

## Position for the Study assessing articles 32 and 36 of the “Horizontal Directive” (2008/118/EC).

### Summary

- The current wording of Article 32 and the additional Commission’s explanatory statement already give Member States the flexibility and legal clarity they need to effectively enforce this regulation;
- The ‘Horizontal Directive’ does not provide for further product regulations or sales restriction, but only sets out technicalities for handling these products. Public Health objectives are already addressed via the ‘vertical’ Directives (e.g. 2011/64/EU) as well as Directive 2014/40/EU;
- The tobacco industry has recently implemented an unprecedented Tracking & Tracing system, which provide national authorities with an efficient monitoring system;
- Non-domestic duty-paid consumption of tobacco products is best addressed by implementing smart taxation policies.

### Introduction

The Council is deciding on a recast<sup>1</sup> of the “Horizontal Directive” (2008/118/EC), while in the meantime, the European Commission (DG TAXUD) has commissioned a study to assess whether articles 32 and 36, respectively on cross-border purchases of excise goods by private individuals and distance-selling of excise goods, can have a potential negative impact on public health.

To the best of their knowledge, ESTA and Tobacco Europe are not aware of any negative impact on public health resulting from Directive 2008/118/EC, including its articles 32 and 36. Although manufactured tobacco is associated with health risks, the Horizontal Directive only sets out the technicalities of handling and moving excise goods across the EU. It does not interfere with existing product regulation. The products, manufacturing and sale, and taxation levels are already covered by other European and national legislation, ensuring the public health objective is met (e.g. EU large and harmonised combined health warnings across the Union). The general arrangements are necessary common rules to facilitate cross-border trade as tax controls at the borders have been abolished with the establishment of the Single Market, in 1993. It should therefore be very clear that general arrangements are not to be tinkered with to address any purported negative effect resulting from diversity in tax levels.

This study should take into account that Directive 2008/118/EC is legally based on Article 113 TFEU which enables Member States to unanimously *“adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the*

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<sup>1</sup> European Commission, Proposal for a Council Directive laying down the general arrangements for excise duty (recast) - COM/2018/346 final, 25 May 2018.

establishment and the functioning of the internal market and to avoid distortion of competition<sup>2</sup>. We recall that no regulatory failures associated with article 32 were identified or addressed in the REFIT Evaluation nor are mentioned in the Commission's report to the Council and European Parliament on the implementation of the Directive<sup>3</sup>.

## Article 36 - Distance Selling

Article 36 sets out the administrative procedures and charging conditions for distance selling, and the current discussion on a potential one-stop-shop for excise goods aims solely at simplifying those procedures where possible. This cannot have any negative impact on public health. Directive 2014/40/EU<sup>4</sup> sets clear requirements and conditions for distance selling of tobacco products, including registration of retail outlets, information to be provided and verifications to be conducted. This Directive also allows Member States to simply prohibit distance selling of tobacco products to consumers if deemed necessary.

## Article 32 – Acquisition by private individuals

Concerning Article 32 and the concept of “*personal use*”, ESTA and Tobacco Europe believe that the revised wording initially proposed by the European Commission as part of the recast serves its purpose well, referring to “*goods acquired by a private individual for his own use, and transported from the territory of one Member State to the territory of another Member State by the private individual*”<sup>5</sup>. The second paragraph provides even further guidance and criteria to determine whether goods are used for personal use or not. This gives Member States the flexibility and the legal clarity needed to effectively implement and enforce this legislation. This was further supported by the statement of the European Commission on the implementation of this article, which was annexed to the latest legislative proposal in May 2019<sup>6</sup>. The statement clarifies that: “*Member States may lay down guide levels, as a form of evidence as to how the goods are to be used. Quantities of excise goods below the guide levels can be assumed to be for own use. If the guide levels are exceeded, a Member State is considered to have reasonable grounds to suspect that the goods are not for own use unless it is evidenced otherwise. If it is not evidenced that the goods are for own use, excise duty shall become due in the Member State of consumption*”.

As it stands, Article 32 is more appropriate and thorough than applying an “*average yearly personal consumption*” method as advocated by some stakeholders. Such an approach creates regulatory weaknesses whilst attempting to address a non-existent issue. Using a “*yearly average*” method requires to determine whether such applies per Member State or at EU level. Keeping an average up to date would also significantly increase the burden for national authorities and European legislators.

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<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union - PART III, Title VII, Article 113 (ex-Article 93 TEC). *Official Journal* 115, 09 May 2008 p.94

<sup>3</sup> European Commission, Report from the Commission to the Council and the European parliament on the implementation and evaluation of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty, COM/2017/184 final, 21 April 2017

<sup>4</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC. OJ L 127, 29 April 2014, p. 1–38

<sup>5</sup> European Commission, op.cit., p. 48-49.

<sup>6</sup> European Council, COREPER Meeting of 15 May 2019, Proposal for a Council Directive laying down the general arrangements for excise duty (recast), Annex II “Statement by the Commission on the implementation of Article 32 of Directive 2008/118”, Document 9368/19, Page 61.

Several stakeholders have also requested to lower the minimum thresholds per product as established by the Directive, or even to set binding limits. This ignores the free circulation of goods in the EU and the very basic principles of the Internal Market, on which this Directive is based. Enforcing such additional restrictions also requires establishing stricter border controls, thereby increasing the administrative burden and cost for the national authorities.

One of the assumptions made by PwC, the consultant commissioned by DG TAXUD to assess Art 32 and 36 of the Horizontal Directive, is that the “*absence of an efficient monitoring system*” may conflict with health policies. Our associations would like to point out that the tobacco industry is currently implementing an unprecedented Tracking & Tracing system, which aims to enable national authorities to track any product from manufacturing to the point of sale. This system also requires each product to bear a security feature which will in practice allow authorities to determine the intended country of sale.

In more general terms, it is wrong to assume that a decrease of cross-border purchases would translate into a similar decrease of consumption. In absence of legal cheaper alternatives (i.e. cross-border purchases), price-sensitive consumers will switch to the illicit market and unregulated product, undermining the presumed health objectives. The recent London Economics Study<sup>7</sup> clearly shows that taxation policy must recognise the interdependency between markets across national borders. The Study also demonstrates that when consumers are outpriced following a tax increase, illegal and counterfeited products often substitute legal domestic consumption, which presents much higher risks for public health and diminishing government revenues. In that respect, cross-border purchases by private individuals are a better and legal alternative to illicit trade. Lowering the thresholds or establishing binding limits would therefore disrupt competition within the internal market and take away a consumers’ legal alternative to illicitly traded tobacco, thereby hindering the Directive’s objective to safeguard Member States’ fiscal revenues.

Rather than lowering national guide levels as a quick-fix solution, cross-border purchases are best addressed by implementing smart taxation policies in the Member States. As put by the European Commission in its answer to Petition N° 0645/2017 in February 2018<sup>8</sup>: “*Member States are perfectly aware of the excise duty rates applied by other Member States and particularly those applied in their neighbouring Member States and that they set their own excise duty rates with a view to avoiding the risk of tax losses*”.

*The European Smoking Tobacco Association (ESTA) represents mainly mid-sized companies including SMEs and several generation-old family-owned businesses. These companies manufacture and distribute fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. Many ESTA members are still rooted in their original locality and have moved from manufacturing and selling only locally, to truly European companies selling across the EU and beyond. Their traditional and artisan European tobacco products are part of European cultural heritage.*

*Tobacco Europe (formerly The Confederation of European Cigarette Manufacturers – CECCM) represents the common views of major European-based cigarette manufacturers such as British American Tobacco (BAT), Imperial Brands (IMB), and Japan Tobacco International (JTI).*

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<sup>7</sup> London Economics, Study on fine-cut tobacco excise structure in the European Union, July 2018. Available here: <https://www.esta.be/london-economics/>

<sup>8</sup> European Parliament, Committee on Petitions, Notice to members on Petition No 0645/2017 by Marc Smets (Belgian) on the alleged unlawful competition in the Belgian market of wine and alcoholic beverages due to the increase of excise duty, 30 July 2019 ([here](#)), page 3.