

# TOBACCO TAX AND THE NEW PORTUGUESE EXCISE DUTIES CODE: THE SMOKE OF UNCONSTITUTIONALITY? - ABBC ADVOGADOS

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**The taxation of tobacco products in Portugal has been subject to changes in three recent diplomas: (i) the 2010 State Budget Law (Law 3-B/2010); (ii) Ordinance 250-A/2010, and (iii) the new Excise Duties Code (Decree-Law 73/2010).**

The new Code transposes into Portuguese law EC Directive 2008/118/EC, concerning the general arrangements for excise duties, and implements the computerised system for monitoring movements of excise goods in the EU. One of the concerns of the law-maker was to improve the Code's systematisation, to implement new statutory operators and to harmonise the terminology with the one used in other EC countries. Simultaneously, a new system of circulation for the products liable to tax and new electronic methods of control were implemented, through the

imposition of electronic reporting obligations.

In general terms, the Code and the changes made were seen with disbelief by tobacco operators that were expecting an inflection in the tax policy of the Portuguese government and the withdrawal of the restrictive measures implemented in the past years.

In effect, since 2005, the Portuguese Government has created a constraint system to the placement of tobacco products in the market limiting the quantities of tobacco released on the market by each operator.

The first attempt was fiercely challenged by the operators and abandoned in 2007 with the publication of Decree-Law 307- A/2007, which jointly with Ordinance 243- A/2008 established the existing system: a two-fold constraint which now includes:

La reciente reforma de la legislación fiscal portuguesa transpone la Directiva 2008/118/CE, con nuevos procedimientos para establecer impuestos especiales sobre el consumo, así como para implementar un sistema computarizado de monitorización de los bienes sujetos a dichos impuestos en la UE. No obstante, también impone nuevas restricciones en la venta e importación de tabaco, a expensas de la libre circulación de mercancías, y limita la entrada al mercado de nuevos operadores y productos, opinan António Moura Portugal e Inês Teixeira de ABBC Advogados.

(i) a restriction to the quantities of tobacco products that manufacturers can release from fiscal warehouses, in Portugal, during a four month "constraint period" (between September and December of the fiscal year) during which, the monthly amounts of manufactured tobacco that can be placed on the market may not exceed by more than 10% the average monthly quantity that had been placed on the market during the previous year;

(ii) a prohibition to sell tobacco products carrying the fiscal stamp of a determined budget year after the third month of the following year (cigarette packets), the end of the following year (fine cut tobacco for rollup cigarettes and other smoking tobaccos) and the end of the fifth following year (cigars and cigarillos).

However, when the operators thought that the legal framework had reached the limit in terms of restrictiveness, the 2010 State Budget Law combined with Ordinance 250-A/2010 introduced a new tax stamp in the middle of the year and set a deadline for commercialisation of tobacco products (31 July 2010), other tobacco products (31 of December 2011) and cigars (31 of December 2015) with the old stamp.

With the implementation of the new mandatory fiscal stamp with a different colour (bordeaux) and different price (increase of € 0,0003), products that were already in the market and in the retail sector with the old stamp had to be recalled by the operators.

These two measures have long been criticised by operators for violating both the Portuguese Constitution and European Law. The new Code has only made clearer that violation.

The adoption of a period of constraint is viewed as unnecessary, inadequate and disproportionate to the objectives pursued. Portuguese Customs Authorities have been justifying the restrictions with the need to ensure tax revenue on a stable and regular basis throughout the year. In response, tobacco manufacturers and importers claim that their constitutional right and freedom of economic enterprise is inadmissibly harmed.

By preventing economic agents from importing the quantities deemed adequate to the satisfaction of market demand these sales limitations also violate EU Law, namely article 34 of the EC Treaty, which prohibits quantitative restrictions on imports and all measures having equivalent effect, and the harmonised system set forth by the Council Directive 92/12/EEC.

The restrictions of Portuguese law impose a system oriented to satisfying current needs at the

expense of the free movement of tobacco products, limit the entry of new operators and products into the market and help to reinforce the relative position and market share of the current operators and products. Free competition is seriously affected. Where there is smoke, there is fire.

In this case, the "smoke" has caught the European Commission's attention and several lawsuits regarding the constitutional review of the "sales constraint period" are already running in Portuguese courts. The question is, will the national courts or the ECJ stop the fire?

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