

## Revising the definition of Smoking Tobacco in Directive 2011/64/EU

### A. Why revising the definition of Smoking Tobacco (Art. 5 of Directive 2011/64/EU)?

Since the Ruling on the Eko-Tabak Case (C-638/15) in 2017, EU Member States have diverging interpretations of Article 5(1)(a) of Directive 2011/64/EU. This results in many forms of unmanufactured tobacco being treated as excisable products in certain Member States and not in others. Such a **non-harmonised fiscal treatment** creates obstacles to the free movement of goods and impedes the smooth functioning of the EMCS for excisable goods while increasing the burden on all economic operators, and especially smaller and mid-sized companies.

The definition of smoking tobacco must ensure a **harmonised application** of the Directive throughout the Union and provide **legal certainty** for both tax authorities and economic operators whilst allowing for **effective enforcement** by the Member States. Excise duties are **indirect taxes** and, therefore, in principle, are only applicable to products **intended for sale to the consumer** (to be distinguished from raw materials intended for further manufacturing). The definition of smoking tobacco, therefore, must enable Member States to **levy excise duties on any tobacco product which is made available to the final consumer** (regardless of its characteristics) and avoid undue excise duties on unmanufactured raw tobacco intended for further manufacturing.

### B. How the definition of Smoking Tobacco can be improved?

1. Amending Article 5(1)(a) to use the **“put up for retail”** clause (which already exists in Art. 5(1)(b)) as an additional **cumulative condition** for a tobacco product to be classified as smoking tobacco. This amendment would clarify that:
  - When made available to the consumer, any tobacco must be treated as smoking tobacco and therefore subject to excise duties, regardless of its physical characteristics or ingredients;
  - Raw/unmanufactured tobacco, when used exclusively for further manufacturing, would not be subject to excise duties.
2. Introducing a new subparagraph Article 5(3) that further clarifies the “put up for retail” clause and **defines the conditions** under which a tobacco product can be considered as put up for retail. This definition would clarify that:
  - Tobacco products, when proven to be **at the disposal of a legitimate and authorised operator in the supply chain**, shall not be considered as put up for retail, and therefore, shall not be considered as smoking tobacco.

However,

- Member States' authorities have the discretion to determine whether a tobacco product is put up for retail, based on the product's presentation (when tobacco is prepared, conditioned and intended for sale).

ESTA believes this amended definition will allow for a **harmonised application of the Directive** throughout the Union, and therefore a harmonised application of the EMCS, avoiding unnecessary administrative burden.

It will also provide **legal certainty** to tax authorities and all economic operators in the supply chain, ensuring that products used for further manufacturing are not considered as excisable products.

Finally, it will ensure **flexibility for the Member States' authorities** to levy excise duties on tobacco products, when there is confidence that the products are destined to be sold to the consumer.

