

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)

- Article 1 The Danish Act on taxation of saturated fat in certain...
Article 2 This Decision is addressed to the Kingdom of Denmark.
Signature

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

- (1) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9). With effect from 14 November 2015, this Council Regulation repealed Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1) and replaced these rules. In accordance with Article 35 of Council Regulation (EU) 2015/1589, references to the repealed Regulation are regarded as references to this Regulation and must be read in accordance with the correlation table in Annex II to Regulation (EU) 2015/1589.
- (2) State Aid — Denmark — State Aid No SA.33159 (14/C) (ex SA.33159 (11/NN)) — Taxation of saturated fat in certain food products sold in Denmark — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 94, 20.3.2015, p. 11).
- (3) In Danish: *Lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven)* <https://www.retsinformation.dk/FORMS/R0710.aspx?id=136314>
- (4) OJ C 94, 20.3.2015, p. 11.
- (5) See the reasoning to the draft Act, L 111 *Forslag til lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven)*. 19 January 2011, p. 7. Danish authorities' translation.
- (6) See speech by Danish Tax Minister Troels Lund Poulsen in the Danish Parliament on 19 January 2011.
- (7) Danish VAT Act [LBK No 287 of 28 March 2011].
- (8) See webpage www.foodcomp.dk
- (9) See the reasoning to the draft Act, L 111 *Forslag til lov om afgift af mættet fedt i visse fødevarer (fedtafgiftsloven)*. 19 January 2011, p. 7. Danish authorities' translation.
- (10) See speech by Danish Tax Minister Troels Lund Poulsen in the Danish Parliament on 19 January 2011.
- (11) For example '*Kostkompasset — vejen til en sund balance*' (in English: 'The Diet Compass — the path to a healthy balance'), the Ministry of Family and Consumer Affairs of Denmark and the Danish Veterinary and Food Administration, January 2006.
- (12) The Diet Compass, p. 14.
- (13) Judgment of the Court of 15 November 2011 in Case C-106/09 P, *Co mmission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 97.
- (14) Dietary habits in Denmark 2003-2008, DTU Fødevareinstituttet, 2010, p. 114. The report was produced by the National Food Institute, a part of the Technical University of Denmark and is based on data on dietary habits collected from 4 431 participants aged 4 to 75 during the period of 2003-2008. The task of the National Food Institute is to research and communicate sustainable and value-adding solutions in the areas of food and health for the benefit of society and industry.
- (15) Economic consequences of the Danish tax on saturated fat in certain food products (Incentive Report), (on behalf of Danish Ministry of Taxation), 2015, p. 31. The report was produced by Incentive, an economic consultant, on request by the Danish Ministry of Taxation, in response to the opening decision by the European Commission in 2015. The task of Incentive was to conduct an economic assessment of the tax, its impact on consumer and producer prices and to what extent it resulted in distortive effect on competition.
- (16) Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ L 109, 6.5.2000, p. 29).
- (17) This consideration is also apparent from Article 1, No 7, of the Act, and the preparatory works.
- (18) Dietary habits in Denmark 2003-2008, p. 114.
- (19) The Danish authorities are not in possession of any precise data on the consumption of seeds and nuts in Denmark and their contribution to the total intake of saturated fat. However, nuts and oily seeds were included in the category of Fruit in Table 1 above and this category only contributed with 1 percent to the total intake of saturated fat. Accordingly, it seems fair to assume that neither seeds nor nuts contribute significantly in any way to the total intake of saturated fat in Denmark. Further, it should be noted that oil made from seeds was covered by the tax; cf. Section 1, No 4, of the Act with reference to codes 1507-1516 in the Union combined nomenclature code.

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- (20) The Diet Compass.
- (21) The Diet Compass, p. 15.
- (22) The Diet Compass, p. 15, ‘*Vidensgrundlag for rådgivning om indtag af mælk, mælkeprodukter og ost i Danmark, 2010*’ the National Food Institute of the Technical University of Denmark (DTU) and ‘*Betydningen af mælk som calciumkilde og for udviklingen af osteoporose*’, Ernæringsrådet, 2003.
- (23) The Diet Compass, p. 6.
- (24) Dietary habits in Denmark 2003-2008, pp. 30-33.
- (25) The Danish National Food Institute, Technical University of Denmark (DTU), ‘*Frukt, grøntsager og sundhed — opdatering af vidensgrundlaget for mængdeanbefalingen 2002-2006*’, October 2007, p. 38 and p. 8.
- (26) The Diet Compass, p. 10.
- (27) The Diet Compass, p. 11.
- (28) The Diet Compass, p. 11.
- (29) The Diet Compass, p. 8.
- (30) Dietary habits in Denmark 2003-2008, p. 38.
- (31) *Helhedssyn på fisk og fiskevarer*, Fødevarerdirektoratet, *FødevareRapport 2003:17*, October 2003, p. 36- 37.
- (32) *Helhedssyn på fisk og fiskevarer*, Fødevarerdirektoratet, p. 41-46.
- (33) ‘*Mad til spædbørn og småbørn*’, (in English: ‘Food for infants and young children’), The Danish Health and Medicines Authority, 2010, pp. 9, 18-19, 27, and 36.
- (34) Incentive report, p. 31, Figure 10.
- (35) Judgment of the Court of 15 November 2011 in Case C-106/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 97.
- (36) Judgment of the Court of 12 November 2013 in Case T-499/10, *MOL v Commission*, ECLI:EU:T:2013:592, paragraph 77.
- (37) Judgment of the Court of 7 March 2012 in Case T-210/02 — RENV, *British Aggregates v Commission*, ECLI:EU:T:2012:110, paragraphs 47, 49 and 68, Judgment of the Court of 7 November 2014 in Case T-399/11, *Banco Santander and Santusa v Commission*, ECLI:EU:T:2014:938, paragraph 37.
- (38) Judgment of the Court of 22 December 2008 in Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, paragraphs 85 and 89, Judgment of the Court of 8 September 2011 in Case C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, paragraph 51, Judgment of the Court of 15 November 2011 in Case C-106/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 97.
- (39) Judgment of the Court of 7 March 2012, Case T-210/02 — RENV, *British Aggregates v Commission*, ECLI:EU:T:2012:110, paragraph 73.
- (40) Decision of the European Commission of 27 March 2015, SA.34775 British Aggregates Levy, C(2015) 2141 final, paragraphs 181-183.
- (41) Draft Act, p. 10.
- (42) Incentive report, p. 26, Table 8.
- (43) The Diet Compass and Food for infants and young children.
- (44) Judgment of the Court of 7 November 2014 in Case T-399/11, *Banco Santander and Santusa v Commission*, ECLI:EU:T:2014:938.
- (45) Judgment of the Court of 15 March 1994 in Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, paragraph 14, Judgment of the Court of 15 November 2011 in Case C-106/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 72.

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- (46) Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12).
- (47) Judgment of the Court of 17 June 1999 in Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, paragraph 39.
- (48) Judgment of the Court of 8 September 2011 in Joined Cases C-78/08 and C-80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paragraph 69.
- (49) Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).
- (50) *Vidensgrundlag for rådgivning om indtag af mælk, mælkeprodukter og ost i Danmark*, 2010, p. 14-15.
- (51) Covered by the obligation of professional secrecy.
- (52) A report carried out upon request of the European Commission, DG Enterprise and Industry.
- (53) Dejgaard Jensen and Smed (2013).
- (54) Food taxes and their impact on competitiveness in the agri-food sector, ECORYS, 2014, Annexes, p. 83.
- (55) ECORYS Report.
- (56) Statistics Denmark.
- (57) Diagram submitted by MIFU, Statistical Denmark.
- (58) Covered by the obligation of professional secrecy.
- (59) Dejgaard Jensen, Jørgen, and Sinne Smed (2013), published in Food Policy 42 (2013), 18-31.
- (60) ECORYS Report, p. 40, point 2.3.1.
- (61) Dejgaard Jensen, Jørgen, and Sinne Smed (2013), published in Food Policy 42 (2013), 18-31.
- (62) *Dansk Erhvervs Perspektiv 2012 No 23: Fedtafgiften: et dyrt bekendtskab*.
- (63) *Dansk Erhvervs Perspektiv 2012 No 23: Fedtafgiften: et dyrt bekendtskab*.
- (64) Judgment of the Court of Justice of 19 September 2000 in Case C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999 in Case C-6/97, *Italy v Commission*, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005 in Case C-172/03, *Heiser*, ECLI:EU:C:2005:130, paragraph 36.
- (65) Judgment of the Court of 24 January 1978 in Case C-82/77, *Van Tiggele*, ECLI:EU:C:1978:10, paragraphs 25 and 26; Judgment of the Court of 12 December 1996, in Case T-358/94, *Air France v Commission*, ECLI:EU:T:1996:194, paragraph 63.
- (66) Judgment of the Court of Justice of 16 May 2000 in Case C-83/98 P, *France v Ladbroke Racing and Commission*, ECLI:EU:C:2000:248, paragraphs 48 to 51.
- (67) Judgment of the Court of 15 March 1994 in Case C-387/92, *Banco Exterior de España v Ayuntamiento de Valencia*, ECLI:EU:C:1994:100, paragraph 14.
- (68) Judgment of the Court of 24 January 1978 in Case C-82/77, *Van Tiggele*, ECLI:EU:C:1978:10, paragraphs 25 and 26.
- (69) Judgment of the General Court of 15 June 2000 in Joined Cases T-298/97, T-312/97 etc., *Alzetta*, ECLI:EU:T:2000:151, paragraphs 141 to 147; Judgment of the Court of Justice of 24 July 2003 in Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415.
- (70) Judgment of the Court of Justice of 14 January 2015 in Case C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, paragraph 66.
- (71) See, for example, Judgment of the Court of 22 December 2008 in Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, paragraphs 82 and following; Judgment of the Court of Justice of 3 March 2005 in Case C-172/03, *Heiser*, ECLI:EU:C:2005:130, paragraph 40 and following; Judgment of the Court of 8 November 2001 in Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, ECLI:EU:C:2001:598, paragraphs 41-42.

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- See, also, the recent judgments of the Court of Justice in Joined Cases C-234/16 and C-235/16, *ANGED*, ECLI:EU:C:2018:281, paragraph 35; Case C-323/16 P, *Eurallumina v Commission*, ECLI:EU:C:2017:952, paragraph 62, and Case C-74/16, *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:C:2017:496, paragraphs 69 to 72. In these judgments, the Court does not apply the three-step analysis to establish the selectivity of the schemes in question, but focuses on whether the schemes give rise to a discrimination between comparable undertakings, which corresponds to the first step of the two-step analysis.
- (72) See, for example, Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, paragraph 37, Joined Cases C-78/08 to C-80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paragraph 49. See also Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free*, ECLI:EU:C:2016:981, paragraph 57. However in point 54 of the latter judgment the Court of Justice assesses the condition of selectivity as a question of discrimination (first step) for which possible justifications may apply (second step).
- (73) See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), in particular points 127 et seq. and the jurisprudence quoted therein. See also judgments of the Court of 28 June 2018 in Case C-203/16 P, *Andres (faillite Heitkamp BauHolding) v Commission*, ECLI:EU:C:2018:505, paragraphs 83-94, and of 19 December 2018 in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, paragraph 37.
- (74) Opinion of Advocate General Bobek in Case C-270/15 P *Belgium v Commission*, EU:C:2016:289, para. 28.
- (75) Judgment of the Court of 15 November 2011 in Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732.
- (76) See, for example, Case C-143/99, *Adria-Wien Pipeline*, ECLI:EU:C:2001:598, paragraph 41 and Case C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, paragraph 62.
- (77) See, for example, Judgment of the Court of 15 November 2011 in Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 75 and Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free*, ECLI:EU:C:2016:981, paragraph 54.
- (78) See Joined Cases C-234/16 and C-235/16, *ANGED*, ECLI:EU:C:2018:281, paragraph 35; Case C#323/16 P, *Eurallumina v Commission*, ECLI:EU:C:2017:952, paragraph 62. See also Joined Cases C#20/15 P and C-21/15 P, *Commission v World Duty Free*, ECLI:EU:C:2016:981, paragraph 76 and Case C-74/16, *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:C:2017:496, paragraphs 69-72.
- (79) Judgment of the Court of Justice of 15 November 2011 in Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraphs 101 et seq.
- (80) Judgment of 6 September 2006 in Case C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, paragraph 82, Judgment of the Court of Justice of 18 July 2013 in Case C-6/12, *P Oy*, ECLI:EU:C:2013:525, paragraph 27 et seq.
- (81) Judgment of the Court of 22 December 2008 in Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, paragraph 92.
- (82) Judgments of the Court of Justice in Joined Cases C-234/16 and C-235/16, *ANGED*, ECLI:EU:C:2018:281, paragraphs 45-55.
- (83) Judgment of 19 December 2018 in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, paragraph 37.
- (84) Judgment of 19 December 2018 in Case C-374/17, *A-Brauerei*, ECLI:EU:C:2018:1024, paragraph 37.
- (85) Judgment of the Court of Justice of 15 November 2011 in Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraphs 101 et seq.
- (86) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paragraph 138 (OJ C 262, 19.7.2016, p. 1).
- (87) Judgment of the Court of 8 September 2011 in Joined Cases C-78/08 and C-80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paragraphs 69 and 70, Judgment of the Court of Justice of

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- 6 September 2006 in Case C-88/03, *Portugal v Commission*, ECLI:EU:C:2006:511, paragraph 81, Judgment of the Court of 8 September 2011 in Case C-279/08 P, *Commission v Netherlands*, ECLI:EU:C:2011:551, Judgment of the Court of 22 December 2008 in Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757; Judgment of the Court of Justice of 18 July 2013 in Case C-6/12, *P Oy*, ECLI:EU:C:2013:525, paragraphs 27 et seq.
- (88) For undertakings for collective investment; see section 5.4.2 of Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).
- (89) Judgment of the Court of 8 September 2011 in Joined Cases Case C-78/08 and C-80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paragraph 71.
- (90) Decision of the European Commission of 24 April 2018, SA.45862 (2018/N) Irish tax on sugar-sweetened drinks C(2018) 2385 final
- (91) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, paragraph 136 (OJ C 262, 19.7.2016, p. 1).
- (92) For eggs there are no specific dietary recommendations, however general recommendations to include eggs in the diet can be found in ‘*Danskernes kostvaner 2003-200 8*’ (p. 40), ‘*Kostkompasset*’ (p. 16), ‘*Mad til spædbørn & småbørn*’ (p. 25).
- (93) Scientific Opinion on establishing Food-Based Dietary Guidelines, *EFSA Journal* 2010; 8(3):1461, page 8.
- (94) *Ibid.*, page 9.
- (95) Point 4.1 on page 10, which states ‘for a number of nutrients, such as trans fats and food groups, a dietary imbalance can increase the risk of obesity and diet-related disease.’
- (96) Point 4.2 on page 12.
- (97) Point 4.4.1 on page 15, which states: ‘several European countries the intake of energy, total fat, saturated and trans fatty acids, sugars and salt might be consumed in excess, whereas the intake of unsaturated fatty acids, dietary fibre, as well as of certain vitamins and minerals might be lower than recommended in some countries. Therefore, in setting FBDG [food-based dietary guidelines] it is important to focus on foods providing nutrients that should be limited or increased in a healthy diet. Fat intake is used as an example as it is of concern for most European countries.’
- (98) Point 4.4.2 on page 16-17 suggests to consider the level of consumption of foods with established relationships to health that are not nutrient-specific: ‘For some foods, there is evidence of health benefits that cannot be attributed to their specific content of nutrients. For instance, a higher consumption of foods from the fruit and vegetable group has been associated with a lower risk of some chronic diseases (Eurodiet, 2000; WHO/FAO, 2003), an effect that cannot be easily explained on the basis of specific nutrients.’
- (99) *EFSA Journal* 2010; 8(3):1461, page 3.
- (100) *Ibid.*, page 3, footnote 4.
- (101) Dejgaard Jensen, Jørgen, and Sinne Smed (2013), published in *Food Policy* 42 (2013), 18-31.
- (102) Incentive report, Table 6, p. 22.
- (103) ‘*Mad til spædbørn og småbørn*’, (in English: ‘Food for infants and young children’), The Danish Health and Medicines Authority, 2010, pp. 9, 18-19, 27, and 36.
- (104) Covered by the obligation of professional secrecy
- (105) L 111 — *Forslag til lov om afgift af mættet fedt i visse fødevarer (fedt-afgiftsloven)*, 28 February 2011, Annex 3.
- (106) *Forslag til Lov om afgift af mættet fedt i visse fødevarer (Fedtafgiftsloven)*, September 2010 *udkast*, ‘*Bemærkninger til lovforslaget*’, Article 3.4.1 (Annex 3).
- (107) An authorised warehousekeeper is a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse.
- (108) A registered consignee is a natural or legal person authorised by the competent authorities of the Member State of destination, in the course of his business and under the conditions fixed by those

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authorities, to receive excise goods moving under a duty suspension arrangement from another Member State.

- (109) Judgment of the Court of 2 April 1998 in Case C-213/96, *Outokumpu*, ECLI:EU:C:1998:155, paragraph 25, Judgment of the Court of 11 June 1992 in Joined Cases C-149/91 and C-150/91, *Sanders Adour and Guyomarc'h Orthez v Directeur des services fiscaux des Pyrénées-Atlantiques*, ECLI:EU:C:1992:261, paragraph 18.
- (110) Judgment of the Court of 2 April 1998 in Case C-213/96, *Outokumpu*, ECLI:EU:C:1998:155, paragraph 25, Judgment of the Court of 11 June 1992 in Joined Cases C-149/91 and C-150/91, *Sanders Adour and Guyomarc'h Orthez v Directeur des services fiscaux des Pyrénées-Atlantiques*, ECLI:EU:C:1992:261, paragraph 18.

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