Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 1 February 2018 [1]

Case C-30/17

Dyrektor Izby Celnej w Poznaniu
v
Kompania Piwowarska S.A. w Poznaniu

(Request for a preliminary ruling
from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Tax provisions — Harmonisation of laws — Excise duties — Directive 92/83/EEC — Article 3(1) — Alcohol and alcoholic beverages — Beer — Flavoured beer — Degrees Plato — Method of calculation)

1. This request for a preliminary ruling concerns the interpretation of Article 3(1) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages. [2]

2. This request was made in the course of proceedings between the Dyrektor Izby Celnej w Poznaniu (Director of the Customs Chamber in Poznań, Poland) and Kompania Piwowarska S.A. w Poznaniu ('Kompania Piwowarska'), a company which produces beer and, in particular, flavoured beer, concerning the determination of the method of calculating degrees Plato in order to establish the basis for calculating the excise duty payable by Kompania Piwowarska on the sale of flavoured beers for November 2004.

3. By the question referred for a preliminary ruling the Court is asked to rule on whether, in the determination of the basis of assessment for flavoured beer using the Plato scale, account should be taken of the aromatic substance and sugars added following the completion of fermentation.

4. The interpretation that the Court is asked to provide will be the first interpretation of Article 3(1) of Directive 92/83 and of 'degrees Plato'.

5. In this Opinion, I shall set out the reasons why I take the view that, in the determination of the basis of assessment for flavoured beers using the Plato scale, account should not be taken of the aromatic substance and sugars added following the completion of fermentation.

1 Original language: French.
2 OJ 1992 L 316, p. 21.

I. Legal framework

A. EU Law

1. Directive 92/12/EEC

6. Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [3] provides:

'Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3). ...'

2. Directive 92/83

7. The third, fourth and fifth recitals of Directive 92/83 are worded as follows:

'whereas, it is important to the proper functioning of the internal market to determine common definitions for all the products concerned;

whereas, it is useful to base such definitions on those set out in the combined nomenclature in force at the date of the adoption of this Directive;

whereas, in the case of beer, it is possible to permit alternative methods of calculating the duty on the finished product'.

8. Section I of that directive is entitled 'Beer'. Within that section, Article 2 of that directive provides:

'For the purposes of this Directive, the term "beer" covers any product falling within CN code 2203 or any product containing a mixture of beer with non-alcoholic drinks falling within CN code 2206, in either case with an actual alcoholic strength by volume exceeding 0.5% vol.'

9. Article 3 of Directive 92/83 is worded as follows:

'1. The excise duty levied by Member States on beer shall be fixed by reference either:

– to the number of hectolitre/degrees Plato,

or

– to the number of hectolitre/degrees of actual alcoholic strength by volume

of finished product.

2. In assessing the charge to duty on beer in accordance with the requirements of Directive 92/84/EEC, [4] Member States may ignore fractions of a degree Plato or degree of actual alcoholic strength by volume.

3 OJ 1992 L 76, p. 1.

4 Council Directive of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29).

In addition, Member States which levy the duty by reference to the number of hectolitre/degrees Plato may divide beer into categories consisting of no more than four degrees Plato per category and charge the same rate of duty per hectolitre on all beers falling within each category. Such rates shall invariably equal or exceed the minimum rate laid down in Article 6 of Directive 92/84 …, hereinafter referred to as the minimum rate.'

10. Article 5 of Directive 92/83 provides:

'1. Member States may apply reduced rates, which may fall below the minimum rate, for beer with an actual alcoholic strength by volume not exceeding 2.8% vol.

2. Member States may confine the application of this Article to products containing a mixture of beer with non-alcoholic drinks falling within CN code 2206.'

11. Section IV of that directive is entitled 'Intermediate products'. Within that section, Article 17(1) of that directive provides:

'For the purposes of this Directive the term "intermediate products" covers all products of an actual alcoholic strength by volume exceeding 1.2% vol, but not exceeding 22% vol and falling within CN codes 2204, 2205 and 2206 but not covered by Articles 2, 8 and 12.'

12. Article 28 of Directive 92/83 forms part of Section VII, entitled 'Exemptions', and provides:

'The United Kingdom may continue to apply the exemptions which it applied on 1 January 1992 to the following products:

– concentrated malt beverage the worts of which prior to fermentation were of a specific gravity of 1 200 of Original Gravity (47° Plato) or more;

– aromatic bitters of an actual alcoholic strength from 44.2 to 49.2% vol., containing from 1.5% to 6% by weight of gentian, spices and other aromatic ingredients and from 4 to 10% by weight of sugar, delivered in containers holding 0.2 litres or less of product.'

3. Directive 92/84

13. The second and seventh recitals of Directive 92/84 are worded as follows:

'whereas Directive 92/83... lays down provisions relating to the harmonisation of the structures of excise duties on alcohol and alcoholic beverages;

…

whereas the methods of taxing beer within the Member States vary, and it is possible to permit this variation to continue, in particular by laying down a minimum rate expressed as a charge related both to the original gravity and to the alcoholic content of the product'.

14. Article 6 of Directive 92/84 provides:

'As from 1 January 1993, the minimum rate of excise duty on beer shall be fixed:

– E*UR 0.748 per hectolitre/degree Plato*,

or

– *E*UR 1.87 per hectolitre/degree of alcohol

of finished product.'

B. Polish law

15. Article 68(1), (3), (4) and (5) of the ustawa o podatku akcyzowym (Law on excise duties, as amended) of 23 January 2004[5] is worded as follows:

'1. For the purposes of this Law, the term "beer" covers products listed in item 13 of Annex 2 and all mixtures of beer with non-alcoholic beverages classified under Heading 15.94.10 of the Polish Classification of Goods and Services (PKWiU) and CN code 2206 00, with an actual alcoholic strength by volume exceeding 0.5%.

…

3. The basis of assessment for beer is the number of hectolitres/degrees Plato of finished product.

4. The rate of excise duty on beer is PLN 6.86 (Polish zloty) [approximately EUR 1.63] per hectolitre for each degree Plato of finished product.

5. The minister responsible for public finances shall fix, by order, the methods of calculating the basis of assessment for beer, taking account of the bases of assessment which apply in the Member States.'

16. Paragraph 1(1) of the rozporządzenie Ministra Finansów w sprawie sposobu ustalania podstawy opodatkowania piwa (Regulation of the Minister for Finance on the methods of calculating the basis of assessment for beer) of 31 March 2004,[6] provides:

'For the purposes of calculating the basis of assessment for beer, 1 degree Plato equals 1% by mass of the dry wort extract calculated on the basis of the alcoholic strength and real extract in the finished product.'

II. The facts in the main proceedings and the question referred for a preliminary ruling

17. The dispute in the main proceedings is between the Director of the Customs Chamber in Poznań and Kompania Piwowarska, a company which produces traditional beer and flavoured beer, and concerns the determination of the method of calculating degrees Plato for the purposes of establishing the basis for calculating the excise duty payable by that company on the sale of flavoured beers for November 2004.

18. After initially submitting a tax return which took account of the ingredients added following the completion of the fermentation process in the basis of assessment for the flavoured beer and after paying that tax, Kompania Piwowarska sent the tax authority a corrigendum to that tax return and an application for a declaration that excise duty had been overpaid on the sale of flavoured beers. It submitted that the overpayment resulted from an incorrect degrees Plato measurement in so far as that measurement took account of the sugar added after fermentation.

5 *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland) 2004, No 29, heading 257.

6 *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland) 2004, No 70, heading 635.

19. The first-instance tax authority and subsequently the appeal body rejected the application for a declaration of overpayment on the ground that, for flavoured beer, the number of degrees Plato and, therefore, the amount of excise duty had to be calculated taking account of sugar-based aromatic substance in the finished product which had been added after the fermentation process.

20. Kompania Piwowarska brought an action before the Wojewódzki Sąd Administracyjny w Poznaniu (Poznań Regional Administrative Court, Poland) which, by judgment of 5 December 2014, annulled the decision of the appeal body and the previous decision by the Head of the Poznań customs office. That administrative court held that, when calculating the real extract content of the finished product, the aromatic substance that had been added to that finished product and, in particular, sugar and syrup, had to be deducted.

21. The Director of the Customs Chamber in Poznań brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) against that decision, relying in particular on the fact that the decision by the Wojewódzki Sąd Administracyjny w Poznaniu (Poznań Regional Administrative Court) infringed Article 68(3) and (4) of the Polish Law on excise duties and Paragraph 1(1) of the Regulation of the Minister for Finance on the methods of calculating the basis of assessment for beer, since those provisions, which are in accordance with Directive 92/83, do not, when calculating excise duty, allow the quantity of added extract resulting from the addition of aromatic substance in the form of syrup following the completion of fermentation to be deducted from the real extract.

22. Kompania Piwowarska repeated its argument that, in essence, the sugar added following the completion of fermentation cannot be regarded as a component of the dry wort extract and should not be included in the basis of assessment for the flavoured beer.

23. In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘In the light of Article 3(1) and the objectives of Council Directive 92/83 in the determination of the basis of assessment for flavoured beers using the Plato scale, must the extract resulting from the aromatic substance added following the completion of fermentation be added to the real extract of the finished product or is the extract resulting from the added substances to be disregarded?’

III. My analysis

A. Excise in the European Union

24. In the EU, excise rules consist of a general directive, Directive 92/12,[7] and directives which relate specifically to certain products, such as alcohol, tobacco and energy[8] providing for minimum harmonisation.[9]

25. Despite that legislation, and as already noted,[10] there is no broadly accepted definition of the notion of 'excise duty' in EU law.

26. Therefore, like Directive 92/12,[11] Directive 2008/118 does not define this notion and merely states, in Article 1(1) and in line with recital 9, that it lays down 'general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods', namely energy products and electricity, alcohol and alcoholic beverages and manufactured tobacco.

27. Nevertheless, the general system of Directive 92/12, and subsequently that of Directive 2008/118, attests to the fact that excise duties may be understood as specific indirect tax on the consumption of goods which has several objectives including, in particular, to provide revenue and to discourage the consumption of certain products.[12]

28. The purpose of the general directive is to contribute to the establishment of the internal market through the free movement of goods subject to excise duties.[13] Thus, that directive imposes the approximation of the laws of the Member States governing those types of tax so as to 'ensure that chargeability of excise duties is identical in all the Member States'.[14]

29. Since excise duty is a tax on consumption, it should become chargeable as near as possible to the end consumer and Article 6(1) of Directive 92/12 provides for the excise duty to become chargeable at the time of release for consumption or in equivalent situations.[15] Therefore, the chargeable event coincides with the manufacture or importation into the territory of the European Union of the goods subject to excise duty and the duty becomes chargeable when they are released for consumption.

7 Replaced by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2009 L 9, p. 12).

8 For alcohol, Directives 92/83 and 92/84; for tobacco, Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8), Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10), Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40) and Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24); for energy, Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19) and Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

9 Opinion of Advocate General Fennelly in *Braathens* (C-346/97, EU:C:1998:538, point 17). In that Opinion, Advocate General Fennelly stated that the harmonisation resulting from Directive 92/12 had been classified as 'general and flexible harmonisation' or on the 'smallest common denominator' of possible harmonisation.

10 See Opinion of Advocate General Fennelly in *Braathens* (C-346/97, EU:C:1998:538, point 18).

11 See Opinion of Advocate General Fennelly in *Braathens* (C-346/97, EU:C:1998:538, point 17).

12 See Opinions of Advocate General Ruiz-Jarabo Colomer in *Van de Water* (C-325/99, EU:C:2000:614, point 25) and of Advocate General Poiares Maduro in *Heintz van Landewijck* (C-494/04, EU:C:2006:110, point 2). See, also, judgment of 24 February 2000, *Commission* v *France* (C-434/97, EU:C:2000:98, paragraphs 18 and 19).

13 See Opinion of Advocate General Ruiz-Jarabo Colomer in *Van de Water* (C-325/99, EU:C:2000:614, point 26) and the first recital of Directive 92/12, in accordance with which 'the establishment and functioning of the internal market require the free movement of goods, including those subject to excise duties'.

14 Judgment of 2 April 1998, *EMU Tabac and Others* (C-296/95, EU:C:1998:152, paragraph 22).

15 See Opinion of Advocate General Ruiz-Jarabo Colomer in *Van de Water* (C-325/99, EU:C:2000:614, point 30.)

30. In conclusion, as demonstrated by the case-law of the Court, excise duty is primarily calculated on the volume of the product, becomes payable when the products subject to it are made available for consumption and is imposed only on specified products. [16]

31. With regard to excise duty on alcohol and alcoholic beverages in particular, in addition to the general directive, the excise duty on those products is regulated by Directives 92/83 and 92/84.

32. The first is dedicated to the harmonisation of the structures of the duties whereas the second concerns the approximation of rates.

33. In that regard, it should be noted that, for alcohol and alcoholic beverages, the harmonisation arising from those directives has already been classified as partial harmonisation. [17]

34. The directives not only take account of the different fiscal traditions in the Member States [18] and, in particular, the differences in the methods of taxing beer in the Member States, but also permit the retention of those methods.

35. Thus, first, Article 3(1) of Directive 92/83 provides that the excise duty levied by Member States on beer is to be fixed by reference either to the number of hectolitre/degrees Plato or to the number of hectolitre/degrees of actual alcoholic strength by volume and Article 6(1) of Directive 92/84 provides that the minimum rate of excise duty on beer is to be fixed at EUR 0.748 per hectolitre/degree Plato, or EUR 1.87 per hectolitre/degree of alcohol. Secondly, this is clear from the seventh recital of Directive 92/84, in accordance with which the methods of taxing beer within the Member States vary, and it is possible to permit this variation to continue, in particular by laying down a minimum rate expressed as a charge related both to the original gravity and to the alcoholic content of the product.

36. Therefore, although the system is aimed at reducing national disparities, in particular, by providing a definition of products subject to excise duties, by imposing a specific minimum rate or amount of excise duty for each product and by ensuring that national systems do not cause distortions of competition within the internal market, Directive 92/84 stipulates only the minimum rates of excise duty for certain types of alcoholic beverages and therefore merely provides for an incomplete harmonisation of excise duty rates.

37. The Member States therefore retain the ability to apply a general increase of excise duties with a view, for example, to pursuing the attainment of specific public health objectives provided, however, that that taxation is compatible with Article 110 TFEU. [19]

38. Finally, the products subject to excise duty are defined in the light of the combined nomenclature. In the present case, beer is defined as any product falling within CN code 2203 or any product containing a mixture of beer with non-alcoholic drinks falling within CN code 2206, in either case with an actual alcoholic strength by volume exceeding 0.5% vol. [20]

B. Definitions

39. To facilitate the reading of this Opinion, as a preliminary point, a number of terms and concepts, the understanding of which is essential for the present reference for a preliminary ruling and the proposed response to the question referred by the national court, must be defined.

16 Judgment of 9 March 2000, *EKW and Wein & Co* (C-437/97, EU:C:2000:110, paragraph 44).

17 See judgment of 24 February 2000, *Commission* v *France* (C-434/97, EU:C:2000:98, paragraph 17).

18 See judgment of 24 February 2000, *Commission* v *France* (C-434/97, EU:C:2000:98, paragraph 18).

19 See my Opinion in *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:527, point 143).

20 Article 2 of Directive 92/83.

40. This is all the more pressing since it is apparent from the observations of the parties that they are using the same terms, but to refer to different things. For example, the 'real extract' designated by the applicant in the main proceedings does not require clarification that the finished product contains ingredients added after fermentation. According to the Polish Government, the real extract in the finished product is an extract in which the ingredients added after fermentation are necessarily taken into account. The defendant in the main proceedings considers that the real extract is the part of the extract which has not been converted into alcohol or carbon dioxide and uses 'general extract' to refer to the extract made up of the real extract and the sugars and extracts added following the completion of the fermentation process.

41. First, as the parties noted in their written observations, although there is no definition of a 'degree Plato' in EU law, in accordance with what brewing science teaches us and as the parties agree, degrees Plato may be understood as a measurement of the concentration of the solution by weight. It is therefore a measurement of the ratio between the weight of the extract and the weight of the whole solution applied to the concentration of wort extract. 'Degrees Plato' refers to the percentage by mass of dry wort extract.

42. Therefore, 23 degrees Plato refers to a wort in which 23 g of extract is used per 100 g of wort, that is to say a solution with a concentration of 23% by weight.

43. As regards the question whether 'degrees Plato' involves measuring the original gravity, corresponding to the gravity of the original wort, that is to say the wort prior to fermentation, which is the natural chemical reaction which converts the sugar into alcohol, this is the central issue raised in the question referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court) and it will be answered below.

44. Original wort refers to the wort until the start of the fermentation process. Original wort is an intermediate product consisting of water and the ingredients of beer which are prepared for fermentation, such as hops and barley malt for brewing, also known as extract, which form the basis of the fermentation process.

45. Real extract refers to the part of the extract which has not been converted into alcohol or carbon dioxide after fermentation.

46. Added extract is the extract resulting from the addition of aromatic substance in the form of syrup following the completion of fermentation.

47. In order to understand how those concepts interact when beer is produced, it should be noted that the original wort, consisting of water and extract, is converted, after fermentation, into beer and secondary products, such as carbon dioxide and yeast. The beer thus obtained consists of alcohol, extract which has not been converted into alcohol, that is to say, real extract, and water.

48. Finally, flavoured beer is made from traditional beer to which sugar syrup and aromatic substance are added, generally after fermentation.

49. Secondly, as regards the calculation of degrees Plato, the measurement of the concentration by weight on the Plato scale is obtained after the density of the solution is calculated and using the calculation tables. For example, a solution with a density of 1.1 corresponds to 23.7 degrees Plato.

50. Originally, in order to determine the concentration of the extract of original wort in degrees Plato, the measurement was taken directly of that liquid before alcoholic fermentation. Subsequently, technological progress has enabled the introduction of a different measurement process. Therefore, degrees Plato may be calculated on the basis of characteristics measured in the product obtained by the fermentation process, namely the beer, as a result of, in particular, the discovery of the existence

of a constant physical correlation between the mass of the original wort extract, the mass of the alcohol created during the fermentation process and the mass of the extract which remains in the finished product after fermentation. That physical correlation, expressed mathematically by the Balling formula, makes it possible to calculate the alcohol content of a finished product if the concentration of original wort extract and the concentration of real extract in the finished product are known. Above all, this law of physical correlation enables the calculation to be carried out in reverse and the concentration of original wort extract to be determined if the alcoholic strength and the concentration of real extract in the finished product are known.

51. Thirdly, it would appear from the written observations submitted by the parties that there is some confusion between 'flavoured beers' and 'sweetened beers'. It is clear from the order for reference that, before the national courts, 'flavoured beer' and 'sweetened beer' are equivalent in so far as the aromatic substance are sweeteners, although the question referred for a preliminary ruling mentions only flavoured beers. The Polish Government appears to make a distinction between the two concepts, although it considers that sweeteners are among the ingredients added to traditional beer after fermentation in the process to make flavoured beer. The Spanish Government, like the European Commission, appears to treat flavoured beer in the same way as sweetened beer since the expressions 'sweetened beers' and 'flavoured beers' are used without distinction in their written submissions, whereas the Greek Government refers only to flavoured beer whilst citing sweeteners among the ingredients which may be added.

52. Aromatic substance can be defined as a food additive which is intended to give food a particular flavour, sweetener refers to either a substance which imparts a sweet flavour or, with regard to artificial sweeteners in particular, a sweetening product which does not contain sugar and is low in calories. Given that all of the substances added after fermentation may have an impact on the calculation of degrees Plato, albeit in varying proportions, 'flavoured beers' and 'sweetened beers' must be regarded as similar, even though the question referred for a preliminary ruling mentions flavoured beers only.

53. Moreover, it should be noted, as have the parties and the national court, that, in the dispute in the main proceedings, both aromatic substance added after fermentation and sugar syrup are problematic since the consideration of ingredients added after fermentation may change the degrees Plato measurement.

54. The addition of ingredients and, in particular, sugar after fermentation increases the mass of dry extract in the finished product. In those circumstances, the 'aromatic substance' mentioned in the question referred for a preliminary ruling must be understood as referring to both aromatic substance in the strict sense and sugar syrup.

C. Analysis of the question referred for a preliminary ruling

55. As a preliminary point, it should be noted that the question whether, in practice, it is possible or, on the contrary, impossible to determine in the finished product the proportion of dry extract that was not present in the original wort certainly merits attention, but must necessarily be addressed after the definition of 'degrees Plato' within the meaning of Directive 92/83. Practical feasibility must not influence the legal interpretation of that directive and of that concept.

56. In particular the fact that, on one hand, in order to determine degrees Plato the wort after fermentation may be analysed and that, on the other hand using the Balling method it is possible to determine the original gravity of the wort will therefore be addressed after my analysis of the question referred for a preliminary ruling and of the interpretation sought by the national court.

57. The national court is asking the Court, in essence, to determine whether, for the purposes of calculating the strength of flavoured beer in degrees Plato and, therefore, to determine the excise duty on that product, account should be taken of the dry extract of original wort or the dry extract of the finished product including the ingredients added after fermentation, namely aromatic substance and sugar syrup.

58. This question, however technical, is novel since the Court has never had occasion to interpret Article 3 of Directive 92/83 and, moreover, it presents two challenges.

59. First, that interpretation is required since neither degrees Plato nor the method of calculating degrees Plato are defined in EU legislation,[21] which leads to differences between the Member States.[22]

60. Since the concept of 'degrees Plato' is not defined in the Member States which have chosen this method of calculation to determine the structure of excise duty on traditional and flavoured beer, some Member States calculate the strength in degrees Plato by taking into account the ingredients added after fermentation whereas others calculate it by taking into account the original wort.

61. However, the use of such methods of calculation leads to different levels of taxation in respect of excise duty and may have a distortive effect between Member States, or even constitute protective or discriminatory internal taxation.

62. Secondly, in view of the differences set out in point 60 of this Opinion and the rates contained in Article 6 of Directive 92/84, the interpretation of Article 3 of Directive 92/83 is of considerable economic importance for economic operators and, by the same token, for Member States' finances.

63. Given that the issues of the present case have been defined, I must now give my own interpretation of Article 3 of Directive 92/83.

64. In this connection, there is a clash of two diametrically opposed interpretations.

65. On the one hand, the Director of the Customs Chamber in Poznań and the Greek and Polish Governments consider that Directive 92/83 must be interpreted as meaning that, in the determination of the strength of flavoured beer in degrees Plato, account should be taken of the finished product, including the ingredients added after the fermentation of the wort.

66. On the other hand, Kompania Piwowarska, the Spanish Government and the Commission submit that that directive must be interpreted as meaning that, in the determination of the strength of flavoured beer in degrees Plato, account should be taken of the original wort and, therefore, the ingredients added after the fermentation of the wort should be disregarded.

21 In that regard, it is significant that, in its opinion on the 'Proposal for a Council Directive amending Directive 92/84 on the approximation of the rates of excise duty on alcohol and alcoholic beverages' (OJ 2007 C 175, p. 1), the European Economic and Social Committee refers to the definition of degrees Plato taken from the website Wikipedia (paragraph 3.6 of that opinion).

22 On the one hand, those differences were highlighted by the parties in their written submissions and at the hearing. On the other, they are set out in the final external evaluation report on Directive 92/83 which followed the evaluation of that legislation in the context of the Regulatory Fitness and Performance (REFIT) programme. See the Evaluation of Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages — Final Report, available at the following website: https://circabc.europa.eu/sd/a/3e197d56-02d3-4efd-b056-5b7d53b8e196/Evaluation%20of%20Council%20Directive%2092-83-EEC%20on%20the%20harmonisation%20of%20the%20structures%20of%20excise%20duties%20on%20alcohol%20and%20alcoholic%20beverages.pdf and, in particular, recommendation 15, in accordance with which the interpretation of Article 3(1) of Directive 92/83 should be clarified, in particular with respect to beer to which sugar is added after fermentation since some Member States calculate degrees Plato taking into account the sugar added after fermentation whereas others do not take it into account (p. 141 and 142).

67. In order to provide an answer to the national court, it should be recalled, first, that Article 3(1) of Directive 92/83, read in conjunction with Article 6 of Directive 92/84, lays down two methods of calculating excise duty on beer. The first method is based on three parameters, namely, first, the number of hectolitres of finished product; secondly, the degrees Plato of that product and, thirdly, the rate of excise duty fixed by the Member State, which cannot be less than the rate fixed in Article 6 of Directive 92/84. The second method is also based on the ratio of three parameters, namely, the number of hectolitres of finished product, the actual alcoholic strength by volume of the product and the rate of excise duty.

68. Secondly, it should be noted that, according to settled case-law, the interpretation of Article 3(1) of Directive 92/83 must be based on the wording of that provision, its context and the objectives of the directive in question.

69. In the first place, as regards the wording of that provision, it must be stated that some of the parameters mentioned therein, such as the number of hectolitres or the rate of excise duty, are not problematic.

70. Moreover, the second parameter used in the second method of calculation, namely the actual alcoholic strength by volume of the product, in Article 3(2) of Directive 92/83 corresponds, in the Commission's words, to 'alcohol content' and to 'actual strength by volume of the product' defined in EU law in Chapter 22 of Annex I to Implementing Regulation (EU) 2016/1821 [23] as 'the number of volumes of pure alcohol contained at a temperature of 20 °C in 100 volumes of the product at that temperature'.

71. By contrast, the concept of 'degrees Plato' contained in Article 3(1) of Council Directive 92/83 is not defined in EU law and the EU legislature makes no reference to national laws as regards the meaning to be given to that concept.

72. In those circumstances, according to the settled case-law of the Court, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation. [24]

73. First, it is clear from the usual meaning of 'degrees Plato' with regard to brewing that the degrees Plato of beer must be calculated on the basis of the part of the beer extract from original wort.

74. Although the parties agree that degrees Plato refers to the concentration of wort by weight, they disagree, however, on the wort to be taken into account — original wort or the wort after fermentation — in order to determine the excise duty on flavoured beer. Thus, irrespective of the problem mentioned in point 55 of this Opinion, there are two possible approaches to the concept of 'degrees Plato'.

23 Commission Implementing Regulation of 6 October 2016 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2016 L 294, p. 1).

24 See judgments of 18 January 1984, *Ekro* (327/82, EU:C:1984:11, paragraph 11); of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 32); and of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraph 25).

75. In the first approach, the basis of assessment for beer is determined with the help of concepts used in the brewing industry, such as degrees Plato, the 'dry wort extract' or the 'real extract', which must be understood according to their meaning in brewing. However, in the brewing industry, since degrees Plato corresponds to the concentration of original wort by weight, for flavoured beer it should be calculated on the basis of the part of the beer extract from the original wort that was fermented, that is to say on the basis of the real extract and, therefore, without taking into account the ingredients added after fermentation.

76. In the second approach, for the purposes of establishing the excise duty on flavoured beer in the light of Directive 92/83, the concept of 'degrees Plato' is independent of its meaning in brewing. In particular, the strength of flavoured beer in degrees Plato should be calculated on the basis of the finished product by reference to the general extract of the wort after fermentation, that is to say the real extract and the added extract and, therefore, by taking into account the ingredients added to the beer following the completion of that fermentation.

77. It is common ground between the parties that, for the same flavoured beer, the choice between one method of establishing degrees Plato and the other is not a neutral one since using the second approach means a significant increase, of 20%, in the degrees Plato measurement, and, therefore, a significant increase in the excise duty payable.

78. However, Kompania Piwowarska and the Commission submit that the Balling formula, which enables the concentration of original wort extract to be determined if the alcoholic strength and the concentration of real extract in the finished product are known, does not reflect the actual physical correlation if the sugar syrup and the aromatic substance added after fermentation are included in the calculations. Those calculations would reveal a notional value for the concentration of original wort extract which does not reflect the dry wort extract content.

79. The applicant in the main proceedings has not disputed that claim and, at the hearing, agreed that the Balling formula led to an incorrect result where ingredients have been added after fermentation.

80. Moreover, nothing in Directive 92/83 or Directive 92/84 indicates that the EU legislature intended to move away from the meaning in the brewing industry of 'degrees Plato' for the purposes of establishing the excise duty on beer.

81. Secondly, the interpretation that 'degrees Plato' are determined by reference to original wort is not called into question by the use in Article 3(1) of Directive 92/83 of the expression 'finished product'.

82. Therefore, contrary to the submissions of the applicant in the main proceedings and the Polish Government, I take the view that that expression which is contained in both Article 3 of Directive 92/83 and Article 6 of Directive 92/84 does not necessarily mean that degrees Plato must be calculated having regard to the aromatic substance and sugar syrup added after fermentation.

83. While it is evident that the 'finished product' in Article 3 of Directive 92/83 applies to two methods of establishing the excise duty on beer, I consider, like the Spanish Government and the Commission, that it relates more to the number of hectolitres than to the method used for calculating the strength in degrees Plato, since the basis of assessment of excise duty on beer is the volume of the products falling within the scope of the excise duty, expressed in hectolitres of finished products.

84. In that regard, it should be noted that, despite the fact that it appears in the singular in Article 3 of Directive 92/83, 'finished product' refers to two methods of establishing the excise duty levied on beer, as demonstrated unquestionably in Article 3(1) of the Proposal for a Council Directive on the harmonisation of the structures of excise duties on alcoholic beverages and on the alcohol contained

in other products [25] and Article 6 of the proposal for the amendment of Directive 92/84. [26]

85. However, in the case of both methods of calculating excise duty on beer, I am not convinced that 'finished product' relates to the product on the basis of which excise duty is to be calculated. To my mind, there is no solid basis in the wording of Article 3(1) of Directive 92/83 for such an interpretation. Moreover, as I have already outlined in point 67 of this Opinion, the 'finished product' in Article 3(1) of that directive simply clarifies that, for each of those methods of fixing the excise duty on beer, that duty must be calculated on the basis of the number of hectolitres of finished product.

86. In the light of the foregoing, the definition of 'degrees Plato' is unconnected to the use of 'finished product' in Directive 92/83 and, therefore, it cannot validly be argued that that directive and Directive 92/84 and, in particular, Article 3(1) of Directive 92/83 require that the degrees Plato be determined by taking into account the ingredients added after fermentation.

87. However, even if the expression 'finished product' applies to the method of calculating degrees Plato and that calculation is carried out using the wort extract on the basis of the finished beer, that is to say in the 'finished product', that does not mean that the ingredients added after fermentation must be taken into account.

88. For flavoured beer, the Balling formula does not enable the dry extract content of the original wort to be determined correctly, without error, on the basis of the parameters of the finished beer.

89. Therefore, even if Directive 92/83 refers to the 'degrees Plato' of finished product, that fact cannot mean that the degrees Plato of the flavoured beer are measured in the flavoured beer once the production of that product is complete.

90. It is clear from the foregoing that the wording of Article 3(1) of Directive 92/83 does not require that the degrees Plato measurement of the flavoured beer is calculated taking into account the aromatic substance and the sugar syrup added after fermentation.

91. In the second place, as regards the contextual interpretation, I consider that it clearly demonstrates that the calculation of degrees Plato does not assume that, for flavoured beer, the aromatic substance and sugar syrup added after fermentation are taken into consideration.

92. On the one hand, Article 28 of Directive 92/83 provides unambiguously that the United Kingdom may continue to apply the exemptions which it applied on 1 January 1992 to 'concentrated malt beverage the worts of which prior to fermentation were of a specific gravity of 1 200 of Original Gravity (47° Plato) or more'.

93. In the context of that provision, degrees Plato is determined on the basis of the gravity before fermentation, thus, degrees Plato must be calculated on the basis of the original wort and not on the basis of the wort obtained from fermentation.

94. It is true that, as several parties claimed at the hearing, with respect to an exemption, the EU legislature has been more forthcoming in defining the scope and the extent of that exemption.

25 OJ 1990 C 322, p. 11. Under that article, '[t]he excise duty levied by Member States on beer shall be fixed by reference either to the number of hectolitre/degrees Plato of finished product released for consumption or recorded as missing and exceeding any allowance granted ...'.

26 Proposal for a Council Directive amending Directive 92/84 on the approximation of the rates of excise duty on alcohol and alcoholic beverages, [COM(2006) 486 final]. Under Article 1(4) of that proposal, Article 6 of Directive 92/84 is replaced as follows: 'As from 1 January 2008, the minimum rate of excise duty on beer shall be fixed at one of the following rates, by reference to the finished product: (a) EUR 0.98 per hectolitre/degree Plato; (b) EUR 2.45 per hectolitre/degree of alcohol.'

95. However, the fact that the EU legislature has provided details regarding the calculation of degrees Plato for the purposes of applying an exemption does not mean that, *a contrario*, those details do not concern the calculation of excise duty.

96. Moreover, for me, it is hard to imagine that, in the absence of any definition of 'degrees Plato', the EU legislature intended to impose two methods of calculating that measurement according to whether it referred to taxation or exemption from excise duty.

97. On the other hand, the legislature has referred to the original gravity of the product subject to excise duty in a broader context, namely Directive 92/84.

98. Therefore, where the seventh recital of that directive points out there are two methods of taxing beer and describes those methods, it is referring, without doubt, to the methods laid down in Article 3(1) of Directive 92/83.

99. However, by stating that it is possible to permit the variation in methods of taxing beer to continue, in particular by laying down a minimum rate expressed as a charge related both to the original gravity and to the alcoholic content of the product, it is clear that the EU legislature is implying that the calculation of degrees Plato must be based on original wort.

100. In the third place, the teleological interpretation confirms, in my view, that there is no need to take into account the extract resulting from the aromatic substance and sugar syrup added following the completion of fermentation for the purposes of calculating degrees Plato.

101. Through the harmonisation of the structures and the rates of excise duties on alcohol and alcoholic beverages, the legislature's aim is to tax the alcohol consumed.

102. Therefore, it is significant that Article 2 of Directive 92/83 states, with regard to beer, that that directive applies to traditional beer and to products made of mixtures of beer with non-alcoholic drinks falling within CN code 2206, on the express condition in respect of those products that the alcoholic strength by volume exceeds 0.5% vol. Moreover, it follows from Article 5(1) of that directive that the volume of alcohol is essential for the purposes of applying the rate of excise duty, since, if a certain volume of alcohol is not reached, a reduced rate may be applied.

103. Furthermore, it follows from Article 27 of Directive 92/83 and the case-law of the Court that alcohol used for other purposes may be the subject of exemptions. [27]

104. If the objective is to harmonise, even partially, the taxation of alcohol which is consumed, then it is necessary to maintain the concordance, albeit relative, between the ratio between the tax rates, on the one hand, and the ratio between degrees Plato and degrees of alcohol, on the other.

105. As I have already pointed out in points 34 and 35 of this Opinion, although the legislature has permitted the variation in methods of taxing beer to continue, the fact that it has fixed tax rates relating to each of those methods demonstrates, in my view, that there is concordance between those ratios.

27 See, to that effect, judgment of 19 April 2007, *Profisa* (C-63/06, EU:C:2007:233, paragraph 17).

106. Therefore, the tax rates are related in that the minimum rate of taxation that the Member States must apply per hectolitre/degree Plato of a finished product corresponds to the minimum rate of taxation that they would have to apply per hectolitre/degree of alcohol should they decide to apply the second method of taxation. Nevertheless, since the ratio, observed empirically, between the degrees Plato of beer and its degrees of alcohol is dependent on many factors, it is not rigid, but may lie within a certain range of values.

107. In that regard, it should be recalled, however, that, for flavoured beer, the consideration of sugars and aromatic substance added after fermentation increases the degrees Plato of that product significantly whereas, since those ingredients have been added after fermentation, they have no effect on its alcohol content.

108. Therefore, the interpretation of Article 3(1) of Directive 92/83 put forward by the applicant in the main proceedings and by the Greek and Polish Governments therefore leads to the methods and the rates of excise duty becoming disconnected and, above all, to flavoured beer being taxed more heavily.

109. That position runs counter to the purpose of excise duty on beer.

110. While it is certainly true that the addition of ingredients after fermentation leads to a volume difference, the basis of assessment for excise duty cannot be altered, however, in so far as the total alcohol content by volume is the same before and after those ingredients have been added, since ingredients added after fermentation cannot increase the alcohol content.

111. But, as I have already pointed out, the consideration of ingredients added after fermentation distorts the results if the Balling formula is applied in so far as the number of degrees Plato is artificially increased and no longer reflects the alcohol content of the beer in any way.

112. Therefore, when calculating the degrees Plato of flavoured beer, the consideration of the aromatic substance and sugars added after fermentation results in products which have the same alcohol content being taxed differently and the taxation being disconnected from the alcohol content of the beer.

113. In view of the concordance, although relative, between the ratio between the tax rates, on the one hand, and the ratio between degrees Plato and degrees of alcohol, on the other, the fact that the legislature has permitted the variation in methods of taxing beer to continue and has harmonised excise duty on beer only partially does not allow the Member States to do so and, *in fine*, to tax not only alcohol consumed in the form of beer, but also aromatic substance and sugar.

114. In the light of the foregoing, the argument that disregarding the ingredients added after fermentation, in respect of flavoured beer, amounts to taxing not the finished product released for consumption but an intermediate product and, therefore, to taxing two different products in the same way, is not convincing.

115. Apart from the fact that an 'intermediate product' is defined in Directive 92/83 and does not apply to the flavoured beer falling within the scope of Article 2 of that directive, the fact remains that the ingredients added after fermentation increase the volume of the flavoured beer and, therefore, the taxation.

116. Moreover, as is clear from the definition of 'degrees Plato', this taxation method is based on original wort and the strength in degrees Plato is therefore characteristic of all finished products, be they traditional beer or flavoured beer, which are derived from wort.

117. In those circumstances, it cannot be argued that disregarding the ingredients added after fermentation leads to different products being taxed in the same way.

118. Furthermore, the interpretation of Article 3(1) of Directive 92/83 according to which that provision does not require the degrees Plato measurement of flavoured beer to be calculated taking into account the aromatic substance and sugar syrup added after fermentation also allows a uniform approach for different types of beer and any distinction to be avoided between flavoured beers and beers to which artificial sweeteners have been added, in respect of which the real extract content does not increase or increases very little despite the addition of those sweeteners.

119. In the light of the foregoing, the question whether it is possible or, on the contrary, impossible to determine in the finished product the proportion of dry extract that was not present in the original wort must now be addressed.

120. It is apparent from the observations of several parties that precise information on the final composition of the beer, on the ingredients added after fermentation and analyses of the flavoured beer make it possible to determine the proportion of aromatic substance and sugars added after fermentation in order to apply the Balling formula.

121. In any event, in my view, the concentration of original wort extract can still be determined by directly measuring that liquid before the alcoholic fermentation. Unlike the method based on the extract contained in the finished product which includes sugar and other ingredients added after fermentation, this method enables the actual value of the concentration of original wort extract to be determined in degrees Plato.

122. In the light of all the foregoing considerations, I take the view that Article 3(1) of Directive 92/83 must be interpreted as meaning that, in the determination of the basis of assessment for flavoured beers using the Plato scale, there is no need to take into account the extract resulting from the aromatic substance and sugar syrup added following the completion of fermentation.

IV. Conclusion

123. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland):

Article 3(1) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages must be interpreted as meaning that, in the determination of the basis of assessment for flavoured beers using the Plato scale, there is no need to take into account the extract resulting from the aromatic substance and sugar syrup added following the completion of fermentation.