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2. Italy

3A. MINISTERO DELLE IMPRESE E DEL MADE IN ITALY
Dipartimento Mercato e Tutela
Direzione Generale Consumatori e Mercato
Divisione II - Normativa tecnica - Sicurezza e conformità dei prodotti, qualità prodotti e servizi
00187 Roma - Via Molise, 2

3B. Ministero delle Imprese e del Made in Italy
Direzione generale per la politica industriale, la riconversione e la crisi industriale, l'innovazione, le PMI e il made in Italy
Div. XIII – Agroindustria, industrie culturali e creative, industria del turismo

4. 2024/9015/NO - X40M - Labelling and advertising

5.

6. The competent services of the Ministry of Enterprise and Made in Italy have examined the draft legislative proposal submitted by Norway, "Regulations on the prohibition of the marketing of certain food and beverage products aimed at children", corresponding to notification 2024/9015/NO. Having examined it, Italy delivers the following detailed opinion in light of the provisions of the Treaty on the Functioning of the European Union ("TFEU") and the Agreement on the European Economic Area ("EEA Agreement")
I. SYSTEM CHARACTERISTICS
The legislative proposal, submitted by the Norwegian Government, pursues the stated objective of promoting public health through the prevention of food-related diseases, in particular by protecting children from the so-called "harmful marketing".
For the purposes of this legislation, "children" means people under 18 years of age, "marketing" means any form of communication or action for marketing purposes, and "sponsorship" means any form of public or private contribution to an event, an enterprise, or a person with the purpose or the direct or indirect effect of promoting the sale of products to consumers.
The legislative proposal would introduce a ban on the marketing of certain food products, listed in Annex I, aimed at children, while also identifying certain circumstances in which marketing should always be considered to be aimed at children.
In addition, and regardless of whether it is aimed at children, the marketing of the products listed in Annex I should never be done in such a way as to encourage adults to purchase those products for children.
Finally, it is considered that the legislative proposal under consideration introduces a ban on displaying the products listed in Annex I at points of sale in relation to other products and services that children like, such as toys, children's books, games.
II. INTERNAL MARKET AND FREE MOVEMENT OF GOODS - INCOMPATIBILITY WITH ARTICLE 34 TFEU AND ARTICLE 11 OF

THE EEA AGREEMENT

First of all, Italy considers (as the Norwegian Government also points out) that a ban on the marketing of packaging and containers is a measure capable of restricting the free movement of goods on the market and entails a serious risk of disincentives for the marketing of products in Norway.

The legislation under consideration presents critical aspects with respect to the obligations deriving from the TFEU and the EEA Agreement - which, for the sake of simplicity, will be analysed together - ultimately affecting consumer choice. This is because the appropriateness and proportionality of the legislative proposal in question, in relation to the alleged pursuit of the objective of public health protection, has not been demonstrated. At the same time, the repackaging of products specifically for Norway is likely to constitute unjustified obstacles to the free movement of goods on the market.

In order to ensure the free movement of goods, Article 34 TFEU (Article 11 of the EEA Agreement) prohibits quantitative restrictions on imports and all measures having equivalent effect among Member States.

Any good may fall within the scope of the provisions on the internal market, provided that it has an economic value: indeed, “goods” must be understood as products that can be valued in terms of money and as such are capable of being the subject of commercial transactions.

As regards the subjective scope, there is no doubt that the provisions of the TFEU and the EEA Agreement are binding not only for Member States but also for all the entities through which the organisation of the State is structured, in the exercise of legislative, executive or judicial power. It follows, clearly, that the Ministries which proposed the adoption of those provisions are required to comply with the provisions of the Treaties.

Insofar as is relevant here, the focus must be on measures having an effect equivalent to a quantitative restriction, which must be regarded as incompatible with EU/EEA law even if they are not of a discriminatory nature, i.e. even if they apply indiscriminately both to undertakings having the nationality of the Member State that implements them and to undertakings having the nationality of other Member States.

The Court of Justice of the European Union has repeatedly intervened on the concept of a measure having equivalent effect to a quantitative restriction, forming what can now be considered a consolidated and unambiguous interpretative guideline.

It has been established that any legislation adopted by the Member States which is capable of hindering, even indirectly, actually or potentially, intra-Community trade must be regarded as a measure having an effect equivalent to quantitative restrictions (ex multis, CJEU, 11 July 1974, C-8/74, Dassonville).

Moreover, as is well known in light of settled case-law on the impact of labelling requirements, legislation imposing country-specific communications on packaging must be regarded as an obstacle to intra-Union trade, as it directly affects the product and thus trade on the EU market. This is also the case where the measures allegedly apply indiscriminately to all producers and products, irrespective of their origin.

It follows that a national measure does not necessarily have to contain a discriminatory element in order to be prohibited by Article 34 TFEU (Article 11 of the EEA Agreement).

This approach was endorsed by the CJEU in subsequent case law (ex multis, CJEU, 20 February 1979, C-120/78, Cassis de Dijon). Recognising that the existence of differences between the national rules of the Member States is liable to hinder the free movement of goods, the CJEU confirmed that Article 34 TFEU (and, likewise, Article 11 of the EEA Agreement) may also concern national measures which apply equally to domestic and imported goods.

In other words, those provisions apply not only to measures which discriminate against imported goods, but also to measures which, prima facie, appear to apply equally to domestic and imported goods, but in fact impose an additional burden on imports. This burden stems from the fact that imported goods are subject to compliance with two sets of rules: those established by the Member State of origin and those in force in the Member State of destination.

In this regard, in recent case-law (CJEU, 3 April 2012, C-428/12, Commission v. Spain), the CJEU has stated that it is clear from case-law that a measure, although not having as its purpose or effect the penalisation of products from other Member States, falls within the concept of a measure having equivalent effect to a quantitative restriction within the meaning of Article 34 TFEU (Article 11 of the EEA Agreement) where it hinders access to the market of a Member State for products originating in other Member States.

However, the specific characteristics and functioning of the regulation notified by Norway constitute sufficient elements to consider the situation referred to in Article 34 TFEU (Article 11 of the EEA Agreement) to be integrated. The obligation imposed on operators in the supply chain (who are, moreover, arbitrarily identified as the addressees of the legislation, since it has not been sufficiently explained on the basis of which criterion certain products have been identified in Annex I instead of others) constitutes a measure equivalent to a quantitative restriction since, although it does not have as its

purpose or effect the penalisation of products from other Member States, it does in fact hinders access to the market of a Member State for products originating in other Member States to a greater extent, by the effect of a twofold order of conditions which must be complied with, namely those of the Member State of production and those laid down by the Member State of importation.
The significant difficulty in entering the market for undertakings from States other than Norway is reflected in the obvious higher cost they will have to bear in order to enter the Norwegian market. This is particularly important as the majority (actually, the totality) of EU/EEA countries have not introduced similar restrictions on marketing communications related to the packaging of food and beverage products.
It follows that the repackaging of products and the imposition of an obligation to conceal prohibited elements on the packaging would impose a significant economic burden on producers, thus representing a technical barrier to trade. The increase in production costs for packaging, labels and/or repackaging specific to the Norwegian market is likely to make non-Norwegian-originating products less competitive than those originating from Norway. As a result, the choice spectrum of Norwegian consumers is likely to be significantly restricted.
All of the above, even if it were to be concluded that there is prima facie no discrimination, nevertheless leads to a loss of attractiveness of the Norwegian market for undertakings from other Member States because of the inherent potential of hindering access to the Norwegian market in the face of the increased burdens to be borne, thus introducing a measure having equivalent effect.
III. EXCEPTIONS TO THE FREE MOVEMENT OF GOODS – INCOMPATIBILITY WITH ARTICLE 36 TFEU AND ARTICLE 13 OF THE EEA AGREEMENT
In addition, the Italian Government considers that the legislative proposal which is the subject of this detailed opinion is critical in certain other respects, since it contains measures of dubious proportionality.
It is considered that the legislative proposal in question, while affecting the free movement of goods, is not justified on the basis of Article 36 TFEU (Article 13 of the EEA Agreement), with particular reference to the derogation invoked in relation to the protection of health. The principle of free movement of goods is without prejudice to prohibitions and restrictions on imports, exports and transit justified on grounds of, inter alia, the protection of health and life of humans.
Over the years, the Court of Justice has extended the grounds on which Member States may restrict trade to include a wide range of justifications. Ultimately, therefore, it is for the Court to mediate interests, specifically with regard to the balance between economic freedom and the exceptions in question. The Court of Justice has used, for this purpose, a series of general principles from which to borrow the characteristics of State measures, which: a) must be effective; b) shall not entail arbitrary discrimination; c) shall take into account the regulatory requirements already adopted by other Member States; d) shall represent the measure with the least restriction for trade that can be adopted to achieve a given objective.
The range of interests successfully invoked to safeguard national legislation, by invoking Treaty exceptions, can be grouped as follows: a) market externalities; b) civil rights; c) socio-cultural preferences; d) preservation of the State machine. Of particular relevance with respect to the case analysed here is the category relating to market externalities: “Market externalities [...] may also explain their effectiveness on a subject directly involved in the transaction. The sale of a dangerous product constitutes an example. In all these cases, the transaction is associated with the risk of certain unintended physical consequences. The Court of Justice has provided protection against a large number of market externalities. These include adverse effects on public health; prejudice to consumers [...] and unfair competition”.
A ruling by the Court of Justice, Greenham and Abel, is related to the above-discussed point, in which the Court clarified that ‘[...] in exercising their discretion relating to the protection of public health, the Member States must comply with the principle of proportionality. The means which they choose must therefore be confined to what is actually necessary to ensure the safeguarding of public health; they must be proportionate to the objective thus pursued, which could not have been attained by measures less restrictive of intra-Community trade”. The principles set out in this judgment (illustrative of settled EU case-law) are fully applicable to the case examined in this opinion.
First of all, the legislative proposal under consideration is allegedly aimed at children, but is in fact also directed at an adult audience, thereby restricting the marketing of certain products to an unjustified, disproportionate, and therefore detrimental extent to the free movement of goods.
Secondly, the proposed provisions, as formulated, limit the advertising of numerous food and beverage products beyond what is necessary in relation to the stated objective, as they inhibit the advertising of many high-nutrient food and beverage products, including those that provide crucial nutrients, the consumption of which is known to be associated with healthy diets. In this sense, therefore, not only is the proposal excessively restrictive of the free movement of goods,

but it also risks becoming paradoxically contrary to the objective of the public health protection it allegedly pursues.
Thirdly, the proposal ignores alternative measures that could be equally effective in reducing the exposure of children (and adults who are nevertheless affected by the draft legislation in question).
Therefore, in the present case, the Norwegian Government has not demonstrated that the proposed measures: a) are effective; b) do not entail arbitrary discrimination; c) take into account the regulatory requirements already adopted by other Member States; d) represent the least trade-restrictive measure that can be adopted to achieve a specific objective. It follows that the legislative proposal as submitted infringes the TFEU and the EEA Agreement.
IV. DEVELOPMENT OF UNDERTAKINGS IN EU TERRITORY – INCOMPATIBILITY WITH ARTICLE 173 TFEU AND ARTICLE 7 OF THE EEA AGREEMENT
In addition, it should be noted that the imposition of the obligations resulting from the proposed legislation affects undertakings differently depending on their economic size.
While it is true that all undertakings would be required to comply with these obligations, the financial burden which that legislation imposes on small and medium-sized enterprises, which are obliged to comply with specific labelling and marketing requirements exclusively for products intended for the Norwegian market, is undoubtedly exorbitant compared to that borne by more structured undertakings.
This legislative proposal thus constitutes a further infringement of EU law, as it is clearly contrary to Article 173(1) TFEU (Article 7 of the EEA Agreement), which provides that action by the Member States shall be aimed at, inter alia, encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized enterprises.
V. FURTHER CONSIDERATIONS
Italy wishes to make further policy considerations with regard to the content of the proposal submitted by the Norwegian Government.
Firstly, when setting age thresholds for children, almost all government policies and the most prevalent self-regulatory standards in the global food industry tend to set the age of a child, in the context of food marketing restrictions, alternatively between under 13 and under 16 years of age. By way of example, global industry standards such as those of the International Chamber of Commerce apply restrictions in this regard to children under the age of 13.
This is also because a significant part of the scientific community considers that at the age of 12 children develop their own consumer behaviour, effectively recognising advertising and adopting critical attitudes towards it.
Consequently, Italy considers that setting the regulatory age threshold at 18 years old is disproportionate and recommends not extending restrictions on food advertising to adolescents who are over 13. To determine otherwise would lead to the paradox that a young adolescent can purchase firearms at the age of 16, but cannot be exposed to advertising for certain food products. Products which, moreover, would be lumped together with the restrictions applicable to alcohol, with a clear distortion in the representation of their effects.
Identifying the correct age limit is of fundamental importance, especially when considering the proposal to ban advertisements that “may appeal to” children. It is quite evident that there is no way to impose such restrictions up to the age of 18 – or at any rate, the Norwegian Government has not duly proposed one – without having a massive impact on advertising aimed at adults.
In addition, the legislative proposal suggests banning the marketing of products listed in Annex I if this is done in such a way as to encourage adults to purchase products for children (Article 4 (4)). This measure could, in practice, prohibit representation at convivial and domestic times in connection with the marketing of most common household products. Such an approach, which is manifestly excessively restrictive, would undoubtedly be detrimental to the freedoms laid down in the TFEU and the EEA Agreement, and could not be duly justified in the balancing of interests.
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In light of the above, Italy invites the European Commission to consider the negative impact that the proposed provisions would have on the functioning of the EU/EEA single market and therefore requests the Norwegian Government to withdraw its proposal.

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European Commission
Contact point Directive (EU) 2015/1535
email: grow-dir2015-1535-central@ec.europa.eu