



30.7.2019

NOTICE TO MEMBERS

Subject: Petition No 0645/2017 by Marc Smets (Belgian) on the alleged unlawful competition in the Belgian market of wine and alcoholic beverages due to the increase of excise duty

1. Summary of petition

The petitioner says that, due to the successive increases of excise duty on wine and alcoholic beverages in Belgium, the many small enterprises operating in the sector have suffered losses of 20% on their turnover. The petitioner expects such losses to be even bigger this year, as customers, individuals and/or companies, are limited to either basic drinks or turn to alternative sources for their purchases, such as neighbouring countries (with lower excise duty), or the internet. The petitioner complains that the tax burden of excise duty and VAT in Belgium on such drinks is so huge that it makes sense to purchase from an alternative source, even if it is for a single bottle. He also finds that no effective border controls are carried out because the relevant services are understaffed, and the offices of the competent Belgian ministers admit that they are aware of this fact. The petitioner states that increases in excise duty have created a form of unfair competition and asks for the process to harmonise the minimum threshold for excise duty in the 28 Member States to be accelerated, so that such phenomena may cease. He also asks that, if possible, he be compensated for the losses he suffered in previous years.

2. Admissibility

Declared admissible on 7 November 2017. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 28 February 2018

The answers to the petitioner's questions follow from the legal tax framework for alcohol excise duties which are indirect taxes on the sale or use of a specific product containing alcohol. All revenue from excise duties goes entirely to the Member States. Most of the tax

rules for alcohol excise duties applying in Belgium are thus contained in national Belgian tax provisions.

EU legislation on alcohol excise duties only provides minimum harmonisation largely prompted by the launch of the Single Market in 1993. As tax controls at the borders between Member States were abolished, common rules were needed to facilitate cross-border trade in certain products and to prevent competitive distortions. Member States adopted therefore three Directives which are the main pieces of EU legislation for regulating excise duties on alcohol:

- Directive 92/83/EEC sets out the structures of excise duties on alcohol and alcoholic beverages, the categories of alcohol and alcoholic beverages subject to excise duty, and the basis on which the excise duty is calculated; the intention is to ensure that excise duties for alcohol products are applied in the same way, and to the same products throughout the Single Market;
- Directive 92/84/EEC sets out the minimum rates that must apply to each category of alcoholic beverage. The intention of this Directive is to ensure that Member States apply a minimum rate of excise duty;
- In addition, the horizontal Directive 2008/118/EC contains common provisions applying to all products subject to excise duties at European level. In accordance with such rules Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the EU tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions. Member States may also levy taxes on products other than excise goods, the supply of services, including those relating to excise goods, which cannot be characterised as turnover taxes. However, the levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

In accordance with the provisions referred to above, Belgium has the right to introduce excise duty rates on alcohol and alcoholic beverages consumed in Belgium as long as these excise duty rates are consistent with the minimum rates provided for by Directive 92/84/EEC.

Tax increases may result in a reduction of turnover in alcoholic beverages. However, the Commission is not aware of any reliable economic figures suggesting that the tax burden of excise duty and VAT in Belgium on specific alcoholic beverages has reached a level making it viable to purchase from an alternative source, such as another Member State. In fact, the economic studies commissioned and carried out by the Commission in 2016¹ and more

¹<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>

recently in 2017¹ to verify the functioning of the relevant provisions of Directive 92/83/EEC, did not generate any such economic information. These studies rather seem to suggest that Member States are perfectly aware of the excise duty rates applied by other Member States and particularly those applied by their neighbouring Member States and that they set their own excise duty rates with a view to avoiding the risk of tax losses.

Concerning the petitioner's argument that no effective border controls are carried out on individuals because the relevant Belgian services are understaffed, reference is made to the statement above that tax controls at the borders between Member States were abolished in 1993. In accordance with Article 32 (1) of Directive 2008/118/EC, excise duty on excise goods acquired by a private individual for his own use and transported from one Member State to another by him, shall be charged only in the Member State in which the excise goods are acquired. These are guaranteed rights of European citizens which cannot be limited or reduced by border controls. To prevent a misuse of that provision Member States have installed mobile control units and these control units together with the guide levels Article 32 (2) (3) of Directive 2008/118/EC seem to work. In fact, the economic studies mentioned above did not suggest that this is a matter of concern. However, following the Commission Report to the Council on the implementation and evaluation of Council Directive 2008/118/EC concerning the general arrangements for excise duty, the Council has asked the Commission in its conclusions adopted on 5 December 2017² to explore the possibilities for revising the provisions on guide-levels for intended own use of alcohol and tobacco, set out in Article 32 of the Directive, ensuring that they remain fit for purpose to balance the objectives of public revenues and health protection. This work could also cover the analysis of a feasibility of introducing quantitative limits to intra-Community transport of such products, respecting the principle of free movement of goods.

The petitioner states that increases in excise duty have created a form of unfair competition and asks for the process to harmonise the minimum threshold for excise duty in the 28 Member States to be accelerated, so that such phenomena may cease. Directive 92/84/EEC already sets out minimum rates of excise duty on alcohol and alcoholic beverages. In 2006 the Commission made a proposal to further harmonise minimum excise duty rates for alcoholic beverages. The proposal was rejected because Member States were of the opinion that the current system of minimum rates represents a fragile but balanced system which should not be abandoned. The Commission does currently not plan an initiative on minimum excise duty rates for alcohol products.

The petitioner also asks if he could possibly be compensated for the losses he suffered in previous years. The text of the petition does not specify whether it is the responsibility of the EU or that of the Belgian State which is being invoked, and on which grounds. If it was that of the EU, the non-contractual liability of the Union must comply with specific conditions which have been developed by the case law of the Court of Justice of the European Union. However, the text of the petition does not provide sufficient information to determine whether they are fulfilled or not. Therefore, it is not possible to take a position on this point.

¹ Study on Council Directive 92/83/EEC on the structures of excise duty on alcohol and alcoholic beverages carried out by Economisti Associati and to be published soon under:

https://ec.europa.eu/taxation_customs/business/excise-duties-alcohol-tobacco-energy/excise-duties-alcohol/excise-duties-alcoholic-beverages_en

² <http://data.consilium.europa.eu/doc/document/ST-14481-2017-INIT/en/pdf>

4. REV I Commission reply, received on 13 August 2018

In response to the initial Commission's reply of 28/02/2018, the petitioner notes that the economic studies commissioned by the Commission in 2016¹ and more recently in 2017² to verify the functioning of the relevant provisions of Directive 92/83/EEC do not focus on the cross border shopping and the economic impact on enterprises operating in Belgium. It is therefore wrong to say, based on the findings of these reports, that there would be no loss of turnover.

The studies commissioned by the Commission in 2016 and in 2017 did not evaluate the economic impact of large variations in duty levels between Member States. As a result, the Commission currently has no information on the basis of which it can assess whether the divergence in rates of excise duty among the various Member States represents a major obstacle to the smooth functioning of the internal market.

However, in light of the Council Conclusions adopted on 5 December 2017³, the deficiency of economic data in this area and stakeholders' concerns, the Commission will carry out studies to analyse the current arrangements for distance selling and acquisition of excise goods by private individuals. The Commission expects to launch the "Study assessing Articles 32 and 36 of Council Directive 2008/118/EC concerning the general arrangements for excise duty" in the second half of 2018. This Study will evaluate the current situation in order to determine if the current provisions, taking account of the economic impact of differing excise rates on consumer cross border purchases, particularly of alcohol and the protection of public health, remain adequate. The study will assess different options for addressing potential weaknesses in the current legislation. This may identify possibilities for harmonised procedures, simplifications, reduction of administrative burden and fair competition in the area of cross-border distance selling and acquisition by private individuals.

Conclusion

The Commission will carry out a study on the impact of cross border shopping on the internal market and on public health in the second half of 2018. As part of this study, the views of stakeholders on the functioning of the Directive 2008/118/EC will be gathered and form part of the Commission's analysis and possible future proposals. The Commission would welcome the petitioner to contribute to this process.

5. REV II Commission reply, received on 30 July 2019

The petition

The Commission recently launched a study assessing Articles 32 and 36 of Council Directive

¹<https://publications.europa.eu/en/publication-detail/-/publication/fa0a9de1-f4e0-11e6-8a35-01aa75ed71a1/language-en>

²<https://publications.europa.eu/en/publication-detail/-/publication/e0e44d6e-6ac5-11e8-9483-01aa75ed71a1/language-en>

³ <http://data.consilium.europa.eu/doc/document/ST-14481-2017-INIT/en/pdf>

2008/118/EC¹ on the arrangements for the holding and movement of excise goods. In that respect, the Commission encourages the petitioner to contribute to this study.

The Commission's observations

The European Commission has commissioned a study assessing Articles 32 and 36 of Council Directive 2008/118/EC concerning the arrangements for the holding and movement of excise goods. The analysis will cover the current situation of acquisition by private individuals, business-to-consumer distance sales and business-to-business wholesale to retail transactions, including the importation of small consignments of excise goods. The results of the analysis will be used to identify possible weaknesses in the current arrangements and identify feasible alternatives that address such weaknesses.

In order to collect information on the operation of the current arrangements the Commission has awarded a contract to PwC EU Services, a consultancy firm, to carry out surveys of and interviews with a sample of Member States, and trade representatives. The Commission would therefore like to invite the petitioner to dedicate some of his time to an interview (through online surveys and telephone contact) with representatives of this company. The interview will focus on the legal context as well as on the practical use of the provisions of the Directive.

For any further questions, the petitioner should contact Mr Benjamin Copley, PwC EU Services, email: ben.copley@pwc.com

Conclusion

The Commission trusts that the petitioner's input will help to contribute to a balanced assessment of the current arrangements, an analysis of strengths and weaknesses and the formulation of a concrete proposal for improvements.

¹ Commission Regulation (EC) No 118/2008 of 8 February 2008 establishing the standard import values for determining the entry price of certain fruit and vegetables, OJ L 36, 9.2.2008, p. 1–2.