Commission Decision (EU) 2019/1732 of 6 June 2019 on SA.33159 (2015/C) — Taxation of saturated fat in certain food products sold in Denmark (notified under document C(2019) 3926) (Only the Danish text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2019/1732

of 6 June 2019

on SA.33159 (2015/C) — Taxation of saturated fat in certain food products sold in Denmark

(notified under document C(2019) 3926)

(Only the Danish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU),

Having regard to Council Regulation (EU) 2015/1589[(1)], and in particular to Article 15(1) thereof,

Having called on interested parties to submit their comments pursuant to Article 6 of Regulation (EC) No 659/1999 (corresponding to Article 6 of Council Regulation (EU) 2015/1589)[(2)],

Whereas:

1. PROCEDURE

(1) On 9 June 2011 the Commission received a complaint from Margarineforeningen (MIFU) regarding the Danish Act on taxation of saturated fat in certain food products, Law No 247 of 30 March 2011[(3)] ('the Act'). The law entered into force on 1 October 2011 and was later abolished as of 1 January 2013. The complaint concerned possible aid to producers of non-taxed products.

(2) In order to seek clarification, an information request was sent to Denmark on 4 July 2011. The Commission forwarded the original complaint to the Danish authorities and asked them to submit their own summary of the facts in order to address the claims made by the complainant within 20 working days or to notify the measure as State aid to the Commission for approval. Denmark asked for an extension of the deadline on 18 July 2011 which was granted until 31 August 2011. On 7 September 2011 Denmark submitted its response to the Commission's letter in which it presented its views on the issues raised by the complainant.

(3) On 13 October 2011 the Commission forwarded Denmark's comments to the complainant. On 27 June, 28 July, 12 September and 15 November 2011 the complainant submitted additional information in support of the complaint.

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1732. (See end of Document for details)*

(4) On 14 December 2011 the Commission informed Denmark that, as the Act had entered into force on 1 October 2011 without having been notified pursuant to Article 108(3) TFEU, the measure in question had been registered as non-notified aid under the number SA.33159 (2011/NN).

(5) On 13 March 2012 the complainant submitted further information in support of the complaint.

(6) On 16 March 2012 a meeting was held between the Commission and Denmark. On 12 April 2012 the Commission forwarded the full complaint to the Danish authorities and asked them to address and clarify the issues put forward by the complainant. In case the Danish authorities would be of the opinion that the measure does not give rise to State aid concerns, they were asked to provide their own summary of the facts, as well as a substantiated reasoning of their view. On 13 September 2012, after a request to extend the deadline for answering, Denmark replied to the Commission's letter of 12 April 2012.

(7) On 30 October 2012 the Commission forwarded the Danish authorities' comments to the complainant. On 30 November 2012 the complainant submitted additional information in support of the complaint.

(8) On 16 May 2013, after the Act ceased to be in force on 1 January 2013, a meeting was held between the Commission and the complainant.

(9) By letter of 4 February 2015 (C(2015) 535 final) the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 108(2) TFEU with regard to the Act ('the opening decision').

(10) In the opening decision the Commission stated that the measures imposed by the Act appeared to have all the characteristics of State aid and requested Denmark to submit its comments and to provide all information which could be helpful for the assessment of the aid.

(11) By letter dated 26 May 2015, Denmark submitted comments concerning the opening decision.

(12) The opening decision was published in the *Official Journal of the European Union*[4]. The Commission invited interested parties to submit their comments within one month. The Commission received comments from three interested parties on the measures mentioned in the opening decision. The comments received were transmitted to Denmark by letters of 22 October and 9 November 2015. Denmark responded to those comments on 21 December 2015 and 29 January 2016. By letter of 10 August 2017 the Commission requested further information from Denmark. By letter dated 15 December 2017 Denmark submitted the further information.

2. DESCRIPTION

(13) The Danish Act on taxation of saturated fat in certain food products had as simultaneous objectives to promote better diets and to improve the health of the Danish

***Changes to legislation:** There are currently no known outstanding effects for the Commission Decision (EU) 2019/1732. (See end of Document for details)*

population[5]. These were to be achieved by taxing the primary sources of intake of saturated fat in Denmark (see recital 37), while at the same time taking into account official dietary guidelines[6] (see recital 47) and other considerations (see e.g. recital 34), which led to exempting certain products from the scope of the tax.

(14) The Act was in force between 1 October 2011 and 1 January 2013, which is therefore the relevant time frame for this decision.

(15) The Act levied a tax on the weight of saturated fat in the food products listed in Article 1 of the Act, and identified by the Union combined nomenclature code, if the saturated fat content in the food product exceeded 2,3 percent of the weight of the product. The food products listed were:

(i) meat, according to the table in Annex I to the Act;

(ii) dairy products under codes 0401-0406;

(iii) animal fat under codes 1501-1504 and 1516 which was melted off or extracted in another way;

(iv) edible oils and fats under codes 1507-1516;

(v) margarine and other food products under code 1517;

(vi) spreadable blended products under code 2106;

(vii) other food products which, based on an overall evaluation of the characteristics and use of the food products and the way in which they are marketed, could be considered substitutes for or imitations of the products specified in points (i)-(vi) above.

(16) According to Article 2 of the Act, the tax was fixed at DKK 16 per kg of saturated fat in the respective food product.

(17) Article 3 of the Act defined operators liable to pay the tax as those who for commercial purposes

(a) produced a taxable food product in Denmark;

(b) received a taxable food product in Denmark from another EU country;

(c) imported a taxable food product to Denmark from a country outside the EU or from territories within the EU which were outside the fiscal territory of the EU; or

(d) sold a taxable food product from another EU country in such a way that the food product was directly or indirectly sent or transported by or on behalf of the seller to a non-commercial purchaser in Denmark (distance selling), if the entity was registered under section 47(2) of the VAT Act[7].

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1732. (See end of Document for details)*

(18) Exempted from paying the tax (and from registration under the Act) were those businesses with annual sales of taxable food products totalling DKK 50 000 (exclusive of tax) or less (Article 4(6) of the Act).

(19) The amount of saturated fat in the food products listed in Article 1 (2-7) of the Act was determined based on:

(a) the nutritional label, if the food product had one and it listed the saturated fat content of the food product;

(b) publicly available food information which set average standards for a number of food products. Publicly available food information means the standards which are found in the Food Composition Databank[8];

(c) a technical analysis of the food product.

(20) If the base amount on which the tax was to be paid could not be set using one of the above methods, the tax was to be paid based on the food product's total fat content or ultimately on the food product's net weight.

2.1. *SPECIAL PROVISIONS ON TAXATION OF IMPORTED FOOD NOT LISTED IN ARTICLE 1 OF THE ACT BUT WHICH CONTAIN FOOD PRODUCT(S) LISTED IN ARTICLE 1 OF THE ACT*

(21) According to Article 8 of the Act, a coverage tax was to be paid on the constituents used in the production of food, where these constituents originated from any taxable food product specified in Article 1 of the Act and where such food was received, imported or sold by distance selling in Denmark. The coverage tax was only imposed on food received, imported or sold by distance selling in Denmark, as a taxable food product produced in Denmark was always taxed in its 'pure' form at the first point of sale/use and therefore there was no need for a coverage tax on food produced in Denmark.

(22) According to Article 12 of the Act, the tax basis was the weight of saturated fat in the constituents which originate from the taxable food product specified in Article 1 and which were used in the production of food received, imported or sold by distance selling.

(23) According to the second paragraph of Article 1 of the Act, taxable businesses had to be able to document the weight of saturated fat in the constituents used in the production of food and were, on request, to present a declaration thereof from the producer. For constituents subject to a coverage tax as specified in Article 1(1), i.e. meat, the tax basis was to be determined on the basis of the average rates provided for in Annex I.

(24) For other constituents on which coverage tax was to be paid, the producer could, when issuing the producer declaration, make use of publicly available food product information, which provided average standards for the amount of saturated fat

in specific food products, to determine the tax basis for the constituents subject to the coverage tax which were used in the production of the food.

(25) Where the taxable business was unable to present the specified producer declaration, constituents other than those specified in Article 1(1) of the Act would be subject to a coverage tax based on the total content of both saturated and unsaturated fat in the food product or, where such information could not be provided, on the basis of the net weight of the food product.

(26) In case the Danish Tax and Customs Administration found that the coverage tax calculated in accordance with Article 12(2) of the Act would constitute a higher amount than the coverage tax calculated on the basis of the total fat content or the net weight, the Danish Tax and Customs Administration could determine the tax basis on the basis of an estimate.

2.2. *ALLEGED AID MEASURES*

(27) As described in section 2.1.8 of the opening decision, the Act contained 6 possible aid measures. These were:

(1) Measure 1: Omission of certain food products from the list of food products in Article 1 of the Act on which tax was levied, described in detail in section 2.1.8.1 of the opening decision.

(2) Measure 2: Non-taxation of food products with saturated fat content not exceeding the 2,3 percent threshold, described in detail in section 2.1.8.2 of the opening decision.

(3) Measure 3: Exemption from paying the tax for businesses whose annual sales of taxable food products was total DKK 50 000 or less, described in detail in section 2.1.8.3 of the opening decision.

(4) Measure 4: Exemption of products not intended for human consumption, such as feed for animals, described in detail in section 2.1.8.4 of the opening decision.

(5) Measure 5: Differential treatment of domestic and imported products with regard to when and how the tax was levied, described in detail in section 2.1.8.5 of the opening decision.

(6) Measure 6: The tax deferral and tax deduction regimes, described in detail in section 2.1.8.6 of the opening decision.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(28) In the opening decision, based on the available information, the Commission took the preliminary view that the conditions of Article 107(1) TFEU were fulfilled for measures 1-3 and 5-6. The measures were deemed not to be justified on the basis of the nature or general scheme of the system of reference as Denmark failed to