



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

13 March 2019*

(Reference for a preliminary ruling — Taxation — Excise duties on alcohol and alcoholic beverages — Directive 92/83/EEC — Article 2 — Definition of ‘beer’ — Beverage produced from wort obtained from a mixture containing more glucose than malt — Combined Nomenclature — Heading 2203 (beer made from malt) or 2206 (other fermented beverages))

In Case C-195/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Piotrkowie Trybunalskim (Regional Court, Piotrków Trybunalski, Poland), made by decision of 2 February 2018, received at the Court on 19 March 2018, in the criminal proceedings against

B. S.,

other parties:

Prokuratura Okręgowa w Piotrkowie Trybunalskim,

Łódzki Urząd Celno-Skarbowy w Łodzi,

Urząd Celno-Skarbowy w Piotrkowie Trybunalskim,

THE COURT (Tenth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, E. Juhász and I. Jarukaitis, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- B. S., by T. Grzejszczak, adwokat,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Greek Government, by M. Tassopoulou, A. Dimitrakopoulou and I. Kotsoni, acting as Agents,
- the European Commission, by C. Perrin and M. Siekierzyńska, acting as Agents,

* Language of the case: Polish.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21) in conjunction with 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) in the version of Commission Regulation (EEC) No 2587/91 of 26 July 1991 (OJ 1991 L 259, p. 1).
- 2 The request has been made in criminal proceedings against B. S. for, inter alia, providing the Polish tax authorities with incorrect information leading to a reduction of the excise duty for which he was liable.

Legal context

EU law

Directive 92/83

- 3 Article 2 of Directive 92/83 provides:

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

- 4 In accordance with Article 26 of that directive:

‘References in this Directive to CN headings shall be to those of the version of the combined nomenclature in force when this Directive is adopted.’

The Combined Nomenclature

- 5 Article 12 of Regulation No 2658/87 provides that the European Commission is to adopt each year by means of a regulation a complete version of the Combined Nomenclature (‘the CN’) together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council of the European Union or by the Commission. The regulation is to be published not later than 31 October in the *Official Journal of the European Union* and is to apply from 1 January of the following year.
- 6 In accordance with Article 26 of Directive 92/83, the version of the CN applicable to the facts of the main proceedings is that in Annex I to Regulation No 2658/87 in the version of Regulation No 2587/91.
- 7 Part Two of the CN includes Chapter 22, headed ‘Beverages, spirits and vinegar’, which mentions headings 2203 and 2206 of the CN.

8 Heading 2203 reads as follows:

'2203	Beer made from malt'
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9 Heading 2206 reads as follows:

'2206	Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included'.
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The Explanatory Notes to the HS

- 10 The Customs Cooperation Council, now the World Customs Organisation (WCO), was created by the convention establishing that body concluded at Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System ('the HS') was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System concluded at Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1). The CN takes over the six-digit headings and subheadings of the HS. Only the seventh and eighth digits creating further subdivisions are specific to it.
- 11 The Explanatory Notes to the HS are drawn up within the WCO in accordance with the provisions of the convention on the HS and are published in the two official languages of the WCO, French and English.
- 12 The French language version of the explanatory note to the HS relating to heading 2203 reads as follows:

'La bière est une boisson alcoolique qui s'obtient par la fermentation du moût préparé avec du malt d'orge ou de froment, qu'on a fait bouillir en présence d'eau avec généralement du houblon. Certaines quantités de céréales non maltées (maïs et riz, par exemple) peuvent éventuellement être utilisées pour la préparation du moût. L'addition de houblon a pour effet de développer des principes amers et aromatiques et de permettre une meilleure conservation du produit. Elle est parfois aromatisée en cours de fermentation à l'aide de cerises ou d'autres produits.

On ajoute parfois à la bière des sucres, des colorants, du dioxyde de carbone ou encore d'autres substances.

Selon les procédés de fermentation employés, on peut avoir: les bières de fermentation basse, obtenues à basse température avec des levures dites *basses* et des bières de fermentation haute obtenues à une température plus élevée avec des levures dites *hautes*.

Les bières peuvent être claires ou foncées, douces ou amères, légères ou fortes; elles se présentent ordinairement en fûts, en bouteilles ou en boîtes hermétiquement closes et peuvent aussi être commercialisées sous les appellations de « ale », « stout », etc.

Cette position comprend également les bières concentrées qui sont préparées en concentrant dans le vide, jusqu'à 1/5 ou 1/6 de leur volume, des bières, en général peu alcooliques, mais très riches en extrait de malt.

N'entrent pas dans cette position:

- a) Certaines boissons qui, bien que parfois appelées bières, ne contiennent pas d'alcool (par exemple, celles obtenues avec de l'eau et des sucres caramélisés) (No 22.02).
- b) Les boissons appelées *bières sans alcool*, qui sont des bières de malt dont le titre alcoométrique volumique a été ramené à 0,5% vol ou moins (No 22.02).
- c) Les médicaments des n^{os} 30.03 ou 30.04.'

13 The English language version of the explanatory note reads as follows:

'Beer is an alcoholic beverage obtained by fermenting a liquor (wort) prepared from malted cereals (most commonly barley or wheat), water and (usually) hops. Certain quantities of non-malted cereals (e.g., maize (corn) or rice) may also be used for the preparation of the liquor (wort). The addition of hops imparts a bitter and aromatic flavour and improves the keeping qualities. Cherries or other flavouring substances are sometimes added during fermentation.

Sugar (particularly glucose), colouring matter, carbon dioxide and other substances may also be added.

According to the fermenting process employed, the products may be bottom fermentation beer, obtained at a low temperature with bottom yeasts, or top fermentation beer, obtained at a higher temperature with top yeasts.

Beer may be pale or dark, sweet or bitter, mild or strong. It may be put up in barrels, bottles or in airtight tins and may be marketed as ale, stout, etc.

This heading also covers concentrated beer prepared by vacuum-condensing beer of low alcoholic strength (but with a high content of malt extract) to between one fifth and one sixth of its original volume.

The heading does not cover:

- (a) Certain beverages which, although they are sometimes described as beers, do not contain alcohol (e.g., beverages prepared from water and caramelised sugar) (heading 22.02).
- (b) Beverages called non-alcoholic beer consisting of beer made from malt, the alcoholic strength of which by volume has been reduced to 0.5% vol or less (heading 22.02).
- (c) Medicaments of heading 30.03 or 30.04.'

Polish law

14 The Ustawa o podatku akcyzowym (Law on excise duty) of 6 December 2008 (Dz. U. 2009, No 3, item 11), in the version applicable to the dispute in the main proceedings ('the Law on excise duty'), provides in Article 94:

'1. "Beer" within the meaning of this Law means all products within CN heading 2203 00 and all products containing a mixture of beer with non-alcoholic beverages within CN heading 2206 00 if the actual strength of alcohol by volume in those products exceeds 0.5% vol.

...

4. The rate of excise duty on beer is 7.79 [Polish złoty (PLN) (approximately EUR 1.80)] per hectolitre for each degree Plato of the finished product.’

15 Article 96(4) of the Law on excise duty provides:

‘The rates of excise duty on fermented beverages are:

(1) on cider and perry within CN headings 2206 00 31, 2206 00 51 and 2206 00 81, with an actual strength of alcohol by volume not exceeding 5.0% vol. — PLN 97.00 [(approximately EUR 22.6)] per hectolitre of the finished product;

(2) on other fermented beverages — PLN 158.00 [(approximately EUR 36.5)] per hectolitre of the finished product.’

The dispute in the main proceedings and the question referred for a preliminary ruling

16 From May 2011 to May 2013 B. S. produced an alcoholic beverage which he stated to be a mixture of beer and non-alcoholic beverages. One hundred hectolitres of wort, from which the intermediate product he described as beer was made, was obtained from 134.9 litres of malt extract, 1 708.2 litres of glucose syrup, 9 litres of citric acid, 2.4 litres of ammonium phosphate, yeast nutrient and water.

17 From 29 June 2011 to 26 June 2013 B. S. sent the competent customs office each month an excise duty declaration describing the beverage manufactured by him as a ‘mixture of beer’ within CN heading 2203 and non-alcoholic beverages and applying, pursuant to Article 94 of the Law on excise duty, the rate of excise duty for beer, namely PLN 7.79 (approximately EUR 1.80) per hectolitre for each degree Plato of the finished product.

18 By several decisions adopted from 27 September 2012 to 14 February 2014, the head of the competent customs office contested B. S.’s declarations and fixed the excise duty payable at significantly greater amounts, on the ground that the beverage manufactured by B. S. should be classified under CN heading 2206 as a beverage based on fermented beverages other than beer and on non-alcoholic beverages, and should be subject to a rate of excise duty of PLN 158 (approximately EUR 36.50) per hectolitre of the finished product. Those decisions were based on the fact that the main ingredient used for making the intermediate product was glucose syrup, not malt, and that the product could not therefore be classified under CN heading 2203, which refers to ‘beer made from malt’. Consequently, the head of the customs office found that the end product mentioned in the declarations referred to in paragraph 17 above, which was a beverage based on that intermediate product and on non-alcoholic beverages, had to be regarded as a beverage based on fermented beverages other than beer and on non-alcoholic beverages.

19 Those decisions of the head of the customs office were confirmed by a number of decisions of the director of the tax chamber. The appeals brought by B. S. against those decisions were dismissed by the Polish administrative courts.

20 In the main proceedings, B. S. is being prosecuted for misleading the Polish tax authorities, from June 2011 to June 2013, by providing incorrect information in his excise duty declarations on the beverage produced by him, which led to a substantial reduction in that duty, and for causing the beverage to leave the tax warehouse without excise stamps first being applied.

21 By judgment of the Sąd Rejonowy w Piotrkowie Trybunalskim (District Court, Piotrków Trybunalski, Poland) of 21 June 2017, B. S. was found guilty of those offences and fined 300 day-units of PLN 200 each (approximately EUR 46.20). B. S. appealed to the referring court against that conviction.

- 22 The referring court observes that, in accordance with the relevant provisions of the Law on excise duty, the classification of a product under that law must be done by reference to its classification under the CN, in accordance with the rules of interpretation annexed to the CN. It points out, moreover, that the definition of beer in that law is the same as that in Article 2 of Directive 92/83.
- 23 The referring court states that, for the purposes of applying the provisions of the Law on excise duty, the concept of 'beer' covers not only beer made from malt, referred to in CN heading 2203, but also mixtures of beer within that heading with non-alcoholic beverages referred to in CN heading 2206, provided that the alcohol content exceeds 0.5% vol. It finds, on the other hand, that those provisions do not specify the (minimum or maximum) percentage of the ingredients of the beer produced, leaving the manufacturer a margin of discretion as to the proportions of those ingredients. It concludes that any quantity of unmalted ingredients may be used, as long as malt is present. Those provisions likewise do not specify that sugar may be added to beer only after the fermentation process is complete.
- 24 According to the referring court, to determine whether B. S. has committed a criminal offence, it is essential to know whether the beverage manufactured by B. S. was rightly classified by him as a 'mixture of beer', falling within CN heading 2203, and non-alcoholic beverages, or whether it is a beverage based on a fermented beverage other than beer and non-alcoholic beverages.
- 25 The referring court observes, referring to binding tariff indications issued in France, that there is a divergence between Member States as regards the tariff classification of that beverage where malted ingredients do not predominate, which justifies the need to harmonise the case-law.
- 26 In those circumstances, the Sąd Okręgowy w Piotrkowie Trybunalskim (Regional Court, Piotrków Trybunalski, Poland) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 2 of [Directive 92/83] in conjunction with Annex I to [Regulation No 2658/87] be interpreted as meaning that beer made from malt, within the meaning of CN heading 2203, may include a product in the case of which malt extract, glucose syrup, citric acid and water have been used to produce the wort, even where the proportion of non-malt ingredients in the wort is predominant in relation to the malted ingredients and glucose syrup was added to the wort before the wort fermentation process, and what criteria should be taken into account when determining the proportions of malted and non-malt ingredients in the wort in order for the product obtained to be classified as beer within CN heading 2203?'

Consideration of the question referred

- 27 By its question the referring court essentially asks whether Article 2 of Directive 92/83 must be interpreted as meaning that an intermediate product intended to be mixed with non-alcoholic beverages, obtained from a wort containing less malt ingredients than non-malt ingredients and to which glucose syrup is added before the fermentation process, may be classified as 'beer made from malt' within CN heading 2203.
- 28 Article 2 of Directive 92/83 includes under the description of 'beer' not only any product falling within CN heading 2203 but also any product containing a mixture of beer with non-alcoholic drinks falling within CN heading 2206, in either case with an actual alcoholic strength by volume exceeding 0.5% vol.
- 29 According to the order for reference, the end product marketed by B. S. is a mixture of an intermediate alcoholic product obtained by fermentation and non-alcoholic beverages. It follows that the mixture constituting the end product marketed by B. S. cannot be classified within CN

heading 2203 and is not therefore covered by the first of the two cases referred to in Article 2 of Directive 92/83. The product can therefore be classified as ‘beer’ and be covered by Article 2 only if the intermediate alcoholic product, intended to be mixed by B. S. with non-alcoholic beverages in order to obtain the end product, can itself be classified as ‘beer made from malt’ within the meaning of CN heading 2203; it does not appear to be disputed that the end product has an alcohol content exceeding 0.5% vol.

- 30 In accordance with Article 26 of Directive 92/83, the CN applicable to the main proceedings is the version in force on the date of adoption of that directive, namely the version resulting from Regulation No 2587/91 (see, to that effect, judgment of 14 July 2011, *Paderborner Brauerei Haus Cramer*, C-196/10, EU:C:2011:487, paragraph 28).
- 31 According to settled case-law, in the interests of legal certainty and for ease of verification, the decisive criterion for the tariff classification of goods is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant CN heading and the notes to sections and chapters. The explanatory notes drawn up by the Commission as regards the CN and by the WCO as regards the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (judgment of 12 May 2016, *Toorank Productions*, C-532/14 and C-533/14, EU:C:2016:337, paragraphs 34 and 36 and the case-law cited).
- 32 It is in the light of those factors that it must be determined whether an alcoholic product obtained by fermentation of a wort produced from, inter alia, glucose syrup and a small proportion of malt may be classified as ‘beer made from malt’ within the meaning of CN heading 2203.
- 33 As regards, first, the question of the proportion of malt in the mash, it must be observed that the CN does not lay down a minimum percentage of malted ingredients in the mash from which the beer is to be produced.
- 34 CN heading 2203 does indeed refer to ‘beer made from malt’, which presumes that a beer within that heading cannot be produced without malt being used as an ingredient. However, it cannot be deduced simply from the words ‘beer made from malt’ that a minimum percentage of malt is required in the mash.
- 35 Moreover, the explanatory note to the HS relating to heading 2203 expressly states that certain quantities of unmalted cereals may be used for preparing the wort, without requiring the proportion of those non-malt ingredients to be smaller than that of malt ingredients.
- 36 As regards, second, the glucose syrup added to the mash, it must be observed that the presence of that syrup is not prohibited by the CN.
- 37 Moreover, the explanatory note to the HS relating to heading 2203 expressly recognises the possibility of flavourings being added to the wort during fermentation. Even if there is some divergence between the English and French language versions as to the precise moment when glucose may be added, the French referring to it being added ‘to the beer’ while the English does not specify, neither of those two official versions require that the wort to be fermented is free from glucose.
- 38 It follows that a product manufactured with a small proportion of malt and the addition of glucose before the alcoholic fermentation is not precluded on those grounds alone from being ‘beer made from malt’ within CN heading 2203.

- 39 Nevertheless, such a product can come under that heading only on condition that its objective characteristics and properties correspond to those of beer. In this regard, account must be taken more particularly of the organoleptic characteristics of the product in question (see, to that effect, judgments of 7 May 2009, *Siebrand*, C-150/08, EU:C:2009:294, paragraphs 36 and 37, and of 16 December 2010, *Skoma-Lux*, C-339/09, EU:C:2010:781, paragraph 46).
- 40 It follows that if the organoleptic characteristics of the intermediate alcoholic product, which is mixed by B. S. with non-alcoholic beverages in order to manufacture the end product sold by him, do not correspond to those of beer, which would be the case in particular if that intermediate product did not visually resemble beer or did not have its specific taste, that product could not be classified as ‘beer made from malt’ within CN heading 2203. It is for the referring court to carry out the necessary verifications in that respect.
- 41 In the light of the above considerations, the answer to the question referred is that Article 2 of Directive 92/83 must be interpreted as meaning that an intermediate product intended to be mixed with non-alcoholic beverages, obtained from a wort containing less malt ingredients than non-malt ingredients and to which glucose syrup is added before the fermentation process, may be classified as ‘beer made from malt’ within CN heading 2203, provided that the organoleptic characteristics of the product correspond to those of beer, which is for the referring court to ascertain.

Costs

- 42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 2 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 an intermediate product intended to be mixed with non-alcoholic beverages, obtained from a wort containing less malt ingredients than non-malt ingredients and to which glucose syrup is added before the fermentation process, may be classified as ‘beer made from malt’ within heading 2203 of the Combined Nomenclature 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 in the version of Commission Regulation (EEC) No 2587/91 of 26 July 1991, provided that the organoleptic characteristics of the product correspond to those of beer, which is for the referring court to ascertain.

[Signatures]