

C-674/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date of receipt:**

10 September 2019

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

4 September 2019

Applicant:

‘Skonis ir kvapas’ UAB

Defendant:

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos

Subject matter of the action in the main proceedings

The appeal proceedings currently under way concern a tax dispute between ‘Skonis ir kvapas’ UAB, a private limited company, and the tax administration in respect of the calculation of excise duty and value added tax on imports. The parties are essentially in disagreement as to whether the water-pipe tobacco imported by the applicant must be regarded as smoking tobacco and subject in its entirety (that is to say, all of its constituent parts) to excise duty or whether it is only the tobacco contained in that product that is subject to excise duty.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Articles 2(2) and 5(1) of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (‘Directive 2011/64’); interpretation of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the

Common Customs Tariff and interpretation of the provisions of the Combined Nomenclature ('the CN') set out in Annex I to the Common Customs Tariff.

Third paragraph of Article 267 of the Treaty on the Functioning of the European Union.

Questions referred

(1) Is Article 2(2) of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco to be construed as meaning that water-pipe tobacco, such as that under consideration in the present case (that is to say, consisting of tobacco (up to 24%), sugar syrup, glycerine, flavourings and preservative), is to be regarded as 'consisting [...] in part of substances other than tobacco' for the purposes of the application of that provision?

(2) Is Article 5(1) of Directive 2011/64/EU, including in those cases in which it is to be read together with Article 2(2) of that directive, to be construed as meaning that, in the case where the tobacco contained in a blend intended for smoking – in this case, water-pipe tobacco (the contested product in the case under examination) – satisfies the criteria listed in Article 5(1) of Directive 2011/64/EU, that entire blend is to be regarded as smoking tobacco, irrespective of the other substances contained therein?

(3) If the second question is answered in the negative, is Article 2(2) and/or Article 5(1) of Directive 2011/64/EU to be construed as meaning that the entire contested product, such as that in the main proceedings, made by blending fine-cut tobacco with other liquid and normally fine substances (sugar syrup, glycerine, flavourings and preservative), is to be treated as smoking tobacco for the purposes of the application of that directive?

(4) If the second question is answered in the negative and the first and third questions are answered in the affirmative, are the provisions in heading 2403 of the Combined Nomenclature 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, as amended by Commission Regulation (EU) No 1006/2011 of 27 September 2011, Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012, Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 and Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014, to be construed as meaning that such components of water-pipe tobacco as (1) sugar syrup, (2) flavourings and/or (3) glycerine are not to be treated as 'tobacco substitutes'?

Relevant provisions of EU law

Recitals 2 and 9 and Articles 2(2), 5(1) and 14(1)(b) of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

Chapter 24 in Section IV of Part Two of the Combined Nomenclature 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, as amended by Commission Regulation (EU) No 1006/2011 of 27 September 2011, Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012, Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 and Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014.

Relevant provisions of national law

Lietuvos Respublikos akcizų įstatymas (Law of the Republic of Lithuania on Excise Duty): Article 3(27), defining the term ‘smoking tobacco’; Article 3(35), defining the term ‘cigars and cigarillos’; Article 3(36), stipulating that products consisting wholly or in part of tobacco substitutes are considered to be smoking tobacco; and Article 31(2), setting the rate of excise duty applicable to smoking tobacco.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Between 2012 and 2015 the applicant (an undertaking established in Lithuania and engaged in, inter alia, the retail sale of a range of tobacco products) imported into the Republic of Lithuania various quantities of water-pipe tobacco, consisting of tobacco products containing tobacco (up to 24%), sugar syrup (47%), glycerine as a humectant (27%), flavourings (2%) and potassium sorbate as a preservative (less than 1 g per kg) (‘the contested product’), in packs of 50 or 250 g.
- 2 In the corresponding declarations, those goods were classified under the CN in force during the relevant period under CN subheading 2403 11 00 as ‘water-pipe tobacco’ and additionally under the national code X203 as ‘smoking tobacco subject to excise duty as laid down in Article 31(2) of the Law on Excise Duty’.
- 3 Water-pipe tobacco is a tobacco product distributed by the applicant and purchased by consumers for the purpose of smoking. This product is intended for use in water pipes and the smoke to be inhaled is produced by burning or heating the product, that is to say, the smoke to be inhaled is produced by all the components (substances) of the contested product smouldering simultaneously; the product in question may be smoked as it is, while the sugar syrup, tobacco and flavourings which it contains are essentially intended to impart a certain flavour to the smoke.

- 4 Having examined the electronic import declarations submitted by the company, the customs authority for the Vilnius region established that the applicant had indicated a (net) weight for the contested product that did not correspond to the data contained in the invoices and packaging documents, since the applicant had declared only the (net) weight of the tobacco contained in the contested product, that is to say, the net weight of one component, and not the net weight of the contested product in its entirety. As it took the view that, in accordance with the provisions of national law, the entire contested product – and not merely the tobacco contained therein – was to be treated as smoking tobacco subject to excise duty, that regional tax authority, by an inspection report of 23 August 2017 (‘the Report’) calculated that the company would additionally have to pay excise duty of EUR 1 308 750.28, import VAT of EUR 274 837.74, interest of EUR 512 513 for late payment of the excise duty and interest of EUR 43 532 for late payment of the import VAT. It also imposed on the company a fine of EUR 158 359.
- 5 By decision of 14 November 2017 the defendant, following examination of the appeal brought against that decision of the customs authority for the Vilnius region, upheld the Report and refused to accede to the company’s request that it be exempted from the late-payment interest and the fine imposed.
- 6 As it disagreed with the decisions of the tax authorities and, *inter alia*, believing that excise duty should be charged only on the tobacco contained in the contested product, and not on the contested product in its entirety, the applicant appealed against those decisions to the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Commission on Tax Disputes attached to the Government of the Republic of Lithuania), which confirmed the tax amounts calculated in the Report and ordered to be paid but exempted the company from the late-payment interest imposed.
- 7 As the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius), in its examination of the tax dispute concerning the decisions of the regional tax authority, the defendant and the Commission on Tax Disputes, also upheld those decisions, the applicant filed an appeal with the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).

Brief summary of the reasons for the referral

Concerning the recognition that the contested product ‘consist[s] [...] in part of substances other than tobacco’ within the meaning of Article 2(2) of Directive 2011/64

- 8 The EU legislature does not specify in Article 2(2) of Directive 2011/64 of which ‘other substances’ the product must consist in order for it to be regarded as manufactured tobacco.
- 9 So far as this aspect is concerned, this concept may first appear to cover not any substances whatsoever but only substances which are substitutes for tobacco in a

certain manufactured tobacco product, that is to say, substances that have the same purpose (perform the same function) as tobacco in a specific product. Indeed, there is no doubt that in the case of cigarettes, for instance, cigarette papers are not such an 'other substance' for purposes of the application of Article 2(2) of Directive 2011/64.

- 10 Substances other than tobacco that are contained in water-pipe tobacco as defined, *inter alia*, in subheading note 1 to Chapter 24 of the CN are the usual ingredients of such a product and their presence meets the expectations of consumers. Therefore, assuming that the concept in issue ('other substances') is used to refer to substances substituting tobacco in the product, it is necessary to examine whether the contested product, irrespective of the proportions of tobacco and other substances therein, does indeed come within the scope of application of Article 2(2) of Directive 2011/64.
- 11 That said, tobacco contained in a tobacco product intended for smoking is burnt or heated so that it will emit smoke of a certain flavour to be inhaled. In this respect the applicant does not dispute the fact that the sugar syrup and flavourings contained in the contested product are intended primarily to impart to that smoke a certain flavour, that is to say, in that particular sense these substances contained in the contested product are essentially used for the same purposes as is the tobacco present therein.
- 12 Moreover, as Directive 2011/64 does not offer any clear definition of the term 'other substances', it may be maintained that those words are used here in the broadest sense possible, that is to say, as covering all substances irrespective of their purpose and their relationship with the tobacco contained in the product.
- 13 In the light of the foregoing, it is first of all appropriate to refer the first question to the Court of Justice for a preliminary ruling.

*Concerning the recognition of the contested product as fulfilling the criteria for
'smoking tobacco'*

- 14 Next, in the examination as to whether the contested products fulfil the criteria listed in Article 5(1) of Directive 2011/64 (both when read individually and in conjunction with Article 2(2) of that directive), it should first of all be noted that they are 'capable of being smoked without further industrial processing' within the meaning of Article 5(1)(a) (see, in this respect, *inter alia*, the judgment of the Court of Justice of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraphs 30 to 32) and that they also 'can be smoked' within the meaning of point (b) of Article 5(1).
- 15 Article 5(1)(a) of Directive 2011/64 also sets out a second mandatory criterion, that is to say, that smoking tobacco is a product 'which has been cut or otherwise split, twisted or pressed into blocks'.

- 16 The data collected in the main proceedings indicate that there can be no doubt that the tobacco contained in the contested product is ‘split’ within the meaning of Article 5(1)(a) of Directive 2011/64. The tobacco contained in the contested product intended for smoking without further processing and used by consumers as a product containing nicotine, when smoked, is used for its main and primary purpose, which is to obtain, through burning or heating, nicotine-containing smoke intended for inhaling.
- 17 A systemic analysis of the provisions of Directive 2011/64 shows that excise duty must apply to all manufactured tobacco, that is to say, to relevant products, including those considered to be smoking tobacco, and not to the tobacco contained therein (the specific quantity of tobacco). This, in turn, leads to the conclusion that, in a case such as that in the main proceedings, other constituent elements of the contested product are likely to be incapable of rendering the entire product unrecognisable as smoking tobacco within the meaning of Article 5(1) of Directive 2011/64.
- 18 An assessment to the contrary would probably be incompatible with the objectives of the directive in question, as set out in its recitals 2 and 9, and would not meet the requirement that various categories of manufactured tobacco be defined on the basis of criteria pertaining to their characteristics and use (judgment of the Court of Justice of 11 April 2019, *Skonis ir kvapas*, C-638/17, EU:C:2019:316, paragraph 41).
- 19 The second question is therefore referred to the Court of Justice for a preliminary ruling with a view to confirming or negating this assessment.

Concerning the classification of the contested product according to Article 5(1) of Directive 2011/64

- 20 Should the Court of Justice answer the foregoing question in the negative, that is to say, that, even in the light of circumstances such as those in the main proceedings, one needs to focus on the contested product in its entirety (all the substances of which the contested blend is composed), in order to consider the product to be smoking tobacco for the purpose of excise duty it is necessary, first of all, to examine whether the condition laid down in Article 5(1)(a) of Directive 2011/64 (‘has been cut or otherwise split’) is met.
- 21 As the Court of Justice has stated, given that there is no definition of the words ‘cut’ and ‘split’ in that directive, it is necessary, in order to determine the scope of those words, to refer to their usual and everyday accepted meanings; those words, the usual meaning of which is very wide, refer, *inter alia*, as regards the first, to the result of the process of removing a part or a piece of something with a sharp instrument, and, as regards the second, to the result of the process of breaking up or dividing something (judgment of the Court of Justice of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraph 28).

- 22 As the contested product is a blend, it would be logical to suppose that, when examining the criterion of 'cutting' or 'splitting' for the purposes of Article 2(2) and/or Article 5(1)(a) of Directive 2011/64, one should assess the substances of which the product is composed.
- 23 So far as this last aspect is concerned, given the various linguistic versions of Article 5(1)(a) of Directive 2011/64 (for instance, English 'otherwise split' or French 'fractionné d'une autre façon'), it is possible to take the view that the substances in question other than tobacco (sugar syrup, glycerine, flavourings and the preservative mentioned) may meet the criteria in question, irrespective of the fact that the contested product consists primarily of liquid (viscous) and normally fine substances. This view might be in line with the interpretation put forward in paragraph 24 of the judgment of the Court of Justice in *Eko-Tabak* that the concept of 'smoking tobacco' cannot be construed narrowly.
- 24 On the other hand, the ingredients other than tobacco also make it possible to take the opposite view as to whether the blending of normally liquid or otherwise fine substances or the division of the final blend into smaller quantities may be considered 'cutting' or 'splitting' within the meaning of Article 5(1)(a) of Directive 2011/64. Indeed, the concept defining a product that is subject to excise duty must be objective, which is the reason why an evaluation of the criterion in question ('cut' or 'split') should not be dependent on whether there is a larger quantity of liquid or otherwise normally fine substances used for manufacturing the contested product.
- 25 It is also necessary to examine whether the contested products have the characteristics of smoking tobacco listed in Article 5(1)(b) of Directive 2011/64. Recital 8 of Directive 2011/64, *inter alia*, stipulates that 'tobacco refuse [should be] clearly defined', which leads to the conclusion that the concept of 'tobacco refuse' referred to in that recital cannot be interpreted broadly. The contested product proper, in turn, albeit intended for retail trade, is not to be regarded as refuse or as a by-product; there are no data that individual ingredients of the contested product might be considered as such either.
- 26 That said, in the absence of case-law of the Court of Justice, the fact that the contested product is made by processing tobacco, that is to say, by blending it with other substances, does not allow the possibility to be excluded that that product, containing only up to 24% tobacco, could be regarded as a by-product obtained from tobacco processing within the meaning of Article 5(1)(b) of Directive 2011/64.
- 27 The third question for a preliminary ruling is therefore referred with a view to dispelling these doubts which have arisen.

Concerning the concept of 'tobacco substitutes'

- 28 Should the Court of Justice answer the third question in the affirmative and confirm (1) that the relations in this dispute are subject to Article 2(2) of Directive

2011/64 and (2) that the decision on whether the contested product is to be regarded as smoking tobacco has to be made by examining whether the criteria listed in Article 5(1) are met not only by the tobacco but also by the other constituent substances, the main proceedings also raise a question of the possible inadequacy of the transposition of Directive 2011/64 into national law. The question is, specifically, whether Article 3(36) of the Law on Excise Duty concerning products considered to be smoking tobacco is compatible with Article 2(2) of Directive 2011/64.

- 29 Indeed, this provision of EU law defining the composition of the product refers to ‘other substances’ whereas the national legislation uses the term ‘tobacco substitutes’.
- 30 The current stage of the proceedings in this case reasonably leads to the conclusion that this concept (‘tobacco substitutes’) matches the one used in the CN.
- 31 The present Chamber agrees that the provisions of Directive 2011/64 defining the product subject to excise duty do not refer to the CN (see, on this matter, judgment of the Court of Justice of 11 April 2019, *Skonis ir kvapas*, C-638/17, EU:C:2019:316, paragraph 46). In the case at hand, however, the content of the CN provisions is relevant to the application of the national provisions and to deciding on what effect the possible inadequacy in the transposition of EU legislation might have on the applicant’s obligations.
- 32 The applicant classified the contested product under CN subheading 2403 11 00 as ‘water-pipe tobacco specified in subheading note 1 to this chapter’. That note states that ‘[f]or the purposes of subheading 2403 11, the expression “water-pipe tobacco” means tobacco intended for smoking in a water pipe and which consists of a mixture of tobacco and glycerol, whether or not containing aromatic oils and extracts, molasses or sugar, and whether or not flavoured with fruit [...]’.
- 33 The above subheading is attributed to CN heading 2403 ‘smoking tobacco, whether or not containing tobacco substitutes in any proportion’.
- 34 This leads to the conclusion that *all* water-pipe tobacco as defined in subheading note 1 referred to above is considered to be smoking tobacco and that constituent elements other than tobacco listed in that note (glycerol/glycerine, sugar, molasses, etc.) are possibly not to be regarded as ‘tobacco substitutes’.
- 35 This in part is confirmed by the second sentence of the subheading note to CN 2403 11 00 (‘... tobacco-free products intended for smoking in a water pipe are excluded from this subheading’) and the explanatory notes to the CN (OJ 2019 C 119, p. 1) (‘the explanatory notes’) on CN subheading 2403 99 90 stating that this subheading includes ‘products for smoking (for example, “water-pipe tobacco”), consisting wholly of tobacco substitutes *and substances other than tobacco*’.

- 36 The fact that, for the purposes of the CN, 'tobacco substitutes' include substances that, by their purpose, are intended to substitute the tobacco (usually) contained in the product is confirmed not only by the linguistic meaning of that concept but also (in part) by the explanatory notes on CN subheading 2402 90 00 stating that 'this subheading includes cigars, cheroots, cigarillos and cigarettes consisting wholly of tobacco substitutes, for example, cigarettes made from specially prepared leaves of a lettuce variety and containing neither tobacco nor nicotine'.
- 37 In these circumstances, it is also appropriate to refer the fourth question to the Court of Justice for a preliminary ruling.
- 38 The answers to these questions will have a significant bearing on the case under examination as they will be a prerequisite for examining the national legal rules for the purpose of establishing the applicant's fiscal obligations.

WORKING DOCUMENT