17(1) b	Exemptions	All		X		X				If yes, how do you determine the existence of "the achievement of environmental protection objectives" or "improvements in energy efficiency"?	Please explain.
279	Clarity / wording / content	17(1) b	Exemptions	All		X		X		X		In your Member State, how are "tradable permit schemes" defined/adopted?	"Please elaborate Refer to the legislative provision if possible"
280	Clarity / wording / content	17(1) b	Exemptions	All		X					X	In your Member State, is there any case law available on the concept of "tradable permit schemes" or the national equivalent?	Yes / No / If yes, please provide a brief description

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
281	Clarity / wording / content	17(1) b	Exemptions	All							X	What do Member States include in their national legislation or practice in the term 'tradable permit schemes'?	
282	Matching with other policy instruments + State Aid rules	17(1) b	Exemptions	All	X						X	To what extent is this provision compatible with other EU provisions (State Aid, etc.)?	Please explain.
283	Clarity / wording / content	17(2)	Exemptions	All		X X						Did you encounter any difficulties with regard to the implementation of Article 17(2) ETD?	Yes / No / If yes, please explain.
284	Clarity / wording / content	17(3)	Exemptions	All		X X						Did you encounter any difficulties with regard to the implementation of Article 17(3) ETD?	Yes / No / If yes, please explain.
285	Clarity / wording / content	17 (2-3-4)	Exemptions	All		X	X					How do you assure that the measures businesses need to adhere to for application of the reduced rate (environmental permits, ...) are broadly equivalent to what would have been achieved if the standard Community excise duty rates would have been applied?	Please explain.
286	Clarity / wording / content	17 (2-3-4)	Exemptions	All		X						Should an EU regulated assessment mechanism be introduced for these purposes?	Yes / No
287	Clarity / wording / content	20(1)	Scope	All		X X X						Council Directive 2008/118/EC lays down the rules to levy excises on the goods within the scope of the Directive and elaborates on the rules to move excise goods. In particular, excise goods may be moved under a duty suspension arrangement within the EU through the use of an eAD. In your Member State, what is understood to be the ""control and movement provisions of Directive 92/12/EEC"" (current Directive 2008/118/EC)? A. chapter III (tax warehouse arrangements) and chapter IV (arrangements for movements under suspension of excise duty) as laid down in Directive 2008/118/EC? B. chapter III (tax warehouse arrangements), chapter IV (arrangements for movements under suspension of excise duty) and chapter V (duty paid regime) as laid down in Directive 2008/118/EC?	Yes / No Yes / No Please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
												C. other	
288	Clarity / wording / content	20(1)	Scope	All		X	X	X				IF YES TO A: For taxable energy products in scope of Article 20 ETD (e.g., petrol and diesel), what is the procedure applied in your Member State to intra-EU movements of taxable products for which duties have already been paid in the Member State of departure?	Please explain.
289	Clarity / wording / content	20(1)	Scope	All		X	X	X				IF YES TO B: For non-taxable energy products, not subject to Article 20 ETD (so excluded from the control and movement provisions of Directive 2008/118, e.g., lubricants), does this mean that an SAD needs to accompany the goods in case of intracommunity movements?	- yes - no, as these goods are not excise goods - no (please explain)
290	Clarity / wording / content	20(1)	Scope	All		X		X		X		How is the movement and payment of excise duties dealt with in your MS for taxable energy products not in scope of Article 20 ETD (e.g., LNG)? What in case of an intracommunity supply? (use of SAD possible based on 2008/118?)	Please explain.
291	Clarity / wording / content	20(1)	Scope	All		X		X				How is the movement and payment of excise duties dealt with in your MS for taxable product, not qualifying as energy product under art 2, §1 ETD, per definition not in scope of Article 20 ETD (e.g., synthetic methanol intended to be used as motor fuel)? What in case of an intracommunity supply?	Please explain.
292	Clarity / wording / content	20(1)	Scope	All		X		X				Do you see the need / possibility to foresee in control and movement provisions applied to electricity? How could this work?	Yes / No Please explain.
294	Clarity / wording / content	20(1)	Scope	All	X	X	X					Is the list of Article 20 ETD adequate or should products be removed or added?	Please explain.
295	Clarity / wording / content	20(2)	Scope	All		X	X					Would you be in favour of a delegation of power to include energy products in Article 20(1) ETD to the European Commission? If no such delegation is introduced, the modification of the provision would only be possible through a special legislative act requiring unanimity.	Yes / No - why (not)?
296	Clarity / wording / content	20(2)	Scope	All						X		Lisbon Treaty changes.	
297	Clarity /	20(3)	Scope	All		X	X	X			X	Did your Member State conclude any bilateral or multilateral agreements resulting in dispensation of some or all of the control	Yes / No / If yes, with whom?

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content											measures?	
298	Clarity / wording / content	20(3)	Scope	All		X	X	X		X		If no, does / did your Member State consider to conclude such bilateral agreements?	Yes / No / If no, why not?
299	Clarity / wording / content	20(3)	Scope	All		X	X	X		X		If yes, what are the criteria your Member State applies to decide when / with which MS it would conclude such agreement?	Please elaborate
300	Clarity / wording / content	20(3)	Scope	All		X			X			If the Member State from which your company/organisation operates has concluded bilateral agreements resulting in dispensation of some or all of the control measures set out in Directive 2008/118/EC, does your company/organisation make use of the simplification of the control and movement provisions on excise products?	Yes/ No
301	Administrative burden	20(3)	Scope	All	X	X	X		X			If yes, does the procedure for benefiting from that simplification lead to administrative burden that could not be justified?	Yes/ No/ If yes, please explain
302	Matching with other policy instruments + State Aid rules	20(3)	Scope	All	X					X		Does this provision contradict other policy instruments, and in particular State Aid rules?	
303	Clarity / wording / content	20(3)	Scope	Refineries and biofuels		X	X			X		In accordance with the ETD (Article 21(3)), the consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consists of energy products produced within the curtilage of the establishment. In your Member State, what is considered to be ""the curtilage of an establishment producing energy products""? Is the use of motor vehicles (e.g., lorries) driving on the terrain also covered?	Please elaborate Yes / No
304	Clarity / wording / content	20(3)	Scope	Refineries and biofuels		X				X		In your Member State, is there any case law / administrative definition available with regard to determining whether the energy consumed is produced within the curtilage of the establishment?	Yes / No / If yes, please provide a brief description
305	Clarity /	21(3)	Scope	Refineries		X	X	X				Did your Member State extend the scope of the absence of a	Yes / No

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content			and biofuels								chargeable event to situations where external energy products and electricity are used within the curtilage of the establishment?	
306	Clarity / wording / content	21(3)	Scope	Refineries and biofuels		X	X		X			Would you be in favour of the mandatory extension of the scope of the absence of a chargeable event to all energy products and electricity used for purposes of production (i.e., also for energy products and electricity not produced by the undertaking)?	Yes / No - why (not)?
307	Matching with other policy instruments + State Aid rules	21(3)	Scope	Refineries and biofuels	X					X		Does the extension of the scope of the absence of a chargeable event to situations where external energy products and electricity are used within the curtilage of the establishment potentially give rise to State Aid issues?	Yes / No / If yes, please explain
308	Clarity / wording / content	21(3)	Scope	Refineries and biofuels		X	X	X				Did your Member State extend the scope of the absence of a chargeable event to situations where (external or internal) energy products and electricity are used within the curtilage of an establishment producing fuels to be used for generation of electricity?	Yes / No
309	Clarity / wording / content	21(3)	Scope	Refineries and biofuels		X				X		Which of the following products are covered by the exclusion from the taxable event giving rise to taxation (in accordance with Article 21(3) ETD): - consumption of produced synthetic methanol - consumption of produced bioethanol - consumption of produced hydrogen	Yes / No - why (not)? Yes / No - why (not)? Yes / No - why (not)?
310	Clarity / wording / content	21(3)	Scope	Refineries and biofuels					X	X		In accordance with the ETD (Article 21(3)), the consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event giving rise to taxation, if the consumption consists of energy products produced within the curtilage of the establishment. Additionally, in some Member States the consumption of electricity and other energy products not produced within the curtilage of such an establishment and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity are not considered to give rise to a chargeable event. Does your company/organisation benefit from any of the aforementioned exclusions from the chargeable event? If yes, has your company/organisation ever experienced uncertainty concerning the applicability of that exclusion?	Yes / No Yes / No / If yes, please explain.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
311	Clarity / wording / content	21(5)	Scope			X	X			X		In accordance with Article 21(5) ETD, electricity and natural gas shall be subject to taxation and shall become chargeable at the time of supply by the distributor or redistributor. In your Member State, are all types of natural gas (also LNG and CNG) covered by Article 21(5) ETD? Do you consider natural gas which is not transported by pipelines to be covered by Article 21(5) ETD?	Yes / No Yes / No
312	Clarity / wording / content	21(5)	Scope			X		X				According to the procedures laid down in your Member State, what triggers the taxable event?	- booking of the invoice - leaving the storage facility - moment of actual delivery - consumption
313	Impact on revenue from taxes	21(5)	Scope			X	X	X				If a distributor supplies electricity or natural gas from your Member State to a consumer in another Member State, does your Member State tax the natural gas?	Yes / No
314	Administrative burden	21(5)	Scope			X	X					Considering your Member State as the Member State of delivery of the product, when is a company considered to be registered within the meaning of Article 21(5) ETD?	Yes / No - why (not)?
315	Clarity / wording / content	21(5)	Scope			X					X	Are there any further requirements laid down in your Member State for the company to which the tax is chargeable?	Yes / No / If yes, please explain
316	Clarity / wording / content	21(5)	Scope			X	X					In your Member State, is there an exemption granted to ""small producers""? If yes, is this exemption granted to small producers who produce for their own use only? If yes, who is considered a ""small producer"" in your Member State?	Yes / No Yes / No Please explain.
317	Clarity / wording / content	21(5)	Scope								X	Is there a need for a definition of "small producer" on EU level? How would such definition be construed, considering the difference in size of the Member States (and corresponding difference in size in economic operators)?	
318	Clarity / wording / content	21(5)	Scope			X		X				In your Member State, are excise duties due on electricity produced through photovoltaic installations and used by the owner of those installations? Would the answer be different if not used by the owner but onwards supplied (f.i. to tenants)? Does a declaration need to be submitted?	Yes / No Yes / No Yes / No
319	Administrative	21(5)	Scope			X		X				Please briefly describe the mechanism of appointing the responsible person for charging the excise duty on coal	Please explain

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	burden											(who needs to be the registered company)	
320	Administrative burden	21(5)	Scope		X	X	X	X				Please briefly describe the registration procedure for the registered company delivering coal, coke or lignite.	Please explain
321	Clarity / wording / content	21(5)	Scope					X				Is your company/organisation producing electricity for its own use? If yes, is your company/organisation regarded as electricity distributor? If yes, has your company/organisation ever experienced uncertainty/unclarity concerning the registration as distributor?	Yes / No Yes / No, the company/organisation is exempt as it is considered a small producer. Yes / No / Please explain.
322	Clarity / wording / content	21(5)	Scope		X			X				Is being considered as a "distributor" burdensome in your Member State? (i.e., do any cost arise for the economic operator)	Yes / No / If yes, please elaborate on the costs.
323	Clarity / wording / content	21(5)	Scope		X	X						How do you define distributor or redistributor in your MS?	Yes / No / If no, please explain.
324	Single market	21(5)	Scope		X				X			To what extent do the different interpretations of this provision by the Member States undermine harmonisation and distort competition in the single market?	Please explain
325	Matching current needs/ technological developments	21(5)	Scope		X	X	X					Is there according to you a technological development that requires an update of this exemption/reduced rate provision?	Please explain
326	Administrative burden	21(5)	Scope		X	X	X	X				Does this provision lead to administrative burden that could not be justified?	Yes / No - why (not)?
327	Clarity / wording / content	21(6)	Scope	Refineries and biofuels		X			X			Did you encounter any difficulties when implementing this provision in your Member State?	Yes / No / If yes, please explain
328	Clarity / wording / content	21(6)	Scope	Refineries and biofuels	X	X			X			In accordance with the ETD, a Member State shall not treat as "production of energy products" operations during which small quantities of energy products are obtained incidentally. In your Member State, what are considered "small quantities"? How are small quantities determined?	Please explain
329	Clarity /	21(6)	Scope	Refineries	X				X			In your Member State, is there any case law available on the interpretation of "operations during which small quantities of	Yes / No / If yes, please provide a brief description.

Q	Research Question	ETD Article	Topic	Sector	Strategy IV	DDT Network	MS General	MS Specific IV	EO General	EO Specific IV	Desk Research	Question	Answers
	wording / content			and biofuels								energy products are obtained incidentally"?	
330	Clarity / wording / content	23			X	X						Does your Member State allow for the refund of amounts of taxation already paid on contaminated or accidentally mixed energy products sent back to a tax warehouse for recycling? If yes, are there any specific criteria on what needs to be considered as contaminated or 'accidentally' mixed? If yes, is there any case law available in your Member State in this respect?	Yes / No Yes / No / If yes, please explain. Please provide a brief description.
331	Clarity / wording / content	24	Exemptions	Aviation/Maritime		X	X	X				Do you consider it necessary to include standard tanks of other means of transportation (e.g., trains, ships, planes)?	Yes / No - why (not)?
332	Clarity / wording / content	24(2)	Exemptions		X	X			X			Does your Member State allow for the exemption of energy taxation for standard tanks fitted by another person than the manufacturer?	Yes / No - why (not)? (C-152/13 - Holger Forstmann Transporte)
333	Clarity / wording / content	25(1)	Levels of taxation				X					Did this provision lead to uncertainties on the way it should be applied?	Yes / No / If yes, please explain
334	Administrative burden	25(1)	Levels of taxation		X	X						Is it considered burdensome to provide the European Commission with the information required in accordance with Article 25(1) ETD?	Yes / No / If yes, please explain
335	Administrative burden	25(1)	Levels of taxation							X		Is the requested information considered sufficient? Is an additional level of detail needed?	

Annex B - Findings per Article

B.1 Article 1

Delineating the scope of the ETD

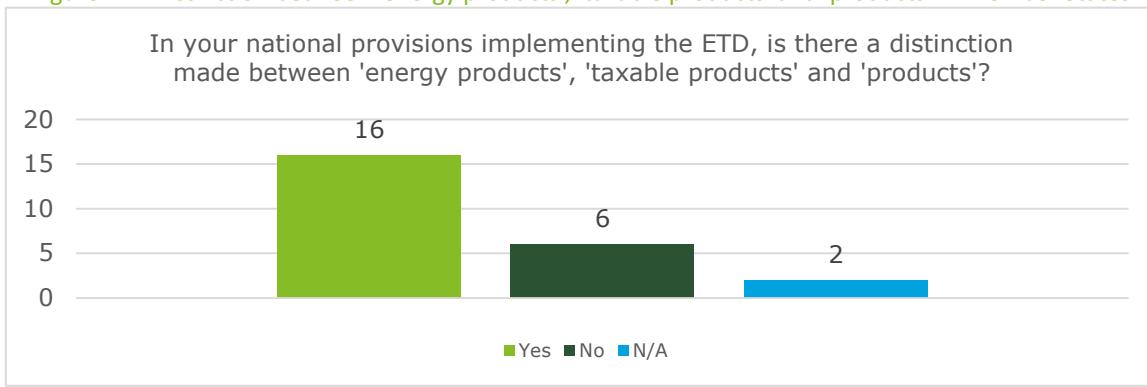
The EU Member States levy taxes on energy products and electricity in accordance with the Energy Taxation Directive. Article 1 of the ETD defines the scope of the harmonized framework: the Member States are obliged to impose taxation on the energy products and electricity covered by the Directive and this taxation is subject to the conditions as laid down in the Directive. All situations / uses / ... that are not covered by the ETD are left to the discretion of the Member States.

Article 1 is to be read and interpreted together with Article 2, which defines the products covered by the ETD:

- ‘energy products’, that are defined through the reference to the 2002 codes of the Combined Nomenclature;
- ‘electricity’, which is defined as falling within CN code 2716;
- other taxable products, i.e., products that are either “*intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels*” or “*hydrocarbons, except for peat, intended for use, offered for sale or used for heating purposes*” (the so-called equivalent products).

Ambiguity in the wording can be witnessed throughout the Directive. Whereas Article 1 ETD limits the scope of the Directive to ‘energy products’ and ‘electricity’, terms which are subsequently defined strictly (through the reference to the 2002 CN codes), from Article 2(3) ETD it follows that there are additional taxable products also falling within the harmonized framework (the equivalent products). This inconsistency has not been reported by all EU Member States as problematic, however, there is common understanding and agreement that the current wording is illogical and that a change in the wording would serve the readability of the Directive.

Figure 14 - Distinction between 'energy products', 'taxable products' and 'products' in Member States



Source: Survey to Member States

From the difference in wording in the Directive ('energy products', 'taxable products', and 'products'), the Member States could face issues in the past on how to delineate the scope of a particular provision.

E.g. according to the strict wording of Article 14(1)(b) and (c), equivalent products supplied for use as fuel for the purpose of air navigation or the navigation within Community waters do not fall within the mandatory exemption laid down in this provision, as the text only refers to 'energy products' as defined in Article 2(1).

Some EU Member States uphold a pragmatic approach when it comes to e.g. the application of exemptions or reductions to the equivalent products. The exemptions / reductions are deemed applicable to all taxable products, not to a particular category (e.g. only energy products). This approach contradicts with the literal text of the legislation. Other EU Member States do not face any issue on a national level, as consistency in the wording in the implementing legislation was preserved by those Member States.

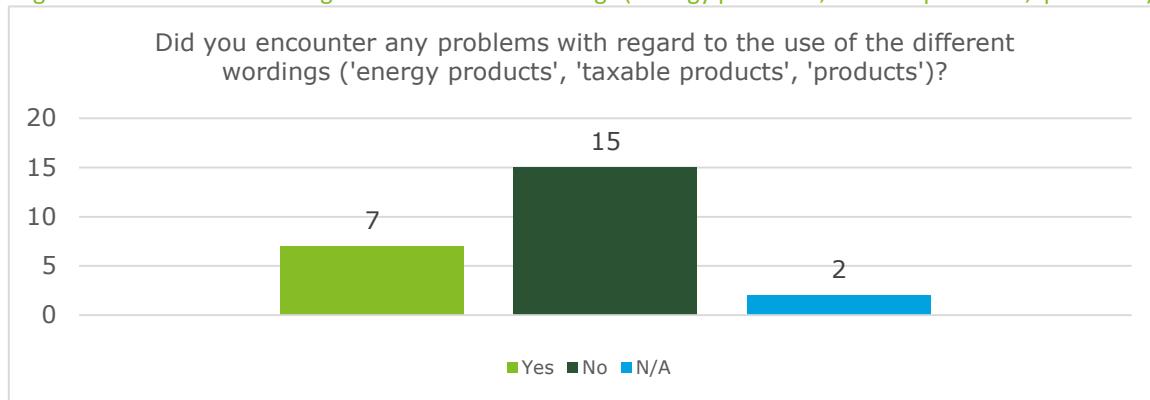
- In Sweden, the term 'energy products' as defined in Article 2(1) ETD is understood as 'taxable products'. The major distinction made is between 'fuels covered by the suspension regime' and 'fuels not covered by the suspension regime'. Hence, there is consistency on a national level when it comes to the application of the legal framework on energy taxation (e.g. the reductions / exemptions). Also in Denmark, no distinction in wording similar to the ETD is made. Likewise, Germany, Poland and France only use the wording 'energy products' in the national implementing legislation;
- Although Belgium has almost literally transposed the text of the Directive into national legislation, in practice, a pragmatic approach similar to the other countries listed above is maintained;
- In the Portuguese legislation, the same distinction as laid down in the ETD is made and adhered to.

The difference in approach between the Member States when it comes to the concepts of energy products, taxable products, and products results in (i) discrepancies in the interpretation of the ETD on a national level and (ii) inconsistencies in application of the legal framework on energy taxation across the Member States. These inconsistencies do not

serve the economic operators and affect the functioning of the internal market and the competition between the Member States. Also the competitiveness of the EU as a whole, particularly for businesses operating in different Member States and facing the different approaches, may be disadvantageously influenced because of an unnecessary additional burden for those multinational companies.

This is confirmed by the view of the European Court of Justice (**ECJ**) in its judgement *Kraftwerk Lippe-Ems*¹⁰³, where the Court upheld a different, less pragmatic interpretation than some of the Member States looked into above, adhering to the strict text of the Directive. The question arose whether nuclear fuels used to produce electricity should be exempt from taxation on the basis of Article 14(1)(a) ETD, which foresees in a mandatory exemption from taxation for energy products and electricity used for the production of electricity. The ECJ *only* assessed whether nuclear fuels are caught by the concept of 'energy products' as laid down in Article 2(1) ETD. As this was considered not to be the case, the Court decided that no mandatory exemption was in place. Indeed, the Court deemed that it was not of any use to assess whether the nuclear fuels fall within or outside the scope of the ETD (Article 2(3) and 2(4) ETD), as only 'energy products' are mentioned in the text of Article 14(1) ETD. Assessing whether the nuclear fuel should be considered as an 'energy product' under Article 2(1) ETD, the ECJ did not only look into the classification of the product in accordance with the Combined Nomenclature as such, but also established whether a "*direct and inseverable link, within the meaning of Braathens (C-346-97, EU:C:1999:291), exists between the use of nuclear fuel and the consumption of electricity produced by the reactor of a nuclear power plant*". Hence, not only the classification but also the link between production and consumption is to be considered when determining whether a product is an 'energy product' in the sense of the ETD.

Figure 15 - Problems with regard to the use of wordings ('energy products', 'taxable products', 'products')



Source: Survey to Member States

Considering the pragmatic approach of most Member States – either because of the specifics of their implementing legislation or due to the application of the legislation in practice – only a limited number of Member States (7 out of 22) indicate that they have

¹⁰³ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

been facing issues in practice regarding the wording of the ETD. The problems reported relate to the following:

- The control and movement provisions of Directive 2008/118/EC are only applied to a limited number of energy products. Some Member States indicate to apply these provisions also to energy products and other taxable products not covered by Article 20 ETD, resulting in discrepancies between the Member States;
- The duty paid regime through the use of an SAAD for intra-Union movements, as laid down in the Horizontal Excise Directive, is applied only by some Member States to ETD taxable products, which are not energy products or electricity;
- The different use of 'energy products', 'taxable products', and 'products' has a considerable impact on the scope of the provision in question. This impact is not always recognized by the Member States (e.g. the scope is extended to all taxable products, whereas the actual wording only refers to energy products). Some Member States also question whether the limitation of the scope of some Articles to e.g. only energy products makes sense and whether this wording reflects the initial intention of the Member States.

The issues reported by the Member States are more of a theoretical nature. However, from the ECJ case law *Kraftwerk Lippe-Ems* discussed above, it follows that issues have risen in practice when it comes to the wording of Article 1 and the application of e.g. the exemptions laid down in Article 14 ETD. The delineation of the scope of the harmonized framework on energy taxation is highly relevant in practice. Recently, a Danish Court referred two questions to the Court of Justice for preliminary ruling on the application of Article 21(3) ETD, in particular¹⁰⁴:

1. *Is Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the consumption of self-produced energy products for the production of other energy products is tax exempt in a situation such as that in the main proceedings, in which the energy products produced are not used as motor fuels or as heating fuels?*
2. *Is Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the Member States may restrict the scope of the exemption so as to cover only consumption of an energy product used in the production of an equivalent energy product (i.e. an energy product which, like the energy product consumed, is also subject to tax)?*

The issue essentially concerns the application of the ETD to self-produced products, classifying as 'energy products' in the sense of Article 2(1) ETD, which are not used as motor fuel or heating fuel. As the products in question, regardless of their use, classify as 'energy

¹⁰⁴ ECJ C-49/17, *Koppers Denmark* (pending).

products' (CN code 2707), the complainant claims that the exemption as provided for by Article 21(3) ETD should still apply, notwithstanding the product will not be taxable under the ETD on the basis of its use.

Interplay with Directive 2008/118/EC

Council Directive 2008/118/EC concerning the general arrangements for excise duty¹⁰⁵ (**Horizontal Excise Directive**) and the ETD are inextricably linked, which was also reported by the Member States when asked about the current issues regarding the wording of Article 1 ETD. When it comes to the delineation of the scope of the Horizontal Excise Directive, Article 1(1)(a) refers to "*the energy products and electricity covered by Directive 2003/96/EC*" as 'excise goods'. Regardless the foregoing, if a product does not fall within the scope of the ETD, similarly the product also does not fall within the scope of the Horizontal Excise Directive¹⁰⁶. If products are not covered by the harmonized framework on energy taxation, Member States retain the right to levy a tax on the consumption of those products, provided that those taxes do not give rise to border-crossing formalities in trade between the Member States¹⁰⁷.

As a consequence of the introduction of the ETD, Directives 92/81/EEC and 92/82/EEC, referring to mineral oils, were withdrawn. References in Directive 92/12/EEC¹⁰⁸ to 'mineral oils' and 'excise duty', insofar as it applies to mineral oils, must be interpreted as covering all energy products, electricity and national indirect taxes referred to respectively in Article 2 and 4(2) ETD¹⁰⁹. As Directive 2008/118/EC replaced Council Directive 92/12/EEC of 25 February 1992, all references to the latter Directive should be interpreted as reference to the former¹¹⁰. This does not serve the readability of the current ETD, requiring insight on the legal developments concerning the Union framework on the general arrangements for excise duty. Furthermore Directive 2008/118/EC takes into account the fact that the harmonised excise duties apply to energy products and electricity and not just to mineral oils, but it does not take into account fuels which are not energy products.

¹⁰⁵ Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, *OJ. L.* 9/12, 14 January 2009; eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008L0118 (Accessed: [12/01/2018]). The Directive was amended by Directive 2010/12/EU of 16 February 2010 (eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0012) (Accessed: [12/01/2018]) and Directive 2013/61/EU of 17 December 2013 eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0061 (Accessed: [12/01/2018]).

¹⁰⁶ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354. Unless it concerns an alcohol / tobacco product. See also ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411. Where an energy product intended for use as lubricant (i.e. not as motor fuel) was considered as falling outside the scope of application of Directive 2003/96/EC.

¹⁰⁷ ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

¹⁰⁸ Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, *OJ. L.* 076, 23 March 1992; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1893> (Accessed: [12/01/2018]).

¹⁰⁹ Article 3 ETD.

¹¹⁰ Article 47 Directive 2008/118/EC.

In accordance with Article 1(2) Horizontal Excise Directive, Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned. Despite the purpose of this provision, the unclear wording of Article 1(2) Horizontal Excise Directive seemed to allow for Member States not to respect the provisions on exemptions in the ETD. This first reading of the provision would contradict the reasoning of the Court of Justice (**ECJ**) in its judgements C-346/97 and C-437/01¹¹¹, in which the Court established that to allow the Member States to levy another indirect tax on products which must be exempted from harmonised excise duty under Directive 92/81, would render that provision entirely ineffective¹¹². Notwithstanding that the current wording in the ETD is different than the prior EU instruments (as mineral oils used for purposes other than as motor fuels or as heating fuels are not exempt from taxation but fall outside the scope of the Directive, leaving the discretion to the Member States to introduce or maintain taxes on those products provided that those taxes do not give rise to border-crossing formalities in trade between Member States¹¹³), the reasoning of the Court is still relevant for the other exemptions laid down in the ETD.

When levying other indirect taxes on energy products and electricity than those covered by the harmonization, Member States must do so with a specific purpose. Not any purpose can be considered to be a ‘specific purpose’ in accordance with Article 1(2) Horizontal Excise Directive. Since every tax necessarily pursues a budgetary purpose, the ECJ established that the mere fact that a tax is intended to achieve a budgetary objective cannot, in itself, suffice to preclude the tax from being regarded as having a ‘specific purpose’¹¹⁴. Next to the budgetary purpose, another purpose could and should qualify as ‘specific purpose’ providing sufficient justification for the national tax under Article 1(2) Horizontal Excise

¹¹¹ From conversations with the legislator, it follows that the phrase “*but not including the provisions on exemptions*” aimed to reflect the *Braathens* principle, i.e. a Member States cannot levy a non-harmonised tax on excise goods where there is an obligatory exemption foreseen on EU level. The wording of the provision does not provide for unequivocal interpretations in view of this assumed intention.

¹¹² The ECJ first came to that conclusion in the *Braathens* case, which concerned a national environmental protection tax calculated on fuel consumption and emissions of hydrocarbons and nitric oxide. ECJ C-346/97, *Braathens Sverige AB*, ECLI:EU:C:1999:291. See also ECJ C-437/01, *Commission of the European Communities v. Italian Republic*, 25 September 2003, par. 31 with reference to the *Braathens*-case.

¹¹³ Article 2(4)(b) ETD excludes energy products used for purposes other than as motor fuels or heating fuels from the scope of application of the ETD.

Article 8(1)(a) Directive 92/81 stated:

“In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

- mineral oils used for purposes other than as motor fuels or as heating fuels.”

See also ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

¹¹⁴ Any other view would render Article 1(2) Horizontal Excise Directive meaningless; ECJ C-553/13, *Tallinna Ettevõtlusamet v. Statoil*, ECLI:EU:C:2015:149.

Directive. From the ECJ case law it follows for example that it is necessary that the tax in itself is directed at protecting health and the environment, and not e.g. intended to finance the exercise by the authorities of their powers in the fields of health and environment¹¹⁵. There must be a direct link between the use of the revenue from the tax and the specific purpose. Alternatively, the tax must be designed – regarding the structure and particularly the taxable item or the tax rate – in such a way as to guide behaviour of taxpayers in a direction which facilitates the achievement of the specific purpose, e.g. by taxing goods heavily in order to discourage their consumption¹¹⁶.

The scope of (part of) the Horizontal Excise Directive, in particular the ‘control and movement provisions of Directive 92/12/EEC’, is limited by Article 20(1) ETD. This Article is a compromise provision, in the sense that energy products which were considered not commonly to be used as motor / heating fuel or the transportation of which does not bear an inherent risk of fraud, should not be made subject to the control and movement provisions, and the burden linked thereto. Article 20 ETD makes sure that the strict conditions regarding storage and movement (warehouse keeper, guarantees, etc.) are not applied to all taxable products covered by the ETD. This makes sense, as additional burden should only be imposed when there is also a need to do so. Member States refer to the fact that equivalent products are often (or in other cases mostly) used for other purposes than heating or motor fuels. Automatically covering these products by the control and movement provisions of the Horizontal Excise Directive would bring a disproportionate burden for trade and for the competent authorities. Alternatively, the control and movement provisions could be applied as a trade facilitation instrument (being an alternative for the duty-paid regime, e.g. products classified under CN code 3811)¹¹⁷. For products covered by CN code 2707 99 99, a similar trade facilitating request (i.e. to be covered by the control and movement provisions) reached the European Commission. Opinions differ when it comes to which products should be covered by the control and movement provisions, considering a balance must be found between trade facilitation and ensuring adequate controls. Member States maintain different national policies on prevention and repression, influencing the prospective discussion at EU level. Whatever the viewpoint, it is important for the functioning of the internal market that all Member States adhere to the same approach in practice.

Nonetheless, in light of the foregoing, the question arises whether all taxable products covered by the ETD are considered also to fall within the scope of the Horizontal Excise Directive, or whether the latter is limited to the ‘energy products’ and ‘electricity’ as defined

¹¹⁵ ECJ C-82/12, *Transportes Jordi Besora SL v. Generalitat de Catalunya*, ECLI:EU:C:2014:108.

¹¹⁶ ECJ C-553/13, *Tallinna Ettevõtlusamet v. Statoil*, ECLI:EU:C:2015:149 with reference to ECJ C-82/12, *Transportes Jordi Besora SL v. Generalitat de Catalunya*, ECLI:EU:C:2014:108.

¹¹⁷ In certain cases, e.g. where it is not straightforward to differentiate between sub-categories of products or when the alternative would be the application of the duty-paid scheme for cross-EU movements, it may be useful and reduce administrative burden when products would be made subject to the control and movement provisions of the Horizontal Excise Directive, rather than excluding them (e.g. CN 3811 or 2707 99 99 products).

in Article 2(1) and 2(2) ETD. Admittedly, the relevance of this question is limited, as the application of the Horizontal Excise Directive is further limited by Article 20(1) ETD¹¹⁸. However, e.g. for the application of the general framework on chargeability, reimbursement, exemption (Chapter II) or for the duty paid regime (Chapter V – movement and taxation of excise goods after release for consumption), this remains a valid issue requiring common understanding. When it comes to the holding of energy products / electricity / other taxable products in another Member State for commercial purposes, Article 33 of the Horizontal Excise Directive lays down the chargeability rules for ‘excise goods’. Whereas the common understanding of this wording would involve all ETD taxable products, the term is defined in Article 1(2) Horizontal Excise Directive as “*energy products and electricity covered by Directive 2003/96/EC*”. The chargeability conditions for ‘excise goods’ set out in Article 33 of the Horizontal Excise Directive are supplemented by the conditions laid down in Article 21(1) ETD according to the text of the latter provision¹¹⁹. However, the chargeable events mentioned in Article 2(3) ETD, as referred to by Article 21(1) ETD, relate to other taxable products and not to ‘energy products’, with only the latter being covered by the Horizontal Excise Directive. This discrepancy could inflict interpretation issues regarding the legal basis for taxation when taxable products other than energy products which were released for consumption in one Member State, are held available for commercial purposes and use in another Member State.

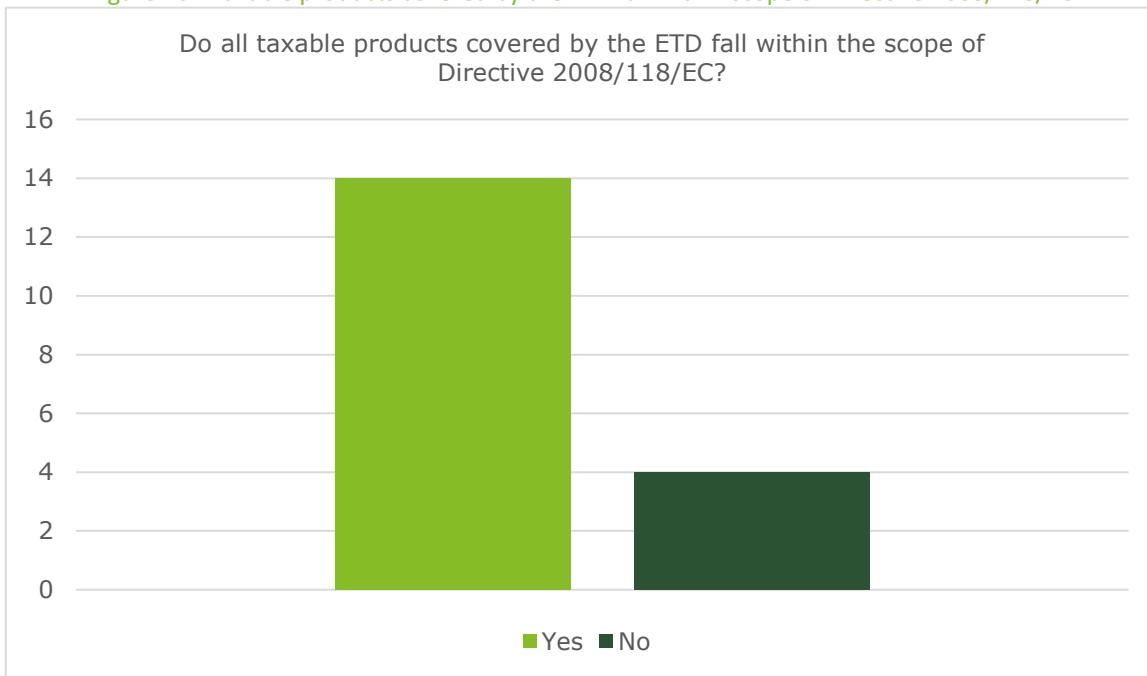
Currently, there is no uniform understanding on the interpretation of and relation between the ETD and the Horizontal Excise Directive, adversely affecting the Single Market.

E.g. Belgium, Italy, Sweden and Denmark consider that all taxable products covered by the ETD fall within the scope of the Horizontal Excise Directive.

¹¹⁸ The scope of this concept is elaborated in the analysis of Article 20 below.

¹¹⁹ Article 21(1) ETD: “*In addition to the general provisions defining the chargeable event and the provisions for payment set out in Directive 92/12/EEC, the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2(3).*”

Figure 16 - Taxable products covered by the ETD fall within scope of Directive 2008/118/EC



Source: Survey to Member States

From the Member States which were not part of the in-depth analysis the following answered affirmative to the question: Austria, Bulgaria, Cyprus, Estonia, Finland, Hungary, Luxemburg, Romania, Spain and UK.

The Czech Republic, Slovenia, Slovakia, and the Netherlands answered no.

A number of Member States added information as a simple yes or no answer was not a given with the above question.

Austria is of the opinion that all taxable products under the ETD also fall under the scope of Directive 2008/118/EC, but products that are not mentioned in Article 20 ETD should also not be subject to certain provision of the horizontal directive.

The Czech Republic pointed out that natural gas transported through pipeline and electricity should not be covered by Directive 2008/118/EC.

Slovakia determined that only products falling within CN codes 2710 19 71 to 2710 19 99 fall under the control and movement provisions of Directive 2008/118/EC.

Luxemburg did not answer with yes or no, but proposed instead to update the CN code list for both Directives every 2 years to prevent any confusion with regard to the scope.

Interplay with Directive 92/83/EEC

The relation between the ETD and Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages¹²⁰ (**Alcohol Directive**) has been subject of debate in the past. In particular, the question arose whether a product with the following characteristics is, as regards the applicable excise duty, subject to the provisions of the Alcohol Directive or the provisions of the ETD¹²¹:

- which potentially meets the definition of bioethanol in Article 2(2)(a) of Directive 2003/30;
- which is obtained from biomass by means of a technology which differs from the technology used for the production of agricultural ethyl alcohol;
- which contains more than 98.5% ethyl alcohol;
- which contains substances rendering it unsuitable for consumption;
- which complies with the requirements of the prEN 15376 for bioethanol as fuel; and
- which has not been denatured in a special denaturing procedure.

The application of the Alcohol Directive takes priority over that of the ETD. With reference to recital 27 in the preamble to the ETD¹²², the ECJ concludes in the *Evroetil* case that the application of the provisions of the ETD is, in respect of ethyl alcohol for the purposes of the Alcohol Directive, subordinate to the application of the provisions of the Alcohol Directive: “*Thus, it is only if a product classified as ‘ethyl alcohol’ for the purposes of the [Alcohol Directive] is exempt from excise duty under that same directive that that product may, as the case may be, come under the provisions of [the ETD].*”¹²³

Conclusion

- Throughout the ETD, there is an ambiguity in the wording between ‘energy products’, ‘taxable products’, and ‘products’, ultimately affecting the scope of the provisions. The nature and purpose of the system may be different than what is expressed in the literal text of the Directive, or in the interpretation by the individual Member States. The reasoning behind the limitation of certain reductions / exemptions to energy products and electricity only, not covering equivalent products, does not follow from the Directive itself nor from the preparatory works,

¹²⁰ Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, O.J.L. 316/21, 31 October 1992; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0083:en:HTML>. (Accessed: [12/01/2018]).

¹²¹ ECJ C-503/10, *Evroetil AD*, ECLI:EU:C:2011:872.

¹²² This recital reads: “*This Directive shall be without prejudice to the application of the relevant provisions of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (4), when the product intended for use, offered for sale or used as motor fuel or fuel additive is ethyl alcohol as defined in Directive 92/83/EEC.*”

¹²³ ECJ C-503/10, *Evroetil AD*, ECLI:EU:C:2011:872.

potentially suggesting an incautious wording. On the other hand a broad approach which considers all obligatory tax exemptions as applicable to ‘taxable products’ could have unexpected budgetary consequences. For instance the exemption foreseen under Article 21(3) of the ETD only for energy products, would become applicable to other taxable products, such as hydrogen, but also synthetic methanol and other products. The use of different concepts (‘energy products’ vs. ‘equivalent products’) is not necessary for the underlying systematics to the Directive in most cases, allowing for a single concept. The only situation that may require further consideration appears to be the tax exemption for energy used in the production of energy products;

- Member States uphold different approaches towards the different use of the wording of ‘energy products’, ‘taxable products’, and ‘products’. Both strict views and different gradations of pragmatic approaches – not necessarily in line with the views of the European Court of Justice, adhering to the wording of the ETD and taking into account the link between production and consumption – can be identified. Regardless which view is considered most appropriate, the differences in approach between the Member States affects the functioning of the Single Market and affects the competition between the Member States. Adding extra burden and (legal / economic) uncertainty for economic operators active in different Member States, the dispersed approach affects the competitiveness of the EU as a whole (the diversification between high and low aromatic products in the petrochemical sector just being one example);
- The ETD and the Horizontal Excise Directive are inextricably linked. The references to the predecessors of Directive 2008/118/EC do not contribute to the readability of the ETD. The Horizontal Excise Directive delineates the ETD and vice versa:
 - Article 1(1)(a) Horizontal Excise Directive excludes taxable products that are not energy products or electricity. From the pragmatic approach adhered to by some of the Member States, however, this provision is considered to refer to all taxable products under the ETD;
 - Article 20(1) ETD limits the application of the *control and movement provisions* of the Horizontal Excise Directive to a list of energy products (more limited than the list in Article 2(1) ETD);
 - Article 21(1) ETD – referring to the chargeability of equivalent products – suggests an addition to the chargeability criteria as defined in Article 33 Horizontal Excise Directive, notwithstanding the former Article does not relate to ‘excise goods’ covered by the latter directive.

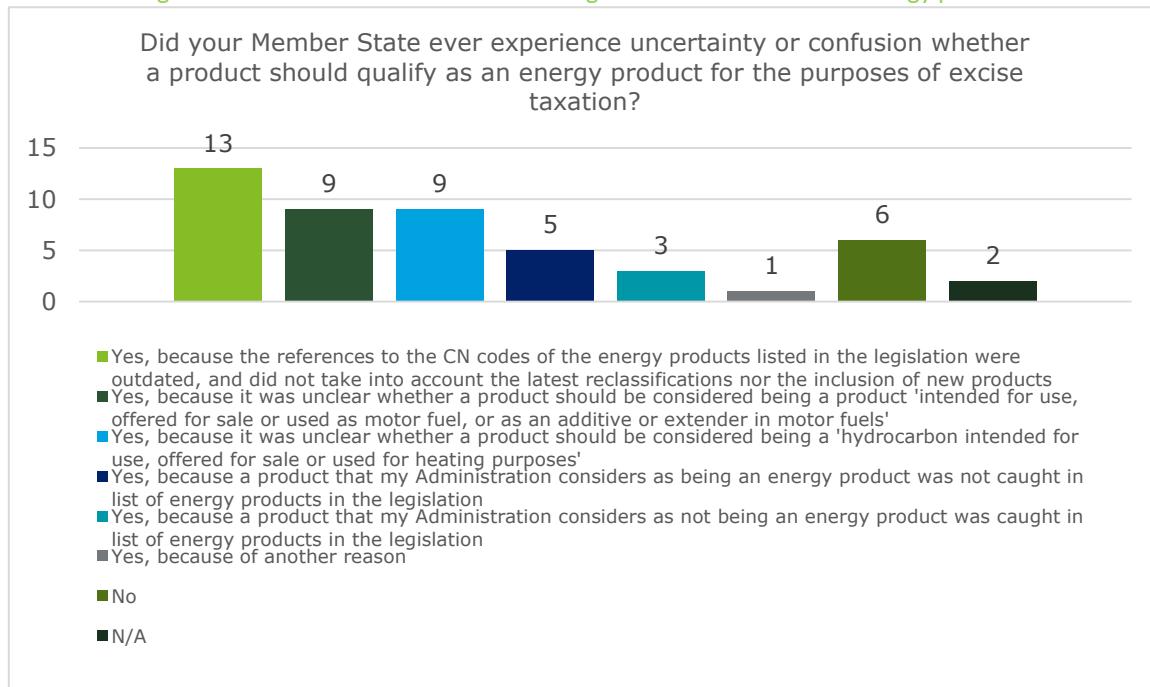
B.2 Article 2

Article 2(1) ETD defines 'energy products' through reference to a number of codes of the 2002 Combined Nomenclature. Likewise, Article 2(2) ETD defines 'electricity' by reference to CN code 2716. Article 2(3) ETD establishes the tax rate applicable to those energy products for which no rate has been determined in the ETD. Furthermore, this paragraph extends the scope of the ETD to other products which are (intended to be) used as motor fuels or hydrocarbons (intended to be) used as heating fuels – the so-called *equivalent fuels*. Article 2(4) ETD determines which specific products (fuel wood / wood charcoal) and which specific uses (among others dual use, use for metallurgical processes ...) remain outside of the EU harmonized framework and retain with the discretion of the individual Member States.

Article 2(1) – Defining 'energy products'

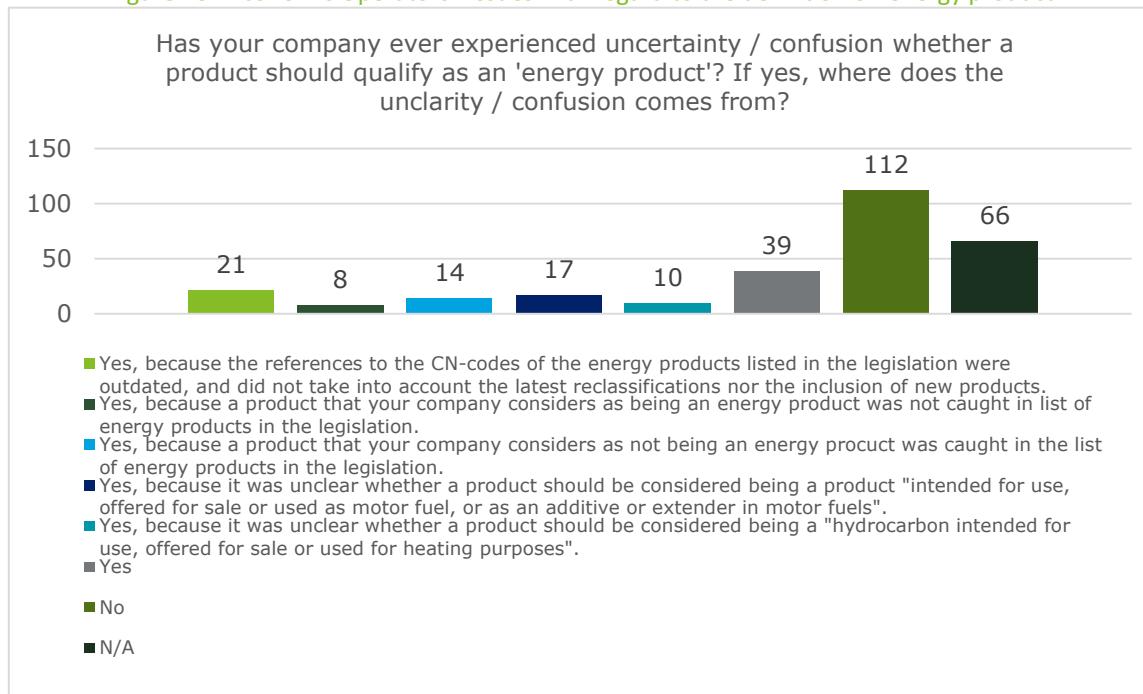
Defining the concept of 'energy products', Article 2(1) ETD refers to a number of CN codes. The reference to the CN codes intended to create uniformity in the interpretation of energy products across the EU Member States. Compared to its predecessors, the ETD extends the scope of the Union framework of energy taxation to coal, cokes, lignite and derivatives, and natural gas. Both respondent Member States and economic operators confirm that the interpretation of the concept of 'energy product', as expressed through the list of CN codes in Article 2(1), has been the cause of issues in practice.

Figure 17 - Member States' issues with regard to the definition of 'energy product'



Source: Survey to Member States

Figure 18 - Economic Operators' issues with regard to the definition of 'energy product'



Source: Survey to Member States

Several causes were listed as the source of ambiguity / unclarity:

- As the 2002 CN version is referred to, the current list of codes is outdated (e.g. codes were split since then). Identifying the correct CN code requires considerable technical expertise;
- The concept of 'energy product' is strictly defined and does not necessarily include all products that are commonly considered as energy products. The products not covered by the list might – depending on their use – be taxed as an equivalent fuel;
- The products included in the definition of 'energy product' are not necessarily used as energy products, and may be applied in practice for another purpose, nonetheless triggering taxation;
- The equivalent fuels – covered under Article 2(3) ETD – refer to the intended use of the product, which is not necessarily known and/or traceable by all actors in the supply chain;
- Whereas for motor fuel purposes, all products are taxable, for heating purposes only 'hydrocarbons' come into the scope of the Directive as an equivalent product.

The ETD considers the following products as energy products:

1. *falling within CN codes 1507 to 1518, if these are intended for use as heating fuel or motor fuel*

Oils of a vegetable (e.g. soy bean oil, groundnut oil, olive oil) or animal (animal fats) nature. Determining the (intended) use of the product in question is needed in order to establish whether the product concerns an energy product falling within the scope of the ETD.

2. *falling within CN codes 2701, 2702 and 2704 to 2715*

Among other products coal, lignite, coal gas, (oil from) tar, petroleum oil / gas / cokes, bituminous mixtures.

3. *falling within CN codes 2901 and 2902*

Acyclic hydrocarbons and cyclic hydrocarbons.

4. *falling within CN code 2905 11 00, which are not of synthetic origin, if these are intended for use as heating fuel or motor fuel*

Non-synthetic methanol (methyl-alcohol).

5. *falling within CN code 3403*

Lubricating preparations.

6. *falling within CN code 3811*

Additives.

7. *falling within CN code 3817*

Mixed alkylbenzenes and mixed alkylnaphthalenes.

8. *falling within CN code 3824 90 99 if these are intended for use as heating fuel or motor fuel*

Methyl esters of vegetable oils and fats.

A similar list of products – with references to the CN codes – was laid down in the national implementing legislation of only some of the Member States.

- E.g. in the Belgian, German and Swedish legislation, an analogous list of CN codes is provided. Implementing the list was seen as an obligation, as a list of ever changing CN codes was deemed not to be in line with the ETD. The European legislator made use of a *static reference* to the CN codes, also laying down the procedure to update the list in Article 2(5) ETD.
- In the Danish legislation, no list of CN codes similar to the one in the ETD is provided. Taxable products are defined in a practical way, with their conventional names (petrol, gasoil, natural gas ... - the names behind the CN codes covered). The descriptions allow for a *dynamic system*, covering changes in the CN codes over time. The authorities will interpret the names mentioned in Danish in order to determine whether a product is taxable or not. If issues would arise, they take into consideration the notes to the Combined Nomenclature into account.

Article 2(5) establishes that the ETD references to the Combined Nomenclature concern the version applicable as of 1 January 2002¹²⁴. The EU Member States implemented Article 2(1) ETD differently¹²⁵. Although definitely adhering strictly to the text of the ETD, the dynamic approach has considerable disadvantages when it comes to the classification of products for energy taxation purposes. Since 2002, some CN codes mentioned have been subject to modification or reclassification (e.g. CN code 3824 90 99 was split in 3824 90 91 and 3824 90 97).

A German MNE active across the EU in the field of supplying energy products to trading and logistic companies reports cases where in the end the correct classification was found, but it posed very technical issues. In some cases, it is reported that it is not easy to make reference to the current classification considering the 2002 CN codes embodied in the directive, especially when it comes to new products (new biofuels, other new products / alternative resources).

A Swedish company producing and supplying electricity reports that particularly with regard to biofuels, the classification could be subject to debate. All new fuels invented after 2001 are considered difficult to classify, given the fact that the CN codes relate to a fixed date in the past. When classifying in practice, one has to act as if it was 2001, hence, many biofuels are said to have the same CN code for excise purposes.

A Swedish fuel trader reports difficulties in practice when it comes to the classification of the products. The list with CN codes referred to in Article 2 ETD is pasted in the Swedish national legislation. These CN codes are obsolete and do not correspond with the current CN codes used anymore. It is considered almost practically impossible to translate the current CN codes into the old list. Also, the Swedish tax authorities are said to experience issues with this.

A Member State's administration reports problems in practice for traders, who have to keep track of 2 codes. Their trading documents normally refer to the current version of the CN code

Member States reported that tax authorities receive questions regarding the reclassification or ‘translation’ of the current CN code into the CN code referred to in the national legislation (for excise taxation purposes only) (e.g. the classification of E85, a high-blended ethanol product). Also the Member States encounter difficulties due to the absence of an update of the CN codes in the ETD, particularly when it comes to the classification of products that did not exist at the time of the introduction of the ETD. Over time, the problems are deemed to increase.

¹²⁴ Commission Regulation (EC) No 2031/2001 of 6 August 2001, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L. 279, 23 October 2001; <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R2031&from=FR> (Accessed: [12/01/2018]).

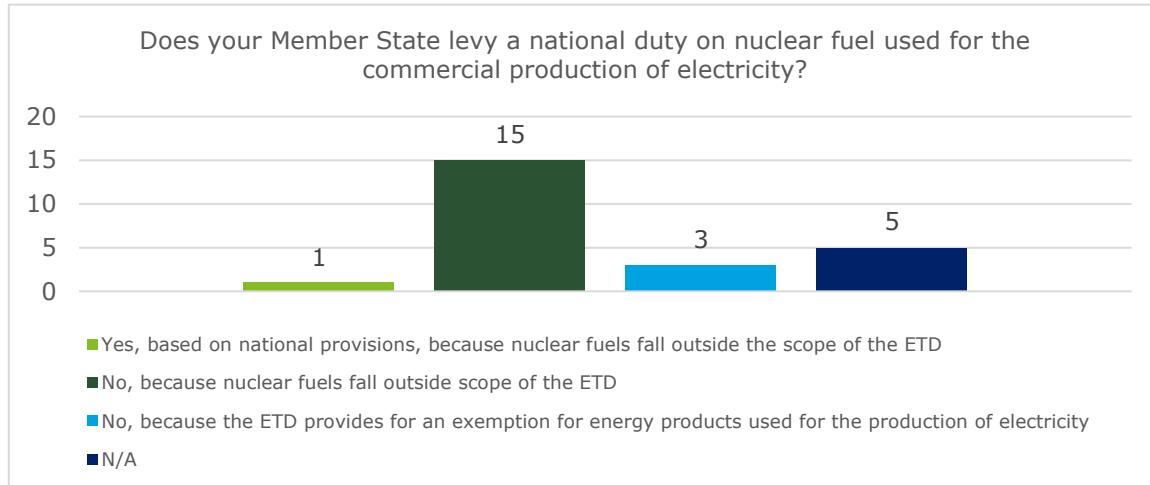
¹²⁵ Cf. difference in static and dynamic approach as described above.

The list of products laid down in Article 2(1) ETD is exhaustive for the definition of energy products¹²⁶. In the context of a Swedish tax on the thermal power of nuclear reactors (heat production capacity), the ECJ ruled in the *OKG AB* case¹²⁷ that this could not constitute a tax within the scope of the harmonized ETD framework, as the thermal power of a nuclear reactor does not fall within the CN codes of the exhaustive list of Article 2(1) ETD and is not used for motor or heating purposes.

The Swedish thermal power capacity tax consisted in the levying of a fixed monthly amount calculated according to a theoretical value, being the quantity of megawatts of maximum thermal power fixed for each nuclear reactor by the authorisation, issued by the national authorities, to own and operate that nuclear reactor. Moreover, the holder of the authorisation to own and operate a nuclear reactor remains liable for the tax on the thermal power even when it is not being operated, except for extraordinary power stoppages of over 90 consecutive days.

The ECJ adds that, as the tax in question does not fall within the scope of the ETD, such tax cannot be considered an excise duty as referred to in the Horizontal Excise Directive. Not all Member States' administrations are aware of the *OKG AB* case law, as indicated by the responses to the survey. A limited number of respondent Member States (3 out of 24) deems that no national taxation on nuclear fuel for the commercial production of electricity can be imposed, as Article 14(1)(a) ETD would foresee in a mandatory exemption.

Figure 19 - Member States' levying national duty on nuclear fuel used for the commercial production of electricity



Source: Survey to Member States

With regard to the list of products in Article 2(1) ETD, the economic operators and the Member States reported a number of practical issues:

¹²⁶ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, ECLI:EU:C:2015:354.

¹²⁷ ECJ C-606/13, *OKG AB*, ECLI:EU:C:2015:636.

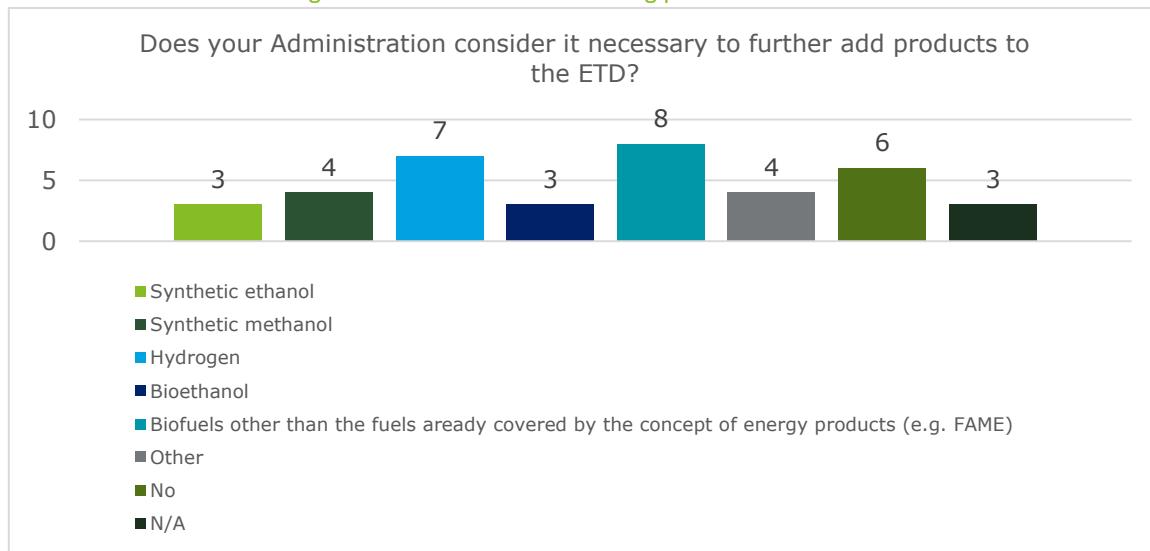
- when energy products are mixed, issues may arise regarding the determination of the correct classification and the applicable tax rate;
- the classification of energy products is burdensome for economic operators not working with energy products on a regular basis;
- determining whether a product is taxable and whether an exemption applies could be difficult in practice.

A Swedish entity of a multinational refinery business indicates that currently, they face issues with high aromatics in fuels. Depending on the percentage of high aromatics, the classification of the products changes. This change in classification may influence the classification as 'energy product'.

This is also confirmed in other interviews with market operators.

Most Member States indicate there is a need to further add products to the ETD. It is remarkable, however, that also some products which are already covered by the ETD are mentioned. There are several possible explanations, e.g. a lack of awareness of which products are currently covered by the ETD (e.g. FAME is mentioned, currently an energy product taxable under the ETD if used as motor or heating fuel under its old CN code 3824 90 99), or that Member States urge to cover products by the concept of 'energy product' in order to achieve a uniform approach towards taxation (e.g. synthetic methanol is not an energy product although it is often used as motor fuel, i.e. as an additive to petrol).

Figure 20 - Member States adding products to the ETD



Source: Survey to Member States

The list of CN codes laid down in Article 2(1) ETD does not meet the current and future needs. Issues arise with new products based on international standards, e.g. bunker fuel criteria, which are currently not covered by the CN codes listed.

According to a German MNE active across the EU in the field of supplying energy products to trading and logistic companies, the tariff classification concerning fuels does not match the current situation. There are new products, e.g. bunker fuels that are based on international standards (ISO standards). The criteria of the international

standards are not the same as foreseen in the tariff classification. One product (e.g. marine gas oil DMA, depending on the aromatic content and density; bunker fuels following international bunkering standards), could be classified within 5 or 6 different CN codes due to small differences in the characteristics of different fuel batches. The classification changes in some cases ultimately impact the application of the control and movement provisions in the Horizontal Excise Directive.

Furthermore, new products will emerge in the future.

E.g. PTL – Power-to-Liquid: by using electricity, water is reduced to hydrogen and CO₂ and methanol is produced. Through this technique, it is likely that other, environmentally friendly, new products will be created as well¹²⁸.

An additional difficulty lies within the delineation of the term ‘energy product’, as for some products their qualification depends on the use of that product, in particular:

- products falling within CN codes 1507 to 1518;
- products falling within CN code 1905 11 00, which are not of synthetic origin;
- products falling within CN code 3824 90 99.

Only if these products are used as heating fuel or motor fuel, they qualify as ‘energy products’.

Article 2(2) – Electricity

The Explanatory Memorandum to the ETD Proposal provides for further guidance on the taxation of electricity. According to the European Commission¹²⁹, there are two possible ways to bring electricity within the scope of the taxation arrangements: by taxing the fuels used in the production of electricity (input tax) or by taxing the electricity itself (output tax).

The energy products and electricity used to produce electricity are exempt from taxation in accordance with Article 14(1)(a) ETD. The Commission has proposed harmonisation on the basis of output taxation for the following reasons:

- it is the only method by which the general indirect taxation principle of applying tax in the country of consumption can be uniformly achieved;
- electricity can be traded within and between countries without having been taxed thus avoiding double taxation in the country of consumption;

¹²⁸ As these products are not of bio-origin, they will not be able to benefit from the tax reductions under Article 16 ETD. .

¹²⁹ Explanatory Memorandum to the Proposal for a Council Directive Restructuring the Community Framework for the Taxation of Energy Products, COM (97) 30 final, 12 March 1997; aei.pitt.edu/3522/1/3522.pdf (Accessed: [12/01/2018]).

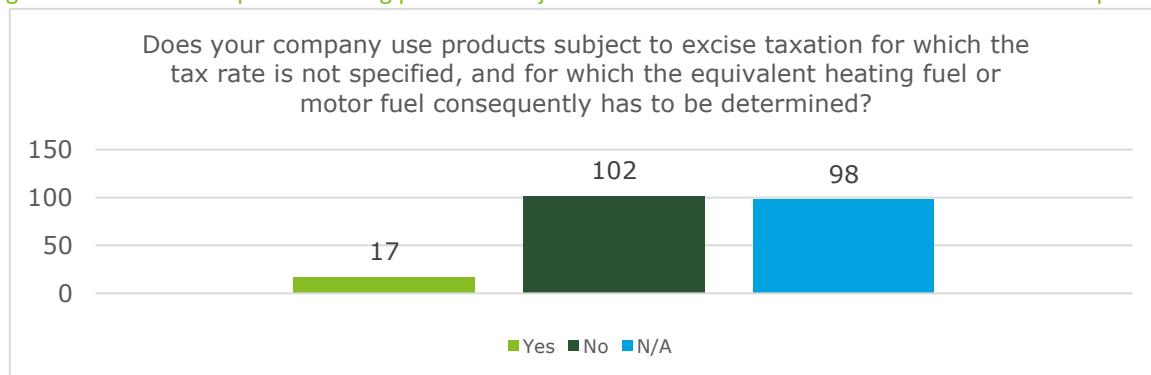
- Member States can differentiate between electricity used by final consumers and industry and thus apply differential taxes (this is the case in nearly all Member States who currently tax electricity);
- it is the only means by which the tax burden on energy intensive industry can be reduced.

Article 2(3) – Equivalent products

Article 2(3) ETD lays down the tax rate at which energy products and electricity for which no level of taxation is specified in the ETD shall be taxed. Furthermore, the provision establishes that any product offered for sale or (intended to be) used as motor fuel, or as an additive or extender in motor fuels, shall be taxed at the rate for the equivalent motor fuel. A similar section relates to the taxation of hydrocarbons, except for peat and only others than those laid down in Article 2(1) ETD. These other taxable products not considered ‘energy products’ are referred to as *equivalent products*.

Several economic operators indicate to make use of products subject to excise taxation, but for which the tax rate is not specified.

Figure 21 - Economic Operators using products subject to excise taxation for which the tax rate is not specified



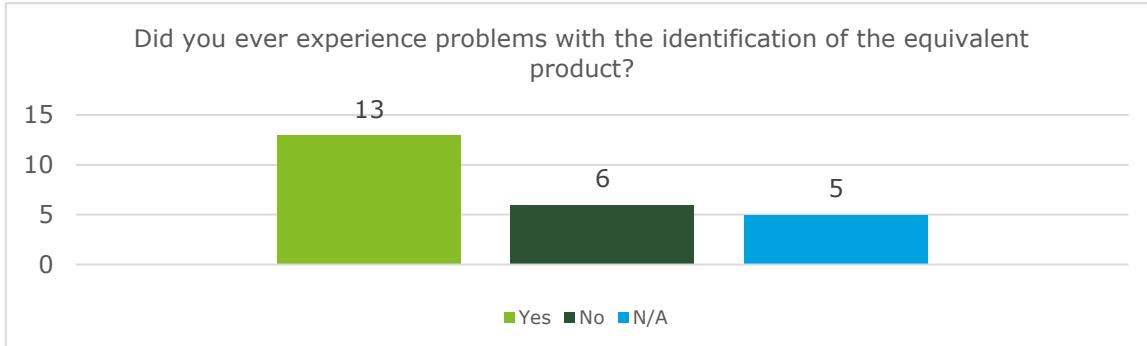
Source: Survey to Economic Operators

They mention e.g. the use of HVO, fuel oil, biofuel (used under experimental conditions), additives, waste oils, petroleum gases, gaseous hydrocarbons. For these products, the equivalent heating or motor fuel has to be determined.

Determining the equivalent fuel

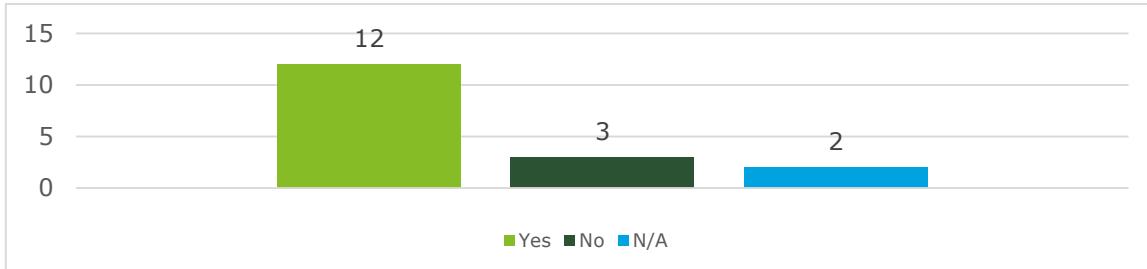
The ETD lays down the rate for products for which no level of taxation is specified in the ETD. Identifying the equivalent fuel, which is necessary to determine that rate of taxation, has led to major difficulties in the Member States, as confirmed by both the Member States and the economic operators.

Figure 22 - Member States experiencing problems with the identification of the equivalent product



Source: Survey to Member States

Figure 23 - Economic Operator experiencing problems with the identification of the equivalent product



Source: Survey to Economic Operators

The ECJ confirmed in the *Jednostka* case¹³⁰ that, for additives falling within CN code 3811, the ETD conflicts with a national regime laying down a different rate of taxation for those additives than the rate of taxation applicable on the fuel to which they are added. The ECJ recognized the ambiguity related to Article 2(3), first paragraph ETD in the *Afton Chemical* case¹³¹, where it stated that “*it must indeed be admitted, as the Commission itself acknowledged at the hearing in reply to the Court’s questions, that the wording of Article 2 of Directive 92/81 and Directive 2003/96 could be clearer and more precise*”. Afton’s products, falling within CN code 3811, were not intended for use, offered for sale, or used as motor fuel. The additives were not designed to function as fuel or to power vehicles, but consisted of e.g. cleansing agent, anti-foam, demulsifier, carrier fluid, solvent, cetane and lubricity improver or corrosion inhibitor. From the wording of the second subparagraph of Article 2(3) ETD, the ECJ considers it sufficiently clear that the additives intended to be added to motor fuels are covered by the ETD taxation regime.

When it comes to the determination of equivalent products, the wording of the provision – and in particular the word order – is different in the diverse language versions of the ETD, resulting in ambiguity.

DE *werden je nach Verwendung zu dem für einen gleichwertigen Heiz- oder Kraftstoff erhobenen Steuersatz besteuert*

¹³⁰ ECJ C-275/14, *Jednostka*, ECLI:EU:C:2015:75.

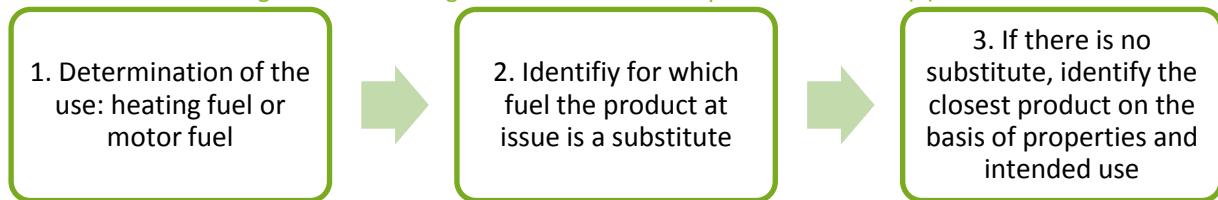
¹³¹ ECJ C-517/07, *Afton Chemical Limited*, ECLI:EU:C:2008:751.

DK	<i>beskattes, alt efter <u>anvendelse</u>, med den sats der er fastsat for det <u>tilsvarende</u> motorbrændstof eller brændsel til opvarmning</i>
EN	<i>shall be taxed according to <u>use</u>, at the rate for the <u>equivalent</u> heating fuel or motor fuel</i>
ES	<i>se gravarán, en función de su <u>utilización</u>, con el mismo tipo impositivo aplicable al combustible para calefacción o al carburante de locomoción <u>equivalente</u></i>
FR	<i>sont taxés en fonction de leur <u>utilisation</u>, au taux retenu pour le combustible ou le carburant <u>équivalent</u></i>
IT	<i>sono tassati, in relazione al loro <u>uso</u>, all'aliquota applicabile al combustibile per riscaldamento o carburante per motori <u>equivalente</u></i>
NL	<i>worden belast tegen het belastingniveau van de <u>gelijkwaardige</u> motor- of verwarmingsbrandstof, naar gelang van het <u>gebruik</u> dat ervan gemaakt wordt</i>
PT	<i>serão tributados de acordo com a sua <u>utilização</u>, à taxa prevista para o carburante ou o combustível de aquecimento <u>equivalente</u></i>
SE	<i>beskattas i enlighet med <u>användningen</u>, i nivå med skattesatsen för likvärdigt bränsle för uppvärmning eller motorbränsle</i>

From this difference in wording, the question arises whether the actual use of the product needs to be examined first and that only in the second place the reference product that is 'equivalent' is to be examined, or vice versa. In the *Kronos Titan GmbH* case¹³², the ECJ established that the decisive criterion of use as motor fuel or heating fuel serves to preclude possible distortions of competition between products used for the same purposes. The Court held that is necessary, first of all, to determine the use as motor fuel or heating fuel, before establishing which motor fuel or heating fuel is equivalent to it.

The concept of product equivalence must be interpreted insofar as possible, from the perspective of the substitutability or interchangeability of the energy products at issue. Insofar as there is no 'substitution', the motor fuel or heating fuel which is, by its properties and intended use, the closest to the product at issue must be identified.

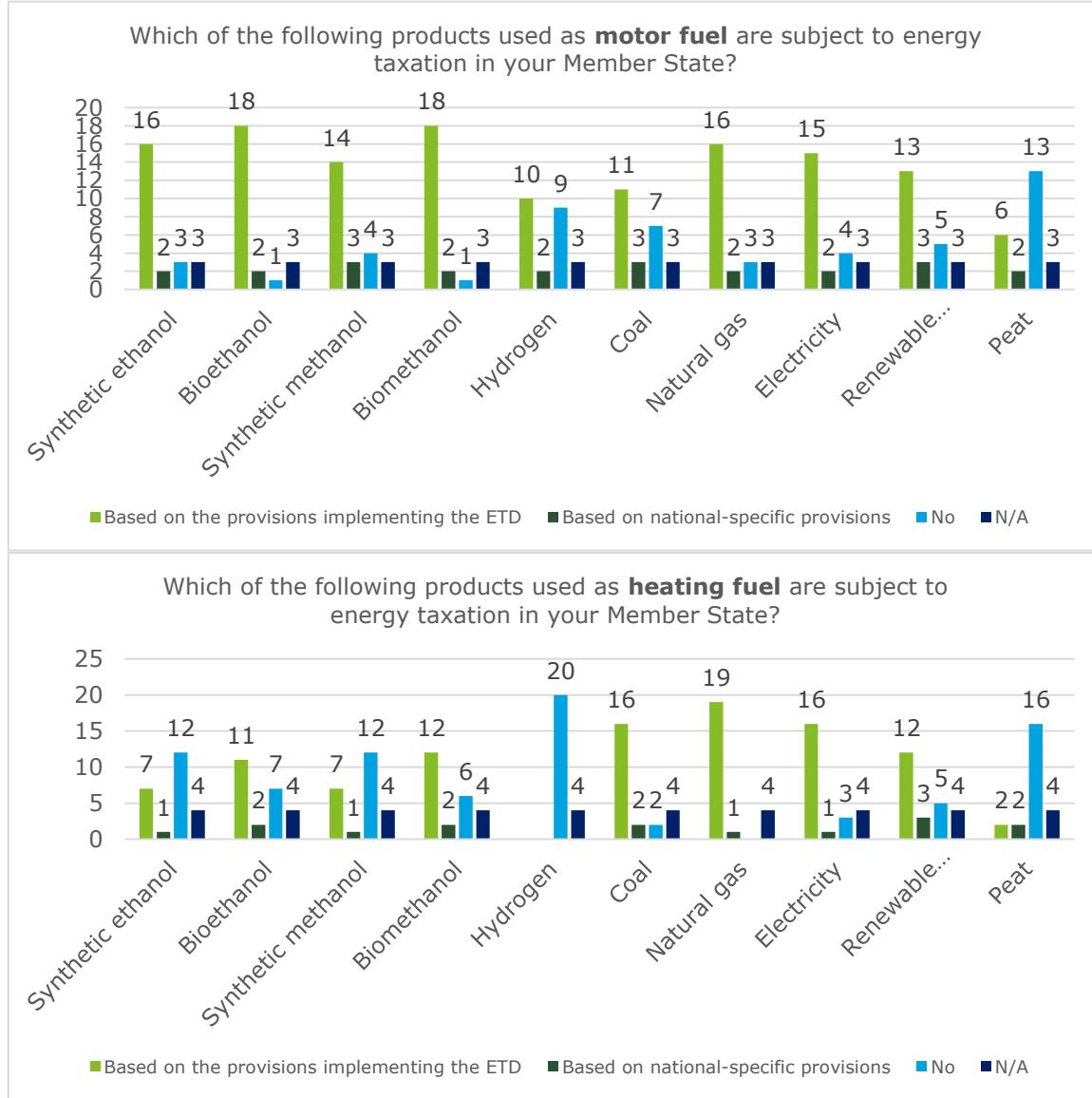
Figure 7 - Reasoning ECJ Kronos Titan: Interpretation Article 2(3) ETD



¹³² ECJ C-43/13 and C-44/13, *Kronos Titan GmbH*, ECLI:EU:C:2014:216.

From the input provided by the Member States, it follows that there is no common understanding on the interpretation, implementation, and application of the ETD, resulting in the same product (not) taxed depending on the location and contrary to the aims of the ETD.

Figure 8 - Taxation of products used as motor fuel and heating fuel in Member States



Implementing the ETD, the Member States cannot do so with a too restrictive interpretation of the scope of the ETD. AG Geelhoed concluded that “*an interpretation of the concept ‘use ... as heating fuel’ in Article 2(2) of Directive 92/81 to the effect that certain industrial activities are not subject to the harmonised excise duty would entail leaving the Member States free to decide whether to make those activities taxable and to organise any such tax*

at their discretion. It is obvious that in that case the objectives pursued by the excise duty Directives with regard to the products and activities concerned would not be achieved”¹³³.

As a result of the *Kronos-Titan* case of the ECJ, Germany is currently amending its national legislation.

According to the German view, the wording ‘intended use as heating fuel or motor fuel’ is debatable. It is necessary to establish the intention, which is difficult and is subject to change in practice. In particular, it would force the consignor to inquire about the intended use by the consignee, which is currently excluded under German law. From the German perspective, therefore, the determination for use as heating fuel or motor fuel is the decisive criterion. Even for the understanding of this criterion, questions regarding the knowledge a consignor must have in practice remain.

In practice, the economic operators are identifying themselves the tax rate applicable to their products. Subsequently, the authorities may carry out an audit, possibly leading to discussions on the equivalent fuel used.

E.g. an economic operator produces synthetic diesel through a process making use of natural gas. The operator argues that the lower applicable tax rate for natural gas should apply, considering the environmentally-friendly character of the product and the processing. The authorities considered that the synthetic diesel is to be taxed as traditional diesel.

Considering the approach in practice, eventual difficulties with regard to the determination and subsequent taxation of equivalent products could lead to reduced tax revenues for the Member States. As the economic operators themselves identify the equivalent fuel, there will be an incentive towards tax ‘optimization’, identifying an ‘equivalent’ which is least taxed.

During the fieldwork, the Member States’ administrations were asked to identify the equivalent product of a number of products used as heating or motor fuel. Although the answers below cannot be considered decisive, they do provide an insight in the reasoning of the authorities¹³⁴.

Table 12 - Equivalent products of products used as heating or motor fuel in selected Member States

	Sweden	France	Germany	Denmark	Portugal	Belgium
Petrol used as heating fuel	Same rate as motor fuel	Same rate as motor fuel	The determination is based on the characteristics	Same rate as motor fuel	According to the principle of equivalence	Same as motor fuel
Toluene used as	LPG	According to the principle		Rate of normal		Gasoil

¹³³ ECJ C-240/01, *Commission v. Germany*, ECLI:EU:C:2003:262.

¹³⁴ The minimum and actual rates differ per product. The impact of a difference in answer is mostly relevant where there are different applicable rates between the products mentioned. E.g. unlike other fuels, LPG and kerosene used for heating purposes have a minimum level of taxation of zero.

heating fuel		of equivalence	and the intended use. If the intended use is difficult to determine, how it is used is decisive.	heating fuel		
Biogas used as heating fuel	Natural gas (not taxed)	According to the principle of equivalence		Natural gas		Natural gas
Ethanol / methanol used as motor fuel	Petrol	Petrol (if incorporated in petrol)		Petrol		Depending on the engine
White spirit as heating fuel	Kerosene		Kerosene / gas oil (same rate)	Kerosene	Petrol	Gasoil

The Member States provide guidelines to the taxpayers in order to be able, as an economic operator, to determine the equivalent fuel. Different tools are used, e.g.:

- guidance in the preparatory works to the implementing acts (e.g. Sweden);
- general guidance through a publication of the tax authorities (e.g. Belgium – general publication on excises applying to energy products and electricity);
- specific guidance on the tax administration's website (e.g. Sweden – dimethyl ether is considered as an equivalent for diesel);
- internal guidance within the tax administration (e.g. France – internal note on the *Kronos Titan* case law).

Motor fuels and hydrocarbons

Whereas all products used as motor fuel are taxable, only hydrocarbons used as heating fuel are taxable under Article 2(3) ETD. The term 'hydrocarbons' has not been defined in the ETD. This leads to very different interpretations of what is considered a hydrocarbon in the Member States. From the Member States' survey, it follows that a definition of hydrocarbon would be useful. Especially when only part of a product is a hydrocarbon, the treatment can be very different in the Member States.

E.g. the treatment of waste partially consisting of hydrocarbons is different across the Member States. Whereas some Member States will only tax the actual percentage of hydrocarbons included, others consider the whole as a taxable product.

A German economic operator in the refinery business indicates that the equivalence principle is not always easy to apply in practice, as the taxation depends on the customer. Petrol coke is sold for heating purposes to two of its customers. For these specific customers, duties become due because they use the product as heating fuel. The company agreed with the customs authorities on the applicable rate in order to ensure legal certainty.

From the wording of the ETD, it follows that peat is considered a hydrocarbon¹³⁵. Chemically, however, hydrocarbons consist of carbon and hydrogen only, whereas peat

¹³⁵ Article 2(3) ETD: "any other hydrocarbon, except for peat".

consists of other chemical components as well. The same accounts for most of the other ‘hydrocarbons’ covered by Article 2(1) ETD (i.e. coal and lignite), with the exception of natural gas. The wording of the ETD does not correspond with the chemical substance of the ‘hydrocarbons’, which again could contribute to discrepancies in the Member States’ understanding of ‘hydrocarbons’. All these products are all covered by Chapter 27 of the Combined Nomenclature (*mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes*). As the use of the concept of ‘hydrocarbons’ is not aligned with the chemical definition thereof, one could question the relevance of the term in the ETD.

There is a definite lack of clarity regarding the concept of ‘hydrocarbon’ laid down in the ETD. A clear, common concept would contribute to the understanding application of the directive. When defining the term ‘hydrocarbon’ (or a similar concept), there are two main options:

- i. adhere to the chemical substance of the product (i.e. only consider products that consist of carbon and hydrogen only);
- ii. define the products covered by listing them / describing them (possibly with reference to the Combined nomenclature), which would require regular updates and which would not require reference to the term ‘hydrocarbons’ as such.

The first option would narrow down the scope of the ETD and would not necessarily correspond with the current intention of the legislator. The latter option has the benefit of clarity, to the extent this list of references is kept up-to-date (i.e. the same discussion regarding Article 2(1) ETD). Even after introducing a common EU definition of ‘hydrocarbons’ or similar (cf. approaches elaborated above), further guidance could be required, e.g. on the approach towards products partially consisting of hydrocarbons (e.g. taxability of waste).

Article 2(4) – Delineating the scope of the ETD

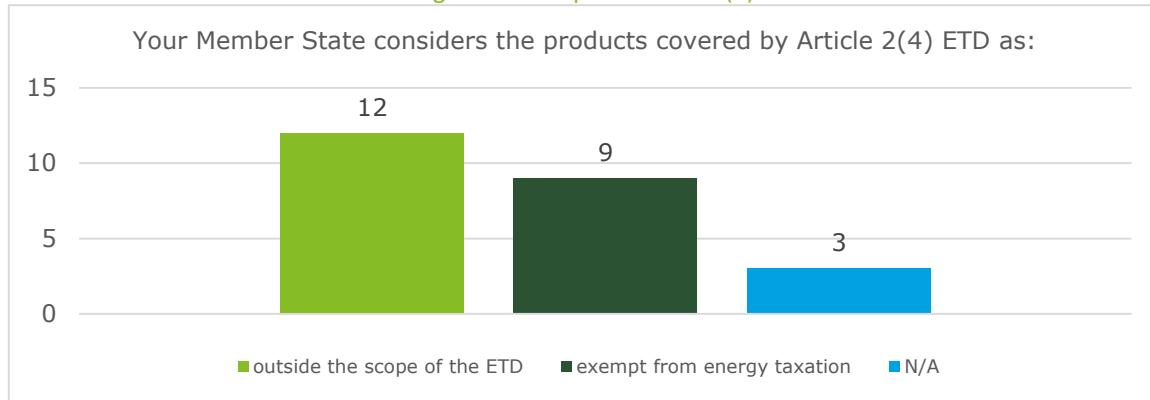
Article 2(4) ETD describes the processes and cases, which are out of the scope of the Directive. Recital 22 to the ETD states:

Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. Electricity used in similar ways should be treated on an equal footing.

As these processes and cases are out of the scope of the ETD, there is no taxation for the products used in these processes / cases foreseen on a harmonized level. Eventual taxes or control measures are the result of national policy measures. As this provision did not form part of the initial Commission’s proposal, there is no explanatory background available.

Under the ETD's predecessor (Directive 92/81/EEC), the first indent of Article 2(4)b ETD was covered as an exemption. This is no longer the case. Several Member States (9 out of 21 respondents) have decided to treat the exceptions out of the scope of the ETD as exemptions, thus providing for control measures on a national level¹³⁶.

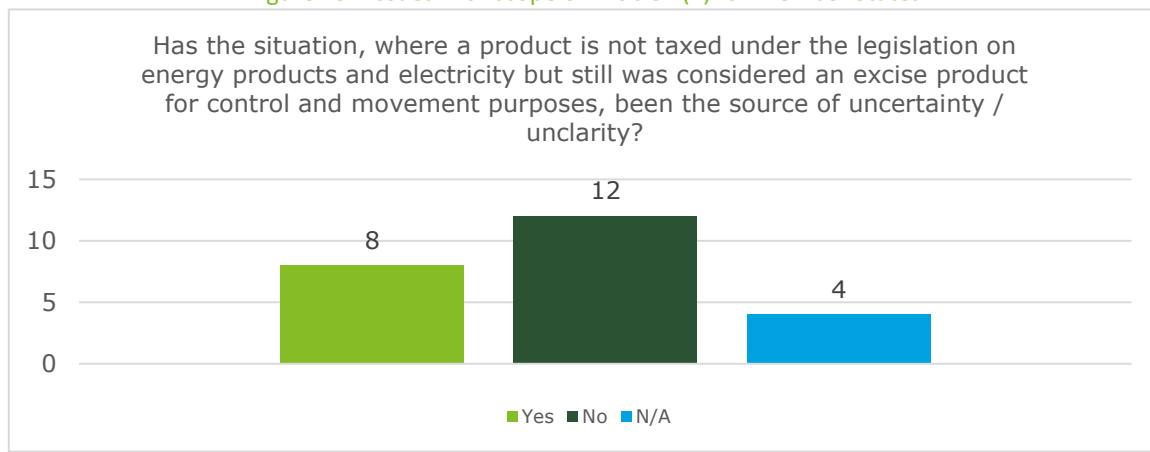
Figure 24 - Scope of Article 2(4)



Source: Survey to Member States

Notwithstanding the exclusion from the scope of the ETD, Article 20 ETD is still applicable to the products listed in Article 2(4)(b). Indeed, although some energy products may be excluded from the scope of application of the legislation on excise taxation on energy products and electricity on the basis of Article 2(4)(b) ETD, they are still considered as excise products under the Horizontal Excise Directive and may fall within Article 20 ETD, if listed therein. A considerable number of Member States' administrations have reported issues in this regard, whereas the data from the economic operators' survey shows less issues in practice.

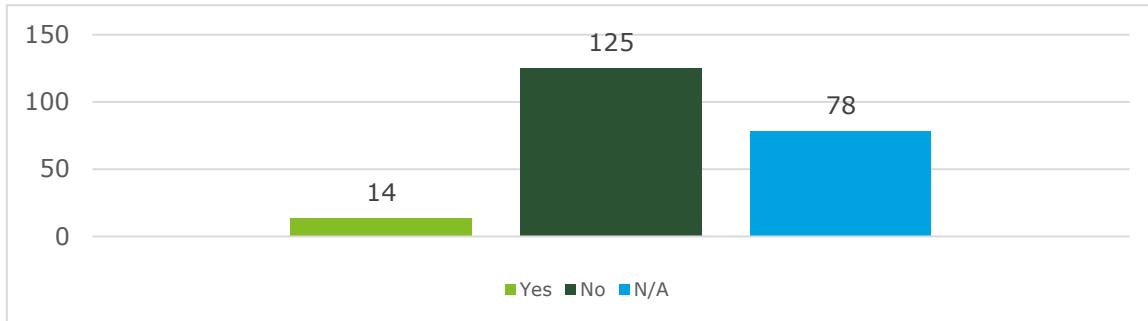
Figure 25 - Issues with scope of Article 2(4) for Member States



Source: Survey to Member States

¹³⁶ The Member States that responded 'exempt from energy taxation' do not necessarily consider the products to be exempt on the basis of the ETD. The answers provided are not mutually exclusive.

Figure 26 - Issues with scope of Article 2(4) for Economic Operators



Source: Survey to Member States

- Several chemical products are not taxed but still fall within the general excise legislation on control and movement. As an example amongst many others, toluene (CN code 2707 10) and xylene (CN code 2707 20) used as paint thinners in retail packages can be mentioned. Other products – such as firelighters (CN code 2701 10 00 or 2701 20 00) – are covered by the definition of ‘energy products’ but not mentioned in Article 20(1) ETD, leaving questions on how to treat those products for intra-EU movement purposes (i.e. does the duty-paid regime necessarily apply?)¹³⁷. These issues will be looked into more in detail in the analysis under Article 20.

The Member States’ administrations mention uncertainty related to the accompanying documents. Also differences in interpretation between the EU Member States – resulting in inconsistencies for the same shipment and either difficulties for economic operators or a lack of controls – were reported, both by the Member States and by economic operators. Economic operators indicate they do not always have legal certainty on the application of the control and movement provisions to certain products.

Furthermore, regarding the wording of the provision, a Member State indicates that the sentence *‘However, Article 20 shall apply to these energy products’* could be interpreted as only applying to mineralogical processes due to its position in the Article, notwithstanding its general scope and wording.

The ETD does not apply to:

- output taxation of heat;
- input taxation of heat: products falling within CN codes 4401 and 4402 (fuel wood, charcoal);
- energy products used for purposes other than as motor fuels or as heating fuels;
- dual use of energy products;
- electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes;

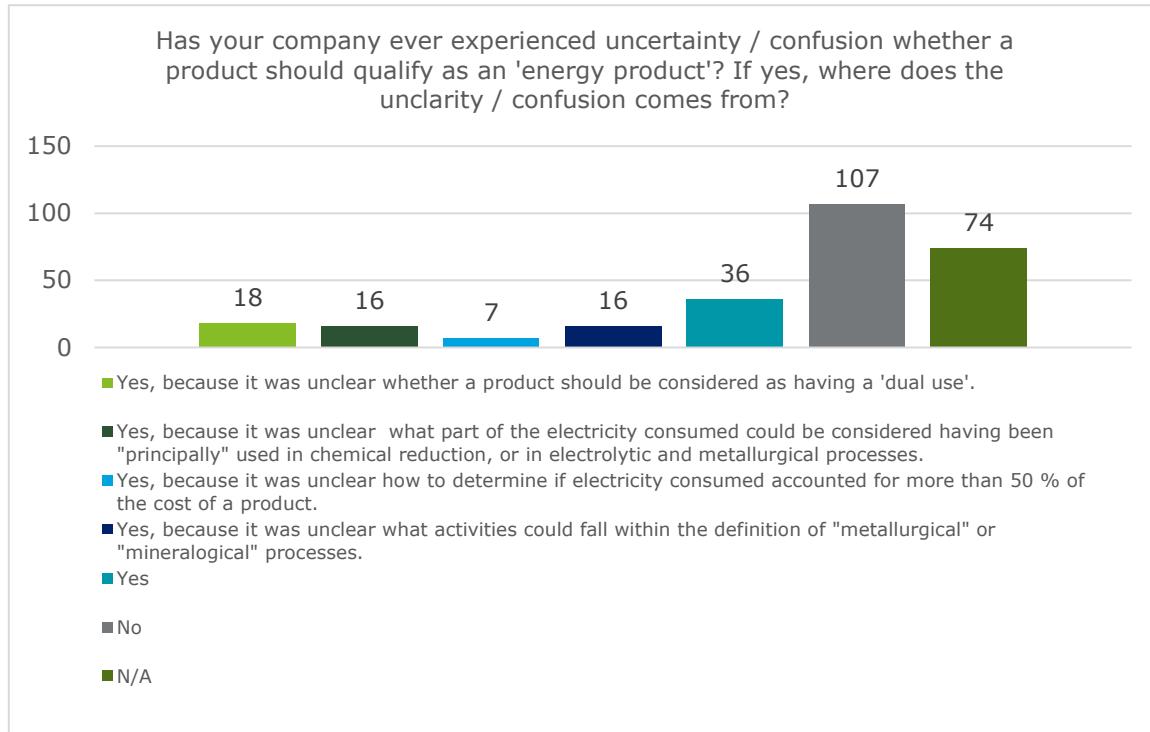
¹³⁷ Similar discussions arise when it comes to the intra-EU movement of taxable products not qualifying as energy products, such as fire starters falling under CN code 3606 90 90 containing naphthalene (which is a hydrocarbon). Issues arise regarding the classification of such fire starters (are they taxable products / do they serve a heating purpose). For bioethanol fuels - are they taxable under the Alcohol Directive – see above under Article 1. Also the intra-EU movement thereof (as the Horizontal Excise Directive is not applicable, which regime applies?).

- electricity, when it accounts for more than 50% of the cost of a product;
- energy products and electricity used for mineralogical processes.

The majority of the respondent Member States (19 out of 21) considers it not necessary to exclude additional products from the ETD.

Below, the different indents of Article 2(4)(b) ETD are looked into. The application of this provision calls for a case-by-case analysis. From the economic operators' survey, it follows that it is not always clear when a product is out of the scope of the ETD and out of the scope of energy taxation in a Member State.

Figure 27 - Uncertainties on application of 'energy product' definition



Source: Survey to Economic Operators

Energy products used for purposes other than as motor fuels or as heating fuels

This first indent narrows down the scope of Article 2(1) ETD. The latter provision is already narrowed down to a certain extent, as some products are only considered energy products if used as heating fuel or motor fuel. The limitation of the concept of 'energy products' to certain uses is still useful, notwithstanding the limitation of the scope of the ETD in Article 2(4)(b) ETD. Indeed, e.g. additives covered by CN code 3811 will only be covered by the ETD if used for purposes of motor fuel or heating fuel. At the same time, these additives are caught by the Horizontal Excise Directive, due to its direct reference to 'energy products' in the ETD when it comes to the scoping in Article 1.

In the ETD's predecessor (Directive 92/81/EEC), this case was covered as a mandatory exemption by the Member States, still implying control measures. As they were taken out of the harmonized system through the ETD, currently the Member States retain full discretion on how to treat energy products not used as motor or heating fuel, both when it comes to the control measures as to the actual taxation. Under Directive 92/81/EEC, Member States could not tax mineral oils used for other purposes than heating or motor fuel (e.g. lubricating oils¹³⁸). These oils would be treated similar to the products covered by Article 14 ETD today. Today, under the ETD, the ECJ has explicitly confirmed that Member States can

¹³⁸ ECJ C-437/01, *Commission v. Italy*, ECLI:EU:C:2003:498.

indeed levy a tax on the consumption of lubricating oils, where they are intended for use, offered for sale or used other than as motor fuels or heating fuels¹³⁹.

This provision does not preclude any additives to motor or heating fuels to be falling within the scope of the ETD. Even though they are not used as motor / heating fuel as such, the additives will be considered as equivalent products as any other treatment would deprive Article 2(3) ETD of any useful effect¹⁴⁰.

Dual use of energy products

The dual use of energy products is not caught by the ETD and as a consequence, Member States retain the discretion to treat this use according to their national policy. Dual use is defined in the ETD:

An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use.

The ECJ shed its light on the interpretation of 'dual use'. The fact of using coal as a heating fuel in the sugar production process and carbon dioxide generated by the combustion of that energy product to produce chemical fertilizers was not considered to constitute 'dual use' in itself by the ECJ. However, the Court added this would constitute 'dual use', if it is established that the sugar production process cannot be completed without using the carbon dioxide generated by the combustion of the coal¹⁴¹. From the X case, it follows that the Court considers that there could be only 'dual use' if the product is necessary to complete the production process (*essentiality*).

There may be dual use of an energy product burned in a manufacturing process where, as is the case in the circumstances of the main proceedings, that process cannot be completed without a substance that can be generated [...] only by the combustion of that product.

Furthermore, the product generated must be used directly in the same manufacturing process (*immediacy of use*):

However, if, in circumstances such as those in the main proceedings, a gas generated by combustion is not the product required to complete the production process, but a residue of that process which is merely recycled, there is no dual use of the actual energy product. Thus, the mere fact that the gas generated constitutes a primary material in a separate manufacturing process, such as the production of chemical

¹³⁹ ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

¹⁴⁰ ECJ C-517/07, *Afton Chemical Limited*, ECLI:EU:C:2008:751.

¹⁴¹ ECJ C-426/12, *X*, ECLI:EU:C:2014:2247.

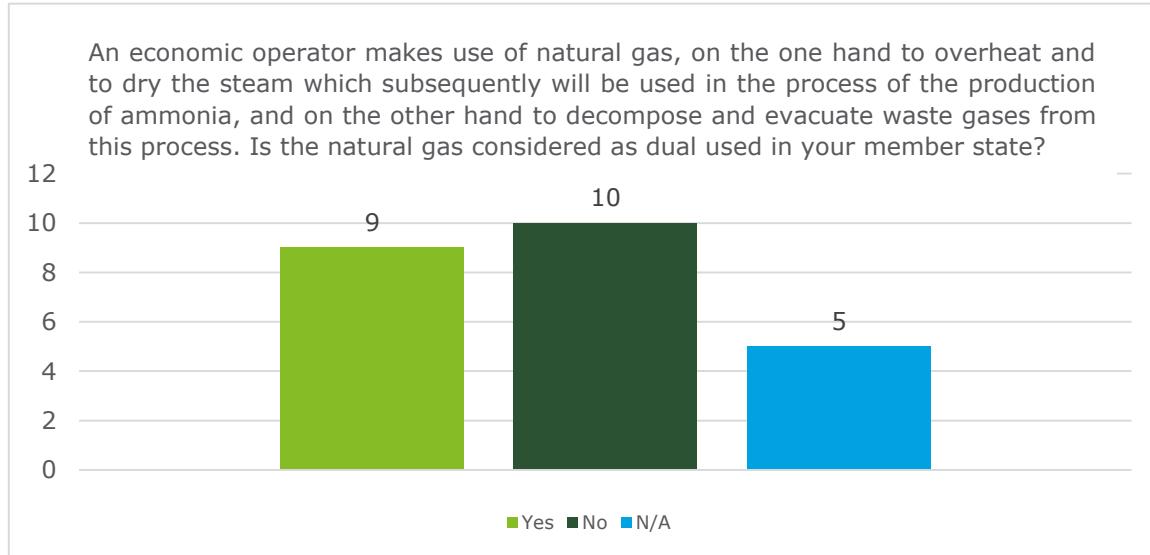
fertilizer, cannot suffice for the view to the taken that there is dual use of the energy product which was burned.

Referring to the X case, the Court ruled that natural gas used for (1) the heating and drying of steam, which is subsequently used in the process of producing ammonia and (2) for the thermal decomposition and the drainage of the residual gases originating from this process, is not considered dual use, which is excluded from the scope of the ETD¹⁴².

In his opinion to the *Hüttenwerke Krupp Mannesman GmbH* case, AG Bobek considers it implicit in both the X case and the YARA case “that the energy product could only benefit from the ‘dual use’ exception to the extent that it has been **physically transformed and contributed in that altered state in the production process**”.

Among the Member States, there are still divergent views on the interpretation of ‘dual use’ in this context.

Figure 28 - Interpretation of ‘dual use’ of natural gas

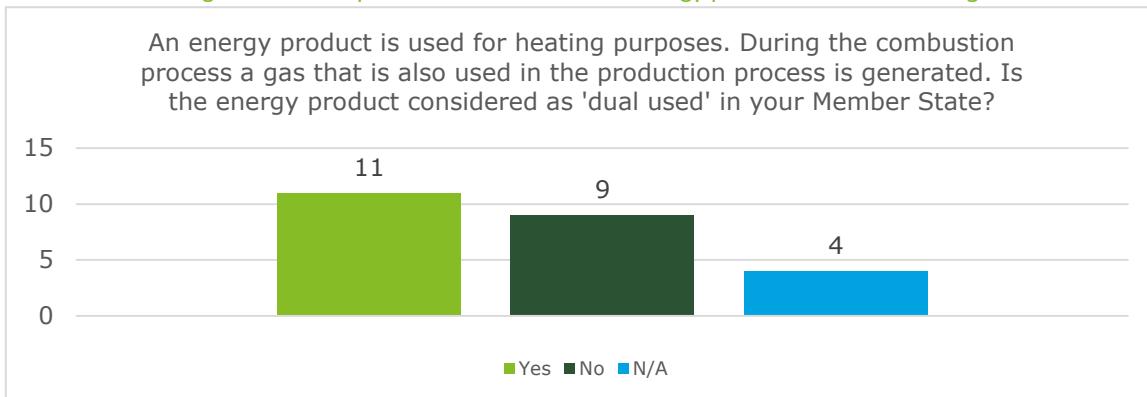


Source: Survey to Economic Operators

Notwithstanding there is a definition in the ETD of ‘dual use’, the Member States have different views on what is considered ‘dual use’ and what is not.

¹⁴² ECJ C-529/14, *YARA Brunsbüttel GmbH*, ECLI:EU:C:2015:836.

Figure 29 - Interpretation of 'dual use' of energy product used for heating



Source: Survey to Member States

The EU Member States may apply a different definition for 'dual use' and retain the discretion to tax dual use in accordance with the national legislation. The moment the use does not qualify as 'dual use' in accordance with the ETD, however, the Member States shall respect the rules laid down in the ETD.

Table 13 - Definitions of 'dual use' in selected Member States

Belgium	Used both as heating fuel and for purposes other than as motor fuel or heating fuel. Dual use is limited to products used for purposes of chemical reduction and in electrolytic and metallurgical processes. ¹⁴³
Denmark	Used both as heating fuel and for the purposes other than as motor fuel or heating fuel. Exemptions are only foreseen on a national level for very energy-intensive processes – low energy-intensive processes are not taxed differently. ¹⁴⁴
France	Used both as fuel and for uses other than heating fuel or motor fuel. This definition is further expanded in a decree from 24 September 2008 which states that 'an energy product has a dual use when it is used both as heating fuel and when its combustion is a necessary step to its transformation in the view of obtaining another product sought by the operator for the purpose of using it'. ¹⁴⁵

¹⁴³ Art. 429. § 1, b) Programme Law of 27 December 2004;

<http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=128253b2-b088-4ec8-b24a-d63d30abc0e2&caller=1#findHighlighted> (Accessed: [12/01/2018]).

¹⁴⁴ Guidance to the *Lov om ændring af lov om afgift af elektricitet, lov om kuldioxidafgift af visse energiprodukter og forskellige andre love*; <https://www.retsinformation.dk/Forms/R0710.aspx?id=128322> (Accessed: [12/01/2018]).

¹⁴⁵ Decree n° 2008-1001 of 24 September 2008 pris pour l'application des dispositions des 2° et 3° du I et du II de l'Article 265 C du code des douanes, du 2° du a du 4 de l'Article 266 quinques et des b et c du 1° du 4 de l'Article 266 quinques B du même code relatif aux produits énergétiques, mentionnés aux articles 265, 266 quinques et 266 quinques B du même code, qui font l'objet d'une utilisation placée en dehors du champ d'application des taxes intérieures de consommation sur les produits énergétiques ; <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000019528135> (Accessed: [12/01/2018]).

Germany	Used simultaneously for heating purposes and for purposes other than for use as heating fuel or motor fuel. ¹⁴⁶
Poland	No definition. Polish provisions do not exclude from the scope of excise duty dual use products. However, there are exemptions from excise duty to the use of products in specified processes (of dual use character), provided that certain conditions are met.
Portugal	Used both as heating fuel and for purposes other than as motor fuel or heating fuel. The exemption is linked to the achievement of environmental objectives. ¹⁴⁷
Sweden	Used both for heating purposes and for other purposes than heating. ¹⁴⁸

Electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes

Whereas energy products used for chemical reduction is considered as dual use, the use of electricity for such purpose is out of the scope of the ETD on the basis of a different indent.

There is no definition of ‘metallurgical process’ laid down in the ETD. Several Member States have defined the concept in their national legislation.

Table 14 - Definitions of ‘metallurgical process’ in selected Member States

Belgium	Processes resulting in the production of products classified under the DI codes of the NACE nomenclature, or under the following Prodcodes: 23.10, 27.10, 27.41, 27.42, 27.43, 27.44, 27.45. ¹⁴⁹
Denmark	The energy product must be used directly in metallurgical processes. The heating must be carried out in installations and the materials used must change chemical or internal physical structure through the heating in the installation. There is also a requirement that the energy product is used for particularly energy-intensive

¹⁴⁶ Paragraph 51, section 1, no. 1, d) of the *Energiesteuergesetz*; <https://www.gesetze-im-internet.de/energiestg/EnergieStG.pdf> (Accessed: [12/01/2018]).

¹⁴⁷ Decree-Law 566/99, of 22 December 1999; <https://dre.tretas.org/dre/108996/decreto-lei-566-99-de-22-de-dezembro> (Accessed: [12/01/2018]).

¹⁴⁸ <https://www4.skatteverket.se/download/18.22f626eb14fb326a4b6883b/1441865036021%20/prop.+2006+07+13.pdf> (Accessed: [12/01/2018]).

¹⁴⁹ Art. 429. § 1, b) Programmawet van 27.12.2004;
<http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=128253b2-b088-4ec8-b24a-d63d30abc0e2&caller=1#findHighlighted> (Accessed: [12/01/2018]).

	processes, which are mentioned in Annex 1 to the Act on the carbon dioxide tax on certain energy products. ¹⁵⁰
France	Activities of production and transformation of ferrous and non-ferrous metals and their alloys (' <i>activités de production et de transformation à chaud des métaux ferreux et non ferreux et de leurs alliages</i> ') mentioned in column A of the nomenclature of installations classified for the protection of the environment annexed to Article R.511-9 of the Environment Code under headings 2541 1, 2541 2, 2542, 2545, 2546, 2547, 2550, 2551, 2552, 2560, 2561 and 2562. ¹⁵¹
Germany	To produce and work metals as well as, within the context of the production of metal products, to produce forging, pressing, drawing and stamping parts, roll forms and powder metallurgy products and for the treatment and coating of metals. ¹⁵²
Poland	No definition.
Portugal	No definition.
Sweden	Used in metallurgical processes, on the condition that the material by heating in a furnace or a similar box is being changed or maintained chemically or its inner physical structure is changed or maintained. ¹⁵³

The ECJ issued a ruling on the interpretation of Article 2(4)(b) ETD in the *Hüttenwerke Krupp Mannesmann* case recently¹⁵⁴. The *Finanzgericht Düsseldorf* wanted to understand whether the indent on “*electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes*” is to be interpreted with respect to the blast

¹⁵⁰ Section 11d of the Petroleum Tax Act; <https://www.retsinformation.dk/Forms/R0710.aspx?id=163901> (Accessed: [12/01/2018]); Section 10 d of the Gas Tax Act; <https://www.retsinformation.dk/Forms/R0900.aspx?s19=312&s20=2011&s22=%7c10%7c&s113=0> (Accessed: [12/01/2018]); Section 8 d of the Coal Tax Act; <https://www.retsinformation.dk/Forms/R0900.aspx?s19=1080&s20=2015&s22=%7c10%7c&s113=0> (Accessed: [12/01/2018]); Appendix 1 of The carbon dioxide tax act; <https://www.retsinformation.dk/Forms/R0710.aspx?id=133858> (Accessed: [12/01/2018]).

¹⁵¹ Decree n° 2008-1001 of 24 September 2008 pris pour l'application des dispositions des 2° et 3° du I et du II de l'Article 265 C du code des douanes, du 2° du a au 4 de l'Article 266 quinques et des b et c du 1° du 4 de l'Article 266 quinques B du même code relatif aux produits énergétiques, mentionnés aux articles 265, 266 quinques et 266 quinques B du même code, qui font l'objet d'une utilisation placée en dehors du champ d'application des taxes intérieures de consommation sur les produits énergétique ; <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000019528135> (Accessed: [12/01/2018]).

¹⁵² Paragraph 51, section 1, no. 1, b) of the *Energiesteuergesetz*; <https://www.gesetze-im-internet.de/energiestg/EnergieStG.pdf> (Accessed: [12/01/2018]).

¹⁵³ Chapter 6a, par. 1b (for energy products) and Chapter 11, par. 9 (for electricity) of Act (1994 :1776) of Excise duties on Energy; https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfatningssamling/lag-19941776-om-skatt-pa-energi_sfs-1994-1776#K6a (Accessed: [12/01/2018]).

¹⁵⁴ ECJ C-465/15, *Hüttenwerke Krupp Mannesmann GmbH*, ECLI:EU:C:2017:640.

furnace process for the production of pig iron as meaning that electricity for the propulsion of the turbo blower is to be regarded as electricity which is used principally for the purposes of chemical reduction.

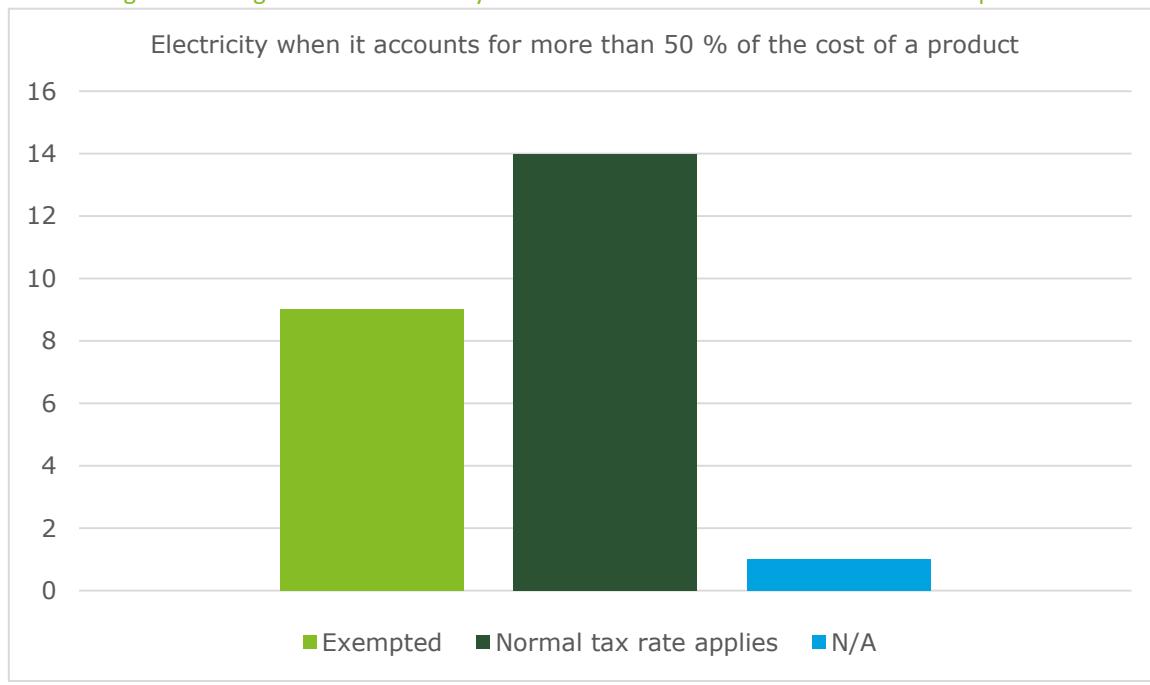
Before the Court it turns out that the degree of connection which must exist between the electricity and the chemical reduction is of the essence. The different language versions of the ETD suggest that a remote connection between the use of electricity and the chemical reduction does not suffice to make that use fall within the scope of the provision (as is the case for electricity which is not required to complete the chemical reduction), but the ECJ points out that the wording of the ETD does not allow to determine whether there is a sufficiently close connection in the case at hand.

The ECJ pointed out that the electricity used to drive the turbo blowers cannot be considered as "*used principally for the purposes of chemical reduction*". In fact, if the turbo blowers were to run on energy products (e.g. gas oil) instead of electricity this use would be covered by the concept for motor fuels used in stationary motors. The Court therefore concluded that electricity used to drive mechanical equipment falls within the scope of Directive 2003/96/EC.

Electricity, when it accounts for more than 50% of the cost of a product

Both the cost of electricity and the cost of the product are defined in the ETD. The cost of electricity is the actual purchase value of electricity or the cost of production of electricity if generated in the business. The cost of a product is defined as the addition of total purchases of goods and services plus personnel cost plus the consumption of fixed capital, at the level of the 'business' (defined in Article 11).

Figure 30 - Regime when electricity accounts for more than 50 % of the cost of a product



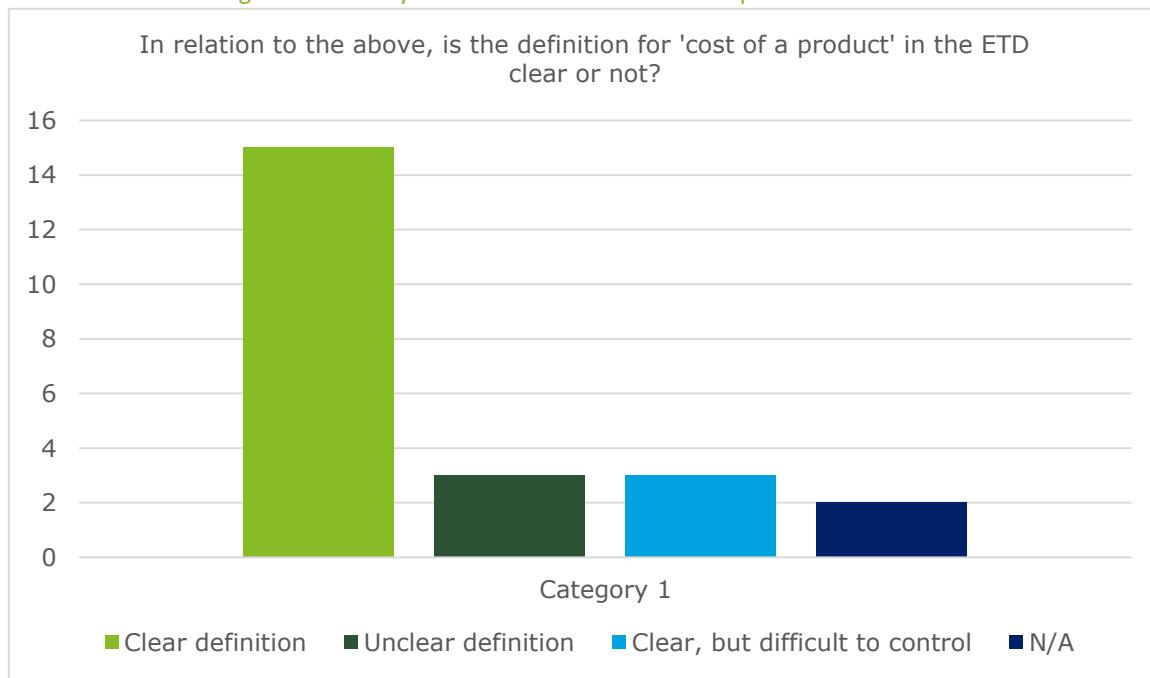
Source: Survey to Member States

Nine Member States indicate that they exempt the taxation on electricity when it accounts for more than 50% of the product. These Member States are Estonia, France, Latvia, Romania, Slovenia, Slovakia and Bulgaria.

Luxemburg indicated that there is no situation in their Member State where electricity accounts for more than 50 % of the cost of a product and that no legislation is applicable. While Estonia applies the exemption their authorities communicated the same thing.

14 other Member States responded that even though the ETD does not apply to electricity, which accounts for more than 50 % of the cost of a product, this electricity is still subject to energy taxation.

Figure 31 - Clarity of the definition for 'cost of a product' in the ETD



Source: Survey to Member States

15 Member States responded that the definition for 'cost of a product' in the ETD is clear. However, most of these Member States mention that the reason therefore is because they simply do not apply the exemption on electricity that accounts for more than 50% of the cost of the product and they cannot face controversy over it.

France, Denmark and Finland responded that the definition in the ETD is unclear.

The French customs authorities explained that the definition is not adapted to the industrial and fiscal situation in France. The exemption is only rarely invoked by some economic operators in the industrial sector with a large electricity consumption. But when it is, the French customs services have difficulties to determine the amount of energy in relation to the cost of production because of the complexity of all factors that need to be included. These factors often also do not align with the customs legislation.

The Danish authorities noticed that the ‘cost of a product’ must be seen in conjunction with the concept of business unit mentioned in Article 11(2) of the ETD. In practice, the business unit can be defined very narrowly. This may increase the ‘cost of a product’ arbitrarily.

According to the Finnish authorities, the definition is complex, open to interpretation and administratively challenging to implement.

Energy products and electricity used for mineralogical processes

Also energy products and electricity used for mineralogical processes is considered out of the scope of the ETD. Mineralogical processes are defined in the Directive, with reference to the NACE nomenclature. The NACE nomenclature was introduced by Council Regulation (EEC) No 3037/90 (hereinafter **NACE regulation**)¹⁵⁵. The NACE regulation was most recently revised by Council Regulation (EC) No 1893/2006, with effect as of 1 January 2008 – the NACE rev. 2¹⁵⁶. The current ETD reference to NACE rev. 1 is outdated and could cause similar issues in practice as those identified in the context of Article 2(1) ETD. The practical impact of the outdated reference will be much more limited, however, considering the non-recurrent character of the NACE code attribution.

Table 15 - Definitions of ‘mineralogical processes’ in selected Member States

Belgium	Reference to the NACE DI 26 classification. Are considered as ‘mineralogical processes’, all processes from the unloading of the raw materials up to the moment of obtaining the manufactured products (including the transportation to and from a place of storage) ¹⁵⁷ .
Denmark	The Danish legal framework adheres to a strict interpretation of ‘mineralogical process’ ¹⁵⁸ . The energy product has to be used directly and must change the structure of the product. <i>E.g. electricity used for cement production, which is a mineralogical process. However, Danish authorities will not consider the energy product used for a mineralogical process if the product is used to power an engine to help produce cement. The power has to be used more directly (for example heating the cement). In order to be considered mineralogical, the energy must change somehow the</i>

¹⁵⁵ Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community, OJ. L. 293, 24 October 1990; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01990R3037-20080101> (Accessed: [12/01/2018]).

¹⁵⁶ Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains, OJ. L. 393, 30 December 2006; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1893>.

¹⁵⁷ Art. 429. § 1, d) Programmawet van 27.12.2004;
<http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=128253b2-b088-4ec8-b24a-d63d30abc0e2&caller=1#findHighlighted> (Accessed: [12/01/2018]).

¹⁵⁸ Guidance of SKAT; <http://www.skat.dk/skat.aspx?oid=2062238&vid=214126> (Accessed: [12/01/2018]).

	<i>structure of the product. The transport of chalk is not a mineralogical process, it is transportation. Drying wet chalk might not be a mineralogical process, but burning chalk might be (changing the structure).</i>
France	Reference to the NACE DI 26 classification. ¹⁵⁹
Germany	To produce glass and glassware, ceramic products, ceramic wall and floor tiles and panels, bricks, tiles and construction products in baked clay, cement, lime and burnt gypsum, products from concrete, cement and plaster, vitrified-bonded abrasives, mineral insulating materials, asphalt, goods made of graphite or other carbon, products made of aerated concrete products and mineral fertilizers for drying, firing, melting, heating, keeping warm, expanding, tempering or sintering the above-mentioned products or the semi-finished products used in their production. ¹⁶⁰
Poland	Reference to the NACE DI 26 classification. ¹⁶¹
Portugal	Reference to the NACE DI 26 classification. ¹⁶²
Sweden	Used in processes producing other mineral products than metals, on the condition that the material by heating in a furnace is being changed chemically or its inner physical structure is changed. ¹⁶³

Although providing for clarity, the reference to the NACE nomenclature is not considered to be a good solution by all Member States. The nomenclature was introduced for different (statistical) purposes, whereas it is used for taxation purposes in the ETD. The activities

¹⁵⁹ Decree n° 2008-1001 of 24 September 2008 pris pour l'application des dispositions des 2° et 3° du I et du II de l'Article 265 C du code des douanes, du 2° du a du 4 de l'Article 266 quinques et des b et c du 1° du 4 de l'Article 266 quinques B du même code relatif aux produits énergétiques, mentionnés aux articles 265, 266 quinques et 266 quinques B du même code, qui font l'objet d'une utilisation placée en dehors du champ d'application des taxes intérieures de consommation sur les produits énergétiques ; <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000019528135> (Accessed: [12/01/2018]).

¹⁶⁰ Paragraph 51, section 1, no. 1, a) of the *Energiesteuergesetz*; <https://www.gesetze-im-internet.de/energiestg/EnergieStG.pdf> (Accessed: [12/01/2018]).

¹⁶¹ The definition of “mineralogical processes” is stipulated in Article 2 paragraph 1 point 33 of the Act of 6th December 2008 on Excise Duty. The definition reads as follows:

“33) mineralogical processes – processes classified within the NACE under code DI 26 “manufacture of other non-metallic mineral products” in the Council Regulation (EEC) No. 3037/90 of 9th October 1990 on the statistical classification of economic activities in the European Community (OJ L 293, 24.10.1990, p. 1, as amended, OJ Polish Special Edition, Chapter 02, v. 4, p. 177, as amended.”; <http://dziennikustaw.gov.pl/du/2017/43/1> (Accessed: [12/01/2018]). It is the consolidated text of the Act on Excise Duty, which has been published in Journal of Laws of 2017 under item 43. Please note that the linked version does not include subsequent amendments (these amendments, however, do not affect the definition in question).

¹⁶² Article 89 (1)(f) of the Portuguese Code of Excise Duties, approved by Decree-Law 73/2010, of June 21; <http://www.dgaiec.min-financas.pt/NR/rdonlyres/314EF2B6-7EFE-4BF5-A8F2-4D8B61082810/0/CIEC.pdf> (Accessed: [12/01/2018]); Currently the national legislation does not make any reference to mineralogical processes.

¹⁶³ Chapter 6a, par. 1, 16° (for energy products) and Chapter 11, par. 9 (for electricity) of Act (1994:1776) of Excise duties on Energy; https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfatningssamling/lag-19941776-om-skatt-pa-energi_sfs-1994-1776#K6a (Accessed: [12/01/2018]).

falling within a particular NACE code will be much broader compared to the activities qualifying as ‘metallurgical processes’, even though there is no particular reason for this difference in approach. Moreover, the NACE code could be different depending on the location of the plant using energy products.

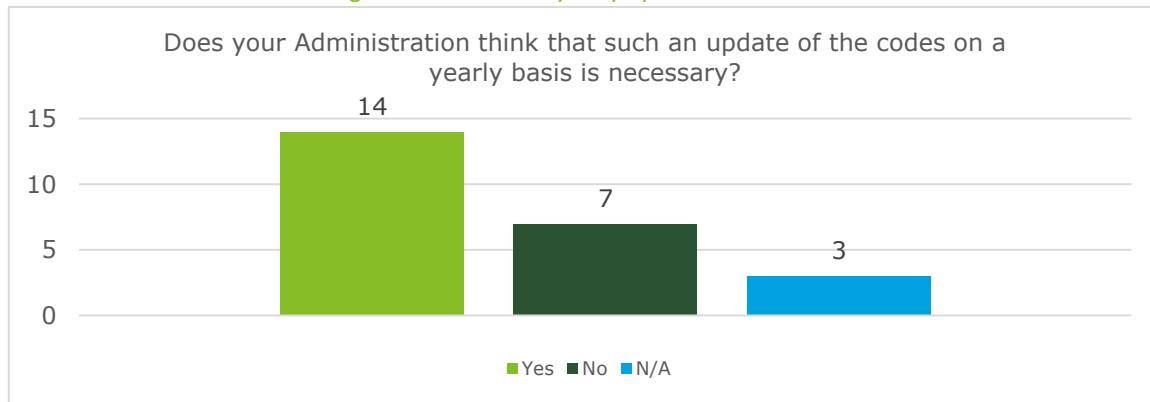
E.g. a window production plant produces glass at the same production plant. NACE codes will be attributed by the plant operator according to his own discretion. Difficulties in practice could arise, e.g. which use is covered by which code, whether the attributed codes are correct, etc. The same could apply to a cement production plant located near a sand exploitation mine.

The Member States have indicated that the different interpretation of the scope of uses is problematic. Economic operators are faced with different taxation of the same use within the internal market. Moreover, as this use is outside the scope of the harmonized framework, most of the time the Member States do not have a knowledgeable insight in the taxation regime in the other Member States.

Article 2(5) – Updating CN codes used to describe ‘energy products’

Article 2(5) ETD foresees in a decision to update the codes of the combined nomenclature for the products referred to in the ETD, to be taken once a year in accordance with Article 27 ETD. Although not carried out, the existence of this provision shows that the EU Member States understood the importance of updating the CN codes over time. The Member States did not intend to have static CN codes in Article 2(1) ETD. Article 2(5) ETD provides for the necessary dynamism in this regard but, as it has never been carried out, it does not have any value in practice to date.

Figure 32 - Views on yearly update of CN codes



Source: Survey to Member States

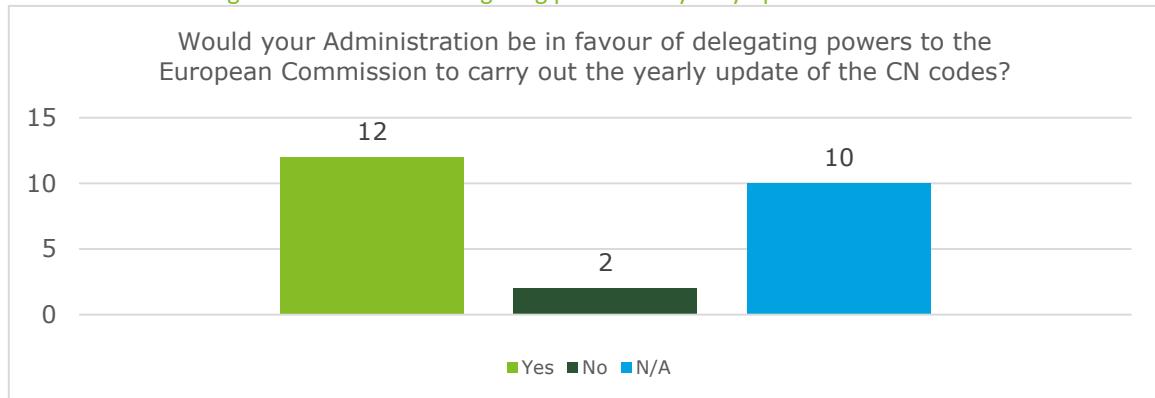
According to the Member States indicating that the current list of CN codes is obsolete, the use of the static CN codes list results in legal uncertainty for economic operators, in some cases pushing the national customs administration to issue CN tables of correspondence (the national legislation is based on old CN codes, but economic operators are using up-to-date CN codes within EMCS). This is confirmed by a number of economic operators,

experiencing issues due to the obsolete CN codes list which, apart from legal certainty, also brings additional burden to identify the correct CN code.

Considering the adoption of the new Combined Nomenclature in October of each year, little time is left for the adaption of the ETD. Additionally, the survey results and interviews suggest that a regular update does not imply that the CN codes list will be up-to-date at all times, taking into account the necessity of a national implementation which may be burdensome and time-consuming.

Since the Lisbon Treaty, primary EU law foresees in the possibility for the European Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act (Article 270 TFEU). This is only possible if the objectives, content, scope and duration of the delegation of power to the Commission is explicitly defined in that legislative act. A delegated act can only be used to lay down / modify non-essential elements of the legislation. Such delegation to the European Commission could provide the appropriate tool for the amendment of the 2002 CN codes laid down in the ETD on a more regular basis, reducing the burden for traders and administrations in identifying the appropriate old CN code for excise purposes. Such amendment by the European Commission through a delegated act could prove useful, however, further implementation will be required on a national level to put the modifications in practice.

Figure 33 - Views on delegating powers for yearly update of CN codes



Source: Survey to Member States

A vast majority of the respondent Member States are in favor of delegating powers to the European Commission to carry out the (yearly) update of the CN codes listed in Article 2(1) ETD. The Member States consider that the European Commission disposes of the necessary information, expertise and resources to carry out this update, which is estimated to bring a considerable burden. The delegation to the Commission, both allowing sufficient flexibility and consistency in updating the CN codes, would offer clarity to the economic operators. However, for the delegation to the European Commission to be the right tool to update the CN codes in the ETD, it is indeed necessary that only 'non-essential' elements of the Directive are changed. The update of the CN codes could, however, influence the scope of taxation through the ETD, resulting in a considerable impact. If altering the scope of taxation through a European Commission update of the CN codes is a possibility, such delegation

cannot be considered to cover only the ‘non-essential’ elements of the ETD. Adjusting the scope of the ETD should be left to the Council to decide.

Concluding, it follows from the research that an update of the CN codes used is needed in order to ensure more clarity for and a common approach by the stakeholders involved. The update should make sure that the same CN code is used in practice for trade and excise purposes. As an intermediary solution, an explicit reference to the correlation tables could be inserted in the Directive.

Conclusion

- As confirmed by the European Court of Justice, the European Commission, and the input received from the Member States and the economic operators, the wording of Article 2 ETD could be clearer and more precise. Additives which are added to motor fuels are according to a strict reading of the ETD not taxed, but are taxable according to the interpretation of the European Court of Justice. The lack of an EU definition of *hydrocarbons* and *dual use* results in very different concepts at a national level, ultimately affecting the functioning of the internal market. The concepts defining which uses fall outside the scope are interpreted very differently (either very broad or very strict), ultimately excluding sometimes processes which were not intended to be exempted by the EU legislator. The structure of the Article (in particular the strange alignment of the subparagraph) – *‘however, Article 20 shall apply to these energy products’* resulting in doubts if the provision could apply only to products used in mineralogical processes – leads to questions in practice;
- The European Court of Justice interpreted a number of the concepts laid down in Article 2 ETD. Nonetheless, these interpretations are not unanimously adhered to by the Member States. On the contrary, the data gathered suggest there are still very divergent approaches towards the interpretation of several of the concepts;
- The concept of ‘energy products’ is strictly defined in the ETD, with an exhaustive list of codes referring to the 2002 version of the Combined Nomenclature. The procedure for a (mandatory) update of the list of codes in the Directive was never applied. The outdated list of codes causes problems for traders - both from a legal (lack of certainty) and from a practical (additional administrative burden) nature – who have to keep track of 2 codes (one for trading / customs purposes, one for excise purposes);
- The use of a fixed list of CN codes is considered as a static reference, imposing on the Member States the obligation to adhere to the codes listed therein. Nonetheless, there are Member States that have implemented the ETD with a dynamic reference. This does not necessarily affect the application and scope of the ETD in practice, however;
- At first reading, the list of products considered as ‘energy products’ in Article 2(1) ETD provides for clarity and legal certainty for the Member States’ administrations and the economic operators, reason why several Member States indicate that other

products should be added to the list, at the same time criticizing the current list (referring to the 2002 Combined Nomenclature) is outdated. However, the scope of the ETD is always determined by the use of the product (cf. Article 2(4) ETD and relevant case law¹⁶⁴ and the reference to the use for some of the CN codes mentioned in Article 2(1) ETD). Therefore, the added value of the delineation of ‘energy products’ in Article 2(1) ETD could be questioned. Indeed, the term ‘energy products’ is being referred to by a number of other provisions and instruments (e.g. exemptions in Articles 14 and 15, the chargeable event in Article 21(3), the Horizontal Excise Directive, etc.), nonetheless the impact in practice of this wording is often nonexistent in practice (with Member States applying the provisions to all ETD taxable products). The legislator could reconsider the intended purpose of the limitation of certain provisions to ‘energy products’ only, and subsequently keep or remove this concept. In the latter case, only the concept of ETD taxable products would remain;

- Article 2(3) ETD is considered as a catch-all provision, encompassing all products which are used as motor fuel and all hydrocarbons used as heating fuel, which are not already covered by the definition of ‘energy product’. Major issues arose in practice regarding the identification of the equivalent product, as reported by both the Member States and the economic operators. The different language versions of the ETD result in discrepancies in the interpretation of the ETD, requiring the European Court of Justice to step in for the interpretation of the equivalence principle;
- There is currently no common approach on which products are taxed and the identification of the equivalent rate. The framework laid down in the ETD is approached differently by the Member States, despite intervention of the European Court of Justice. Several Member States have issued interpretative guidance on a national level, indicating the need for a common approach at EU level. The same fuel, used for the same purpose and not subject to any exemption, may be taxed in one Member State and not taxed in another, because of this difference in approach. In the end, this affects the functioning in the internal market and the competition between the Member States (e.g. taxation of waste plastics, taxation of products used in mineralogical processes – or, more in general, the difference in approach towards products in or out of the scope of the ETD);
- On a micro level and based on the current practice, the initial impact of this difference in approach on which products are taxed and the determination against which rate between the Member States is relatively limited for the economic operators, due to the practicalities of the excise system (declaration by the economic operator himself). Due to a lack of common approach and understanding by the

¹⁶⁴ ECJ C-49/17, *Koppers Denmark ApS v. Skatteministeriet* (pending); ECJ C-43/13 and C-44/13, *Kronos Titan GmbH*, ECLI:EU:C:2014:216; ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

Member States, economic operators may be incentivized to look for ‘tax optimization’, identifying the least taxed ‘equivalent’ product, ultimately affecting the tax revenues of the Member States. However, post-declaration audits could result in considerable tax claims (and accessory interest and fines), which are potentially due to the complexity of the system. Moreover, the identification of illegal tax exemptions following judgements of the ECJ¹⁶⁵ could result in the observation that illegal State aid has been granted. Even though no practical examples of such observation could be identified to date, they would potentially have a considerable (financial) impact for economic operators, not only for the future but also for past tax treatment;

- Both Member States (increase in tax revenue) and economic operators (less administrative burden – e.g. identification of equivalent products, disputes with the authorities regarding the interpretation of concepts ...) would benefit from increased clarity and uniformity contributing to a more streamlined taxation across the Member States.

B.3 Article 3

Interplay with the Horizontal Excise Directive

Article 3 ETD defines the interplay between the ETD and Directive 92/12/EEC¹⁶⁶. According to this provision, references in Directive 92/12/EEC to ‘mineral oils’ and ‘excise duty’, insofar as it applies to mineral oils, shall be interpreted as covering all energy products, electricity and national indirect taxes referred to in Articles 2 and 4(2) ETD.

Directive 92/12/EEC laid down the general arrangements for products subject to excise duty – in particular mineral oils, alcohol and manufactured tobacco – and on the holding, movement and monitoring of such products. Directive 2008/118/EC repealed Directive 92/12/EEC with effect from 1 April 2010. In accordance with Article 47(2) of the former Directive, references to the repealed Directive 92/12/EEC shall be construed as references to Directive 2008/118/EC.

Conclusion

- All references in the ETD to ‘Directive 92/12/EEC’ are to be read as references to Directive 2008/118/EC. The references to the predecessors of Directive 2008/118/EC do not contribute to the readability of the ETD;

¹⁶⁵ See e.g. ECJ C-465/15, *Hüttenwerke Krupp Mannesmann GmbH*, ECLI:EU:C:2017:640.

¹⁶⁶ Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ. L. 76, 23 March 1992; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0012:en:HTML> (Accessed: [12/01/2018]).

- Article 3 ETD could be removed from the current Directive to the extent the provision refers to ‘mineral oils’, as this wording is outdated.

B.4 Article 4

Context

Article 4(2) ETD reads:

“The levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive.

For the purpose of this Directive ‘level of taxation’ is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.”

The second paragraph of Article 4 explains what elements need to be taken into account in order to correctly calculate the ‘level of taxation’ and to ensure that level of national taxation does not drop below the minimum level of taxation as determined in the Energy Tax Directive.

The total charge levied in respect of all indirect taxes (except VAT) calculated either directly or indirectly on the quantity of energy products and electricity represents the material scope of this provision. The taxes need to be levied on energy products and electricity within the scope and purpose of the ETD.

The criteria to determine which indirect taxes fall in the scope of Article 4(2) ETD for the calculation of the level of taxation are set out in Directive 2008/118/EC¹⁶⁷. It defines the general conditions for applying indirect taxes on energy products and electricity.

Link with Article 1 Directive 2008/118

The first paragraph of Article 1 Directive 2008/118 explains that the rules in this Directive relate to excise duties that are levied on the consumption of energy products and electricity as covered by Directive 2003/96/EC. Taxes that are defined as excise duties and are levied on these products fall within the scope.

The issue with this paragraph is that it only refers to the energy products and electricity, whereas under Directive 2003/96/EC other products are taxable as well if used as motor or heating fuel. This wording affects the scope of the provision because a restrictive

¹⁶⁷ Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, O.J. L. 9, 12, January 2009, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0118&from=EN> (Accessed: [12/01/2018]).

interpretation would mean that the criteria of this Directive should only be applied on the energy products and electricity under the ETD and not the other taxable products.

The second paragraph actually determines what indirect taxes may be levied in addition to excise duties and which as a result will also be included in the calculation of the level of taxation.

Other indirect taxes may be levied, under the condition that these additional taxations pursue one or more specific goals. In doing so, these additional taxes must also comply with the applicable rules for excise and VAT taxation with regard to the determination of the tax base, the calculation of the tax, the chargeability and monitoring.

Any indirect taxes on top of the excise duties and in accordance with the above conditions need to be included in the calculation of the level of taxation.

Further Paragraph 3(a) of Article 1 Directive 2008/118 allows Member States to levy these taxes on products other than excise goods.

Following interpretations of the Court of Justice in three separate judgments¹⁶⁸, it appears that an additional indirect taxation different from the harmonized excise taxation can only be levied on the supply of electricity if certain specific objectives are pursued, "different than budgetary objectives". The fact that the contribution will finance the public expenditure of the government in some form or another is not considered a specific objective.

On the basis of the predetermined expenditure of the contribution, the realization of the specific objective should be guaranteed and there should be a direct (causal) link between the usage of the contributions and the objective.

Case law

In a judgment of 24 February 2004, Commission/France (C-434/97) the Court found that Article 3(2) of Directive 92/12/EEC (juncto art 4(2) ETD) does not require a Member State to comply with all rules applicable to excise and VAT taxation with regard to the determination of the tax base, calculation, chargeability and monitoring for it to levy the indirect tax. Instead, it is sufficient that the indirect taxation which pursues specific objectives is in accordance with the general intention of the taxation technique in the Community law.

On the other hand, the ECJ confirmed earlier judgments in the Santa Lucia judgment when it made a decision in a case concerning Italian legislation in which the Italian Electrical energy and Gas Authority could set new amounts payable for general electricity charges, while taking into account incentives for energy-intensive businesses. The amounts covering general electricity charges were obligations laid down in national Italian law for entities

¹⁶⁸ ECJ C-437/97, *EKW and Wein & Co*, ECLI:EU:C:2000:110; ECJ C-82/12, *Transportes Jordi Besora*, ECLI:EU:C:2014:108; ECJ C-553/13, *Talinnna Ettevõtlusamet/Statoil Fuel & Retail*, ECLI:EU:C:2015:149.

using the services of the electricity network. The Court decided that state enforcement in case of non-payment by the debtor revealed the fiscal nature of the charges.

The amounts were intended to finance objectives in the general interest and in accordance with the allocation criteria laid down by the public authorities instead of specifically financing the electricity production and distribution costs. These objectives included the promotion of renewable energy sources and energy efficiency, nuclear safety and territorial clearance payments, the special tariff schemes for the national railway company, compensation intended for small undertakings in the electricity sector, support for applied research in the electricity sector and covering ‘the electricity bonus’ and incentives granted to energy-intensive businesses.

The duties were typically charged to the end consumers of electricity by being entered on their electricity bills. The general electricity charges were also reduced according to electricity consumption.

The ECJ came to the decision that this form of indirect taxation was being used for specific objectives in the general interest, calculated on the quantity of the electricity and at the time of release for consumption and therefore constitutes indirect taxation within the meaning of Article 4(2) ETD and needs to be included in the calculation of ‘the level of taxation’¹⁶⁹.

Currently, a reference for a preliminary ruling is pending before the Court of Justice, referred by the French Conseil d’Etat¹⁷⁰. The case concerns a contribution on the electricity consumption for the public service of electricity supply.

A company filed a claim for refund on this contribution with interest as it claimed that the contribution was in breach of Directives 92/12/EEC (juncto 2003/96/EC) and Directive 2008/118/EC.

The company claimed that the contribution was a taxation on top of the excise taxation and this was only allowed if it served one or more specific objectives and was in compliance with the applicable rules on excise and VAT with regard to the determination of the tax base, calculation of the tax, chargeability and monitoring.

The contribution was an indirect taxation, which was implemented before the entry into force of the ETD, and the only taxation on the consumption of electricity until the law of 7 December 2010, which added another indirect taxation with the same legal ground, but without adapting the legal framework for the initial contribution.

The company in this case stated that the contribution for the public service of electricity supply was imposed as another indirect taxation and which requires it to pursue specific objectives in accordance with Union law.

¹⁶⁹ ECJ C-189/15, *IRCCS - Fondazione Santa Lucia*, ECLI:EU:C:2017:17.

¹⁷⁰ ECJ C-103/17, *Messer SAS / France*, pending.

The question asks whether, when a Member State has not taken a measure implementing excise taxation on the consumption of electricity following the entry into force of the ETD but instead maintained an earlier indirect taxation on the electricity consumption, without changing the legal framework and local taxations:

- The initial indirect taxation should comply with the conditions for another indirect taxation, being the pursuit of specific objectives and the compliance with the applicable rules for excise and VAT taxation
- Or the maintaining of another indirect taxation is only possible in case of the existence of a harmonized excise taxation and in that case can the indirect taxation of the energy consumption be considered as such an excise which must be tested whether it is in accordance with the Directives 92/12/EEC and 2003/96/EC?

Analysis

The earlier case law and the reference for preliminary ruling indicates the difficulties Member States experience with regard to the scope of ‘other indirect taxation’ on the one hand and the uncertainty they have when it comes to the entry into force and applicability of the ETD in relation to existing indirect taxations.

Under Article 8(1)(a) of Directive 92/81/EC Member States were obliged to exempt mineral oils from excise taxation if they were used for purposes other than as motor fuel or heating fuel.

Article 3(2) of Directive 92/12/EC stated that certain products, among which some mineral oils, may be subjected to other indirect taxes for specific purposes, if such taxation respected the generally applicable rules of excise duty for mineral oils.

In case C-437/01 (Commission/Italy) the European Court of Justice found that Member States couldn’t levy another indirect tax on products, which are already, exempted from harmonized excise duty under Directive 92/81/EEC as it would make the exemption provision in Directive 92/81/EEC redundant.¹⁷¹

The new ETD left out the exemption for mineral oils not used as fuels and made certain energy products (such as lubricants) fall within its scope, if used as motor or heating fuel. This means these products can also be subject to taxation. Article 1(2) of Directive 2008/118/EC determines that Member States may levy other indirect taxes on excise goods.¹⁷² Because of the new provisions in the two Directives, the earlier judgment of the ECJ has no further effect and the exemption provision in Directive 92/81/EEC has no legal

¹⁷¹ ECJ C-437/01, *Commission Italy*, ECLI:EU:C:2003:498.

¹⁷² A. Ortega Ibanez, ‘Les défaillances du régime des droits d’accises européen sur les produits énergétiques’, *Journal de droit européen* 2017, 2, p. 48-49.

ground anymore. As a result, some Member States have applied new specific national excise duties where others have not.¹⁷³

The outcome of the interviews with the authorities of the eight selected Member States on the topic of ‘level of taxation’ indicates that the Member States do not experience too much difficulty with the implementation and application of this Article 4(2).

Denmark does apply some additional taxation on energy products, but these are calculated based on the emission of the product and not the consumption (e.g. sulphur tax) which from a legal perspective means it cannot be considered as an energy tax. As indicated by the ECJ in the Santa Lucia judgment the indirect tax needs to be levied at the time of release for consumption in order to be included in the level of taxation. Certain ‘public service’ fees serve as public environmentally-friendly investments and are not taken into account for the calculation of the level of taxation as they are not considered to be of a fiscal nature.

While some countries experience no problems with the minimum levels of taxation in the ETD (e.g. Sweden, Germany, Italy), because their energy taxation far exceeds it, other countries (Poland, France) include additional national fees or charges to comply with the prescribed minimum levels of taxation.

In Italy, the minimum level of taxation is reached with only the excise duties on taxable products. The same goes for Germany and Sweden.

Sweden applies so called lower level tax rates on electricity for certain sectors and certain businesses and households in the north of the country due to an Article 19 ETD derogation (but subject to heavy requirements to avoid State aid) instead of the normal applicable energy tax on electricity.

Belgium applied an excise rate on diesel for stationary motors used for industrial/commercial purposes below the minimum level of 21 EUR/ 1000 litres in Annex I Table B to Article 8 ETD. Afterwards the government imposed an additional special excise to levy the total rate. This special excise was accepted for the calculation of the taxation level under Article 4(2) ETD.

In France a contribution rather than a tax is charged on certain petroleum products (diesel fuel, petrol fuel) for the constitution of strategic stocks managed by the Professional Committee for Strategic Oil Stocks (CPSSP, *Comité Professionnel des Stocks Stratégiques Pétroliers*). The DG for Energy and the Environment, Customs and anti-fraud authorities are members of the administration board of this semi-public committee.

French authorities are currently reflecting on the establishment of a similar contribution for gas strategic stocks. The question does not arise for electricity.

However, it is not always clear whether certain charges fall within the scope of indirect taxes of Article 4(2) ETD that are to be included in the calculation of the taxation level.

¹⁷³ Union of the European Lubricants Industry, Position paper on the Energy Taxation Directive.

In the judgment Commission/Austria, the ECJ ruled on a case in which the Austrian government guaranteed that the entire production of green energy in the country would be bought at a fixed price. The costs for the government would be transferred to electricity consumers by means of an annual contribution to be paid by each final consumer connected to the grid irrespective of consumption but depending on the level of consumption.

Austria obliged electricity to buy from the government all green electricity at a fixed price, but also allowed them to pass on the additional costs to their customers in the invoice price.

As an exemption to this policy a scheme of specific compensation was implemented for energy-intensive businesses, limiting the amounts payable according to the value of their net annual production.

According to the ECJ, these charges (and compensations) do not fall under the ETD. The charges are non-harmonized, meant to serve specific objectives and not the mere harmonization of taxes in favour of the general budget without any specific allocation.

Deriving from this judgment and the Santa Lucia judgment the charges need to have a legal basis, they need to be of a fiscal nature (meaning they are enforced by a state authority), the revenue needs to be allocated to specific objectives and not just for the general budget. The charges also need to be imposed at the time of release for consumption¹⁷⁴ and there should be a direct and inseverable link between the tax and the consumption of the energy products¹⁷⁵. If these conditions are fulfilled, contributions outside the scope of the ETD must be considered as indirect taxes on energy products and electricity which need to be taken into account for the calculation of the tax level.

The application of new legislation which deviates from preceding case law and has Member States applying different indirect taxations creates questions on whether these indirect taxations should be included in the calculation of the level of taxation. In its latest judgments the ECJ has tried to provide certainty through the imposition of its criteria. The first question will be whether it is legally allowed to impose certain non-harmonized indirect taxes before the assessment can be made on whether this tax should be included in the calculation of the level of taxation. Court cases on this issue are multiplying in several member states.

Link with Article 7 of Directive 2008/118

The calculation of the national level of taxation in comparison with the minimum level of taxation imposed by the ETD needs to take place at the time of release for consumption.

Paragraph 2 of this Article explains how ‘release of consumption’ must be understood when applying this Directive.

For the purposes of this Directive, ‘release for consumption’ shall mean any of the following:

¹⁷⁴ ECJ T-251/11, *Commission/Austria*, ECLI:EU:T:2014:1060 ; ECJ C-189/15, *Fondazione Santa Lucia*, ECLI:EU:C:2017:17.

¹⁷⁵ ECJ C-346/97, *Braathens Sverige AB*, ECLI:EU:C:1999:291; ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

- (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
- (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
- (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

The definition of what constitutes the exact time of release for consumption can be found in Article 7(3):

The time of release for consumption shall be:

- (a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;
- (b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;
- (c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery

Case law

The ECJ gave an interpretation in the OKG AB/ Skatteverket case¹⁷⁶ to the question which indirect taxes could or could not be included in the calculation of the level of taxation under the ETD. In this case OKG, a nuclear plant operator, had to pay duties on the thermal power of its reactors. OKG contested that the duty was a tax in breach of Article 4(2) and Article 21(5) ETD with regard to the production of electricity. The taxation on the thermal power was a fixed amount with regard to the generation of heat and not a variable amount dependent on the produced amount of electricity.

The Court found that thermal power was not included in the scope of energy products in the ETD and that it was not destined as a heating or motor fuel, nor for electricity production. A fortiori, the Court decided that the ETD could not prevent a taxation on thermal power, since thermal power is not within the scope of the ETD.

Additionally, the tax was not levied “at the time of release for consumption” since the energy was still being generated.

From this decision also follows that the indirect taxation on energy, which is not destined as a heating or motor fuel, nor for electricity production and/or which is not levied at the time

¹⁷⁶ ECJ C-606/13, OKG AB, ECLI:EU:C:2015:636.

of release for consumption, cannot be included in the calculation of the level of taxation under the ETD.

Some energy products¹⁷⁷, when sold and moved in small quantities instead of bulk are excluded from the control and movement provisions of Directive 2008/118/EC. This however, only applies to a very limited number of products.

Energy products not used as heating or motor fuel are not considered as excise goods under the ETD.¹⁷⁸ Even though the ETD does not apply to these products, if such a concerned product is stated in Article 20 ETD, the control and movement provisions of the Horizontal Directive do apply¹⁷⁹. This leads to a situation wherein these energy products can be moved under EMCS, but cannot be released for consumption at the end of their movement¹⁸⁰. In that scenario, excise duty shall also not become chargeable. In practice these goods are effectively sold, and Member states either create a declaration for such goods with exemption of taxation or a declaration with payment of the equivalent tax which is applicable to the same product if used for motor or heating fuel. In Belgium, toluene which is an energy product that can be used for other purposes than motor or heating fuel, can be moved under EMCS and subsequently declared for release in consumption under a specific declaration code with exemption of excise duties in accordance with national legislation.

Conclusion

- The possibility of levying indirect taxations on energy products and electricity that are already subjected to excise taxation has led to disparity and uncertainty among Member States whether these need to be included to the calculation of the ‘level of taxation’.

The first uncertainty is whether the contributions on energy products and electricity outside the scope of the ETD are allowed to be imposed on the product. Secondly, the question arises whether it is effectively an indirect taxation in accordance with the criteria as determined in the ECJ judgments. The ECJ has laid down a number of conditions to which the contribution needs to comply in order to be considered an indirect taxation which needs to be included in the calculation of level of taxation.

- The interplay between the ETD and Directive 2008/118/EC whereas Article 1(a) of the latter only includes energy products and electricity under the ETD and not taxable products used as heating or motor fuel creates uncertainty with regard to

¹⁷⁷ Article 20(1)(c) ETD

¹⁷⁸ Article 2(4)(b) ETD.

¹⁷⁹ Article 2(4) last subparagraph ETD.

¹⁸⁰ ECJ C-145/06, *Fendt Italiana*, ECLI:EU:C:2007:411.

the requirements for the calculation of ‘level of taxation’ for those specific products under the ETD.

- There is some uncertainty to which conditions actually apply in order to levy non-harmonised indirect taxes on excise goods. Do they need to actually comply with all the rules applicable to excise and VAT taxation with regard to the determination of the tax base, calculation of the tax, chargeability and monitoring and be allocated to specific purposes in the general interest in order to be considered an indirect taxation or is it sufficient that the indirect taxation which pursues specific objectives is in accordance with the general intention of the taxation technique in the Community law? The ECJ already decided that this provision does not require Member States that are levying non-harmonized indirect taxes to comply with all rules applicable for excise duty or VAT purposes when it comes to determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax. “*It is sufficient that the indirect taxes pursuing specific objectives should, on these points, accord with the general scheme of one or other of these taxation techniques as structured by the Community legislation.*”¹⁸¹ On the other hand the ECJ found that taxes, duties and charges that carry essential characteristics of VAT must be deemed to constitute VAT, even in case they are not identical to VAT.¹⁸²

The concept ‘level of taxation’ remains uncertain to an extent because of the open definition in Article 1 Directive 2008/118 which can be interpreted differently by Member States (and is) and by the fact that the new Directive has overruled preceding case law.

For a charge to be considered an indirect tax on energy products and electricity it needs to have a legal basis, it needs to be of a fiscal nature (meaning they are enforced by a state authority), the revenue needs to be allocated to specific objectives and not just for the general budget¹⁸³. A specific objective or purpose is a purpose other than a budgetary purpose wherein the tax itself is also directed at protecting that purpose and is not merely used to finance it. The charges also need to be calculated on the quantity and imposed at the time of release for consumption¹⁸⁴ and there should be a direct and inseverable link between the tax and the consumption of the energy products¹⁸⁵. If these conditions are fulfilled, contributions outside the scope of the ETD must be considered as indirect taxes on energy products and electricity which need to be taken into account for the calculation of the tax level.

¹⁸¹ ECJ C-379/97, *EKW en Wein & Co*, ECLI:EU:C:2000:110, point 47.

¹⁸² ECJ C-379/97, *EKW en Wein & Co*, ECLI:EU:C:2000:110, point 21.

¹⁸³ ECJ C-82/12, *Transportes Jordi Besora*, ECLI:EU:C:2014:108.

¹⁸⁴ ECJ T-251/11, *Commission/Austria*, ECLI:EU:T:2014:1060; ECJ C-189/15, *Fondazione Santa Lucia*, ECLI:EU:C:2017:17.

¹⁸⁵ ECJ C-346/97, *Braathens Sverige AB*, ECLI:EU:C:1999:291; ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

B.5 Article 5

Description

Article 5 ETD stipulates that, in the enumerated cases, Member States are allowed under fiscal control to apply differentiated rates of taxation. The condition is that these taxation rates cannot be lower than the minimum levels of taxation prescribed by the Directive, and that they are compatible with Community law.

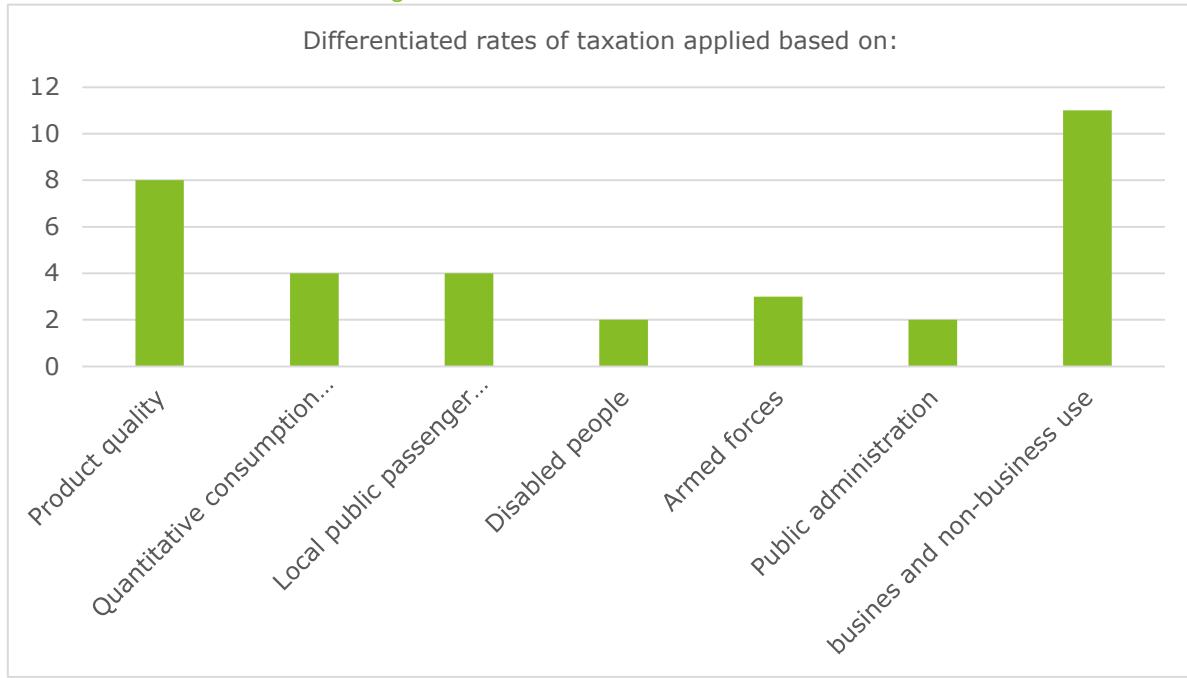
Article 5 ETD makes a distinction between four cases:

- *When the differentiated rates are directly linked to product quality.* Based on this provision, Member States can apply a reduced taxation rate, e.g. for more environmental friendly fuels.
- *When the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes.* Based on this provision, Member States can e.g. apply a tax bracket scheme for electricity, as is the case for the energy contribution in the Netherlands.
- *For the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances.* Based on this provision, Member States can among others apply a reduced taxation rate for local public passenger transport (including taxis). It can be observed that this provision partially connects with Article 15, §1, e) ETD, which foresees the possibility for a reduced rate or an exemption for energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus.
- *Between business and non-business use, for energy products and electricity referred to in Articles 9 and 10.* Based on this provision, Member States can differentiate the taxation rates between business and non-business use for energy products and electricity referred to in Articles 9 and 10. Articles 9 and 10 ETD define the minimum levels of taxation respectively for heating fuels and for electricity. Article 11 ETD defines what should be understood with the term 'business use'.

Analysis

The application of differentiated rates of taxation according to the criteria of Article 5 ETD are left to the discretion of each Member States. The answers of the 24 respondents to the questionnaire addressed to the Member States authorities to the question whether these different grounds for differentiation were effectively used is represented in the below graph.

Figure 34 - Differentiated rates of taxation



Source: Survey to Member States

The opportunity of applying differentiated rates between business and non-business use for electricity and for energy products used for heating purposes is the most widely used by the Member States.

The differentiated rates linked directly to product quality appears to be a common practice for a third of the respondents.

On the contrary to the two previous criteria, the use of differentiated rates depending on the quantitative consumption levels for electricity and energy products used for heating purposes, or depending on a specific use of public interest, is less homogenous. It has to be observed that no Member State indicated making use of differentiated rates for waste collection nor for ambulances.

In that regard, different Member States' authorities, organisations and federations called into question the substance and merits of a provision allowing differentiated rates for specific uses, which have nothing to do with the achievement of environmental objectives, in a Directive taxing energy products.

The responses coming from the economic operators testify the broad application that is made from differentiated rates by Member States. Out of more than 200 respondents, 49 revealed that they were benefitting from a more advantageous taxation rate based on the different grounds for differentiation. The results from the questionnaire addressed to the economic operators also confirm that the importance of the effective application of differentiated rates between business and non-business use of energy products.

In the questionnaire, eight Member States indicated not being satisfied with the existing grounds for differentiation in the rates of taxations. Some Member States stressed that in

their opinion, differentiated rates are leading to inconsistencies and fraud in the tax system, and that they should therefore be abolished from the ETD.

For three other Member States, this dissatisfaction results from the lack of clarity of the provision.

With regard to the term 'product quality', it has been pointed out by some Member States that a clear definition would provide more certainty on its scope. For example, they questioned themselves whether the life cycle CO₂ emissions could be regarded as a 'product quality'. Sweden was one of the Member States that was highly in favour of the possibility to differentiate according to quality. Sweden had different kinds of environmental classes with differentiated tax rates on (unleaded) petrol and diesel. This Member State indicated having had initiated a discussion with the European Commission on whether the differentiation according to quality could be used to introduce deviating rates for biofuels (depending on the biofuel content), but the Commission did not agree with this view.

For them, an additional ground for differentiation should thus be explicitly added, depending on the renewable character of the taxable product. The French customs authorities underlined the need to align environmental and budgetary objectives. According to them, it could be envisaged to go further, so that the current measures would be clearly extended to 'green products'. However, this statement was also balanced by pointing out that taxing fossil fuels heavily and exempting green energies would create imbalances for consumers who do not have other alternative than using the former (E.g. where the switch towards environmental-friendly installations, such as photovoltaics, would require an investment).

Where difficulties are experienced with the application of a differentiated rate of taxation, economic operators pointed-out that these difficulties are resulting from the administrative burden linked to it.

Conclusion

- The several criteria for differentiation are applied differently in the Member States. The criteria for differentiation according to the specific use (public passenger transport, waste collection; armed forces, public administration, disabled people, ambulances) are less widely used, and the logic for having them has been conceptually challenged by some Member State authorities and academics, as they do not pursue environmental objectives.
- The term 'product quality' is vague, and the Member State consequently all have their own interpretation and implementation of it. There is among others a will to include/specify that the environment-friendliness character of a product can be a criteria to define its quality (CO₂ emissions, biofuel content, etc.). In order to streamline its scope, this term should be clarified.
- Member States are split between those who make use of the possibility to differentiate and other who do not. It is observed however that in all circumstances,

Member States are incentivized to ensure that the rates applicable to business use are closer to the EU minima, to avoid distortions of competition.

B.6 Article 6

Analysis

In order to provide for a reduction or exemption, the ETD leaves room for different systems. Member States are free to give effect to the exemptions or reductions in the level of taxation prescribed by the ETD, either:

- directly
- by means of a differentiated rate
- by refunding all or part of the amount of taxation

The first two systems are deemed to be the least burdensome for the economic operators. A refund system is linked to the fulfilment of certain conditions imposed by the Member State. Only if the conditions for the exemption / reduction are met, the economic operator can claim the refund. This has the advantage for the Member State to carry out checks *a posteriori*, but at the same time brings considerable burdens for both the economic operators (pre-financing of taxes that in the end turn out not be owed because of an exemption / reduction; inherent risk of not meeting the conditions afterwards, not being able to claim the refund; additional monitoring and compliance costs) and for the Member States (requirement to check whether the conditions are met; performing the refund; additional monitoring and compliance costs).

From Article 6, it follows that it is possible that an ‘exemption’ within the meaning of that provision is provided in the form of a refund¹⁸⁶. Article 6 is not a standalone provision and should be read in conjunction with the other provisions of the ETD. Only if the ETD allows for an (optional, mandatory, or ad hoc) exemption, the Member States have the possibility to choose from the Article 6 options. The fact that the Member State in question maintains a level of taxation above the minimum level, is not sufficient to apply an exemption which is not explicitly allowed for by the Directive¹⁸⁷. Any derogation is subject to acceptance after having been subject to the procedure laid down in the EU legislation. The fact that the European Commission refused to comply with a request, does not allow for a unilateral derogation by the Member State.

The Lithuanian administrative court requested for a preliminary ruling on the application of Article 6 in conjunction with Article 14 ETD¹⁸⁸. With its question, the Lithuanian court wanted to understand whether Article 14(1)(c) ETD stands in the way of provisions of

¹⁸⁶ ECJ C-55/12, *European Commission v. Ireland*, ECLI:EU:C:2013:274.

¹⁸⁷ ECJ C-55/12, *European Commission v. Ireland*, ECLI:EU:C:2013:274.

¹⁸⁸ ECJ C-151/16, *Vakaru Baltijos laivų statykla*, ECLI:EU:C:2017:537.

national legislation of Member States, which preclude the benefit of the tax exemption provided for in that provision in the case where the supply of energy products was carried out in breach of the conditions laid down by the Member State, even though that supply satisfies the essential conditions for application of the exemption set out in Article 14(1)(c). Hence, the national court wanted to understand whether a Member State may make the exemption subject to compliance with certain formal requirements.

In its judgement of 23 July 2017, the Court ultimately ruled in general terms that "*the refusal by the national authorities to exempt energy products from excise duty on the sole ground that certain conditions that must be complied with under national law in order to obtain that exemption are not fulfilled, without it being checked, on the basis of the evidence provided, whether the substantive requirements necessary for those energy products to be used for purposes giving entitlement to exemption are met, goes beyond what is necessary to ensure the correct and straightforward application of those exemptions and to prevent any evasion, avoidance or abuse*". The Court comes to this conclusion with reference to the principle of proportionality and to the fact that the limitations of the introductory sentences of Article 14(1) ETD cannot affect the latitude of the subsequent mandatory exemptions.

It is standing case law of the ECJ that Member States, when exercising their power to lay down the conditions to which exemption from excise duty is subject, must comply with the general principles of law which form part of the legal order of the EU, including the principle of proportionality¹⁸⁹. The ECJ came to a similar conclusion in the *Polihim-SS* case in the context of Article 14(1)(a) ETD as the one in the *Vakary Baltijos laivų statykla* case cited above, when it stated:

"In those circumstances, the refusal by the national authorities, in a case such as that of the main proceedings, to exempt heavy fuel oils from excise duty on the sole ground that the person declared by the authorised warehousekeeper as being their consignee does not have the status of end-user authorised under national law to receive energy products exempt from excise duty, without it being checked, on the basis of the evidence provided, whether the basic requirements necessary for those heavy fuel oils to be used for purposes giving entitlement to exemption are met at the time of their removal from the tax warehouse, goes beyond what is necessary to ensure the correct and straightforward application of those exemptions and to prevent any evasion, avoidance or abuse."

Conclusion

- The ETD currently leaves much discretion to the Member States to decide which tool is used to provide for an exemption / reduction. Depending on the tool, economic operators may encounter more or less administrative burden. Whereas an exemption from excise duty will result in the most economic operator-friendly system, a refund mechanism will require prefinancing of the duty ultimately not due.

¹⁸⁹ ECJ C-355/14, *Polihim-SS EOOD*, ECLI:EU:C:2016:403 and the reference in Paragraph 59.

Although both tools may be dependent on the fulfilment of certain requirements, a refund system may provide for an incentive to adhere to a stricter check on the fulfilment of those conditions.

- Whereas each of the different options has its inherent value, it may be considered to harmonize the exemption/reduction mechanism across Member States at least per product category.

B.7 Article 7

Article 7 (1) ETD lays down the minimum levels of taxation for motor fuels. Article 7(2) ETD specifies that the Member States may differentiate between commercial and non-commercial use of gas oil used as propellant. Article 7(3) ETD defines the meaning of 'commercial use of gas oil used as propellant'. At last, Article 7(4) ETD establishes that Member States which introduce a system of road user charges for motor vehicles intended exclusively for the carriage of goods by road may apply a reduced taxation rate on the gas oil used by such vehicles.

Article 7(1)

Description

Article 7(1) ETD lays down the minimum levels of taxation for motor fuels, as from 1 January 2004 and as from 1 January 2010, by referring to Annex I Table A. In this annex, the minimum levels of taxation for the following motor fuels are included: leaded and unleaded petrol, gas oil, kerosene, LPG and natural gas. Pursuant to Article 4(1) ETD, the levels of taxation applied by the Member States cannot be less than these minimum levels of taxation.

Furthermore, Article 7(1) foresees that the Council shall take a decision no later than 1 January 2012 upon the minimum levels of taxation applicable to gas oil for a further period beginning on 1 January 2013. Such a decision has not been taken yet.

The general scheme of the ETD relies on a clear distinction between motor fuels and heating fuels, which is made on the criterion of use, as it appears from recitals (17) and (18) to the ETD:

- (17) *It is necessary to establish different Community minimum levels of taxation according to the use of the energy products and electricity.*
- (18) *Energy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant.*

This distinction is also reflected in Articles 7 to 9 ETD, where the manner of establishing the minimum levels of taxation is fixed, for heating fuels on the one hand, and for motor fuels

and products used as motor fuels for specific industrial and commercial purposes on the other hand. Both the general scheme and the objective of the ETD are based on the principle that energy products are taxed according to the effective use that is made of them.

Analysis

The ECJ recently confirmed the importance of the principle according to which energy products are taxed depending on the effective use that is made of them in the *ROZ-SWIT* case¹⁹⁰. In this case, the ECJ ruled that the ETD and the principle of proportionality must be interpreted as precluding national legislation under which, if a list of statements from purchasers is not submitted within a prescribed time limit, the excise duty applicable for motor fuels is applied to the heating fuel sold, even though it has been found that the intended use of that product for heating purposes is not in doubt.

Article 7(2)

Description

Article 7(2) ETD determines that the Member States may differentiate between commercial and non-commercial use of gas used as propellant. Two conditions apply:

- the Community minimum levels should be respected;
- the rate for commercial gas oil used as propellant does not fall below the national level of taxation in force on 1 January 2003, notwithstanding any derogations for this use laid down in the Directive.

For the definition of 'commercial gas oil used as propellant', we refer to the analysis of Article 7(3) ETD below.

Article 7(2) ETD was not foreseen in the initial Commission's proposal, and there is consequently no explanatory background available on this text. However, recital 20 of the ETD gives further insights on the possible reason of this text introduced by the Council during the discussions:

(20) Member States may need to differentiate between commercial and non-commercial diesel. Member States may use this possibility to reduce the gap between the taxation of non-commercial gas oil used as propellant de petrol.

Analysis

A comparison between different language versions of the ETD has been performed, in order to analyse the wording of the terms 'used as motor fuel' in Article 7(1) ETD and 'used as propellant' in Article 7(2) ETD.

¹⁹⁰ ECJ C-418/14, *ROZ-SWIT*, ECLI:EU:C:2016:400.

BG *От 1 януари 2004 година и от 1 януари 2010 година минималните данъчни ставки по отношение на **моторните горива** са фиксираны, както е посочено в приложение I, таблица A.*

*Държавите-членки могат да разглеждат диференцирано търговското и нетърговското приложение на газюла, **използван като гориво**, при условие че се съблюдават минималните нива, определени за Общността и ставката за търговския газъл, използван като гориво не е под националните прагове на данъчно облагане в сила от 1 януари 2003 година, независимо от изключениета за това приложение, предвидени в настоящата директива.*

DE *Ab dem 1. Januar 2004 und ab dem 1. Januar 2010 gelten für **Kraftstoffe** die in Anhang I Tabelle A festgelegten Mindeststeuerbeträge.*

*Die Mitgliedstaaten dürfen zwischen gewerblich und nicht gewerblich genutztem Gasöl, das als **Kraftstoff** verwendet wird, differenzieren, vorausgesetzt, die gemeinschaftlichen Mindeststeuerbeträge werden eingehalten und der Steuersatz für gewerbliches Gasöl, das als Kraftstoff verwendet wird, wird nicht unter den am 1. Januar 2003 geltenden nationalen Steuerbetrag abgesenkt; dies gilt ungeachtet der in dieser Richtlinie für diese Nutzung festgelegten Ausnahmeregelungen.*

DK *Fra den 1. januar 2004 og fra den 1. januar 2010 er minimumsafgiftssatserne for **motorbrændstoffer** som fastsat i bilag I tabel A.*

*Medlemsstaterne kan indføre differentierede afgiftssatser for erhvervsmæssig og ikke-erhvervsmæssig brug af diesellole anvendt i **motorkøretøjer**, forudsat at EF-minimumsafgiftssatserne overholdes, og at afgiftssatsen for diesellole anvendt i motorkøretøjer ikke kommer under den afgiftssats, der var gældende pr. 1. januar 2003, uanset eventuelle undtagelser for denne brug, der måtte være fastsat i dette direktiv.*

EN *As from 1 January 2004 and from 1 January 2010, the minimum levels of taxation applicable to **motor fuels** shall be fixed as set out in Annex I Table A.*

*Member States may differentiate between commercial and non-commercial use of gas oil used as **propellant**, provided that the Community minimum levels are observed and the rate for commercial gas oil used as propellant does not fall below the national level of taxation in force on 1 January 2003, notwithstanding any derogations for this use laid down in this Directive.*

ES	<p>A partir del 1 de enero de 2004 y del 1 de enero de 2010, los niveles mínimos de imposición aplicables a los carburantes de automoción serán los establecidos en el cuadro A del anexo I.</p> <p>Los Estados miembros podrán establecer una diferencia entre el uso profesional y no profesional del gasóleo utilizado como carburante de automoción siempre que se respeten los niveles comunitarios mínimos y que el tipo aplicable al gasóleo profesional utilizado como carburante de automoción no sea inferior al nivel nacional del impuesto vigente a 1 de enero de 2003, sin perjuicio de cualesquiera excepciones a este uso establecidas en la presente Directiva.</p>
FR	<p>À partir du 1^{er} janvier 2004 et du 1^{er} janvier 2010, les niveaux minima de taxation applicables aux carburants sont fixés conformément à l'annexe I, tableau A.</p> <p>Les États membres peuvent établir une différence entre le gazole à usage commercial et le gazole à usage privé utilisé comme carburant, à condition que les niveaux minima communautaires soient respectés et que le taux fixé pour le gazole à usage commercial utilisé comme carburant ne soit pas inférieur au niveau national de taxation en vigueur au 1^{er} janvier 2003, nonobstant toute dérogation à cette utilisation prévue dans la présente directive.</p>
IT	<p>A decorrere dal 1° gennaio 2004 e dal 1° gennaio 2010 i livelli minimi di tassazione da applicare ai carburanti per motori sono quelli fissati nell'allegato I, tabella A.</p> <p>Gli Stati membri possono distinguere tra uso commerciale e non commerciale del gasolio utilizzato come propellente, purché siano rispettati i livelli minimi comunitari e l'aliquota per il gasolio commerciale utilizzato come propellente non sia inferiore al livello nazionale di tassazione vigente al 1° gennaio 2003, a prescindere dalle deroghe per detta utilizzazione stabilite dalla presente direttiva.</p>
NL	<p>Met ingang van 1 januari 2004 en vanaf 1 januari 2010 worden de minimumbelastingniveaus voor motorbrandstoffen vastgesteld zoals beschreven in bijlage I.A.</p> <p>De lidstaten mogen onderscheid maken tussen commerciële en niet-commerciële aanwending van gasolie gebruikt voor voortbeweging, op voorwaarde dat de communautaire minimumbelastingniveaus gerespecteerd worden en het belastingniveau voor commerciële gasolie gebruikt voor voortbeweging niet onder het op 1 januari 2003 geldende nationale belastingniveau daalt, niettegenstaande de in deze richtlijn bepaalde afwijkingen voor dit gebruik.</p>
PT	<p>A partir de 1 de Janeiro de 2004 e de 1 de Janeiro de 2010, os níveis mínimos de tributação aplicáveis aos carburantes são os fixados no quadro A do anexo I.</p> <p>Os Estados-Membros podem estabelecer uma diferenciação entre o</p>

gasóleo utilizado como **carburante** para fins comerciais e para fins não comerciais, desde que sejam observados os novos níveis mínimos comunitários e que a taxa para a utilização comercial do gasóleo utilizado como carburante não desça abaixo do nível nacional de tributação vigente em 1 de Janeiro de 2003, não obstante quaisquer derrogações ao disposto na presente directiva relativamente a esta utilização.

SE Från och med den 1 januari 2004 och från och med den 1 januari 2010 skall minimiskattenivåerna för **motorbränsle** enligt tabell A i bilaga I tillämpas.

Medlemsstaterna får differentiera mellan yrkesmässig och icke-yrkesmässig användning av dieselbrännolja som **drivmedel**, under förutsättning att gemenskapens miniminivåer iakttas och att skattesatsen för dieselbrännolja för yrkesmässig användning som används som drivmedel inte är lägre än den gällande nationella skattenivån den 1 januari 2003, utan hinder av de eventuella undantag beträffande denna användning som fastställs i detta direktiv.

It appears that, depending on the language version of the text, the nuance between the terms 'used as motor fuel' and 'used as propellant' is not always reflected. The term 'used as propellant' is, in some language versions, broadly translated as 'used as motor fuel'. In other words, it means that, depending on the language version of the text of the ETD, Article 7(2) ETD is susceptible of receiving a different scope. Indeed, the term 'gas oil used as propellant' has a narrower scope, as, unlike the term 'gas oil used as motor fuel', it does only refer to the use of gas oil that results in causing something to move forward, which consequently excludes the stationary motors.

Four Member States have indicated that they implemented the differentiation between commercial and non-commercial use of gas oil used as propellant. These Member States were asked about the interpretation of Article 7(2) ETD. In one of the involved Member States, it was confirmed that the differentiated tax rate also applies to stationary engines. In two Member States the reduced rate is not applied to stationary engines. In the remaining Member State the scope of application in practice is unknown.

In the majority of the Member States, no differentiation has been made between commercial and non-commercial use of gas oil used as propellant (i.e. Denmark).

Some stakeholders of the industry suggested broadening the scope of Article 7 to all commercial use of gas oil, rather than restricting the uses of gas oil eligible to differentiated excise duty rate. Others, suggest to include the use of ED95, GTL, LNG or CNG as propellant in the extent to fully exempt the commercial use of alternative, environmental friendly energy products.

A noteworthy trend is that trade has increased within the EU, putting downwards pressure on diesel and gasoil prices across the Union. The downwards pressure leads to a race to the bottom, only limited by the (inadequate) minimum rates laid down in the ETD.

E.g. Luxemburg has a much lower diesel rate than the surrounding Member States, but a much higher annual consumption of diesel per capita, indicative of diesel tourism. As such, in 2007, whereas the consumption of diesel per capita was less than 750 litres in other Member States, it amounted to more than 4200 litres in Luxembourg¹⁹¹. This phenomenon prevents other countries from raising taxes on diesel.

The ETD allows Member States to set different taxes on motor fuels depending on their use in commercial and non-commercial vehicles. This differentiation makes it possible to tax the average consumer. Fearing competitive disadvantages, Member States are inclined to impose lower rates on the commercial use of motor fuels.

E.g. Italy has a high formal tax level, but the differentiated, reduced rate for commercial vehicles is very low. This low rate is deemed necessary in order not to impose too much of a burden on companies and not to make commercial vehicles fill their tanks in the surrounding countries. The considerable differences in taxation between the fuel depending on the use (commercial / non-commercial) leads to a high rate of fraud.

The race to the bottom regarding commercial transportation fuel prices has incentivised some Member States to make use of other instruments. In order to make up for the losses in tax revenue and to make user pay adequately for the infrastructure use and some external effects, back in 2005 Germany has introduced a charge on heavy duty vehicles for the use of motor ways, which is distance and emission related. Recently further and in the future all federal roads were included in the levy obligation (*editorial note: this charge is based on the eurovignette Directive; a few other Member States have introduced similar charges*) Fuel taxation might be the best tool from an environmental point of view, so these road charges are considered a second best alternative. However, they have one major advantage which is that they can hardly be avoided as is the case by choosing filling stations in other countries with lower energy taxation. The heavy vehicle charge relating also to the actual consumption of fuels should be technically possible and thus be the future aim.

E.g. the North American taxation of motor fuels used by heavy vehicles. They are taxed according to the fuel used in a State, in accordance with the international fuel tax agreement between the US and Canada. The use is measured in function of the driven distance and the average fuel consumption. This example would offer a solution in the EU to the extent it can be agreed upon in line with the principles of the TFEU, whereby it needs to be assessed whether Article 113 TFEU applies or not.

¹⁹¹ Commission of the European Communities, Accompanying document to the Proposal for a Council Directive amending Directive 2003/96/EC as regards the adjustment of special tax arrangements for gas oil used as motor fuel for commercial purposes and the coordination of taxation of unleaded petrol and gas oil used as motor fuel, COM(2007) 52 final, 13 March 2007, <http://ec.europa.eu/transparency/regdoc/rep/2/2007/EN/2-2007-170-EN-1-0.Pdf> (Accessed: [12/01/2018]).

Article 7(3)

Description

Article 7(3) ETD defines what is understood under the concept 'commercial gas oil used as propellant', mentioned in the second paragraph of the same Article. This concept covers the gas oil used for the carriage of goods by motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7,5 tonnes. Next thereto, this concept also includes the carriage of passengers by a motor vehicle used for that purpose, comprising more than eight seats in addition to the driver's seat, and having a maximum weight not exceeding five metric tons (category M2) or exceeding five metric tons (category M3). The aforementioned categories of motor vehicles are defined in Directive 2007/46/EC, which replaced the Directive 70/156/EEC to which it is referred to in the ETD. Once more, this provision was not included in the initial Commission's proposal for the ETD, which explains why no further explanatory background is available.

Analysis

Member States that differ in tax rate between commercial and non-commercial use of gas oil used as propellant, often provide more guidance on the concept in local legislation and/or local administrative rules. They acknowledge the concept should be revised often since new fuels such as ED95¹⁹² are not included and thus cannot benefit from it. On the other hand Article 2(3) of the ETD stipulates that these fuels must be taxed at the rate of the equivalent fuel which can arguably mean that they must be taxed at the rate for commercial gas oil.

Member States that apply a differentiation in tax rate between commercial and non-commercial use of gas oil used as propellant, often provide more guidance on the concept in local legislation and/or local administrative rules. As such, local rules in some Member States set different limits for the maximum permissible gross laden weight above the 7,5 tonnes threshold foreseen in Article 7(3)(a) ETD. It needs to be observed that such local instructions providing for other thresholds than the 7,5 tonnes maximum permissible gross laden weight infringe the rule set in the ETD and their validity is questionable. Where some derogations in this regard were allowed under Article 18 ETD, these have expired in the meantime. On the contrary, the majority of Member States interpreted that latter threshold strictly.

Still concerning the maximum permissible gross laden weight of vehicles, it is observed that Article 7(3)(b) ETD, as well as other EU legislation (E.g. the Directive 1999/62/EC on the charging of heavy goods vehicle for the use of certain roads (referred to as the 'Eurovignette' Directive)), are making reference to the Directive 2007/46/EC when it comes

¹⁹² ED95 is an ethanol-based fuel for specialised compression ignition (i.e. diesel-type) engines. Gas oil is defined by references to the codes in the Combined Nomenclature. ED95 cannot be considered as 'gas oil' as it falls within a code of the Combined Nomenclature different than those for gas oil and it can be argued that it is not covered by the special tax treatment for commercial gas oil.

to the size of the vehicle. This Directive defines the different vehicle categories and vehicle types. For vehicles designed and constructed for the carriage of goods, the Directive foresees three different categories:

- Category N1, for vehicles designed and constructed for the carriage of goods and having a maximum mass not exceeding 3,5 tonnes;
- Category N2, for vehicles designed and constructed for the carriage of goods and having a maximum mass exceeding 3,5 tonnes but not exceeding 12 tonnes; and
- Category N3, Vehicles designed and constructed for the carriage of goods and having a maximum mass exceeding 12 tonnes.

The threshold of 7.5 tonnes foreseen in Article 7(3)(a) ETD thus does not correspond to the fixed European standards, when it comes to the categorization of heavy duty vehicles.

Article 7(4)

Description

Article 7(4) ETD contains an exemption on the second paragraph for Member States which introduce a system of road user charges for motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road. These Member States are allowed to apply a reduced rate on gas oil used by such vehicles that goes below the national level of taxation in force on 1 January 2003, as long as:

- the overall tax burden remains broadly equivalent
- the Community minimum levels are observed
- the national level of taxation in force on 1 January 2003 for gas oil used as propellant is at least twice as high as the minimum level of taxation applicable on 1 January 2004.

Article 7(2) ETD edicts as a condition for application of a differentiated rates that the rate for commercial gas oil used as propellant does not fall below the national level of taxation in force on 1 January 2003. In line with Article 7(4) ETD, this condition can be disregarded, but then another condition should be satisfied, namely that the national level of taxation in force on 1 January 2003 for gas oil used as propellant is at least twice as high as the minimum level of taxation applicable on 1 January 2004.

Recital 19 of the ETD further sheds light on this provision:

(19) The taxation of diesel motor fuel used by hauliers, notably those engaging in intra-Community activities, requires a possibility for a specific treatment, including measures to allow for the introduction of a system of road user charges, in order to limit the distortion of competition operators might be confronted with.

Analysis

According to the survey, a small minority of Member States (i.e. Belgium, Hungary and Malta) opted to introduce a system of road user charges for motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road.

Only one Member State (Belgium) opted to introduce a tax rate below the national level of taxation. Two other Member States opted not to go below the national level of taxation.

Conclusion

- As recently confirmed by the ECJ in the ROZ-SWIT case, the principle according to which energy products are taxed depending on the effective use that is made of them should not be jeopardized by the application of national administrative requirements imposed on economic operators. At this moment we do not have knowledge of any Member State having reduced its administrative burdens in light of this judgment.
- The term ‘used as propellant’ in Article 7(2) ETD is translated in some languages the same way as ‘used as motor fuel’. As a consequence, the option to apply a differentiated rate between commercial and non-commercial use of gas oil used as propellant receives a narrower or broader scope of application depending on the language version of the ETD that served as reference for the national implementation. In order to avoid ambiguities, it would be recommendable to insert a precision in the text of this provision, explicitly stating that stationary motors are excluded from its scope of application.
- The option left to the Member States to differentiate between commercial and non-commercial use is only applicable to gas oil, used as propellant. In view of the technological developments and taking into account the environmental objectives pursued by the ETD, some Member States questioned whether this provision should not apply to other taxable products used as propellant.
- Even if the differentiation between commercial and non-commercial use, as foreseen in Article 7(2) ETD, is optional, Member States are inclined to impose lower rates on the commercial use of motor fuels because they are fearing competitive disadvantages, even if their environmental awareness is telling them otherwise.
- Article 7(3)(a) ETD is referring to motor vehicles or articulated vehicle combinations intended for the carriage of goods by road and with a maximum permissible gross laden weight of not less than 7,5 tonnes. There is ambiguity on the scope of the term ‘not less than 7,5 tonnes’, as some Member States interpret it in a flexible sense, as meaning that any other threshold above that minimum can be nationally fixed, while others are of the opinion that the threshold of 7,5 tonnes should be mandatorily implemented over the whole EU. Next thereto, it is remarked that that threshold of 7,5 tonnes does not correspond with the thresholds defined in the EU categorization of vehicles intended for the carriage of goods. There is consequently a multiplicity of definitions applicable to these vehicles that economic operators have to consider, which makes it burdensome. Therefore, Article 7(3)(a) would gain in clarity if the 7,5 tonnes threshold would be better defined, for instance by only referring to the

categories defined in Directive 2007/46/CE. Such an approach could have revenue consequences as it would enlarge the scope of application of the provision.

- In Article 7(3)(b) ETD, reference is made to the Council Directive 70/156/EEC. This Directive has been repealed by the Directive 2007/46/CE. In terms of readability, the text of this provision should be updated to the legal text currently in force.

B.8 Article 8

Article 8(1) ETD lays down the minimum levels of taxation for products used as motor fuel for the purposes set in the second paragraph. Article 8(2) ETD states that the Article is applicable to the industrial and commercial purposes described in this paragraph.

Article 8(1)

Description

Article 8(1) ETD lays down the minimum levels of taxation for products used as motor fuel for the purposes set in the second paragraph. These levels of taxation, applicable as from 1 January 2004, are fixed in Annex I Table B. In this annex, the minimum levels of taxation for the following products are included: gas oil, kerosene, LPG and natural gas. Pursuant to Article 4(1) ETD, the levels of taxation applied by the Member States cannot be less than these minimum levels of taxation.

The precursor of the ETD, namely the Directive 92/81/EEC, provided for a similar provision in its Article 8(3). According to this provision, the Member States were allowed to apply a reduced excise duty rate for gas oil, liquefied petroleum gas, methane or kerosene used for the described industrial and commercial purposes under fiscal control. The latter condition, namely the use under fiscal control, is not mentioned in Article 8 ETD. However, it is still a condition in Articles 5, 15 and 16 ETD.

Analysis

This condition of using mineral oils under fiscal control had led the Commission to bring an action¹⁹³, maintaining that Finland had failed to fulfil its obligation, notably when it comes to the guaranteeing of an adequate fiscal control. The Finnish system relating to the use of gas oil as motor fuel was based on two main elements. First, the owners or users of motor vehicles were obliged to give prior notice to the tax authorities of their intention to use domestic fuel oil as motor fuel and to pay a surcharge and/or fuel levy. Second, the authorities were to ensure by means of road checks that those conditions are complied with, and the breaches recorded were to be penalised by fiscal charges imposed automatically, and at a sufficiently high level to have a deterrent effect.

The Advocate General L.A. Geelhoed concluded in this case *C-185/00 Commission v. Finland*, that:

¹⁹³ ECJ C-185/00, *Commission v. Finland*, ECLI:EU:C:2003:639.

In opposition to this the Commission has not presented any facts or data which might show that fiscal control in Finland is so inadequate qualitatively and quantitatively that the result which Article 5(1) of Directive 92/82 is intended to have, the payment of a minimum excise duty of EUR 245 per 1 000 litres on gas oil used as motor fuel, is not ensured.

I therefore conclude that the Commission has not succeeded with its pleas in law and arguments and that its action should therefore be dismissed.

The ECJ did nevertheless not follow this opinion, and declared:

It must therefore be held that examination of the detailed rules for applying the mechanism of fiscal control put in place by Finnish law reveals that that mechanism does not allow the objective pursued by the provisions of Article 5(1) of Directive 92/82, read in conjunction with those of Article 8(2) and (3) of Directive 92/81, to be attained, since it cannot effectively prevent mineral oils intended for other purposes and therefore less heavily taxed from being used as motor fuel or guarantee that gas oil used as motor fuel is in fact taxed at the minimum rate of excise duty laid down by those provisions.

In the light of all the foregoing considerations, it must be held that by maintaining in force the laws and regulations on the use of gas oil as a fuel, as they are applied in practice, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Council Directive 92/81 and Article 5(1) of Directive 92/82.

Concerning the appreciation of Article 8(1) ETD, for the Swedish authorities, it should be clarified that the Member States do not have to impose a lower tax level for all the purposes mentioned, and moreover, that above the minimum level, Member States have the possibility to impose different rates of taxation.

Other Member States however note that the determination of minimum levels of taxation still leaves them a broad liberty in fixing the taxation rates. This has also been reflected in conversations with authorities of different Member States:

- Denmark explained that, for the application of the reduced levels of taxation, it had decided to levy a single reduced rate indifferently for all energy products, regardless of the fact that the ETD, in its Article 8 and in Annex I Table B, allows for a difference in minimum rates according to the energy product concerned;
- In France, a reduced taxation rate is applied to all the machineries listed in Article 8 of the Directive except those used for fish culture and forestry;
- In Germany, a reduced taxation rate is applied only with regard to stationary motors.

It was consequently questioned whether laying down additional minimum levels of taxation was not a contra-productive measure when it comes to harmonizing the taxation system and to building a single market. The French customs authorities remarked that an element

mitigating the risk of distortion of competition are to regularly update guidelines from the Commission on cross-border activities, in particular for agricultural activities.

Article 8(2)

Description

Article 8(2) ETD states that the Article is applicable to the industrial and commercial purposes described in this paragraph.

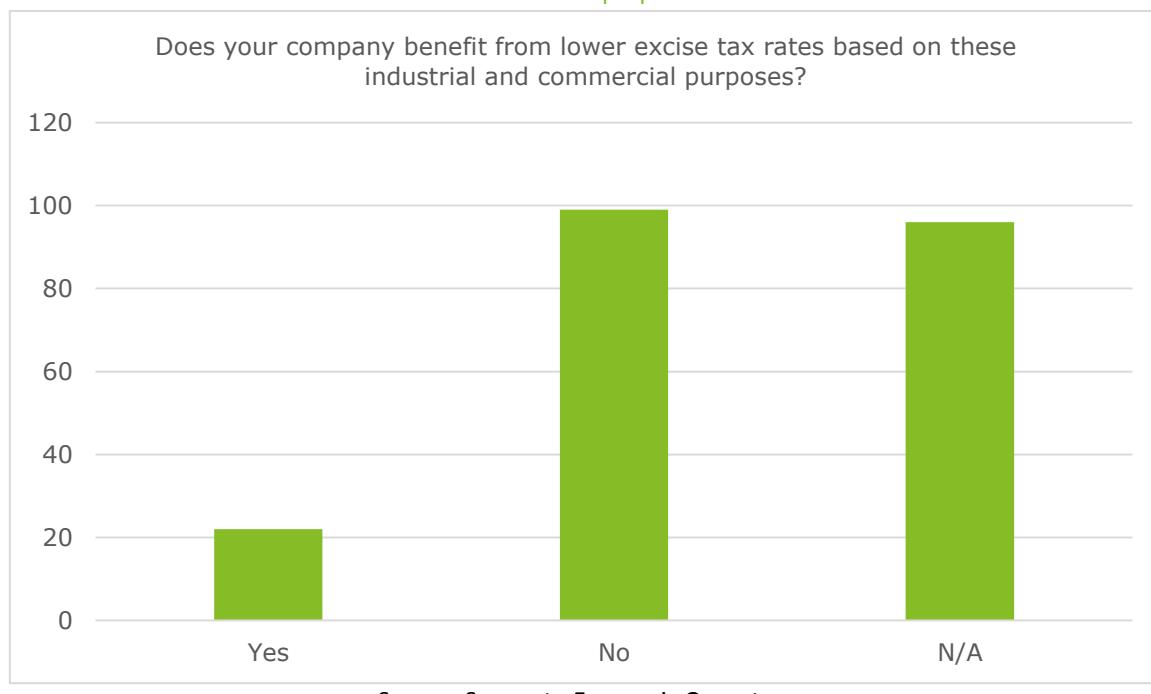
Recital 18 of the ETD reads as follows:

Energy products used as a motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as propellant.

The minimum levels of taxation laid down in Article 8, which are lower than the ones laid down in Article 7, are based on this assumption. Article 8(2) refers to products used as motor fuel in the agri-, horti-, and pisciculture, and in forestry; in stationary motors; in plant and machinery used in construction, civil engineering and public works; and in vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public roadway.

Analysis

Figure 35 - Economic Operators benefiting from lower excise tax rates based on these industrial and commercial purposes



At the economic operators' side, 22 respondents, so approximately ten percent of the companies participating to the survey, indicated benefitting from lower excise tax rates based on the industrial and commercial purposes set out in Article 8 ETD. From these 19 respondents, we learn that the lower minimum levels of taxation applicable to products used as motor fuel are primarily applied for stationary motors. The use of motor fuels for plant and machinery used in construction, civil engineering and public works as well as those used for vehicles intended for use off the public roadway both rank as second, in terms of occurrence. Within the 22 respondents benefitting from the lower rates, only one was from the agricultural sector.

When questioned about the clarity of the different terms used in Article 8 ETD, the overwhelming majority of the Member States state that the current wording is sufficiently clear. For instance, the French customs authorities insisted that an update of Article 8(2) ETD was not necessary, since they have not received any request from operators so far. The question on the distinction between 'piscicultural' and 'aquacultural' did not raise particular concerns. In that regard, the interrogated Member States informed that the European Commission had been helpful in precising that the pisciculture is understood as including aquaculture.

Except in two Member States, the respective administrations have not experienced uncertainty or confusion concerning the definition of the terms 'stationary motors' or 'use off the public roadway'. Similarly, Member States are not an asking party for updating the current wording, nor for detailing what should be understood under the term 'machineries used in construction, civil engineering and public works'.

However, when confronted to situational examples¹⁹⁴, it has been observed that the Member States could have diverging interpretations of the concept and of the scope of this provision. It thus appears that a more detailed definition of the concepts used in this provision would be required, to ensure a common understanding and application. This observation was backed by the Swedish authorities, which notice that the provision stems from the 1992 Directive and is interpreted very differently in the Member States.

The same observation as above concerning the diverging interpretations of Article 8 ETD can be made when analysing the answers from the economic operators. In contextual illustrations, the understanding of the provision vary from one operator to another.

¹⁹⁴ Member States gave diverging replies to the following questions: "Do you consider that a tractor used both for transportation of goods and agricultural purposes should benefit from the lower minimum levels of taxation?"; "Do you consider that a stationary motor of a crane (with its own separate fuel tank) on a ship should benefit from the lower minimum levels of taxation?"; "Do you consider that a stationary motor of a crane (where the motor is fuelled through the tank of the ship) on a ship should benefit from the lower minimum levels of taxation?".

Conclusion

- Article 8(1) ETD actually lays down reduced minimum levels of taxation for certain industrial and commercial uses of energy products. The observed divergence in the implementation of that provision raises the issue of selectivity. It is not clear if the intention with this provision was to foresee a lower rate of taxation that would apply identically to all the uses mentioned, or if it was indeed intentionally left to the discretion of Member States to select the uses for which a lower rate of taxation would be set. In other words, it should be clarified whether this provision should also give a right to introduce differentiated rates for each of the listed uses or not. In the affirmative, this provision would be more detrimental for the harmonisation of the energy taxation scheme within the Member States, and would be more susceptible to cause distortion of trade and competition between energy sources and energy consumers and suppliers.
- Even if it is not perceived as problematic by the Member States, it appears that they have very diverging interpretations of the industrial and commercial purposes laid down in Article 8(2) ETD. In order to ensure alignment on the scope of these industrial and commercial purposes, further clarifications would be required. To that end, Commission's guidelines have already proved to be helpful interpretative instruments.

B.9 Article 9

Article 9(2)

Context

Article 9, paragraph 2 of the ETD determines that Member States which on 1 January 2003 were authorised to apply a monitoring charge for gasoil for heating purposes can continue to apply a reduced rate of 10 EUR per 1000 litres for that product. This provision was included on the request of Denmark, Belgium and Luxemburg.

When implementing the ETD, these countries recognized and applied a reduced rate according to Article 9(2). It is stated in the preparatory works:

“The minimum rate for fuel gas oil is 21 EUR per 1000 l. However, according to Article 9(2) of the Energy Tax Directive, Member States who, as of 1 January 2003, use a control fee for fuel gas oil, may continue to apply a reduced rate of EUR 10 per 1000 liters for this product.”

The Council had the power as of 1 January 2007 to repeal this authorisation for a reduced rate if the decision was taken unanimously and on the basis of a report and proposal of the Commission, which must conclude that the reduced rate is too low to avoid problems of trade and distortion.

Analysis

A monitoring charge of EUR 10/ 1000 litres is still applicable today in Belgium on certain sorts of low and high sulphur gasoil. An additional excise levy of respectively 8, 6521 EUR for high sulphur and 7, 2564 EUR for low sulphur gasoil is applied. This results in an overall excise duty rate which is still below the EU minimum rate for these products. Belgium indicated in the web survey that it considers the reduction useful and that it should be maintained.

The rate implemented in Denmark was higher than the minimum rate of 10 EUR per 1000 liters; still it is considered a reduced rate implemented with reference to Article 9(2), since the rate for heating gasoil was lower than the rate for other types of oil. From a Danish perspective the rate for heating gasoil is very low. In general, the rates in Denmark are significantly higher than the minimum rates mentioned in the ETD.

The implemented rates were:

- Gas- or diesel oil used for motor fuel: 278, 7 øre per l (day temperature) and 277, 1 øre per l (15 degrees)
- Other types of gas- or diesel oil (including heating gasoil): 185, 7 øre per l (day temperature) and 184, 6 øre per l (15 degrees)

Today, the following rates are applied:

- Gas – or diesel oil used for motor fuel: 303, 9 øre per l (day temperature) and 198,2 øre per l (15 degrees)
- Other types of gas- or diesel oil (including heating gasoil): 302, 1 øre per l (day temperature) and 197,0 øre per l (15 degrees)

Please note that the rule has not been changed since it was implemented, but the applied rates have changed every year.

Denmark has implemented some special rules regarding colored oils like e.g. heating gas oil. These types of oil can only be used for heating, agriculture or fishery since the rate is reduced compared to the rate for motor fuels. If these types of mineral oil are used for motor fuel, a higher rate has to be used. To ensure the colored oils are not used for motor fuel or mixed with non-colored oils, the tax authorities are given extended control opportunities. The tax authorities are entitled to control the companies applying for a reimbursement of energy taxes. The tax authorities' instructions on the storage of colored oil products must be met and, on request, it must be stated what the oil products are used for. The authorities are entitled to collect samples of both uncolored and colored oil stocks. In case of unauthorized use of colored oil, the authorities may require the tank to be emptied and cleaned before it can be used for storing uncolored mineral oil products again.

Luxembourg defined the monitoring charge as a charge which has no fiscal counterpart on the expenditure side and indicated in the web survey that it wishes to maintain the reduction on excise taxation of the heating gasoil as a result thereof.

Finally, Malta expressed in the web survey that it also wishes to maintain the reduced rate in heating gas oil in case of the application of a monitoring charge.

Belgium, Luxembourg and Malta all three denied the necessity for further reduced rates related to other charges than monitoring charges.

In its 2011 proposal to revise the ETD, the Commission suggested to remove this paragraph, but the Council could not reach unanimity on the proposal.

Conclusion

- It can be concluded from the statements of certain Member States and the fact that it is still used in a few Member States, that the provision cannot simply be deleted. However one may consider implementing a broader, more commonly applicable mechanism which may contribute to the further alignment of the internal market and even the avoidance of trade distortion (for misuse of gasoil as propellant) in case of deletion of this provision. To assess whether the current rate applied by the Member States involved are of a nature that they inflict trade distortion between Member States, the comparison and analysis of rates between these and neighbouring Member States could be the subject of a future study.

B.10 Article 10

Article 10(2)

Context

The second paragraph of Article 10 ETD determines that above the fixed minimum levels of taxation applicable to electricity, Member States can independently choose the applicable taxable base on condition that they respect Directive 92/12/EEC (juncto Directive 2008/118/EC).

Normally the tax base represents the measuring unit (i.e. the quantity) upon which the tax liability will be determined for electricity. However, the provision allows Member States to choose other tax bases such as price, assets' value, etc. There are other opportunities (procurement tax), but it would require additional monitoring, because of paragraph 1 which requires that the minimum levels have to be respected and they are expressed in EUR per MWh.

On the other hand, existing jurisprudence seems to suggest that there must be a 'direct and inseverable link'¹⁹⁵ between the consumption of electricity and the tax, plus the tax should be proportional to the quantities of electricity consumed¹⁹⁶, which would reduce the possibilities for choosing a tax base.

Analysis

One Member State confirmed that it uses the price of the electricity as the taxable base. For many Member States it is not clear what is meant with the taxable base.

Other tax bases besides price can be considered in light of technological needs. A differentiation based on the source of the electricity generation could be introduced, whereas more environmentally friendly sources are taxed lower. For example the electricity generation through wind versus coal. The taxation could also be based on the level of CO2 emission that is used.

Another interesting option would be an ad valorem duty, but economic operators entering the market with a higher cost model will automatically experience competitive disadvantages.

The Danish authorities stated that it is not sensible to let Member States freely choose the tax base. Denmark imposes a power tax on all power delivered by the public network. The country also imposes a power tax on power produced for own consumption, but with the

¹⁹⁵ See ECJ C-346/97, *Braathens*, ECLI:EU:C:1999:291; ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354; C-606/13 – OKG and Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16.

¹⁹⁶ See ECJ C-4/15, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354 and Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16.

possibility to claim an exemption for certain applications (e.g. electricity produced on a bike).

The tax above the minimum level for electricity which France has chosen only existed in its current version since the fusion of the contribution to the public service charges for electricity (CSPE) and of the domestic tax on the final consumption of electricity (TICFE) on 1 January 2016. The taxation rate has been reviewed and increased from EUR 0.50/MWh to EUR 22.5/MWh.

The excise duty is due by the final operator in the delivery country, therefore all European operators are submitted to the same rate and there are no distortionary effects on the electricity market.

Germany has an electricity tax law in place since 1999 which has not changed since 2003 and which respects the minimum level of the tax rate. There are no noticeable effects on the market because of it.

Poland claims that the choice of tax base does not cause distortionary effects, but the fact that Member States also have levels of discretion regarding tax rates they apply may cause the distortion of competition. The Polish energy-intensive industry for example, has a higher excise duty rate for electricity.

Portugal merely applies the minimum rate on electricity. They are however in favour of an automatic updates of the minimum rates, linked to inflation. Instead, the minimum level in the EU has remained the same for 14 years.

The possibility to choose the applicable tax base above the minimum levels has not been used in Sweden. They indicate that in the 2011 proposal for a revision this Article was not even in the Directive anymore and that it questions the relevance of the provision, considering energy taxation is output taxation.

Sweden has never used this Article. In the 2011 proposal it was also not included anymore and Sweden questions its relevance considering energy taxation is an output taxation.

Italy also indicates that it would be desirable to harmonize the taxable base in order to compute it with the consumed quantities.

Conclusion

- The use of different tax bases across Member States makes it difficult to compare taxation of electricity between Member States;
- Since some Member States do apply a separate applicable tax base above the minimum levels to attain certain policy objectives and others do not, this could have some distortionary effects;
- Further clarity about the limitations for Member States' when choosing the tax base can be considered in view of existing jurisprudence;

- The reference to the old Directive 92/12/EEC does not serve the readability of the provision.

B.11 Article 11

Article 11(1) ETD defines what is meant by ‘business use’. Article 11(2) ETD in turn stipulates what constitutes a ‘business entity’. Article 11(3) ETD relates to the taxation in case of mixed business and non-business use. Article 11(4) ETD establishes that Member States can limit the scope of the reduced level of taxation for business use.

These definitions and precisions are needed, since Member States may, pursuant to Article 5 ETD, apply differentiated duty rates between business and non-business use.

Article 11(1)

Description

Article 11(1) ETD defines what is meant, under the Directive, by ‘business use’. The definition is needed, considering that Member States may differentiate the business and the non-business use of energy products and electricity referred to in Articles 9 and 10 ETD.

As this provision was not forming part of the initial Commission’s proposal, and recital 21 of the ETD remains succinct in stating that:

Business use and non-business use of energy products and electricity may be treated differently for tax purposes.

Article 11(1) ETD, first paragraph, defines business use as being the use by a business entity, identified in accordance with the second paragraph of this Article, which independently carries out, in any place, the supply of goods and services, whatever the purpose or results of such economic activities. Article 11(1) ETD, second paragraph describes that the economic activities, namely the supply of goods and services, comprise all activities of producers, traders and persons supplying services, including mining and agricultural activities and activities of the professions. Article 11(1) ETD, third paragraph, determines that states, regional and local government authorities and other bodies governed by public law are not considered as business entities in respect of the activities or transactions in which they engage as public authorities. When they engage in such activities or transactions, they are however considered as a business where treatment as non-business would lead to significant distortions of competition.

Analysis

In the questionnaire, only three Member States raised concerns concerning the exact definition of the term ‘business use’. In their opinion, the definition as it is stipulated in

Article 11(1) ETD is not easily transposable in practice. The overwhelming majority of the responding Member States expressed their satisfaction with the current definition laid down in Article 11(1) ETD. This was also confirmed in the discussions.

Greece, Malta and Croatia replied that the term was not clear to their administrations. Croatia elaborated on the issue and doubted whether their national definition of business use is in line with the definition from ETD.

Croatia's definition of business use is:

Business use shall mean the use by business entities independently supplying goods or services, whatever the purpose or results of such economic activities. A business entity shall also mean legal persons that from an organisational point of view constitute an independent business which is capable of functioning by its own means. Business activity is every activity of the producer, trader or person offering services, including mining and agricultural activities and activities in free profession.

Article 11(2)

Description

In line with Article 11(1), first paragraph ETD, business use is the use by a business entity, identified in accordance with the second paragraph of this Article, which independently carries out, in any place, the supply of goods and services, whatever the purpose or results of such economic activities. Article 11(2) ETD indeed defines that, with respect to the ETD, the business entity cannot be considered as smaller than a part of an enterprise or a legal body that from an organisational point of view constitutes an independent business, that is to say an entity capable of functioning by its own means.

Analysis

The Member States stated having no particular difficulties in understanding the definition of 'business entity'. The answers provided to situational examples indeed support that statement, where correct and homogeneous answers were provided.

This observation does not impede the Member States to implement this definition in different manners. For instance, Denmark links the concept of a 'business entity' as defined in Article 11(2) ETD with the VAT legislation. Therefore, a business will not be granted a refund of the energy tax if it cannot have a refund of VAT. The energy tax refunds are entirely linked to the VAT system (also regarding the declaration). Therefore, small businesses that are not VAT registered will pay the high rate (similar to households), even if they would claim that they conduct a business. As a non-VAT registered business (e.g. banks for part of their activities), there is no possibility to benefit from the reduced rate. Article 11(4) ETD allows for this regime.

Article 11(3)

Description

Article 11(3) ETD foresees that, where mixed business and non-business use takes place, taxation applies in proportion to each type of use. The provision further indicates that where either the business or the non-business use is insignificant, it may be treated as nil.

Analysis

The question has been asked whether the term 'insignificant' has led to any problem in practice. The authorities of a single Member State indicated having suffered from difficulties in assessing the definition of this term.

The other Member States responded that they had not experienced any problem in interpreting this term. Of these Member States, some, like Germany, did not define the term 'insignificant', and consider that all uses have to be taken into account.

Article 11(4)

Description

Article 11(4) ETD states that Member States can limit the scope of the reduced level of taxation for business use. This provision for instance gives the possibility for Member States to grant a reduced level of taxation only for some, and not for all, activity sectors. However, differentiation based on other criteria such as size of enterprise etc. would also be possible.

In this regard, a reference can be made to Article 17(1) ETD. That latter provision provides for a possibility for the Member States to apply tax reductions in favour of energy-intensive businesses. Here also, Member States are free to 'apply more restrictive concepts, including sales value, process and sector definitions'. As such, unlike what is the case for Article 11(4) ETD, here specific criteria for differentiation on who can benefit from the reduced rate are foreseen.

Analysis

With regard to the possibility for Member States to reduce the scope of the term 'business use', we refer to the analysis carried out for Article 17(1) ETD.

Conclusion

- The definitions of the terms 'business use', 'business entity', and 'mixed use' are considered as being clear enough, both by the Member States and the economic operators. It has been observed that the implementation of these definitions could slightly differ among the Member States, but these differences were not seen as problematic.
- Unlike the previous paragraphs, Article 11(4) ETD does not simply provide for definitions, but instead it stipulates that the scope of the reduced level of taxation

for business use, as foreseen in Article 17 ETD, can be limited by Member States. For the sake of clarity and coherence, this provision would fit better in Article 17 ETD.

B.12 Article 12

Context

Paragraph 1 of Article 12 determines that Member States are allowed to express their national levels of taxation in units different from the ones in the ETD (in the annexes to Article 7 to 10) under the condition that the corresponding levels of taxation, following conversion into these units are not below the minimum levels as determined in the Directive.

In annex 1A (referring to Article 7 ETD), annex 1B (referring to Article 8 ETD) and annex 1C (referring to Articles 9 and 10 ETD) the minimum taxation levels are expressed in certain measuring units, depending on the type of product.

The energy products mentioned in Articles 7, 8 and 9 which have a taxation level based on volume must be measured at a temperature of 15°C.

The units used in the ETD are limited to:

- Litre
- Kilogram
- Gigajoule
- Megawatt hour (for electricity)

Member States may opt to express their levels of taxation in different units. An example is the possibility to express the rate of taxation for liquid fuels in gallons instead of litres in the UK. Another, less straightforward example, is expressing the level of taxation for natural gas in cubic metres, instead of Gigajoule as is done in the ETD¹⁹⁷. In such a scenario the Member State must ensure that the actual taxation level does not fall below the minimum levels in the ETD if the rates are converted into the units of the ETD.

Seventeen Member States confirmed in the web survey that they use the quantity, expressed in Megawatt Hours as the unit for taxation of electricity. The Netherlands and Austria use quantity expressed in Kilowatt-hours as the unit, Malta uses Gigajoule.

¹⁹⁷ The energy content of a cubic metre of gas can vary considerably though, depending on the quality of the gas, the temperature or the pressure when the measurement is taken.

Figure 36 - Tax base for electricity in the Member States

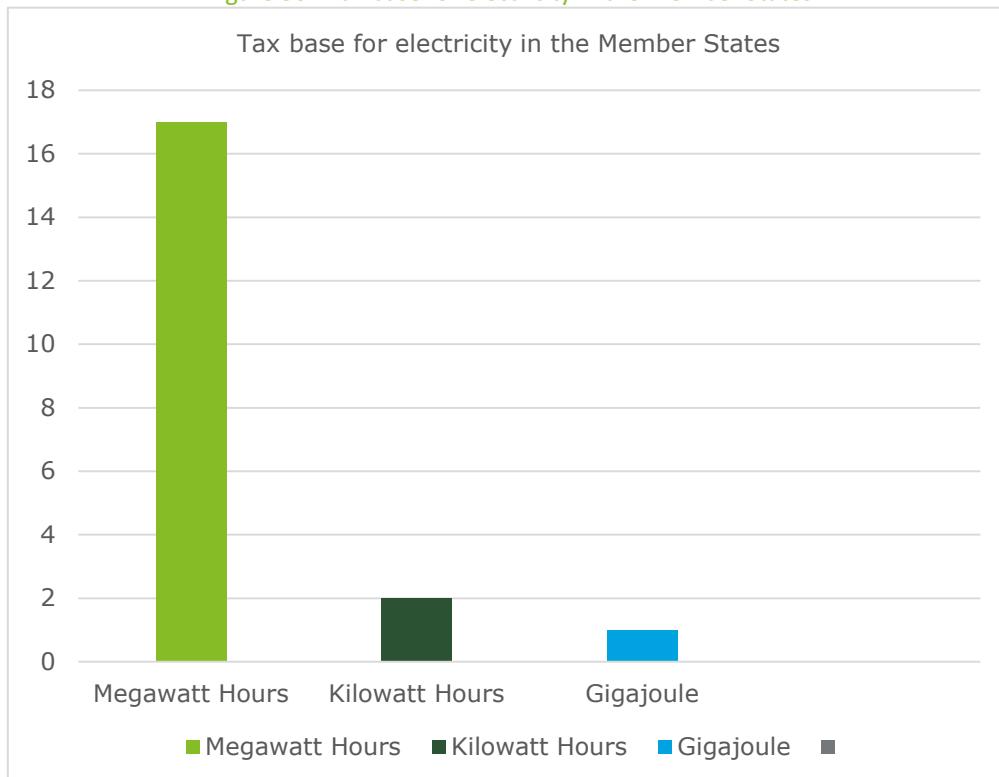
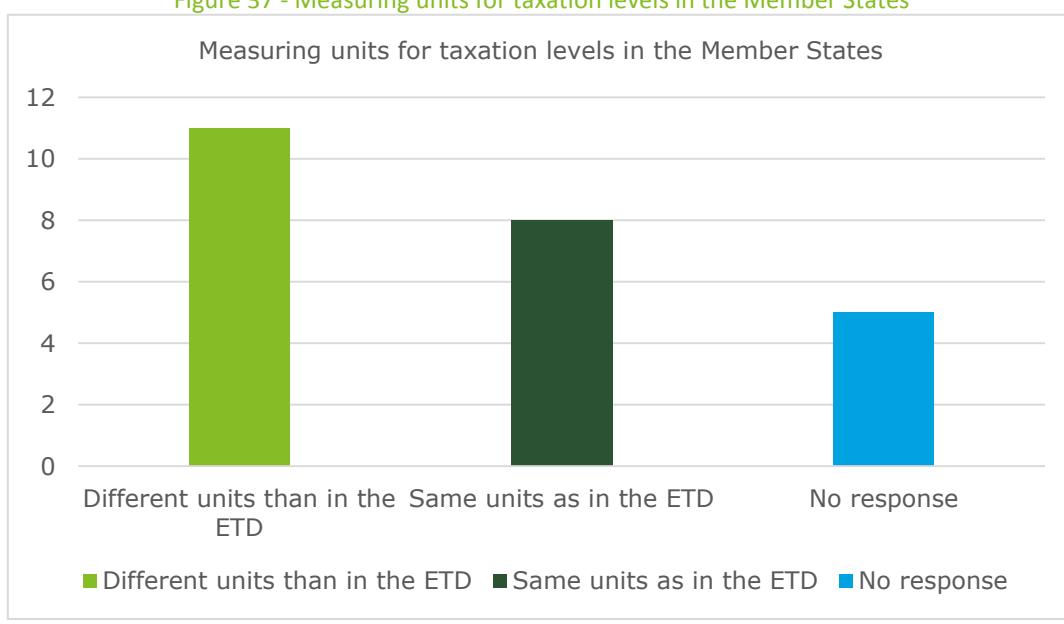


Figure 37 - Measuring units for taxation levels in the Member States



Article 12(1)

Analysis

Eleven Member States (Belgium, Czech Republic, Finland, Germany, Hungary, Latvia, Lithuania, Austria, Slovakia, Sweden, and the Netherlands) responded in the web survey that they express the national levels of taxation in different units than those specified in the annexes to Articles 7 to 10 ETD. Eight Member States (Bulgaria, Cyprus, Greece, Luxemburg, Malta, Poland, Croatia, and Spain) responded that they express their national levels in the same units as those specified in the Annexes to Articles 7 to 10 ETD.

Out of around 220 respondents, 39 economic operators responded to the web survey that they at times have to convert the volumes of the energy products and electricity, which they consume into another measurement unit in order to calculate the excise duties. These respondents are spread out over the different Member States. About one third (14) of those expressed that they experience problems with these conversions. Some of the problems are:

- Administrative burdens
- Difficulties with the density and temperature which fluctuate and thus change the outcome
- Unclarity on the definition of kg (air vs vacuum)
- Manual errors

Denmark, France, Germany and Sweden consider it important to retain the possibility to express national levels of taxation in other units than the ones laid down in the ETD. While Poland uses the same units as in the ETD (the units for coal and gas are Gigajoule (GJ) - to particular types of gas and coal fixed calorific values expressed in GJ are assigned to facilitate the excise duty settlements), it could accept that other Member States express national levels of taxation in other units than laid down in the ETD.

Denmark indicated that for large quantities of petrol or diesel, the temperature will always be measured, but for smaller quantities this is not the case. The temperature and independent expression of the levels of taxation is considered one of the ways to correct the taxation in function of the energy content.

The Council document 13253/03 ADD 1 FISC 139 and the simplified procedures are probably the ones Denmark is using when applying the day temperature approach.

Regarding the minimum levels of taxation: the levels are too low according to Denmark. The minimum levels should be indexed, as was the case in the 2011 Proposal. This way, the rates do not lose their effectiveness over time and at least a status quo is achieved in that regard. Further issues arise.

- The lack of indexation of the minimum rates brings additional complexities due to the particularities of the Danish system. As the national rates are indexed but the

minimum rates are not, Denmark cannot express the minimum rates in terms of a percentage of the normal rate (as this rate is increasing).

- There is no logic embedded in the structure of the minimum rates. It cannot be explained why certain fuels have a lower minimum rate than others; this is more of a political agreement rather than a sensible differentiation.

A common minimum rate on the basis of the energy content would be most suitable according to the Danish authorities.

The French customs authorities are strongly in favour of further harmonization with identical rates (preferably high) which should deter fiscal competition between Member States. Some companies threaten to relocate their production but there is no evidence that it happens and those who do so are motivated by labour costs rather than the electricity taxation rate, especially since electricity in France remains one of the cheapest in Europe.

The conversion in France is made through the ASTM tables B and C, which are currently under revision to be replaced by the ISO 91-1: 2017 norm in the years ahead. Textual references of the conversions are found directly in the BODs (*Bulletins officiels des douanes*).

Germany does generally not experience problems to reach the minimum level of taxation, even with conversion. Measurements are still necessary for natural gas. Conversion from for example 60 gigajoule → 16,666 Mwh.

Further harmonization is not possible according to Poland. We agree with a current state of harmonization, but greater interference seems impossible. Different level of economic development in EU countries makes introduction of uniform tax rates for all Member States impossible.

In Poland special conversion tables are used (prepared by the American Institute - API). There is also the Polish standard PL ISO 91/1 1999 that regulates the issue of simplified procedures to take into account the variations in temperature. It refers to the conversion tables prepared by API.

It would be difficult in practice to provide for harmonization on the measurement of taxable products for which no minimum level is set in the ETD.

The tax rates in Sweden are laid down in normal trade units (for electricity kWh). Coal is currently benefitting from a beneficial tax rate compared to other energy products (particularly considering energy content and environmental performance).

In Sweden, heating fuels are taxed since 2007 (liter tax in accordance to their energy content –CO₂ content for the CO₂ tax).

Sweden is of the opinion that the minimum levels of taxation should be higher, or at least should be indexed. The current levels are not considered to be effective in order to reach the goals pursued.

The Italian authorities apply the same taxation units as in the ETD, except for natural gas which is converted on the basis of specific scientific criteria. In particular, the reference unit adopted in Italy for the excise taxation is always in line with the ETD except for natural gas for which the taxation is calculated based on sm3 (standard cubic meter) instead of Gigajoule.

Correspondence between the measurement of natural gas under Italian legislation and under the ETD is guaranteed through a conventional conversion factor based on scientific literature and the kind of gas generally traded. Either way there is no risk of not exceeding the minimum level of taxation for natural gas since the excise duties in Italy are more than high enough. Italy also wishes to keep the discretion to express the national level of taxation in units other than laid down in the ETD and no further harmonization is required.

Article 12 (2)

Analysis

The second paragraph of Article 12 indicates that for energy products mentioned in Articles 7, 8 and 9 of which the levels of taxation are based on volumes, the volumes need to be measured at a temperature of 15° C.

During the negotiations for the new proposal, a change for the rule on temperature was pushed for, as currently the rule can lead to quite some administrative burdens.

In Denmark two rates are mentioned in the national law: the rate for volumes measured at 15°C and the day temperature rate, the latter being used most.

When an economic operator receives an invoice calculated at 15°C he has to convert the invoice to the day temperature rate. For the calculation of the minimum rates, the 15 °C rate is used and Denmark always exceeds the minimum rates considerably.

According to Germany, if goods have different temperatures, conversion has to be made to determine the quantity of the energy product.

In Sweden, all taxable products are treated the same in accordance with this provision (Council document) – so not only energy products but also equivalent products (Chapter 2, §2). A separate rule is laid down in the Swedish legislation on gaseous fuels (pressure is determined).

The tax authority has made statements on how to calculate the volume. The tax authorities allow for adjustments considering the fact e.g. that certain heavy oils must be heated to high temperature in order to become liquid, and enable their movement. . Further

adjustments might be possible in order to rule out contamination (if significantly above the average). This has been explicitly noted in the guidance from the authorities

Moreover, the measurement of the volume is not only necessary to ensure taxation at the minimum level, it is necessary in general in order to be able to tax / to actually carry out taxation. Also, for the application of the EMCS, the numbers on the volume must be inserted in the system. Different approaches regarding the calculation of the volumes might be problematic in practice. This is partially anticipated by the Directive, for instance by foreseeing weight as unit of measurement for certain products such as heavier fuels, LPG. However, of course at the same time Article 12 ETD grants member States the liberty of deviating of this unit of measurement.

No reference is made to ISO 91/1 – 1982 or any subsequent revision (the reference is not known to the Swedish authorities).

When in Italy natural gas is calculated in sm3 at a different temperature than 15 °C, compliance with the minimum tax level is ensured by comparing the volume (in sm3) and the applicable temperature to the density at that time. The density can indicate what the volume would be at the temperature of 15°C and the applicable tax rate.

Conclusion

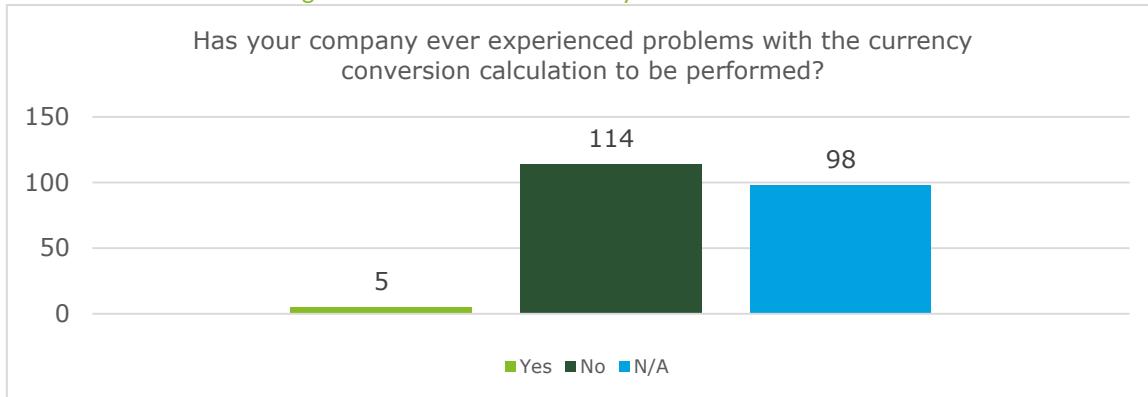
- For most liquid fuels, conversion from and to the ETD temperature of 15°C can pose some administrative burdens as is demonstrated in the above examples for Denmark, Germany and Italy. Some economic operators (e.g. in Denmark) need to make the conversion to know the rate against the day temperature. The burden consists of creating and using conversion tables. The question is whether this can be avoided? An alternative would be to weigh it in kilogram, but it remains unsure whether the installations can measure this way.
- A significant number of Member States make use of different measuring units and also wish to continue to do that. The problem for natural gas is that measurement of the volume are dependent on temperature and pressure.
- However, the fact that a conversion mechanism has to be applied in order to make sure the minimum levels in the ETD are respected results in some administrative burdens for Member States and economic operators. It would be logical to follow the commercial practice as established in the ISO. However, it is to be taken into account that consulting the ISO is subject to a payable subscription.
- The provision is very open (lack of clarity) and from the input and sources it seems that Member States use different systems to do the conversion (different implementation) which may result in unequal results and a distortion of competition between Member States.

B.13 Article 13

Context

Article 13 ETD is only of relevance for EU Member States that do not have euro as a currency. In accordance with Article 13(1) ETD, the value of the euro in national currencies to be applied to the levels of taxation shall be fixed once a year. If needed, the Member States have to adjust their national levels of taxation. The adjustment is not necessary under the conditions laid down in Article 13(2) ETD.

Figure 38 - Problems in currency conversion calculation



Source: Survey to Economic Operators

Very few economic operators report issues with regard to the conversion of the tax rates.

A multinational company operating in Romania reported that the exchange rate used for the calculation of the excise duties is set once a year, i.e. in October for the upcoming year. The government would artificially increase the exchange rate on that day, in order to benefit from increased revenues from taxation.

Conclusions

- No considerable issues to be reported, as this provision is deemed to work properly in practice. Member States should be urged not to artificially raise the conversion rate to benefit from increased tax revenues.

B.14 Article 14

On the basis of Article 14 ETD, the use of energy products (and electricity, in the case of paragraph 1) is mandatorily exempted from energy taxation in three cases:

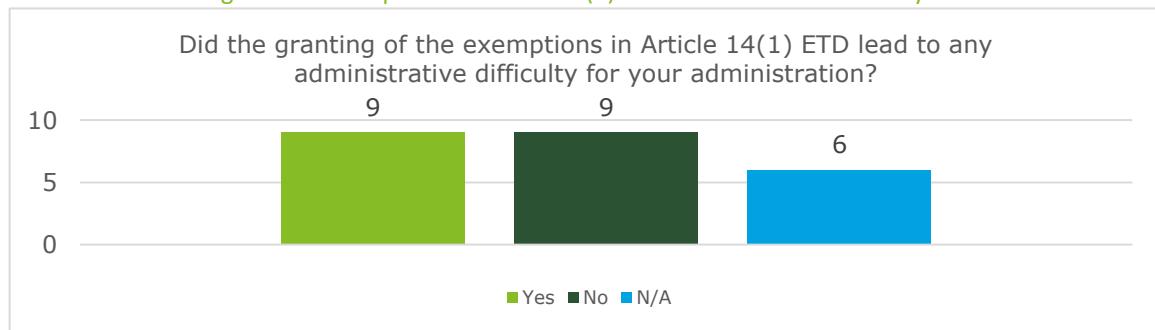
- if used to produce electricity (or electricity used to maintain the ability to produce electricity);
- if used as fuel for the purpose of air navigation other than private pleasure flying;
- if used as fuel for the purpose of navigation within Union waters (including fishing), other than private pleasure craft (and electricity produced on board a craft).

These exemptions are applied under conditions laid down by the Member States themselves '*for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse*'. When exercising their power to lay down the conditions for the exemption from excise duty provided for in Article 14(1) ETD, Member States must comply with the general principles of law which form part of the legal order of the EU, including the principle of proportionality¹⁹⁸.

According to the Member States, the conditions imposed on the economic operators who want to benefit from the exemption (and the eventual administrative burden linked thereto) can be justified for reasons of avoiding tax evasion / fraud. The economic operators making use of the exemptions strongly confirm this view.

An economic operator states that currently, for companies active in different Member States, it is burdensome that entities within the group have to individually approach the Member States' authorities and that discussions are held on a case-by-case basis.

Figure 39 - Exemptions in Article 14(1) and administrative difficulty



Source: Survey to Member States

Half of the respondent Member States (9 out of 18) indicate that they have faced (administrative) difficulties in the granting of the exemptions of Article 14(1) ETD. These difficulties relate to:

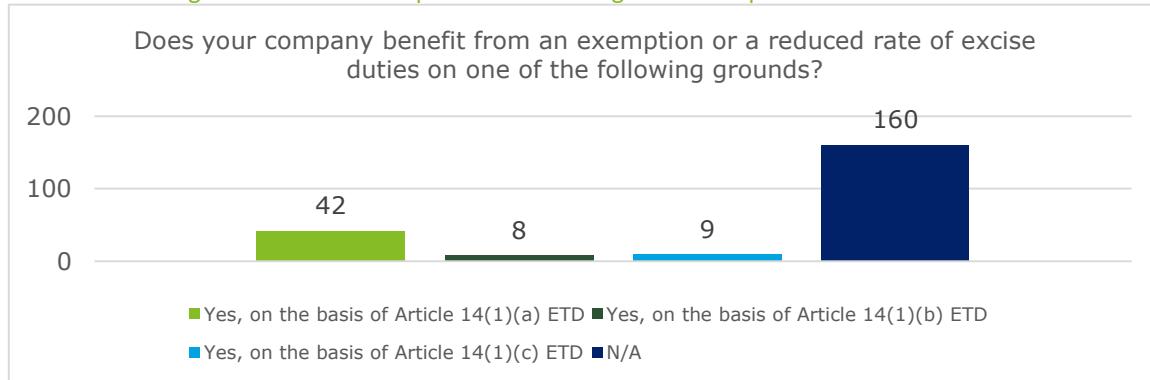
¹⁹⁸ ECJ C-355/14, *Polihim-SS EOOD*, ECLI:EU:C:2016:403.

- the applicability of Article 14(1)(a), particularly in the context of combined heat and power generation;
- the scope of the exemptions in Article 14(1)(b) and 14(1)(c), and in particular the interpretation of private pleasure-flying and private pleasure craft and the ECJ case law in this regard.

Article 14(1) ETD refers to energy products and electricity. According to the jurisprudence of the ECJ, taxable products not covered by Article 2(1) ETD and thus not covered by the term ‘energy products’ as such, cannot be considered to fall within the scope of the mandatory exemptions¹⁹⁹. Several Member States adhere to a different view, however (e.g. Belgium, Sweden, Denmark – see analysis in the context of Article 2(1) ETD). The ECJ considers it impossible to apply the mandatory exemption *by analogy* to nuclear fuel used for the production of electricity and caught by a national tax²⁰⁰.

The mandatory exemptions are applied in addition to the general provisions laid down in the Horizontal Excise Directive. Under certain conditions, some mandatory exemptions could be limited in scope or waived by a Member State.

Figure 40 - Economic operators benefiting from exemption or a reduced rate



Source: Survey to Economic Operators

Article 14(1)(a)

Energy products and electricity used to produce electricity, and electricity used to maintain the ability to produce electricity, are exempt from taxation. The initial 1997 ETD Proposal imposed a system on the basis of output taxation, for the following reasons:

- it was considered the only method by which the general indirect taxation principle of applying tax in the country of consumption could be uniformly achieved;
- electricity could be traded within and between countries without having been taxed thus avoiding double taxation in the country of consumption;
- Member States could differentiate between electricity used by final consumers and industry and thus apply differential taxes;

¹⁹⁹ ECJ C-4/15, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

²⁰⁰ ECJ C-606/13, *OKG AB*, ECLI:EU:C:2015:636.

- it was considered the only means by which the tax burden on energy intensive industry could be reduced.

In the Explanatory Memorandum to the 1997 Proposal, the Commission proposed to add an additional (non-harmonised) input tax in the case of non-environmentally friendly fuels, and to refund to electricity producers who use environmentally friendly fuels the tax paid by the final consumer.

The jurisprudence of the ECJ on Article 14(1)(a) ETD is limited. In the *Flughafen Köln/Bonn GmbH* case²⁰¹, the Court ruled that this provision is sufficiently precise in imposing on Member States the obligation not to impose taxation under the ETD. Moreover, the provision is sufficiently unconditional, in the sense that the possibility to restrict the scope of this provision is a potential limitation, which is to be exercised by the Member State in order to refuse a taxpayer from the benefit of the exemption. Being both sufficiently precise and conditional, the ECJ decided that Article 14(1)(a) ETD has direct effect in the Member States. The mere lack of implementation of this provision cannot be considered a legitimate derogation from the mandatory exemption laid down in the provision.

The application of this provision in the context of combined heat and power generation led to the French *Conseil d'Etat* asking referring following question to the ECJ for preliminary ruling²⁰²:

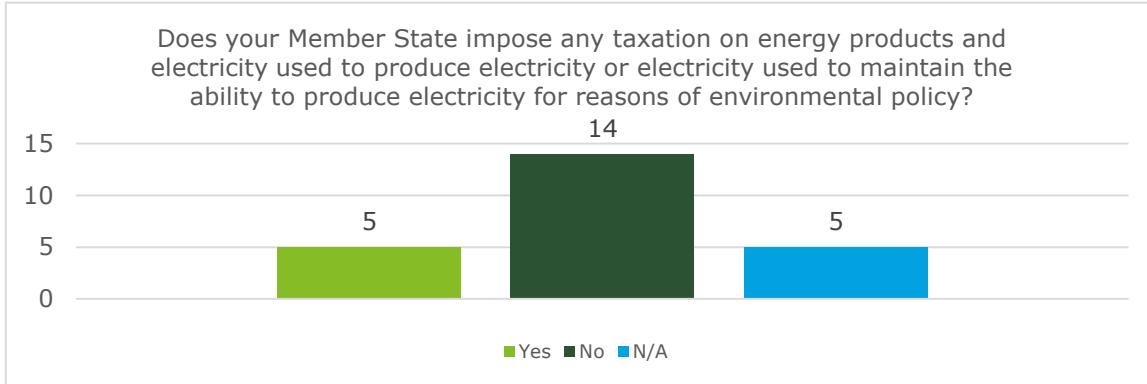
Do energy products used for combined heat and electricity generation come exclusively within the scope of the optional power to exempt conferred by Article 15(1)(c) of Council Directive 2003/96/EC of 27 October 2003 or do they also come, as regards the proportion of those products the consumption of which corresponds to the generation of electricity, within the scope of the obligation to exempt provided for by Article 14(1)(a) of that Directive?

Today, Member States may, for reasons of environmental policy, subject input energy products and electricity to taxation without having to respect the minimum levels of taxation laid down in the ETD. This exception is of a general nature and phrased accordingly. Questions arise on the clarity of the provision and on the alignment with other policy instruments (in particular Article 1(2) Horizontal Excise Directive).

²⁰¹ ECJ C-226/07, *Flughafen Köln/Bonn GmbH*, ECLI:EU:C:2008:429.

²⁰² ECJ C-31/17, *Sucrerie de Toury SA*, pending.

Figure 41 - Member States impose taxation for reasons of environmental policy



Source: Survey to Member States

Only a limited number of Member States makes use of this derogation.

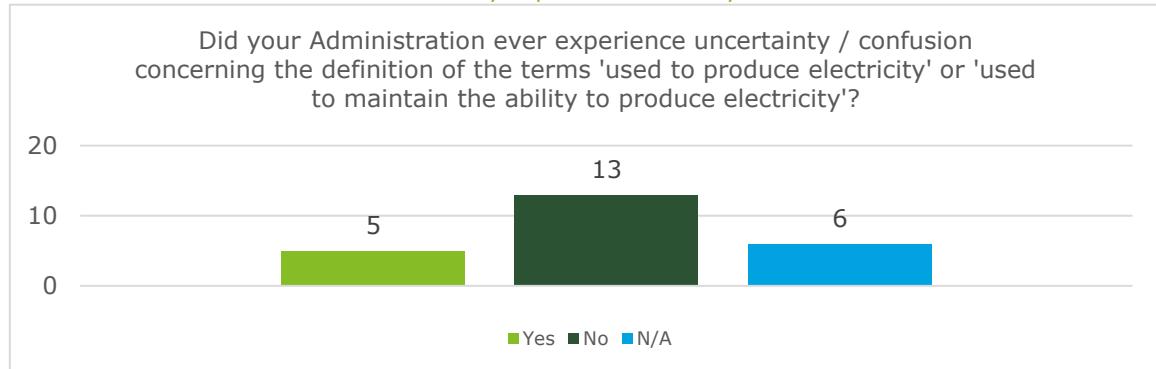
E.g. in Austria, stationary installations and heat pumps for the generation of electricity are envisaged by taxation. Taxpayers need to make use of marked gasoil (or contribute the difference) to comply with the tax legislation. The measure also covers the generation of electricity by households.

The interplay with other policy instruments, in particular the Horizontal Excise Directive, has led to a number of proceedings on national and EU level. As it appears from the case law in the Member States, also the interplay with Article 1(2) Horizontal Excise Directive is unclear, as *reasons of environmental policy* is different in scope than the *specific purposes* referred to in the Horizontal Excise Directive. This interplay (and analogy) between both Directives is relevant in order to understand to what extent the ECJ jurisprudence on the interpretation of Article 1(2) Horizontal Excise Directive could be applied to Article 14(1)(a) ETD. This topic is subject of a pending court case in the Netherlands before the Supreme Court (*Hoge Raad*), concerning the introduction of a tax on coal used to generate electricity. In his conclusion of 1 February 2017, the AG has suggested to the Supreme Court to refer the following questions to the ECJ²⁰³:

- Are the considerations in the case at hand sufficient to be considered as 'reasons of environmental policy', in the sense of Article 14(1)(a) ETD? Do the same conditions as developed by the ECJ on the application of 'specific purpose' laid down in Article 1(2) Horizontal Excise Directive apply?
- For the application of the limitation, is it necessary to achieve environmental effects (is there an obligation of result) or is it sufficient for a Member State to introduce taxation for reasons of environmental policy?
- Does a Member State, making use of the possibility to limit the scope of the mandatory exemption, have to cover all energy products covered by the provision or is it allowed to subject to taxation 1 product only (coal) whereas other products are still falling within the scope of the mandatory exemption?

²⁰³ HR 15/05429, *X v. State Secretary of Finance*, ECLI:NL:PHR:2017:27.

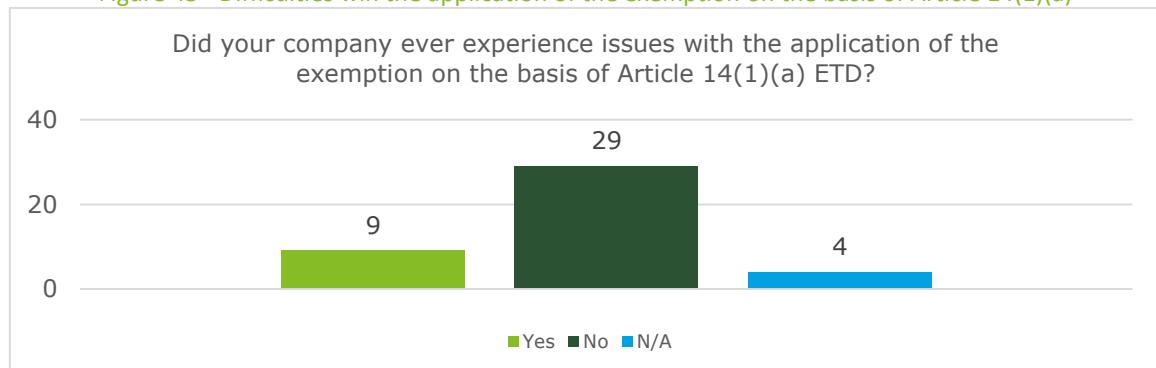
Figure 42 - Difficulties with the definition of the terms 'used to produce electricity' or 'used to maintain the ability to produce electricity'



Source: Survey to Member States

The issues reported by the Member States relate mostly to what is understood as 'used to maintain the ability to produce electricity', which requires knowledge about the technological processes used. As a practical case, one of the Member States refers to the equipment used for the production of electricity which is temporarily out of order, but still requires powering in order to ensure the future operation of the device (e.g. maintenance of the temperature of the premises where the equipment is located to ensure the operability of the equipment after its inactivity, which would thus ensure the ability to produce electricity). Other examples which could trigger questions on whether the input electricity is used for the production of electricity are pumped-storage hydroelectricity (storage of electricity through pumping, storing, and subsequently releasing water) and the electricity lost on the power grid (due to the resistance of the equipment).

Figure 43 - Difficulties with the application of the exemption on the basis of Article 14(1)(a)



Source: Survey to Economic Operators

Only a limited number of respondent economic operators experienced issues with the application of this provision. The issues reported by the economic operators relate to the following:

- regarding the identification of the person who is entitled to benefit from the tax exemption (an operating entity, which is a 100% subsidiary of another company, acts on behalf and on instructions of the parent company);

- regarding combined heat and power generation, discussions arose concerning the taxation / exemption of electricity consumption for the heat generation;
- the interpretation and the scope of the exemption, in particular regarding the ability to produce electricity, is reported not to be the same in all Member States.

According to some economic operators, new technologies and needs – relating to energy efficient equipment and incentives, e.g. waste-to-energy solutions (biogas plant to turn waste into energy) may require an update of the provision, with a view to also include taxable non-energy products in the exemption.

Article 14(1)(b)

Energy products supplied for the use as fuel for the purpose of air navigation other than private pleasure-flying is mandatory exempt in the Member States. ‘Private pleasure-flying’ is defined in the Directive as “*the use of an aircraft by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities*”. The EU tax exemption of aircraft fuel is based on the 1944 Chicago Convention, most recently updated in 2006²⁰⁴.

According to recital 23 of the ETD, the existing international obligations²⁰⁵ and the maintenance of the competitive position of EU companies²⁰⁶ made it advisable to continue the exemptions of energy products supplied for air navigation and sea navigation, other than for private pleasure purposes, while there should be a possibility for the Member States to limit the exemptions. As a consequence, today, the mandatory exemption laid down in Article 14(1)(b) ETD can be:

- limited in scope to supplies of jet fuel (CN code 2710 19 21)²⁰⁷;
- limited in scope to international and intra-Union transport;
- waived by a Member State if there is a bilateral agreement with another Member State in place for intra-EU flights.

Hence, Member States can tax aviation fuel for domestic flights or for intra-EU flights (the latter in the case of a bilateral agreement in place). In those cases, the Member States may apply a level of taxation below the minimum level set out in the ETD.

²⁰⁴ Convention of 7 December 1944 on International Civil Aviation; <https://www.icao.int/publications/pages/doc7300.aspx> (Accessed: [12/01/2018]).

²⁰⁵ The international obligations referred to mainly concern the 1944 Convention on International Civil Aviation (Chicago-Convention) and international bilateral air service agreements concluded between the EU / its Member States and third countries, and between the EU Member States themselves.

²⁰⁶ This competitive position mainly refers to the competitiveness between EU airlines and third country airlines.

²⁰⁷ E.g. in Belgium.

Over the years, the ECJ has provided more background to this provision through multiple court cases.

In the *Braathens* case²⁰⁸, the Court established that a national tax, calculated on the basis of data supplied by the national civil aviation authority on fuel consumption and emissions of hydrocarbons and nitric oxide by the relevant type of aircraft on an average flight, is incompatible with Directive 92/81/EEC. The Court agreed with the view that there is a direct and inseverable link between fuel consumption and the polluting substances referred to in the national legislation. Hence, the tax at issue was to be regarded as levied on consumption of the fuel itself for the purposes of Directives 92/81/EEC and 92/82/EEC.

The ECJ has provided its autonomous interpretation²⁰⁹ to the concept of ‘private pleasure-flying’, which is defined in the ETD. As it appears from the case law, there is also non-private use that falls within the scope of this concept. This follows from the negative character of the definition laid down in the ETD, referring to “*other than commercial purposes*”. This follows even more clearly from the German and Danish version of the ETD, given the explicit reference to the non-commercial character in the general wording as well:

DE	<i>privaten nichtgewerblichen Luftfahrt</i>
DK	<i>ikke-erhvervsmæssig privatflyvning</i>
EN	<i>private pleasure-flying</i>
ES	<i>navegación aérea de recreo privada</i>
FR	<i>l'aviation tourisme privée</i>
IT	<i>aviazione private da diporto</i>
NL	<i>particuliere plezierluchtvaart</i>
PT	<i>aviação de recreio privada</i>
SE	<i>privat nöjesflyg</i>

Hence, the air navigation covered by the mandatory exemption relates to the use of fuel where the aircraft is used directly for the supply of air services for consideration; the supply of services for consideration is an inherent reason for the aircraft’s movements²¹⁰. The purpose of the journey is irrelevant for the application of the tax exemption. The ECJ refers in this regard to the jurisprudence in the context of Article 14(1)(c) ETD²¹¹.

The ETD did not seek to establish general exemptions. Rather, the European Commission wanted to enable equal treatment for air travel between any two points within the

²⁰⁸ ECJ C-346/97, *Braathens*, ECLI:EU:C:1999:291.

²⁰⁹ ECJ C-389/02, *Deutsche See-Bestattungs-Genossenschaft eG*, ECLI:EU:C:2004:214.

²¹⁰ ECJ C-79/10, *Systeme Helmholtz*, ECLI:EU:C:2011:797.

²¹¹ ECJ C-505/10, *Sea Fighter*, ECLI:EU:C:2011:725.

European Union. For the purposes of the tax exemption for aviation fuel, the European Commission drew a distinction between commercial aviation and private aviation²¹²:

Most Member States distinguish between commercial and private flying although the exact nature of the definition varies. The treatment accorded to international as against internal navigation differs and in some instances a distinction is drawn between scheduled and chartered navigation. There are sufficient disparities in practice to give rise to distortions and/or the need for additional controls in the event of the removal of existing controls at national borders.

The approach taken is to standardise the existing exemption for fuel supplied to international commercial flights, to all commercial aviation. This would give equal treatment to air travel between any two points within the community, in the process emphasising the seamless nature of the internal market. Fuel supplied for private aviation should be subject to tax – as is generally the case today.

In the *Systeme Helmholtz* case²¹³, the ECJ established that a company carrying out activities consisting in the carriage of its personnel to clients or trade fairs in its own aircraft, cannot be considered the use of an aircraft for commercial purposes and thus is to be considered as ‘private pleasure-flying’, insofar as those air navigation operations are not *directly* used for the supply of an air service for consideration. The Court furthermore establishes that the fuel used for the purpose of flights to and from a maintenance facility is not covered by Article 15(1)(j) ETD. For training and maintenance flights, the ECJ applies the same reasoning as for the carriage of personnel: the aircraft movement must relate directly to the supply, by the company, of air services for consideration.

In the *Haltergemeinschaft* case²¹⁴, the Court established that the mandatory exemption is not limited to be relied upon by aviation companies only. The company in question leased an airplane to other companies, which was used by those companies mostly for commercial purposes (and to a lesser extent for non-commercial purposes). In the case at hand, *Haltergemeinschaft* could not benefit from the exemption, as the aircraft did not *directly* serve for providing aviation services against consideration. In this regard, it should be noted that charter contracts (e.g. time charters) provide the use of the airplane to another party, which often does not provide services for consideration to a third party. As a consequence, in these circumstances the condition for the exemption is, strictly speaking, not met. The application of Article 14(1)(b) ETD will depend on the use of the airplane by the charterer²¹⁵.

²¹² Commission of the European Communities, Proposal for a Council Directive on the harmonization of the structures of excise duties on mineral oils, COM (90) 434 final, 7 November 1990; aei.pitt.edu/11816/1/11816.pdf (Accessed: [12/01/2018]).

²¹³ ECJ C-79/10, *Systeme Helmholtz*, ECLI:EU:C:2011:797.

²¹⁴ ECJ C-250/10, *Haltergemeinschaft*, ECLI:EU:C:2011:862.

²¹⁵ ECJ C-250/10, *Haltergemeinschaft*, ECLI:EU:C:2011:862.

Also, there appeared to be doubts as to when navigation constitutes part of a service that is provided for consideration. The ECJ shed some light on this issue in judgments related to water navigation (Cases C-391/05, Jan de Nul and C-151/16, UAB). In particular the Court confirmed that fuel used for journeys that constituted a necessary and indispensable step of navigation for commercial purposes is also covered by the tax exemption²¹⁶.

The ECJ case law is not straightforward and still leaves considerable room for interpretation. Questions remain on what is considered sufficiently direct use and what is considered as an air service for consideration. Furthermore, Member States have difficulties applying the case law in practice – many indicate the case law is impossible to apply and does not correspond with reality – and several Member States raised the need for guidance at EU level regarding the interpretation of these provisions to ensure a common approach. From the input from the Member States, it appears that such guidance is indeed necessary, as there is no common approach towards the exemption laid down in Article 14(1)(b) ETD.

E.g. no exemption may be provided under Article 14(1)(b) ETD if the company uses the airplane not directly for supplying a service for consideration. What about the fuel still in the plane?²¹⁷ For commercial navigation, what is included in the price of a flight ticket? Is an empty leg considered as inherent to the subsequent commercial flight and when is a journey a 'necessary and indispensable step of a navigation for commercial purposes' ? ...

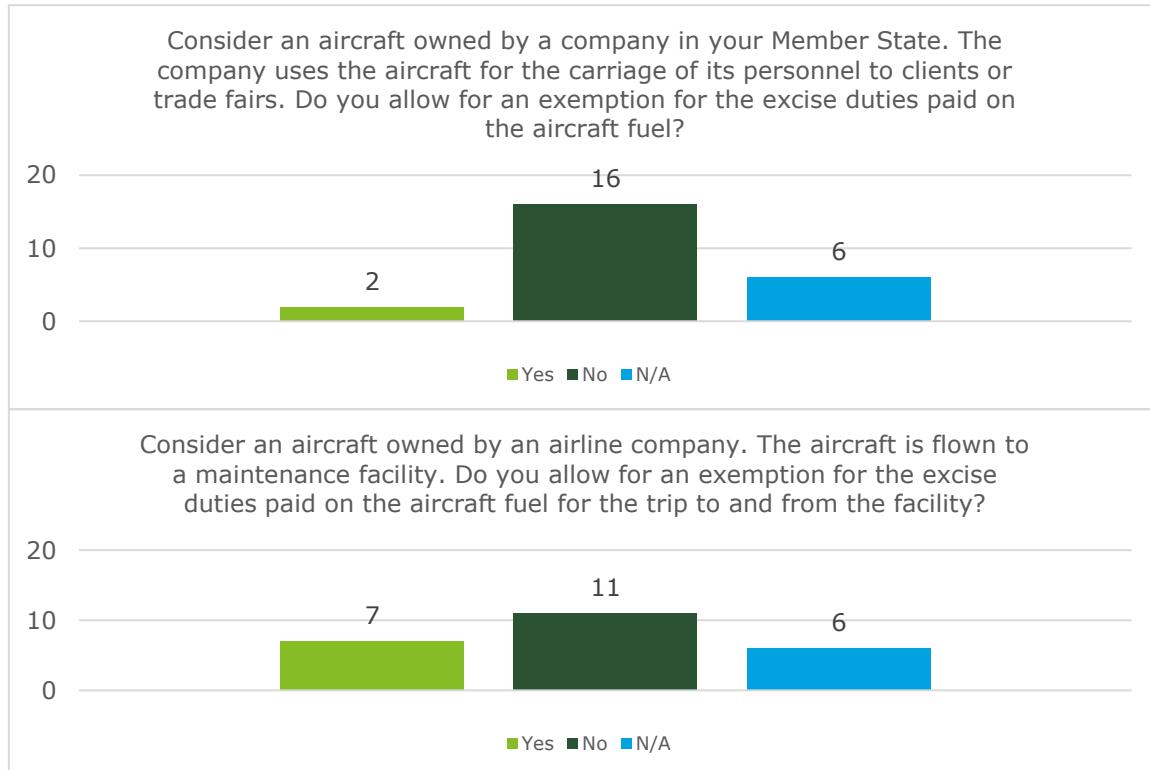
E.g. in Belgium, the guidance to the Program law concerning energy taxation ('Boekwerk accijns'²¹⁸), the example of invoiced helicopter flights for tourism purposes. As such helicopter flights concern the transportation of passengers and essentially constitutes a service for consideration, this is considered to qualify for the exemption (thus not considered as private-pleasure flying), notwithstanding its sole purpose of providing pleasure to the passengers.

²¹⁶ The issue is further discussed below in the section dedicated to Article 14(1)(c).

²¹⁷ Note that fuel in a plane is normally not taxed as it has been released for consumption elsewhere in the EU and it has been taxed already. Next thereto, fuel coming from another country (including outside the EU) is in principle covered by the Chicago Convention and hence cannot be treated as import and excise duty cannot be charged.

²¹⁸ §233 Circular letter 2017/C/51 concerning excise taxation – energy products and electricity; <http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=91b1314a-03a3-40b4-b40f-fe6ab5e3272e&documentLanguage=NL#findHighlighted> (Accessed: [12/01/2018]).

Figure 44 - Exemption of excise duties paid on aircraft fuel



Source: Survey to Member States

In most Member States the exemption will be assessed on a case-by-case basis, depending on the underlying contract. Some of the Member States allowing for an exemption explicitly consider the flight to and from a maintenance facility to be inherent to e.g. the price of a flight ticket purchased for previous or subsequent flights²¹⁹. One Member State refers to the implementation of Article 15(1)(j) ETD (contradicting the ECJ case law).

Influenced by the ECJ case law, the Swedish legal framework was amended. The prior rules were straightforward: if it concerns business use, it is exempt. Now there is a stricter, more complex regime in place, pushing the authorities to issue guidance. A major change relates to the fact that businesses cannot transport goods ‘in house’ without remuneration (intra-company movements, e.g. between 2 warehouses of the same company). Even after the ECJ intervention, issues remain, hence, guidance on EU level is desired and deemed useful. Also in other Member States, the authorities have issued guidance on the interpretation of the concept of private-pleasure flying.

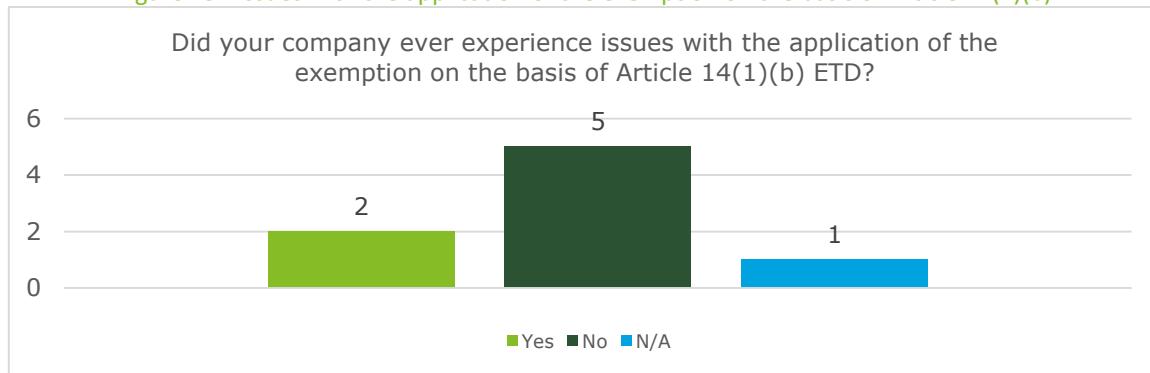
Whereas most Member States apply the case law in the context of Article 14(1)(b) ETD, also in the context of Article 14(1)(c) ETD, the German authorities are of the opinion that the

²¹⁹ In its recent judgement of 13 July 2017 in Case C-151/16, the ECJ ruled that “*a journey of the ship from the port of Klaipeda to that of Stralsund constituted the first necessary and indispensable step of a navigation for commercial purposes, since the sole objective of that journey was to collect goods from the latter port to then be transported to the port of Santander and, without that journey, that service of transporting the goods could not have been provided*”, reason for which the Court concludes that such voyage is considered “*a navigation activity used directly for the supply of services for consideration, [...] so that the fuel used to enable the ship to make that journey was used for ‘navigation’ within the meaning of Article 14(1)(c) ETD*”. This will be further elaborated under Article 14(1)(c) ETD below.

findings in the cases cannot be substituted, as they concern different modes of transportation with different characteristics (e.g. the ECJ ruling C-79/10 on maintenance is not to be considered for shipping as it is argued that maintenance is carried out differently, depending on whether it concerns shipping or flying) and different legal obligations linked thereto (e.g. training requirements). This does not affect the analogy in the wording between the provisions, however, and the fact that the underlying principles could still be the same.

The use of the wording ‘private pleasure’ is considered problematic, as this is semantically not easy to explain. All non-commercial use – not used to directly supply services for consideration – is envisaged by the wording.

Figure 45 - Issues with the application of the exemption on the basis of Article 14(1)(b)



Source: Survey to Economic Operators

The issues reported by the economic operators relate to the interpretation of the concept of private-pleasure flying and the difference with commercial flights.

A German enterprise active in the aviation industry indicates that the (non-commercial character of a flight is approached differently in the Member States. E.g. in Austria, a passenger list is requested in order to assess whether the flight is carried out for commercial purposes.

New technologies and needs – e.g. with regard to the identification of private vs. commercial use and the monitoring thereof – may require an update of the provision, according to some economic operators. Consider e.g. drones, which could be affected by the difference in interpretation of the provision between the Member States. Does the provision push for outsourcing of services, considering the need for a consideration?

Questions arise on whether the actual use of the airplane should be decisive. Currently, a private jet with pilot used to go shopping abroad will be exempt in at least some of the Member States (as it is considered a service for consideration)²²⁰, whereas a private jet used by a company with its own pilot for attending business meetings would qualify as private-pleasure flying. Moreover, the current provision poses considerable practical difficulties in

²²⁰ Depending on who is claiming the exemption, this could not be in line with the reasoning of the ECJ on chartering and particularly with the reasoning in its *Feltgen & Bacino* case; see below.

practice, as the distinction per journey is often difficult to make (how to treat the fuel in the tank after the use? what if the jet was fuelled prior to knowing the subsequent flight?).

Article 14(1)(c)

Whereas letter (b) concerns aviation, letter (c) lays down a similar rule for energy products supplied for use as fuel for the purpose of navigation in Community / Union waters (including fishing), other than private pleasure craft, and for electricity produced on board a craft. ‘Private pleasure craft’ is defined as “*any craft used by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities*”.

Private pleasure craft

The mandatory exemption is designed to facilitate intra-Union trade, particularly the movement of goods and the freedom to provide services capable of taking place on the waters concerned. With this provision, the legislator intended to promote the equality of certain tax conditions under which the transport undertakings or other services which ply the waters concerned operate. When it comes to the interpretation of the term ‘private pleasure craft’, there is great similarity with the term ‘private pleasure-flying’ as elaborated under Article 14(1)(b) ETD. This similarity is recognized by the ECJ, referring in its judgements on paragraph (b) to the explanation of paragraph (c)²²¹.

Again, any navigation other than commercial purposes is excluded from the exemption. By analogy, reference can be made to the different language versions of the ETD, with the German version explicitly referring to ‘non-commercial’ use rather than ‘private’ use, the latter term potentially leading to ambiguity concerning the scope of the (exception to the) exemption.

DE	<i>privaten nichtgewerblichen Schifffahrt</i>
DK	<i>fritidsfartøjer</i> ²²²
EN	<i>private pleasure craft</i>
ES	<i>embarcaciones privadas de recreo</i>
FR	<i>bateau de plaisance privé</i>
IT	<i>imbarcazioni private da diporto</i>
NL	<i>particuliere pleziervaartuigen</i>
PT	<i>embarcação de recreio privada</i>

²²¹ E.g. ECJ C-79/10, *Systeme Helmholtz*, ECLI:EU:C:2011:797.

²²² Contrary to the concept of *private pleasure-flying*, the Danish version does not refer explicitly to the non-commercial character.

All navigation activity for commercial purposes comes within the scope of the exemption from the harmonized excise duty on energy products. The ECJ established that it is sufficient to determine that a vessel is used to provide services for consideration, in order to benefit from the exemption (and not fall within the exception thereto)²²³. The purpose of the navigation is irrelevant; distortions of competition – which the ETD wants to avoid – could arise in any type of navigation activity. The ECJ deemed it necessary for the legislator, if any limitation regarding the purpose would have been intended, to lay such limitations down in the provision itself.

Recently, a question was referred to the ECJ concerning the exemption claimed by a ship builder selling a ship together with some fuel to a shipping company²²⁴. The manufacturer purchased fuel directly delivered into the ship's fuel tank. This fuel was partially consumed carrying out tests on the ship. Together with the ownership of the ship, the remainder of the fuel was transferred to the purchaser. The vessel subsequently set sail from the shipyard in Lithuania to the port of Stralsund in Germany. This first navigation was under its own power and without any commercial cargo (an *empty run*). Similar to the *Systeme Helmholtz* case elaborated in the context of the mandatory exemption for commercial aviation, the AG takes the position that, as the fuel is not *directly* used for commercial navigation but only as part of a sales contract by the manufacturer of the ship, the mandatory exemption does not apply. Whether or not the *empty run* is to be considered as navigation for commercial purposes is not answered by the AG, as this is not necessary to decide in this case. Nonetheless, the AG refers to the positions of the European Commission, Poland and Lithuania, in order to conclude that the first journey to receive a cargo would also come under the notion of commercial navigation, even if that journey is not made directly for consideration.

*The costs of the journey are costs incurred by the shipping company which are allocated either the first or any further journey (for consideration). The spirit and purpose of the exemption under Article 14 of Directive 2003/96 is just as relevant in the case of a journey to the place of loading as in the case of a journey to the place of unloading (with the cargo). In both cases, the ship owner undoubtedly operates for the purposes of (commercial) navigation.*²²⁵

The recent ruling of the ECJ largely ignores the AG's view and rules opposite of the opinion by stating that the initial journey of the ship constituted the first necessary and indispensable step of a navigation for commercial purposes. Without this first journey, the service of transporting goods could not have been provided. Therefore the first voyage must

²²³ ECJ C-505/10, *Sea Fighter*, ECLI:EU:C:2011:725.

²²⁴ Case C-151/16, *Vakaru Baltijos laivų statykla*, ECLI:EU:C:2017:159.

²²⁵ AG Kokott in C-151/16, *Vakaru Baltijos laivų statykla*, ECLI:EU:C:2017:159.

be considered as a navigation activity used directly for the supply of services for consideration. Hence, the fuel used during this initial journey falls within the scope of Article 14(1)(c) ETD.

Navigation

What is considered 'navigation' has been subject of multiple ECJ cases.

In the *Jan De Nul* case²²⁶, the ECJ elaborated on the situation of a hopper dredger, carrying out its activities in Community waters (i.e. during its pumping and discharge of materials). First, the Court established that a hopper dredger disposes of a propulsion system that permits it to be autonomous in its movements, essentially allowing it to carry out services for consideration. Subsequently, the Court established that maneuvers carried out by a hopper dredger during its operations of pumping and discharge of materials come within the scope of 'navigation'. Hence, hopper dredgers benefit from the mandatory exemption laid down in Article 14(1)(c) ETD for its movements in Union waters while carrying out its activities.

The ECJ ruled in the *Sea Fighter* case, contrary to the opinion of the AG, that the mandatory exemption is limited to the energy products used for navigation purposes only²²⁷. The consumption of energy products which are not linked to a vessel's movement cannot benefit from the exemption laid down in this provision.

*E.g. if an excavator is affixed to a vessel, the fuels used to operate the excavator are in principle not covered by the exemption. In the *Sea Fighter* case, the excavator affixed to the vessel at issue was totally independent of the vessel's propulsion. In those circumstances, the consumption by the excavator cannot be considered to be inherent in the movement of the vessel to which the excavator is affixed.*

Ambiguity on the interpretation and application of the ECJ case law remains, with Member States issuing interpretative guidance on a national level. During the fieldwork, the administrations were asked about the national viewpoint on practical cases.

In your Member State, are all uses of vessels in Community waters other than the use for pleasure considered to be included in the use of vessels for purposes of navigation? (e.g., a vessel used to carry out burials on high seas?)

Belgium ²²⁸	Denmark	France	Germany	Poland	Portugal	Sweden
N/A	Yes	N/A	Yes	Yes	N/A	Not in all cases

A hopper dredger performs operations of pumping and discharge of materials. Are

²²⁶ ECJ C-391/05, *Jan De Nul NV*, ECLI:EU:C:2007:126.

²²⁷ ECJ C-505/10, *Sea Fighter*, ECLI:EU:C:2011:725.

²²⁸ The Belgian authorities indicate that they cannot apply the ECJ judgements, because of a practical impossibility.

maneuvers carried out during the performance of these activities considered as "navigation in Community waters", resulting in an exemption from energy taxation for fuel used during those activities?

Belgium	Denmark	France	Germany	Poland	Portugal	Sweden
N/A	Yes	N/A	Yes	Yes	N/A	Yes

Consider the same hopper dredger, permanently equipped with digging equipment. The digging equipment can be operated separately from the dredger and has a separate motor and fuel tank. Are the fuels used for the digging equipment exempt from energy taxation?

Belgium	Denmark	France	Germany	Poland	Portugal	Sweden
N/A	No	N/A	No	No	N/A	No

Consider the same hopper dredger, permanently equipped with digging equipment. The digging equipment can be operated separately from the dredger but makes use of the dredger's motor and fuel tank. Are the fuels used for the digging equipment exempt from energy taxation?

Belgium	Denmark	France	Germany	Poland	Portugal	Sweden
N/A	No	N/A	Yes	Yes	N/A	N/A

Consider energy products supplied as fuel for a ship to be used in navigation within the EU waters with the objective, not involving direct consideration, of sailing that ship under its own power from the place where it was built to a port in another Member State for the purpose of taking on its first commercial cargo. Are these energy products supplied as fuel exempt from energy taxation in your Member State?

Belgium	Denmark	France	Germany	Poland	Portugal	Sweden
N/A	N/A	N/A	Yes	Yes	N/A	N/A

Similar concerns regarding chartering arise compared to the elaboration on air navigation above. The ECJ established that the actual use by the charterer is decisive for the determination whether the exemption of Article 14(1)(b) ETD will apply²²⁹. In the *Feltgen & Bacino* case, the ECJ ruled in the same sense when it comes to navigation, even though this judgement relates to a case of VAT²³⁰. The Court stated that a vessel leased to persons using

²²⁹ See above; ECJ C-250/10, *Haltergemeinschaft*, ECLI:EU:C:2011:862.

²³⁰ ECJ C-116/10, *État du Grand-Duché de Luxembourg v. Pierre Feltgen and Bachino Charter Company SA*, ECLI:EU:C:2010:824. The economic activity referred to in the VAT Directive corresponds largely with the commercial use required by the ETD. Article 15(4) and (5) of the 6th VAT Directive read:

4. the supply of goods for the fuelling and provisioning of vessels;

that vessel exclusively for leisure purposes and not for financial gain, does not meet the conditions for the Article 15(5) of the 6th VAT Directive.

The term ‘including fishing’ is considered by the ECJ as a simple clarification concerning the purpose of the exemption laid down for commercial navigation²³¹. Reading paragraphs 27 and following of the ECJ *Deutsche See-Bestattungs-Genossenschaft* judgement, one cannot but conclude that also for fishing the requirement of a commercial purpose should be met. Such an interpretation might be difficult to fit with practice as most of the fishing is not provided as a service for consideration, but it is rather done as commercial activity on the own account of the boat owner. Also, the exemption only extends to the fuel used for the navigation, not for any of the on-board equipment. With regard to the concept of fishing, not a single Member State reports uncertainty or confusion about the interpretation. In practice, it seems that the entire fishing sector is exempt.

Community waters

A distinction is made between navigation in ‘Community waters’ and navigation in ‘inland waterways’. Whereas for the former the ETD foresees in a mandatory exemption, for the latter the exemption is only optional in accordance with Article 15(1)(f) ETD (except if considered a private pleasure craft).

- ‘Community waters’²³²: All the waters in which maritime navigation is normally practiced for commercial ends (concerns all sea-going vessels, including those which have the greatest capacity). Hence, to a certain extent, what would be commonly considered as ‘inland waterways’ is also covered by this term.

The ECJ recognized that it is common ground that vessels appropriate for navigation for commercial purposes on maritime waters can also pursue those purposes on certain internal waterways as far as certain sea ports, although they are not situated on the coast²³³. Excluding such navigation from the mandatory exemption would harm intra-Union trade since such an exclusion would risk diverting some of the sea traffic away from inland ports, placing operators at a disadvantage in relation to those operating in coastal ports.

The (broad) interpretation of ‘Community waters’ alone can ensure the equality of economic conditions between sea ports within the Union, irrespective of the

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships’ provisions;

5. the supply modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment – including fishing equipment – incorporated or used therein;

²³¹ ECJ C-389/02, *Deutsche See-Bestattungs-Genossenschaft EG*, ECLI:EU:C:2004:214.

²³² ECJ C-391/05, *Jan De Nul NV*, ECLI:EU:C:2007:126.

²³³ ECJ C-391/05, *Jan De Nul NV*, ECLI:EU:C:2007:126.

geographical position of each port in relation to the nearest coast from which the activities are carried on.

- ‘*Inland waterways*’: This is residual in meaning and restrictively interpreted. The interpretation of this exemption cannot be a conclusive factor in interpreting the extent of the obligatory exemption in Article 14(1)(c) ETD.

Mandatory exemption – scope and limitations

The substitution of guidance and jurisprudence on letters (b) and (c) of Article 14(1) ETD was elaborated above. In particular the German authorities are of the opinion that the findings in the case law cannot be substituted, as they concern different modes of transportation with different characteristics and different legal obligations linked thereto. Again, this does not affect the analogy in the wording between the provisions, however, and the fact that the underlying principles could still be the same.

The application of this mandatory exemption is considered essential, but very problematic by a respondent German enterprise in the bunkering sector.

The issue arises when loading the fuels: does the ETD and the suspension regime apply, or is this considered as export? There is currently no harmonized approach between the Member States (e.g. different approaches in Germany, France, and Poland)²³⁴.

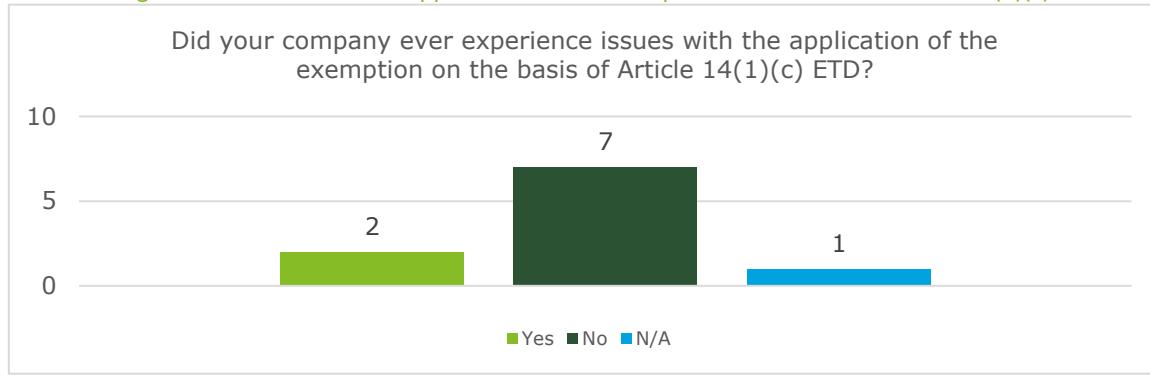
The mandatory exemption laid down in Article 14(1)(c) ETD can be:

- limited in scope to international and intra-Union transport;
- waived by a Member State if there is a bilateral agreement with another Member State in place.

²³⁴ The European Commission recently brought an action before the ECJ against Greece on the supply of motor fuels at filling stations held at border posts, whereby fuels are made available without excise duty being charged. According to the Commission, this constitutes an infringement of the Horizontal Excise Directive – in particular Article 7(1) – as the supply of vehicles with fuel at those filling stations would constitute a release for consumption; C-590/16, *European Commission v. Hellenic Republic*,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=187253&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=643558> (Accessed: [12/01/2018]).

Figure 46 - Issues with the application of the exemption on the basis of Article 14(1)(c)



Source: Survey to Economic Operators

The issues reported by the economic operators relate to the interpretation of the concept of community waters and the difference with inland waterways / non-community waters.

Finally, it should be noted that Council Directive 95/60/EC²³⁵ (the **Euromarker Directive**) laid down the common framework on the marking of fuels (gas oils and kerosene) subject to no or a lower tax rate. The common fiscal marker was established through Commission Implementing Decision 2011/544/EU²³⁶. Despite the existence of a common framework, problems in practice remain when it comes to intra-EU traffic, which is mainly caused by the inextricable link with the ETD. Differences in conception of the taxability of gas oils / kerosene by the Member States could cause incoherence regarding the fiscal marking.

E.g. if considered non-taxable gas oil in Member State A, the fuel will be marked under supervision of the authorities prior to release for consumption. If that fuel, used for the same purpose, would be considered in Member State B, any intra-EU traffic to Member State B could lead to additional burden and / or legal uncertainty. When refuelling takes place, what happens with the remainder of the marked fuel in the tank? The same issue may arise in the context of the voluntary exemptions / reductions on the basis of Article 15.

Conclusion

- In allowing economic operators the benefit of the exemptions in Article 14 ETD, Member States may impose conditions for reasons of avoiding tax evasion / fraud. These conditions are perceived as proportionate by both the economic operators and the Member States;
- The different subparagraphs of Article 14(1) ETD lack clarity, as demonstrated by the past and pending ECJ cases. Both the Member States and the economic operators report practical issues regarding the application of the exemptions;

²³⁵ Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene, OJ. L. 291/46; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0060:en:HTML> (Accessed: [12/01/2018]).

²³⁶ Commission Implementing Decision 2011/544/EU of 16 September 2011 on establishing a common fiscal marker for gas oils and kerosene, OJ. L. 241/31; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.241.01.0031.01.ENG (Accessed: [12/01/2018]).

- The exemption of energy products and electricity used to produce electricity has primarily been subject to discussion in the context of combined heat and power generation, and the relation with the optional exemptions foreseen in Article 15(1) ETD in this regard;
- On the basis of the text of Articles 14(1)(b) and 14(1)(c) and the ECJ case law in this regard, the following can be concluded:
 - the concepts of ‘private pleasure-flying’ and ‘private pleasure craft’ are subject to ongoing discussions on a national and EU level, as the wording in itself is ambiguous (diverting from the common understanding of ‘private’, covering all non-commercial use);
 - also the concepts of ‘navigation’, ‘community waters’, and ‘fishing’ have led to disputes before the ECJ, with particularly for the latter term still remaining open questions (e.g. what is fishing? could fishing equipment somehow benefit from any exemption? could fishing be covered by an exemption for agricultural purposes? ...);
 - in order to qualify as use for commercial purposes, the activities should be carried out directly for the supply for a service for consideration;
 - only the fuel used for navigation purposes are covered, not for e.g. on-board equipment (even though practical issues may arise in the case of a single fuel tank, if the optional exemption of 15(1)(k) ETD is not implemented);
 - the first journey of a ship to a port in order to load its first shipment is considered to be a first necessary and indispensable step of a navigation for commercial purposes, reason for which this trip will qualify as a navigation activity used directly for the supply of services for consideration;
 - however, the case law seems to suggest that the fuel used for maintenance and training trips, cannot benefit from the mandatory exemption;
 - for chartering, the use of the plane / vessel by the charterer is to be assessed in order to consider whether the exemption could be claimed.

The case law did provide for some clarifications, but (1) Member States do not adhere to this jurisprudence in a uniform manner – both because of different interpretations of the rulings and because of a claimed ‘inapplicability’ – and (2) practical questions remain (e.g. on the treatment of leftover fuel in cases of commercial and non-commercial use).

- Despite the analogy in the wording of paragraph (b) and (c) of Article 14(1) ETD, not all Member States apply the case law in the context of the one paragraph to situations relating to the other. From the purpose and wording of both provisions, however, it should be concluded that both paragraphs embody the same underlying principles;
- The practical applicability of some of the exemptions should be questioned. The mandatory exemptions are limited to very specific cases only, whereas Article 15 ETD provides for discretion for the Member States to decide which exemptions /

reductions are granted. The delineation of the exemptions laid down in both Articles is not always straightforward in practice, however, forcing the Member States to implement an optional exemption (e.g. navigation in inland waterways vs. navigation in Community waters; e.g. for propulsion and dredging equipment fueled by the same tank).

B.15 Article 15

Context

Article 15 determines that Member States may apply, under fiscal control, total or partial exemptions or reductions of excise taxation on energy products and electricity mentioned in paragraph 1(a) until (i) when used for specific objectives as explained in those provisions.

In its 1997 proposal for a new Council Directive restructuring the community framework for the taxation of energy products²³⁷, the Commission gave an explanation into the proposed provision to provide the Member States with a number of facultative exemptions/reductions. The optional measures of the European Commission aimed at making it possible for the Member States to pursue a more ambitious environmental policy. The Commission wanted to promote the environmental objectives of the Energy Council and the Climate Change framework treaty of the UN in which it took part.

In the proposal, the Commission allows Member States to grant reduced tariffs or exemptions on certain energy products or usages of energy products that are environmentally friendly such as biofuels, renewable energy sources, railway transport, inland navigation and cogeneration.

For Member States whose natural gas markets were still in the development phase, the Commission proposed to grant exemptions or reductions on the taxation levels for a period up to ten years after the entry into force of the Directive.

All these proposals of the Commission in which it promoted the development and diversification of alternative energy sources have been included in the ETD. Member States who choose to exempt or reduce the applicable rates on one of these grounds are required to apply some sort of fiscal control to prevent fraud.

Analysis

Out of 24 Member States who responded to the Member State web survey, 19 Member States completely filled out the questions on Article 15 ETD. Belgium and Hungary concluded overall that the different grounds for exemption or reduction of taxation on

²³⁷ Proposal for a Council Directive restructuring the Community framework for the taxation of energy products, COM(97) 30, 12 March 1997; <http://aei.pitt.edu/3522/1/3522.pdf>.

electricity under Article 15(1) ETD cause problems because of the lack or inaccuracy of definitions for the renewable resources.

Fiscal control

In Denmark, the fiscal control, which is obliged in order to apply the exemptions/ reductions under Article 15 ETD, is carried out through a return, to be filed by the taxpayer who wants to benefit from an exemption / reduction. In certain situations, claiming the reduction / exemption is possible through the VAT return (implying a necessary VAT registration). For other situations, the energy taxation is dealt with outside the VAT system. Regardless the VAT system, there is always a necessity to register or to apply on beforehand, prior to claiming the beneficial regime. The tax authorities always have access to the knowledge about the consumption (also allowing for controls in practice).

Regarding the fiscal control of French excise duties (CIT), the control in France is managed by customs authorities. It takes place a priori during the delivery of certificates and authorizations and a posteriori during check and reimbursement procedures. Every year, internal administrative guidelines define the declaration data checking policy based on a national and regional risk analysis. The effectiveness of this policy is also measured at term renewal.

Fiscal control in Poland focuses on the monitoring of meeting the conditions for application of exemptions: registration of entities, record keeping requirements etc. Other tools for fiscal control are reviews and audits.

Fiscal control in Sweden is organized through a warehouse keeper authorization, authorized trader system, reimbursement system to non-registered persons. Audits are carried out in order to make sure the legal requirements are met.

Fiscal control in Italy is organized with the Customs Authorities territorial office and, apart from the general controls (like EMCS) with the acquisition of the data by subjects using products which can benefit from an exemption or a reduced tax rate.

Member States seem to have adequate controls and checks in place, different in form, but which should ensure that the exemptions or reductions are applied in the right way and that fraud is prevented.

Scope of products

The applicable exemptions/reductions in Denmark under Article 15 ETD concern all taxable products in the scope of the ETD and are not limited to energy products/electricity.

The exemptions in France apply without distinction to all taxable products in the scope of the ETD. French authorities consider that none of the existing exemptions should be abolished.

In Poland the exemptions apply only to a limited number of specific products - they are not applied to all energy products under the ETD. They do not consider it necessary to abolish any of the exemptions.

All taxable products in scope of the ETD can be exempted under the provisions according to Sweden.

The scope of the Article is not properly defined at EU level and can have different interpretations in different Member States. The reference to only “energy products and electricity” in some of the subprovisions could be interpreted as not including any other products taxable under the ETD. However a majority of Member States apply the provision to all taxable products as was established in the analysis of Article 1.

The difference in approach between the Member States when it comes to the concepts of energy products, taxable products, and products results in (i) discrepancies in the interpretation of the ETD on a national level and (ii) inconsistencies in application of the legal framework on energy taxation across the Member States.

As was also explained in the analysis of Article 1 ETD, the ECJ rendered a judgement in the case *Kraftwerk Lippe-Ems*²³⁸, where the Court upheld a different, less pragmatic interpretation than some of the Member States do and adhered to strictly applying the text of the Directive. The question arose whether nuclear fuels used to produce electricity should be exempt from taxation on the basis of Article 14(1)(a) ETD, which foresees a mandatory exemption from taxation for energy products and electricity used for the production of electricity. The ECJ *only* assessed whether nuclear fuels are caught by the concept of ‘energy products’ as laid down in Article 2(1) ETD. It did not go as far as to assess whether the nuclear fuels fall within or outside the scope of the ETD (Article 2(3) and 2(4) ETD), as only ‘energy products’ are mentioned in the text of Article 14(1) ETD (and in the sub provisions of Article 15 (ETD) .

This divergence between the ECJ point of view and the actual application of the ETD by Member States with regard to the scope has a negative impact on the effectiveness of the single market since in some Member States more products will be exempt or have reduced rates than in other Member States.

Consider also the fact that Article 33 of Directive 2008/118/EC, which covers the holding of excise goods in another Member State and the issue of double taxation, refers to excise goods and since only energy products which are intended for fuel use are excise goods²³⁹ a number of fuels are not covered by this provision.

The ETD aims to eliminate distortions in the single market, for example by not subjecting energy products which have been released to consumption in one Member State for commercial purposes in a standard tank, to taxation in any other Member State (Article 24 ETD). However, at the same time the ETD continues to create distortions due to its inconsistent wording of energy products vs taxable products (for example but not only under Article 15 ETD) resulting in differentiated taxation and exemption regimes.

²³⁸ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

²³⁹ See ECJ judgments in Cases *Kernkrafwerke Lippe-Ems*; ECJ C-145/06, *Fendt Italiana Srl*, ECLI:EU:C:2007:411.

Article 15(1)(a)

Member States have the option to apply an exemption or reduction to the level of taxation, under fiscal control, for pilot projects engaging in the technological development of more environmentally friendly products or regarding fuels from renewable resources.

Case law

This exemption/reduction was met with confusion by Member States. It was uncertain to what it actually referred.

The General Court of the European Community interpreted the scope of this optional exemption very restrictive in its judgment of the case BP Chemicals Ltd/ Commission²⁴⁰. In its judgment, the Court referred to Article 8(2) of Directive 92/81/EEC which expressly required that the exemption from excise taxation for pilot projects on the development of environmentally friendly products specifically needs to relate to the technological development aspect of these products.

Member State implementation

In accordance with settled case law, exceptions to fundamental community principles such as the functioning of the internal market need to be interpreted restrictively²⁴¹.

In our web survey, six Member States indicated that they apply an exemption or reduced rate for pilot projects for the technological development of more environmentally friendly products or in relation to fuels from renewable resources:

- Belgium
- Czech Republic
- Luxemburg
- Austria
- Republic of Slovakia
- Spain

The Belgian authorities added that the lack of a clear definition for pilot project resulted in some uncertainty and that decisions on the application of the exemption/ reduced rate are made on a case-by-case basis.

The Hungarian authorities concurred that the lack of accurate definitions for a pilot project posed a problem in their Member State. Hungary does not make use of the optional exemption.

²⁴⁰ ECJ T-184/97, *BP Chemicals/ Commission*, ECLI:EU:T:2000:217.

²⁴¹ ECJ 2/62 and 2/63, *Commission/Luxemburg & Belgium*, ECLI:EU:C:1962:45; ECJ T-571/93, *Lefebvre a.o./Commission*, ECLI:EU:T:1995:163.

Though Denmark considered to apply this exemption/reduction, it was never implemented because of budgetary constraints.

Article 15(1)(a) is not implemented in France and the normal taxation rate is applied to products “environmentally-friendly”. However it was underlined by the French authorities that the notion of “environmentally friendly” is interesting and would be worth considering. No definition for environmentally-friendly exists because the provision is not implemented in France.

France tries to cooperate with other Member States on environmental policies but mentioned that it is not always easy to obtain information from them.

Sweden applied Article 15(1)(a) ETD in the beginning, when biofuels were not that ‘big’ in Sweden. After an ECJ court case on chemicals, in which it was established that this provision only relates to pilot projects and not something that is marketed, the national provisions were abolished. Under the mineral oils Directive, this EU provision was the sole possibility to foresee in tax benefits for biofuels.

Today, Sweden has the sustainability criteria on the basis of other Directives. This provision does not have much of a role anymore, as it was moved from the 1992 Directive into the ETD. Now that there is Article 16 ETD and other EU legislation covering environmentally friendliness, the need for this provision may be gone.

Italy and Poland do not apply the exemption and indicated that no fiscal definition exists for “environmentally-friendly” nor does it for “pilot projects”.

Only one respondent to the web survey for economic operators indicated that they benefitted from this exemption or reduced rate for the consumption of energy products and/or electricity and they had no further comments. This response does however imply that France also applies this optional exemption whereas the French authorities did not respond to this question in the Member State survey.

No reference in Article 15(1)(a) ETD is made to the Renewable Energy Directive (2009/28/EC) which establishes the EU policy for the promotion and production of energy from renewable resources. The resources mentioned in this Directive also serve as a basis for environmentally friendly energy production, however the two Directives seem to be applied in parallel to each other without further alignment. On the other hand the broad wording used in the ETD can in theory allow Member States to extend tax exemptions or reductions to the production of renewable liquid and gaseous transport fuels of non-biological origin²⁴².

Conclusion

- The lack of an accurate definition of environmentally friendly products can create some uncertainties for Member States

²⁴² See the Fuel Quality Directive for the definition of such fuels.

- The existence of Article 16 in the ETD and other EU legislation covering environmentally friendly concepts has decreased the need for this optional exemption/reduction
- The provision is unclear, possibly outdated and not consistent with EU environmental policies as demonstrated by the lack of a link between environmentally-friendly products in this provision and the Renewable Energy Directive or the Fuel Quality Directive.

Article 15(1)(b)

On the basis of this Article Member States can apply, under fiscal control, exemptions or reductions to the level of excise taxation of electricity resulting from several renewable resources as listed here below:

- Solar, wind, tidal or geothermal origin
- Hydraulic origin produced in hydroelectric installations
- Biomass or from products produced from biomass
- Methane emitted by abandoned coalmines
- Fuel cell generation

Article 15 does not provide a definition for the term “biomass”, however Article 16(1) ETD does:

“Biomass shall mean the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry, and related industries, as well as the biodegradable fraction of industrial and municipal waste.”

Except for the introduction of exemptions or reductions to the taxation level of the electricity in the cases specified in Article 15(1)(b) ETD, Member States can also refund the producer in whole or in part the tax paid by the consumer on electricity produced in accordance with Article 15(2) ETD.

Some recitals in the preamble of the ETD portray a better understanding of this provision²⁴³.

Member States should be able to lay down certain exemptions or reductions on excise taxation within their territory if they do not harm the proper functioning of the internal market or lead to distortion of competition.

Energy generated from renewable resources should be considered for preferential treatment taking into account the objective to promote alternative energy resources.

²⁴³ Consideration 24 and 25 in the preamble of the Energy Taxation Directive.

Member State implementation

13 Member States responded to the survey that they apply at least one or more exemption or reductions under Article 15(1)(b) ETD.

- Belgium (*infra*), the Czech Republic, Germany and Poland (*infra*) apply an exemption or reduction to taxation on the generation of electricity based on all grounds in paragraph 1.
- The Republic of Slovakia applies exemptions or reductions to electricity generation on the grounds of solar, wind, tidal wave, geothermal origin; hydraulic origin and biomass.
- Hungary, Lithuania and the Republic of Croatia apply the exemption or reduction based on solar, wind, tidal wave or geothermal origin and biomass.
- Finally, Malta and Austria apply an exemption or reduction based on the biomass provision.
- Denmark applies a number of the exemption/reduction grounds (*infra*)
- France applies a number of exemption/ reduction grounds (*infra*)

16 economic operators, of which nine Italian indicated that they benefitted from an exemption or reduced rate on electricity made of the renewable sources under Article 15(1)(b) ETD. One concern in Italy was that the local distributors often do not automatically recognize the exemption rate.

Another (French) economic operator pointed out that the technological development of waste-to-energy power plants requires an update of the provision to have this renewable source included in the provision.

Almost every one of these respondents answered “no” to the questions as to whether the granting procedure for this exemption/reduction leads to considerable administrative burdens.

Distortion of competition

At first sight Member States claim not to encounter difficulties from a competition point of view with regard to electricity originating from renewable resources falling outside the scope of Article 15(1)(b) ETD. As indicated, most of them apply the exemption/reduction based only on some of the grounds in the provision.

The Swedish government does not really encounter difficulties finding out where the electricity is from. However, from a competition perspective, Sweden has chosen to go for all possibilities from the ETD. The problem mainly relates to the fact that there is the possibility to limit the scope of the reductions when implementing Article 15(1)(b) ETD. Sweden has indeed limited the scope (cf. discussion above, only applied to solar installations with a limited capacity expressed in kWh). Sweden considers that it has set the limits to rely on the exemption / reduction at such a low level that this does not burden competition for the ‘real’ producers.

It would have been a possibility to take a part of this provision and include it in Article 14 ETD, making it a mandatory exemption for small installations. This would avoid any State aid problems for the Member States. All Member States are exempting renewable electricity, however, at different levels and with different kinds of origin. A mandatory exemption would make sense where all Member States agree it should not be taxed. Conclusion on section (b): a two-step approach would be desirable. Have a mandatory exemption for small installations (and provide for a definition) and have the possibility to exempt larger installations. This would tackle the State aid issue.

Application

The reduction / exemption possibility is only used in Denmark when the producer and the consumer are the same, production being for their own use. After all, when the power is on the collective grid, the output will be taxed the same (regardless the origin).

The exemption is typically used for electricity from wind and solar origin. For electricity produced from solar panels, there is only an exemption for private individuals / businesses producing electricity for their own consumption. The electricity can be supplied to the grid and taken off within the same hour in order to still be entitled to this exemption. During a short time, the grid can be used as a storage place.

No reduction / exemption is foreseen for electricity generated from methane emitted by abandoned coalmines.

When it comes to evaluating whether all these renewable sources are environmentally-friendly Denmark limits itself to saying that this is a political question and that not everyone agrees on what can be considered environmentally-friendly.

In France there are no differentiated rates for fossil and renewable origins but this could change depending on the evolution of the energy transition policy.

It could be envisaged to introduce differentiated taxation in the long term, while a complete exemption is unlikely. The most significant concern arising for the French authorities from controls and in particular the basis of these controls is how to control? Shall a certificate be set up? Granting fiscal advantages for renewable source which cannot be checked is particularly problematic for network energy products (e.g. biomethane injected in gas networks) if it is not possible to distinguish between the renewable and non-renewable parts. On this matter, it could be envisaged to deliver certificates in a harmonised EU framework despite the different positions between Member States derived from political choices on the one hand and technical processes on the other hand. French authorities insist that technical provisions should be as precise as possible and more clarified by the European Commission.

In Poland the scope of the exemption regulated in Article 15(1)(b) is quite broad. For the definition of renewable source Poland, refers to the environmental law regulations. The Ministry of Finance has not received any signals that a new technology was invented in Poland that would be a renewable source of energy not covered yet by the Article 15(1)(b) ETD.

It could be problematic to define which renewable sources should not be treated as environmentally friendly. Regulating this issue solely in tax regulations could be problematic. Therefore Poland is also not in favour or a common EU definition of “environmentally-friendly”, at least not in tax regulations. If we would go towards a common definition, put it in other provisions.

Electricity generated from methane emitted by abandoned coal mines is not exempt in Sweden. This is the result of an explicit request from the UK and Poland. Sweden does not support this provision in the ETD, as it could be considered harmful for the environment.

Regarding electricity generated from fuel cells, issues may arise when it comes to hydrogen cars. When the hydrogen is used to power the motor of the car directly, the hydrogen will be taxed. When the hydrogen is used to produce electricity making use of a fuel cell, and subsequently the electricity propels the car, this will be exempt.

Regarding the effect of renewable energy on the surroundings (e.g. windmill has an effect on the bird life), a prior authorization is necessary analysing the potential effect. This should not be regulated through the ETD, there are different solutions available. This issue does not relate to energy taxation but to other policy domains. Not everything can and should be taking care of through the ETD. Nonetheless, the interplay between Directives is necessary to consider when analysing and potentially revising a Directive.

The Italian authorities suggest to have a new general environmental review of all renewable resources in light of environmental policy since not all renewable resources necessarily impact the environment in a more positive way.

Conclusion

- The fact that the exemption/reduction to certain renewable sources is an option and the possibility for Member States to choose only certain of the underlying grounds triggers questions about possible market distortions between Member States. From a competition and an environmental point of view it would be a logical step to make the exemptions mandatory
- Often in the Member States, the exemption is only applicable in case it is for the producer's own use or only for certain categories which make use of the renewable resource (e.g. electricity produced from solar power only exempt for installations with a limited capacity in Sweden instead of for all electricity produced from solar power). It is unclear what is meant with “partial exemptions” under Article 15(1)(b) ETD. Is it a synonym for reduction instead of exemption or can it be seen as an exemption for certain categories only (e.g. for own use only)? The environmental goals of the ETD are insufficiently pursued with this provision if the exemption can be applied to certain categories and not to others. The partial exemption or reduction also represents a differentiation on top of a differentiation and raises more pressing concerns with regard to market distortion. More likely a partial exemption is an exemption of taxation on a limited amount of electricity production

or consumption. Once that amount has been surpassed, the taxation becomes applicable. In that case, there are a number of Member States who do seem to abuse the provision by differentiating between categories and based on criteria that are not in Article 5 of the ETD, instead of applying the exemption on all electricity produced out of these renewable sources.

- The fact that some renewable resources are included in the optional exemption/reduction and others are not, may pose State aid issues. E.g. renewable methanol of non-biological origin, used as motor fuel.
- Both Member States and economic operators do voice the possibility to add types of renewable electricity they can exempt
- The provision triggers some administrative burdens for Member States to perform the proper controls to make sure the produced energy is effectively the result of renewable sources in Article 15(1)(b) ETD. Especially for network energy products it is extremely difficult to distinguish what part of the energy is produced from renewable sources and what part from non-renewable sources (e.g. biomethane injected in gas networks).
- It is important to respect the coherence between the ETD and other Directives with environmental policy goals. Like under Article 15(1)(a) ETD, no link is made with the Renewable Energy Directive or the Fuel Quality Directive on renewables of non-bio origin. The ETD on the one hand and the other aforementioned Directives on the other hand do for a large part but not completely cover the same renewable sources.
- The environmental argument can be extended also to the use of biomass if it is the result of industries that are harmful to their surroundings. The use of alternative energy resources instead of traditional energy resources which emit unhealthy amounts of carbon dioxide fails its purpose if in some other part of the chain the same consequences occur.

Article 15(1)(c)

Article 15(1) c allows Member States to apply, under fiscal control, exemptions or reductions to the taxation level on energy products and electricity used for combined heat and power generation.

Recitals 24 and 25 in the preamble to the Energy Tax Directive, promoting the use of alternative energy resources, as brought up under Article 15(1) b also apply to energy and electricity used for cogeneration.

Case law

The French Conseil d'Etat issued a request for preliminary ruling to the Court of Justice earlier this year asking whether the energy products used for combined heat and power generation can only be exempt under Article 15(1)(c) or also, to the extent that these

products equal the production of electricity, fall under the obligatory tax exemption under Article 14(1)(a)?²⁴⁴ (*infra*)

Member State implementation

14 Member States responded to the web survey that the optional exemption or reduction on taxation of energy products and electricity used for combined heat and power generation is applicable in their Member State.

A majority of Member State respondents to the survey is opposed to the idea of limiting this optional exemption to only the use of environmentally friendly energy products.

A small number of respondents (8) to the economic operator web survey indicated that they benefitted from this exemption, but provided no further insights.

Germany and Belgium apply the optional exemption on energy products (natural gas, heating oil, fuel oil, all typical products) used for cogeneration and power generation.

The particularity about the German exemption regime for energy products used for cogeneration is that the refund depends on the size of the facilities in the company (more than 2MW). In Belgium there are no further conditions to the exemption.

German economic operators pointed out that the processes can be quite bureaucratic and that varying legal interpretations between German customs offices can result in different application.

The Swedish implementation of this Article needs to be clarified.

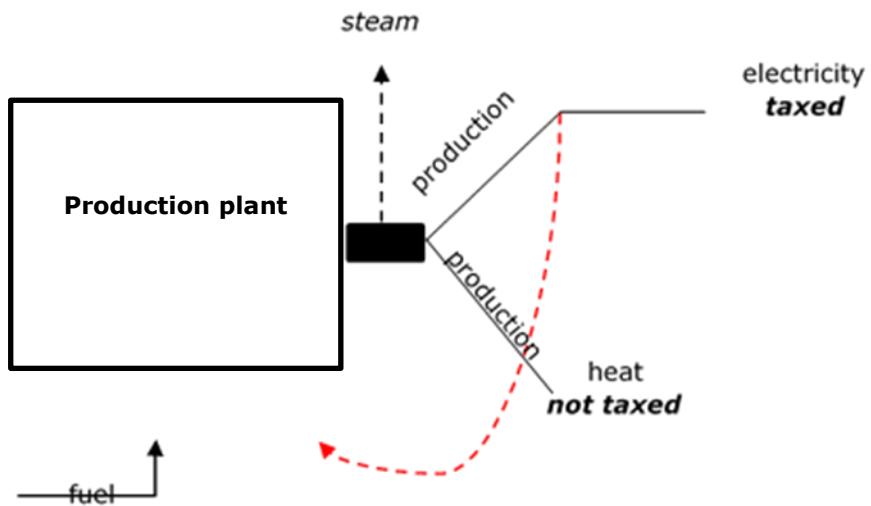
In Sweden, the input fuels are to be allocated for three purposes:

- the fuel allocated to power production (electricity) is fully exempt, as the output (electricity) will be taxed;
- the fuel allocated to heat production is taxed (but subject to different reductions, also depending on whether the plant is within or outside of the Emission Trading system), as the output (heat) will not be taxed;
- the fuel used to produce electricity, which is used to run the CHP plant, is fully taxed in Sweden.

This system involves a difficult calculation of the amount of output electricity used to power the plant and to produce taxable output electricity (the case in which the input fuel will not be taxed) and non-taxable output heat (the case in which the input fuel will be taxed). In the Swedish legislation, only the fuel used for the production of taxable electricity will be exempt (cf. Article 14 ETD). The calculation of the part of the electricity used to power the CHP plant to be allocated to the production of electricity and to the production of heat has been subject of several court cases, which have set out the leading principles.

Figure 47 - Calculation of tax base for cogeneration in Sweden

²⁴⁴ ECJ C-31/17, *Sucrerie de Toury SA v. Ministre de l'économie et des finances*, OJ. C. 112, 10 April 2017, p. 21–21.



Source: in-depth interview with Economic Operators

As regards fuels used for simultaneous production of heat and taxable electric power in one and the same process, when the generated heat is utilized, the allocation of the fuel consumed for the production of heat, taxable electric power and tax exempt electrical power, shall be proportional to respective energy production. If several fuels are consumed, the proportioning shall be calculated to each fuel separately. This is clearly stated in the Swedish Act on Energy Tax (1994:1776), 6a chapter 3§.

This means that if the output energy consists of 80 % heat, 19 % taxable electricity and 1 % tax exempt electricity, the fuels shall be allocated with the same percentages.

However, as regards the allocation of the electric power used for production of heat and electricity in the CHP, the application of the rules is much more liberal. The Swedish Tax Agency has stated that since there are no specific method of allocation pointed out in the legislation, the taxpayers are free to apply any given method. This may be e.g. 1) a flat-rate calculation, 2) proportioning in the same way as the fuels, or 3) a method calculating what extra consumption of electricity you need in order to utilize and distribute the heat compared to if you only produced electricity without utilizing the heat.²⁴⁵

In Italy, there is the same excise duties treatment for all the cogeneration plants/heat and power generation plant. Furthermore, as for the consumption occurred in said plant, there is a different taxation/exemption treatment on the quantity which are "deemed" destined to the production of heat and those which - on the contrary - are deemed to be destined to the productions of electricity.

One interviewed operator in Italy benefits from an exemption for the quantity of "vegetable oil not modified chemically" which is deemed to be destined to the production of electricity.

Vegetable oil not modified chemically

²⁴⁵ <https://www4.skatteverket.se/rattsligvagledning/324540.html?date=2011-05-12> (Accessed: [12/01/2018]).

If the company is a registered consignee, at the time of the import of oil, the excise duties are suspended, being the oil dispatched to the premise of the registered consignee and by furnishing a proper guarantee. Within 24 hours from the arrival, the company pays the relevant excise duties applying a forfait criteria. In particular the forfait criteria is applied for distinguishing the quantity of the oil destined to the production of heating (then used during the production of the sugar) from the residual part for the production of the electricity. For this purpose, the Italian customs require the application of a forfait parametre/coefficient provided by the law for another kind of oil (i.e. heavy fuel oil with an high content of sulphur, so called ATZ oil). Once computed the quantity of the oil destined for the production of the heating, it is assumed that the residual part is destined to the production of electricity, for which there is a specific excise duties exemption.

Gas and electricity

As for the gas and the electricity, the subject liable to pay the excise duties is the supplier. The supplier computes the excise duties on the basis of quantity arising from the meters and on the declarations received by the customers (e.g. as for gas, the company has declared to the supplier that it is consumed for industrial use).

It could be advisable to introduce a specific forfait coefficient for the "vegetable oil non modified chemically", rather than using the same provided by the law for the high sulfur oil in order to better estimate the quantity of oils to be subject to taxation and the one which can benefit from the exemption.

Poland also applies the exemption on excise duties for energy products and electricity for combined heat and power generation.

Polish economic operators brought up the remark that the scope of this exemption and the understanding of the term "heating purpose" are very unclear in the ETD.

According to Polish companies, several doubts result from the fact that there are two separate and different exemptions: (i) for the process of electricity production under Article 14(1)(a) and (ii) for the process of combined heat and power generation under this provision. The companies believes that such distinction causes uncertainty whether given energy consumption is related to the independent process of electricity production or to the combined heat and power generation. To them it is not clear if the combined heat and power generation should be understood as every process of combined heat and power production or only high-efficiency cogeneration process.

Because of the above, one of the interviewed company only applies the exemption provided for the consumption of electricity in the process of electricity production and for the electricity used for the purpose of maintaining of such production processes. In the light of the above, it is very unclear what should be the proper understanding of the term „production process”, especially for the purposes of determination when the process starts and ends.

There is also an unclear distinction in the scope of application of said exemptions implemented on the grounds of the Polish excise duty regulations. The Polish Excise Duty Act states that, in the event of the process of electricity production, the exemption covers both consumption of electricity in the process of electricity production, as well as the consumption of electricity for the purposes of maintaining such production processes. Nevertheless, in the event of the exemption provided for combined heat and power generation, the Excise Duty Act provides that this exemption covers only the main production process (the energy used for maintaining processes is out of scope of exemption). The interviewed companies stated that the abovementioned distinction is totally unclear, and, in addition, it makes application of such exemption more complicated. As a result, there is no need to provide any difference between the independent electricity production process and the process of the combined heat and power generation.

Polish companies consider this exemption very relevant and justified for their competitiveness on the EU market, but that more clarity on the definitions and distinction with the other exemption may lead to better application of the exemption. Portugal also applies the exemption.

Conclusion

- A majority of Member State respondents are opposed to the idea of limiting this optional exemption to only the use of environmentally energy products
- Energy products used for the electricity part of the cogeneration should already be mandatory exempt under Article 14(1)(a) (overlap)
- The optional exemption/ reduction applies to the input that goes to the heat production, but many Member States do not make the difference and provide it to all production (heat and electricity). The material scope of the Article and the distinction with Article 14(1)(a) are unclear.

Article 15(1)(d)

On the basis of this provision Member States may apply, under fiscal control, an exemption or reduction to the level of excise taxation on electricity produced from combined heat and power generation.

The condition to apply this exemption or reduction states that the cogeneration installations used to produce the electricity are environmentally friendly. Member States may impose their own national definitions of what is considered environmentally friendly to make a decision whether the exemption/ reduction can be granted.

Member State implementation

In Member States, the exemption/ reduction is either linked to a definition of environmentally friendly or high efficiency.

5 answers:

- Belgium – environmentally friendly
- Austria and Slovakia – high efficiency
- Luxemburg – both

Among respondents there appears to be no confusion or uncertainty concerning the definition of these two terms. Four Member States answered no to that question.

In Denmark this arrangement is foreseen for electric devices generating heat and power. The heat will be cheaper than if produced by fossil fuels. There is no exact definition of what should be considered as environmentally-friendly. Danish legislation prescribes a reduction under this provision. Fuels for power are free of tax, whereas fuels for heat are taxed. In Germany, all fuels are considered to be used for the generation of power (as long as the definition of high-efficiency is met). In Denmark, a lower rate is only foreseen for the very high-efficiency cogeneration.

Both environmentally-friendly and high-efficiency cogeneration are covered. The reduction is not linked to any strict definition of these concepts, however.

Denmark is open for the heavier taxation of fuels used for the production of electricity in opposition of cogeneration.

The way Germany is using the exemption electricity produced from cogeneration is very beneficial for the German industry. The condition for the applicability of the exemption is that the combined generators are environmentally-friendly. Cogeneration is generally positive for the environment, but the environmental benefit does not necessarily have an impact to the extent that everything should be exempted. The high-efficiency definition laid down in the Directive is not meeting the current standards. This definition is used to exempt too much.

France considers that a common EU definition should take country-specific features into account.

In France, this concept refers both to the sustainability of energy products origins and to emissions. The latter are taxed through the general tax on polluting activities (TGAP, taxe générale sur les activités polluantes).

Taxation rates are meant to encourage the use of more environmentally-friendly products, e.g. with fuels for which the current French government has chosen to bring petrol and diesel fuel taxation to similar levels in the past two finance laws should encourage the use of green fuel.

France has not developed a national definition because it waits for an EU framework. It was pointed out that a common EU definition of ‘environmentally-friendly’ would make it more difficult to differentiate cogeneration according to its origin (fuel or gas). France would like an EU definition; in particular for the term “high efficiency”.

Portugal does not have a specific definition for 15(d) “environmental friendly” but it does apply the exemption on taxation of electricity produced from combined heat and power generation although it is not transposed into the Portuguese legislation

At the EU level, Directive 2012/27/EU on energy efficiency lays down a definition for high-efficiency cogeneration in Article 2(34) and annex II. This annex lays down the criteria for determining the efficiency of the cogeneration process. For the purpose of this Directive high-efficiency cogeneration shall fulfil the following criteria:

- Cogeneration production from cogeneration units shall provide primary energy savings of at least 10 % compared with the references for separate production of heat and electricity
- Production from small-scale and micro-cogeneration units providing primary energy savings may qualify as high-efficiency cogeneration.

No link currently exists between the ETD and this Directive on energy-efficiency.

Conclusion

- Different interpretation and use of definitions in Member States. Some Member States have no definition and some have both. There is a need for more harmonization (a framework) but with country-specific features.
- The lack of a definition for environmentally-friendly or high-efficiency cogeneration in the ETD results in uncertainty among Member States and different implementations which in return can result in distortion of competition and flaws in the internal market. A definition actually exists at the EU level in Directive 2012/27/EU on energy efficiency, but no link is made to the ETD. Making reference to this definition would be in line with the objective of the EU to bring more alignment between its policies.

Article 15(1)(e)

Member State implementation

Member States may apply, under fiscal control, an exemption or reduction to the level of excise taxation on energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus. Issues may arise with the use of conveyor belts and rail trolleys, although a strict interpretation of the provision would clearly leave these out of the scope of this provision.

Most Member States responding to the web survey indicated that there is no need to extend the list. However, Luxembourg and Poland came with the suggestion to add funicular, a type of cable railway, and buses to the scope. These suggestions demonstrate that discrepancies between Member states persist. Sweden also proposed to exempt or reduce the taxation on electricity used in buses, but under the condition that it can be controlled. The fact that trolley buses fall in the scope, but electric buses do not seems the consequence of an outdated provision which does not sufficiently take into account the new technologies.

Conclusion

New technologies have brought to life other forms of environmentally-friendly carriage for goods and passengers which are not yet included in the current provision. Their exclusion creates automatic market distortions for providers of these services or the Member States that make use of them.

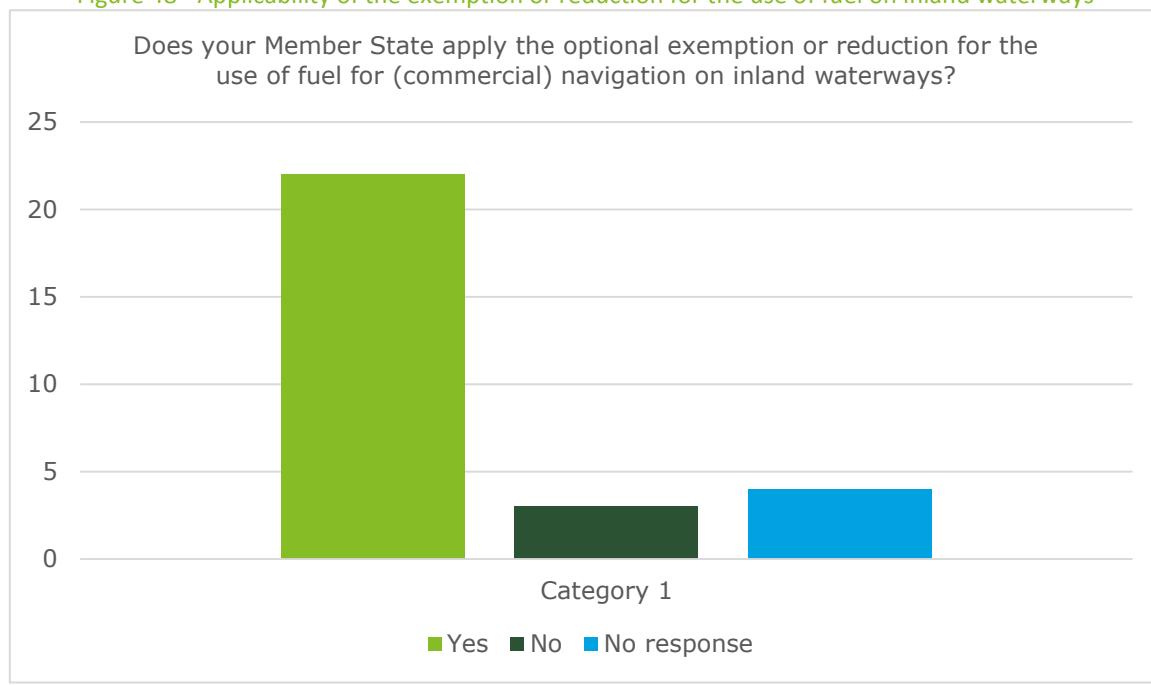
Article 15(1)(f)

Article 15(1)(f) ETD allows Member States to apply, under fiscal control, an exemption or reduction to the level of excise taxation on energy products supplied for use as fuel of navigation (including fishing) under the condition that the navigation takes place on inland waterways and other than in a private pleasure craft.

Additionally, the provision makes it possible for Member States to exempt or reduce the taxation on electricity produced on board of a navigation craft.

Member State implementation

Figure 48 - Applicability of the exemption or reduction for the use of fuel on inland waterways



22 Member States respondents confirmed that they make use of the exemption or reduction on taxation of energy products used as fuel for the navigation on inland waterways other than private pleasure craft and electricity produced on board the craft. One of the responding shipping companies extends the reduction/exemption to all energy products used on the ship. This can be justified by interpreting the definition of propulsion of the vessel as meaning the proper functioning of the vessel in the broadest terms possible. Electricity used on the ship is also placed under the exemption. In case it would not be allowed, sea going vessels could still do this on high seas where they are not subject to any taxation or licenses.

In Slovenia the exemption is not applied. According to national legislation the use of marked fuel in vessels is not allowed.

The Slovak Republic does not mark (dye) any of the mineral oils at the moment. If there would be a vessel detected using marked fuel originating in another Member State on our territory, we wouldn't take any action, as there is zero possibility of tax evasion on our territory – we do not apply any tax exemption which would require marked mineral oil.

Estonia does also not apply this optional exemption. Fuel used in Estonian territorial waters has a standard rate. In practice there have been no cases detected when vessels have tanked marked gas oils in another MS and then using it in Estonia.

The Italian State applies, in particular, the exemption for energy products used as fuel for navigation on inland waterways, limited to fishing and transport of goods. If denatured fuel is detected in uses for which the exemption is not applicable in the national territory, the Italian Authorities check if the denatured fuel has been correctly purchased in another Member State.

Navigation on inland waterways vs navigation on community waters (supra)

The distinction needs to be made between this optional exemption and the mandatory exemption of Article 14(1)(c) ETD. The latter obliges Member States to exempt the taxation on energy products used as fuel for the navigation (including fishing) within Community (Union) waters other than private pleasure craft and also the electricity produced on board a craft.

The difference in scope between the two provisions is situated in the definition of Community waters and inland waterways.

In an Opinion to case C-391/05, the Advocate-General to the Court of Justice stated that the definition of inland waterways and Community waters should not be left exclusively to the Member States. The risk for different interpretations would be too big and would oppose the Council's intention for harmonization as set out in Directive 92/81/EEC.

The A-G gave an opinion on the definition of Community waters, which was later altered into another definition by the Court. He also offered an opinion on the definition of inland waterways, which according to him needs to be interpreted as covering the whole of the Community's inland waterway network, as listed in annex I to Directive 82/714²⁴⁶.

In its judgment on the case, the Court of Justice defined Community waters as including "all waters which can be used by all sea-going vessels, including those which have the greatest capacity, capable of travelling maritime waterways for commercial purposes."²⁴⁷

²⁴⁶ Opinion A-G Bot to the ECJ C-391/05, *Jan De Nul*, ECLI:EU:C:2006:79.

²⁴⁷ ECJ C-391/05, *Jan De Nul*, ECLI:EU:C:2007:126.

It must be mentioned that the use of the term “Community waters” is outdated and should be referred to as “Union waters”.

The judgment also stated that vessels appropriate for navigation for commercial purposes on maritime waters can also do this on certain inland waterways as far as certain sea ports go, even though they are not located on the coast. To exclude this sort of navigation from the obligatory exemption would harm the intracommunity trade as the exclusion of these economic operators who perform inland navigation would put them at a disadvantage to those who operate in coastal ports.

Guidelines adopted by the Committee on Excise Duty in 2002, expressed that Member State delegations almost unanimously agreed that the wording “navigation on inland waterways” covers any commercial navigation in all inland waters, which includes lakes. Nearly all Member States used this interpretation.²⁴⁸ In the interviews with Member States for this study these interpretations are mostly confirmed.

Recital 23 to the ETD states that existing international obligations (such as the Revised Convention for Navigation on the Rhine and the Convention Regarding the Regime of Navigation on the Danube) and the maintaining of the competitive position of EU companies make it advisable to continue to apply exemptions to energy products supplied for navigation on these inland waterways. Member States should preferably not change the scope by taxing fuels only on certain water routes.

Denmark and Sweden apply both the optional exemption under Article 15(1) f by analogy to the mandatory exemption under Article 14(1)(c) ETD.

In Denmark, all waterways are treated the same (regardless whether inland or community). Therefore, the decision of the ECJ defining the concept (big ship which cannot sail is considered inland) is not of much relevance for Denmark.

In Sweden the mandatory exemption is applied by analogy to all Swedish territorial waters.

In France, inland waterways are defined by opposition to Community (Union) waters (decree n° 59-951 of 31 July 1959).

Italy determines inland waterways as the result of a process of elimination starting from the definition of Union waters water.

Other than private pleasure craft

See analysis under Article 14(1)(c) (*supra*)

As explained under the analysis of Article 14(1)(c) ETD, the ECJ decided that in order to benefit from the exemption the vessel needs to be used for commercial purposes which

²⁴⁸ European Commission, Committee on Excise Duty guidelines CED 372rev 1, TAXUD/2002/4349/00/00, 2002.

needs to be explained as “to provide services for consideration”. This would evenly apply to Article 15(1)(f) ETD²⁴⁹.

In interviews with sector federations for the shipping community it was pointed out that the Directive currently stipulates that the exemption shall be available for any ship employed on a commercial purpose and in particular for any ship engaged in the carriage of passengers or of goods or in the supply of services (or in Government service). The Directive does not mention “cargo ships”, and according to the federations there is no reason to treat such vessels differently from other types of merchant ships. Therefor all movements of cargo ships should remain in the scope of “movement for commercial purposes”.

The availability of duty free bunkers is equally important for all types of merchant ships: not just cargo ships but also ferries, cruise ships, and the many types of specialized service vessels that are employed around Europe (laying submarine pipes or cables, for example, or constructing offshore windfarms, or carrying out hydrographic surveys, or handling the anchors of oil rigs, or extracting sand and aggregate from the seabed). The scope of the exemption should remain unchanged.

In response to the question whether it is “necessary for the cargo on the vessel to be for sale in order for the craft to be considered as a vessel navigating for commercial purposes”, the answer is NO according to the sector federations. Except for a few commodities (such as oil and coffee) that may be traded while in transit, it is extremely rare for cargo to be for sale. “Navigation for commercial purpose” means that someone is paying for the operation of the ship: a passenger buying a ticket to travel on a ferry or a cruise ship, a shipper paying for the carriage of a container, a Harbour Authority chartering a survey ship to produce a chart of its navigation channel, a telecoms company chartering a ship to lay a submarine telephone cable, etc.

A European company active in the shipping industry indicated that it remains quite unclear what the extent of “commercial purposes” is, but that they continue to apply the exemption in the broadest possible way especially since they did not receive clear guidelines from the national authorities. The company looks at its core activities for which it makes shipments and these activities are of course commercial. They do not want to start assessing for each shipment whether a specific return or considerans is taking place, since in general they perform commercial activities. If the rule should be interpreted differently it would not be workable according to them.

Poland considers any commercial navigation in all inland waters also eligible for exemption/reduction.

In Denmark “other than private pleasure craft remains a grey area. Authorities consider a movement for commercial purposes a movement which is directly linked to the supply of services/ goods for consideration in line with the ECJ judgment. This is assessed on a case-

²⁴⁹ ECJ C-79/10, *Systeme Helmholtz*, ECLI:EU:C:2011:797.

by-case basis. The authorities also acknowledge that in practice this leads to uncertainties (especially when part of the shipment is for sale and part is not).

Economic operators in Denmark indicate that this rule is not workable in the way ECJ and authorities interpret it. The criterion of commercial use should be linked to the activities of a company rather than identifying a direct consideration. Often, they say these operators apply it is still accepted by the Danish authorities.

In France, any transport of goods is eligible for exemption of taxation.

In Italy, only the transport of goods in inland waters leads to an exemption/reduction, not the transport of passengers.

Conclusion

- Uncertainty with regard to ‘community waters’, “inland waterways” and “commercial purposes” have led to different interpretations at first and subsequently to an ECJ judgment
- Inland waterways can be defined as the whole of the Community’s inland waterway network, as listed in Annex I to Directive 82/714
- This optional provision has in reality been applied similar to the mandatory exemption of Article 14(1)(a) ETD and calls into question the necessity to keep on this provision. Instead the mandatory exemption could be applied in its broad interpretation.

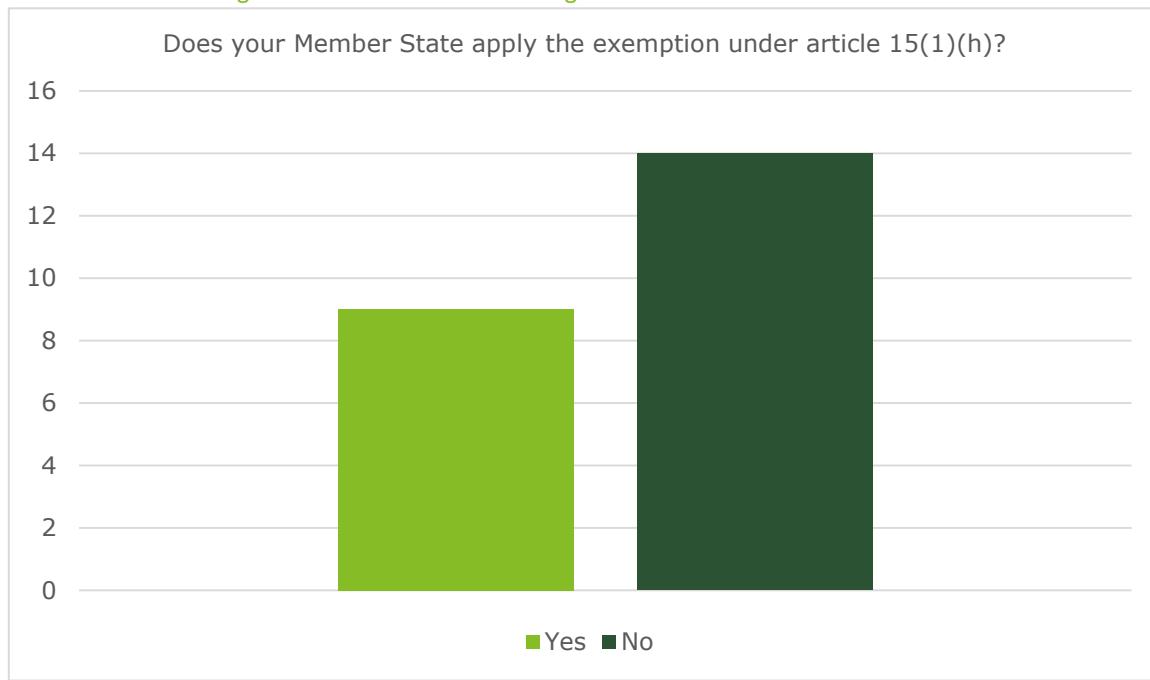
Article 15(1)(h)

Member States may apply, under fiscal control, an exemption or reduction to the level of excise taxation on electricity, natural gas, coal and solid fuels used by households and/or by organizations recognized as charitable by the Member State concerned.

In the case of charitable organizations, Member States can limit the exemption or reduction to the use for non-business activities. In case of mixed use, the taxation can be levied in proportion to each type of use. If a use is insignificant, it may be treated as nil.

Member State implementation

Figure 49 - Taxation of fuel for agricultural use in 10 Member States



Source: Survey to Member States

Nine Member State respondents to the web survey indicated that they use this exemption or reduction (Belgium, Czech Republic, Hungary, Latvia, Lithuania, Poland, Republic of Croatia, Republic of Slovakia, the Netherlands).

Fourteen Member States responded that they do not apply the exemption: Austria, Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Hungary, Italy, Luxemburg, Slovenia, Spain, Sweden and the UK.

From interviews with economic operators it became clear that the exemption also applies in Portugal to electricity and natural gas in a situation of economic vulnerability.

For two of the Member States (Czech Republic and Poland) the application of the optional exemption/reduction still poses a problem because of the uncertainty of the terms "households" and "charitable organization". The question arises whether a competition issue exists with these charitable organizations that become involved in economic activities. The link can be made with public companies which are in competition with other economic operators carrying out the same activities, but being financed with public funds.

Poland applies this exemption for coal and natural gas. It is of the opinion that Member States should have room for manoeuvre with regard to granting the exemptions.

By a statement of the household (in case of the natural gas in the gas supply agreement) it can benefit from the exemption.

The definition of households in case of gas refers to the amount of consumed gas. See Article 31(b), §6 of Polish Excise Duty Act. There are no provisions limiting the application of the exemption only to certain households.

The exemption/ reduction for charitable organizations is not limited to use for business-use and no distinction is made in Poland. Charitable organization is defined by reference to respective law regulations.

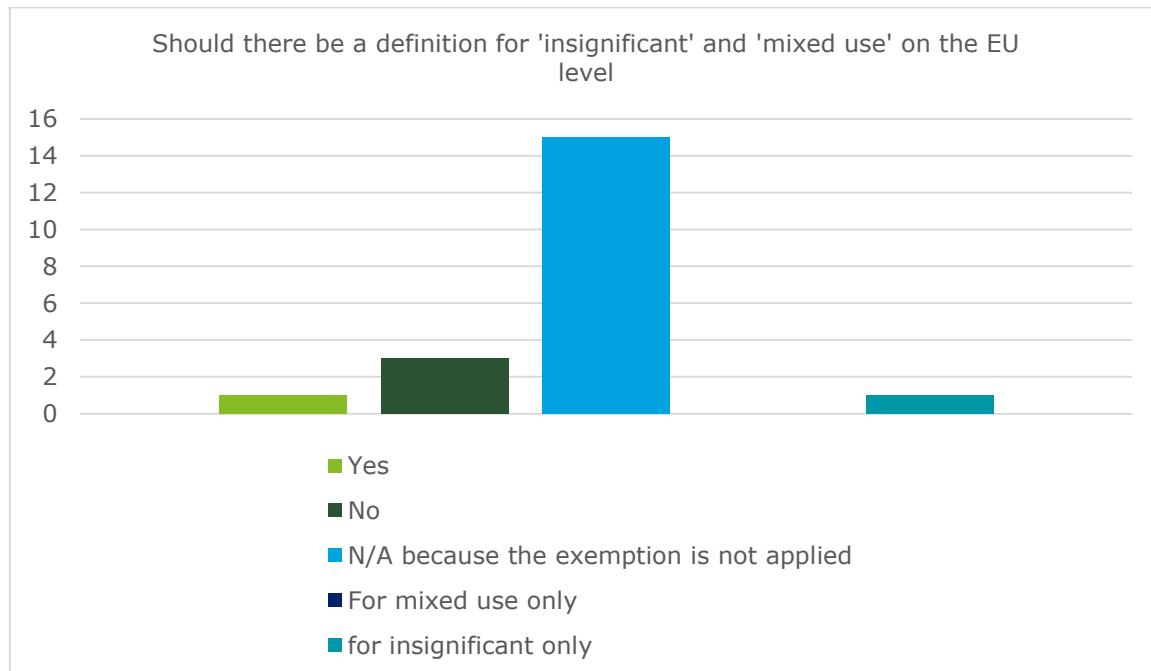
Insignificant use is not applicable in the Polish regulations. The exemption is a direct exemption to the actual use of the energy products as used by households and charitable organizations.

When it comes to charitable organisations, there is no definition laid down in the ETD. Moreover, it starts from the assumption that there is a 'business use'. The relevance of this provision is unclear.

Social corrections are foreseen in the Swedish income tax system. Social concerns should remain outside the scope of the ETD, as it does not seem the appropriate instrument. The exemptions / reductions affect the effectiveness of the tax (i.e. other means than exemptions / reductions might be more suitable).

E.g. in Sweden, a social allowance is granted for the rent. Heating is mostly included in the rent, meaning that there is a social support system for poor households.

Figure 50 - Necessity for a definition for 'insignificant' and 'mixed use'



Source: Survey to Member States

Only Finland believes that it would be beneficial to have an EU definition for these terms in order to correctly apply the exemption. Belgium considers it a good idea to have an EU definition for significant, however for mixed use they consider it unnecessary. The Netherlands, Slovakia and Czech Republic state they are against such a general definition.

Most Member States (15) indicate that they do not see the use since they don't apply the exemption.

Conclusion

- Uncertainty of the concepts 'household' and 'charitable organization' as no clear definition exists on the EU level. This creates the possibility of different implementation and market distortion.
- It is difficult to justify these exemptions for social considerations when social policy is not an objective of the ETD, whereas the environment and health are.
- Liquid fuels are normally less detrimental to environment and health than solid fuels, but unlike the latter these are not covered by this exemption. Potentially this is because they can be misused or used fraudulently (marked gas oil, HFO are not suitable for motor fuel use)? In the proposal for a revised ETD in 2011, the products under this provision were simply replaced by "energy products" used as heating fuel and "electricity"²⁵⁰.

Article 15(1)(i)

Member States may apply under fiscal control, an exemption or reduction to the level of excise taxation on natural gas and LPG used as propellants.

The Commission states that the term 'used as propellants' needs to be interpreted as movement or transport and should not for example apply to stationary motors.

Member State implementation

Almost all of the Member State respondents to the web survey indicated that their national legislation refers to the 'use as a motor fuel' as exemption or reduction ground for the consumption of natural gas or LPG. This wording is problematic since it can also cover stationary motors, which use is not supposed to fall in the scope of this provision.

The French national legislation refers to use as fuel and not as propellant. Natural gas and LPG benefit from lower tax rates than diesel fuel and petrol. It is not foreseen that this differentiated tax regime will disappear.

Sweden indicates that it does not apply the exemption, just because the text refers to propellants, hence motor fuels (which also cover stationary motors) are not covered.

The difference in interpretation between France and Sweden shows the lack of a clear understanding.

²⁵⁰ Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 169 final, 13 April 2011; .
[http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0169/_com_com\(2011\)0169_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0169/_com_com(2011)0169_en.pdf).

Conclusion

- Member States do not always apply the provisions as they should be doing. The EU definition should be placed in the provision for clarity and to prevent market distortions between Member States.
- Differences in language versions of this provision lead to different interpretation. The French word “carburant” as is used in the provision for propellant also means fuel and is interpreted as such.

Article 15(1)(j)

Member States may apply, under fiscal control, an exemption or reduction to the excise taxation level on motor fuels used in the field of the manufacture, development, testing and maintenance of aircraft and ships.

Case law

Case law on this provision has clarified some of the uncertainties that may exist regarding the terms manufacture, development, testing and maintenance.

The Court of Justice found in case C-79/10²⁵¹ that motor fuel used by an aircraft for the purpose of flights to and from an aircraft maintenance facility does not fall within the scope of the optional exemption. The flight to and from the maintenance facility cannot be considered as maintenance in se.

That same judgment found that Article 15(1)(j) ETD is specifically directed to aircraft manufacturers and maintenance facility operators, not to all companies active in the air navigation sector.

In reference to the analysis under Article 14(1)(c) ETD the ECJ judgment in the case C-151/16 concerning a company that is building a cargo ship for a client plays an important role with regard to this provision. During the construction, motor fuel is delivered and is partially consumed for the testing of the ship. When the manufacturer finished and delivered the ship to the client it claimed a refund from the Lithuanian state for the paid excise duties on the remaining fuel in the tanks of the ship. The claimant argued that this fuel was exempt from excise taxation under Article 14(1)(c) of the ETD, namely because the fuel was being used for the purpose of navigation within Union waters by the client.

The Lithuanian government did not grant the refund since the first navigation of the ship was set under its own power and not directly for commercial navigation. First the AG in his Conclusion to the Court confirmed this stance. According to the AG, to benefit from the exemption under Article 14(1)(c) ETD the supplied fuel must be used for the purpose of navigation for commercial purposes and the person claiming the reimbursement must form part of that navigation. In this case, the claimant had merely supplied a ship together with

²⁵¹ ECJ C-79/10, *Systeme Helmholtz GmbH v Hauptzollamt Nürnberg*, ECLI:EU:C:2011:797.

shipping fuel to a client, without being part of the navigation. Additionally, the AG opined that the first voyage of the ship, which happened without any commercial cargo did not constitute a service for consideration for the purpose of (commercial) navigation. The fuel was delivered at the time for the manufacturing and testing of the ship and could not fall under the mandatory exemption for navigation in Union waters at the time of the supply²⁵².

On the other hand, A-G Kokott referred to the optional exemption of Article 15(1)(j) of the ETD under which provision the excise taxation on the total amount of delivered motor fuel could be exempted or reduced at the time of supply because it was used for the manufacture and testing of a ship. The interpretation was a formal one, since Lithuania does not apply the optional exemption or reduced rate under this provision.

In its final judgment, the ECJ largely ignored the AG's opinion and concluded in the opposite that the first journey of a ship, even though it does not carry commercial cargo yet, constituted the first necessary and indispensable step of a navigation for commercial purposes. If the sole objective of the first journey is to collect commercial cargo from a port to then be transported to another port, and without that journey, that service of transporting goods could not have been provided, this first voyage must be considered as a navigation activity used directly for the supply of services for consideration. As a result, the fuel used to enable the ship to make the journey is used for navigation within the meaning of Article 14(1)(c) ETD²⁵³.

Article 15(1)(k)

Member States may apply, under fiscal control, an exemption or reduction to the level of excise taxation on motor fuels used for dredging operations in navigable waterways and in ports.

Case law

The Court has already confirmed that the mandatory exemption of Article 14(1)(c) ETD, on energy products supplied for use of fuel for the purpose of navigation in Community waters, relates to all waters which can be used by all seagoing vessels, including those which have the greatest capacity, capable of travelling maritime waterways for commercial purposes²⁵⁴.

The judgment also stated that vessels appropriate for navigation for commercial purposes on maritime waters can also do this on certain inland waterways as far as certain sea ports go, even though they are not located on the coast. To exclude this sort of navigation from the obligatory exemption would harm the intracommunity trade as the exclusion of these economic operators who perform inland navigation would put them at a disadvantage to those who operate in coastal ports.

²⁵² Conclusion of the Advocate-General ECJ C-151/16, *Vakaru Baltijos laivų statykla*, ECLI:EU:C:2017:159.

²⁵³ ECJ C-151/16, *Vakaru Baltijos laivų statykla*, ECLI:EU:C:2017:537.

²⁵⁴ ECJ C-391/05, *Jan De Nul*, EU:C:2007:126, paragraph 32.

In the same judgment the Court answered that manoeuvres carried out by a hopper dredger during its operations of pumping and discharge of materials, inherent to dredging activities fall within the scope of navigation of used in Article 14(1)(c) ETD.

From this and a number of other ECJ judgments it follows that the mandatory exemption of Article 14(1)(c) can be applied to motor fuels for any sort of navigation (in Community or Union waters) as long as the navigation constitutes a service for consideration.

When it comes to the actual usage of the machines on the dredging hopper who carry out the dredging activities, the company will only be able to apply for an exemption or reduction for these under Article 15(1)(k) ETD if the Member State in which the dredging company is active has opted in.

-The implementation of Article 15(1)(k) ETD is almost a necessity in the case of a single fuel tank used for both propulsion of the ship and the on-board equipment. If not, it becomes very difficult to determine to what extent the fuel in the tank is used for an exempt purpose (navigation) and to what extent it is used for a taxed purpose (dredging operations if the optional exemption is not applied). This issue is similar to the discussion on differentiation between fuel used for Community waters and inland waterways as it is difficult for some operators to distinguish the uses when they work with a single fuel tank. Despite these practical shortcomings, Denmark still requires economic operators to distinguish which fuel in the tank is used for which purpose in practice.

Conclusion

- Uncertainty with regard to the term “navigable waterways” and “navigation” which led to ECJ judgments

Article 15(1)(l)

Member States may apply, under fiscal control, an exemption or reduction to the excise taxation level on products falling within CN code 2705 used for heating purposes.

CN code 2705 consists of the following products: coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.

Article 2(5) first paragraph of the ETD determines that any references to CN codes refer to the version of 2002.

In Poland, all types of gas used for heating purposes are subject to the same level of taxation (applicable to natural gas), without application of any reduced rate or exemption. Sweden applies the exemption in the context of dual-use processes. Sweden considers it to be in the nature and logic of the system to exempt those processes. The provision can also mean that for individuals or companies producing their own energy products or electricity a refund mechanism could be put in place instead of an exemption. It may be considered to provide for a clearer wording in the Directive in order to bring further harmonization in the formalities relating to this exemption/ reduced rate.

Article 15(2)

The refund procedure can pose administrative burdens on the economic operators and may unfairly advantage bigger companies over SMEs. This comment refers to Article 6 ETD. This refund procedure bears a certain basic burden which is more difficult to overcome for smaller operators. Probably Member States opt to work with a refund mechanism rather than an immediate exemption due to State aid considerations. However, some Member States like Belgium, do apply immediate exemptions.

The provision could also mean that for individuals or companies producing their own power a refund mechanism could be put in place instead of an exemption. The provision is not clear especially for electricity produced for own consumption and in the light of Articles 6 and 21(5), third subparagraph of the ETD.

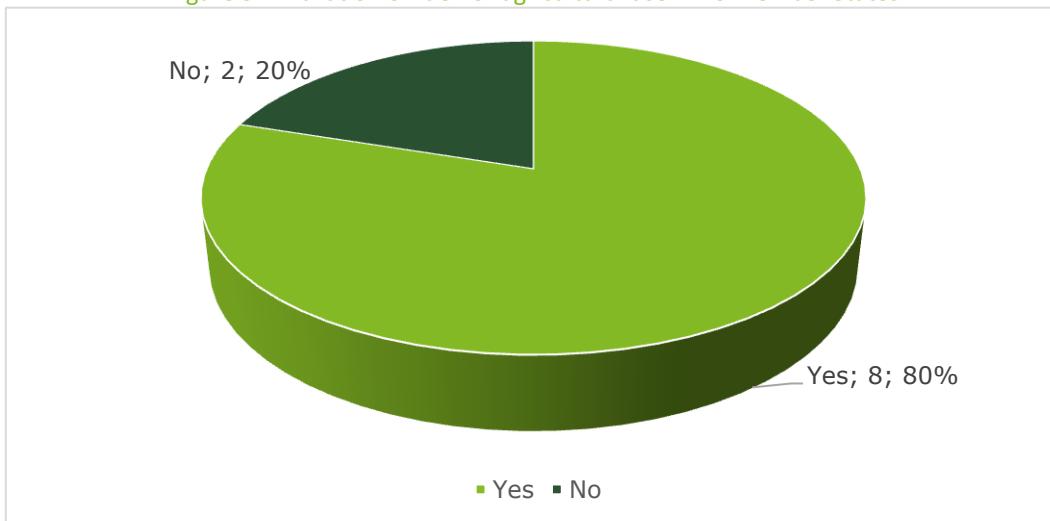
Article 15(3)

This Article allows Member States to apply an exemption or reduction to the excise taxation level on energy products and electricity used for agricultural, horticultural or piscicultural works and in forestry.

Article 15(3), second paragraph imposed on the Council the obligation to examine before 1 January 2008 the possibility whether a reduction or exemption can be repealed. This provision has not resulted in the repealing of the optional reduction.

The “Confédération Européenne des Entrepreneurs de Travaux Techniques, Agricoles, Ruraux et Forestiers » (CEETTAR) also held a survey in 2014 on the taxation on fuel for agricultural use in 10 countries : Sweden, Denmark, Slovakia, UK, Finland, Netherlands, Belgium, Italy, France, Germany, Ireland, Luxemburg and Spain.

Figure 51 - Taxation of fuel for agricultural use in 10 Member States



Source: CEETTAR survey, 2014

Based on the results CEETTAR provided 8 out of 10 of these countries apply special taxation rules on the agricultural use of fuel (only Slovakia and Netherlands do not).

In some of these countries (France and Italy) the rules apply to all works carried out by a contractor. For most of the countries in scope the special rules apply to agricultural work (in Slovakia, Denmark, UK, Finland, Belgium, Italy, France and Germany). An almost equal amount of countries applies its special taxation rules on forestry works (Slovakia, UK, Finland, Belgium, Italy, France, Germany). France and Slovakia also apply the rules to transport and France applies the rules to rural works as well.

In most of the countries the contractor himself has to fill out the administrative formalities (7 countries).

A majority of the countries in scope is happy with the rules and administrative conditions, but three are not (Slovakia, Belgium, France).

Belgium and France indicated that there are some problems with the application. Slovakia indicated the level of taxation as a problem and both Slovakia and Belgium notice issues with the administrative formalities.

What Member States experienced as positive about the special tax legislation on agricultural use of fuel are:

- The possibility to get a tax refund on agricultural work (DK)
- The use of rebated fuel for agricultural and forestry operations (UK)
- Lower tax levels (FI, FR)
- Fair competition and simple rules (NL)
- Farmers who do transport work as well (BE)
- Benefits for farmers and contract workers (IT)

In Germany, contractors have no administrative worries about the tax rules on fuel for agricultural use. They invoice the amount of fuel used (without VAT) to the farmer who has

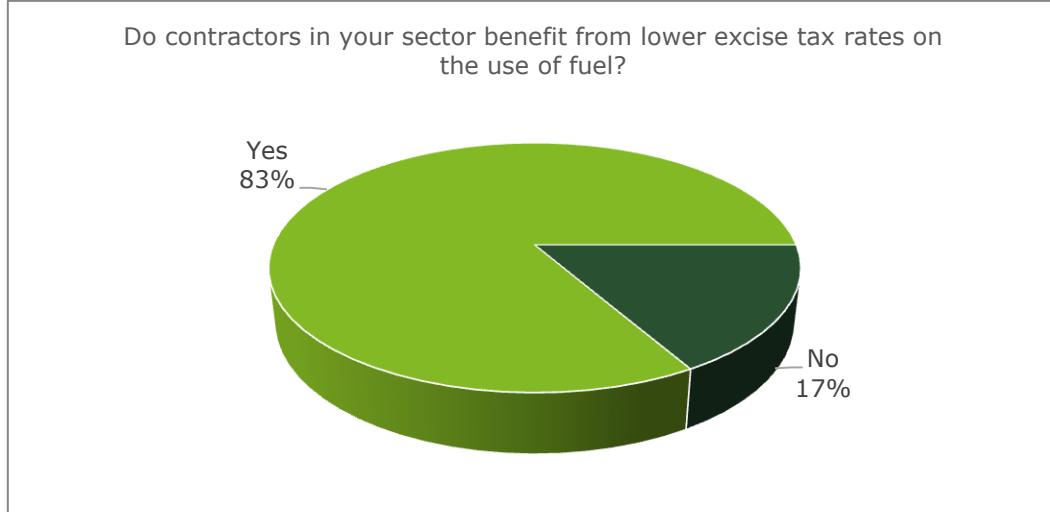
to pay for the services. Afterwards, the farmer can make a declaration and get a tax refund. The invoice from the contractor can be used as proof of payment. ↗ no disadvantages for contractors if fuel prices or taxes rise.

(Most) Negative elements:

- Possibility misinterpretation rules leading to having to pay tax back (DK)
- Price fuel = all consumers, no support for agriculture contractors (SK)
- Rules sometimes unclear, specific activities? (UK)
- Higher cost level(NL)
- Much administrative work (BE) – expensive (IT)
- Legal uncertainty (FR)

CEETTAR performed the same study that same year with a total of 13 Member States, the same ones as before plus Ireland and Spain (and Norway). The results can be found below.

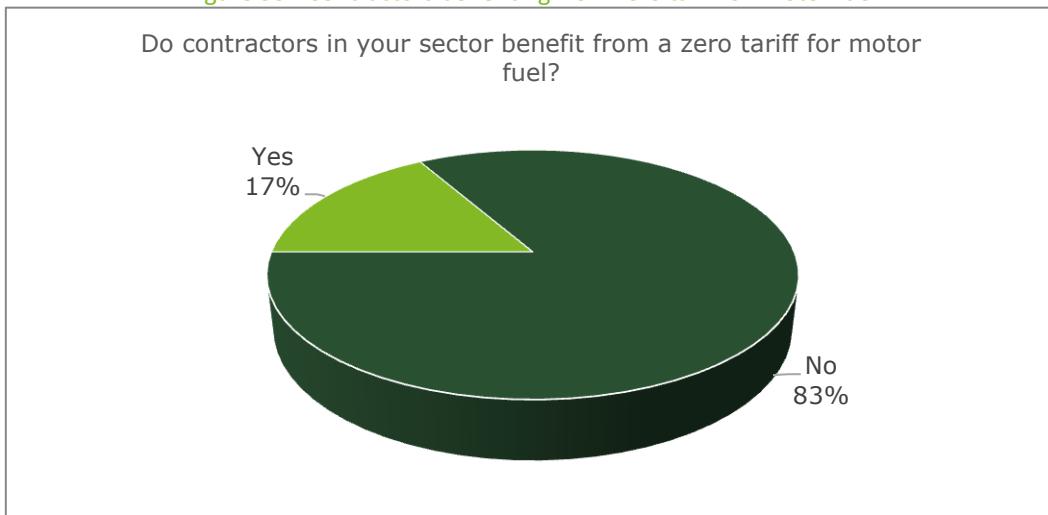
Figure 52 - Contractors benefiting from lower excise rates on the use of fuel



Source: Data obtained from CEETTAR survey

Answer	Country
Yes	BE, DK, FI, UK, DE, IE, IT, LU, PL, ES, SE
No	NL, SK

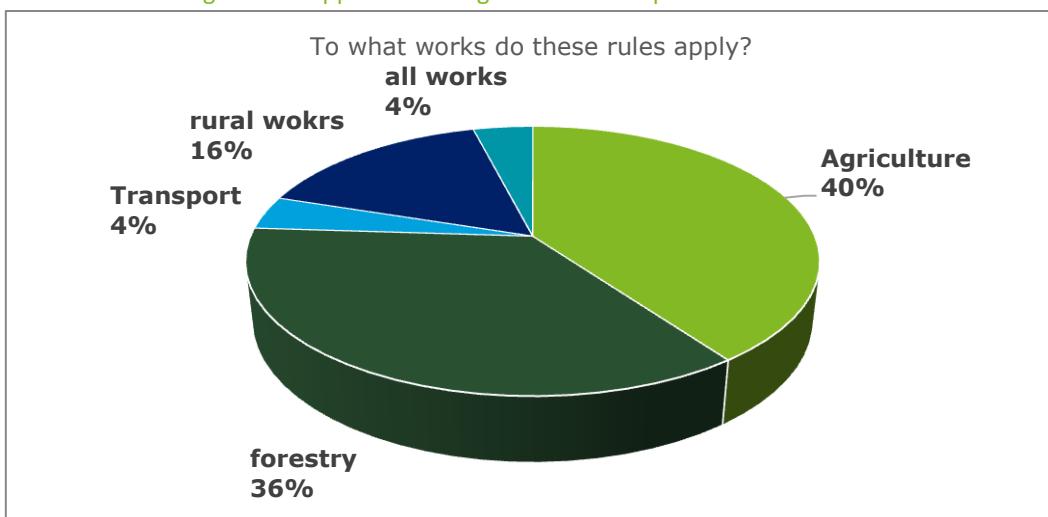
Figure 53 - Contractors benefiting from zero tariff on motor fuel



Source: Data obtained from CEETTAR survey

Answer	Country
Yes	BE, IE
No	DK, FI, NL, SK, ES ²⁵⁵ , FR, UK, DE, SE K
N/A	IT

Figure 54 - Application of agricultural exemptions and reduction



Source: Data obtained from CEETTAR survey

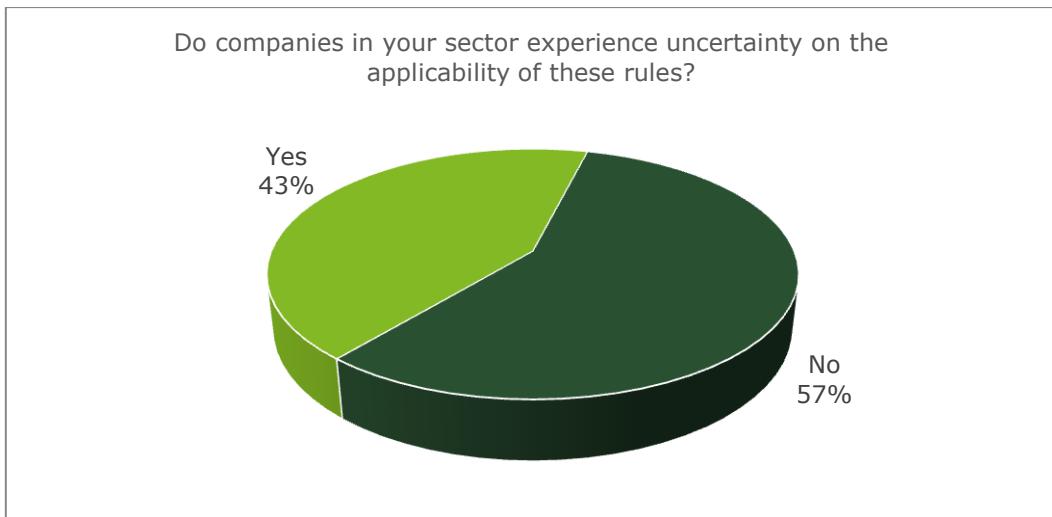
Note: This means that Article 15(3) is applied in Belgium and in Ireland (and in some Spanish regions).

Area	Country
Agriculture	BE, DK, FI, FR, UK, DE, IE, IT, ES, SE

²⁵⁵ Spain is very close to having a zero tariff for motor fuel for agricultural use. The national tariff is zero, but some regions still have an excise duty. Nevertheless, this regional excise duty is very small, going from 0 to 12 €/1000L

forestry	BE, DK, FI, FR, UK, DE, IE, IT, SE
Transport	SE
Rural works	BE, FR, IE, IT
All works	IT

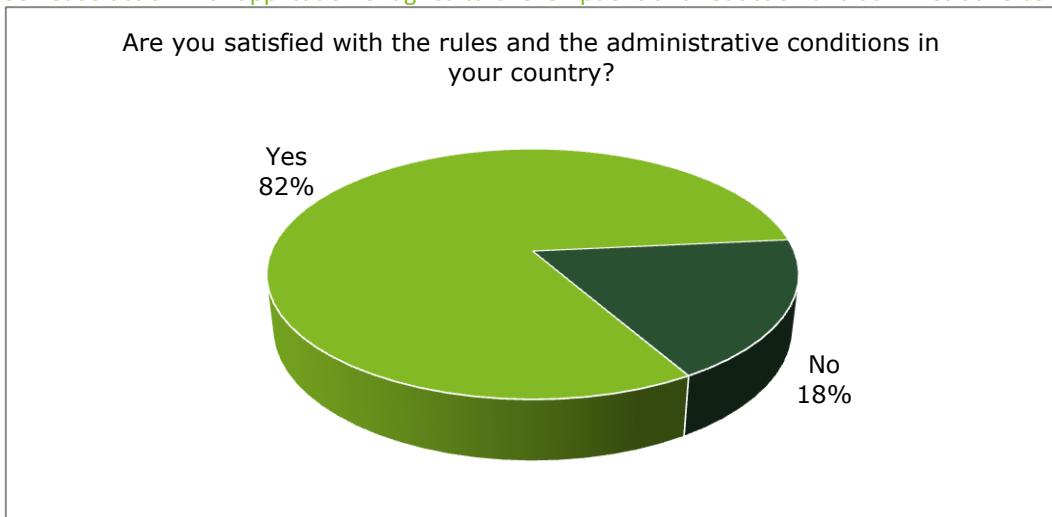
Figure 55 - Uncertainties in the application of agricultural exemptions and reduction



Source: Data obtained from CEETTAR survey

Answer	Country
Yes	FR, IE, ES
No	BE, DK, FI, DE
Not applicable	NL, SK
N/A	UK, IT, LU, SE

Figure 56 - Satisfaction with application of agricultural exemptions and reduction and administrative conditions



Source: Data obtained from CEETTAR survey

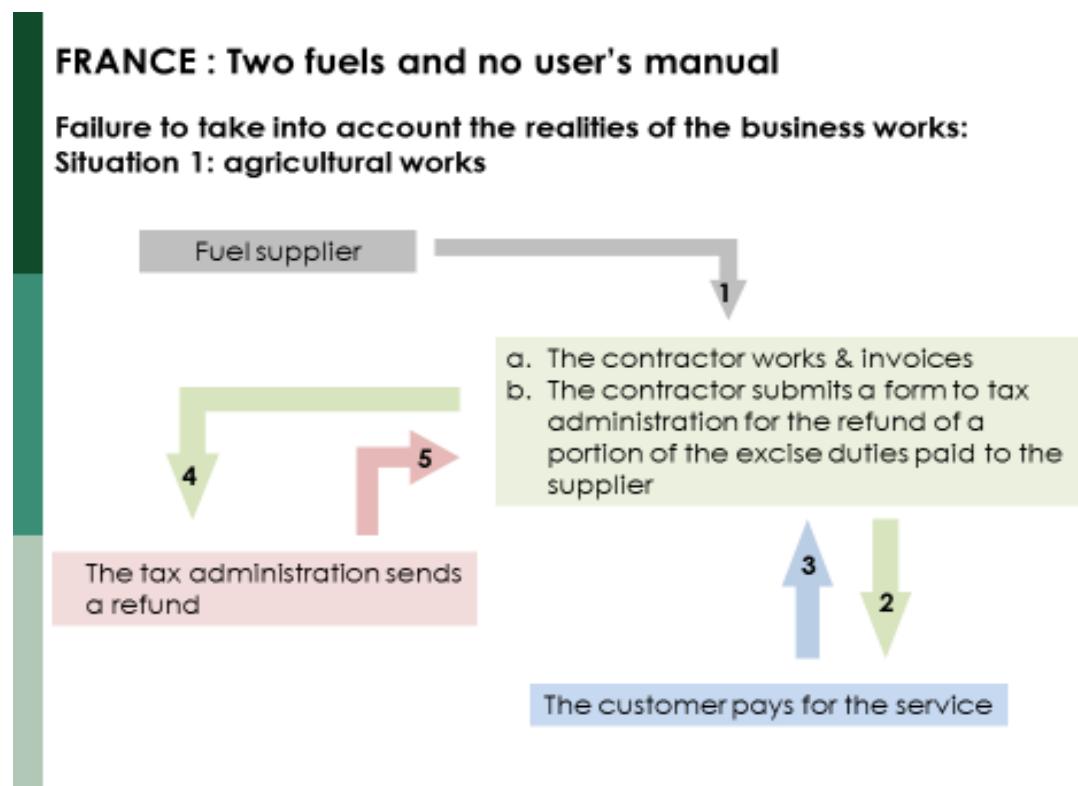
Answer	Country
Yes	BE, DK, FI, FR, Uk, DE, IE, IT, NL
No	SK
N/A	ES

CEETTAR provides an overview of the different administrative measures economic operators have to undertake in order to benefit from the tax exemption/ reduction for fuel used for agricultural purposes.

You can find the procedures for France, Spain, Germany, Netherlands, Belgium, Italy, Denmark and Poland here below.

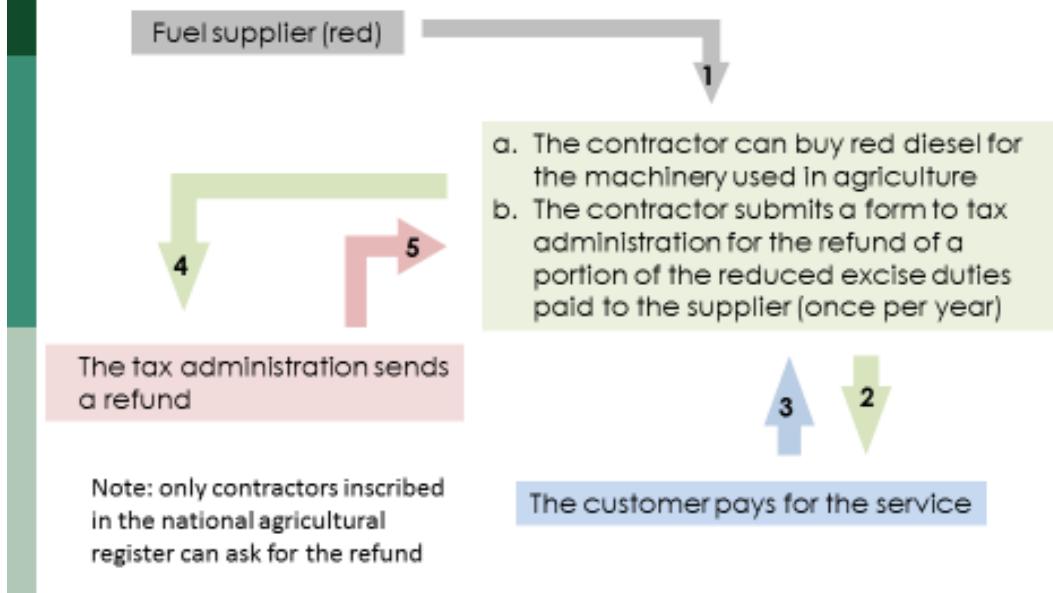
FRANCE : Two fuels and no user's manual

Failure to take into account the realities of the business works: Situation 1: agricultural works

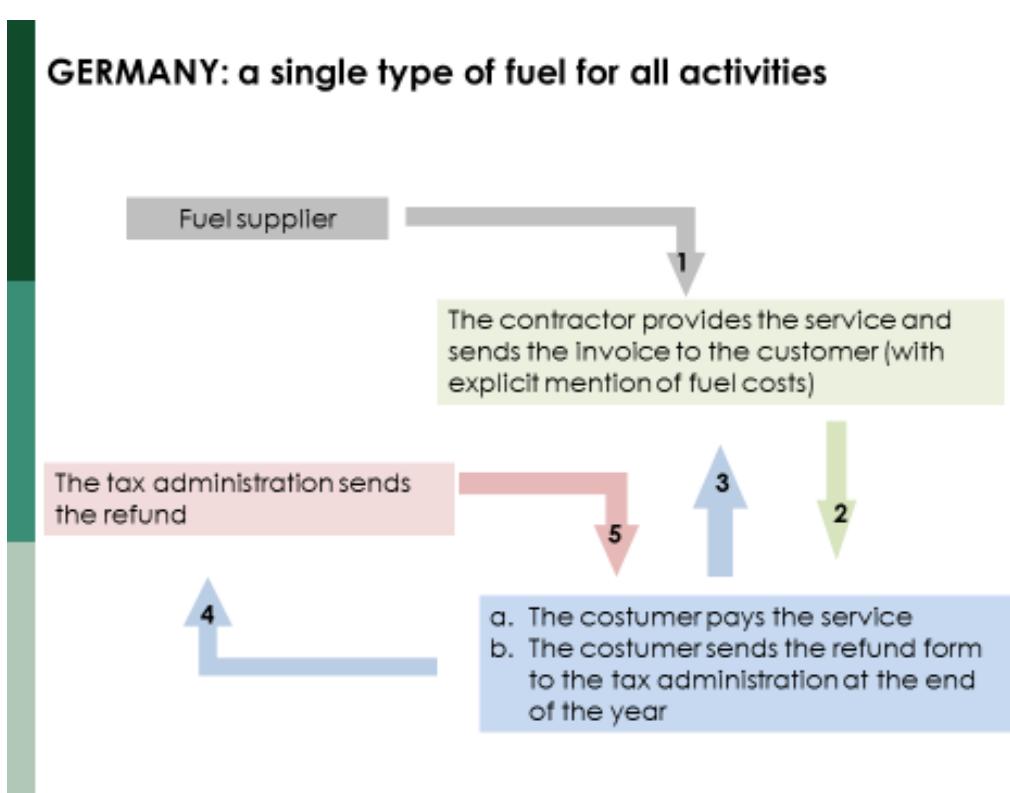


Spain, dual system: reduced excise duty (red diesel) and refund scheme

Only for agricultural works

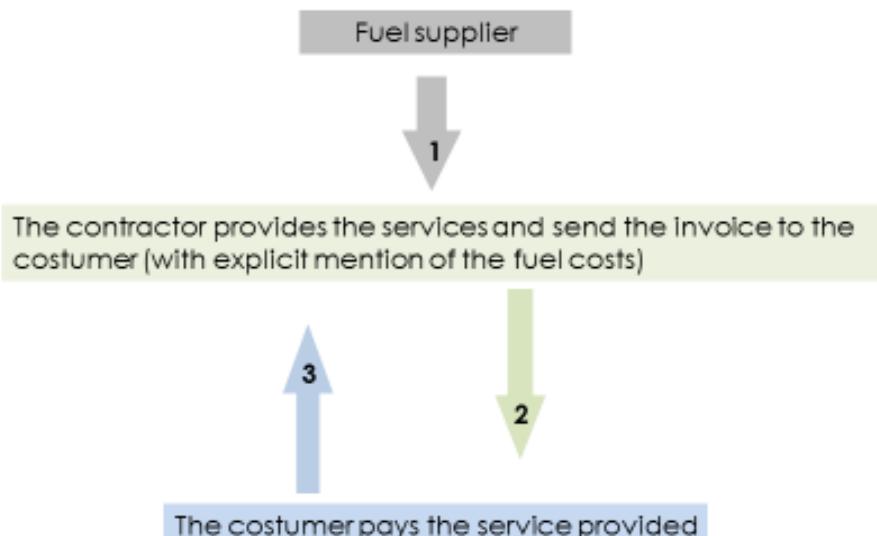


GERMANY: a single type of fuel for all activities

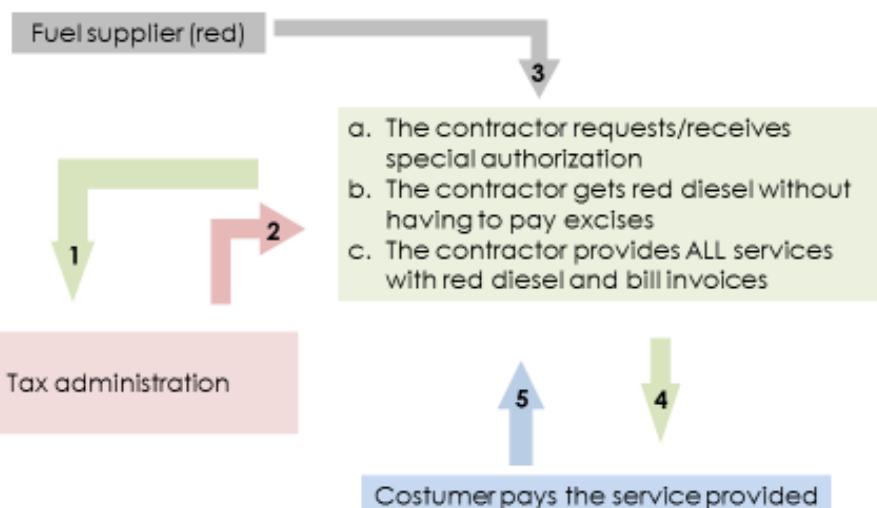


THE NETHERLANDS: a single type of fuel for all activities

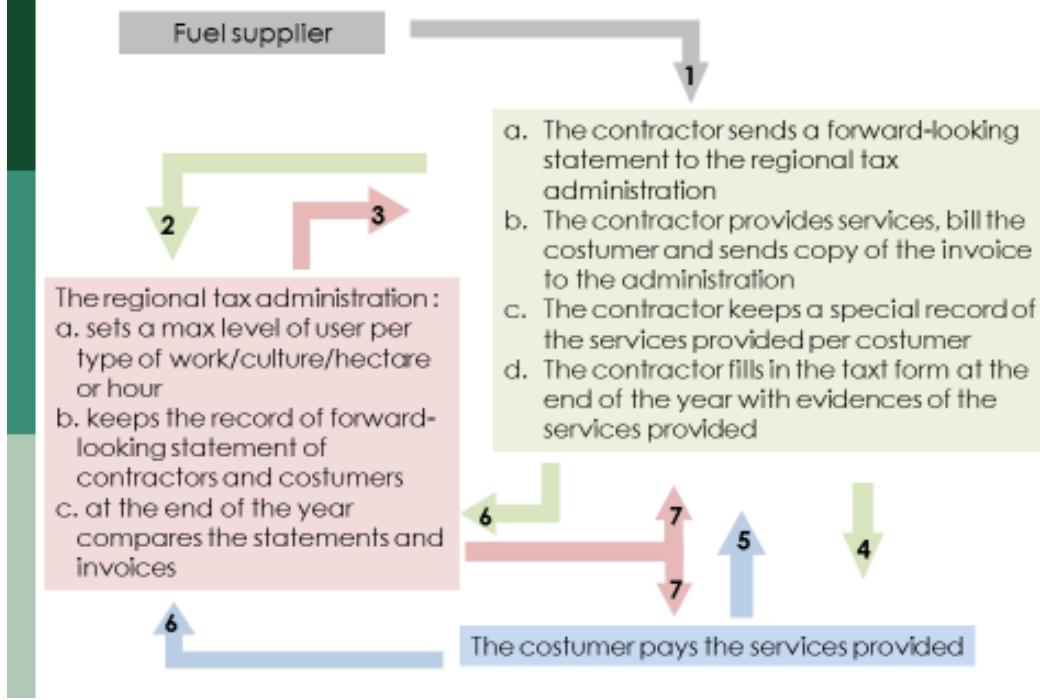
(since 01/01/2013)



BELGIUM: heavy administrative burdens

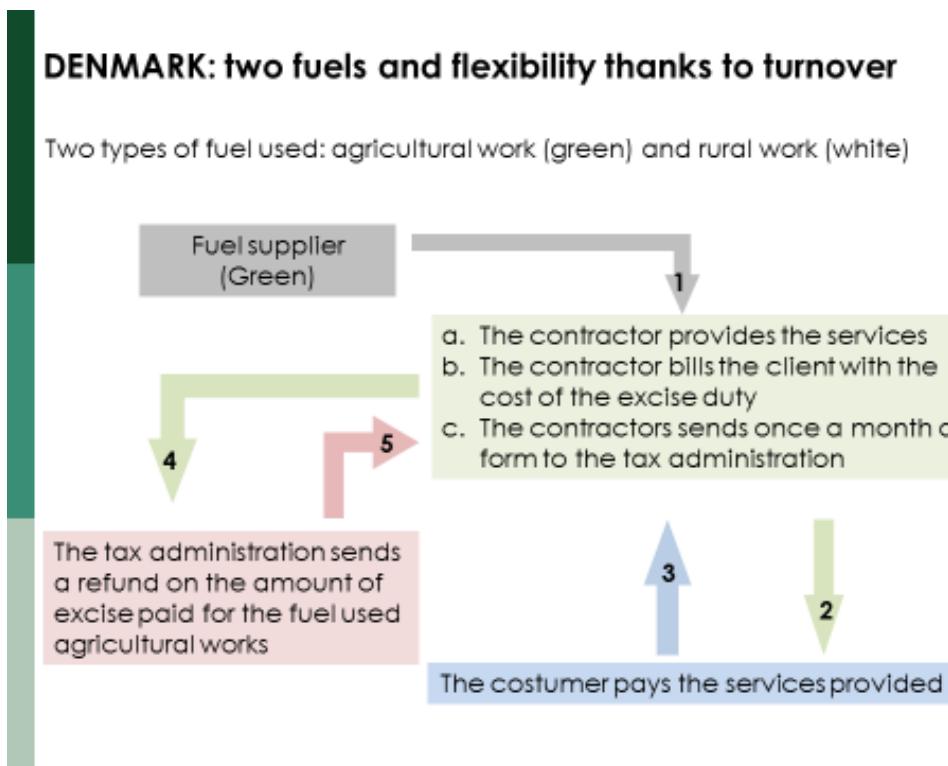


ITALY: 3 types of fuels and heavy administrative burdens

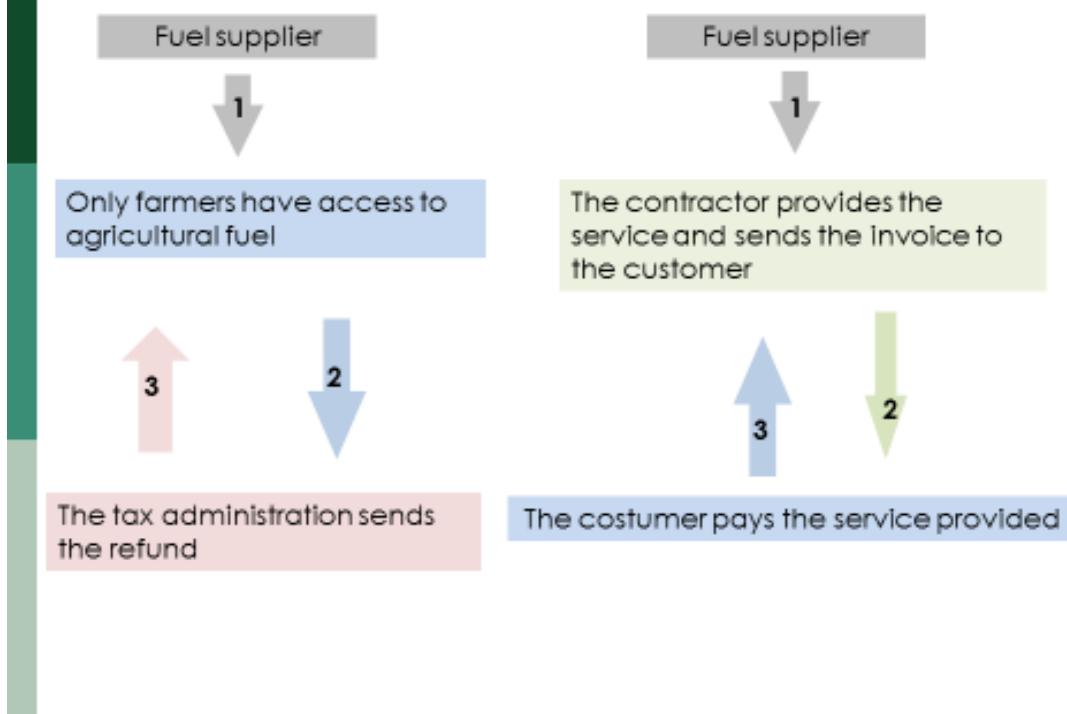


DENMARK: two fuels and flexibility thanks to turnover

Two types of fuel used: agricultural work (green) and rural work (white)



POLAND: unequal treatment for Contractors



Member State implementation

This provision is not applied in Denmark. The minimum rates are provided for agriculture/ pisciculture / and horticultural works in accordance with Article 8 ETD and Annex I table B to the ETD.

There are two sets of rules applying to the same situation. Article 15(3) ETD refers to agricultural and piscicultural works. At the same time, Article 14 ETD provides for an obligatory exemption for energy products supplied for use as fuel for the purposes of navigation within community waters, including fishing.

E.g. getting on the ship to check on the salmons would be the same as a farmer using a tractor to check on his cattle. The use of the fishing vessel to check on the salmon would imply also a reduced rate of taxation. However, fishing is a different activity than pisciculture and a 'fishing vessel' means any vessel equipped for commercial exploitation of marine biological resources or a blue fin tuna trap²⁵⁶.

France does not consider it necessary to include aquacultural works other than piscicultural works as eligible for zero taxation, since there is no particular need.

Sweden thinks it is important to abolish this provision, as there is no reason to provide for the 0 % rate possibility. Reductions are currently covered by Article 8(2) ETD.

²⁵⁶ Article 4(1) point (4) Regulation (EU) No 1380/2013.

Sweden considers aquacultural works and piscicultural works the same. Sweden makes use of 'aquaculture', rather than pisciculture (as also shellfish is included). Swedish legislation refers to 'commercial aquaculture'.

The Directorate-General for Taxation and Customs Union of the Commission considers pisciculture also to cover aquaculture (CED n° 870). Nevertheless, strictly speaking, the two terms are not equivalent as the former literally means fish farming.

The fact that some Member States have implemented the optional exemption or reduction on excise duties for fuel which is used for agricultural purposes and some have not, creates some cross-border issues. While agriculture seems very much like a national business and for the most part is in inland regions of big Member States such as France, Germany and Spain, CEETTAR explains that there are many border regions within the EU where competition is distorted because of the different implementation of this optional exemption. Examples are the French-German border, Belgium-Luxemburg-Netherlands and Danish-German border.

Such agricultural services happen a lot and companies experience problems from a competition point of view, subsequently complain that there is no level playing field in the EU because of different legislation everywhere.

As demonstrated in the images above the administrative burdens also differ very much according to the Member State. There exist too many different systems and philosophies within the EU. Big operational inequalities also result from the fact whether a Member State allows an immediate exemption under some form or whether the administration works with a pre-financing system and a refund afterwards. According to CEETTAR, in France the refund system in combination with the heavy administrative burden leads to a situation where farmers do not even apply for a rebate anymore.

Another issue that is pointed out with regard to Article 15(3) ETD is that the optional exemption applies to the actual farmers, but often not to contractors even though the Article refers to agricultural activity and not farmers. A number of agricultural activities are exempted for farmers, but when outsourced to these service providers it is not exempt any more. The exemption is made *ratione personae* and not *ratione materiae* on a national level even though the ETD talks about the agricultural activity.

This system is disadvantageous for SMEs since these are often the ones who have to outsource more activities to contractors (because of the high cost of the machines) and therefore neither they nor their contractors get an excise exemption on the fuel, which results in higher prices.

Big farmers do it themselves and get the exemptions and lower prices.

Contractors however are necessary. They are not considered to be farmers (non-agricultural businesses) according to EU law, since they are only providing services to farmers and not producing farming products themselves (Article 40 TEU).

But when the farmer wants to buy a machine and he or she is not subsidized, most of the time the machine will be too big for the farmer's activities or too expensive.

Conclusion

- The application of the optional/exemption in Article 15(3) can lead to severe administrative burdens for economic operators in some countries which in return leads to market distortions
- Differences in interpretation lead to different implementation: the fact that Member States grant exemptions or reductions to farmers but not to professionals providing agricultural services is a wrong implementation
- Distortion of completion and State aid: big farming benefit from the exemption/reduction while smaller farmers who have to rely on services from third parties do not benefit since the service providers are excluded from the scope of application
- The possibility that the optional tax scheme is limited to pisciculture and the possible exclusion of other aquaculture activities requires further assessment.

General conclusions for Article 15 ETD

- According to the European Economic and Social Committee, this whole list of optional exemptions and reductions in Article 15 ETD ends up undermining the efficiency of the objectives that form the basis of these fiscal benefits. The objectives and values, which the EU wishes to obtain and protect through these fiscal benefits, need to be common to all EU Member States and not just to some²⁵⁷.
- Additionally, the different terms and concepts used in the provisions lack clarity or are not properly worded which results in different interpretations and implementations by Member States

B.16 Article 16

Exemption / reduction for taxable products from biomass

In accordance with Article 16 ETD, Member States may apply an exemption / reduction on the taxable products covered by Article 2 ETD, if they contain biofuels or water. The products for which a (proportionate) exemption / reduction can be granted, are the following:

- CN codes 1507 to 1518 (vegetable and animal oils and fats);

²⁵⁷ A. Ortega Ibanez, 'Les défaillances du régime des droits d'accises européen sur les produits énergétiques', *Journal de droit européen* 2017, 2, p. 49 ;

- CN codes 3824 90 55 (emulsifiers for fats) and 3824 90 80 to 3824 90 99 (blends from vegetable and animal oils and fats, biofuels, e.g. biodiesel), for the content originating from biomass;
- CN codes 2207 20 00 (ethyl alcohol and distilled beverages, denatured, regardless the volume) and 2905 11 00 (methanol), not of synthetic origin;
- products produced from biomass, including products falling within CN codes 4401 and 4402 (fuel wood and charcoal);
- CN code 2201 (waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow);
- CN code 2851 00 10 (distilled and conductivity water and water of similar purity).

Biomass is defined in the ETD as "*the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste*".

The exemption / reduction is granted only under fiscal control / supervision and is limited to (maximum) the amount of tax payable on the volume of the biofuels / water contained in the taxable product mentioned in Article 2 ETD. This seems to be out of place, at it refers to any taxable product in Article 2 ETD containing water (without any other substances mentioned). As a consequence, the level of taxation applied by the Member States on the products benefiting from the (partial) exemption / reduction, may be lower than the minimum levels specified in Article 4 ETD.

E.g. if 25% biofuel is added to gasoil, the reduction / exemption cannot be granted for more than the tax normally owed on the 25% biofuel part.

The exemption / reduction is adjusted to take account of changes in raw material prices in order to avoid over-compensation for the higher production costs of the products for which the exemption / reduction can be granted.

Article 16(4) ETD, allowing Member States to exempt or continue to exempt products solely or almost solely made up of the products covered by Article 16(1) until 31 December 2003, is outdated.

Article 16(5) ETD allows Member States to grant the exemption / reduction under a multiannual programme by means of an authorization issued by an administrative authority to an economic operator for more than one calendar year (but maximum six consecutive years, possible to be renewed). The second section of this paragraph states that multiannual programmes concluded before 31 December 2012 cannot be renewed anymore. From this section, it appears that the (theoretical and practical) relevance will be gone by 31 December 2018, as the programmes could only last for a maximum of six years and cannot be renewed. The practical relevance of the provision could be questioned. This section was not part of the initial Commission's ETD Proposal and has been inserted without further

motivation or reference. It seems that it has been left in the text by mistake in the Council²⁵⁸.

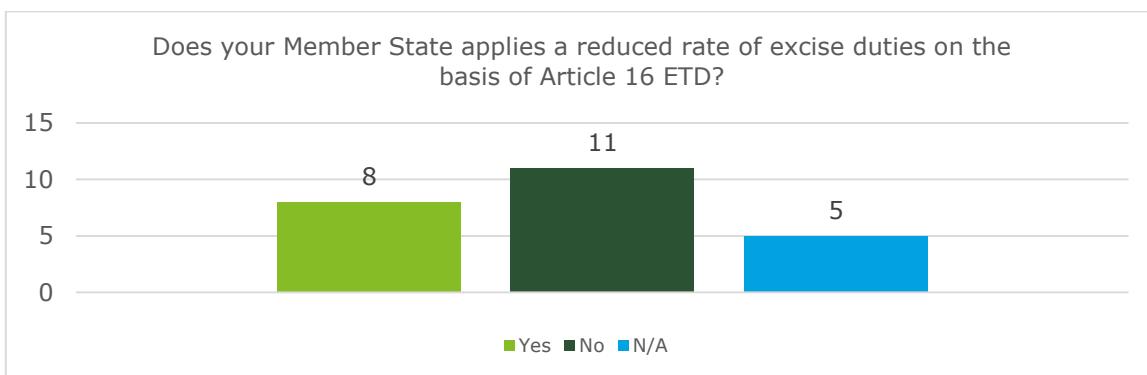
Article 16(6) ETD refers to the obligations under Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (**Renewable Energy Directive**)²⁵⁹, which is currently under revision²⁶⁰. From the Renewable Energy Directive, it follows that Member States have to reach national targets of energy produced from renewable sources by 2020. Sustainable biofuels are considered important to reach the 10% renewables target in the transportation sector.

²⁵⁸ Proposal for a Council Directive Restructuring the Community Framework for the Taxation of Energy Products, COM (97) 30 final, 12 March 1997; aei.pitt.edu/3522/1/3522.pdf, (Accessed: [12/01/2018]). The wording did form part of the first consolidated version of the Proposal; <http://data.consilium.europa.eu/doc/document/ST-10979-2002-INIT/en/pdf> (Accessed: [12/01/2018]).

²⁵⁹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance), *O.J. L.* 140, 5 June 2009, p. 16–62; eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0028 (Accessed: [12/01/2018]).

²⁶⁰ Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM (2016) 0767 final/2 – COM (2016) 0382(COD), 23 February 2017; eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0767R%2801%29 (Accessed: [12/01/2018]).

Figure 57 - Application of a reduced rate on excise duties on the basis of Article 16 ETD?



Source: Survey to Member States

The Member States providing for the reduction indicate they did not experience considerable uncertainty / confusion concerning the definition of biomass. The ETD definition is currently not fully in line with the Renewable Energy Directive.

ETD	The biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste.
Renewable Energy Directive	The biodegradable fraction of products, waste and residues <u>from biological origin</u> from agriculture (including vegetal and animal substances), forestry and related industries <u>including fisheries and aquaculture</u> , as well as the biodegradable fraction of industrial and municipal waste.
Proposed Renewable Energy Directive	The biodegradable fraction of products, waste and residues <u>from biological origin</u> from agriculture, (including vegetal and animal substances), forestry and related industries <u>including fisheries and aquaculture</u> , as well as the biodegradable fraction of <u>waste, including industrial and municipal waste of biological origin</u>
Belgium	Same definition as in the ETD.
France	Same definition as in the ETD.
Germany	Extensively defined in the Biomass Ordinance of 21 June 2001.
Sweden	Same definition as in the ETD.

Biofuels have gained importance over time (e.g. in Sweden currently approximately 18% of the energy content of all motor fuels). However, at the time of drafting the ETD, biofuels were niche fuels. Consequently, the legal framework does not sufficiently take into account

the specificities of these fuels. If special minimum tax levels would be introduced for biofuels (ethanol, biogas, FAME), there is no further need for this provision.

As it follows from the provision itself that '*the products produced from biomass*' may be exempt, there is no need to name all the other codes. The biomass in the ETD is not aligned with the definitions laid down in other instruments, e.g. the renewables Directive / environmental State aid guidelines. A proposal from the European Parliament to use the common legal definition of biofuels in Directive 2003/30/EC (predecessor of the Renewable Energy Directive) did not make it to the final ETD text²⁶¹. The Parliament deemed it necessary to make use of the common definition in order to ensure a coherent and consistent legislative framework, avoiding overlapping and possibly contradicting definitions of biofuels.

Furthermore, Article 16(3) ETD relating to the overcompensation calculations does not fit in the ETD. It is a measure relating to State aid and deserves a different legal framework (currently, there might be double regulation). Moreover, the relevance of this provision can be questioned, as there is no overcompensation calculation or similar rule laid down in conjunction with other reductions / exemptions. At the time of proposing the ETD, the applicability of State aid rules on the exemptions laid down in harmonized Directives was not entirely clear. In-depth discussions on State aid issues did take place within the Fiscal Questions Group of the Council for the purpose of analysing the ETD proposal. In a Commission Staff Working Paper, it was concluded that even though the assessment of the applicability of the State aid rules is only possible after the implementation of the ETD, "*the transparent rules of [the Community guidelines on State aid for environmental protection], in relation with a clear wording of the energy tax directive, give a high level of legal certainty to Member States and operators*"²⁶².

Overcompensation could be defined as the excess aid received to compensate for the purpose behind the aid. The overcompensation calculations are necessary for the application of both Article 16(3) ETD and the State aid framework (these calculations are very burdensome for economic operators and the authorities, and the calculation highly depends on what is compared).

When overcompensation is calculated in Sweden, the changes in production prices are taken into account (e.g. ethanol – considering labour costs etc.). The production price of ethanol is subsequently compared to the price of petrol (not the production price). Hence, overcompensation very much depends on the oil price. When the oil

²⁶¹ European Parliament, Report on the draft Council directive restructuring the Community framework for the taxation of energy products and electricity, A5-0302/2003, 11 September 2003; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0302+0+DOC+PDF+V0//EN> (Accessed: [12/01/2018]).

²⁶² Commission Staff Working Paper State-aid aspects in the proposal for a Council directive on energy taxation, SEC(2002) 1142, 24 October 2002; https://www.eumonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vi7jgstmxvl/f=/13545_02.pdf (Accessed: [12/01/2018]).

price rises, there is a large risk for overcompensation. The tax level is uncertain due to the risk of overcompensation, which is an impediment for new investments. If there is overcompensation, Sweden has to adapt its legislation as quickly as possible, either by lowering the petrol tax or by taxing the biofuels. Normally, the biofuel tax is increased.

The ETD only refers to taking account of the changes in raw material prices to avoid over-compensating for the extra costs involved in the manufacture of biomass products. For biofuels produced from waste, however, raw material prices are quite low ultimately leading to very few or even no aid allowed to be granted. The raw material prices do not take account of e.g. the production process, however, which also could be of relevance. Moreover, the State aid guidelines to account for overcompensation appear broader than the Article 16(3) ETD calculations. Alignment between the different sets of rules is needed to ensure a coherent approach towards over-compensation.

Conclusion

- The exemption / reduction for biomass foreseen in the ETD was concluded in a different technological and political context. The specific conditions linked to the biomass exemption / reduction are to be framed in a new context. Nowadays, however, questions arise regarding the position of biofuels in the EU framework on energy taxation, also considering new policy objectives and needs.
- The overcompensation provision overlaps with the State aid framework. Both instruments have the same objectives (tackling unjustified aid), but have different requirements in practice. This double coverage is deemed to burden the Member States disproportionately.
- The lack of requirements in the ETD as regards the fulfilment of any sustainability criteria for biofuels runs against the developments in climate change and energy policy.
- The limitation of the optional tax scheme to renewable fuels of biological origin also seems to be out of touch with the latest developments in other policy areas as regards renewable fuels of non-biological origin.
- The broad range of optional tax measures creates potential for market distortions and discrimination. This requires the application of State aid rules, which sometimes curb outdated energy taxation rules (e.g. lack of restrictions for unsustainable biofuels which are harmful to the environment). As a result of the optional character of the tax measures, State aid rules inevitably create certain restrictions for Member States sometimes hindering them in rolling out a fair tax treatment for 'green' energy. Environmental objectives can only be effectively supported by more consistent energy taxation legal rules, leaving less room for optional schemes. The legitimacy of the optional tax schemes, although argued on the basis of national circumstances and the subsidiarity principle is seriously undermined by the fact that it creates potential for market distortions and requires rigorous State aid analysis creating additional administrative burden for tax authorities, economic operators and the staff of the European Commission.

- The current rules aim to avoid overcompensation of the additional costs involved in the production of biofuels, essentially offering a neutral policy approach from a tax perspective. However, as explained above, the overcompensation requirement is related only to the price of raw materials, which is not in line with reality, where other costs or circumstances (e.g. the lower energy content per litre) could further undermine the competitiveness of sustainable biofuels. At the same time, this also implies that it is harder for the Member States to introduce tax incentives for biofuels because of the necessity to undergo complex State aid assessment due to the numerous options available to the Member States for providing tax schemes for biofuels.
- The text of Article 16 ETD is outdated and consists of superfluous sections. Referring to ‘products produced from biomass’, Article 16(1) consists of needless references to CN codes. Article 16(4) is outdated, Article 16(5), second subparagraph is redundant as it was most probably left in the text by mistake.
- The text of Article 16 ETD seems out of place, in particular when it comes to the exemption from taxation to the extent that a taxable product contains water. Additives or extenders in motor fuels are taxed at the rate for the equivalent motor fuel in accordance with Article 2(3) ETD. One could question why the reduced rate of taxation for products should only apply for water and not for other substances not contributing to the energy content of the fuel.
- The definition of ‘biomass’ is not aligned with other policy instruments, in particular the Renewable Energy Directive. The European Parliament deemed it necessary at the time of the introduction of the ETD to make use of a common definition at EU level (the one in the Renewable Energy Directive’s predecessor) in order to ensure a coherent and consistent legislative framework, avoiding overlapping and possibly contradicting definitions of biofuels.

B.17 Article 17

Article 17(1) ETD provides that the Member States can apply, under specific conditions, tax reductions in favour of energy-intensive business and of undertakings which concluded agreements leading to the achievement of environmental protection objectives or to improvements in energy efficiency. The tax reductions apply on energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) ETD, and on electricity. Article 8(2)(b) and (c) ETD relate to products used as motor fuel in stationary motors and in plant and machinery used in construction, civil engineering and public works. Article 17(2) ETD stipulates that Member States may apply a level of taxation down to zero to energy products and electricity used by energy-intensive businesses. Article 17(3) ETD determines that the Member States may apply a level of taxation down to 50 % of the minimum levels of taxation for business entities as defined in Article 11 ETD, which are not energy-intensive businesses. Article 17(4) ETD prescribes that businesses that benefit from the possibilities referred to in paragraphs 2 and 3 have to enter into agreements, tradable permit schemes

or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency.

Article 17(1)

Description

Article 17(1) ETD provides that, provided the minimum levels of taxation prescribed in the ETD are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) ETD and on electricity, in favour of energy-intensive businesses and where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency. Recital 29 of the ETD justifies:

Businesses entering into agreements to significantly enhance environmental protection and energy efficiency deserve attention; among these businesses, energy intensive ones merit specific treatment.

An important condition imposed by Article 17 (1) ETD is thus that Member States respect the minimum levels of taxation prescribed in the ETD ‘on average for each business’. It should be looked at the minimum levels of taxation of Articles 8, 9 and 10 ETD for the application of this provision. The tax reductions apply on energy products used for heating purposes or for the purposes of Article 8 (2)(b) and (c) ETD, and on electricity. Article 8 (2)(b) and (c) ETD relate to products used as motor fuel in stationary motors and in plant and machinery used in construction, civil engineering and public works.

With regard to the definition of ‘energy-intensive business’, Article 17 (1)(a) ETD specifies that this term designates a business entity, as referred to in Article 11 ETD, where either the purchases of energy products and electricity amount to at least 3,0% of the production value or the national energy tax payable amounts to at least 0,5% of the added value.

In this definition of ‘energy-intensive business’, the first criterion relates to the costs of purchases of energy products and electricity. With ‘purchase of energy products and electricity’ is meant the actual cost of energy purchased or generated within the business. This includes only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8 (2)(b) and (c) ETD. The costs include all taxes, except deductible VAT. The costs of the purchases of energy products and electricity should amount to at least 3,0% of the production value. The ‘production value’ is also defined in Article 17 (1)(a) ETD, as being the turnover, including subsidies directly linked to the price of the product, plus or minus the changes in stock of finished products, work in progress and goods and services purchased for resale, and minus the purchases of goods and services for resale.

In the above definition of ‘energy-intensive business’, the second criterion concerns the payable national energy tax, that should amounts to at least 0,5% of the added value. In its

fourth paragraph, Article 17(1) ETD defines the added value as the total turnover liable to VAT including export sales, minus the total purchases liable to VAT including imports.

The last sentence of Article 17(1)(a), subparagraph 1 ETD concludes on the definition of ‘energy-intensive business’ by stating that Member States are allowed to apply more restrictive concepts, including sales value, process and sector definitions.

At last, it should be mentioned that the transitional provision contained in Article 17(1) ETD, fifth subparagraph, has become obsolete.

Analysis

The first condition for application of Article 17(1) ETD is that the minimum levels of taxation prescribed in the Directive are respected ‘on average for each business’. This provision thus relates to the average applied rate within a business entity, i.e. the average between the parts of the consumption of energy product or electricity for that are zero-rated and the remaining part of the consumption for which other rates apply. In practice however, the authorities from several Member State admitted that this condition was actually not monitored. Others have an own interpretation and implementation of this term. For example, Poland notes that tax rate for electricity is set at a high level, significantly exceeding the levels set in the ETD and that exemptions can be applied only by a limited number of taxpayers who meet the conditions. Therefore, for them there is no doubt that on average the minimum levels of taxation are respected. It thus seems that the Polish authorities interpret the notion ‘business’ broadly, as meaning ‘sector’. It seems to be unclear whether the concept ‘on average for each business’ refers to the average rate applied to businesses on Member State level, the average rate applied to businesses on sector level, or the average rate applied to individual businesses.

Since Article 17 ETD explicitly refers to ‘energy products’ only, the question was raised whether this would mean that other taxable products falling within the scope of the ETD would be not be exempted or would not benefit of a reduced rate (e.g., non-energy products intended to be used as motor fuel). According to the jurisprudence of the ECJ, taxable products not covered by Article 2(1) ETD and thus not covered by the term ‘energy products’ as such, cannot be considered to fall within the scope of the exemptions²⁶³. Several Member States adhere to a different view, however. In this regard, all the Member States interrogated on that question interpreted the provision broadly, and indicated that in their view all taxable products should be covered.

According to two of the three Member States which indicated applying an exemption to energy products and electricity used by energy-intensive businesses, the definition of ‘energy-intensive business’ is not clear enough. For these two authorities, the satisfaction to the criteria used for the definition of ‘energy-intensive business’ are difficult to monitor. They also recognize the administrative burden for the companies to prove that ‘energy-

²⁶³ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

intensive' status. On the term 'energy-intensive business', Denmark notes that the definition provided for in the ETD is too broad, and therefore fears that companies would structure themselves in order to be considered as energy-intensive, for example, by separating a company and restructuring the different parts. Furthermore, in this definition of 'energy-intensive business', the first criterion relates to the costs of purchases of energy products and electricity. With 'purchase of energy products and electricity' is meant the actual cost of energy purchased or generated within the business. It was pointed out that overcharges on energy purchases to support renewable energy (e.g. additional contributions of EUR 62 per kilowatt/hour on electricity in Germany) are not taken into account in the ETD criteria although they are higher than energy costs. Several participants were in favour of keeping the differentiation and definition of energy intensive industries, as the ETD is the only Directive to do so, but one of them suggested that this definition takes into account CO₂ costs and environmental taxes. All participants highlighted the link between the ETD and ETS and that if the definition changed in one case, it should also be adapted in the other.

The answers received from the nine concerned economic operators are on the same line. The administrative burden is seen as an obstacle for the application of the provision. In particular, the methodology for calculating the percentages as set in the definition based on which establishment can be classified as an energy-intensive business for the purpose of exemption of electricity is seen as problematic. In practice, questions arise concerning the data that should be taken into the account to calculate these percentages. For example, should only the cost of the electricity be taken into account, or should the distribution fees also be included? It is doubted that same calculation methodology can be applied irrespective the energy product concerned.

The last sentence of Article 17(1)(a), §1 ETD concludes on the definition of 'energy-intensive business' by stating that Member States are allowed to apply more restrictive concepts, including sales value, process and sector definitions. In this regard, reference should be made to Article 11(4) ETD, which grants even more flexibility for Member States to limit the scope of the reduced levels of taxation for business use foreseen in Article 17 ETD. Indeed, whereas Article 17 ETD ties up the restriction to the concept of energy-intensive businesses, Article 11(4) extends this possibility to all business entities.

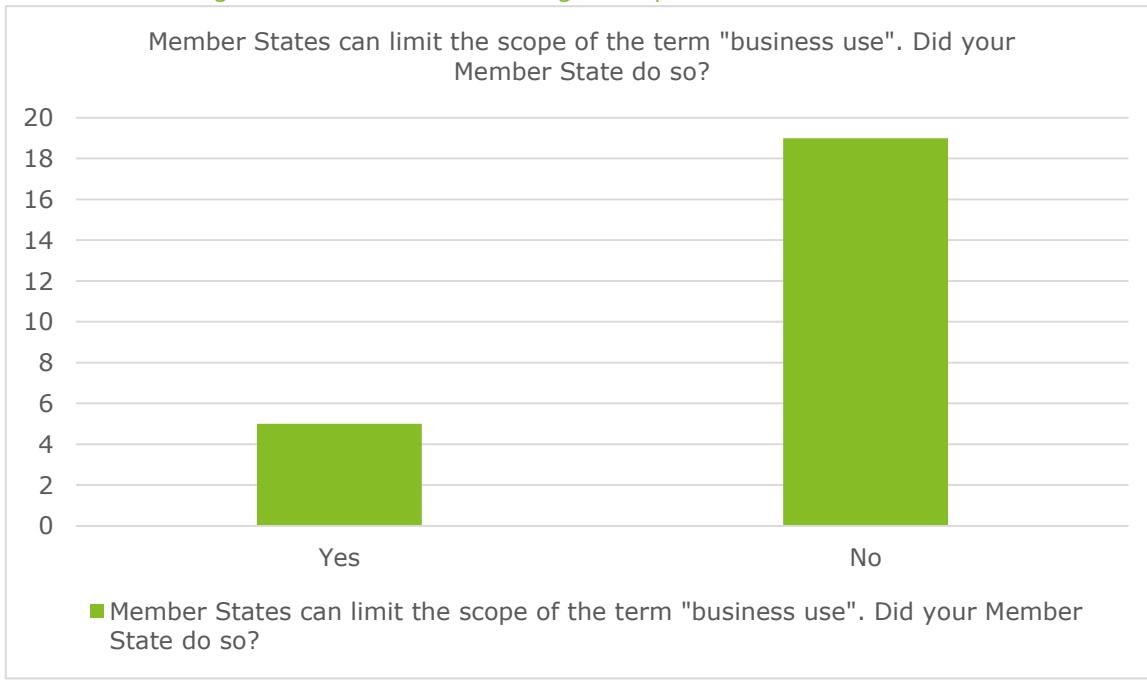
This provision has led to a request for an ECJ preliminary ruling²⁶⁴. The request was made in proceedings concerning the refusal by the competent Italian authorities to permit the Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) — Fondazione Santa Lucia ('the foundation') to benefit from the Italian national payment incentive scheme covering general electricity charges. In this case, the second question for the ECJ to answer is whether Article 17(1) ETD must be interpreted as precluding national rules which provide for tax reductions on the consumption of electricity in favour of energy-intensive businesses in the

²⁶⁴ ECJ C-189/15, *IRCCS – Fondazione Santa Lucia*, ECLI:EU:C:2017:17.

manufacturing sector alone. With regard to this second question, the ECJ answers in the negative:

46. *In that regard, it is apparent from the order for reference that, by virtue of the national rules at issue in the main proceedings, only 'energy-intensive' businesses in the manufacturing sector have the benefit of incentives relating to the amounts covering general electricity charges.*
47. *In accordance with Article 17(1)(a) of Directive 2003/96, provided the minimum levels of taxation prescribed in that Directive are respected on average for each business, Member States may apply tax reductions on the consumption of electricity in favour of energy-intensive businesses.*
48. *That provision also defines the concept of 'energy-intensive business' and states, in the context of that definition, that Member States may apply more restrictive criteria, such as sales value, process and sector definitions.*
49. *It follows therefrom that, for the purposes of that provision, the Member States remain free to restrict the benefit of tax reductions for energy-intensive businesses to those in one or more industrial sectors. Consequently, that provision does not preclude national rules, such as those at issue in the main proceedings, which grant incentives in respect of the amounts covering general electricity charges to the manufacturing sector alone.*
50. *That interpretation is borne out by the examination of the objectives pursued by Directive 2003/96. It is apparent from recitals 9 and 11 of that Directive that it seeks to give Member States the flexibility necessary to define and implement policies appropriate to their national circumstances and the arrangements made in connection with the implementation of that Directive are a matter for each Member State to decide.*

Figure 58 - Member States limiting the scope of the term 'business use'



Source: Survey to Member States

In the web-survey, the question has been raised whether the Member States were effectively using the possibility that is offered to them to limit the scope of the reduced level of taxation for business use. It appears that five Member States have made use and implemented the possibility granted under Articles 11(4) and 17(1) ETD to limit the scope of the reduced level of taxation for business use.

As an illustration, Germany indicated having limited the scope of the reduced level of taxation for business use to the agriculture and forestry sectors; and Sweden has limited the scope of business use to manufacturing processes. The Swedish authorities indicated that, if the identification of a ‘manufacturing process’ may be regarded as difficult, in practice, once the ‘manufacturing process’ has been established after case-by-case analysis has been carried out, no further issues arose. They argue that, if the scope of ‘business use’ was not limited, more administrative burden (and potentially distortions) would arise.

Denmark used that possibility to apply more restrictive concepts, so that only the part which is used for the energy-intensive processes will receive a reduced rate. As such, for the activities performed in its administrative building of the company, the higher rate will apply (similar to non-energy-intensive businesses). According to Denmark’s authorities, this results in less distortion of the national market. A business will have to differentiate between the energy used for space heating and for processes, and to calculate themselves to what extent the energy is used for which business.

Economic operators did not indicate that the reduction of the scope was experienced as a distortion of the competition. Considering Article 17(1) ETD contains the optional possibility to introduce a reduced rate, the question whether distortion would arise is to be considered at that level, as any distortion would be inherent to the optional character of this provision.

Article 17(2)

Description

Article 17(2) ETD stipulates that notwithstanding Article 4(1) ETD, Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2 ETD, when used by energy-intensive businesses.

In line with Article 17(4) ETD, the condition for a business to implement an arrangement as prescribed under Article 17(1)(b) ETD is however applicable to benefit from the reduced taxation rate down to zero.

Analysis

Certain authors consider that, since the condition of Article 17(1) ETD – according to which Member States should respect, on average for each business, the minimum levels of taxation prescribed in the ETD – is not reiterated in Article 17(2) ETD, it would also not apply to this second paragraph. This would result from the formulation ‘notwithstanding Article 4(1) ETD’. In that latter provision, it is established that the levels of taxation which

Member States apply may not be less than the minimum levels of taxation prescribed by this Directive.²⁶⁵

It has to be noted however that this view could be contested. Indeed, the condition set in Article 17(1) ETD relates to the possibility to apply tax reductions for businesses. These possibilities to apply tax reductions are further described in Article 17(2) and (3) ETD, and not in Article 17(1) ETD. Therefore, we are of the opinion that the condition of Article 17(1) ETD precisely aims to be applied on the following two paragraphs.

As regard the condition according to which businesses should implement arrangements as prescribed under Article 17(1)(b) ETD, it undoubtedly remains fully valid. That condition is indeed contained in Article 17(4) ETD.

Member States may apply a level of taxation down to zero to energy products and electricity when used by energy-intensive businesses. The main concern from the perspective of State aid control “is that firms benefiting from such reductions are obtaining an unfair advantage, which improves their competitive position compared to other firms and potentially distorts trade between Member States. Schemes could also introduce distortions within Member States if companies in specific sectors are treated differently (e.g. large firms receive support, while smaller firms do not)”²⁶⁶.

Some Member States have indeed confirmed having been confronted with State aid cases with the European Commission. For instance, the Belgian authorities have adapted their tariffs preventively, when they were informed that a State aid case could be opened and have a negative outcome. Therefore, the zero-tariff for energy-intensive companies parts to an environmental agreement have been increased above to the EU minimum levels of taxation.

Article 17(3)

Description

Pursuant Article 17(3) ETD, notwithstanding Article 4(1) ETD, Member States may apply a level of taxation down to 50 % of the minimum levels in this Directive to energy products and electricity as defined in Article 2 ETD, when used by business entities as defined in Article 11 ETD, which are not energy-intensive as defined in Article 17(1) ETD.

In line with Article 17(4) ETD, the condition for a business to implement an arrangement as prescribed under Article 17(1)(b) ETD remains however applicable to benefit from the reduced taxation rate down to 50 % of the minimum levels.

²⁶⁵ Overgaauw, J., De Blieck, J. And Koopman, R.-J., “Vakstudie 12 – Accijnzen en milieubelastingen”, *Fiscale encyclopedie De Vakstudie*, 2016.

²⁶⁶ European Commission, ‘Improving State Aid for Energy and the Environment’, *Competition policy brief*, issue 14, October 2016, ISBN 978-92-79-38783-8, ISSN: 2315-3113.

Analysis

Three Member States indicated that they apply the reduced taxation rate based on Article 17(3) ETD.

From the nine economic operators benefitting from the reduced rates for business entities, which are not energy-intensive, that entered into agreements, tradable permit schemes or equivalent arrangements, three witnessed the considerable administrative burden that is associated with the national granting procedure.

Article 17(4)

Description

Article 17(4) ETD specifies that businesses that benefit from the possibilities referred to in paragraphs 2 and 3 must enter into the agreements, tradable permit schemes or equivalent arrangements as referred to in Article 17(1)(b) ETD. The Article further edicts that the agreements, tradable permit schemes or equivalent arrangements must lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed.

Analysis

The five Member States' authorities that acknowledged having implemented a system of zero-rated or reduced duty rates based on Article 17 ETD confirmed that the wording 'agreements, tradable permit schemes or equivalent arrangement leading the achievement of environmental objectives or increased energy efficiency' was clear enough in their opinion.

In the questionnaire, no economic operators flagged this provision as being problematic.

The analysis of what is considered as 'agreements, tradable permit schemes or equivalent arrangement leading the achievement of environmental objectives or increased energy efficiency' within the different Member States shows however big variations.

In France, the existence of 'the achievement of environmental protection objectives' or 'improvements in energy efficiency' is determined by the Ministry of Environment ; the customs authorities are only the fiscal arm of the environmental policy and are not liable of this issue.

In Poland, the achievement of environmental protection objectives or the improvements in energy efficiency is assessed by implementation of environmental systems and certification (EU ETS, EMAS, ISO 14001:2004; ISO 50001:2011).

In Portugal, for small and medium enterprises the responsible is the Ministry of Economy and the DG of energy and for the big companies they need to respect the ETS and so the

responsible for the decision is the Ministry of Economy. Decree-Law no. 71/2008, of April 15, regulates the SGCIE - Energy Intensive Consumption Management System. This system is applicable to energy-intensive consumer installations with consumptions exceeding 500 toe / year. Within this framework, this Decree-Law defines which Intensive Energy Consumption (CIE) installations extend their application to a wider range of companies and installations with a view to increasing their energy efficiency, taking into account the need to safeguard their respective Competitiveness in the global economy. The SGCIE provides for CIE facilities to conduct periodic energy audits related to the conditions for energy use and promotes increasing on energy efficiency, including the use of renewable energy sources. It also provides for the elaboration and execution of Energy Consumption Rationalization Plans (PREn) that contemplates minimum energy efficiency objectives. The PREn, when approved, give raise to Energy Consumption Rationalization Agreements (ARCE).

Upon today, this provision is used in Sweden only to provide for reductions for installations covered by the EU Emission Trading system (ETS). Sweden had a programme for energy efficiency in place to cover those businesses but Sweden abolished it as the scheme was not in line with State aid rules (app. four years ago, with the last companies leaving the programme in 2017). Another provision, which gave a tax reduction above the minimum level to heavy fuel consumers, was abolished in 2013. Sweden considers Article 17 ETD important insofar it allows having tax reductions for companies covered by the EU ETS system.

Sweden apparently interprets the term 'tradable permit schemes' so as to include the EU ETS. It can be questioned whether the ETS should effectively be covered by this provision. In that regard, it is first referred to Recital 29 ETD, which stipulates that businesses entering into agreements to significantly enhance environmental protection and energy efficiency deserve attention. Next thereto, Article 17(4) ETD adds quantitative references on the effects of to be achieved by these environmental protection or improvements in energy efficiency: they should be broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed. At last, it should be reminded that the ETS Directive was adopted before the ETD, so the ETS could have been mentioned explicitly in Article 17 ETD if it had been the intention to cover it. Furthermore, the wording of Article 17(1)(b) suggests that the participation in these particular tradable permit schemes is voluntary, whereas the ETS poses obligations on certain economic operators.

Conclusion

- Considering the different implementation of that Article among Member States, additional definitions and clarifications would serve the harmonization:
- The conditions in Article 17(1) ETD to respect the minimum levels of taxation 'on average for each business' and in Article 17(4) ETD concerning the achievement of environmental objectives or increased energy efficiency that should be 'broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed', are too vague and not clear enough. Consequently, these

conditions receive very diverging implementations in Member States, if any. There is a lack of rules to verify that the conditions in these paragraphs are fulfilled;

- It is not entirely clear if the requirement in paragraph 1 on the ensuring that on-average for each business the minimum levels of taxation are met, is not applicable to paragraphs 2 and 3.
- The definitions of ‘energy-intensive businesses’ and ‘agreements, tradable permit schemes or equivalent arrangements’ are, according to Member States and economic operators, difficult to implement and to monitor. A notable illustration is the existing confusion between the term ‘tradable permit scheme’ and the EU ETS. In that regard, Commission guidelines would provide more clarity and certainty.
- In practice, and as it has already been pointed out earlier in this study, the term ‘energy products’ is, for the application of Article 17 ETD, often interpreted broadly as covering all taxable products.
- The scope of the reduced level of taxation for business use may be limited by Member States. Some Member States confirmed applying such a limitation. The ECJ, in case C-189/15, has recognised that the Directive seeks to give Member States the flexibility necessary to define and implement policies appropriate to their national circumstances and the arrangements made in connection with the implementation of that Directive are a matter for each Member State to decide.

Due to the numerous possibilities for selective application of the tax reductions and exemptions and the associated risk of distorting competition, the actual application of the tax schemes normally requires State aid assessment.

B.18 Article 20

Control and movement provisions of the Horizontal Excise Directive

The energy products referred to in Article 2(1) ETD, that are subject to the *control and movement provisions* of the Horizontal Excise Directive, are listed in Article 20(1) ETD. The fact that the products in question would be out of the scope of the ETD on the basis of Article 2(4)(b) ETD does not bear any consequences for the application of Article 20 ETD. Only the following energy products are covered by the control and movement provisions from the Horizontal Excise Directive:

- a) *falling within CN codes 1507 to 1518, if these are intended for use as heating fuel or motor fuel*
- b) *falling within CN codes 2707 10, 2707 20, 2707 30 and 2707 50*
- c) *falling within CN codes 2710 11 to 2710 19 69*
- d) *falling within CN code 2905 11 00, which are not of synthetic origin, if these are intended for use as heating fuel or motor fuel*
- e) *falling within CN code 3403*
- f) *falling within CN code 3811*
- g) *falling within CN code 3817*

h) falling within CN code 3824 90 99 if these are intended for use as heating fuel or motor fuel

The Member States have the possibility to advise the European Commission on the inclusion of other products to fall under the control and movement provisions of the Horizontal Excise Directive.

The majority of the respondent Member States (15 out of 20) considers that the current list of products covered in Article 20 ETD is inadequate and that products should be removed and/or added.

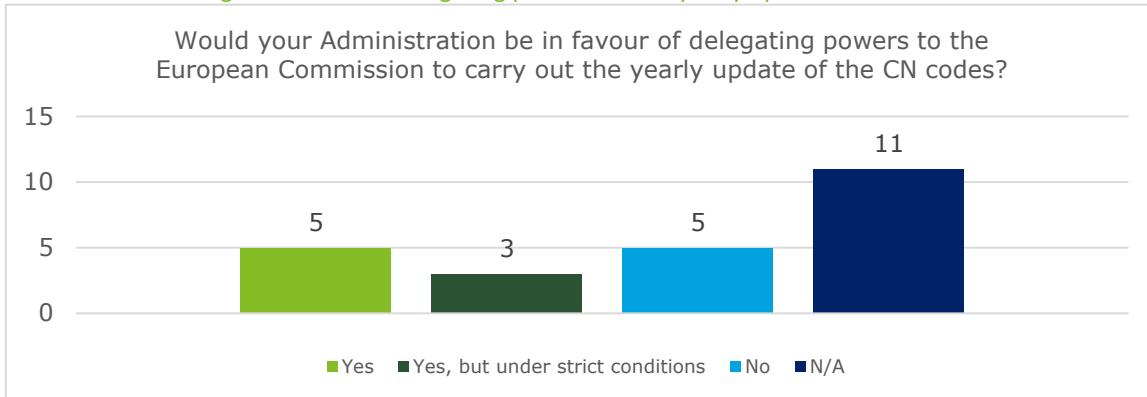
- A number of Member States (7 out of 15) suggest adding lubricants / lubricating oils (for bulk commercial movements – codes 2710 19 91 to 2710 19 99).
- Also hydrogen, liquefied natural gas (LNG), and other products if the need would arise could be added to the list, according to comments of individual Member States. The need to add LNG to the list is backed by 29 out of the 71 respondent economic operators active in the energy sector.

It should be noted that the clarification regarding the classification of low-viscosity lubricating oils from 2710 19 99 to 2710 19 41 (gas oil)²⁶⁷ potentially results in these products falling within the scope of Article 20(1)(b) ETD, in principle as of the date of a future revision of the legal instrument with respect to the Combined Nomenclature applicable.

Contrary to the suggested delegation to the European Commission regarding the update of the list in Article 2(1) ETD, however, the Member States are less inclined to delegate powers to the Commission to include in or remove energy products from the list in Article 20(1) ETD. This could be explained considering the impact of adding products to the list in Article 20(1) ETD, whereas an update of the list in Article 2(1) ETD is more of a formal nature, bringing the ETD in line with the actual CN codification.

²⁶⁸ Excise Committee Guideline, *Definition of 'bulk' for the application of Article 20(1)(c) of Directive 2003/96/EC*; CED No 585; http://www.agenciatributaria.es/static_files/AEAT_Intranet/Aduanas/Manuales/IIEE/Comite_Accisas/ced585en.pdf (Accessed: [12/01/2018]).

Figure 59 - Views delegating powers for the yearly update of CN codes



Source: Survey to Member States

The control and movement provisions of the Horizontal Excise Directive apply to products within CN codes 2710 11 21, 2710 11 25 and 2710 19 29, only if it concerns *bulk commercial movements*. This has been defined on EU level with a guideline of the Committee on Excise Duty as “*unpackaged product transported in containers that are either an integral part of the means of transport (road tank wagons, railway tank wagons, tanker vessels, etc), or in ISO-tanks*”, as well as “*unpackaged product transported in other containers exceeding 210 litres volume*”²⁶⁸. This definition was integrated in e.g. the Belgian national guidelines²⁶⁹.

The following Member States provided their national definitions for bulk commercial movements in the application of Article 20 ETD.

Austria	<p>See §2 (8) (2) Mineral oil tax act: “wenn diese in Gebinden abgefüllt sind”(if filled in containers/barrels – then the products are excluded).</p> <p>In guidelines we precise a bulk commercial movement is in any case a transport in a road- or rail tanker or tanker vessel (as there the transport takes place in immediate packings).</p> <p>Never a bulk commercial movement is a transport in small containers for end users.</p> <p>Decisive in other cases is whether the container (plus content) can be removed readily from the transport vehicle and whether the container/barrel contains 210 l or more.</p> <p>(We apply the excise committee guideline).</p>
Belgium	Article 418, Section 1, last paragraph of the Program Act of 27

²⁶⁸ Excise Committee Guideline, *Definition of ‘bulk’ for the application of Article 20(1)(c) of Directive 2003/96/EC*; CED No 585; http://www.agenciatributaria.es/static_files/AEAT_Intranet/Aduanas/Manuales/IIEE/Comite_Accisas/ced585en.pdf (Accessed: [12/01/2018]).

²⁶⁹ §6 Circular letter 2017/C/51 concerning excise taxation – energy products and electricity; <http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=91b1314a-03a3-40b4-b40f-fe6ab5e3272e&documentLanguage=NL#findHighlighted> (Accessed: [12/01/2018]).

	December 2004 states: "For the purposes of paragraph 1 (c)," commercial bulk carriage "means the carriage of unpacked goods in containers which are an integral part of the means of transport (tanks, tankers, tankers, or similar means of transport) or in ISO tanks. This shall be equivalent to the carriage of unpacked goods in other containers with a capacity exceeding 210 liters.
Bulgaria	Commercial bulk carriage or goods in "draft condition" are unpackaged, transported in vessels, forming integral part of the means of transportation, as well as in cases, if its unpackaged, transported in vessels of a volume in excess of 210 lt.
Croatia	Bulk commercial movements means unpackaged product transported in containers that are either an integral part of the means of transport (road tank wagons, railway tank wagons, or tanker vessels) or in ISO-tanks, including unpackaged products transported in other containers exceeding 210 litres volume.
Cyprus	Cyprus applies Guideline CED 585 according to which a package exceeding 210 liters is considered as "bulk commercial movement".
Czech Republic	Bulk movements are not stipulated in the excise legislation, but in one piece of legislation with regard to lubricating oils the definition contained in Guideline No 585 is used. The person handling lubricating oils means the person acquiring these oils which are loaded in bulk or placed in package exceeding 220 litres.
Denmark	There is no definition in national law. It depends on an assessment.
Estonia	This term is not defined in our national legislation. According to ETD EMCS is used when products within CN codes 2710 11 21, 2710 11 25 and 2710 19 29 are dispatched in bulk.
Finland	In the Finnish Act on Excise Duty on Liquid Fuels (1472/1994), 'bulk' is defined so that it does not apply to retail packages. In practice Finland has applied Commission's guidelines (CED No 585 Final)
France	Les mouvements commerciaux en vrac sont définis au paragraphe [4] du bulletin officiel des douanes (BOD) n° 6950 : "Le transport d'une huile minérale en vrac est constitué dès lors que le produit est transporté : – dans des conteneurs faisant partie intégrante du moyen de transport (camion-citerne, remorque-citerne, bateau-citerne, etc.) ; – ou dans une citerne ISO ; – ou dans des récipients d'une contenance supérieure à 210 litres".
Germany	The German definition is based on the EU Guideline (CED No 585 final) concerning bulk commercial movements. Without any

	relevant modifications, Germany has adopted these guidelines in several internal service regulations.
Italy	As for the products referred to in Article 20 ETD, for which the control and circulation rules are applied only in case of bulk commercial movements (i.e. products falling within CN codes 2710 11 21, 2710 11 25 and 2710 19 29 – white spirits and similar), it must be assumed that no circulation limits apply when they are packaged in specific containers of a predetermined capacity (generally up to 1 liter, but this limit may be increased up to 225 liters upon specific authorization from the Customs Authorities).
Latvia	As bulk commercial movements are assumed any bulk movements and movements of sealed package with the volume exceeding 250 liters for energy products mentioned in Article 20 ETD.
Hungary	Bulk movement shall mean the commercial movement of energy products in tanker trucks, rail tanks cars, tanker ships, tank containers or in containers holding 210 liters or more.
Luxemburg	The transport of unpacked products in containers that are an integral part of the means of transport (tanker, tanker vehicles, tank trailer, tank car, tanker vessel and other similar means of transport) or in ISO tank containers. Transport of unpacked products in other containers of a volume beyond 210 liters. (Règlement ministériel du 29 mars 2005 portant publication de la loi-programme belge du 27 décembre 2004). Modified by: Règlement ministériel du 27 février 2009 portant publication de la loi belge du 8 juin 2008 portant des dispositions diverses)
Netherlands	This is not defined in our national legislation.
Poland	National legislation does not stipulate legal definition of bulk commercial movement”.
Portugal	The legal definition is literally the same, and is generally understood as meaning the movement of products that are not packaged for retail sale.
Romania	According to Romanian legislation, the bulk commercial movements of energy products means their transport through: (a) tanks, reservoirs or other similar containers that are an integral part of the means of transport, such as: road tank wagons, railway tank wagons, tanker vessels, b) ISO certified tanks,

	c) other containers exceeding 210 litres in volume. (find attached on the bottom of the e-mail CED 585/2006 - regarding bulk movements)
Slovakia	In accordance with the Directive. Common tanks are for the purposes of this act understood as tanks firmly built in by the producer of means of transport, machines and equipments as well as gas tanks if gas serves as a motor fuel.
Slovenia	In Slovenia for bulk commercial movements are considered products transported in containers, which are an integral part of the means of transport or the ISO-containers or other containers exceeding 210 liters. ISO container is a container that conforms to ISO 668: 2013 and ISO 1496-1: 2013 and ISO 15867: 2003rd.
Spain	For the purposes of the excise Law, the consideration of "bulk commercial movements" shall be those shipments which, regardless of the condition of the recipient, are made without any other container than the tank or similar continent integrated in the means of transporting making the supply.
Sweden	Sweden has no national definition of the term "bulk commercial movements", however compares the EU guideline in CED document no 585.
UK	We understand this question to refer to control and movement rules for the following commodities in the 2002 Combined Nomenclature (CN), with System for Exchange of Excise Data (SEED) excise product code E480: <ul style="list-style-type: none"> •White spirit •Light oils and preparations for other purposes (not for undergoing a specific process or chemical transformation) •Medium oils for other purposes (not for undergoing a specific process or chemical transformation, and not including kerosene) For these commodities the United Kingdom follows the accepted practice defined by the Commission. This is that anything carried in a road tanker, rail wagon or similar is a bulk commercial movement.

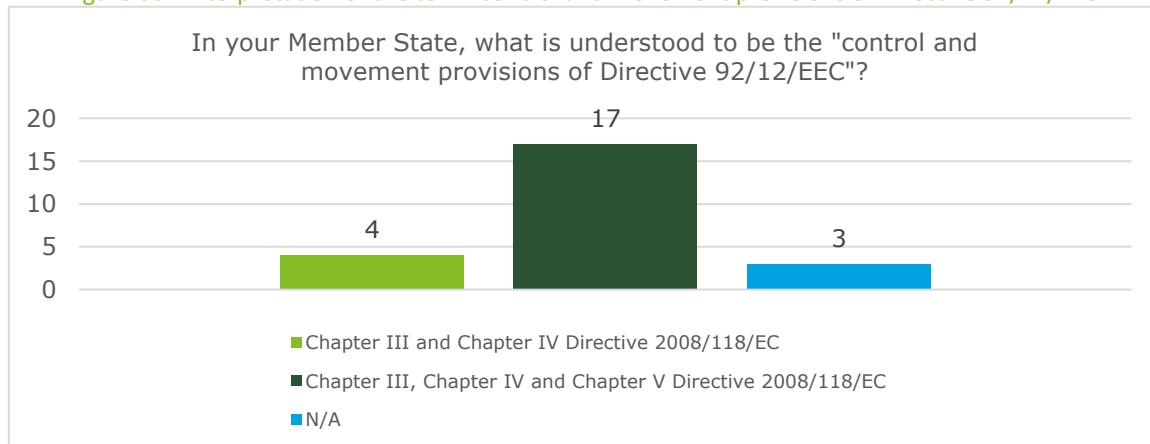
Although this terminology may be clear in most of the cases, this still could lead to issues in practice, as it appears from the interviews with economic operators.

The question arose in practice whether the movement of a 200 liter barrel can / is to be treated as a bulk commercial movement, whereas the movement of a 1.000 liter container is not. Especially when the movement is carried out under duty suspension, this could lead to issues due to the differences in interpretation between the Member States.

As this is not apparent from the current provision, the version of Article 20 of the 2011 Commission Proposal for revision of the ETD referred explicitly to “chapters III and IV of Directive 2008/118/EC”. Chapter III concerns *production, processing and holding* of excise goods, whereas Chapter IV concerns the *movement of excise goods under suspension of excise duty*. Chapter V – which was not included in the 2011 Commission Proposal for revision of the ETD – concerns the *movement and taxation of excise goods after release for consumption*, i.e. after the duty was paid. As excise taxes are in principle levied at the place of consumption, the Horizontal Excise Directive foresees in provisions on the chargeability and information obligations if the goods are subject to intra-EU movements after the duty was paid.

There is indeed a need for further clarification on the chapters considered as the holding and movement provisions of the Horizontal Excise Directive, as it is apparent from the chart below that the Member States are currently not fully aligned when it comes to the application of the provisions of the Horizontal Excise Directive.

Figure 60 - Interpretation of the term ‘control and movement provisions of Directive 92/12/EEC’

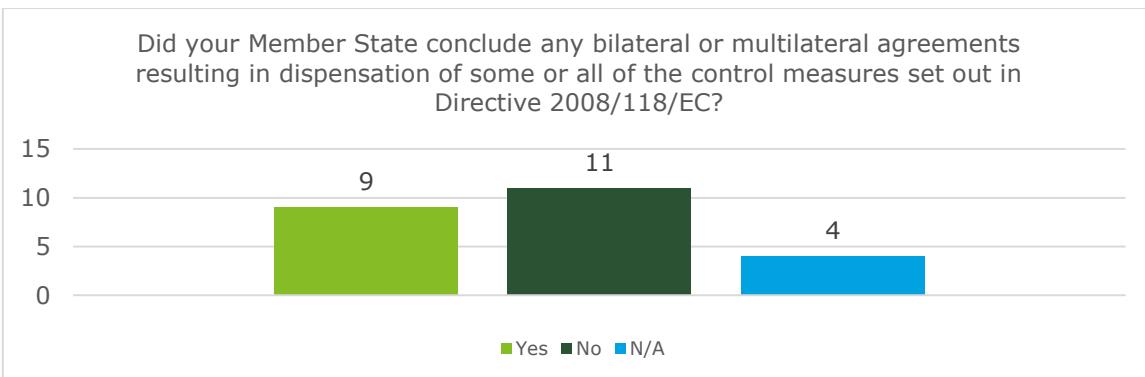


Source: Survey to Member States

Member States may, pursuant to bilateral arrangements, dispense some or all of the control measures set out in the Horizontal Excise Directive for particular products. The communication of the existence of such bilateral arrangement is carried out through the European Commission. Examples of such agreements are the Helsinki Agreement (concluded on 15 May 1998 between the Netherlands, Luxembourg, Belgium, Germany, Austria and the United Kingdom), an agreement between the Czech Republic and Slovakia concerning the simplification of energy product movements via pipeline, an agreement between France and Belgium with a specific list of products benefiting from exemptions from controls (concluded on 1 August 2005)²⁷⁰.

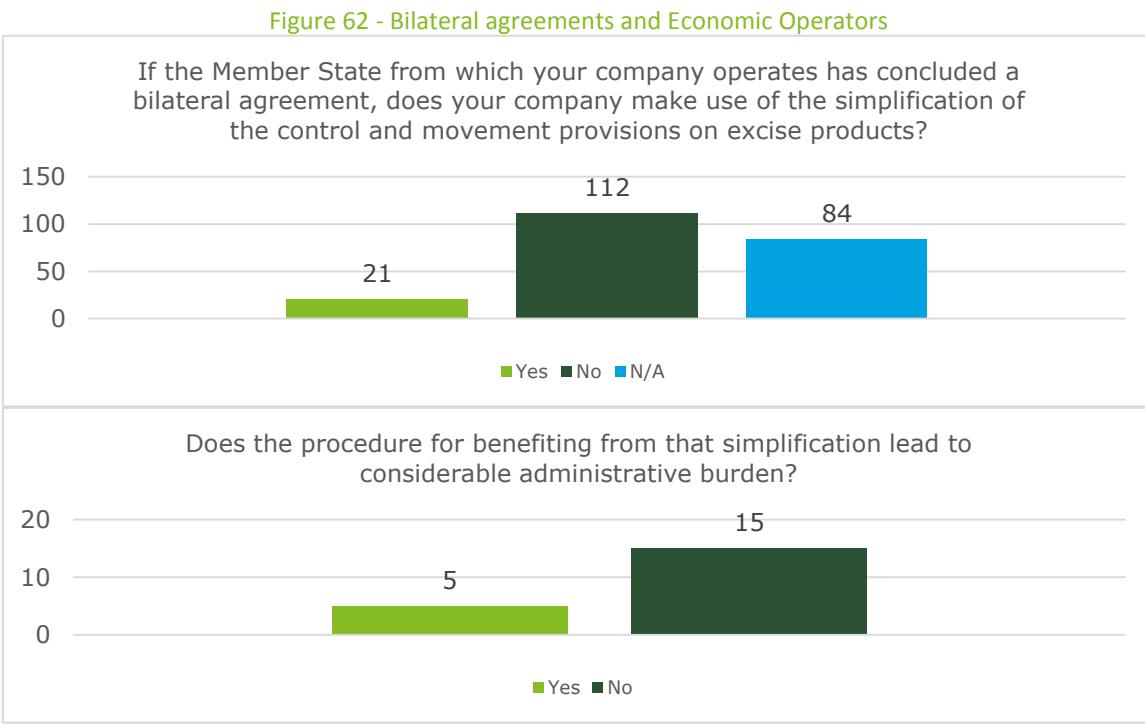
Figure 61 - Bilateral or multilateral agreements resulting in dispensation of some or all of the control measures set out in Directive 2008/118/EC

²⁷⁰ Source: Survey to the Member States.



Source: Survey to Member States

As reasons to conclude such agreement, Member States mention simplification, the reduction of the administrative burden for economic operators. The Member States that did not conclude any bilateral agreements did not do so because they never experienced any need for such agreement or they are of the opinion that the control and movement provisions should be applied equally among all Member States.



Source: Survey to Member States

Approximately than 1/6th of the respondent economic operators that have access to a bilateral agreement (21 out of 133 respondents) make use of the simplifications laid down in the agreement. Several operators indicate that the agreement still requires certain procedures / formalities to be met, such as the recording and (monthly) reporting of the movement of goods, the tracking of the goods, the drafting of reports and regular reporting towards the authorities.

Conclusion

- The movement of the taxable products caught by the ETD is not always straightforward. In practice, different approaches are adhered to by the Member States, ultimately resulting in either (i) double taxation or (ii) no controls.
- The term of *bulk* commercial movements led to different interpretations in the Member States and in the end to mismatches, causing considerable difficulties for economic operators. To avoid further discrepancies, a guideline was unanimously agreed upon by the Member States in the Committee on Excise Duty. However this guideline does not have the legal value of a definition included in a legal act, namely in the ETD and Member States can still have national definitions without formally infringing a concrete provision of EU legislation.
- Article 20 ETD provides for clarification on which products are covered by the control and movement provisions of the Horizontal Excise Directive. The current list is inadequate and does not meet the current needs of some of the Member States. However, economic operators may have a different view on this, particularly considering the administrative impact of adding products to the list (cf. the discussion on lubricants). In practice, it may prove difficult to assess the appropriate balance between fiscal control and economic flexibility. Also, the scope of the ‘control and movement provisions’ is interpreted differently by Member States giving rise to different treatment of intra-EU movements of some taxable products.

B.19 Article 21

Article 21(1) ETD stipulates that the taxation is also due on the occurrence of a chargeable event mentioned in Article 2(3) ETD. Article 21(2) ETD specifies that the word ‘production’ include extraction. On the basis of Article 21(3) ETD, the consumption of energy products within the curtilage of an establishment producing energy products is not considered as a chargeable event. Article 21(4) ETD foresees for a possibility for the Member States to provide that taxation will become due when a final use condition for the purpose of a reduced level of taxation or exemption is not fulfilled. Article 21(5) ETD describes specific provision concerning the chargeability of taxation for natural gas, electricity, coal, coke and lignite. Finally, Article 21(6) ETD authorizes Members States not to treat certain operations as being production of energy products.

Article 21(1)

Description

Article 21(1) ETD states that, in addition to the general provisions defining the chargeable event and the provisions for payment set out in Directive 92/12/EEC, the amount of taxation on energy products will also become due on the occurrence of one of the chargeable events mentioned in Article 2(3) ETD.

It is referred to the Directive 92/12/EEC, which laid down the general arrangements for products subject to excise duty – in particular mineral oils, alcohol and manufactured tobacco – and on the holding, movement and monitoring of such products. Directive 2008/118/EC repealed Directive 92/12/EEC with effect from 1 April 2010. In accordance with Article 47(2) of the former Directive, references to the repealed Directive 92/12/EEC shall be construed as references to Directive 2008/118/EC.

The Directive 2008/118/EC concerns the general arrangements for excise duty. In the context of the present analysis, we make in particular reference to:

- Article 2 of Directive 2008/118/EC, defining the chargeable events as being the production of excise goods, including, where applicable, their extraction, within the territory of the Community; and the importation of excise goods into the territory of the Community; and
- Article 7 (1) of Directive 2008/118/EC, which prescribes that the excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

The chargeable events mentioned in Article 2 (3) ETD do in principle not fall under the ‘general provisions’ of Directive 2008/118/EC. This is the reason why Article 21 (1) ETD dictates that the amount of taxation on energy products shall also become due on the occurrence of one of the chargeable events mentioned in Article 2 (3) ETD. The provision ensures that energy products referred to in Article 2 (3) ETD are taxed, even if they are not associated with a particular taxation rates and even if they are not defined in Article 2 (1), because of their similar destination.

Analysis

Article 21 (1) ETD defines that, on the occurrence of one of the chargeable events mentioned in Article 2 (3) ETD, the amount of taxation ‘on energy products’ will become due. There is a clear reference to ‘energy products’, and not ‘taxable products’ nor ‘electricity’.

In light of the judgment *Kernkraftwerke Lippe-Ems*²⁷¹, which was admittedly slightly different since it dealt with a mandatory exemption and not with a definition of the chargeable event, the ECJ seemed to impose a strict interpretation of the term ‘energy products’. According to this point of view, Article 21(1) ETD would thus not cover the other taxable products mentioned in Article 2(3) ETD.

It is doubted however that it will have been the intention of the legislator to leave the other taxable products out of the scope from Article 21(1) ETD, first because the chargeable event for these remaining products is nowhere else defined, and second as the wording ‘one of the chargeable events mentioned in Article 2(3) ETD’ suggests that the other products used

²⁷¹ ECJ C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354.

as motor fuels and the hydrocarbons used for heating purposes should also be taken into account.

Next thereto, it is also remarked that the wording of the current ETD could be subject of an amendment in order to replace all references to Directive 92/12/EEC by references to Directive 2008/118/EC. Although legally not making any difference, this would improve the general readability of the ETD.

Article 21(2)

Article 21(2) ETD states that for the purpose of the ETD, the word 'production' in Article 4(c) and 5(1) of Directive 92/12/EEC shall be deemed to include 'extraction', when appropriate.

It is referred to the Directive 92/12/EEC, which in the meantime has been repealed by Directive 2008/118/EC. Pursuant to Article 47(2) of the latter Directive, references to the repealed Directive 92/12/EEC shall be construed as references to Directive 2008/118/EC.

Under the repealed Directive 92/12/EEC, the references to the 'production of excise goods' where not assorted with the precision that this term would include extraction. On the contrary, the repealing Directive 2008/118/EEC stipulates explicitly, in its Article 2(a), that the production of excise goods include, where applicable, their extraction. This insertion is not coincidental, as demonstrated in the Commission's proposal that has led to the Directive 2008/118/EEC:

Article 2(1) corresponds to Article 5(1) of Directive 92/12/EEC. However, the word "extraction" has been added in point a) in order to clarify that direct extraction from the soil is also covered by the word "production", as specified in Article 21(2) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

The insertion of the precision that production includes extraction in the Directive 2008/118/ECC render Article 21(2) ETD obsolete.

Article 21(3)

Description

Article 21(3), first sentence ETD stipulates that the consumption of energy products within the curtilage of an establishment producing energy products is not considered as a chargeable event giving rise to taxation, if the consumption consist of energy products produced within the curtilage of the establishment.

The second sentence of that Article offers to the Member States the possibility to broaden its scope, where they may also consider

- the consumption of electricity and other energy products not produced within the curtilage of such an establishment; and

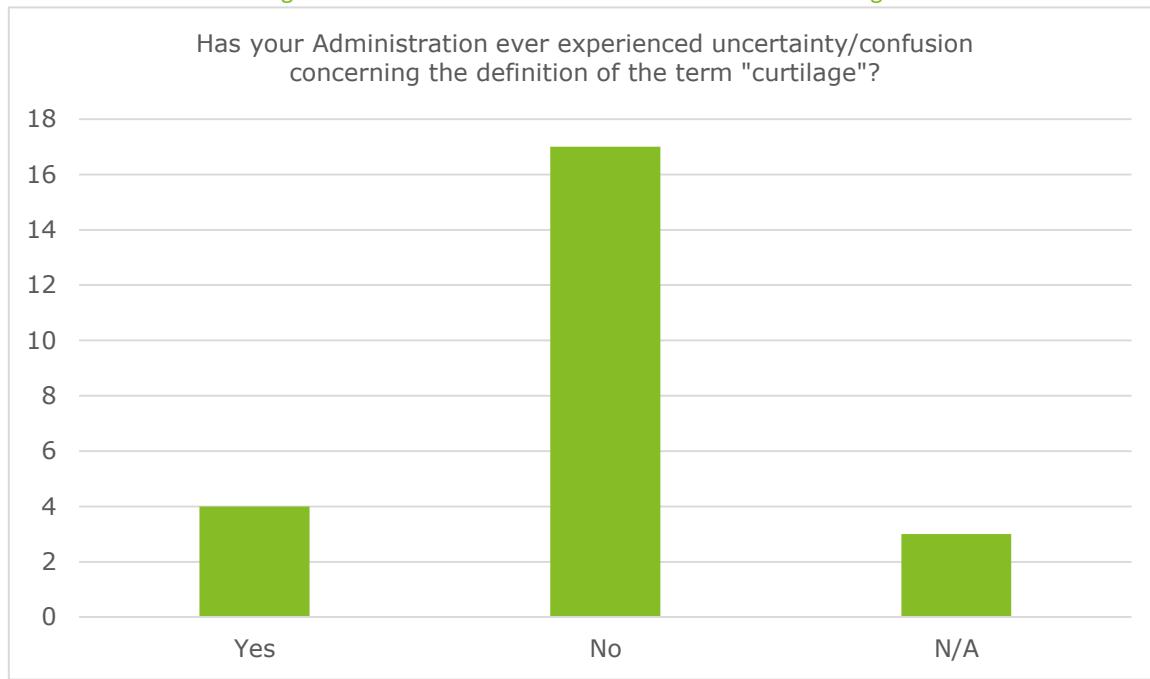
- the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event.

The third and last sentence of Article 21(3) ETD specifies that the consumption for purposes not related to the production of energy products and in particular for the propulsion of vehicles will be considered a chargeable event, giving rise to taxation.

Analysis

Article 21(3) ETD dictates that the consumption of energy products within the curtilage of an establishment producing energy products is not considered as a chargeable event giving rise to taxation, if the consumption consist of energy products produced within the curtilage of the establishment.

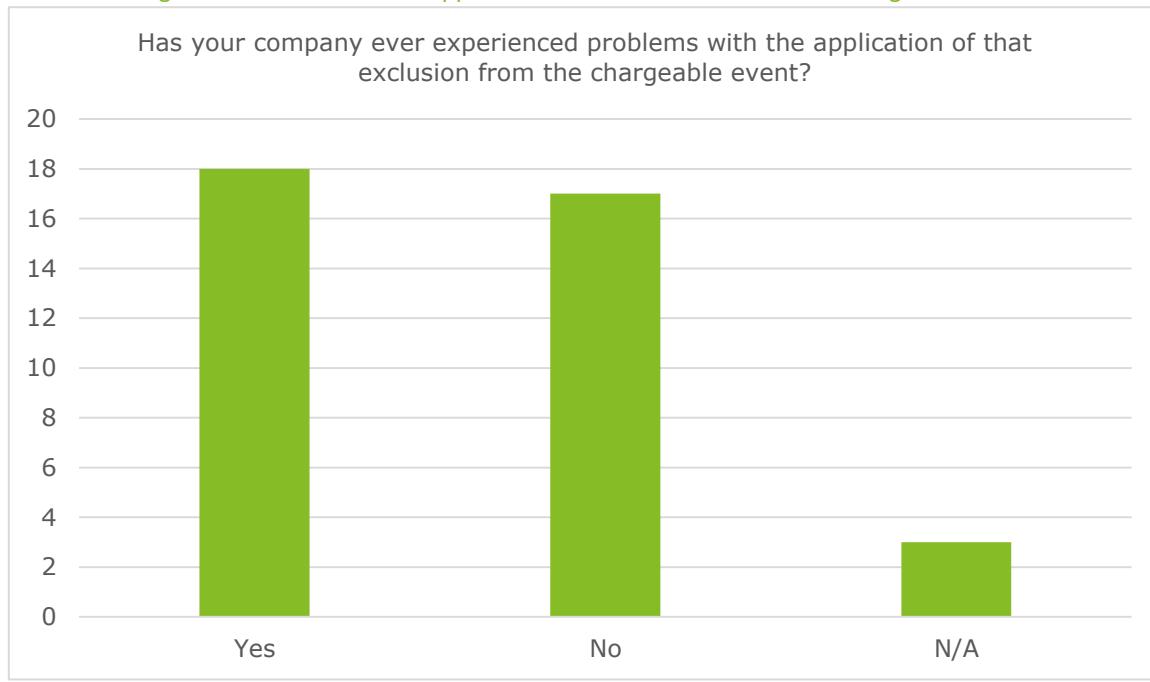
Figure 63 - Issues with the definition of the term "curtilage"



Source: Survey to Member States

The first question here relates to the term 'curtilage'. Four Member States, out of the 24 which responded to the questionnaire, expressed their confusion concerning the definition of this term. They indicated that the exact scope of what is to be understood as 'curtilage' is unclear, and gives rise to disputes with economic operators.

Figure 64 - Issues with the application of that exclusion from the chargeable event



Source: Survey to Economic Operators

This is also acknowledged by the 38 economic operators who took part to the questionnaire and indicated being benefitting and using the exclusion from the chargeable event foreseen in Article 21(3) ETD. Some economic operators illustrated their point: in case refinery facilities are imperatively required for the production process, but are not producing energy products themselves (e.g. desulphuriser units), will it be considered to be the curtilage of an establishment producing energy products? Economic operators thus also raise the difficulty to distinguish the activities that are or are not considered as participating to the production process.

One Member State's authority made a remark concerning the lack of a clear definition of 'production of energy products'. The same concern was backed by refineries. For example, it was regretted that blending, which also require highly technically advanced operations and which is in fact leading to the creation of a new energy product, is not recognized as the production of energy products'. This statement needs to be analysed in the light of Article 21(6) ETD, according to which an operation consisting of mixing energy products may not be treated as 'production of energy products' provided some conditions are fulfilled. A contrario, it can thus be interpreted that mixing energy products should in principle be seen as the production of energy products. This uncertainty expressed by the companies active in the sector is an indication that the provision suffers from a lack of clarity.

When questioned whether the use of vehicles, as lorries, driving on the terrain should also be covered by this provision, the overwhelming majority of the Member States' administrations agreed that this use would not be seen as being related to the production of energy products. Only one dissenting vote was registered, where the Member State's administration considered that the use of lorries within the curtilage of an establishment

producing energy products was not giving rise to a chargeable event. The last sentence of Article 21(3) ETD however explicitly states that the consumption of energy products for the propulsion of vehicles should be considered as a chargeable event, as it is not consumed for purposes directly related to the production of energy products.

As illustrated recently with the request of a Danish court to the ECJ for a preliminary ruling²⁷², this provision can also raise issues, in terms of clarity, for example on the correlation between the energy products used in the production, and the energy products produced:

1. *Is Article 21(3) of Council Directive 2003/96/EC (1) of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the consumption of self-produced energy products for the production of other energy products is tax exempt in a situation such as that in the main proceedings, in which the energy products produced are not used as motor fuels or as heating fuels?*
2. *Is Article 21(3) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity to be interpreted as meaning that the Member States may restrict the scope of the exemption so as to cover only consumption of an energy product used in the production of an equivalent energy product (i.e. an energy product which, like the energy product consumed, is also subject to tax)?'*

The ECJ ruling on these question should allow to better define the exact meaning of Article 21(3) ETD.

Another possible issue concerns the mandatory exemption for the energy products produced and subsequently consumed within the curtilage of an establishment producing energy product. If activities are outsourced because they are not part of the core business, will the third party be participating in the production of the energy products? The fact that a different treatment exists between producers of energy products who outsource certain activities and those who don't, which may lead to market distortion in the sector, is an argument in favour of rendering the other optional exemptions mandatory, so that the exemption would apply all along the value chain, either of removing the tax exemption altogether. It is observed that latter option could pose some practical issues in terms of keeping track and monitoring the consumption of a variety of products. In any case, a differentiated treatment, potentially disadvantaging producers outsourcing part of their activities, may have a negative impact on an economically effective and efficient production process.

The difficulty seems to derive from the interpretation of Article 21(3) ETD and in particular from the identification of the products that can benefit from this out-of-scope provision. But on the other hand, no one mentioned the different tax treatment of inputs originating from

²⁷² ECJ C-49/17, *Koppers Denmark ApS v. Skatteministeriet* (pending).

within and those from outside the curtilage of the establishment as giving rise to an elevated administrative burden. This can partially been explained by the fact that the production of energy products is taking place in tax warehouses, for which the holders must in any way keep detailed records.

The same Article foresees the optional possibility for Member States to also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment, and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity, as not giving rise to a chargeable event. It was investigated whether that option to extend the exemption is used by Member States. 12 of them answered positively, for at least one of the two optional possibilities, which indicates that these options are broadly used.

The majority of the Member States applying at least one of the two optional exemptions were also in favour of mandatorily extending the scope of the provision to the consumption of all energy products and electricity (i.e. not only the products produced within the curtilage of the establishment), so that all Member States would have the obligation not to tax these energy products and electricity. The evoked reasons are twofold. First, they estimate that a mandatory exemption, which by definition would be applied by all Member States, would foster harmonisation and would avoid the current problems that they experience in today's situation from a State aid perspective. Second, they argue that having to pay excises on both the input and the output energy products can be seen as a double taxation. However, regarding to this second argument, it could be stated that double taxation in a strict sense is only taking place when the energy products used within the curtilage of the establishment of a producer is used as a raw material in the production process, meaning it is transformed into a different type of energy product. In case the energy product is merely used as a resource in the production process (E.g. for heat generation, or engine use), the existence of double taxation could be disputed. The same recommendation was voiced by the economic operators, who also designated the optional character of the provision as being problematic for State aid concerns. Indeed, similar to what has been observed above with the application of optional exemptions, the implementation by Member States of the option to extend the situations that are not giving rise to a chargeable event has been seen as contrary to the competition rules, because the advantage that is thereby granted to the recipient is affecting trade and distorting competition.

The different opinions on this provision were also reflected during interviews. Denmark for example applies the exemption for refineries, but only for taxable products produced within the curtilage of the establishment, to avoid double taxation. Indeed, Denmark is of the opinion that refineries should not be paying taxes both on the input oil and the output product itself. This being said, Denmark believes that the decision to apply the optional exemptions provided in Article 21(3) ETD should remain to the discretion of each Member State. France on the other hand did extend the scope, and the French customs authorities are in favour of the mandatory extension in order for harmonisation purposes.

The companies active in the refinery sector that were interviewed testified that the optional regime was seen as a distortion in competition.

On the side of the eight respondents who indicated not having implemented any of the options to extend the exemption, the opinions are divided. Some are in favour of keeping the options and leaving the flexibility to the Member State to decide whether they will trigger it or not; while the others would prefer to withdraw the current possibilities offered to Member States, because they assess that the existing mandatory exemption is sufficient, and that optional exemptions make the system less transparent and possibly conducive to tax evasion.

Article 21(4)

Description

According to Article 21(4) ETD, Member States may provide that taxation on energy products and electricity will become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled.

Analysis

Article 21(4) ETD concerns the conditions associated with the application of the reduced rates and exemptions laid down in Articles 14 to 19 of the directive²⁷³. As such, it can thus be seen as an anti-fraud measure.

It is however unclear what is meant with ‘final use condition’: does it relate to the effective final use, for example as heating or motor fuel, that is made of the products, or does it relate to the administrative conditions that the Member States have imposed to concretely implement and apply these reductions and exemptions? The ROZ-SWIT case makes it apparent that the term ‘final use condition laid down in national rules’, as mentioned in Article 21(4) ETD, actually refers to the effective final use that must be made of the products that are provided for in the ETD, and that are transposed into national legislation.

A recent Belgian court case goes in the same direction. It recognizes that the modalities for the application of the tax, as defined by the Belgian authorities, relate to the procedure to be followed by the economic operator to be invoiced the reduced tariff. As such, where this procedure would not be followed by the requester of the reduction, then its supplier should invoice him the full tariff. However, the court specifies that, where the effective use that was made of the product indeed qualifies for a reduced tariff, the economic operator is totally entitled to ask for a refund of the amounts paid in excess. The conditions for benefitting from the reduced tariff, as enacted in the ETD and in its implementation in the

²⁷³ ECJ C-418/14, *ROZ-SWIT*, ECLI:EU:C:2016:400.

Belgian law, depend from the effective final use of the product, and not from the application modalities. The application modalities cannot receive an extensive interpretation whereby these modalities would actually impose additional conditions²⁷⁴.

On the optional character of this provision though, it should be stressed that one of the main ideas forming the base of harmonisation of excise duties is that the correct working of the internal market absolutely requires that the chargeability conditions are the same in all the Member States. Article 21(4) ETD contravenes that basic principle, because it leaves to the discretion of the Member State to define the chargeability conditions, stipulating that these Member States may provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled²⁷⁵.

Article 21(5)

Description

Article 21(5), subparagraphs 1 and 2 of the ETD contain specific provisions concerning the chargeability of electricity and natural gas.

Article 21(5), subparagraph 1, first sentence ETD determines that for the purpose of applying Articles 5 and 6 of Directive 92/12/EEC, electricity and natural gas will be subject to taxation and become chargeable at the time of supply by the distributor or redistributor. It is referred to the Directive 92/12/EEC, which in the meantime has been repealed by Directive 2008/118/EC. Pursuant to Article 47(2) of the latter Directive, references to the repealed Directive 92/12/EEC shall be construed as references to Directive 2008/118/EC. Accordingly, the references to Articles 5 and 6 of Directive 92/12/EEC should be read as references respectively to Articles 2 and 7 of Directive 2008/118/EC. The taxation system as it is foreseen in the last mentioned Directive is not applicable to natural gas and electricity. Article 21(5), subparagraph 1 therefore foresees for a diverging arrangement. Electricity and natural gas are subject to taxation and become chargeable at the time of supply by the distributor or redistributor.

Pursuant Article 21(5), subparagraph 1, second sentence ETD, where the delivery to consumption takes place in a Member State where the distributor or redistributor is not established, the tax of the Member States of delivery will be chargeable to a company that has to be registered in the Member State of delivery.

The third sentence of Article 21(5), subparagraph 1 ETD specifies that tax will in all cases be levied and collected according to procedures laid down by each Member State.

²⁷⁴ Tribunal de première instance de Bruxelles, jugement RG 2012/12941/A, p.11.

²⁷⁵ Alex Ortega Ibanez, ‘Les défaillances du régime des droits d'accises européen sur les produits énergétiques’, Journal de droit européen, 2017, p. 48-50 .

Article 21(5), subparagraph 2 ETD declares that, notwithstanding the first subparagraph, Member States have the right to determine the chargeable event, in the case where there are no connections between their gas pipelines and those of other Member States.

Article 21(5), subparagraph 3 ETD defines that an entity producing electricity for its own use is regarded as a distributor. This provision aims at including in the taxation the own use of the electricity producer. The same provision further stipulates that notwithstanding Article 14 (1)(a), Member States can exempt small producers of electricity provided that they tax the energy products used for the production of that electricity. Pursuant to Article 14 (1)(a) ETD, Member States are obliged to exempt from taxation energy products and electricity used to produce electricity, and electricity used to maintain the ability to produce electricity. The logic behind this exemption in the Directive is that the final product, i.e. the electricity, should be taxed (output taxation), and that the energy products used for its production (the input products) should be exempted. In Article 21(5), subparagraph 3 ETD, contrary to what is prescribed in Article 14(1)(a) ETD, it is foreseen that Member States may exempt small producers of electricity, provided that they tax the energy products used for the production of that electricity.

Article 21(5), subparagraph 4 ETD indicates that for the purpose of applying Articles 5 and 6 of Directive 92/12/EEC, coal, coke and lignite are subject to taxation and become chargeable at the time of delivery by companies, which have to be registered for that purpose by the relevant authorities. Those authorities may allow the producer, trader, importer or fiscal representative to substitute the registered company for the fiscal obligations imposed upon it. It is referred to the Directive 92/12/EEC, which in the meantime has been repealed by Directive 2008/118/EC. Pursuant to Article 47(2) of the latter Directive, references to the repealed Directive 92/12/EEC shall be construed as references to Directive 2008/118/EC. Accordingly, the references to Articles 5 and 6 of Directive 92/12/EEC should be read as references respectively to Articles 2 and 7 of Directive 2008/118/EC. The taxation system as it is foreseen in the last mentioned Directive was manifestly not deemed workable for coal, coke and lignite. Article 21(5), subparagraph 4 therefore foresees for a diverging arrangement.

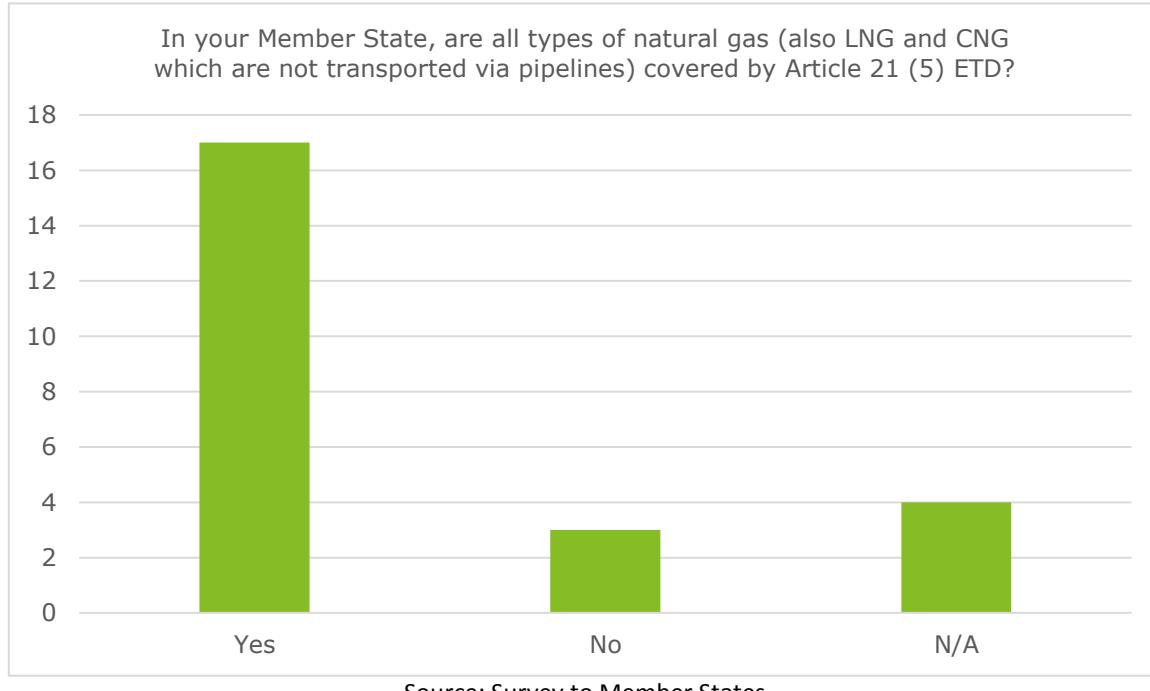
Analysis

With regard to the implementation of Article 21(5), subparagraph 1 first sentence ETD, the Commission brought a case before the ECJ, arguing that the Polish system of electricity tax, according to which electricity would be subject to taxation and become chargeable at the time of introduction of the electricity on the grid by the producer, and not at the time of supply by the distributor or the redistributor, was contrary to the Article 21(5) ETD. In its judgement of 12 February 2009, the Court declared that, by failing to adapt, by 1 January 2006, its system of electricity tax, with regard to the time at which the electricity tax becomes chargeable, to the requirements of the first subparagraph of Article 21(5) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, as amended by Council Directive

2004/74/EC of 29 April 2004, the Republic of Poland has failed to fulfil its obligations under that Directive²⁷⁶.

This case indicates that this Article should be strictly implemented by the Member States.

Figure 65 - Scope of Article 21(5)



Source: Survey to Member States

Pursuant to Article 21(5), first subparagraph ETD, electricity and natural gas become chargeable at the time of supply by the distributor or redistributor. It was questioned though whether all types of natural gas (also LNG and CNG which are not transported via pipelines) were considered as being covered by Article 21(5) ETD. The vast majority of the Member States, namely 17 of them, answered in the affirmative, based on the fact that Article 21(5) ETD does not make any distinction between natural gas in liquid or gaseous form. On the contrary, three Member States indicated that the excise duty on LNG becomes chargeable, as it is foreseen in Directive 2008/118/EC, at the time of release for consumption.

It seems logical that, for the purpose of applying Article 21(5) ETD, the majority of Member States treat natural gas in gaseous and in liquid forms the same way. Indeed, this provision does not make any distinction between the two. On the other hand, the three other Member States applying a different treatment depending on the state of the natural gas, consider that is justified given their respective physical characteristics, and therefore, their different mode of transport. They justify their choice, stating that LNG was almost nonexistent in energy trading back in 2003, and that it therefore not is properly tackled in the Directive. In the context of this discussion, actors from the energy sectors brought two supplementary arguments to the attention. They first indicated that having two different treatment linked

²⁷⁶ ECJ C-475/07, *Commission v. Poland*, ECLI:EU:C:2009:86.

to natural gas would, from a practical and administrative point of view, be difficult to manage. Secondly, it is reminded that natural gas presented in one particular state, gaseous or liquid, can be transformed in the other one.

The same Article stipulates that, where the delivery to consumption from electricity or natural gas takes place in a Member State where the distributor or redistributor is not established, the tax of the Member States of delivery shall be chargeable to a company that has to be registered in the Member State of delivery. It was asked to the Member States' authorities when a company would be considered to be registered within the meaning of Article 21(5) ETD. The variety of responses shows that this part of the provision received many different national interpretations and implementations: some indicate that the distributor should notify the authorities; in other Member States, a company will be considered to be registered when it obtained a particular license; for others, it is considered that the company should be recognized in the destination Member State as tax warehouse holder; for some, the registration depends on a VAT registration in that country; where other Member States consider it necessary to appoint a fiscal representative; or it can be even a combination of the previous mentioned requirements. Economic operators active in different Member States pinpointed this issue as distorting the single market. They testified that distribution of gas and electricity in other Member States was rendered extremely complicated, due to the different registration obligations. The fact that operators testify how difficult it is to become active in certain Member States can be seen as evidence of market access restrictions applying, possibly as a result of the strive of Member States to implement rigid control and prevention mechanisms. Introducing stringent requirements may dissuade some operators from entering the energy market.

However, the "Energy Union" initiative aims toward a fully integrated internal energy market, without technical or regulatory barriers. This include the freeing up of the supply side of the market, by removing barriers preventing alternative suppliers from importing or producing energy. Considering the above observations, it can be concluded that the different 'registration' procedures implemented in the Member States are rather detrimental to the unhindered access of alternative suppliers. Therefore, and in respect of the principles of subsidiarity and proportionality, the relevance of providing more detailed and harmonized rules with regard to the registration requirement of Article 21(5) ETD should be considered.

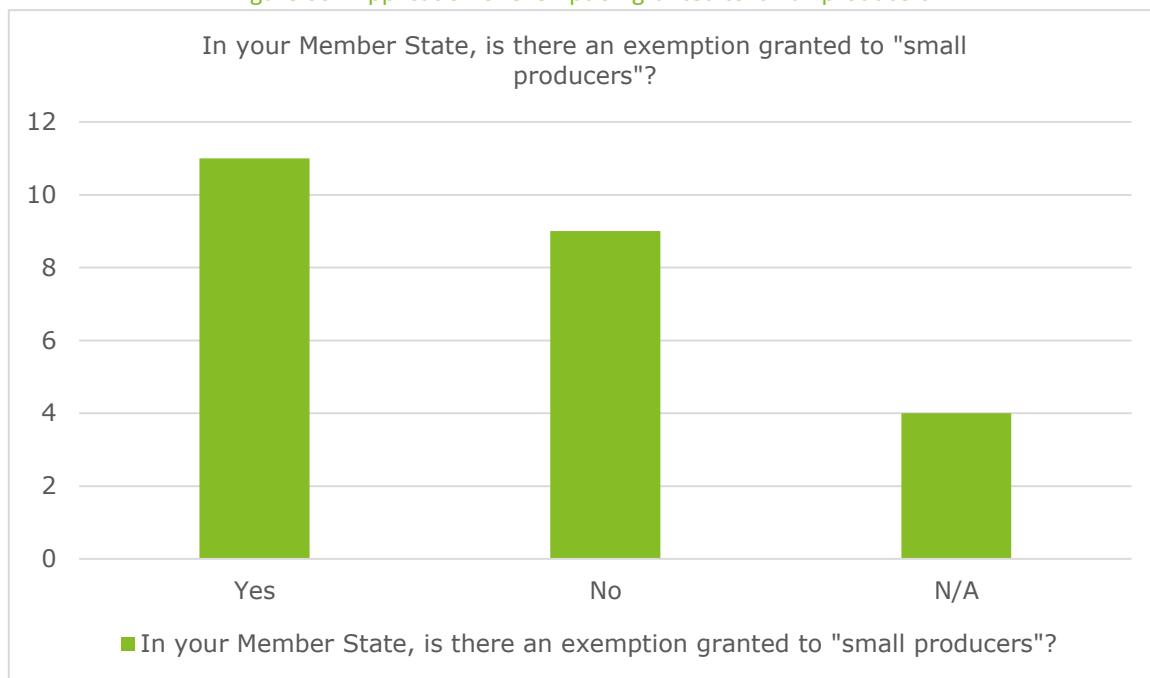
Article 21(5), first subparagraph ETD also stipulates that "Tax shall in all cases be levied and collected according to procedures laid down by each Member States". Does that mean that, if a distributor supplies electricity or natural gas from your Member State to a consumer in another Member State, your Member State will tax the natural gas? For all but two Member States authorities, it is clear that the time of the supply definitely is the moment of delivery in another Member State, and that the product should not be taxed when it leaves the tax warehouse. As such, if a distributor supplies electricity or natural gas from one Member State to a consumer in another Member State, the French, Swedish and Polish authorities confirmed that the operation should not be taxed in the Member State of departure.

Based on Article 21(5), third subparagraph ETD, an entity producing electricity for its own use is regarded as a distributor, however small producers may be exempted provided that they tax the energy products used for the production of that electricity.

It is first observed that the term 'entity' is rather vague, which leaves room for interpretation. Does it cover only 'business entities', or does it also covers households? Should that entity be a legal person? For example, is a park meter with photovoltaics an entity or should the company owning the park meter be considered as the entity?

Moreover, where the term 'entity' would include households, it would mean that these households are also imposed all the national administrative requirements and formalities linked with the status of distributor. This would be hardly applicable in practice (E.g.: households having installed photovoltaic panels).

Figure 66 - Application of exemption granted to 'small producers'



Source: Survey to Member States

11 Member States have mentioned having implemented that provision. Out of these 11 Member States, nine interpreted the provision strictly, so that according to them, the electricity produced should be entirely and exclusively destined for own use, whereas the two remaining countries implemented the provision with more flexibility, considering that the consumption of only a part of the electricity produced for own use was sufficient to benefit from the application of the provision. Interesting is the situation of Denmark which adopted an in-between system. The exemption for small producers will play if the electricity is used within the same entity, and not placed on the grid. However, a simplification is foreseen: provided some conditions are observed, if there are two adjacent buildings, the solar panels on the first building can supply the second building free from tax.

Another development worth mentioning is that, recently, a Portuguese judge requested the ECJ for a preliminary ruling on the interpretation of Article 21(5), subparagraph 3 ETD²⁷⁷:

- 1. Pursuant to and for the purposes of the third paragraph of Article 21(5) of Directive 2003/96/EC, (1) must entities which produce electricity for their own use be small producers in order for them to be regarded as distributors, and [thus] subject to tax in accordance with the first paragraph of Article 21(5) of that Directive, so that other entities (those which are not small producers) which produce electricity for their own use are excluded from that classification as distributors, or must all entities which produce electricity for their own use (regardless of their respective size and of whether they do so as their main or secondary economic activity), and are not exempt as small producers under the second sentence of the third paragraph of Article 21(5) of that Directive, be regarded as distributors, and [thus] subject to tax in accordance with the first paragraph of Article 21(5) of that Directive?*
- 2. In particular, may an entity, such as the one at issue in these proceedings, which is a large electricity producer, producing around 9% of the national energy for sale to the national grid, be regarded as ‘an entity producing electricity for its own use’, as referred to in Article 21(5) of Directive 2003/96/EC, when only a small part of the electricity which it produces is consumed in its own production of new electricity as an integral part of its production process?*

This illustrates that the exact scope of the exemption for small producers suffers from a lack of clarity.

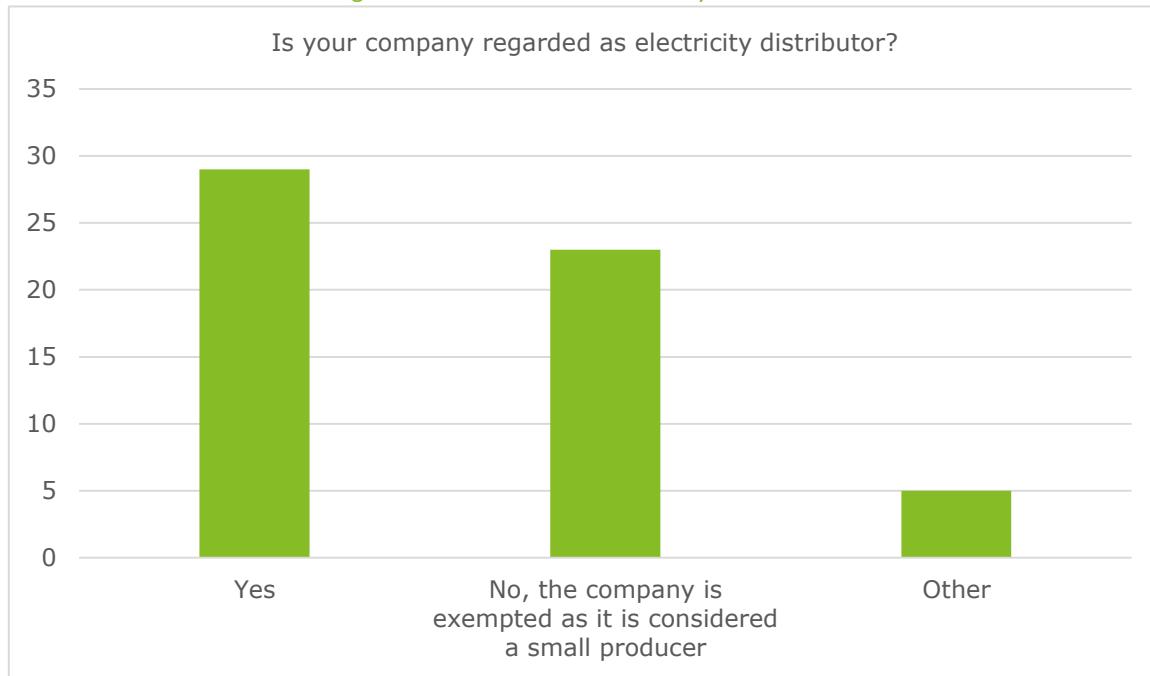
With regard the definition of what is understood by ‘small producers’, the Member States which implemented that provision have strongly diverging interpretations. The two criteria used for defining the term ‘small producers’ are the installation’s capacity, expressed in watts on the one hand, and the yearly production, expressed in watts per hour, on the other hand. The capacity should not exceed the threshold of, depending on the Member State, 100 kilowatts up to 50 megawatts, and/or the maximum limit of produced electricity on a yearly basis should be, depending on the Member State, 5 MWh up to 240 GWh. Taking into the huge disparities, and in order to strive toward more harmonisation, it seems appropriate to define the term ‘small producer’ in a Directive. This observation was confirmed in the interviews. In France, a measure states that the exemption for small producers applies if the power of installation does not go beyond 1 000 kilowatts-hour. In Poland, the electricity produced in the photovoltaic installation could be exempt from the excise duty provided that the power of this installation does not exceed 1 MW and the electricity produced in that installation will be consumed by a producer. In Sweden, energy produced and used at the same place can rely on a full exemption (255 kWh limit). If remaining below the threshold, no declaration is to be filed. Above the threshold, this will be taxed. The producer remains out of scope of the system.

²⁷⁷ ECJ, C-90/17, *Produtora Energética, SA v. Autoridade Tributária e Aduaneira*, pending.

The exemption for small producers may be granted, 'provided that they tax the energy products used for the production of that electricity'. This means that this provision does not apply to electricity produced from renewables, considered that it is impossible to tax these input energies (E.g.: wind, sunlight, water, and biomass). Note however that Article 15(1)(b) ETD provides for another legal basis for applying a tax exemption for the electricity produced from these renewable energy sources. When asked about possible technical developments that should be reflected in the Directive, the Member States pointed out that the increasing number of small installations, including a.o. photovoltaic panel systems, producing electricity from renewable energy sources to supply the site where the electricity is produced, which include e.g. household, might justify a new exemption for electricity produced in these small installations. In that regard, it should however be referred to Article 15(1)(b) ETD, according to which Member States may apply total or partial exemptions or reductions in the level of taxation to electricity produced from listed renewables.

From the side of the economic operators, 57 companies indicated in the survey that they were producing electricity for their own use.

Figure 67 - Definition of 'electricity distributor'



Source: Survey to Economic Operators

The majority of the companies producing electricity for own use are regarded as distributor.

A company that is not registered as distributor, being a small producer, stressed the inadequacy of the provision as it is nationally applied: as soon as the producer does not use a part, albeit really limited, of the electricity for own consumption, then the entity will be considered as not fulfilling the conditions laid down in that Article. Moreover, it can be questioned whether it should be further clarified if the own use exemption only applies to SME's or not.

The chargeable event for coal, coke and lignite, is the time of delivery by companies 'which have to be registered for that purpose'. This phrasing leaves room for different interpretations. As an illustration, in France, the procedure simply consists in filling in the statement of existence and sending it to the customs office, and tax representatives deal with the procedure for foreign companies, whereas, in Poland, the system consists in a prior notification to the authorities on the planned activity with coal, coke and lignite, containing well-specified data. The diversity of national procedures for registration, but also for the levy and the collection of the taxes, makes it more burdensome for economic operators to be active in different Member States.

Article 21(6)

Description

Article 21(6) ETD determines that the Member States do not need to treat as production of energy products some operations:

- Operations during which small quantities of energy products are obtained incidentally;
- Operation by which the user of an energy product makes its reuse possible in his own undertaking, provided that the taxation already paid on such product is not less than the taxation which would be due if the reused energy product were again to be liable to taxation;
- Operations consisting of mixing, outside a production establishment or a tax warehouse, energy products with other energy products or other materials, provided that the taxation on the components has been paid previously (this condition is not applicable where the mixture is exempted for a specific use); and that the amount paid is not less than the amount of the tax which would be chargeable on the mixture.

Analysis

Article 21(6) ETD provides that Member States need not treat as production of energy products: (a) operations during which small quantities of energy products are obtained incidentally; (b) operations by which the user of an energy product makes its reuse possible in his own undertaking, provided that the taxation already paid on such product is not less than the taxation which would be due if the reused energy product were again to be liable to taxation; (c) an operation consisting of mixing, outside a production establishment or a tax warehouse, energy products with other energy products or other materials, provided that taxation on the components has been paid previously and that the amount paid is not less than the amount of the tax which would be chargeable on the mixture. Overall, the Member States responded that the implementation and the application of this provision did not cause particular problems.

No specific remarks were raised concerning Article 21(6) ETD. It is nonetheless observed that, the fact that the application of this provision, which touches upon the chargeability, is left to the discretion of the Member State, makes it contestable when it comes to harmonizing towards a well-functioning internal market.

Conclusion

- All references in the ETD to 'Directive 92/12/EEC' are to be read as references to Directive 2008/118/EC. The references to the predecessors of Directive 2008/118/EC do not contribute to the readability of the ETD;
- Article 21(1) ETD refers to 'energy products' only. In line with the ECJ jurisprudence, it seems that this term should be interpreted strictly. It can be questioned however if it was not the intention to also include other taxable products with this provision. This results in a lack of clarity with regard to the definition of the chargeable events under the ETD;
- The insertion of the precision that 'production' includes extraction in Directive 2008/118/ECC renders Article 21(2) ETD obsolete.
- The terms 'curtilage of an establishment producing energy products', 'production of energy products', 'registration', 'entity' and 'small producers' referred to in Article 21 (3), (5) and (6) ETD are not entirely clear and should be further defined, to ensure an harmonized implementation and application within the Member States. Where the different implementation of registration procedures for energy suppliers can be detrimental for the establishment of a fully integrated internal energy market, and in the light of the subsidiarity and proportionality principles, EU action may prove to be more effective when defining conditions for supplying gas, electricity or coal in another Member State.
- The implementation by Member States of the option to extend the situations that are not giving rise to a chargeable event, pursuant to Article 21(3) ETD, has in some cases given rise to State aid problems, since the advantage that is thereby granted by some Member States to recipient is affecting trade and distorting competition.
- The reach of the 'final use condition' mentioned in Article 21(4) ETD has been further clarified in an ECJ case. As it can be observed from the national cases still popping up on this issue, the current wording of that provision in the ETD could be clarified.
- In the context of Article 21(5) ETD, a debate on the specific excise treatment of LNG has emerged. This debate comes from the technological development that LNG represents, which couldn't be foreseen at the time of adoption of the ETD. The term 'natural gas' could be further explicated, to avoid different treatments being imposed on LNG in the Member States.

B.20 Article 22

Based on Article 22 ETD, stocks of energy products already released for consumption can be subject to an increase in, or a reduction of, the tax, when taxation rates are changed. This provision means that stocks of energy products that were already released for consumption at the moment of an increase of the taxation rates can be subject to the payment of a levy equivalent to the difference between the new and the old excise rates. A corresponding arrangement can be made in the event of an excise rate reduction.

Figure 68 - Application of possibility to adapt tax when rates are changing

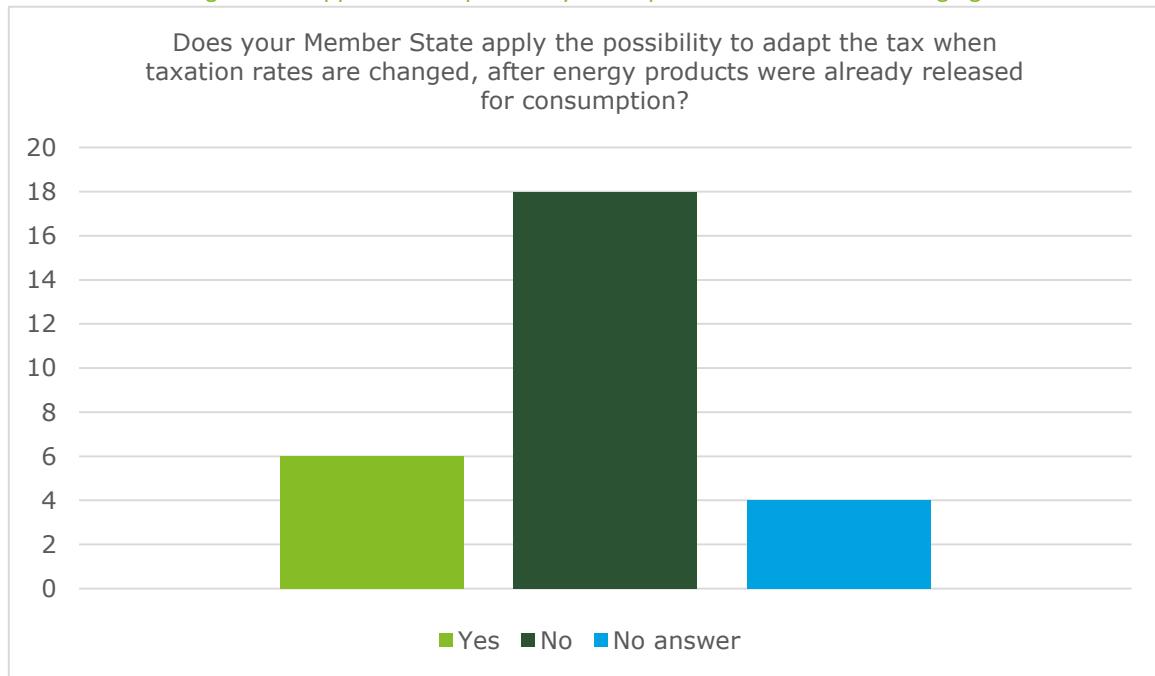
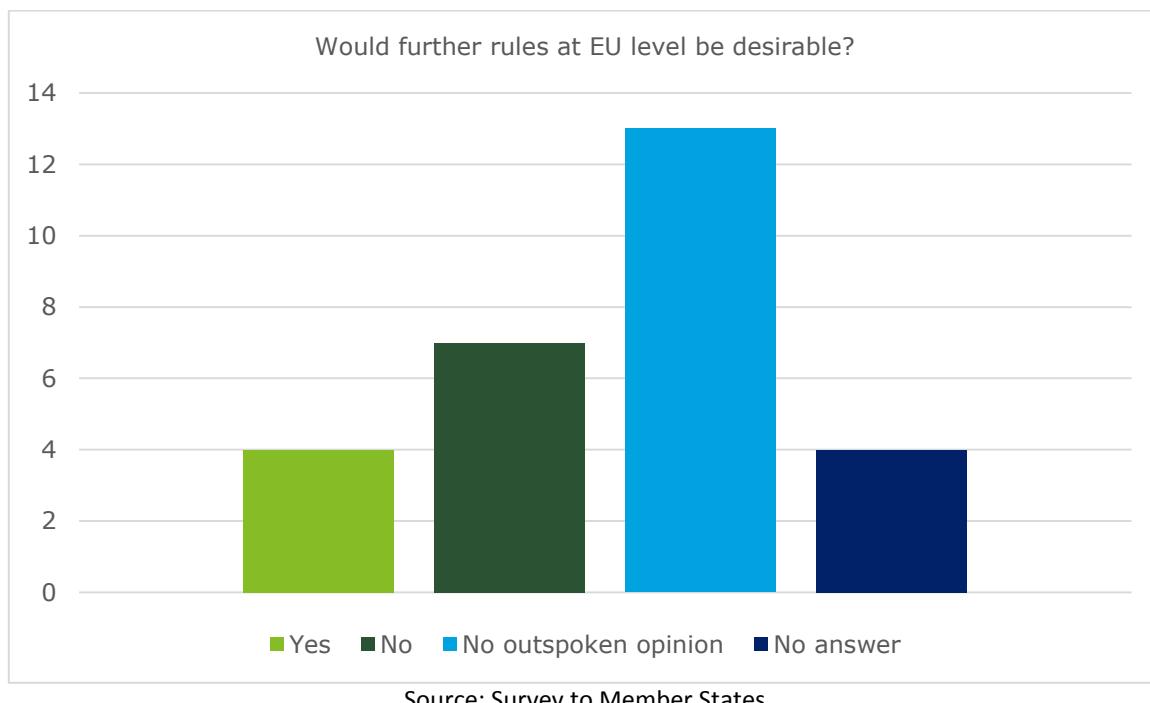


Figure 69 - Harmonisation at EU level



From these replies it can be concluded that only a minority of Member States sees the need for further harmonization of the rules at EU level, e.g. to unify the procedures or requirements for the reimbursement, additional payment.

B.21 Article 23

Description

Article 23 ETD stipulates that Member States are allowed to refund the amounts of taxation already paid on contaminated or accidentally mixed energy products sent back to a tax warehouse for recycling. Recycling usually takes place by using the products as fuel and as raw material for the production of new energy products on which excises will be levied. When used as fuel in a tax warehouse, the tax becomes chargeable, as prescribed by Article 21(1) ETD, unless use takes place in line with Article 21(3) ETD. Article 23 ETD thus gives the opportunity to the Member States to refund the amounts of taxation already paid, in order to avoid double taxation.

Analysis

The discussions with Member States authorities demonstrated diverging situations.

In some countries, the option foreseen in that Article has been implemented. For example, in France, in such cases, previously paid taxes can be reimbursed once the accidental nature of the mix has been established through laboratory analysis of samples. This does not apply

for gas and electricity. The procedure is described in a BOD²⁷⁸. Another example is Sweden, which has a specific provision (Chapter 7, §1a)²⁷⁹: a tax deduction can be claimed by the warehouse keeper if fuels are brought back into the warehouse after the excise was paid. The tax authority has provided general guidance: if oil quantities are brought into the warehouse and this fuel was contaminated, 10% may be deducted. If nothing is proven, the oil is treated as marked oil (with a lower tax rate).

Other Member States however indicated not having foreseen the possibility to refund the amounts of taxation paid on contaminated or accidentally mixed energy products. In practice, difficulties may occur in situations whereby contaminated or accidentally mixed and excise duty-paid energy product is moved to another Member State for re-processing. The procedure for cross-EU movement with Simplified Excise Accompanying Document and subsequent excise duty refund is not tailored to situations whereby the product is re-entered into a tax warehouse in the Member State of destination, instead of released for consumption. No particular concern was voiced by the economic operators concerning this provision.

Conclusion

No problem for the single market and no particular difficulties with differences of application have been identified.

Article 24

B.22 Article 24

Article 24(1) ETD determines that energy products released for consumption in a Member State and contained in the standard tanks of commercial motor vehicles and intended to be used as fuel by those same vehicles will not be subject to taxation. The same applies to energy products contained in special containers and intended to be used for the operation, during the course of transport, of the systems equipping those same containers. Article 24(2) ETD in turn defines the concepts 'standard tanks' and 'special container' used in the previous indent of the same Article.

The purpose of this provision is to safeguard the free circulation of persons and goods, and to avoid double taxation.

²⁷⁸ Bulletin officiel des douanes n° 6906 du 31/08/2011 - Régime de l'entrepôt fiscal de stockage (EFS) – See : <http://www.douane.gouv.fr/informations/bulletins-officiels-des-douanes?da=11-026> (Accessed: [12/01/2018]).

²⁷⁹ https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfatningssamling/lag-19941776-om-skatt-pa-energi_sfs-1994-1776#K7 (Accessed: [12/01/2018]).

Article 24(1)

Description

Article 24(1) ETD determines that energy products released for consumption in a Member State and contained in the standard tanks of commercial motor vehicles and intended to be used as fuel by those same vehicles will not be subject to taxation. The same applies to energy products contained in special containers and intended to be used for the operation, during the course of transport, of the systems equipping those same containers.

This provision was also included in Article 8bis of the ETD's predecessor, the Directive 92/81/EEC on the harmonization of the structures of excise duties on mineral oils. That Article 8bis was inserted in Directive 92/81/EEC pursuant to Directive 94/74/EEC. Recital 19 of that latter Directive explains that:

Whereas it is necessary to specify that mineral oils released for consumption in a Member State, contained in the fuel tanks of motor vehicles and intended to be used as fuel by such vehicles are exempt from excise duty in other Member States in order not to impede free movement of individuals and goods and in order to prevent double taxation.

Article 24 ETD is a specific exception on Article 33(1) of Directive 2008/118/EC, which stipulates that where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they must be subject to excise duty and excise duty become chargeable in that other Member State.

Analysis

The pre-existing Directive 68/297/EEC of 19 July 1968 on the standardisation of provisions regarding the duty-free admission of fuel contained in the fuel tanks of commercial motor vehicles governs a matter referred to in Article 24 ETD. This former Directive aims at standardizing the provisions regarding the duty-free admission of fuel contained in the standard fuel tanks of commercial motor vehicles travelling across common frontiers between Member States. As such, Member States are imposed to admit duty-free certain defined quantities of fuel contained in standard fuel tanks. It also defines the term 'standard fuel tank' as meaning the tanks permanently fixed by the manufacturer to all motor vehicles of the same type as the vehicle in question and whose permanent fitting enables fuel to be used directly, both for the purpose of propulsion and, where appropriate, for the operation a refrigeration system.

Article 24 ETD modernises and broaden the scope of application of the provisions of Directive 68/297/EEC. Therefore, Directive 68/297/EEC has become obsolete and should be repealed.

In the case *Meiland Azewijn BV v Hauptzollamt Duisburg*, the ECJ gave its interpretation concerning the scope of Article 24 ETD²⁸⁰.

Meiland Azewijn BV operated an agricultural-service supply agency employing about 10 people in the Netherlands. Two thirds of that undertaking's customers were in the Netherlands and one third in Germany. All the agricultural machinery utilised by Meiland in the course of its activities was refuelled in the evening, when it was often not yet known where the machines would be used the next day. It was impossible to replace marked gas oil, which could lawfully be used as fuel in the Netherlands, with unmarked gas oil, the only fuel which could lawfully be used in Germany, because it was too time-consuming to empty or change the tanks. In addition, when fuel was pumped out, there was a risk of traces of marking remaining. Because of the size of its business, it was also impossible for Meiland to keep its agricultural machinery exclusively for the German market. Near the border between Germany and the Netherlands, officials of the Hauptzollamt Duisburg checked two tractors and one combine harvester which Meiland had supplied to harvest maize. The machines were running on marked gas oil. That same day, the Hauptzollamt Duisburg issued an assessment notice charging Meiland with excise duty on mineral oils. The national court dealing with this dispute referred preliminary questions to the ECJ, notably concerning the interpretation of Article 8bis of the Directive 92/81/EEC (later replaced by Article 24 ETD).

The ECJ remarked that doubts were relating to three points: the first concerns the meaning of 'commercial motor vehicle'; the second concerns the use of fuel – limited to the use exclusively to move the vehicle or covering also the use for other purposes, such as the performance of agricultural works – in the Member State to which the vehicle has been brought; and the third concerns possible inconsistencies arising from the fact that the Member States have adopted different approaches to implementing the rule laid down in Article 8(a) and other rules under secondary legislation.

The Court enounced that, in light of the objectives set out in the Directive, namely to protect freedom of movement for individuals and goods and to prevent double taxation, Article 8bis of Directive 92/81/EEC must be interpreted broadly. Therefore, it concluded that the interpretation of the term 'commercial motor vehicle' must be construed as extending to agricultural machinery using mineral oils as fuel; and that the rule laid down in Article 8bis of Directive 92/81/ ECC should not be limited to instances where the vehicle is simply brought into another Member State, but should also apply where the fuel is used for other purposes such as agricultural works. As regard the third point, the Court found that a use permitted by a Member State in accordance with Community law, such as the use of marked mineral oil provided for by the Netherlands legislation, cannot be considered improper within the meaning of Article 3 of Directive 95/60 by another Member State.

As last remark in that regard, and in view of the technological developments achieved in the domain of the energy sources used as propellant, it can be questioned whether Article 24

²⁸⁰ ECJ C-292/02, *Meiland Azewijn BV v. Hauptzollamt Duisburg*, ECLI:EU:C:2004:499.

ETD should not be broadened so as to include other taxable products and electricity (E.g.: hydrogen or batteries).

Article 24(2)

Description

Article 24(2) ETD defines the concepts ‘standard tanks’ and ‘special container’ used in the previous indent of the same Article.

The term ‘standard tanks’ is first defined as being the tanks permanently fixed by the manufacturer to all motor vehicles of the same type as the vehicle in question and whose permanent fitting enables fuel to be used directly, both for the purpose of propulsion and, where appropriate, for the operation of refrigeration systems and other systems. Standard tanks also designate gas tanks fitted to motor vehicles designed for the direct use of gas as a fuel and tanks fitted to the other systems with which the vehicle may be equipped. Secondly, ‘standard tanks’ is also understood as being the tanks permanently fixed by the manufacturer to all containers of the same type as the container in question and whose permanent fitting enables fuel to be used directly for the operation, during transport, of the refrigeration systems and other systems with which special containers are equipped.

Article 24(2) ETD then finally indicates that ‘special container’ means any container fitted with specially designed apparatus for refrigeration systems, oxygenation systems, thermal insulation systems or other systems.

Analysis

In the case *Holger Forstmann Transporte*²⁸¹, a company bought a lorry from a manufacturer with a tank which was removed and refitted afterwards by another dealer. The company performed commercial services in Germany but regularly refuelled the tanks of its vehicle in the Netherlands because of the more favourable prices charged there. The fuel was exclusively used for propulsion of the vehicle. The German customs office wanted to charge taxation because the fuel was consumed in Germany, and argued that the tank was not a standard tank under the conditions of Article 24 ETD.

The ECJ ruled that the term ‘standard tanks’, referred to in the first indent of Article 24(2) ETD must be interpreted as not excluding tanks fixed permanently to commercial motor vehicles intended for the direct supply of fuel to those vehicles when the tanks have been fitted by a person other than the manufacturer, in so far as the tanks enable fuel to be used directly, both for the purpose of propulsion of the vehicles and, where appropriate, for the operation, during transport, of refrigeration systems and other systems. The Court justifies its decision with the observation that Article 24 ETD is intended to counteract double

²⁸¹ ECJ C-152/13, *Holger Forstmann Transporte GmbH & Co. KG v Hauptzollamt Münster*, ECLI:EU:C:2014:2184.

taxation and ensure free movement, whilst protecting the Member States' legitimate fiscal interests, and that therefore, that Article should be interpreted broadly. This analysis is borne out by the second sentence of the first indent of Article 24(2) ETD, according to which '[g]as tanks fitted to motor vehicles ... shall also be considered to be standard tanks'. Such gas tanks are not normally fixed by manufacturers, and even less are they fitted 'to all motor vehicles of the same type', as usually motor vehicles are originally intended to be propelled not by gas but by an oil-derived fuel. Accordingly, gas tanks are generally fitted by specialist undertakings independent of the manufacturers. This clarification in the second sentence of the first indent of Article 24(2) of Directive 2003/96 reflects the legislature's intention to define the concept of 'normal tanks' broadly in order that users of vehicles equipped with gas tanks are not unfairly excluded from entitlement to the exemption laid down in Article 24 ETD.

In the same Court case, Advocate General observed concerning the wording of Article 24 ETD that:

These words, which were already present in Regulation No 918/83, reflect the legislature's intention to make the definition of 'standard tanks' flexible so as not to exclude, in an unjustified manner, certain taxpayers from enjoyment of the exemption. At a time when petrol or diesel tanks were normally fitted as standard, that flexibility could be limited to gas tanks. In the current economic context of the phased construction of vehicles, it would not be sufficient. Consequently, although Directive 2003/96 expressly provides for the exemption of gas contained in tanks fixed by third parties, I cannot see any reason for asserting that petrol or diesel contained in such tanks are not to benefit from the same exemption. Once again, such an assertion would be based on factors which are entirely irrelevant having regard to the purposes of the provision in question.

The Advocate General also noted that in its proposal²⁸², the Commission proposed an amendment to the definition of 'standard tanks' within the meaning of Article 24(2) of Directive 2003/96 in order to take account of the changes in the way commercial vehicles are manufactured. According to the Commission proposal, that definition should cover 'the tanks permanently fixed to a motor vehicle by the manufacturer or by a third party' which comply with technical requirements and enable fuel to be supplied directly to the vehicle. This proposal has been withdrawn in the meantime.

It is interesting to see the different consequences that this case law has had for the implementation in the Member States:

²⁸² Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity of 13 April 2011, COM(2011) 169 final, 13 April 2011; [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0169/com_com\(2011\)0169_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0169/com_com(2011)0169_en.pdf).

- The case law of the ECJ was directly applied by Denmark and Sweden, and was implemented in the national guidelines. Standard tanks include tanks which are constructed by other enterprises than the constructor of the vehicle itself.
- At the moment, France does not allow for the exemption of energy taxation for standard tanks fitted by another person than the manufacturer but harmonisation is foreseen to modify the provision following the CJEU judgement on the notion of tank.
- For Poland, the container needs to be installed by the manufacturer.

When it comes to the interpretation of the definition of ‘standard tanks’, it is also interesting to have a look on how this term is interpreted from a customs point of view. Indeed, the customs legislation, notably in Regulation 1186/2009 setting up a Community system of reliefs from customs duty, foresees in a customs duty relief for the fuel contained in the standard tanks of commercial motor vehicles. In that context, a court case also occurred concerning the interpretation of the definition of ‘standard tanks’. In the case *Schoonbroodt v Belgian State*²⁸³, the ECJ ruled that provisions granting suspension of customs duties are to be interpreted strictly according to their terms and may not be applied, contrary to their wording, to products which they do not mention. Therefore, it was decided that the definition of ‘standard tanks’ does not apply to tanks fixed, not directly by the manufacturer, but by a dealer or by a coachbuilder.

The definition of ‘standard tanks’ thus receives a different interpretation in the customs and excise domains. This adds to the complexity, where economic operators are left with ambiguities on how to apply the rules.

Diverging opinions and implementations can lead to a distortion of the single market. A resonant illustration has been given by Denmark. Denmark explained that some other Member States had a stricter interpretation of what was considered as energy products contained in a container, which could lead to the payment of excise duties in these other Member States. As a consequence, and with a view to avoid double taxation, a refund can be applied for in Denmark if tax has been levied after leaving the Danish territory in Denmark.

Article 24 ETD foresees the exemption from tax of energy products released for consumption in one Member States and contained in a standard tank or special container of a motor vehicle used in another Member State. Concerning the term ‘motor vehicles’, it can be questioned whether it covers other modes of transport than road vehicles, and in

²⁸³ ECJ C-247/97, *Schoonbroodt v. Belgian State*, ECLI:EU:C:1998:586.

particular locomotives. In the case *Lietuvos geležinkeliai*²⁸⁴, the ECJ has had the chance to pronounce itself with regard to the scope of the term ‘motor vehicles’ as it is referred to in the legislation on the relief from customs duties and VAT exemptions on imports of goods. In that case, the Court ruled that the notion ‘motor vehicles’ should not apply to locomotives. The reach of this judgement to the excise legislation needs to be mitigated however. Unlike Article 24 ETD, in the customs and VAT provisions scrutinized by the Court in the aforementioned judgment, some language versions referred explicitly to ‘road’ motor vehicles; and it was found that the provisions in question, having regard to their wording and the rules that they imposed, could only have regard to road vehicles.

It has been asked in the questionnaire addressed to the Member States if there is, according to them, a need to include in the Article standard tanks of other means of transport, like trains, ships or planes. Out of the 19 Member States’ representatives who answered the question, 11 were not necessarily in favour of extending the scope of Article 24 ETD to other means of transportation. They argued that the other means of transport could in most cases enjoy from tax reductions and exemptions anyway. On the other hand, the eight remaining respondents indicated that standard tanks of other means of transportation should be included, not only from a practical point of view, but also in view of ensuring an equal tax treatment of the fuels used as motor in different modes of transport. In this regard, it should be borne in mind however that extending this exemption to ships could imply some difficulties, as these ships might have different storage tanks.

Conclusion

- Article 24 ETD and Directive 68/297/EEC are to some extent duplicative. There is no longer need for the Directive 68/297/EEC.
- In view of the ongoing technological developments, it can be considered whether Article 24 ETD should not be extended to other products used as propellant than energy products used as fuel and contained in the standard tanks of vehicles.
- The ECJ jurisprudence provided with guidance on the interpretation of the term ‘commercial motor vehicle’ and ‘tanks fixed to motor vehicles’. It has been noticed though that the implementation of this provision remains diverging among Member States. Furthermore, contradicting ECJ decisions in the domain of customs and VAT law render these judgements weaker. The clarity of Article 24 ETD, notably concerning these notions, could be improved.
- Even with the existing definitions and case law, cases of double taxation are reported. This stresses the importance of having a detailed definition of the concept, and of monitoring that this concept is applied correctly by the Member States.

²⁸⁴ ECJ C-250/11, *Lietuvos geležinkeliai*, ECLI:EU:C:2012/496.

B.23 Article 25Article 25(1) determines that on 1 January of each year and every time following a change in national legislation, Member States must inform the Commission of the taxation levels they apply. With this information the Commission can control whether the Member States comply with the obligation in Article 4 of the Directive to apply taxation levels higher than the minimum levels written in the Directive.

The second paragraph of Article 25 explains that in case Member States communicate the taxation level in different measuring units than the ones stated in the annexes to Article 7 to 10 of the ETD these would also need to be converted into these units and notified as such to the Commission. Member States do not experience problems with this Article.

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Annex D - Surveys

Survey on Energy Taxation Directive (ETD) - Member States

PART 1 - Member State's Administration profile

- For which EU Member State is your Administration active?
- What is the name of your Administration and what is its domain of competences?
- Which function do you perform within your Administration?

PART 2 - Scope of application of the ETD

- In the ETD, reference is made to "energy products", "taxable products" and "products".
 - In your national provisions implementing the ETD, is there a distinction made between "energy products", "taxable products" and "products"?
 - No
 - Yes
 - Did you encounter any problems with regard to the use of these different wordings?
 - No
 - Yes
 - Please explain
- In Article 2 ETD, it is specified which products should qualify as a product taxable for the purposes of excise taxation on energy products and electricity. These energy products are determined according to their CN-code or to the use that is made of them.
 - Has your Administration ever experienced uncertainty/unclarity whether a product should qualify as a product taxable for the purposes of the excise taxation on energy products and electricity?
 - No
 - Yes, because the references to the CN-codes of the energy products listed in the legislation were outdated, and did not take into account the latest reclassifications nor the inclusion of new products.
 - Please explain
 - ✓ Yes, because a product that your administration considers as being an energy product was not caught in list of energy products in the legislation.

- Please explain
- ✓ Yes, because a product that your administration considers as not being an energy product was caught in the list of energy products in the legislation.
 - Please explain
- ✓ Yes, because it was unclear whether a product should be considered being a product "intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels".
 - Please explain
 - Did your Member State lay down any rules, instructions, guidelines or regulations in order to identify the intended use of an energy product?
 - No
 - Yes
 - If an economic operator mixes additives to motor fuel, which do not power the fuel but rather are consumed in the engine as part of the combustion process, are these additives subject in your Member State to energy taxation? (e.g., additives used as cleaning agent, anti foam or demulsifier)
 - No
 - Yes
- ✓ Yes, because it was unclear whether a product should be considered being a "hydrocarbon intended for use, offered for sale or used for heating purposes".
 - Please explain
- ✓ Yes, because of a reason not mentioned in the above propositions.
 - Please explain
- Which of the following products used as motor fuel are subject to energy taxation in your Member State?
 - ✓ Synthetic ethanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Bioethanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Synthetic methanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Biomethanol
 - On which basis?

- Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Hydrogen
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Coal
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Natural gas
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Electricity
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Renewable energy products
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Peat
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- Which of the following products used as heating fuel are subject to energy taxation in your Member State?
 - ✓ Synthetic ethanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Bioethanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Synthetic methanol
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
 - ✓ Biomethanol
 - On which basis?

- Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Hydrogen
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Coal
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Natural gas
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Electricity
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Renewable energy products
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- ✓ Peat
 - On which basis?
 - Based on the provisions implementing the ETD
 - Based on national-specific provisions
- Does your Member State levy a national duty on nuclear energy used for the commercial production of electricity?
 - Yes, based on the ETD
 - Yes, based on national provisions, because nuclear energy falls outside the scope of the ETD
 - No, because the ETD provides for an exemption for the production of electricity
 - No, because nuclear energy falls outside the scope of the ETD
- Does your Administration consider it necessary to further add products to the ETD?
 - No
 - Synthetic ethanol
 - Synthetic methanol
 - Hydrogen
 - Biofuels other than the fuels already covered by the concept of energy products (E.g.: FAME)
 - Other

- Please specify
- Article 2(5) ETD provides for a regular update of the codes of the combined nomenclature for the products referred to in the Directive every year. However, this has never been done.
 - Does your Administration think that such an update of the codes on a yearly basis is necessary?
 - No
 - Yes
 - Would your Administration be in favour of delegating powers to the European Commission to carry out the yearly update of the CN codes?
 - No
 - Please explain
 - Yes
 - Please explain
 - " Article 2(4) ETD stipulates that it will not apply to:
 - (a) Output taxation of heat and the taxation of products falling within CN-codes 4401 and 4402;
 - (b) Following uses of energy products and electricity:
 - Energy products used for purposes other than as motor fuels or as heating fuels;
 - Dual use of energy products;
 - Electricity used principally for the purposes of chemical reduction and in Electrolytic and metallurgical processes;
 - Electricity, when it accounts for more than 50% of the cost of a product;
 - mineralogical processes."
 - Your Administration considers that these product:
 - fall outside of the scope of the ETD
 - are exempted from taxation
 - Has your Administration ever experienced uncertainty/unclarity whether a product should be excluded from the scope of application of the excise taxation on energy products and electricity?
 - No
 - Yes, it was unclear whether a product should be considered as having a "dual use".
 - Please explain
 - Yes, it was unclear what part of the electricity consumed could be considered having been "principally" used in chemical reduction, or in electrolytic and metallurgical processes.
 - Please explain
 - Yes, it was unclear how to determine if electricity consumed accounted for more than 50 % of the cost of a product.

- Please explain
 - Yes, it was unclear what activities could fall within the definition of "metallurgical" or "mineralogical" processes.
 - Please explain
 - Yes, because of a reason not mentioned in the above propositions.
 - Please explain
 - An energy product is used for heating purposes. During the heating process, gas that can be recycled is generated. Is the energy product considered as "dual used" in your Member State, and thus considered to fall outside the scope of the ETD?
 - No
 - Yes
 - An economic operator makes use of natural gas, on the one hand to overheat and to dry the steam which subsequently will be used in the process of the production of ammonia, and on the other hand to decompose and evacuate waste gases from this process. Is the natural considered as "dual used" in your Member State?
 - No
 - Yes
 - Does your Administration consider it necessary to further exclude products from the ETD?
 - No
 - Yes
 - Please explain
- Article 20(1) ETD lists energy products which shall be subject to control and movement provisions of Directive 92/12/EEC (replaced by Directive 2008/118/EC)
- In your Member State, what is understood to be the "control and movement provisions of Directive 92/12/EEC" (current Directive 2008/118/EC)?
 - Chapter III (tax warehouse arrangements) and chapter IV (arrangements for movements under suspension of excise duty) of the Directive 2008/118/EC
 - What is the procedure applied in your Member State to intra-EU movements of taxable products for which duties have already been paid in the Member State of departure? Please explain.
 - Chapter III (tax warehouse arrangements), chapter IV (arrangements for movements under suspension of excise duty) and chapter V (duty paid regime) of the Directive 2008/118/EC?
 - For energy products excluded from the control and movement provisions of Directive 2008/118 (E.g., lubricants), does this mean that a Simplified Administrative Accompanying

Document needs to accompany the goods in case of intracommunity movements? Please explain.

- According to your Administration, is the list of Article 20 ETD adequate or should products be removed or added?
 - The list is adequate
 - Products should be removed or added
 - Please explain
 - Would you be in favour of a delegation of power to the European Commission to include/remove energy products in Article 20(1) ETD?
- "Some goods may be excluded from the scope of application of the legislation on excise taxation on energy products and electricity, based on Article 2(4) ETD, but still be considered as being an excise product in accordance with the general excise legislation. Consequently, these products are still subject to the control and movement provisions of that general excise legislation. (As an example amongst many others, we can mention toluene and xylene used as paint thinners in retail packages)"
 - Has this situation, where a product is not taxed under the legislation on energy products and electricity but still considered as an excise product for control and movement purposes, been the source of uncertainties/unclarities?
 - No
 - Yes
 - Please explain
- In line with Article 20(3) ETD, certain energy products may be dispensed from the control and movement provisions on excise products, pursuant to bilateral arrangements between Member States.
 - Did your Member State conclude any bilateral or multilateral agreements resulting in dispensation of some or all of the control measures set out in Directive 92/12/EEC (Directive 2008/118/EC)?
 - No
 - Why not?
 - Yes
 - What was the reason for your Member State to conclude such an agreement? Please explain.
 - Does the procedure for benefiting from that simplification lead to administrative burden?
 - No
 - Yes
 - Please explain

PART 3 - Chargeable event

- Pursuant to Article 21(3) ETD, the consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event, if the consumption consist of energy products produced within the curtilage of the establishment.
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "curtilage"?
 - No
 - Yes
 - Please explain
 - According to your Administration, is the use of motor vehicles (e.g. Lorries) driving on the terrain also covered in the scope of the absence of chargeable event?
 - No
 - Yes
- The same Article foresees the optional possibility for Member States to also consider the consumption of electricity and other energy products not produced within the curtilage of such an establishment, and the consumption of energy products and electricity within the curtilage of an establishment producing fuels to be used for generation of electricity, as not giving rise to a chargeable event.
 - Did your Member State extend the scope of the absence of a chargeable event to situations where external energy products and electricity are used within the curtilage of the establishment?
 - No
 - Yes
 - Would your Administration be in favor of the mandatory extension (i.e. mandatory for all the Member States) of the scope of the absence of a chargeable event to energy products and electricity not produced within the curtilage of such an establishment?
 - No
 - Please explain
 - Yes
 - Please explain
 - Did your Member State extend the scope of the absence of a chargeable event to situations where energy products and electricity are used within the curtilage of an establishment producing fuels to be used for generation of electricity?
 - No
 - Yes
- Pursuant to Article 21(5) ETD, electricity and natural gas become chargeable at the time of supply by the distributor or redistributor.

- "In your Member State, are all types of natural gas (also LNG and CNG which are not transported via pipelines) covered by Article 21(5) ETD?"
 - No
 - Please explain
 - Yes
 - Please explain

- Where the delivery to consumption from electricity or natural gas takes place in a Member State where the distributor or redistributor is not established, the tax of the Member States of delivery shall be chargeable to a company that has to be registered in the Member State of delivery. Tax shall in all cases be levied and collected according to procedures laid down by each Member States.
- Considering your Member State as the Member State of delivery of the product, when is a company considered to be registered within the meaning of Article 21(5) ETD?
 - Any company
 - A distributor/redistributor in the Member State of supply
 - A branch/representative of the distributor/redistributor affecting the supply
- "Tax shall in all cases be levied and collected according to procedures laid down by each Member States". Does that mean that, if a distributor supplies electricity or natural gas from your Member State to a consumer in another Member State, your Member State will tax the natural gas?
 - No
 - Yes

- An entity producing electricity for its own use is regarded as a distributor, however small producers may be exempted provided that they tax the energy products used for the production of that electricity.
 - In your Member State, is there an exemption granted to "small producers"?
 - No
 - Yes
 - Is this exemption granted to small producers who produce for their own use only?
 - No
 - Yes
 - Who is considered as being a "small producer" in your Member State? Please explain.
 - Is there according to you a technological development that requires an update of this exemption?
 - No

- Yes
 - Please explain.
 - Did the granting of these exemptions/reductions lead to any administrative difficulty for your Administration?
 - No
 - Yes
 - Please explain.
- "Article 21(6) ETD provides that Member States need not treat as production of energy products
- (a) Operations during which small quantities of energy products are obtained incidentally;
 - (b) Operations by which the user of an energy product makes its reuse possible in his own undertaking, provided that the taxation already paid on such product is not less than the taxation which would be due if the reused energy product were again to be liable to taxation
 - (c) An operation consisting of mixing, outside a production establishment or a tax warehouse, energy products with other energy products or other materials, provided that taxation on the components has been paid previously and that the amount paid is not less than the amount of the tax which would be chargeable on the mixture."
- Did your Member State encounter any problem when implementing this provision?
 - No
 - Yes
 - Please explain.
 - In your Member State, what are considered "small quantities"? How are small quantities determined? Please explain.

PART 4 - Levels of taxation

- "The ETD sets minimum levels of taxation for energy products used as motor or heating fuel and for electricity. Above these minima, Articles 5 and 7(2) ETD, Member States are allowed to apply differentiated rates of taxation:
 - When the differentiation is linked to products quality;
 - When the differentiation depends on the quantitative consumption levels for electricity and energy products used for heating purposes;
 - For local public transport, waste collection, armed forces and public administration, disabled people, ambulances;
 - Between business and non-business use;
 - between commercial and non-commercial use of gas oil used as propellant."
- Does your Member State differentiate in taxation between
 - products of different quality

- Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "product quality"?
 - No
 - Yes

➤ Please explain
 - quantitative consumption levels
 - products used for local public passenger transport
 - products used for waste collection
 - products used for armed forces
 - products used for public administration
 - products used for disabled people
 - products used for ambulances
 - business and non-business use of energy products
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "business use"?
 - No
 - Yes

➤ Please explain
 - Does your Member State consider public schools, public transportation, or public health services to be business entities?
 - No
 - Yes
 - Where mixed use takes place, taxation apply in proportion to each type of use, and where either the business or non-business use is insignificant, it may be treated as nil. Have you experienced any problems with the definition of the term "insignificant"?
 - No
 - Yes
 - Member States can limit the scope of the term "business use". Did your Member State do so?
 - No
 - Yes
 - commercial and non-commercial use of gas oil used as propellant
 - Does your national legislation refer to "gas oil used as propellant" or to "gas oil used as motor fuel"?
 - gas oil used as propellant
 - gas oil used as motor fuel
 - Does the reduced rate also apply for stationary engines?
 - No

- Yes
- Does your Member State apply the differentiation to all commercial vehicles, regardless of the Member State of registration? E.g., a truck registered in Germany, could it benefit from the reduced rate in France?
 - No
 - Yes
- Pursuant Article 7(4) ETD, Member States which introduce a system of road user charges for motor vehicles or articulated vehicle combinations intended exclusively for the carriage of goods by road may apply a reduced rate on gas oil used by such vehicles, that goes below the national level of taxation in force, as long as the overall tax burden remains broadly equivalent. In your Member State, is there a possibility to impose a tax rate below the national level of taxation for gas oil, on the basis of that provision?
 - No
 - Yes
- Did your Administration encounter any problems in practice when applying a differentiated rate?
 - No
 - Yes
 - Please explain
- Does your administration consider the list of available differentiations to be up-to-date, taking into account technological developments or social needs?
 - Yes
 - No
 - Would you consider it relevant to include other grounds for differentiation in the rates of taxations?
 - No
 - Yes
 - What should be these other grounds for differentiation?
 - differentiation for electricity used as propellant (e.g. including electricity supplied to road charging stations)
 - differentiation depending on the renewable character of the taxable product
 - other [open field]
 - Would you consider it relevant to abolish all the existing grounds for differentiation?
 - No
 - Yes
 - Please explain.

- "Article 8 ETD provides for lower minimum levels of taxation for products used as motor fuel for the following industrial and commercial purposes:
 - Agricultural, horticultural or piscicultural works and in forestry;
 - Stationary motors;
 - Plant and machinery used in construction, civil engineering and public works;
 - Vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public roadway."
- Is there according to your Administration a technological development of the machineries mentioned that requires an update?
 - No
 - Yes
 - Please explain
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "stationary motors"?
 - No
 - Yes
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "use off the public roadway"?
 - No
 - Yes
 - Does your Member State distinguish between "piscicultural" and "aquacultural" works?
 - No
 - Yes
 - Please explain
 - Which of the following uses does your Administration consider as falling within the scope of Article 8 ETD (and thus the energy taxation on the motor fuels used should meet the minimum levels laid down in the ETD)?
 - a tractor used both for transportation of goods and agricultural purposes at the same time
 - a stationary motor of a crane on a ship (the motor has a separate fuel tank)
 - a stationary motor of a crane on a ship (the motor is fuelled through the tank of the ship)
- Article 9 ETD foresees the minimum levels of taxation applicable to heating fuels. The second paragraph of that provision states that Member States which are authorised to apply a monitoring charge for heating gas oil may continue to apply a reduced rate of EUR 10 per 1 000 litres for that product.
 - Is your Member State making use of that provision and applying the reduced rate?
 - No
 - Yes
 - In your Member State, what is considered a "monitoring charge"? Please explain.

- Do you consider the reduced rate to be useful and that they should be maintained?
 - No
 - Please explain
 - Yes
 - Please explain
 - Do you consider it necessary to allow for a further reduced rate related to other charges than monitoring charges?
 - No
 - Yes
 - Please explain
- Article 10 ETD foresees the minimum levels of taxation applicable to electricity. The second paragraph of that provision states that, above the minimum levels of taxation, Member States have the option of determining the applicable tax base.
 - What is the taxable base for electricity in your Member State?
 - the price
 - the volume, expressed in Megawatt hours
 - the volume, expressed in Giga Joules
 - Other
 - Please explain
- The products subject to the excise taxation on energy products and electricity for which the level of taxation is not specified should be taxed at a rate for the equivalent heating fuel or motor fuel.
 - Has your Administration ever experienced problems with the identification of that equivalent product?
 - No
 - Yes
 - Please explain
- Pursuant to Article 12 ETD, Member States may express their national levels of taxation in units other than those specified in the Directive, provided that the corresponding levels of taxation, following the conversion into these units, are not below the minimum levels specified in the Directive.
 - Does your Member State express national levels of taxation in units other than those specified in Articles 7 to 10 ETD?
 - No
 - Yes
- Pursuant to Article 13 ETD, for Member States that have not adopted the euro, the value of the euro in national currencies to be applied to the value of the levels of taxation are fixed once a year.
 - Has your Member State adopted the euro?

- Yes
- No
 - Do you think that the yearly periodicity for updating the exchange rate is adequate?
 - Yes
 - No
 - Please explain
 - Did you encounter any issues in practice with regard to the conversion calculation to be performed?
 - No
 - Yes
 - Please explain
 - Article 13(2) stipulates that Member States may maintain the amounts of taxation in force at the time of the annual adjustment if the conversion of the amounts of the level of taxation expressed in euro would result in an increase of less than 5 % or EUR 5 in the level of taxation expressed in national currency. Did you Member State ever maintain the amount of taxation at the time of the annual adjustment, in accordance with this provision?
 - No
 - Yes

PART 5 - Exemptions or reductions in the level of taxation

- "Article 14 ETD foresees in mandatory exemptions from taxation for
 - a) energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity;
 - b) energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying;
 - c) energy products supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than private pleasure craft, and electricity produced on board of a craft."
- Did the granting of these exemptions/reductions lead to any administrative difficulty for your Administration?
 - No
 - Yes
 - Please explain
- Has your Administration ever experienced uncertainty/unclarity concerning the definition of the terms "used to produce electricity" or "used to maintain the ability to produce electricity"?
 - No
 - Yes

- Please explain
- Consider an aircraft owned by a company in your Member State. The company uses the aircraft for the carriage of its personnel to clients or trade fairs. Do you allow for an exemption for the excise duties paid on the aircraft fuel? Please explain.
- Consider an aircraft owned by an airline company. The aircraft is flown to a maintenance facility. Do you allow for an exemption for the excise duties paid on the aircraft fuel for the trip to the maintenance facility? Please explain.

- Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "fishing"?
 - No
 - Yes
- Please explain

- Notwithstanding the exemption provided for energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity, Member States may, for reasons of environmental policy, subject these products to taxation without having to respect the minimum levels of taxation laid down in the Directive.
- Does your Member State impose any taxation on energy products and electricity used to produce electricity or electricity used to maintain the ability to produce electricity for reasons of environmental policy?
 - No
 - Yes
 - Under which circumstances?
 - What is this taxation composed of?
 - What is the rate of taxation?
 - How is the taxable base determined?
 - Does this include private /home production of electricity?
 - No
 - Yes

- Article 24 ETD foresees the exemption from taxes of energy products released for consumption in one Member States and contained in a standard tank or special container of a motor vehicle used in another Member State.
- Does your Administration consider it necessary to include standard tanks of other means of transportation (e.g., trains, ships, planes)?
 - No
 - Yes
- Please explain

- The ETD provides for several exemptions or reduced rates possibilities in its Articles 15, 16 and 17. The criteria for benefitting from an exemption or a reduction can be related to the origin, the use or the composition of the product, or even to the specific situation of the company that is consuming the products.
 - Does your Member State apply an exemption or a reduced rate of excise duties on one of the following grounds:
 - energy products and electricity used in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the terms "environmentally-friendly" or "pilot projects"?
 - No
 - Yes
 - Please explain
 - electricity of solar, wind, wave tidal or geothermal origin
 - electricity of hydraulic origin produced in hydroelectric installations
 - electricity generated from biomass or from products produced from biomass
 - electricity generated from methane emitted by abandoned coalmines
 - electricity generated from fuel cells
 - energy products and electricity used for combined heat and power generation
 - Would your Administration be in favour of a restriction of the scope to cogeneration of energy which is also environmentally-friendly?
 - No
 - Yes
 - electricity produced from combined heat and power generation, provided that the combined generators are environmentally friendly
 - In your Member State, is the exemption / reduction linked to
 - environmentally-friendly cogeneration
 - high efficiency cogeneration
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the terms "environmentally-friendly" or "high efficiency"?
 - No
 - Yes
 - Please explain
 - energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus

- According to you, should the specific references to "rail, metro, tram and trolley bus" be extended to other means of transportation?
 - No
 - Yes

➤ Please explain
- energy products supplied for use as fuel for navigation on inland waterways (including fishing) other than in private pleasure craft, and electricity produced on board a craft
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "inland waterways"?
 - No
 - Yes

➤ Please explain
- electricity, natural gas, coal and solid fuels used by households and/or by organisations recognised as charitable
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the terms "households" or "charitable organisations"?
 - No
 - Yes

➤ Please explain
 - Would you be in favour of an extension of the scope of the exemption / reduction to other forms of energy products than electricity, natural gas, coal and solid fuels?
 - No
 - Yes

➤ Please explain
- natural gas and LPG used as propellants
 - Does your national legislation refer to "used as propellant" or to "used as motor fuel"?
 - used as propellant
 - used as motor fuel
- motor fuels used in the field of the manufacture, development, testing and maintenance of aircrafts and ships
- motor fuels used for dredging operations in navigable waterways and in ports
- energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry
- energy products and electricity made up of, or containing soya-bean oils or animal or vegetable fats and oils

- energy products and electricity made up of, or containing mixtures of fatty acid esters of glycerol or mixtures of amines derived from dimerised fatty acids, for their components produced from biomass
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "biomass"?
 - No
 - Yes
 - Please explain
- energy products and electricity made up of, or containing denatured ethyl alcohol and other spirits or methanol, which are not of synthetic origin
- energy products and electricity produced from biomass, including products made up of, or containing fuel wood or wood charcoal
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "biomass"?
 - No
 - Yes
 - Please explain
- energy products and electricity made up of, or containing water
 - Does your Administration consider it necessary to provide for a reduced rate for taxable product containing additives other than water, which do not contribute to the improvement of the energy of the fuel but serve other functions (e.g., lubricants in two-stroke engines)?
 - No
 - Yes
 - Please explain
- energy products used by energy-intensive businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency
 - Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "energy-intensive business"?
 - No
 - Yes
 - Please explain
- energy products used by businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency

- Has your Administration ever experienced uncertainty/unclarity concerning the definition of the term "tradable permit schemes"?
 - No
 - Yes
 - Please explain
- Did the granting of these exemptions/reductions lead to any administrative difficulty for your Administration?
 - No
 - Yes
 - Please explain
- Is there according to your Administration a technological development that would require an update of the exemption/reduced rate provisions?
 - No
 - Yes
 - Please explain

PART 6 - Miscellaneous

- Please, provide the references to the legal instrument implementing the ETD into your national law.
 - Do you have any remaining remark or concern regarding the clarity of the legislation on excise taxation of energy products?
 - No
 - Yes
 - Please explain
 - Do you have any remaining remark or concern regarding the extend to what the legislation on excise taxation of energy products still matches the current needs in terms of technological developments?
 - No
 - Yes
 - Please explain
 - Do you have any remaining remark or concern regarding the administrative burden linked with the application of (some provisions of) the legislation on excise taxation of energy products?
 - No
 - Yes
 - Please explain

Survey on Energy Taxation Directive (ETD) – Economic Operators

PART 1 - Company's profile

- What is the name of your company? (Confidential - will not be disclosed)
- Which sector does your company operate in?
 - Consumer business
 - Transport
 - Retail, Wholesale and Distribution
 - Energy and resources
 - Financial services
 - Life science and health care
 - Manufacturing
 - Agriculture and silviculture
 - Technology, media and telecommunications
 - Other
 - Which sector?
- Which function do you perform within your company?
 - Strategy
 - Marketing
 - Operations
 - Finance
 - Human resources
 - R&D
 - Other
 - Which function?
- In which Member State of the EU is your company established?
- How many employees did your company employ in 2015?
 - 1-9
 - 10-49

- 50-249
- Over 250

- What was your company's annual turnover in 2013?
 - Up to EUR 2.000.000
 - Between EUR 2.000.000 and EUR 10.000.000
 - Between EUR 10.000.000 and EUR 50.000.000
 - Above EUR 50.000.000

PART 2 - Scope of application

- In the legislation, it is specified which products should qualify as an "energy product" for the purposes of excise taxation on energy products and electricity. These energy products are determined according to their CN-code or to the use that is made of them.
 - Has your company ever experienced uncertainty/unclarity whether a product should qualify as an "energy product" for the purposes of the excise taxation on energy products and electricity?
 - No
 - Yes
 - Where does that uncertainty/unclarity come from:
 - The references to the CN-codes of the energy products listed in the legislation were outdated, and did not take into account the latest reclassifications nor the inclusion of new products.
 - A product that your company considers as being an energy product was not caught in list of energy products in the legislation.
 - A product that your company considers as not being an energy product was caught in the list of energy products in the legislation.
 - It was unclear whether a product should be considered being a product "intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels".
 - It was unclear whether a product should be considered being a "hydrocarbon intended for use, offered for sale or used for heating purposes".
 - Because of a reason not mentioned in the above propositions.
 - Please explain

- The legislation also excludes products from the scope of application of the excise taxation on energy products and electricity, depending on their CN-code or on the use that is made of them.
 - Has your company ever experienced uncertainty/unclarity whether a product should be excluded from the scope of application of the excise taxation on energy products and electricity?
 - No
 - Yes
 - Where does that uncertainty/unclarity come from:
 - It was unclear whether a product should be considered as having a "dual use".
 - It was unclear what part of the electricity consumed could be considered having been "principally" used in chemical reduction, or in electrolytic and metallurgical processes.
 - It was unclear how to determine if electricity consumed accounted for more than 50 % of the cost of a product.
 - It was unclear what activities could fall within the definition of "metallurgical" or "mineralogical" processes.
 - Because of a reason not mentioned in the above propositions.
 - Please explain
 - If your company is active in the energy sector, do you see the need/possibility to foresee in control and movement provisions applied to liquified natural gas (LNG)?
 - Don't know
 - No
 - Yes
 - "Some goods may be excluded from the scope of application of the legislation on excise taxation on energy products and electricity, but still be considered as being an excise product in accordance with the general excise legislation. Consequently, these products are still subject to the control and movement provisions of that general excise legislation. (As an example amongst many others, we can mention toluene and xylene used as paint thinners in retail packages)"
 - Has this situation, where a product is not taxed under the legislation on energy products and electricity but still considered as an excise product for control an movement purposes, been the source of uncertainties/unclarities?
 - No
 - Yes
 - Please explain

- Certain energy products may be dispensed from the control and movement provisions on excise products, pursuant to bilateral arrangements between Member States.
 - If the Member State from which your company operates has concluded such bilateral agreements, does your company make use of the simplification of the control and movement provisions on excise products?
 - No
 - Yes
 - Does the procedure for benefitting from that simplification lead to considerable administrative burden?
 - No
 - Yes

PART 3 - Chargeable event

- Pursuant the ETD, the consumption of energy products within the curtilage of an establishment producing energy products shall not be considered as a chargeable event, if the consumption consist of energy products produced within the curtilage of the establishment. Member States may also consider the consumption of electricity and other energy products not produced within the curtilage of an establishment producing fuels to be used for generation of electricity as not giving rise to a chargeable event.
 - Does your company benefit from that exclusion from the chargeable event?
 - No
 - Yes
 - Has your company ever experienced problems with the application of that exclusion from the chargeable event?
 - No
 - Yes
 - Please explain
- Electricity and natural gas become chargeable at the time of supply by the distributor or redistributor. An entity producing electricity for its own use is regarded as a distributor, however small producers may be exempted provided that they tax the energy products used for the production of that electricity.
 - Is your company producing electricity for its own use?
 - No
 - Yes
 - Is your company regarded as electricity distributor?
 - No, the company is exempted as it is considered a small producer.

- Is there according to you a technological development that requires an update of this exemption?
 - No
 - Yes [open field]
- To your experience, does the procedure for being granted/requesting the exemption lead to considerable administrative burden?
 - No
 - Yes [open field]
- Has your company ever experienced problems with the registration as distributor?
 - No
 - Yes [open field]

PART 4 - Levels of taxation

- "The ETD sets minimum levels of taxation for energy products used as motor or heating fuel and for electricity. Above these minima, Member States are allowed to apply differentiated rates of taxation:
 - When the differentiation is linked to products quality;
 - When the differentiation depends on the quantitative consumption levels for electricity and energy products used for heating purposes;
 - For local public transport, waste collection, armed forces and public administration, disabled people, ambulances;
 - Between business and non-business use;
 - between commercial and non-commercial use of gas oil used as propellant."
- To your knowledge, does your company benefit from lower excise tax rates based on these criteria?
 - No
 - Yes
 - Based on which criteria does your company benefit from that lower excise tax rate?
 - differentiation linked to products quality
 - differentiation depending on the quantitative consumption levels for electricity and energy products used for heating purposes
 - differentiation linked to use by local public transport, waste collection, armed forces and public administration, disabled people, ambulances
 - differentiation between business and non-business use

- differentiation between commercial and non-commercial use of gas oil used as propellant
- Has your company ever experienced problems with the application of that differentiating criteria?
 - No
 - Yes

➤ Please explain
- Do you consider the list of available differentiations to be up-to-date, taking into account technological developments or social needs?
 - No
 - Yes
 - Would you consider it relevant to include other grounds for differentiation in the rates of taxations?
 - No
 - Yes

➤ What should be these other grounds for differentiation?

 - differentiation for electricity used as propellant (e.g. including electricity supplied to road charging stations)
 - differentiation depending on the renewable character of the taxable product
 - other [open field]
 - Would you consider it relevant to abolish all the existing grounds for differentiation?
 - No
 - Yes
- "The ETD provides for lower minimum levels of taxation for products used as motor fuel for the following industrial and commercial purposes:
 - agricultural, horticultural or piscicultural works and in forestry;
 - stationary motors;
 - plant and machinery used in construction, civil engineering and public works;
 - vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public roadway."
 - Does your company benefit from lower excise tax rates based on these industrial and commercial purposes?
 - No
 - Yes
 - Based on which industrial or commercial purpose does your company benefit from that lower excise tax rate?

- agricultural, horticultural or piscicultural works and in forestry
 - Do you consider that a tractor used both for transportation of goods and agricultural purposes should benefit from the lower minimum levels of taxation?
 - No
 - Yes
 - Please explain
- stationary motors
 - Do you consider that a stationary motor of a crane (with its own separate fuel tank) on a ship should benefit from the lower minimum levels of taxation?
 - No
 - Yes
 - Please explain
 - Do you consider that a stationary motor of a crane (where the motor is fuelled through the tank of the ship) on a ship should benefit from the lower minimum levels of taxation?
 - No
 - Yes
 - Please explain
- plant and machinery used in construction, civil engineering and public works
- vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public roadway
- Has your company ever experienced problems with the applicability of these industrial and commercial purposes?
 - No
 - Yes
 - Please explain
- Is there according to you a technological development of the machineries mentioned that requires an update?
 - No
 - Yes
 - Please explain
- The products subject to the excise taxation on energy products and electricity for which the level of taxation is not specified should be taxed at a rate for the equivalent heating fuel or motor fuel.

- Does your company use products subject to excise taxation for which the tax rate is not specified, and for which the equivalent heating fuel or motor fuel consequently has to be determined?
 - No
 - Yes
 - Has your company ever experienced problems with the identification of that equivalent product?
 - No
 - Yes
- Please explain

- In each Member State, the taxation rates are expressed in well-defined measurement units.
- Do the volumes of (some of) the energy products and electricity consumed by your company need to be converted into another measurement unit in order to calculate the excise duties?
 - No
 - Yes
 - Please explain

PART 5 - Exemptions or reductions in the level of taxation

- The ETD provides for several exemptions or reduced rates possibilities. The criteria for benefitting from an exemption or a reduction can be related to the origin, the use or the composition of the product, or even to the specific situation of the company that is consuming the products.
- Does your company benefits from an exemption or a reduced rate of excise duties on one of the following grounds (tick the box)?
 - energy products and electricity used to produce electricity and electricity used to maintain the ability to produce electricity
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes

➤ Please explain

 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision? (E.g. self-powered equipment such as objects powered by solar batteries)
 - No
 - Yes

➤ Please explain

- To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products supplied for use as fuel for the purpose of air navigation other than private pleasure-flying
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products supplied for use as fuel for navigation within Union waters (including fishing), other than private pleasure craft, and electricity produced on board a craft
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain

- energy products supplied for use as fuel for navigation on inland waterways (including fishing) other than in private pleasure craft, and electricity produced on board a craft
 - Has your company ever experienced problems with the application of that exemption/reduced rate? (E.g. resulting from the lack of definition for inland waterways)electricity produced on board a craft
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products and electricity used in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- electricity of solar, wind, wave tidal or geothermal origin
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain

- Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
- To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- electricity of hydraulic origin produced in hydroelectric installations
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- electricity generated from biomass or from products produced from biomass
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain

- electricity generated from methane emitted by abandoned coalmines
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- electricity generated from fuel cells
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products and electricity used for combined heat and power generation
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain

- To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
 - Has your company encountered any competitive disadvantage because of the different national definitions?
 - No
 - Yes
 - Please explain
- electricity produced from combined heat and power generation, provided that the combined generators are environmentally friendly
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products and electricity used for the carriage of goods and passengers by rail, metro, tram and trolley bus
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No

- Yes
 - Please explain
- electricity, natural gas, coal and solid fuels used by households and/or by organisations recognised as charitable
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- natural gas and LPG used as propellants
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- motor fuels used in the field of the manufacture, development, testing and maintenance of aircrafts and ships
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain

- Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes

➤ Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes

➤ Please explain
- energy products and electricity used for agricultural, horticultural or piscicultural works, and in forestry
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes

➤ Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes

➤ Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes

➤ Please explain
- energy products and electricity made up of, or containing mixtures of fatty acid esters of glycerol or mixtures of amines derived from dimerised fatty acids
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes

➤ Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes

➤ Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No

- Yes
 - Please explain
- energy products and electricity made up of, or containing denatured ethyl alcohol and other spirits or methanol, which are not of synthetic origin
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products and electricity made up of, or containing fuel wood or wood charcoal
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products and electricity made up of, or containing water
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?

- No
 - Yes
 - Please explain
- To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain
- energy products used by energy-intensive businesses which entered into agreements, tradable permit schemes or equivalent arrangements leading to the achievement of environmental objectives or increased energy efficiency
 - Has your company ever experienced problems with the application of that exemption/reduced rate?
 - No
 - Yes
 - Please explain
 - Is there according to you a technological development that requires an update of this exemption/reduced rate provision?
 - No
 - Yes
 - Please explain
 - To your experience, does the procedure for being granted/requesting the exemption or the reduced rate lead to considerable administrative burden?
 - No
 - Yes
 - Please explain

PART 6 - Miscellaneous

- Where your company would operate in different Member States, did you ever encounter cases of double taxation with regard to energy taxation in intra-EU situations?
 - No
 - Yes
 - Please explain
- Do you have any remaining remark or concern regarding the clarity of the legislation on excise taxation of energy products?
 - No
 - Yes
 - Please explain

- Do you have any remaining remark or concern regarding the extend to what the legislation on excise taxation of energy products still matches the current needs in terms of technological developments?
 - No
 - Yes
 - Please explain
- Do you have any remaining remark or concern regarding the administrative burden linked with the application of (some provisions of) the legislation on excise taxation of energy products?
 - No
 - Yes
 - Please explain