

Manual of European Environmental Policy

The following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.

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Energy taxation

Formal reference	
2003/96/EC (OJ L283/51 31.10.03)	Directive restructuring the Community framework for the taxation of energy products and electricity framework for the taxation of energy products and electricity
Proposed 6.5.1997 – COM(97)30	
Legal base	Article 113 TFEU (originally Article 93 TEC)
Binding dates	
Formal compliance	1 January 2004
Dates on which first set of minimum rates apply	1 January 2004
Dates on which second set of minimum rates apply	1 January 2010
Review of minimum rates	Annually
Dates on which Member States must inform Commission of level of taxation	Annually on the 1 January

Purpose of the Directive

The Directive establishes an EU framework for the taxation of energy products including electricity while contributing to the objectives of employment, environment, energy and transport policies across the EU.

Summary of the Directive

The Directive sets out a framework of rules that Member States must adhere to in relation to setting duties for minimum rates for the various energy products covered by the Directive. Member States must report to the Commission the levels of duties they have set. However, Member States have the option of requesting further exemptions or reductions to those set out in the Directive. They must inform the Commission, providing relevant information to allow the Commission to examine the request, and decide whether to authorize it. The following products are exempt from the scope of the Directive:

- 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 metallurgic processes.
- Electricity, when it accounts for more than 50 per cent of the cost of a product.
- Mineralogical processes.

Minimum levels of duty for motor fuels are set out in Annex 1 Table B of the Directive and include leaded and unleaded petrol, gas oil and kerosene, liquid petroleum gas and natural gas. The minimum rate for diesel is set at €302/1000 l, which rises to €330 by 2010. However, Italy and France are allowed to continue with lower rates of duty for their road hauliers. Other Member States – Spain, Austria, Belgium, Portugal, Luxemburg and Greece – are allowed to delay reaching the first minimum rate (that for 2004) by up to six years. Special provisions are made for transport fuel used in certain industries, including inter alia agriculture, forestry, plant and machinery used in construction, civil engineering and public works and vehicles used off the public roadway. These are allowed to apply lower minimum duty rates, which can be found in Annex 1, Table B.

The Directive also sets minimum levels of duty applicable to heating fuels and electricity which include; gas oil, heavy fuel oil, kerosene, LPG, natural gas, coal and coke and electricity. These are set out in Annex 1 Table C. Provided that Member States respect the minimum levels, differentiated rates of duty may be applied in a number of cases. These can be prescribed either directly, by means of a differentiated rate or by refunding all or part of the amount of taxation.

In addition to those listed above, there are further derogations, including energy products used to produce electricity, fuel used for the purpose of air navigation, other than in private pleasure flying, and navigation within Community waters (including fishing), other than private pleasure craft and electricity produced on board a craft. The Directive also lists a number of products whereby Member States can apply partial exemptions or reductions in the level of taxation to. These include, inter alia, products used for public transport, renewable sources of energy and fuel used for navigational purposes in inland waterways.

Development of the Directive

The Commission published the original proposal for a Directive to harmonize fuel tax rates (COM(97)30), at the request of the ECOFIN Council in 1997, in an attempt to circumvent the problems that had been faced by an earlier [carbon/energy tax proposal](#). Consequently, the proposal was much less ambitious than the carbon tax proposal and aimed merely to harmonize and gradually increase the minimum rates of duty applicable to a range of energy products. Prior to this Directive only the duty applied to motor fuels was subject to any form of harmonization and minimum taxation rates, as set out in the 1992 Mineral Oils Directives [92/81/EEC](#) and [92/82/EEC](#). In relation to motor fuels, the proposal effectively fulfilled the requirement to review the minimum rates of duty applied to motor fuel as set out in the Mineral Oils Directives. Beyond this, however, it proposed to introduce for the first time minimum duty rates for a range of other fuels, notably coal, natural gas and electricity for both industrial and domestic uses. Implementation would take place in three stages, over six years beginning in 1998.

In spite of the fact that this approach was more incremental than that proposed for the carbon/energy tax, it fared little better in the legislative process in its early stages than had its predecessor. Early discussions on the proposal, which required a unanimous agreement in the Council of Ministers, revealed a range of concerns. For example, the United Kingdom did not want the minimum rates applied to domestic energy; while Spain and countries with low duties on motor fuels feared inflationary pressures if the minimum fuel duty rates were increased in line with those in the proposal. By early 1999, France and the United Kingdom had softened their opposition, as a result of having received appropriate concessions.

However, further progress was stalled by Spain, and other Member States opposed further compromise, as they felt that the proposal had already been weakened too much. The fuel protest of autumn 2000 helped firm up opposition to the proposal in many countries, which seemingly put an agreement further beyond reach. France and Italy, in particular, insisted on being able to continue with tax breaks for their respective road haulage industries that they had introduced in the aftermath of the protests.

In early 2001, the incoming Swedish Council Presidency canvassed Member States views on the proposal with the intention of moving the dossier forward with a view to presenting a report to the ECOFIN Council in June 2001. Environment Commissioner Margot Wallström intervened in the stalemate and called for a majority of Member States to take forward the energy tax harmonization proposals as a group in the absence of a unanimous agreement at the EU level. In the conclusions to the Barcelona European Council of March 2002, EU leaders attempted to revive the process by calling on EU finance ministers to reach an agreement on the proposal by the end of that year.

Agreement was finally reached during an extraordinary meeting of ECOFIN on 20 March 2003. The Council's position was then passed to Parliament for its opinion. Under the consultation procedure, Parliament did not have the power to amend the Council's text but it did propose a number of amendments. These mainly consisted of increasing the minimum rates for motor fuels to be applicable from 2004 and 2010 and bringing forward the latter date by two years. However, not surprisingly given the fact that the Directive had taken six years to agree, these were ignored by the Council.

Consultation with the Acceding Countries was also necessary, as the Directive was agreed after their accession negotiations had been concluded, but before the countries were able to have a say in the development of the legislation. The Directive's provisions were likely to place a larger burden on both industry and consumers in these countries. Accordingly, the Commission announced alternative arrangements for Acceding Countries in [\(COM\(2004\)42\)](#), which sets out the exact time frame and scope of temporary exemption or reductions in the level of taxation and energy products in each of the ten countries assessed separately based on their unique needs. Nonetheless, it states that the transitional measures should last no longer than 2012 and is to be proportionate to the problem they seek to address.

Implementation of the Directive

Information on the measures taken by the Member States to transpose Directive 2003/96/EC can be found in their national [execution measures](#).

In 2006 the Commission released a Communication reviewing more than 100 derogations to the Energy Taxation Directive, included in Annex II and III ([COM\(2006\)342](#)). The derogations that cannot be applied after 2006 unless a new derogation is granted by the Council were considered no longer needed by the Commission, which suggested that they should not be renewed as they were incompatible with Community policies. It is up to Member States though to consider under their own responsibility if, despite the arguments presented by the Commission, they wish to apply for a renewal of any of these derogations. Such requests will be assessed taking into account the proper functioning of the internal market, the need to ensure fair competition and EU environment, energy and transport policies.

Enforcement and court cases

Four preliminary rulings have been issued by the European Court of Justice requiring clarification or interpretation of Directive 2003/96/EC:

- [C-250/10](#) 21.12.2011. This was a preliminary ruling sought by a German court concerning the interpretation of the Directive in relation to products used as fuel for aviation. The judges decided that Article 14(1)(b) must be interpreted as meaning that the tax exemption on energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying provided for under that provision cannot apply in the case of a company where it leases or charters out an aircraft belonging to it with the fuel to undertakings whose air navigation operations are not directly used for the supply, by those undertakings, of air services for consideration.
- [C-517/07](#) 18.12.2008. This was a preliminary ruling concerning the interpretation of the second subparagraph of Article 2(3) and the first indent of Article 2(4)(b) of Council Directive 2003/96/EC. The request came from the Chancery Division of the High Court of Justice of England and Wales which had to decide whether a motor fuel with additives was subject to the taxation of Directive 2003/96/EC. The Court stated that Directive 2003/96/EC is intended to introduce a harmonized taxation regime for mineral oils and energy products. It is then clear that it intended to include motor fuels additives, whatever their nature, simply because they are added to those fuels, in order to make them subject to the same taxation regime as motor fuels. Consequently, the second subparagraph of Article 2(3) of Directive 2003/96 is intended to cover any product used as an additive, whether or not it is a 'mineral oil' or 'energy product' within the meaning of the Directive.
- [C-226/07](#) 17.07.2008. This was a preliminary ruling arising from Germany. It concerns the interpretation of Article 14(1)(a) of Directive 2003/96/EC and whether this Article has direct effect in the sense that it may be relied upon by an individual before national courts. This question arose in a dispute between an individual and the customs authorities of Germany, who argued that the national legislation was incompatible with that provision and, consequently, they sought a refund of the tax which infringed that provision. The Court decided that the obligation to exempt from taxation energy products intended to produce electricity is expressed in terms sufficiently precise and unconditional to confer on individuals the right to rely on it in proceedings before national courts with a view to contesting national rules that are incompatible with it.
- Joined Cases [C-145/06 and C-146/06](#) 05.07.2007. This was a preliminary ruling introduced by the Italian Court concerning the scope of Directive 2003/96/EC and whether it must be interpreted as not precluding national legislation 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. The Court decided that 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/EC, they are explicitly excluded from the scope of the Directive by the first indent of Article 2(4)(b) and, therefore, are not covered by the harmonized excise duty arrangements.

Three cases concerning delays in implementation by Member States have been concluded by the European Court of Justice:

- [C-475/07](#) 12.02.2009. This was a judgement against Poland. The Court found that it failed to adapt its system of electricity tax to the requirements of the first subparagraph of Article 21(5) of Directive 2003/96/EC within the prescribed time limit.
- [C-388/06](#) 29.03.2007. This was a judgement against France. The Court found that it failed to adopt the necessary measures to implement the Directive within the prescribed time limit.
- [C-360/05](#) 05.10.2006. This was a judgement against Italy for failure to adopt the necessary transposing legislation within the prescribed period.

Further developments

Further developments were explored in a March 2007 green paper on Market Based Instruments ([COM\(2007\)140](#)), which had a major focus on energy taxation. A key proposal was the introduction of an ‘explicit’ environmental element in Directive 2003/96/EC, that is a split between the energy and the environmental component of the tax rates. The document also explored the possibility of shifting taxes from labour to environmentally-damaging products and services. Reactions to the paper were meant to provide input to a revision of Directive 2003/96/EC. A revision was initially expected in 2007, but has been postponed ever since. A proposal was meant to be issued in early April 2009 as part of a ‘green tax package’ of measures on environmental taxation – including draft legislation on reduced VAT rates for ‘green’ products¹ and a Commission Communication on the role of taxes in energy and environmental policy². The package however has not been released yet, as the draft proposal has been put on hold following internal consultations within the Commission. A stakeholder meeting on the revision of the Directive was held on 28 September 2009 at which the European Commission invited all participants to send comments by the end of October.

In April 2011 a proposal for a revision to the Energy Taxation Directive was finally published by the Commission ([COM\(2011\)169](#)). The Commission's rationale for the revision is threefold. The current minimum rates for energy products are mainly based on volume (EUR/1000l) and are set according to historical rates in the Member States. The Commission believes that this creates unfair competition between fuel sources and unjustifiable tax benefits for certain types of fuel compared to others. With a tax based on volume, rather than energy content, products with lower energy content such as renewables carry a heavier tax burden compared to the fuels they are competing with. Secondly, from a climate change point of view, the current Energy Taxation Directive does not address the need to reduce CO₂ emissions. An EU framework would, argues the Commission, allow Member States to apply a CO₂ tax to meet their effort sharing targets, without fear of jeopardising their competitiveness within the EU. Finally, a revised Energy Taxation Directive with a CO₂ element would prevent a patchwork of national policies from creating obstacles and distortions in the Internal Market.³

Taxes on energy would be split into two components: one based on CO₂ content and the other based on energy content. A single minimum rate for CO₂ emissions (20 €/t CO₂) would be introduced for all sectors not covered by the EU ETS. This would provide a carbon price for these sectors of the economy, namely households, transport, smaller businesses and agriculture that are outside the EU ETS. Renewable energy sources would not be subject to this CO₂ element. Minimum tax rates for energy would be based on the energy content of a fuel (€/GJ) rather than the volume. This means that a fuel would be taxed on the basis of the

amount of energy that it generates, and greater energy efficiency will automatically be rewarded. One GJ would be taxed in the same way, regardless of the product producing it. Both CO₂ and energy content elements would be combined to produce the overall rate at which a product is taxed. Member States would be free to set their own rates above the EU minima, and design their own structure for these taxes: for instance, they could decide to only increase the energy-content tax element above the minima and not the CO₂ element or the other way round). However, the same rates and structure must then be applied to all fuels used for the same purpose (motor fuels or other fuels). Long transitional periods for the full alignment of taxation of the energy content, until 2023, would leave time for industry to adapt to the new taxation structure. The energy element of the tax would apply to all fuel used for transport and heating. Non-fuel related uses of energy products would remain outside the scope of energy taxation as is currently the case (e.g. in metallurgical processes). The CO₂ element of the tax will complement the emission trading system by applying to sectors that remain outside (transport, households, agriculture and small industries). In this way, all emissions from industrial installations will be subject to one CO₂ price signal.

The Energy Council is expected to discuss the proposal at a meeting 30 November 2011. A European Parliament Report is scheduled for adoption in committee 24 January 2012, and to be discussed in a European Parliament Plenary sitting around the middle of March 2012.

Related legislation

The following legislation has a relationship with Directive 2003/96/EC with regard to the issue of carbon emissions resulting from different forms of energy or fuel use:

- Regulation (EC) No [443/2009](#) on CO₂ from passenger cars.
- Directive [2005/32/EC](#) on energy using products.
- Directive [2003/30/EC](#) on the promotion of the use of biofuels or other renewable fuels for transport.
- The Integrated Pollution Prevention and Control Directive [2008/1/EC](#).

References

1 ENDS Europe (2009) EU to table revised energy taxation Directive. 4 March 2009.

2 European Commission, Directorate-general taxation and Customs Union. Letter to EEB on 'Draft 'Green VAT' proposal', 4 March 2009, <http://www.endseurope.com/docs/90304a.pdf>

3 European Commission (2011) Press Release: Revision of the Energy Taxation Directive - Questions and Answers. [MEMO/11/238](#), Brussels, 13.4.2011.