

Brussels, 6 May 2019

To: [REDACTED]
European Commission - DG TAXUD, Unit C2
SPA3, Rue de Spa, 3 1049 Brussels

Cc: [REDACTED]

Subject: Proposal for a Council Directive laying down the general arrangements for excise duty (recast) - 2018/0176 (CNS)

Dear [REDACTED]

Between the proposal of the Commission for a Council Directive laying down the general arrangements for excise duty (recast) 2008/118/EC issued on the 25th of May 2018 and the ECOFIN meeting discussing the proposal on 12th of March, an important change was introduced to Article 8 (current Article 9).

The new paragraph added at the end of article 8 reads as follows:

"When excise duty rates are changed, stocks of excise goods already released for consumption may be subject, where appropriate, to an increase in, or a reduction of, the excise duty."

CECCM would like to raise its concerns with the new paragraph:

1. The measure contradicts other provisions in the directive, is disproportionate, increases the administrative burden on customs authorities and economic operators, and creates legal uncertainty
 2. The proposed amendment has not been through an impact assessment nor has it been drafted in a legally certain manner¹
 3. Anti-forestalling measures are already permitted and utilised: additional changes in the legislation is dispensable
1. The measure directly contradicts other provisions in the Directive, is disproportionate, increases the administrative burden on Member States' authorities and economic operators, and creates legal uncertainty
 - The measure is disproportionate as it applies to all products released for consumption before the excise change and not only to those that may have been presumably released in excessive quantities and hence could be subject to forestalling. In Member States where the price is printed on the pack or banderole, it would mean that the product should be sold at the price indicated on the pack or banderole with the additional excise to be paid by the economic operator. This is not conducive with the basic principle of an excise tax: which is an indirect tax on the consumption of certain goods, like VAT.

¹ See, to this effect, Principle 1 in the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, p. 10, available at: <https://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

The implication of returning stock already released for consumption is doubly problematic. Firstly, as the goods have been released for consumption, Member States may decide not to refund the excise paid on these products and secondly, it causes a disruption of the supply chain and increases the administrative burden for all involved operators (manufacturers, wholesalers and retailers). This again demonstrates the disproportionality of the measure. Considering the large number of economic operators involved, the enforceability of this measure is highly questionable.

- The aim of the Directive laying down the general arrangements for excise duty is to create uniform conditions of chargeability and the application of the basic requirement of chargeability, namely that excise duties are charged at the time of release for consumption.

Recital 7: "Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States,

it is necessary to make clear at Union level when excise goods are released for consumption and who is liable to pay the excise duty."

- o The amendment contradicts Article 6:

Article 6 determines when the taxable event takes place: it is at the time and in the Member State of release for consumption. Not before, not after but at a fixed point in time. Article 6 also provides details of what 'release for consumption' means. This makes it clear which rate is applied to those products released for consumption at a given point in time. The amendment introduced in Article 8 makes the content of Article 6 entirely redundant, as it determines that the taxable event could now be at any point in time to coincide with a Member State changing the excise rate. Not only is the chargeable event now uncertain, the amount of excise due is also uncertain through the amendment in article 8. A slow-moving product can, as a result, be subject to excise several times over, which goes against the concept of the excise tax that must be paid only once and the Directive does not foresee any possibility of an additional taxing event.

- o The amendment also contradicts articles 7:

Article 7 determines clearly who is liable to pay the excise. In case of regular movements, it is the authorised warehouse keeper, the registered consignee, or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement. Usually, these are manufacturers or importers. With the new amendment, any operator could be liable to pay the additional excise, even wholesalers or retailers.

2. The proposed amendment has not been through an impact assessment nor has it been drafted in a legally certain manner

To avoid discrimination, disproportionate impacts on operators and unforeseen violations of the law, EU law-making requires a proper impact assessment: before measures are proposed, the impact on the various players must be considered². An impact assessment would also address whether the proposed new text is viable and would also allow the legislator to determine appropriate safeguards (i.e. specific requirements that should be established in the Directive to safeguard against action by Member States that would be inconsistent with EU law). In the case

² See, to this effect, Article 15 of the Interinstitutional agreement on better law-making of 13 April 2016, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)&from=EN).

of the proposed amendment, there has been no impact assessment. It is unlikely, considering the late introduction of the amendment, that a full legal assessment has been undertaken. The

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amendment contradicts the previous 2 paragraphs of the same article and provides no legal certainty.

Even if the amendment as proposed is only optional for Member States to apply, the comments above remain valid.

3. No need for change to legislation: anti-forestalling measures are already permitted and in force

The amendment is intended as a measure against forestalling practices. Forestalling occurs when manufacturers/importers of products, in anticipation of a tax rise, increase the levels of stocks released for consumption to benefit from the previous excise rate. Member States trying to avoid this practice from happening already have a number of legal options available to them. In Case C- 126/15 *Commission v Portugal*, the General Court held that a combination of (i) a cap on sales in the last quarter of a calendar year with (ii) a prohibition on the sales of stock with a tax stamp from the previous year past March of the following year, complies with the Directive as well as with the principle of proportionality.

The type of measures described above should be considered as sufficient to tackle the forestalling practices by manufacturers/importers.

We thank you in advance for your attention on the above and we remain at your disposal should you need further information.

Yours sincerely,

