5 August 2022

Joint Freshfel Europe and ESSA response to TRIS Notification Number 2022/325/E (Spain) on *'Draft Royal Decree on Packaging and Packaging Waste'*

Freshfel Europe, the European Fresh Produce Association, and ESSA, the European Sprouted Seeds Association, who are the EU representative Associations for the fresh fruit and vegetable sector across the whole supply chain and the sprouted seeds sector respectively, are responding to TRIS Notification Number 2022/325/E (Spain) on '*Draft Royal Decree on Packaging Waste',* notified on 05/06/2022. The draft decree pertains to the application of Directive (EU) 2019/904 among others. Freshfel Europe and ESSA alert that this Draft Royal Decree is a significant trade barrier and includes disproportionate provisions for the fresh produce and sprouted seeds sectors.

The fresh produce and sprouted seeds sectors are committed to enhancing their sustainability to meet societal and environmental needs and requirements. This includes the use of sustainable packaging materials, eliminating unnecessary packaging as well as reducing packaging material use that is less sustainable, especially those that are not recyclable or reusable. This response does not dispute the sentiment of the Draft Royal Decree, but alerts the presence of a significant trade barrier and disproportionate provisions for the fresh produce and sprouted seeds sectors to further enhance sustainability in the sale of fresh fruit and vegetables as well as sprouted seeds in Spain.

Specifically, Freshfel Europe and ESSA believe the provisions are disproportionate in Article 7 Section 4(a) and Article 7 Section 4(b), which state the following:

> *4. Food retailers will adopt the necessary measures to:*
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> *a) Present fresh fruits and vegetables whole in bulk. This obligation does not apply to fruit and vegetables packaged in batches of 1.5 kilograms or more, as well as to fruit and vegetables that present a risk of deterioration when sold in bulk, which will be determined by the Spanish Agency for Food Safety and Nutrition, in coordination with the Ministry of Agriculture, Fisheries and Food, within three months of the entry into force of the Royal Decree. Once the above list has been published, the shops shall have a period of four months for their adaptation in the case of fruit and vegetables not excepted.*

Lack of clarity of applicable products in Draft Royal Decree Article 7 Section 4(a) with TBT in all cases

First, Freshfel Europe and ESSA would like to underline the lack of clarity in the Draft Royal Decree text in terms of applicable products in Article 7 Section 4(a). The draft text does not state whether the obligation to present fresh fruits and vegetables whole in bulk applies to merely products grown domestically and sold in Spain or whether the scope of the text applies to all products sold in Spain, that is including fruit and vegetables from other Member States as well as products imported from outside of the Union.

Barrier to trade for domestic produce

If the scope of Article 7 Section 4(a) applies to products grown domestically and sold in Spain, this presents anti-competitive legislation putting Spanish fresh fruits and vegetables and sprouted seeds at a disadvantage to those imported from other Member States or outside of the EU. This is not consistent with

the role of the Single Market, preventing free circulation of goods on the Single Market under Articles 34 and 35 of the Treaty on the Functioning of the European Union.

Barrier to trade for produce from Member States & third countries

If the scope of Article 7 Section 4(a) applies to all products regardless of their origin, the Draft Royal Decree also presents a significant barrier to trade. Considering the highly perishable nature of the products concerned, such a measure is liable to restrict the entry into Spain of fresh perishable fruits and vegetables and sprouted seeds from other Member States, where high volumes of fresh produce are traded on the Single Market. For example, this would be the case where such packaging of products in smaller quantities of less than 1.5 kilograms is allowed in the Member State of origin of the fruits and vegetables or sprouted seeds because it is considered necessary to preserve the product and limit evapotranspiration, which leads to food waste in the supply chain and at retail level. Moreover, it is not excluded that the impact of this measure will be more important for fresh fruits and vegetables and sprouted seeds from other Member States, since they are likely to be transported over longer distances and for a longer time period than fruits and vegetables and sprouted seeds produced and packaged in Spain.

For operators exporting into Spain and who also have operations throughout Europe, products may not be packed specifically for the Spanish market. Thus, products may need to be unpacked on entry into Spain. This will entail higher costs and many small and medium sized businesses, which make up a large percentage of fresh produce operators, will consequently face an economic barrier to enter the Spanish market. Moreover, operators outside the EU are also moving towards packaging elimination and minimalisation. However, many products still require protective packaging, without which a high food safety risk would be present as well as high levels of food waste.

Prohibition of packaged fresh fruits and vegetables in quantities less than 1.5kg not required by EU law

The prohibition of packaging for fresh unprocessed fruits and vegetables and sprouted seeds is not required by EU law. Member States are merely encouraged to take measures to limit the use of plastic products under Directive (EU) 2019/904 whose objectives are to prevent and reduce the impact of certain plastic products on the environment, provides in Article 4(1) that "Member States shall take the necessary measures to achieve an ambitious and sustained reduction in the consumption of the single-use plastic products listed in Part A of the Annex". It is however provided that such measures "shall be proportionate and non-discriminatory". This provision applies only to products referred to in Part A of the Annex, which are "Food containers, i.e. receptacles such as boxes, with or without a cover, used to contain food which: (a) is intended for immediate consumption, either on-the-spot or take-away, (b) is typically consumed from the receptacle, and (c) is ready to be consumed without any further preparation, such as cooking, boiling or heating". Under Directive 2019/904, national rules limiting the use of packaging, which fall within the scope of Part A of the Annex of Directive 2019/904 shall be proportionate and non-discriminatory.

Packaging which does not fall within the scope of Part A of the Annex of Directive 2019/904 nevertheless falls within the scope of Directive 94/62/EC, which aims at harmonising national measures concerning the management of packaging and packaging waste. **This Directive does not prohibit the use of packaging for fresh fruits and vegetables either but regulates what kind of packaging can be placed on the EU market, as well as packaging waste management and packaging waste prevention measures.** Its Article 18 provides that *"Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive*".

Furthermore, under Directive 94/62/EC, national rules prohibiting the use of packaging for certain types of products may not impede the placing on the market of these products when produced in other Member States as long as they satisfy the provisions of the Directive. Therefore, the notified Draft Royal Decree should therefore clarify that it does not apply to fruits and vegetables from other Member States.

Disproportionate measure concerning products sensitive to evapotranspiration wilt

In its current form Article 7 Section 4(a) does not provide proportionality within the measure. **Freshfel Europe and ESSA note the lack of inclusion of proportionate measures for products where packaging in a functional form is necessary for the placing on the market of the product.** This is the case for products with very specific evapotranspiration requirements, such as sprouted seeds and berries where the risk of evapotranspiration, wilt and/or damage leading to spoilage is very high. These products fall outside the included exemption for "*fruit and vegetables that present a risk of deterioration when sold in bulk".* In its current form Article 7 Section 4(a) prevents these products from being placed on the market and is therefore a significant barrier to trade.

Freshfel Europe and ESSA also have high concern for products where functional packaging materials are necessary in terms of product containment for prevention of product spoilage and avoiding unnecessary food waste generated. Both associations note that this may impeded Spain ability to attain EU food waste targets in the future once they are implemented as outlined in the Farm to Fork Strategy.

Adaptation period of 4 months insufficient for depletion of packaging stocks and information exchange

Article 7 Section 4(a) notes that "*the shops shall have a period of four months for their adaptation in the case of fruit and vegetables not excepted".* This transition period is insufficient considering the need for operators to deplete stocks. Packaging stocks are planned in advance of the season and these stocks should be depleted to avoid unnecessary high amounts of packaging waste. A four-month period is not long enough for stocks to be used for all products with different seasonalities.

As the measures contained in the Draft Royal Decree are a significant trade barrier, adequate information should be provided to all fresh fruit and vegetable operators in Europe before the entry into force of the decree. This will enable operators to adjust operations where possible and make business decisions to redirect their products to other markets if they consequently cannot enter the Spanish market. Freshfel Europe and ESSA believe that 4 months is insufficient for full sector awareness and preparedness, in a market where business decisions are taken in advance of the product season.

Recommendation to exempt products with sustainable packaging solutions and lengthen adaptation period to at least one year to two years

Freshfel Europe and ESSA recommend that less trade restrictive measures, both concerning intra-EU trade and from trade from third countries, are instead adopted in the Royal Decree.

In this respect, Freshfel Europe and ESSA recommend an amendment to the Draft Royal Decree with the following inclusions (in bold):

> *4. Food retailers will adopt the necessary measures to:*
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> *a) Present fresh fruits and vegetables whole in bulk **or in recyclable, reusable, biodegradable or compostable packaging**. This obligation does not apply to fruit and vegetables packaged in batches of 1.5 kilograms or more, as well as to fruit and vegetables that present a risk of deterioration when sold in bulk, which will be determined by the Spanish Agency for Food Safety and Nutrition, in coordination with the Ministry of Agriculture, Fisheries and Food, within three months of the entry into force of the Royal Decree. Once the above list has been published, the shops shall have a period of **at least one year to two years** for their adaptation in the case of fruit and vegetables not excepted.*

Restriction of fresh fruit and vegetables sales to bulk sales or in recyclable, reusable, biodegradable or compostable packaging formats allows for a science-based, data-driven approach to be taken on the most appropriate and most sustainable packed or unpacked options available on the market today per fruit and vegetable product.

Freshfel Europe and ESSA affirm that packaging choice must be driven by life cycle/environmental footprint calculation analysis to determine the most sustainable option. Unpackaged bulk sale of fresh produce is not always the best choice, in consideration of the environmental costs of food waste along the chain as well as in the home for many products. Extending the scope of the legislation to sustainable packaging solutions, including recyclable, reusable, biodegradable or compostable packaging materials allows for necessary functional packaging to be maintained on the Single Market. This will facilitate the continuation of functional packaging employed by operators for:

- **Product containment:** Small multi-item fruit and vegetables sold by weight, e.g. berries, cherry tomatoes, small apples, fresh cut salad, sprouted seeds.
- **Extend product shelf life:** Products must be sold in good condition as per marketing standards, packaging innovations extending freshness.
- **Prevent spoilage and food waste, maintain freshness:** Ripe ready to eat products, e.g. avocados, pears, small multi-item fruit and vegetables, are especially susceptible to spoilage, as well as products susceptible to evapotranspiration wilt.
- **Prevent microbiological contamination:** Prevent contact with surfaces and ensure traceability, where some products more susceptible such sprouted seeds.
- **Product information display**: Obligatory legal and essential product information for non-branded products including variety (e.g. apples, potatoes, kiwi), colour, traceability, branding, country of origin, PLU codes, barcodes, messages (e.g. 'ready to eat'), organic and fraud detection information.
- **Consumption promotion:** Text and graphics in efforts to increase consumption to at least the recommended level by WHO for good health (400g per day) in a highly competitive food choice environment.
- **Consumption facilitation:** Essential for pre-cut, on the go formats and meal kits.
- **Consumer confidence:** Guarantee of product safety and quality.

Freshfel Europe and ESSA would like to emphasize the importance of harmonisation of packaging legislation across the Union to prevent distortion on the Single Market. In a trading environment with increasing prices and subsequently decreasing fresh produce consumption, any measures augmenting operational costs and ultimately additional cost burden to consumers, namely disparate packaging requirements across Member States, must be avoided.

Thank you for taking Freshfel Europe and ESSA's perspective into account, and we remain available for further information and consultation.

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