



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.06.1997

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Proposal for a

COUNCIL DIRECTIVE

amending Directive 92/12/EEC

on the general arrangements for products subject to

excise duty and on the holding, movement and

monitoring of such products

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. The Committee on Excise Duties ("Excise Committee") and its current terms of reference

Article 24 of Directive 92/12/EEC, as amended by Article 1(11) of Directive 94/74/EEC, stipulates that the Commission is to be assisted by a Committee on Excise Duties with a view to ensuring that the Community provisions on excise duties are correctly and uniformly interpreted and applied.

The above-mentioned provision assigns a dual role to the Committee:

It may act:

- either under the "regulatory committee" procedure as regards the measures necessary for applying Articles 5,¹ 7,² 15b,³ 18,⁴ and 23⁵ of Directive 92/12/EEC, Article 27⁶ of Directive 92/83/EEC and Directive 95/60/EC;⁷
- or as an advisory committee as regards the application of the other Community provisions on excise duties.

1.1 *Regulatory role*

In the course of performing its regulatory function, the Committee has delivered its opinion on the following regulations:

- (a) Regulation (EEC) No 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty, as amended by Regulation (EEC) No 2225/93;
- (b) Regulation (EEC) No 3649/92 of 17 December 1992 on a simplified accompanying document for products which have been released for consumption in the Member State of dispatch;
- (c) Regulation (EC) No 31/96 of 10 January 1996 on the excise duty exemption certification;
- (d) Regulation (EC) No 3199/93 of 22 November 1993 on the mutual recognition of procedures for the complete denaturing of alcohol, as amended by Regulation (EC) No 2546/95.

¹ Adaptation of customs documents for products subject to excise duty.

² Accompanying document for products already released for consumption.

³ Document for the exchange of information between national administrations.

⁴ Accompanying document for products moving under duty-suspension arrangements.

⁵ Exemption certificate for certain international bodies.

⁶ Mutual recognition of alcohol denaturants.

⁷ Marking of certain mineral oils that are exempt or taxed at a reduced rate.

Following the adoption of Council Directive 95/60/EEC of 27 November 1995, the Committee will also be called upon to give its opinion on the specification of products to be used for the fiscal marking of gas oil and kerosene that are to be released for consumption exempt from, or at a reduced rate of, duty.

1.2 Advisory role

When it comes to ensuring that the remaining Community provisions on excise duties are correctly and uniformly interpreted and applied, the Committee has only an advisory role.

On several occasions it has been called upon to resolve urgent problems that could not be resolved under existing Community legislation.

For example:

Movement:

- Movement of mineral oils by ship (consignee unknown). While being transported by ship, goods may undergo several changes of owner and/or consignee. Transportation to destinations outside the EU triggers a change of legal regime; consignments then cease to be covered by the tax rules governing intra-Community movement, falling instead under the customs rules governing exportation;
- Movement of mineral oils by pipeline;
- Formalities to be observed in the event that goods refused by the consignee are returned to the consignor;
- Link-up needed with the customs rules governing exportation or transit;
- Transport by rail and use of the CIM consignment note.

Taxation:

- Tax treatment of flavourings used in the manufacture of drinks;
- Tax treatment of firelighters;
- Tax treatment of certain tobacco products, and problems of double taxation of cigarettes bearing tax markings;
- Tax treatment of new products (particularly alcoholic beverages and manufactured tobacco) whose features make their classification for excise purposes uncertain.

2. General features of the common excise-duty system

An examination of problems such as those mentioned above brings out the complexity and ongoing development of the Community excise-duty system.

It should be borne in mind that the finishing line for Community harmonization of excise duties was crossed only a few months before the entry into force of the single market.

Thus, unlike other areas of taxation (customs, VAT) which underwent a slower and gradual harmonization process, the Community system of excise duties took shape at the same time as the single market and, what is more, in the form of definitive arrangements.

Within the general structure of the system there is a degree of flexibility which has made it possible to adapt to legal, economic and social factors that differ significantly from one Member State to another. But this is also a weakness of the system.

This is because the system comprises:

- a horizontal Directive (Directive 92/12/EEC and subsequent amendments) on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products;
- specific directives on the tax classification of products (the "structural" Directives⁸) that concern the definition of products subject to excise duty and their division into tax categories for each of the following: mineral oils, alcoholic beverages and manufactured tobacco;
- specific directives laying down the minimum rates of excise duty for each tax category of product (the "rates" Directives⁹).

While the Directives on minimum rates of excise duty form a clearly defined and rigid system, the horizontal Directive constitutes a general framework of principles and rules for ensuring the free movement of goods in a manner compatible with the monitoring requirements.

For this reason, the procedures laid down in that Directive are described in only general terms and there is a resulting risk of divergent interpretations and implementation or of Member States adopting mutually incompatible national provisions. Experience over the last few years has clearly demonstrated this.

⁸ Directive 92/81/EEC on the structures of excise duties on mineral oils, Directive 92/83/EEC on the structures of excise duties on alcohol and alcoholic beverages, and Directive 95/59/EC on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

⁹ Directive 92/82/EEC for mineral oils, Directive 92/84/EEC for alcoholic beverages, and Directives 92/79/EEC and 92/80/EEC for cigarettes and other manufactured tobacco.

In addition, a number of general rules contained in the Directive are not applicable if they are transposed as such at national level. They require legal structures directly applicable throughout Community territory. This applies, for example, to the measures to be adopted with a view to recovering the guarantee lodged by the person responsible for transportation in the event of the discovery of an irregularity or infringement.

Thus, a considerable number of problems submitted to date to the Committee have remained unresolved since the Commission is not empowered to take a decision with the assistance of the Committee.

Other problems, e.g. the rules governing the movement of mineral oils not subject to duty, have required the adoption of a new directive. This solution is not always appropriate given that adopting and transposing a directive is a very protracted process.

3. Legal problems associated with the Committee's advisory role

The Commission is empowered to lay down rules on excise duties only in the specific cases referred to in Article 24(2) of Directive 92/12/EEC. Other cases may be examined only in an advisory capacity by the Committee provided for in Article 24(5).

In other words, the Committee examines the problems raised by the Member States or by the Commission representative and gives its opinion. The resolutions thus adopted do not have binding legal force in the Member States and are not public.

It follows from this that the Member States are not legally bound to abide by the Committee's opinions, even where these have been adopted unanimously, and that the adoption of national provisions in line with the Committee's opinion is entirely voluntary.

Consequently, in the event of non-transposal or of incomplete or divergent transposal, the Commission is unable to institute infringement proceedings against the Member State concerned. Because they have no legal force, the guidelines adopted by the Committee cannot be invoked before the courts by the parties concerned.

Moreover, even where Member States comply with the guidelines adopted by the Committee, they may encounter legal rulings by the courts that run counter to the common interpretation.

Once the opinions delivered and guidelines issued by the Committee do not form part of Community law, the new Member States are not obliged to accept them, particularly since those opinions were adopted on an agreed basis, following discussions in which they did not take part.

This last aspect could become even more worrying when the countries of central and eastern Europe join the Union.

4. Outlook

The Member States have recently encountered another challenge: combating fraud and contraband. Products subject to excise duty have always been the object of illegal activity, and it is understandable that specialist criminal organizations try to profit from the fact that national monitoring procedures have not been fully harmonized.

In addition, administrative monitoring procedures must keep pace with the rapid technological advances in systems for gathering and exchanging data. The current system for monitoring the intra-Community movement of goods subject to excise duty, which is based on accompanying documents, is to be discontinued and replaced (or, for an initial period, backed up) by computerized monitoring systems.

Since the same scenario awaits Community transit, it is desirable that the two systems work in parallel in order to ensure uniformity of treatment for businesses.

Against this background, the introduction of more flexible and more streamlined arrangements for Community excise-duty procedures must be accorded priority.

It goes without saying that the Member States must, in any event, retain their autonomy in tax matters. Accordingly, the scope of the proposal for a Directive does not extend to the Community provisions governing levels of duty.

The regulatory powers provided for by the proposal for a Directive relate only to the correct and uniform application of the horizontal and structural Directives.

Problems are posed by the tax treatment of a number of products whose features make their tax categorization uncertain. In such cases, a general implementing rule is required so that the same product will not be taxed differently according to the Member States in which it is released for consumption, the aim being to avoid all forms of abusive practice and distortion of competition.

Explanation of the articles

Article 1 - Change in the powers assigned to the Commission and the Committee in the excise duty field

Article 1 of the proposal for a Directive amends Article 24 of Directive 92/12/EEC in such a way as to assign to the Commission wider-ranging regulatory powers with regard to excise duties.

Accordingly, the first paragraph stipulates that the Commission may adopt the measures necessary for the correct and uniform application both of the provisions of Directive 92/12/EEC and of the provisions contained in the structural Directives.

The following paragraphs concern the powers of the Committee, which will be able to act as a regulatory committee in the matters referred to in the preceding paragraph. The Committee will deliver its opinion on draft measures submitted by the Commission representative and will act by a qualified majority.

The setting-up of the Committee and the procedure to be followed are proposed in accordance with procedure III(a) referred to in Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.¹⁰

The Committee will therefore be called upon to give its opinion on the measures needed to ensure the proper functioning of the Community excise-duty system with regard to the movement and taxation of products. This role is assigned to it with a view to combating abusive practices and tax fraud and in anticipation of the introduction of more modern and efficient monitoring systems.

The Committee will retain its consultative powers in matters not covered by the powers exercised under the "regulatory committee" procedure (e.g. administrative cooperation and exchange of information between Member States).

¹⁰ OJ No L 197, 18.7.1987, p. 33.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 99 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 24 of Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products confers on the Commission regulatory powers within the limits laid down in Articles 5, 7, 15b, 18, 19 and 23 of that Directive;

Whereas the Commission has already adopted regulations implementing the above provisions;

Whereas experience gained with regard to the harmonization of national excise-duty legislation, and in particular the provisions concerning the system of intra-Community movement and the structure of excise duties, has shown that the relevant Community legislation needs to be more uniformly interpreted and applied;

Whereas, for the reasons stated above, the terms of reference of the Committee on Excise Duties should be changed;

Whereas the Decision of 13 July 1987 has laid down the procedures for the exercise of implementing powers conferred on the Commission,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 92/12/EEC is hereby amended as follows:
Article 24 of the Directive is replaced by:

“Article 24

1. The measures necessary for the correct and uniform application of this Directive and of the following Directives:

- Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils;¹
- Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages;²
- Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco;³

shall be adopted by the Commission in accordance with the procedure set out below.

2. The Commission shall be assisted by a Committee on Excise Duties, hereinafter referred to as the “Committee”. The Committee shall be composed of representatives of the Member States and chaired by a Commission representative.

3. The Commission representative shall submit to the Committee a draft of the measures to be adopted. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. It shall take its decision by the majority laid down in Article 148(2) of the Treaty for the adoption of decisions which the Council is called upon to take acting on a proposal from the Commission. The Chairman shall not vote.

4. (a) The Commission shall adopt the intended measures where they are in accordance with the Committee’s opinion.

(b) Where the intended measures are not in accordance with the opinion of the Committee, or in the absence of any opinion, the Commission shall forthwith submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

¹ OJ No L 316, 31.12.1992, p. 12.

² OJ No L 316, 31.12.1992, p. 21.

³ OJ No L 291, 6.12.1995, p. 40.

- (c) If, on the expiry of a period of three months from the date on which the matter was referred to it, the Council has not adopted any measures, the Commission shall adopt the proposed measures.

5. In addition to the measures referred to in paragraph 1, the Committee shall examine the matters raised by its Chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of the Community provisions on excise duties."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on ...

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member State.

2. Member States shall inform the Commission of the main provisions of national law which they adopt to comply with this Directive.

Article 3

This Directive shall enter into force on the day that it is published in the Official Journal of the European Communities.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

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