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**EXPLANATORY NOTES
ON
THE QUALITATIVE CRITERIA APPLICABLE TO INDEPENDENT SMALL
PRODUCERS OF ALCOHOLIC BEVERAGES**

(Articles 4(2), 9a(2), 13a(4), 18a(3) and 22(2) of Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages)

Disclaimer: These explanatory notes are not legally binding and only contain practical and informal guidance on the basis of the views of the Commission's Directorate General for Taxation and Customs Union.

IMPORTANT PRELIMINARY REMARKS

These Explanatory Notes aim at providing a better understanding of EU excise duty legislation concerning the qualitative criteria applicable to independent small producers of alcoholic beverages.

The Explanatory Notes only serve as general guidance and their content does not have any legal force and does not bind the Commission in any way. The Notes provide a practical and informal guidance based on the views of DG TAXUD.

The Explanatory Notes are not exhaustive. It means that although the Notes provide detailed information on a given issue, there may be elements that are not included in this document.

Table of contents

PART 1 GENERAL OBSERVATIONS	Page 4
1.1. Background	Page 4
1.2. Purpose of these Notes regarding the qualitative criteria	Page 4
PART 2 QUALITATIVE CRITERIA APPLICABLE TO INDEPENDENT SMALL PRODUCERS	Page 6
2.1. General considerations	Page 6
2.2. Legal and economic independence	Page 6
2.3. Premises physically apart	Page 8
2.4. No operation under license	Page 9
2.5. Cooperation	Page 10

PART 1

GENERAL OBSERVATIONS

1.1. Background

Council Directive 92/83/EEC¹, as amended by Council Directive 2020/1151², on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, sets out provisions for classifying alcohol and alcoholic beverages, the tax structures for each category and reduced excise duty rates for specific products. Directive 92/83/EEC also provides for reduced rates, subject to certain conditions, for beverages produced by independent small producers of alcoholic beverages³. That possibility allows Member States to support the competitiveness of independent small producers without distorting competition in the internal market.

The legislation contains individual provisions for independent small producers for each category of alcoholic beverages. Each provision sets out qualitative conditions (which are analysed in Part 2 of this document) as well as a quantitative condition (annual production threshold)⁴ for each category of product. Those conditions are cumulative and should be assessed together.

To implement the recent amendments to Directive 92/83/EEC, the Commission adopted Implementing Regulation (EU) 2021/2266⁵ as regards the certification and self-certification of independent small producers of alcoholic beverages. The latter lays down the form of the certificate to be issued by Member States authorities as well as the references of certified and self-certified independent small producers in the administrative documents for the movement of alcoholic beverages.

1.2. Purpose of these Notes regarding the qualitative criteria

Regarding the qualitative criteria applicable to independent small producers of alcoholic beverages, these Explanatory Notes clarify the interpretation of the different criteria in view of a harmonised implementation across all the Member States.

¹ Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages.

² Council Directive (EU) 2020/1151 of 29 July 2020 amending Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages.

³ For abbreviation purposes, the term “independent small producer” jointly refers to independent small breweries, independent small producers of wine, independent small producers of fermented beverages other than wine and beer, independent small producers of intermediate products and independent small distilleries, as defined in Articles 4, 9a, 13a, 18a and 22 respectively of Directive 92/83/EEC. The term “alcoholic beverages” refers to both alcohol and alcoholic beverages as defined in Directive 92/83/EEC.

⁴ Explanatory Notes on the total annual production threshold applicable to independent small producers of alcoholic beverages has been published in December 2021 providing general guidance: https://ec.europa.eu/taxation_customs/document/download/5dd013eb-66fd-4533-832d-1c93ef424291_en

⁵ Commission Implementing Regulation (EU) 2021/2266 of 17 December 2021 laying down rules for the application of Council Directive 92/83/EEC as regards the certification and self-certification of independent small producers of alcoholic beverages for excise duty purposes.

These Notes take into account the following rulings from the Court of Justice of the European Union (CJEU) on the provision applicable to small breweries:

- [C-83/08](#) Glückauf Brauerei GmbH
- [C-285/14](#) Brasserie Bouquet
- [C-221/20](#) and C-223/20 A Oy and B Oy

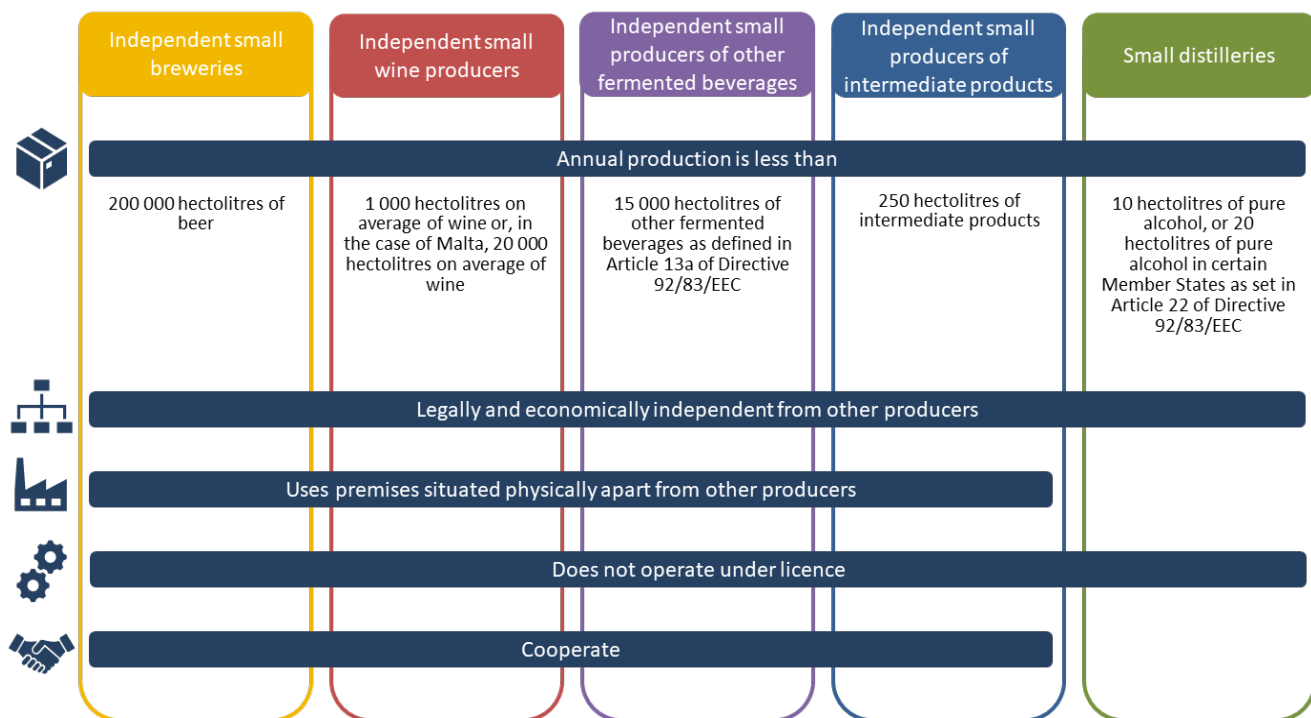
PART 2

QUALITATIVE CRITERIA APPLICABLE TO INDEPENDENT SMALL PRODUCERS

2.1. General considerations

Directive 92/83/EEC contains, in its Articles 4, 9a, 13a, 18a and Article 22(1), (2) and (3), individual provisions on independent small producers for each category of alcoholic beverages. Each of these Articles set out qualitative conditions as well as a quantitative condition. **The conditions applying to each category are cumulative conditions and must be assessed together.** Any breach on any of them is to result in loss of being eligible as “independent small producer”. Figure 1 provides an overview of these conditions.

Figure 1 – overview of the conditions for the optional reduced rates for small producers of alcoholic beverages



2.2. Legal and economic independence

The condition of legal and economic independence for granting reduced rates to independent small producers applies to each category of producer. For each category of producer, the legislation provides that the **independent small producer must be legally and economically independent of another producer of the same alcoholic beverage category**, i.e. a brewery must be independent from another brewery but it could be dependent on a distillery.

The Directive does not define this concept and in the case C-83/08 the CJEU was asked to interpret the concept of legal and economic independence within the meaning of Article 4(2) of Directive 92/83/EEC. In that context, the Court's findings were:

26 ... the criteria of legal and economic independence [...] seek to ensure that any form of economic or legal dependence between breweries results in exclusion from the tax advantage represented by the reduced rate of duty on beer.

27 ... small breweries [...] should be genuinely autonomous from any other brewery both as regards their legal and economic structure, and as regards their production structure, where they use physically separate premises and do not operate under licence.

28 ...the concept of a 'brewery which is legally and economically independent of any other brewery' [...] implies ascertaining whether, as between the breweries concerned, there is a relationship of legal dependency at the level of, in particular, management of the breweries or the holding of share capital or voting rights, or even a relationship of economic dependence, such as to affect the capacity of those breweries to take business decisions independently.

29...it is necessary to ensure that the condition of independence is not circumvented by purely formal means and, in particular, by legal arrangements between allegedly independent breweries which form, in reality, an economic group the production of which exceeds the limits prescribed in Article 4 of Directive 92/83...

To ascertain the legal and economic independence, the following cumulative criteria must be fulfilled:

a. Management & decision making within the undertaking

Management consists of the interlocking functions of creating business policy and organising, planning, controlling, and directing resources in order to achieve the objectives of that policy.

Depending on the size of the undertaking, the size of management can range from one person to many. Regardless of the size and title of the relevant persons, management have the power and responsibility to make decisions and oversee the undertaking.

The business policy and business decisions (e.g. about price policy or purchases) of the undertaking are determined by the undertaking's management and has no involvement with any other undertaking.

An undertaking can be considered legally and economically independent when one or more producer(s) of the same type of alcoholic beverage, have **no right to appoint or remove a majority of its members of the administrative, management or supervisory body** and has neither the power nor responsibility to make business decisions.

b. Share capital holdings

A producer can be considered legally and economically independent when less than 50 % of its share capital is held by **another producer** of the same type of alcoholic beverage, or by associated companies or legal entities corresponding to such company.

A producer is not considered legally and economically independent of any other producer of the same type of alcoholic beverage where they are **owned either by the same person or by associated companies**⁶ or legal entities corresponding to such companies.

c. Voting rights holdings

A producer may be considered as legally and economically independent in the following cases:

- where another **producer of the same type of alcoholic beverage has no right to exercise a dominant influence** pursuant to a contract between undertakings or to a provision in its Memorandum or Articles of Association;
- where another **producer of the same type of alcoholic beverage is not controlling**, pursuant to an agreement with other shareholders in or members of another entity, a **majority** of shareholders' or members' **voting rights**.

2.3. Premises physically apart

All independent small producers except small distilleries must use **premises which are situated physically apart from the premises of other producers of the same alcoholic beverage category**. This means, for example, that an independent small wine producer must use a premise that is physically apart from another wine producer. However, an independent small wine producer may be entitled to use the same premises that are used by an independent small producer of a different category of alcoholic beverage - e.g. independent small producer of intermediate products.

Article 14.2 of Council Directive (EU) 2020/262⁷ provides that the production, processing, holding and storage of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse. This must be the case except when a derogation duly foreseen in the Directives may apply (e.g. small wine producers producing on average less than 1,000 hectolitres of wine per year as per Article 48 of Directive (EU) 2020/262).

The use of the term 'premises' covers all **rooms and areas used by the producer where the technical equipment required for the production of alcoholic beverages is**

⁶ For the purpose of these Explanatory Notes, a company may be considered an 'associated company' of a second company if, at least:

(i) the first company has a direct minimum holding of 25 % in the capital of the second company, or
(ii) the second company has a direct minimum holding of 25 % in the capital of the first company, or
(iii) a third company has a direct minimum holding of 25 % both in the capital of the first company and in the capital of the second company.

⁷ Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast). OJ L 58, 27.2.2020, p. 4

located, not including the farmland. This term may also include filling systems for the production of canned or bottled beverages.

The use of the premises, including the technical equipment, **does not require the purchase of property**; renting or leasing shall be sufficient.

Regarding the possibility of sharing premises, it should not result in the loss of eligibility for the reduced rate provided that the **same premises are used by different independent alcohol producers in different periods of time**.

The above paragraph means, for example, that brewery A uses the premises from January to February, brewery B uses the same premises from April to October and brewery C uses the same premises from November to December. Brewery A, B and C are entitled to be considered as independent small producers provided that the other applicable conditions are fulfilled.

In relation to shared filling premises concerning more than one producer of the same type of beverage, it will not be possible for beverages from different producers to be bottled at the same time if these premises do not include differentiated bottling systems.

An independent small producer A may be entitled to bottle its product at the filling premises of another producer B, as long as the bottling services are performed in accordance with general market principles and do not lead to any other obligations or form of cooperation between A and B. This should not affect the eligibility of either A or B to be considered an independent small producer, provided that all conditions are fulfilled.

2.4. No operation under license

The provisions for reduced rates for independent small producers include the requirement that **independent small producers cannot operate under licence**. In case C-285/14, the CJEU was asked for an interpretation of this requirement as provided for in article 4(2) of Directive 92/83/EEC.

The following question was referred to the Court:

‘Must Article 4(2) of Directive 92/83 be interpreted as meaning that the term “operate under licence” refers exclusively to operation under a licence to exploit a patent or trade mark, or can that provision be interpreted as meaning that the term “operate under licence” refers to operation in accordance with a production process of a third party and authorised by that party’

In that context, the Court’s finding were:

23...It follows that the notion of ‘operat[ing] under licence’ must be interpreted so that it includes beer making subject to any form of authorisation which results in that small brewery not being completely independent of the third party which has given it that authorisation. Such is the case as regards an

authorisation to exploit a patent, a trade mark or a production process belonging to that third party”

25. ... the condition laid down in Article 4(2) of Directive 92/83 according to which a brewery must not operate under licence, is not met if the brewery concerned makes its beer in accordance with an agreement pursuant to which it is authorized to use the trade marks and production process of a third party.

For this purpose, license should be understood as an intellectual or intangible property right (e.g. all kinds of patents, trademarks, industrial designs, know-how), which the owner of the right allows someone else to use for consideration or free of charge.

The provider can be a legal or a natural person who owns, or has the right to dispose of the right, or certain characteristics of the right, and to provide them to the acquirer.

An independent small producer should **not have any authorisation, agreement or contract that allows them to exploit a patent, a trademark or a production process** belonging to a third party.

This condition **applies to each category of alcoholic beverage separately**. This means that an operator who produces both beer and wine will not be entitled to benefit from the reduced duty rate applicable to beer should this beverage be produced under licence, but will be entitled to the reduced rate when producing wine not under license (provided that all other criteria are fulfilled).

Considering all the above mentioned and as a means of example, if a small distillery produces spirits with the use of its own recipe and with its own label on the bottles, this operator will be entitled to apply a reduced excise duty rate on the spirits it sells to its customers, provided that all the other applicable conditions are fulfilled. However, if an undertaking provides to the distillery a liquor recipe or allows the distillery to use its name on the label of the bottles, the distillery's operations are to be considered as taking place under a license and the producer is not entitled to apply the reduced duty rate in any of the spirits.

2.5. Cooperation

Next to the qualitative criteria described in the previous sections, Directive 92/83/EEC contemplates the possibility that **where two or more small producers cooperate and their combined annual production does not exceed the quantity allowed, these producers may be treated as a single independent small producer**. This does not apply to small distilleries.

In relation to the application of the cooperation principle across Member States and the possibility for small producers to cooperate and be treated as a single independent small producer, the CJEU provided the following opinion in the joint cases C-221/20 and C-223/20:

25. [...] the EU legislature has introduced an option, and not an obligation, for a Member State to treat two or more small cooperating breweries whose

combined annual production does not exceed 200 000 hectolitres as a single independent small brewery, even though that Member State has taken up the option, provided for in Article 4(1) thereof, of applying reduced rates of excise duty to beer brewed by independent small breweries producing not more than 200 000 hectolitres per year.

In this respect, small producers of alcoholic beverages may be entitled to be treated as a single independent small producer if the necessary conditions are met (e.g. combined annual production below the allowed quantity) and **when the applicable national legislation foresees it**.

As per the possibility for small producers to cooperate and be treated as a single independent small producer, the following would be applicable:

- (i) Two or more small producers that cooperate and are treated as a single independent producer may be **legally and economically dependent between themselves**, but they must be legally and economically independent from other producers;
- (ii) Two or more small producers that cooperate and are treated as a single independent producer may be entitled to **share premises at the same time between themselves**, but these premises cannot be used by other producers at the same time;
- (iii) One or more small producer(s) may be entitled to **operate under the license of (an)other small producer(s) if these two (or more) are cooperating** and jointly treated as a single independent producer. However, these two (or more) cooperating small producers cannot be entitled to operate under the license of a third party (the rights cannot be transferred beyond these two (or more) cooperating small producers).