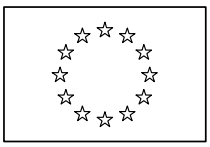

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

Review of the derogations in Annexes II and III of Council Directive 2003/96/EC that expire by the end of 2006

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1. INTRODUCTION

The taxation of energy products and electricity in the Community is governed by the provisions of Council Directive 2003/96/EC[1] restructuring the Community framework for taxation of energy products and electricity (hereafter referred to as the "Energy Tax Directive" or the "Directive"). This Directive lays down the taxable products concerned, the uses that make them liable to tax and the minimum rates of taxation applicable to each product depending on whether it is used as propellant, for certain industrial and commercial purposes or for heating. It also lays down some compulsory exemptions from the normal rules on taxation, and in addition, contains a wide range of optional provisions that give Member States the possibility to apply reduced rates of taxation or exemption from taxation for certain policy purposes.

Moreover, in its Annexes II and III, the Directive contains additional 127 derogations further authorising Member States to apply reduced rates or exemptions from energy taxation for various products and purposes[2]. Some of the derogations have already expired, and a further 111 will expire on 31 December 2006.

Most of the derogations in Annex II of the Energy Tax Directive were originally authorised under Article 8(4) of Council Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils[3] (hereafter referred to as "the Mineral Oils Directive"); they were extended for the last time in 2001[4] and (with minor amendments) were incorporated into the Energy Tax Directive with a view to expire, most frequently, by the end of 2006. A similar scheme has been put into place in Annex III of the Directive for the Member States having joined the Community in 2004[5].

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1 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for taxation of energy products and electricity (OJ L 283 of 31.10.2003 p. 51; Directive last amended by Directives 2004/74/EC and 2004/75/EC (OJ L 157 of 30 April 2004, p. 87 and p.100).

2 It has to be added that under Article 19 of the Directive three derogations have been granted to France, Sweden and the UK since the entry into force of the Directive. They are not subject to the present review.

3 Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (OJ L 316 of 31.10.1992); Directive repealed together with Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils as from 31 December 2003 by means of Council Directive 2003/96/EC.

4 Council Decision 2001/224/EEC of 12 March 2001 concerning reduced rates of excise duty and exemptions from such duty on certain mineral oils when used for specific purposes (OJ L 84 of 23 March 2001, p. 23).

5 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. Furthermore, two new Member States were granted one-year transitional periods directly in the Accession Treaty (these are outside the scope of this review).

This Communication analyses the derogations expiring by the end of 2006, in the framework of Articles 18(1), subparagraph 2, and 18a(1), subparagraph 2, of the Directive[6]. In preparing this Communication the Commission services have carried out a detailed review of all the derogations following a consultation with the Member States concerned. In the light of this review, the Commission concludes that the general provisions of the Directive (outside Annexes II and III) take appropriately account of most situations meriting particular treatment. This notwithstanding, Member States are free to consider under their own responsibility, and in the light of this Communication, whether they wish to apply for an extension of any of the derogations using the possibilities offered by the new legal basis (Article 19).

2. ASSESSMENT OF THE DEROGATIONS

The derogations in Annexes II and III that expire by the end of 2006 can be divided into four categories[7]:

(1) Derogations relating to situations outside the scope of the Directive

This category concerns non-fuel uses of energy products; Article 2(4) of the Energy Tax Directive excludes such uses from the scope of the Directive. The relating (five) derogations will not need to be considered further.

(2) Derogations having become obsolete

Following the consultation with Member States, it has emerged that at least 8 derogations are no longer applied although the Member States concerned were authorised to apply the derogations in question until the end of 2006. It is considered that these do no longer correspond to concrete policy needs. No particular analysis needs to be devoted to these derogations either.

(3) Derogations currently used but whose objectives are taken into account through the flexibility offered by the general provisions of the Directive

In a large number of cases (so far covered by derogations) a specific tax treatment could be granted by Member States in one way or another under various articles of the Energy Tax Directive (without prejudice to the State aid provisions of the Treaty). In some cases, however, adjustments to the schemes will be necessary in order to bring them fully in line with the Directive.

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6 The wording of Articles 18(1) and 18a(1) is inspired by Article 1 of Council Decision 2001/224/EC. Article 1(2) of this decision has to be seen against the background of the Mineral Oils Directive which provided only for a limited number of optional exemptions or reductions. Thus, in an important number of cases, Member States could pursue particular policy objectives only through individual derogations, in particular in the field of environment. This situation has changed with the adoption of the Energy Tax Directive, which itself offers a wide range of possibilities to grant exemptions or reductions for a number of policy reasons.

7 For the sake of simplicity, the Commission will refer to the items set out in Annexes II and III of the Directive as "derogations", notwithstanding the fact that one or the other item may actually not deviate from the general scheme of the Directive (cf. in particular category (3) below).

(4) Derogations corresponding to objectives not taken into account by the general provisions of the Directive

This group contains a further 35 derogations that are still applied by Member States but which, following their expiry, will not have any legal basis in the Directive. These derogations cover reduced rates of taxation and exemptions:

- for fuel used by private pleasure air navigation (10 cases);
- for fuel used for navigation in private pleasure craft (6 cases);
- for waste oils reused as fuel, either directly after recovery or following recycling, and where the reuse is subject to duty (11 cases);
- for specific policy purposes in certain geographical areas (6 cases);
- for other miscellaneous purposes (2 cases).

Categories (3) ad (4) will be assessed more closely in the following two subsections.

2.1. Derogations whose objectives are taken into account through the flexibility offered by the general provisions of the Energy Tax Directive

The general provisions of the Energy Tax Directive are flexible enough to accommodate most of the objectives pursued by Member States in the context of the existing derogations. According to these provisions, indeed, Member States may resort to tax differentiation under fiscal control for specific policy purposes[8]. However, the Directive most commonly requires that minimum levels of taxation (and therefore the underlying Community objectives) be respected[9]. Only in a limited number of cases is a tax reduction below the minima or full tax exemptions allowed by the Directive - in particular where such an approach is truly justified, in particular by more specific environmental reasons.

This position, whereby minimum levels of taxation have as a rule to be respected, corresponds to the objectives of the Energy Tax Directive, namely to improve the functioning of the internal market and to promote sustainable development[10]. Each of the general provisions of the Directive has to be seen against this background. Thus, for example, the fact that certain economic or social policy purposes may justify tax differentiations according to national views (cf. Article 5, third and fourth indents), does not mean that internal market and environmental concerns (reflected in the minima) become irrelevant.

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8 Many of the derogations previously granted were incorporated directly into the Energy Tax Directive thus allowing Member States to apply them under fiscal control, without needing any prior approval from the Council on fiscal grounds; but without prejudice to Community State aid rules.

9 Which means either Community minimum levels of taxation, or, in certain cases, (e.g. Article 5 of the Directive) minimum levels of taxation prescribed by the Directive, which covers also situations where transitional periods were granted to Member States in order to gradually reach the Community minima.

10 The Directive (sixth recital) explicitly refers to Article 6 of the Treaty. According to this provision, environmental protection requirements must be integrated into the definition and implementation of Community policies, in particular with a view to promoting sustainable development.

In the following, the Commission gives an overview of the wide ranging options for tax differentiation that are allowed by the Directive and that are relevant for the purpose of this review.

2.1.1. Differentiation in rates according to Article 5

Under Article 5 Member States may apply differentiated rates of taxation, provided that such differentiation is compatible with Community law (in particular environmental policy) and provided that they respect the minimum levels of taxation prescribed by the Directive. Among others, this refers to the following cases[11]:

Differentiation in rates on the basis of product quality (Article 5, first indent)

This provision is intended to reflect different environmental characteristics for various categories of the same product but must in any case be limited to differentiation above the applicable minimum levels of taxation.

Differentiation in rates for certain types of use (Article 5, third indent)

Under this provision *local* public passenger transport vehicles including taxis, ambulances and vehicles used by armed forces, public administration, disabled people and for waste collection can benefit from lower levels of taxation (above the minima) granted by Member States traditionally for specific policy purposes (including social policy)[12].

2.1.2. The specific case of public transport

As regards public transport in general, the Energy Tax Directive contains provisions that can be used to promote the potential environmental and social benefits of public transport, taking into account the environmental impact of the different means of transport. Under Article 5, Member States can apply differentiated rates of taxation (down to the minima) to motor fuels consumed by *local* public passenger transport vehicles including taxis. Member States may also fully exempt from taxation energy products and electricity used for the carriage of goods and passengers by those means of transport listed in Article 15(1)(e) of the Directive (rail, metro, tram and trolley bus). Furthermore, Article 7(2) contains an optional provision whereby Member States may, under certain conditions, decouple tax rates applied to diesel (gas oil) used for commercial and non-commercial purposes that could lead to an improvement in the competitive position of buses[13] over private cars.

2.1.3. Tax differentiation applicable to certain energy products (in particular Articles 15 and 16)

The Energy Tax Directive also contains various optional provisions allowing Member State to apply favourable tax treatment to certain products where justified, for example for

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11 Other cases are dealt with in sub 2.1.4 below.

12 This applies quite apart from the fact that excise duty paid by public bodies does not have any overall impact on the State budget.

13 Defined by the Directive as vehicles for the carriage of passenger, whether by regular or occasional service, of category M2 or M3 as specified in Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ L 42 of 23.2.1970, p.1; Directive last amended by Directive 2005/64/EC (OJ L 310 of 25 November 2005, p. 10)).

environmental reasons (in particular under Articles 15 and 16). Often such provisions are conditional and apply only to specific uses of the product.

The corresponding provisions of the Mineral Oils Directive were again rather limited in scope and, in consequence, several derogations were granted to Member States over the years[14].

Natural gas was taxable under the Mineral Oils Directive only if used as motor fuel. In such cases it was subject to taxation at the rate of the equivalent motor fuel, i.e. LPG. Several Member States benefited however, with respect to natural gas and/or LPG, from derogations under the Mineral Oils Directive. As a corresponding general provision, the Energy Directive contains Article 15(1)(i), whereby, under fiscal control, "natural gas and LPG used as propellants" may benefit from exemptions or reduction in the level of taxation. Methane, which was mentioned in several derogations, generally used in the context of propellants, is not mentioned in Article 15(1)(i) of the Energy Tax Directive, but may fall under its Article 16, under the conditions set out therein. If it is considered that the Directive does not sufficiently reflect the environmental benefits of methane, an adaptation, for example of Article 15(1)(i), could be contemplated.

The Energy Tax Directive sets positive Community minimum rates (albeit rather low) for all the taxable uses of natural gas. At the same time it offers in its Article 15 several possibilities for more favourable tax treatment of natural gas if used for heating purposes, taking into account that natural gas was not taxable under the previous legal framework. The same possibilities apply to other newly taxable products, such as electricity, coal and solid fuels. These provisions are designed for cases when Member States would encounter difficulties in adapting to the new situation.

Finally, as regards biofuels or other fuel blends with environmental benefit, biomass and renewables in general, Articles 15 and 16 of the Directive contain a comprehensive framework for granting favourable fiscal treatment to such products should their use become taxable under the Directive.

2.1.4. Tax differentiation for commercial/industrial and business uses

Numerous derogations from the Mineral Oils Directive concerned tax reductions or exemptions for the consumption of taxable products by industry or business in general. These issues are addressed in detail in the Energy Tax Directive, which contains numerous provisions allowing Member States to apply more favourable treatment to business if needed, for example, for competitiveness reasons.

For example, for *use as heating fuel*, Article 5 allows Member States to apply differentiated levels of taxation to business and non-business uses of energy products and electricity with lower minimum levels of taxation applicable for business use. With respect to *use as motor fuel*, Article 7(2) allows for tax differentiation for commercial gas oil used as propellant. Article 8 sets significantly lower minimum levels of taxation for motor fuels used for certain agricultural, commercial and industrial purposes. Moreover, Article 17 permits Member States to grant total or partial tax exemptions or reductions from excise duty applied on energy products and electricity used for certain purposes and under certain conditions. Also,

[14] Allowing them for example to apply preferential tax treatment to LPG, methane and natural gas, or to biofuels.

certain *very specific uses* of energy products by industry have particular provisions set out in Article 21 of the Directive (in particular in its third paragraph).

Finally, it should be recalled that non-fuels uses of energy products and electricity such as industrial processing were explicitly left outside the scope of the Directive, under Article 2(4).

2.2. Derogations corresponding to objectives not taken into account by the general provisions of the Directive

A certain number of derogations set out in Annexes II and III correspond to objectives which are not taken into account by the general provisions of the Directive as they reflect specific policy considerations of particular Member States. The Commission has always accepted that, inevitably, certain needs of Member States may not always be fully reflected in the harmonised Community legal framework and that, consequently, there might be a need for derogations that would allow the Member State concerned gradually to adapt to Community law.

For this purpose, the Energy Tax Directive contains Article 19, an article that largely corresponds to Article 8(4) of the Mineral Oils Directive, but with stricter conditions. Member States may be authorised by the Council to introduce further exemptions or reduction in the level of taxation for specific policy considerations. Such schemes must first be examined, however, to ensure compatibility with Community policies, taking into account, *inter alia*, the proper functioning of the internal market, fair competition and Community health, environment, energy and transport policies.

Against this background, the following review has been carried out of the derogations concerned.

2.2.1. Fuel used in private pleasure air navigation

Article 14(1)(b) of the Energy Tax Directive states that Member States shall exempt from taxation energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying[15]. This provision had originally come into force in 1993 under Article 8(1)(b) of the Mineral Oils Directive. Private pleasure-flying was thus not subject to the obligatory exemption set out for commercial aviation, nor indeed did it benefit from any optional tax advantages under the Directives. In total ten Member States were authorised to derogate from these rules for specific policy considerations.

Community policy considerations

With the aim of making Community transport, environment and fiscal policy more coherent, the Commission already proposed to abolish these derogations for the first time in 1996[16]. Subsequently, a gradual phasing-out of nine of these derogations was initiated by the Commission in 2000 when it stated that these derogations should end with the forecasted entry into force of the Energy Tax Directive or, in any case, at the latest on

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15 Private pleasure-flying is defined 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".

16 COM (1996) 549 of 14 November 1996.

31 December 2002[17]. The Commission sees no reason to change its opinion in the matter. Such derogations create distortions within the internal market, do not accurately reflect negative external costs of transport and even contradict the Council's choices made when adopting the directive.

Arguments by Member States

Some Member States argue that expiry of this derogation would generate the following negative consequences:

- High compliance costs for the sector (new infrastructure necessary to ensure that taxable and exempt fuel is sold separately);
- High administrative compliance costs;
- Risk of tank tourism;
- Negative effect on the sector of private pleasure flying;

The Commission considers that in general such arguments are not justified. Fuel used by private pleasure craft has been taxable in principle since 1993. Member States have had enough time by now to adapt to the requirements of Community law. From a practical point of view, the introduction of taxation should not pose particular problems because in any event small light aircraft use different type of fuel from jets or commercial aircrafts.

The Commission recognises that there might be additional administrative burdens or compliance costs associated with the shift to the new tax treatment. However, if such arguments were to be accepted, it would mean that the derogations would have to be maintained forever thus contradicting the general policy principle that derogations must be time-limited and must aim at overcoming initial difficulties encountered with implementation of new legislation.

The argument about so called tank tourism, i.e. concerning conduct adopted by citizens who cross borders to avail of lower fuel prices in other Member States, is not valid either, in the Commission’s view. If tank tourism effectively constitutes a problem in this field, the derogations currently in place, limited to 10 out of 25 Member States, tend to aggravate it rather than to contain it.

It appears thus that the activity in point should no longer be treated more favourably than comparable other (transport or leisure) activities, by reflecting its negative externalities less fully in taxation.

[17] COM (2000) 678 of 15 November 2000.

2.2.2. Fuel used by private pleasure craft

According to Article 14(1)(c) of the Energy Tax Directive (which reproduces Article 8(1)(c) of the Mineral Oils Directive), Member States shall exempt from taxation energy products supplied for use as fuel for the purpose of navigation within Community waters (including fishing), other than private pleasure craft[18]. Traditionally, Member States may extend such exemption to navigation in inland waterways. However, private pleasure craft is explicitly excluded from both provisions.

Annexes II and III contain in total 6 derogations authorising Member States for specific policy considerations to apply reduced rates of taxation or exemptions for fuel used in the navigation in private pleasure craft. The gradual phasing-out of 5 of these derogations was initiated by the Commission in its review of derogations undertaken in 2000.

Community policy considerations

The considerations set out above with regard to private pleasure air navigation apply equally to the analogous case of private pleasure craft. Consequently, the favourable tax treatment of fuel used for the activity in point, compared to fuel used for comparable (transport or leisure) activities, should not be renewed.

Arguments by Member States

Some Member States argue that the expiry of these derogations will generate the following negative consequences:

- High compliance costs for the sector (new infrastructure to ensure that taxable and exempt fuel are sold separately and, in case of certain types of boats, difficulties related to the dual use of fuel for heating purposes (which might be subject to reduced rate of excise duty) and as propellant);
- High administrative compliance costs;
- Risk of fraud (especially in cases where the fuel is used both for heating purposes and as propellant);
- Risk of tank tourism;
- Negative effect on the private pleasure boating industry.

The Commission considers that in general such arguments are, once again, not justified. Most Member States enjoying derogations have had enough time by now to adapt to the new situation given that fuel used by private boats has been taxable in principle since 1993 and that phasing-out of the derogation was initiated by the Commission in 2000. It should also be pointed out that very often the tank facilities for pleasure boats and commercial ships are located separately (e.g. a marina on one side and commercial ports on the other).

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[18] 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".

The Commission can accept once again that there might be additional administrative burdens and compliance costs associated with the shift to the new tax treatment. However, the arguments used above for aircraft in this context are equally valid here.

There might also be a risk of fraud related to dual-use of the same fuel on one boat (which might in particular be the case for inland waterway boats). However, it can be argued that similar risks of fraud exist in other sectors where one type of fuel is used by the same person for different purposes thereby triggering different rate of excise duty (e.g. in farming). In any event, the experience of Member States not benefiting from any derogation in the matter could be helpful in this respect.

As regards the argument about tank tourism, it must be pointed out that only six Member States presently apply the derogation. From the internal market point of view, if any distortions do exist, then they are most likely to be caused by the existence of the derogation itself rather than by its expiry. Finally, although the expiry of the derogation might lead to an increase in prices, this is the necessary consequence of the assimilation of the activity in point with comparable activities (cf. the Community policy considerations set out immediately above, as the analogous points made *sub* 2.2.1 above).

2.2.3. Waste oils

Waste oils mostly consist of used lubricants from vehicles and engines or used hydraulic oils and are, by their nature, hazardous. They must be therefore collected and treated in the least harmful way[19]; the two generic treatment categories being an energy source or a material source. Under the first category, for fiscal purposes waste oils are treated in the same way as other mineral oils and therefore they have been subject to Community excise duty framework since 1993.

However a total of 11 Member States were authorised in the past, for specific policy considerations, to exempt from excise duty waste oils reused as fuel, either directly after recovery or following a recycling process for waste oils, in cases where such reuse would be taxable.

Community policy considerations

One of the main objectives of the Energy Tax Directive is to treat various competing energy products equally, in order to ensure that no distortions on the internal market occur. More favourable fiscal treatment of certain energy products can be applied only if justified for example on environmental grounds. For waste oils such a justification however does not exist, from today's perspective. In its "Thematic Strategy on the Prevention and Recycling of Waste", adopted in December 2005[20] the Commission expressed that the central objective must be to ensure full collection of waste oils and their treatment in controlled installations, while respecting the emission limits set by Community legislation. The Strategy aims at creating a level playing field between various subsequent uses of the raw material collected, taking into account the environmental impact of each use; it favours competition between different treatment technologies, which best meet market needs and supports innovation.

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19 The Community policy on waste oils dates from the 1970s; its objective is to avoid harmful effects of waste oils on the environment.

20 COM(2005) 666 of 21 December 2005.

More favourable fiscal treatment of waste oils would therefore be inconsistent with the Community fiscal and environmental policies, as it would favour waste oils over other directly competing energy products, and at the same time it would favour one generic treatment category of waste oils over another.

Arguments by Member States

It appears from the consultation carried out with Member States concerned that several of them consider that there are good environmental, economic and social reasons in favour of the tax exemption (however, without specifying why in great detail), in particular as follows:

- Tax exemptions applied to waste oils used as fuel either directly or after re-processing favours the collection of such oils;

- The amount of waste oils is not high enough to make the collection and regeneration economically viable. A tax exemption for burning at least ensures that waste oils are not dumped.

The Commission considers that such considerations again do not justify favouring one possible use of the raw material over another through taxation. The data gathered over time do not confirm any correlation between the tax exemption and the collection rate achieved, on the other hand, they rather confirm that the tax exemption favours one of the two generic treatments[21].

It must be pointed out that waste oils must in any case be collected and then treated in controlled installations. Measures directly aimed at ensuring collection (for example direct subsidies, increasing public awareness) would seem to be a better targeted instrument for such purposes. In addition, the increasing price of waste oils seems to indicate that there is sufficient demand for them on the market and that, with high oil prices waste oils are increasingly becoming attractive as a cheap alternative to other energy products. Finally, it should be pointed out that most of the fuel uses of waste oils (such as in cement kilns, limestone works, steel works, or quarry industry) fall outside the scope of the Energy Tax Directive.

2.2.4. Derogations with regional scope

In the past, some Member States were authorised to apply tax reductions or exemptions for specific policy purposes in certain geographic areas or regions, linked either to economic development or to geographical particularities (climate, location) of such zones. Furthermore, certain regional schemes were implemented with the aim of discouraging so called tank tourism.

In the view of the Commission, two main problems arise in connection with this group of derogations:

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[21] For more details see for example the regular reports on the implementation of Community waste legislation (COM (1999) 752 of 10 January 2000, COM (2003) 250 of 11 July 2003). A new report is to be published later this year.

First of all, and according to the case, there might be instruments fully (and perhaps better) suitable to achieve the same objective, i.e. overcoming disadvantages suffered by certain areas, but which do not affect the benefits flowing from the harmonisation of excise duties on energy products and electricity. Such instruments may for example relate to cohesion policy.

Secondly, the interest in an internal market of undistorted competition has to be taken into account. The concept of minimum rates serves this interest; if necessary minimum rates could be adjusted.

All in all, it appears upon careful analysis that the derogations in point should not be renewed.

2.2.5. Miscellaneous derogations

A very limited number of derogations do not fit under any of the provisions of the Directive. These comprise tax reductions applied to petrol distributed from specially equipped petrol stations. In the view of the Commission, the reason for granting such derogations no longer seem to be valid. While the measure might have served to encourage the introduction of such equipment when first introduced, it is logical that the derogation should be phased out.

Similar considerations apply to a further derogation in this group, namely to the tax exemption for coal, coke and lignite, which has been set to expire on 1.1.2007. It must be underlined that the extension of the scope of Community legislation from mineral oils to all other competing products such as natural gas, electricity and solid fuels was the main principle underpinning the adoption of the Energy Tax Directive. At the same time, as mentioned *sub* 2.1.3 and 2.1.4 above, the Directive nevertheless contains several provisions allowing Member States to apply more favourable tax treatment to newly taxable products, both for households and for companies that can be implemented without prior approval from the Council.

3. CONCLUSIONS

Based on the above analysis, the Commission has reached the following conclusions:

Where Member States may pursue the objectives underlying certain derogations in accordance with the general provisions of the Energy Tax Directive (subsection 2.1. above), no prolongation is needed and consequently, no further steps appear to be necessary, subject perhaps to minor adaptations.[22]

For derogations corresponding to objectives not taken into account by the general provisions of the Directive, this Communication forms part of the background against which Member States should assess their position, in view of the expiry of such derogations. Should individual Member States consider that for specific policy considerations they still need a derogation from the Directive, they may submit a request to the Commission in accordance with Article 19 of the Directive. Any such request will be assessed against its own merits, taking into account in particular the proper functioning of the internal market, the need to ensure fair competition as well as Community environment, energy and transport policies (cf. Article 19 of the Energy Tax Directive).

[22] Cf. sub 2.1.3 above.

Furthermore, the Commission would like to remind the Member States that all tax measures that could constitute State aid must be notified to the Commission in advance in order to be assessed under the State aid rules[23]. More generally, fiscal instruments have to comply with all relevant provisions of the Treaty.

Finally, the Commission considers that the expiry of most of the derogations should also be seen as an opportunity to achieve greater transparency and greater coherence in the energy tax legislation, which would ensure that the Directive is a better instrument at the service of Member States and the Community and their overall objectives of sustainable development and the Lisbon Strategy.

[23] See in particular recital 32 of the Directive.