



Reports of Cases

OPINION OF ADVOCATE GENERAL
SÁNCHEZ-BORDONA
delivered on 28 November 2018¹

Case C-567/17

**UAB ‘Bene Factum’
intervener:**

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania))

(Reference for a preliminary ruling — Excise duty — Partially denatured alcohol — Exemptions — Products not for human consumption — Formal intended use of products — Actual use — Power of the receiving State to withdraw the exemption granted in another Member State — Serious risk of evasion, avoidance or abuse — Procedure for withdrawing the exemption)

1. Certain cosmetic and oral hygiene products manufactured in Poland using partially denatured alcohol are exempt, in that country, from the harmonised excise duty provided for in Directive 92/83/EEC.² The referring court essentially asks whether that exemption remains in place when those products have been transported to Lithuania for sale in that State and are consumed by a number of people as an alcoholic beverage.

I. Legal framework

A. EU law

1. Directive 92/83

2. In accordance with Article 27 of Directive 92/83:

‘1. Member States shall exempt the products covered by this Directive from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

(b) when both denatured in accordance with the requirements of any Member State and used for the manufacture of any product not for human consumption;

¹ Original language: Spanish.

² Council Directive of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

...

5. If a Member State finds that a product which has been exempted under paragraphs 1(a) or 1(b) above gives rise to evasion, avoidance or abuse, it may refuse to grant exemption or withdraw the relief already granted. The Member State shall advise the Commission forthwith. The Commission shall transmit the communication to the other Member States within one month of receipt. A final decision shall then be taken in accordance with the procedure laid down in Article 24 of Directive 92/12/EEC. Member States shall not be obliged to give retroactive effect to such a decision.

...'

2. Directive 2008/118/EC³

3. Article 2 of Directive 2008/118 reads as follows:

'Excise goods shall be subject to excise duty at the time of:

- (a) their production, including, where applicable, their extraction, within the territory of the Community;
- (b) their importation into the territory of the Community.'

4. Article 7 of Directive 2008/118 provides:

'1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, "release for consumption" shall mean any of the following:

- (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
- (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
- (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

...'

5. Article 33(1) of Directive 2008/118 is worded as follows:

'... where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

³ Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

For the purposes of this Article, “holding for commercial purposes” shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him ...’

B. Lithuanian law

1. Law of the Lithuanian Republic on excise duty

6. Article 27(1)(1) of the Lietuvos Respublikos akcizų įstatymas (Law of the Lithuanian Republic on excise duty)⁴ provides for an exemption for ‘ethyl alcohol recognised as denatured ethyl alcohol not subject to excise duty’.

7. Under Article 28(1) of the Law of the Lithuanian Republic on excise duty, ‘ethyl alcohol denatured in accordance with the requirements of the relevant Member State and used for the manufacture of non-food products, which is exempt from excise duty under Article 27(1)(b) of Directive 92/83 ..., shall be exempt from excise duty’.

2. Lithuanian rules for the application of Directive 92/83

8. Paragraph 3.3 of the Tarybos direktyvos 92/83/EEB dėl akcizų už alkoholį ir alkoholinius gėrimus struktūrų suderinimo 27 straipsnio 1 dalies b punkto taikymo Lietuvos Respublikoje taisyklės (Rules on the application in the Republic of Lithuania of Article 27(1)(b) of Directive 92/83)⁵ states as follows

‘Ethyl alcohol imported from another Member State of the European Union shall be subject to excise duty only if it ... is contained in non-food products and, in the Member State from which those non-food products are imported, that denatured ethyl alcohol may be used without excise duty being paid for such non-food products.’

II. Facts of the dispute and the questions referred for a preliminary ruling

9. Bene Factum is a company established in Lithuania, where it manufactures and sells cosmetics and other personal care products.

10. From 2009 to 2014, Bene Factum imported, for commercial purposes, mouthwashes and alcohol for cosmetic purposes under various names, which it acquired from a company in Poland, which produced those goods solely for Bene Factum.

11. Bene Factum did not simply order the products at issue from the Polish company; it also controlled the manufacturing process, deciding on the composition, the appearance of the packaging and the labelling of the products, which bore the mark ‘BF cosmetics’, of which Bene Factum was the proprietor.

12. The ethyl alcohol contained in those products was, at the time of their release for circulation in Poland, denatured in accordance with the legislation of that Member State by the addition of isopropyl alcohol.

13. Bene Factum did not declare the importation of those goods into Lithuania and did not pay excise duty on the ethyl alcohol contained in them, since it had been denatured.

⁴ Law No XI-722 of 1 April 2010.

⁵ Those rules were approved by Decree No 902 of the Government of the Republic of Lithuania of 13 June 2002.

14. The Lithuanian tax authority carried out a tax inspection in which it discovered that the products imported and supplied by Bene Factum had been sold by various wholesale and retail distributors (such as companies operating kiosks), which essentially marketed the products as alcoholic beverages.

15. The Lithuanian tax authority, relying on the principle of substance over form, considered that the products were intended for human consumption as alcoholic beverages and that the ethyl alcohol they contained should therefore not be exempt from excise duty. Accordingly, the tax authority found that Bene Factum was liable for excise duty and ordered Bene Factum to pay that duty.

16. Bene Factum unsuccessfully challenged the various decisions of the tax authority before the Tax Disputes Commission and the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), which confirmed those decisions.

17. Bene Factum appealed against the first-instance judgment to the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court of Lithuania). That court takes the view that it is commonly known that in Lithuania certain individuals, generally people who are alcohol-dependent or are on a particularly low income, and some homeless people, consume products like those at issue in order to become intoxicated, that is to say, as alcoholic beverages.

18. The referring court takes it as given that Bene Factum knew that those products were consumed by a certain group of individuals as alcoholic beverages.⁶ Although that company did not sell the products directly to end consumers, the labelling chosen by it (for example, the indication of the alcoholic strength as a percentage), the addition of aromatic substances (the use of flavour enhancers), the fact that the ethyl alcohol was not denatured in accordance with Lithuanian legislation and the low price charged, inter alia, may be regarded as factors which contributed to the consumption of the products concerned as alcoholic beverages.

19. The referring court concludes from the above that not only did Bene Factum know that some of the products at issue were consumed by certain individuals as alcoholic beverages after they had been imported into Lithuania, but it also took that fact into account when it placed orders for the manufacture of those products.⁷

20. The referring court has no doubt that the basic (primary) intended use of the products at issue is as cosmetics and personal care products. There is also no doubt that the individuals who purchased those products in order to become intoxicated knew that they were in fact purchasing, and consuming as alcoholic beverages, cosmetics and personal care products.⁸ However, the referring court goes on to state that, when placing orders for the manufacture of the products and importing them into Lithuania, Bene Factum knew for certain that those products are (may be) consumed by some individuals as alcoholic beverages in order to become intoxicated.⁹

21. After noting that ‘the position adopted by the tax authority means that in the present case reliance is not placed on the exception provided for in Article 27(5) of Directive 92/83’, the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court of Lithuania) referred the following questions to the Court for a preliminary ruling:

‘(1) Is Article 27(1)(b) of ... Directive 92/83 ... to be interpreted as applying to any products not for human consumption in accordance with their basic (direct) intended use (consumption), irrespective of the fact that some individuals consume cosmetics and personal care products such as those at issue in the present case as alcoholic beverages for intoxication purposes?’

⁶ Order for reference, paragraph 12.

⁷ Ibid., paragraphs 13 and 14.

⁸ Ibid., paragraph 27.

⁹ Ibid., paragraph 28.

- (2) Is the answer to the first question affected by the fact that the person who imported the products at issue from a Member State knew that the products containing denatured ethyl alcohol that were manufactured to his order and supplied (sold) to final consumers in Lithuania by other persons, are consumed by certain individuals as alcoholic beverages and he therefore manufactured and labelled those products with that in mind, having the objective of selling as many of them as possible?’

III. Summary of the parties’ arguments

22. Bene Factum submits that the interpretation of Article 27(1)(b) of Directive 92/83 and liability without exemption to excise duty on alcohol cannot be contingent on the fact that persons who are not fully integrated into society decide to consume¹⁰ cosmetic products as a beverage, thereby disregarding the natural intended use of those products.

23. The classification of the product sold depends on objective circumstances, such as the intended use stated by the manufacturer (according to the information provided on the packaging, together with particulars indicated in the marketing material derived from laboratory tests conducted during the manufacturing process), the exemption from excise duty granted by the Polish tax authorities, and tests carried out by the Lithuanian customs laboratory, which classified the product under Chapter 33 (‘cosmetics’) of the combined nomenclature.¹¹

24. The refusal to grant the exemption is at odds with the concepts of ‘cosmetics’ and ‘foodstuffs’ reflected in other areas of EU law, which take account of the intended use and not the use that may be made of it in practice or a use other than that for which the product was created.

25. Moreover, the grant of the exemption in Poland must also be valid in all other Member States because that is required by the fact that Directive 92/83 is intended to apply uniformly throughout the EU.

26. Lastly, although Article 27(5) of Directive 92/83 provides that Member States may object to an exemption granted by another Member State in order to prevent any evasion, avoidance or abuse, the procedure referred to in that provision was not initiated in this case. The Lithuanian tax authority withdrew the exemption without undergoing monitoring by the other Member States and the Commission, which is competent to give a final decision on the matter.

27. The Greek Government examines the two conditions laid down by Article 27(1)(b) of Directive 92/83. It states, as regards the first condition (denaturing of the product), that, since the products concerned are cosmetics and oral hygiene products, the denaturing process must be carried out using substances which are non-aggressive, have a low level of toxicity, a non-repellent odour, and do not give rise to allergic reactions or irritation. In that connection, the use of isopropyl alcohol was recommended¹² for the minimum denaturing of ethyl alcohol, which would thus be eligible for the exemption. That condition was complied with in the instant case

¹⁰ In the context of this Opinion, ‘consume’ in fact means ‘ingest’.

¹¹ The combined nomenclature (‘CN’) is set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

¹² The Greek Government cites recommendation ITEG/R/3/2014 of the Fiscalis Project Group (FPG/013).

28. In connection with the second condition, which relates to the intended use for human consumption, the Greek and Czech Governments both essentially argue that it is necessary to look beyond the formal name given to the product and examine the actual use to which it is put. The importer's conduct is relevant for the purpose of determining whether or not that condition is satisfied. Both governments examine Bene Factum's conduct and submit that the exemption should not apply.

29. In particular, the Czech Government contends that Bene Factum was not, in any event, in competition with other cosmetics producers but rather with alcoholic beverage producers. In obtaining the exemption from excise duty in this way, Bene Factum infringed the general objective of guaranteeing freedom of competition, pursuant to which products of the same nature must be taxed at the same level.

30. The Lithuanian Government submits that Bene Factum is not eligible for the exemption, in the light of the cosmetic product's real intended use. It accepts that the principle of mutual recognition means that the exemption should be applicable in a Member State other than that which granted it but does not prevent a finding that a product which is not formally intended for human consumption really is for human consumption and is in fact so used, and that there has been evasion, avoidance or abuse.

31. In order to establish such a finding, the Lithuanian Government goes on to analyse Bene Factum's actions and the factors which lead to the conclusion that, when the products at issue were placed on the Lithuanian market, they were intended for human consumption as an alcoholic beverage.

32. The Portuguese Government submits that the use of denatured alcohol in the product sold and the fact that that product was intended for a use other than human consumption are overriding factors. Therefore, the exemption must be granted, even though some persons ingest the product as an alcoholic beverage, since those persons knew or should have known that what they were purchasing and consuming were cosmetics or personal hygiene products.

33. The Commission examines the two conditions for grant of the exemption laid down by Article 27(1)(b) of Directive 92/83 and echoes the judgment of the Court of Justice of 7 December 2000, *Italy v Commission*,¹³ which held that the exemption was applicable even if 'the use for which [the product] is really intended does not correspond with the name assigned to it by the trader'.

34. However, the Commission goes on to observe that that judgment also stated, at paragraph 50, that 'exemption of products covered by Article 27(1)(a) and (b) of Directive 92/83 is the rule and refusal is the exception'. The power granted to Member States by Article 27(1) of Directive 92/83 to lay down conditions 'for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse' cannot detract from the unconditional nature of the obligation imposed by that provision to grant an exemption.

35. The Commission observes that Article 27(5) of Directive 92/83 allows Member States to refuse to grant an exemption or withdraw an exemption which has already been granted, if that exemption gives rise to evasion, avoidance or abuse. However, those measures are subject to monitoring by other Member States and the Commission. The Commission adds that, in May 2016, the Lithuanian authorities commenced a procedure of the kind referred to in that provision, in relation to the same kind of products as those at issue in this case, but that the Committee on Excise Duty nevertheless decided not to adopt a decision in that regard.

¹³ Judgment of 7 December 2000, *Italy v Commission* (C-482/98, EU:C:2000:672, paragraph 42).

36. On those grounds, the Commission submits that, in the circumstances of the main proceedings, the exemption cannot be refused if the conditions laid down in Article 27(1)(b) of Directive 92/83 are satisfied, unless there is evasion, avoidance or abuse which has been established in accordance with the procedure laid down in Article 27(5) of that directive.

IV. Procedure before the Court of Justice

37. The order for reference was received at the Registry of the Court on 26 September 2017.

38. Written observations were lodged by Bene Factum, the Lithuanian, Czech, Greek and Portuguese Governments, and the Commission. Only the Lithuanian Government and the Commission attended the hearing held on 19 September 2018.

V. Assessment

39. Question 1 turns on the meaning of the term ‘product not for human consumption’, used in Article 27(1)(b) of Directive 92/83. The referring court asks whether, from an *objective* and general perspective, the exemption from harmonised excise duty laid down in that provision can be refused where a cosmetic product which contains denatured alcohol and which, in principle, is not intended for human consumption, is, in practice, ingested as an alcoholic beverage.

40. Question 2 echoes question 1 but adds the *subjective* element, namely the intentions of the company which manufactures or sells the product by presenting it in a way which encourages its use as an alcoholic beverage.

41. It should be recalled that, according to the account of the facts and the findings of the referring court:

- Bene Factum sold its products in Lithuania after commissioning a Polish undertaking to manufacture them in accordance with its instructions, which included the instruction to use alcohol denatured in accordance with Polish law.¹⁴ The product was released for consumption in Poland, where the exemption was applied, and was transported to Lithuania to be sold without payment of excise duty.
- The products sold in Lithuania were ingested by some consumers in order to become intoxicated cheaply.¹⁵ Not only was Bene Factum aware of that fact but it also encouraged it.¹⁶

¹⁴ It used isopropyl alcohol, which, according to the parties’ observations, is one of the methods of denaturing which involves a low level of toxicity.

¹⁵ The order for reference refers to persons with alcohol dependence or low purchasing power.

¹⁶ In reaching that view, the referring court took into account, inter alia, the following points: (a) the label indicated the alcoholic strength as a percentage, which is irrelevant and unusual for cosmetics; (b) aromatic substances and flavourings were added; (c) the denaturing processes permitted in Lithuania were not used; and (d) the sale price is particularly low.

42. However, the two questions referred for a preliminary ruling do not address the difficulties inherent in the ability of Member States to deprive of any effect exemptions from excise duty which have already been granted, where they find that there has been ‘evasion, avoidance or abuse’. The referring court expressly notes that the tax authority has not refused the exemption on the basis of Article 27(5) of Directive 92/83, which is the reason why it has not sought interpretation of that provision.¹⁷ I believe, nevertheless, that there is nothing to prevent the Court from referring to that provision in its reply to the request for a preliminary ruling.¹⁸

A. Alcohol as a taxable object

43. Pursuant to Article 2 of Directive 2008/118, the event giving rise to excise duty occurs at the time of production or importation of the alcohol. However, liability for payment of the duty occurs at the time of ‘release for consumption’, which is when Article 7(1) of Directive 2008/118 provides that the duty becomes chargeable.¹⁹

44. Since excise duty is levied on the consumption of excise goods (recital 9 of Directive 2008/118), it is logical that duty on alcohol is levied on alcohol which is intended for use in alcohol-based beverages.

45. For that reason, and conversely, Directive 92/83 lays down (Article 27(1)) a number of exemptions relating to alcohol which is not intended for consumption as a beverage. Those exemptions include the exemption relating to the use of denatured alcohol.

46. Article 27(1) of Directive 92/83 provides for two cases in which the exemption applies:

- alcohol which has been completely denatured (paragraph 1(a)), where its odour, taste and colour have been totally altered. In the case of products distributed in the form of alcohol which has been completely denatured by means of the addition of certain substances, those substances must be permitted by the provisions of a Member State. This involves a radical transformation and there has been a relative degree of harmonisation of the applicable provisions, since the substances approved by each Member State are recognised throughout the EU;²⁰
- partially denatured alcohol (paragraph 1(b)). In other cases, owing to production requirements, the use of completely denatured alcohol is not appropriate and it is necessary to use alcohol which has been subjected to a more moderate level of denaturing so that only its odour or taste is affected.²¹ There is no harmonisation in such cases, meaning that each country regulates the denaturants provided for in its own legislation.

¹⁷ Paragraph 30 of the order for reference.

¹⁸ Paragraph 22 of the judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385) states as follows: ‘[That omission] does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions (see, to that effect, judgments of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 48, and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 28 and the case-law cited).’

¹⁹ Release for consumption is linked to the ‘duty suspension arrangement’, which is the mechanism laid down by Directive 2008/118 for delaying chargeability and, for the purpose of determining what is meant by ‘release for consumption’, Article 7(2) of Directive 2008/118 refers to the four situations covered by the term ‘duty suspension arrangement’.

²⁰ Those substances are set out in Commission Regulation (EC) No 3199/93 of 22 November 1993 on the mutual recognition of procedures for the complete denaturing of alcohol for the purposes of exemption from excise duty (OJ 1993 L 288, p. 12).

²¹ The denaturants used in complete denaturing tend to be highly aggressive, in terms of their odour and taste, and are unsuitable for uses which involve application on the body, as in the case of cosmetics or oral hygiene products, for example.

B. The exemption laid down in Article 27(1)(b) of Directive 92/83

47. This exemption depends on fulfilment of the following cumulative conditions:

- the alcohol has been denatured in accordance with the requirements of a Member State;
- the (partially denatured) alcohol has been used for the manufacture of any product;
- the product thus manufactured is not for human consumption.

48. The wording of the provision points to the presence of factors of an objective nature, and that is the line taken by the Court in its interpretation:

- the Court has held that, ‘if ... the alcohol contained in a product not intended for human consumption has been denatured in accordance with a method approved in a Member State, the exemption provided for by Article 27(1)(b) should be applied’;²²
- from the perspective of use of the product, the Court added that ‘it would be contrary to Directive 92/83 to withhold exemption for a product which meets the conditions laid down in Article 27(1)(b) solely because it has been found that the use for which it is really intended does not correspond with the name assigned to it by the trader’.²³

49. The first to third recitals of Directive 92/83 refer to products subject to excise duty and state that it is important to determine common definitions for all such products. The fourth recital states that ‘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’. Indeed, Article 20 of the directive uses the CN to define what is meant by ‘ethyl alcohol’.

50. In connection with that guidance, it may be helpful to recall the Court’s criteria for the proper classification of products in accordance with the CN.

51. In the judgment in *Sachsenmilch*, the Court held that ‘according to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters’.²⁴ The Court considered the possible acquisition of ‘one or more new objective characteristics or properties, in particular with regard to its composition, appearance or taste’, it being for the national court to determine whether those conditions are satisfied.²⁵

52. That case-law, in accordance with which the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties, is referred to in the judgment in *Siebrand*,²⁶ which held that:

- as the factors for establishing the essential characteristic of a product may vary according to the kind of goods, regard must be had to both quantitative and qualitative characteristics;²⁷

²² Judgment of 7 December 2000, *Italy v Commission* (C-482/98, EU:C:2000:672, paragraph 41).

²³ *Ibid.*, paragraph 42.

²⁴ Judgment of 8 June 2006, *Sachsenmilch* (C-196/05, EU:C:2006:383, paragraph 22). That case concerned the changes which cheese could undergo while in storage.

²⁵ *Ibid.*, operative part.

²⁶ Judgment of 7 May 2009 *Siebrand* (C-150/08, EU:C:2009:294, paragraph 24). That case concerned fermented alcohol-based beverages composed of a number of materials, and it was necessary to determine which material gave the beverages their essential character.

²⁷ The Court refers to ‘the nature of the material or component, by its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods’ (judgment of 7 May 2009 *Siebrand* (C-150/08, EU:C:2009:294, paragraph 34)).

- in particular, ‘a number of objective characteristics and properties may be taken into account in determining their essential character’, and ‘the Court has consistently held that taste can constitute an objective characteristic or property of a product’;²⁸
- in addition to those factors, ‘the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties’.²⁹

53. It is apparent from the judgments cited above that, as a general rule, if the criteria by which the exemption is *objectively* defined are satisfied, the exemption must be granted. In accordance with that rule, the exemption granted by the Republic of Poland is lawful because the products at issue come within the category of cosmetics, within the meaning of Regulation (EC) No 1223/2009,³⁰ denatured alcohol having been used in their manufacture, and the products are not, in themselves, intended for human consumption.

54. That characteristic was also accepted by experts at the Lithuanian customs laboratory, in response to a request from the Lithuanian tax authority, and was confirmed by the Lithuanian national inspectorate of non-food products.³¹

55. Moreover, the referring court expressly states that it has ‘no doubt in the present case that the basic (primary) intended use of the products at issue is as cosmetics and personal care products’.³²

C. Intra-Community movement of products containing partially denatured alcohol and monitoring of the exemption

56. Ethyl alcohol may be used in the Member State where it is produced or be transported to different Member States, as occurred in this case (the goods were transported from Poland to Lithuania).

57. Denatured alcohol may be transported as it is or be added to a product that has already been manufactured, as occurred in the present case, the cosmetics and mouthwashes bearing the BF mark having been made in Poland using alcohol which had been denatured in accordance with Polish legislation.

58. Although, in accordance with Article 33(1) of Directive 2008/118, the movement of products manufactured for commercial purposes results in the transfer of the power to impose taxes from Poland to Lithuania, the exemption is not affected in principle because Lithuanian law recognises the application in Lithuania of an exemption granted in another Member State.³³

59. That recognition is consistent with the judgment in *Repertoire Culinaire*, in which the Court observed that ‘the uniform application of the provisions of Directive 92/83 requires that the imposition or not of excise duty on a product and the exemption from duty of a product in a Member State must, as a rule, be recognised by all the other Member States ... Any other interpretation would compromise the attainment of the objective of Directive 92/83 and would be likely to hinder the free movement of goods’.³⁴

²⁸ Ibid., paragraphs 35 and 36.

²⁹ Ibid., paragraph 38.

³⁰ Regulation of the European Parliament and of the Council of 30 November 2009 on cosmetic products (OJ 2009 L 342, p. 59).

³¹ According to Bene Factum’s written observations (paragraphs 10 to 12), the reports by the official customs experts appointed by the Lithuanian authorities classified the products under chapter 33, subheadings 33 04 99 00 (beauty or make-up preparations and preparations for the care of the skin) and 33 06 90 00 (preparations for oral or dental hygiene) of the CN.

³² Order for reference, paragraph 27.

³³ Paragraph 3.3 of the Rules on the application in the Republic of Lithuania of Article 27(1)(b) of Directive 92/83.

³⁴ Judgment of 9 December 2010 *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraphs 41 and 42).

60. That said, that statement must be qualified because the cases entailing exemption set out in Article 27(1) of Directive 92/83 are preceded by an introductory paragraph which refers to ‘preventing any evasion, avoidance or abuse’ when the exemption is applied.³⁵

61. Those restrictions were taken into account in the judgment in *Repertoire Culinaire*, in which the Court stated that ‘a Member State cannot be bound by an incorrect application of the provisions of Directive 92/83 by another Member State nor denied the possibility, recognised by the 22nd recital and by Article 27 of that directive, of adopting measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions and to ensure the correct and straightforward application of such exemptions’.³⁶ The Court added that ‘the finding that such measures have been applied incorrectly or the adoption of such measures must be based on concrete, objective and verifiable evidence’.³⁷

62. In line with those observations, the Court went on to state that, if certain products which have been exempted from excise duty under Directive 92/83 and released for consumption in the Member State in which they were manufactured, ‘are intended to be put on the market in another Member State, the latter must treat those products in the same way in its territory, unless there is concrete, objective and verifiable evidence that ... in accordance with Article 27(1) [of Directive 92/83], it is justifiable to adopt measures to combat any evasion, avoidance or abuse which may arise in the field of exemptions’.³⁸

63. It may therefore be concluded that the Lithuanian authorities were entitled to monitor *a posteriori* the exemption granted in Poland. The uncertainties relating to the criteria and the procedure for carrying out such monitoring remain to be resolved. The case-law cited above does not provide comprehensive guidance on when and how a Member State is permitted to withdraw the exemption, particularly where the products granted an exemption in another Member State have been imported into the Member State of destination, which puts forward reasons for withdrawing it.

D. Criteria justifying withdrawal of the exemption

1. The ‘real’ intended use of the product

64. The referring court draws attention to the discrepancy between the formal description of the product manufactured in Poland and subsequently transported to Lithuania (cosmetics or hygiene product) and the fact that it is actually consumed by certain persons in Lithuania as an alcoholic beverage. The referring court asks whether that factor is sufficient for a finding that it is a ‘product not for human consumption’, which would lead to withdrawal of the exemption which it had been granted.

65. The difficulty lies in assessing which factors enable the Lithuanian tax authority (and the court reviewing its decisions) to conclude that greater importance is to be attached to the material aspects than to the mere formal declaration of the intended use of the product.

³⁵ The provision thus echoes the wording of the 22nd recital of Directive 92/83, which states that Member States must ‘not be deprived of the means of combating any evasion, avoidance or abuse which may arise in the field of exemptions’.

³⁶ Judgment of 9 December 2010, *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraph 43). The Spanish version of the judgment refers to the 27th recital whereas it should be the 22nd recital, as stated in the other language versions.

³⁷ *Ibid.*, paragraph 44.

³⁸ *Ibid.*, paragraph 45 and operative part.

66. When it examines all the evidence, objective characteristics and properties for the purposes of the correct classification of the product, the national authority must take account of the product's intended use, in other words the use that is inextricably linked to its nature and qualities. There is nothing to suggest that the Polish authorities failed to take account of that criterion when they classified the products at issue as cosmetic products.

67. In the judgment in *Repertoire Culinaire*,³⁹ the Court appears to accept that, even in cases other than those of evasion, avoidance and abuse, the incorrect classification of a product by a Member State (for the purposes of the exemption at issue) may be corrected by another Member State.⁴⁰ In this case, however, the Lithuanian authorities do not claim that the Polish authorities made an error by classifying Bene Factum's products as cosmetics and not as foodstuffs.

68. The Lithuanian authorities and the referring court itself also accept that the *primary* intended use of those products is as cosmetics. However, they add that Bene Factum's commercial strategy involves offering the products for sale free of excise duty, with the intention that a particular sector of the population will consume them as a beverage, thereby enabling Bene Factum to profit from increased sales.

69. I do not believe that that factor, which is more *sociological* in nature, is sufficient to justify withdrawal of the exemption granted to the products in Poland. It should be recalled that, according to the judgment in *Commission v Italy*, 'it would be contrary to Directive 92/83 to withhold exemption for a product which meets the conditions laid down in Article 27(1)(b) solely because it has been found that *the use for which it is really intended* does not correspond with the name assigned to it by the trader'.⁴¹

70. Any other solution would introduce elements of legal uncertainty into intra-Community trade involving the same products, with the resulting market distortions, since the sale of those products would be subject to duty in some Member States and exempt in others. The determination of when and to what extent the genuine intended use of articles not intended for human consumption is replaced, de facto and in practice, by use for human consumption would depend on assessments which vary depending on the time and the country (or even the regions of a country), which is at odds with the harmonisation of excise duty sought by Directive 92/83.

2. *Evasion, avoidance or abuse*

71. However, an exemption which has already been granted can be withdrawn where 'the Member State concerned [puts] forward ... concrete evidence of a serious risk of evasion, avoidance or abuse',⁴² which shifts the focus of the discussion to the application of Article 27(5) of Directive 92/83.

³⁹ Judgment of 9 December 2010 *Repertoire Culinaire* (C-163/09, EU:C:2010:752, paragraph 43).

⁴⁰ Logically, by using the complex procedure to which I shall refer below.

⁴¹ Judgment of 7 December 2000, *Italy v Commission* (C-482/98, EU:C:2000:672, paragraph 42) (italics added).

⁴² Ibid., paragraph 52. In the judgment of 9 December 2010, *Repertoire Culinaire*, (C-163/09, EU:C:2010:752, paragraph 52), the Court also stipulated that the Member State concerned 'must put forward concrete, objective and verifiable evidence of a serious risk of evasion, avoidance or abuse'.

72. I am not ruling out that Bene Factum's conduct, as described by the referring court, might come within one of those categories.⁴³ However, according to the order for reference,⁴⁴ the Lithuanian authorities did not rely on that provision to withhold the exemption applied to Bene Factum's products. Furthermore, neither of the two questions referred for a preliminary ruling concern the interpretation of Article 27(5) of Directive 92/83.

73. If that is the case, which it falls exclusively to the referring court to determine, that ground for withdrawal of the exemption cannot succeed. As has been pointed out, for that ground to be effective, the Member State concerned must rely on it and put forward 'concrete, objective and verifiable evidence of a serious risk of evasion, avoidance or abuse'.

74. The following points are, therefore, by way of alternative considerations, in the event that Court finds that it is, nevertheless, appropriate to refer to Article 27(5) of Directive 92/83 in order to provide the referring court with guidance which may be of use to it to which the questions it concerning issues has referred do not, at least directly, relate.

E. The procedure for withdrawal of the exemption where there is a risk of evasion, avoidance or abuse

75. In its written observations, the Commission infers from the wording of Article 27(5) of Directive 92/83 that it is only possible to withdraw the exemption, in the case of evasion, avoidance or abuse, where the latter have been established in accordance with the procedure referred to in Article 27(5).

76. That assertion is partially correct and partially incorrect.

77. It is correct in so far as the mechanism set out in that provision requires Member States which refuse to grant an exemption or withdraw the relief previously granted to initiate the procedure provided for therein. Failure to advise the Commission, as required by Article 27(5) of Directive 92/83, would defeat the objective of the provision and would infringe the Member States' obligation to respect EU law.

78. However, the assertion is partially incorrect in so far as it appears to require that a Member State's decision must, at all events, come after that of the Commission.

79. It does not follow from the wording of that provision that the refusal (to grant or the withdraw of) the exemption necessitates a *prior* procedure which involves the Commission. On the contrary, the wording of the provision indicates that the Member States are entitled in their own right to ensure that exemptions are correctly applied and to prevent evasion, avoidance and abuse.⁴⁵

80. The structure of Article 27(5) of Directive 92/83 indicates that the sequence of actions is as follows:

- the procedure is initiated when the Member State concerned refuses to grant exemption or withdraws the relief already granted;
- next, that State 'shall advise the Commission forthwith', and the Commission, in turn, 'shall transmit the communication to the other Member States within one month of receipt';

⁴³ In theory, it could be argued that, to a certain extent, an abuse of law occurs where an undertaking relies on a provision (governing the exemption from excise duty of products not intended for human consumption) and in reality pursues, facilitates or encourages an outcome that is at odds with that provision (the consumption of that product as an alcoholic beverage).

⁴⁴ Paragraph 30.

⁴⁵ That is confirmed by the 22nd recital of Directive 92/83, which states that Member States should not be deprived of the means of combating any evasion, avoidance or abuse.

- lastly, a final decision is taken in accordance with the procedure to which Article 27(5) refers (Article 24 of Directive 92/12/EEC).⁴⁶

81. In its judgment in *Italy v Commission*, the Court referred to the fact that (anti-exemption) measures ‘adopted unilaterally’ by Member States in order to combat evasion, avoidance or abuse are subject to monitoring by the other Member States and the Community institutions. Logically, such monitoring must take place after the adoption of the measure by the Member State concerned, which, it must be emphasised, is unilateral.⁴⁷

82. That view is bolstered by the last sentence of Article 27(5) of Directive 92/83, which provides that Member States are not obliged to give retroactive effect to the final decision taken by the Commission. In other words, the Commission’s decision, which is taken after obtaining the opinion of the Committee on Excise Duty, does not, in itself, deprive of any effect the earlier *unilateral* decision of the Member State.⁴⁸

83. However, the Commission modified its position at the hearing. Although it reaffirmed the duty of the Member State concerned to initiate the procedure laid down in Article 27(5) of Directive 92/83, the Commission accepted that the authorities of that State may deprive the exemption of any effect unilaterally if they find that there has been evasion or abuse. The Commission added that the decision adopted by those authorities in that regard has immediate effect until such time as the Commission itself adopts a final decision.

84. The Commission also provided at the hearing additional information about the procedure initiated by the Lithuanian authorities in 2016.⁴⁹ After acknowledging that those authorities had sent a communication concerning the initiation of that procedure which covered the products at issue in the main proceedings, the Commission explained that, in fact, its subject matter was broader, because it called into question the method of partial denaturing, which explained why the procedure had not yet come to an end.⁵⁰

85. On the basis of the above, it may be taken as established that:

- the Lithuanian authorities relied, albeit rather belatedly, on Article 27(5) of Directive 92/83, which, in principle, gives legal effect to their decision to withdraw the exemption granted;
- those authorities will be bound, only as regards the future,⁵¹ by the decision to be given by the Commission at the end of that procedure, unless that decision is detrimental to their interests and they challenge it before the Court of Justice,⁵² which annuls it.

⁴⁶ Council Directive of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1). That reference must now be deemed to be made to Articles 43 and 44 of Directive 2008/118, which repealed Directive 92/12.

⁴⁷ Judgment of 7 December 2000, *Italy v Commission* (C-482/98, EU:C:2000:672, paragraph 51).

⁴⁸ From the point of view of domestic law, its validity is dependent on national rules governing the review of administrative action.

⁴⁹ See point 35 of this Opinion.

⁵⁰ As a result of the wording of the communication, the Committee on Excise Duty was not able to adopt a decision because it lacks the capacity to make decisions on the harmonisation of methods of partial denaturing. However, the Commission draws attention to the fact that the procedure has not come to an end and that, at the next meeting of the Committee on Excise Duty, which will be held in November 2018, it will be proposed that the Lithuanian authorities provide further details regarding its request so that it is relevant to those specific products, without calling into question the methods of denaturing themselves.

⁵¹ Without prejudice to the fact that the provisions governing the national administrative procedure may provide that the Commission’s decision is to have retroactive effect.

⁵² As occurred in the judgment of 7 December 2000, *Commission v Italy* (C-482/98, EU:C:2000:672).

86. Therefore, as a matter of EU law, there is nothing to preclude the referring court from assessing, in the light of the facts of the present case, which it alone can determine, whether there are grounds for refusing the exemption on the basis that the sale of the products at issue in Lithuania gave rise to evasion, avoidance or abuse.

VI. Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Lietuvos vyriausiosios administracinės teisės (Supreme Administrative Court of Lithuania):

- (1) The exemption provided for in Article 27(1)(b) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages is applicable to cosmetic products containing denatured ethyl alcohol which are not for human consumption in accordance with their basic (direct) use, irrespective of the fact that some individuals consume those products as alcoholic beverages.
- (2) The above answer is not affected by the fact that the person importing or selling those products in a Member State other than that in which they were manufactured, whose authorities granted the exemption, knew that the products are consumed as alcoholic beverages by certain individuals in the country of destination, and, with that in mind, placed an order for them to be manufactured and labelled with the objective of selling as many of the products as possible.
- (3) If the Lithuanian authorities take the view that, in those circumstances, there has been evasion, avoidance or abuse, they may refuse to grant an exemption or withdraw the relief already granted, in accordance with the procedure laid down in Article 27(5) of Directive 92/83.