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"I/A" ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	15550/15
Subject:	Draft Council Conclusions on the Commission Report to the Council on the REFIT evaluation of Directive 2011/64/EU and on the structure and rates of excise duty applied to manufactured tobacco - Adoption

1. The Commission has on 21 December 2015 presented a Report to the Council on the REFIT evaluation of Directive 2011/64/EU and on the structure and rates of excise duty applied to manufactured tobacco (hereafter - "the Commission Report").
2. According to Article 19, paragraph 1 of Directive 2011/64/EU¹ the Commission is required to submit a report on the rates and structure of excise duty laid down in this Directive every four years. Furthermore, the Directive has been identified for evaluation under the Commission's Regulatory Fitness and Performance Programme (REFIT).²

¹ Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176, 5.7.2011).

² REFIT is a programme to review the entire stock of EU legislation – to identify burdens, inconsistencies, gaps or ineffective measures and to make the necessary proposals to follow up on the findings of the review.

3. The Commission Report outlines the background that led to its production, the methodology used for external evaluation of Directive 2011/64/EU, the issues that were identified by the evaluation and the recommendations that were made on that basis. In its report, the Commission inter alia refers to 16 recommendations that were put forward by the external evaluators. The Commission then identifies four work areas where specific recommendations could be addressed.
4. In its report, the Commission also indicates that the current report does not focus on increases in the minimum rates of excise duty prescribed by Directive 2011/64/EU. Many increases in the minimum overall excise duty have only entered into force recently; some Member States have been granted transitional periods and some gradual increases must still take effect.³
5. The Commission Report was discussed at the meeting of the High Level Working Party on Tax Questions (HLWP) on 1 February 2016, where delegations agreed to work towards reaching an agreement on Council conclusions, which would set out its views on this report and on the way forward.
6. At the HLWP meeting of 23 February all delegations could unanimously support the draft Council Conclusions on the Commission Report to the Council on the REFIT evaluation of Directive 2011/64/EU and on the structure and rates of excise duty applied to manufactured tobacco, which are set out in Annex I to this note.
7. Austria, Finland and France have indicated their wish to insert a statement in the Minutes of the Council, which is set out in Annex II to this note.
8. Against this background, the Committee of Permanent Representatives is invited to suggest that the Council adopt the abovementioned draft Council conclusions as set out in Annex I of this note, as an "A" item on the agenda of a forthcoming meeting.

³ Article 10 and Article 14 of Directive 2011/64/EU.

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COUNCIL CONCLUSIONS ON THE COMMISSION REPORT TO THE COUNCIL ON THE REFIT EVALUATION OF DIRECTIVE 2011/64/EU AND ON THE STRUCTURE AND RATES OF EXCISE DUTY APPLIED TO MANUFACTURED TOBACCO

The Council (ECOFIN):

1. WELCOMES the 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 applied to manufactured tobacco.
2. NOTES that the Union's fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection, as required by Article 168 of the Treaty on the Functioning of the European Union, bearing in mind that the consumption of tobacco products causes serious harm to health.
3. RECALLS that the EU is a party to the WHO Framework Convention on Tobacco Control and that tobacco products should be seen as an avoidable health risk in the EU and, in this context, Directive 2011/64/EU is an adequate tool for combating this threat.
4. CONFIRMS that one of the objectives of the Treaty on European Union is to maintain an economic union, whose characteristics are similar to those of a domestic market, within which there is healthy competition. As regards manufactured tobacco, achievement of this aim presupposes that the application in the Member States 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.
5. TAKES NOTE of the findings and recommendations set out in the Commission's report referred to above.

6. RECOGNISES the need for creating, where relevant, more accurate definitions in Directive 2011/64/EU, in order to reduce legal uncertainty, hamper substitution by borderline products and avoid possible different approaches in Member States and potential distortion of the internal market.
7. HIGHLIGHTS that efforts should be made towards simplification and clarification of the structure of the current excise duties on manufactured tobacco by adjusting, where appropriate, the categories or definitions of manufactured tobacco in the excise legislation to avoid inconsistencies with, and take account of, where relevant, the classification for custom purposes and the corresponding Explanatory notes to the Combined Nomenclature.
8. NOTES that Directive 2011/64/EU contains specific provisions to allow certain transitional periods and reduced rates of excise duties on cigarettes for certain Member States.
9. RECALLS that the Commission should, pursuant to Article 19 of Directive 2011/64/EU, continuously monitor the rates and the structure of excise duty laid down in that Directive, so that the objectives sought by EU legislation in that area are continuously attained.
10. OBSERVES that some of the products, such as e-cigarettes, defined in Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, do not fall into any of the categories of products subject to excise duty under Directive 2011/64/EU.
11. NOTES that in most of the Member States some of such non-categorised products, often being niche-products in the market, are not subject to an excise duty or any other specifically designed tax, and AGREES that the situation in the market should continue to be monitored and, should the market share of such products show a tendency to increase, the ongoing efforts to develop an efficient taxation method for such products would have to be intensified.

12. UNDERSCORES that, in this context, a solution for excise taxation of e-cigarettes, heated tobacco, other novel tobacco products and, where relevant, of products related to tobacco products, needs to be practical and foresighted, and strike the right balance between the revenue, expenses of tax administration and public health objectives.
13. CALLS upon the Commission, in this context, to examine possible ways forward towards the introduction of new product categories or definitions into Directive 2011/64/EU in order to facilitate an appropriate, equal taxation treatment of new products within the internal market and remove potential inconsistencies and legal uncertainty, which would lead to a even more unified approach at the level of EU legislation.
14. STRESSES that any potential amendments to the current text of Directive 2011/64/EU have to be proportional and, inter alia, where possible, aim at the reduction of an administrative burden to businesses and the competent authorities concerned, as well as simplification of compliance requirements, without undermining the functioning of the excise duty system. In this context, the particular circumstances of small and medium enterprises should be borne in mind.
15. EMPHASISES that any initiatives for adjustments of the EU legal framework on excise duties should also aim at reducing tax fraud, including initiatives in respect of products which are not currently controlled within a harmonised EU framework, such as raw tobacco. In this context, the solutions leading to a more systematic monitoring of movement of raw tobacco could also be explored.
16. REQUESTS that the European Commission, taking into account these Council Conclusions, as well as the objectives set out in Directive 2011/64/EU, undertakes all relevant studies and, after carrying out relevant technical analysis, public consultations and impact assessment, submits to the Council an appropriate legislative proposal in 2017 or, in case it chooses not to submit a proposal, informs the Council of the reasons.

17. TAKES NOTE that some of the recommendations in the Commission Report on Directive 2011/64/EU are aimed at improving the overall system of excise duty collection in Member States and, consequently, LOOKS FORWARD to receiving, in due time, the Commission Report on the parallel and on-going evaluation of Council Directive 2008/118/EC.
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STATEMENT BY AUSTRIA, FINLAND AND FRANCE

Austria, Finland and France recall the Union's fiscal legislation on tobacco products has to ensure the proper functioning of the internal market and, at the same time, a high level of health protection.

To this end, Austria, Finland and France stress the need to achieve a closer convergence of excise duty applied to manufactured tobacco towards the highest common denominator.

As the Commission will have to undertake studies, carry out relevant technical analysis, public consultations and impact assessment before submitting an appropriate legislative proposal to the Council, Austria, Finland and France do find it necessary to start work on a future revision of the minimum rates without delay.
