

I

(Legislative acts)

DIRECTIVES

COUNCIL DIRECTIVE 2010/12/EU

of 16 February 2010

amending Directives 92/79/EEC, 92/80/EEC and 95/59/EC on the structure and rates of excise duty applied on manufactured tobacco and Directive 2008/118/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Acting in accordance with a special legislative procedure,

Whereas:

(1) In accordance with Article 4 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes ⁽³⁾ and Article 4 of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes ⁽⁴⁾, an in-depth review has been carried out of the rates and structure of excise duties on tobacco products. That review included provisions of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco ⁽⁵⁾.

(2) In order to ensure the proper functioning of the internal market and, at the same time, a high level of health protection, as required by Article 168 of the Treaty, bearing in mind that serious harm to health can be caused by tobacco products and that the Union is

Party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), various changes should be made to the Union's fiscal legislation on tobacco products. These changes should take account of the situation prevailing for each of the various tobacco products.

(3) As regards cigarettes, the arrangements should be simplified so as to create neutral conditions of competition for manufacturers, to reduce the partitioning of the tobacco markets and to underscore health objectives. To this end, the concept of the most popular price category should be replaced; the price related minimum requirement should refer to the weighted average retail selling price, whereas the monetary minimum should be applicable to all cigarettes. For the same reasons, the weighted average retail selling price should also serve as a reference for measuring the importance of specific excise duty within the total tax burden.

(4) Without prejudice to the mixed tax structure and the maximum percentage of the specific component on the total tax burden, Member States should be given more effective means to levy specific or minimum excise duty on cigarettes, so as to ensure that at least a certain minimum amount of taxation applies throughout the Union.

(5) As regards fine-cut tobacco intended for the rolling of cigarettes, the Union price related minimum requirement should be expressed in such a way as to obtain effects similar to those in the field of cigarettes and should take the weighted average retail selling price as the point of reference.

(6) The changes of prices and excise levels have been analysed, in particular, for cigarettes — by far the most important category of tobacco products — as well as for fine-cut tobacco intended for the rolling of cigarettes. The analysis shows that there are still considerable differences between Member States which may disturb the operation of the internal market. Greater convergence

⁽¹⁾ Opinion of 24 March 2009 (not yet published in the Official Journal).

⁽²⁾ OJ C 228, 22.9.2009, p. 130.

⁽³⁾ OJ L 316, 31.10.1992, p. 8.

⁽⁴⁾ OJ L 316, 31.10.1992, p. 10.

⁽⁵⁾ OJ L 291, 6.12.1995, p. 40.

between the tax levels applied in the Member States would help reduce fraud and smuggling within the Union.

- (7) Greater convergence would also help to ensure a high level of human health protection. The level of taxation is indeed a major factor in the price of tobacco products, which in turn influences consumers' smoking habits. Fraud and smuggling undermine tax induced price levels, in particular of cigarettes and fine-cut tobacco intended for the rolling of cigarettes, and thus jeopardise the achievement of tobacco control and health protection objectives.
- (8) In order to achieve greater convergence and to reduce consumption, the minimum levels of taxation in the Union for cigarettes and fine-cut tobacco intended for the rolling of cigarettes should therefore be increased.
- (9) It is necessary to bring the minimum levels for fine-cut tobacco intended for the rolling of cigarettes closer to the minimum levels applicable to cigarettes, so as to better take account of the degree of competition existing between the two products, reflected in consumption patterns observed, as well as their equally harmful character.
- (10) Transitional periods should allow Member States to adapt smoothly to the new levels of the overall excise duty, thus limiting possible side effects.
- (11) In order to prevent damage to Corsica's economic and social equilibrium it is both essential and justifiable to extend until 31 December 2015 the derogation by which France may apply a rate of excise duty that is lower than the national rate to cigarettes and other manufactured tobaccos released for consumption in Corsica. By that date the tax rules for manufactured tobaccos released for consumption there should be brought fully into line with the rules for mainland France. Nevertheless, too abrupt a change should be avoided and there should therefore be a stepwise increase in the excise duty currently levied on cigarettes and fine-cut tobacco intended for the rolling of cigarettes in Corsica.
- (12) In order to avoid distortion of competition and unacceptable diversions of trade and the resulting revenue loss for those Member States which apply high excise duties, both as an important source of revenue and for health reasons, it appears necessary to allow the latter to apply quantitative limits as regards cigarettes which may be brought into their territory without further payment of excise duties where those cigarettes are brought into their territory from Member States benefiting from transitional periods. It is appropriate to modulate such authorisation of restrictions taking into account the level which the general mandatory minimum level of taxation will have reached and the difficulties which Member States benefiting from a derogation may encounter from lower taxation in other Member States

on their way to gradually aligning on the general mandatory minimum level.

- (13) In order to avoid a fall in the value of the Union minimum levels of duty on cigars, cigarillos and smoking tobaccos other than fine-cut tobacco intended for the rolling of cigarettes, it is necessary to increase the minimum levels expressed as a specific amount.
- (14) In the interests of uniform and fair taxation, the definition of cigarettes, cigars and cigarillos and of other smoking tobacco should be adapted so that, respectively, rolls of tobacco which according to their length can be considered as two cigarettes or more are treated as two cigarettes or more for excise purposes; a type of cigar which is similar in many respects to a cigarette is treated as a cigarette for excise purposes; smoking tobacco which is similar in many respects to fine-cut tobacco intended for the rolling of cigarettes is treated as fine-cut tobacco for excise purposes; and tobacco refuse is clearly defined. In view of the economic difficulties that immediate implementation could cause for the German and Hungarian operators concerned, the Federal Republic of Germany and the Republic of Hungary should be authorised to postpone the implementation of the new definition of cigars and cigarillos until 1 January 2015.
- (15) In accordance with point 34 of the Interinstitutional Agreement on better law-making⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (16) Directives 92/79/EEC, 92/80/EEC, 95/59/EC and Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty⁽²⁾ should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 92/79/EEC is hereby amended as follows:

1. Article 2 is replaced by the following:

'Article 2

1. The overall excise duty (specific duty and *ad valorem* duty excluding VAT) on cigarettes shall represent at least 57 % of the weighted average retail selling price of cigarettes released for consumption. That excise duty shall not be less than EUR 64 per 1 000 cigarettes irrespective of the weighted average retail selling price.

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

⁽²⁾ OJ L 9, 14.1.2009, p. 12.

However, Member States which levy an excise duty of at least EUR 101 per 1 000 cigarettes on the basis of the weighted average retail selling price need not comply with the 57 % requirement set out in the first subparagraph.

2. From 1 January 2014, the overall excise duty on cigarettes shall represent at least 60 % of the weighted average retail selling price of cigarettes released for consumption. That excise duty shall not be less than EUR 90 per 1 000 cigarettes irrespective of the weighted average retail selling price.

However, Member States which levy an excise duty of at least EUR 115 per 1 000 cigarettes on the basis of the weighted average retail selling price need not comply with the 60 % requirement set out in the first subparagraph.

Bulgaria, Estonia, Greece, Latvia, Lithuania, Hungary, Poland and Romania shall be allowed a transitional period until 31 December 2017 in order to reach the requirements laid down in the first and second subparagraphs.

3. The weighted average retail selling price shall be calculated by reference to the total value of all cigarettes released for consumption, based on the retail selling price including all taxes, divided by the total quantity of cigarettes released for consumption. It shall be determined by 1 March at the latest of each year on the basis of data relating to all such releases for consumption made in the preceding calendar year.

4. Member States shall gradually increase excise duties in order to reach the requirements referred to in paragraph 2 on the dates set therein.

5. The Commission shall publish once a year the value of the euro in national currencies to be applied to the amounts of the overall excise duty.

The exchange rates to be applied shall be those obtained on the first working day of October and published in the *Official Journal of the European Union*. They shall apply from 1 January of the following calendar year.

6. Member States may maintain the amounts of the excise duties in force at the time of the annual adjustment provided for in paragraph 5 if the conversion of the amounts of the excise duties expressed in EUR would result in an increase of less than 5 % or less than EUR 5, whichever is the lower amount, in the excise duty expressed in national currency.;

2. Article 2a is replaced by the following:

'Article 2a

1. Where a change in the weighted average retail selling price of cigarettes occurs in a Member State, thereby bringing the overall excise duty below the levels specified

in the first sentences of paragraphs 1 and 2 of Article 2 respectively, the Member State concerned may refrain from adjusting that duty until 1 January of the second year following that in which the change occurs.

2. Where a Member State increases the rate of value added tax on cigarettes, it may reduce the overall excise duty up to an amount which, expressed as a percentage of the weighted average retail selling price, is equal to the increase in the rate of value added tax, also expressed as a percentage of the weighted average retail selling price, even if such an adjustment has the effect of reducing the overall excise duty to below the levels, expressed as a percentage of the weighted average retail selling price, laid down in the first sentences of paragraphs 1 and 2 of Article 2 respectively.

However, the Member State shall raise that duty again so as to reach at least those levels by 1 January of the second year after that in which the reduction took place.;

3. Article 3(4) is replaced by the following:

'4. By way of derogation from Article 2, France may continue to apply for the period from 1 January 2010 to 31 December 2015, a reduced rate of excise duty to cigarettes released for consumption in the departments of Corsica up to an annual quota of 1 200 tonnes. The reduced rate shall be:

— until 31 December 2012, at least 44 % of the price for cigarettes in the price category most in demand in those departments,

— from 1 January 2013, at least 50 % of the weighted average retail selling price of cigarettes released for consumption. The excise duty shall not be less than EUR 88 per 1 000 cigarettes irrespective of the weighted average retail selling price,

— from 1 January 2015, at least 57 % of the weighted average retail selling price of cigarettes released for consumption. The excise duty shall not be less than EUR 90 per 1 000 cigarettes irrespective of the weighted average retail selling price.;

4. Article 4 is replaced by the following:

'Article 4

1. Every 4 years, the Commission shall submit to the Council a report and, where appropriate, a proposal concerning the rates of excise duty laid down in this Directive and the structure of excise duty as defined by Article 16 of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (*).

The report by the Commission shall take into account the proper functioning of the internal market, the real value of the rates of excise duty and the wider objectives of the Treaty.

2. The report referred to in paragraph 1 shall be based in particular on the information provided by the Member States.

3. The Commission shall, in accordance with the procedure referred to in Article 43 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (**), determine a list of statistical data needed for the report, excluding data relating to individual natural persons or legal entities. Apart from data readily available to Member States, the list shall only contain data the collection and assembly of which does not involve a disproportionate administrative burden on the part of the Member States.

4. The Commission shall not publish or otherwise divulge those data where it would lead to the disclosure of a commercial, industrial or professional secret.

(*) OJ L 291, 6.12.1995, p. 40.

(**) OJ L 9, 14.1.2009, p. 12.'

Article 2

Directive 92/80/EEC is hereby amended as follows:

1. in Article 3(1), the following subparagraphs are added:

'From 1 January 2011, the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT) on fine-cut smoking tobacco intended for the rolling of cigarettes shall represent at least 40 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or at least EUR 40 per kilogram.

From 1 January 2013, the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT) on fine-cut smoking tobacco intended for the rolling of cigarettes shall represent at least 43 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or at least EUR 47 per kilogram.

From 1 January 2015 the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT) on fine-cut smoking tobacco intended for the rolling of cigarettes shall represent at least 46 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or at least EUR 54 per kilogram.

From 1 January 2018, the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT) on fine-cut smoking tobacco intended for the rolling of cigarettes shall represent at least 48 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or at least EUR 60 per kilogram.

From 1 January 2020, the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT) on fine-cut smoking tobacco intended for the rolling of cigarettes shall represent at least 50 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or at least EUR 60 per kilogram.

The weighted average retail selling price shall be calculated by reference to the total value of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, based on retail selling price including all taxes, divided by the total quantity of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption. It shall be determined by 1 March at the latest of each year on the basis of data relating to all such releases for consumption made in the preceding calendar year.

From 1 January 2011, the overall excise duty expressed as a percentage, as an amount per kilogram or for a given number of items shall be at least equivalent to the following:

- (a) in the case of cigars or cigarillos, 5 % of the retail selling price inclusive of all taxes or EUR 12 per 1 000 items or per kilogram;
- (b) in the case of smoking tobaccos, other than fine-cut smoking tobacco intended for the rolling of cigarettes, 20 % of the retail selling price inclusive of all taxes, or EUR 22 per kilogram.;

2. Article 3(4) is replaced by the following:

'4. By way of derogation from paragraph 1, France may continue to apply, for the period from 1 January 2010 to 31 December 2015, a reduced rate of excise duty to manufactured tobacco other than cigarettes released for consumption in the departments of Corsica. The reduced rate shall be:

- (a) for cigars and cigarillos:

at least 10 % of the retail selling price, inclusive of all taxes;

- (b) for fine-cut smoking tobacco intended for the rolling of cigarettes:

- until 31 December 2012, at least 27 % of the retail selling price, inclusive of all taxes,
- from 1 January 2013, at least 30 % of the retail selling price, inclusive of all taxes,
- from 1 January 2015, at least 35 % of the retail selling price, inclusive of all taxes;

(c) for other smoking tobacco:

at least 22 % of the retail selling price, inclusive of all taxes.;

3. Article 4 is replaced by the following:

'Article 4

1. Every 4 years, the Commission shall submit to the Council a report and, where appropriate, a proposal concerning the rates and the structure of excise duty laid down in this Directive.

The report by the Commission shall take into account the proper functioning of the internal market, the real value of the rates of excise duty and the wider objectives of the Treaty.

2. The report referred to in paragraph 1 shall be based in particular on the information provided by the Member States.

3. The Commission shall, in accordance with the procedure referred to in Article 43 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (*), determine a list of statistical data needed for the report, excluding data relating to individual natural persons or legal entities. Apart from data readily available to Member States, the list shall only contain data the collection and assembly of which does not involve a disproportionate administrative burden on the part of the Member States.

4. The Commission shall not publish or otherwise divulge those data where it would lead to the disclosure of a commercial, industrial or professional secret.

(*) OJ L 9, 14.1.2009, p. 12.;

4. Article 5(1) is replaced by the following:

1. The Commission shall publish once a year the value of the euro in national currencies to be applied to the amounts of the overall excise duty.

The exchange rates to be applied shall be those obtained on the first working day of October and published in the *Official Journal of the European Union* and shall apply from 1 January of the following calendar year.'

Article 3

Directive 95/59/EC is hereby amended as follows:

1. Article 3 is replaced by the following:

'Article 3

1. The following shall be deemed to be cigars or cigarillos if they can be and, given their properties and normal consumer expectations, are exclusively intended to be smoked as they are:

(a) rolls of tobacco with an outer wrapper of natural tobacco;

(b) rolls of tobacco with a threshed blend filler and with an outer wrapper of the normal colour of a cigar, of reconstituted tobacco, covering the product in full, including, where appropriate, the filter but not, in the case of tipped cigars, the tip, where the unit weight, not including filter or mouthpiece, is not less than 2,3 g and not more than 10 g, and the circumference over at least one third of the length is not less than 34 mm.

2. By way of derogation from paragraph 1, Germany and Hungary may continue to apply until 31 December 2014 Article 3 of Directive 95/59/EC as amended by Directive 2002/10/EC.;

2. Article 4(2) is replaced by the following:

'2. A roll of tobacco referred to in paragraph 1 shall, for excise duty purposes, be considered as two cigarettes where, excluding filter or mouthpiece, it is longer than 8 cm but not longer than 11 cm, as three cigarettes where, excluding filter or mouthpiece, it is longer than 11 cm but not longer than 14 cm, and so on.;

3. in Article 5, point 2 is replaced by the following:

'2. tobacco refuse put up for retail sale which does not fall under Articles 3 and 4 and which can be smoked. For the purpose of this Article, "tobacco refuse" shall be deemed to be remnants of tobacco leaves and by-products obtained from tobacco processing or the manufacture of tobacco products.;

4. Article 6 is amended as follows:

(a) in the first subparagraph the wording '1 millimetre' is replaced by the wording '1,5 millimetre';

(b) in the second subparagraph the wording 'more than 1 millimetre' is replaced by the wording '1,5 millimetre or more';

5. Article 7(1) is replaced by the following:

'1. Products which consist in part of substances other than tobacco but otherwise fulfil the criteria set out in Article 3 shall be treated as cigars and cigarillos.;

6. Article 8(4) is replaced by the following:

'4. Where necessary, the excise duty on cigarettes may include a minimum tax component, provided that the mixed structure of taxation and the band of the specific component of the excise duty as laid down in Article 16 is strictly respected.;

7. Article 16 is replaced by the following:

'Article 16

1. The percentage of the specific component of excise duty in the amount of the total tax burden on cigarettes shall be established by reference to the weighted average retail selling price.

2. The weighted average retail selling price shall be calculated by reference to the total value of all cigarettes released for consumption, based on the retail selling price including all taxes, divided by the total quantity of cigarettes released for consumption. It shall be determined by 1 March at the latest of each year on the basis of data relating to all such releases for consumption made in the preceding calendar year.

3. Until 31 December 2013, the specific component of the excise duty may not be less than 5 % and not be more than 76,5 % of the amount of the total tax burden resulting from the aggregation of the following:

(a) specific excise duty;

(b) the proportional excise duty and the value added tax levied on the weighted average retail selling price.

4. From 1 January 2014, the specific component of the excise duty on cigarettes may not be less than 7,5 % and not be more than 76,5 % of the amount of the total tax burden resulting from the aggregation of the following:

(a) specific excise duty;

(b) the proportional excise duty and the value added tax levied on the weighted average retail selling price.

5. By way of derogation from paragraphs 3 and 4, where a change in the weighted average retail selling price of cigarettes occurs in a Member State, thereby bringing the specific component of the excise duty, expressed as a percentage of

the total tax burden, below the percentage of 5 % or 7,5 %, whichever is applicable, or above the percentage of 76,5 % of the total tax burden, the Member State concerned may refrain from adjusting the amount of the specific excise duty until 1 January of the second year following that in which the change occurs.

6. Notwithstanding Article 8(1), Member States may exclude customs duties from the basis for calculating the proportional excise duty on cigarettes.

7. Subject to paragraphs 3, 4, 5 and 6, Member States may levy a minimum excise duty on cigarettes.;

8. Article 17 is deleted.

Article 4

Directive 2008/118/EC is hereby amended as follows:

in Article 46, the following paragraph is added:

'3. Without prejudice to Article 32, Member States not referred to in the third subparagraph of Article 2(2) of Directive 92/79/EEC may, as regards cigarettes which may be brought into their territory without further payment of excise duties, apply from 1 January 2014 a quantitative limit of not less than 300 items with respect to cigarettes brought in from a Member State which applies, in accordance with the third subparagraph of Article 2(2) of that Directive, lower excise duties than those resulting from the provisions of the first subparagraph of Article 2(2) thereof.

Member States referred to in the third subparagraph of Article 2(2) of Directive 92/79/EEC which levy an excise duty of at least EUR 77 per 1 000 cigarettes irrespective of the weighted average retail selling price, may, from 1 January 2014, apply a quantitative limit of not less than 300 items as regards cigarettes brought into their territory without further payment of excise duties from a Member State which applies a lower excise duty in accordance with the third subparagraph of Article 2(2) of that Directive.

Member States which apply a quantitative limit in accordance with the first and the second subparagraphs of this paragraph shall inform the Commission thereof. They may carry out the necessary checks provided that these checks do not affect the proper functioning of the internal market.'

Article 5

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive with effect from 1 January 2011 except where otherwise provided for in this Directive. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, those provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 6

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 7

This Directive is addressed to the Member States.

Done at Brussels, 16 February 2010.

For the Council
The President
E. SALGADO