

EXPLANATORY MEMORANDUM TO
THE TOBACCO PRODUCTS (DESCRIPTIONS OF PRODUCTS)
(AMENDMENT) ORDER 2010

2010 No. 2852

1. This explanatory memorandum has been prepared by HM Revenue & Customs and is laid before the House of Commons by Command of Her Majesty.

2. Purpose of the instrument

The instrument amends the Tobacco Products (Descriptions of Products) Order 2003 (“the Order”) to align it with changes made to the relevant European Directive. The changes are designed to curb tax avoidance methods which are being practiced within the European Union and to simplify and clarify the definition of tobacco products for the purposes of taxation.

3. Matters of special interest to the Select Committee on Statutory Instruments

None

4. Legislative context

4.1 The Order sets out definitions of the products which are liable to Tobacco Products duty. The Order implements the descriptions set out in Council Directive 95/59/EC (“the 1995 Directive”).

4.2 This instrument is required in order to amend the definitions in the Order, to implement amendments made to the relevant articles of the 1995 Directive by Council Directive 2010/12/EU (“the 2010 Directive”). The amendments concern the definitions of hand-rolling tobacco, cigars and tobacco refuse.

4.3 A transposition note is appended to this memorandum showing how the amendments to the 1995 Directive have been implemented.

4.4 As the UK law already reflects the 1995 Directive as it stood before it was amended by the 2010 Directive, the exercise is relatively straightforward.

4.5 The 2010 Directive was considered and cleared by the HOC (European Scrutiny) committee on 15 October 2008 and by the HOL (European Union Select Committee) on 21 October 2008.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Economic Secretary to the Treasury has made the following statement regarding Human Rights in respect of this order:

In my view the provisions of the order are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 Pipe tobacco (“other smoking tobacco”) is subject to a lower rate of duty than hand-rolling tobacco. As the Order currently stands, tobacco is hand-rolling tobacco if it is (a) sold or intended to be sold for that purpose, (b) of a kind used for that purpose or (c) more than 25% of it has a ‘cut width’ of less than 1 millimetre. The rationale of (c) is that tobacco of that cut width is ‘of a kind used for the purpose of making hand-rolled cigarettes’.

7.2 It has become apparent in recent years that tobacco with a ‘cut width’ of up to 1.5 millimetres is being used to make hand-rolled cigarettes. Accordingly, the 1995 Directive, as amended, allows member states to provide that tobacco of that quality is to be treated as hand-rolling tobacco. Article 6(1)(a) of the Order is amended accordingly. This amendment is intended to prevent the avoidance of the duty on tobacco products which purport to be pipe tobacco but are used by smokers to make cigarettes.

7.3 Definition of Tobacco Refuse
“tobacco refuse” is liable to excise duty as ‘other smoking tobacco’. Neither the 1995 Directive as it stood, nor the relevant UK provisions, contain a definition of ‘tobacco refuse’, leading to potential confusion. In order to clarify the law, the 2010 Directive introduces a definition of ‘tobacco refuse’, which is inserted in the Order as article 7(3).

7.4 Cigars made entirely of natural tobacco
These were hitherto the subject of a separate description but it has been recognised that that description is redundant since ‘cigars made entirely of natural tobacco’ are necessarily also ‘cigars with an outer wrapper of natural tobacco’, which are among the descriptions of cigars in the 1995 Directive and in the Order. The 2010 Directive removes that redundant description and the corresponding provision of the Order (paragraph 1 of the Schedule) is revoked accordingly.

7.5 Cigars with a threshed blend filler and with an outer wrapper (of reconstituted tobacco) that has the normal colour of a cigar, weighing not less than 1.2grams but less than 2.3 grams.

7.6 It has been recognised that these, while they are commonly presented as cigars or cigarillos, are, to all intents and purposes, cigar-coloured cigarettes (cigarettes are subject to a higher rate of duty than cigars). The 2010 Directive removes products of this description from the list (in the 1995 Directive) of products that are to be regarded as cigars. The corresponding amendment is made to the Order by revoking paragraph 3 of the Schedule.

7.7 Cigars with a threshed blend filler and with an outer wrapper (of reconstituted tobacco) that has the normal colour of a cigar, weighing not less than 2.3g and not more than 10g.

7.8 In certain parts of the EU (not, to the knowledge of the authors of this document, the UK) a product has been developed which has the external appearance of an outsize cigar but which consists of a wrapper of reconstituted tobacco containing a quantity of cigarettes. The intention is that the outer wrapper is removed and the cigarettes smoked individually. In order to prevent such products being treated as cigars, the 2010 Directive introduces a 10g limit to the weight of cigars with a threshed blend filler and an outer wrapper of reconstituted tobacco. The corresponding change is made to the relevant provision of the Order (paragraph 4 of the Schedule).

8. Consultation outcome

The European Commission conducted a consultation process in the course of making the amendments to the Directive 95/59/EC by means of a further Directive 2010/12/EC.

HM Revenue & Customs have kept trade associations and individual traders informed, where possible, of how the changes were to be transposed into UK law and discussed how any issues concerning implementation might be handled.

9. Guidance

The changes will be notified to the public and industry by means of changes to the HM Revenue & Customs Public Notice on Tobacco Products Duty (notice 476). The relevant trade associations will also be informed of the progress.

10. Impact

10.1 A formal impact assessment has not been produced for this instrument. This is because the changes will only impact on those who seek to avoid paying the appropriate tax on their products. The changes will ensure that tobacco products are classified correctly and so attract the appropriate amount of tax. There is no anticipated impact on legitimate business or other interested parties.

10.2 The changes will have no unexpected adverse effect on any particular gender, ethnic group or people with a disability. Therefore, no formal equality impact assessment is necessary.

10.3 HMRC has consulted with tobacco manufacturers and importers and has not been advised of any legitimate products which will unintentionally be affected by the proposed changes.

10.4 Costs to implement and administer the changes for HMRC and business are negligible.

10.5 The impact on the public sector is nil.

11. Regulating small business

11.1 The legislation does apply to small business as well as medium and large enterprises.

11.2 Although the instrument will affect a small number of small businesses in the UK, the administrative burdens will not be disproportionate (indeed there should be none at all for those who have been observing the law as it stands). The change simply relates to the definition of certain tobacco products, so that there will be no more confusion (whether or not intentional) as to the category to which those products belong.

11.3 Although the instrument is necessary in order to align UK law with the European Directive, there has been consideration of how this might affect individual businesses. Where possible, the businesses concerned have been told of the forthcoming changes either directly or through a trade association.

11.4 It is not thought that the complexity of change here is such that it will have a greater effect (if it has any) on small businesses than it does on larger enterprises.

12. Monitoring and review

There are no specific plans to monitor the implementation of this change. However, if there is an unexpectedly high level of enquiries regarding the change, we will look to issue supplemental guidance at the earliest opportunity.

13. Contact

Paul McKee at HM Revenue and Customs (telephone 0161 827 0892 or e-mail: paul.mckee@hmrc.gsi.gov.uk) can answer any queries regarding the instrument.

Appendix 1 - Transposition note.

Transposition Note setting out how the Tobacco products (description of products) amendment order 2010 implements the requirements of Council Directive 95/59/EC (OJ No. L291, 6.12.1995, p.40), as amended by Article 3 of Council Directive 1999/81/EEC (OJ No. L211, 11.8.1999, p.47), Article 3 of Council Directive 2002/10/EC (OJ No. L46, 16.2.2002, p.26) and Article 3 of Council Directive 2010/12/EU (OJ No. L50, p.1).

Directive

Council Directive 95/59/EC (OJ No. L291, 6.12.1995, p.40) (“the Directive”), which is concerned with the excise duty on manufactured tobacco.

Introduction

The Directive provides harmonised rules for the structure, charging and collection of the excise duty on manufactured tobacco. It includes provisions on the descriptions of tobacco products which were recently amended by Article 3 of Directive 2010/12/EU. Member States are required to implement the amended requirements of Directive 95/59 with effect from 1 January 2011.

Articles 3; 4.1; 5; 6; 7.1 and 7.2 are implemented by the Tobacco Products (Descriptions of Products) Order 2003 (S.I. 2003 No. 1471) (“**the 2003 Order**”).

Articles 3, 6 and 7.1 are amended by Article 3 of Directive 2010/12. This Order is made under s.1(3) of the Act and amends the 2003 Order so as to give effect to these Articles as amended.

This Order (“the amending Order”) does not go beyond what is necessary to implement the Directive.

Article 4.2 as amended will be implemented by section 4 of the Tobacco products duty act 1979 as amended by Clause 23 of the Finance No 2 Bill 2010. This amends the definition of long cigarettes for duty calculation purposes in order to curb tax avoidance.

The articles identified in the first column of the table that is set out below are the relevant articles of Council Directive 95/59/EC.

ARTICLE	PURPOSE	IMPLEMENTATION
3	To define the products that are deemed to be cigars or	Article 5 and the Schedule to the 2003 Order define cigars for the

	<p>cigarillos.</p> <p>Article 3 of Directive 2010/12 amends article 3 of Directive 95/59/EC so as to (a) remove the reference to cigars made entirely of natural tobacco; (b) remove the reference to cigars filled with a ‘threshed blend’, except for those weighing more than 2.3g; (c) provide that cigars filled with a ‘threshed blend’ may not weigh more than 10g.</p>	<p>purposes of the Act (any product described as a cigarillo, which also falls within one of the descriptions in the Schedule, is a cigar for the purposes of the Act).</p> <p>Article 2(4)(a) of the amending Order revokes paragraph 1 of the Schedule to the 2003 Order to remove the reference to cigars made entirely of natural tobacco;</p> <p>Article 2(4)(b) of the amending Order revokes paragraph 3 of the Schedule to the 2003 Order to remove the reference to cigars filled with a ‘threshed blend’ that weigh less than 2.3g;</p> <p>Article 2(4)(c) of the amending Order revokes paragraph of the Schedule to the 2003 to provide that cigars filled with a ‘threshed blend’ may not weigh more than 10g.</p>
5	<p>To define other smoking tobacco; includes (at article 5(2)) ‘tobacco refuse’.</p> <p>Article 3(2) of Directive 2010/12 introduces a definition of ‘tobacco refuse’ in Article 5(2) of Directive 95/59/EC</p>	<p>Article 7 of the 2003 Order which defines other smoking tobacco for the purpose of the Act, to include (at article 7(1)(b)) ‘tobacco refuse’.</p> <p>Article 2(3) of the amending Order adds to Article 7 of the 2003 Order a final paragraph (paragraph 3) defining ‘tobacco refuse’ in identical terms to the amended Directive</p>
6	<p>To define fine cut tobacco for the rolling of cigarettes: provides that tobacco of which at least 25% by weight has a ‘cut-width of less than 1mm is hand-rolling tobacco.</p> <p>Article 3(4) of Directive 2010/12 amends article 6 to increase the relevant threshold to 1.5mm.</p>	<p>Article 6(1)(a) of the 2003 Order provides that tobacco of which at least 25% by weight has a ‘cut-width’ of 1mm or less is hand-rolling tobacco for the purposes of the Act.</p> <p>Article 2(4)(c) of the amending Order amends article 6(1)(a) of the 2003 Order to increase ‘1mm’ to ‘1.5mm’</p>
7.1	<p>To require that, subject to certain conditions, products consisting in part of substances other than tobacco should be treated as</p>	<p>The Schedule to the 2003 Order, which provides (at paragraph 2) that cigars with an outer wrapper of natural tobacco include cigars containing a mixture of tobacco and</p>

	<p>cigars or cigarillos.</p> <p>(Amended by Directive 2010/12, to be implemented with effect from 1 January 2011)</p>	<p>other substances, and which describes (at paragraph 3) products containing a 'threshed blend filler' and 'material other than tobacco' .</p> <p>No amendment needed</p>
7.2	<p>To require that, subject to certain conditions, products consisting in whole or in part of substances other than tobacco should be treated as cigarettes and smoking tobacco.</p>	<p>Articles 4(2) and 7(2), which bring cigarettes, other smoking tobacco and hand-rolling tobacco, which are made wholly or partly of substances other than tobacco, within the descriptions of those products.</p> <p>No amendment needed.</p>