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"I/A" ITEM NOTE

from:	General Secretariat
to:	Coreper/Council
Subject:	Energy Taxation Directive - State of play

1. A Note reflecting the state of play and setting out proposals for the future work regarding the Energy Taxation Directive has been prepared by the Presidency. It was agreed in the Working Party on Tax Questions following discussions on 22 November 2012.

2. The Permanent Representatives Committee is therefore invited to:

- forward the draft Note to the Council (ECOFIN) on 4 December 2012;
- suggest endorsement of the Note as set out in the Annex by the Council.

Presidency Note

This note explains the background and the state of play of the discussions on the Commission proposal for a COUNCIL DIRECTIVE amending the Energy Taxation Directive to the Council (ECOFIN) of 4 December 2012.

A. Background and state of play of the discussions

In April 2011 the Commission presented to the Council a proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity ("the Energy Taxation Directive" or "the ETD"). The proposal seeks to bring the ETD more closely into line with the EU's energy and climate change objectives as requested by the March 2008 European Council. In June and October 2012, the European Council asked that work and discussions on the Commission proposal on energy taxation should be carried forward.

1. The proposal has been discussed in the Council's Working Party on Tax Questions on several occasions under successively the Hungarian, Polish, Danish and Cyprus Presidencies. The Cyprus Presidency has chaired five meetings. It has started technical discussions on a compromise text respecting the outcome of the ECOFIN Council's orientation debate of 22 June 2012 reflected in the Presidency note discussed in the Council's Working Party on Tax Questions on 9 July 2012 (doc. 11931/12 FISC 94), while keeping in mind the request from the March 2008 European Council.

2. The Cyprus Presidency, taking into account the discussions in the Council's Working Party on Tax Questions in July 2012 and in order to facilitate further discussions, has presented four compromise proposals, three on the whole text, the latest one dated 12 November 2012 (doc. 16060/12 FISC 161 ENER 457 ENV 845). The Presidency's compromise proposals have, inter alia, been based on the following principles as a starting point for further discussions:

- the levels of taxation which Member States shall apply to energy products and electricity may not be less than the minimum levels of taxation laid down in the Directive;

- the single minimum levels of taxation were established on the basis of two reference components, an energy related component and a CO_2-related component;

- Member States may express their national levels of taxation as one single tax or as separate taxes as well as in units other than those used to express the minimum levels of taxation, provided that the minimum levels laid down in the Directive are respected.

Even though most Member States support in principle this structure of the taxation, additional discussions on the minimum levels and a number of technical issues are necessary to achieve further progress on the compromise text.

3. In its latest compromise text (doc. 16060/12 FISC 161 ENER 457 ENV 845), the Presidency proposed new lower minimum levels, based on the Commission proposal but adjusting the CO_2 related component. The Presidency chose the rate of 12 €/tCO_2 as the rate of the CO_2-related component to calculate the minimum level of taxation, which is a value between the Commission's proposal (20 €/tCO_2) and the current price of the emission allowances in the EU ETS. In addition, it is the lowest rate that could be used in order to respect the current minimum level of taxation for LPG used for the purposes of Article 8(2) without having to adjust the rate of the energy related component, which is provided in the Commission's Proposal (9270/11 FISC 39).

Additional and more detailed work on minimum rates will be necessary to overcome objections to the proposed minimum rates.

4. The Presidency proposed lower overall minimum levels of taxation for biofuels and bioliquids (putting the CO_2-component at 0 €/tCO_2 and the energy related component at a substantially lower level than that of the corresponding fossil fuel), where the product concerned complies with the sustainability criteria laid down in Article 17 of 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.

As regards biofuels and bioliquids that do not comply with the sustainability criteria mentioned above, the Presidency proposed EU minimum rates expressed in €/GJ equal to the minimum level of taxation of the equivalent fossil fuel, thus allowing Member States to take into account the generally lower energy content per litre of biofuels and bioliquids.

Even though there is support from some Member States to this approach, other Member States disagree and they would like sustainable and unsustainable biofuels and bioliquids to be taxed at the rate for the equivalent fossil fuel, only allowing exemptions and reductions in accordance with Article 16.

5. In order to avoid overlaps between the EU ETS and the Energy Taxation Directive, the Presidency proposes that Member States should have the possibility to apply lower rates of taxation to installations falling within the EU ETS. To do so the Presidency has identified two options that received support of a number of Member States:

- The rate of the CO_2-related component, as specified in Annex II on Presidency's compromise proposal, may be set at 0 for energy products used within installations covered by the EU ETS, ensuring that Member States will only have to respect a minimum tax level for this sector corresponding to the value of the energy related component, thus allowing Member States to apply differentiated national rates.

- The taxation of installations falling within the EU Emission Trading Scheme (ETS) shall fall under Article 17 of the Energy Taxation Directive allowing Member States to apply tax reductions, under certain conditions, for energy products and electricity used by the industry. Member States would have the option to apply tax reductions provided the installations concerned are covered by the EU ETS, allowing them to compensate the companies concerned for the amount paid for the emission allowances. However, Member States will have to respect the EU minimum levels of taxation for this sector, which will be specified in the directive.

6. The Cyprus Presidency on the 5 November 2012 organized a meeting of the WPTQ with the participation of DG Competition of the Commission, concerning the State aid implications, which could arise in the context of the presented compromise proposal. The Presidency noted that future meetings with the participation of DG Competition will be necessary.

7. Article 18 has not yet been discussed.

B. Future Work

Against this background the Presidency proposes that the Council:

(1) takes note of the Presidency's approach as presented in the compromise proposal on 12 November 2012 (doc. 16060/12 FISC 161 ENER 457 ENV 845) and of the progress achieved so far;

(2) notes that, in order to achieve further progress towards a final compromise, further work is needed, in particular in the following areas:

a) Levels of the minimum rates of taxation of the energy products and electricity[1];
b) Taxation of installations falling within the EU Emission Trading Scheme (ETS);
c) Tax treatment of biofuels and bioliquids;
d) Tax treatment of commercial gasoil;
e) Tax treatment of energy products and electricity used for agriculture;
f) Transitional periods;
g) Tax reliefs below the minimum levels;

[1] Some Member States want in particular discussion on LPG, natural gas and on certain other energy products.

(3) notes the link with other relevant areas of EU legislation;

(4) invites the incoming Irish Presidency to continue work, having as a starting point the compromise legislative text of 12 November 2012 (docs 16060/12 + COR 1)[1].

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[1] Two Member States maintain their objection to the approach on the principle of the structure of taxation.