

SMOKE FREE PARTNERSHIP POSITION PAPER ON Cross-border acquisitions of excise goods by private individuals – revision of Article 32 of Directive 2008/118/EC (from 13 February 2023 Directive (EU) 2020/262)

Introduction

Price policies are known to be the single most effective means for reducing the demand and consumption of tobacco products, as part of a comprehensive tobacco-control strategy¹.

As also recognised by the Commission's tobacco tax strategy², the high number of smokers in the EU remains a major concern with 23% of adults and 20% of young people smoking³, and with price gaps between EU countries fuelling unintended cross-border shopping.

We welcome this timely initiative to review the current rules on cross-border acquisition of tobacco products which is in line with the targets set in [Europe's Beating Cancer Plan](#) for reducing tobacco use to less than 5% and achieving a tobacco free generation by 2040.

We noted the main conclusions of the study commissioned by DG TAXUD and DG SANTE. In particular, we highlight the potential of the current rules to undermine national health policies in higher-tax Member States by increasing the volume of tobacco products purchased in lower-tax Member States.

Public health is already an objective of the current rules, and should remain at the center of its revision. Cross-border shopping rules should support and complement the specific rules on excise duties and should not deter governments from utilising fiscal policy to improve public health.

It is crucial that any update of these rules envisages the smooth application of the other EU tobacco control laws and national fiscal and public health policies.

1. Problem description

Cross-border shopping of tobacco products, including illegal purchases, is one of the main deterrents for Member States from exercising their ability to use fiscal policies to improve public health by implementing higher excise duties on (alcohol and) tobacco products.

Cross-border acquisition of excise goods by individuals:

- a. Can cause a loss of tax for the higher taxing Member State (tax avoidance strategy);⁴
- b. Undermines the public health and the effects of tax and price increases;
- c. The significant flows of tobacco products from low-tax to high-tax countries may generate distortive effects on competition, thereby creating significant obstacles to the smooth functioning of the internal market;

The recent external study by Economisti Associati estimates that around 12% of the total adult population purchased tobacco products in another Member State over the previous 12 months, but there is significant variation between Member States, with high-rate, high-price countries like Ireland and Finland tending to have a higher proportion of cross-border shoppers than low-rate countries like Bulgaria and Romania.⁵

As recognised in the aforementioned study, the combination of no border controls, the absence of frequency restrictions and generous guide levels means that individuals can engage in fraudulent activity in a significant way and with minimal difficulty.⁶

2. Impact on public health and public revenues

The negative impact of (unrestricted) cross-border shopping of tobacco products on **public health** relates to rendering tobacco products more affordable and available, while also jeopardising the public health impact of Tobacco Products Directive measures such as health warnings and quit line labelling, which are construed on the specific circumstances in each Member States and in their respective languages. In addition, the availability of cheaper tobacco products, combined with the lack of effective and enforceable limits for cross-border purchases invalidates the public health benefits of increased tobacco taxes in their own countries, for citizens in regions bordering lower-tax Member States.

Closely linked with the public health impact is the **impact on fiscal policies** and public revenues. The tax (and price) differentials create a strong economic incentive to shop and to divert excise goods from low-rate Member States to re-sell them to the illicit markets of high-rate Member States.⁷ The movement of excise goods has a high inherent fiscal risk and cross-border shopping of tobacco generates revenues losses for the higher-tax Member States. Recent data estimates the EU aggregated net effects at approximately EUR 2.5 billion of revenue losses.⁸

The difficulties for authorities in enforcing Article 32 have an impact on Member States' ability to independently set their own public health policies and rates of taxation in this area.

Market distortion impact: Regions bordering with lower-tax countries where there is an important cigarette price difference are more impacted by tobacco cross-border purchase.

3. SFP's main asks

A. Reduce the indicative limits in line with the average consumption of private individuals to, at most, 200 cigarettes and 150g of smoking tobacco;

The quantitative limit for cross-border shopping is **an incentive** for price-sensitive smokers to purchase cheaper cigarettes outside the home country at least some of the time (especially in Germany⁹, Poland¹⁰, France, Austria, Finland¹¹) even though as a total proportion of the population they may be a minority.

Despite the various legal, political and economic changes (such as the access to internet lower disposable income and consumer mobility and fewer Member States), the guide levels in Article 32 have not changed since the establishment of the internal market in 1993. The limits should be revised in line with the current circumstances as explained below. The current limit is very high: based on the average of 14 cigarettes per smoker per day, 6 travels are enough to bring a year consumption of cigarettes (a problem exacerbated by the fact that frequency of transport is not mentioned in the Directive).

This is why we are calling for a reduced level of 200 cigarettes and 150g of smoking tobacco (at an equivalence rate of 0.7 gr per stick). To be enforced, the legislation change should go together with other measures, such as awareness campaigns and enforcement measures (tougher penalties, increasing the number of random checks by the customs).

B. Replace the EU indicative limits with mandatory limits;

Following reports by Member States and CSOs, it is now clear that the current EU rules for the cross-border purchase of alcohol beverages and tobacco products are not effective in fighting fraud and illegal activities (resale of products). It is also clear that the current rules are unenforceable, particularly due to the indicative nature of the current limits.

The guide levels serve as a form of evidence only and do not relate to a specified time period. The absence of a timeframe means that private individuals living close to a border may be able to make frequent (even daily) cross-border purchases without exceeding the guide levels.¹²

In addition to lowering the limits, these should be made mandatory, so that authorities can more easily identify breaches and enforce the rules. This would mean that purchases over these limits would be subject to taxation where the goods are actually consumed, thus setting a clear burden of proof. The clarification of the concept of 'own use' would further help to establish potential illegal activities which, when detected should result in the application of sanctions and fines.

C. Revise the rules to improve the legal certainty regarding the concept of own use by private individuals.

Currently, national authorities have difficulties verifying if people actually purchase alcohol and tobacco products for their own use and not for resale.

We support changes which would enable Member States to tax tobacco products being consumed within their territory, regardless of their purchase. Specifically, we echo the concerns regarding the unenforceability of Article 32 under the current (vague) framing of 'personal use' together with the high, indicative guide levels.

The concept of 'own use' should be clarified through explicit, binding, uniform conditions (such as frequency, average consumption, etc.). A restrictive interpretation of 'own use' should facilitate the detection of breaches of these rules and provide for clear instructions for authorities when applying these rules. In addition, a frequency of the travels criteria should be introduced in determining 'own use.'

The revision of 'own use' should take into account (and incorporate) the extensive jurisprudence of the European Court of Justice on the interpretation of Article 32.

4. Other potential solutions in the shorter and medium term

D. Compensation system

There are examples of Member States having agreements in place to compensate for excise loss to cross-border shopping. In such arrangements, the source country of the products would compensate the country where these are transported for the tax loss due to the cross-border trade. Despite the existence of some such agreements, there is little data available as to how they are enforced.

E. Limiting the releases for consumption to quantities commensurate with the demand

The Illicit Trade Protocol (Art 6 (3) (b) (viii); Art 7 (1) (b) ; and Art 10 (1) (b)) requires Parties to implement supply chain measures in order to avoid oversupply of tobacco products in their market. Such measures, for example, could include Member States limiting the releases for consumption to amounts commensurate with consumption rates and legal cross-border shopping in their jurisdiction, based on smoking rates and consumption trends.

This could be achieved through restrictions on the numbers of tax stamps (or equivalent) issued, or through the numbers of unique identifiers released to manufacturers or importers through the tracking and tracing system. Data from the EU tracking and tracing system could help in identifying and investigating oversupply particularly in border regions.

5. In the medium term, we call for measures to ensure upward convergence of prices across the EU to reduce cross-border tobacco products purchasing and improve public health, by contributing to decrease in tobacco consumption.

SFP stresses that the revision of Article 32 along the lines described above can only address one side of the cross-border purchases challenges: that of the probability of **detecting fraudulent actions**, which in any case would remain slim in land borders within the Schengen area. While their adoption would be beneficial, the potential rewards for cross-border purchases of tobacco products, the other side of the problem will remain intact as long as **tax-induced price differentials** persist.

Member States levy an overall excise tax of at least €90/1000 cigarettes and at least 60% of the weighted average retail selling price. MS that levy an excise tax of €115/1000 cigarettes need not comply with the 60% criterion. In spite of these regulations, price differentials remain.¹³ Economic modelling shows that reducing price differentials through tax and price increases in low-tax countries would reduce consumption in both their jurisdiction and terrestrial neighbours, and would eliminate incentives for cross-border tax avoidant shopping¹⁴. This is also a desideratum expressed by the Council in June 2020 and is aligned with public health objectives.¹⁵ Therefore, reducing tax-induced price differentials is, in the view of SFP the most sustainable solution to reduce cross-border tobacco purchases in the medium term.

SFP's position paper "[Tobacco Taxation for the Healthier Europe](#)" outlines SFP's policy proposals for approximating tobacco excise duties across the EU.

List of endorsing organisations:

European organisations

European Heart Network (EHN)

European Network for Smoking and Tobacco Prevention (ENSP)

European Public Health Alliance (EPHA)

Association Internationale de la Mutualité (AIM)

Association of European Cancer Leagues (ECL)

EuroHealthNet

European Medical Students' Association (EMSA)

INWAT Europe

National organisations

Belgium, Alliance Smoke Free Generations

Belgium, Fondation contre le Cancer /Stichting tegen Kanker

Belgium, Kom op tegen Kanker

Bosnia and Herzegovina, Progressive Reinforcement of Organizations and Individuals (PROI)

Bulgaria, Smoke Free Life Coalition

Czech Republic, Česko Bez Couře

Denmark, Danish Cancer Society

Finland, Cancer Society of Finland

Finland, Suomen ASH

France, Comité National Contre le Tabagisme (CNCT)

France, La Ligue contre le cancer

Germany, Blue 21 Unfairtobacco

Germany, German Smokefree Alliance

Ireland, ASH Ireland

Ireland, Irish Cancer Society

Ireland, Irish Heart Foundation

Israel, Smoke Free Israel

Italy, Società Italiana di Tabaccologia

Kosovo Advocacy and Development Center (KADC)

Lithuania, Lithuanian Tobacco and Alcohol Control Coalition (NTAKK)

Macedonia, Institute of Public Health of Republic of Macedonia

Montenegro, NVO JUVENTAS

Netherlands, Health Funds for a Smokefree Netherlands (GvRV)

Norway, Norwegian Cancer Society

Poland, MANKO Association

Poland, Medical University of Gdańsk

Portugal, Centro de Apoio, Tratamento e Recuperação

Romania, Asociatia Romana pentru Promovarea Sanatatii (Romanian Association for Health Promotion)

Romania, Association Healthy Romania 2035

Serbia, Association Health Mission

Serbia, Serbian Society for the Fight Against Cancer

Slovenia, No Excuse Slovenia

Slovenia, Slovenian Coalition for Public Health, Environment and Tobacco Control

Spain, Comite Nacional de Prevencion del Tabaquismo

Spain, Grupo I + D en Economía, Políticas Públicas y Salud

Spain, XQNS!

Sweden, Tobaksfakta: A think tank on tobacco

Turkey, Health Institute Association

Ukraine, Advocacy Center LIFE

United Kingdom, Action on Smoking and Health (ASH UK)

United Kingdom, ASH Scotland

United Kingdom, Cancer Research UK (CRUK)

United Kingdom, Fresh – Balance

United Kingdom, UK Centre for Tobacco and Alcohol Studies

Wales, ASH Wales

References

- ¹ Ruger, Jennifer Prah. 2005. "Global Tobacco Control: An Integrated Approach To Global Health Policy". *Development* 48 (2): 65-69. doi:10.1057/palgrave.development.1100135.
- ² <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12645-Tobacco-taxation-revision-of-EU-rules->
- ³ <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2240>
- ⁴ Agaku IT, Blecher E, Filippidis FT, et al Impact of cigarette price differences across the entire European Union on cross-border purchase of tobacco products among adult cigarette smokers *Tobacco Control* 2016;25:333-340.
- ⁵ Study assessing articles 32 and 36 of Council Directive 2008/118/EC concerning the general arrangements for excise duty p. 57
- ⁶ Study assessing articles 32 and 36 of Council Directive 2008/118/EC concerning the general arrangements for excise duty p. 69
- ⁷ COMMISSION STAFF [WORKING DOCUMENT](#) EVALUATION of the Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco p. 25
- ⁸ Study on Council Directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco, Economisti Associati, 2019
- ⁹ 32 % of German smokers living in region bordering lower-price countries reported purchasing cheaper out-of-country cigarettes in the previous 6 months, against 4.9 % for non-borders regions. *ibid*
- ¹⁰ 11 % of Polish smokers living in region bordering lower-price countries reported purchasing cheaper out-of-country cigarettes in the previous 6 months, against 4.6% for non-border region. *ibid*
- ¹¹ Nagelhout GE, van den Putte B, Allwright S, et al Socioeconomic and country variations in cross-border cigarette purchasing as tobacco tax avoidance strategy. Findings from the ITC Europe Surveys *Tobacco Control* 2014;23:i30-i38.
- ¹² Study assessing articles 32 and 36 of Council Directive 2008/118/EC concerning the general arrangements for excise duty
- ¹³ Driezen P, Thompson ME, Fong GT, et al. Cross-border purchasing of cigarettes among smokers in Six Countries of the EUREST-PLUS ITC Europe Surveys. *Tobacco Induced Diseases*. 2018;16(2):13. doi:10.18332/tid/100411.
- ¹⁴ Stoklosa, M Stoklosa M. *Tob Control* 2018;0:1–6. doi:10.1136/tobaccocontrol-2018-054678
- ¹⁵ Council of the European Union. 2016. Council conclusions on the structure and rates of excise duty applied to manufactured tobacco, ECOFIN. <http://www.consilium.europa.eu/en/press/press-releases/2016/03/08/ecofin-conclusions-structure-rates-manufactured-tobacco/>

About the SmokeFree Partnership (SFP):

The Smoke Free Partnership is a coalition of NGOs working exclusively on EU policy analysis and advocacy linked to the implementation of the Framework Convention on Tobacco Control. Since its creation in 2006, SFP has helped lead campaigns on a number of important EU tobacco control policy areas, including smoke-free policies, the EU Tobacco Tax Directive, FCTC Article 5.3 Guidelines, FCTC Article 6 Guidelines, and the revised Tobacco Products Directive. The World Health Organisation recognised the SFP for its tobacco control work by awarding it a World No Tobacco Day Award in 2011. SFP was also awarded the 2015 Luther L. Terry Award for outstanding global achievement and exemplary leadership in Tobacco Control. SFP's vision is a world where all children can grow up healthy and free from the harm caused by tobacco.

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