

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM(2008) 459/2

2008/xxxx (CNS)

Proposal for a

COUNCIL DIRECTIVE

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

(presented by the Commission)

{SEC(2008) 2266}

{SEC(2008) 2267}

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

Under Article 4 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes¹ and Article 4 of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes² the European Commission is required to examine every four years the smooth operation of the single market, the real value of excise-duty rates and the wider objectives of the Treaty. This examination is supposed to extend to relevant provisions of Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco³. Given the characteristics of manufactured tobacco products, particular attention needs to be paid to health policy considerations.

This proposal for a Directive suggests a number of important amendments to existing Community legislation in order to modernise and simplify the existing rules, make them more transparent and better integrate public health concerns. In addition, this proposal deals with the alignment of excise duties for fine-cut smoking tobacco ("roll-your-own") with excise duties for cigarettes.

The proposed amendments are the result of an in-depth examination conducted by the Commission. The conclusions of this examination are set out in the attached Commission report.

- **General context**

As stated above, Article 4 of Directives 92/79/EEC and 92/80/EEC stipulates that the rates and structure of excise duty are to be reviewed every four years.

In accordance with this provision, in September 1995 the Commission presented its *first report*⁴. This report noted that, in general, little approximation had taken place, but concluded that more detailed analysis and consultation with interested parties was necessary before final decisions were taken on modifying the legislation.

The *second report*, presented by the Commission in May 1998⁵, suggested that only a few technical amendments to existing Community legislation were necessary and concluded that the structures and rates of excise duty could remain unchanged. The report was accompanied by a proposal for a Directive amending the existing tobacco legislation to incorporate the recommended technical adjustments. The proposal was adopted by the Council on 29 July 1999 as Directive 1999/81/EC. However, the Commission was asked by a large number of Member States, in a statement entered in the Council minutes, to consider a more fundamental review of the rates and structures of excise duties on tobacco products.

¹ OJ L 316, 31.10.1992, p.8 last amended by Directive 2002/10/EC (OJ L 046, 16.02.2002, p.26)

² OJ L 316, 31.10.1992, p.10 last amended by Directive 2002/10/EC (OJ L 046, 16.02.2002, p.26)

³ OJ L 291, 6.12.1995, p. 40, last amended by Directive 2002/10/EC (OJ L 046, 16.02.2002, p.26)

⁴ COM(95)285 final, 13/09/1995.

⁵ COM(98)320 final, 15.05.1998

In March 2001, the Commission presented its *third report*⁶. The report was accompanied by a proposal for a Directive introducing significant revisions. For cigarettes, the Commission proposed a minimum fixed amount of excise duty of €70 per 1000 cigarettes in the MPPC, in addition to the existing minimum requirement of 57%, so as to ensure greater approximation of tax levels between Member States. The Commission proposal also provided for taxation similar to that of cigarettes for competing tobacco products such as fine-cut tobacco. The proposal was adopted by the Council on 12 February 2002 as Directive 2002/10/EC. However the Council only agreed on €64 as minimum fixed amount introduced, and did not align the minimum rates for fine-cut tobacco with the minimum rates for cigarettes. In this context, the Commission, upon request of a number of Member States, made the following statement to the Council minutes on Directive 2002/10/EC: *"The Commission states that, in its next review report provided for under Article 4 of Directive 92/79/EEC and Directive 92/80/EEC, it will present sufficient elements in order to proceed to an overall review of the possibility to bring the structure of excise duties for fine-cut smoking tobacco into line with the structure of excise duties for cigarettes"*.

The current review is the fourth one and suggests again a number of significant amendments to existing Community legislation in order to modernise the existing rules and ensure a level playing field for the operators. In addition, the public health protection is a crucial issue in this review given that the European Community became party , on 30 June 2005, to the WHO framework convention on tobacco control and that several Member States demand that a higher level of human health protection and consequently higher European minima for excise duties on tobacco. Finally, given the aforementioned Commission statement, this proposal deals with the alignment of excise duties for fine-cut smoking tobacco ("roll-your-own") with excise duties for cigarettes.

- **Existing provisions in the area of the proposal**

The current provisions are laid down in Directives 92/79/EEC, 92/80/EEC and 95/59/EC.

These arrangements were introduced on 1 January 1993. They are the outcome of discussions which started in 1985 with the White Paper on completing the internal market, in which the Commission proposed full harmonisation of excise duties on manufactured tobacco. However, the Council chose not to take this approach and harmonisation extended only to taxation structures and to minimum rates.

- **Consistency with the other policies and objectives of the Union**

This proposal is in line with the main policies and objectives of the Union.

Article 152 of the Treaty provides that a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities. Given the characteristics of manufactured tobacco products, particular attention has therefore been paid to the relationship between public health and the final price of the products, taking stock of the WHO Framework Convention on Tobacco Control.

⁶ COM(2001)133 final, 14.03.2001

Smoking is still the biggest single form of avoidable death in the Community and one of the leading causes of morbidity and mortality in the EU, with about 650,000 smoking-related deaths per year in the Community.

Taxation forms part of an overall strategy of prevention and dissuasion which also includes other reduction demand measures such as non-price measures, protection from exposure to tobacco smoke, regulation of the contents, etc. However, according to the World Bank price increases of tobacco products are the most effective single intervention to prevent smoking. A price increase of 10 % decreases consumption on average by about 4% in high income countries among adults. Importantly, the impact of higher prices is likely to be greatest on young people, who are more responsive to price rises than older people.

This proposal suggests the setting of a monetary minimum duty and establishing a tax "floor" for all cigarettes sold in the EU allowing to address health concerns for all categories of cigarettes. It increases the minimum requirements in order to contribute to a reduction in tobacco consumption over the forthcoming five years, notably by preventing that Member States' tobacco control policies be undermined by considerably lower levels in other Member States. In addition the proposal allows Member States greater flexibility to apply specific duties and to levy minimum excise duties on cigarettes in order to achieve health objectives. Finally it brings the minimum rates and structure for fine-cut tobacco intended for the rolling of cigarettes into line with the rate and structure for cigarettes in order to discourage substitution of cigarettes by fine cut.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

• Consultation of interested parties

A broad consultation process preceded this report. The Commission services requested the taxation authorities of the Member States to give their views on a possible overall review of excise rates and structures for tobacco products on the basis of a questionnaire. The replies were used as a basis for subsequent bilateral discussions between the national administrations and the Commission departments concerned. Associations and other stakeholders (trade, health, etc.) were also invited to submit position papers via a public web-consultation. Collection and use of expertise

Beyond the comprehensive consultation of interested parties,, position papers and articles have been taken into account in the impact assessment.

• Impact assessment

The Commission services made an impact assessment focusing on potential measures that could modernise or add more transparency to the structure of excise duties on tobacco products. In addition, particular attention was paid to the relationship between public health and the final price of the products, taking stock of the WHO Framework Convention on Tobacco Control, as well as to the options to bring the structure and the rates of excise duties for fine-cut smoking tobacco ("roll-your-own"), into line with excise duties for cigarettes.

In order to examine how the different objectives for tobacco taxation could be addressed, the Commission assessed four basic approaches.

The first approach consists of **not intervening** further at Community level (the no policy change option). This approach will not solve the problem of distortions of cross-border shopping and smuggling currently existing on the tobacco market, which has consequences in terms of revenue and health protection. It will not resolve the fiscal instability and distortions of competition which are currently created by the most popular price category (MPPC) concept. It will also not address the problem of substitution and tax induced distortions of competition between the different products of manufactured tobacco. It was therefore not an option that the Commission chose to pursue.

The second approach option consists of **changing only the structure of excise duties on cigarettes**. In order to resolve the fiscal instability and distortions of competition which are currently created by the MPPC concept, the Impact assessment examines abolishing the concept of the MPPC as benchmark for minimum requirements. Instead, EU minimum requirements could either apply to all cigarettes or apply in accordance with weighted average prices (WAP). Simultaneously the impact is assessed of providing more flexibility to Member States as concerns the structure of the excise duties at national level.

In general this approach would only have a minor impact on the tobacco markets and on Member States' revenues. Neither a 57% rule on all cigarettes or on WAP would entail an increase of administrative costs for any of the stakeholders. Both options would simplify the arrangements as compared to the current situation. However only applying the minimum of €64 on all cigarettes would create a tax floor for all cigarettes in the EU. It would also reduce the tax and price gap between Member States more than the other options and, to an appreciable extent, integrate public health concerns. Therefore this option gets priority from an internal market and a health point of view. On the other hand, applying the 57% rule on all cigarettes would for a number of Member States result in a compulsory ad valorem duty and not be in line with the objective to provide more flexibility to Member States as concerns the relation specific and ad-valorem duties. Therefore applying the 57% rule on WAP is the favoured option.

The second approach would, however, not sufficiently take account of health considerations.

The third approach consists of **changing minimum rates of excise duties on cigarettes** in addition to the structure. The Impact assessment simulated increases of the minimum rates of excise duties on cigarettes, either the 57% and/or the minimum of €64 per 1000 cigarettes in the sub-options. Again an increase of the monetary minimum is the best instrument to achieve approximation of taxes and prices of cigarettes in the EU in the interest of the Internal market and with a view to tobacco control. An increase of the 57% rule would require an update of the escape clause, which is currently set at €101. An update to €122 would keep pace with the recent evolution of excise duties on cigarettes in the Internal Market and would have the same effect as in 2001, namely cover the five highest taxing Member States.

In view of the above, the Commission has considered a number of possible increases.

An increase to €90 on all cigarettes and 63% on WAP would trigger a probable decrease of demand of on average 10% in 22 Member States. In addition it would pave the way for further increases of excise duties on cigarettes, also by those Member States which already have a high level of taxation. Apart from BG and RO it would not render prices over expensive as compared to the local purchasing power in the Member States.

All in all, in the field of cigarettes, this approach appears best suited to ensure the proper functioning of the Internal Market and, at the same time, a high level of health protection.

The fourth approach consists of **changing the structures and minimum rates of excise duties on other products**, in particular fine-cut tobacco, in order to avoid substitution of cigarettes by less taxed tobacco products.

The substantial differences in tax levels among Member States on fine-cut tobacco entail smuggling and cross border shopping between a number of neighbouring countries and give rise to distortions in the internal market. In addition, the gap between the level of taxation of cigarettes and fine-cut tobacco gives rise to substitution. There is little justification for significant differences in the minimum rates for these products at Community level. This applies both in a perspective of fair competition and, given the harmful character of both products, from a health point of view. Therefore the minimum rates for fine-cut tobacco intended for the rolling of cigarettes should be brought into line with the rate for cigarettes.

For fine-cut Member States may choose between complying with a monetary or an *ad valorem* minimum rate. However since the monetary minimum requirement is the best approximating factor, there should be (in addition to the *ad valorem* minimum rate) a compulsory monetary minimum rate for all Member States, as for cigarettes.

Taking account of the specific characteristics of fine cut tobacco, it is reasonable that the minimum excise for fine-cut tobacco could be fixed at about two thirds of the minimum excise incidence for cigarettes. In order to respect a two thirds relationship between fine-cut and cigarettes, the monetary minimum requirement should be fixed at €43 per kilogram and the proportional minimum requirement at 38%.

Applying the aforementioned 2:3 relationship on the suggested increases for cigarettes, would increase the minimum rates for fine cut to €60 and 42% over a period of five years.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The Commission proposes:

- *to abolish the MPPC as a reference point for EU minimum requirements on excise duties and for measuring the importance of of specific excise duty within the total tax burden*

The MPPC, as benchmark for minimum rates, is not in line with Internal Market objectives as it entails a partition of the tobacco markets of the Member States. Moreover, abolishing the MPPC would significantly simplify the arrangements, create a level playing field for manufactures and underscore health objectives. Instead it is proposed that the minimum requirement of €64 will be applied to all cigarettes which would make the existing situation more transparent and establish a "tax floor" for cigarettes sold in the EU, addressing Internal Market and health concerns for all categories of cigarettes. Simultaneously it is proposed that weighted average prices would be the benchmark for the other minimum requirements. This would resolve the fiscal instability that is created by the MPPC concept and it would provide a fair and neutral competitive environment for tobacco manufacturers.

For similar reasons, the MPPC should no longer be a benchmark for measuring the importance of specific excise duty within the total tax burden (Article 16(2) of Directive 95/59/EC). The reference should be the WAP instead.

- *to increase gradually the minimum requirement for cigarettes in line with internal market objectives and health considerations*

Greater convergence is needed in order to ensure the proper functioning of the Internal Market. Indeed, there are still considerable differences between tax levels in the various Member States. In order to reach this objective, the minimum tax levels need to be increased.

The consumption of cigarettes in the EU decreased during the period 2002-2006 by slightly more than 10%. Over the same period the excise duties on cigarettes increased on average by ca. 33%. In order to trigger a similar decline in consumption over the coming 5 years further increases in excise duties would be desirable. Taking into account a price elasticity of -0.43 as suggested by the World Bank, a 25% price increase is needed to achieve a 10% reduction in demand. From a health perspective an increase to €90 on all cigarettes and 63% on WAP would trigger a probable decrease of demand of on average 10% in 22 Member States, in particular through protecting the results of policies conducted by Member States in the field of taxation. In addition it would pave the way for further increases of excise duties on cigarettes, also by those Member States which already have a high level of taxation.

These increases should be gradually introduced over a period of 5 years, namely by 31 December 2013 at the latest. In order to take into account that the current transitional periods, granted under the Acts of Accession, have not expired yet for a number of Member States, the transposition period is prolonged for those Member States with 1 or 2 years depending on the current remaining transitional periods.

- *to allow Member States greater flexibility to apply specific duties and to levy minimum excise duties on cigarettes;*

As stated in the Commission report, from an internal market, budgetary as well as a health point of view, specific and minimum duties have clear advantages and more flexibility could be provided to those Member States that place greater reliance on specific excise duties or on minimum duties.

However, in order to avoid a situation of purely specific taxation in one Member State and purely ad valorem taxation in a neighbouring Member State, which would result in cross border flow for premium brands from the first to the second Member State with bottom priced brands flowing in the opposite direction, some consistency of excise tax structures remains desirable. Therefore it is proposed to widen the band from 5% - 55% to 10% - 75% of the total tax burden.

As concerns minimum excise duties, Member States are allowed greater flexibility by not longer restricting the level of the minimum tax to the excise due on the MPPC, as is currently the case for other tobacco products.

- *to bring gradually the minimum rates for fine-cut tobacco intended for the rolling of cigarettes into line with the rate for cigarettes;*

In line with the structure of minimum rates on cigarettes, it is proposed to introduce a compulsory monetary and ad-valorem minimum requirement for fine-cut tobacco. In order to respect a two thirds relationship between fine-cut and cigarettes, the monetary minimum requirement should be fixed at €43 per kilogram and the proportional minimum requirement at 38%.

Applying the aforementioned 2:3 relationship on the proposed increases for cigarettes, would increase the minimum rates for fine cut to €60 and 42%.

- *to adjust for inflation the minimum requirements for tobacco products other than cigarettes and fine-cut tobacco intended for the rolling of cigarettes.*

An adjustment of the specific excise duty for cigars and cigarillos and for smoking tobacco (other than fine-cut tobacco intended for the rolling of cigarettes) is needed to take account of inflation for the period 2003 to 2007. On the basis of Eurostat data on the annual rate of change of the HICP (Harmonised Index of Consumer Prices) between 2003 and 2007, the rate of inflation can be estimated at around 2% a year or at 8% over the period as a whole. Applying this percentage to the minimum specific amounts and rounding up to the nearest unit gives €12 for cigars and cigarillos and €22 for other smoking tobacco.

- *to amend the existing definition of cigarettes, cigars and other smoking tobacco.*

- *amending the definition of cigarettes*

A roll of tobacco is, for excise duty purposes, considered as two cigarettes where, excluding filter or mouth piece, it is longer than 9 cm but not longer than 18 cm, or three cigarettes where, excluding filter or mouthpiece, it is longer than 18 cm but not longer than 27 cm, and so on. In order to reduce the excise duties on cigarettes, new products have been marketed, consisting of rolls of 18 cm and separate filter tubes. The rolls are subsequently cut into three pieces and inserted in the filter tubes. Consequently three cigarettes are taxed as two. In order to stop this trend, a roll of tobacco should be considered as two cigarettes when, excluding filter or mouth piece, it is longer than 9 cm but not longer than 12 cm, as three cigarettes when it is longer than 12 cm but not longer than 15 cm, and so on

- *amending the definition of cigars*

Several Member States and the trade have reported that new products have appeared which are marketed as cigars - they have the colour of a cigar or cigarillo, rather than the white colour of a cigarette – but in terms of function, taste and presentation must be regarded as cigarette substitutes. Therefore it is preferable to remove the relevant provision (Article 3 point 3 of Directive 95/59/EC) completely from the current cigar definition. Such an amendment would ensure uniform taxation of these products and restrict application of the lower minimum rate to traditional cigars and cigarillos.

- *amending the definition of pipe-tobacco*

The definition of smoking tobacco should be adapted in order to better differentiate between pipe and fine-cut tobacco and to avoid inappropriate taxation. It is proposed to increase the minimum cut-width for pipe tobacco from the current 1 mm to 1,5 mm.

- *monitoring the arrangements for tobacco taxation*

Article 4 of Directives 92/79/EEC and 92/80/EEC stipulates that the Commission shall regularly examine the structure and rates of excise duty. However in order to carry out this examination, the Commission needs information on the quantities and prices of the tobacco products released for consumption in the Member States. In order to ensure an efficient and effective collection of this information from all Member States, new rules are proposed regarding the provision of information on tobacco taxation, as well as the definition of the necessary statistical data.

- **Legal basis**

Treaty establishing the European Community, and in particular Article 93 thereof.

- **Subsidiarity principle**

The proposal falls under shared Community and Member State competence. Therefore, the subsidiarity principle applies.

Although the existence of the current EU minimum rates limits the divergences in national excise duty rates on tobacco products, it has not been sufficient to prevent the persistence of significant divergences, despite the increasing attention paid by Member States to the achievement of health objectives in this field. These divergences entail substantial cross border shopping and smuggling, which creates distortions of competition in the tobacco market, leads to losses in budgetary resources for those Member States applying a relatively high excise duty and moreover undermines the health policy objectives.

No EU action would be detrimental since tax policy interaction among Member States has not led to a reduction in divergences. Therefore only a change of the existing provisions, as explained above, is capable of remedying the existing situation. Such a change can only be operated by the Community legislator himself, author of the Directives to be amended.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

The objectives of the current review are best achieved by amending the current Directives to the effect explained above. .

The proposal consists notably in increasing the minimum rates in order to ensure the proper functioning of the Internal Market without fiscal borders and to safeguard Member States health objectives. Above the minima, Member States retain sovereignty to set excise duty rates at levels they consider appropriate according to their own national circumstances. Simultaneously, this proposal allows Member States greater flexibility to determine the structure of the excise duties and to levy minimum excise duties on cigarettes.

The proposal is thus limited to what is necessary in order to achieve the objectives of the Treaty.

- **Choice of instruments**

Proposed instruments: Directive. In this area already covered by a series of Directives, Member State should continue to retain an important margin of flexibility, as explained above. Other means than amending Directives would thus be inadequate.

4) **BUDGETARY IMPLICATIONS**

The adoption of the proposal could in theory have an impact on the calculation of the VAT own resource. However the implication will be insignificant and in any case, not measurable.

Proposal for a

COUNCIL DIRECTIVE

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission⁷,

Having regard to the opinion of the European Parliament⁸,

Having regard to the opinion of the European Economic and Social Committee⁹,

Whereas:

- (1) In accordance with Article 4 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes¹⁰ and Article 4 of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes¹¹ 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 tobacco¹².
- (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 152 of the EC Treaty, bearing in mind that the Community is Party to the World Health Organization's Framework Convention on Tobacco Control (FCTC), different changes should be made in the matter. 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 manufactures, to reduce the partitioning of the tobacco

⁷ OJ C , , p. .

⁸ OJ C , , p. .

⁹ OJ C , , p. .

¹⁰ OJ L 316, 31.10.1992, p.8; Directive as last amended by Directive 2003/117/EC (OJ L 333, 20.12.2003, p.49).

¹¹ OJ L 316, 31.10.1992, p10; Directive as last amended by Directive 2003/117/EC

¹² OJ L 291, 06.12.1995, p. 40 Directive as last amended by Directive 2002/10/EC (OJ L 46, 16.02.2002, p.26).

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 similar 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) Member States should be given more effective means to levy specific or minimum excise duty on cigarettes, so as to ensure a minimum monetary amount of taxation.
- (5) As regards fine-cut tobacco intended for the rolling of cigarettes, the Community minima should be expressed in such a way as to obtain effects similar to those in the field of cigarettes. To this end, it should be provided that national levels of taxation have to comply both with a minimum expressed as percentage of the retail price and one expressed as a fixed amount.
- (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 between the tax levels applied in the Member States would help reduce fraud and smuggling within the Community.
- (7) Greater convergence would also help to ensure a high level of human health protection. The level of taxation is a major factor in the price of tobacco products, which in turn influences consumers' smoking habits. Fraud and smuggling undermine tax induced price levels of cigarettes and fine-cut tobacco intended for the rolling of cigarettes and thus jeopardise the achievement of tobacco control objectives.
- (8) In order to achieve greater convergence and to reduce consumption, the Community minimum levels of taxation for cigarettes and fine-cut tobacco intended for the rolling of cigarettes should be increased.
- (9) Before that increase, 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) 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; and 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.
- (11) In order to avoid a fall in the value of the Community 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.

- (12) Directives 92/79/EEC, 92/80/EEC and 95/59/EC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 92/79/EEC is amended as follows:

- (1) Article 2 is replaced by the following:

“Article 2

1. Member States shall ensure that excise duty (specific duty and ad valorem duty) on cigarettes represents at least 57 % of the weighted average retail selling price of cigarettes sold. That excise duty shall not be less than EUR 64 per 1 000 cigarettes irrespective of the weighted average retail selling price.

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. As from 1 January 2014, Member States shall ensure that excise duty (specific duty and ad valorem duty) on cigarettes represents at least 63 % of the weighted average retail selling price of cigarettes sold. 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 122 per 1 000 cigarettes on the basis of the weighted average retail selling price need not comply with the 63% requirement set out in the first subparagraph.

3. The weighted average retail selling price shall be determined at 1 January of each year, by reference to the year n-1, on the basis of the total releases for consumption, and prices including all taxes.

4. By way of derogation from paragraph 2 the second and third subparagraphs of this paragraph shall apply.

Poland, Hungary and Slovakia shall be authorised to bring into force the provisions necessary to comply with paragraph 2 by 31 December 2014 at the latest; they shall apply those provisions from 1 January 2015.

Romania, Bulgaria, Lithuania, Estonia and Latvia shall be authorised to bring into force the provisions necessary to comply with paragraph 2 by 31 December 2015 at the latest; they shall apply those provisions from 1 January 2016.

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

6. The Commission shall publish once a year the value of the euro in national currencies to be applied to the amounts of the overall minimum 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 as from 1 January of the following calendar year.”

(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 excise duty below the levels specified in paragraphs 1 and 2 of Article 2 respectively, the Member State concerned may refrain from adjusting that duty until no later than 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 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 excise duty to below the levels, expressed as a percentage of the weighted average retail selling price, laid down in 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 no later than 1 January of the second year after that in which the reduction took place.”

(3) Article 4 is replaced by the following:

“Article 4

1. Every four years, the Commission shall submit to the Council a report and, where appropriate, a proposal concerning the rates of duty laid down herein and the structure of excise duties as defined by Article 16 of Council Directive 95/59/EC*.

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 Member States shall communicate to the Commission any available information relevant for the report referred to in paragraph 1.

3. The Commission shall, in accordance with the procedure referred to in Article 24(2) of Council Directive 92/12/EEC**, determine a list of statistical data needed for the report.

* OJ L 291, 06.12.1995, p.40.

** OJ L 76, 23.03.1992, p. 1.”

Article 2

Directive 92/80/EEC is amended as follows:

(1) In Article 3(1) the following eighth to eleventh subparagraphs are added:

“As from 1 January 2010, Member States shall apply an excise duty on fine-cut smoking tobacco intended for the rolling of cigarettes of at least 38% of the retail selling price inclusive of all taxes, and at least EUR 43 per kilogram.

As from 1 January 2014, Member States shall apply an excise duty on fine-cut smoking tobacco intended for the rolling of cigarettes of at least 42% of the retail selling price inclusive of all taxes, and at least EUR 60 per kilogram.

Member States shall gradually increase excise duties in order to reach the new minimum requirements referred to in the ninth subparagraph on 1 January 2014.

As from 1 January 2010, the 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 4 is replaced by the following:

“Article 4

1. Every four years, the Commission shall submit to the Council a report and, where appropriate, a proposal concerning the rates of duty laid down herein.

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 Member States shall communicate to the Commission any available information relevant for the report.
- 3. The Commission shall, in accordance with the procedure referred to in Article 24(2) of Council Directive 92/12/EEC*, determine a list of statistical data needed for the report.

* OJ L 76, 23. 3. 1992, p. 1.”

(3) 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 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 amended as follows:

(1) Article 3 is replaced by the following:

"Article 3

The following shall be deemed to be cigars or cigarillos if they can and, given their properties and normal consumer expectations, are 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 mouth-piece, is not less than 2.3 g and the circumference over at least one third of the length is not less than 34 mm.”

(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 mouth piece, it is longer than 9 cm but not longer than 12 cm, as three cigarettes where, excluding filter or mouthpiece, it is longer than 12 cm but not longer than 15 cm, and so on."

(3) Article 6 is amended as follows:

- (a) in the first paragraph the term "1 millimetre" is replaced by the term "1,5 millimetre";
- (b) in the second paragraph the term "1 millimetre" is replaced by the term "1,5 millimetre";

(4) 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.”

(5) Article 16 is replaced by the following:

“Article 16

1. The specific component of the excise duty may not be less than 10% and more than 75% 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 .

The average weighted retail selling price shall be determined at 1 January of each year, by reference to the year n-1, on the basis of the total releases for consumption, and prices including all taxes.

2. By way of derogation from paragraph 1, 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 10% or above 75% of the total tax burden, the Member State concerned may refrain from adjusting the amount of the specific excise duty until not later than 1 January of the second year following that in which the change occurs.

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

4. Member States may levy a minimum excise duty on cigarettes.”

(6) Article 17 is deleted.

Article 4

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2009 at the latest. They shall forthwith inform the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

Article 5

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

Article 6

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President