Message 316

Communication from the Commission - TRIS/(2022) 02691
Directive (EU) 2015/1535
Translation of the message 315
Notification: 2022/0325/E

Detailed opinion from the Commission (article 6, paragraph 2, second indent of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 07-11-2022.

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1. MSG 316 IND 2022 0325 E EN 07-11-2022 04-08-2022 COM 6.2(2) 07-11-2022

2. Commission

3. DG GROW/E/3 - N105 04/63

4. 2022/0325/E - S10E

5. article 6, paragraph 2, second indent of Directive (EU) 2015/1535

6. Within the framework of the notification procedure laid down by Directive (EU) 2015/1535 , the Spanish authorities notified to the Commission on 6 May 2022 the 'Draft Royal Decree on packaging and packaging waste' under the reference 2022/325/E.

According to the notification message, the notified draft sets out obligations for precaution, reuse and design of packaging in order to move towards a circular economy.

Examination of the notified draft has prompted the Commission to issue the following detailed opinion and comments.

1. DETAILED OPINION

Article 21 (3) of the notified draft provides that the symbols used for identifying that the packaging is included in an extended producer responsibility scheme shall comply with specific requirements: 'Extended producer responsibility schemes may only organise the management of waste from packaging typologies and packaging materials that producers who are part of those systems place on the market and for which they are authorised or have been collected in their communication. To this end, packaging covered by the extended producer responsibility scheme, if provided for by the system, may be identified by an identical attesting symbol throughout the territory of that system. This symbol shall be clear and unambiguous and shall not mislead consumers or users as to the recyclability of packaging. For this purpose, it is considered that the 'green dot' symbol may mislead consumers'.

The requirements imposed by Article 21 (3) of the notified draft are mandatory for the packaging of all products (domestic and foreign), meaning that products originating from other Member States and placed on the Spanish market shall comply with the specific Spanish marking. The prohibition imposed by Article 21 (3) would result in banning from the Spanish market packaging where the above-mentioned "green dot" symbol is affixed and this might result in banning packaging that is lawfully marketed in other EU Member States, in breach of Article 34 TFEU. In fact, the prohibition to use the 'green dot' symbol may be contradictory to the rules applicable in other Member States and could thus require the producers to re-design special packages or to amend the packaging of their products (e.g., using stickers to cover the 'green dot' symbol) in order to distribute them on the Spanish market. The requirements could result, therefore, in an additional and significant economic and regulatory burden for economic operators (and notably for SMEs) seeking access to the Spanish market, and eventually hinder the free movement of goods in violation of Article 34 TFEU. Indeed, as the harmonisation brought about by EU Directives on waste does not seem to preclude the compatibility of the national rules

in question (use prohibition of the “green dot” as a symbol reflecting an extended producer responsibility scheme) with Article 34 TFEU from being examined, diverging approaches in different Member States might represent obstacles to the free movement of goods.

It should be noted that the notified draft does not provide a specific justification substantiating the proportionality of the prohibition to use the “green dot” as a symbol attesting that a product is covered by an extended producer responsibility scheme.

For the reasons stated above, the Commission delivers a detailed opinion as provided for in Article 6(2) of Directive (EU) 2015/1535 to the effect that it considers Article 21 (3) of the notified draft to be in breach of Article 34 TFEU for what concerns the prohibition to use the ‘green dot’ symbol, were it to be adopted without giving due consideration to the above remarks.

The Commission would remind the Spanish authorities that under the terms of Article 6(2) of Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State that has drawn up the draft technical regulation concerned, to postpone its adoption for six months from the date of its notification.

This standstill period therefore comes to an end on 7 November 2022.

The Commission further draws the attention of the Spanish authorities to the fact that under the above-mentioned provision the Member State that is the addressee of a detailed opinion is obliged to inform the Commission of the action that it intends to take as a result of the opinion.

The Commission furthermore invites the Spanish authorities to communicate to it on adoption the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

Should your Government not comply with the obligations provided in Directive (EU) 2015/1535 or should the text of the draft technical regulation under consideration be adopted without account being taken of the above-mentioned objections, or be otherwise in breach of EU law, the Commission may commence proceedings pursuant to Article 258 of the Treaty on the Functioning of the European Union.

2. COMMENTS

Annex III of the notified draft contains the “Basic requirements on packaging composition and on the nature of reusable and recoverable packaging, including recyclable packaging”.

In general, the provisions of the aforementioned Annex III appear to correspond to the essential requirements of Annex II of the Packaging and Packaging Waste Directive (“PPWD”) . Nevertheless, Annex III contains the following point 1.d), which would not appear to correspond Annex II of the PPWD: “The use of phthalates and bisphenol A in packaging shall be prohibited in accordance with Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).”

The Commission draws the attention of the Spanish authorities to the fact that the REACH Regulation does not prohibit bisphenol A in packaging. Moreover, entry 51 of Annex XVII of the REACH Regulation prohibits the use of 4 specific phthalates in articles (including packaging), but does not cover other phthalates. In addition, although Annex XIV prohibits the incorporation of several specific phthalates in articles (including packaging), unless authorised or exempted, it does not prohibit the import of articles containing those phthalates, nor the incorporation in articles (including packaging) of phthalates not mentioned in Annex XIV or the import of articles containing those phthalates.

In view of the above, the wording of point 1.d) risks to cause legal uncertainty or unclarity as to the requirements of the REACH Regulation with regard to the use of bisphenol A and phthalates in packaging. Accordingly, the Commission suggests rephrasing point 1.d) to represent REACH more accurately, for example by replacing the words “shall be

prohibited in accordance with" by the words "shall comply with the applicable provisions of". Such a clarification could have the additional advantage of automatically covering any future amendments to the REACH Regulation relating to the use of bisphenol A or phthalates in packaging.

Additionally, the following provisions of the notified draft would seem to raise possible instances of non-conformity with the applicable EU law:

1) Article 6(1)(a) of the notified draft sets out waste reduction targets that go beyond the empowerment/mandate given to the Member States in the PPWD. Article 4(1) of the PPWD only foresees prevention targets for lightweight plastic carrier bags.

2) Article 6(2) of the notified draft sets a 20% reduction target in the number of single-use plastic beverage bottles placed on the market by 2030. Directive 2019/904 on Single-Use Plastics ("SUP Directive") states that only single-use plastic products listed in Part A of its Annex are subject to a sustained reduction in consumption requirement. The notified draft would go beyond the SUP Directive, since the adoption of consumption reduction measures exclusively applies to single-use plastic beverage cups and food containers.

3) Article 7 (4) (a) and (b) of the notified draft provides for a ban on packaging for fruit and vegetables in retail stores: a similar ban is envisaged with the revision of the PPWD and was adopted by France (notification 2021/149/F). At that time, the Commission issued comments and Spain a detailed opinion. The Commission reiterates the comments expressed on notification 2021/149/F.

4) Article 11(3) and (4) of the notified draft concerns mandatory plastic recycled content targets and requires producers to ensure that the plastic packaging they place on the market, and which is not made of compostable plastic, meets a number of minimum recycled plastic content requirements by 2025 and 2030. This would seem to be contrary to Art 18 PPWD.

5) The notified draft imposes separate packaging waste collection targets on the extended producer responsibility ("EPR") schemes, with respect to household, commercial and industrial packaging waste. In cases where this kind of waste ends up in waste management circuit of local competence, including cleaning up public roads, green areas, recreational areas and beaches, the costs borne by local authorities in order to manage this waste should be compensated by a respective EPR scheme. This litter clean-up costs are expressly envisaged as a measure under the SUP Directive, but might be beyond the current obligations on EPR schemes as stated in Article 8a of the Waste Framework Directive .

The Commission invites the Spanish authorities to take the above comments into account.

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