

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Possible proposal for revision of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG TAXUD/C.2	DATE OF ROADMAP	16/06/2016
LIKELY TYPE OF INITIATIVE	Impact Assessment, possible proposal for revision of Directive		
INDICATIVE PLANNING	1 st quarter 2017		
ADDITIONAL INFORMATION	N/A		
This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.			

A. Context, Subsidiarity Check and Objectives
<p>Context</p> <p>Directive 2011/64/EU¹ defines and classifies various types of manufactured tobacco products according to their characteristics. The structure of the excise duties for the different types of products is also established in this Directive. For each category a minimum overall excise duty must be respected when Member States set their rates.</p> <p>Since the entry into force of Directive 2011/64/EU numerous questions have been raised by Member States experts in the Excise Committee², which concerned in most cases classification of tobacco products for excise duty purposes.</p> <p>Every four years the Commission is required to submit a report to the Council on the rates and structures of excise duties³. Where appropriate, this report should be accompanied by a proposal concerning the rates and the structure of excise duty. The fifth (and most recent) report was prepared in the context of the Regulatory Fitness and Performance programme (REFIT)^{4 5}. It was supported by an external study. According to the Commission report, possible improvements in Directive 2011/64/EU have been identified which would reduce administrative burdens and costs for both Member States and economic operators and reduce distortion within the internal market. Following the evaluation, the Commission has decided to include the potential revision of the Directive into the Commission Work Programme 2016 as part of the REFIT programme.</p> <p>The Council discussed the Commission report and adopted conclusions on 8 March 2016. In these conclusions the Council has requested the Commission to carry out an impact assessment on the</p>

¹ Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco; Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

² Since 2014: the Indirect Tax Expert Group and Working Group 2.

³ Article 19 of Council Directive 2011/64/EU.

⁴ [COM\(2015\) 621 final](#) - Report from the Commission to the Council on the REFIT evaluation of Directive 2011/64/EU and on the structure and rates of excise duty

⁵ The Commission ensures through its REFIT programme that the EU acquis is 'fit for purpose'. Within REFIT, the Commission screens the EU's legislation and identifies necessary corrective actions. These actions include evaluations and Fitness Checks to assess relevance, coherence, efficiency, effectiveness and EU added value of EU legislation and identify further opportunities for simplification and burden reduction.

possible revision of Directive 2011/64/EU.
Issues
<p>Based on the evaluation's findings and recommendations, the following problems have been identified and are expected to be addressed in the current initiative.</p> <ol style="list-style-type: none"> 1. Divergent treatment for some tobacco/new products⁶ and substitution <ul style="list-style-type: none"> • The current definitions do not take the development of new (tobacco) products into account. This leads to differences and difficulties in classification amongst Member States and possibly reductions in revenue. Introduction of national taxes could jeopardize the proper functioning of the internal market. • Borderline products⁷ have been introduced to the market with the specific aim of being classified in a product category with a lower excise duty rate compared to competing products. Such borderline products might cause a reduction of revenue, distortion of competition. The difference in rates between excise duty categories can lead to an undesirable substitution of higher taxed products by lower taxed products. • Subjective criteria⁸ in the definitions of some product categories result in legal uncertainty. This results in a higher number of legal disputes or can delay the launch of new products, both of which create administrative cost for the economic operators. It can also distort the proper functioning of the internal market because such products are treated different throughout the EU. • Water-pipe tobacco is currently taxed according to the same principles and rate as 'other smoking tobacco'⁹, while having different characteristics. This results in a relatively high tax burden on water pipe tobacco or low tax burden on other products in this category. 2. The Minimum Excise Duty (MED) rules are applied differently by Member States <p>Directive 2011/64/EU introduced a harmonised option for Member States to set a minimum level of excise duty for tobacco products (tax floor). However, the study on tobacco taxation has shown that there are various interpretations of the MED, which might distort the proper functioning of the internal market.</p> 3. Raw tobacco replaces some of the products covered by the Directive without a system of proper control <p>During the study it was reported that raw tobacco was sold at retail level without excise duty and diverted from the legal to the illegal circuit. Administrative cooperation, exchange of information and</p>

⁶ Electronic cigarettes and products where a heating process takes place instead of combustion process in traditional tobacco products ('heat-not-burn').

⁷ Tobacco products which arguably fulfil the minimum criteria for one excise tax category but whose classification is disputed or called into question by tax authorities on the basis of their properties and normal consumer expectations; for example a product which fulfils the requirements of the definitions to be classified as cigar/cigarillo in order to benefit the preferential rate of this category while being in essence a cigarette substitute.

⁸ For example: 'capable of being smoked', 'without further industrial processing', 'consumer expectations', 'exclusively intended to be smoked as it is'.

⁹ Article 2 (1) (c) (ii) and article 5(1) of Directive 2011/64/EU

the Excise Movement and Control System (EMCS), which are key tools in the fight against fraud cannot be used when products (such as raw materials or by-products¹⁰) are not defined or are treated inconsistently in different Member States.

4. Dual classification systems for excise and customs for the same products

There are different classification systems for excise and custom purposes. The confusion caused and the double classification/double treatment of the same entry leads both to higher administrative burden and costs for economic operators and national authorities.

Affected stakeholders

The stakeholders who are affected by the problems mentioned above are economic operators, national tax authorities and consumers.

The economic operators and tax authorities experience problems mainly because of the legal uncertainty. Both are exposed to higher costs and have to allocate resources to disputes, court cases etc. For economic operators, a dispute concerning the category to which a product belongs, can also lead to delay of the launch of the product and ultimately a profit loss. The current definitions could lead to distortion of competition because the same products are treated differently across Member States.

Consumers might experience differences in price level depending on the category of excise duty and their corresponding rates.

Subsidiarity check

As set out in article 113 of the Treaty on the functioning of the European Union ([TFEU](#)), the Council can, on the basis of a proposal from the Commission, 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 establishment and the functioning of the internal market and to avoid distortion of competition. As regards manufactured tobacco, achievement of this aim presupposes that the application of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Union.

In addition, article 168 TFEU requires that a high level of human health protection be reflected in the defining and implementation of all Union policies and activities. Moreover, Member States and the Union are a Party to the World Health Organization Framework Convention on Tobacco Control (WHO FCTC). In article 6 of the WHO FCTC (*'price and tax measures to reduce the demand for tobacco'*), the parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons. The EU has also been actively involved in the negotiations on the FCTC Protocol to Eliminate to Illicit Trade in Tobacco products and has proposed ratification in the EU to Council.¹¹ Possible implications for the definitions of Directive 2011/64/EU will have to be mapped in consequence.

For products included in the scope of excisable tobacco products, the EMCS is used for the monitoring of the movements of excise goods under suspension of excise duty within the EU. For those products administrative cooperation and exchange of information are key elements in the fight against fraud. While recognising that the task of preventing illicit trade in excise products falls (in particular in terms of enforcement) primarily under the responsibility of Member States, the Commission is, nevertheless, of the opinion that EU rules should be as effective as possible in order to combat such trade. As fraud is a cross-border issue, the EU should do the possible to help Member States enable their actions against

¹⁰ For example: reconstituted tobacco, tobacco refuse not suitable for smoking, expanded tobacco

¹¹ COM(2015) 193 final and COM(2015) 194 final.

this.
Main policy objectives
<p>General objectives</p> <ul style="list-style-type: none"> • to ensure proper functioning of the internal market, free movement of goods within the EU (articles 26 and 113 TFEU); • to protect public health (article 168 TFEU) <p>Specific objectives</p> <ul style="list-style-type: none"> • to prevent and correct distortion of competition; • to reduce administrative burden/costs for economic operators and tax authorities; • to strengthen the fight against fraud and tax evasion – in line with the Action Plan; • to ensure that competition in the different categories of manufactured tobacco belonging to the same group is not distorted by the charging of tax; <p>Operational objectives</p> <ul style="list-style-type: none"> • uniform application of the MED; • a tax structure for excisable tobacco products to limit incentives for the development of borderline products and substitution; • an up-to-date scope of excisable products; • simplification of the use of dual classification (the existence of different systems for excise and custom purposes); • harmonised definitions of excisable tobacco products <ul style="list-style-type: none"> – to support consistent treatment and legal clarity in classification for excise duty purposes within the EU; – to improve the effective monitoring of the movement and production. • support Member States in their fight against fraud, in particular avoid that raw tobacco is sold at retail level without excise duty or diverted to the illegal circuit.
B. Option Mapping
Baseline scenario – no EU policy change
The scope and content of the Directive will remain the same. Member States can act on own initiative

and in line with the current European legislation.

For new products there is no specific regulation at EU level¹² for taxation purposes; Member States may impose a national tax on new products which are not covered by Directive 2011/64/EU as they see fit. Therefore, the impact assessment will analyse the potential impacts of the non-regulation on EU level for taxation purposes from the point of view on the functioning of the internal market and fair competition. The same will be done for raw tobacco, which is currently also excluded from the scope of excisable goods. This analysis will also include the effect of non-regulation on the fight against tax fraud. Raw tobacco is the primary product for many excisable products but currently not monitored.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

This section contains the options for solutions identified so far. However, according to information obtained during the study, additional options might be identified. The 2015 Commission report and the Council conclusions will set the basis for the design of policy options.

- 1) Reducing classification difficulties, incentives for borderline products and substitution between product categories, by:
 - a) Revise the subjective criteria included in the current definitions of Directive 2011/64/EU:
 - i) Bring article 4(1) (a) in line with explanatory notes of the Combined Nomenclature ([CNEN code](#) 24021000 (cigars and cigarillos)
 - ii) Revise 'capable of being smoked without further industrial processing' of article 5(1) (a) by specifying that 'processing' refers to 'processing in a tax warehouse' (smoking tobacco)
 - iii) Revise article 5(1) (b) 'put up for retail sale and which can be smoked' by removing the wording 'retail' from the definition (tobacco refuse)
 - b) Introduce a mandatory mixed rate structure or specific rate (per 1000 pieces) for cigars/cigarillos to discourage the development of borderline products.
 - c) Align the minimum of excise taxes (i.e. through a mechanism similar to the MED on cigarettes) on other product categories with those of cigarettes to eliminate the incentive to develop borderline products and tax driven substitution
 - d) Develop a distinct tax category for water-pipe tobacco.
- 2) Revise article 7(4) and 8(6) in order to remove the uncertainty with respect to the limits of the MED
- 3) Raw tobacco
 - a) Include an additional tax category within the scope of the Directive to include raw materials and by-products whose monitoring under the EMCS is necessary and refer whenever possible directly to CN codes.
 - b) Develop a harmonized approach based on best practices among the measures currently applied on national level to control and monitor raw tobacco..
- 4) Excise and customs

¹² Shortly e-cigarettes and novel tobacco products will be regulated at EU-level with the transposition deadline of 20 May 2016 of [Directive 2014/40/EU](#) which seeks to improve the functioning of the internal market while improving public health by decreasing smoking prevalence.

<p>a) Establish a concordance table including which CN codes correspond to the definitions of the excise duty categories;</p> <p>b) Adapt the excise duty categories , prioritising the need for non-excisable products to share the same CN classification as excisable products within the same tariff classification to be potentially classified in multiple excise categories</p>
Alternative policy approaches
<p>(1) Adjust the scope of excisable tobacco products by including new products in order to facilitate an appropriate, equal taxation treatment of new products within the internal market.</p>
Alternative policy instruments
<p>Recommendations on:</p> <ul style="list-style-type: none"> • the implementation and interpretation of the MED including practical examples; • the classification and monitoring of raw materials and by-products; • the implementation and interpretation of the articles 2-5 of the Directive in order to clarify the subjective criteria of these articles; • tax structures which could be implemented on national level to reduce the incentives for borderline products and substitution.
Alternative/differentiated scope
<p>If the scope of Directive 2011/64/EU were to be extended to products such as e-cigarettes and raw tobacco, the holding and movement provisions would also have to be applied to these new excise goods. If the cost/benefit analysis shows that Small and Medium Enterprises (SMEs) will face a relatively higher burden, simplified procedures or a longer transitional period to comply with the requirements could be considered.</p>
Options that take account of new technological developments
<p>The possible influence on the functioning of the EMCS system will be taken into account under all options.</p>
Preliminary proportionality check
<p>None of the options should go beyond what is necessary to solve the identified problems. Moreover, the initiative has to be limited to solving problems of a cross-border nature that cannot be achieved by the Member States alone.</p>
C. Data Collection and Better Regulation Instruments
Data collection
<p>Existing information and data are available from the Fiscalis Seminar on legal and technical issues related to tobacco products (Vilnius (LT) 29-31 October 2013), the study of tobacco taxation by Ramboll which was delivered in September 2014, and the Excise Duty Tables (EDT).</p> <p>To carry out the evaluation of Directive 2011/64/EU, DG TAXUD commissioned an external study from a consortium established by Ramboll Management Consulting AS, The Evaluation Partnership, and Europe Economics. The aim of the study was to assess the current EU legislative framework for excise duties on tobacco products. This study started in December 2012 and was finalised in September 2014.</p>

The aim of the **study** was to evaluate the current EU legislation imposing excise duties on tobacco products. The study focused on providing answers to the evaluation questions listed below.

- (1) To what extent do the current arrangements for excise duty on tobacco products ensure the proper functioning of the internal market and avoid distortions in competition?

The findings of the study were that the proper functioning of the internal market is hindered by the following issues:

- Differences in interpretation and implementation of the MED;
- Inconsistent treatment of tobacco products and e-cigarettes;
- Substitution caused by the current tax structure.

- (2) To what extent are the current arrangements for excise duty on tobacco products implemented in a cost-effective way?

The study showed that the current formulation of the definitions of excisable tobacco products negatively affects the compliance costs and administrative burden. Also differences between these definitions and (the Explanatory Notes to) the CN used for custom purposes, create higher operating costs.

- (3) To what extent do the current arrangements of excise duty on tobacco products safeguard Member States' budgetary objectives?

Apart from a number of exceptions, the findings of the study supports the conclusion that the definitions of Directive 2011/64/EU are in general effective and appropriate for enabling adequate (correct categories and rates) collection of excise duties for the large majority of manufactured tobacco products. However, the definitions are not fully appropriate for effective and efficient monitoring.

During the **Fiscalis Seminar**, Member States had the opportunity to identify the problematic areas of Directive 2011/64/EU and discuss these amongst each other. Representatives of Ramboll also participated in the seminar, in order to improve the design of the study and focus the evaluation questions towards problematic areas.

The **Excise Duty Tables** are established by the Commission in collaboration with the Member States and show the rates that are in force in the different Member States. Since January 2007 the Excise Duty Tables cover all Member States. The 'release for consumption' figures are available from 2002 and the tax receipts from manufactured tobacco are available as of 2007.

The **input of experts** from Member States (including experts from laboratories) is desirable on the recommendations of the study. In particular the recommendations to analyse further the possibilities of including e-cigarettes and raw tobacco in the scope of excisable goods. This will be done under the Fiscalis 2020 programme, which aims to strengthen the internal market through efficient and effective taxation systems. [A Fiscalis Project Group](#) has been set up to discuss the classification and inclusion of (new) products within the scope of excisable tobacco products. The conclusions of the Project Group will be presented to the members of the Indirect Tax Expert Group and used as input for the Impact Assessment. The JRC is invited to participate in the meetings of the Fiscalis Project Group and asked to provide the necessary chemical analytical information.

The required data for the Impact Assessment will be collected with the help of an **external contractor**.

Consultation approach

A consultation strategy has been established for the Impact Assessment. More information on the consultation approach can be found in this document. In the table below the planned consultation activities, which will cover the problems and policy options, are summarized.

Stakeholder type	Method of consultation	Consultation period
Public Authorities in Member States	Targeted questionnaires followed up by telephone and in-depth interviews as appropriate Roundtable meeting	Q2&Q3 2016
Economic operators and related organizations/associations	Targeted questionnaires followed up by telephone and in-depth interviews as appropriate Roundtable meeting	Q2&Q3 2016
NGOs active in the health area	Targeted questionnaires followed up by telephone and in-depth interviews as appropriate Roundtable meeting	Q2&Q3 2016
Citizens/General Public	Open public consultation	Q3 2016

Will an Implementation plan be established?

☒ Yes ☐ No

D. Information on the Impact Assessment Process

The preparatory work for the Impact Assessment started in the fourth quarter of 2015.

A Steering Group was established for the evaluation of Directive 2011/64/EU. This group was composed of members from the Directorate General for Taxation and Customs union, the Directorate General for internal market, Industry, Entrepreneurship and SMEs, the Directorate General for Health and Food Safety, the Secretariat General and the Joint Research Centre, and The Directorate General of the European Anti-Fraud Office. In addition, for the Impact Assessment an Inter Service Group has

also been established. In addition to the members mentioned above, the Legal Service, the Directorate General for Trade and the Directorate-General for Agriculture and Rural Development will participate in the Inter Service Group. Meetings will be organised at pertinent stages of the Impact Assessment process. Currently, 3 to 4 meetings of the Inter Service Group are envisaged.
E. Preliminary Assessment of Expected Impacts
The costs and benefits of each option will be the subject of further analysis in the Impact Assessment.
Likely social impacts
<p>The inclusion of e-cigarettes within the scope of excisable goods with a positive excise duty rate can lead to a price increase which might affect the choice of consumers. However the long term health effects of e-cigarettes and nicotine are emerging. On one hand, stakeholders seem to agree that the switch from traditional tobacco products to e-cigarettes should be considered as positive development for a given individual. On the other hand, taxation of these products may discourage young non-smokers from experimenting with e-cigarettes, and would increase the control of the supply chain, which might have a positive effect on the safety, quality and control of the products in general.</p> <p>The option to design a tax structure to limit the incentives for borderline products should lead to an appropriate level of taxation which could increase the taxation of these products and reduce the incentive to develop them and for consumers to use them as a substitute. An increase in taxation might lead to higher prices which could reduce the demand and have a positive effect on public health. The same applies for raw tobacco sold at retail level. An increase in the price (if the excise duty rate for smoking tobacco is applied) might reduce the demand and influence the public health in a positive way. This analysis will have to be further developed while considering possible options.</p>
Likely environmental impacts
There are no environmental impacts foreseen.
Likely impacts on simplification and/or administrative burden
<p>In general, options would be designed aiming at simplification and reduction of administrative burden. Adjustment of the definitions of the excisable tobacco products should reduce legal uncertainty regarding the treatment and thereby reduce legal disputes and classification difficulties. This would be an advantage for both tax authorities and economic operators.</p> <p>The purpose of the option to revise the definition of the MED is to clarify the application and simplify the current provisions.</p> <p>Regulation to avoid that raw tobacco is diverted onto the illegal circuit might lead to an increased administrative burden for tax authorities and economic operators. For harmonised measures at EU level based on best practices, it will depend on individual Member State as to what the effects will be. Some Member States currently have national measures in place which could be used or expanded to fit within a possible harmonised framework.</p> <p>Including raw tobacco and e-cigarettes in the EMCS system would lead to an administrative burden. All economic operators in the supply chain would have to comply with the holding and movement provisions for production and transportation until the release for consumption. They would have to apply for licences to become authorised tax warehouse keepers. The additional burden would lead to extra costs, which can be divided in continuous compliance costs and one-off setup costs for new systems or the extension of current systems. The Impact Assessment will have to show if an increased burden would be outweighed by the benefits of such an option.</p> <p>Simplification of the use of dual classification would reduce complexity for economic operators (in particular for SMEs) and customs and tax authorities. Less confusion related to customs and excise definitions is expected to lead cost reduction as it would help to streamline processes of importation and custom clearance.</p> <p>To avoid additional administrative burden or costs, the effects of a possible change of the definitions of Directive 2011/64/EU on other EU legislation, such as Directive 2014/40/EU will have to be taken into</p>

consideration. The impact on simplification and/or administrative burden will be subject of further analysis in the impact assessment.
Likely impacts on SMEs
<p>The assessment of impacts on SMEs would be subject of further analysis in the Impact Assessment.</p> <p>For some options, the impacts on SMEs could be relatively higher than for other economic operators. For instance, the options to adjust the scope of excisable products by including e-cigarettes and raw tobacco could lead to an increase of the administrative burden for all economic operators, with a possibly relatively higher impact on SMEs than on larger enterprises.</p> <p>Simplification of the use of dual classification for custom and excise purposes would reduce complexity in particular for SMEs.</p> <p>Should SMEs face a relatively higher burden, mitigating measures would be considered. These could, for instance, include simplified procedures, or a longer transitional period to comply with new requirements.</p> <p>The impact on SMEs will be identified according the better regulation guidelines and include where necessary an analysis on sectoral competitiveness.</p>
Likely impacts on competitiveness and innovation
<p>There is evidence to suggest that the implementation of the MED has affected neutral conditions of competition and the proper functioning of the internal market. There are different interpretations of the limits of the MED amongst Member States. Clarification on the interpretation of the MED could (partly) correct the distortion.</p> <p>Several Member States have currently national measures in place to control the flows of raw tobacco and levy taxes on e-cigarettes. A harmonised approach would avoid that economic operators who are active in more than one Member State have to comply with different sets of rules in each Member State. On the other hand, additional regulation for e-cigarettes and raw tobacco could complicate the process to enter the market for new players.</p> <p>Adjustment of the definitions of the excisable goods should lead to less legal uncertainty and fewer legal disputes and classification difficulties which would be an advantage for both tax authorities and economic operators. Redefining the definition could also limit situations wherein the same product is treated differently in Member States.</p>
Likely impacts on public administrations
<p>Adjustment of the definitions of the excisable goods should lead to less legal uncertainty and thereby less legal disputes and classification difficulties for public administrations.</p> <p>Inclusion of raw tobacco within the scope of excisable goods will improve the ability to combat illicit trade by the monitoring of the raw material of tobacco products and increase revenue. The costs and benefits will differ from Member State to Member State. For example, in some Member States there are already obligations concerning the trade or possession of raw tobacco, which could be replaced by a new (harmonized) approach. For e-cigarettes the benefits will depend on the size of the national market and the extent of regulation. In general, taxation of e-cigarettes would be an opportunity to generate more revenue for the national budgets of Member States.</p> <p>Including raw tobacco and e-cigarettes in the EMCS system would lead to higher administrative burdens for public administrations. The additional burden will lead to extra costs which can be divided into compliance costs for enforcement and control (continuous) and setup costs for new or extension of current systems (once). Moreover the costs for authorisation and control of customs and tax warehouses will have to be taken into account. The IA will have to show if an increased burden will be outweighed by the benefits of this option.</p> <p>Simplification of the use of dual classification for customs and excise systems purposes would reduce complexity for public authorities (in particular SMEs) and customs and tax authorities.</p>

Likely impacts on third countries, international trade or investment
<p>Economic operators in third countries, who are active in more than one Member State of the EU, would benefit from harmonised rules for raw tobacco and e-cigarettes they only would have to comply with one set of rules within the EU.</p> <p>Simplification of the use of dual classification for customs and customs and excise systems would reduce the administrative burden for bringing products on the EU market.</p>