

The Structure of the Market in Tobacco Products and Their Alternatives from 2013 to 2023. Legal, Economic, and Legislative Aspects

**Scientific Editors:
Piotr Stanisławiszyn, Ph.D.
Andrzej Tatar, Ph.D.**



**Polskie
Towarzystwo
Ekonomiczne**

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The List of Abbreviations

1. Sources of Law

Act on the Excise Duty, AED – the Act of 6 December 2008 on the excise duty (consolidated text: Journal of Laws 2020, item no. 722, as amended).

AJPA, Administrative Judicial Procedure Act – the Act of 30 August 2002 – the Law on the procedure before administrative courts (consolidated text: Journal of Laws of 2019, item no. 2325, as amended).

Alcohol Directive - Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages.

Alcohol Directive - Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (OJ L 316, 31/10/1992, p. 21–27).

Civil Code – the Act of 23 April 1964 – Civil Code (consolidated text: Journal of Laws of 2023, item no. 2809).

Constitution of Poland – Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item no. 483, as amended)

Criminal Code – the Act of 6 June 1997 – the Criminal Code (consolidated text: Journal of Laws of 2024, item no. 17).

Criminal Tax Code – the Act of 10 September 1999 – the Criminal Tax Code (consolidated text: Journal of Laws 2024, item no. 628).

Europe Agreement - Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (Journal of Laws no. 11, item no. 38, as amended).

Excise Duty Act 2004 – the Act of 23 January 2004 on the excise duty (Journal of Laws of 2004, No. 29, item no. 257).

Family and Guardianship Code – the Act of 25 February 1964 – Family and Guardianship Code (consolidated text: Journal of Laws of 2024, item no. 1061).

FOA, Fiscal Ordinance – the Act of 29 August 1997 – the Fiscal Ordinance (consolidated text: Journal of Laws 2020, item no. 1325, as amended).

Horizontal Directive - Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12–30).

SENT Act - the Act of 9 March 2017 on the system of monitoring of road and rail transport of goods and the trade in heating fuels (consolidated text: Journal of Laws of 2024, item no. 1857).

Tariff Directive - Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ L 316, 31/10/1992, p. 29–31).

TEU – Treaty on the European Union of 26 October 2012, OJ C 2012, No. 326.13.

TFEU – Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon (consolidated version, OJ C 2010 No.83.13).

The Accession Treaty - Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, done at Athens on the sixteenth day of April in the year two thousand and three, Journal of Laws of 2004, No. 90, item no. 864.

Tobacco Directive - Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176, 05/07/2011, p. 24–36).

Tobacco Products Directive - Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1–38).

UCC - Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast, OJ L 269, 10.10.2013, p. 1–101).

2. Courts, Administrative Authorities, and Institutions

CC – Customs Chamber

CHR, Commissioner for Human Rights – the Commissioner for Human Rights of the Republic of Poland

CJEU – the Court of Justice of the European Union

CT, the Constitutional Tribunal – the Constitutional Tribunal of the Republic of Poland

EC – the European Commission

ECtHR – the European Court of Human Rights

EU – the European Union

MF – the Ministry of Finance

Minister of Finance – Minister competent for the matters of public finances

OECD – Organization for Economic Co-operation and Development

SAC, Supreme Administrative Court – the Supreme Administrative Court of the Republic of Poland

SAO, Supreme Audit Office – the Supreme Audit Office of the Republic of Poland

SC, the Supreme Court – the Supreme Court of the Republic of Poland

VAC – Voivode Administrative Court

WCO – World Customs Organization

WHO – World Health Organization

WTO – World Trade Organization

3. Official Journals and Gazettes

ECR – Case Reports of the European Court of Justice/Court of Justice of the European Union

EEC – European Economic Community

EPS – the European Judiciary Review (*Europejski Przegląd Sądowy*), Wolters Kluwer’s academic journal

JL, Journal of Laws – Journal of Laws of the Republic of Poland

MP – the Fiscal Monitor (*Monitor Podatkowy*), an academic journal

OGMF – Official Gazette of the Minister of Finance

OJ – Official Journal of the European Union

OSNKW – The Case Reports of the Supreme Court, Criminal and Military Chamber (*Orzecznictwo Sądu Najwyższego, Izba Karna i Wojskowa*), the Criminal and Military Chamber of the Supreme Court’s judicial reporting periodical

OSNPG – the Case Reports of the Supreme Court, Published by the General Prosecution Office (*Orzecznictwo Sądu Najwyższego, Wydawnictwo Prokuratury Generalnej*), the General Prosecution Office’s judicial reporting periodical

OSP – the Case Reports of the Polish Courts (*Orzecznictwo Sądów Polskich*), a judicial reporting periodical

OTK – the Case Reports of the Constitutional Tribunal (*Orzecznictwo Trybunału Konstytucyjnego*)

OTK-A – the Case Reports of the Constitutional Tribunal, Official Publication, “A” Series

OTKZU – the Case Reports of the Constitutional Tribunal, Official Publication

SIP Legalis – Legal Information System (*System Informacji Prawnej*) Legalis, CH Beck publishing house’s legal information solution

SIP LEX – Legal Information System (*System Informacji Prawnej*) LEX, Wolters Kluwer’s legal information solution

The Polish Monitor – “the Polish Monitor” Official Gazette of the Republic of Poland

4. Others

a/m – above-mentioned

AAD – Administrative Accompanying Document

AEO – Authorized Economic Operator

AES – Automated Export System

amend. – as amended

Art. – Article

BEI – Binding Excise Information

BOI – Binding Origin Information

BTI – Binding Tariff Information

case ref. no. – case reference number (sygnatura)

CBOSA – Central Database of Case Law of Administrative Courts (Centralna Baza Orzecznictwa Sądów Administracyjnych), a case law database kept by the SAC

CCC – Community Customs Code

cf. – confer (compare)

Chap. – Chapter

CMR, CMR Convention – Convention on the Contract for the International Carriage of Goods by Road

CN – Combined Nomenclature

cons. Text – consolidated text

dec. – decision (ruling, judicial)

DTT – double taxation treaty

e.g. – *exempli gratia* (for example)

e-AD – electronic administrative document for excise duty

EBTI – European Binding Tariff Information

ECS – Export Control System

ed. By – edited by

e-DD – electronic delivery document for excise duty

EMCS – Excise Movement and Control System

G – a gramme (unit of weight)

GATT1947 – General Agreement on Tariffs and Trade (1947)

GJ – gigajoule (unit of energy)

ICSG – Intra-Community supply of goods

inter alia – among other things

INTRASTAT – a specific data collection system for the trade between EU Member States

ISZTAR – a ‘Integrated Customs Tariff System’ operated by the Polish customs authorities

judg. – judgment

kg – a kilogramme (unit of weight)

KRET – a ‘National Register of the Export of Goods (Krajowy Rejestr Eksportu Towarów)’

l - a litre

lit. – a letter

MC OECD – Model Convention of the OECD

MRN – Movement Reference Number

MWh – Megawatt hour

no. – number

op.cit. – opus citatum (the work hitherto cited)

ord. –order

p. – page

Para. – paragraph

pg. – page

pos. – position (item)

pt – a part

pt. – point

pts – parts

s.c. – so-called

s.n. – side number (pagination, “nb.”)

SAD – Simplified Accompanying Document

SAD – Single Administrative Document

SEED – System for the Exchange of Excise Data

SENT – the ‘System for Electronic Transport Supervision’, an IT system for monitoring of the transport of goods (System Monitorowania Transportu Towarów)

snt. – sentence

SP – Statistics Poland (Polish Statistics Office)

t. – tome

Track & Trace – identification and security system for tobacco products in the European Union

VAT – Value Added Tax

viz. – videlicet (“please see”)

Vol. – volume

Introduction

The framework of the present report includes the complete analysis of the market in tobacco products and their alternatives in Poland, and of the impact on that market through legislative measures. Within the scope of this work, and in line with the terminology adopted by the Act on the Excise Duty (AED), the authors consider tobacco products to be: cigarettes, cigars and cigarillos, and smoking tobacco. Products alternative to tobacco products are held by the authors to be novel tobacco products, electronic cigarette liquid, nicotine pouches, and other nicotine products. Due to the nature of the research performed here, the results thereof were divided into three parts. The theoretical deliberations encompass the issues of the structure of the excise duty on tobacco products and their alternatives. The technical elements of the tax were therein discussed, and the importance of the functions of taxation for the framing of legal regulations in the scope of taxation of the products at issue was also indicated therein. The respective categories of tobacco products and the alternatives therefor, together with the definition of those categories were discussed under the analytical part of the report. In that latter part, the changes of the market in tobacco products over the span of recent years and the impact of rules on tax rates in that matter were the subject of attention. Then, the analysis of the solutions introduced by the so-called “roadmap” that includes the indexing of tax rates for excise goods during the 2023-2027 period was commenced. The impact of that solution on the availability of tobacco products and their alternatives was analysed, and attention was devoted to the importance of that legal instrument for the curbing of the “grey market” in the tobacco products. The amendments which aim at the alteration of the current regulation and at the introduction of an increase of tax rates were taken note of, and the consequences of implementing those legal solutions currently were analysed. The issue of punitive regulations in the scope of the trade in tobacco products and their alternatives was addressed. The prospective amendments in the scope of extending the definition of novel tobacco products, subjecting nicotine pouches and other nicotine products to excise, as well as subjecting single-use electronic cigarettes and vaporisation equipment to taxation were considered.

The entirety of the research carried out allows for positing a research hypothesis indicating that the “roadmap” in force since 2022 is a solution advantageous both for the State Treasury and for the broadly construed tobacco industry. Changes to the

roadmap should be introduced with care due to the potential occurrence of results that would be at the same time multitudinous and detrimental to the entire sector of the economy. To meet the objectives set herein, the following research issues were considered: the importance of the “roadmap” from the perspective of the certainty of fiscal law and its foreseeability, the participation of the broadly construed tobacco industry in the legislative process on the current “roadmap”, the effects of the current solutions for the entire sector of economy. The amendments introduced by the legislator were taken into account and an analysis of them was carried out. The fiscal, legal and economic effects foreseeable from the point of view of the current solutions were determined.

The concept of a “roadmap”, referred to many times in this report, is a term taken from the spoken language, or even from the language of politics. However, it is a term that became widely accepted by the scholarship in academic deliberations on the excise duty, having in mind the import and significance thereof. As such, that term, referred to by the legal doctrine, is used in the latter part of the report.

The list of bibliographic sources used to carry the research task posited here consists of dogmatic works on fiscal law, constitutional law, European Union law, and international law. The literature used in this work includes monographs, papers in academic journals, chapters in collective works, and legal commentaries. The part on theory constitutes the commercialization of research carried out while drafting a doctoral dissertation, as well as the conclusions provided in the monograph *Prawne ograniczenia swobody kształtowania akcyzy w Polsce* (Legal Restrictions on the Discretion of Levying Excise Duty in Poland), published in Zielona Góra, 2023, by A. Tatar. The case law of the European Court of Human Rights, The Court of Justice of the European Union, the Polish Constitutional Tribunal, the Polish Supreme Administrative Court, and the Polish voivode administrative courts was analysed. The completion of the research task required consideration of the contents of statements of reason for the statutes on excise duties, as well as of the amendments currently pending in the context of statutory bills. On the other hand, the legal acts subjected to analysis are primarily statutes, executive acts, international agreements, directly applicable Union provisions, and acts of secondary Union law.

Solving the research issue required the application of the dogmatic, analytical, comparative, and the historical juridical method, as well as the application of the economic analysis of law. The dogmatic method allowed for the determination of legal regulations on the taxation of tobacco products and their alternatives and the amendments of that matter over the span of the last decade. Textual, teleologic and systemic construction had to be implemented in the scope of that method. The analytical method allowed for the identification of problematic issues in the scope of taxation of tobacco products and their alternatives. The comparative research method required the comparison of the provisions on excise products and their alternatives contained in the acts of national law, Union law, and in international law. It should be stressed that there was no need to use the comparative method in its full horizontal aspect from the point of view of the research objective, only in its vertical aspect. The horizontal aspect of the comparative method was only used in regard to the analogous legal regulation on the so-called “roadmap” for the tax rates of the excise duty on tobacco products and their alternatives. The historic method enabled the research of the origins and the path of evolution of the excise duty in the scope of the taxation of tobacco products and their alternatives over the span of the recent years, including the amendments during the 2013-2024 period. In turn, the economic analysis of law made it possible to carry an analysis of the market in tobacco products and their alternatives out, from the perspective of the statutory changes relevant for those products. The application of that method allowed for making a finding as to how the amendments of legal regulations, especially in the scope of tax rates, caused changes in the structure of the market in tobacco products and their alternatives.

Moreover, having the regulations in the scope of tobacco products and their alternatives adopted in Poland in mind, the marked absence of harmonization in the field of taxation of alternatives for tobacco products at the European Union level is noted hereunder. This underscores the need for amendments to the Directive of the Council no. 2011/64/EU of 11 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

The law as it stood on 31 October 2024 was taken into consideration, together with the proposed amendments of levying the excise duty on single-use electronic cigarettes, vaporization equipment, nicotine pouches, and other nicotine products.

THEORETICAL ISSUES¹

1. The Essence of Fiscal Legislation

“Legislation” is derived from the term “*legislatio*”, meaning lawmaking.² In Polish, it is also understood as the process of drafting legislative acts.³ The concept of fiscal legislation should be understood as the entirety of actions carried out in order to frame fiscal law. The rational model of lawmaking is important for the framing of tax statutes, beginning from the description of the objective of regulation up to their enactment.⁴ In principle, the process of framing fiscal law does not deviate from the framing of legal acts from other areas of law, for it is based on the setting of an objective pursued through the regulation being introduced, the means through which the fiscal idea is to be performed, the drafting of legal provisions on the basis of those assumptions, and the initiation of the legislative process.⁵

The objective of the fiscal legislation should be construed from the performance of tasks attributable to taxes. The fundamental function of public dues is the safeguarding of the sources of budgetary income⁶ and of the stable income of public funds that are indispensable for the performance of the public tasks. Obviously, this also constitutes one of the indications that the fiscal policy is being carried out. However, while construing the legislative objective, one should also consider other functions carried out by the law on levies. From the point of view of framing the excise duty, the redistributive, stimulating, and informational-supervisory activities designed during the legislative procedure are important. Fiscal legislation should also be carried out in such a way that those ancillary functions would also be completed. As regards the stimulating function, that means the need to formulate the appropriate system of

¹ The part on theory constitutes a commercialization of research carried out while drafting a doctoral dissertation and the conclusions that the so drafted dissertation contains, namely *Prawne ograniczenia swobody kształtowania akcyzy w Polsce* [Legal Restrictions on the Discretion of Levying Excise Duty in Poland], Zielona Góra 2023 by A. Tatar.

² Latin-Polish Dictionary, accessed 21.07.2024 <http://lacina.globalnie.com.pl/slownik-polsko-lacinski/?dir=2&name-directory-search-value=legislatio&dir=2>

³ The Polish Dictionary, Tome II, edited by M. Szymczak, Warsaw 1988, p. 19.

⁴ J. Wróblewski, Racionalny model tworzenia prawa [The Rational Model of Lawmaking], Państwo i Prawo 1973, no 11, pp. 4-6.

⁵ B. Brzeziński, Wstęp do nauki prawa podatkowego [Introduction to Fiscal Jurisprudence], Toruń 2001, pp. 117-118.

⁶ M. Weralski, Funkcje podatków a instrumenty podatkowe [Functions of Taxes and Fiscal Instruments], [in:] System instytucji prawno-finansowych PRL Tom III Instytucje Budżetowe [The System of Legal and Fiscal Institutions of the Polish People's Republic, Tome III Budgetary Institutions], edited by M. Weralski, Wrocław 1985, p. 53.

stimuli that would facilitate the achievement of desired outcomes.⁷ The key aspects of the stimulating function of the excise duty pertain in particular to the issues of the protection of environment, promotion of health, and the stimulation of the economy. On the other hand, the performance of the informational-supervisory function is quite important for the exercise of control by the State over the trade in excise goods, as said trade is susceptible to the transfer into the so-called “grey market”.⁸ In turn, redistributive activities consist in the apportionment of the GDP, which occurs as regards the excise duty also as a result of the creation of fiscal preferences. In the process of fiscal legislation, the need to formulate the appropriate tools allowing for extensive control over the trade in excise goods must be taken into account. However, the regulations on the oversight of trade in those goods may not go beyond the framework introduced by the principle of proportionality.⁹ Due to the inclusion of the excise duty in harmonization, the legislative process should also take the implementation of objectives following from the rules of European Union (EU) law into consideration.

The process of framing fiscal law may be divided into multiple phases, including pre-legislative works; the works on legislative bills; alignment of viewpoints, opinion drafting, and consultation as regards the assumptions of normative acts; the enactment of a statute; the signature and the promulgation of a statute; the adoption of executive acts and the review of conformity of a normative act with the Constitution of the Republic of Poland.¹⁰ It follows that the fiscal legislation is premised on the three major phases, i.e. the pre-parliamentary phase, the parliamentary phase, and the post-parliamentary phase. The criterion for this divide considers the role of a Parliament as an authority of the legislative branch of government.¹¹ During the pre-parliamentary phase, the Minister of Finance (MF) – which is the mover of the amendments being introduced – plays the key role in the drafting of the fiscal bills. The bills of fiscal statutes are primarily drafted by the Ministry of Finance. During the pre-parliamentary work, the

⁷ H. Reniger, [in:] System instytucji prawnofinansowych PRL Tom I Instytucje Ogólne [The System of Legal and Fiscal Institutions of the Polish People’s Republic, Tome I General Institutions], edited by M. Weralski, Wrocław 1982, pp. 321-333.

⁸ I. Mirek, Podatek akcyzowy niezbędne i możliwe korekty [Excise Duty and Its Necessary and Possible Corrections], [in:] Dylematy reformy prawa podatkowego w Polsce [Problems of Fiscal Law Reform in Poland], edited by H. Dzwonkowski, J. Kulicki, Warszawa 2016, pp. 378-379.

⁹ Viz. Article 95(1) of the Constitution of the Republic of Poland.

¹⁰ C. Kosikowski, Ustawa podatkowa [Fiscal Statute], Warszawa 2006, p. 96.

¹¹ Viz. Article 95(1) of the Constitution of the Republic of Poland.

actions of the Minister of Finance are often of passive nature.¹² Such a state often becomes pronounced in particular as regards the excise duty, where the lawmaking process comes in the main to the harmonisation of the provisions of national law with the rules of EU law. The abandonment of careful consideration of the drafting of the provisions of fiscal law results in the lack of medium-term and long-term perspectives for the creation of such rules. There is consultation with the academic community, the businesspersons, and other stakeholders, but the results thereof have little impact on the final form of the fiscal provisions.¹³ The cooperation between the ministerial department of finance and the business environment comes to the pushing of unpopular solutions through and then seeking any evidence of approval for the drafted projects on part of the Ministry.¹⁴ A lengthy process of drafting the statute, or the lack of coordination in drafting work between the respective ministries does not bode well for the creation of fiscal law.¹⁵ On that basis, one may arrive at a thesis that the provisions of fiscal law, especially those pertaining to the excise duty, do not keep up with the needs and the specificity of the industries subject to the excise duty.¹⁶

The stage of parliamentary work is most important from the perspective of the final form of the fiscal provisions. It is initiated by transmission of the bill to the Marshal of the Sejm by the authorized body, i.e. the body having the right of legislative initiative.¹⁷ Legislative initiative in Poland is held by the President of the Republic of Poland, the Council of Ministers, the Senate, the deputies (members of the Sejm, “*posłowie*”), and the group of one hundred thousand citizens that have the right to cast

¹² B. Brzeziński, W. Nykiel, *Legislacja Podatkowa* [Fiscal Legislation], [in:] *Prawo Podatkowe Teoria Instytucje Funkcjonowanie* [Tax Law – Theory, Institutions, Functioning], edited by B. Brzeziński, Toruń 2009, pp. 147-149.

¹³ B. Brzeziński, W. Nykiel, *Stan prawa podatkowego w Polsce. Raport 2000* [The State of Tax Law in Poland, Report 2000], *Kwartalnik Prawa Podatkowego* 2000, no. 1, pp. 112-118; B. Brzeziński, W. Nykiel, *Stan prawa podatkowego w Polsce. Raport 2005* [The State of Tax Law in Poland, Report 2005], *Kwartalnik Prawa Podatkowego* 2006, No. 1, pp. 104-110, B. Brzeziński, W. Nykiel, *Stan prawa podatkowego w Polsce. Raport 2010* [The State of Tax Law in Poland. Report 2010], *Kwartalnik Prawa Podatkowego* 2011, No. 1, pp. 63-70.

¹⁴ B. Brzeziński, W. Nykiel, *Legislacja...*, op. cit., p. 151.

¹⁵ R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie* [Legislating Tax Law and Application Thereof], Warszawa 2016, p. 70-71.

¹⁶ S. Parulski, D. Rusiński, *Deregulacja akcyzowa – zmiany w przepisach akcyzowych od 1 stycznia 2016* [Excise Duty De-Regulation – Amendments to Excise Duty Provisions from 1 January 2016], *Przegląd Podatkowy* 2016, No. 1, p. 17.

¹⁷ Viz. Article 33 of the Procedural Rules of the Sejm of the Republic of Poland of 30 July 1992, consolidated text, “the Polish Monitor” official gazette of 2022, item no. 990, hereinafter referred to as “The Procedural Rules of the Sejm”.

a ballot during the election to the Sejm.¹⁸ The statutory bills by the deputies of the Sejm may be lodged through the committees of the Sejm or by the group of at least 15 deputies.¹⁹ The Council of Ministers plays a key role in initiating the process of enacting fiscal law. The number of statutory bills lodged by a group of deputies is significantly smaller. On the other hand, the Senate and the President of the Republic of Poland are showing minimal initiative in that regard.²⁰ The bill of a statute is processed by three readings.²¹ The first reading may take place at a Sejm committee.²² After the completion of three readings and the vote on the bill, it is transferred to the Marshal of the Senate,²³ who transfers the statutory bill to the work of committees, and then puts it to vote. The time-limit stipulated for the Senate to hear the statutory bill is 30 days.²⁴ After the completion of proceedings in the Senate and the acknowledgement or dismissal of either the Senatorial amendments, or the resolution of rejection of the bill in its entirety, the Marshal of the Sejm lodges the statute with the President of the Republic of Poland for signature.²⁵

The last phase of fiscal legislation consists in the post-parliamentary stage. In the main, it comes to the transmission of the final text of the fiscal statute to the President of the Republic of Poland for signature, who may sign it, refuse to sign it, or transfer it to the Constitutional Tribunal.²⁶

The well-founded suggestion of an amendment to the model of introducing fiscal law by making it partially alike to the legislative process for the budgetary bill is worth noting.²⁷ The deficiency of lawmaking results in very frequent amendments to the fiscal rules, including the provisions on excise duty. It is the consequence of the lack of insight into the creation of fiscal law, as well as into the introduction of certain solutions

¹⁸ Viz. Article 118(1) and (2) of the Constitution of the Republic of Poland of 2 April 1997, JL no. 78, item no. 483, as amended, hereinafter referred to as "the Constitution of Poland".

¹⁹ Viz. Article 32(2) of the Procedural Rules of the Sejm.

²⁰ C. Kosikowski, *Ustawa...*, op. cit., p. 121.

²¹ Viz. Article 119(1) of the Constitution of Poland.

²² Viz. Article 37(1) of the Procedural Rules of the Sejm.

²³ Viz. Article 52(1) of the Procedural Rules of the Sejm.

²⁴ Viz. Article 68(1) and (4) of the Procedural Rules of the Senate.

²⁵ Viz. Article 122(1) of the Constitution of Poland.

²⁶ Viz. Article 122 of the Constitution of Poland.

²⁷ C. Kosikowski, *Kontrola tworzenia prawa podatkowego [Oversight of Fiscal Lawmaking]*, [in:] *Oversight of Fiscal Lawmaking and of the Application of Tax Law Pursuant to the Constitution of Poland*, edited by E. Ruśkowski, Warszawa 2006, pp. 64-65, a similar view by A. Krzywoń, *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej [Taxes and Other Public Dues under the Constitution of the Republic of Poland]*, Warszawa 2011, pp. 247-248.

in too quick a manner. The excessive detailedness of fiscal provisions is discernible.²⁸ That issue in particular makes itself visible against the background of the excise duty, both as regards the legal rules pertaining to the object of taxation and the fiscal duty, in relation to the list of tax exemptions, or to the passive taxable person. The formal elements of fiscal legislation require correction due to its meagre standard of quality, which is regrettably an issue not only for fiscal legislation, but for the entire legislative process.

The other element important for the proper configuration of the legislative process for levies is the formation of a list of principles therefor. However, this issue must not be restricted only to the description of the specialised standards of that procedure. The impact of the general principles of fiscal law should also be taken into account. The view formed by B. Brzeziński²⁹ on the rules of legislation on levies consists in the standards of proper framing of taxes, the safeguarding of the source of tax, the respect for the rights and principles of economy as the substantive fiscal barriers, the foresight of long-term and short-term effects of tax law regulations, the fluidity of changes to the steepness of fiscal burdens, and in the safeguarding of the financial interests of the State. Those legitimate demands are however incomplete, because they do not encompass the entire list of principles capable of being formed for the fiscal legislation. On the other hand, M. Duda-Hyz³⁰ bases her list of standards for introduction of fiscal law on the regulations contained in the Constitution of the Republic of Poland. She refers only to the doctrinal principle of fairness of taxation. The collection of rules proposed by L. Etel³¹ includes both the normative principles following from the Constitution of the Republic of Poland and those that have doctrinal nature. Extra-normative suggestions voiced by L. Etel are consonant with the assumptions taken by B. Brzeziński. However, the postulate that fiscal law must be introduced by the bodies having requisite expertise in that scope is particularly worth noting. The adoption of such a principle as a rule would undoubtedly enhance the quality of the statutes on levies, in particular on the excise duty. The expertise in the scope of legal theory and

²⁸ B. Brzeziński, W. Nykiel, *Legislacja...*, op. cit., p. 151.

²⁹ B. Brzeziński, *Wprowadzenie do prawa podatkowego [Introduction to Tax Law]*, Toruń 2008, pp. 118-122.

³⁰ M. Duda-Hyz, *Źródła i zasady tworzenia prawa podatkowego [Sources and Principles of Fiscal Lawmaking]*, [in:] *Prawo podatkowe [Tax Law]*, edited by P. Smoleń, W. Wójtowicz, Warszawa 2017, pp. 47-54.

³¹ L. Etel, *Ogólne prawo podatkowe [General Tax Law]*, edited by L. Etel, Warszawa 2008, pp. 74-78.

the manufacturing of tobacco products would allow a marked improvement in the quality of fiscal provisions. A comprehensive list of principles for fiscal legislation should include both the normative principles (following from the Constitution of the Republic of Poland) and the extra-normative ones (that are delineated by the scholarship). The fiscal principles, including above all the principle of fiscal fairness³² and the principle of tax cheapness, should be counted among the principles of fiscal legislation.

2. Description of the Model of Polish Excise Duty

Historically speaking, the excise duty appeared in Poland for the first time as the so-called stopper duty (*“czopowe”*), meaning the tax on tavern sale of beer.³³ Beginning from the seventeenth century, excise duties permanently became a part of the budgetary income. That follows from several factors, i.e. high fiscal efficiency, ease of collection, and the equal burden for the respective social strata.³⁴ During the Partitions, there were the so-called fiscal monopolies within the territory of the First Republic of Poland,³⁵ encompassing alcoholic products, tobacco products, salt, yeast, matches, and playing cards.³⁶ Different excise goods were subject to fiscal monopolies in each of the partitioned territories. During the Interwar period, fiscal monopolies were still in force and their scope was made uniform, yet they were still fragmented into various legal acts.³⁷

The excise duty was applied only for a short period after the Second World War.³⁸ It was replaced by the turnover tax,³⁹ which performed a function similar to the excise duty. It should, however, be pointed out that the excise duty itself was a selective tax, as the object of taxation had been the goods in regard to which fiscal monopolies were

³² A. Gomułowicz, *Zasady podatkowe [Fiscal Principles]*, [in:] *System Prawa Finansowego T. III Prawo Daninowe [The System of Financial Law, Tome III, The Law of Public Dues]*, edited by L. Etel, Warszawa 2010, pp. 126-130.

³³ Z. Fedorowicz, *Instytucje finansowe [Financial Institutions]*, Warszawa 1965, p. 117.

³⁴ A. Komar, *Finanse publiczne [Public Finances]*, Warszawa 1994, p. 185.

³⁵ P. Grata, *Podatki pośrednie w Drugiej Rzeczypospolitej [Indirect Taxes during the Second Republic of Poland]*, *Studia Historica Gedanensia* 2015, Tome VI, pp. 136-139.

³⁶ E. Taylor, *Polityka skarbowa i system podatkowy Rzeczypospolitej Polskiej [The Fiscal Policy and the Fiscal System of the Republic of Poland]*, Poznań 1929, pp. 1-8.

³⁷ P. Grata, *Podatki pośrednie w Drugiej... , op. cit.*, p. 148.

³⁸ The excise duty was introduced by decree of 3 February 1947 – the Law on Excise Duty, JL of 1947, item no. 29, No. 122, the decree introduced taxation of beer, wine beverages, carbonic acid, acetic acid, smoking tobacco rollers, sugar, artificial sweeteners, playing cards, and bakery yeast by excise duty. That decree was abrogated by decree of 25 October 1948 on turnover tax, JL of 1948, No. 52, item no. 413.

³⁹ A. Gorgol, *Podatek akcyzowy [Excise Duty]*, [in:] *Prawo podatkowe [Tax Law]*, edited by P. Smoleń, W. Wójtowicz, Warszawa 2017, p. 329.

in place during the Interwar period. On the other hand, the turnover tax applied to all goods manufactured by the private sector. In a manner similar to excise duty, it met a fiscal objective and had a bearing on the setting of prices for goods. It was also characterized by single taxation and was paid in principle by the manufacturers.⁴⁰ However, it did not constitute an excise duty, neither according to the modern meaning, nor according to the pre-War fiscal monopolies. Currently, the excise duty is a turnover tax collected once.⁴¹ The maintenance of this singular nature required the precise specification of the moment when the tax liability appears. Due to that reason, it was assumed that the tax liability would appear at the moment the goods are made available for consumption.

As a single tax, the excise duty is added to the price of the goods, from which follows that it includes the consumption of excise goods.⁴² The model of excise duty adopted in Poland presupposes single taxation of consumption. Having that in mind, one should consider that there are two separate models of taxation under the same statute on excise duty. The first of these is the harmonised taxation of excise goods. In that instance, only the releasing of goods for consumption is subject to taxation. The second one is found in taxation of passenger cars, with the first registration of a passenger car within the territory of the country subject to taxation. Therefore, that is a situation in which taxation of passenger cars occurs at the moment of releasing them for use by the taxpayer. The detailed description of the model of the excise duty shall be carried out through the characterisation of its scope and features.

Due to the object of taxation, the excise duty may be levied on goods indispensable for the general public, such as, but not limited to, sugar, vinegar or yeast, as well as on luxurious goods such as, but again not limited to, alcohol or tobacco. The ease of collection as regards the excise duty follows from the designated moment when the tax liability appears, which occurs at the moment of placing the excise goods on the market or at the moment of their manufacture, and during the cross-border movement.⁴³ Despite the appearances, the collection of excise duty as a tax on

⁴⁰ J. Harasimowicz, *Finanse i prawo finansowe* [Finances and Financial Law], Warszawa 1988, p. 141.

⁴¹ N. Gajl, *Modele podatkowe. Podatki obrotowe i inne formy obciążeń pośrednich* [Fiscal Models. Turnover Taxes and Other Forms of Indirect Burdens], Warszawa 1995, pp. 45-46.

⁴² Z. Jaśkiewicz, *Teoria akcyzy w Polsce Ludowej* [The Theory of Excise Duty in the Polish People's Republic], Sopot 1963, pp. 107-108.

⁴³ Viz. Article 8(1) of the Act on the Excise Duty of 6 December 2008, consolidated text JL of 2023, item no. 1542, hereinafter referred to as "AED".

consumption is less noticeable than the payment of direct taxes, as it occurs in relation to the expenditure carried out for the purposes of purchasing goods.⁴⁴

There is a strong connection between EU regulations on excise duty with the customs legislation. Such a state of affairs exists for historical reasons, as the origin of excise duty is seen in the customs duty.⁴⁵ The horizontal directive refers both to the customs territory of the Union⁴⁶ and to the monitoring of customs suspension arrangements, specified in the Community Customs Code.⁴⁷ A similar configuration of the institutions of excise duty and customs leads to a conclusion that excise duty is modelled after the customs duty.

It should be noted that there is a dissonance between national law and the EU law as regards excise duty. In the domestic legal system, a single statute on excise duty remains in force, which means that the excise duty operates as a single tax in Poland.⁴⁸ On the other hand, there is a differentiation of that tax in EU law and a normative carving out of a given category of excise goods. There is the following categorisation according to EU law: manufactured tobacco, energy products and electricity, alcohol and alcoholic beverages. The conceptual discrepancy between the terms of national and EU law results from the fragmentation of the issue of excise duty regulation into several legal acts within EU law. Separate legal EU acts were adopted on the rules of harmonisation pertaining to the taxation of mineral oils, tobacco and manufactured tobacco, and alcoholic products.⁴⁹ For that reason, the excise duty in Poland formally constitutes a single tax, yet the legal fragmentation of excise duty in EU law results in the need to use the term “excise duty” in parentheses.⁵⁰

⁴⁴ J. Jaśkiewiczowa, *Prawo Finansowe [Financial Law]*, Gdańsk 1988, pp. 107-108.

⁴⁵ A. Gorgol, *Podatek akcyzowy...*, op. cit., p. 328, L. Adam, *Podatki i opłaty w kapitalizmie [Taxes and Charges in Capitalism]*, Warszawa 1962, p. 64.

⁴⁶ Preamble to the Horizontal Directive.

⁴⁷ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1–50). It should be pointed out that the rules currently in force are contained in Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast, OJ L 269, 10.10.2013, p. 1–101), hereinafter referred to as the UCC.

⁴⁸ A. Gorgol, *Podatek akcyzowy...*, op. cit., p. 330.

⁴⁹ C. Kosikowski, *Harmonizacja prawa polskiego z prawem wspólnotowym w zakresie akcyz [Harmonising Polish law with Community law in the scope of excise duties]*, [in:] B. Brzeziński, J. Głuchowski, C. Kosikowski, *Harmonizacja prawa podatkowego Unii Europejskiej i Polski [Harmonisation of European Union and Polish tax laws]*, Warszawa 1998, p. 154.

⁵⁰ A. Gorgol, *Podatek akcyzowy...*, op. cit., p. 330.

Excise duty is a State tax, and the revenue generated thereby constitutes the income of the State budget.⁵¹ The excise duty is a tax on consumption comprising the use as food and the manufacturing of excise goods. It is levied on goods that are rigid in demand, *i.e.* those which would not differ as regards the need for them, despite an increase in prices.⁵²

Excise duty is an indirect tax,⁵³ as there is a split between the effective and formal taxable person as mandated by the statute, by virtue of the intent of the active taxable person.⁵⁴ The thesis of the ability of the excise duty to be passed on cannot be subscribed to.⁵⁵ The concept of passing on should be understood as the spontaneous split between the effective and formal taxable person, occurring often contrary to the will of the active taxable person (*i.e.*, the State or the unit of local government), and the vesting of the economic burden of the tax into a third party by the effective taxable person.⁵⁶ In indirect taxes, there is often a split of the effective taxable person from the formal taxable person according to the intent of the active taxable person. This results in the vesting of the economic burden of tax, which follows from the nature of indirect taxes.⁵⁷ The passing on occurs when the taxpayer, acting on their own in line with the economic considerations, either vests the burden of tax onto a third party, or rejects the tax burden.⁵⁸ The phenomenon of passing the tax on does not occur in indirect taxes, as only their economic burden is transferred. The formal taxable person includes the amount of excise duty due in the price of goods actually paid by the consumer. The assumption of the indirect nature of excise duty excludes its capability for passing on.

⁵¹ Viz. Article 1(2) AED.

⁵² J. Głuchowski, *Konsumpcja jako przedmiot opodatkowania: casus akcyza* [Consumption as the Object of Taxation: the Case of Excise Duty], [in:] *Finanse publiczne i prawo finansowe – realia...*, op.cit., p. 417.

⁵³ A. Gorgol, *Podatek akcyzowy...*, op.cit., p. 331.

⁵⁴ W. Wójtowicz, *Struktura podatku* [the Structure of Tax], [in:] *Prawo podatkowe część ogólna i szczegółowa* [Tax Law – General Part and the Part on Specific Issues], edited by W. Wójtowicz, Lublin 2005, p. 10.

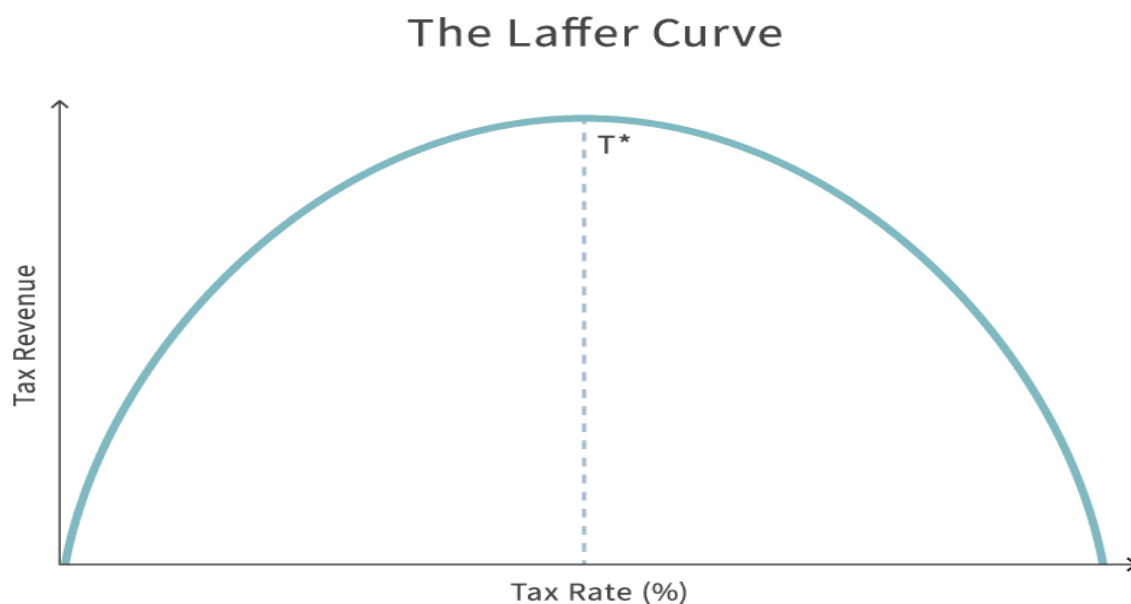
⁵⁵ J. Głuchowski, *Konsumpcja jako przedmiot opodatkowania: casus akcyza* [Consumption as the Object of Taxation: the Case of Excise Duty], [in:] *Finanse publiczne i prawo finansowe – realia i perspektywy zmian. Księga jubileuszowa dedykowana Profesorowi Eugeniuszowi Ruśkowskiemu* [Public Finances and Financial Law – Reality and Perspectives of Change. Anniversary Tome Dedicated to Professor Eugeniusz Ruśkowski], edited by L. Etel, M. Tyniewicz, Białystok 2012, p. 417.

⁵⁶ W. Wójtowicz, *Struktura...*, op. cit., p. 22.

⁵⁷ W. Wójtowicz, *Struktura...*, op. cit., p. 10.

⁵⁸ W. Wójtowicz, *Podatki pośrednie a zjawisko przyczynowości podatku* [Indirect Taxes and the Phenomenon of Passing a Tax On], [in:] *Regulacje prawno-podatkowe i rozwiązania finansowe. Pro publico bono. Księga Jubileuszowa Profesora Jana Głuchowskiego* [Legal and Fiscal Rules and Financial Solutions. Pro Publico Bono. Anniversary Tome of Professor Jan Głuchowski], Toruń 2002, p. 257, R. Rybarski, *Nauka Skarbowości* [The Science of Treasury Affairs], Warszawa 1935, p. 183.

Indeed, the economic burden of excise duty is vested in the consumer, by charging their expenses,⁵⁹ which in turn makes excise duty a consumption tax. The calculation of the excise duty into the price of goods causes it to be price-generating.⁶⁰ As mentioned, the excise duty is generally levied on the goods that are rigid in their demand. This in particular applies to electricity and energy products, because those are raw materials of key importance for the economy of a state to function. However, having in mind the price-generating nature of the excise duty, the so-called Laffer curve should be noted.



Graph: "the Laffer curve"
 Y axis : "budgetary revenue"
 X axis : "tax rate in %"

Said curve depicts the correlation between the increase in the tax rates and the amount of budgetary income. In a situation where tax rates are relatively low, their increase would cause the increase in the budgetary income. However, further increases in tax rates would lead to a situation where budgetary income would cease to grow, and then would start to diminish.⁶¹ This phenomenon is more visible as regards direct taxes, where the increase in fiscal burdens envelops a major part of the taxpayer's income,

⁵⁹ A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [Polish translation: *Badania nad naturą i przyczynami bogactwa narodów*], Tome 2, Warszawa 2013, p. 558.

⁶⁰ A. Gorgol, *Podatek akcyzowy* [the Excise Duty], [in:] *Prawo podatkowe część ogólna i szczegółowa* [Tax Law – the General Part and the Part on Specific Issues], edited by W. Wójtowicz, Lublin 2005, p. 273.

⁶¹ B. Brzeziński, *Wprowadzenie...*, op. cit., p. 60.

while the passive taxable person restricts their economic activity. However, it may also occur for the excise duty. The excise goods exhibit a rigid demand by their nature, yet that rigidity does not translate to all excise goods, such as manufactured tobacco and its alternatives or alcoholic beverages. Where there is an excessive increase in fiscal burden for manufactured tobacco, alternatives thereto, and alcoholic beverages, the consumers may forgo them, the result of which would be a decrease in budgetary income. A person may not currently exist without electricity, fuel, or heating during winter. However, the increase in prices related to the increase of excise duty rates for alcoholic beverages, manufactured tobacco and its alternatives could cause a decrease in budgetary revenue, for the consumers would restrict the use of those products. Increasing tax rates may cause a drop in budgetary income by virtue of the excise duty on manufactured tobacco, alternatives thereto, or alcoholic products. The price-generating feature of the excise duty impacts upon the freedom of the state to regulate fiscal burdens in that regard. The excessive increase in prices would cause a decrease in demand for a part of excise goods, which would ultimately influence the decrease in the budgetary income from that tax. During the process of configuring the amount of tax rates, the sovereign power of taxation is subject to restrictions due to the economic aspects of functioning as regards that tax, as the excessive increase in prices may lead to a drop in consumption, equating a decrease in budgetary income. That fact is also related to the stimulating function of the tax.

The taxation effected by the excise duty is selective in nature. This follows from the foundational premise that the excise goods are the object of taxation,⁶² which constitutes a restriction of its objective scope as regards the universal tax on goods and services.⁶³ Passenger cars are also subject to excise duty in Poland, which are however not included in the statutory definition of excise goods.⁶⁴

A major feature distinguishing the excise duty from other indirect taxes is its single phasing.⁶⁵ It is manifesting in the collection of that tax only once, at the stage of release

⁶² A. Gomułowicz, *Podatki pośrednie [Indirect Taxes]*, [in:] *Podatki i prawo podatkowe [Taxes and Tax Law]*, edited by A. Gomułowicz, J. Małecki, Poznań 2000, p. 449.

⁶³ A. Gorgol, *Podatek akcyzowy...*, op. cit., p. 332.

⁶⁴ Viz. Article 1(1) AED, definition of excise goods is contained in Article 2(1)(1) AED.

⁶⁵ Viz. Article 8(6) AED.

for consumption,⁶⁶ which determines the singular collection of excise duty. When the tax would have been already paid, each subsequent transaction is not subject to taxation, and the party carrying it out should not be treated as a taxpayer of excise duty.⁶⁷ The consequence of the single phasing of excise duty is also the taxation of excise goods constituting so-called intermediaries, excise goods used up for the manufacture of other excise goods.⁶⁸ Such a situation could have led to a conclusion that the excise duty is levied more than once as regards the same goods. However, at the moment of using the original goods up, other excise goods are being manufactured, which would then be placed on the market.⁶⁹

The procedure for a duty suspension arrangement is also linked to the single phasing of the excise duty. It has been defined by virtue of EU law and is applied to the production, processing, holding, or movement of excise goods.⁷⁰ The implementation of the single phasing of taxation is carried out through such solutions, as a tax warehouse, the registered consignee, the registered consignor. In addition, that procedure implements the objective of harmonisation found in the collection of excise duty in the Member State where the consumption of excise goods took place.⁷¹ Duty suspension arrangement consists in the deferral of the moment the fiscal obligation occurs from the stage of manufacturing the excise goods to the release of those goods for consumption. That solution causes the expiry of the fiscal obligation and the absence of the fiscal obligation occurring by virtue of moving the excise goods subject to such an arrangement.⁷² The duty suspension arrangement for excise duty is an

⁶⁶ Viz. Article 7(1) of the Horizontal Directive, R. Kubal, Komentarz do art. 8 ustawy o podatku akcyzowym [Commentary on Article 8 AED], [in:] Akcyza Komentarz [Excise Duty – a Commentary], edited by M. Zimny, p. 132.

⁶⁷ A. Bigas, Zachowanie należytej staranności w transakcji a odpowiedzialność podatkowa na gruncie art. 8 ust. 2 pkt 4 ustawy o podatku akcyzowym [Meeting the Standard of Due Diligence and Fiscal Liability Pursuant to Article 8(2)(4) AED] [in:] Prawo celne i podatek akcyzowy. Błaski i cienie dziesięciu lat członkostwa Polski w Unii Europejskiej [The Law of Customs and Excise Duty. Bright and Dark Sides of Ten Years of Accession of Poland to the European Union], ed. T. Nowak, P. Stanisławiszyn, Warszawa 2016, p. 47.

⁶⁸ Viz. Article 8(4)(1) AED.

⁶⁹ Viz. Article 7(1) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12–30), hereinafter referred to as the Horizontal Directive.

⁷⁰ Viz. Article 4(7) of the Horizontal Directive.

⁷¹ J. Arciszewski, Komentarz do art. 2 u. p. a. [Commentary on Article 2 AED], [in:] Akcyza..., op. cit., p. 40.

⁷² Article 41(5) AED.

institution that is preferential in nature.⁷³ It implements the standards of the Horizontal Directive as regards the chargeability of excise duty at the moment of release for consumption.⁷⁴ Due to the special nature of the duty suspension arrangement for the excise duty, consisting in the temporal deferral of the occurrence of the fiscal obligation, the application of that procedure has been greatly formalised. The restriction of the list of situations to which that procedure would apply is important.⁷⁵ The moving of excise goods subject to the duty suspension arrangement is carried out under cover of an electronic administrative document (the “e-AD”) and requires the prior provision of the excise duty security (“*zabezpieczenie akcyzowe*”).⁷⁶ At this point, it should be noted that the duty to document the movement of goods pursuant to an e-AD within the territory of the European Union does not apply to novel tobacco products and to electronic cigarette liquids, which are not subject to the provisions of Directive 2020/262/EU. Irrespective of the above, and by virtue of the national provisions, those goods may be moved within the framework of the duty suspension arrangement within the national territory, subject to further formal requirements. In turn, the termination of the duty suspension arrangement results in the occurrence of the fiscal obligation with the concurrent expiry of tax liability.⁷⁷ However, there have been some exceptions to the general rule provided for, as regards which the fiscal obligation would not occur despite the termination of the duty suspension arrangement.⁷⁸

The excise duty security is an institution specific for the excise duty, the objective of which is to cover one or more fiscal obligations.⁷⁹ The statute specifies the list of parties required to provide such security,⁸⁰ which constitutes a guarantee for the State Treasury that the extant fiscal obligation would be performed, by allowing the clearance

⁷³ A. Gorgol, *Wygaśnięcie obowiązku podatkowego w akcyzie – zagadnienia doktrynalne i praktyczne* [Expiry of Fiscal Liability as regards Excise Duty – Doctrinal and Practical Issues], [in:] *Regulacje w zakresie prawa celnego i podatku akcyzowego po przystąpieniu Polski do Unii Europejskiej* [Rules in the Scope of the Law of Customs and Excise Duty After the Accession of Poland to the European Union], edited by T. Nowak, P. Stanisławiszyn, Warszawa 2012, p. 56-57, a similar view was taken in the judgment of the Voivode Administrative Court in Kraków of 25 February 2010, case ref. III SA/Kr 1137/09, CBOSA.

⁷⁴ Viz. Article 7 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12–30), referred to as the Horizontal Directive.

⁷⁵ Viz. Article 40(1) and (2) AED.

⁷⁶ Viz. Article 41(1) AED.

⁷⁷ Viz. Article 45(1) AED.

⁷⁸ Viz. Article 42(1)(1) and (1)(2) AED.

⁷⁹ Viz. Article 63(2) AED.

⁸⁰ Viz. Article 63(1) AED.

of tax dues directly from the security provided.⁸¹ Securities are divided into one-time securities that are meant to cover one specific transaction, and general securities that have the objective of covering the recurring economic operations by their scope.⁸² The forms of security are non-exhaustively listed and include, but are not limited to cash security, bank or insurance guarantees, a check, a promissory note, a different document having a payment value, and the mortgaging of real property.⁸³ Specific rules on the provision of excise duty security were specified in an executive act.⁸⁴ The possibility of the party obligated to provide excise duty security being granted leave from that duty is notable.⁸⁵ Such a preference is granted by the competent Head of the tax office, but several requirements have to be met.⁸⁶ The leave from the duty to provide security may be granted by a decision for the period of two years, which may be extended each time by further periods, no longer than two years.⁸⁷ It occurs by way of an individual and at the same time specific act. The leave from the duty to provide fiscal security does not have the nature of fiscal preference granted to businesspersons obliged to provide excise duty security. The objective of providing the security is the coverage of the declared, and yet unpaid, amount of excise duty.⁸⁸ However, a leave from that duty does not constitute a fiscal preference. Firstly, tax relief and tax exemptions may be granted after fulfilling certain formal criteria, by way of an individual act.⁸⁹ Secondly, the objective of provision of the security is to guarantee the propriety of making good on the fiscal obligation before its occurrence.⁹⁰ A leave from the duty to provide security does not affect the amount of tax due in any way. For that reason it does not constitute a fiscal preference, yet it should be deemed to be an economic preference, i.e. the decrease in the businessperson's burdens that are related to the operation of a business, e.g. in the form of tying a portion of their funds

⁸¹ A. Drozdek, *Zasady stosowania zabezpieczenia wyrobów akcyzowych w formie hipoteki* [Principles of Applying Security For Excise Goods in the Form of a Mortgage], *Monitor Prawa Celnego i Podatkowego* 2018, No. 6, p. 211.

⁸² A. Bigas, *Komentarz do art. 65 ustawy o podatku akcyzowym* [Commentary on Article 65 AED], [in:] *Akcyza...*, op. cit., p. 661.

⁸³ *Viz.* Article 67(1) AED.

⁸⁴ Order of the Minister of Finance of 21 December 2018 in the matter of excise duty securities, *JL* of 2018, item no. 2543.

⁸⁵ *Viz.* Article 64 AED.

⁸⁶ *Viz.* Article 64(1) AED.

⁸⁷ *Viz.* Article 64(4) AED.

⁸⁸ *Viz.* Article 73(1) AED.

⁸⁹ W. Nykiel, *Ulgi i zwolnienia w konstrukcji prawnej podatku* [Relief and Exemptions in the Legal Structure of a Tax], Warszawa 2002, pp. 49-50.

⁹⁰ A. Bigas, *Komentarz do art. 65 ustawy o podatku akcyzowym* [Commentary on Article 65 AED], [in:] *Akcyza...*, op. cit. p. 641.

in order to post security in cash, or in order to pay a bank or an insurance guarantee. A leave from the duty to provide security does not constitute a fiscal preference, but reduces the negative duties of a businessperson that are linked to the business operated by them.

Another regulation that is not typical for tax statutes, yet specific for the excise duty, is found in the requirement for the excise goods to carry excise markings,⁹¹ which is optional according to EU law. The reason for that obligation should be sought in the implementation of control over the trade in excise goods than in the fiscal function.⁹² This state of affairs is reasonable for two reasons. Firstly, the value of excise markings is not equal to the fiscal due that should be paid in relation to the occurrence of the fiscal obligation. The excise markings are a means to pay the tax due, but their value is significantly lower than the amount of fiscal obligation. Secondly, the marking of goods with the excise markings allows for the determination that the excise goods come from a legitimate source. This has particular importance, as the market in excise goods is vulnerable to the development of illegal trade.⁹³ The duty to mark with excise markings aims at securing oversight over the trade in excise goods, while at the same time indicating that given excise goods come from a legitimate source. In principle, the excise goods specified in Schedule 3 to the Act on the Excise Duty are subject to the marking duty. However, there are exceptions to that principle provided for, consisting in exempting certain excise goods from that duty.⁹⁴ They should be marked with excise markings before placing them on the market.⁹⁵

The last, but in fact the most important element of the Polish model for excise duty is found in harmonisation. As specified above, it constitutes the process of bringing the laws of Member States closer, in order to ensure the functioning of the common market

⁹¹ Viz. Article 114 AED, a list of excise goods subject to the duty to mark such goods was included in Schedule no. 3 to the Act on the Excise Duty.

⁹² P. Stanisławiszyn, Komentarz do art. 39 dyrektywy Rady 2008/118/WE z dnia 16 grudnia 2008 r., w sprawie ogólnych zasad dotyczących podatku akcyzowego, uchylająca dyrektywę 92/12/EWG [Commentary on Article 39 of the Horizontal Directive], [in:], *Akcyza w prawie Unii Europejskiej* [Excise Duty in the Law of the European Union], edited by K. Lasiński-Sulecki, Warszawa 2014, p. 217.

⁹³ Judgment of the Court of 10 December 2002. *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. Case C-491/01. European Court Reports 2002 I-11453, ECLI identifier: ECLI:EU:C:2002:741, Judgment of the Court (Fifth Chamber) of 29 April 2004. *British American Tobacco Manufacturing BV v Hauptzollamt Krefeld*. Case C-222/01. European Court Reports 2004 I-04683, ECLI identifier: ECLI:EU:C:2004:250.

⁹⁴ Viz. Article 118 AED and Order of the Minister of Finance of 20 August 2010 in the matter of exemptions for excise goods from the obligation of marking with excise marks, consolidated text JL of 2021, item no. 1631.

⁹⁵ Viz. Article 117 AED.

and the elimination of economic barriers to trade within the European Union (EU).⁹⁶ The degree of harmonisation of excise duties is significant.⁹⁷ That follows from the long-term actions related to the configuration of the EU system of excise duty. That process was commenced by making a division of excise duties into three categories: excise duties of great importance for the budgetary income of the respective Member States and the harmonisation thereof (excise duties for alcoholic beverages, manufactured tobacco, mineral oils); the maintenance of consumption taxes with local scope of operation, which are deemed not to impact the competitiveness of goods originating from the respective States in international trade, without harmonisation; and the elimination or the inclusion into the system of the universal turnover tax as regards taxes on consumption that have relatively small fiscal importance for the respective States.⁹⁸ The need to harmonise both the consumption of excise goods and those that constitute intermediate goods for manufacturing another excise goods was noted.⁹⁹ The uniformization of the trade in intermediate goods resulted from the fact of possible distortion of the common market caused by differing taxation of goods not meant for consumption. It would be difficult to consider the maintenance of competitiveness when the taxation of consumption of excise goods would have been harmonised, yet the raw materials subject to excise duty would not be. Excise duties apply both to goods meant for final consumption and to goods intended for further manufacturing.¹⁰⁰

The process of approximation of Polish regulations to the provisions of EU law has begun in the 1990s with the conclusion of the Europe Agreement.¹⁰¹ In that agreement, Poland declared the intent to accede to the European Community on one hand, and undertook to make the internal legislation uniform with the rules of Community law.¹⁰²

⁹⁶ Preamble to the Horizontal Directive.

⁹⁷ B. Brzeziński, M. Kalinowski, *Prawo podatkowe Wspólnoty Europejskiej* [Tax Law of the European Community], Gdańsk 2006, p. 175.

⁹⁸ C. Kosikowski, *Harmonizacja...*, op. cit., p. 153.

⁹⁹ K. Lasiński-Sulecki, *Akcyza – historia harmonizacji i proces dostosowywania prawa krajowego do prawa unijnego* [Excise Duty – a History of Harmonization and the Process of Approximating National Law to EU Law], [w:] *Polskie prawo podatkowe a prawo unijne Katalog rozbieżności* [Polish Tax Law and EU Law – a List of Divergences], edited by B. Brzeziński, D. Dominik-Ogińska, K. Lasiński-Sulecki, A. Złasiński, Warszawa 2016, p. 226.

¹⁰⁰ C. Kosikowski, *Harmonizacja...*, op. cit., p. 152.

¹⁰¹ Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1), hereinafter referred to as the Europe Agreement.

¹⁰² D. Mączyński, *Polska akcyza na tle regulacji europejskich* [Polish Excise Duty Against the Background of European Rules], *Kwartalnik Prawa Podatkowego*, 2003, No. 2-3, p. 70.

One of the important regulations was to successively introduce an area of free trade between Poland and the European Community.¹⁰³ That gave form to the approximation of the legal order and to the drive for the safeguarding of the free movement of goods at the pre-accession stage. A regulation was introduced, to the effect that both of the parties ought to refrain from the fiscal discrimination of goods as regards similar goods.¹⁰⁴ That solution was similar to the current Treaty rules.¹⁰⁵ It had the objective of making the barrier-free trade between Poland and the European Community a reality. Even at the pre-accession stage, Poland could not introduce excise duty regulations that would discriminate excise goods originating from the European Community. However, the most important stipulation on the excise duty was the obligation on part of Poland to align the domestic legislation closer to the rules of Community law,¹⁰⁶ including those on taxation.¹⁰⁷ That obligation did not vest the requirement to closely transpose the law of the European Community in Poland, yet the approximation as it was then had to have such a degree that the objectives of the Community would be met.¹⁰⁸ The conclusion of the Europe Agreement resulted in the restriction of discretion as regards lawmaking, in the form of the prohibition of regulations that would have discriminatory and protectionist nature, as well as required Poland to introduce laws that would be drafted in a manner similar to the Union rules. As regards the excise duty, the adoption of a statute meeting the Union standards occurred shortly before the accession.¹⁰⁹ The statute hitherto in force¹¹⁰ did not take account of the rules adopted by the law of the European Union. That pertained both to the respective elements of the tax and to the list of excise goods, the latter being much longer than the one from the rules contained in the directives.¹¹¹ At the moment of accession, the scope of excise goods was restricted, with the aim of aligning it in Poland to the one in the European Union. As there were no appropriate legislative measures taken at the pre-accession

¹⁰³ Viz. Article 7(1) of the Europe Agreement.

¹⁰⁴ Viz. Article 26(1) of the Europe Agreement.

¹⁰⁵ Viz. Article 110 TFEU.

¹⁰⁶ Viz. Article 68 of the Europe Agreement.

¹⁰⁷ Viz. Article 69 of the Europe Agreement.

¹⁰⁸ A. Kostecki, *Przesłanki i metody harmonizacji prawa podatkowego z unijnym prawem podatkowym* [Prerequisites and Methods of Harmonising Tax Law with EU Tax Law], [in:] *Prawo finansowe i nauka prawa finansowego na przełomie wieków* [Financial Law and the Scholarship of Financial Law at the Turn of the Millennium], ed. A. Kostecki, Zakamycze 2000, pp. 161-162.

¹⁰⁹ The Act of 23 January 2004 on the Excise Duty, JL of 2004, No. 29, item no. 257.

¹¹⁰ The Act of 8 January 1993 on the Tax on Goods and Services and on the Excise Duty, JL of 1993, No. 11, item no. 50.

¹¹¹ D. Mączyński, *Polska...*, op. cit. pp. 74-75.

stage, the list of excise goods stopped to include e.g. salt, maritime yachts, or high-grade electronic equipment at the moment of the Excise Duty Act of 2004 came into force. The accession to the EU entailed the restriction of discretion as to the contents of the list of excise goods subject to tax, and well as the requirement to implement the Union solutions as regards excise duty especially in regard to the introduction of elements specific for that tax, including e.g. the change of the moment of collection of the tax.

The accession of Poland to the European Union has curbed the discretion of passing legislation on the excise duty to great extent. Poland is required to align the domestic legislation closer to the system of European Union law. That phenomenon is determined by the objective of functioning of the common market.¹¹² The structural elements of the tax, the list of excise goods, and the procedures related to the marking of excise goods are subject to harmonisation. Poland is required to subject excise goods to excise duty,¹¹³ which constitutes an interference with legislative discretion.¹¹⁴ The Member States retain the possibility to levy taxes not having the nature of turnover taxes on other products than excise goods and on services.¹¹⁵ However, the condition therefor is found in the prohibition of increasing formalities during the crossing of borders. It follows from the above that there is a need to implement the solutions contained in the directives in a manner that their objective is fully implemented in the national legal order.¹¹⁶ At the same time, it should be noted that the duty to implement Union solutions must be carried out in line with the constitutional rules. In that aspect, the requirement to introduce such solutions by way of a legal act at the level of a statute should be viewed as priority, which follows from the principle of exclusivity of a statute in fiscal matters.¹¹⁷ Additionally, implementation should take place in line with the axiological values and standards of legislation foreseen in the Constitution of the Republic of Poland. The discretion to frame the excise duty is subject to restrictions in two aspects. Firstly, the rules of Union law vest the duty of harmonisation of excise

¹¹² Preamble to the Horizontal Directive.

¹¹³ Viz. Article 1(1) of the Horizontal Directive.

¹¹⁴ K. Lasiński-Sulecki, Komentarz do art. 1 dyrektywy Rady 2008/118/WE z dnia 16 grudnia 2008 r., w sprawie ogólnych zasad dotyczących podatku akcyzowego, uchylająca dyrektywę 92/12/EWG [Commentary on Article 8 of the Horizontal Directive], [in:], *Akcyza w prawie Unii Europejskiej* [Excise Duty in the Law of the European Union], edited by K. Lasiński-Sulecki, Warszawa 2014, p. 45.

¹¹⁵ Viz. Article 1(3) of the Horizontal Directive.

¹¹⁶ A. Drozdek, Granice swobody implementacji dyrektywy w sprawach podatkowych przez państwa członkowskie [Limits of Discretion in Implementing a Directive in Fiscal Matters by Member States], *Monitor Prawa Celnego i Podatkowego* 2018, no. 3, p. 95.

¹¹⁷ Viz. Article 217 of the Constitution of Poland.

duty in Poland. Secondly, the harmonisation must be carried out in line with the constitutional legal order and should conform to the premiss of the directive. It is prohibited to frame the provisions of the Polish statute on excise duty in a manner that would preclude or hinder the objectives of the directive.

An element constituting a result of harmonisation of excise duty is found in the systemisation of classification of excise goods on the basis of the Combined Nomenclature (CN).¹¹⁸ Not all excise goods are described on the basis of the CN classification, as e.g. manufactured tobacco and its alternatives are not. In addition, deeming certain goods to be excise goods requires the description of their intended use. The rules on classification are meant to specify the objective scope and the amount of tax rates for the excise duty.¹¹⁹ At the same time, as a subsidiary factor for the Combined Nomenclature that serves to qualify the respective excise goods, the explanatory notes to the Combined Nomenclature are applied.¹²⁰ They are not binding, but nonetheless are a factor that influences the classification of excise goods.¹²¹

In addition, it should be noted that there are in fact two separate excise duties in place despite the regulation thereof in a single legal act, i.e. the harmonised tax on excise goods and the non-harmonised tax on passenger cars.¹²² The taxation of passenger cars by the excise duty constitutes an autonomous regulation, due to the discretion of levying taxes on products other than excise goods. Using that power caused the non-uniform structure of excise duty to appear.

3. Functions of Excise Duty That Determine Its Structure

The significant elements that determine the structure of a tax are its functions to be performed thereby in a fiscal system. There are four principal functions of taxes discerned in the scholarship on fiscal law, i.e. the fiscal, redistributive, stimulating and

¹¹⁸ Commission Implementing Regulation (EU) 2019/1776 of 9 October 2019 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 280, 31.10.2019, p. 1–1042).

¹¹⁹ K. Lasiński-Sulecki, Wybrane problemy wykładni przepisów klasyfikacyjnych [Select Issues of Interpretation of Classification Provisions], *Monitor Prawa Celnego i Podatkowego* 2015, no. 7, p. 247.

¹²⁰ Explanatory notes to the Combined Nomenclature of the European Union OJ C 76, 4.3.2015, p. 1–388.

¹²¹ W. Morawski, Charakter prawny not wyjaśniających i opinii klasyfikacyjnych WCO [Legal Nature of Explanatory Notes and Classification Opinions of the WCO], *Monitor Prawa Celnego i Podatkowego* 2013, No. 2, pp. 43–45.

¹²² A. Gorgol, *Podatek...*, op. cit., p. 331.

informational-supervisory functions.¹²³ The second, third, and fourth function are also known as extra-fiscal functions.¹²⁴

The most important function of the excise duty is the fiscal function, which follows from the very nature of a tax which is supposed to constitute a source of budgetary income. The primacy of the fiscal function does not engender any doubt. However, it is not appropriate to say that the extra-fiscal functions of the excise duty have no place in the rational model of fiscal law.¹²⁵ W. Modzelewski stressed that, while stating reasons for the need to introduce extra-fiscal functions, that they are the price paid for social peace. However, that view is misplaced. A tax is not only to provide budgetary income, but also to serve as a tool to influence the social and economic mechanisms.¹²⁶ The impact of fiscal regulations on the economic system is beyond question due to e.g. the price-generating nature of the excise duty, which applies to the goods that are important from the point of view of the economy, including sources of energy. The view to the effect that the only function of a tax is to ensure budgetary income cannot be subscribed to.¹²⁷

The fiscal function of taxes is also termed as the income function,¹²⁸ which follows from the very nature of tax - the main objective of which is to secure funds indispensable for operation of the state, for that state.¹²⁹ Taxes constitute the fundamental source of budgetary income and allow for the coverage of a major part of the state's expenses.¹³⁰ W. Wójtowicz rightly points out to the key importance of the fiscal function for the fiscal system, which finds its confirmation in the drafting of the rules of fiscal law in Poland. It is worth noting that the importance of that function was being depreciated by the scholarship, to the benefit of the interventionist, the dividing or distributive, or the informational functions.¹³¹ That followed from the political considerations and from the

¹²³ W. Wójtowicz, *Funkcje systemu podatkowego* [Functions of the Fiscal System], [in:] *Prawo podatkowe* [Tax Law], edited by P. Smoleń, W. Wójtowicz, Warszawa 2017, pp. 27-28.

¹²⁴ I. Mirek, *Daniny publiczne w prawie niemieckim* [Public Dues under German Law], Warszawa 1999, p. 167.

¹²⁵ W. Modzelewski, *Wstęp do nauki polskiego prawa podatkowego* [Introduction to the Doctrine of Polish Tax Law], Warszawa 1998, p. 24.

¹²⁶ W. Wójtowicz, *Kontrowersje wokół „prorodzinności systemu podatkowego”* [Controversy Regarding the So-Called Family-Orientedness of the Fiscal System], *Kwartalnik Prawa Podatkowego* 2000, no. 2, p. 59.

¹²⁷ W. Modzelewski, *Wstęp do nauki polskiego prawa podatkowego* [Introduction to the Doctrine of Polish Tax Law], Warszawa 1998, pp. 23-24.

¹²⁸ J. Harasimowicz, *Finanse i prawo finansowe* [Finances and Financial Law], Warszawa 1988 p. 119.

¹²⁹ R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie* [Legislating Tax Law and Application Thereof], Warszawa 2016, p. 37.

¹³⁰ W. Wójtowicz, *Elementy teorii podatku* [Elements of the Theory of Tax], [in:] *Zarys...*, op. cit., p. 165.

¹³¹ L. Kurowski, M. Weralski, *Prawo finansowe* [Financial Law], Warszawa 1968, pp. 14-15.

functioning of the state during the socialist regime. According to the state of affairs back then, the major part of the state's income came from its economic activities, while taxes constituted an additional share in the system of public income.¹³² Due to the change of the political system, the fiscal function has regained its significant importance for the implementation of the budgetary goals in the market economy. The framing of fiscal law is largely determined by the collection of income from taxes.

The stimulating function of the excise duty¹³³ manifests in the framing of that tax in a manner that induces advantageous phenomena in the economy, the society, and in politics, while at the same time eliminating the noxious phenomena.¹³⁴ It is aimed to promote the activity within the given area by appropriate framing of that public due and of the instruments of fiscal policy. Its implementation is carried out in, among other things, the application of the fiscal preferences.¹³⁵

The redistributive function of the excise duty makes it possible that the appropriate framing of the fiscal system allows the State to direct the process of redistributing the Gross Domestic Product (GDP), and to participate in that process to some extent.¹³⁶ Despite the changes of constitutional nature, the understanding of the redistributive function of taxes as the possibility of transfer of funds between the respective branches of economy, or areas of different economic stage of development remains pertinent. Redistribution allows for funding of weaker branches of the economy and the support for the areas less economically developed.¹³⁷

In turn, the informational-supervisory function of the excise duty provides information on the social, economic and political events taking place. The additional duties arising from the contents of a fiscal statute, such as the payment of tax by a bank account, the duty to mark excise goods, or the imposition of a specific manner of operating a business in the form of the tax warehouse, allow for the implementation of formal

¹³² K. Ostrowski, *Prawo finansowe - Zarys Ogólny* [Financial Law – General Outline], Warszawa 1970, p. 142.

¹³³ That function also tends to be referred to by the scholarship as “the interventionist function”, yet it is not reasonable to distinguish those functions of a tax, or accord a status of a variation of the interventionist function to the stimulating function. It is so because both descriptions formulate the same assumption, i.e. influencing a certain sphere of operation of a state in order to induce an expected result.

¹³⁴ W. Wójtowicz, *Elementy teorii podatku* [Elements of the Theory of Tax], [in:] *Zarys finansów publicznych i prawa finansowego* [Outline of Public Finances and Financial Law], edited by W. Wójtowicz, Warszawa 2017, p. 165.

¹³⁵ B. Brzeźński, *Wprowadzenie...*, op. cit., pp. 74-75.

¹³⁶ W. Wójtowicz, *Elementy...*, op. cit., p. 165.

¹³⁷ L. Kurowski, M. Weralski, *Prawo...*, op. cit., p. 15.

oversight over the business operated by the taxpayer.¹³⁸ Thanks to that function, it is possible to ascertain the state of the economy. The rapid decrease in the budgetary income from taxes may point to negative changes in the economy, as well as to the excess of fiscal burdens. In turn, its unforeseen increase indicates either economic prosperity, or the insufficient fiscal burden as regards certain excise goods, which causes an increase in consumption.

The fiscal function determines such a framing of the excise duty that the budgetary income is optimised. From the point of view of securing the profitability of the tax, the tax rates and the mechanisms of its collection are the key elements. Just as well, an important element that serves to perform the fiscal function is the tax base. The amount of budgetary income is negatively impacted by the exemptions to taxation, i.e. the objective and subjective tax carve-outs, tax relief and tax exemptions, and tax reductions. Those instruments must take the primacy of the fiscal function into account for the purposes of ensuring the appropriate income efficiency of the tax. In the event of forgoing the fiscal function and assigning the leading role to the other functions of the tax, said tax would not perform its income function. That would result in the decrease in budgetary revenues, which could also take place through the incorrect setting of tax rates, improper setting of the tax base, the defective mechanism of tax collection, or through the extensive list of relief and exemption measures. An analogous situation would occur while setting too steep tax rates, minimalizing relief and exemptions, while having a defective system of collection. Even if the excise duty includes goods in rigid demand in the scope of taxation, the budgetary revenue therefrom may be subject to a decrease caused by the amount of tax rates. The performance of the fiscal function should be based on balancing of extra-fiscal functions and the instruments of their implementation, so as to avoid causing a drop in the budgetary revenue by legislative actions.

The excise duty performs the fiscal function and constitutes a stable source of budgetary income. The fiscal stability of the excise duty follows from the two important features thereof. It may be pointed out that there are the selective nature of that tax and the relatively rigid demand for goods subject to taxation following therefrom, with the exceptions of tobacco products and their alternatives, as well as alcohol. The

¹³⁸ W. Wójtowicz, *Funkcje...*, op. cit., p. 28.

excise duty applies to such goods the demand for which is not subject to rapid changes caused by market tendencies. The effectiveness of the excise duty may also follow from the adopted technique of collection of that tax, which is chargeable once at the moment of the release for consumption. The safeguarding of efficiency of the excise duty requires the proper balance between the respective structural elements that determine its income efficiency. The performance of the fiscal function restricts the discretion of the configuration of the structural elements of the tax. That determines the adoption of such solutions that guarantee the optimal relationship between the tax base, the tax rates, the list of relief and exemption measures, and the mechanism of tax collection in order to maximise the budgetary income.

The stimulating function of the excise duty is the another function thereof that is important for the economy. It consists in the implementation of tax instruments in such a manner as to facilitate the achievement of appropriate economic outcomes and to bring the desired political, economic and societal effects about.¹³⁹ The stimulating function is performed through stimuli. A financial stimulus is constituted by any situation in which certain financial effects are a motive of human behaviour. The financial stimuli activated by the law are referred to as the legal-financial stimuli.¹⁴⁰ It is appropriate to use the legal-financial stimuli that follow from the provisions of fiscal law and make their impact on their addressee due to financial gain or detriment posed thereby. H. Reniger systematises a detailed list of those stimuli.¹⁴¹ It is pointed therein to the functioning, in the legal-financial system, of stimuli that are: positive and negative, energising and hindering, collective and individual, personal and societal, as well as specialised and synthetic. The positive stimuli encourage the undertaking of a certain effort or the making of a certain choice.¹⁴² In turn, negative stimuli are based on the danger of financial detriment, where the behaviour of the party concerned does not conform to that what is expected.¹⁴³ The energising stimuli have the objective of motivating one to acts expected by the state, whereas the hindering stimuli are to limit the acts with negative results.¹⁴⁴ The individual stimuli consist in the conferral of an

¹³⁹ N. Gajl, *Teorie podatkowe w świecie* [Fiscal Theories Over the World], Warszawa 1992, p. 131.

¹⁴⁰ H. Reniger, *Bodźce prawno-finansowe* [Legal and Fiscal Stimuli], [in:] *System instytucji prawnofinansowych PRL Tom I Instytucje Ogólne* [The System of Legal and Fiscal Institutions of the Polish People's Republic, Tome I General Institutions], edited by M. Weralski, Wrocław 1982, p. 319.

¹⁴¹ H. Reniger, *Bodźce...*, op. cit. pp. 321-333.

¹⁴² H. Reniger, *Bodźce...*, op. cit. p. 322.

¹⁴³ H. Reniger, *Bodźce...*, op. cit. p. 322.

¹⁴⁴ H. Reniger, *Bodźce...*, op. cit. p. 322.

advantage or the imposition of a detriment, being related to the actions of an individual, whereas the collective stimuli are linked to the effects achieved by a certain group.¹⁴⁵ The personal and the societal stimuli are based on the subjective criterion, and the basis of their division is constituted by the determination of the party who, as a result of their act or their omission, acquires the advantage or suffers the financial detriment.¹⁴⁶ The synthetic stimuli are those that are connected to the overall effect that is expressed in the form of a given measure, whereas the specialised stimuli associate the advantage or the detriment with a sub-result.¹⁴⁷ The deliberations of H. Reniger are still relevant in the context of the performance of the stimulating function by way of legal-financial stimuli, despite the considerable lapse of time.

From the point of view of the structure of the excise duty, the positive and negative stimuli, as well as energising and hindering stimuli are key, as there is an influence being exerted on the taxpayers and the consumers through the respective legal-financial instruments. The objective of those actions is for the State to achieve the desired behaviour of taxpayers. The positive stimuli result in a financial incentive that encourages a certain behaviour. The negative stimuli consist in the danger of a financial detriment as regards behaviour considered undesirable by the State. However, the division between those stimuli does not always have to be markedly distinct, which could result in the combination of positive and negative stimuli.¹⁴⁸ The regulation of stimuli contained in the provisions of the Act on the Excise Duty constitutes an expression of the stimulating function being performed. The stimuli may function on several planes. As regards the excise duty, the influence on taxpayers takes place in three aspects. The first of those is the setting of tax rates. The second is the application of tax preferences. The third aspect consists of the reporting and informational duties. One arrives at a situation where the taxpayer of the excise duty who aims to acquire a certain financial advantage – e.g. through the decrease of the tax rate, or the acquisition of an exemption – acts in a manner prescribed by the law. Undoubtedly, the rates of the excise duty constitute a fiscal stimulus. The actions undertaken in order to increase the consumption of the given excise goods may consist in the decrease of the tax rates. The aspiration to restrict the consumption of the given

¹⁴⁵ H. Reniger, *Bodźce...*, op. cit. p. 326.

¹⁴⁶ H. Reniger, *Bodźce...*, op. cit. p. 328.

¹⁴⁷ H. Reniger, *Bodźce...*, op. cit. p. 329.

¹⁴⁸ H. Reniger, *Bodźce...*, op. cit. p. 323.

excise goods may be the cause of the increase in the tax rates. The exertion of influence through the system of incentives and detriments may impact on the degree of performance of the fiscal function of the tax. Actions aiming to restrict the consumption of certain goods through the increasing of tax rates may result in the increase of budgetary income. However, the above-mentioned phenomenon of the Laffer curve should be kept in mind, for according to that phenomenon, the consumers may forgo tobacco products and their alternatives, as well as alcoholic beverages, and then seek cheaper products that originate from the grey market and which are not taxed on the Polish market in the event of the excessive increase in fiscal burdens on those goods, the result of which shall be a drop in budgetary income. The stimulating function also has a negative fiscal meaning, as rewarding certain behaviour through the grant of fiscal or economic preferences may cause a decrease of the budgetary income.

The health-promoting role of the excise duty is the another element of stimulation in its scope.¹⁴⁹ That aspect has key importance from the perspective of the instant research, as it influences the framing of taxation of manufactured tobacco and its alternatives. Among the goods on the list of excise goods, tobacco use (especially smoking) and alcohol consumption negatively affect human health. The taxation of those goods is quite important from the point of view of human health, as alcoholic beverages and manufactured tobacco are strong carcinogenic factors.¹⁵⁰ In particular, the substances contained in the tobacco smoke may cause not only cancers, but also illnesses of the respiratory and the circulatory systems, interfere with the gastrointestinal system, contribute to the dysfunction of the reproductive system, the illnesses of the periodontium, the weakening of the visual system, the impairment of the immune system, and may further increase the risk of cerebrovascular accidents (strokes).¹⁵¹

¹⁴⁹ The objective of securing a high level of protection of human health, related to taxation of tobacco products that influences the behaviours linked to smoking tobacco among consumers, was formulated in the preamble to the Tobacco Directive. However, the Alcohol Directive contains no similar wording.

¹⁵⁰ D. B. Cornelio, G. Schwartzmann, Palenie papierosów i rzucanie palenia [Smoking Cigarettes and Ceasing to Smoke], [in:] European Society for Medical Oncology: Podręcznik profilaktyki chorób nowotworowych [Handbook of Cancer Prevention], ed. of Polish edition J. Meder, Warszawa 2009, pp. 63-69, E. loosens, D. Schrijvers, Alkohol [Alcohol], [in:] European Society..., op. cit., pp. 69-79, S. Jyrkkiö, P. Boström, H. Minn, Smoking and cancer what are the benefits of cessation?, Duodecim Medical Publications 2012, no. 128, pp. 1081-1087.

¹⁵¹ National Center for Biotechnology Information, PubChem Database: Arsenic Compounds, Bethesda 2019, pubchem.ncbi.nlm.nih.gov/compound/arsenic, accessed 21.07.2024; National Center for Biotechnology Information, PubChem Database: Vinyl Chloride, Bethesda 2019,

The taxation of alcoholic and tobacco goods by the excise duty, apart from the implementation of the objective of ensuring free movement of goods, implements the secondary objective found in the protection of health. From the perspective of the scope of research carried out in the latter part of this report, the scope of the health-promoting function as regards excise taxation would include only the manufactured tobacco.

There are general legal provisions in the domestic legal order, not explicitly referring to fiscal law, yet pointing to the need to take action to restrict the consumption of manufactured tobacco.¹⁵² As regards the regulation of manufactured tobacco, the governmental and local authorities are required to take action aimed at protecting the health of citizens against the noxious consequences of using tobacco.¹⁵³ A basic list of actions directed at the achievement of the objectives of the health-promoting policy as regards the counteraction of the consequences of tobacco use was drawn up.¹⁵⁴ The excise duty is an instrument used to create economic and legal conditions facilitating the restriction of tobacco consumption.¹⁵⁵ The Act implements the provisions of the Tobacco Directive as regards the protection of health against the noxious effect of tobacco.

In the process of passing laws, there is the possibility of introducing stimuli that would aim to restrict the consumption of excise goods that negatively affect the human health through their influence. The very taxation of manufactured tobacco by the excise duty should be deemed a stimulus, but it is not the most important issue from the point of view of counteracting the negative results of consumption of those goods. The objective of performing the health-promoting function of the excise duty is the appropriate framing of the respective structural elements of tax, such as the tax base or the amount of tax rates on the manufactured tobacco. While the issue of determining

pubchem.ncbi.nlm.nih.gov/compound/6338#section=Top; IARC, Formaldehyde: Studies of Cancer in Humans, in: IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Lyon 2006, ncbi.nlm.nih.gov/books/NBK326457/, accessed 21.07.2024; NCCDPHP, CDC, OSH, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease. A Report of the Surgeon General, Atlanta, 2010, ncbi.nlm.nih.gov/books/NBK53017/, accessed 21.07.2024; National Center for Biotechnology Information, PubChem Database: Benzene, Bethesda 2019, pubchem.ncbi.nlm.nih.gov/compound/241#section=Top, accessed 21.07.2024.

¹⁵² Act of 9 November 1995 on the Protection of Health against the Effects of Using Tobacco and Tobacco Products, consolidated text, JL of 2023, item no. 700, hereinafter referred to as APHT.

¹⁵³ Viz. Article 1 APHT.

¹⁵⁴ Viz. Article 3 APHT.

¹⁵⁵ Viz. Article 3(3) APHT.

the scope of taxation is subject to significant impediments, as it is subject to harmonisation,¹⁵⁶ the Tobacco Directive introduces the principles of framing the tax rates for manufactured tobacco,¹⁵⁷ the minimum amounts of which have been stipulated.¹⁵⁸ The tax rates, as the second of the above stimuli, play a crucial role in the counteraction of the effects of tobacco smoking. That follows from the configuration of the system of EU rules on the excise duty for manufactured tobacco, which sets only the minimal level of rates. That allows the Member States to influence the price of manufactured tobacco, and thus to restrict the demand for them. The rates of excise duty for those goods were increased several times from the adoption of the current Act on the Excise Duty, i.e. beginning from 2008.¹⁵⁹ The health-promoting aspect of the tax was each time indicated as the argument to increase the rates of the excise duty.¹⁶⁰ The protection of health of the citizens constituted a major part of the statement of reasons as regards three statutory bills.¹⁶¹ However, in one instance, the indication of that factor was only marginal.¹⁶² The reasons for the increase of rates of the excise

¹⁵⁶ Cf. Article 2 and 13 of the Tobacco Directive.

¹⁵⁷ Cf. Article 7, 9 and 14 of the Tobacco Directive.

¹⁵⁸ It was stipulated under Article 10 of the Tobacco Directive that the minimum amount of excise duty on cigarettes shall represent at least 57 % of the weighted average retail selling price of cigarettes, and that excise duty so calculated shall not be less than EUR 64. In regard to tobacco products other than cigarettes, the minimum tax rate was set under Article 14 of the Tobacco Directive, at the following level: for cigars or cigarillos: 5 % of the retail selling price inclusive of all taxes or EUR 12 per 1 000 items or per kilogram; for fine-cut smoking tobacco intended for the rolling of cigarettes: 40 % of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or EUR 40 per kilogram (from 1 January 2020, the minimum rate amounts to 50% of the weighted average retail selling price, or EUR 60 per kilogram); for other smoking tobaccos: 20 % of the retail selling price inclusive of all taxes, or EUR 22 per kilogram.

¹⁵⁹ Act of 2 December 2009 on the amendment of the Act on the Excise Duty, JL of 2009, No. 215, item no. 1667; Act of 29 October 2010 on the amendment of the Act on the Excise Duty, JL of 2010, No. 226, item no. 1477; Act of 22 December 2011 on the amendment of certain statutes related to the performance of the budgetary act, JL of 2011, No. 291, item no. 1707; Act of 7 December 2012 on the amendment of certain statutes in relation to the performance of the budgetary act, JL of 2012, item no. 1456; Act of 8 November 2013 on the amendment of certain statutes in relation to the performance of the budgetary act, JL of 2013, item no. 1645; Act on the amendment of the Act on the Excise Duty of 21 November 2019, JL of 2019, item no. 2523.

¹⁶⁰ An argument relying on the promotion of health has been omitted from the statement of reasons to the governmental bill to amend the act on the excise duty, Sejm draft no. 2507, Vth term of the Sejm, p. 4, whereunder an increase of budgetary income was pointed out as the purpose of regulation, whereas a markedly brief grounds for the need to index the excise duty on tobacco products were provided under the statement of reasons for the act to amend the act on the excise duty, Sejm draft no. 15, IXth term of the Sejm, pp. 2-3.

¹⁶¹ Statement of reasons for the governmental bill to amend certain statutes in relation to the performance of the budgetary act, Sejm draft no 809, VIIth term of the Sejm, p. 21, as well as under the statement of reasons for the governmental bill to amend certain statutes in relation to the performance of the budgetary act, Sejm draft no 1788, VIIth term of the Sejm, p.9, and under the statement of reasons for the governmental bill to amend certain statutes in relation to the performance of the budgetary act, Sejm draft no 29, VIth term of the Sejm, p. 13.

¹⁶² Statement of reasons for the governmental legislative bill to amend the act on the excise duty, Sejm draft no. 3502, VIth term of the Sejm, p. 4.

duty for manufactured tobacco featured an opinion that the too low a price for such goods could lead to the increase of their consumption in circles of limited income, especially among the young population. There was a single instance of the health-promoting reasons having a broad reference to the contents of the Act on the Protection of Health Against the Results of Tobacco and Manufactured Tobacco Use, and to the WHO Guidelines.¹⁶³ All statements of reasons for the bills to amend the Act on the Excise Duty posited that the increase of excise duty rates would offset the possible decrease in the budgetary income that would occur because of the cessation of consumption of tobacco goods. Beyond the fiscal aspect, the implementation of the health-promoting objective of taxing tobacco goods was noted. The exertion of influence on the consumption of those goods is primarily carried out on the basis of the regulation of tax rates. In such a manner, the health-promoting aspect of the stimulating function is implemented.

It is worth noting that the performance of the stimulating function in its health-promoting aspect as regards the manufactured tobacco requires a number of legislative actions that would hinder the negative phenomena related to the trade in tobacco goods. Such phenomena include trafficking tobacco, illegal cigarette manufacturing within the territory of the State, and illegal manufacturing and processing of tobacco within the country.¹⁶⁴ Passivity as regards those phenomena would result in trade in tobacco products originating from an illegal source, and as such, untaxed goods priced far lower than legal goods. Such a state of affairs would facilitate the access to manufactured tobacco for citizens of unstable financial situation, in turn nullifying the actions aimed at restriction of consumption of tobacco goods. The taxation of raw tobacco – dry tobacco not constituting excise goods at that time was one of the elements of counteracting the so-called “grey market” in tobacco products.¹⁶⁵ The legislative action was aimed at elimination of cheaper tobacco capable of being smoked at home after processing from trade. Dried tobacco, due to the lack of tax excise burden, was

¹⁶³ Statement of reasons for the governmental bill to amend certain statutes in relation to the performance of the budgetary act, Sejm draft no 809, VIth term of the Sejm, p. 21.

¹⁶⁴ G. Musolf, *Akcyza na tytoń – tylko dostosowywać do prawa UE czy zrobić krok naprzód* [Excise Duty on Tobacco – Whether Only Approximate to EU Law Or To Go Further], [in:] *Prawo celne i podatek akcyzowy kierunki przeobrażeń i zmian* [Customs Law and Excise Duty – Ways of Transformation and Change], edited by P. Stanisławiszyn, T. Nowak, Warszawa 2014, p. 205.

¹⁶⁵ Detailed views on the taxation of raw tobacco were provided by E. Piechota-Ołoś, *Regulacje w zakresie suszu tytoniowego wczoraj, dziś, jutro...* [Legal Rules in the Scope of Raw Tobacco Yesterday, Today, and Tomorrow], [in:] *Prawo celne i podatek akcyzowy* *Blaski...*, op. cit., pp. 336-355.

very competitive for finished tobacco products. The absence of taxation of raw tobacco could entail the unwanted increase of its consumption, which would nullify the performance of both the health-promoting function and the fiscal function of the excise duty. Another action aimed at elimination of trade in illegal tobacco products was the introduction of the system of identification and security features for tobacco products in the EU, the so-called Track & Trace. The implementation of those solutions to the domestic legal system¹⁶⁶ resulted from the duty so vested by the rules of Union law.¹⁶⁷ A directive stipulated the requirements of identification for tobacco products and the appropriate security for the identification.¹⁶⁸ Such legislative actions allowed for the verification of the source of origin of tobacco products, which significantly impedes the illegal trade in those goods.

The increase of fiscal rates for tobacco products would have been ineffective from the perspective of the protection of health, if there would be significantly cheaper products from illegal sources remaining in trade. The actions aimed at the performance of the health-promoting stimulus would be nullified by the insufficient degree of oversight over the trade in them.

According to the national statistical data, the number of smokers decreased from 2009 to 2019. In 2009, 29% of citizens were heavy smokers, whereas that ratio increased in 2011 to 31%, began to fall to 29% in 2013, then to 2015 and 2017 to 24%, in order to ultimately show 21% in 2019.¹⁶⁹ There is a notable downward trend as regards the number of people consuming tobacco products. It should be added that there is currently an observable societal trend “not to smoke”, which is not without importance for the data provided here. In addition, the greater societal awareness in the context of healthcare may have an impact on the decrease in income from the excise duty on tobacco products.

¹⁶⁶ Act of 22 February 2019 on the amendment of the Act on the Protection of Health against the Effects of Using Tobacco and Tobacco Products, JL of 2019, item no. 638.

¹⁶⁷ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1–38).

¹⁶⁸ Cf. Articles 15 and 16 of the Tobacco Products Directive.

¹⁶⁹ Report on the Poland-wide survey on the attitudes towards smoking tobacco, drafted by Kantar for the Chief Sanitary Inspectorate in 2019, page 6 (Raport z ogólnopolskiego badania ankietowego na temat postaw wobec palenia tytoniu, przygotowany przez Kantar na zlecenie Głównego Inspektoratu Sanitarnego w roku 2019, p. 6), https://gis.gov.pl/wp-content/uploads/2018/04/Postawy-Polak%C3%B3w-do-palenia-tytoniu_Raport-Kantar-Public-dla-GIS_2019.pdf, accessed 21.07.2024.

It is worth considering whether there is a correlation between the increasing of tax rates for tobacco products and the decrease in the amount of persons using those products. It would appear that that the decrease in the number of consumers should cause a decrease in the income from the excise duty on tobacco products. However, one should also take the actions related to the reinforcement of the system of trade in tobacco products and the increase of tax rates into account, which partially offset the decrease in demand for tobacco products.

Table 1.1. Revenues from excise duty on tobacco products in Poland in 2000-2023

Year	Income from the excise duty on tobacco products, in thousands of PLN ¹⁷⁰	Percentage change in income, from the previous year
2000	6 356 000	-

¹⁷⁰ Commentary on the report on the performance of the budgetary act for the year 2000, Tome I, Part I, Chap. II, p. 128, mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2001, Tome I, Part I, Chap. II, p. 6 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2002, Tome I, Part I, Chap. II, p. 85 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2003, Tome I, Part I, Chap. II, p. 74 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2004, Tome I, Part I, Chap. II, p. 86 mf.gov.pl, accessed 21.07.2024 r,
 Commentary on the report on the performance of the budgetary act for the year 2005, Tome I, Part I, Chap. II, p. 95 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2006, Tome I, Part I, Chap. II, p. 64 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2007, Tome I, Part I, Chap. II, p. 62 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2008, Tome I, Part I, Chap. II, p. 61 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2009, Tome I, Part I, Chap. II, p. 51 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2010, Tome I, Part I, Chap. II, p. 46 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2011, Tome I, Part I, Chap. II, p. 39 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2012, Tome I, Part I, Chap. II, p. 40 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2013, Tome I, Part I, Chap. II, p. 41 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2014, Tome I, Part I, Chap. II, p. 42 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2015, Tome I, Part I, Chap. II, p. 43 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2016, Tome I, Part I, Chap. II, p. 38-39 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2017, Tome I, Part I, Chap. II, p. 36 mf.gov.pl, accessed 21.07.2024,
 Commentary on the report on the performance of the budgetary act for the year 2018, Tome I, Part I, Chap. II, p. 37 mf.gov.pl, accessed 21.07.2024,

Year	Income from the excise duty on tobacco products, in thousands of PLN ¹⁷⁰	Percentage change in income, from the previous year
2001	7 305 200	114,93
2002	7 927 200	108,51
2003	8 456 500	106,68
2004	9 275 761	109,69
2005	9 819 728	105,86
2006	11 247 982	114,54
2007	13 483 026	119,87
2008	13 460 051	99,83
2009	16 057 843	119,30
2010	17 436 293	108,58
2011	18 264 158	104,75
2012	18 578 651	101,72
2013	18 746 876	100,91
2014	17 922 709	95,60
2015	17 789 708	99,26
2016	18 484 506	103,91
2017	18 782 641	101,61
2018	19 813 010	105,49
2019	20 892 741	105,45
2020	21 460 031	102,72
2021	23 039 283	107,36
2022	25 573 752	111,00
2023	27 549 023	107,72

Source: *personal research*

Data contained in Table 1.1, to the effect that irrespective of the decrease in the percentage of smokers from 2009 to 2019, a gradual increase in income from excise duty on tobacco products was occurring.

It is likely that the higher rates of excise duty were compensating the decreased demand for tobacco products during the 2009-2019 period. In addition, the discernible

Commentary on the report on the performance of the budgetary act for the year 2019, Tome I, Part I, Chap. II, p. 37, mf.gov.pl, accessed 21.07.2024,

Commentary on the report on the performance of the budgetary act for the year 2020, Tome I, Part I, Chap. II, p. 68, mf.gov.pl, accessed 21.07.2024,

Commentary on the report on the performance of the budgetary act for the year 2021, Tome I, Part I, Chap. II, p. 75, mf.gov.pl, accessed 21.07.2024,

Commentary on the report on the performance of the budgetary act for the year 2022, Tome I, Part I, Chap. II, p. 73, mf.gov.pl, accessed 21.07.2024,

Commentary on the report on the performance of the budgetary act for the year 2023, Tome I, Part I, Chap. II, p. 66-67., mf.gov.pl, accessed 21.07.2024.

decrease in the percentage share of goods originating from illegal sources plausibly had an important impact upon the amount of income gained during that period, which was discussed at length under the part devoted to the analysis of the market in tobacco products. While it is possible, basing on the statistical data for the 2009-2019 period, to formulate hypotheses in relation to the effectiveness of the fiscal policy in regard to meeting the objectives of pro-health policy, it is impossible – due to the absence of available statistical data relating to the popularity of smoking tobacco products among the Polish population during the 2020-2023 period – to make a definitive assessment of effectiveness of legislative attempts related to the increasing of tax rates and the impact thereof on the number of smokers in the country. Certainly, there is a need to maintain the appropriate proportion between implementations of the fiscal function and the additional function of health-promoting influence. This is because excessive increase in the tax rates could lead to both the restriction of consumption of tobacco products and the decrease in budgetary income from the excise duty.

The informational-supervisory function of the excise duty serves a specific purpose in the configuration of the structure of that tax. This is related to the selective nature of taxation and the inclusion of certain categories of goods in its scope, including tobacco products, novel tobacco products, electronic cigarette liquid, raw tobacco, alcoholic products, electricity and energy products, as well as passenger cars that do not constitute excise goods, yet are subject to taxation by the excise duty. Those products are also taxed by the tax on goods and services (VAT), and by the fuel charge as regards liquid fuels, which results in a significant fiscal burden for the excise goods.¹⁷¹ Such a state of affairs causes the intent to lower the fiscal burden or to avoid the payment thereof in its taxpayers. The trade in excise goods may constitute the object of attention of parties attempting to avoid the official rules of operating a business, which function on the grey market. That issue may be equally relevant for engine

¹⁷¹ K. Lasiński-Sulecki, *Oplata paliwowa – próba oceny zgodności z prawem Unii Europejskiej* [Fuel Charge – Attempt at Assessment of Conformity with EU Law], [in:] *Prawo celne i podatek akcyzowy kierunki...*, op. cit., p. 137. In addition, K. Lasiński-Sulecki rightly points to the essentially fiscal nature of the fuel charge, which does not contribute to any objective but the fiscal one. The key feature that distinguishes a charge from a tax is the issue of equivalency and the attribution of a charge to a specific objective, which may be implemented through earmarked funds. In addition, there is an emergent tendency to name newly levied taxes in such a way that is intended to hinder an ordinary citizen from identifying them as belonging to the matter of tax law, e.g. the so-called ‘solidarity due [danina solidarnościowa]’, or the so-called ‘sugar charge [opłata cukrowa]’. In fact, the differing terminology deals only in semantics, while the public obligations at issue are in fact tax rules.

fuels,¹⁷² tobacco products,¹⁷³ and for other excise goods. Actions of illegal nature often materialize in relation to the operation of the grey market.¹⁷⁴ In the absence of the requisite supervision and control on part of the State, they could cause the excise duty to lose its fiscal importance, by way of minimising budgetary revenue. The State penalises a set list of actions that may be collectively termed as tax fraud, and combating those offences and counteracting them constitute one of the more important tasks of the State where fiscal law is involved.¹⁷⁵ In that respect, the role of the informational-supervisory function of fiscal law makes itself apparent, as it allows for a depiction of the degree of tax avoidance by the citizens and businesspersons possible, on the basis of the amount of budgetary revenue.¹⁷⁶ The informational-supervisory function allows for the implementation of control over the trade in excise goods. The performance of that function presupposes the setting up of authorities enabling the monitoring of trade in excise goods and the acquisition of information on that trade, which in turn makes it possible to form conclusions on the scale of tax avoidance in the context of the trade in excise goods.

Tax avoidance is a phenomenon distorting competition in the scope of operating a business, as the goods originating from the grey market are taxed to a much lesser extent than the others, if they are taxed at all. The first among the components of oversight over the trade in excise goods is found in the need to operate a business related to the manufacturing, processing and holding of excise goods in the form of a tax warehouse should the tax not be paid.¹⁷⁷ The setting up of a tax warehouse constitutes a business subject to administrative regulation requiring the obtaining of

¹⁷² I. Mirek, Nie zna granic ni kordonów... rzecz o szarej strefie w paliwach [And It Shall Know Neither Bounds Nor Barriers...On the Issue of the Grey Market in Fuels], [in:] *Prawo celne, podatek akcyzowy oraz kary pieniężne w ustawie o grach hazardowych* [Customs Law, Excise Duty and Financial Penalties pursuant to the Act on Games of Chance], edited by T. Nowak, P. Stanisławiszyn, Szczecin 2018, p. 80.

¹⁷³ A. Bolek, *Wpływ zmian legislacyjnych na kierunki rozwoju szarej strefy tytoniowej* [The Impact of Legislative Amendments on the Lines of Expansion of the Grey Market in Tobacco, [in:] *Prawo celne, podatek...*, op. cit. pp. 25-30.

¹⁷⁴ I. Mirek, Nie zna..., op. cit. p. 80.

¹⁷⁵ A. Derkacz, *Przestępczość podatkowa ze szczególnym uwzględnieniem oszustw karuzelowych na tle podatku od towarów i usług oraz akcyzy*, [in:] *Prawo celne i podatek akcyzowy* Blaski..., pp. 97-101.

¹⁷⁶ Very interesting insight is offered in that regard by I. Mirek, who highlights the relation between the growth of the gross domestic product, economic growth, and the absence of income from the excise duty due because of the taxation of liquid fuels. The conclusion is that there is an expansion of the grey market as regards the trade in liquid fuels. Such a view, offered in the work cited here, is well founded, refers to a neutral indicator constituted by the GDP that should correspond to the increase of fiscal income out of excise as the economy would then exhibit greater demand for strategic raw materials – which the energy products subject to excise duty are.

¹⁷⁷ Viz. Article 15 of the Horizontal Directive.

a permit.¹⁷⁸ Making a form of business subject to administrative regulation introduces an element of control of the State over the conformity of the activities of the businessperson with the contents of the permit and with the legal provisions. The rules of Union law provide for additional criteria for the acquisition of authorisation for the operation of a tax warehouse,¹⁷⁹ unlike where other types of business are concerned, with said criteria making the effective implementation of supervision of procedural operation and the curtailment of release of goods with their excise duty unpaid for consumption possible.¹⁸⁰ As regards those goods subject to a duty suspension arrangement, the duty of moving them under cover of an electronic excise document¹⁸¹ in the EMCS system.¹⁸² That document is not only an element simplifying the trade in excise goods as opposed to the former obligation of documenting the movement in writing,¹⁸³ but also an element of oversight over the trade in excise goods.¹⁸⁴ In addition, it constitutes a large database on the businesspersons carrying the trade in those goods out.

Further documentation obligations related to the duty suspension arrangement are introduced by the following sections of the Horizontal Directive.¹⁸⁵ Those solutions were implemented in the national legal system as regards the introduction of authorisations for the operation of a tax warehouse¹⁸⁶ and the enforcement of regulations on the trade in those goods within the framework of the duty suspension arrangement.¹⁸⁷ The rules of Union law provide for the duty of registration of consignees of excise goods.¹⁸⁸ A part of regulations allowing for the performance of the supervisory function was introduced under the legal acts other than the national rules

¹⁷⁸ Viz. Article 16 of the Horizontal Directive.

¹⁷⁹ Viz. Article 16(2) of the Horizontal Directive.

¹⁸⁰ K. Lasiński-Sulecki, Komentarz do art. 16 dyrektywy Rady 2008/118/WE..., op. cit., pp. 122-123.

¹⁸¹ Viz. Article 21 of the Horizontal Directive.

¹⁸² The Excise Movement and Control System (EMCS) has been introduced by virtue of Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products (OJ L 162, 1.7.2003, p. 5–8).

¹⁸³ Z. Liptak, M. Zawadzki, EMCS (Excise Movement and Control System) – zagrożenie czy szansa [Threat or Opportunity]?, [in:] Regulacje w zakresie prawa celnego i podatku akcyzowego po przystąpieniu Polski do Unii Europejskiej. Doświadczenia i perspektywy [Rules in the Scope of the Law of Customs and Excise Duty After the Accession of Poland to the European Union], edited by T. Nowak, P. Stanisławiszyn, Warszawa 2012, pp. 130-133.

¹⁸⁴ Viz. Article 1(2) of the Decision no. 1152/2003 of the European Parliament and the Council of 16 June 2003.

¹⁸⁵ Cf. Articles 21-29 of the Horizontal Directive.

¹⁸⁶ Viz. Article 49 AED.

¹⁸⁷ Cf. Articles 41a-41i AED.

¹⁸⁸ Viz. Article 18 of the Horizontal Directive.

on excise duty. Such a state of affairs relates to the implementation of the Track and Trace system.¹⁸⁹ The role of that system is quite important for the performance of the informational-supervisory function of the excise duty. It allows for a detailed verification of origin of tobacco products, which constitutes an important aspect of the implementation of control of the State over the trade in tobacco products.

A duty related to the trade in excise goods is the registration of a businessperson in the system of monitoring of road and rail transport of goods and the trade in heating fuels.¹⁹⁰ That system provides for the collection and processing of data on the transport of goods, the part of which constitute excise goods.¹⁹¹ The scope of information transmitted to the system is very broad.¹⁹² In addition, the transport of excise goods requires the use of a geolocating device and the transmission of data on the location of the vehicle carrying out the transport.¹⁹³ The scope of information in possession of the fiscal authorities is very detailed. Introduction of such a scrupulous system of monitoring results primarily from the need to counteract illegal trade in excise goods and to combat abuse within that trade.¹⁹⁴ That need is especially true as regards the supervision of the trade in, and the use of those goods sold at reduced prices. The objective of those rules is to, *inter alia*, discipline the taxable persons by way of sanctions, including the fiscal sanction. Furthermore, that solution is to preclude unintended use of excise goods that are subject to monitoring by the parties purchasing them at preferential rates.¹⁹⁵

The punitive nature of that regulation was noted in the statement of reasons for the bill introducing it,¹⁹⁶ as it was unequivocally stated that the loss of fiscal preference has

¹⁸⁹ Act of 22 February 2019 on the amendment of the Act on the Protection of Health against the Effects of Using Tobacco and Tobacco Products, JL of 2019, item no. 638, into which the provisions of the Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC were transposed.

¹⁹⁰ Act of 9 March 2017 on the system of monitoring of road and rail transport of goods and the trade in heating fuels, consolidated text of 2024, item no. 1218, hereinafter referred to as the SENT Act.

¹⁹¹ *Viz.* Article 3(1) and (2) of the SENT Act, on the proviso that the obligation to monitor applies to excise goods subject to CN codes 2905 11 00; 2207; 2707; 3403; 3811.

¹⁹² *Cf.* Articles 4 and 6 of the SENT Act.

¹⁹³ *Cf.* Articles 10a and 10b of the SENT Act.

¹⁹⁴ Statement of reasons for the governmental legislative bill on the monitoring of road and rail transport of goods and the trade in heating fuels, Sejm draft no. 1244, VIIIth term of the Sejm, pp. 1-2.

¹⁹⁵ Statement of reasons for the governmental bill on the excise duty, Sejm draft no. 1083, VIth term of the Sejm, p. 69. It is worth noting that the basis of the provision at that time was to be found in Article 85(13).

¹⁹⁶ *Cf.* Article 85(13), currently Article 89(16) AED.

a disciplining nature and contains an element typical of a fiscal sanction. The duty of the taxable person to file statements and the collections of statements of purchasers of the heating fuel with the Head of the competent Tax Office makes it possible to detect irregularities in the trade in those excise goods.¹⁹⁷ The consequence of a failure to file a statement, a collection of statements, or of formal defects in those documents result in the loss of the fiscal preference and the application of the base rate. There were many doubts voiced by the scholarship related to the constitutionality of that regulation, and in particular to the conformity thereof with the principle of proportionality, as the provision at issue constitutes, in essence, a fiscal sanction.¹⁹⁸

The other aspect of the performance of the informational-supervisory function is the collection of data that are statistical in nature. The requirement of such an action follows from the law of the Union.¹⁹⁹ The contents of the regulation on the statistical data of the Community relating to the trade in goods between the Member States were

¹⁹⁷ K. Lasiński-Sulecki, Zestawienia oświadczeń nabywców oleju opałowego – rozważania w związku z wyrokiem Trybunału Konstytucyjnego z dnia 11 lutego 2014 r., P 24/12 [Collections of Statements of Purchasers of Heating Oil – Thoughts In Relation to the Judgment of the Constitutional Tribunal of 11 February 2014, P 24/12], *Przegląd Podatkowy* 2014, no. 7, p. 18.

¹⁹⁸ L. Etel, P. Pietrasz, Uwagi w przedmiocie konstytucyjności art. 89 ust. 16 ustawy o podatku akcyzowym [Remarks on the Constitutionality of Article 89(16) AED], *Przegląd Podatkowy*, 2011, no. 10, pp. 32-38, M. Kalinowski, K. Lasiński-Sulecki, Znaczenie prawa Unii Europejskiej dla wykładni przepisów dotyczących oświadczeń nabywców oleju opałowego – wybrane problemy [Significance of the law of the European Union for the Interpretation of Provisions Relating to the Statements of Purchasers of Heating Oil], *Kwartalnik Prawa Podatkowego* 2011, no. 1, pp. 27-31, M. Kalinowski, Zgodność z Konstytucją przepisów nakładających obowiązek uzyskania oświadczeń od nabywcy oleju o jego przeznaczeniu na cele opałowe [Conformity with the Constitution on Part of the Provisions Vesting a Duty to Acquire Statements from the Purchaser of Oil That It Is Intended for Heating Purposes], *Kwartalnik Prawa Podatkowego* 2011, no. 1, pp. 14-21, D. Malinowski, Warunki formalne dla zastosowania preferencyjnej stawki podatku akcyzowego przy sprzedaży oleju napędowego do celów opałowych [Formal Requirements for Applying Preferential Rate of Excise Duty In Sales of Motor Oil For Heating Purposes], *Przegląd Podatkowy* 2013, no. 7, pp. 2-3, A. Mudrecki, Orzecznictwo sądów administracyjnych w sprawach oświadczeń paliwowych [Case law of Administrative Courts in Matters of Fuel Statements], [in:] *Prawo celne i podatek akcyzowy kierunku...*, op. cit., pp. 198-200. The position of the scholarship was not altered by the judgment of the Constitutional Tribunal of 11 February 2024, case ref. no. P 24/12, SIP Legalis, K. Lasiński-Sulecki, Zestawienia..., op. cit. pp. 18-21, I. Mirek, Akcyza – konstytucyjność sankcji podatkowej za niezłożenie miesięcznego zestawienia oświadczeń nabywców oleju opałowego [Excise Duty – Constitutionality of the Fiscal Sanction for Failure to File a Monthly Collection of Statements of Purchasers of Heating Oil], *Gdańskie Studia Prawnicze Przegląd Orzecznictwa* 2015, no. 3, pp. 87-90, with the final say on the matter of collections of statements provided by the judgment of the Court of Justice of 2 June 2016 ROZ-Świt Zakład Produkcyjno-Handlowo-Uslugowy Henryk Czurko, Adam Pawłowski spółka jawna v. Dyrektor Izby Celnej we Wrocławiu, case ref. no. C-418/14, curia.europa.eu; the decision at issue pointed to the disproportionality of the sanction against the background of a breach made by the taxpayer, with a similar view offered by K. Lasiński-Sulecki, Zasada proporcjonalności a wymóg składania zestawień oświadczeń nabywców oleju opałowego [The Principle of Proportionality and the Duty to File Collections of Statements of the Purchasers of Heating Oil], *Przegląd Podatkowy* 2016, no. 9, pp. 48-50.

¹⁹⁹ Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 on Community statistics relating to the trading of goods between Member States and repealing Council Regulation (EEC) No 3330/91 (OJ L 102, 7.4.2004, p. 1–8).

transposed into the national legal order by way of an executive act in the scope of the regulations on customs.²⁰⁰ That caused the fact that the registration procedure and the list of data subject to registration in the INTRASTAT system are contained in an executive act, i.e. an executive order of the Minister competent for the matters of public finances.²⁰¹ The scope of data is also very broad,²⁰² as it includes a vast catalogue of statistical data allowing the tax authorities to infer conclusions and to perform analyses on the potential revenue from the excise duty.

It is notable that there is a significant legislative dispersion of registers documenting the trade in excise goods, as well as of the systems of monitoring. It should be stressed that the issues of being issued an authorisation to operate a tax warehouse and of functioning as a consignee of goods, or as an intermediary, were specified by the Act on the Excise Duty. On the other hand, the Track and Trace system and the so-called SENT system for monitoring of goods were introduced by various legal acts of varying legal rank. Despite the possession of scores of data, the analysis thereof may cause significant problems and might not necessarily translate to the increase of income from the excise duty. The lack of an effective data analysis may cause inefficiency of the preventive function of registers that monitor the trade in excise goods, which aims to counteract the trade in goods being effected without the payment of excise duty.²⁰³ Despite a number registration and reporting duties, the performance of the informational-supervisory function may be disrupted due to such marked dispersion of the functioning registers. At the same time, the lack of coordination as regards the actions in the scope of data analysis from the registers and the counteraction of the trade in goods with unpaid excise duty is noticeable. The encroachment of the grey market may be caused by such a state of affairs.²⁰⁴

²⁰⁰ Viz. Article 98(2) of the Act of 19 March 2004, the Law on Customs, consolidated text JL of 2019, item no. 1169.

²⁰¹ Order of the Minister of Development and Finance of 25 November 2021 in the matter of an Intrastat application, consolidated text, JL of 2021, item no. 2258.

²⁰² Viz. §13 of the Order of the Minister of Development and Finance in the matter of an Intrastat application.

²⁰³ B. Rogalska, Rozproszenie rejestrów prowadzonych przez organy podatkowe jako przyczyna ograniczenia wpływów budżetowych z podatków [Fragmentation of Registers Kept by the Tax Authorities as a Reason For Restricting Budgetary Income Due To Taxes], *Przegląd Podatkowy* 2015, no. 6, pp. 40-41.

²⁰⁴ S. Parulski, M. Marczak, M. Zientara, Pakiet tytoniowy – walka z czarnym rynkiem papierosów [The Tobacco Pack – Combating the Black Market in Cigarettes], *Przegląd Podatkowy* 2018, no. 3, p. 28.

4. Fiscal Policy as a Factor Influencing the Technical Elements of Excise Duty

According to its linguistic meaning, a policy is the action of the state authorities, the government, in the social, economic, cultural, military, and other fields. Politics may also be understood as the action of social groups, as determined by specific goals and interests, aimed at securing and maintaining public power.²⁰⁵ That allows for the definition of fiscal policy and the entirety of actions undertaken by the public authorities in the field of fiscal law. Those actions may be divided into two categories. The narrower one, specifying the selection of means of implementation of the objectives set, and the broader one, understood as the setting of objectives and the selection of means aimed at the achievement of those objectives.²⁰⁶

The definition of fiscal policy should also take the functioning of Poland within the structure of the European Union into consideration. In that respect, fiscal policy is defined as the action of the public authority, consisting of the determination of the objective for the operation of the fiscal system and the respective taxes while at the same time being mindful of the prerequisites following from the rules of Union law, and of taking actions aimed at the implementation of such prerequisites. Failure to take the objectives mandated by Union law would be contrary to the legal order within the nation, as the primary Union law is an inalienable part thereof.

The issue of fiscal policy has been under consideration from ancient times until the modern times. In principle, the understanding thereof was determined by the social and cultural context of an age.²⁰⁷ Fiscal policy should be deemed one of the key components of the financial policy of a state.²⁰⁸ The result of the process of drafting fiscal law constitutes the outcome of various factors that are economic, social, and political in nature.²⁰⁹ Actions related to such a process should take those factors into consideration. On that basis, the definition of fiscal policy may be formed. It shall be understood as the actions of the public authority, consisting in the determination of the objectives for the functioning of the fiscal system and fiscal law, and the selection

²⁰⁵ Słownik..., tome II, op. cit., pp. 785-786.

²⁰⁶ B. Brzeziński, *Wstęp do nauki...*, op. cit., p. 71.

²⁰⁷ Z. Fedorowicz, *Instytucje...*, op. cit. pp. 154-188.

²⁰⁸ K. Nizioł, *Prawne aspekty polityki podatkowej* [Legal Aspects of Fiscal Policy], Warszawa 2007, pp. 10-12.

²⁰⁹ P. Pomorski, *System podatkowy i jego uwarunkowania* [The Fiscal System and Its Premiss], [in:] *Prawo podatkowe...*, op. cit., p. 54.

of means to implement those objectives, while taking the economic, social and political consequences into consideration.²¹⁰ The major objective thereof is the acquisition of public income, while being mindful of the fair distribution of fiscal burdens and the low cost of tax collection, as the collection of tax is stabilised and the economic growth is ensured.²¹¹ The social objective of fiscal policy, which is found in the removal of unwarranted differences in the income of the members of the society, the improvement of the level of education of the general public, and the creation of incentives for generosity for the benefit of fair goals, should be remembered.²¹² The negative aspect of the contents of policy carried out in the field of taxation and the legal regulation thereof is also important. The drive to ensure budgetary income to the exclusion of other societal, economic and political goals must not be the imperative for the fiscal policy of the state. In such a situation, there might be an aberration in the fair distribution of fiscal burden, the result of which shall be the impediment to economic growth and, as a consequence, the loss of welfare on part of the citizenry.²¹³

One should consider whether a tax should be either neutral or incentivise the taxable person towards certain behaviour. The concept of tax neutrality is inferred from the fiscal nature of the public due.²¹⁴ Neutrality of a tax occurs where both the systemic solutions and those solutions that are contained in the respective legal acts on the issues of taxation provide for the performance of the fiscal, redistributive, and informational-supervisory functions to the exclusion of the stimulating function. It should be stressed that the excise duty is not a neutral tax. It also performs extra-fiscal functions, in particular those related to the protection of the environment, promotion of health, and economic stimulation.

Excise duty exerts strong social influence, in particular through the list of exemptions and tax rates. The example of such a stimulus is the exemption from taxation for coal products intended for the production of electricity or other energy products.²¹⁵ This follows from the fact that coal corresponds to a large share in energy production in

²¹⁰ J. Serwacki, *Polityka podatkowa* [Fiscal Policy], [in:] *Prawo podatkowe Teoria...*, op. cit. pp. 529-533.

²¹¹ A. Gomułowicz, *System podatkowy a polityka podatkowa* [Fiscal System and Fiscal Policy], [in:] *Podatki i prawo podatkowe* [Taxes and Tax Law], A. Gomułowicz, J. Małecki, Poznań 2000, p. 168.

²¹² B. Brzeziński, *Wstęp do nauki...*, op. cit., p. 71.

²¹³ . Gomułowicz, *Polityka podatkowa w Polsce i przesłanki jej kształtowania* [Fiscal Policy in Poland and the Premiss of Framing Thereof], *Monitor Podatkowy* 1996, no. 5, electronic access through czasopisma.beck.pl, accessed 21.07.2024.

²¹⁴ W. Wójtowicz, *Kontrowersje...*, op. cit., p. 60.

²¹⁵ Viz. Article 31a(1)(1) and (1)(2) AED.

Poland. Taxation of coal products would result in the increase of energy prices and in expenses borne by their final purchasers, including households. That would cause a negative effect consisting in the increase in prices for basic commodities. A similar exemption is also provided for coal products intended for heating purposes.²¹⁶ The excise duty takes both the implementation of social aspects of fiscal policy and the economic stimulation initiated by fiscal law into account.

The fiscal policy of the European Union as regards the excise duty was based on fiscal premises, which is a consequence of the adopted model of excise harmonisation. Within the framework of Union policy, it was determined that excise duties of major importance to the budget and those that do not interfere with the competitiveness of goods originating from the respective Member States of the EU are to be maintained.²¹⁷ On the other hand, excise duties of marginal importance to the budgets of Member States were eliminated. The fiscal premise, however important through the perspective of the financial policy of the EU, is not the most important one. It is key to secure conformity of fiscal provisions with the Treaty principles. The Union fiscal policy strives to implement the freedom of movement of goods and the absence of distortions of competition within the area of the common market. There are certain precepts and prohibitions formed at the level of the Treaties.²¹⁸ Those prohibitions mainly relate to the introduction of customs and charges having equivalent effect, as well as granting fiscal preferences that could constitute prohibited State aid. Apart from fiscal policy in its negative aspect, the positive aspect of fiscal policy should be noted. The latter consists in approximation of legislation of Member States. A certain split of objectives of fiscal policy of the EU into the acts of primary and secondary law, which however does not preclude their mutual interaction. The premises of fiscal Union policies should be looked for in the preambles to the Treaties, which outline general objectives for the entire legal system.²¹⁹ On the other hand, more specific objectives should be sought

²¹⁶ Viz. Article 31a(1)(3) AED.

²¹⁷ C. Kosikowski, *Harmonizacja prawa...*, op. cit. p. 153.

²¹⁸ *Prawo podatkowe wspólnoty...*, op. cit., p. 13.

²¹⁹ The Preamble to the TFEU indicates, inter alia, objectives in the form of creation of foundations for the ever closer Union between the nations of Europe, securing economic progress, guaranteeing stable development, fair competition, as well as balanced trade, alongside the objectives partly inspired by ideology, such as the betterment of life and work conditions, guaranteeing stability and development, and reinforcement of peace and freedom.

within the acts of secondary Union law.²²⁰ The basic premises for the objectives of fiscal policy are reflected in the statements of reasons to the acts of EU law, which constitutes an important tool for the construction of the rules of the entire legal act.²²¹ Due to the hierarchy of EU legal rules, the primary objective of the fiscal policy of the Union is the implementation of goals set by the Treaties, and the secondary objective is the implementation of such goals as set by the acts of secondary law.

The primary law of the Union became a part of the Polish legal system at the moment of accession to the European Union. The Accession Treaty vests Poland with the duty to observe Union law and the current *acquis* thereof.²²² The Constitution of the Republic of Poland lays down an obligation to respect international law.²²³ The fiscal policy of the European Union should become a part of the national fiscal policy as to the objectives implemented by the latter, as that is required by the duty to ensure the functioning of the common market. The fiscal law of the European Union and the fiscal laws of the respective Member States serve an important role in the achievement of goals set in the Union fiscal policy.²²⁴ There may be a view that the law of the Union applicable to taxes has only a subsidiary role to the national fiscal law. However, that is no impediment to the setting of objectives of the fiscal policies of the Member States in line with the objectives of the Union. Where there would be a discrepancy between the national and the Union fiscal policies as regards the exclusive competences of the European Union, as well as in regard to the implementation thereof in neutral areas, priority is to be accorded to the pro-Union fiscal policy. The action of public authorities taken in the field of fiscal law must be in line with the objectives of the fiscal law of the European Union.

²²⁰ Preamble to the Horizontal Directive foresees the need to secure the functioning of the common market, preclusion of tax avoidance and the free movement of excise goods, whereas the preamble to the Energy Directive additionally points to the need to maintain competitiveness on the common market; the preamble to the Tobacco Directive points to the need to protect health.

²²¹ B. Brzeziński, *Wykładnia celowościowa w prawie podatkowym* [Purposive Interpretation in Tax Law], *Kwartalnik Prawa Podatkowego* 2002, no. 1, p. 13.

²²² Article 3(1) of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ L 236, 23.9.2003, pp. 17—930).

²²³ Article 9 of the Constitution of Poland.

²²⁴ W. Nykiel, *Wykładnia prawa podatkowego wewnętrznego, międzynarodowego i prawa podatkowego Unii Europejskiej* [Interpretation of Internal, International and EU Tax Law], *Kwartalnik Prawa Podatkowego*, 2004, no. 4, p. 133.

Taxes play a significant role not only in the area of implementing internal objectives, but also implement the goals set by the European Union.²²⁵ There is a long list of restrictions following from the rules of constitutional, international, and Union law that are applicable in the process of framing the fiscal policy.²²⁶

The objectives of fiscal policy as set forth within the system of fiscal law and the objectives of the respective taxes are different from each other. Both the systemic premises and those applicable to the respective taxes should respect the prohibitions following from the rules of the Treaties. However, due to the economic aspect to the European integration, the need to ensure the proper functioning of the common market and the uninterrupted competitiveness, those premises lead to the approximation of provisions of fiscal law between the Member States. That is the primary reason for the application of the respective taxes. The Union regulations on taxes should be taken into account, and at the same time, the systemic solutions should be respected. As to the excise duty, which is a harmonised tax, such fiscal policy should be carried out that would ensure the complete achievement of objectives set both by the rules of primary and secondary law.

The objectives of fiscal policy as regards the excise duty are as follows:

- Ensuring budgetary income,
- Drafting fiscal regulations that do not restrict the free movement of goods, and do not cause administrative burden,
- Precluding such an impact of fiscal regulations that would cause a distortion of competition within the scope of the common market,
- Implementation of the requirements contained in the acts of secondary law (e.g., care for the natural environment, and the improvement of health),
- Fair allocation of fiscal burdens,
- Ensuring stable economic growth,
- Minimising the cost of collection of taxes,
- Proper control over the trade in excise goods,
- Limitation of negative effects of the price-generating influence of the excise duty.²²⁷

²²⁵ E. Juchniewicz, *Prawo podatkowe Unii Europejskiej* [Tax Law of the European Union], [in:] *System prawnofinansowy Unii Europejskiej* [Legal-Financial System of the European Union], edited by A. Drwiłło, A. Jurkowska-Zeidler, Warszawa 2017, p.191.

²²⁶ R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie* [Legislating Tax Law and the Application Thereof], Warszawa 2016, p.37.

²²⁷ A part of the postulates on the objectives of fiscal policy were formulated by A. Gomulowicz, *System podatkowy...*, op.cit., p. 168; A. Gomulowicz, *Polityka podatkowa...*, op. cit., pp. 168-174. However, the

There is a need to verify the extent to which those objectives inform the process of framing the respective technical elements of tax. On one hand, the European Union forces the negative aspect of the fiscal policy of the Member States onto them, as the EU formulates prohibitions and precepts to implement in the process of framing fiscal law. The prohibitions relate to the differentiation in levying excise duty on domestic goods and goods originating from other Member States. Union rules allow for a certain room for manoeuvre, making the levying of excise duty on goods not subject to harmonisation possible.²²⁸ However, that may happen on condition that no increase in formalities for the movement of goods between the Member States would appear.²²⁹

In addition, due to its selectivity and the selection goods subject to harmonisation, the excise duty has a major economic importance. While framing the rules of fiscal law, one should consider not only the need to secure the budgetary income, but also the fact that there must not be excessive taxation that would negatively impact on the sectors of the economy dependent on excise goods. For that reason, an exemption from the excise duty for electricity to the benefit of energy-intensive businesses was introduced.²³⁰ Due to the price-generating nature of the tax at issue, it is very important that there would not be excessive fiscal burdens impacting upon the increase in prices of both the energy products and the commodities.

It is worth noting that, in the event of processing excise goods into different excise goods, the tax becomes chargeable at the moment of their release for consumption.²³¹ A straightforward example is the use of coal products to generate electricity. At the moment of their release for the end user, that being the electricity plant, the consumption of those goods is to take place, processing them into electricity which constitutes another excise goods subject to taxation. Exempting coal products intended for the production of electricity from the excise duty is reasonable, as at the stage of trade there would be two instances of collection of tax, which would prompt a substantial increase in energy prices. The legislative actions in the scope of the

list of assumptions on part of the fiscal policy regarding excise duty requires further reinforcement. Firstly, doing so is required by the specific features of excise duty, which is an indirect tax of a price-generating nature, levied on turnover and having major importance for the movement of goods within the scope of the common market – which could constitute an inducement to implement protectionist and discriminatory solutions.

²²⁸ Viz. Article 1(3) of the Horizontal Directive.

²²⁹ Viz. Article 1(3) of the Horizontal Directive.

²³⁰ Viz. Article 31d AED.

²³¹ Viz. Article 7(1) of the Horizontal Directive.

excise duty should take the possible negative social effects related to the increase in prices into account. The excise goods are susceptible to the business operated within the framework of the grey market, which implies the requirement to control the trade in those goods by the State. Such a solution is reasonable for two reasons. First, it secures a source of budgetary income. Second, it is a guarantee for the proper market competition. The trade in excise goods without any need to pay the tax due places those entities that use the goods from the grey market in a better economic position. The entrepreneurs that duly make good on public dues are then in a much worse economic position. As it was mentioned above, guaranteeing competition is also one of the objectives of the fiscal policy of the European Union.

It should be recalled that, where the implementation of fiscal policy is concerned, the excise duty exerts strong fiscal and stimulating influence. A State is a complex organism, with a broad social structure, varied in its scope both as to the social stratification and the economic stratification. For that matter, the position that there is a requirement to aim at the maximum neutrality of the fiscal system and the lack of its influence within the various fields where a State functions cannot be subscribed to.²³² Excise duty cannot be neutral, as it is an effective instrument used to achieve the designated economic, social and political outcomes. However, defective configuration of the fiscal system may cause the outflow of capital. As a consequence, it is key to use systemic solutions that provide a stable and approachable fiscal system.²³³

The hitherto deliberations on the objectives of fiscal policy justify a need to formulate two key postulates: the stability of fiscal law and the fiscal fairness. The latter should be equated to the burdening of taxpayers only to such an extent, and for such an amount, as their capability for payment allows. The stability of fiscal law is a state where there are no constant changes and modifications thereof.²³⁴ The postulate of stability of fiscal law being drafted has key importance. That follows from the equally distributed financial burden as regards excise duty, as it burdens the consumers of

²³² A. Gomułowicz, Zagadnienie neutralności systemu podatkowego [The Concept of Neutrality of the Tax System], *Ruch Prawniczy Społeczny i Ekonomiczny* 1990, no. 2, pp. 80-82.

²³³ J. Głuchowski, Patriotyzm a podatki [Patriotism and Taxes], *Kwartalnik Prawa Podatkowego* 2014, no. 3, p. 17.

²³⁴ P. Pomorski, Prawna regulacja zasad polityki podatkowej [Legal Regulation of the Principles of Fiscal Policy], [in:] *Teoretyczne i praktyczne aspekty prawa finansowego. Problemy, koncepcje, wyzwania i rozwiązania* [Theoretical and Practical Aspects of Financial Law. Issues, Concepts, and Solutions], edited by A. Gorgol, Warszawa 2020, pp. 467-470.

excise goods. However, an important issue is found in the maintenance of stability of the fiscal system as regards that tax. This is because there is no long-term fiscal policy that would pursue clear objectives as far as the excise duty would be concerned. Admittedly, this is a situation reserved not only for the excise duty. There is an absence of greater insight into the framing of the respective taxes and into the goals to be achieved thereby in the process of legislation. This is a noticeable and widespread problem in Poland.²³⁵ The legislative actions are often forced by the need to give effect to regulations following from European Union law. Poland was entitled to use transition periods while introducing excise duty for certain excise goods. A defective legislative technique used in regard to fiscal law, excise duty included, does not serve its stability, effectiveness, and efficacy as regards the achievement of the objectives of fiscal policy. Usually, fiscal legislation is directed towards the achievement of short-term fiscal goals that are indispensable for the satiation of particular interests of a given social group. However, there are no long-term views. It may be said that the systemic solutions employed by Poland and the EU are not always coherent and coordinated as regards the implementation of fiscal policy, due to frequent modifications to fiscal law and to the pursuit of short-term goals by the excise duty.²³⁶

5. Structural Elements of the Scope of the Excise Duty

It has been accepted by the scholarship of fiscal law that the structural elements of the tax are its subjects, the object of taxation, the tax base, the tax rates and tax scales, conditions and the procedure for the payment of tax, and the exemptions and relief.²³⁷ A part of the scholarship adds a further division thereof into obligatory and optional instruments.²³⁸ However, those views are incorrect, as the structure of taxes in Poland is highly variable. The division as presented by B. Brzeziński, who points to the

²³⁵ B. Brzeziński, W. Nykiel, Stan prawa podatkowego w Polsce. Raport. 2000..., op. cit. pp. 112-118; B. Brzeziński, W. Nykiel, Stan prawa podatkowego w Polsce. Raport 2005..., op. cit., pp. 104-110, B. Brzeziński, W. Nykiel, Stan prawa podatkowego w Polsce..., pp. 63-70.

²³⁶ R. Dowgier, Stanowienie prawa podatkowego w Polsce [Fiscal Lawmaking in Poland], [in:] Prawo podatkowe [Tax Law], edited by L. Etel, Warszawa 2008, p. 73.

²³⁷ N. Gajl, *Finanse i prawo finansowe* [Finances and Financial Law], Warszawa 1980, p. 204, W. Wójtowicz, *Elementy teorii podatku* [Elements of the Theory of Tax], [in:] *Zarys finansów*, op. cit., p. 155, B. Brzeziński, *Zarys prawa finansów publicznych* [Outline of the Law of Public Finances], Toruń 1997, p. 103, B. Brzeziński, *Wstęp...*, op. cit., p. 47, A. Dobaczewska, *Definicja podatku i jego elementy konstrukcyjne* [The Definition of a Tax and Its Structural Elements], [in:] *Podstawy finansów i prawa finansowego* [The Basics of Finances and Financial Law], edited by A. Drwiłło, Warszawa 2011, pp. 389-391, A. Gomułowicz, *Pojęcie podatku* [The Concept of Tax], [in:] *Podatki...*, op. cit., pp. 84-94, L. Etel, *Konstrukcja wewnętrzna podatku* [The Internal Structure of Tax], [in:] *Prawo...*, op. cit., p. 27.

²³⁸ W. Modzelewski, *Wstęp do...*, op. cit., pp. 50-71.

structural elements specific for any types of tax and to elements that are featured only in the certain types thereof, is sound from the point of view the fiscal system. An optional element is something in operation, but which is not necessarily included in the structure of the respective taxes. The implementation of object marking into the Act on the Personal Income Tax can hardly be pictured. The difference in approach between W. Modzelewski and B. Brzeziński appears more due to a less fortunate phrasing of “optional”, as in principle their reasoning converges and points, in both instances, to elements that differ for the given legal institutions. However, putting the tax base among the obligatory elements is incorrect, as there are taxes not featuring a tax base in Poland. The subject and the object of taxation should be indicated as the elements of the scope of taxation.

The scholarship agrees in principle that the key fiscal parties are found in the active taxable persons and the taxpayers.²³⁹ The issue of regulating the concept of a payer (remitter)²⁴⁰ and that of a collector²⁴¹ should be noted. Those are parties in whom fiscal law vests duties that follow from the legal provisions.²⁴² The concept of “key parties” arises out of the fact that the determination of the active and the passive taxable person²⁴³ is indispensable for the proper configuration of the subjective scope of the tax. On the other hand, other parties to a tax, such as payers (remitters) and collectors do not have to appear in every tax. It is however controversial, from the point of view of constitutional rules, to consider the contents of the principle of statutory exclusivity in fiscal matters only to the taxpayer.²⁴⁴ A duty to configure the subjective scope of the tax in a tax statute²⁴⁵ follows from the merits of the principle of statutory exclusivity in fiscal matters.²⁴⁶ It was correctly pointed out in the scholarship that the duties of the parties other than the taxpayer should be among the elements governed by

²³⁹ W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe...*, op. cit., p. 9, B. Brzeziński, *Wprowadzenie...*, op. cit., p. 54, A. Olesińska, *Polskie prawo podatkowe* [Polish Tax Law], Toruń 2012, p. 29, W. Nykiel, *Podatek – zagadnienia ogólne* [Tax – General Issues], [in:] *Polskie prawo podatkowe* [Polish Tax Law], edited by W. Nykiel, Warszawa 2011, p. 13.

²⁴⁰ The concept of a payer was defined under Article 8 of the Act of 29 August 1997 – Fiscal Ordinance Act, consolidated text, JL of 2023, no. 2383, as amended, hereinafter referred to as FOA.

²⁴¹ The concept of a collector was defined under Article 9 FOA.

²⁴² A. Olesińska, *Polskie...*, op. cit., p. 29.

²⁴³ W. Wójtowicz, *Struktura podatku* [the Structure of Tax], [in:] *Prawo podatkowe...*, op. cit., p. 12.

²⁴⁴ W. Nykiel, A. Mariański, *Komentarz do art. 217 Konstytucji RP* [Commentary on Article 271 of the Constitution of Poland], [in:] *Konstytucja RP. Komentarz* [the Constitution of Poland – a Commentary], ed. by M. Safjan, L. Bosek, electronic version at the SIP Legalis, accessed 20.07.2024.

²⁴⁵ Viz. Article 217 of the Constitution of Poland.

²⁴⁶ Viz. Article 217 of the Constitution of Poland.

a statute.²⁴⁷ The formation of a list of addressees for fiscal duties shall only occur by way of a statute.

The first of the elements of the structure of the scope of a tax are the subjects of taxation by excise duty. Two autonomous definitions thereof were formed.²⁴⁸ That is a corollary of the separate taxation of excise goods and passenger cars by excise duty.²⁴⁹ It also follows from the implementation of the constitutional standard consisting in the need to determine the subject of taxation – the taxable person.²⁵⁰ The status of fiscal legal personality (*podmiotowość prawnopodatkowa*) is independent of the legal capacity (*zdolność prawna*) as governed by the civil law. A civil-law partnership (*spółka cywilna*) has no legal capacity in the scope of civil law, yet due to the provisions of the Act on the Excise Duty it enjoys fiscal legal capacity (*zdolność prawnopodatkowa*).²⁵¹ This points to the discretion of framing the list of subjects of the fiscal legal relationship (*stosunek podatkowopravny*) in a manner autonomous to the other fields of law, and constitutes an instance of fiscal public powers.²⁵² The specific features of excise duty caused the need of very detailed regulation of the list of subjects in the fiscal legal relationship. That is mandated by the framing of excise duties as burdening, in principle, the production and excavation of excise goods,²⁵³ and by the chargeability of excise duties at the moment of the release of said goods for consumption.²⁵⁴ The excise duty encompasses a number of sets of factual circumstances, which results in the need of definition of a taxable person, both subject-wise and object-wise, as the participants in the trade in excise goods are the addressees of the fiscal norm.²⁵⁵ Parties that pay the tax other than the taxable person, including the payer (remitter) or the collector, must also be governed by statutory regulation.²⁵⁶ It is worth noting that the concept of a payer (remitter) was subjected to regulation only to the extent pertinent to

²⁴⁷ T. Dębowska-Romanowska, *Obliczenie podatku, a gwarancje praw obywatelskich* [Calculation of Tax and the Guarantees of Civil Rights], *Państwo i Prawo*, 1998, no. 7, pp. 31-32.

²⁴⁸ Viz. Article 13 AED for all excise goods, and Article 102 AED for passenger cars.

²⁴⁹ Viz. Article 1 AED.

²⁵⁰ W. Nykiel, A. Mariański, *Komentarz do art. 217...*, op. cit.

²⁵¹ Resolution of the Panel of Seven Judges of the Supreme Administrative Court of 14 December 2015, case ref. I GPS 1/15, CBOSA.

²⁵² Judgment of the Constitutional Tribunal of 27 December 2004, case ref. SK 35/02, OTK ZU 11A/2004, item no. 119.

²⁵³ Viz. Article 2 of the Horizontal Directive.

²⁵⁴ Viz. Article 7(1) of the Horizontal Directive.

²⁵⁵ A. Gorgol, *Podatek akcyzowy* [The Excise Duty], [in:] *Prawo podatkowe...*, op. cit., p. 334.

²⁵⁶ T. Dębowska-Romanowska, *Obliczenie podatku...*, op. cit., pp. 31-32.

the excise duty on passenger cars.²⁵⁷ To that extent, a court enforcement officer selling a passenger car is a payer of excise duty. At the same time, there is no analogous provision as regards excise goods. That results in the absence of regulation of such a court enforcement officer that sells such goods by way of enforcement. At least from the formal point of view, no obligation to pay excise duty is vested in a court enforcement officer due to a lacuna in that scope. However, owing to the sale of excise goods outside the duty suspension arrangement, a court enforcement officer should pay that tax.

The active taxable person of the excise duty is the State Treasury,²⁵⁸ and by virtue of that, the excise duty constitutes income of the budget of the State. The excise duty is an indirect tax. Such a state of affairs occurs where there is a split between the effective taxpayer and the formal taxpayer, per the intent of the active taxable person. The formal taxpayers of the excise duty are the manufacturer or the seller of excise goods or passenger cars. The addressees of the fiscal liability of the excise duty are the parties that market the products subject to taxation. However, the effective taxpayer is the consumer of those products.²⁵⁹ The statute only governs the formal taxpayer, and the effective taxpayer is the party that bears the effective fiscal burden.²⁶⁰ However, beyond some exceptions, the effective taxpayer is not obliged to bear the fiscal burden by virtue of the excise duty. From the point of view of the separation of the effective taxpayer and the formal taxpayer of the excise duty, a judicial decision on the refusal of refund of excess tax paid in the event of passing the economic burden of the tax on the consumer.²⁶¹ That decision was subject to broadly critical commentary on part of the scholarship of fiscal law.²⁶² The resolution of the Commercial Chamber of the

²⁵⁷ Viz. Article 103(1) AED.

²⁵⁸ Viz. Article 1(2) AED.

²⁵⁹ W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe część...*, p. 21.

²⁶⁰ M. Kalinowski, *Podmiotowość podatkowopravna* [Fiscal Legal Capacity], [in:] *Prawo podatkowe Teoria...*, op. cit., p. 54.

²⁶¹ Resolution of the Commercial Chamber of the Supreme Administrative Court of 22 June 2011, case ref. I GPS 1/11, CBOSA.

²⁶² B. Brzeziński, *Komentarz do uchwały Pełnego Składu Naczelnego Sądu Administracyjnego z dnia 22 czerwca 2011 r. (I GPS 1/11)* [Commentary on the Resolution of the Full Bench of the Supreme Administrative Court of 22 June 2011 (I GPS 1/11)], *Przegląd Orzecznictwa Podatkowego*, 2012 no. 5, pp. 419-420, K. Lasiński-Sulecki, W. Morawski, *Czy nadpłatę trzeba podatnikowi zwrócić? Glosa do uchwały Pełnego Składu Naczelnego Sądu Administracyjnego z dnia 22 czerwca 2011 r. (I GPS 1/11)* [Must Overpaid Tax Be Returned to the Taxpayer? A Glossa On the Resolution of the Full Bench of the Supreme Administrative Court of 22 June 2011 (I GPS 1/11)], *Przegląd Podatkowy*, 2011 no. 10, p. 53.

Supreme Administrative Court (SAC) only refers to the excise duty on electricity.²⁶³ For that reason, it should be considered that there is a possibility of refund of the excess tax paid, where the economic burden of tax on other excise goods and on passenger cars was passed onto a party other than the taxpayer.²⁶⁴ That decision is an example of the pro-fiscal construction of the rules of fiscal law. It was also put to doubt by dissenting opinions, by as many as eight of the sitting judges.²⁶⁵ However, it is key that the axiological basis for the decision thus entered into was the fiscal interest of the State Treasury. That is a worrying phenomenon, as even in the absence of any legal grounds therefor, the quality of fiscal interest became a determining factor for the SAC. As such, the judicial prerogative to correct the statutory law was transgressed, and a de facto precedent was created, contrary to the substantive rules of fiscal law. As such, that ruling may nullify the legal institution of refunding the excess tax, as the court may rule on the basis of the fiscal interest of the State Treasury, in a manner contrary to the rules of statutory law.

The view expressed by B. Brzeziński, K. Lasiński-Sulecki and W. Morawski,²⁶⁶ in that there is a factual passing of the economic burden of tax on the consumer as regards indirect taxes, is well-founded. So is the further addendum of those authors, in that the prohibition of passing the tax on should follow from a rule of fiscal law, or barring that, from the economic consideration. However, as regards the above judicial decision, there were none such precluding conditions for the passing of the burden of excise tax on. The judicial resolution at issue incorrectly refused the right to have the excess tax returned to the formal taxpayer, despite the fact that, where the indirect taxes are concerned, the passing on of the economic burden from the formal taxpayer to the effective taxpayer is normal.

²⁶³ This is rightly pointed out by B. Brzeziński, K. Lasiński-Sulecki, W. Morawski, *Zubożenie podatnika akcyzy jako przesłanka zwrotu nadpłaty. Problemy metodologiczne postępowania dowodowego* [Impoverishment of a Taxpayer of Excise Duty as a Prerequisite For Returning Overpaid Tax], *Przegląd podatkowy*, 2020, no. 3, p. 20.

²⁶⁴ Resolution of the Panel of Seven Judges of the Supreme Administrative Court of 13 July 2009, case ref. I FPS 4/09, CBOSA.

²⁶⁵ Dissenting opinions have been made by the following judges: Rafał Batorowicz, Jan Bała, Hanna Kamińska, Anna Stec, Małgorzata Korycińska, Zofia Borowicz, Joanna Kabat-Rembelska i Marzenna Zielińska, who have rightly pointed the fact of relying on extra-legal grounds in the decision at issue out. Obviously, it was not spelt out in the decision proper that it relates to the fiscal interest of the State Treasury and the possible negative effects of the decision thus made for the budget. Instead, phrasing along the lines of “the specific facts of this case” was used. Such grounds for the decision plainly point to the pro-fiscal interpretation of the composition so seized, which is further confirmed by the dissenting opinion of Judge Rafał Batorowicz.

²⁶⁶ B. Brzeziński, K. Lasiński-Sulecki, W. Morawski, *Zubożenie...*, op. cit., p. 20.

The passive taxable person of the excise duty is a natural person, a legal person, or an organisational unit that does not have a legal personality.²⁶⁷ The distinctive feature, essential for the definition of the concept of a taxpayer, is the state of being subject to fiscal liability.²⁶⁸ The concepts of “the natural person” and “the legal person” originate from the rules of civil law. A natural person equates to any human who enjoys legal capacity (*zdolność prawna*).²⁶⁹ On the other hand, a legal person is either the State Treasury or an organisational unit, to which other provisions accord legal capacity.²⁷⁰ The legal capacity of a natural person persists from their birth until death,²⁷¹ but a child conceived also has legal personality.²⁷² However, the legal personality of a nasciturus is conditional on a live birth.

For the purposes of the excise duty, the acquisition of the capacity for legal actions (*zdolność do czynności prawnych*) by a natural person has major importance,²⁷³ as the businesspersons operating a business in the scope of manufacturing and sale of excise goods and passenger cars are the formal taxpayers. A situation that a natural person not having full capacity for legal actions would be an excise duty taxpayer is precluded.²⁷⁴ At the same time, it should be added that certain persons of age also cannot be taxpayers of excise duty, i.e. persons that are fully²⁷⁵ or partially²⁷⁶ legally incapacitated. The lack of capacity for legal actions, as well as a restriction on the capacity for legal

²⁶⁷ Viz. Article 7 FOA.

²⁶⁸ *Ordynacja podatkowa. Komentarz praktyczny* [Fiscal Ordinance Act. Practical Commentary], edited by B. Brzeziński, M. Kalinowski, A. Olesińska, Gdańsk 2015, p. 43.

²⁶⁹ Viz. Article 8§1 of the Act of 23 April 1964 – Civil Code, consolidated text, JL of 2024, item no. 1061, hereinafter referred to as the Civil Code.

²⁷⁰ Viz. Article 33 of the Civil Code.

²⁷¹ Viz. Article 8§1 of the Civil Code.

²⁷² Viz. Article 927§2 of the Civil Code.

²⁷³ Viz. Article 11 of the Civil Code, which states that the full capacity for legal acts is acquired only at the moment of coming of age.

²⁷⁴ A different view was voiced in *Ordynacja podatkowa...*, op. cit., p. 44. It was pointed out that a taxpayer is a natural person, regardless of the capacity for legal acts. Such an approach is not impossible in regard to the understanding of a taxpayer pursuant to the FOA, as well as for the purposes of certain taxes. However, for the purpose of the excise duty and due to the nature of that tax, the possibility of a person not enjoying full capacity for legal acts having the status of a taxpayer must be excluded beyond one instance. The only situation where there could be, on the facts, an appearance of a person who would not enjoy capacity for legal acts at all, or who would have only partial capacity therefor, is found in the purchase of a business (*przedsiębiorstwo*) by such a person through inheritance (*dziedziczenie*) or a gift (*darowizna*).

²⁷⁵ Viz. Article 13§1 of the Civil Code.

²⁷⁶ Viz. Article 16§1 of the Civil Code.

actions do not preclude the enjoyment of the status of a taxpayer as far as taxes other than the excise duty are concerned, e.g. the tax on inheritance and gifts.²⁷⁷

The definition of a legal person also corresponds to the rules of civil law.²⁷⁸ The provisions make a reference to a number of statutes according legal capacity to certain entities.²⁷⁹ This is an important issue from the point of view of excise duty, and the legal capacity of corporations – the private limited company²⁸⁰, the simple public limited company²⁸¹, and the public limited company²⁸² causes those entities to be the taxpayers of that tax.

There are practical problems caused by the statutory indication of an organisational unit not having legal personality as a taxpayer. Those problems appear due to an absence of a normative definition thereof. The introduction of the rules of civil law that refer to the provisions on the legal persons²⁸³ did not materially inform the possibility of making a definition of an organisational unit not having legal personality.²⁸⁴ In order to determine it, it should be verified whether there are links of personal, proprietary and economic nature within a given unit.²⁸⁵ Only then one may find that an entity not being a legal person nonetheless has a status of an organisational unit not having legal personality. In that context, a problem of deeming a civil-law partnership a taxpayer of

²⁷⁷ Viz. Article 1 of the Act of 23 July 1983 on the Tax on Inheritances and Gifts, consolidated text, JL of 2024, item no. 596, whereunder it is stated that the purchase of ownership of a thing through, inter alia, inheritance or a gift is subject to tax. However, in such a situation, the act causing the appearance of fiscal liability is carried out by a statutory representative in the name of such a person – Article 98 of the Act of 25 February 1964 – Family and Guardianship Code, Journal of Laws (JL) of 2023, item no. 2809, hereinafter referred to as the FGC. A similar situation may occur in regard to the personal income tax, where a person not enjoying full capacity for legal acts may hold property by virtue of which they could gain income, e.g. by virtue of renting an apartment. However, in regard to persons fully or partially legally incapacitated, the act is carried out by a legal guardian (*opiekun*) or a curator (a guardian ad litem, *kurator*).

²⁷⁸ Viz. Article 33 of the Civil Code.

²⁷⁹ Viz. Article 33 of the Civil Code. An example of a statute conferring legal capacity to legal persons is found in the provisions on commercial companies.

²⁸⁰ Viz. Article 151 of the Act of 15 September 2000 – The Code of Commercial Companies and Partnerships, consolidated text, JL of 2024, item no. 18, hereinafter referred to as the CCCP.

²⁸¹ Viz. Article 300¹ CCCP.

²⁸² Viz. Article 301 CCCP.

²⁸³ Viz. Article 33¹ of the Civil Code.

²⁸⁴ A differing view - M. Niezgódka-Medek, *Komentarz do art. 7 Ordynacji podatkowej* [Commentary on Article 7 FOA], [in:] *Ordynacja podatkowa Komentarz* [Fiscal Ordinance Act. Commentary], S. Babiarsz, B. Dauter, R. Hauser, A. Kabat, M. Niezgódka-Medek, J. Rudowski, Warszawa 2019, p. 101. The rule from the Civil Code at issue does not introduce an unequivocal understanding of an organisational unit that does not enjoy legal personality, but only mandates the application of the rules pertinent to legal person to such a body to which such a status may be ascribed. That rule does not solve the issue of the identity of a body to which such a status of an organisational unit not enjoying legal personality.

²⁸⁵ *Ordynacja podatkowa. Komentarz praktyczny...*, op. cit., p. 44.

excise duty emerged.²⁸⁶ That followed from the lack of inclusion of a civil-law partnership in the concept of an organisational unit not having legal personality, and at the same time, an absence of any other legal basis pursuant to which a civil-law partnership could have been deemed a taxpayer of excise duty. Such a situation was criticised, however,²⁸⁷ as personal, proprietary and structural links allowing for the conferral of a status of an organisational unit not having a legal personality on a civil-law partnership may be attributed thereto, contrary to the position of a part of the case law.²⁸⁸ However, the key factor allowing for the attribution of the status of a taxpayer to a natural person, a legal person, or to an organisational unit is the quality of being subject to fiscal liability pursuant to a statute. There is a concept applicable within the framework of excise duty premised on the fact that the taxpayer is not only the party liable to pay tax, but also such a party that would not be subject to the obligation to pay tax.²⁸⁹ The legal definition of a taxpayer contained in the Fiscal Ordinance Act (*Ordynacja podatkowa*) has a general nature, and thus the provisions of the Act on the Excise Duty must be considered during a determination of the identity of a taxpayer of excise duty.

The subjective part of the definition of the taxpayer of excise duty corresponds to the one found in the Fiscal Ordinance Act, both as regards the excise goods and passenger cars.²⁹⁰ However, it refers to factual scenarios subjected to taxation by excise duty as regards its objective scope.²⁹¹ In that respect, one should refer to the regulations determining the object of taxation, i.e. sets of facts subject to taxation.²⁹² The definition

²⁸⁶ Judgment of the Supreme Administrative Court of 24 January 2012, case ref. I GSK 746/10, CBOSA; judgment of the Supreme Administrative Court of 23 October 2012, case ref. I GSK 974/11, CBOSA.

²⁸⁷ A. Tatara, Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 24 stycznia 2012 r., sygn.. I GSK 743/10 [A Glossa on the Judgment of the Supreme Administrative Court of 24 January 2012, case ref. no I GSK 743/10], *Przegląd Orzecznictwa Podatkowego* 2014, pp. 30-35, A. Tatara, *Spółka cywilna jako podatnik podatku akcyzowego [Civil-Law Partnership as a Taxpayer of Excise Duty]*, [in:] *Prawo celne i podatek akcyzowy blaski...*, op. cit., pp. 371-378.

²⁸⁸ Resolution of the Panel of Seven Judges of the Supreme Administrative Court of 14 December 2015, case ref. I GPS 1/15, CBOSA.

²⁸⁹ M. Popławski, *Komentarz do art. 7 Ordynacji podatkowej* [Commentary on Article 7 FOA], [in:] *Ordynacja podatkowa. Komentarz* [Fiscal Ordinance – a Commentary], edited by L. Etel, Warszawa 2017, p.109. As it was rightly pointed out, such a state pertains to a situation where a body is enjoying tax relief and exemptions. Then, despite the absence of an obligation to pay excise duty, such a person would be a taxpayer.

²⁹⁰ Viz. Article 13 and 102 AED.

²⁹¹ Viz. Article 13(1) AED.

²⁹² Cf. Articles 8-9c AED.

of a taxpayer as regards the passenger cars also presupposes a reference to the sets of facts subject to taxation.²⁹³

The definition of a taxpayer of excise duty was effected through a list of actions carried out by a natural person, a legal person, or an organisational unit not having legal personality, that result in the emergence of a set of facts that is subject to taxation.²⁹⁴

In principle, the taxpayer of the excise duty is an entity:

- 1) Purchasing or possessing excise goods located outside the duty suspension arrangement, if no excise duty was paid on those goods in due amount and it was not found out as a result of a fiscal check, a customs-tax check, or fiscal proceedings that the duty was in fact paid;
- 2) Being a final purchaser using electricity up, if no excise duty in the due amount was paid on that electricity, and the entity that sold the electricity at issue to such a final purchaser cannot be determined;
- 3) Being a purchaser or a possessor of raw tobacco who is not an entity operating a tax warehouse, an intermediary tobacco company, or a farmer who manufactured the raw tobacco, where no excise duty in the due amount was paid on that raw tobacco, and the entity that sold that raw tobacco cannot be determined;
- 4) In regard to whom losses in excise goods occur, or a complete destruction of excise goods took place;
- 5) Being a fiscal representative;
- 6) Being a registered consignee, excluding a registered consignee having an authorisation for one-time purchase of excise goods as a registered consignee – due to an intra-Community acquisition of excise goods to the benefit of another party;
- 7) Being a registered consignor, should they send excise goods from a place of importation while using a duty suspension arrangement;
- 8) Effecting use or sale of excise goods that were acquired by them through an act prohibited by law on pain of a penalty;
- 9) Being an intermediate tobacco entity using raw tobacco;
- 10) Being an entity operating a tax warehouse using raw tobacco for other purposes than the production of manufactured tobacco;
- 11) Being an intermediate coal entity using coal products;
- 12) Being a final coal purchaser;
- 13) Being an intermediate gas entity using gas products;

²⁹³ Cf. Article 102(1) AED and Article 100(1) and (2) AED.

²⁹⁴ Viz. Article 13(1), (1a), (2)-(5a) AED.

14) Being a final gas purchaser.

The subjective scope of the definition of a taxpayer as regards passenger cars is the same as its scope for the excise duty on excise goods. However, the objective scope of that definition was framed differently. In its objective aspect, as to the actions, the taxpayer of excise duty on passenger cars is an entity that carries out:²⁹⁵

- 1) Importation of a passenger car not previously registered within the territory of the State, pursuant to the provisions on road traffic;
- 2) Intra-Community acquisition of a passenger car not previously registered within the territory of the State, pursuant to the provisions on road traffic;
- 3) First sale within the territory of the State of a passenger car not registered within the territory of the State, pursuant to the provisions on road traffic, said car being manufactured within the territory of the State, on which excise duty was not paid;
- 4) Sale of new passenger cars, imported cars, or cars acquired intra-Community, on which excise duty was not paid.

The two autonomous definitions of the taxpayer of excise duty were framed in a casuistic manner. That partly follows from the specific features of the trade in excise goods and passenger cars, as well as those of the excise duty. The excise duty is a single phase tax, which makes a precise determination of the entity subject to taxation indispensable for the proper implementation of functions attributed to that tax, with the same following from the constitutional standards.²⁹⁶

Another element of the structure of the tax that has to be governed by statute is the object of taxation. That is a phenomenon or an event that causes legal effects in the form of taxation, being specified by a fiscal statute.²⁹⁷ Like the regulation of the concept of a taxpayer, the object of taxation was determined in a separate manner for excise goods and passenger cars. Against the background of constitutional standards, however, it should be noted that the object of taxation was framed in a casuistic manner.²⁹⁸ It consists in the listing of all factual situations that result in the appearance of fiscal liability. Such a framing of the object of taxation is caused by its disintegration and by the duality of excise duties at the national and the Union level. However, due to the regulation of the object of taxation and the chargeability of the excise duty at the

²⁹⁵ Viz. Article 102(1) AED.

²⁹⁶ Viz. Article 217 of the Constitution of Poland.

²⁹⁷ W. Wójtowicz, *Elementy teorii podatku* [Elements of the Theory of Tax], [in:] *Zarys finansów publicznych i prawa finansowego* [Outline of Public Finances and of Financial Law], edited by W. Wójtowicz, Warszawa 2017, p. 158.

²⁹⁸ A. Gorgol, *Podatek akcyzowy* [The Excise Duty] [in:] *Prawo podatkowe...*, op. cit., p. 335.

moment of release of the excise goods for consumption, the broad construction of the object of taxation as being subject to the obligation of statutory regulation is warranted. For that reason, the duty of statutory regulation applies not only to the sets of facts that cause the appearance of fiscal liability, but also to elements related to the trade in excise goods, including: the regulation of the duty suspension arrangement, the movement of excise goods, tax warehouses, or even intermediate entities and registered consignees. The provision of security is also a specific feature of the excise duty, although in that regard the duty of statutory regulation does not directly follow from the principle of exclusivity of the statute in fiscal matters,²⁹⁹ but instead from general constitutional regulations.³⁰⁰ The obligation to provide excise security constitutes an interference with the freedom of economic activity, as the consequence thereof is the need to bear additional cost that would otherwise not be borne by the businessperson, had they operated their business in a different field.

Two separate regulations on the taxation of harmonised excise goods and the excise duty on passenger cars were introduced under the national statute on the excise duty.³⁰¹ Those regulations implement the constitutional standard of the exclusivity of a statute in tax matters. There is a number of legal institutions specific only for the excise duty under the statute thereon. Above all, those are the regulations of commercial law that specify the trade in excise goods. Those provisions specify that the place of manufacture is a tax warehouse, and that the trade in excise goods subject to a duty suspension arrangement is carried out only between intermediate entities. Moreover, the provisions on the excise duty introduce administrative regulation of business by way of authorisations, and they provide for a requirement to provide security. The subjective and the objective scope is framed in a casuistic manner, which is caused by the adopted model of taxing consumption, determining a very detailed indication of situations during which the fiscal liability appears.

No list of general tax exemptions was drafted in the provisions on the scope of the excise duty, contrary to the other fiscal statutes. The possibility of taxing the actions and sets of facts was also not made dependent on the observance of forms and conditions specified by the provisions of law.³⁰² Even criminal activity, such as larceny,

²⁹⁹ Viz. Article 217 of the Constitution of Poland.

³⁰⁰ Viz. Article 31(3) of the Constitution of Poland.

³⁰¹ A. Gorgol, *Podatek...*, op. cit., p. 334.

³⁰² Viz. Article 5 AED.

receiving and handling of stolen goods, and trafficking, results in the obligation to pay excise duty.³⁰³ It should be stressed that not the excise goods themselves are the object of taxation, but factual events related to the trade in such goods. A major disintegration of the object of taxation took place, which was caused by the diversification of the excise duty and the harmonisation of the object of taxation in line with Union law,³⁰⁴ and by the determination of the object of taxation in various sections of the statute.³⁰⁵ The object of taxation for all excise goods and for passenger cars was determined in a manner peculiar to the excise duty, i.e. by listing all sets of facts subject to taxation. That causes far-reaching casuistry, which also has its origins in the rules of Union law.³⁰⁶ Those in turn determine that the excise duty becomes chargeable at the moment of releasing the excise goods for consumption,³⁰⁷ while at the same time introducing a definition of the concept of a release of those goods for consumption.³⁰⁸ The list of taxpayers also makes a reference to the object of taxation and to the failure to pay excise duty during the previous stage of the trade in excise goods.³⁰⁹

The categories of activities subject to taxation by the excise duty may generally be divided into three groups. The ordinary taxable activities belong to the first group. The second is constituted by the activities linked to a breach of the rules of using the exemptions and the reduced rates. The third group consists of the activities peculiar to the trade in excise goods.³¹⁰ The manufacturing of excise goods is an ordinary activity subject to taxation by the excise duty.³¹¹ In principle, it may occur only at a tax warehouse, where a duty suspension arrangement is in place.³¹² The lack of an uniform definition of the manufacturing of excise goods may be problematic, although the

³⁰³ R. Kubal, *Komentarz do art. 8...*, op. cit. p. 145

³⁰⁴ A. Gorgol, *Podatek akcyzowy...*, op. cit., p. 335.

³⁰⁵ The general rule on the object of taxation is governed by Article 8 AED. Separate rules were provided for the object of taxation in the forms of electric energy – Article 9 AED, coal products – Article 9a AED, raw tobacco – Article 9b AED, and gas products – Article 9c AED. The object of taxation for separately regulated excise goods is formulated somewhat differently and includes a list of acts that takes account of the specific features of the goods at issue. On one hand, this is an approach that impacts upon the cohesion of the tax system. On the other, due to the inadmissibility of legal analogy in tax law, the need to stipulate the object of taxation by statute, as well as the inadmissibility of liberal, extensive interpretation, that is the correct approach.

³⁰⁶ Viz. Article 7 of the Horizontal Directive.

³⁰⁷ Viz. Article 7(1) of the Horizontal Directive.

³⁰⁸ Viz. Article 7(2) of the Horizontal Directive.

³⁰⁹ A. Gorgol, *Podatek*, op. cit. p. 334.

³¹⁰ S. Parulski, *Akcyza Komentarz [Excise Duty – a Commentary]*, Warszawa 2016, pp. 146-147.

³¹¹ Viz. Article 8(1)(1) AED.

³¹² Viz. Article 47(1) AED.

provisions of the Act on the Excise Duty provide a definition of manufacturing for the respective lists of goods.³¹³

Another object of taxation is the entry of goods into a tax warehouse.³¹⁴ That activity is linked to the legal institution of the expiry of fiscal liability without the appearance of a fiscal obligation, specific to the excised duty.³¹⁵ The expiry of fiscal liability without the appearance of an obligation results from the movement of excise goods under the duty suspension arrangement.³¹⁶

Importation of excise goods is also an activity subject to taxation.³¹⁷ The differences between the customs territory of the European Union³¹⁸ and its fiscal area should be noted.³¹⁹ Due to the territorial discrepancies, a situation may occur where a certain activity constitutes importation pursuant to the customs law, while being classified as intra-Community acquisition for the purposes of excise duty.³²⁰ Intra-Community acquisition of excise goods is defined as the import of excise goods or a passenger car from a Member State into the territory of Poland.³²¹ A reservation must be made that the object of taxation is the intra-Community acquisition of excise goods that occurs for the purpose of consuming the goods. However, an intra-Community acquisition into a tax warehouse occurs within the duty suspension arrangement,

³¹³ Cf. Articles 87, 93(2), 94(2), 95(2), 96(2), 97(2), 99(1) and (1a) AED.

³¹⁴ Viz. Article 8(1)(2) AED.

³¹⁵ A. Gorgol, *Wygaśnięcie...*, op. cit. pp. 56-64.

³¹⁶ Viz. Article 41(5) AED.

³¹⁷ Cf. Article 8(1)(3) AED. It bears noting that the specific definition of imports has been defined under Article 2(1)(7) AED. "Import" is constituted by importation of excise goods from territories of third countries into the territory of the country if, upon entering the territory of the country, such goods are not placed under a special procedure, i.e.: external transit procedure, customs warehousing procedure, duty-free zone procedure, temporary clearance procedure or inward processing procedure, or placed under temporary storage, or if the temporary storage of such goods has been completed or if a special procedure was discharged and a customs debt has arisen.

³¹⁸ Viz. Article 4 UCC.

³¹⁹ Viz. Article 2(1)(2)-(5) AED.

³²⁰ The UCC rules do not consider the overseas territories of the French Republic and the Canary Islands to be a part of the Union customs area. However, pursuant to Article 5(4) and Article 5(5) of the Horizontal Directive, France and Spain may make a declaration to apply the Horizontal Directive also to those territories. In such a situation, those areas do not constitute a part of the Union customs area, yet they do constitute an internal area within the framework of the movement of excise goods. In such a situation, movement of goods from those overseas territories to Poland would constitute import for the purposes of the law on customs, but it would also constitute an intra-Community acquisition for the purposes of the excise duty.

³²¹ Cf. Article 8(1)(2) AED. The concept of the "territory of the country" has been stipulated under Article 2(1)(2) AED, with the concept of the territory of the Member State having been stipulated under Article 2(1)(3) AED.

so the fiscal liability expires after the completion of the movement, with the fiscal obligation not appearing.

The exit of excise goods that are not property of the entity operating that warehouse, who is the owner of those goods and is granted authorization to effect the exit of goods by the competent Head of the Tax Office, is the object of taxation by the excise duty.³²² Such a state of affairs occurs where the right of ownership of excise goods is held by an entity using a third party's tax warehouse, without the transfer of ownership of excise goods. The last of the activities constituting an object of taxation, classified as ordinary activities, is found in the dispatch of imported excise goods under the duty suspension arrangement from the place of importation by the registered consignor.³²³

The second group of instances of taxation of excise goods consists in sets of facts related to a breach of the conditions for exemption, for the application of a preferential rate, or a failure to pay excise duty at the previous stage of trade despite under an obligation to do so. Taxation is applicable to unintended use of excise goods for which a preferential rate of excise duty was provided.³²⁴ A situation of using the goods without the conditions entitling for an exemption is also the object of taxation. The delivery of excise goods exempt due to their intended use without meeting the delivery conditions,³²⁵ i.e. moving the goods without the cover of the e-AD document, causes analogous fiscal effects. A further instance of a set of facts constituting an object of taxation is the sale of excise goods while using a preferential tax rate related to the intended use of such goods, without meeting the conditions prescribed for the sale of heating oil, without the required statement on the intention of using such goods for heating purposes.³²⁶

The object of excise duty is the purchase or possession of excise goods on which said duty was not paid in the due amount.³²⁷ That is an exceptional regulation, which to a large extent results from the single phasing of the excise duty, and from the one-time collection thereof. It may cause a situation where there would be a remerging of the formal taxpayer and the effective taxpayer. Where a party purchases excise goods on

³²² Cf. Article 8(1)(5), 54(1) AED.

³²³ Viz. Article 8(1)(6) AED.

³²⁴ Cf. Article 8(2)(1) AED in relation to Article 32 AED.

³²⁵ Viz. Article 8(2)(2) AED.

³²⁶ Cf. Article 89(5)(3) in relation to Article 89(16) AED.

³²⁷ Viz. Article 8(2)(4) AED.

which the excise duty was not paid at the earlier stage, despite the duty to do so, that party as a purchaser is liable to pay that tax. It should be stressed that the appearance of fiscal liability is not dependent on the awareness of the purchaser as to whether the excise duty was paid at the earlier stage of trade. It is also not material in the context of the appearance of fiscal liability whether the consumer acted in good faith, i.e. whether they could have learned of the failure to pay excise duty had they acted with due diligence.³²⁸ Owing to such a framing of the provision at issue, it is the consumer who is under an obligation to prove that the excise duty on the excise goods possessed by them was paid. That constitutes a shift of the burden of proof vested in the fiscal authorities onto the purchaser of excise goods on which the excise duty was not paid. It is the purchaser who has to prove that their counterpart paid the due excise duty.³²⁹ Due to the specific features of the excise duty, it is not important whether the purchaser of excise goods had acted in good faith, having had been convinced that their counterpart had had paid the due excise duty.³³⁰ Such views in the case law on that issue are, in fact, a transposition of the decisions by the Court of Justice of the European Union.³³¹ That strand of case law might cause doubt as to whether it is in line with the Constitution of the Republic of Poland to burden the purchaser of excise goods on which the excise duty was not paid with that duty. Such doubts relate to the

³²⁸ Judgment of the Supreme Administrative Court of 14 July 2010, case ref. I GSK 960/09, CBOSA; Judgment of the Supreme Administrative Court of 14 September 2010, case ref. I GSK 1162/09, CBOSA; Judgment of the Voivode Administrative Court in Opole of 30 April 2014, case ref. I SA/Op 48/14, CBOSA; Judgment of the Voivode Administrative Court in Gliwice of 20 March 2013 r. case ref. III SA/GI 1794/12; Judgment of the Supreme Administrative Court of 5 October 2017, case ref. I GSK 1359/15, CBOSA; Judgment of the Supreme Administrative Court of 8 November 2017, case ref. I GSK 1971/15, CBOSA; Judgment of the Supreme Administrative Court of 15 February 2018, case ref. I GSK 108/16, CBOSA; Judgment of the Supreme Administrative Court of 16 February 2018, case ref. I GSK 115/16, CBOSA; Judgment of the Supreme Administrative Court of 29 August 2018, case ref. I GSK 792/16, CBOSA; Judgment of the Supreme Administrative Court of 29 August 2018, case ref. I GSK 714/16, CBOSA; Judgment of the Supreme Administrative Court of 7 February 2019, case ref. I GSK 1227/16, CBOSA; Judgment of the Supreme Administrative Court of 22 January 2020, case ref. I GSK 567/17, CBOSA; Judgment of the Supreme Administrative Court of 6 February 2020, case ref. I GSK 1319/19, CBOSA; Judgment of the Supreme Administrative Court of 12 February 2020, case ref. I GSK 1337/19, CBOSA.

³²⁹ Judgment of the Supreme Administrative Court of 7 November 2019, case ref. I GSK 252/17, CBOSA; Judgment of the Supreme Administrative Court of 15 June 2018, case ref. I GSK 647/16, CBOSA; Judgment of the Supreme Administrative Court of 15 February 2018, case ref. I GSK 665/16, CBOSA.

³³⁰ Judgment of the Supreme Administrative Court of 15 June 2018, case ref. I GSK 822/16, CBOSA; Judgment of the Supreme Administrative Court of 27 March 2018, case ref. I GSK 234/16, CBOSA; Judgment of the Supreme Administrative Court of 8 November 2017, case ref. I GSK 1996/15, CBOSA; Judgment of the Supreme Administrative Court of 31 October 2017, case ref. I GSK 1857/15, CBOSA; Judgment of the Supreme Administrative Court of 11 October 2017, case ref. I GSK 834/17, CBOSA.

³³¹ Judgment of the Court (Sixth Chamber) of 5 March 2015. Ralph Prankl. Case C-175/14. ECLI identifier: ECLI:EU:C:2015:142, accessed 21.07.2024, Judgment of the Court (Second Chamber), 3 July 2014. Stanislav Gross v Hauptzollamt Braunschweig. Case C-165/13. ECLI identifier: ECLI:EU:C:2014:2042, accessed 21.07.2024.

principles following from the clause of the democratic state ruled by law,³³² as well as to the rules on the protection of ownership.³³³ However, the following reservation should be taken note of. Said reservation relates to situations where a party genuinely is not aware of the fact that no excise duty was paid on the purchased or possessed goods. The awareness of the illegal source of origin of goods, or of the failure to pay the excise duty at the earlier stage of the trade, is not only a breach of fiscal provisions, but also constitutes, depending on the amount of tax, either a fiscal offence or a fiscal contravention. The regulation pertinent to the taxation of goods with unpaid excise duty on them should be deemed aimed at the counteraction of the illegal trade in excise goods.³³⁴ However, the lack of awareness of the failure to pay the excise duty makes two constitutional doubts well-founded. First, there is doubt as to the certainty of the law, and second, as regards the nullification of solutions from the other areas of law by fiscal law.

The Polish Civil Code provides for the presumption of good faith.³³⁵ The trade in excise goods, despite a large number of provisions on the excise duty, has a nature of civil-law activities. It is worth considering whether the above rule nullifies the legal institution of good faith by introducing a *de facto* presumption of bad faith as far as the excise duty is concerned. It is problematic as to how exactly is the purchaser to prove that they undertook the requisite action to determine whether excise duty was paid on the goods possessed by them. As to the transgression of the principle of legal certainty, it should be pointed out that it is for the actions of the public authorities to detect businesspersons breaching the principles of trade in excise goods and to allow the purchasers to make themselves familiar with such data, for the purposes of absolving them from the potential liability for the unpaid excise duty.

In a sense, the legal solution currently in force creates a trap for purchasers acting in good faith, who assume that their counterpart is also a honest trader. The authority may require payment of the party that carried out the first act prompting the need to pay excise duty, but may also demand such payment from the consumer of excise goods, irrespective of the fact that there were several parties between the taxable event for the excise duty and the consumer. The authority may select the party that

³³² Article 2 of the Constitution of Poland.

³³³ Cf. Article 21(1) and Article 64 of the Constitution of Poland.

³³⁴ A. Bigas, *Zachowanie...*, op. cit. p. 43-47.

³³⁵ Viz. Article 7 of the Civil Code.

would be made liable to pay excise duty at the authority's discretion, which elicits doubt as to the certainty of the law thus framed.

The legal institution specific for the excise duty is the taxation of losses in excise goods, as well as of their destruction.³³⁶ The definition of losses in the excise goods provides that such losses in excise goods are related to the possible factual situations linked to their movement and holding.³³⁷ Taxation of losses may cause some doubt of constitutional nature as to the conformity of determining the norm for acceptable losses.³³⁸ That problem comes down to a determination whether the norms for acceptable losses could be determined by an executive regulation. The losses in the excise goods are an object of taxation. They are currently determined by the Minister of Finance by way of a regulation. In principle, three possible variations of that problem should be considered. Firstly, the losses in excise goods constitute the object of taxation that should be governed by statute. That would mean that the determination of the maximum value of losses by way of a regulation is not allowed. For that reason, such a state of affairs would be contrary to the principle of exclusivity of a statute in fiscal matters, that requires the object of taxation be governed only by statute. The other possible variant is to assume that the norms of permissible losses constitute an element allowing for the determination of the tax base. Were that to be the case, there would be no constitutional requirement to determine the tax base by way of a statute. The third version, well-founded in our view, is the assumption that the general principle of excise duty is the taxation of all losses in excise goods. However, the determination of the norm for those acceptable losses constitutes a grant of a fiscal preference. Said preference consists in the abolition of the payment of duty on such losses in excise goods that appear naturally, as a result of normal physical and chemical processes, e.g. evaporation of alcohol. That position follows from the literal interpretation of the provision of the Act on the Excise Duty. Said provision clearly states that losses are subject to taxation. It should be considered that the norms of acceptable losses constitute a general fiscal preference of a sort, all the more so since there is a possibility of a more detailed determination thereof by way of a decision

³³⁶ Viz. Article 8(3) AED.

³³⁷ Viz. Article 2(1)(20) AED.

³³⁸ Order of the Minister of Finance of 19 September 2019 in the matter of maximum norms of acceptable losses and acceptable limits for use of excise goods, JL of 2019, item no. 1791, Order of the Minister of Finance of 19 September 2019 in the matter of norms for the acceptable losses of certain excise goods, JL of 2019, item no. 1790.

by the Head of a Tax Office.³³⁹ However, the losses in excise goods constitute, in principle, a decrease in their volume. Taxation applies to losses that appear in a duty suspension arrangement, to losses in exempt goods, and to losses to goods subject to the zero rate.³⁴⁰

The framing of the losses in excise goods as an object of taxation is important for the counteraction of the illegal trade in those goods. There could be a decrease in the tax base in the event of a failure to tax the losses.³⁴¹ That would occur in such a manner that the taxpayer would insist that, due to the features of certain goods, e.g. evaporation of ethyl alcohol, there was a loss in the volume of goods. That could enable trade in excise goods on the grey market, as traders would aim at the minimisation of fiscal burdens and the maximisation of profit, alleging that a part of excise goods had evaporated.

Further instances of the appearance of fiscal liability due to the excise duty include the destruction of excise goods³⁴² and the unintended use of excise goods, should they be subject to an exemption or to a zero rate.³⁴³ It would also appear in the event of trade in manufactured tobacco outside the duty suspension arrangement, with pricing above the maximum retail price.³⁴⁴

Separate regulations apply to the object of taxation as regards electricity, coal products, raw tobacco, and gas products. The object of taxation for electricity follows

³³⁹ Viz. Article 85(1) AED.

³⁴⁰ Judgment of the Voivode Administrative Court in Opole of 7 November 2017, case ref. I SA/Op 303/17, CBOSA; Judgment of the Voivode Administrative Court in Białystok of 12 April 2017, case ref. I SA/Bk 1145/16, CBOSA; Judgment of the Voivode Administrative Court in Opole of 25 May 2011, case ref. I SA/Op 126/11; Judgment of the Voivode Administrative Court in Gdańsk of 22 December 2010, case ref. I SA/Gd 488/10, CBOSA; Judgment of the Voivode Administrative Court in Łódź of 12 May 2010, case ref. I SA/Łd 11/10, CBOSA; Judgment of the Supreme Administrative Court of 2 July 2015, case ref. I FSK 623/15, CBOSA; Judgment of the Supreme Administrative Court of 16 July 2014, case ref. I FSK 1236/13, CBOSA; Judgment of the Supreme Administrative Court of 19 February 2014, case ref. I FSK 416/13, CBOSA; Judgment of the Supreme Administrative Court of 5 February 2014, case ref. I FSK 418/13, CBOSA; Judgment of the Supreme Administrative Court of 8 November 2011, case ref. I GSK 683/10, CBOSA.

³⁴¹ K. Lasiński-Sulecki, *Dopuszczalność opodatkowania akcyzą wyrobów skradzionych jako nadmiernych ubytków pod rządami ustawy o podatku od towarów i usług oraz o podatku akcyzowym* [Permissibility of Levying Excise Duty on Stolen Goods as Excessive Losses Pursuant to the Act on the Tax on Goods and Services and the Act on the Excise Duty], *Kwartalnik Prawa Podatkowego* 2007, no. 1.

³⁴² Viz. Article 8(3) AED.

³⁴³ Viz. Article 8(4) (1) and (2) AED.

³⁴⁴ Viz. Article 8(5) AED.

from the need to take the rules of the Electricity Directive into account.³⁴⁵ The object of taxation for electricity is its intra-Community acquisition by the final purchaser,³⁴⁶ the sale thereof to the final purchaser,³⁴⁷ use by a party holding a concession for storage, production, transmission, distribution, or trade,³⁴⁸ use of electricity,³⁴⁹ and importation.³⁵⁰ As far as coal products are concerned, the reasons for making that category legally distinct cannot be ascertained, as the amendments on the taxation of coal products by the excise duty were introduced at the stage of legislative work in committee after the second reading.³⁵¹ The object of taxation for coal products is their intra-Community acquisition by the final purchaser or the intermediate coal company,³⁵² their use,³⁵³ and the appearance of losses in coal products.³⁵⁴ Dried tobacco constitutes excise goods not subject to harmonisation; the separation of the object of taxation followed from different specific features of trade, as raw tobacco is available for consumption only after appropriate processing. For that reason, the object of taxation for raw tobacco is its intra-Community acquisition, as well as the purchase and possession thereof by a party other than the authorised

³⁴⁵ 1. Statement of reasons for the governmental bill on the excise duty, Sejm draft no. 1083, VIth term of the Sejm, p.9.

³⁴⁶ Viz. Article 9(1)(1) AED.

³⁴⁷ Viz. Article 9(1)(2) AED.

³⁴⁸ Viz. Article 9(1)(3) AED.

³⁴⁹ Viz. Article 9(1)(4) AED.

³⁵⁰ Viz. Article 9(1)(5) AED.

³⁵¹ The governmental bill on the reduction of certain duties on part of citizens and entrepreneurs alongside the statement of reasons for that bill, Sejm draft no. 4461, VIth term of the Sejm. The amendments were introduced during the second reading of the bill, and it was only at the stage of the repeated commission hearings that the reasons for inclusion of the provisions on the taxation of coal products, i.e. the need to harmonise the national rules with EU norms, were indicated; Biuletyn Kancelarii Sejmu – Biuro Komisji Sejmowych [Bulletin of the Office of the Sejm – Bureau of the Sejm Commissions], a hearing of the extraordinary commission “Przyjazne Państwo [Friendly State]” on rollback of bureaucracy, of 19 August 2011, no. 5489/VI, p. 14. Neither the reason nor the objective of the framing of the rules were pointed out at the commission hearing. The introduction of taxation on coal products in that statute was being justified with the need to harmonise those products. The expiring deadline for the transition period as regards the taxation of coal products was also relied on. Such a state of affairs only serves to prove a meagre level of legislative technique, as the statute in its original wording was supposed to reduce the burden on entrepreneurs, while those burdens were *in fine* exacerbated – as the trade in coal products was subjected to tax. Obviously, it is not in doubt that due to the transition period for coal products (Article 18b of the Energy Directive) there was a need to tax those products, yet the introduction of such a solution to a statute on a wholly different matter and in the course of legislative procedure should be viewed negatively.

³⁵² Cf. Article 9a(1)-(3)(5) AED.

³⁵³ Cf. Article 9a(4)-(6)(5) AED.

³⁵⁴ Cf. Article 9a(7) AED.

warehousekeeper,³⁵⁵ sale,³⁵⁶ importation,³⁵⁷ and use.³⁵⁸ However, due to the nature of the trade, the object of taxation was determined in a different manner for gas products, for which it is constituted by an intra-Community acquisition by a final gas purchaser,³⁵⁹ sale,³⁶⁰ importation,³⁶¹ and the use of those goods.³⁶² The separate framing of the object of taxation as regards passenger cars consists in the importation and the intra-Community acquisition of a passenger car that was not previously registered within the territory of the State, as well as in the first sale of a vehicle that is not registered within the territory of the State.³⁶³

6. Technical Elements Shaping the Calculation of Excise Duty

The structural elements of a tax that shape the calculation of that tax have key impact on implementation of its fiscal function. Those are the tax base, tax rates, the tax scale, and fiscal preferences.

The tax base constitutes a materialisation of the object of taxation.³⁶⁴ It consists of the recognition of that object either ad valorem or quantitatively.³⁶⁵ Due to the fact that the tax base is specified in physical or monetary units, it indicates the amount due attributable to the taxpayer. The tax base is a measurement to be measured, and the units of measure in which that measurement ought to be presented.³⁶⁶ The tax base may be determined in various ways as regards different taxes.³⁶⁷

The excise duty has specific features in that aspect, which follows from the split of certain categories of excise goods into the following groups: energy products and electricity, alcoholic and tobacco products, novel tobacco products, electronic cigarette

³⁵⁵ Cf. Article 9b(1), (6) AED.

³⁵⁶ Viz. Article 9b(2) AED.

³⁵⁷ Viz. Article 9b(3) AED.

³⁵⁸ Viz. Article 9b(4) and (5) AED.

³⁵⁹ Viz. Article 9c(1) AED.

³⁶⁰ Viz. Article 9c(2) AED.

³⁶¹ Viz. Article 9c(3) AED.

³⁶² Viz. Article 9c(4) and (5) AED.

³⁶³ Viz. Article 100(1) AED.

³⁶⁴ W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe część...*, op. cit. p. 24.

³⁶⁵ L. Etel, *Konstrukcja...*, op. cit., p. 32, B. Brzeziński, *Wprowadzenie...*, op. cit. pp. 49-50, W. Modzelewski, *Wstęp*, op. cit. pp. 59-60, N. Gajl, *Finanse...*, op. cit. pp. 207, J. Harasimowicz, *Finanse...*, op. cit. p. 116, J. Jaśkiewicz, Z. Jaśkiewicz, *Zarys nauki finansów publicznych* [Outline of the Science of Public Finances], Warszawa 1968, p. 74, L. Kurowski, *Wstęp do nauki prawa finansowego* [Introduction to the Doctrine of Financial Law], Warszawa 1976, p. 167, K. Ostrowski, *Prawo...*, op. cit. p. 149.

³⁶⁶ M. Kalinowski, *Przedmiot podatku* [The Object of a Tax], Toruń 2013, pp. 95-96.

³⁶⁷ M. Kalinowski, *Kilka uwag o definiowaniu podstawy opodatkowania* [Some Remarks on the Definition of the Tax Base], *Kwartalnik Prawa Podatkowego*, 2013, no. 3, pp. 13-15.

liquid, raw tobacco, coal products and gas products. The tax base for passenger cars is framed separately. Such a division of the tax base follows from the fact that the energy products, alcoholic products and tobacco products are subject to harmonisation. On the other hand, passenger cars are not excise goods.³⁶⁸ The determination of a uniform tax base for excise goods is not possible, as there is no universal metric allowing for their parameterisation. Under Union law, excise duty on the respective groups of excise goods is regulated separately in structural directives.³⁶⁹ Yet, it formally constitutes a single tax in Poland. There is a formal differentiation of excise duties that are governed by specific directives within the scope of EU law. The implementation of Union solutions has in fact caused an internal disintegration of the structure of the excise duty.³⁷⁰ The tax base for the respective categories of goods is determined separately on the basis of various physical measurements.

The proper calculation of excise duty requires the determination of the tax base. A proper parameterisation of technical elements is important for the data on physical measurements to be measurable, verifiable, and objective. For that reason, the regulations of the Act on the Excise Duty introduce plainly casuistic technical indicators related to the production of excise goods. Such an action constitutes a manifestation of making the excise duty more technical, a tax that is already the most technical one from the point of view of national fiscal statutes.³⁷¹ The approaches to regulation of the tax base for the respective categories of excise goods and for passenger cars should be taken note of.

The issue of determining the tax base for tobacco products, novel tobacco products, and electronic cigarette liquid is problematic. A. Gorgol rightly points out³⁷² that such a base is not regulated. That distinguishes those three types of products from other excise goods, as the other excise goods do have an explicitly determined tax base. There is none such as regards tobacco products, novel tobacco products, and electronic cigarette liquid. A tax base may be inferred through the construction of

³⁶⁸ A. Gorgol, *Podatek akcyzowy...*, op. cit. pp. 336, 340.

³⁶⁹ Cf. Article 2 of the Energy Directive, Articles 10, 14(2) of the Tobacco Directive, Article 3 of the Alcohol Directive.

³⁷⁰ A. Gorgol, *Podatek akcyzowy...*, op. cit. pp. 336-337.

³⁷¹ A. Gorgol, *Ustalenie podstawy opodatkowania akcyzą – wybrane zagadnienia* [Finding a Tax Base for the Excise Duty – Select Issues], [in:] *Prawo celne i podatek akcyzowy kierunki...*, op. cit. p. 79.

³⁷² A. Gorgol, *Ustalenie...*, op. cit., pp. 78-79.

a provision setting the amount of tax rates on the respective tobacco products,³⁷³ as well as on novel tobacco products and electronic cigarette liquid. Tax rates are specified through parametrised measurements for the three categories mentioned above. For cigarettes and tobacco intended for smoking, that is a number of items and a maximum retail price, in regard to tobacco for smoking, that is an amount expressed in kilograms and a maximum retail price. The tax base for cigars and cigarillos is constituted by a quantitative measurement of one kilogram. The tax base in the event of tobacco for smoking and cigarettes not subject to the marking duty is constituted by an amount expressed in kilograms and the amount expressed in items (units), for the tobacco intended for smoking and for cigarettes, respectively. Despite the lacuna as to the tax base, the inference thereof is possible on the basis of the textual interpretation of provisions on tax rates carried out. Both for cigarettes and for the smoking tobacco that are subject to the marking duty that is the quantity of goods and its value in the form of a maximum retail price. However, as regards the rest of tobacco products, the tax base is constituted by the quantity of those products.

The tax base for raw tobacco and novel tobacco products³⁷⁴ is the quantity thereof expressed in kilograms.³⁷⁵ As to the liquid for electronic cigarettes,³⁷⁶ the tax base is the volume in millilitres.

The Constitution of the Republic of Poland only provides for a formal criterion of regulating tax rates. The standard of exclusivity of the statute in fiscal matters does not set substantive thresholds of taxation.³⁷⁷ The principle of exclusivity of the statute in fiscal matters³⁷⁸ does not then directly refer to the configuration of the amounts of tax rates, but only to their formal regulation. As such, the process of shaping the amount of public dues, including tax rates, exhibits a large amount of discretion.³⁷⁹ However, according to a systemic interpretation on the basis of the principle of proportionality³⁸⁰

³⁷³ Viz. Article 99(2) AED.

³⁷⁴ Viz. Article 99c(3) AED.

³⁷⁵ Viz. Article 99a(2) AED.

³⁷⁶ Viz. Article 99b(2) AED.

³⁷⁷ T. Nowak, *Konstytucja i ordynacja podatkowa jako instrumenty zapewnienia bezpieczeństwa prawnego podatnika przy określaniu ciężaru podatkowego* [The Constitution and the Fiscal Ordinance as Instruments of Safeguarding Legal Security of a Taxpayer While Specifying the Tax Burden], Warszawa 2019, p. 67, p. 120.

³⁷⁸ Viz. Article 217 of the Constitution of Poland.

³⁷⁹ Judgment of the Constitutional Tribunal of 14 December 1993, case ref. K 8/93, OTK ZU 1993, item no. 43, Judgment of the Constitutional Tribunal of 24 May 1994, case ref. K 1/94, OTK ZU 1994, item no. 10.

³⁸⁰ Viz. Article 64(3) of the Constitution of Poland.

and the protection of ownership,³⁸¹ the substantive threshold for taxation is such a state that does not amount to a de facto confiscation of property.³⁸² The configuration of the amount of tax rates within the province of the excise duty must be implemented in such a manner as to not introduce a genuinely excessive burden both for the formal and the effective taxpayer.

The tax rates are another structural element that influences the manner of calculating the tax. The rates for the excise duty may have a threefold nature. Where the tax base is expressed through an unit of measurement other than money, then the tax rates must be determined as amounts of money.³⁸³ Rates that are percentages find their application only in regard to passenger cars, as their tax base is constituted by their value expressed by a pecuniary amount.³⁸⁴ However, mixed rates are determined both by pecuniary amounts and by a percentage. They apply to cigarettes and smoking tobacco,³⁸⁵ where due to a lacuna in normative determination of a tax base the quantity of products and the maximum retail price must be deemed to be the tax base.³⁸⁶

The parameter that is indispensable for the calculation of the amount of tax is found in the tax rates.³⁸⁷ They constitute a relationship between the tax levied and the tax base.³⁸⁸ The tax rates may appear in a form of a pecuniary amount, a percentage, or a mix of both. The rate in the form of an amount applies where the tax base is expressed in non-pecuniary measurements. On the other hand, the rate in the percentage form applies to taxation of a value.³⁸⁹ In turn, the mixed rates appear where the tax base is determined in part by a value and in part by a non-pecuniary measurement. The tax rates should be set only by way of a statute. They must not be

³⁸¹ Cf. Article 21(1) and 64(1) of the Constitution of Poland.

³⁸² Judgment of the Constitutional Tribunal of 21 November 1995, case ref. K 12/95, OTK ZU 1995, item no. 35, Judgment of the Constitutional Tribunal of 25 November 1997, case ref. K 26/97, OTK ZU 5_6/1997, item no. 64, Judgment of the Constitutional Tribunal of 22 October 2002, case ref. SK 39/01, OTK ZU 5A/2002, item no. 66, Judgment of the Constitutional Tribunal of 4 May 2004, case ref. K 8/03, OTK ZU 5A/2004, item no. 37.

³⁸³ Cf. Article 89 AED, Articles 93-97 AED, Article 99(2)(3) and 99(3) AED.

³⁸⁴ Viz. Article 105 AED.

³⁸⁵ Viz. Article 99(2)(1) and (2)(2) AED

³⁸⁶ Viz. Article 99 AED.

³⁸⁷ W. Nykiel, Norma prawa podatkowego, a elementy konstrukcji podatku. Wybrane zagadnienia [The Norm of Tax Law and the Elements of the Structure of Tax. Select Issues], [in:] *Ex iniuria non oritur ius* Księga ku czci Profesora Wojciecha Łączkowskiego [Commemorative Tome of Professor Wojciech Łączkowski], edited by A. Gomułowicz, J. Małecki, Poznań 2003, p. 234.

³⁸⁸ W. Wójtowicz, *Elementy teorii podatku* [Elements of the Theory of Tax], [in:] *Zarys...*, op. cit., p. 158.

³⁸⁹ K. Ostrowski, *Prawo finansowe zarys ogólny* [Financial Law – General Outline], Warszawa 1970, p. 150.

set by way of an executive act in regard to the excise duty.³⁹⁰ The tax rates set in a statute may be lowered by virtue of an act that is lesser in rank than a statute.³⁹¹ However, valorisation of tax rates must be done by statute. There is a preponderant view in the case law of the Constitutional Tribunal that the legislative authorities have broad competences as to the shaping of the fiscal system. The determination of the amounts of fiscal burdens and the fiscal dues features significant discretion.³⁹² However, a lacuna in the Constitution of the Republic of Poland as regards an unequivocally determined substantive threshold for taxation results in the need to review the amounts of tax rates against the principles of the proportionality of taxation and of the respect for the right of ownership.³⁹³ The postulate that every taxpayer should bear tax burdens in accordance with their payment capabilities is sound.³⁹⁴

Regulation of the amount of tax rates by way of an act of lesser rank than a statute is a problematic issue. Such a solution in relation to the decrease in rates specified by statute was in force pursuant to the former Act on the Excise Duty.³⁹⁵ According to the law as it stood then, a minister competent for public finances might effect a decrease of tax rates by way of an executive regulation.³⁹⁶ That was resulting in an impermissible transfer of fiscal powers to an executive authority.³⁹⁷ An important argument in that matter was that neither any constitutional values, nor any legal bases were advocating such a transfer of powers to a government authority.³⁹⁸ As the law stands, the rates are determined by statute.³⁹⁹ However, an exception applies to a part of energy products, i.e. motor gasolines with CN codes 2710 12 45, 2710 12 49; diesel fuels with CN codes 2710 19 43 i 2710 20 11; bio-components constituting self-contained fuels; fuel gases, hydrocarbons subject to item CN 2711 and 2901, and other motor fuels.⁴⁰⁰ The statute

³⁹⁰ Judgment of the Constitutional Tribunal of 20 June 2002, case ref. K 33/01, OTK ZU 4A/2002, item no. 44.

³⁹¹ Judgment of the Constitutional Tribunal of 1 September 1998, case ref. U 1/98, OTK ZU 5/1998, item no. 63.

³⁹² Judgment of the Constitutional Tribunal of 2 March 1993, case ref. K 9/92, OTK ZU 1993, item no. 6.

³⁹³ Cf. Articles 21(1), 31(3), 64 of the Constitution of the Republic of Poland.

³⁹⁴ A. Gomułowicz, *Zasada sprawiedliwości w Polskim systemie podatkowym* [The Principle of Fairness in the Polish Fiscal System], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1989, no. 3, p. 60.

³⁹⁵ The Act of 23 January 2004 on the Excise Duty, JL of 2004, No. 29, item no. 257.

³⁹⁶ Cf. Articles 65(2), 68(6), 69(5), 70(5), 71(5), 72(5), 73(7) of the Act of 23 January 2004 on the Excise Duty, JL of 2004, No. 29, item no. 257.

³⁹⁷ A. Krzywoń, *Podatki i inne daniny...*, op. cit., p. 222.

³⁹⁸ A. Bień-Kacała, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.* [The Principle of Power of Public Dues under the Constitution of the Republic of Poland of 1997], Toruń 2005, p.126.

³⁹⁹ Cf. Articles 93-97 and Article 99 AED.

⁴⁰⁰ Viz. Article 89(1)(2), (1)(6), (1)(8), (1)(12)(a) and (c), and (14) AED.

specified that the tax rate on those energy products shall be lowered over the span of years,⁴⁰¹ whereas the current rate amount after the application of a decrease shall be published by the Minister of Finance in a communique.⁴⁰² The publication of rates of the excise duty⁴⁰³ takes place by way of an act not fitting into the list of sources of the universally binding law.⁴⁰⁴ Such a state of affairs is permissible and not contrary to the Constitution of the Republic of Poland, as the publication of the amounts of excise duty is only an act of technical nature, and is not a part of the exercise of fiscal powers. That follows from the fact that the basic rates⁴⁰⁵ and the decreases thereof⁴⁰⁶, including the additional decrease in force until 31 December 2020,⁴⁰⁷ are governed by statute. The role of the Minister of Finance is limited to the subtraction of the value of decreases from the base rate. The actions performed by the executive authority are not an instance of an exercise of the fiscal powers, but only constitute information on the amount of the tax rate which follows from the wording of the statute. This is a state of affairs that meets the constitutional standard of the statutory regulation of tax rates, as both their amount, the decreases thereof, and the period during which they remain in force were stipulated by statute.

The tax scale also constitutes an important element from the perspective of calculating tax. It is understood as the collection of rates in force for the given tax, ranked in relation to the tax base.⁴⁰⁸ W. Wójtowicz proposes a classification of the tax scale as either proportional or disproportional. The proportional scale applies in the scope of the excise duty.⁴⁰⁹ The proportional scale features the constant tax rate, which means that

⁴⁰¹ Viz. Article 89(1a)-(1ab) AED. From 2015 to 2019, the rates were lowered by 25,00 PLN / 1000 litres, 25,00 PLN / 1000 kilograms, or 0,5 PLN / 1 gigajoule; from 2020 to 2021 the rates are lowered by 28,00 PLN / 1000 litres, 28,00 PLN / 1000 kilograms, or by 0,56 PLN / 1 gigajoule, whereas until 31 December 2020, the rates of excise duty are subject to a further decrease; the subsequent rates were lowered by 17,00 PLN / 1000 litres, 17,00 PLN / 1000 kilograms, 0,4 PLN / 1 gigajoule.

⁴⁰² Viz. Article 89(1b) AED.

⁴⁰³ Announcement of the Minister of Finance of 2 March 2020 in the matter of the rates of excise duty for engine fuels for the period from 1 March to 31 December 2020, the Polish Monitor official gazette of 2020, item no. 238.

⁴⁰⁴ Viz. Article 87(1) and (2) of the Constitution of Poland.

⁴⁰⁵ Viz. Article 89(1)(2), (1)(6), (1)(8) and (1)(12)(a) and (c), as well as (1)(14) AED.

⁴⁰⁶ Viz. Article 89(1aa) AED.

⁴⁰⁷ Viz. Article 89(1ab) AED.

⁴⁰⁸ W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe...*, op. cit. p. 15.

⁴⁰⁹ A. Gorgol, *Wpływ Brexitu na podatki graniczne w Polsce* [The Influence of Brexit on Border Taxes in Poland], *Krytyka Prawa*, tome 11, no. 2/2019, p. 236.

the amount of tax changes proportionally to the change in the size of the tax base.⁴¹⁰ Such a solution results in the ease of calculating the fiscal due.

Tax exemptions are a preferential element shaping the calculation of the excise duty.⁴¹¹ The list of exemptions relates to the particular categories of excise goods, as well as to the sets of facts related thereto, constituting the object of taxation. Fiscal preferences are the technical elements that also constitute an instrument for the implementation of the fiscal policy.

Some of the fiscal preferences require introduction only by a statute. That pertains to the definition of a list of exempt entities, as that constitutes an exemption to the principle of general application of tax. The objective exemptions need not be governed by statute. The statutory clarification of the principles of granting exemptions, relief and remissions is sufficient. This is so, because fiscal preferences are an optional element of the structure of tax.⁴¹² That is a corollary of the fact that fiscal preferences are an important stimulus influencing the behaviour of taxpayers⁴¹³ and constitute an instrument, and an element of implementation of the fiscal policy aimed at the materialisation of the desired effect of regulation. That quality makes itself especially known in the scope of the excise duty. That tax, apart from the performance of the fiscal function, implements objectives related to the protection of the natural environment, protection of health, and economic stimulation. Major importance of the extra-fiscal functions of the excise duty results in the need to select a method of influencing taxpayers, in order to achieve the desired results.⁴¹⁴ It is clear that the easiest form of incentive are the fiscal preferences. They are important for the achievement of goals mandated by the environmental protection and the protection of health. However, the implementation of the stimulus goals is linked to the grant of certain fiscal preferences for economic entities using large quantities of excise goods in the manufacturing of other goods, e.g. energy-intensive businesses. The conferral of fiscal preferences strengthens the competitiveness of national businesses on the common market of the European Union.

⁴¹⁰ W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe...*, op. cit. p. 15.

⁴¹¹ A comprehensive list of tax exemptions was foreseen under Part II, Chapter 6 AED.

⁴¹² W. Nykiel, *Ulgi i zwolnienia...*, op. cit., p. 19.

⁴¹³ H. Reniger, *Bodźce...*, op. cit., p. 319.

⁴¹⁴ Judgment of the Constitutional Tribunal of 29 May 1996, case ref. K 22/95, OTK ZU 3/1996, item no. 21.

A statutory regulation of a general and abstract nature would not perform its role due to the technical features of the excise duty. That would lead to an excessive, artificial and unnecessary enlargement of a fiscal statute. The contents of the principle of exclusivity of the statute in fiscal matters allow for the framing of those criteria in the form of an executive regulation,⁴¹⁵ which provides a legal basis for taking a decision in an individual case, i.e. an act that is individual and specific. The statutory regulation of objective exemptions from the excise duty would lead to the need to implement a number of technical and specialist terms not constituting an element of the facts of a fiscal case into the statute, such as denaturants of ethyl alcohol.⁴¹⁶

It must be stressed that the statute frames a broad list of fiscal preferences. At the same time, it is often that there are formal requirements for taking advantage of them, and the failure to observe them may result in the loss of such preferences. Attention should be drawn to the fact that a part of the fiscal preferences constitutes an implementation of Union rules. The formal requirements introduced into the Polish Act on the Excise Duty must correspond to the contents of directives and must not preclude the objective for which those preferences have been introduced under Union law in the first place. Furthermore, they should conform to the principle of proportionality and take note of the 'consumerist' nature of the excise duty.⁴¹⁷ Implementation of an obligatory exemption makes the differentiation of its scope in the context of the formal criteria therefor, or differentiation of the list of eligible entities, impossible.⁴¹⁸ Failure to meet the formal criteria for the exemption might not result in the complete loss of preference, as the disadvantage to occur after the breach of formal criteria should be proportionate to the magnitude of any such breach.⁴¹⁹

⁴¹⁵ Viz. Article 85(7) AED.

⁴¹⁶ Viz. Article 38(1)(4) AED.

⁴¹⁷ W. Krok, M. Woźnica, *Kryteria formalne dla preferencji w podatku akcyzowym – zmiana stanowiska Trybunału Sprawiedliwości* [Formal Criteria for Preferences in Excise Duty – a Change of Position by the Court of Justice], *Przegląd Podatkowy* 2017, no. 7, pp. 42-46.

⁴¹⁸ Judgment of the Court (Fifth Chamber) of 7 December 2000. *Italian Republic v Commission of the European Communities*. Case C-482/98. *European Court Reports* 2000 I-10861, ECLI identifier: ECLI:EU:C:2000:672, accessed 21.07.2024, Judgment of the Court (Third Chamber) of 9 December 2010. *Repertoire Culinaire Ltd v The Commissioners of Her Majesty's Revenue & Customs*. Case C-163/09. *European Court Reports* 2010 I-12717, ECLI identifier: ECLI:EU:C:2010:752, accessed 21.07.2024.

⁴¹⁹ Judgment of the Court (Ninth Chamber) of 2 June 2016. *ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Uługowy Henryk Ciuurko, Adam Pawłowski spółka jawna v Dyrektor Izby Celnej we Wrocławiu*. Case C-418/14. ECLI identifier: ECLI:EU:C:2016:400, accessed 21.07.2024, Judgment of the Court (Ninth Chamber) of 2 June 2016. „*Polihim-SS*” *OOD v Mitnitsa – Svishtov*. Case C-355/14. ECLI identifier: ECLI:EU:C:2016:403, accessed 21.07.2024, Judgment of the Court (Second Chamber), 19 July 2012.

The implementation of fiscal preferences provided for under Union law cannot result in the imposition of formal restrictions that would be disproportionate to the gained advantage. A sanction meted out for the failure to meet the formal requirements must also be proportionate to the magnitude of the breach. Where the Union rules provide for an obligatory exemption of certain excise goods due to their intended use, it is prohibited to restrict the circle of entities eligible for conferral of such a preference.

7. Conditions and the Procedure of Collection in Regard to Excise Duty

The conditions and procedure for the collection of tax should be understood as the principles binding the taxpayer during the payment of tax, as set out in a statute. Such regulations refer to the time-limit of payment for the tax, and to the manner and form of payment.⁴²⁰ The time-limit of payment for the tax is the time set by a statute or by a tax decision that specifies the moment of payment for the tax.⁴²¹ A general time-limit follows from the provisions of a statute, having a general nature as of then. It may also follow from the contents of a decision on the payment of arrears in instalments, and would have an individual nature as of then. In turn, the manner of payment of a tax is the determination of the means by which the payment occurs. A tax may be paid sporadically where one-time activities are the object of taxation, and periodically where recurring events are the object of taxation.⁴²² In addition, payment of tax may occur in advance, in instalments, as well as in the form of a pre-payment.⁴²³

The principle of the single phasing of taxation by the excise duty should be taken into account.⁴²⁴ That legal institution consists in the one-time appearance of fiscal liability in regard to a trade in excise goods.⁴²⁵ The objective framing of that legal institution follows from the rules of the Horizontal Directive.⁴²⁶ Such a framing of provisions at

Ainārs Rēdlihs v Valsts ieņēmumu dienests. Case C-263/11. ECLI identifier: ECLI:EU:C:2012:497, accessed 21.07.2024

⁴²⁰ L. Etel, *Prawo podatkowe...*, op. cit., p. 36.

⁴²¹ *Słownik...*, Tome III, op. cit., p. 496.

⁴²² W. Wójtowicz, *Struktura podatku* [The Structure of Tax], [in:] *Prawo podatkowe...*, op. cit. p. 19.

⁴²³ W. Modzelewski, *Wstęp...*, op. cit. pp. 63-64.

⁴²⁴ Viz. Article 8(6) AED.

⁴²⁵ K. Flis, *Zasada jednofazowości opodatkowania akcyzą w świetle obowiązującej ustawy akcyzowej, a także poprzedzającej ją ustawy z 2004 r.* [The Principle of Single Phasing Pursuant to the Act on the Excise Duty in Force, As Well As Pursuant to the Previous Act of 2004], [in:] *Prawo celne i podatek akcyzowy Kierunki...*, op. cit. pp. 33-34.

⁴²⁶ Viz. Article 7(1) of the Horizontal Directive.

issue mandates that the excise duty on excise goods is payable only once, at the moment of their release for consumption.

The excise duty due is calculated and paid by the taxpayer.⁴²⁷ The amount of excise duty may also be calculated and paid by a payer (remitter), but those are fringe cases as far as excise duty is concerned.⁴²⁸ However, the determination of the amount of the fiscal obligation by way of a decision takes place in a situation of an incorrect calculation of the excise duty by its taxpayer,⁴²⁹ and in a situation of a failure to file a tax return. Self-assessment is the rule for excise duty. A taxpayer is obliged to file a tax return and to pay tax within a time-limit until the 25th day of the month subsequent to the month during which fiscal liability appeared. That rule applies equally to the excise goods, losses, and to passenger cars. The first exception to that general rule is the appearance of the fiscal liability due to an intra-Community acquisition of excise goods. Should that be the case, the taxpayer is under a duty to file a simplified tax return and to pay the tax within the time-limit of 10 days from the date of appearance of the fiscal liability.⁴³⁰ Another exception is found in the procedure for payment in the event of manufacturing excise goods outside a tax warehouse. In such a case, the taxpayer is obliged to file a tax return on the pre-payment of excise duty and the payment of that duty until the last day preceding the month during which the excise goods would be manufactured,⁴³¹ and then file a return pursuant to the general rules. Then, the pre-payment would be credited against the excise duty on which the return was made. In turn, the registered consignees of excise goods, bodies operating tax warehouses, and taxpayers taking excise goods out of a third-party tax warehouse are obliged to calculate and pay tax for daily periods.⁴³² As is similar to the case of pre-payments, daily payments are credited against the fiscal due on which a return is to be made pursuant to the general rules. A regulation separate of the general rules applies to the importation of excise goods, where the taxpayer is obliged to calculate and indicate the amount of excise duty under the customs declaration, simplified

⁴²⁷ Cf. Articles 21(1), 21a, 22(1), 23(1), 24(1), 24a, 24b, 106 AED.

⁴²⁸ A. Gorgol, Podatek akcyzowy [The Excise Duty], [in:] Prawo podatkowe..., op. cit., p. 343.

⁴²⁹ Viz. Article 21(5) AED.

⁴³⁰ Viz. Article 78(1)(3) AED.

⁴³¹ Viz. Article 22(1) AED.

⁴³² Viz. Article 23(1) AED.

declaration, or termination clearance.⁴³³ The forms of tax returns to be filed by a taxpayer are specified in an executive act.⁴³⁴

As mentioned above, the specific feature of the excise duty is the obligation to mark the excise goods. Apart from the performance of the supervisory function, those constitute a form of payment of the fiscal obligation. The value of the respective excise stamps was determined by the Minister of Finance.⁴³⁵ The taxpayers are entitled to decrease the payable tax by the value of the affixed excise stamps.⁴³⁶ In line with the chosen method of payment of the tax, the clearance takes place during payment. However, entities making daily payments⁴³⁷ may decrease the calculated amount of those payments by the value of fiscal excise stamps, with the general rules⁴³⁸ being then inapplicable.

⁴³³ Viz. Article 27(1) AED.

⁴³⁴ Order of the Minister of Finance of 17 December 2021 in the matter of tax return forms for the excise duty and on returns in the matter of excise duty prepayment, JL of 2021, item no. 2436.

⁴³⁵ Schedule 8 to the Order of the Minister of Finance of 7 June 2019 in the matter of marking excise goods with excise marks, JL of 2019, item no. 1147.

⁴³⁶ Viz. Article 21(7) AED.

⁴³⁷ Viz. Article 23(4) AED.

⁴³⁸ Viz. Article 21(7) AED.

ANALYSIS OF THE STATE OF THE MARKET IN TOBACCO PRODUCTS AND THEIR ALTERNATIVES FROM 2013 TO 2023

1. Conceptual Nomenclature in the Scope of Tobacco Products

In order to precisely define the object of research, it is imperative that the respective categories of tobacco products are defined. The definitions of the respective types of tobacco products have been framed at the level of the provisions of national law and at the level of the law of the European Union.⁴³⁹ Due to the harmonised Polish model of excise duty, the point of departure for the definition of the respective categories of excise goods shall be the definitions set under the law of the Union.

Cigarettes are rolls of tobacco capable of being smoked as they are and which are not cigars or cigarillos, rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes, and rolls of tobacco which, by simple non-industrial handling, are wrapped in cigarette paper.⁴⁴⁰ For the purposes of excise duty and in the context of calculation of the amount due, it was deemed that the above product shall be considered as two cigarettes where, excluding filter or mouthpiece, it is longer than 8 cm but not longer than 11 cm, as three cigarettes where, excluding filter or mouthpiece, it is longer than 11 cm but not longer than 14 cm, and so on. The factor determining such addition of a cigarette for the purpose of excise duty as regards a single tobacco product is the difference of 3 cm, and it cannot be excluded that one product could constitute 4 or more cigarettes.⁴⁴¹

In turn, a cigar is the roll of tobacco if they can be and, given their properties and normal consumer expectations, are exclusively intended to be smoked as they are rolls of tobacco with an outer wrapper of natural tobacco, or with a threshed blend filler and with an outer wrapper of the normal colour of a cigar, of reconstituted tobacco, covering

⁴³⁹ Cf. Article 2(34)-(36) AED, Article 93 AED, Articles 1-6 of the Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (codification, OJ L 176, 5.7.2011, p. 24-36), hereinafter referred to as the Tobacco Directive, Article 2 of the Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1-38), hereinafter referred to as the Tobacco Products Directive.

⁴⁴⁰ Cf. Article 2(10) of the Tobacco Products Directive and Article 3(1) of the Tobacco Directive.

⁴⁴¹ Viz. Article 3(2) of the Tobacco Directive.

the product in full, including, where appropriate, the filter but not, in the case of tipped cigars, the tip, where the unit weight, not including filter or mouthpiece, is not less than 2,3 g and not more than 10 g, and the circumference over at least one third of the length is not less than 34 mm.⁴⁴² Furthermore, a cigarillo is a small type of cigar that does not fulfil the criteria of deeming that product a cigar.⁴⁴³

Smoking tobacco is a tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing.⁴⁴⁴ Smoking tobacco may also mean tobacco refuse put up for retail sale which are not cigarettes, cigars, or cigarillos, and which can be smoked. Tobacco refuse is deemed to be remnants of tobacco leaves and by-products obtained from tobacco processing or the manufacture of tobacco products.⁴⁴⁵ Smoking tobacco in which more than 25 % by weight of the tobacco particles have a cut width of less than 1,5 millimetre is deemed to be fine-cut tobacco for the rolling of cigarettes.⁴⁴⁶

Owing to the technological progress and the changes appearing on the market, which include consumer preferences, two new categories of products appeared, which constitute a substitute for the classic tobacco products. The new category of products is linked to the possibility of eliminating the process of smoking tobacco in order to provide the consumer with nicotine. While the definitions of new categories of products have been regulated at the level of the Tobacco Products Directive, the provisions of the Tobacco Directive contain no regulations pertinent to that type of products. Among that new generation of products, electronic cigarettes (e-cigarettes) and novel tobacco products are distinguished.⁴⁴⁷ An electronic cigarette is a product that can be used for consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank. Electronic cigarettes can be disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges.⁴⁴⁸ On the other hand, a novel tobacco is a product which does not constitute cigarettes, roll-your-own tobacco, pipe

⁴⁴² Cf. Article 2(11) of the Tobacco Products Directive and Article 4(1) of the Tobacco Directive.

⁴⁴³ Viz. Article 2(12) of the Tobacco Products Directive.

⁴⁴⁴ Viz. Article 5(1)(a) of the Tobacco Directive.

⁴⁴⁵ Viz. Article 5(1)(b) of the Tobacco Directive.

⁴⁴⁶ Viz. Article 5(2) of the Tobacco Directive.

⁴⁴⁷ Cf. Article 2(14) and (16) of the Tobacco Products Directive.

⁴⁴⁸ Viz. Article 2(16) of the Tobacco Products Directive.

tobacco, waterpipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco, or tobacco for oral use, and is placed on the market after 19 May 2014.⁴⁴⁹

In principle, the definitions of tobacco products under the national legal order – cigarettes, cigars, cigarillos, and smoking tobacco – constitute full implementation of solutions adopted by the Tobacco Directive.⁴⁵⁰ A difference between the law of the European Union and the national rules should be noted in the context of electronic cigarettes and novel tobacco products. In the case of electronic cigarettes, the definition of that product, in itself, is close to the Union model, as contained in the Tobacco Products Directive. However, the legislator has autonomously defined the concept of a liquid intended for electronic cigarettes under the AED. That product is understood as a solution intended for use in electronic cigarettes, both with nicotine or without it, including a base for such a solution which contains glycol or glycerine. A solution is considered to be intended to use in electronic cigarettes if it is used, or if it can be used due to its contents and physico-chemical properties, in electronic cigarettes, irrespective of its place of sale.⁴⁵¹ The possibility of framing a national definition of the liquid for electronic cigarettes followed from the fact of the lack of harmonization of the provisions on excise as regards that type of products at the level of the Tobacco Directive.

The concept of raw tobacco appeared in the Act of 6 December 2008 on the Excise Duty from 1 January 2013. Up until that moment, the national provisions did not contain a distinct regulation thereon. According to its original wording, raw tobacco was a tobacco that was not yet a tobacco product.⁴⁵²

According to the current wording of the provision, raw tobacco means,⁴⁵³ irrespective of its dampness, tobacco that is not connected to a live plant and is not yet a tobacco product. The statement of reasons for the amending bill provided that there was a worrying tendency noted in the span of a year to place tobacco containing large amounts of moisture on the market, described as wet tobacco, with said tobacco not

⁴⁴⁹ Cf. Article 2(14)(a) and (b) of the Tobacco Products Directive.

⁴⁵⁰ Cf. Article 98 AED.

⁴⁵¹ Viz. Article 2(35) AED.

⁴⁵² Viz. Article 7(15) of the Act of 7 December 2012 on the amendment of certain statutes in relation to the performance of the budgetary act, JL of 2012, item no. 1456.

⁴⁵³ Viz. Article 99a(1) AED.

subject to excise duty while being placed on the market. That definition of raw tobacco is in force from 1 January 2014.⁴⁵⁴

Dried tobacco could constitute both raw material and a semi-manufactured product for the production of smoking tobacco and cigarettes. The taxation of raw tobacco resulted from preventive actions in the scope of the trade in that product, which could be used for the manufacture of illegal cigarettes.

A definition of novel tobacco products was framed separately under the Act on the Excise Duty, with said products defined as a mixture that contains tobacco or raw tobacco in its contents, and the one which could contain liquid for electronic cigarettes, with said mixtures not being cigarettes, cigars, cigarillos, smoking tobacco, as well as raw tobacco.⁴⁵⁵ According to the definition of novel tobacco products that is currently in force, the criterion for deeming a novel product to constitute a novel tobacco product fulfilling the statutory criteria is the presence of tobacco in its contents.

The amendment bill⁴⁵⁶ provides for an extension of the definition of the novel products in the Act on the Excise Duty, by including the non-tobacco products thereunder, both those with and without nicotine. For some time already, there are non-tobacco products that are being placed on the market, both with and without nicotine, which do not fit in the definition of novel products in force, and thus are not subject to excise duty. Those are products in which tobacco is substituted with any raw material fit for purpose that is most commonly herbal, e.g. with tea, true hemp, red bush (rooibos plant), etc. In that connection, a need to encompass such goods with excise duty appeared, through the adjustment of the current definition of novel products to match the changes on the market in substitutes for tobacco products.⁴⁵⁷ Here, the absence of a uniform approach in the scope of the definition of novel tobacco products at the level of the Tobacco Directive (where there is no definition for that type of products) or at the level of the

⁴⁵⁴ Viz. Article 7(3)(a) of the Act of 8 November 2013 on the amendment of certain statutes in relation to the performance of the budgetary act, JL of 2013, item no. 1645.

⁴⁵⁵ Viz. Article 2(36) AED.

⁴⁵⁶ Viz. Article 1 point (1)(b) of the Bill to amend the Act on the Excise Duty, the Act on Public Health, and certain other statutes of 11 July 2024, draft no. UD 53, source: <https://legislacja.gov.pl/projekt/12384805/katalog/13057081#13057081>, accessed 9 August 2024

⁴⁵⁷ Statement of reasons, bill to amend the Act on the Excise Duty, the Act on Public Health, and certain other statutes of 11 July 2024, draft no. UD 53, source: <https://legislacja.gov.pl/projekt/12384805/katalog/13057081#13057081>, accessed 9 August 2024

Tobacco Products Directive, the AED, or the Act on the protection of health against the consequences of using tobacco and tobacco products.

There has been a recent and significant increase of the market in nicotine ‘pouches’. This is caused by the absence of excise duty on those products. This is a product containing nicotine, its compounds, or its derivatives. Nicotine pouches are a non-harmonised product, although certain Member States decided to subject them to excise duty (Denmark, Sweden, Italy). The subjecting of nicotine pouches to excise duty constitutes an outcome of the fiscal interest, the issues of the promotion of health, and the social approach to products substitutable for tobacco.

As of now, the Polish legislator plans on expanding the definition of excise goods – by adding nicotine pouches thereto. According to the bill, nicotine pouches shall be understood as products not containing tobacco, but containing nicotine, its compounds, or its derivatives, either mixed or unmixed with plant fibres or other additives, placed in apportioned pouches or in equivalent form, that may be used orally for the human organism to absorb nicotine, its compounds, or derivatives. “In fact, the excise goods shall be the nicotine matter whose contents may include nicotine, but also its compounds or derivatives, plant components, flavourings, often sweeteners. A substantive form of a ‘pouch’ is obviously most often encountered. Others are possible. It is not the ‘pouch’ in the sense of a small satchel that warrants the taxation by excise duty, but the possibility to orally absorb nicotine”.⁴⁵⁸

2. The Union Standard for the Taxation of Tobacco Products with Excise Duty

The harmonisation of excise duties is an element of the Union legal order that follows from the Treaty rules and influences the configuration of the structural elements of the excise duty.⁴⁵⁹ The essence of the process of harmonisation of the excise duty is the standardisation of the provisions on it and its substantive approximation.⁴⁶⁰ Harmonisation of excise duties does not aim at the substitution of national law with the

⁴⁵⁸ W. Kieszkowski, *Saszetki nikotynowe – nowy wyrób akcyzowy w 2025* [Nicotine Pouches – New Excise Product in 2025], source: <https://legalis.pl/saszetki-nikotynowe-nowy-wyrob-akcyzowy-w-2025-r/>, accessed 9.08.2024.

⁴⁵⁹ Viz. Article 113 TFEU.

⁴⁶⁰ A. Gorgol, *Władztwo podatkowe Polski w zakresie kształtowania konstrukcji akcyzy w warunkach członkostwa w Unii Europejskiej* [Fiscal Public Powers of Poland in the Scope of Stipulating the Structure of Excise Duty Under the Conditions of Membership in the European Union], [in:] *Prawo celne i podatki akcyzowy. Blaski i cienie...*, op. cit., p. 130.

law of the Union, but constitutes an instrument within the process of creation of the common market and the maintenance of competitiveness in the scope of that market.⁴⁶¹ The natural objective of harmonisation in the field of the excise duty is the elimination of fiscal barriers that make trade more difficult.⁴⁶² That result is possible to achieve through the alignment of structural elements of the tax, including the object of taxation, the basis of assessment for the tax, tax rates, the list of exemptions and relief measures, as well as principles of trade in excise goods. Harmonisation constitutes a compromise between a low degree of coordination and a high degree of standardisation,⁴⁶³ aims to eliminate barriers of fiscal nature that may distort the integration processes.⁴⁶⁴ Adopting such a form of harmonisation of excise duties encourages the selection of the tool therefor, constituted by the directives. The Horizontal Directive and the Tobacco Directive are a model for the configuration of technical elements of the excise duty. The respective rules for the configuration of structural elements of the excise duty are subject to breakdown into various legal acts of the Union. Union standards are twofold in nature. They determine the specific structural elements of the excise duty that are obligatory in their nature. The Member States are under a duty to implement them. On the other hand, the second group of standards is optional, both in the context of introducing certain solutions and the selection of means through which the result presumed by the rules of the directive is to be achieved. In principle, the majority of elements under the Polish provisions in the scope of taxation of tobacco products constitute direct implementation of rules contained both in the Horizontal Directive and in the Tobacco Directive.

The list of exemptions of tobacco products from taxation contains only optional preferences.⁴⁶⁵ As such, the Member States have discretion to implement those Union solutions. The Tobacco Directive provides for four instances of the application of the optional exemptions at issue. Those apply to the following tobacco products: (a) denatured manufactured tobacco used for industrial or horticultural purposes;⁴⁶⁶ (b)

⁴⁶¹ D. Mączyński, *Podatek akcyzowy w prawie polskim i europejskim. Komentarz* [The Excise Duty under Polish and European Law], Warszawa 2004, p. 223.

⁴⁶² P. Farmer, R. Ryal, *EC Tax Law*, Oxford 1994, p. 336.

⁴⁶³ J. Głuchowski, *Międzynarodowe stosunki finansowe* [International Financial Relations], Warszawa 1997, p. 217.

⁴⁶⁴ W. Pietrasiewicz, *Ogólna charakterystyka podatku akcyzowego* [General Features of Excise Duty], [in:] *Prawo podatkowe przedsiębiorców* [Tax Law Applicable to Businesspersons], edited by H. Litwińczuk, Warszawa 2013, p. 666.

⁴⁶⁵ G. Musolf, *Komentarz do art. 17 dyrektywy rady 2011/64/UE...*, op. cit., pp. 485-486.

⁴⁶⁶ Viz. Article 17, letter (a) of the Tobacco Directive.

manufactured tobacco which is destroyed under administrative supervision;⁴⁶⁷ (c) manufactured tobacco which is solely intended for scientific tests and for tests connected with product quality;⁴⁶⁸ (d) manufactured tobacco which is reworked by the producer.⁴⁶⁹ The absence of a mandatory list of exemptions for tobacco products constitutes an exception from the solutions provided for under the other Structural Directives. That is justified by the objective of taxing tobacco products, i.e. by the health-promoting influence.⁴⁷⁰

The Union rules do not provide a model on the configuration of the tax base of tobacco products, which may be the cause of its omission from the national provisions.⁴⁷¹ The Directive includes very detailed rules pertaining to the definition of the respective tobacco products,⁴⁷² as well as those related to the configuration of tax rates. The determination of the tax base in relation to the respective tobacco products is nonetheless possible by way of legal interpretation, through the analysis of the rules contained in the Directives. As regards cigarettes, the tax base may be specified as the maximum retail selling price and the amount of cigarettes expressed in items.⁴⁷³ In turn, the tax base for cigars, cigarillos, and smoking tobacco is their quantity expressed in items, or the maximum retail selling price, and it is possible to adopt a tax base similar to cigarettes.⁴⁷⁴

The Structural Directives do not directly specify the amount of tax rates, but only provide for the minimal level of taxation.⁴⁷⁵ The rates of excise duty for tobacco products are dependent on two factors, i.e. the maximum retail selling price calculated ad valorem, and the amount following from the quantity of excise goods.⁴⁷⁶ The rules of the Union model for that technical element differ as regards the specific categories of excise goods. That causes differentiation in the level of influence or the respective Union standards on the discretion to frame the provisions that regulate rates.

⁴⁶⁷ Viz. Article 17, letter (b) of the Tobacco Directive.

⁴⁶⁸ Viz. Article 17, letter (c) of the Tobacco Directive.

⁴⁶⁹ Viz. Article 17, letter (d) of the Tobacco Directive.

⁴⁷⁰ Preamble to the Tobacco Directive.

⁴⁷¹ A. Gorgol, *Ustalenie podstawy...*, op. cit., pp. 78-79.

⁴⁷² Cf. Article 3(1), Article 4(1), Article 5(1) of the Tobacco Directive.

⁴⁷³ Viz. Article 10(1) of the Tobacco Directive.

⁴⁷⁴ Viz. Article 14(1) of the Tobacco Directive.

⁴⁷⁵ Such a state of affairs applies to energy products for which the amount of the minimum levels of taxation was stipulated under Articles 7-10 of the Energy Directive, referring to the tables contained under Annex I to the Energy Directive.

⁴⁷⁶ Cf. Article 10(1) and Article 14(2) of the Tobacco Directive.

On the rates for tobacco products, the thesis by P. Pietrasz⁴⁷⁷ that the minimum level of taxation may be linked to the minimum tax rate is partly correct. That follows from the separate structure of tax rates for tobacco products. That separation relates in particular to cigarettes, as regards which the configuration of tax rates is based on a percentage of the maximum retail selling price and on the parametrised quantity expressed in units.⁴⁷⁸ The situation of other tobacco products, i.e. cigars, cigarillos and smoking tobacco, is different. As regards the tobacco products other than cigarettes, the Union rules provide for an alternative possibility to fix tax rates as percentages of the maximum retail selling price, a specific tax rate on the quantity of products, as well as a mixed structure thereof, similar to the one for cigarettes.⁴⁷⁹ A method of calculating the maximum retail selling price was also specified by the provisions of the Tobacco Directive.⁴⁸⁰

The above considerations, both those contained in the part on theoretical issues and those from the present chapter, show that the key elements of the structure of the excise duty have been regulated by a common model, and that the legal solutions as regards the respective Member States are similar. However, the Union legislator left a margin of discretion to the Member States in regard to the method of configuration of tax rates, by determining the minimum level of taxation that in essence constitutes a minimum tax rate. However, Member States may specify the normative structure of tax rates for tobacco products. Within the margin of discretion, the rate of excise duty in force within the respective Member States may be based on taxation of the specific excise duty on the quantity of products – a rate as an amount, a percentage rate on the maximum retail selling price, or potentially on both of those rates jointly. The structure of rates on the respective categories of tobacco products is different, depending on the Member State. To illustrate those differences, it is worth considering the graphs which show the amounts of tax rates in the respective Member States (figures 9.1 and 9.2). The first of these illustrates the amount of a rate expressed as such (i.e., as a monetary rate, also known as the “PLN rate”, expressed in a figure of currency), while the second indicates the amount of the maximum retail selling price.

⁴⁷⁷ P. Pietrasz, *Komentarz do art. 4 dyrektywy Rady 2003/96/WE...*, op. cit., p. 550.

⁴⁷⁸ *Viz.* Article 7 of the Tobacco Directive.

⁴⁷⁹ *Viz.* Article 14(1) of the Tobacco Directive.

⁴⁸⁰ *Viz.* Article 15 of the Tobacco Directive.

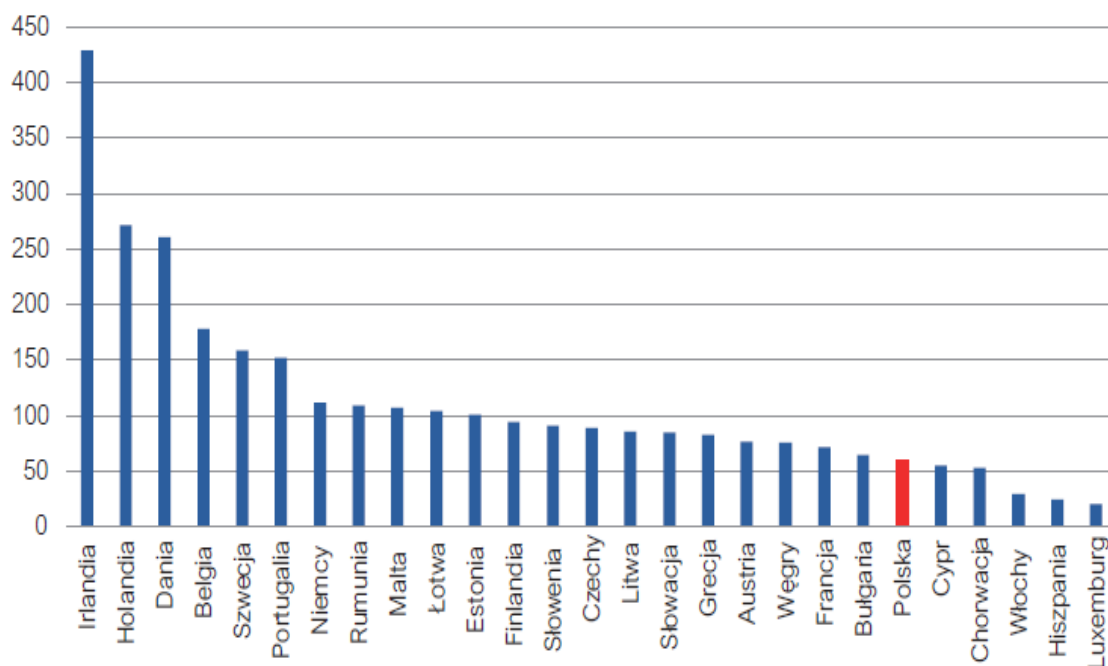


Figure 9.1. The PLN Rate of Excise Duty in 2023 for Cigarettes, 1000 units, in EUR

Source: *Raport Mapa drogowa zmian stawek akcyzy w latach 2022-2027. Ocena drugiego roku obowiązywania autorstwa Wojciecha Bronickiego* [Report: Roadmap for the amendments in the excise duty rates for the 2022-2027 period. Assessment of the second year of application]

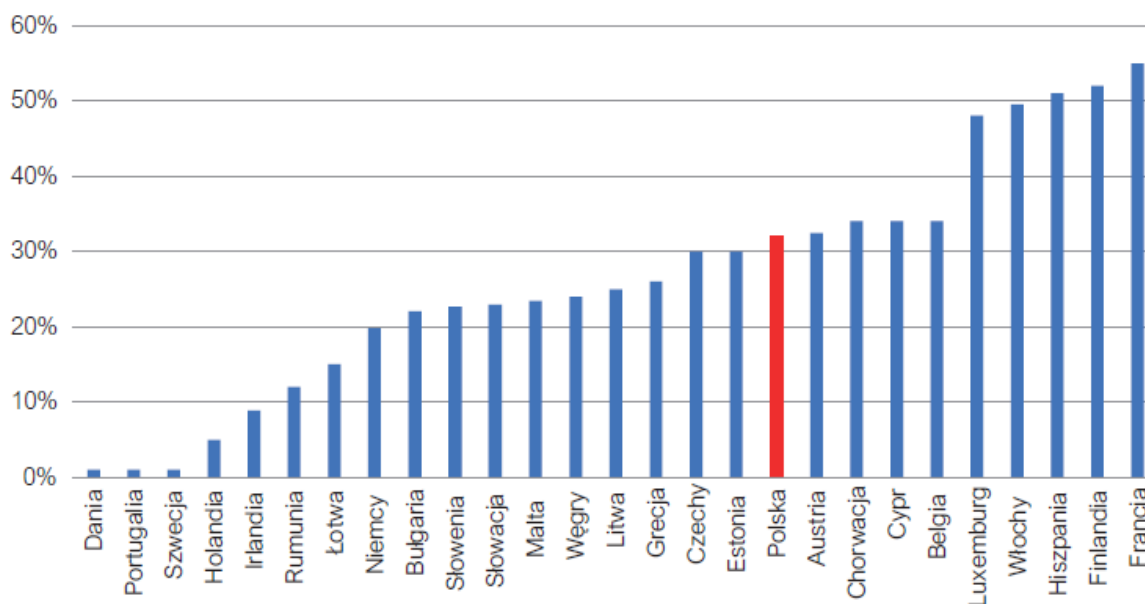


Figure 9.2. The Percentage Rate of Excise Duty for Cigarettes in 2023, on the Maximum Retail Selling Price

Source: *Raport Mapa drogowa zmian stawek akcyzy w latach 2022-2027. Ocena drugiego roku obowiązywania autorstwa Wojciecha Bronickiego* [Report: Roadmap for the amendments in the excise duty rates for the 2022-2027 period. Assessment of the second year of application]

The above collation of the amounts of tax rates on cigarettes allow for the inference of a conclusion that the Member States that introduce a significant PLN rate also set up a relatively low percentage rate on the maximum retail selling price, and vice versa. As regards Poland, the adopted solution is to set up a relatively low PLN rate, but to set one of the highest percentage rates on the maximum retail selling price, as well. In the event of a significant percentage rate on the maximum retail selling price there may be a so-called “price war” between the manufacturers of tobacco products, which are aimed at the minimisation of the maximum retail selling price in order to decrease the due excise duty following from the percentage tax rate.⁴⁸¹ It is worth noting that where a high level of the percentage rate is maintained, the manufacturers of tobacco products may keep the maximum retail selling prices low. For that reason, it could be reasonable in the long term for the structure of the mixed rate on cigarettes to be amended, and that there be an increase in the PLN rate at the expense of a decrease in the percentage rate on the maximum retail selling price.

A further point should be made on the aspect often neglected in the scope of taxation of tobacco products, i.e. the location of Poland in the European Union. Poland has one of the longest land borders with third states among all the Member States of the European Union, the length of which is ca. 1163 kilometres (the aggregate length of the border with Russia, Belarus, and Ukraine). Such a state of affairs may exacerbate smuggling of tobacco products and their alternatives from third states into the territory of Poland and the illegal placing of those products on the common market of the European Union, including on the national market. This is one of the reasons why a drastic increase in excise duty rates for tobacco products and their alternatives should not take place, and any potential increases should be gradually implemented, so as to avoid a sharp rise in smuggling. In that context, the possible sharp increase in the share of the grey market in the tobacco products and their alternatives should be taken into account. Rapid increases of tax rates for tobacco products and their alternatives, neither considered prior nor preceded by any analysis, could cause a rise of an illegal activity. The result thereof would be a drastic increase in availability of tobacco products and their alternatives from illegal sources. At the same time, the

⁴⁸¹ Wojciech Bronicki, Raport Mapa drogowa zmian stawek akcyzy w latach 2022-2027. Ocena drugiego roku obowiązywania [Report: Roadmap for the amendments in the excise duty rates for the 2022-2027 period. Assessment of the second year of application], <https://akcyza.net/mapa-drogowa-zmian-stawek-akcyzy-2/>, accessed 22.07.2024, p. 41.

consequence of such actions could be a distortion of competition in the scope of the common market, or even the national market, as the products offered for sale by legally operating businesspersons would not be able to compete with the tobacco products or their alternatives in the event of such products not being taxed at all.

3. The Market in Tobacco Products and Their Alternatives in Poland

Turning to the consideration of the market in tobacco products and their alternatives, certain issues that are important from the perspective of the specific features of those products should be noted. Undoubtedly, tobacco products and their alternatives should be counted among stimulants. As a rule, those products are not indispensable, but are characterised by a relatively constant demand. It was pointed out under the part on theory that tobacco products were deemed during the Union legislative agenda on the harmonisation of the excise duty to be greatly important for the budget, and so the approximation of laws in the scope of taxation by excise duty was decided on. Beyond a doubt, however, tobacco products and their alternatives, as any excise goods, exhibit great fiscal efficiency. That follows from severe burdening of those products by the excise duty, and from a relatively rigid demand which, by virtue of the implementation of the effective policy of combating the grey market, does not undergo drastic fluctuations due to a significant increase in taxation of those products. The changes of the share in the structure of income from excise duty were presented in the table 10.1.

Table 10.1.: Percentage of Income from the Excise Duty for the Respective Products during the 2000-2023 Period

Year	Aggregate Income from Excise Duty, in Thousands PLN	Fuels	Electricity	Ethyl Alcohol	Beer	Wine	Passenger Cars	Tobacco Products
2000	27 312 000,00	46,05%	0,00%	16,18%	6,47%	0,00%	0,00%	23,27%
2001	28 860 500,00	45,78%	0,00%	14,55%	7,03%	0,00%	0,00%	25,31%
2002	31 489 800,00	43,89%	4,95%	12,31%	6,68%	0,00%	0,00%	25,17%
2003	34 444 949,00	42,73%	7,33%	11,88%	6,50%	0,00%	0,00%	24,55%
2004	37 967 377,00	43,14%	6,96%	12,01%	6,35%	1,51%	3,75%	24,43%
2005	39 479 110,00	42,07%	6,43%	11,22%	6,64%	1,39%	2,53%	24,87%
2006	42 078 023,00	41,99%	6,13%	10,96%	6,50%	1,20%	2,08%	26,73%
2007	49 025 521,00	43,36%	5,37%	10,83%	6,14%	1,02%	2,36%	27,50%
2008	50 490 116,00	43,47%	5,28%	11,65%	5,91%	0,90%	3,04%	26,66%
2009	53 926 887,00	41,78%	4,16%	11,86%	5,89%	0,86%	2,84%	29,78%
2010	55 684 476,00	40,72%	4,17%	11,67%	5,92%	0,80%	2,40%	31,31%
2011	57 963 709,00	41,68%	4,21%	11,12%	5,90%	0,74%	2,16%	31,51%
2012	60 449 853,00	43,22%	3,89%	10,94%	5,92%	0,65%	2,15%	30,73%

Analysis of the state of the market in tobacco products

Year	Aggregate Income from Excise Duty, in Thousands PLN	Fuels	Electricity	Ethyl Alcohol	Beer	Wine	Passenger Cars	Tobacco Products
2013	60 653 116,00	41,92%	3,87%	10,62%	5,84%	0,61%	2,33%	30,91%
2014	61 570 439,00	44,60%	3,78%	10,74%	5,79%	0,60%	2,67%	29,11%
2015	62 808 633,00	44,42%	3,99%	11,34%	5,75%	0,61%	3,02%	28,32%
2016	65 749 274,00	44,68%	3,59%	11,61%	5,49%	0,54%	3,50%	28,11%
2017	68 261 286,16	46,01%	3,17%	11,46%	5,06%	0,56%	3,73%	27,52%
2018	72 108 486,00	46,54%	3,35%	10,88%	4,93%	0,54%	4,00%	27,48%
2019	73 000 000,00	46,43%	1,03%	11,43%	4,59%	0,54%	4,16%	28,62%
2020	71 787 252,00	45,37%	0,61%	13,13%	4,91%	0,60%	3,22%	29,89%
2021	75 798 033,00	45,46%	0,70%	12,23%	4,33%	0,62%	3,35%	30,40%
2022	79 773 438,00	42,43%	0,51%	13,11%	4,59%	0,64%	3,63%	32,06%
2023	84 798 844,00	42,41%	0,61%	12,34%	4,34%	0,60%	4,15%	32,49%

Source: own work on the basis of the reports from the implementation of the act on budget

The percentage increase of the share of budgetary income from the taxation of tobacco products over the span of years is noticeable, but it is also characterised by fluctuations following most often from the effected increases in the tax rates. Admittedly, those were insignificant adjustments that were not decisive for the instability of the share in income from taxation of tobacco products as opposed to the entirety of income from the excise duty. A certain stabilisation in 2022 and 2023 should be noted, when the percentage share of the excise duty for tobacco products exceeded in 2022 the threshold of 32% of all income from the excise duty, and then further increased in 2023 by 0.5%. Such a change that was positive from the point of view of public finance took effect despite the introduction of the solutions of the so-called 'roadmap'. That puts forward the fact that the foreseeability of increases of tax rates, to an extent hitherto unknown, caused a successive increase of income from the excise duty on tobacco products. Another aspect should be noted, in that the income from the excise duty systematically grow. For 2021 and 2022, the amount of growth is 4 billion PLN, whereas the aggregation of 2022 and 2023 amounts to 5 billion in revenue, with the share in tax income from the excise duty on tobacco products maintained above the level of 30%. That means that the fiscal policy based on foreseeable increases effected in line with the adopted plan ensures the stability of budgetary income, while at the same time meeting the objectives related to the mitigation of smoking.

In the context of the profitability of excise duty burdening tobacco products and their alternatives, certain reservations should be made. Within the framework of reports on the implementation of the budgetary act, tobacco products as understood under the

EU law are treated as a single item, and so the share in income from tobacco products constituted by income from cigarettes, smoking tobacco, cigars, and cigarillos cannot be discerned on the basis of official data from the Ministry of Finance. However, the separate data for non-harmonised alternatives for classic tobacco products, i.e. electronic cigarettes, novel tobacco products, or raw tobacco are indicated in the reports on the implementation of the budgetary act.

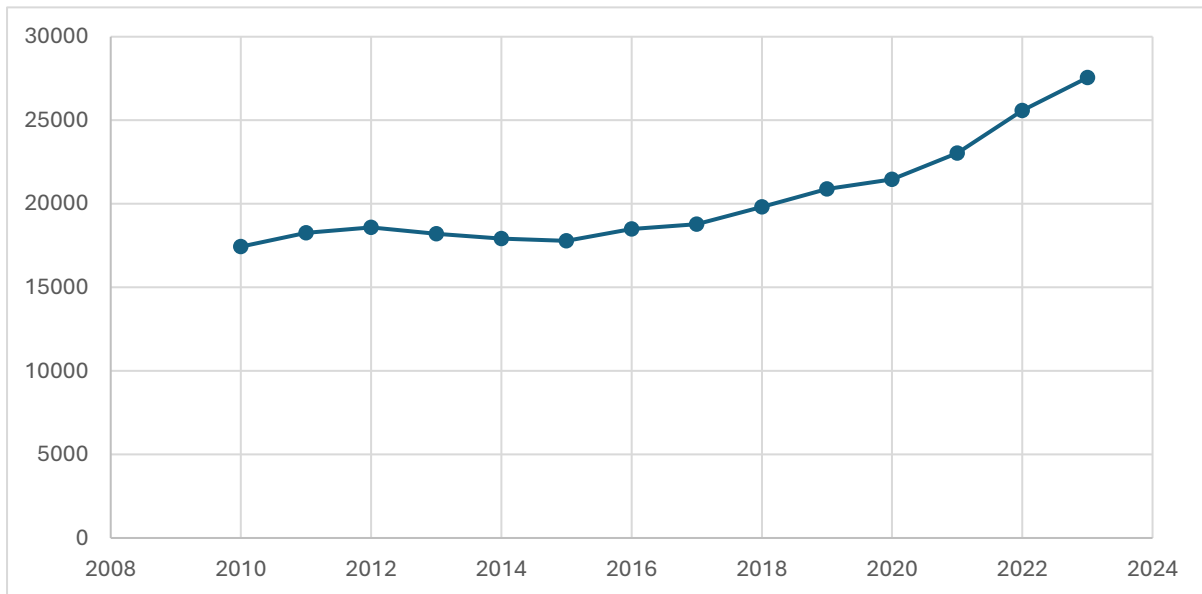
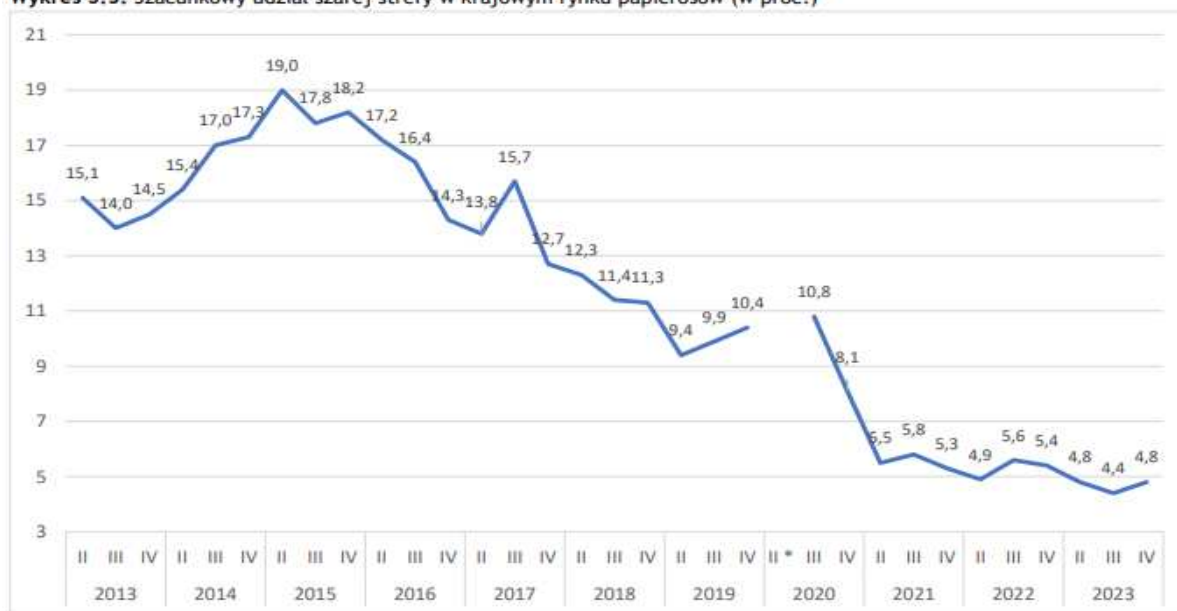


Figure 10.1. Income from the excise duty on tobacco products for the 2010-2023 period [in millions of PLN]
Source: author's own work on the basis of the reports on the implementation of the budgetary act

Figure 10.1 shows the changes in the amount of income from the excise duty on tobacco products. Despite a noticeable upwards trend from 2010 to 2023, a decrease in the monetary income from 2012 to 2024 should be noted. That was a period of making successive increases of tax rates for tobacco products, and at the same time, a period of major growth of the grey market, referred to under the first part of the present monograph. Figure 10.2. is worth considering:

Wykres 5.3. Szacunkowy udział szarej strefy w krajowym rynku papierosów (w proc.)



* II kwartał 2020 r. - brak danych ze względu na ograniczenia związane z pandemią koronawirusa

Figure 10.2. Approximate percentage share of the grey market in the national market for cigarettes [%]
Source: Almares company reports - study of a sample of collected empty cigarette packs

The above figure shows data on the percentage share of the grey market in the Polish cigarette market.

It is noticeable that the 2013-2015 period is the time of successive growth of the share of the grey market in the overall market in tobacco products. At its highest, that share reached ca. 19%, according to the report by Almares, a firm. Such a period coincided with the decrease in the revenue from the excise duty on the tobacco products. A more conservative estimate as to the share of the grey market followed from the reports by KPMG, illustrated by figure 10.3.

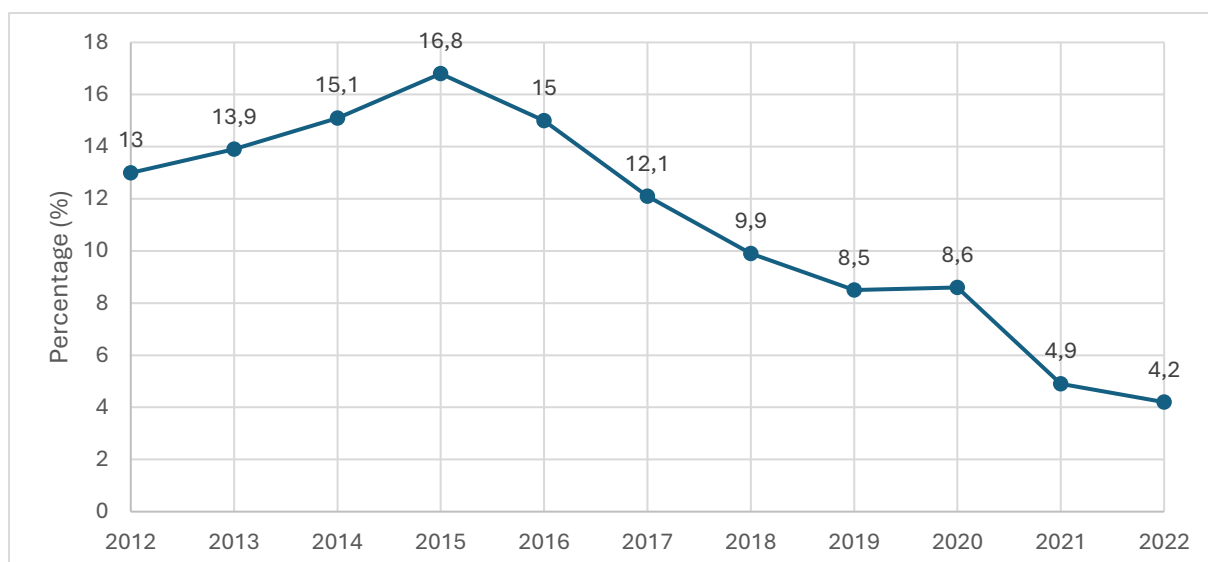


Figure 10.3. Percentage share of the 'grey market' within the overall market in tobacco products from 2012 to 2022, according to the KPMG

Source: author's own work on the basis of data from the KPMG report on the grey market.

However, even the above data allow one to observe a certain trend from 2013 to 2015, in that the growth of the grey market was accompanied by a decrease in budgetary income from the excise duty on tobacco products. In principle, the activities within the grey market in the tobacco products may consist in smuggling goods ready for smoking (cigarettes and smoking tobacco) from the territory of third states into the territory of Poland and into the *de facto* common customs territory on one hand, but also in the illegal processing of raw tobacco on the other. Dried tobacco is not subject to harmonisation and may be purchased in neighbouring States, e.g. in Germany, and then illegally processed into smoking tobacco, with cigarettes ultimately capable of being manufactured therefrom. Both of those scenarios are disadvantageous from the perspective of fiscal interests, and rightly there were actions taken to curtail such a harmful practice, through the introduction of the Track and Trace system, the road monitoring system (the SENT), and by making fiscal, criminal, and criminal tax sanctions for illegal manufacturing of tobacco products more severe. However, the fiscal interests of the State are not the only interests subject to harm, as the illegal manufacturing of cigarettes and smoking tobacco, and their subsequent distribution, is linked to distortions of competition. Firstly, the production costs are significantly lower due to its illegal nature. Secondly, the taxes constituted by the excise duty and the tax on goods and services (the VAT) are not levied on such tobacco products. Therefore, the goods originating on the so-called grey market, or even on the black market, are markedly more competitive than those manufactured by legally operating

businesspersons. As of now, due to the reasons pointed out above, a share of the grey market in the trade in tobacco products was successfully curtailed to a level of ca. 5%, which undoubtedly is a consequence of the implementation of the informational-supervisory function, as well as of the actions aimed at making criminal liability for crimes more severe. The influence of the 'roadmap' on the curtailment of the grey market should also not be left out. According to a report by Almares, a firm, the share of the grey market in the trade in tobacco products was decreasing, due to the introduction of the roadmap in 2021 and the regular indexation of tax rates. It means that the rational indexation of rates by an amount at the level of 10% p.a., taken together with fiscal planning in the medium term, results in a decrease of the phenomenon of the grey market, harmful from the perspective of businesspersons and of the fiscal interests of the State. In that context, the issue of the Laffer curve, discussed under the first part, should be noted. A rapid and significant increase of the fiscal burdens will cause a decrease in the budgetary income and the growth of the share of the grey market in the trade in tobacco products and their alternatives. Thus, the potential discernible drop in the sales of tobacco products may be the result not of the performance of the stimulating function in its health-promoting aspect, but of the increase of the share of the grey market in the overall market in the tobacco products.

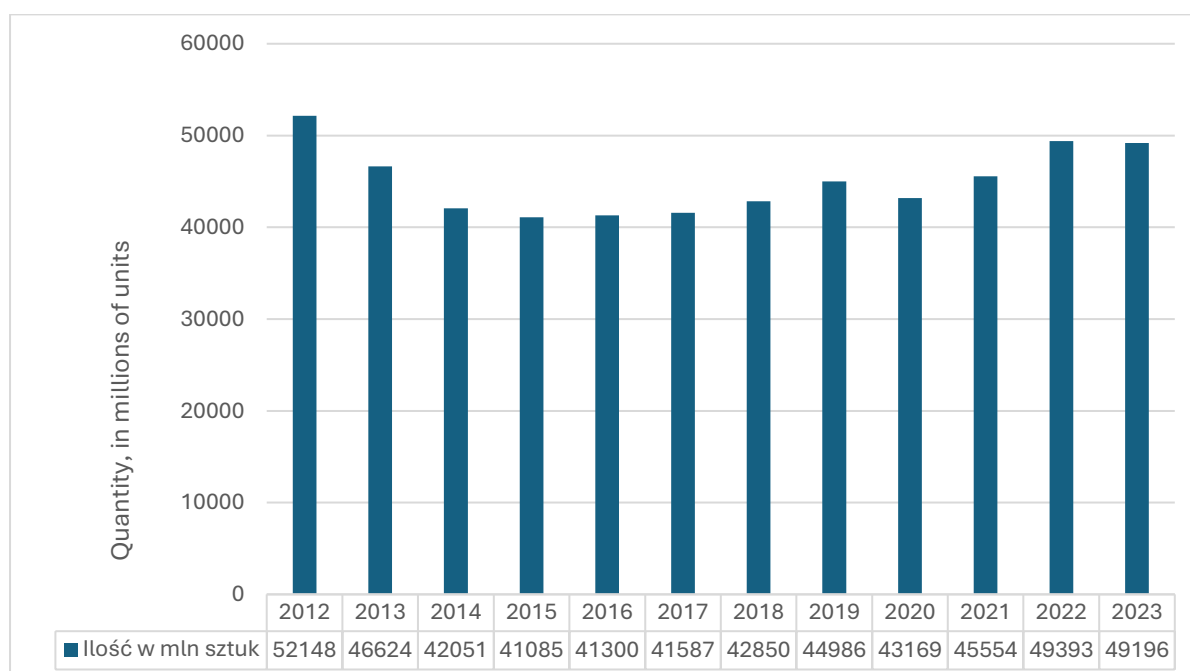


Figure 10.4. Market in Cigarettes During the 2012-2023 Period

Source: author's own work on the basis of industry data for the 2012-2023 period

Figure 10.4 shows the changes in the quantity of units of cigarettes sold during the 2012-2023 period. It should be noted, again, that there was a marked decrease in the sale of cigarettes from 2013 to 2015, which was the result of the impact of the grey market. Then, the gradual increase in consumption is noticeable until 2020, when the raise of the rate of excise duty on tobacco products took place, the last one before the 'roadmap'. While, in line with the research referred to under the first part, the amount of smokers in our country decreased from 2015 until 2019, from 24% to 21%, the data on sales of products during the 2015-2020 period point to a gradual increase of volumes of products sold legally during that period, which was influenced by the diminished scope of the grey market (decrease by a percentage point). In 2021 and 2022, there is a discernible increase in sales of cigarettes, and then a minor decrease thereof in 2023. However, those actions have a positive impact on the tobacco market, as that change does not have such a drastic nature as in the year 2013, and at the same time there already is a developing market in the alternatives for the conventional tobacco products. Two graphs were drawn up to illustrate the state of the market in cigarettes and the impact of the fiscal solutions, intended to depict the effectiveness as regards the performance of the stimulating function of the excise duty in its health-promoting aspect, in the context of the argument relied on the legislator as to the need to curtail the economic availability of tobacco products.

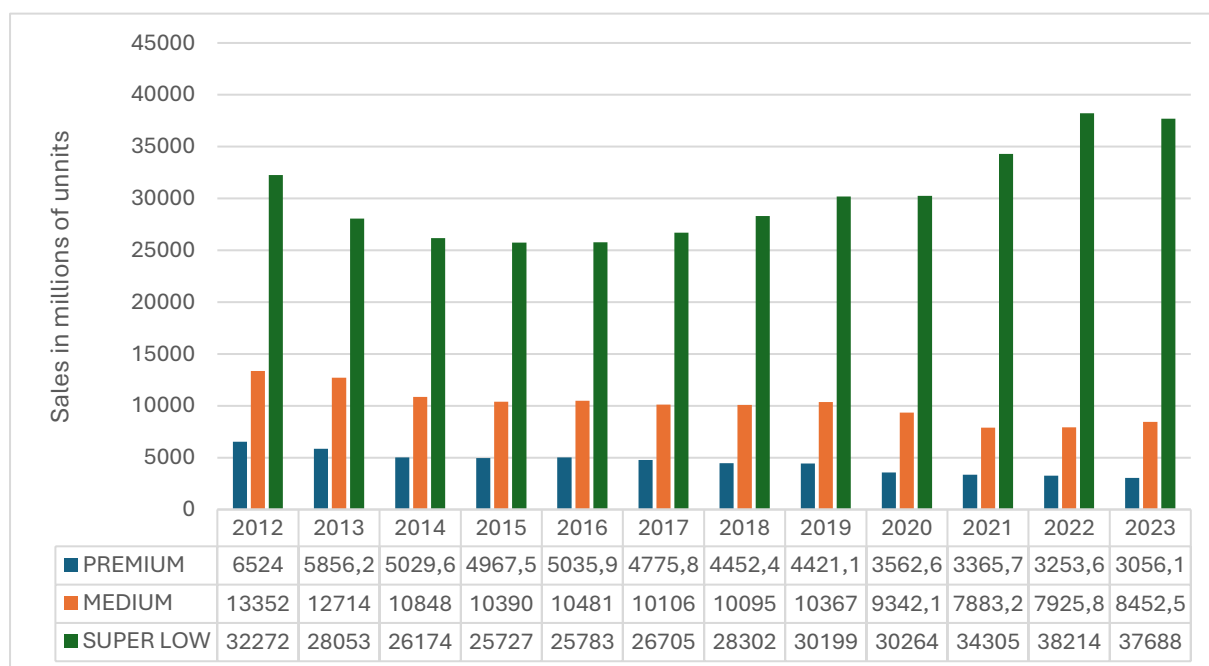


Figure 10.5. Sales of Cigarettes, Divided Into the Respective Categories, During the 2012-2023 Period
Source: the author's own work on the basis of industry data for the period 2012-2023

Figure 10.5 shows the quantitative share of the respective market segments in the overall market, i.e. those of the cigarettes falling within the Premium, Medium, and the Super Low segments. It should be noted that there is a fluctuating trend with respect to the Super Low segment (the cheapest cigarettes), with said segment being most popular among the persons with lowest incomes. In that instance, there was a significant decrease in consumption of those products also over the span of years 2013-2015. The price is the most important factor for the consumers of the goods falling in the scope of the lowest segment, which plausibly means that they began to purchase their products from illegal sources. That state of affairs may be confirmed by the gradual increase of consumption of cigarettes from the Super Low segment since 2017, corresponding to the downturn of the grey market. The second trend that becomes discernible is the quantitative decrease of the share of the cigarettes of the Premium and Medium segments in the overall market in cigarettes. That correlation is more visible in Figure 10.6 below.

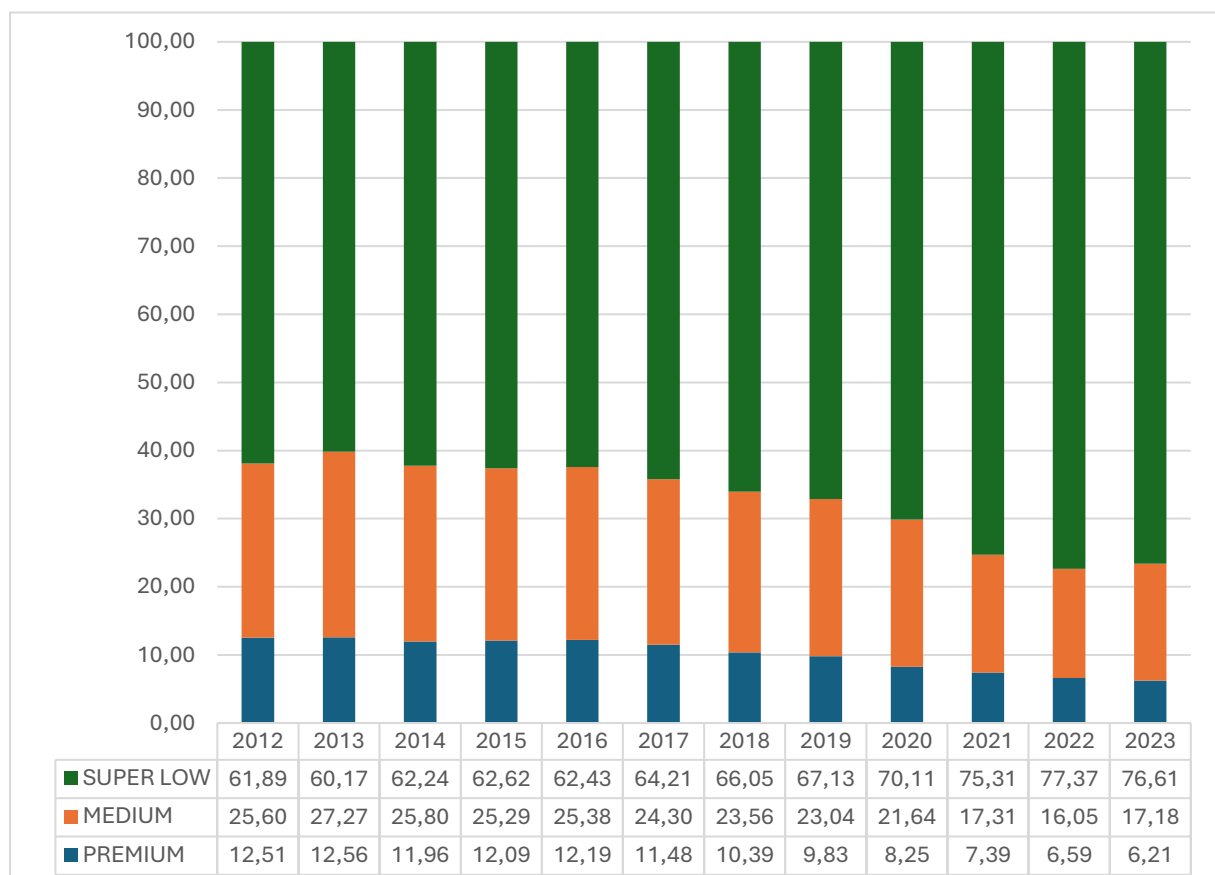


Figure 10.6. Percentage Structure of the Market in Cigarettes, Divided into the Respective Categories of Cigarettes, During the 2012-2023 Period

Source: author's own work on the basis of industry data for 2012-2023

The growth of the share of the Super Low segment and the fall of consumption of cigarettes of the Premium and Medium segments allows for posing a hypothesis that the fiscal activities of the State aimed at the restriction of consumption of cigarettes though the curtailment of its economic availability result in consumers making purchases of tobacco products from the lower price segment.

The consumption of the smoking tobacco should also be noted, with said tobacco capable of being self-rolled into cigarettes with paper wrapping, and of being manufactured into cigarettes through a special machine and the filling of cigarette tubes.

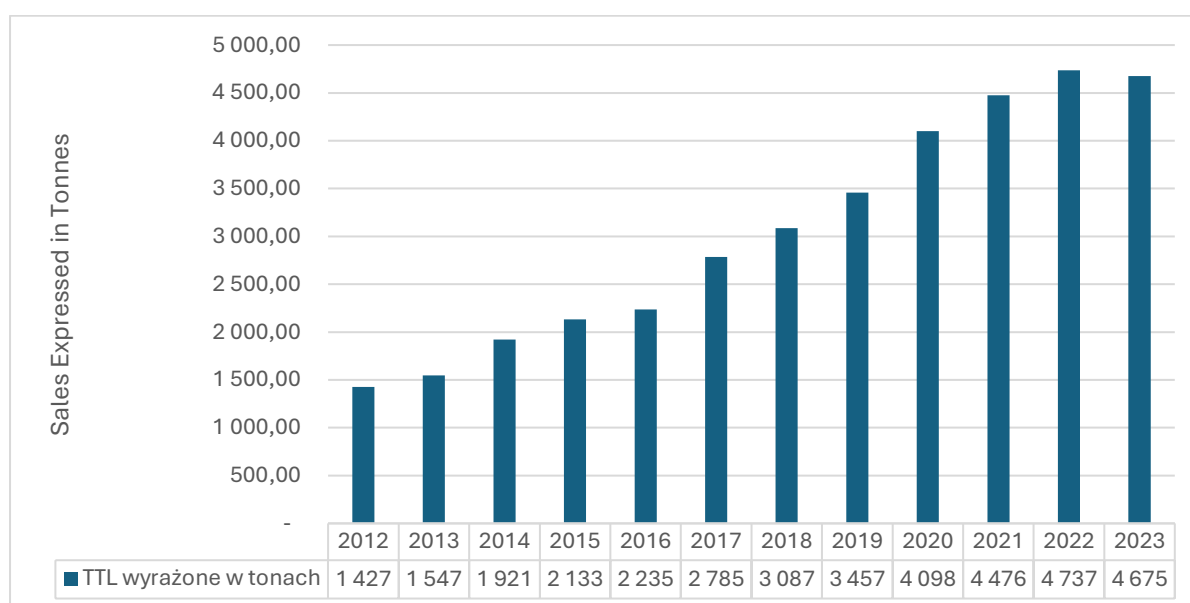


Figure 10.7. Sales of Smoking Tobacco During the 2012-2023 Period

Source: the author's own work on the basis of industry data for the 2012-2023 Period

Figure 10.7 depicts the upwards trend of the smoking tobacco, which may be related to its higher economic availability resulting from the lower level of taxation. Ipso facto, this causes smoking tobacco to constitute a cheaper substitute for cigarettes. In turn, the market in cigars and cigarillos (Figure 10.8) is characterised by quite big fluctuations due to the exclusive nature of those tobacco products.

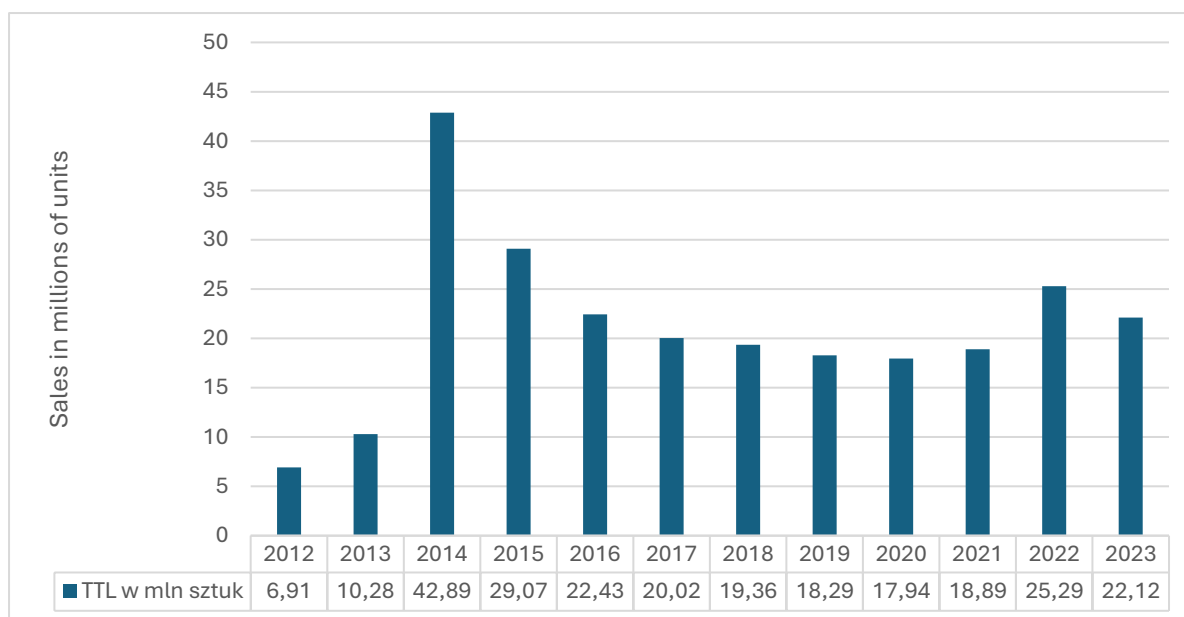


Figure 10.8. Sales of Cigars and Cigarillos During the 2012-2023 Period

Source: the author's own work on the basis of industry data for the 2012-2023 period

On the major increase in sales of cigars in 2014, it should be noted that such an increase was caused by the sales of the so-called “party cigars”. Due to the then-regulations including a unit of cigars in taxation without specifying its weight, a possibility of purchasing rolled tobacco wrapped in a leaf appeared on a market – meeting the definition of a cigar weighting several hundred grams. In principle, such a form of sale was intended to circumvent the provisions on taxation of cigarettes and smoking tobacco, as such “cigars” were then cut, with the tobacco so acquired intended for the production of cigarettes. Lower income from excise duty, and at the same time an increase in sales of products falling within the category of cigars, were the result of such activities. After the amendment of the definition, the decrease in sales of cigars and cigarillos, as well as the stabilisation of the demand, are noticeable as of 2017.

Figure 10.9 shows the structure of the market in the conventional tobacco products and the percentage share of the respective categories of tobacco products, i.e. cigarettes of the respective price segments, smoking tobacco, cigars, and cigarillos. The marginal market role of those last tobacco products should be noted: their percentage share in the market being below 0.1%.

At the same time, as pointed out before, the increase in consumption of the tobacco products from the cheaper segments, i.e. cigarettes from the Super Low segment and

smoking tobacco, which have a lower price resulting from the lower level of taxation, is noticeable.

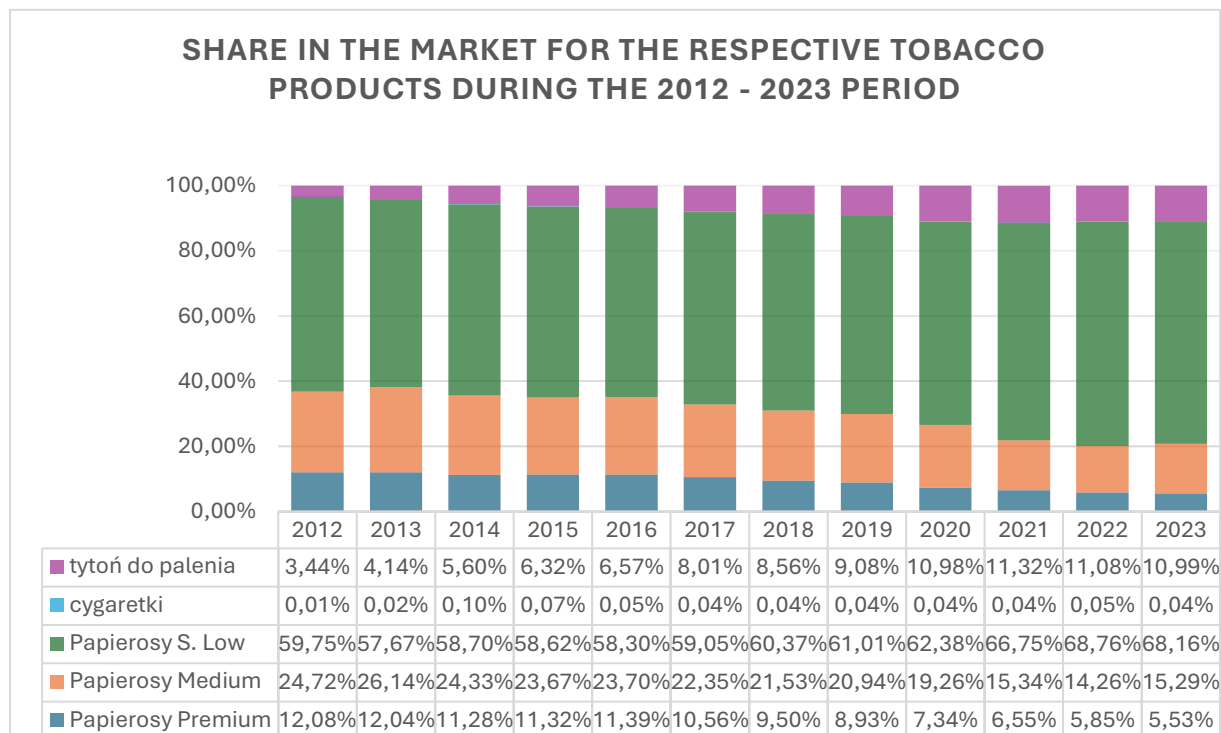


Figure 10.9. Share in the market for the respective tobacco products during the 2012-2023 period

Source: the author's own work on the basis of industry data for the 2012-2023 period

There is a number of alternatives to the conventional tobacco products that appear on the market. Their consumption does not occur by the smoking of tobacco, but through its heating or by the use of steam as a nicotine carrier. Despite the short time of functioning of such products on the market in alternatives for tobacco products, they are efficient from the perspective of the fiscal interests of the State, and their sales and popularity among consumers are increasing. The income from the taxation of electronic cigarettes over the span of two years increased more than two times. That is visible in Figure 10.10.

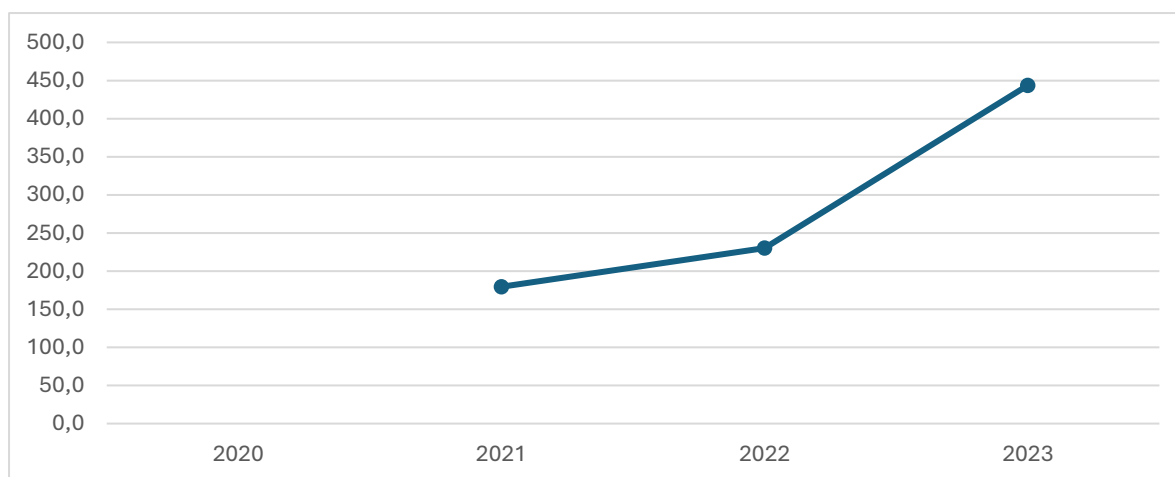


Figure 10.10. Income from the Excise Duty on Electronic Cigarettes During the 2021-2023 Period, in Millions of PLN

Source: the author's own work on the basis of the reports from the implementation of the budgetary act

The increase in consumption of those products as a substitute for the conventional tobacco products is discernible, and is subject to a successive increase since 2019 (Figure 10.11). In turn, Figure 10.12 shows the structure of the respective categories of electronic cigarettes and their quantitative share in the market.

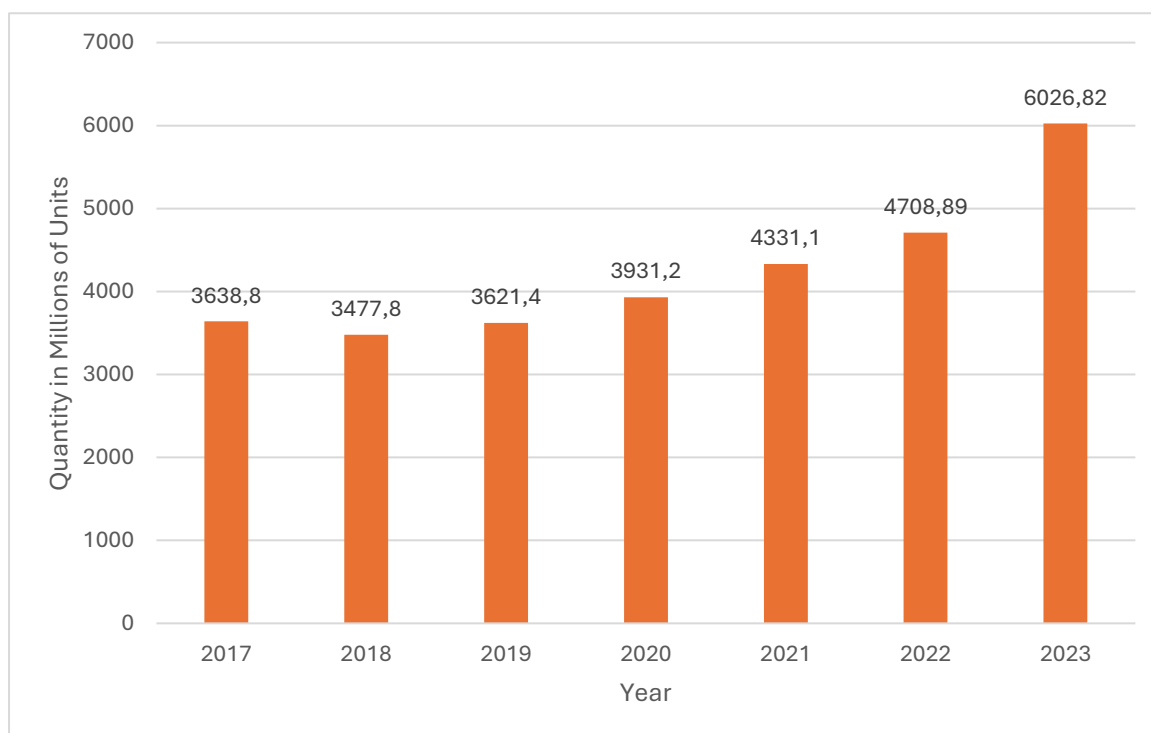
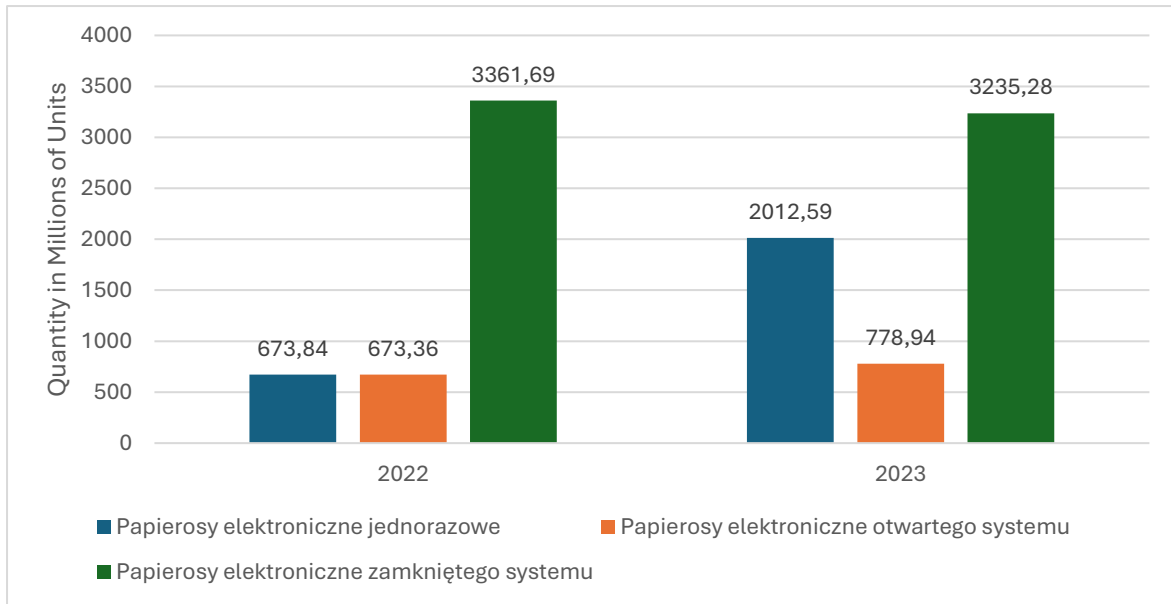


Figure 10.11. The Market in Electronic Cigarettes During the 2017-2023 Years, After Conversion to a Quantity of Cigarettes, 1 ml of Liquid = 10 Units of Cigarettes

Source: the author's own work on the basis of industry data for the 2012-2023 period



[Blue: single use electronic cigarettes; Orange: 'open system' electronic cigarettes; Green: 'closed system' electronic cigarettes]

Figure 10.12. The Market in the Electronic Cigarettes During the 2022-2023 Years, After Conversion Into Units of Cigarettes, 1 ml of Liquid = 10 Units of Cigarettes

Source: the author's own work on the basis of industry data for the 2012-2023 period

The second product that constitutes an alternative for the conventional tobacco products are the novel tobacco products. In principle, the fiscal income from the excise duty on those products grew almost four times over the span of two years (Figure 10.13).

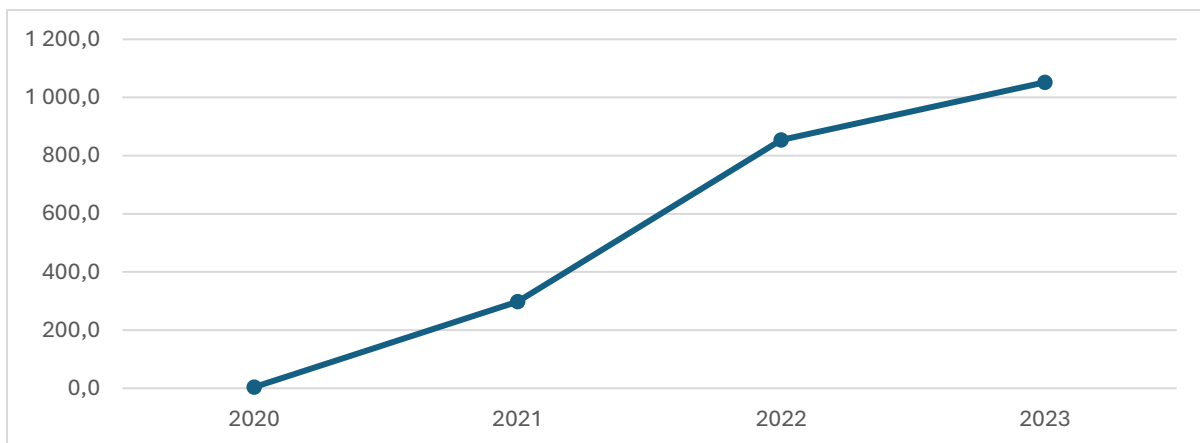


Figure 10.13. Income From Excise Duty on Novel Tobacco Products During the 2020-2023 Years

Source: the author's own work on the basis of the reports from the implementation of the budgetary act

Those goods are a relatively new product, yet they swiftly gained popularity. An intense growth of that alternative for conventional tobacco products is worth noting. Their undisputed advantage is the dispensation with the need to burn tobacco for their consumption, as tobacco is heated inside those products. Such a solution eliminates the inhalation of noxious tar substances appearing during the consumption of

conventional tobacco products by the consumer. At the same time, a developing market is capable of adjusting the consumption of cigarettes and smoking tobacco. Attention should be drawn to the fact that, already after the first year of the excise map remaining in force, the dynamic of growth of the market in novel tobacco products was subject to a significant slowdown. The PLN rate for novelty products was increased in 2022 by 100%, which ultimately translated to the increase on the overall taxation by 50%. During the first year of the map remaining in force, tobacco products were not given an increase in their excise duty at all. An additional factor that may negatively impact on the restriction of the market in novel tobacco products could be the amendment to the 'roadmap' currently in force, and a drastic increase of the PLN rate, i.e. an increase by 50% during the first year only. The increase shall be even greater due to the fact that the rate of taxation for novel tobacco products is dependent on the price of smoking tobacco, as regards which the government has also decided to increase tax rates. A bill aimed at the prohibition of manufacturing and distribution of flavoured novel tobacco products, including menthol novel tobacco products, should not be lost from the sight as well. Those two solutions will cause a significant decrease in the demand for novel tobacco products, which constitute a less harmful alternative for the conventional tobacco products. The state of that dynamic market is shown in the Figure 10.14.

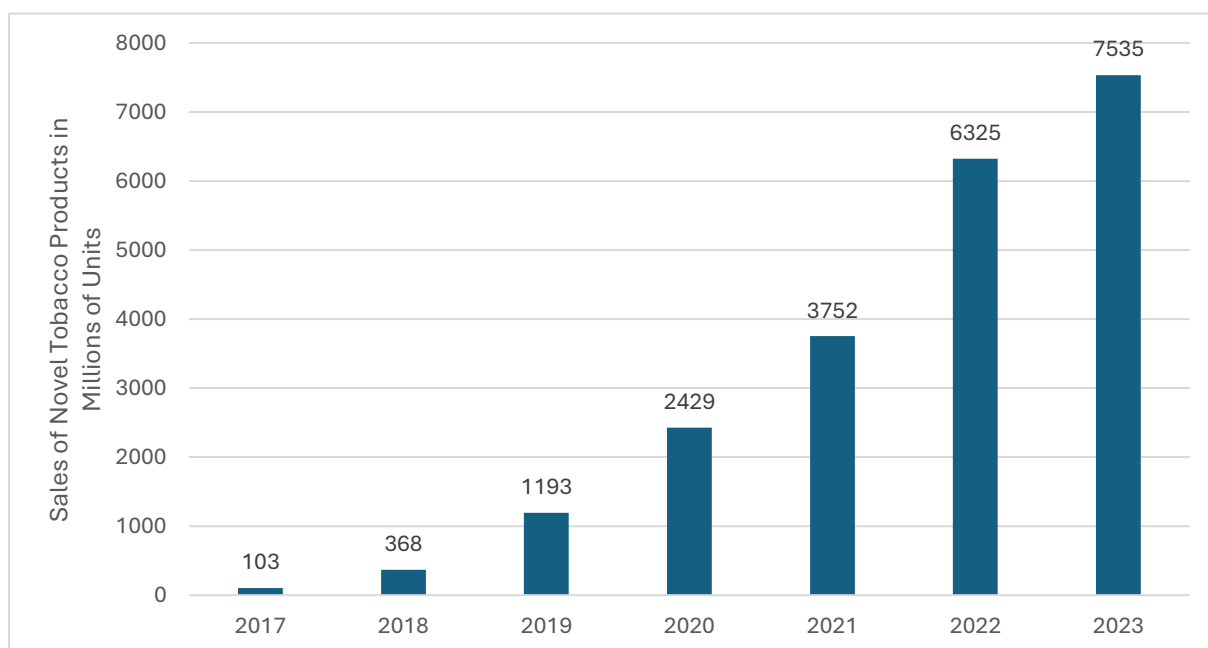


Figure 10.14. The Market in Novel Tobacco Products During the 2017 - 2023 Period

Source: the author's own work on the basis of industry data for the 2012-2023 period

The last profitable element is the raw tobacco. In principle, that product is not a product made common and available among the consumers. However, due to the trade in it, budgetary income from excise duty is acquired. Regrettably, due to the unstable efficiency of that product subject to excise duty, the dynamic in the trade in it cannot be determined. This is because that is a product generally unavailable for consumers. Its fiscal efficiency was presented in the Figure 10.15.

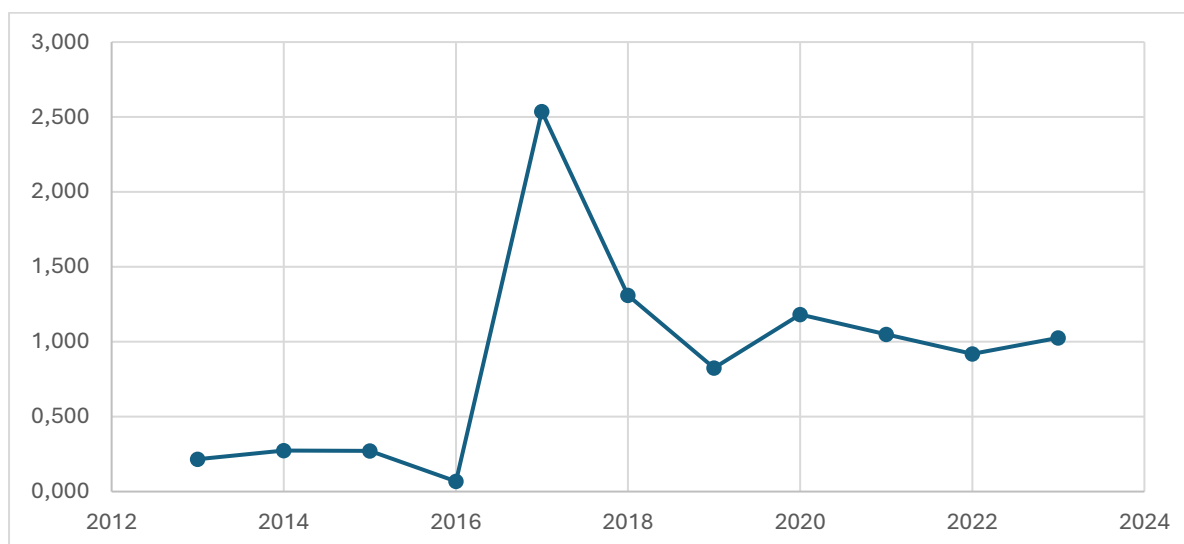


Figure 10.15. Income from Excise Duty on Raw Tobacco During the 2013-2023 Period, in Millions of PLN

Source: the author's own work on the basis of industry data for the 2012-2023 period

4. The Shaping of Tax Rates on Tobacco Products During the 2009-2027 Years

In the context of the changes of the tax rates on tobacco products, the changes in the level of taxation of those products should be taken note of. The date of departure is the day on which the current Act on the Excise Duty came into force, on 1 January 2009. The end date was set at the end of application for the excise duty roadmap, as the current tax rates, as specified under the provisions on the taxation of tobacco products, are those that are to be achieved as a result of the introduction of the excise duty roadmap.⁴⁸² The scope of comparison thus framed will allow for the depiction of the hitherto increase of tax rates of the excise duty on tobacco products first, and the depiction of the results of the amendments following from the excise duty map second.

⁴⁸² Cf. Article 99(2) AED, Article 99(3) AED, Article 99a(3) AED. Also viz. Article 99c(4) AED.

Cigarettes

Table 11.1. The Amendment of the Rates of the Excise Duty on Cigarettes Marked with Excise Duty Stamps and the Minimum Retail Selling Price

Year	PLN Rate for 1000 Units, in PLN	Rate [%]	% Change in the PLN Rate
2009	138,5	31,41	-
2010	146,83	31,41	6,01
2011	158,36	31,41	7,85
2012	170,97	31,41	7,96
2013	188,00	31,41	9,96
2014	206,76	31,41	9,97
2015	206,76	31,41	0,00
2016	206,76	31,41	0,00
2017	206,76	31,41	0,00
2018	206,76	31,41	0,00
2019	206,76	31,41	0,00
2020	228,10	32,05	10,32
2021	228,10	32,05	0,00
2022	228,10	32,05	0,00
2023	250,91	32,05	0,10
2024	276,00	32,05	9,99
2025	303,60	32,05	10,00
2026	333,96	32,05	10,00
2027	367,36	32,05	10,00

Source: the author's own work on the basis of the acts to amend the Act on the Excise Duty

It follows from the data in Table 11.1 presented that the increase in the tax rates for the excise duty was effected six times until the date on which the excise roadmap was adopted, and it was also that the rate was left unchanged six times. In five instances the increases fit within the 6%-9% range, while there was the one-time increase of ca. 10% in 2020. However, the roadmap guaranteed an annual increase of the PLN rate for cigarettes during the 2023-2027 years by a 10% per annum. The dynamic of growth of the PLN rate of the excise duty during the 2009-2027 years for each 1000 units of cigarettes is shown in the Figure 11.1.

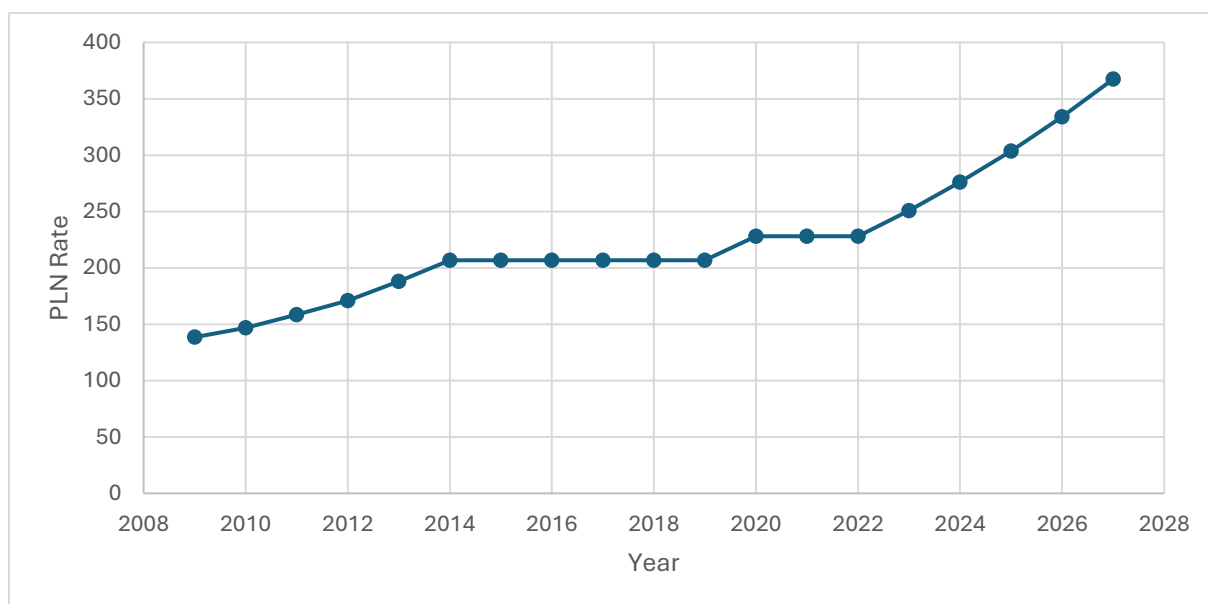


Figure 11.1. Changes in the amount of the PLN rate of the excise duty for cigarettes, for 1000 units, during the 2009-2027 years, taking account of the changes following from the 'roadmap'

Source: the author's own work

Without a doubt, the introduction of the roadmap favours the dynamic growth of the PLN rate of the excise duty on tobacco products, and said growth is incomparably greater over the span of the 2023-2027 years than during the 2009-2021 period. At the same time, due to the allocation of changes over the span of five years so indicated, it allows the businesspersons to adapt to the changes thus effected as to the burdens of taxation, while also supporting the stability and foreseeability of the fiscal law. The operation of the roadmap has also restricted the economic availability of tobacco products, as the regular annual indexation of rates of the excise duty to the extent of 10% causes an increase in the prices of tobacco products and their alternatives, while at the same time nullifying the effects of the increase of the value of the disposable income. Thus, as a result of introducing the roadmap, there was a decrease in the economic availability of tobacco products that was previously occurring due to the increase in the disposable income.

The analogous situation applies to the amount of the PLN rate for the cigarettes both unmarked by the excise duty stamps and without a determination the maximum retail selling price thereof.

Table 11.2. The Changes in the Rates of the Excise Duty on Cigarettes Unmarked with Excise Duty Stamps and By the Maximum Retail Selling Price

Year	PLN Rate For 1000 Units [PLN]	% Change of the PLN Rate
2009	300,00	
2010	300,00	0,00
2011	300,00	0,00
2012	312,00	4,00
2013	327,60	5,00
2014	343,98	5,00
2015	343,98	0,00
2016	343,98	0,00
2017	343,98	0,00
2018	343,98	0,00
2019	343,98	0,00
2020	378,38	10,00
2021	378,38	0,00
2022	378,38	0,00
2023	416,22	10,00
2024	457,84	9,99
2025	503,62	9,99
2026	553,96	9,99
2027	609,38	10,00

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

The rate on those tobacco products was increased four times, and it was left unchanged further nine times. The changes fluctuated in the 4%-5% range, whereas a single indexation amounted to 10%. The dynamic of growth is presented in the Figure 11.2.

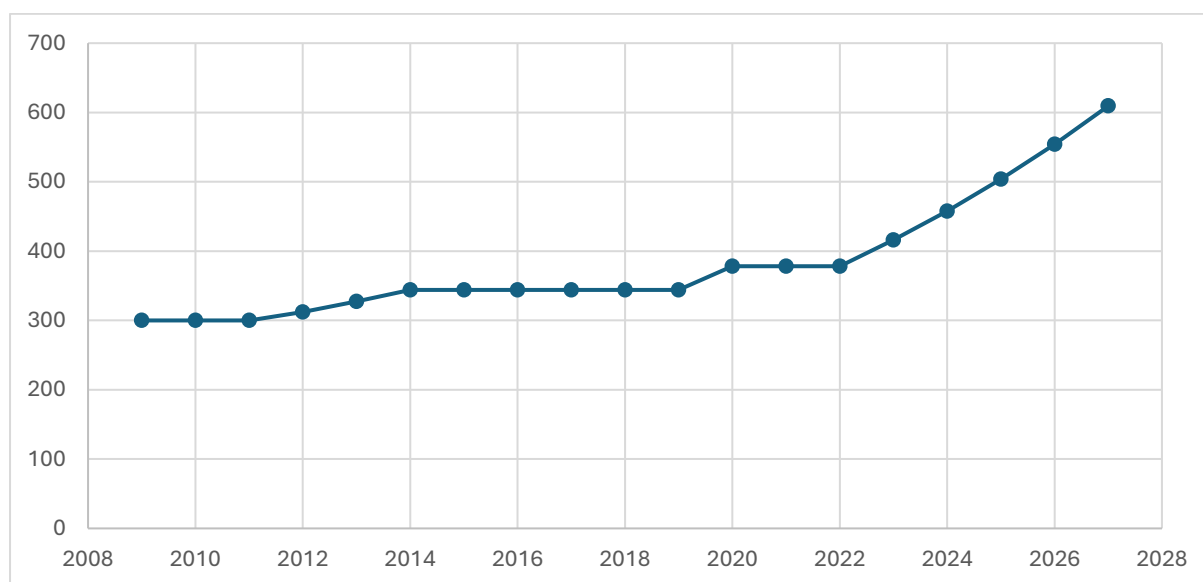


Figure 11.2. Changes in the Amount of the PLN Rate of the Excise Duty on Cigarettes, For 1000 Units, During the 2009-2027 Years, Taking Account of the Changes Following From the 'Roadmap'

Source: the author's own work

Smoking Tobacco

Table 11.3. Changes of the Rates of the Excise Duty on Smoking Tobacco Marked with Excise Duty Stamps and with the Maximum Retail Selling Price

Year	PLN Rate Per Kilogram	Rate [%]	% Change in the PLN Rate
2009	95,00	31,41	-
2010	95,00	31,41	0,00
2011	102,20	31,41	7,57
2012	115,86	31,41	13,36
2013	128,02	31,41	10,49
2014	141,29	31,41	10,36
2015	141,29	31,41	0,00
2016	141,29	31,41	0,00
2017	141,29	31,41	0,00
2018	141,29	31,41	0,00
2019	141,29	31,41	0,00
2020	155,79	32,05	10,26
2021	155,79	32,05	0,00
2022	155,79	32,05	0,00
2023	171,37	32,05	10,00
2024	188,51	32,05	10,00
2025	207,36	32,05	9,99
2026	228,10	32,05	10,00
2027	250,91	32,05	10,00

Source: the author's own work on the basis of acts amending the Act on the Excise Duty

In a manner similar to cigarettes, the increases of the excise duty on smoking tobacco during the 2009 – 2021 years happened only five times. However, that which distinguishes smoking tobacco from cigarettes is the fact that the increases of the PLN rate were occurring by ca. 10%. Nevertheless, that took place over the span of 12 years. The dynamic of growth of tax rates before the introduction of the roadmap and after the introduction thereof is shown in the Figure 11.3.

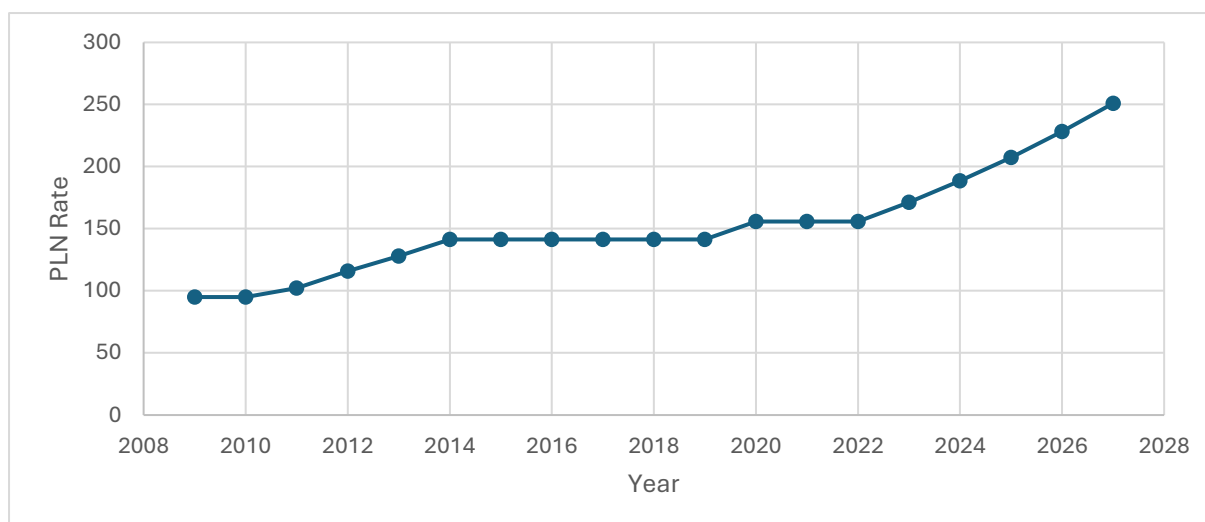


Figure 11.3. Rate for Each Kilogram of Smoking Tobacco Marked with Excise Duty Stamps and by the Maximum Retail Selling Price During the 2009-2027 Years

Source: the author's own work

It should be noted that the dynamic of growth of the tax rates rapidly increased after the introduction of the roadmap, again.

Table 11.4. The Change in the Excise Duty Rates for Smoking Tobacco Not Marked with the Excise Duty Stamps and the Maximum Retail Selling Price

Year	PLN Rate For Each Kilogram	% Change in the PLN Rate
2009	200,00	-
2010	200,00	0,00
2011	200,00	0,00
2012	208,00	4,00
2013	218,40	5,00
2014	229,32	5,00
2015	229,32	0,00
2016	229,32	0,00
2017	229,32	0,00
2018	229,32	0,00
2019	229,32	0,00
2020	252,25	9,99
2021	252,25	0,00
2022	252,25	0,00
2023	277,48	10,00
2024	305,23	10,00
2025	335,75	9,99
2026	369,33	10,00
2027	406,26	9,99

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

As regards smoking tobacco not marked with the excise duty stamps and the maximum retail selling price, the changes of the PLN rate from 2009 to 2022 happened four times, with three increases hovering around 5% of the original rate, while only the increase in

2020 oscillated to 10% of the original rate. The dynamic of growth while taking account of the roadmap may be observed in the Figure 11.4.

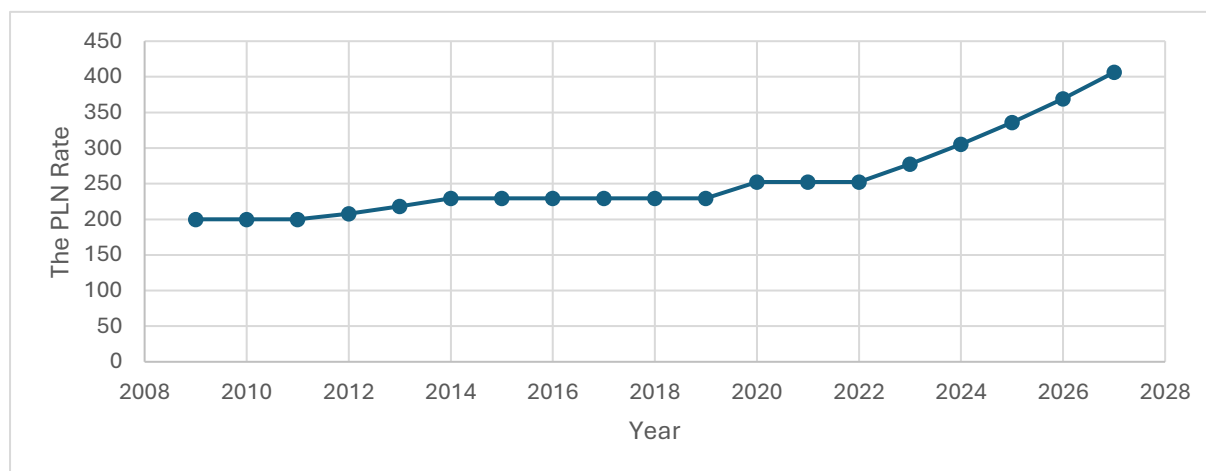


Figure 11.4. The PLN Rate for Each Kilogram of Smoking Tobacco Not Marked with the Excise Duty Stamps and the Maximum Retail Selling Price During the 2009-2027 Years

Source: the author's own work

Cigars and Cigarillos

Table 11.5. Changes of the Rates of the Excise Duty for Cigars and Cigarillos During the 2009-2027 Years

Year	PLN Rate for Each Kilogram of the Product	% Change in the PLN Rate
2009	235,00	-
2010	235,00	0,00
2011	244,40	4,00
2012	254,20	4,00
2013	266,90	4,99
2014	280,25	5,00
2015	393,00	40,23
2016	393,00	0,00
2017	393,00	0,00
2018	393,00	0,00
2019	393,00	0,00
2020	433,00	10,17
2021	433,00	0,00
2022	433,00	0,00
2023	476,00	9,93
2024	524,00	10,08
2025	576,00	9,92
2026	634,00	10,06
2027	697,00	9,93

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

In the case of cigars and cigarillos, the increase of the tax rate occurred six times, but hovered around 4-5% in four instances. In one instance, an increase amounted to 10%.

Atypically in regard to other tobacco products up until then, another instance of an increase marginally exceeded 40%. A rapid increase in the rate is noticeable in 2015. That situation did not repeat during the other years. Growth with a similar dynamic occurred only after the introduction of the roadmap.

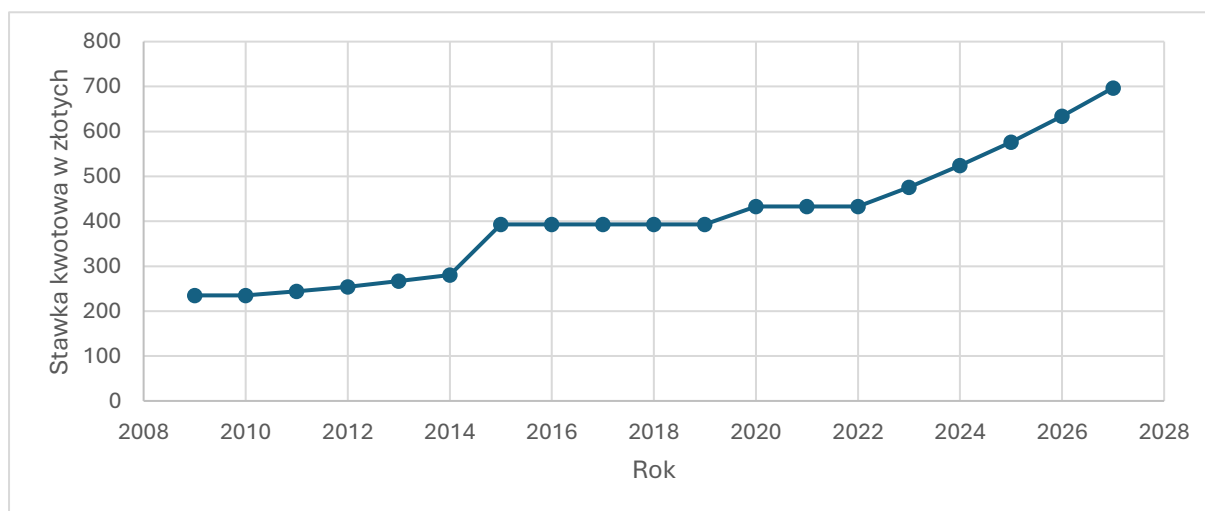


Figure 11.5. The Increase of the PLN Rate for Cigars and Cigarillos During the 2009 - 2027 Years

Source: the author's own work

Raw Tobacco

Table 11.6. The Change of the Rate of the Excise Duty on Raw Tobacco Marked with Excise Duty Stamps During the 2013-2024 Years

Changes of the PLN Rate of the Excise Duty on Raw Tobacco Marked with Excise Duty Stamps during the 2013-2027 Years		
Year	The PLN Rate for Each Kilogram of Raw Tobacco	% Change of the Rate
2013	218,40	-
2014	229,32	5,00
2015	229,32	0,00
2016	229,32	0,00
2017	229,32	0,00
2018	229,32	0,00
2019	229,32	0,00
2020	252,25	9,99
2021	252,25	0,00
2022	252,25	0,00
2023	277,48	10,00
2024	305,75	10,19
2025	335,75	9,81
2026	369,33	10,00
2027	406,26	10,00

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

In the event of taxation of raw tobacco, attention should be given to the fact that the PLN rate during the 2013-2022 years was increased twice. In one instance the increase amounted to a 5% of the PLN rate, while in the other it was a figure close to 10% of the previous rate. Regular increases of the rate of the excise duty on raw tobacco were only applied after the introduction of the roadmap. The dynamic of those changes is illustrated in the Figure 11.6.

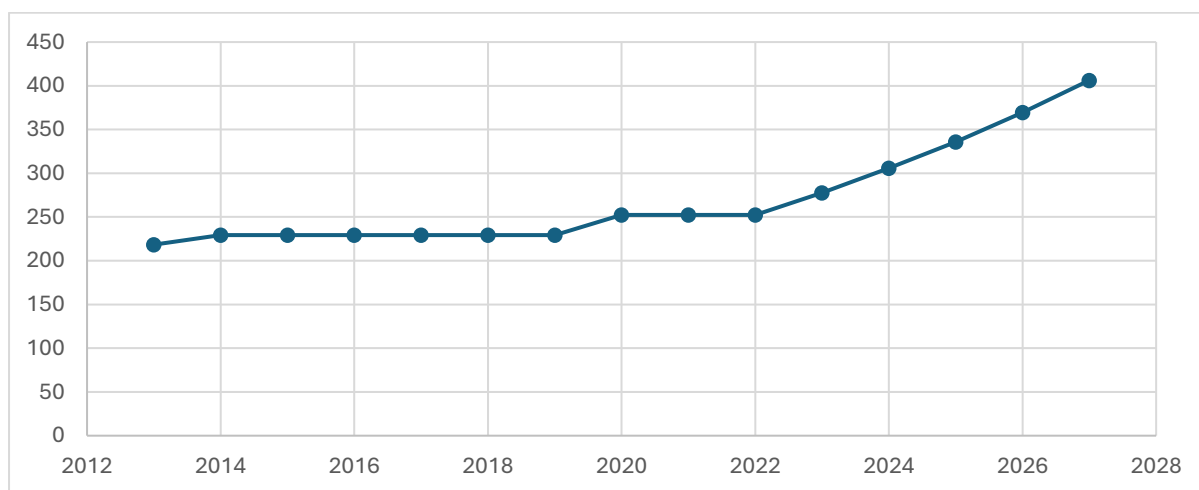


Figure 11.6. The PLN Rate For Each Kilogram of Raw Tobacco Marked With Excise Duty Stamps During the 2013-2027 Years, While Taking Account of the Roadmap

Source: the author's own work

Table 11.6. The Changes in the PLN Rate of the Excise Duty On Raw Tobacco Not Marked with Excise Duty Stamps, During the 2013-2027 Years

The Changes in the PLN Rate of the Excise Duty On Raw Tobacco Not Marked with Excise Duty Stamps, During the 2013-2027 Years		
Year	The PLN Rate Per Kilogram Pursuant to the Current Roadmap	% Change of the Rate
2013	436,80	-
2014	458,64	5,00
2015	458,64	0,00
2016	458,64	0,00
2017	458,64	0,00
2018	458,64	0,00
2019	458,64	0,00
2020	504,50	9,99
2021	504,50	0,00
2022	504,50	0,00
2023	554,96	10,00
2024	610,46	10,00
2025	671,50	9,99
2026	738,66	10,00
2027	812,52	9,99

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

A sanction rate is in a situation analogous to the example of raw tobacco marked with excise duty stamps. In one instance, the increase amounted to 5% of the PLN rate, while in the other instance it was close to 10%. Only after the implementation of the 'roadmap' were the regular increases of the rate of the excise duty for raw tobacco unmarked with excise duty stamps introduced.

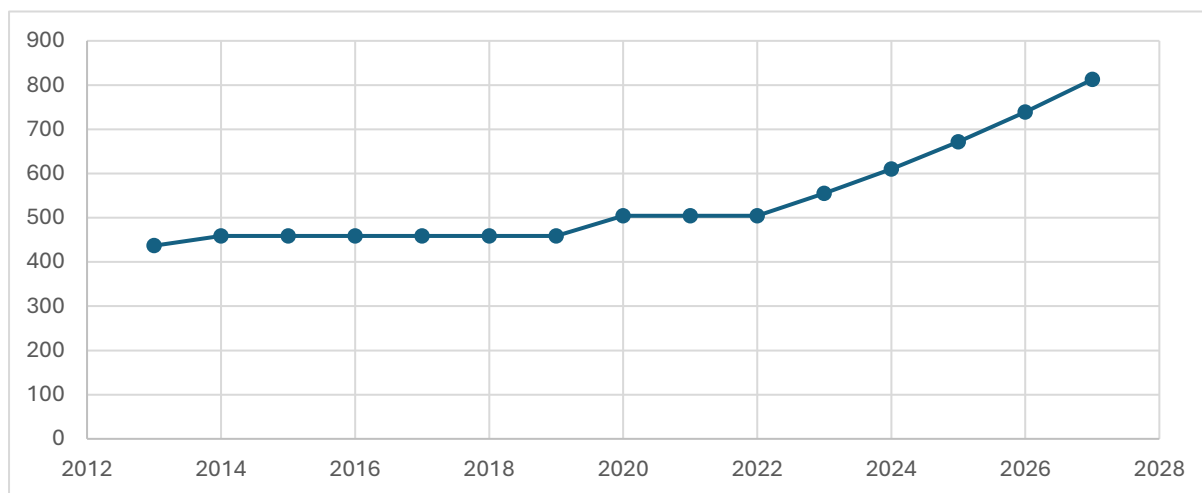


Figure 11.7. The PLN Rate for Each Kilogram of Raw Tobacco Not Marked With Excise Duty Stamps During the 2013-2027 Years, Taking Account of the Current Roadmap

Source: the author's own work

Electronic Cigarettes

Table 11.7. Changes of the PLN Rate of the Excise Duty on Liquid to Electronic Cigarettes, During the 2018-2024 Years

Year	The PLN Rate, in Millilitres	% Change of the Tax Rate
2018	0,50	-
2019	0,50	0,00
2020	0,55	10,00
2021	0,55	0,00
2022	0,55	0,00
2023	0,55	0,00
2024	0,55	0,00

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

The liquid for electronic cigarettes was not subjected to the rules of the roadmap, while the excise duty on that substitute for tobacco products was introduced in 2018. It is worth noting that there was a single increase by 10% in the tax rate of the excise duty over the span of six years. The first, and as of now only, increase of the excise duty occurred in 2020. As such, Figure 11.7 contains only a single modification. As to the remainder, the rate of excise duty on liquid for electronic cigarettes did not change.

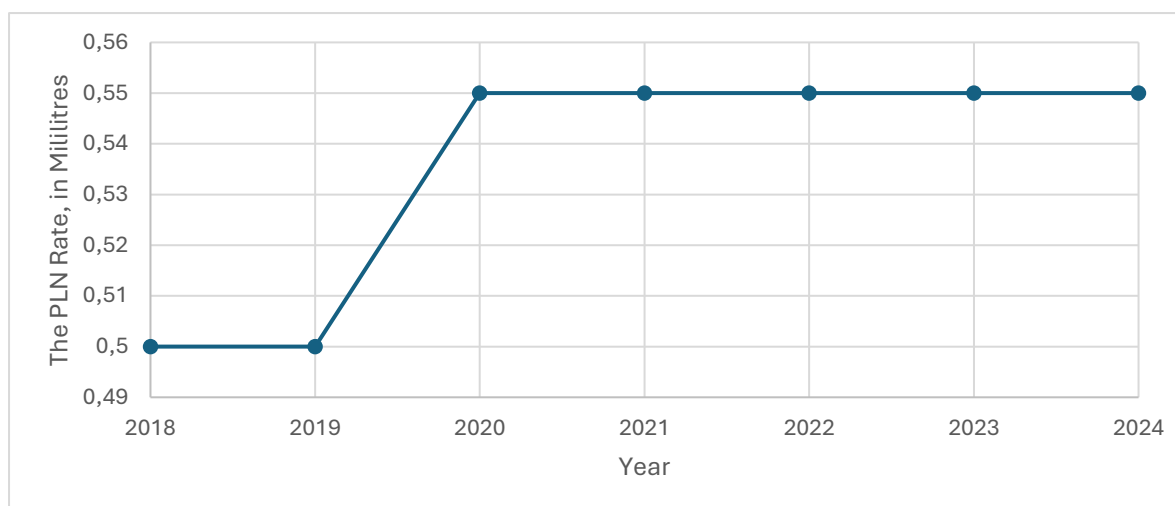


Figure 11.7. The Change of the Rates of Excise Duty For Electronic Cigarette Liquid During the 2018-2024 Years

Source: the author's own work

Novel Tobacco Products

Table 11.8. Changes of the Rates of Excise Duty on the Novel Tobacco Products During the 2018-2027 Years

Year	PLN Rate for Each Kilogram of the Product	Rate %	% Change of the Tax Rate
2018	141,29	31,41	
2019	141,29	31,41	0,00
2020	155,79	32,05	10,26
2021	155,79	32,05	0,00
2022	311,58	32,05	200,00
2023	342,74	32,05	10,00
2024	377,01	32,05	9,99
2025	414,71	32,05	9,99
2026	456,18	32,05	9,99
2027	501,80	32,05	10,00

Source: the author's own work on the basis of the acts amending the Act on the Excise Duty

Unlike the liquid for electronic cigarettes, the second of the alternatives for conventional tobacco products, i.e. novel tobacco products, was subjected to the rules of the roadmap. Both of those alternatives were taxed by the excise duty from 2018, but unlike the liquid for electronic cigarettes or the conventional tobacco products, the PLN rate for novel tobacco products was left unchanged only twice during the 2018-2023 period. The increase in the rate amounted to ca. 10% of the rate three times, and there was a single instance of the PLN rate being doubled. The dynamic of growth should be however noted, with said growth occurring since 2022. It is important to note

that the dynamic of growth is not as momentous as in 2022, and a systematic and dynamic growth is noticeable since the adoption of the roadmap. Taken together with the market data, it may be noted that the rapid double increase of the rate for novel tobacco product caused a fall in demand, and a slowdown of a dynamically developing market occurred. It is worth noting that the novel tobacco products constitute one of the less noxious alternatives for the conventional tobacco products, for they do not generate tar substances due to the use of technology of heating the tobacco. Thus, they are an alternative to the conventional products. In that regard, determination of lower fiscal burdens for that category of products should be considered, in line with the strategy adopted by certain Member States of the European Union that less noxious tobacco products are to be burdened with public dues to a lesser extent, which will constitute a stimulus for restricting the consumption of conventional tobacco products.

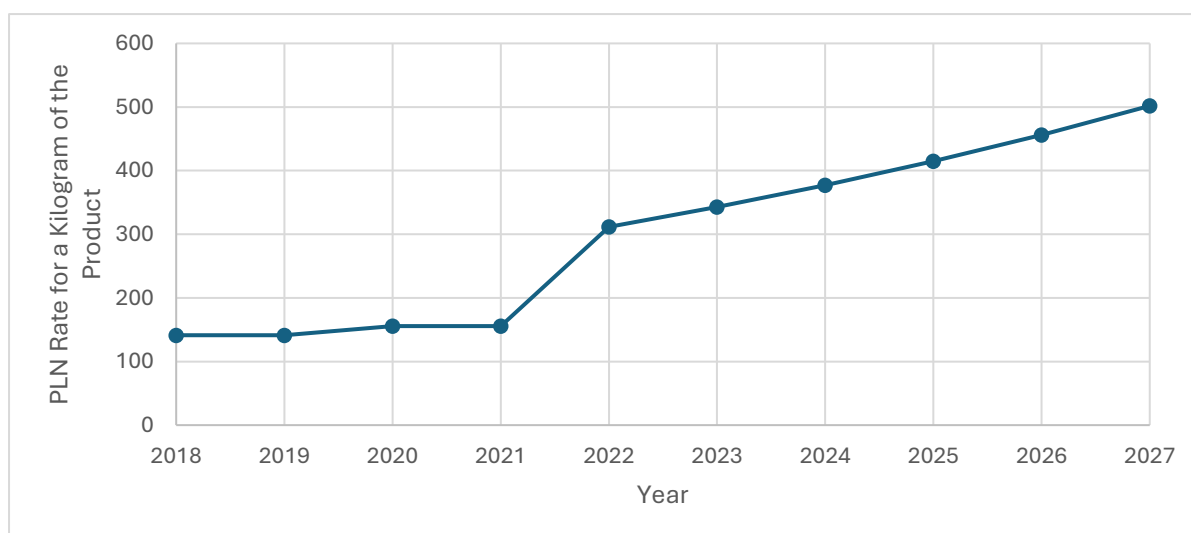


Figure 11.8. Changes of the Rates of the Excise Duty for Novel Tobacco Products During the 2018-2027 Years

Source: the author's own work

In the context of the changes of rates, the roadmap is undoubtedly an innovative solution, as it provides for a regular, annual increase of tax rates for tobacco products or their alternatives. The adopted system safeguards stability and the gradual nature of the increases thus effected, while at the same time the growth of a rate does not occur in a one-time rapid manner, as was the case with the novel tobacco products, cigars, and cigarillos. It is worth noting that, save the one-time increase of 40% for cigars and cigarillos, the increases of rates, or of the PLN part of the rate, only scarcely approached the threshold of 10%. However, in the case of the roadmap, annual growth at the level of 10% is noticeable and visible.

5. Amendment of Tax Rates For Tobacco Products Pursuant to the Alteration to “the Roadmap”⁴⁸³

On 29 July 2024, a bill to amend the Act on the Excise Duty and Certain Other Statutes was made available at the index of legislative and policy works.⁴⁸⁴ On 2 August 2024, the bill at issue was made available on the website of the Governmental Centre of Legislation.⁴⁸⁵ The assumptions drafted by the Ministry of Finance consist in the increase of rates for the respective tobacco products and for the novel tobacco products in relation to those drafted within the framework of the roadmap. At the same time, the electronic cigarettes are also made subject to the rules of the roadmap. On 18th of October 2024, the bill to amend the Act on the Excise Duty was passed. The assumptions for the increase of rates in relation to the current rules of the roadmap are as follows:

1. Annual increase of the monetary (PLN) part of the rate of the excise duty on cigarettes:
 - In 2025 – 25%
 - In 2026 – 20%
 - In 2027 – 15%
2. Annual increase of the monetary (PLN) part of the rate of the excise duty on smoking tobacco:
 - In 2025 – 38%
 - In 2026 – 30%
 - In 2027 – 22%
3. Annual increase of the rate on cigars and cigarillos,
 - In 2025 – 25%
 - In 2026 – 20%
 - In 2027 – 15%
4. Annual increase of the rate on raw tobacco,

⁴⁸³ Bill to amend the Act on the Excise Duty and certain other statutes of 2 August 2024, legislative track number by the Governmental Legislation Centre UD105, drafted during the X term of the Sejm of the Republic of Poland, <https://legislacja.gov.pl/projekt/12387956/katalog/13073712#13073712>, accessed 5 August 2024. As of now, the Act of 18 October 2024 to amend the Act on the Excise Duty, Sejm draft no. 692, <https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?nr=692>, accessed 8.11.2024.

⁴⁸⁴ The list of legislative and programme-related works by the Council of Ministers, draft no. UD105, <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-podatku-akcyzowym5>, accessed 5 August 2024.

⁴⁸⁵ Bill to amend the Act on the Excise Duty and certain other statutes of 2 August 2024, legislative track number by the Governmental Legislation Centre UD105, drafted during the X term of the Sejm of the Republic of Poland, <https://legislacja.gov.pl/projekt/12387956/katalog/13073712#13073712>, accessed 5 August 2024, hereinafter referred to as the “bill of 2.08.2024”.

- In 2025 – 38%
 - In 2026 – 30%
 - In 2027 – 22%
5. Annual increase of the monetary (PLN) part of the rate of the excise duty on novel tobacco products,
- In 2025 – 50%
 - In 2026 – 20%
 - In 2027 – 15%
6. Annual increase of the rate of the excise duty on the liquid for electronic cigarettes
- In 2025 – 75%
 - In 2026 – 50%
 - In 2027 – 25%⁴⁸⁶

At the same time, the adopted bill at issue also corrects the so-called “sanction rates”, i.e. rates for cigarettes not marked with excise duty stamps and with a missing depiction of a maximum retail selling price, raw tobacco not marked with excise stamps, novel tobacco products manufactured outside of a tax warehouse, and, due to inclusion of the liquid for electronic cigarettes in the roadmap, the rate for the manufacturing of the liquid for electronic cigarettes outside a tax warehouse.⁴⁸⁷ A monetary amount of an increase of the rates of the excise duty was determined under the bill, in line with the following scheme:

As regards the tax rates of the excise duty on cigarettes marked with excise duty stamps and a maximum retail selling price, they shall amount to:⁴⁸⁸

- During the period from 1 January 2024 to 28 February 2025 – 276,00 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- During the period from 1 March 2025 to 31 December 2025 – 345,00 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- 2026 – 414,00 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- 2027 – 476,00 PLN for each 1000 units and 32,05% of the maximum retail selling price;

⁴⁸⁶ The list of legislative and programme-related works by the Council of Ministers, draft no. UD105, <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-podatku-akcyzowym5>, accessed 5 August 2024.

⁴⁸⁷ Viz. Article 1 point (36)(g) of the bill of 02.08.2024.

⁴⁸⁸ Cf. Article 1 point (12) and Article 1 point (36), letter (a) of the bill of 02.08.2024.

As regards the tax rates of the excise duty on smoking tobacco marked with excise duty stamps and a maximum retail selling price, they shall amount to:⁴⁸⁹

- During the period from 1 January 2024 to 28 February 2025 – 188,51 PLN for each kilogram and 32,05% of the maximum retail selling price,
- During the period from 1 March 2025 to 31 December 2025 – 260,14 PLN for each kilogram and 32,05% of the maximum retail selling price,
- 2026 – 338,18 PLN for each kilogram and 32,05% of the maximum retail selling price,
- 2027 – 412,58 PLN for each kilogram and 32,05% of the maximum retail selling price,

As regards the tax rates of the excise duty on cigars and cigarillos, they shall amount to:⁴⁹⁰

- During the period from 1 January 2024 to 28 February 2025 – 524,00 PLN for each kilogram,
- During the period from 1 March 2025 to 31 December 2025 – 655,00 PLN for each kilogram,
- 2026 – 786,00 PLN for each kilogram,
- 2027 – 903,90 PLN for each kilogram,

As regards the tax rates of the excise duty on cigarettes not marked with excise duty stamps and the maximum retail selling price, they shall amount to:⁴⁹¹

- During the period from 1 January 2024 to 28 February 2025 – 457,84 PLN for each 1000 units,
- During the period from 1 March 2025 to 31 December 2025 – 572,30 PLN,
- 2026 – 686,76 PLN for each 1000 units,
- 2027 – 789,77 PLN for each 1000 units,

As regards the tax rates of the excise duty on smoking tobacco not marked with excise duty stamps and the maximum retail selling price, they shall amount to:⁴⁹²

- During the period from 1 January 2024 to 28 February 2025 – 305,23 PLN for each kilogram
- During the period from 1 March 2025 to 31 December 2025 – 421,22 PLN for each kilogram,
- 2026 – 547,59 PLN for each kilogram,
- 2027 – 668,06 PLN for each kilogram,

⁴⁸⁹ Cf. Article 1, point (12) and Article 1, point (36), letter (a) of the bill of 02.08.2024.

⁴⁹⁰ Cf. Article 1, point (12) and Article 1, point (36), letter (a) of the bill of 02.08.2024.

⁴⁹¹ Cf. Article 1, point (12) and Article 1, point (36), letter (b) of the bill of 02.08.2024.

⁴⁹² Cf. Article 1, point (12) and Article 1, point (36), letter (b) of the bill of 02.08.2024.

The tax rate of the excise duty on raw tobacco shall amount to:⁴⁹³

- During the period from 1 January 2024 to 28 February 2025 – 305,23 PLN for each kilogram,
- During the period from 25 March 2025 to 31 December 2025 – 421,22 PLN for each kilogram;
- 2026 – 547,59 PLN for each kilogram,
- 2027 – 668,06 PLN for each kilogram,

The tax rate of the excise duty on raw tobacco unmarked with excise duty stamps shall amount to:⁴⁹⁴

- During the period from 1 January 2024 to 28 February 2025 – 610,46 PLN for each kilogram,
- During the period from 1 March 2025 to 31 December 2025 – 842,43 PLN for each kilogram,
- 2026 – 1095,16 PLN for each kilogram,
- 2027 – 1336,10 PLN for each kilogram,

As regards the tax rates of the excise duty on novel tobacco products, they shall amount to:⁴⁹⁵

- During the period from 1 January 2024 to 28 February 2025 – 377,01 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco;
- During the period from 1 March 2025 to 31 December 2025 – 565,52 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- 2026 – 678,62 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- 2027 – 780,41 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco

As regards the tax rates of the excise duty on novel tobacco products manufactured outside of a tax warehouse, they shall amount to:⁴⁹⁶

- During the period from 1 January 2024 to 28 February 2025 – 377,01 PLN for each kilogram and 32,05% of three times the amount of the average weighted retail selling price for smoking tobacco,

⁴⁹³ Cf. Article 1, point (13) and Article 1, point (36), letter (c) of the bill of 02.08.2024.

⁴⁹⁴ Cf. Article 1, point (13) and Article 1, point (36), letter (d) of the bill of 02.08.2024.

⁴⁹⁵ Cf. Article 1, point (15) and Article 1, point (36), letter (e) of the bill of 02.08.2024.

⁴⁹⁶ Cf. Article 1, point (15) and Article 1, point (36), letter (f) of the bill of 02.08.2024.

- During the period from 1 March 2025 to 31 December 2025 – 565,52 PLN for each kilogram and 32,05% of three times the amount of the average weighted retail selling price for smoking tobacco,
- 2026 – 678,62 PLN for each kilogram and 32,05% of three times the amount of the average weighted retail selling price for smoking tobacco,
- 2027 – 780,41 PLN for each kilogram and 32,05% of three times the amount of the average weighted retail selling price for smoking tobacco,

The rate of the excise duty on the liquid to electronic cigarettes shall amount to:⁴⁹⁷

- During the period from 1 January 2025 to 28 February 2025 – 0,55 PLN for each millilitre,
- During the period from 1 March 2025 to 31 December 2025 – 0,96 PLN for each millilitre,
- 2026 – 1,44 PLN for each millilitre.
- 2027 – 1,80 PLN for each millilitre.

The bill proposed by the Ministry of Finance and since adopted by the Sejm to amend the regulation adopted within the framework of the roadmap is going to cause a significant increase of the PLN rate of the excise duty on tobacco products, and – above all - on novel tobacco products. In addition, the roadmap would, according to the proposed and adopted solution, include the liquid for electronic cigarettes in its normative scope. In that respect, the rate of the excise duty will increase from the amount of 0,55 PLN for millilitre to the level of 1,8 PLN for millilitre over the span of three years, which amounts to an annual increase by ca. 100%. As regards cigarettes, the increase of the PLN rate over the 2025-2027 years will also hover around the threshold of doubling the current PLN rate, i.e. from the current amount of 276 PLN for 1000 units to the amount of 476,1 PLN for 1000 units in 2027. The dynamic of growth is pictured in the Figure 12.1:

⁴⁹⁷ Cf. Article 1, point (14) and Article 1, point (36), letter (g) of the bill of 02.08.2024.

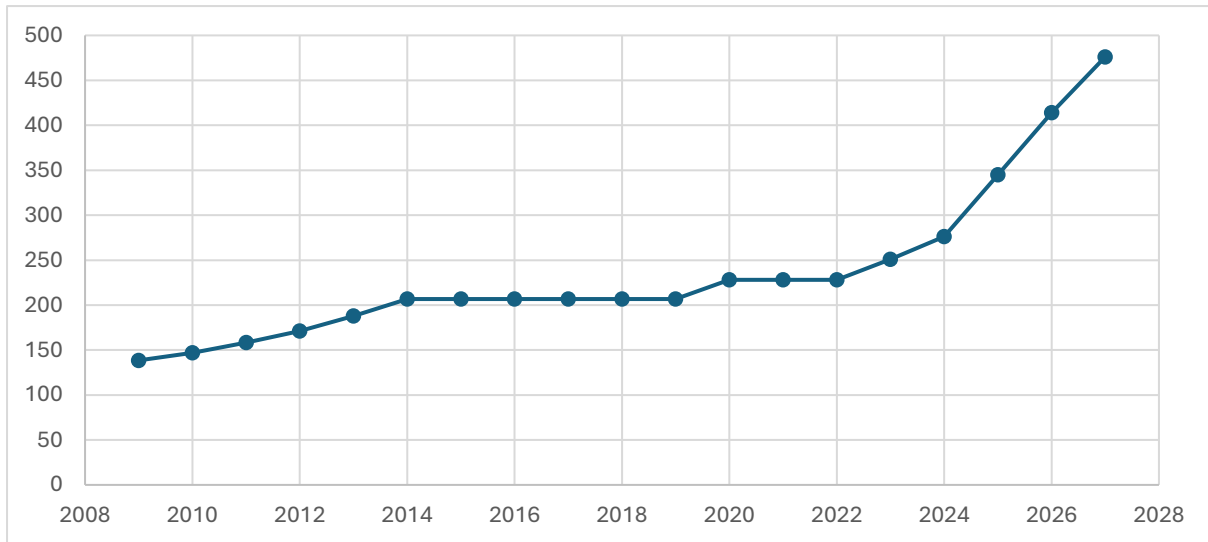


Figure 12.1. The Change of the Tax Rates on Cigarettes Marked With Excise Duty Stamps and a Maximum Retail Selling Price - Bill of 2 August 2024

Source: the author's own work

For the purposes of comparison, Figure 12.2 depicts a difference between the growth of the PLN rate of the excise duty on cigarettes pursuant to the current rules of the roadmap, and in lieu of the solution adopted as proposed by the Ministry of Finance:

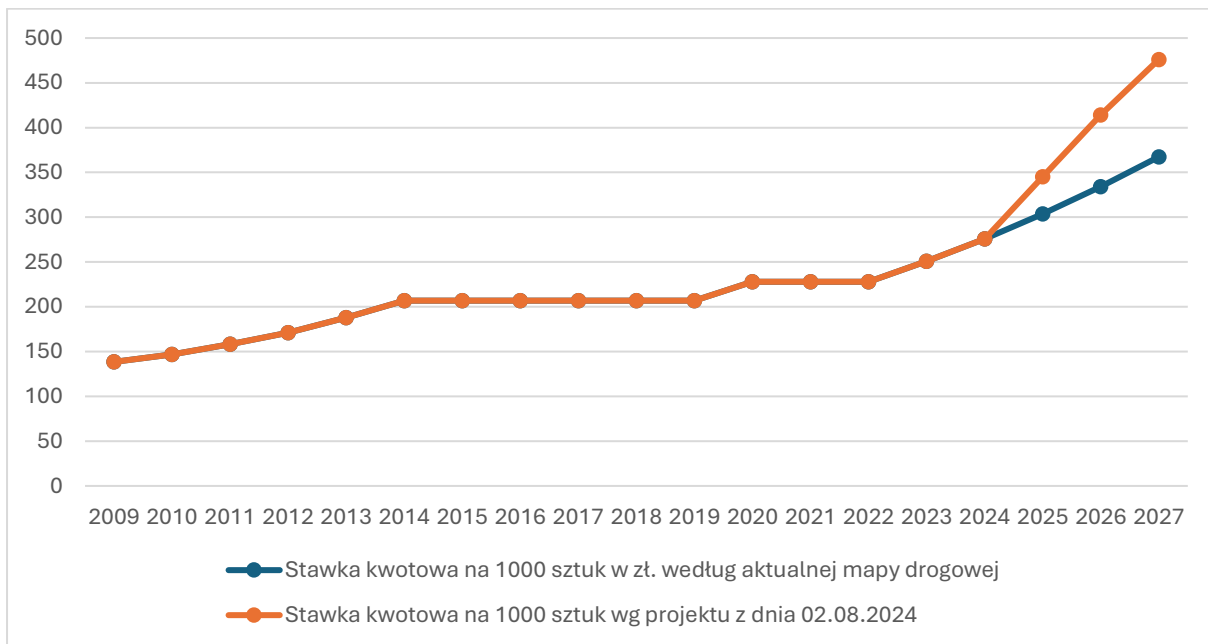


Figure 12.2. Comparison of the Changes of the PLN Rates For 1000 Units of Cigarettes During the 2009-2027 Years, Taking Account of the Current Roadmap and the Bill of 2.08.2024

Blue: PLN rate for 1000 units in PLN, pursuant to the current roadmap

Orange: PLN rate for 1000 units according to the bill of 2.08.2024

Source: the author's own work

Figures 12.3 through 12.9 show the increase in tax rates following from the roadmap adopted in 2021 (blue), coinciding with the other version (orange), whereas the latter

part of the orange line depicts tax rates that have been adopted due to the increase of PLN rates as a result of passing the bill of 2 August 2024.

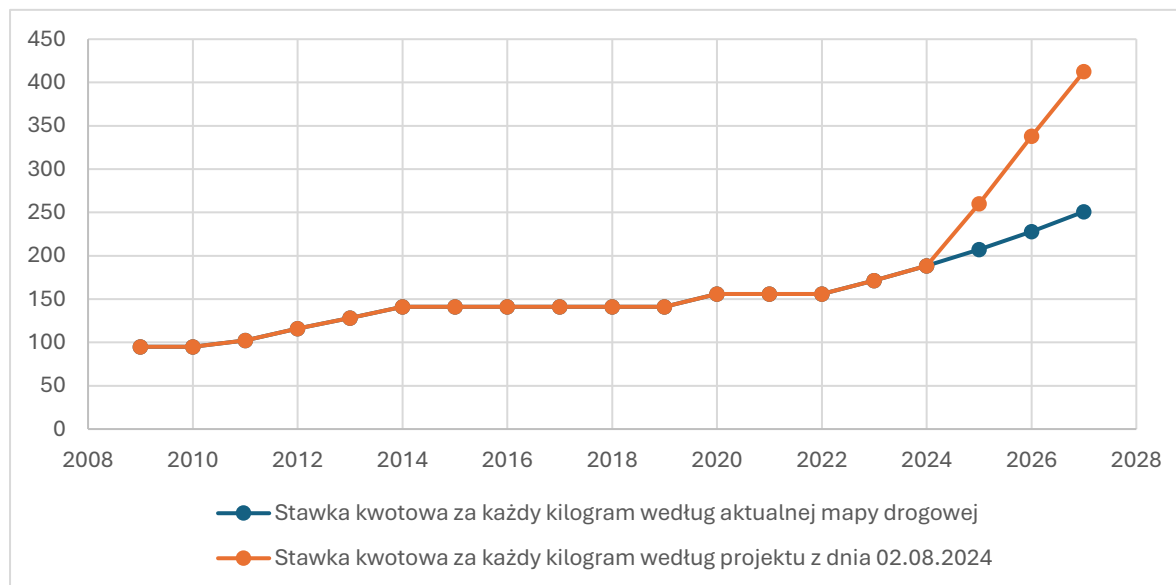


Figure 12.3. The Comparison of the Changes in PLN Rates for Smoking Tobacco Marked with Excise Duty Stamps and a Maximum Retail Selling Price for 1 Kilogram During the 2009-2027 Years, Taking Account of the Current Roadmap and the Bill of 02.08.2024

Blue: PLN rate for 1 kilogram, pursuant to the current roadmap
 Orange: PLN rate for 1 kilogram, according to the bill of 2.08.2024

Source: the author's own work

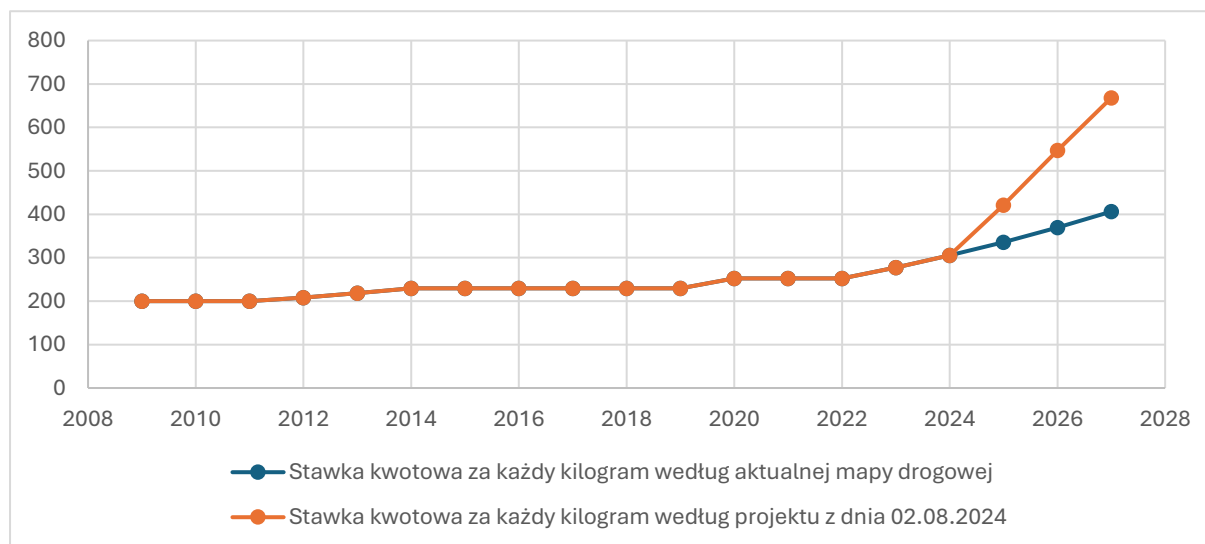


Figure 12.4. Comparison of the Changes of PLN Rates for Smoking Tobacco Marked with Excise Duty Stamps and a Maximum Retail Selling Price for 1 Kilogram During the 2009-2027 Years, Taking Account of the Current Roadmap and the Bill of 2.08.2024

Blue: PLN rate for each kilogram, pursuant to the current roadmap
 Orange: PLN rate for each kilogram, according to the bill of 2.08.2024

Source: the author's own work

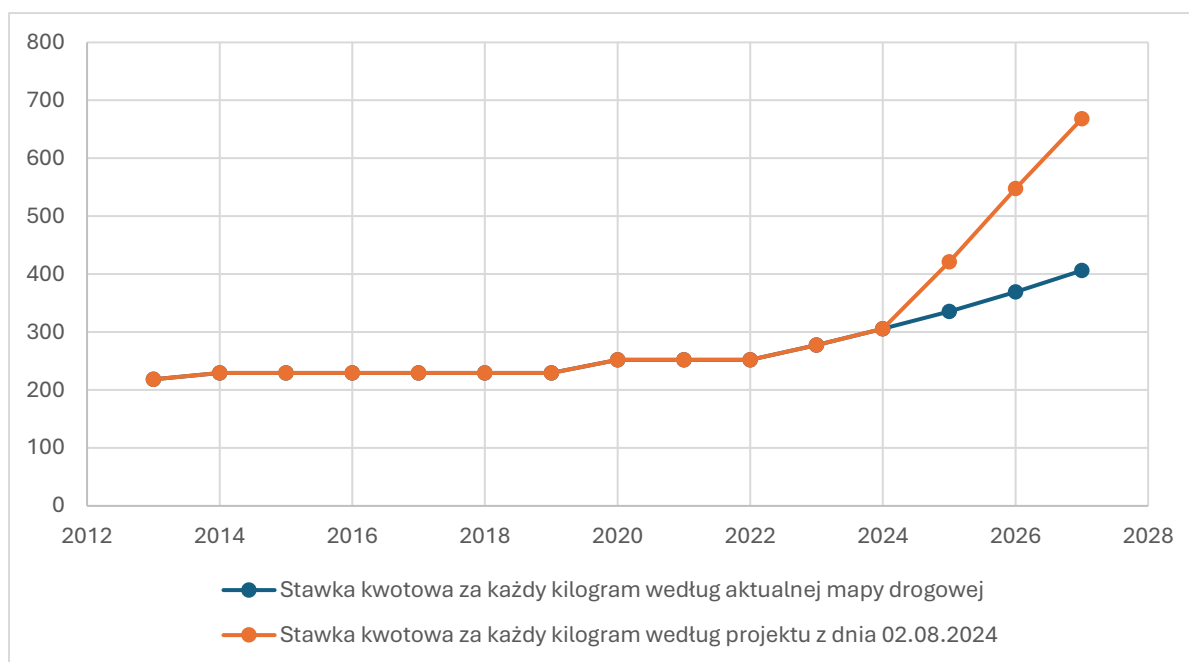


Figure 12.5. Comparison of the Changes of PLN Rates for Raw Tobacco Marked with Excise Duty Stamps, for 1 Kilogram During the 2013-2027 Years, Taking Account of the Current Roadmap and the Bill of 2.08.2024

Blue: PLN rate for each kilogram, pursuant to the current roadmap

Orange: PLN rate for each kilogram, according to the bill of 2.08.2024

Source: the author's own work

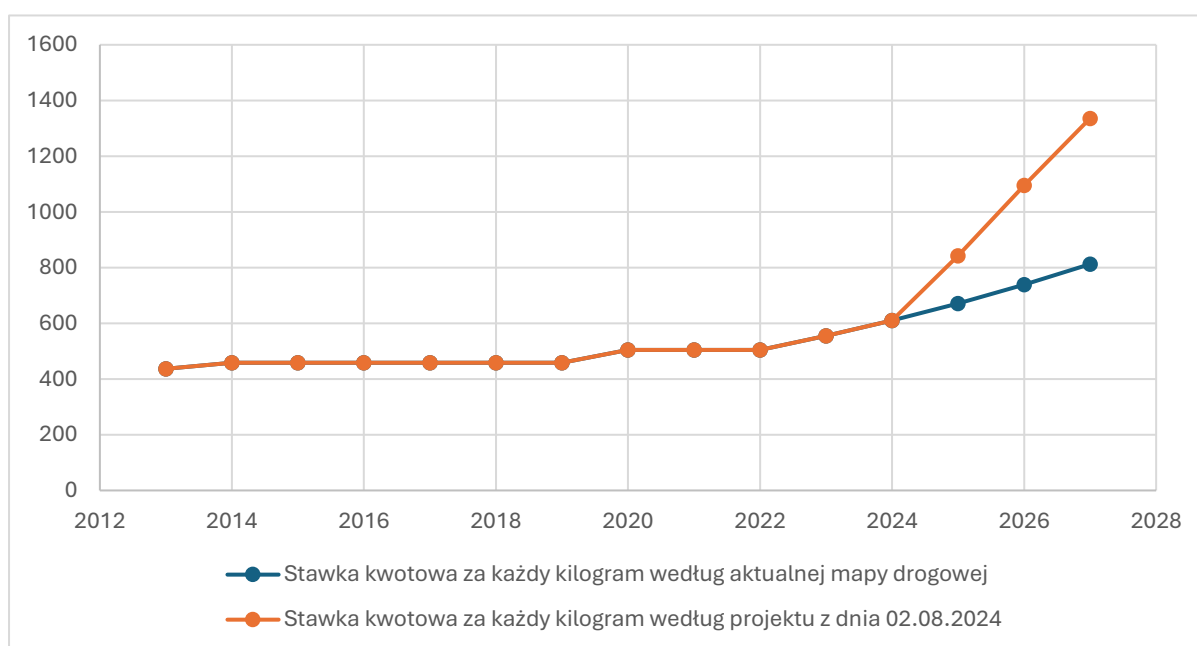


Figure 12.6. Comparison of the Changes of PLN Rates for Raw Tobacco Not Marked with Excise Duty Stamps, for 1 Kilogram During the 2013-2027 Years, Taking Account of the Current Roadmap and the Bill of 2.08.2024

Blue: PLN rate for each kilogram, pursuant to the current roadmap

Orange: PLN rate for each kilogram, according to the bill of 2.08.2024

Source: the author's own work

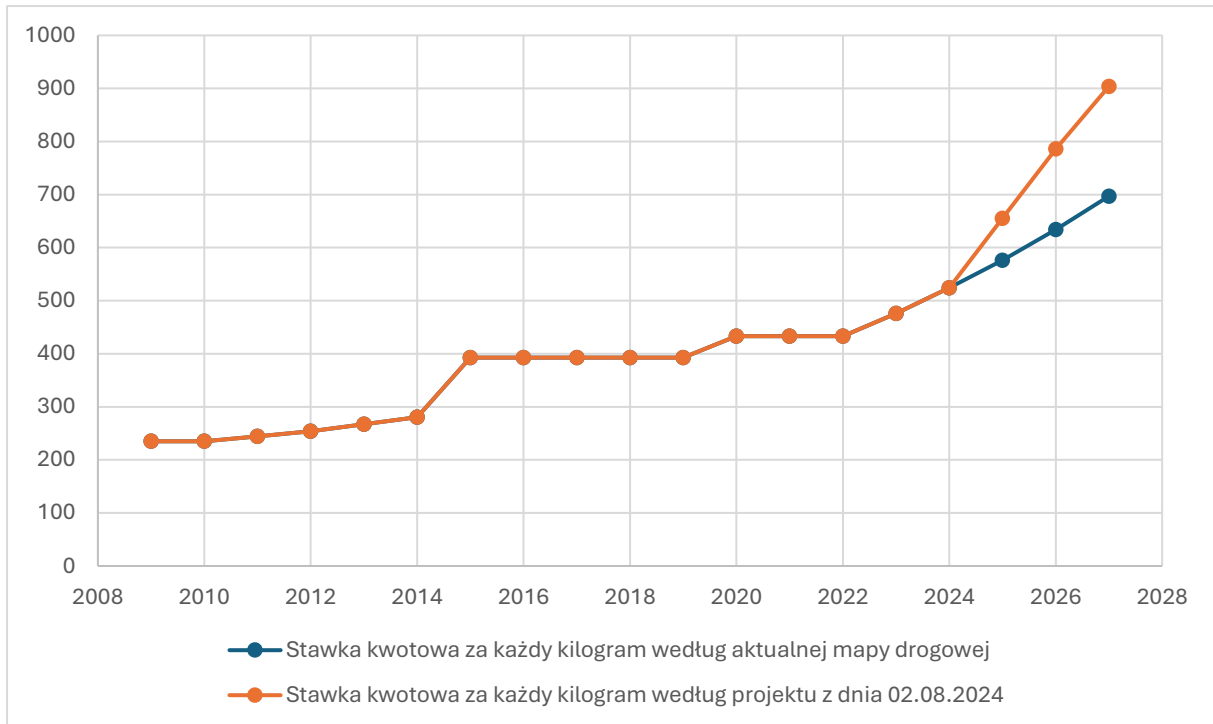


Figure 12.7. Comparison of the Changes of PLN Rates for Cigars and Cigarillos, For 1 Kilogram, During the 2009-2027 Years, Taking Account of the Current Roadmap and the Bill of 2.08.2024

Blue: PLN rate for each kilogram, pursuant to the current roadmap
 Orange: PLN rate for each kilogram, according to the bill of 2.08.2024

Source: the author's own work

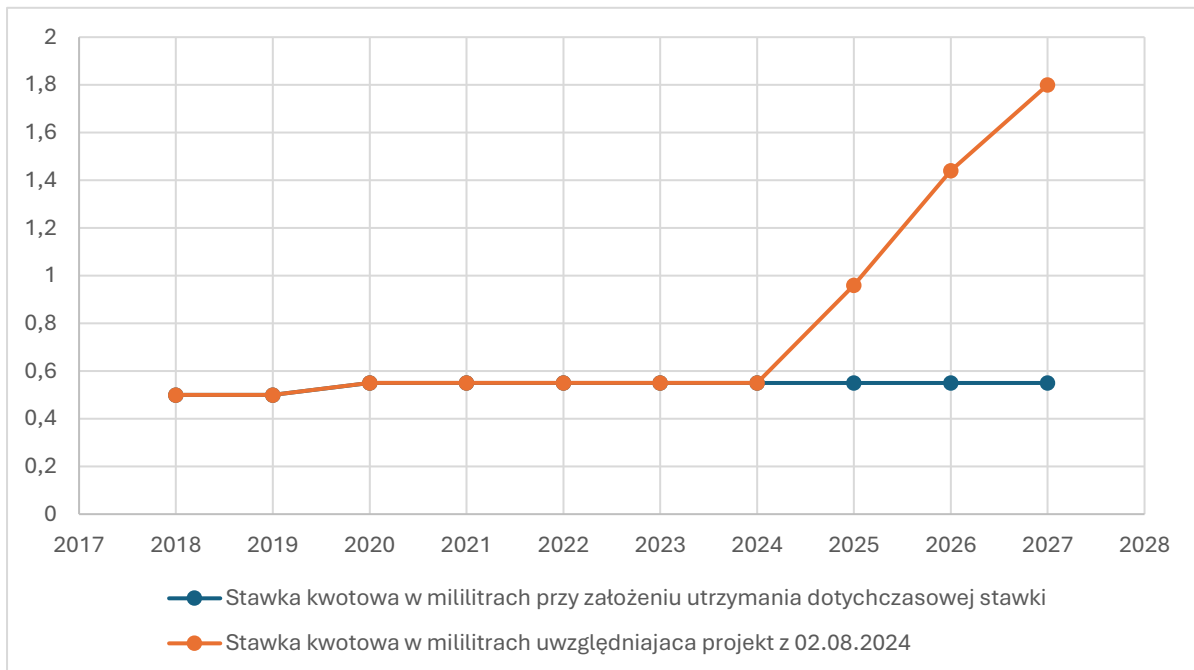


Figure 12.8. Changes of Rates of Excise Duty on the Liquid For Electronic Cigarettes, During the 2018-2027 Years, on Assumption of the Maintenance of the Current Rate, and While Taking Account of the Bill of 2.08.2024

Blue: PLN rate in millilitres, on assumption of maintenance of the current rate
 Orange: PLN rate in millilitres, taking account of the bill of 2.08.2024

Source: the author's own work

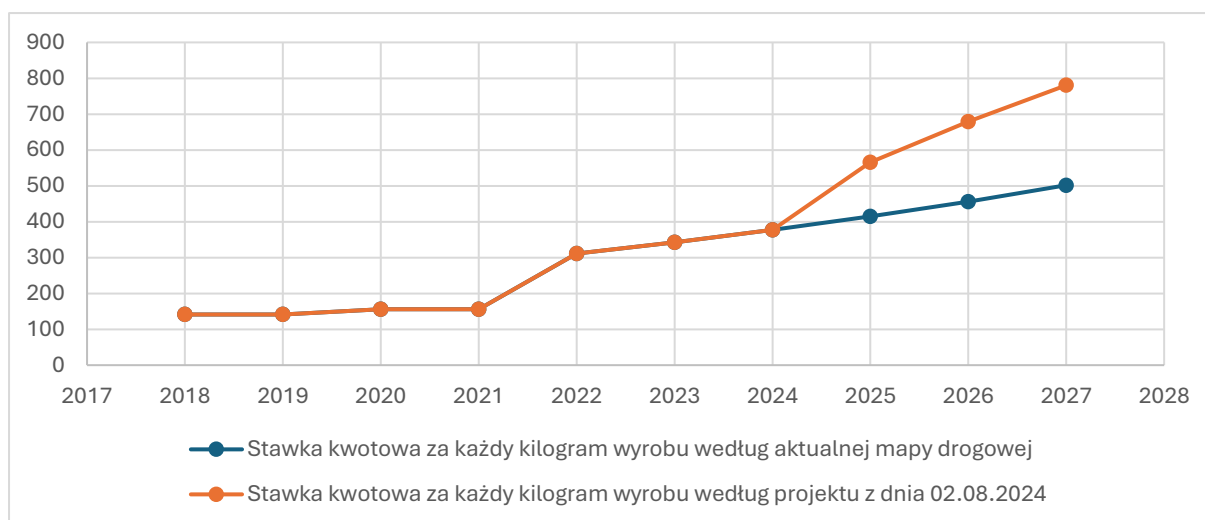


Figure 12.9. The Comparison of Changes of the PLN Rates for 1 Kilogram of Novel Tobacco Products, During the 2009-2027 Years, Taking Account of the Current Roadmap and the Bill of 02.08.2024

Blue: PLN rate for each kilogram of the product pursuant to the current roadmap

Orange: PLN rate for each kilogram pursuant to the bill of 2.08.2024

Source: the author's own work

The above graphs show a major dynamic of changes in the PLN rate for tobacco products, electronic cigarettes, and novel tobacco products, in that it is drastically larger than the one that was to follow from the roadmap, adopted in 2021. The result of the adoption of a statute in line with the bill of 2 August 2024 will be the drastic increase in prices for tobacco products and their alternatives, i.e. novel tobacco products and electronic cigarettes.

In addition, the legislator provided under the amendment bill for the inclusion of vaporisation equipment in taxation,⁴⁹⁸ which ultimately was allocated to a separate legislative track due to the remarks made during the public consultation. The separately processed bill defines vaporisation equipment as electronic cigarettes, i.e. non-reusable or reusable equipment intended for consumption of vapour created out of a liquid for electronic cigarettes, retrofitted with cartridges or containers, as well as heaters, i.e. equipment intended to consume aerosol created out of novel tobacco products without burning them.⁴⁹⁹ In principle, taxable persons are regulated in a manner similar to other excise goods and products taxed by the excise duty, which however are not excise goods as understood under the Act or under the law of the European Union. The tax base for the vaporisation equipment shall be a quantity of units of such equipment, according to the bill. A rate for that equipment shall amount

⁴⁹⁸ Viz. Article 1, point (16) of the bill of 02.08.2024.

⁴⁹⁹ Viz. Article 1, point (2), letter (c) of the bill of 02.08.2024.

to 40 PLN per unit, or twice the base rate, i.e. 80 PLN, in the event of an unit on which the excise duty was not paid. Taxation of vaporisation equipment by the excise duty will cause an additional increase of usage cost for alternatives to the conventional tobacco products, in particular the cost of non-reusable electronic cigarettes, but also reusable electronic cigarettes and novel tobacco products. In the context of the current state of the market, the dynamic increase in consumption of non-reusable electronic cigarettes is most problematic due to the issue of the protection of environment and recycling of waste created as a result of consuming a non-reusable electronic cigarette. However, taxing any and all vaporisation equipment, in particular that which is reusable, is not reasonable.

The statement of reasons provided by the Ministry of Finance for the bill of 2 August 2024⁵⁰⁰ mainly comes down to the issue of economic availability of tobacco products and the alternatives therefor, in particular amongst young persons. The statement of reasons so presented on the economic availability of tobacco products and their alternatives follows from the increase of both the average wage in the economy, the minimum wage, and the disposable income, taken together with a disproportionate progression of the PLN rate of the excise duty in relation to those economic indicators.⁵⁰¹ One of the arguments levelled against the current roadmap was the one related to the armed conflict between Russia and Ukraine, which would have caused results unforeseen before its eruption.⁵⁰² A reading of the statement of reasons for the bill of 2 August 2024 allows for an inference to the effect that the amendments being passed are based, in principle, on health-promoting issues. On the other hand, it cannot be denied that the Ministry of Finance simply seeks to maximize budgetary income due to the increase of the disposable income. First, the argument to the effect that the Russia-Ukraine war caused any such results that had been unforeseen in 2021 that influenced an increase of consumption of tobacco products, or a drop in prices for tobacco products, is unwarranted. Second, the assertion that there is an economic availability of tobacco products and disproportionate differences of rates of excise duty (which is only an interpretation of the statement of reasons for the bill, made by the

⁵⁰⁰ Statement of reasons for the bill to amend the Act on the Excise Duty and certain other statutes, legislative track number UD105, <https://legislacja.gov.pl/docs//2/12387956/13073712/13073713/dokument677747.docm>, hereinafter referred to as the statement of reasons, draft no. UD105.

⁵⁰¹ Statement of reasons, draft no. UD105, p.2.

⁵⁰² Statement of reasons, draft no. UD105, p.2.

author thereof) is without importance in the context of the purchasing power and the possibility of buying tobacco products, against the background of the consumer price index and the factual decrease in the purchasing power of currency. Thirdly, the indexations of rates being carried out by the Ministry of Finance are not proportionate to the change in the purchasing power of the currency. It should also be noted that such an argument is completely incomprehensible in the context of differences in indexation of tax rates for the respective categories of tobacco products and their alternatives, as percentage values for such respective categories of products are different. Thus, the proposed increase of tax rates has no link to the changes of the purchasing power of the currency. Fourthly, the Ministry of Finance has completely ignored the economic effects of the regulation being passed for the entire tobacco industry, including for the tobacco manufacturers and the processors thereof, only indicating that the economic burden of taxation would be passed on to consumers.⁵⁰³

The impact assessment of the bill also does not allow for answering the question of the effects of the amendments being introduced for the tobacco industry, as it only contains a description of results of introducing the proposed solution for the public finance sector and for the fiscal authorities.⁵⁰⁴ In a similar manner as under the statement of reasons for the bill, the economic availability of tobacco products and their alternatives, especially among young persons, was relied on. It should be noted that the Ministry of Finance assumed a very optimistic perspective of increasing budgetary income from the excise duty during the 2025-2027 years. The prognosis relied on by the Ministry of Finance is contained in the table 12.1 below.

⁵⁰³ Statement of reasons, draft no. UD105, pp. 1-3, 19.

⁵⁰⁴ Regulatory impact assessment for the bill to amend the act on the excise duty and certain other statutes, draft no. UD105, <https://legislacja.gov.pl/docs//2/12387956/13073712/13073713/dokument677748.docx>, bill of 2 August 2024, pp.1-11.

Table 12.1. The Anticipated Increase of Income From the Excise Duty, in Millions PLN, in the Event of Passing the Bill of 2 August 2024 and Its Coming Into Force

specification	2025			2026			2027		
	excise	vat	exc. + vat	excise	vat	exc. + vat	excise	vat	exc. + vat
cigarettes	1838	423	2260	1639	377	2016	1072	246	1318
tobacco	245	56	301	265	61	326	217	50	267
cigars	5	1	6	11	3	14	15	3	18
novel (tobacco products)	288	66	354	227	52	279	197	45	243
liquid	492	113	605	823	189	1012	1231	283	1514
vaporisation equipment	540	124	664	540	124	664	540	124	664
SUM	3408	784	4191	3505	806	4311	3271	752	4024

Source: Impact Assessment for the Bill of 2 August 2024, Draft no. UD105

The data provided in the Table 12.1 assume an increase in budgetary income from the excise duty on tobacco products and their alternatives to a degree of over 3 billion PLN. However, the proponent of the bill completely ignores certain important issues. Firstly, such an assumption in no way corresponds to the potential decrease of demand for tobacco products and their alternatives, desired by the proponent. Secondly, such an assumption does not take the possibility of a decrease in external demand, i.e. purchases of tobacco products and their alternatives by the residents of neighbouring States situated near the border of Poland, including Czech and German nationals, into account. Thirdly and finally, the proponent appears to tacitly forgo the fact of the possible major increase of the grey or even the black market for the trade in tobacco products and their alternatives, as well as the increase in smuggling from neighbouring third countries east of the border, e.g. Ukraine, Russia, or Belarus. At the same time, the increase of illegal trade in tobacco products would prompt the use of tobacco of unknown origin, possibly enriched with various components with not necessarily positive health effects.

A major fiscal burden on tobacco products and their alternatives should be noted. The share of excise duty in the price of a packet of cigarettes hovers around the range of 10,75 PLN – 11,93 PLN depending on the category of cigarettes, while the sale of cigarettes is additionally taxed with the tax on goods and services (VAT), giving another range of 3,05 PLN – 3,74 PLN. Thus, the aggregate fiscal burdens may oscillate from 13.80 PLN to 15,67 PLN depending on the market segment.⁵⁰⁵ This means that the

⁵⁰⁵ Wojciech Bronicki, *Mapa drogowa zmian stawek akcyzy w latach 2022-2027. Ocena drugiego roku obowiązywania* [Report 'The Roadmap for Changes of Rates of the Excise Duty During the 2022-2027

tobacco products and their alternatives are already significantly encumbered with fiscal burdens. Figure 12.10 shows the price components of cigarettes in 2024.

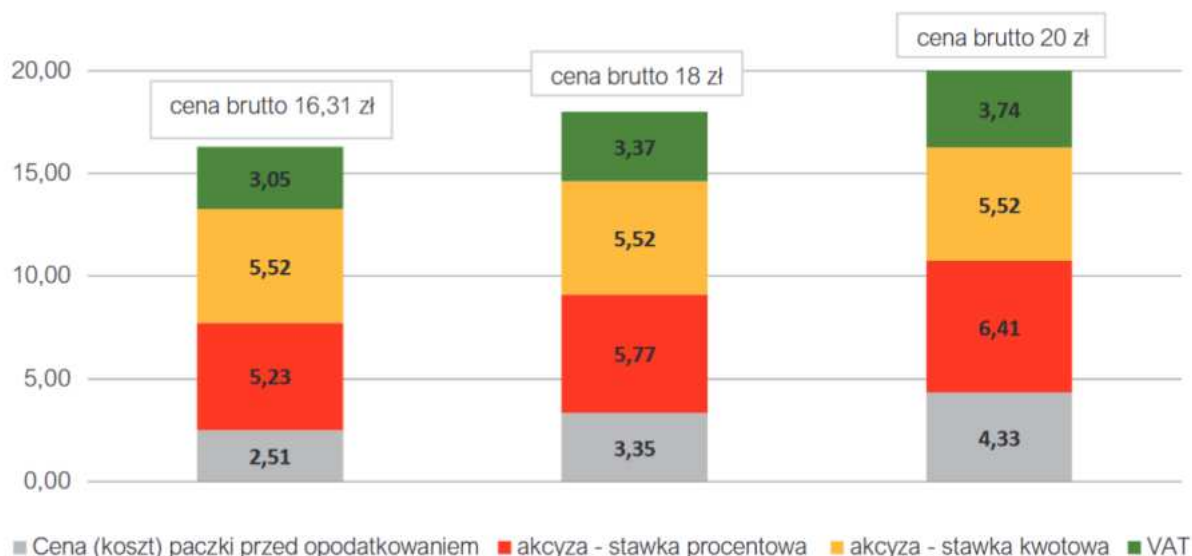


Figure 12.10. Components of cigarette price in 2024

White sections: "gross price"; grey: price (cost) of a packet before taxation; red: excise duty: percentage rate; yellow: excise duty – PLN rate

Source: Report 'The Roadmap for Changes of Rates of the Excise Duty During the 2022-2027 Years. Assessment of the Second Year of Application' by Wojciech Bronicki

Having the increase of prices for tobacco products anticipated by the Ministry of Finance in mind, as presented in the Impact Assessment, it should be noted that the fiscal burdens are going to significantly increase.

Assuming that the cost of a packet of cigarettes before taxation would be maintained, or would only be adjusted for inflation, the fiscal burdens in 2027 may amount to 22,21 PLN for the Super Low segment (the cheapest segment of cigarettes) and 24,03 PLN for the Premium segment. Regrettably, the issue of the increase of fiscal burdens on a packet of cigarettes cannot be addressed with precision, as the Ministry of Finance only presented a single anticipated price of a packet of cigarettes under the Impact Assessment. Thus, owing to the very incomplete information presented by the Ministry of Finance, the increase of fiscal burdens cannot be addressed in detail. In the event of the price thus presented pertaining to the Super Low segment, a price of a packet of cigarettes from the Premium segment could then exceed even the price of 30 PLN for a packet.

Years. Assessment of the Second Year of Application'], <https://akcyza.net/mapa-drogowa-zmian-stawek-akcyzy-2/>, accessed 22.07.2024, pp. 39-40.

Another element that was completely ignored within the framework of the Impact Assessment so drafted and the statement of reasons for the bill to amend the Act on the Excise Duty is the utter disregard for the impact of that legal solution on the tobacco industry, including the tobacco manufacturers, processors, distributors, wholesalers, and retailers. The Ministry of Finance has not considered, not in the slightest, what would be the effect of the potential drop of demand for tobacco products and their alternatives for a number of micro- and small enterprises, and has not offered any analysis as to medium and large enterprises. In particular, it was not indicated how the proposed regulation may impact on the recurrent increase of the grey market for tobacco products, which may contribute in a major way to a crisis for the entire industry when taken together with the price increases. The first factor negatively influencing the entire tobacco sector will be the increase of consumer prices, and the second will be the increase of illegal trade in tobacco products originating from illegal sources – either from illegal manufacturers, or from smuggling.

Given the above considerations, it should be held that the impact assessment and the statement of reasons for the bill drafted by the Ministry of Finance are poorly framed and imprecise. The regulatory impact assessment provided by the Ministry of Finance and the statement of reasons for the bill lack a clear analysis of the impact of the increase on the volume of consumption. Beyond the change of the tax rates, the Ministry of Finance also forgoes the possibility of an additional solution consisting in the change of the status of the criminal act consisting in the sale of tobacco products and their alternatives to minors, from a contravention (“wykroczenie”)⁵⁰⁶ to an offence (“przestępstwo”), which will cause the sellers to try to avoid the sale of tobacco products or their alternatives to minors.

Secondly, the Ministry of Finance has not at all considered the issue of the impact of the regulation at issue on the possible increase of the illegal trade in tobacco products, including the illegal manufacturing of tobacco products and the smuggling thereof from third countries, and thus on the level of competitiveness and the condition of the industry of tobacco products. The problem of the potential drop in purchases of tobacco products by the citizens of the European Union Member States neighbouring Poland for their own use was also not touched upon. Thirdly, the micro- and macroeconomic

⁵⁰⁶ Viz. Article 13(1) APHT.

effects of the introduction of the solutions proposed under the bill for the broadly understood tobacco sector – farmers cultivating tobacco, processors, wholesalers, retail distributors, which means that the impact assessment is incomplete. Fourthly, according to the statement of reasons for the bill, the indexation of tax rates would compensate inflation, but such an argument is not proportional to the proposed amendment, which provides separate percentage increases for separate categories of tobacco products and their alternatives. Fifthly, the *vacatio legis* was not determined for the tax amendments at issue, as the statute would enter into force on 1 January 2025, whereas the first increase of PLN rates would enter into force from 1 March 2025. Apparently, the Ministry of Finance should be reminded that *vacatio legis* is not the time from the lodgement of a bill until the moment when the provisions enter into force, but the time of legal period of grace - from the passing of a statute until the day of its coming into force. If anything, the coalition agreement foresees a period of at least six months of *vacatio legis* for fiscal statutes.⁵⁰⁷

6. The List of Remarks Made Within the Framework of Stakeholder Consultation Carried Out On 4 September 2024 at the Ministry of Finance

Owing to the bill of 2 August 2024 to amend the Act on the Excise Duty and certain other statutes (UD 105) being made public, there were intra-ministerial and public consultations. On 4 September 2024, the Ministry of Finance organised a consultation conference. From that conference and from the commentaries thus made one may infer certain major reservations to the amending bill no. UD 105 so proposed.

I. Observations on the vaporisation equipment

- A postulate to refrain from levying excise duty on vaporisation equipment
- A postulate on the refrainment from levying excise duty on vaporisation equipment already available on the market,
- Subjecting only the non-reusable vaporisation equipment to the excise duty, together with the tentative new definition thereof indicated by the author of the present work:

⁵⁰⁷ The so-called 'Coalition Agreement' between Koalicja Obywatelska [Civic Coalition], Trzecia Droga – PSL [The Third Way – Polish Peasants' Party], Trzecia Droga – Polska 2050 [The Third Way – Poland 2050], Nowa Lewica [The New Left] political parties, of 10 November 2023, source: <https://platforma.org/upload/document/203/attachments/433/UmowaKoalicyjna.pdf>, point 10, pp.6-7.

- Vaporisation equipment means “electronic cigarettes, which at the moment of the placing on the market possess a charged battery, or contain a liquid for electronic cigarettes, intended for the consumption of vapour created from electronic cigarette liquid, excluding cartridges or spare containers separately placed on the market, and equipment intended for medical purposes”.
- There were postulates voiced by other interested parties, reasoned as follows: the intention for introducing a tax on vaporisation equipment is the restriction of availability of non-reusable electronic cigarettes for young persons and such an intention should be implemented, which means that the new tax should only be in force as regards the instance of non-reusable equipment. Such an approach would make the definition of categories subject to tax easier and would contribute to the reduction of their sales, which is the foundational concern for drafting such a provision. Should any and all vaporisation equipment be subject to the excise duty, problems with interpretation would appear as to when a given piece of equipment (charging battery, atomiser, heater, and other elements of reusable equipment) becomes a vaporisation product. Moreover, in the event of subjecting all categories of equipment to excise duty, the value of excise duty security due for reusable e-cigarettes would reach an amount that an average businessperson would not be able to cover, at the rate of 40 PLN/piece of equipment, taken together with the simultaneous increase of security related to the increase of excise duty on e-cigarette liquid.
- Abstention from taxation of vaporisation equipment and the concurrent restriction of availability of the so-called non-reusable electronic cigarettes, by the introduction of a higher rate of excise duty for the liquid contained in non-reusable equipment (e.g., 40 PLN), without the need to design a new taxation system and to notify technical provisions. There should be precise and unequivocal formulation of a definition of vaporisation equipment, in particular as regards the constituent elements of an electronic cigarette or a heater, in order to e.g. eliminate doubt as to whether the very casing of a piece of equipment may be deemed “vaporisation equipment”, and to ensure a precise determination of the object of taxation without the need to apply for binding information on excise duty (WIA, *Wiążąca Informacja Akcyzowa*),
- Introduction of facilitation for importation of sample vaporisation equipment, it is indispensable to determine exemptions for samples moved in order to carry out qualitative research and research on the features of the equipment, while at the same time equipment intended for research purposes should not be subject to marking with excise duty stamps,
- Increasing the limit of importation for vaporisation equipment (e.g., 2 pieces of equipment of any kind, for that matter), so as to allow a consumer to import the main piece of equipment of a certain kind and an emergency device in the event of damage, or in the event of using two devices simultaneously),
- Making the provisions on transition periods more precise, in order to treat all vaporisation equipment already in possession of businesses before 1 March 2025

in the same manner (doubts as to the substance of Article 113b(1)(3), letters (a) and (b),

- A postulate not to levy excise duty in the amount of 40 PLN per unit on vaporisation equipment, as it is contrary to the prohibition of discrimination that follows from Article 32(2) of the Constitution of the Republic of Poland, and which means that creation of legal rules varying for subjects of law that should be counted among the same class (category) cannot be accepted, and contrary to the principle of equal treatment expressed in Article 20 of the Charter of Fundamental Rights of the European Union.
- Regulation of problematic affixing of 2 excise duty stamps to a single product (when the vaporisation equipment will contain electronic cigarette liquid or a novel tobacco product), so there would be no need to change the production line, and allowing excise duty stamps on equipment and liquid to have unlimited duration from the moment of affixing them, in order to resolve both the problem of varying time-limits for validity of excise duty stamps on equipment and on electronic cigarette liquids, and the problem of having to recall goods from the market when only a single excise duty mark loses its validity,
- Extending the period of *vacatio legis* for taxing vaporisation equipment and for marking them with excise duty stamps, as such changes require *inter alia* modifications in systems and processes (invoicing, reporting, monitoring), adjustments to marking machines which is a time-consuming process, and further, there should be elucidation of the manner in which the stamps are to be affixed to the equipment, of the time-limit to make a preliminary inquiry for fiscal excise duty stamps for the production year 2025, and of the date on which the fiscal excise duty stamps would be available for 2025 at the earliest.

II. Uniformization of the Level of Increase for Tax Rates Irrespective of the Type of Product

- A postulate to lower the upper level of rates as regards the planned increases of excise duty on certain tobacco products, in particular on vaporisation equipment and on novel tobacco products, which shall have the consequence of a more proportional and fair burden for all parties within the tobacco sector,
- A postulate to uniformize the excise duty rates for all nicotine products (the proposed increase of rate of the excise duty for novel tobacco products and for electronic cigarette liquid exceeds the increase of rates for other categories of nicotine products to a significant extent).

III. Demand for Excise Duty Stamps and Marking with Excise Duty Stamps

- A postulate on the amendment of the current provisions that require, already in August and September, the making of final corrections to preliminary demands for excise duty stamps with the appropriate year of production printed on, as such time-limits do not allow enough time to specify the final volume of demand during a given year and create a threat to the stability of production and sales. Optimally, those

time-limits could be postponed (e.g., by one month), allowing space for adjustments of demand for bands with the appropriate year printed on, thanks to more precise forecasts,

- Explanation as to since when, and until when, the preliminary demands for 2025 stamps may be made, and when one would receive those at the earliest,
- Regulation of the rules of receipt of excise duty stamps with the 2024 year of production printed on by the parties concerned in an incidental provision, so that it clearly follows from the provisions that the businesses would receive stamps with the production year 2024 when making applications to issue bands in January and February 2025 to the tax offices or the *Polska Wytwórnia Papierów Wartościowych* SA company,
- A postulate to change the validity of bands from limited to unlimited duration for vaping products. Owing to the fact that vaping products are products counted among the fast moving consumer goods (FMCG) category, the manufacturers act upon the expiry date, and not upon the band time-limit, whereas the introduction of additional excise levies and the duty to replace the bands complicate the manufacturing and logistic processes. In practice, rebanding of products is simply impossible.
- Explanation as to since when and until when the preliminary demand for 2026 stamps may be made, and when those could be received at the earliest, indication when the parties may receive the legalising excise duty stamps at the earliest (pursuant to the wording of Article 5(6), the possessor of equipment referred to under paragraph 5 makes a preliminary demand for legalising excise duty stamps to the office for the Minister competent for the matters of public finance, until 31 March 2025 – but it is unknown when the parties would receive those legalising excise duty stamps).

IV. Increase of the Excise Duty and the So-Called “Grey Market”

- The estimated budgetary effects indicated thereunder are not convincing, which was also repeatedly voiced during the consultation conference,
- No estimates that would show that the assumed increases genuinely would provide significantly larger revenue to the budget than the revenue that would be secured while maintaining the current excise duty roadmap, and how the change of the excise duty rates would translate to the increase of the grey market.

The above remarks are consonant with the reservations made herein by the authors of the present monograph. In addition, the authors of the present monograph also pointed to other issues that were relied on during the conference, such as the egregiously short time-limit to prepare for the proposed amendments, or the period of *vacatio legis* that is too short. During the conference, the representatives of the Ministry of Finance made a reservation to the effect that the amount of rates is not subject to negotiation. After consideration of the arguments made by the participants of the

conference, the Ministry of Finance made it known by letter of 12 September 2024 that the hitherto draft no. UD 105 had the provisions on the taxation of vaporisation equipment by the excise duty excluded from its contents, and that those provisions will be moved to a separate bill that is going to be subjected to renewed intra-ministerial and public consultation. In that regard, the bill no. UD 105, later known as the bill no. 692 was put through the legislative process to the extent that it provides for amendments in the scope of the rates of excise duty, the time-limit of validity of excise duty stamps for the electronic cigarette liquid, and the requisite transitory provisions on those regulations. The amended provisions will come into force on 1 January 2025, whereas the application of the increased rates of excise duty shall begin from 1 March 2025.

7. The “Roadmap” As Originally Adopted and the Changes of Excise Duty Rates During the 2022-2027 Years, As Amended By the Act of 18 October 2024

The “Roadmap of Excise Duty Rates” is the byword for the solution consisting in regulation of the changes of the excise duty rates during the 2022-2027 years as levied on the respective categories of excise goods, introduced by virtue of the act to amend the Act on the Excise Duty.⁵⁰⁸ That amendment introduced the determination of the changes of rates for alcoholic beverages and tobacco products into the Act.⁵⁰⁹ It is important that the above changes are binding as they were enshrined in the Act on the Excise Duty. As a result of that, each year over the span of 5 years, on every 1 January and beginning from 2022, the changes of tax rates occur pursuant to the adopted schedule, described in the Act. The solution adopted by the legislator was the first of the binding kind since the reintroduction of the excise duty on Poland. The first attempt to introduce an annual, systematic increase in tax rates on tobacco products was made in 2010, which was to consist in the annual valorisation of tax rates for tobacco products by 5%. Such an obligation on part of the Ministry of Finance was following from the requirement to secure the minimum threshold of taxation for 1000 units of

⁵⁰⁸ The Act to amend the Act on the Excise Duty and Certain Other Statutes of 29 October 2021, JL of 2021, item no. 2313, hereinafter referred to as the Roadmap Act.

⁵⁰⁹ Cf. Article 1, point (12) of the Roadmap Act and Article 165a AED.

cigarettes at the level of 90 EUR.⁵¹⁰ Due to the lack of formalisation of that solution, as well as due to the economic considerations back then, that premiss was not carried out. The roadmap currently in force is nothing else than indexation of tax rates for alcoholic beverages and tobacco products. Framing such a solution in the form of a normative act of the statutory rank should be assessed positively, from the perspective of the legislative process. Firstly, such an indexation has binding nature and remains in force without the need to introduce annual amendments to the Act on the Excise Duty. Secondly, it makes good on the standard of exclusivity of a statute in fiscal matters, as it subjects the legislator to the duty of statutory regulation of tax rates.⁵¹¹ Thirdly, indexation thus adopted secures legal certainty and foreseeability of changes that occur annually. Fourthly, indexation safeguards the uninterrupted and gradual increase of rates to the level provided for the year 2027.⁵¹²

In principle, the roadmap provides for regulating the updates to rates for the respective tobacco products, separating the respective important elements out, such as the duty to mark the goods with excise duty stamps, or the determination of the maximum retail selling price. The base rate⁵¹³ of the excise duty on cigarettes in the event of marking the packets with excise duty stamps and the determination of the maximum retail selling price, amounts to:

- In 2022 – 228,10 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- In 2023 – 250,91 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- In 2024 – 276,00 PLN for each 1000 units and 32,05% of the maximum retail selling price,
- In 2025 – 303,60 PLN for each 1000 units and 32,05% of the maximum retail selling price,

⁵¹⁰ W. Bronicki, J. Neneman, *Mapa drogowa zmian stawek akcyzy w latach 2022-2027. Ocena pierwszego roku obowiązywania* [Report: Roadmap for the amendments in the excise duty rates for the 2022-2027 period. Assessment of the first year of application], https://tep.org.pl/raport_mapa_drogowa/, accessed 22.07.2024, p. 10.

⁵¹¹ Viz. Article 217 of the Constitution of Poland. See further A. Tatara, *Prawne ograniczenia swobody kształtowania akcyzy w Polsce* [Legal Restrictions of the Discretion of Levying Excise Duty in Poland], Zielona Góra 2022, pp. 76-81.

⁵¹² The amount of tax rates specified under the provisions of Article 99(2) AED, Article 99(3) AED, Article 99a(3) AED (viz. Article 99c(4) AED) is specified for 2027, whereas the roadmap allows for uninterrupted achievement of those rates, without one-off and rapid increase of the level of taxation for tobacco products and novel tobacco products.

⁵¹³ Viz. Article 99(2)(1) AED.

- In 2026 – 333,96 PLN for each 1000 units and 32,05% of the maximum retail selling price;⁵¹⁴

The base rate⁵¹⁵ of the excise duty for smoking tobacco amounts to:

- In 2022 – 155,79 PLN for each kilogram and 32,05% of the maximum retail selling price,
- In 2023 – 171,37 PLN for each kilogram and 32,05% of the maximum retail selling price,
- In 2024 – 188,51 PLN for each kilogram and 32,05% of the maximum retail selling price,
- In 2025 – 207,36 PLN for each kilogram and 32,05% of the maximum retail selling price,
- In 2026 – 228,10 PLN for each kilogram and 32,05% of the maximum retail selling price;⁵¹⁶

The base rate⁵¹⁷ of the excise duty for cigars and cigarillos amounts to:

- In 2022 – 433,00 PLN for each kilogram,
- In 2023 – 476,00 PLN for each kilogram,
- In 2024 – 524,00 PLN for each kilogram,
- In 2025 – 576,00 PLN for each kilogram,
- In 2026 – 634,00 PLN for each kilogram.⁵¹⁸

The excise duty rate for cigarettes not subject to the duty of marking with excise duty stamps and not marked with the maximum retail selling price amounts to:

- In 2022 – 378,38 PLN for each 1000 units,
- In 2023 – 416,22 PLN for each 1000 units,
- In 2024 – 457,84 PLN for each 1000 units,
- In 2025 – 503,62 PLN for each 1000 units,
- In 2026 – 553,98 PLN for each 1000 units.⁵¹⁹

The excise duty rate for smoking tobacco not subject to the duty of marking with excise duty stamps and not marked with the maximum retail selling price amounts to:

- In 2022 – 252,25 PLN for each kilogram,

⁵¹⁴ Viz. Article 165a(2)(1) AED.

⁵¹⁵ Viz. Article 99(2)(2) AED.

⁵¹⁶ Viz. Article 165a(2)(2) AED.

⁵¹⁷ Viz. Article 99(2)(3) AED.

⁵¹⁸ Viz. Article 165a(2)(3) AED.

⁵¹⁹ Viz. Article 165a(3)(1) AED.

- In 2023 – 277,48 PLN for each kilogram,
- In 2024 – 305,23 PLN for each kilogram,
- In 2025 – 335,75 PLN for each kilogram,
- In 2026 – 369,33 PLN for each kilogram.⁵²⁰

The base rate⁵²¹ of excise duty for raw tobacco amounts to:

- In 2022 – 252,25 PLN for each kilogram,
- In 2023 – 277,48 PLN for each kilogram,
- In 2024 – 305,23 PLN for each kilogram,
- In 2025 – 335,75 PLN for each kilogram,
- In 2026 – 369,33 PLN for each kilogram.⁵²²

The excise duty rate for raw tobacco not marked with excise duty stamps amounts to:

- In 2022 – 504,50 PLN for each kilogram,
- In 2023 – 554,96 PLN for each kilogram,
- In 2024 – 610,46 PLN for each kilogram,
- In 2025 – 671,50 PLN for each kilogram,
- In 2026 – 738,66 PLN for each kilogram.⁵²³

The base rate⁵²⁴ of the excise duty for novel tobacco products amounts to:

- In 2022 – 311,58 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- In 2023 – 342,74 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- In 2024 – 377,01 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- In 2025 – 414,71 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco,
- In 2026 – 456,18 PLN for each kilogram and 32,05% of the average weighted retail selling price for smoking tobacco.⁵²⁵

⁵²⁰ Viz. Article 165a(3)(2) AED.

⁵²¹ Viz. Article 99a(3) AED.

⁵²² Viz. Article 165a(4) AED.

⁵²³ Viz. Article 165a(5) AED.

⁵²⁴ Viz. Article 99c(4) AED.

⁵²⁵ Viz. Article 165a(6) AED.

In the event of manufacturing novel tobacco products in a manner contrary to the principle of manufacturing excise goods at a tax warehouse,⁵²⁶ the excise duty rate for novel tobacco products amounts to:

- In 2022 – 311,58 PLN for each kilogram and 32,05% of three times the average weighted retail selling price for smoking tobacco,
- In 2023 – 342,74 PLN for each kilogram and 32,05% of three times the average weighted retail selling price for smoking tobacco,
- In 2024 – 377,01 PLN for each kilogram and 32,05% of three times the average weighted retail selling price for smoking tobacco,
- In 2025 – 414,71 PLN for each kilogram and 32,05% of three times the average weighted retail selling price for smoking tobacco,
- In 2026 – 456,18 PLN for each kilogram and 32,05% of three times the average weighted retail selling price for smoking tobacco.⁵²⁷

As such, it may be noted that the legislator provided for an annual 10% update of the monetary part of the tax rate for tobacco products and novel tobacco products. Such a legislative solution is undoubtedly an innovative approach, creating foundations for the implementation of the broader scope of fiscal policy. Without a doubt, the adoption of the roadmap constitutes an implementation of fiscal policy. As it was pointed out under the presentation of theoretical issues of the present work, the essence of fiscal policy hitherto in the scope of the excise duty was aimed solely at the fiscal effect, to the exclusion of the interests of businesspersons. However, the adoption of an annual and foreseeable update of tax rates constitutes an implementation of fiscal policy in the five-year term. Admittedly, that is medium-term fiscal policy, although from the perspective of possible economic, political and societal events, such a period is sufficient to verify the effectiveness of that solution. The very adoption of indexation of tax rates over the span of five years merits approval, without a doubt. The operation of permanent indexation of tobacco products also guarantees the performance of the fiscal function of the excise duty.

The adopted concept of a roadmap constitutes an implementation of a number of doctrinal postulates related to the drafting of fiscal law. Firstly, indexation over the period of five years constitutes an element of fiscal policy differing from the hitherto actions of the Ministry of Finance, which in fact constitute an implementation of J.B.

⁵²⁶ Viz. Article 47 AED.

⁵²⁷ Viz. Article 165a(7) AED.

Colbert's maxim. Secondly, indexation of rates was introduced by way of a fiscal statute, which may signify a retreat from the current, chaotic system of making amendments to fiscal law. Thirdly, the roadmap was drawn up by way of an agreement with the business circles. Fourthly, it is a safeguard of legal certainty and its foreseeability, allowing businesspersons to take investment decisions. Fifthly, it is an example of compromise between the expectations of the businesses and the performance of the fiscal function and securing of stable budgetary income. Sixthly, it constitutes a guarantee of the successive and stable increase of income from the excise duty, which, when viewed from a perspective, is a better solution than a one-time 50% increase of the monetary part of the rate over a longer period of time. Seventhly, it does not require case-by-case intervention of the legislator in the amount of rates as that occurs automatically at the beginning of the year, which also makes good on the requirement of the appropriate *vacatio legis*.⁵²⁸

It is also worth noting that Poland is not the only State introducing solutions of that kind, in the form of annual, successive and predetermined indexation of rates of excise duty on tobacco products. Similar solutions are employed by other Member States of the European Union. The period for which such solutions remain in force is worth noting, as in many instances it is far shorter than the one that was adopted by Poland.⁵²⁹

Table 13.1. Periods of a Roadmap Remaining in Force in Member States of the European Union

Member State	Years With a Roadmap Remaining in Force
Austria	2022 – 2026
Bulgaria	2022 – 2026
Czechia	2022 – 2023
France	2022 – 2026
the Netherlands	2022 – 2024
Lithuania	2022 – 2024
Latvia	2022 – 2023
Germany	2022 – 2026
Romania	2022 – 2026
Slovakia	2022 – 2023
Hungary	2022 – 2023
Italy	2022 – 2026

Source: the author's own work

⁵²⁸ A. Tatar, *Prawne...*, op. cit., pp. 317-325.

⁵²⁹ W. Bronicki, J. Neneman, *Mapa...*, op. cit., p. 16.

Analysis of the above data shows that, against the background of 13 countries, Poland decided to introduce a roadmap of rates for excise goods applicable to a period of five years, and thus is among the group of seven countries that includes, Austria, Bulgaria, France, Germany, Romania, and Italy, apart from Poland itself. In turn, four of the Member States, i.e. Czechia, Latvia, Slovakia, and Hungary adopted a two-year solution, while the Netherlands and Lithuania decided to introduce a roadmap for the period of three years. Undoubtedly, that counts Poland among the pioneering Member States of the European Union which decided to implement fiscal policy in the scope of the excise duty rates in a long-term manner.

Without a doubt, and in the context of the need to begin negotiations related to the amendments of the Directive no. 2011/64/EU, the national experience related to the operation of the roadmap may be an important argument for the introduction of a solution of that type to the EU legal system. As W. Bronicki rightly points out in the report on the first year of application of the roadmap, that solution is a positive influence both on the State budget and on the tobacco industry. For that reason, Poland may serve as an example of reconciling the interests of the businesspersons with the budgetary needs of the State.⁵³⁰ The roadmap, while undoubtedly constituting an important element of fiscal policy and performing the fiscal function, simultaneously facilitates the performance of the extra-fiscal functions of a tax.⁵³¹ It is also worth noting that the legislator committed a very significant fallacy by indicating that the swift increases of excise duty rates on the market in tobacco products carried out from 2004 to 2014 caused a fall in the sales of cigarettes.⁵³² Apparently, the legislator did not recall that those times were the period of the most intensive proliferation of the grey market in tobacco products, the size of which reached its apex in 2015. It is perhaps more reasonable to state that the swift and rapid increases in excise duty rates cause a fall of consumption of cigarettes that originate from a legal source. However, in the event of systematic and successive increase of tax rates by the same percentage per annum, there will be no excessive outsizing of the grey market.

⁵³⁰ W. Bronicki, J. Neneman, *Mapa...*, op. cit., p. 16.

⁵³¹ Statement of reasons for the governmental bill to amend the act on the excise duty of 29 October 2021, JL of 2021, item no. 2313, Sejm draft no. 1673, IXth term of the Sejm, p. 1.

⁵³² Statement of reasons for the governmental bill to amend the act on the excise duty of 29 October 2021, JL of 2021, item no. 2313, Sejm draft no. 1673, IXth term of the Sejm, p. 5.

8. Punitive Regulations in the Scope of the Trade in Tobacco Products

Three categories of sanctions should be distinguished in the context of punitive regulations related to the trade in tobacco products – those governed by the Act on the Excise Duty, criminal tax sanctions – governed by the Polish Criminal Tax Code, and criminal sanctions that are governed by non-codified criminal law. According to the linguistic definition in Polish, “sanctions” are legal consequences that should be applied by the public authorities against persons whose acts are not in line with the legal norm in force.⁵³³ Where criminal law norms are involved, both those contained in the Polish Criminal Code and in the Polish Criminal Tax Code, a breach of the norm protected by sanction should entail a reaction of the State and the application of the sanctioning norm. However, the scholarship on financial law has not yet agreed upon the issue which legal institutions should be counted among sanctions.⁵³⁴ In principle, sanctions under fiscal law perform the preventive, repressive, and compensatory functions,⁵³⁵ therefore their practical objective is to protect the proper operation of the fiscal function. The authors of this report subscribe to the restrictive interpretation of fiscal sanctions, understood as the impairment of the situation of a taxpayer, occurring as a result of a breach of a fiscal-legal norm committed thereby.⁵³⁶

In such a specific context of understanding the fiscal sanctions, attention should be drawn to an important issue of the obligation to manufacture excise goods in a tax warehouse, and the obligation to mark certain excise goods with excise duty stamps. In the case of tobacco products, the legislator provided for various categories of obligations, i.e. the obligation to mark with excise duty stamps and a maximum retail selling price,⁵³⁷ as well as the manufacture of all tobacco products in tax

⁵³³ Słownik..., Tome III, op.cit., p. 179.

⁵³⁴ P. Majka, *Sankcje w prawie podatkowym* [Sanctions under Tax Law], [in:] *Prawo podatkowe Teoria...*, op. cit., p. 96.

⁵³⁵ H. Dzwonkowski, *Konstytucyjność sankcji podatkowych* [Constitutionality of Fiscal Sanctions], *Monitor podatkowy* 1999, no. 3, pp. 24 – 28.

⁵³⁶ B. Brzeziński, *Wstęp...*, op. cit., p. 98, M. Duda-Hyz, *Pojęcie i charakter sankcji podatkowych* [The Concept and Nature of Fiscal Sanctions], *Prawo – Administracja – Kościół* 2002, no. 2-3, pp. 59 – 61, J. Małecki, *Z problematyki sankcji w prawie podatkowym ze szczególnym uwzględnieniem podatku VAT* [On the Issue of Sanctions under Tax Law, With Special Regard for the VAT], [in:] *Księga Pamiątkowa ku czci prof. A. Kosteckiego. Studia z dziedziny prawa podatkowego* [Commemorative Tome In Honour of Professor A. Kostecki], edited by B. Brzeziński, J. Głuchowski, C. Kosikowski, R. Mastalski, Toruń 1998, pp. 155 – 156.

⁵³⁷ Viz. Article 99(2) AED.

warehouses.⁵³⁸ Owing to that legal approach, tax rates for the respective tobacco products, i.e. cigarettes,⁵³⁹ smoking tobacco,⁵⁴⁰ raw tobacco,⁵⁴¹ liquid for electronic cigarettes,⁵⁴² and for novel tobacco products⁵⁴³ were determined. An increased tax rate for those products was set, for when there would be a breach of the obligation to mark cigarettes and smoking tobacco with excise duty stamps and a maximum retail selling price.⁵⁴⁴ An analogous solution in the form of an increase of tax in the event of a failure to mark goods with excise duty stamps was provided for raw tobacco.⁵⁴⁵ However, in the cases of liquid for electronic cigarettes and of novel tobacco products, an increased rate of excise duty was made applicable for those among such alternatives for tobacco products that were manufactured in breach of the principle of manufacturing excise goods outside a tax warehouse.⁵⁴⁶ Such an increase of excise duty in the event of a breach of provisions on marking tobacco products, or in the event of improper production thereof, is undoubtedly punitive in nature. The principal objective of such a legal solution is preventing illegal manufacturing and the prevention of releasing tobacco products and their alternatives originating from an illegal source for consumption.

A similar scope of regulation should be sought under the norms of the criminal tax law. The legislator determined a number of prohibited acts related to the trade in excise goods, such as: trade in excise goods deprived of excise duty stamps,⁵⁴⁷ violation of the principles of taking the excise goods subject to a duty suspension arrangement out of a tax warehouse in order to carry out intra-Community acquisition or supply,⁵⁴⁸ receiving and handling excise goods,⁵⁴⁹ faulty marking of excise goods with excise duty stamps,⁵⁵⁰ falsification of excise duty stamps and trade in such stamps,⁵⁵¹ as well as a number of rules penalising improper behaviour during the duty suspension

⁵³⁸ Viz. Article 47 AED.

⁵³⁹ Viz. Article 99(2)(1) AED.

⁵⁴⁰ Viz. Article 99(2)(2) AED.

⁵⁴¹ Viz. Article 99a(3) AED.

⁵⁴² Viz. Article 99b(4) AED.

⁵⁴³ Viz. Article 99c(4) AED.

⁵⁴⁴ Viz. Article 99(3) AED.

⁵⁴⁵ Viz. Article 99a(4) AED.

⁵⁴⁶ Cf. Viz. Article 99b(5) and Article 99c(5) AED.

⁵⁴⁷ Cf. Articles 63 and 64a of the Fiscal Criminal Code of 10 September 1999, consolidated text, JL of 2024, item no. 628, hereinafter referred to as the FCC.

⁵⁴⁸ Viz. Article 64 FCC.

⁵⁴⁹ Viz. Article 65 FCC.

⁵⁵⁰ Viz. Article 66 FCC.

⁵⁵¹ Viz. Articles 67, 68a, 70 FCC.

arrangement and in the scope of processing the goods at issue.⁵⁵² Undoubtedly, the purpose of making those legal solutions operational is to safeguard the legality of the trade in excise goods, i.e. protecting the fiscal interests of the State.

On the punitive rules that are criminal in their legal nature, attention should be drawn to a non-codified regulation that penalises illegal manufacturing of tobacco products. It should be stressed that operating a business consisting in manufacturing tobacco products is a legally regulated economic activity and requires an entry in the register of manufacturers of tobacco products.⁵⁵³ Unlike the Act on the Excise Duty, the Act applicable to manufacturing tobacco products provides for a different concept of a tobacco product, as the nomenclature adopted thereby includes novel tobacco products, nasal tobacco, and smoking tobacco in the concept of a tobacco product.⁵⁵⁴ At the same time, the stipulations of the Act on the Production of Ethyl Alcohol and the Manufacturing of Tobacco Products make a reference to the norms contained in the provisions of the Act on the Protection of Health Against the Consequences of Using Tobacco and Tobacco Products.⁵⁵⁵ For that reason, a novel tobacco product as understood under the Act on the Production of Ethyl Alcohol and the Manufacturing of Tobacco Products is understood as a product intended for consumption by consumers, other than: a cigarette, tobacco for rolling of cigarettes, pipe tobacco, water pipe tobacco, a cigar, a cigarillo, chewing tobacco, nasal tobacco, or tobacco intended for oral use.⁵⁵⁶ A definition of a novel tobacco product so formulated, i.e. through the exclusion of the respective types of tobacco products therefrom, means that a novel tobacco product is any product other than the above. For that matter, both electronic cigarettes and products intended for heating tobacco are novel tobacco products as understood under the statute at issue, which distinguishes that definition from the one formulated for the purposes of excise duty. In turn, nasal tobacco is a smokeless tobacco product, which, as the name suggests, may be used nasally,⁵⁵⁷ e.g. snuff.

⁵⁵² Viz. Article 73-75c FCC.

⁵⁵³ Viz. Article 3(2) of the Act of 2 March 2001 on the Production of Ethyl Alcohol and the Manufacturing of Tobacco Products, consolidated text of 2024, item no. 262, hereinafter referred to as PEAA.

⁵⁵⁴ Viz. Article 2(2) PEAA.

⁵⁵⁵ Act of 9 November 1995 on the Protection of Health against the Effects of Using Tobacco and Tobacco Products, consolidated text, JL of 2023, item no. 700 ("APHT").

⁵⁵⁶ Viz. Article 2, point (11) APHT.

⁵⁵⁷ Viz. Article 2, point (38) APHT.

However, a tobacco product intended for smoking is any such product that is not smokeless.⁵⁵⁸

Having the scope of the concept of tobacco products outlined above in mind, attention should be drawn to the norms of criminal law. First of those penalises the manufacturing of tobacco products without the entry in the register of manufacturers of tobacco products as required by statute, with sanctions of a fine, restriction of liberty, or imprisonment from 1 month to 3 years to be meted out for that behaviour.⁵⁵⁹ Undoubtedly, that is an offence capable of being committed by anyone, subject to public prosecution, that may be committed with deliberate culpability, and either with direct intent, or while condoning the effect of such behaviour. The object of a crime is the manufacturing of tobacco products within the meaning of the Act on the Production of Ethyl Alcohol and Tobacco Products. The legislator also provided for an aggravated form of that offence in the event of manufacturing tobacco products of significant value. Significant value of tobacco products means that, at the moment of the commission of a crime, the value of those products amounted to two hundred thousand PLN.⁵⁶⁰ In the case of an aggravated form of that offence, the sanction provided for by the legislator equates to at least six months of imprisonment, while the upper statutory sentencing limit amounts to five years of imprisonment.⁵⁶¹ The legislator made a stipulation for the situation of manufacturing tobacco products without the required entry in the registry being made one's permanent source of income. Then, such a criminal act constitutes a grave offence (*zbrodnia*), as the minimum statutory sentencing limit for imprisonment amounts to three years, and the upper statutory limit amounts to eight years. The concept of a permanent source of income relates to a professional criminal who makes commission of a crime their continuous and permanent activity, securing specific income thereby. For a finding that the perpetrator made a permanent source of income, a certain regular and continuous nature of criminalised behaviour is required, i.e. there should be a de facto economic activity consisting in the commission of criminal acts.⁵⁶²

⁵⁵⁸ Viz. Article 2, point (47) APHT.

⁵⁵⁹ Viz. Article 12a(1) PEAA.

⁵⁶⁰ Viz. Article 115§5 of the Act of 6 June 1997 – Criminal Code, consolidated text, JL of 2024, item no. 17, hereinafter referred to as the Criminal Code.

⁵⁶¹ Viz. Article 12a(2) PEAA.

⁵⁶² Kodek Karny. Komentarz do art. 65 [Criminal Code. Commentary on Article 65], edited by A. Grześkowiak, K. Wiak, Warszawa 2024, electronic version at SIP Legalis, para. 2.

As regards offences relating to illegal manufacturing of tobacco products, two types of offences constituting misdemeanours (*występki*) and one type constituting a grave offence were regulated therefor. Undoubtedly, the purpose of introducing that punitive regulation was to aim at curtailing the phenomenon of the grey market within the market of tobacco products. That holds doubly true in the context of regular and continuous commission of prohibited acts, i.e. an illegal de facto economic activity in the scope of manufacturing tobacco products. It should be stressed that the manufacturing of tobacco products without the required entry in the register, in the scope of having a permanent source of income out of that activity, gained a status of a grave offence in 2022.⁵⁶³ That is the year on which the first stage of the roadmap came into force, which means that the tightening of sanctions under non-codified criminal law was to support the influence of the roadmap in the scope of curtailing the grey market inside the market for tobacco products.

⁵⁶³ Viz. Article 2, point 14 of the Act to amend the Act on the Production of Spirit Beverages and the Registration and Protection of Geographical Indications of Spirit Beverages and Certain Other Statutes of 28 September 2022, JL of 2022, item no. 2015.

AMENDMENT OF THE DIRECTIVE 2011/65/EU IN THE CONTEXT OF THE EVOLUTION OF THE MARKET IN TOBACCO PRODUCTS

1. The Need to Amend the 2011/64/EU Directive in the Context of the Development of the Market in Alternative Nicotine Products

The changes occurring in the span of the past decade on the market in tobacco products, in particular in the context of the development of technology and the emergent alternatives to conventional tobacco products, require consideration against the background of the Tobacco Directive currently in force. As of now, there is a number of products that may constitute an alternative to the conventional tobacco products, in particular, but not limited to nicotine pouches, single-use and reusable e-cigarettes, novel tobacco products, and other products that contain nicotine. At the same time, and from the perspective of using raw tobacco to manufacture conventional tobacco products, the issue of raw tobacco is still not regulated at the EU level. For those reasons, the legitimacy of making amendments to the Tobacco Directive currently in force, and extending it to alternatives for tobacco products, should be considered. At the same time, having the need to ensure coherent definitions and the adoption of the common standard for the Member States, an attempt at the definition of that standard has been made, against the background of the possible EU standard.

In the matter of the alternatives to the conventional tobacco products, there is no common EU standard that would include the principles of taxation of those products, while at the same time there is no defined list of those products. Only the Tobacco Products Directive contains a list of alternatives to the conventional tobacco products, yet the main purpose of its drafting is found in the issues related to commerce and trade in those products. As such, there are no appropriate definitions provided for the purposes of the excise duty. For that reason, an amendment to the Tobacco Directive and the introduction of solutions aimed at ordering the list of tobacco products and their alternatives, as well as the definition of the common model of their taxation, should be considered.

Having the above circumstances and the successive development of the alternatives to conventional tobacco products in mind, the European Commission resolved to

reassess that issue under the another Commission assessment⁵⁶⁴ within The Regulatory Fitness and Performance Programme (REFIT) and the subsequent report on taxation.⁵⁶⁵ The Commission assessment mentioned above was published on 10 February 2020, and the issue of harmonizing taxation of novel tobacco products and electronic cigarettes at the EU level indeed became one of the matters put to assessment. Among other things, the European Commission pointed out that the significant difference in treatment of those products from the point of view of taxation by the respective Member States⁵⁶⁶ is one of the major issues. The 2011/64/EU Directive was to that extent deemed unaligned with the development of the market in the broadly understood tobacco products, mainly in the scope of electronic cigarettes and, namely, the so-called “heat, not burn”-type products (HnB). It was noted that the absence of a proper definition and classification of HnB products becomes a serious issue, not only because of fiscal considerations thereof, but also because of the problems related to their monitoring and control.⁵⁶⁷ According to the European Commission’s assessment, the absence of harmonization in the scope of taxation and trade in HnB products translates to difficulties in the functioning of the internal market. Thus, taking actions that are aimed at regulating the status of novel tobacco products at the EU level is recommended.

All of the Member States have subscribed to the reasonableness of amending the Tobacco Directive, including in particular the inclusion of the principles of taxation for alternative products thereto, such as novel tobacco products and e-cigarette liquid. This has been signified by the conclusions of the Council of the European Union of 2 June 2020 concerning the structure and rates of excise duty applied to manufactured tobacco.⁵⁶⁸ In those conclusions, the Member States have noted that the current provisions of the 2011/64/EU Directive have become less effective, as they are either now insufficient or too narrow to address the current and future challenges as regards certain products, such as e-cigarette liquids, heated tobacco products, and other types

⁵⁶⁴ COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco, Brussels, 10.2.2020, hereinafter referred to as the assessment <https://taxation-customs.ec.europa.eu/system/files/2020-02/10-02-2020-tobacco-taxation-report.pdf>, accessed 20.09.2024.

⁵⁶⁵ The basis for that action is found in Article 19 of the Tobacco Directive.

⁵⁶⁶ Evaluation, p.11.

⁵⁶⁷ Evaluation, p. 52.

⁵⁶⁸ <https://www.consilium.europa.eu/media/44235/st08483-en20.pdf>

of next-generation products entering the market. To that end, the Council of the European Union has called on the European Commission to submit a draft directive to the EU Council, which would allow to arrive at a position on the new categories of products that have appeared after the adoption of the current Tobacco Directive.

2. Harmonization in the scope of the definition of tobacco products and other products containing nicotine

As mentioned in the introduction, the proper definition and classification of provisions applicable to products that constitute an alternative to the conventional tobacco products should serve as a foundation for the harmonization of those provisions. While the hitherto division of tobacco products, as introduced by the provisions of the Directive 2011/64/EU, has been mirrored under the fiscal provisions of the Member States that effected their transposition, the provisions on the products that constitute alternatives to tobacco products have been drawn up and implemented by the Member States independently, due to the absence of harmonized models.

As of now, almost all of the Member States already have regulations in the scope of taxing novel tobacco products in their legal systems. It would then appear that the standards of taxation for those products have been already set. Those standards, along with good practices, should be taken into account by the European Commission while drafting the wording of the new excise duty rules. According to the above conclusions of the EU Council, in order to meet the current and future challenges related to the functioning of the internal market and to avoid legal uncertainty as well as regulatory discrepancies in the EU, the European Commission should carry out harmonization of the definition and the fiscal treatment of novel tobacco products that substitute tobacco (such as e-cigarette liquids and heated tobacco products), including products containing nicotine, while taking the respective good practices and expertise acquired in that regard by the Member States into account. Moreover, the European Commission should consider the features of those products and their method of use while drafting the rules of their taxation.

As regards tobacco products subject to heating without burning tobacco (which correspond to novel tobacco products according to the AED), as many as 21 Member States – out of 22 that decided to tax that category of products – have introduced a separate category of excise duty, defining it as a novel tobacco product, tobacco

intended for heating, or as a smokeless tobacco product. Those Member States include: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Slovenia. Six Member States that await the recasting of the 2011/64/EU Directive and did not decide on the creation of a separate category for excise duty are Estonia, Ireland, Malta, the Netherlands, Spain and Sweden. Virtually all Member States have taken the weight of novel tobacco products as their tax base. Only Lithuania, Italy and Hungary tax those products by the amount of units. On this point, it is at the same time worth mentioning that the adoption of taxation on the weight of a product appears most reasonable, as of now. That follows from the fact that novel tobacco products show on the market in various forms, e.g. a tobacco roller, loose tobacco, or even tobacco capsules intended for heating. In that context, indicating a tax rate per unit could lead to abuse in the scope of excise duty, owing to the varying form and weight of products.

In a manner similar to tobacco for heating and as regards electronic cigarette liquid, the majority of the Member States have resolved to subject those products to taxation without awaiting for the recasting of the Directive 2011/64/EU. As of the time of writing, no less than 18 States have ventured to stipulate a separate excise category. Those states include: Belgium, Bulgaria, Croatia, Czechia, Denmark, Finland, Greece, Cyprus, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Sweden. In addition, Slovenia, Germany and Estonia tax electronic cigarette liquid within the framework of the aggregate category of “other nicotine products”. Only 6 countries, i.e. Austria, France, Ireland, Malta, the Netherlands and Spain do not consider electronic cigarette liquid to be excise goods. It is worth noting that electronic cigarette liquid is subject to taxation within the decisive majority of the above-mentioned states irrespective of the nicotine content. Only a few of the Member States condition the taxation on the content of nicotine within the goods, and those include e.g. Denmark, Sweden, Slovenia, Italy and Portugal.

Following in the wake of the regulations on novel tobacco products and on electronic cigarette liquid, a part of the Member States have decided to introduce a separate definition of nicotine pouches into national laws. Those Member States are: Bulgaria, Czechia, Denmark, Finland, Greece, Luxembourg, Romania and Slovakia. A further five Member States, i.e. Estonia, Hungary, Italy, Latvia and Sweden have taxed

nicotine pouches within the category of “other nicotine products”. Other Member States, including Poland, work on the definition of the category for nicotine pouches and the taxation thereof by excise duty.

Due to the autonomous nature of the respective directives in the scope of the matter governed thereby, definitions that are essential for classification of a given product as excise goods should be formed. However, before definition of the respective categories of products, at least two categories of tobacco products subject to harmonization should be distinguished. An acceptable criterion could be found in distinguishing between, on one hand, tobacco products consumed by burning tobacco, such as cigarettes hitherto in use, smoking tobacco, cigars and cigarillos, and products which do not require burning for their consumption. The latter category could include such products as the e-cigarette liquid, novel tobacco products, or nicotine pouches mentioned above. A possible division could also be found in laying down three categories of those products, i.e. tobacco products, the consumption of which occurs by burning tobacco,⁵⁶⁹ nicotine products,⁵⁷⁰ and a separate list of novel tobacco products, that is products, in which nicotine is released not as a result of consuming the product by the burning thereof, but by its heating. A list consisting in a tripartite division appears to be the most comprehensive, as it covers all the categories and, at the same time, reflects the form of consumption of tobacco products. The latter could allow for introduction of differentiation in the level of taxation, depending on the manner in which nicotine is provided. The products intended for burning would be subject to the highest taxation, products that include tobacco for heating would be taxed in a lower manner, whereas products without tobacco would be taxed the lowest. For the purposes of definition, the division of the respective products into e-cigarette liquid, nicotine pouches, as well as conventional tobacco products already defined under EU law should be taken into account.⁵⁷¹

On the definitions of products that may apply to the new alternative products, it was posited under the conclusions of the EU Council that the definitions of tobacco products for the purposes of excise duty could be based on the classification used for customs

⁵⁶⁹ Under this report, the wording of “conventional tobacco products”, i.e. cigarettes, smoking tobacco, cigars, and cigarillos, is used.

⁵⁷⁰ The list of nicotine products would include three categories of products, i.e. nicotine pouches, e-cigarette liquid, and single-use electronic cigarettes.

⁵⁷¹ Cf. Article 2,3,4, and 5 of the Tobacco Directive.

purposes, as adopted in the EU Combined Nomenclature. The new Harmonised System (HS) code of 2022 reflects the various features of new products, as well. Moreover, HS 2022 was put to discussion and unanimously voted in at the EU Council during the adoption of the common EU position for the World Customs Organization's Harmonized System Committee (WCO HSC). In relation to that, the definitions of products in Tenders Electronic Daily (TED) may contain only a reference to the 8-digit customs code. As regards products not yet covered by the scope of TED, the simplest definition could refer only to the 8-digit customs code, as provided in the directive on the energy tax and the directive on alcohol, supplemented by additional criteria where necessary (but not mandatorily). "Without combustion" is considered to be an explicit descriptor of a product under HS 2022, as well as under the excise duty definitions for heated tobacco products set out under the national laws of 21 EU Member States.

The final important element to be considered in the context of harmonization of the definition of excise goods at the European Union level is the implementation of the definition of unmanufactured tobacco and subjecting it to the monitoring system within all the Member States. As posited under the assessment of the European Commission of 10 February 2020 referred to above, the lack of oversight over the supply chain, including over raw tobacco in particular, and the risk of tax avoidance due to the growing illegal manufacturing of cigarettes in the EU, remain a constant issue. While some Member States, including Poland, have introduced specific fiscal and oversight measures in order to monitor the production and trade in raw tobacco, the absence of harmonization in that regard at the level of the European Union substantially affects the effectiveness of those mechanisms. It would appear that the European Commission, taking into account the model implemented in Poland, should consider the possibility of introducing a definition dedicated for such tobacco, fashioned after "raw tobacco" defined under the Polish AED, and subjecting those goods to control – while potentially extending the functionality of the extant EMCS excise goods monitoring system.

3. Structure of Taxation As Regards Tobacco Products and Other Products Containing Nicotine

Definitions are the first of several elements of harmonization that allow for the adoption of further standards, as regards the technical elements of a tax. The technical elements of a tax, as set forth in the directives on the taxation by the excise duty, include the

setting of the tax base and the amount of the tax rates due in their scope. Given the above, the first element subject to regulation should be the tax base. Its adoption ought to be dependent on the specific features of a given product. It is worth noting that the setting of a uniform tax base is impossible due to the variety of the given categories of alternatives for conventional tobacco products, following e.g. from their state of matter. In the case of single-use e-cigarettes, the volume of the liquid contained in that product should be subject to taxation. However, in the case of nicotine pouches, the tax base should be set in units of net weight of a given product, e.g. in grams or kilograms. In turn and as stated above, where novel tobacco products are concerned, the tax base should be constituted by the weight of the mixture contained in the product, expressed in kilograms.

The amount of tax rates, or rather the minimal levels of taxation due to the variation in the tax base recalled above, should also be individually set for each and every product constituting an alternative for the conventional tobacco products. The minimal levels of taxation should take several factors into account, i.e. the fiscal interest of the Member States, the need to ensure legal certainty, upholding the continuity of growing and manufacturing of tobacco, which is significant against the background of the structure of the crops in certain Member States, aspiration to prevent illegal production and manufacturing of tobacco, preventing the trafficking of ready-made tobacco products from third countries, as well as interests of farmers and entrepreneurs dealing with the cultivation and manufacturing of tobacco. The above factors should undoubtedly be taken into account, yet it must be stressed that it is possible to introduce, into the provisions of the directive itself, a maximum level of tax rate indexation akin to the “roadmap”. Such a solution would be undoubtedly beneficial, as it could ensure the certainty of trade within the common market, one of the fundamental objectives of the European Union. The stipulation of the maximum level of tax rate indexation would also prohibit the Member States from excessively and unrestrictedly index the national tax rates, which could negatively impact the freedom of movement of goods within the common market. Due to variation in setting tax rates for tobacco products and their alternatives in the respective Member States, fixing the annual maximum level of indexation would be a welcome solution.

An additional factor bears additional description, as it ought to significantly influence the setting of tax rates, both for conventional and alternative tobacco products.

That factor is the degree of adverse health effects as regards a given tobacco product or an alternative thereto. Where lesser adversity for health is concerned, the range of taxation levels adopted pursuant to the Tobacco Directive should also be lower. In that regard, at the beginning of this part, it is important to highlight the division into categories of products that are consumed through burning tobacco and products that do not feature a combustion process for the purposes of their consumption. In such a situation, products that do not require a combustion process to transmit nicotine into the human body should be taxed to a lower degree than e.g. cigarettes, cigars, cigarillos, or smoking tobacco. Undoubtedly, the appropriate criterion is found in more advantageous taxation of products that do not require the combustion process, as they are less noxious alternatives to the conventional tobacco products. At the same time, the stimulating function of taxation, the objective of which is to persuade consumers to choose less adverse alternatives, is being performed. Such legislative action may bring about beneficial solutions that are aimed to limit consumption of conventional tobacco products.

Lower taxation of alternatives serves also as a homage to the - reasonable and subject to ever-broader international recognition – concept of “harm reduction”. The policy of harm reduction consists in, according to many definitions, a strategy aimed at mitigating risks to personal and public health, associated with using tobacco products. Mitigation of harm relates to a number of pragmatic policies, provisions and actions, which either lessen the risks to health through the provision of safer forms of products or substances, or encourage less risky behaviour.

The above reasoning points to the need to update the Tobacco Directive with the new categories of products. Undoubtedly, due to the interests of the respective Member States, as well as those of the respective sectors of economy, that would not be an easy process, being stretched in time over at least several months, or even some years. However, the postulate aimed at systematisation of categories, definitions, the tax base, minimal levels of taxation, or ultimately the maximum level of indexation should feature as an element of setting a common standard. It is appropriate to argue for such a setting of technical elements in the scope of the directive that would allow a lower level of taxation for products that do not require combustion for transmitting nicotine into the human body. It is beyond doubt that the advances in technology have caused changes on the market of products containing nicotine, and that the need to

modify the directive follows from the necessity of approximation of laws in the context of the functioning of the common market.

FINAL CONCLUSIONS

Turning to the conclusion of the research carried out within the framework of the present work, it should be noted that the excise duty undoubtedly constitutes an important source of budgetary income, which follows from the permanent, significant share of that tax in the structure of budgetary income. A percentage decrease in the share of the excise duty in that structure follows from the increase of budgetary income from the tax on goods and services (VAT). A significant source of budgetary income within the internal structure of the excise duty is the income from taxing tobacco products and their alternatives. Those constitute ca. 30% in 2023 only, and ca. 31,5% of all income from the excise duty. The share of tobacco products in the structure of excise duty was successively growing since 2009. Fluctuations in that scope were caused primarily by an outgrowth of the share of the grey market in the market for tobacco products, caused by unplanned increases of tax rates that were introduced without due consideration and consultation. The stability of demand for tobacco products and their considerable fiscal burdens influence the fiscal efficiency of excise duty on those products, which is mainly caused by the diminishing share of untaxed goods coming from illegal sources - the confirmation of which is supplied by the data on sales of legally compliant goods and the data from the reports showing the dynamics of the share of illegal products in the tobacco market . An additional advantage is found in fiscal revenue from the alternatives for the conventional tobacco products, i.e. electronic cigarettes and novel tobacco products. Due to a dynamic increase of income from excise duty levied on those goods, it is plausible that the income from excise duty on tobacco products and their alternatives will maintain an upward trend.

Undoubtedly, the need to tax tobacco products is a result of the accession of Poland to the European Union. The conventional tobacco products are subject to harmonisation at the level of that supranational organisation. The approximation of laws in that scope is a result of the significant fiscal efficiency of excise duties on tobacco products, as pointed out above. Due to the inclusion of those products in harmonisation in all the Member States of the EU, the structural components of the tax are similar, being based on the Union model. However, the Union legislator left a margin of discretion to the Member States in the scope of configuration of rates for tobacco products and the list of exemptions (the Directive only provides for exceptions

that are optional). Tax rates must be configured in such a way so as to achieve a minimum level of taxation, constituting in essence a minimum tax rate on tobacco products. It should however be noted that while the conventional tobacco products were made subject to the harmonisation in the scope of excise duty, the alternatives for tobacco products were not. This means that the Member States are free to include some alternatives to tobacco products in taxation and separately configure the technical components of the tax thereon, independently of one another. The goods not subject to harmonisation at the EU level include: raw tobacco, electronic cigarette liquid, novel tobacco products, and nicotine pouches. However, the condition for the introduction of additional excise duties is that there must not be negative effects, such as the distortion of functioning on part of the common market. Thus, there must be observance of the Treaty rules on the prohibition of discrimination, and an abstention from fiscal solutions that have effects equivalent to customs duties. Undoubtedly, the solutions being introduced in Poland in the scope of taxation of alternatives to the conventional tobacco products may prompt a discussion on the amendments to the current Tobacco Directive.

The issue of the market for tobacco products and their alternatives should also be addressed. Excise goods show rigid demand, yet that rigidity does not apply to all excise goods, such as tobacco products and their alternatives, or to alcoholic beverages. As regards the alternatives to the conventional tobacco products in particular, that is a developing market that is only as of now garnering the acceptance of consumers. Thus, that market is significantly more vulnerable to fluctuations arising from the amendments to the rates of excise duty.

It is worth noting that, irrespective of the changes of the excise duty rates and their indexation, consumption of tobacco products was not restricted in a major manner, but there was a change of the structure of the market. Faced with the price increase for cigarettes, the consumers more often decided on purchasing cigarettes from a lower price segment, or on the purchase of smoking tobacco that constitutes an alternative for those products. The importance of cigars and cigarillos, as well as their share in the market for tobacco products, is only marginal due to the niche nature of those products. In turn, the market for alternatives to the conventional tobacco products is a dynamically developing market. It is worth noting that the fiscal income from electronic cigarette liquids and from novel tobacco products grew fourfold over the

span of two years. At the same time, they constitute a healthier alternative for conventional tobacco products, as the consumption of them, instead of involving burning, entails the intake of nicotine in the form of vapour or aerosol created due to heating tobacco. Undoubtedly, and in that aspect, this is a healthier form of consuming nicotine. In the case of the conventional tobacco products, nicotine is ingested alongside a number of tar substances created as a result of smoking tobacco. In the case of novel tobacco products and electronic cigarettes, there are no tar substances.

Furthermore, the grey market is of great importance in the context of the market for tobacco products. The decisive criterion for the entire segment of stimulants is the price of a given product. This means that the consumers may purchase cheaper goods, not necessarily from a legal source. Undoubtedly, the goods that remain on the grey market would be markedly cheaper than those that come from legally operating parties. As the fiscal burden on tobacco products is very steep, a very large price disparity appears. The grey market within the trade in tobacco products may consist in smuggling tobacco products from third countries, but also in illegal domestic manufacturing out of raw tobacco. The share of the grey market for tobacco products was subject to change over the span of years. It achieved its peak in 2015, only to gradually decrease and then to reach the lowest level noted hitherto, in 2024. However, the desire of reckless action on part of the Ministry of Finance, in order to maximise budgetary income, may lead to the new resurgence of the grey market, or even the black market. That follows from the current experience and the analysis of the state of the market, in a situation where the increases of tax rates for tobacco products were significant in relation to the changes of the purchasing power of currency. Where that was previously the case, the share of the grey market in the overall market for tobacco products increased.

In that context, a number of State activities in the scope of the attempts to curtail the grey market within the overall market for tobacco products should be noted. Undoubtedly, several activities contributed to curbing the grey market. Firstly, that is the case with taxation by the excise duty of raw tobacco, which constitutes raw material from which illegal tobacco goods could be manufactured. Secondly, so is the introduction of punitive tax regulations, i.e. an increase in tax rates for raw tobacco not marked with excise duty stamps, cigarettes, and smoking tobacco deprived of excise duty stamps and a maximum retail selling price, novel tobacco products, and electronic

cigarette liquid manufactured outside a tax warehouse. Thirdly, attention should be drawn to the influence of criminal tax sanctions as to the curtailment of the grey market. Fourthly, making criminal liability more severe in the case of illegal manufacturing of tobacco products in order to acquire a financial gain, and making that offence a grave offence with a minimum statutory sentencing limit of three years of imprisonment, made its impact. Those actions of the State caused the profitability of the criminal activities in the scope of illegal manufacturing of tobacco products and their alternatives to drop. In addition, a decrease of the share of the grey market in the overall market for tobacco products was also effected by the actions taken to expand the implementation of the informational-supervisory function. In the scope of those actions, the transportation of raw tobacco was made subject to the SENT road monitoring system, and there was the introduction of the Track and Trace system, both of which positively influenced the oversight of the trade in intermediate goods and finished tobacco products.

A novum within the framework of the provisions of the Act on the Excise Duty was the introduction of the so-called roadmap for excise duty. That legal regulation mainly pertained to alcoholic beverages and to tobacco products and their alternatives. As regards tobacco products, it consists in the introduction of annual indexation of excise duty rates on tobacco products and their alternatives, and in the achievement of the target tax rate in 2027. Undoubtedly, having the previous amendments in the scope of the Act on the Excise Duty in mind, that was an innovative approach in the context of legislation. Firstly, the roadmap was made subject to wide consultation, within the consultation framework that included entities from the tobacco industry and tax advisors, and then the Ministry of Finance accommodated the views posited by those parties. Secondly, that was an act constituting an expression of rational and comprehensive legislation, for there was wide consultation, mentioned above, that yielded a solution taking account both the fiscal interest of the State and the interests of the tobacco industry. Thirdly, the roadmap constituted an expression of implementing medium-term fiscal policy, which is a relatively rare undertaking in the Polish state of affairs. Usually, the implementation of the fiscal policy consists in the day-to-day actions intended to maximise budgetary income. However, the adoption of the roadmap in its original form allowed businesspersons to prepare for the increases of excise duty, which were set *ex ante*. However, the fundamental objective of the

roadmap was the successive indexation of tax rates for tobacco products, in order to partially reduce consumption thereof due to the promotion of health. It should not be forgotten that the principal objective of any increase of tax rates is, above all, the maximisation of budgetary income. Due to the indexation of tax rates agreed upon *ex ante*, there was a state of foreseeability as regards fiscal law, in itself something novel in Poland. That was because the increase of rates was introduced by way of a statutory provision, which means an appropriate *vacatio legis* for the purposes of the adjustment on part of businesspersons to the change of the principles of taxation.

In principle, the two years of application of the roadmap in its original wording should be assessed positively, as that legal solution met a number of conditions voiced by the representatives of the academia, the legal practitioners, and the businesses. In addition, the roadmap guaranteed stability and foreseeability of the law, allowing both preparation for the incoming changes and planning of actions for the future. Thus, that was an effective and appropriate implementation of fiscal policy, made in a considered manner and in agreement with the stakeholders. That was very unlike the hitherto practice of the Ministry of Finance to introduce amendments to fiscal law first and then wait for honours and acclaim, while simultaneously ignoring any critical voices. It should be underlined that the budgetary income did not decrease despite the successive increase of fiscal rates. In turn, the share of income from the excise duty on tobacco products and their alternatives increased in proportion to the other products and goods taxed with the excise duty. This also means that the share of the grey market in the sector of tobacco products did not rise. The above proves that a rational and considered fiscal planning causes the implementation of legal solutions that are mutually beneficial for the fiscal interests of the State and for the business.

Regrettably, on 2 August 2024, a bill aimed at nullifying the positive changes made by the introduction of the roadmap was made available at the website of the Governmental Centre of Legislation. As it is, the Ministry of Finance drew up a bill that significantly amends the current rules of the roadmap. It is built upon a premiss of a drastic change to the indexation of rates, by their increase to a degree much greater than provided for under the current roadmap.

The wording of the bill so presented denotes a return to the disgraceful traditions of introducing the amendments to fiscal legislation from the 2000-2010 years, as well as to those that came later, all of which were rightly criticized by the scholarship.

The premiss for the proposed amendments were made public at the beginning of July 2024, and no later than in August of the same year a bill was drafted that not only amends the roadmap, but also subjects vaporisation equipment to taxation. The bill was drafted independently of the fact that there is legislative work underway on a different bill that was to introduce taxation of nicotine pouches by excise duty. Such behaviour, in itself, is a flagrant violation of legislative technique and constitutes evidence of a failure to consider the amendments at issue, apart from the absence of any idea of genuinely implementing the fiscal policy as regards the excise duty on tobacco products and their alternatives on part of the Ministry of Finance. Such a short period between a notice on the planned changes and the drafting of the bill neither allows for a precise drafting of legal provision, nor for a proper impact assessment. The time that passed from providing the information on the planned amendments to the general public, to the publication of the bill suggests that the only premiss of the Ministry was the maximisation of budgetary income. After all, the year 2024 is setting a record level in the context of the budgetary deficit.

As to the statement of reasons for the bill, it contains unpersuasive arguments that were to explain the proposed interference with the contents of the roadmap. It is not comprehensible to rely on the increase of inflation that allegedly requires indexation, irrespective of the fact that, percentage-wise, the increase of rates for the respective tobacco products and their alternatives is different for the respective categories of products. It is also incomprehensible why exactly the rates are to be indexed due to the ongoing armed conflict between Russia and Ukraine. In addition, the Ministry of Finance points to the need of increasing the amounts of PLN rates due to the increased availability of tobacco products and their alternatives among minors. However, it may be sufficient to make the sanction for a contravention (which the sale of tobacco products to minors is) more severe, or to change its status from a contravention to an offence. The statement of reasons partly references the health-promoting issues, but that argument is also misconceived, as the roadmap in the scope of alcoholic beverages is not subject to modification. However, consumption of alcoholic beverages is no less harmful to health than smoking tobacco, and in addition produces very negative societal and economic effects. In that respect, the statement of reasons for the bill appears to conceal the fiscal objective actually being implemented.

It is worth noting that the impact assessment is also incomplete, as it does not touch upon the issue of economic effects, repercussions for businesspersons, and the impact of the amendments on the market. The Ministry of Finance begins their argument with the increase in the disposable income amongst the citizens, yet they appear to forget that such income only grew due to the introduction of an exemption from the tax on goods and services (VAT) as regards basic commodities, as well as due to the freezing of energy prices, both of which were to limit the fall of the purchasing price of currency. However, in 2024 all those protective measures were discontinued, and thus there shall be a decrease in the disposable income of households. Thus, the argument at issue is misconceived. At the same time, the Ministry of Finance completely ignored the fact of market reaction on part of consumers to the increase of fiscal burdens in the scope of tobacco products and their alternatives. The consumers will plausibly choose a cheaper product, as shown by the information on the state of the market wherein the segment of Premium and Medium cigarettes undergoes successive reductions and the consumption of cigarettes from the Super Low segment grows.

A further aspect is found in the failure to consider the economic effects of the bill, as the Ministry of Finance did not address the problem that may appear in relation to the introduction of the changes at issue. The assessment thereof is limited only to cursory remarks that qualify as tautologies. The Ministry completely ignored the effects of introducing the regulation at issue for the widely construed tobacco industry, including those for manufacturers and processors of tobacco, manufacturers of tobacco products and their alternatives, wholesalers, and retailers. The rules of the roadmap introduced stability and foreseeability seldom seen in fiscal law, which prompted the parties active in the tobacco industry to implement long-term economic plans, believing that certain arrangements made within the framework of the roadmap shall be maintained. Meanwhile, a change occurs while the current regulation is in force. The Ministry makes an argument that the increase of the PLN rate of excise duty for tobacco products and their alternatives will apply only from 1 March 2025. However, having the fact in mind that the roadmap was a component of medium-term planning, i.e. over five years, the adopted *vacatio legis* of four months appears to be an insufficient period to prepare for the changes.

The regulatory impact assessment does not reference the effects on the market as regards tobacco products and their alternatives, as well. It is beyond doubt that the bill

drafted by the Ministry of Finance provides for a truly rapid increase in taxation of tobacco products and their alternatives. The result of such a solution is the threat of proliferation of the grey market. As it was pointed out above, the consumers are often guided mainly by the price of goods when they make their choices, while the smuggled or illegally manufactured tobacco products and their alternatives will be markedly cheaper due to not being so severely encumbered by the fiscal burdens. The result of that may be the new rise of the share of the grey market in the overall market for tobacco products, and thus a drop in budgetary income from the excise duty. The growth of the grey market will in turn cause an increase of economic availability of tobacco products among the economically disadvantaged, minor persons included.

The entirety of the above failures causes the impact assessment to be defectively carried out. Its merits, if any, exist only from the perspective of the effects for the public sector. It should be added that, unlike the drafting of the bill for the original roadmap, the participation of business circles in the event of actions taken in relation to its amendment is negligible. In principle, the time-limit of 14 days adopted for public consultation of the proposed amendments might have rather indicated that the Ministry of Finance waited only for praise, while limiting meaningful discussion of the bill. It is worth noting that the adopted statute shall come into force from 1 January 2025, whereas the increase of rates shall occur from 1 March 2025. That proves the legal grace period to be insufficient. It should be stressed that there were announcements by the Government that the minimum grace period would last at least six months. However, only four months were left between the publication of the bill and the moment on which the statute is supposed to come into force. Above all, it should have been considered whether a change of the structure of the rate and a decrease of the percentage rate would be more preferable to an increase of the PLN rate, which would have mitigated the possibility of a price war between the manufacturers of tobacco products aiming to minimise the fiscal burden arising out of the application of the *ad valorem* rate.

Irrespective of the critical conclusions included in the present work and referring to the amendments to the AED as adopted on 18 October 2024, it is commendable in the context of the adopted and planned excise regulations, in particular:

- the broad list of definitions for tobacco products and their alternatives, corresponding to the specifics of respective products,

- the structure of taxation of the respective products, and
- the introduction of a medium-term plan for indexation of excise duty rates,

that Poland finds itself in the elite circles of Member States that implement the excise policy on the basis of dynamic changes occurring on the market in tobacco products and their alternatives. The solutions adopted in Poland as regards the taxation of tobacco products and their alternatives may serve as an example for the expected amendments to the Directive 2011/64/EU.

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