

**Case C-216/23**

**Request for a preliminary ruling**

**Date lodged:**

4 April 2023

**Referring court:**

Bayerischer Verwaltungsgerichtshof (Germany)

**Date of the decision to refer:**

23 March 2023

**Applicant:**

Hauser Weinimport GmbH

**Defendant:**

Freistaat Bayern

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[...]

**Bayerischer Verwaltungsgerichtshof**  
**(Bavarian Administrative Court)**

In the administrative-law case of  
**Hauser Weinimport GmbH,**  
[...] Fischach,  
- applicant -

[...]

v

**Freistaat Bayern,**

[...]

- defendant -

concerning

the law on foodstuffs;  
at this instance: appeal by the applicant against the judgment of the Bayerisches  
Verwaltungsgericht Augsburg (Bavarian Administrative Court, Augsburg) of  
21 September 2020,

the Bayerisches Verwaltungsgerichtshof (Bavarian Administrative Court), 20th  
Chamber,

[...]

on **23 March 2023**, adjudicating without a hearing, makes the following

**Order:**

1. This Chamber refers the following questions to the European Court of  
Justice for a preliminary ruling under Article 267 TFEU:

a.) Is Article 3(4)(c) of Regulation (EU) No 251/2014 to be interpreted as  
meaning that the term ‘alcohol’ also includes a drink which contains alcohol  
and is not a grapevine product within the meaning of Article 3(4)(a) of  
Regulation (EU) No 251/2014?

b.) Does ‘added’ within the meaning of Article 3(4)(c) of Regulation (EU)  
No 251/2014 mean that the alcoholic strength of the end product must have  
increased by comparison with the grapevine product used in accordance with  
Article 3(4)(a) of Regulation (EU) No 251/2014?

c.) If Question a.) is answered in the affirmative, is the first sentence of  
Article 3(1) of Regulation (EU) No 251/2014, read in conjunction with  
Annex I(1)(b)(i) thereto, to be interpreted as meaning that the term  
‘flavouring foodstuff’ includes an alcohol-containing drink within the  
meaning of Question a.)?

2. The proceedings are stayed pending the decision of the European Court of  
Justice on the questions referred for a preliminary ruling [...].

**Grounds:**

1 At issue between the parties to this dispute is whether the applicant may describe  
the product which it manufactures and markets as an ‘aromatised wine-product  
cocktail’ within the meaning of Article 3 of Regulation (EU) [No] 251/2014 of the  
European Parliament and of the Council of 26 February 2014, as amended by  
Regulation (EU) 2021/2117 of the European Parliament and of the Council of  
2 December 2021.

- 2 1. According to the information provided by the applicant itself and not disputed by the defendant [...], the applicant manufactures an alcoholic mixed drink which consists of 55% wine and 10% beer, with an alcohol content of 5.5%, and is flavoured with elderflower. It marketed that drink under the description 'aromatised wine-product cocktail'. The defendant objected to this on the ground that, in its view, the beer added to the drink is 'alcohol' within the meaning of Article 3(4)(c) of Regulation (EU) No 251/2014, which may not be added to a drink described as an 'aromatised wine-product cocktail'. The applicant is of the opinion that alcohol within the meaning of Article 3(4)(c) of Regulation (EU) No 251/2014 is to be construed as referring only to the alcohol mentioned in Annex I(3), since the addition of alcohol within the meaning of Article 3 of Regulation (EU) No 251/2014 must lead to an increase, rather than – as in the case of the applicant's product – a reduction, in the alcohol already present in the wine. In any event, however, beer is a flavouring ingredient within the meaning of Annex I(1)(b)(ii) to Regulation (EU) No 251/2014, with the result that the description 'aromatised wine-product cocktail' may be used even in the event that beer is regarded as alcohol within the meaning of Regulation (EU) No 251/2014.
- 3 2. The request for a preliminary ruling concerns the interpretation of Article 3(4)(c) of Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, as amended by Regulation (EU) No 2021/2117 of the European Parliament and of the Council of 2 December 2021.
- 4 a.) The provisions relevant to the adjudication of the dispute are Article 3(4)(c) of Regulation (EU) No 251/2014, as amended by Regulation (EU) No 2021/2117 of the European Parliament and of the Council of 2 December 2021, and Paragraph 25(1), point 1, read in conjunction with Paragraph 49, point 4, of the German Weingesetz (Law on Wine) ('WeinG'), read in conjunction with Article 7(1)(a) of Regulation (EU) No 1169 of the European Parliament and of the Council of 25 October 2011, read in conjunction with Article 2(2) and Article 1(2) of Regulation (EU) No 251/2014.
- 5 b.) The national provisions are worded as follows:
- 6 **Paragraph 25 of the WeinG** ('Weingesetz (Law on Wine), in the version set forth in the notice of 18 January 2011 (BGBl. I p. 66), as last amended by Article 2(4) of the Law of 20 December 2022 (BGBl. I p. 2752') – **Prohibitions to protect against deception**
- 7 (1) It is prohibited, as a responsible operator for the purposes of Article 8(1) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC,

Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18; OJ 2011 L 331, p. 41; OJ 2015 L 50, p. 48; OJ 2016 L 266, p. 7), as last amended by Regulation (EU) 2015/2283 (OJ 2015 L 327, p. 1), to place on the market or to advertise generally or individually a product containing information on products that does not meet the requirements of

1.

- 8 Article 7(1) of Regulation (EU) No 1169/2011, read in some cases in conjunction with Article 7(4) thereof,

[...].

9 **Paragraph 49 of the WeinG – Criminal provisions**

- 10 Anyone who [...]

4. places on the market or advertises a product in contravention of Paragraph 25(1) [...]

shall be liable to a custodial sentence not exceeding one year or a monetary penalty.

- 11 c.) National case-law:

The Verwaltungsgericht Trier (Administrative Court, Trier), by judgment of 18 April 2019, held that a fruit wine added to a grapevine product must be classified as a flavouring foodstuff for the purposes of Annex I(1)(b)(ii) to Regulation (EU) No 251/2014 and that that product does not constitute alcohol for the purposes of Article 3(4)(c) of Regulation (EU) No 251/2014 (VG Trier (Administrative Court, Trier), judgment of 18 April 2019 – 2 K 6133/18.TR). The Verwaltungsgericht Augsburg (Administrative Court, Augsburg), by judgment of 21 September 2020 (VG Augsburg (Administrative Court, Augsburg), judgment of 21 September 2020 – Au 9 K 20.597), which this Chamber allowed to be appealed, held that no (further) alcohol-containing drink may be added to a drink which is intended to carry the description ‘aromatised wine-product cocktail’.

- 12 So far as this Chamber is able to tell, the higher German courts have not established any case-law on this question.

- 13 4. On the basis of the product composition chosen by the applicant, the questions referred for a preliminary ruling are relevant to the decision to be given because the applicant may describe the product in question as an ‘aromatised wine-product cocktail’ only if the beer contained in it either is not to be regarded as alcohol within the meaning of Article 3(4)(c) of Regulation (EU) No 251/2014 or, if it

were to be regarded as such, is to be regarded as a flavouring ingredient within the meaning of Annex [I](1)(b)(ii) to that regulation.

- 14 5. The questions referred for a preliminary ruling need to be answered by the Court of Justice because this Chamber cannot dispose of the issue relevant to the decision to be given on this dispute with the necessary clarity and a binding interpretation by the Court of Justice of the provision crucial to the adjudication of the case is necessary to enable it to settle the dispute.
- 15 The part of the provision relevant to the dispute reads: ‘(Aromatised wine-product cocktail is a drink: ...) to which no alcohol has been added’ (Article 3(4)(c) of Regulation (EU) No 251/2014).
- 16 a.) Clarification is required in relation to the question as to whether ‘alcohol’ refers only to the alcohol defined in Annex I(3) to Regulation (EU) No 251/2014 as being that which may not be added to a cocktail – which would not include beer, as this does not meet the criteria set out there – or whether alcohol within the meaning of the provision [relevant to the adjudication of the dispute] refers to any alcohol already present in an added drink which is not itself a grapevine product within the meaning of Article 3(4)(a), inasmuch as such alcohol does not fulfil the criteria set out in Annex I(3) and for that reason alone may not be added to drinks within the category of aromatised wine-based drinks (Article 3(1) of Regulation (EU) No 251/2014). Support for that view – it being irrelevant whether or not the food business operator intends to increase the alcoholic strength of the drink – might be found in the need, for reasons of clarity for the market and consumers, for it to be made readily apparent that, in order to be described as an aromatised wine product for the purposes of Article 3 of Regulation (EU) No 251/2014, such a product, in addition to the alcohol contained in the grapevine product itself, may entail the use only of alcohol within the meaning of Annex I(3) to Regulation (EU) No 251/2014, but not the use of any other alcoholic drinks.
- 17 b.) This Chamber – unlike the lower court – inclines to the position that the beer used in this instance, with an alcohol content of 5.5% vol, is not to be regarded as alcohol within the meaning of the provision relevant to the adjudication of the dispute. This emerges from the following considerations:
- 18 aa.) The verb ‘versetzen’<sup>1</sup> [used in the German-language version of Article 3(4)(c) of Regulation (EU) No 251/2014] probably has the same meaning as the substantive form ‘Zusatz’ (‘addition’ in English) used in Annex I(3) to Regulation (EU) No 251/2014[,] and therefore almost certainly means ‘zusetzen’ in the sense of ‘hinzufügen’ (‘to add’ in English). This follows from a comparison with the French-language version of Regulation (EU) No 251/2014, which uses the term ‘l’addition’ (in German: ‘Zugabe’, ‘Zusatz’; in English: ‘addition’) in Article 3 and ‘l’adjonction’ (in German: ‘Hinzufügung’; in English: ‘addition’) in

<sup>1</sup> N.d.t: the ambiguity of the verb ‘versetzen’ only concerns the German-language version of Regulation (EU) No 251/2014.

Annex I(3)[,] and with the English version, which [uses] the expression ‘to which no alcohol has been added’ (‘to add’: ‘hinzufügen’ in German) in Article 3 of Regulation (EU) No 251/2014 and ‘addition of alcohol’ (‘addition’: ‘Zusatz’ in German) in Annex I(3). In the sense in which it is used in the present context of foodstuffs, the German term ‘versetzen’ means ‘vermischen’ (‘und dadurch in der Qualität mindern’) (‘to mix’ (‘and thereby to reduce the quality of’)) (source: Duden). In the light of the French- and English-language versions of Regulation (EU) No 251/2014, and the use of the term ‘Zusatz’ (‘addition’ in English) in [the German-language version of] Annex I(3) to Regulation (EU) No 251/2014, this Chamber inclines to the view that ‘versetzen’ properly means ‘zusetzen’ in the sense of ‘hinzufügen’ (‘to add’ in English) here. The [German-language version of the] provision requiring interpretation thus stipulates that no alcohol within the meaning of Annex I(3) may be added to a drink described as an ‘aromatised wine-product cocktail’.

- 19 bb.) In the view of this Chamber, ‘alcohol’ within the meaning of Article 3(4)(c) is almost certainly to be construed as referring only to alcohol as defined in Annex I(3) to Regulation (EU) No 251/2014, since only the addition of the types of alcohol referred to in the latter provision to one or more of the grapevine products mentioned in Article 3(4)(a) would be likely to lead to an increase in the alcoholic strength of the drink. Alcohol-containing drinks with a lower alcohol strength than the grapevine product reduce the alcohol strength of the original product (in accordance with Article 3(4)(b) of Regulation (EU) No 251/2014, the grapevine products referred to in point (a) must represent at least 50% of the total volume) and are therefore incapable, from a linguistic point of view alone, of fulfilling the condition that alcohol must be ‘added’ (and must therefore represent a greater proportion of the total content of the drink). It is for this reason that the provision at issue here also provides that the actual alcoholic strength by volume of the end product must be between 1.2% vol. and 10% vol., and, thus, must not or not significantly exceed the alcoholic strength by volume of the grapevine product forming the basis of the drink (between 9% vol. and 14% vol. in the case of wine) (the position being otherwise, however, in the case of aromatised wines, the actual alcoholic strength by volume of which must be between 14% vol. und 22% vol., according to Article 3(2)(g) of Regulation (EU) No 251/2014).
- 20 cc.) The second subparagraph of Article 4(2) of Regulation (EU) No 251/2014 provides that, in establishing the authorised production processes referred to in the first subparagraph thereof, the Commission must take into account the production processes recommended and published by the OIV (International Organisation of Vine and Wine). Resolution OIV/ECO 288/2010 listed as treatments in Part I, Chapter 6 (Products derived from grapes, grape must or wine), points 6.6 (Beverages based on vitivinicultural products) and 6.7 (Wine-based beverages), of the International Code of Oenological Practices, inter alia: the ‘addition of food-related products or non-alcoholic products or beverages including water’. Since Regulation (EU) No 251/2014 makes reference to the production processes recommended and published by the OIV and the addition of non-alcoholic drinks is expressly provided for there, it is not clear why the text of the Regulation,

instead of stipulating at the point concerned that only alcohol-free drinks may be added, uses the expression ‘to which no alcohol has been added’, if the legislature wished to ensure that no alcoholic drinks whatsoever should be permitted to be a component of an ‘aromatised wine-product cocktail’.

- 21 dd.) According to recital 4 of Regulation (EU) No 251/2014, the measures applicable to aromatised wine products should contribute to the attainment of a high level of consumer protection, the prevention of deceptive practices and the attainment of market transparency and fair competition. On that basis, the informed average consumer is likely to expect an alcohol-containing drink described as a ‘cocktail’ to contain a mixture of various alcohol-containing drinks, as long as it is not labelled as being alcohol-free. What is more, the protection of consumers and marketing which the Regulation was intended to ensure is more apparent in the case of the categories of ‘aromatised wines’ and ‘aromatised wine-based drinks’, the descriptions of which are closely associated with traditional production processes (‘vermouth’, Annex II(A)(3); ‘sangria’, Annex II(B)(3)), than in the case of drinks marketed under the term ‘aromatised wine-product cocktails’, because the Regulation does not classify as such any products known and described by reference to traditional production processes (Annex II(C)).
- 22 6. In the event that, because of its alcohol content, the beer used in this instance were to constitute ‘alcohol’, within the meaning of Regulation 251/2014, which may not be added to an aromatised wine-based drink, this Chamber wishes to ascertain whether beer may be added to an aromatised wine-product cocktail, within the meaning of the Regulation, as a ‘flavouring foodstuff’ within the meaning of Annex I(1)(b)(ii) to Regulation (EU) No 251/2014, or whether its alcohol content precludes such an understanding. In Germany, there are numerous beer-flavoured foodstuffs on the market. As the research which this Chamber conducted before making the request for a preliminary ruling has shown, beer flavouring as a baking ingredient can be purchased and added to food. To this extent, this Chamber is in no doubt that beer is a flavouring foodstuff within the meaning of the Regulation.
- 23 This order is final [...].

[...]