

**Tobacco Europe Contribution to
the European Commission's Public Consultation on
its proposal for a revised Tobacco Excise Directive (TED)**

Background

Tobacco Europe and its members (British American Tobacco, Imperial Brands and Japan Tobacco International) take note of the European Commission's proposal to amend Directive 2011/64/EU (hereinafter 'the Directive').

We appreciate the enlarged harmonisation of tobacco and tobacco-related products, with separate and dedicated excise categories for electronic cigarettes, nicotine pouches and heated tobacco products. However, we have several concerns that we respectfully request to adapt during the deliberation of the Directive, as summarised below.

1) The proposed minimum excise increases on traditional tobacco products and the minimum incidence are excessive, abet illicit trade and will deliver neither the forecasted excise revenues, nor a reduction in smoking prevalence

The proposed minimum rates of €215 per 1,000 cigarettes equals an increase of 139% from the current level (€90 euros). This is excessive and would affect many Member States disproportionately. The minimum rates for all cigarettes should be set no higher than €155 per 1,000 cigarettes, as recommended by Option 1 in the Impact Assessment. This increase would still require substantial excise rate increases in some Member States.

The minimum rates for fine-cut tobacco intended for the rolling of cigarettes should be differentiated from the minimum rate on cigarettes with nominal rates set lower than the minimum rates on cigarettes, in recognition of the distinctive characteristics of fine-cut tobacco.

The Commission has suggested that an increase in the minimum rates is necessary to reduce the distortive effects on competition of tax-induced cross-border flows of products and contribute to the smooth functioning of the Single Market. However, cross-border differences in cigarette prices and taxes are similar to those for all consumer goods and services and are, therefore, not a signal that the Single Market is working ineffectively in respect of these products. The 22.1 billion of cross-border tax-paid cigarette flows between Member States represent only around 5% of all cigarettes consumed in the EU. They are significantly smaller than the 35.9 billion illicit cigarettes consumed in the EU, either brought in from non-EU

countries or manufactured illegally within the EU, which together represent more than 8% of the cigarettes consumed in the EU¹. A substantial increase in the minimum excise on cigarettes risks exacerbating the consumption of illicit cigarettes across the Single Market and has, in the past, proven to not reduce cross-border cigarette price differences.

Further to this, the Commission's additional proposal to increase the minimum incidence on cigarettes to 63% (with the escape clause set at €274 per 1,000 cigarettes) is inappropriate. Since there is no clear relationship between the excise incidence and the excise burden on cigarettes, the minimum excise incidence requirement has not contributed to a convergence in cigarette excise rates across the EU. In fact, there is no longer a compelling rationale for maintaining an EU minimum excise incidence. If the minimum incidence cannot be abolished, it is essential that the minimum rate (i.e., 60% of the WAP of cigarettes) remains unchanged to avoid disproportionately impacting excise rates in Member States where cigarettes are already significantly less affordable for consumers. The escape clause threshold must be retained and set no more than €180 per 1,000 cigarettes. This would help preventing a disproportionate reduction in tax revenues in markets where cigarette tax rates have already exceeded their revenue-maximizing levels.

Moreover, the Commission has suggested that the proposed increase in the minimum rates would generate €14 billion in additional revenue. *Economisti Associati*, the consultants which prepared the study on the rates for the Commission, have themselves suggested in their 2020 study that the price elasticity for cigarettes in the EU is between -0.96 and -1.09². This is much higher than the estimates used by the Commission. These higher elasticities suggest that the additional revenues projected by the Commission will not materialise as projected.

2) Harmonising the definitions and tax treatment of traditional tobacco products, heated tobacco, e-cigarettes and nicotine pouches to encourage switch to harm reduced products

We welcome the Commission's proposal to harmonize the taxation of novel products by establishing separate and dedicated excise categories for electronic cigarettes, nicotine pouches and heated tobacco products. At the same time, we are concerned with the proposed definitions as a proper characterization of these products must explicitly include the absence of combustion in order to clearly differentiate them from combustible tobacco products already covered by the Directive.

¹ Please see: https://www.pmi.com/resources/docs/default-source/itp/illicit-cigarette-consumption-in-europe-2024-results.pdf?sfvrsn=4ad3ac8_6

² Please see: https://taxation-customs.ec.europa.eu/document/download/aca4d461-9962-47b0-933e-da3cce691d6d_en?filename=annexes-to-the-study-on-the-tobacco-taxation-directive-2019_en.pdf (page 101)

Regarding heated tobacco products, the minimum excise tax should be weight-based only and set at no more than €110/kg, which is lower than the current proposal and revised downward in line with the appropriate reduction in the minimum excise for combustible cigarettes (to no more than €155 per 1,000 cigarettes). There should only be a minimum tax in monetary terms and no relative rate (% of retail price).

As for electronic cigarettes, which may or may not contain nicotine, the minimum rate should be based only on the volume of liquid and be set at no more than 0.25 €/ml. Implementing a single rate per milliliter would minimise the administrative complexity and the costs associated with tax collection, and reduce incentives for fiscal evasion, compared to an excise with different rates based on nicotine content, as recommended in the Impact Assessment.

The minimum excise rate for nicotine pouches should be no more than €25/kg. This aligns with rates in Sweden, ensuring it will not be forced to increase its excise duty rates on modern oral products, and thus overall preserving the sovereign right of Member States to set excise duties at the rates they consider appropriate, given its domestic public health policy objectives and economic conditions.

The minimum excise for other nicotine products (the residual category) should be based on weight or volume only, and aligned to the minimum excise on e-cigarettes and nicotine pouches to ensure a fair and consistent excise treatment between different product categories; that is, no more than €25/kg or €0.25/ml. No relative rate % should be introduced.

We would also like to emphasise that excise duty, as a tax on consumption, should apply solely to the consumable element of tobacco-related products. Taxing hardware or other product components is inconsistent with the principles of good taxation, since it would: (i) lead to variability in the taxes applied to similar products; (ii) create risks of tax-induced distortions to competition; (iii) discourage innovation; and (iv) create unnecessary complexity for fiscal authorities and manufacturers.

Further to this, the product definitions, tax rates and tax base proposed by the Commission for novel products to be included in the revised Directive require several amendments to ensure legal certainty. In particular, it is important that the product definitions and excise treatment of these products take into consideration their reduced risks compared to combusted products. These amendments should include, *inter alia*, the absence of combustion in the definition of these products and removing the incidence tax base.

3) Fully taking into account existing purchasing power disparities in the EU

A correct comparison of excise burden borne by consumers in Member States needs to be done on a purchasing power parity (PPP) basis, reflecting divergencies in incomes between Member States. Tax policy remains a sovereign issue for individual Member States. It is important that all EU countries retain the ability to tailor excise rates in a way that reflects their specific economic conditions, income levels, and the general price of goods and services.

The Commission has suggested, to reflect differences in economic conditions between Member States, to apply a partial PPP adjustment to the nominal rates in the revised Directive, whereby 2/3 of the minimum excise duty is expressed in nominal terms and 1/3 in PPP terms. This is a wholly arbitrary adjustment that fails to address the excessive burden the proposed increased rates would place on lower-income countries. In our view, PPP should be both applied in full (as opposed to an arbitrary 1/3, which has no scientific basis), and more importantly be applied on an optional basis.

4) Keeping excise exemption and refund in the Directive

The Commission proposed amending article of 26(2)(b) of the Directive by deleting the text “...*manufactured tobacco which is destroyed under administrative supervision...*” from excise exemption or refund in case excise duty is already paid. This text should be reinstated.

Tobacco products might be destroyed due to being unfit for consumption, like rejected or returned goods, or as part of a tax-refund process where excise duty was previously paid. Such destruction is mostly operated by a specialised department within the overall Customs & Excise Administration and is not done haphazardly. It is overseen by an administrative body, ensuring that proper procedures are followed. Using this procedure, the process is controlled, and the tobacco is not diverted for unauthorised use. This is an important provision to ensure smooth and controlled operating conditions as far as the legitimate tobacco industry is concerned.

5) Appropriate rules on EU level to solve the risks of raw tobacco diversion to the illegal circuit

The Commission proposes introducing a formal control on the movement of raw tobacco to address the issue of illicit production of tobacco products within the EU, including the diversion of unmanufactured (‘raw’) tobacco for this illicit production. This would add raw tobacco to the harmonised excise goods whilst imposing conditions linked to the movement and approval of supply chain traders, rather than raising revenue from raw tobacco itself.

We support the need to create a harmonised approach to monitor flows of raw (semi-processed) tobacco within and into the EU, with a view to countering illicit trade. From our perspective, the primary objective of including semi-processed tobacco in TED is to monitor its movement rather than to generate revenue.

Therefore, no minimum rate should be established since this would help minimising the administrative burden for various operators. Implementing a minimum rate would introduce unnecessary complexity and additional administrative requirements for both economic operators and Member States.

In light of the inclusion of raw tobacco under the Excise Movement and Control System (EMCS), it is appropriate to consider whether raw nicotine – as defined in Article 2(4), mainly extracted from tobacco for use in e-cigarette liquids and solid non-tobacco products like nicotine pouches – should also fall within the scope of harmonised excise goods. As noted above for raw tobacco, raw nicotine should be included without imposing a minimum excise rate, but would include monitoring and control requirements under the EMCS system. Given that tobacco leaves would already be subject to EMCS tracking, extending this framework to ‘industrial’ nicotine could help maintaining continuity in monitoring the production chain – from raw tobacco to finished nicotine-containing products. While this measure alone would not eliminate the risk of illicit trade practices, it could contribute to a more coherent and transparent regulatory framework.

6) Explicitly limiting delegated power and deleting equalisation language

We recommend that delegated powers to the Commission, through an amendment to Article 12(5), are either deleted or limited to non-essential elements of the Directive (i.e., inflation adjustments mechanism only), in line with Article 290 of the Treaty on the Functioning of the European Union (TFEU). The delegated authority should be confined to adjusting minimum excise levels based on core inflation (excluding volatile components like energy and food), with a cap of 6–10% over each three-years period. Such an approach mirrors the mechanism foreseen in the Council's pre-alignment Energy Taxation Directive and aims at ensuring economic stability, predictability and proportionality across EU Member States.

Further to this, we consider the Commission's recommendation of future tax equalisation between all products covered by the revised Directive as problematic, and it should be deleted.

Equalisation disregards the distinct characteristics of different products; it potentially stifles innovation and severely limits consumer choice. It also introduces regulatory instability and, considering the parallel draft of the Tobacco Excise Own Resource (TEDOR), the equalisation

mandate can be considered as highly problematic in terms of predictability and budget planning for Member States.

From a procedural perspective, the proposal raises concerns as it delegates to the Commission a broad and generically defined power to influence the relative tax treatment of product categories, a power that go beyond simple "non-essential elements" of a legal act; the same power would exclude the direct intervention of the Council that, according to Article 113 TFEU, is unanimously responsible for the harmonization of taxation rules. This approach risks circumventing the unanimity requirement of Article 113 TFEU. In fact, taxation decisions should be reserved for national governments, which possess the authority to levy taxes on various products in alignment with their respective national policies, priorities and strategies. We thus recommend the deletion of Recital 36 and Article 28(4) from the Directive, since these exceed the scope of Article 113 of the TFEU and undermine the principles of national sovereignty, subsidiarity and proportionality.

We urge policy makers to ensure that the Directive respects the flexibility for Member States to tailor excise policies according to their national contexts and priorities.

7) Due process concerns

In order to achieve balanced, effective and proportionate regulations, grounded in evidence, we support and expect EU decision-makers to enable and promote inclusive, open and transparent dialogue with stakeholders, in line with the European Commission's Better Regulation principles.

We note that the opportunity to provide input to the Commission's Public Consultation has been delayed for seven weeks after the publication of the proposal itself.

Further to this, it is lamentable that the publication of the Impact Assessment was delayed, which is contrary to what is laid down in Guidelines: the delay has reduced the time that was made available to Member States as well as to all stakeholders to thoroughly assess the proposal itself and prepare well-informed positions on the Commission's proposal. This approach makes the process and the dialogue less inclusive, open and transparent and ultimately, result in regulations that are less balanced, less effective, more disproportionate and less evidence based. On the merit, we also consider that some of the arguments presented in the Impact Assessment, for instance on the relationship between illicit trade and cross-border sales, have not been properly grounded in evidence and could therefore be misleading. Some of the arguments presented in the Impact Assessment, for instance on the relationship between illicit trade and cross-border sales, have not been properly grounded in evidence and could therefore be misleading.