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SELECTED ISSUES CONCERNING CUSTOMS AND FISCAL CONTROL OF ALCOHOLIC BEVERAGES WITH SPECIAL EMPHASIS ON INFORMATION OBLIGATIONS

| Abstract

- *Goal* – The purpose of this paper is to analyse the implementing regulations for customs and fiscal control of alcoholic beverages in Poland regulated by the Regulation of the Minister of Finance, Funds and Regional Policy dated August 12, 2021 on customs and fiscal control of certain excise goods.
- *Research methodology* – The article uses primarily the dogmatic-legal method the purpose of which is to analyse the issue in question through the prism of both an act of law and (most importantly) a regulation.
- *Score/results* – Information obligations imposed on these entities also play a significant role in carrying out customs and fiscal control. These duties have been differentiated depending on the entity that conducts the activity and the subject of that activity. They provide the competent head of the customs and treasury office, or the permanent control cell, with information regarding the entities in the alcoholic beverage business, which also enables the competent authorities to carry out risk analysis.
- *Originality/value* – The study includes a discussion of the provisions of the Regulation of the Minister of Finance, Funds and Regional Policy of August 12, 2021 on customs and fiscal control of certain excise goods, which has not been discussed more extensively. Special emphasis has been placed on the information obligations of obligated entities, which may prove useful in the application of the law.

| **Keywords:** tax, regulation, customs and fiscal control, alcoholic beverages.

1. Introduction

The Act of November 16, 2016 on the National Revenue Administration (hereinafter: n.r.e.) which came into force on March 1, 2017, introduced changes to the Polish legal order that concerned, among other things, tax procedures. The law established a new control authority – the head of the customs and tax office. He implements customs and fiscal control in entities selected for control on the basis of risk analysis. This control is aimed at tightening the tax system by detecting tax frauds and prosecuting their perpetrators [Byrzykowski, Zdunek, 2017: 52]

Due to the comprehensiveness and multifaceted nature of the issue related to customs and fiscal control of alcoholic beverages, the author of this article would like to focus on discussing the tasks of the control bodies and the procedures for customs and fiscal control of alcoholic beverages regulated by the Regulation of the Minister of Finance, Funds and Regional Policy of August 12, 2021 on customs and fiscal control of certain excise goods¹ (hereinafter: the Regulation). This activity is also rightly described as: “‘sensitive’ from the perspective of the interests of the state treasury” [Flis, 2013: 205]. It was subjected to control in the past, among other things, within the framework of special tax supervision, which justifies a thorough analysis of the current regulation in question. The article is intended to summarise and organise the selected issues.

2. Alcoholic beverages as duty goods

In the Act of December 6, 2008 on Excise Tax² (hereinafter: a.e.t.), a legal definition of the term “excise goods” was constructed by the legislator. In accordance with Article 2, paragraph 1, item. 1 of the a.e.t., this term should be understood as: energy products, electricity, alcoholic beverages, tobacco products, dried tobacco, electronic cigarette liquid and novelty products, as defined in Annex No. 1 to the Act. It can be noted that the construction of this provision “implements the principle of concretisation of the subject matter of taxation expressed indirectly in Article 1 of the a.e.t. (...). Products not included in the group in question cannot

¹ Journal of Laws of 2021, item 1636.

² Journal of Laws of 2022, item 1542 as amended.

be considered excise goods subject to excise taxation” [Matarewicz, LEX access]. The definition lists in an enumerative manner the basic groups of excise goods with reference to their concretisation in Appendix 1 of the a.e.t.

The definition of “alcoholic beverages” is also included in the u.p.a., but not in Article 2 of the a.e.t., which appears to be the functions of the basic “statutory glossary.” Within the a.e.t., it was placed in Division IV, entitled “Excise goods – specific provisions. Tax base and excise rates,” specifically in its Chapter 2 “Alcoholic beverages.” Pursuant to Article 92 of the Act: “Alcoholic beverages within the meaning of the Act include ethyl alcohol, beer, wine, fermented beverages and intermediate products”³.

Keeping in mind the definition in Article 92 a.e.t. and Appendix No. 1 to the A.P.A., the following alcoholic beverages can be specified as excise goods:

1. beer obtained from malt (CN code 2203 00),
2. wine of fresh grapes, including fortified wines; grape must, other than that of heading 2009 (CN code 2204),
3. vermouth and other wines of fresh grapes flavored with plants or aromatic substances (CN code 2205),
4. other fermented beverages (for example, cider, perry and mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages not elsewhere specified or included (CN code 2206 00),
5. undenatured ethyl alcohol of 80% vol. alcoholic strength by volume or more; ethyl alcohol and other alcoholic products, of any strength, denatured (CN code 2207),
6. undenatured ethyl alcohol with an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages (CN code 2208),
7. ethyl alcohol contained in products that are not excise goods with an actual alcoholic strength by volume exceeding 1.2% vol. (regardless of the CN code of the product containing ethyl alcohol)⁴.

³ The various legal definitions of the elements constituting alcoholic beverages which are listed in Article 92 of the a.e.t. have also been defined by the legislator (ethyl alcohol – Article 93(1) of the a.e.t.; beer – Article 94(1) of the a.e.t.; wine – Article 95(1) of the a.e.t.; fermented beverages – Article 96(1) of the a.e.t.; intermediate products – Article 97(1) of the a.e.t.). In view of the subject matter of this article, it is not necessary to analyse each of the definitions.

⁴ Mentioned after: Parulski, 2016.

3. Statutory delegation to issue an regulation by the minister responsible for public finance

While analysing the issues related to customs and fiscal control of alcoholic beverages, attention should be paid to Article 90 n.r.e. In it, the legislator included a statutory delegation for the minister responsible for the public finance to issue a regulation on the control of excise goods. Currently in force is the Regulation of the Minister of Finance, Funds and Regional Policy dated August 12, 2021 on customs and fiscal control of certain excise goods. An analysis of the Regulation in question leads to the conclusion that the Minister of Finance has, in principle, fulfilled the statutory delegation in full, about which more later in this article.

Article 90(1) n.r.e. stipulates that the Minister competent for public finance, when issuing the Regulation, should always include in it:

1. the detailed scope and manner of customs and fiscal control of certain excise goods,
2. the mode of transmission and the scope of information on the dates of activities subject to customs and fiscal control,
3. the procedure for the destruction of excise goods subject to customs and fiscal control,
4. detailed ways and conditions for receiving, storage, issuance and transportation of excise goods subject to customs and fiscal control.

As T.D. Nowak states, “The title of the regulation may be misleading, as it refers only to the wording of Article 90(1)(1). Meanwhile, the regulation also specifies the mode of communication and the scope of information on the dates of activities subject to customs and fiscal control, the mode of destruction of excise goods subject to customs and fiscal control, and the detailed methods and conditions for receiving, storing, issuing and transporting excise goods subject to customs and fiscal control, i.e. the detailed conditions for performing control specified in paragraph 1(2)–(4)” [Nowak, 2018].

The legislator additionally decided in Article 90(2) n.r.e. to specify certain elements that should be considered when issuing the regulation, i.e.:

1. excise goods of special importance for the state budget and goods subject to mandatory excise marking,
2. diversification of the forms and methods of performing inspections and the scope of requirements that should be met by the inspected – depending on

- the type of entity, the type of activity performed and the group of products covered by these inspections,
3. the need to ensure the effectiveness and efficiency of the performance of customs and fiscal control.

At this point, it is necessary to return to the legislator's specification of two categories of excise goods in Article 90 paragraph 2 item. 1 n.r.e. a precisely: "excise goods of particular importance for the state budget" and 'goods subject to mandatory excise marking'. It is puzzling to introduce such a division of excise goods, which, in accordance with the directive of the rational legislator, would suggest that goods of particular importance for the state budget are not the same (in whole or in part) as those subject to excise marking. Such an understanding of this article seems erroneous and would lead to the introduction of an unnecessary division that would deprive certain categories of excise goods of the attribute of "special significance for the state budget" by categorizing them only as "subject to excise marking." This would also be unacceptable in the reverse situation, as it would lead to a misleading situation, where an excise product would obtain the attribute of "special significance for the state budget", but in a manner inconsistent with the special provisions currently in force – it would not be categorized as "subject to excise marking" despite the imposed obligations.

In the current legislation, the legislator has not included a catalog of which excise goods should be included in a particular of the above two groups. In the Regulation the minister responsible for public finance also chose not to enumerate which products should be included in a particular category. This seems to be an appropriate legislative action, especially when the statutory delegation does not contain an explicit order to specify such categories, but only to "include" excise goods of particular importance for the state budget and goods subject to mandatory excise marking. Thus, the legislator left the selection of these excise goods within the discretion of the minister responsible for public finance.

A positive reference should be made to the demand in Article 90 paragraph 2 item. 2 n.r.e. to include in the Regulation also the differentiation of the forms and methods of performing inspections and the scope of requirements that should be met by the inspected – depending on the type of entity, the type of activity performed and the group of products covered by these inspections. Drawing attention to these distinctions is a manifestation of the constitutional principle of proportionality in the tax law, and is also translated into the situation of specific entrepreneurs whose activities involve excise goods.

The postulate in Article 90, paragraph 2, item. 2 n.r.e. to include in the Regulation aimed at ensuring “efficiency” in the performance of customs and fiscal control seems to be aimed at areas of particular interest to the state, and which were also specifically indicated in the preamble to the n.r.e. i.e.: the financial security of the Republic of Poland, the security of the customs territory of the European Union, ensuring modern and friendly performance of tax and customs duties, as well as effective collection of public tributes. The postulate for the introduction of regulations aimed at “efficiency” in the performance of customs and fiscal control is aimed at safeguarding both the interests of the state and the entities subject to the control by minimizing the burden of control activities that may manifest itself primarily in the inadequately prolonged conduct of controls.

As D. Strzelec and M. Łoboda state: “At present, the mode of performing inspections of excise goods under customs and fiscal control, and thus the inspections previously performed under special tax supervision, control of compliance with tax laws and customs control will be performed in accordance with a single procedure regulated by the Law on National Fiscal Administration. However, given the specific nature of special tax supervision, this unification was not necessary, and there is also concern about excessive formalism on the part of employees and officers performing these activities and their time-consuming nature” [Strzelec, Łoboda, 2017: 128].

4. Scope and procedure of control determined by the Regulation

The issued Order regulates the detailed scope and manner of customs and fiscal control of alcoholic beverages, among others:

1. covered by the procedure of suspension of excise duty or exempted from excise duty due to their intended use, such as: beers, wines, fermented beverages and intermediate products, ethyl alcohol (covered by CN item 2207 i.e.: undenatured ethyl alcohol with an alcoholic strength by volume of 80% vol. or more; ethyl alcohol and other alcoholic products, of any strength, denatured), or ethyl alcohol (covered by CN heading 2208 i.e.: undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol.; spirits, liqueurs and other spirituous beverages),
2. subject to exemption from excise tax for a specific purpose, if they are moved to an intermediary entity or stored by this entity, excluding excise

goods moved as a result of a return referred to in Article 32 paragraph 14 item 1 a.e.t.,

3. produced outside a tax warehouse under Article 47 paragraph 1 points 1, 2, 4 and 5 a.e.t.

This control relates to compliance with excise tax regulations on the production, movement and consumption of excise goods, in particular their manufacture, refining, processing, denaturing, bottling, receipt, storage, issuance, transportation and destruction, as well as on the use of excise marks and the marking of excise marks on these goods (§ 1 of the Regulation).

In addition, the Regulation manages: the mode of transmission and the scope of information on the dates of activities subject to control, the mode of destruction of excise goods subject to control, detailed methods and conditions for receiving, storing, issuing and transporting excise goods subject to control.

Control may be carried out either on an ad hoc basis or as a permanent control (§ 3 of the Regulation). With regard to permanent control, the provisions of the n.r.e. are applicable. According to Article 55 of the n.r.e., permanent control consists in the performance of control activities on a continuous basis. As K. Rozycki points out: “We should not confuse the permanent authorisation to carry out customs and fiscal control with conducting this control on a continuous basis. In the former case, a UCS employee/officer is authorised to continuously control various entities. Control conducted on a continuous basis relates to a specific entity and may be conducted by changing employees/functions” [Różycki, 2018: 28].

In accordance with § 4 of the Regulation, permanent control is extended to entities in the field of production, purification or dehydration of CN 2207 ethyl alcohol, excluding scientific units, in which the total volume of ethyl alcohol obtained during the year does not exceed 300 dm³ of ethyl alcohol 100% vol. (unless the Head of the Customs-Treasury Office, taking into account the risk, waives such control in accordance with § 8 paragraph 2 of the Regulation), as well as distilleries and small distilleries (subject to the entities referred to in § 12 paragraph 1 and § 15 paragraph 1 of the Regulation). Pursuant to § 4(2) of the Regulation – The head of the customs and tax office may also include other entities under permanent control. In such a case, he should notify the entity to be subjected to permanent control 7 days before subjecting it to such a form of control (§ 4 paragraph 4 of the Regulation). An analogous duty of notification has been imposed when the head of the customs and revenue office decides to abandon such a form of control. He should, in such a situation, notify the

entity prior to the date of abandonment of this form of control (so § 4(5) of the Regulation).

Permanent inspection or ad hoc inspection of alcoholic beverages covered by the Regulation in question consists of:

1. direct participation of the inspector in activities related to the activities covered by the inspection, including production, receipt, dispensing, consumption, storage and destruction of alcoholic beverages and denaturation of ethyl alcohol,
2. control of production,
3. control of the marking with excise marks of products subject to such obligation and the application of excise marks to such products, as well as control of other obligations arising from the marking of products with excise marks,
4. control of the removal, deletion and destruction of excise marks,
5. their accounting of inventory and turnover,
6. taking and examining samples,
7. control of documentation,
8. control of the correctness of calculation and timeliness of excise tax payments, and Article 47(1)(1), (2), (4), and (5) of the a.e.t.,
9. control of imposed official seals,
10. control of the condition of equipment, instruments, means of transport, premises and vessels used to carry out activities subject to control,
11. comparison of the actual state of affairs at the place of carrying out the activities subject to control with the verification files referred to in Article 109 paragraph 1 of the a.p.a., at the entities where the official check has been carried out, where the excise tax regulations condition the issuance of a decision on the result of the official check.

In addition, it should be pointed out that the destruction of alcoholic beverages covered by the Regulation in question, specifically ethyl alcohol under CN heading 2207 and CN heading 2208, which is unsuitable for consumption, further processing or consumption, is carried out in the presence of an inspector (§ 37(1) of the Regulation). As for the destruction of alcoholic beverages unsuitable for consumption, further processing or consumption such as beers, wines, fermented beverages and intermediate products – this may take place without the presence of an inspector, if two conditions are met (§ 37 item 2 of the Regulation):

1. the entity has informed the competent head of the customs and tax office of the planned destruction,
2. the inspector has not arrived at the entity on the date indicated in the information.

5. Procedure for submitting and the scope of information on the dates of activities under control

Specific information obligations have also been imposed on entities engaged in activities related to the excise products specified in the Regulation. These obligations are arranged in the Table 1, narrowing them down only to the analysis of the issue analysed in this article.

It is clear from the above tabular overview that specific information obligations have been imposed on entities operating alcoholic beverages as defined in the Regulation. These obligations have been differentiated by entity (e.g., distilleries) or by the type of alcoholic beverages they produce. The information is in each case submitted to the competent head of the customs and tax office, and in situations where the entity is under permanent control – to the permanent control unit. The activities to which the Regulation binds the information obligation, as a rule, relate to the activities to be performed (e.g., the intended marking of alcoholic beverages with excise tax marks or the commencement of production of ethyl alcohol). In such a case, the deadline for providing information is, as a rule, at least one day before the planned performance of the activity to which the Regulation binds the obligation to provide information (with one exception of providing information 3 days before the performance of a given activity, e.g., destruction of excise stamps removed from unit packages of excise goods and damaged or destroyed before they are applied to excise goods or in the process of marking excise goods). In some cases, the obligations to provide information relate to activities that have already occurred, e.g., jamming or malfunctioning of a volume meter or other measuring device or leakage of apparatus, pipelines and equipment. In such cases, the information obligation should be carried out immediately.

Table 1. A division of the information obligations contained in the Regulation.

Entity obliged to send information	Addressee of the sent information	The activity with which the obligation to send information is connected	Deadline for sending information	Legal basis
Entity engaged in the business of alcoholic beverages covered by the Regulation	The competent head of the customs and revenue office, and in the case of performing permanent control – permanent control cell	Intentional determination of the actual inventory of alcoholic beverages covered by the regulation	At least one day before the scheduled date of the activity	§ 20 of the Regulation
Entity obliged to mark excise goods with excise stamps	The competent head of the customs and revenue office, and in the case of performing permanent control – permanent control cell	Intentional labeling of alcoholic beverages with excise stamps	At least one day before the scheduled date of the activity	§ 33 of the Regulation (Exceptions § 33(2) of the Regulation)
Entity engaged in the business of alcoholic beverages covered by the Regulation	the competent head of the customs and tax office	• the removal of excise tax marks, in the cases specified in the regulations issued pursuant to Article 123 (4) a.e.t., • introduction of the obligation to cancel excise tax marks, pursuant to Article 124 of the a.e.t., • destruction of excise signs removed from unit packages of excise goods and damaged or destroyed before they are applied to excise goods or in the process of marking excise goods.	At least 3 days before the scheduled date of the activity	§ 34 of the Regulation

Entity obliged to send information	Addressee of the sent information	The activity with which the obligation to send information is connected	Deadline for sending information	Legal basis
Entity engaged in the business of alcoholic beverages covered by the Regulation	the competent head of the customs and tax office	Shipping of alcoholic beverages covered by the regulation	Before the date of shipment	§ 31(1) of the Regulation
Entity engaged in the business of alcoholic beverages covered by the Regulation	the competent head of the customs and tax office	Acceptance of alcoholic beverages covered by the regulation	At least one day before the scheduled acceptance of the shipment	§ 31 (2) of the Regulation
Entity operating CN 2207 ethanol and entity producing CN 2208 ethanol by distillation or process other than distillation process (does not apply to distilleries and small distilleries)	The competent head of the customs and revenue office, and in the case of performing permanent control – permanent control cell	Production, recovery, purification and dehydration of ethyl alcohol	At least one day before the scheduled activity	§ 21 of the Regulation
Ethyl alcohol business entity referred to in the Regulation	The competent head of the customs and revenue office, and in the case of performing permanent control – permanent control cell	Intentional denaturation of ethyl alcohol	At least one day before the scheduled activity	§ 22 of the Regulation

Entity obliged to send information	Addressee of the sent information	The activity with which the obligation to send information is connected	Deadline for sending information	Legal basis
Ethyl alcohol business entity CN 2207, as referred to in the Regulation	The competent head of the customs and revenue office, and in the case of performing permanent control – permanent control cell	Planned release of ethyl alcohol from the warehouse and its consumption	At least one day before the scheduled activity	§ 23 of the Regulation (Exception to the obligation to provide information if official closures prevent access to ethyl alcohol during its dispensing and using)
Distillery	The competent head of the customs and tax office	Start Production of ethyl alcohol	At least one day before the scheduled activity	§ 24 of the Regulation
Distillery	The competent head of the customs and tax office	• jamming or malfunctioning of the volume meter or other measuring device, • leakage of apparatus, pipelines and equipment, • overflow of ethyl alcohol into the overflow vessel in the vat cabinet, • overflow of ethyl alcohol from the auxiliary tank (collecting tank) or from the storage tank at the distillery	Immediately	§ 25 of the Regulation (also applies in the event of alcohol leakage caused by equipment failure or resulting from a due to a fortuitous event or force majeure)
Small distillery	The competent head of the customs and tax office	• production of ethyl alcohol, • redistillation of ethyl alcohol	At least one day before the beginning of the activity	§ 26 of the Regulation

Entity obliged to send information	Addressee of the sent information	The activity with which the obligation to send information is connected	Deadline for sending information	Legal basis
An entity producing beer (excluding an entity producing products containing a mixture of beer with non-alcoholic beverages, as referred to in item 16 of Annex No. 2 a.e.t., if the actual alcoholic strength by volume of these products exceeds 0.5% vol.).	The competent head of the customs and tax office	Intended start of production processes, (information including a list of brews)	At least one day before the scheduled activity	§ 27 of the Regulation
An entity producing products containing a mixture of beer with non-alcoholic beverages, as referred to in item 16 of Appendix No. 2 a.e.t., if the actual alcoholic strength by volume of these products exceeds 0.5% vol.	The competent head of the customs and tax office	Intended start of production processes (information including a list of technological processes)	At least one day before the scheduled activity	§ 28 of the Regulation
Entity producing wines, fermented beverages and intermediate products	The competent head of the customs and tax office	Start of production processes (information containing a list of technological processes or a list of production processes)	At least one day before the scheduled activity	§ 28 of the Regulation

Source: the author's own work.

6. Conclusions

The alcoholic beverage business is an important element due to the interests of the state treasury. In connection with the above, regulations have been introduced that concretise the conduct of customs and treasury inspections of entities engaged in this activity. This regulation was introduced by the Minister of Finance, Funds and Regional Policy with the above-discussed Ordinance, implementing the statutory delegation contained in Article 90 of the Act on customs and fiscal control. However, there are reasonable doubts, among others, whether the conduct of inspections will not be time-consuming and thus unduly burdensome for entities engaged in the business of alcoholic beverages. Undoubtedly, it should be stated that the information obligations imposed on these entities also play a significant role in conducting customs and fiscal control. These duties have been differentiated depending on the entity that conducts the activity and the subject of this activity. They provide the competent head of the customs and treasury office, or the permanent control cell, with information regarding the entities in the field of alcoholic beverage activities, which also enables the competent authorities to carry out risk analysis. The above ensures that revenue for the state treasury can be realized in an appropriate manner.

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- Act of 16th November 2016 – o Krajowej Administracji Skarbowej, Journal of Laws of 2016, item 1948 as amended.
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