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To the Kind attention of Ms Mette Line Brat

OBJECT: **Follow-up of State aid procedure N 327/2008 concerning Denmark NOx tax reduction for large polluters and companies reducing pollution - Preliminary assessment on the scope of the exemption criteria laid down under Chapter 4 of the EU guidelines on State aid for environmental protection.**

1. INTRODUCTION

We have been requested to provide Aalborg Portland A/S (hereinafter, "**Aalborg Portland**") with a preliminary assessment on the scope of the compatibility provisions laid down by the *EU guidelines on State aid for environmental protection*[1] (hereinafter, the "**EU Guidelines**") with specific regard to a tax regime currently under discussion by the Danish Government.

The latter is in fact amending the national provisions concerning the tax regime for Nox emissions from cement production in light of the outcomes of the State aid procedure carried on by the European Commission in case N 327/2008[2].

In this respect, it should be briefly recalled that from January 2010 Denmark is introducing a new tax on nitrogen oxides emissions (hereinafter the "**NOx Tax**"). By the introduction of the NOx

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1 Community guidelines on State aid for environmental protection, in OJ C 82, April 1st, 2008, p. 1–33.

2 State aid No N 327/2008 – Denmark – *NOx tax reduction for large polluters and companies reducing pollution*, of 28 October 2009.

Tax, Denmark aims at decreasing NOx emissions from energy used in stationary plants and contributing to the fulfilment of Denmark NOx emissions ceilings under Directive 2001/81/EC[3] and the UNECE Geneva Convention on Long Range Trans Boundary Air Pollution. The NOx Tax is in fact the only regime in Denmark that helps to decrease the Nox emissions.

Since the NOx Tax will impact on large plants, in the fulfilment of its competences on taxation and in view of guaranteeing a sound fiscal pressure on the undertakings concerned the Danish Government introduced two categories of reductions namely: (a) tax reduction for companies with exceptionally high NOx emissions and (b) tax reductions for undertakings that install equipments to reduce the NOx emissions. Both reductions are considered as "bottom deductions" (hereinafter, the "**NOx Bottom Deductions**").

Considering that the cement industry (which is an energy-intense industry) on the basis of the "polluters pays principle" would have to afford the highest costs for the NOx Tax, the Danish Government decided to combine the abovementioned NOx Bottom Deductions with a waste tax exemption for certain types of waste which are treated by the producer (hereinafter, the "**Waste Tax Exemption**"). In the Danish Authorities aims, the Waste Tax Exemption was therefore structured in conjunction with the NOx Tax in view of decreasing the related fiscal pressure on the undertakings concerned.

The NOx Bottom Deductions were both assessed by the Commission and considered compatible with the European State aids rules in the Decision N 327/2008. In this assessment, the Commission noted that the NOx Tax had a deep impact on the cement industry and considered that the bottom relief for this industry was justified with the necessity to avoid a loss of competitiveness or market share, while at the same time yielding an environmental impact[4].

According to the information currently available, the Danish Government has suggested an increase of the tax rate and in the same time an effective reduction of 50% of the NOX bottom Deduction for the Cement Industry.

The envisaged amendments seem capable to disproportionally jeopardizing Aalborg Portland's activity since they do not provide any specific exemption to the benefit of the undertakings which have already duly complied with the Best Available Technique ("hereinafter "**BAT**") benchmarks, facing the related costs.

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3 *Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants*, OJ L 309, 27.11.2001, p. 22–30

4 According to the Commission, the tax relief was necessary since the NOx Tax would constitute a substantial increase of the beneficiary's production costs and it would be difficult for the beneficiary to cover such an increase without important sales losses. Since the beneficiary would still pay about 53% of the tax after the reduction, the Commission considered that the proposed NOx Tax relief was proportionate.

The present note concerns, in particular, the compatibility with EU State aid law of the exemptions possibly to be entered by the Danish Government into the national tax regime under review.

The issue at stake is analyzed in the following in light of the relevant EU legal framework and case law on State aid for environmental protection, according to the clarification gathered by the competent European Commission officials in charge with the previous assessment of the Danish tax regime under review in case N 327/2008.

2. ASSESSMENT

Articles 107 and 108 of the Treaty on the Functioning of the European Union (hereinafter "**TFEU**") lay down the notion of State aid and a general prohibition for the Member States to grant such measures without prior notification and approval by the European Commission[5].

Provided that they comply with the prior notification obligation, the Member States are allowed to grant State aid measures which are compatible with the EU market according to the derogatory objectives laid down in particular by Article 107, para. 2 or para. 3 TFEU[6].

As far as the environmental protection's objective is concerned, the European Guidelines clarify specifically the criteria under which a State aid measure may be considered compatible with the EU market.

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[5] According to Article 107, para. 1, TFEU, "*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 favoring 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*". According to Article 108, para. 3 TFEU, "*the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision*".

[6] According to Article 107, paras. 2 and 3, "*The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission*".

In particular, Chapter 4 of the EU Guidelines (from point 151 to point 159) provides the criteria which are applicable, on grounds of compatibility, to any State aid measure in the form of "*reductions of or exemptions from environmental taxes*" (hereinafter "**Chapter 4**").

In this respect, the relevant case-law confirms that the European Commission considers that Chapter 4 lays down the *exhaustive* legal framework for the assessment of the admissibility of a tax exemption under State aid law[7]. This means that the introduction of a tax exemption aimed at increasing the environment's protection is not prohibited in principle but may be compatible with the relevant EU legal framework if (upon positive assessment) the measure in question complies with the compatibility criteria provided in Chapter 4.

When assessing upon notification a tax exemption under Chapter 4, according to point 151 of the EU Guidelines the European Commission considers as compatible with the common market any aid in the form of reductions of environmental taxes if the measure in question contributes at least indirectly to an improvement of the level of environmental protection and if it does not undermine the general objective pursued[8]. This is consistent with the effectiveness principle according to which any assessment by the Commission is to be conducted under a substantial point of view considering the actual effects of the measure in question.

In this respect, it emerges therefore that point 151 allows any exemptions which are aimed at avoiding any unjust detriment to the undertakings which have complied with the BAT requirements, thus ensuring that the exemptions in question actually display an incentive effect towards the thorough implementation of the BAT benchmark and therefore the fulfillment of the related environmental goals.

As mentioned in Chapter 4 at point 154 of the EU Guidelines, in order to be compatible with the EU market the tax exemptions shall comply in particular with the conditions set forth by points 155-159.

Point 159 of the EU Guidelines provides several criteria in view of determining if a tax exemption is proportionate with regard to the fulfillment of the related environmental goal, stating that:

> " *The Commission will consider the aid to be proportional if one of the following conditions is met:*
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> *a) the scheme lays down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. Under the aid scheme any undertaking reaching the best performing technique can benefit, at most, from a reduction corresponding to the increase in production costs from the tax, using the best performing technique, and which cannot be passed on to customers. Any undertaking having a worse environmental performance shall benefit from a lower reduction, proportionate to its environmental performance* [emphasis added]*;*

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7 Case C 5/2009, *The Netherlands - Exemption from environmental taxes for ceramic producers.*

8 Case N22/2008 - *Sweden, CO2 tax reduction for fuel used in installations covered by the EU ETS*; Case N 270/2010 - *The Netherlands - Energy green tax, reduction for the glasshouse horticulture sector.*

b) *aid beneficiaries pay at least 20 % of the national tax, unless a lower rate can be justified in view of a limited distortion of competition;*

c) *the reductions or exemptions are conditional on the conclusion of agreements between the Member State and the recipient undertakings or associations of undertakings* […]".

With regard to the proportionality criteria listed above under letters a, b and c, it can be confirmed that they are alternative (and not cumulative) in character. In this respect, it should be underlined that point 159 states explicitly that the proportionally parameter is satisfied "*if one of*" the conditions is met.

According to the EU Guidelines, therefore, the fulfillment of the condition set forth under point 159, lett. a) ensures the full respect of the proportionality criterion and thus the compatibility of the exemption in question with the relevant State aid provisions.

Therefore, the compliance with the BAT benchmark represents one of the elements to be positively assessed under point 159, lett. a) of the EU Guidelines in order to determine the compatibility of the tax exemption in question under Chapter 4.

3. FINAL REMARK

In light of the above, in view of complying with the EU legal framework on State aid, the Danish Government is allowed to amend the tax regime under discussion by providing specific exemptions according to the compatibility criteria set forth under Chapter 4 of the EU Guidelines.

With specific regard to the conditions set forth under point 159 of the EU Guidelines, the very wording of the provision as well as the related case law confirm that the proportionality requirement is met when one of the conditions is satisfied. Accordingly, the fulfillment of the BAT benchmark by the beneficiary undertaking and the fact that the related costs "*cannot be passed on to customers*" should be positively assessed in order to consider the tax exemption's compliance under point 159, lett. a) of the EU Guidelines.

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We remain at your disposal for any further clarification you may need.

AVV. FRANCESCO SCIAUDONE