

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

1 October 2020 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 98 – Option for the Member States to apply a reduced rate of VAT to certain supplies of goods and services – Annex III, point 1 – Definitions of ‘foodstuffs for human consumption’ and ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’ – Aphrodisiac products)

In Case C-331/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 19 April 2019, received at the Court on 23 April 2019, in the proceedings

Staatssecretaris van Financiën

v

X,

THE COURT (Tenth Chamber),

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

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Netherlands Government, by L. Noort and K. Bulterman, acting as Agents,
- the European Commission, by W. Roels and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 1 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in the context of proceedings between the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) and X, concerning the application of the

reduced rate of value added tax (VAT) for foodstuffs to products sold and used as aphrodisiacs, which are composed essentially of elements of animal or vegetable origin, and consumed orally.

Legal context

EU law

Regulation (EC) No 178/2002

3 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1) provides, in Article 1 thereof, headed ‘Aim and scope’:

‘1. This Regulation provides the basis for the assurance of a high level of protection of human health and consumers’ interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

2. For the purposes of paragraph 1, this Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at [European Union] and national level.

It establishes the European Food Safety Authority [(EFSA)].

It lays down procedures for matters with a direct or indirect impact on food and feed safety.

...’

4 Article 2 of that regulation, headed ‘Definition of “food”’, provides

‘For the purposes of this Regulation, “food” (or “foodstuff”) means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.

“Food” includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. It includes water after the point of compliance as defined in Article 6 of [Council] Directive 98/83/EC [of 3 November 1998 on the quality of water intended for human consumption (OJ 1998 L 330, p. 32)] and without prejudice to the requirements of [Council] Directives 80/778/EEC [of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11)] and 98/83/EC.

“Food” shall not include:

- (a) feed;
- (b) live animals unless they are prepared for placing on the market for human consumption;
- (c) plants prior to harvesting;
- (d) medicinal products within the meaning of Council Directives 65/65/EEC [of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ, English Special Edition, Series I Volume 1965-1966 p. 20)]

and 92/73/EEC [of 22 September 1992 widening the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to medicinal products and laying down additional provisions on homoeopathic medicinal products (OJ 1992 L 297, p. 8)];

(e) cosmetics within the meaning of Council Directive 76/768/EEC [of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169)];

(f) tobacco and tobacco products within the meaning of Council Directive 89/622/EEC [of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1)];

(g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs[, signed in New York on 30 March 1961, amended by the 1972 Protocol amending the 1961 Single Convention (*United Nations Treaty Series*, vol. 520, p. 151),] and the United Nations Convention on Psychotropic Substances[, signed in Vienna on 21 February 1971 (*United Nations Treaty Series*, vol. 1019, p. 175)];

(h) residues and contaminants.’

5 Article 5 of Regulation No 178/2002, headed ‘General objectives’, provides, in paragraph 1 thereof:

‘Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers’ interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.’

The VAT Directive

6 Under Article 96 of the VAT Directive, Member States are to apply a standard rate of VAT, which must be fixed by each Member State and which must be the same for the supply of goods and for the supply of services.

7 Article 97 of the VAT Directive provides that the standard rate cannot be less than 15%.

8 Article 98(1) and (2) of that directive provides:

‘1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...’

9 Annex III to the VAT Directive, which contains the list of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied, includes, in points 1 to 4:

‘(1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in preparation of foodstuffs; products normally intended to be used to supplement foodstuffs or as a substitute for foodstuffs;

(2) supply of water;

(3) pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection;

(4) medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled, including the repair of such goods, and supply of children's car seats;

...'

Netherlands law

10 At the material time, pursuant to Article 9(2)(a) of the Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law on replacing turnover tax by the system of taxing added value) of 28 June 1968 (Stb. 1968, No 329), the rate of VAT was 6% for the supply of goods set out in Table I of that law.

11 Point a.1 of that table lists:

'1. foodstuffs, in particular:

a. food and beverages normally intended for human consumption;

b. products clearly intended for use in the preparation of food and beverages as referred to under point (a) and that are wholly or partly contained therein;

c. products intended for use to supplement or as a substitute for food or beverages as referred to under (a), with the proviso that alcoholic drinks are not considered foodstuffs;

...'

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

12 X, a trader subject to VAT, sells items in his sex shop which include capsules, drops, powders and sprays presented as aphrodisiacs that stimulate libido. Those products, which are composed essentially of elements of animal or vegetable origin, are intended for human consumption and are to be taken orally.

13 Between 2009 and 2013, the taxable person applied the reduced VAT rate for foodstuffs to those products.

14 The tax authorities challenged the application of that rate, taking the view that the products in question did not constitute 'foodstuffs' within the meaning of the relevant provisions of VAT legislation, and decided to issue additional assessments.

15 The taxable person contested that decision of the tax authorities before the Rechtbank den Haag (District Court and court of first instance, The Hague, Netherlands).

16 On appeal, the Gerechtshof den Haag (Court of Appeal, The Hague, Netherlands) found in favour of the taxable person, ruling that the use of the products in question as aphrodisiacs did not preclude them from being taxed at the reduced rate applicable to foodstuffs. That court took into

account the fact that the products were intended to be consumed orally and were made from ingredients that may be found in foodstuffs. The court stated, furthermore, that the definition of the concept of ‘foodstuffs’ was so broad that it could cover products not directly associated with foodstuffs, such as sweets, chewing gum or cakes.

17 The State Secretary for Finance brought an appeal on a point of law against the judgment of the Gerechtshof den Haag (Court of Appeal, The Hague) before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

18 Taking the view that resolution of the dispute before it required an interpretation of provisions of the VAT Directive, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the term “foodstuffs for human consumption” used in point 1 of Annex III to the [VAT] Directive be interpreted as covering, in accordance with Article 2 of Regulation [No 178/2002], any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans?

If this question is answered in the negative, how must that term then be defined?

(2) If edible or potable products cannot be regarded as foodstuffs for human consumption, on the basis of which criteria must it then be assessed whether such products can be regarded as products normally used to supplement foodstuffs or as a substitute for foodstuffs?’

Consideration of the questions referred

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, how the concepts of ‘foodstuffs for human consumption’ and ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, set out in point 1 of Annex III to the VAT Directive, are to be interpreted.

20 Under Article 96 of the VAT Directive, each Member State is to apply the same standard rate of VAT in respect of the supply of goods and in respect of the supply of services.

21 As an exception to that principle, Article 98(1) of the VAT Directive gives the Member States the option of applying either one or two reduced rates of VAT. In accordance with the first subparagraph of Article 98(2) of that directive, the reduced rates of VAT can apply only to supplies of goods and services in the categories set out in Annex III to the directive.

22 More specifically, point 1 of Annex III to the VAT Directive allows Member States to apply a reduced rate of VAT, in particular, to ‘foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption’ and to ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’.

23 The VAT Directive contains no definition of the concepts of ‘foodstuffs for human consumption’ or ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, and Council Implementing Regulation No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1) also does not provide any definition of those concepts. Furthermore, neither the VAT Directive nor Implementing Regulation No 282/2011 contains any reference to the law of the Member States in that respect.

24 Under those circumstances, the concepts of ‘foodstuffs for human consumption’ and ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, set out in point

1 of Annex III to the VAT Directive, must be interpreted in accordance with the usual meaning of their words in everyday language, whilst also taking into account the legislative context in which they occur and the purposes of the rules of which they are part (see, to that effect, judgment of 29 July 2019, *Spiegel Online*, C?516/17, EU:C:2019:625, paragraph 65).

25 As regards, in the first place, the usual meaning in everyday language of the words constituting those concepts, first, it should be observed that, as the Advocate General essentially observes in points 18, 19 and 27 of his Opinion, all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed for the purposes of providing it with those nutrients, are in principle ‘foodstuffs for human consumption’.

26 Since that nutritional role is a decisive factor for a product to be classed as a ‘foodstuff for human consumption’, according to the usual meaning of those words in everyday language, the question whether that product has health benefits, its ingestion entails a certain pleasure for the consumer or its use is part of a certain social context, is irrelevant. Consequently, the circumstance that consumption of that product has positive effects on the libido of the person ingesting it is irrelevant in that respect.

27 Second, as regards the usual meaning in everyday language of the words ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, it should be noted that those words cover products the consumption of which also provides nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop.

28 It is clear that such a nutritional role cannot be lacking in that category of products, as such products are intended to supplement or replace foodstuffs.

29 Given that those two categories of product perform the same nutritional role, there is consequently no reason to apply different VAT systems to them.

30 As regards, in the second place, the context of which the concepts of ‘foodstuffs for human consumption’ and ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, set out in point 1 of Annex III to the VAT Directive, are part, it should be noted that, as is clear from paragraphs 20 to 22 of the present judgment, those two concepts designate products the supply of which is subject to a reduced rate of VAT, which constitutes an exception to the principle of the application of the standard rate of VAT. They must, therefore, be interpreted strictly (see, to that effect, judgment of 19 December 2019, *Segler-Vereinigung Cuxhaven*, C?715/18, EU:C:2019:1138, paragraph 25).

31 It should be observed, moreover, that the definition of the concept of ‘foodstuff’, set out in Article 2 of Regulation No 178/2002, is not relevant for the purposes of defining those concepts since that regulation – the aim of which, as is clear from Article 1 thereof, is the protection of human health – concerns all substances contributing to food safety. That regulation thus refers, by way of the particularly broad concept of ‘foodstuffs’, to any substance intended to be ingested or which is reasonably likely to be ingested by humans, including alcoholic beverages and water. Consequently, the scope of that concept exceeds that of the concepts of ‘foodstuffs for human consumption’ or ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, set out in point 1 of Annex III to the VAT Directive.

32 Moreover, neither the concept of ‘foodstuffs’ nor that of ‘products normally used to supplement foodstuffs or as a substitute for foodstuffs’, set out in point 1 of that annex, can cover medicines, as Annex III to the VAT Directive makes separate reference to ‘pharmaceutical

products' in point 3 thereof.

33 As regards, in the third place, the aim pursued by Annex III to the VAT Directive, the Court has held that, in establishing Annex III to the VAT Directive, the EU legislature intended that essential commodities, and goods and services serving social or cultural objectives, may be subject to a reduced rate of VAT, provided that they pose little or no risk of distortion to competition (judgment of 4 June 2015, *Commission v United Kingdom*, C?161/14, not published, EU:C:2015:355, paragraph 25 and the case-law cited).

34 The Court has added that the purpose of that annex is to make less onerous, and thus more accessible for the final consumer, who ultimately pays the VAT, certain goods regarded as being particularly necessary (see, to that effect, judgment of 9 March 2017, *Oxycure Belgium*, C?573/15, EU:C:2017:189, paragraph 22 and the case-law cited).

35 Under those circumstances, any product intended for human consumption which provides the human body with the nutrients necessary to keep the human body alive and enable it to function and develop comes within the scope of the category set out in point 1 of Annex III to the VAT Directive, even if the consumption of that product also aims to produce other effects.

36 By contrast, a product which does not contain nutrients or contains a negligible amount thereof, the consumption of which serves solely to produce effects other than those necessary to keep the human body alive and enable it to function and develop, cannot fall within the scope of that category.

37 Although it would appear from the information before the Court that that is the case in so far as concerns the aphrodisiacs at issue in the main proceedings, that is a matter for the referring court to ascertain.

38 Furthermore, that interpretation is supported by the aim pursued by Annex III to the VAT Directive of making essential commodities subject to a reduced rate of VAT in order to make them more accessible to the end consumer.

39 In the light of all the foregoing considerations, the answer to the questions referred is that the concepts of 'foodstuffs for human consumption' and 'products normally used to supplement foodstuffs or as a substitute for foodstuffs', set out in point 1 of Annex III to the VAT Directive, must be interpreted as meaning that they refer to all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed in order to provide it with those nutrients.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

The concepts of 'foodstuffs for human consumption' and 'products normally used to supplement foodstuffs or as a substitute for foodstuffs', set out in point 1 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as meaning that they refer to all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which

are consumed in order to provide it with those nutrients.

[Signatures]

* Language of the case: Dutch.