

INFORMATIVE NOTE

PLMJ

Advising with Value

May 2009



BIOFUEL: RECENT DEVELOPMENTS

The publication of Decree-Law 49/2009 of 26 February brings with it the compulsory addition of biodiesel to the road diesel used in Portugal in the percentage, by volume, of 6% in 2009 and 10% in 2010.

I – Compulsory addition of biodiesel to diesel used in Portugal

The publication of Decree-Law 49/2009 of 26 February brings with it the compulsory addition of biodiesel to the road diesel used in Portugal in the percentage, by volume, of 6% in 2009 and 10% in 2010. Nevertheless, road diesel must comply with European standard EN 590 and thus until such time as this standard is altered, the maximum percentage of diesel that may be added is only 5%. Once again though, the national legislature has taken the initiative in the apparent hope that the country can influence the advance of the European process in respect of biofuel use.

This change to the composition of road diesel by the national parliament comes about in the wake of the compulsory requirement to add 5% biodiesel to coloured and marked diesel - commonly known as agricultural or green diesel - which was introduced by Decree-Law 89/2008 of 30 May and commenced on 1 July 2008.

The publication of this amendment means that all the diesel used in Portugal must now contain 5% biodiesel - the maximum permitted by EN 590 - which places the country at the forefront in this field, although there is still no consensus in the scientific field as to the benefits that biofuel holds for the environment, whereas the overheads associated with its production are well known.

II – The partial ISP exemption for biodiesel produced and used in Portugal

Ministerial Order 353-E/2009, of 3 April, regulates several of the aspects set out in the above-mentioned Decree-Law 49/2009 and specifically seems to have established a system for calculating the minimum and maximum prices that will inform the contracts under which biofuel will be acquired from the national biofuel industry for use on the national market, using international product and currency quotations for the purpose.

The schedule to the ministerial order lists the national biodiesel producers and the quantities that will benefit from a partial exemption from the Petroleum and Energy Products Duty (ISP) for which this product is eligible, which was set in

Once again though, the national legislature has taken the initiative in the apparent hope that the country can influence the advance of the European process in respect of biofuel use.

“Portuguese Law Firm of the Year”

Chambers Europe Excellence 2009, IFLR Awards 2006 & Who's Who legal Awards 2006, 2008

“Corporate Law Firm of the Year - Southern Europe”

ACQ Finance Magazine, 2009

“Best Portuguese Law Firm for Client Service”

Clients Choice Award - International Law Office, 2008

“Best Portuguese Tax Firm of the Year”

International Tax Review - Tax Awards 2006, 2008

Mind Leaders Awards™

Human Resources Suppliers 2007

PLMJ

The schedule to the ministerial order lists the national biodiesel producers and the quantities that will benefit from a partial exemption from the Petroleum and Energy Products Duty (ISP) for which this product is eligible, which was set in 2009 by Ministerial Order 134/2009, of 2 February, at €280 per thousand litres.

2009 by Ministerial Order 134/2009, of 2 February, at €280 per thousand litres. The beneficiary companies and the respective quantities are as follows for this year and the next:

(unit: kilolitres)

PRODUCER	2009	2010
Iberol	68.104	59.944
Torrejana	62.494	58.338
Biovegetal	52.051	52.763
Prio	52.465	51.499
Sovena	36.965	49.894
Enerfuel	14.995	14.635
TOTAL	287.074	287.073

It can be concluded from the above that this will entail a loss of 80 million euros in revenue for the state.

The amounts of biodiesel in the table above that benefit from the partial ISP exemption may only be added to road diesel and not to agricultural diesel, which will make it difficult to manage fuel in the bonded warehouse as it will be necessary to record, at least in terms of documents, whether the biofuel admitted to the warehouse for addition to the diesel has or has not had the benefit of the ISP exemption. In the case of the former, then it can only be added to road diesel, while in the case of the latter, it can be added to either road diesel or agricultural diesel.

For the sake of simplicity and less bureaucracy, it is sincerely to be hoped that the fact that the Directorate General of Customs and Excise Duties has chosen a management model for the addition of biodiesel to diesel which "requires" that the biodiesel has already been legally "declared for use" upon admission to the bonded warehouse will not make the actual management of warehouse logistics more difficult as it is

not common for "products awaiting tax" and "products already declared for use" to coexist in bonded warehouses.

III – The "forgotten" intracommunity market

The legal framework created by Decree-Law 49/2009 and by Ministerial Order 353-E/2009 appears not to envisage intracommunity acquisition of road diesel, and thus it is not known how the respective operators will be able to comply with their new obligations, that is to say, how will it be determined whether diesel originating in another EU Member State includes the biodiesel percentage now required under Portuguese law. Nor does it seem to envisage any ISP exemption for biodiesel that has been added to this diesel, which, should this be the case, may constitute a breach of community law.

The questions raised in the preceding paragraph are of paramount importance since, for the most representative national institutions, intracommunity acquisitions are the last best hope for achieving greater competition in the fuel sector.

Nor does it seem to envisage any ISP exemption for biodiesel that has been added to this diesel, which, should this be the case, may constitute a breach of community law.

This Tax Information is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Tax Information may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact **Rogério Fernandes Ferreira-rff@plmj.pt**

11/ 2009