

- ***Eko-Tabak* Judgement: diverging interpretations**
- **Use of smoking test for excise purposes: concerns**

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BRUSSELS

# PRESENTATION

## 1. *Eko-Tabak* Judgment

- Background information
- Examples of raw tobacco
- Examples of smoking tobacco
- Diverging interpretation in EU Member States & Impact
- Conclusion
- Recommendation

## 2. Smoking test

- Background information
- Recommendation



# EKO-TABAK JUDGMENT

# *EKO-TABAK* JUDGEMENT: BACKGROUND

- Judgment on Case C-638/15 – Eko-Tabak vs. General Directorate of Customs, Czech Republic on 6 April 2017 relating to a request for preliminary ruling on the interpretation of Directive 2011/64/EU on the definition of **smoking tobacco**.
- CJEU ruled that Articles 2 and 5 of the Excise Directive “*must be interpreted as meaning that dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and **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*”.
- CJEU stated that the definition of “smoking tobacco” in the context of the Excise Directive requires that 2 cumulative conditions are met:
  - 1. “That the tobacco be cut or otherwise split, twisted or pressed into blocks”; and
  - 2. “That it is capable of being smoked without further industrial processing”
- CJEU clarified when tobacco may be regarded as being cut and otherwise split
- Importantly the CJEU also stated “[t]hose products were, in their entirety, intended for sale to the final consumer”

# EXAMPLES OF RAW TOBACCO



- **Virginia** leaf (flue-cured)
  - Large leafs
  - Golden/yellow colour
  - Including butted leafs (first 2cm of the stem cut)
  
- Also valid for Burley & Oriental



# EXAMPLES OF RAW TOBACCO



- **Oriental** leaf (sun-cured)
  - Small leaves
  - green/yellow colour



# EXAMPLES OF RAW TOBACCO



- **Burley** leaf (dark-air-cured)
  - Large leafs
  - brown colour



# EXAMPLES OF RAW TOBACCO



- **Other Tobacco** leaf (fire-cured)
  - Large leafs
  - Dark brown colour





# EXAMPLES OF RAW TOBACCO



- **Virginia Strips** (flue-cured)
  - Partly or wholly stemmed/stripped
  - Also includes:
    - Tobacco strips (cut)
    - Threshed leaf
    - Tipped leafs (top of leaf cut)
  - Also valid for Burley and Oriental



# EXAMPLES OF RAW TOBACCO

- **Tobacco, hand-stripped**
  - Cured tobacco leaf
  - Stem separated manually
  - Stripped leaf



# EXAMPLES OF RAW TOBACCO



## ○ Wrapper leaf

- Semi-finished product
- Delivered on bobbins
- High nicotine content – not consumable with our filler tobacco
- No economic advantage of making smoking tobacco out of it as values is above 5kEUR for 100kg



# EXAMPLES OF RAW TOBACCO



## ○ Scraps

- Tobacco refuse (waste)
- Cured pieces of the tobacco leaf, no standard size
- No clear cutting edges
- Unmanufactured tobacco, by-products occurring during threshing of leaf
- Not smokeable due to little size, low moisture.
- Only small quantities can be added to cut rag mixtures in order not to harm cigarette manufacturing process (rod stability)



# EXAMPLES OF RAW TOBACCO



## ○ Stems

- Tobacco refuse (waste)
- Condition: wood-like



# EXAMPLES OF RAW TOBACCO



## ○ **Expanded Shredded Stems (ESS)**

- Cut, expanded
- Not capable of being smoked acc. to recent BTI
- High level of plant nutrient, thus bad taste and low combustibility



# EXAMPLES OF RAW TOBACCO



- **Cut, Rolled, Expanded Stems (CRES)**
  - Capable of being smoked acc. to recent BTI but opinions vary across industry
  - High level of plant nutrient, thus bad taste and low combustibility



# EXAMPLES OF RAW TOBACCO



## ○ Residues

- Waste/refuse from tobacco leaves occurring during die cutting of wrappers for cigars
- Put into filler production after industrial processing (stemming)





# EXAMPLES OF RAW TOBACCO

- **Ground samples / Dust**

- Tobacco refuse
- Powder-like condition



# EXAMPLES OF RAW TOBACCO



## ○ Recon tobacco

- Reconstituted tobacco made via an industrial process from dust put onto a cellulose layer
- Paper/carton-like condition
- Semi-finished product, requires further processing and moisture to be added



# EXAMPLES OF SMOKING TOBACCO



- **Cut Rag**
  - Smoking tobacco
  - Already subject to excise tax
  - Capable of being smoked
  - Condition: Small cut-width (fine-cut up to 1.5mm)



# EXAMPLES OF SMOKING TOBACCO



## ○ **Expanded Tobacco**

- Smoking tobacco
- Already subject to excise tax
- Capable of being smoked
- Condition: Expanded through special processing, more “loose” than cut rag



# DIVERGING INTERPRETATIONS IN EU MS

- We notice that the Eko Tabak judgment is misused in day to day practice by the authorities of some Member States who generally consider raw tobacco as subject to excise based upon the provisions of the Article 5(1)(a) of Directive 2011/64.

# DIVERGING INTERPRETATIONS IN EU MS

## Germany

- On 28 February 2018, the German Ministry of Finance informed the main national tobacco trade federations (Deutscher Zigarettenverband, Verband der Rauchindustrie and Bundesverband der Zigarrenindustrie) that they will interpret the terms “smoking tobacco” very broadly. In fact, going forward, they will treat any tobacco that is somehow broken, cut or split as being capable of being smoked without further industrial processing which consequently means that these products are going to be treated as excisable.
- This interpretation creates obstacles for the free movement of goods with other EU countries where these goods are rightly considered as non-excisable and are generally subject to national monitoring measures.

# DIVERGING INTERPRETATIONS IN EU MS

## Sweden

- A snus producer had its tobacco scrutinized and, although the customs classification under 2401 heading was upheld, some of the tobaccos were considered as being subject to excise because they could be smoked without further industrial processing (according to Swedish Customs).
- Also, Swedish Customs detained five containers of raw tobacco for use in the snus factory of one of CECCM's members in August 2017. The purpose of this detainment was to take samples and determine if the tobacco fell within the description of smoking tobacco, and should thus be classified under a different customs tariff heading subject to a customs duty rate of 74.9%. We believe the reasoning behind this unreasonable change in customs classification purposes of the "smoking test" referred to in the CN Explanatory Notes.
- Upon examination, three of the containers were found by Swedish Customs to contain goods determined to be classifiable as raw tobacco. Two containers were found to allegedly contain material determined to be classified as smoking tobacco of heading 2403. Aside from the higher rate of customs duty, Swedish Customs determined that because of the customs classification of "smoking tobacco" it was also considered appropriate that the goods should be subject to excise duty and accordingly subject to associated excise controls.

# CONCLUSION

As indicated in multiple occasions by CECCM, and also as supported by the Commission, the inclusion of raw tobacco under EMCS is a disproportionate measure in fighting illicit trade of raw tobacco inter alia considering the following:

- Unbalanced administrative requirements;
- The goal of monitoring raw tobacco can be met more efficiently by other means;
- As highlighted in the key findings of the Economisti Associati study, illicit trade of raw tobacco in the EU is estimated in a range between 0.8% to 1.2% of EU raw tobacco market;
- CECCM already put forward alternative solutions to excise on raw tobacco (2016)



# RECOMMENDATION

CECCM calls on the Commission **to issue an EU-wide clarification** on the interpretation of the preliminary ruling regarding the Eko-Tabak case, taking into account that **in the concrete case, the goods were prepared for retail sale.**



# SMOKING TEST

# SMOKING TEST: BACKGROUND

- 6 April 2016: Publication of amendment to the CN Nomenclature of EU providing for a smoking test designed to distinguish between manufactured tobacco of heading 2403 and unmanufactured tobacco of heading 2401
- CECCM has concerns on whether or not the smoking test for tobacco and tobacco products should be used when determining if a certain tobacco material is capable of being smoked or can be smoked, in the meaning of Article 5 of the Council Directive 2011/64/EU.
- As expressed on several occasions, CECCM regards the smoking test as unsatisfactory in its current form and welcomes the opportunity to have it reviewed and refined
- Advocate General Kokott already established that, in order to assess whether or not tobacco goods are covered by the Council Directive 2011/64/EU (therefore liable to excise duty), **“the determinative element is not the Combined Nomenclature, but Directive 2011/64”**

# SMOKING TEST: BACKGROUND

- In its report on the review of a possible revision of Directive 2011/64 EU (January 2018), EU COM opposed the application of excise duties to raw tobacco as a measure to fight illicit trade;
- The Economisti Associati study clearly points out that the inclusion of raw tobacco among excisable products seems to be a disproportionate response, given the amount of costs associated;
- The application of a smoking test - which is designed for customs classification purposes - to determine if excise tax should be applied to raw tobacco is against the Commission's recent guidance on this matter.

# RECOMMENDATION

CECCM therefore respectfully request that the **Commission ensures a uniform application of the EU excise rules** based on common understanding that the excise liability **should be determined by the Directive and not the by CN Explanatory Notes** or any smoking test provided therein.