

Raw unmanufactured tobacco and excise taxes

What happened since April 6, 2017
and where are we now?

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The issue in a nutshell

- Since the birth of the EEC (1957) leaf and raw processed but non manufactured raw tobacco were freely shipped intra-EU, never being considered excisable goods by MS Authorities.
- Tobacco Excise Directive 2011/64 (TED) is the latest EU act harmonising rules on the structure and rates of excise taxes applied to **manufactured** tobacco products, it defines various **manufactured** (final) tobacco products (cigarettes, cigars, smoking tobacco, etc.) and the structure of the excise duties for each type. Raw tobacco - as **unmanufactured** tobacco - is not covered by the TED and therefore not subject to excise taxation.
- On April 6, 2017 ECJ set out a Judgment on the Eko Tabak case, saying that **the products in question** were excisable smoking tobacco according to TED under specific criteria, specifying also that *“Those products were, in their entirety, **intended for sale to the final consumer**”*.
- Certain MS (Sweden, Germany) misinterpreted the ECJ, widening the scope of the TED, did a number of **seizures of raw unmanufactured tobacco** shipped to legal manufactures' tax warehouses, some also led to **criminal proceedings** for tax evasion against first processors. This situation created a disruption of the EU single market and the free movement of goods.
- Manufacturers stopped intra-EU shipments, impacting on the activity of EU first processors and therefore of growers, paradoxically **advantaging non-EU growers and first processors**.

Legal basis: Tobacco Excise Directive 2011/64

- Directive 2011/64/EU (TED) sets out harmonised rules at EU level on the structure and rates of excise duty applied to **manufactured** tobacco products, it defines and classifies various **manufactured** tobacco products according to their characteristics (cigarettes, cigars, smoking tobacco) and the structure of the excise duties for the different types of products.
- “**Smoking tobacco**” is, *inter alia*, defined in Article 5(1)(a) as “*tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing*”. On the contrary, raw tobacco - as **unmanufactured** tobacco - is not covered by the TED and therefore not subject to excise taxation.
- An external evaluation of the TED was finalized in 2014 and was followed by a Commission Report presenting the results and conclusions of the evaluation in 2015. The report was discussed by Member States in the Council (ECOFIN) and a set of conclusions on future action was adopted on March 8, 2016. ECOFIN requested the Commission to undertake the necessary studies to submit a legislative proposal for revision of the TED.
- The Commission started an impact assessment and contracted an external consultant to carry out a study.
- On May 23 - September 3, 2018 a public consultation on the revision of the TED took place.

When and where the problems originated

- For countless decades tobacco loose dry leaf and processed but non manufactured raw tobacco were freely shipped intra-EU never being considered excisable goods by MS fiscal Authorities.
- On April 6, 2017 the EU Court of Justice (**ECJ**) released Judgement on case C-638/15, **Eko-Tabak** s.r.o. vs. Czech Customs. The Judgement provided an interpretation of Articles 2 and 5 of *Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to **manufactured** tobacco*, regarding the **specific samples** of case C-638-15.
- Certain MS unduly considered the ECJ Judgement to include in the scope of the Directive 2011/64 also unmanufactured raw tobacco as an excisable good.

The ECJ Judgement on Eko-Tabak case



- In its Judgment on Eko Tabak case, the ECJ agreed that **the products in question** were excisable as smoking tobacco under the Tobacco Excise Directive. It ruled that the applicable Directive provisions *“must be interpreted as meaning that:*
 - [1] *dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and*
 - [2] *which are capable of being smoked after simple processing by means of crushing or hand-cutting, fall within the definition of ‘smoking tobacco’ for the purpose of those provisions.”*
- In the preamble (8-1) of the Judgement the ECJ also states that:
 - [3] that *“Those products were, in their entirety, **intended for sale to the final consumer.**”*

The position of the Swedish Fiscal Authorities

Regional Intelligence Liaison Office for Western Europe (RILO WE) - National Contact
Points Meeting (NCP), Dover, UK 14-15 September, 2017

Tobacco and tobacco products and excisable goods

20th RILO WE NCP Meeting
Dover / United Kingdom
14 - 15 September 2017



The position of the Swedish Fiscal Authorities

~~strips~~

~~tobacco waste~~

~~scrap~~

~~raw tobacco~~

~~stems~~

tobacco & tobacco products

~~tobacco refuse~~

~~roll your own~~

~~unmanufactured tobacco~~



Serious problems occurred in certain MS and the disruption of the EU single market

- The misinterpretation of the ECJ Eko Tabak Judgement led to serious problems in certain MS, namely Sweden and Germany where, in the last two years, have been recorded **many cases of seizures of raw unmanufactured tobacco**, in several different forms and conditions, **shipped to legitimate manufacturers tax warehouses for further industrial processing into final products**. It must be highlighted that these goods were packed in industrial cardboard cases generally weighing 100-200 Kgs (unmistakeably **not intended for retail sale**).
- According to Eurostat (2016) Germany is by far the biggest EU cigarettes producer (32%), followed by Poland (19%), and the territory of the latter is reached mainly crossing Germany.
- Some seizures also led to **criminal proceedings for tax evasion** against the directors of the first processing companies.
- Due to the uncertainties **manufacturing companies stopped the shipments**, blocking the EU first processors activity and therefore impacting also on growers.
- The result determines a **disruption of the EU single market** where different MS apply the same EU Directive in different ways.
- Moreover we are facing the paradox that exporters from non-EU countries (whose shipments are not covered by the EMCS) providing an **advantage to growers and first processors outside the EU**.

The position of the EU Commission

On Jan 12, 2018 the Commission sent a report to the Council (COM(2018) 17 final) saying that:

- ***“Raw tobacco currently does not come within the scope of excisable goods as defined in Directive 2011/64.***
- ***Illicit trade in raw tobacco is estimated at approx. 10,000 tonnes per year, about 1 % of the EU raw tobacco market. Including raw tobacco in the scope of excisable goods would ... impose administrative and compliance costs on all legitimate operators. These costs are high compared to the value of production; about 35 % of the market price of EU raw tobacco.***
- ***This would lead to loss of competitiveness of EU-grown tobacco compared to imported tobacco. This would give an advantage to growers and first processors outside the EU which would not have to bear these costs but could still export (raw) tobacco to the EU. The amount of tax evaded that might possibly be recovered as a result of EMCS monitoring is unlikely to outweigh the ... costs incurred by economic operators and, to a lesser extent, public authorities.***
- ***The Commission would therefore support the recommendation of the external study which concludes that including raw tobacco in the scope of excisable goods would be disproportionate and that similar benefits might be achievable at lower costs by a common regulatory framework for growers and first processors in the EU. Some Member States have already introduced a national regulatory framework which requires economic operators to register and keep records of stocks and the flows of raw tobacco.”***

The position of the Italian Fiscal Authorities

(abstract from a letter of June 28, 2018 sent to the Italian first processors association)

- “[ECJ] called to decide on a **specific object of the case**, indicated in the premises of the Judgement of April 6, 2017 (C-638/15) and specifically “tobacco in dried, crushed, irregular, partially discontinued leaves. that has been subjected to primary drying and subsequent controlled humidification, which contains glycerine” **intended for sale to the final consumer** (paragraph 8-1) only confirms the rationale of the provisions referred to above which is precisely to prevent a product from being smoked without subsequent industrial transformation and as such be consumed in tax evasion.
- In Italy, according to the ECJ, **raw tobacco deriving from the first processing, destined to tax warehouses for the production of manufactured tobacco (cigarettes, cigars, cigarillos, etc.) for a subsequent processing is not considered “smoking tobacco”** pursuant to Article 5 of Directive 2011/64/EU and is therefore not subject to the relevant circulation regime (EMCS).
- The different destination and the relative presumptive indicators: such as **the quantity subject of the sale, the shipping methods and the dimensions of the packaging** represent the discrete elements to distinguish the nature of the goods.
- Lastly, the writer has informed that **some Member States, including Italy, have already introduced a specific national regulation in order to control and guarantee the transparency of raw tobacco flows.”**

The public consultation on excise duties applied to manufactured tobacco and the possible taxation of novel products

- **Consultation period:** 23 May 2018 - 3 September 2018
- **Consultation outcome:** the public consultation received **11,410 replies**. Some of the respondents have chosen to also upload a position paper to further explain their views. A total of **200 position papers** have been received. All documents are downloadable at: https://ec.europa.eu/info/consultations/public-consultation-excise-duties-applied-manufactured-tobacco-and-possible-taxation-novel-products_en
- **Participants categories** (number - ratio):
 - **Individual/private (10,929 - 95.78 %)**
 - Economic operator (242 - 2.12 %)
 - Business organisation/advisory (trade associations, law firms, consultants) (92 - 0.81 %)
 - Non-government organization (65 - 0.57 %)
 - Public administration (15 - 0.13 %)
 - Other (67 - 0.59 %)

What should EU Institutions do ?

- The public consultation process ended, the Commission should proceed as soon as possible to **revise the 2011/64 Directive, clarifying the definition of “smoking tobacco”** (art. 5) to exclude from excise taxes industrial semi-finished products, such as raw unmanufactured tobacco, to be further processed into final products and not intended for final consumption.
- Taking into account the Commission standpoint that **excise taxes are not meant to tackle illicit trade, the regulations already in force in certain MS to control the raw tobacco flows should be extended at EU level**, with mandatory registration of the growers, processors and of cultivation contracts, public controls and destruction of non compliant raw tobacco, to defend the general interests of EU citizens but also of legitimate operators. **ELTI, Unitab, Fetratab** and their national Members are ready, willing and committed to cooperate.
- **Harmonize the application of the EU excise legislation in all MS, prevent the unjustified use of Customs related principles** (HS, CN classification, smoking test, etc.) **to justify the illegitimate application of excise taxes to raw unmanufactured tobacco** and provide MS the **correct interpretation of the criteria of the Eko Tabak Judgement**, in order to reinstate a real EU single market and the intra-EU free movement of goods and avoid advantages to non-EU operators

Thank you

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