

Spanish project of Law n. 121/000033 on fiscal frauds

PSOE Amendment n. 203 regarding raw tobacco circulation

(Unofficial translation)

The problem

- Raw tobacco leaf is not included in tobacco products subject to taxation in Spain. The increasing diversion of raw tobacco leaf as raw material for the clandestine manufacture of finished tobacco products, included in the scope of the Finished Tobacco Product Tax (FTPT) applicable in Spain, by irregular operators not authorized or registered as manufacturers of finished tobacco products, as well as the direct or indirect sale of raw tobacco leaves to final consumers, is generating a significant illegal market for this product.
- The above represents a significant loss of effectiveness of the FTPT regime not only from the point of view of their collection, but also from that of its non-fiscal purpose, disincentives for behaviors which, like smoking, involve high social costs and are therefore considered highly harmful.
- This illegal market also poses an additional health risk to consumers, as both illegal production and supply to consumers do not comply with any of the health and marketing requirements imposed on legal products. Finally, the illegal trade in raw tobacco leaves causes significant damage to legitimate operators in the tobacco sector, for which it represents a substantial reduction in their income, a consequence of the increase in the production and legal distribution of tobacco products.

The solution

- For all of the above, it is considered necessary to adopt legislative measures to strengthen the capacities of the state bodies for the prevention and repression of this type of behavior.
- With regard to raw tobacco leaf, a control regime should be established applicable to operators of that product, placing a series of registration, accounting and information obligations on them, regulating the powers of the control bodies and establishing a specific sanction regime applicable in case of violation of the obligations.
- Amendment n. 203 to the project of Law: **”Control rules on raw tobacco leaves and sanctions regime”**

Section one, Scope

1. This article will be applicable to raw tobacco leaf operators and third party transporters of this product.
2. For the purposes of this article, raw tobacco leaf operators are natural or legal persons or entities without legal personality carrying out commercial activities whose object is the raw tobacco leaf that is located or circulates in the Spanish territory.

However, for the purposes referred to in this article, transporters acting on behalf of others will not be considered operators of raw tobacco leaf, subject to the specific obligations imposed on them in section 6 of this article.

Operators of raw tobacco leaf who are not established in Spanish territory must designate a representative domiciled in that territory in order to comply with the obligations set out in this article.

3. For the purposes of this article, the concept of raw tobacco leaf includes the leaves and other natural parts of the tobacco plant, once cured or dried, when they are not considered tobacco products in accordance with the provisions of article 59.4 of the Law 38/1992, of 28 December, on Special Taxes.

This concept does not in any case include the live plant or the cut plant that is not cured or dried.

Section two, Ban on the retail trade of raw tobacco leaves

1. The retail trade of raw tobacco leaves is prohibited.
2. For the purposes of this law, retail trade means the activity, carried out for profit, consisting in offering the sale of the supply of raw tobacco leaves to its final consumers, using or not an establishment and carried out with any means, including direct sales, distance sales, via the Internet or any other form of offer via communication systems.

Section three, Register of Raw Tobacco Leaf Operators and registration obligation

1. The Register of Raw Tobacco Leaf Operators (RRLO) is created, which will be unique for the entire Spanish territory, and will be located at the State Tax Administration, which will be responsible for its management and maintenance.
2. All operators of raw leaf tobacco must register, before starting their activity, in the RRLO. To this end, the operator, together with his identification data, must describe in detail the commercial activity he intends to carry out and the use and destination that he will give to the raw tobacco leaf, indicating the establishments and storage rooms where he will develop its exercise. In the case of operators subject to compliance with the authorization or registration obligations provided for by the regulatory regulations of the Tobacco Market, compliance with these obligations will constitute a requirement for registration in the RRLO.
3. Any changes to the declared data must be communicated in advance to the State Agenda of the Tax Administration.
4. Registration in the RRLO will result in the assignment of a tobacco leaf operator number.

Section four, Accounting obligations

1. Raw tobacco leaf operators must keep a computerized accounting system in which all operations of purchase, sale, entry or exit from the Spanish territory or of deposits or warehouses of raw tobacco leaves will be recorded.
2. In any case, the accounting must specify the date of movement, the quantity of product in kilograms, the identification of the supplier or customer, as well as the owner of the product when it is in a deposit or warehouse, and, in shipments, of the recipient, means of transport, place of delivery and number of the circulation document referred to in the next section.
3. Operators of raw leaf tobacco must keep the accounts referred to in this Section and the related supporting documents during the limitation period set out in Section sixteen.

Section five, Obligations relating to the circulation of raw tobacco leaves

1. All movement of raw tobacco leaf through Spanish territory, even if it begins or ends outside it, must be covered by a registration document, which must accompany the means of transport at all times.
2. **Before circulation** and, in any case, **with a minimum notice of twenty-four hours**, operators holding raw leaf tobacco that is about to be shipped from one establishment to another, **must notify the State Tax Administration Agency**, which will carry out a procedure for validating the data communicated.
3. The data that, in any case, the communication must contain are:
 - a) Name or company name, Tax identification number or VAT number and address of the sender, recipient and courier.
 - b) Address of the shipping establishments and destination and route that the means of transport will follow.
 - c) Quantity of product, in kilograms, and number of packages or containers of the same.
4. Any change in the data indicated must be communicated to the State Tax Administration Agency by the operator who made the communication referred to in point 2 above within twenty-four hours from the time when this change is detected.
5. The circulation document will consist of a paper copy, or on any digital medium, of the document in which all the data relating to the issue appear previously communicated to the State Tax Administration Agency once validated and in which there is a readable secure verification code (CSV).

Section six, Information obligations for the State Tax Administration Agency

1. Carriers of goods, when acting as employees in operations related to raw tobacco leaf, must notify the State Tax Administration Agency, at the time of the request for transport services and, in any case, before its beginning, the identification of the registration document,
2. Transporters of raw tobacco leaves on behalf of third parties must report any change of route, destination or recipient ordered by the operator or by a third party on his behalf, other than that recorded in the registration document, identifying the address of the new destination and, if applicable, of the new recipient, the State Tax Administration Agency will have a period of four hours to give instructions to the carrier, after which, unless otherwise indicated by the first, the second can proceed with the delivery of the leaf of raw tobacco according to the new operator's instructions.
3. The recipient of the shipment of the raw tobacco leaf and the holder of any intermediate storage, who are established in the national territory, must notify the State Tax Administration of the respective receipts, within twenty-four hours from the same, expressly indicating the amount received and any anomaly or discrepancy with respect to the data declared in the circulation document. In the event that the place of delivery is not within the national territory, the notification of receipt by the recipient will be made by the owner operator referred to in point five.2.

Section seven, Powers of the supervisory bodies

1. The control bodies for the purposes set out in this article are those of the State Tax Administration Agency to which its organizational regulation attributes the competence in the matter of control of raw tobacco leaf.
2. The officials of the State Tax Administration Agency integrated into the supervisory bodies will have the following powers for the exercise of their functions:
 - a) Access to establishments and premises where operations subject to control are carried out or if there is evidence of them.

When in the exercise of control actions it is necessary to enter the constitutionally protected domicile of the debtor, the consent of the first or the appropriate judicial authorization must be obtained.

- b) Examination of the documentation, accounting and records, including computerized ones, of the subjects bound by this article.
 - c) Request information relating to operations with raw tobacco leaves, from the operator himself or from third parties related to it for reasons of this.
 - d) Recognition of means of transport that could carry the raw tobacco leaf.
 - e) Physical recognition of the product, weighing, creation of sketches and floor plans, creation of photographs and video-graphic footage of the structures and the product.
 - f) Acquisition of samples for subsequent analysis by the competent laboratory.
3. The obliged subject who has been requested by the control body must present himself, himself or through his representative, at the place, day and time indicated for the exercise of the actions, and must provide or have available to this body the documentation and other required elements.
4. Operators, transporters and owners or managers of warehouses and other places where the raw tobacco leaf is stored will be obliged to facilitate to the officials responsible for the control governed by this article, the exercise of the aforementioned powers, and provide them with the due collaboration for the performance of their functions.
5. The control actions will be documented in proceeds, which are of the nature of public documents and provide evidence of the facts that motivate their formalization, unless proven otherwise. The facts contained in the proceedings and accepted by the person assisting the officials carrying out the control actions, as well as their manifestations, are presumed to be true and can only be rectified by themselves by proving that they have committed a factual error.
6. The officials who carry out the control functions provided for in this section will be considered agents of the Authority and will have to prove their status, if required, outside public offices. Public authorities will provide them with the protection and assistance necessary for the exercise of their supervisory functions.

Section eight, Sanctioning regime

1. Intentional or culpable acts or omissions with any degree of negligence that are characterized and sanctioned as such in this article are infractions.
2. The administrative offenses provided for in this article will be classified as very serious, serious and minor.
3. The performance of several acts or omissions constituting several crimes will result in the imposition of the sanctions that proceed for each of them.

Section nine, Offenders and responsible parties

1. Natural or legal persons and entities mentioned in Article 35.4 of Law 58/2003, of 17 December, General Tax, who carry out the behaviors characterized in the following sections.
2. Anyone acting as a de facto or legal administrator of a legal person, as well as the natural or legal persons who make up the entities referred to in Article 35.4 of Law 58/2003, of 17 December, General Tax, will be jointly and severally liable for offenses for which offensive subjects are responsible.

Section ten, Types of infringements (1)

1. The following behaviors are very serious:
 - a) Failure to comply with the obligation to register in the Register of raw tobacco operators referred to in the third section.
 - b) Absolute failure to keep the inventory accounting provided for in section four.
 - c) The keeping, provided for in section four, of a different accounting that does not allow to know the real situation of the operator of raw leaf tobacco.
 - d) failure to comply with the obligation of prior notification referred to in section 5.2.
 - e) The delivery of the raw tobacco leaf to places or recipients other than those established in the circulation document without this circumstance being communicated to the Agenda of the State Tax Administration within the terms and in the manner provided for in points five and six .
 - f) The inattention to the instructions of the State Agency for Tax Administration in the case provided for in section six.2. when these have been supplied to the carrier within the time limit specified therein.
 - g) The lack of prior notification referred to in section five.2. when it concerns the establishments and the use of raw tobacco leaf.
2. The following behaviors constitute serious crimes:
 - a) The circulation of raw tobacco leaf related to counterfeiting not accompanied by the circulation document referred to in section five, or covered by circulation documents in which the data provided for in section five has been falsified or incorrectly filled in. However, the existence of differences in the quantity of the product transported that do not exceed 10 percent of the quantity that appears in the registration document will not be considered a serious infringement.
 - b) Failure to comply with the information obligations referred to in section six when they do not constitute very serious crimes.
 - c) The retail trade of raw tobacco leaves,
 - d) The resistance, obstruction, justification or refusal to investigate by the competent bodies for the control of the obligations under this article.

Section ten, Types of infringements (2)

To this end, the following conduct of the person under investigation, the alleged offender or the person sanctioned constitutes resistance, obstacle, excuse or refusal:

- I. Failure to facilitate the examination of the supporting documentation of the assets, means or tools and of the activities subject to the investigation or of the documentation necessary for the processing of the penalty file.
 - II. Failure to comply with any duly notified requirement.
 - III. Failure to appear, except for justified reasons, in the place and time indicated.
 - IV. Deny or improperly prevent the authorities, officials or police from entering or preventing the authorities, officials or police from entering or preventing the recognition of means of transport, premises, machines, systems and operations related to filing of the file or execution of the sanction.
 - V. The coercion of authorities, officials and forces in the exercise of the functions entrusted to them by law.
 - VI. Any other action by the alleged offender or the person under investigation aimed at delaying, hindering or obstructing the proceedings.
3. The following are minor offenses behaviors:
- a) The circulation of raw tobacco leaves subject to circulation documents in which there are differences in the quantity of product transported that exceed 5 percent of the quantity contained therein and do not exceed 10 percent.
 - b) The issue of circulation documents in which the data have been falsified or filled in incorrectly when it does not constitute a serious crime.
 - c) Any other irregularities or violations of the obligations and measures established in this article when they do not constitute very serious or serious infringements.

Section eleven, Sanctions

1. The following sanctions will be imposed for the commission of very serious crimes:

- a) The offenses referred to in letters b), c), d), e) or f) of paragraph ten.1 will be sanctioned with a fine of 40 euros for each kilogram of raw tobacco leaf that is involved or related to such infringements, with a minimum of € 10,000.

When, for reasons attributable to the offender, it is not possible to determine the quantity of raw tobacco leaf involved or related to the crime, a fixed financial penalty of 100,000 euros will be imposed.

- b) In the event of a very serious violation, letters a) or g) of section ten.1, a fixed pecuniary sanction of 50,000 euros will be imposed.

2. The following sanctions will be imposed for the commission of serious crimes:

- a) The infractions referred to in letters a), b) or c) of section ten.2 will be sanctioned with a fine of 20 euros for each kilogram of raw tobacco leaf that is involved or related to such infringements, with a minimum 5,000 euros.

When, for reasons attributable to the offender, it is not possible to determine the quantity of raw tobacco leaf involved or related to the offense, a fixed fine of 50,000 euros will be imposed.

- b) The resistance, obstruction, excuse or refusal referred to in section ten. d) of this Law, will be sanctioned with a pecuniary sanction equal to:

- I. In the cases provided for in section ten 2. d) 4th and 5th with a fixed financial penalty of 50,000 euros, provided that, in the latter case, it is not considered a crime.
- II. In the other cases of section ten.2. d), with a fixed financial penalty of 25,000 euros.

III. The following sanctions will be applied for the commission of minor offenses:

- a) The offenses referred to in letters a) and b) of point ten.3 will be sanctioned with a fine of 10 euros for each kilogram of raw tobacco leaf that is involved or connected to such offenses, with a minimum of 2,500 euros.

When, for reasons attributable to the offender, it is not possible to determine the quantity of raw tobacco leaf referred to in the previous paragraph, a fixed fine of 5,000 euros will be imposed.

- b) The offenses referred to in letter c) of paragraph ten.3 will be sanctioned with a fixed pecuniary sanction of 5,000 euros.

Section twelve, Graduation of sanctions

1. The final amount of the penalty will be increased by 20% in the event of repeated infringements.

The repeated commission of infringements will be welcome when the offensive subject has been sanctioned for any administrative infringement provided for in this article by firm administrative resolution within four years from the date of commission of the infringement

2. In the event of competition for infringements, when one of them has led to the discovery of raw tobacco leaves, only the most serious infringement will be sanctioned.

Section thirteen, Confiscation

1. Any sanction imposed for the commission of offenses classified in this article as very serious or very serious will entail, as an ancillary sanction, the confiscation of the raw tobacco leaf which is the subject of the infringement and of the goods, means and instruments with which the infringement has been prepared or performed and, where applicable, the resulting effects.
2. If, for any circumstance, including that indicated in the next section, it is not possible to confiscate the goods, effects or instruments indicated in the previous section, the confiscation will be agreed for an equivalent value of other goods belonging to the transgressors.
 - a) Goods other than raw tobacco leaf, supports and instruments of the crime will not be confiscated:
 - b) When they belong to a third party in good faith not responsible for said violation that has acquired them legally.
 - c) When they are legal for trade and their value is not related to the nature or gravity of the crime, the body competent to impose the appropriate sanction may not consent to the confiscation or partially consent to it.
3. The assets, means and instruments definitively confiscated with a final resolution will be assigned to the State. The assets of legal trade will be alienated from the State Agency of the Tax Administration.

Section fourteen, Apprehension and destination of the goods

1. The authorities, officials and forces who, in the exercise of their powers, are aware of behaviors or events that may constitute an administrative offense provided for in this article, will proceed with the precautionary detention of the assets, means and instruments which, in accordance with section thirteen of this article, may be confiscated.
2. The authorities, officials and forces referred to in the preceding number, must increase the diligence of the facts, which they will deliver to the competent body for the instruction of the sanctioning procedure, making available the assets, means and instruments seized, except tobacco leaves on which we will act in the manner provided in the following section.

Section fifteen, Destruction of the seized raw tobacco leaf

The authorities, officials and forces referred to in the previous paragraph will make the seized raw tobacco leaf available to the Commissioner for the Tobacco Market, in order to proceed with its destruction, which will be ordered by the competent body to resolve the procedure within three months, after which the Commissioner for the Tobacco Market will proceed to its destruction, notifying the competent body for the resolution of the procedure.

Section sixteen, Prescription

The offenses provided for in this article will prescribe all four from their realization. The collection of the sanctions imposed will prescribe four years after its firmness.

Section seventeen, Sanctioning procedure

1. The competence for the elaboration and resolution of the sanctioning procedure in question will correspond throughout the Spanish territory to the State Tax Administration Agency, being attributed to the entity determined in its organizational rules.
2. The data, evidence or circumstances that act or have been obtained in any criminal or administrative action or procedure, including the application of taxes, and which will be taken into account in the sanctioning procedure must be formally incorporated therein prior to the proposal. of resolution.
3. The collection of the sanctions imposed in accordance with the provisions of this chapter will correspond to the agenda of the State Tax Administration, both in the voluntary and in the executive period.

Section eighteen, Communications

All communications that, in application of the provisions of this article, must be made to the Agenda of the State Tax Administration, will be made electronically through the Electronic Headquarters of the Agenda of the State Tax Administration.

Section nineteen, Additional Regulations

In all that was not provided for in this article, Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, and Law 40/2015, of October 1, of the Legal Sector Regime of the public sector. However, the notifications that take place following the procedure governed in this article will be those provided for in section 3 of chapter 3 of Title III of Law 58/2003, of December 17, General Taxes.

Section twenty, Regulatory development

1. The original government shall make the arrangements necessary for the development of the provisions of this article.
2. Without prejudice to the provisions of the previous section, the Head of the parent company Ministry of Finance dictates the necessary provisions for the regulation of the contents, data and forms relating to the communications provided for in this article and the methods and requirements for their implementation.
3. The parent company of the Ministry of Finance establishes the relevant coordination formulas with the other Public Administrations and Authorities competent in the matter.

Section twenty-one, Treatment of personal data

The personal data provided pursuant to this article will be processed in order to effectively apply the tax on tobacco products through the administrative control of economic activities carried out with raw tobacco leaves. This treatment will comply with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 and with the Organic Law 3/2018, of 5 December, on the protection of personal data and the guarantee of digital rights. The information required by Article 13 of the Regulations regarding the possible treatments and the exercise of rights on the same will be provided in the Electronic Headquarters of the Tax Agency.

Section twenty-two, Exchange of information

The competent national authorities can exchange with the competent authorities of other EU member states all information that may allow them to prevent, investigate and suppress tax and customs fraud.

MOTIVATION (1)

Raw tobacco leaf, as a raw material, is not included among the tobacco products whose taxation contemplates the Council Directive 2011/64 / EU, of 21 June, on the structure and rates of the special tax applied to tobacco products nor is therefore subject to the Tax on Tobacco Products governed by Law 38/19 92, of 28 December, on Special Taxes. Said raw tobacco leaf is not subject to taxation either in the Autonomous Community of the Canary Islands or in the cities of Ceuta and Melina, where tobacco products are subject to other specific taxes, given the exclusion of that Autonomous Community and of said cities in the 'scope of the aforementioned directive.

However, the increasing diversion of raw tobacco leaves for the manufacture of tobacco products, included in the scope of the tax on tobacco products or in that of other similar tax data governing in the Canary Islands, Ceuta and Melilla, by irregular traders unauthorized or registered as manufacturers of tobacco products in the special tax management offices, as well as the direct or indirect sale of raw tobacco leaves to final consumers, is generating an illegal market for this product, which has become evident with the high number of seizures of raw tobacco that have occurred in recent years and which represents a significant loss of effectiveness of these taxes, not only from the point of view of collection, but also from the point of view of their additional purpose which discourages habits which, as smoking carry high social costs and are therefore considered highly harmful.

This illegal market also poses an additional health risk to consumers as both illegal production and supply to consumers do not comply with any of the health and marketing requirements imposed on legal products. Finally, the illegal trade in raw tobacco leaves causes significant damage to legitimate operators in the tobacco sector, for which it represents a substantial reduction in their income, as a result of the increase in the illegal production and distribution of tobacco products.

The phenomenon of illicit trade in raw tobacco leaves is recent and affects most of the countries of the European Union. To reduce its impact, some countries such as Poland, Portugal, the Czech Republic or the United Kingdom have chosen to establish national measures to subject raw tobacco leaves to a specific tax or to make it possible to have greater control over the circulation of tobacco.

MOTIVATION (2)

For all of the above, it is considered necessary to adopt a control regime for raw tobacco leaves, as raw material for tobacco products, including related penalties, in order to reduce the risk of health tax fraud and disturbances in the tobacco market. associated with its irregular traffic.

As indicated, the illicit trade in raw tobacco leaves carries not only a tax risk associated with its use in the manufacture of tobacco products taxed by the specific tax, but also health and competition on the tobacco market. Furthermore, in the tax area itself, these risks affect various regulations, given the tax specialties of the Autonomous Community of the Canary Islands and the cities of Ceuta and Melilla. All this suggests establishing the control regime alluded to in the previous paragraph by means of an independent regulation, such as this Law, and without modifying other pre-existing health or fiscal regulations.

For all these reasons, an article relating to a control regime on raw tobacco leaves is incorporated into the law. This regime will be applicable to raw tobacco operators, who have to comply with a number of registration, accounting and circulation obligations. Similarly, a ban on the retail sale of raw tobacco leaves by any means is established. Section six establishes a series of information obligations for carriers and operators when carrying out operations other than the delivery of raw tobacco leaves to the manufacturing industry. The seventh section establishes the powers of the supervisory bodies. Finally, the articles from eighth to sixteenth place establish the system and the sanctioning procedure applicable to non-compliance with the obligations set out in this article.

The Tax Agency is the body responsible for the application of these control rules and the application of the sanctioning regime, without prejudice to collaboration with other competent administrations. Considering the damage that this fraud causes to the collection of taxes, the taxation of tobacco products that can be made with raw tobacco leaf was taken into account at the time of filing the envisaged penalties.