

## Less taxation on flavoured beer?

26 February 2018

The ECJ is about to clarify how excise duties on beer are calculated and whether there is a specific tax duty on flavoured beer. In a request for a preliminary ruling, a Polish court asked for clarification whether substances added *after fermentation* (e.g. sugar, flavours) may be taken into consideration in the overall calculation of the beer tax. The Advocate General took the position that this should not be the case and that substances added after fermentation should not increase excise duties.

### Status Quo

Currently, Member States use two different methods to calculate excise duties on beer based on the so-called Plato scale: One method exclusively takes into account the *original gravity of beer* (basic substances of beer prior to fermentation), whereas the other takes the original gravity plus extracts from added substances as a basis. For non-flavoured beers, these methods usually come to very similar results. However, **for flavoured beers it can make a rather big difference**, whether sugar and flavours, which are always added *after* the fermentation process, are factored into the calculation or not.

### The case Kompania Piwowarska

In his Opinion of 1 February 2018, the Advocate General took the position that excise duties on alcohol should be calculated only on the basis of the original gravity of the beer in question (Case C-30/17, Kompania Piwowarska). The duty's goal would be undermined if other substances were taken into account, which are only added later in the production process. Applying different standards regarding the Plato scale across Europe would distort trade in the Single Market.

The request for preliminary ruling comes from the Highest Polish Administrative Court based on proceedings brought by the Polish brewery Kompania Piwowarska, best known for its Tyskie brand. The local Polish tax authority had calculated excise duties for flavoured beer based on the final beverage, i.e. including the sugar and flavours added in the final stage of the production process. Kompania Piwowarska complained that excise duties should be determined prior to the fermentation stage. Since sugar and flavours are only added afterwards, these substances should not be taken into account. The Advocate General endorsed this position. Since alcohol is subject to taxation – not sugar or flavours – the original substances of the beer should be the determining factor when assessing the “exisable” extract according to the Plato scale. The Advocate General acknowledges that the wording of Art. 3 Directive 92/83/EEC, which refers to the ‘finished product’ could be interpreted differently but argues that the calculation method which focuses on the original gravity before fermentation has a long tradition in the brewery business and should therefore be considered the correct one.

## What next?

If the ECJ follows the Opinion of the Advocate General, this could have a considerable impact for breweries located in Member States that have chosen the Plato scale as a calculation method (instead of the actual alcoholic strength by volume, which is also possible under the Directive) and that have, so far, taken flavours and sugar into the calculation. Amongst the Member States that use the Plato scale (Belgium, Poland, Germany, Italy, Spain, the Czech Republic, Luxembourg and Malta), Germany is one of the countries where sugar is factored into the excise duty calculation. The legality of such taxation was expressly confirmed by the Federal Tax Court in 2006 – at the time, the Court chose not to refer to the ECJ (BFH, 28.03.2006 - VII R 38/04).

Affected companies should therefore carefully consider appealing any open tax declarations and decisions. Whether it will also be possible to appeal decisions that are already final remains to be seen. BLOMSTEIN will monitor and inform about the further developments. If you have questions regarding the potential impact on your company or sector, Roland Stein and Anna Huttenlauch will be happy to answer your questions at any time.

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