

December 10, 2020

Subject: Hi-Cone's Comments on the Spanish Draft Law on Waste and Contaminated Soils

On October 20, 2020, the Spanish Government notified to the European Commission a draft Law on Waste and Contaminated Soils ("Anteproyecto de Ley de Residuos y Suelos Contaminados" -- "Notified Law") in accordance with Directive (EU) 2015/1535 (TRIS Notification 2020/658/E).ⁱ The Notified Law contains different requirements and restrictions on plastic materials that go beyond the mere implementation of Directive (EU) 2019/904 on Single-Use Plastic Products ("SUPD") and other EU legislation.ⁱⁱ

Hi-Cone is grateful for the opportunity to provide its comments on the Notified Law. Hi-Cone is a division of Illinois Tool Works Inc. ("ITW") and is the primary manufacturer of multipack plastic ring carriers for the non-alcoholic ready to drink and beer industries globally.ⁱⁱⁱ Since 1978, Hi-Cone's plant in the province of Barcelona (Spain) has supplied plastic ring carriers to a significant number of beverage manufacturers across Europe.

Hi-Cone has been committed to providing the beverage industry with sustainable multipack solutions since its founding in 1961. The company is permanently researching ways to improve the sustainability of its products and develop new products, in order to meet its commitment to market 100% recyclable and biodegradable or compostable plastic carrier rings by 2025.

Hi-Cone supports the sustainability and circular economy objectives of the Notified Law. However, we have serious concerns about the lawfulness of the obligation that Article 40(4) of the Notified Law imposes on economic operators to reduce the consumption of, and substitute, non-compostable multipack plastic ring carriers ("anillas de plástico que permiten agrupar varios envases individuales"). This obligation of Article 40(4) is a marketing restriction on plastic ring carriers that violates Article 18 of Directive 94/62/EC on Packaging and Packaging Waste ("PPW Directive"),^{iv} constitutes a prohibited and unjustified restriction of trade, is discriminatory, and fails to provide sufficient legal certainty.

For the reasons further explained below, we respectfully request the European Commission to issue a Detailed Opinion against the Notified Law and ask the Spanish Government not to adopt the provision on plastic ring carriers of Article 40(4) of the Notified Law.

I. Article 40(4) of the Notified Law

Article 40(4) of the Notified Law restricts the marketing of non-compostable plastic ring carriers. It requires economic operators to ensure a reduction in the consumption of plastic ring carriers that are not "compostable" and their substitution by products that are reusable or of materials that are compostable. It also warns that if these consumption reduction and substitution objectives are not achieved, the Spanish Ministry for the Ecological Transition may adopt additional restrictive measures. In particular, Article 40(4) states that:

"Market operators involved in the marketing of plastic trays that are packaging but do not fall under Annex IV, mono-dose plastic products, plastic multi-pack ring carriers and plastic sticks used in the food sector to hold products (sticks for candies, ice cream and other products), all made from non-compostable plastic, shall make progress in reducing their consumption by substituting these plastic products with reusable alternatives and other materials such as compostable plastic, wood, paper and cardboard.

The Ministry for the Ecological Transition and the Demographic Challenge shall monitor the reduction in the consumption of these products and, based on the results, may impose other regulatory measures intended to achieve a significant reduction, in particular the adoption of a reduction timeline.”^v

Article 14 of the Notified Law further ensures that market operators take measures to reduce the consumption of, and substitute, plastic ring carriers and other non-compostable products restricted under Article 40(4). It requires competent authorities (including the Autonomous Communities of Spain) to adopt waste reduction programs that list the measures adopted to ensure such consumption reduction and substitution.

II. Article 40(4) of the Notified Law Violates Article 18 of the PPW Directive

Article 40(4) of the Notified Law violates the prohibition of Article 18 of the PPW Directive because: (i) Hi-Cone’s plastic ring carriers are packaging subject to the PPW Directive and comply with its requirements, and (ii) Article 18 prohibits Member States from restricting the marketing of packaging that complies with the Directive’s requirements.

A. The Plastic Ring Carriers Are Packaging and Comply with the Requirements of the PPW Directive

Plastic ring carriers are a set of connected plastic rings that are used in multipacks of beverage containers, such as cans and small bottles. They meet the definition of “packaging” of Article 3(1) of the PPW Directive because they are: (i) “used for the containment [...], handling, delivery and presentation of goods;”^{vi} (ii) secondary packaging as they are “conceived so as to constitute at the point of purchase a grouping of a certain number of sales units;”^{vii} and (iii) not “an integral part of a product” and they are not necessary “to contain, support or preserve that product throughout its lifetime” and “all elements are [not] intended to be used, consumed or disposed of together.”^{viii} This interpretation is confirmed by the case law of the Court of Justice of the European Union (“CJEU”), which has repeatedly held that the concept of “packaging” of the PPW Directive must be interpreted broadly.^{ix}

Hi-Cone’s plastic ring carriers are fully recyclable. The plastic ring carriers comply with the essential requirements and chemical content restrictions of the PPW Directive and are integrated in the packaging waste collection, recovery and recycling collective compliance schemes of the different Member States where they are marketed. As of January 2021, Hi-Cone will only market plastic ring carriers that are not oxo-degradable in the EU.

In addition, Hi-Cone’s new RingCycles™ will contain more than 50% post-consumer recycled material sourced from European suppliers by July 2021.

B. Article 18 of the PPW Directive Prohibits Spain from Impeding the Marketing of Plastic Ring Carriers

The marketing restriction on plastic ring carriers of Article 40(4) of the Notified Law violates Article 18 of the PPW Directive. This provision prohibits Member States from impeding the placing on the market of packaging, such as plastic carrier rings, that complies with the PPW Directive’s requirements.^x As the PPW Directive is based on the total harmonization clause of Article 114 of the Treaty on the Functioning of the European Union (“TFEU”) (ex Article 95 of the EC Treaty), the prohibition in Article 18 of the PPW Directive leaves Spain with no discretion and prohibits it from restricting the marketing of plastic ring carriers.^{xi} While Spain may request a derogation under Article 114(6) of the TFEU, Spain has not made such request and would also not meet the conditions specified in Article 114(6).

Moreover, the SUPD does not allow Spain to derogate from the prohibition of Article 18 of the PPW Directive and restrict the marketing of non-oxo-degradable plastic ring carriers as these do not fall within the scope of the SUPD. Article 2(1) of the SUPD makes clear that the Directive only applies to “the single-use plastic products listed in the Annex, to products made from oxo-degradable plastic and to fishing gear containing plastic.” None of these product categories include non-oxo-degradable plastic ring carriers.

III. Violation of Article 34 of the TFEU

Article 40(4) of the Notified Law also infringes Article 34 of the TFEU, which prohibits all Member State quantitative restrictions on imports and all measures having equivalent effect. The CJEU has interpreted broadly the prohibition of Article 34 of the TFEU and repeatedly held that all Member State measures that are “capable of hindering, directly or indirectly, actually or potentially” trade between Member States are to be considered as prohibited measures having an effect equivalent to quantitative restrictions.^{xii} The requirement of Article 40(4) of the Notified Law obliging economic operators to reduce the consumption and substitute the marketing of non-compostable plastic ring carriers constitutes a prohibited measure that is capable of hindering trade between Member States. This is because it will prevent drink suppliers from other EU Member States from marketing their products with non-compostable plastic carrier rings in Spain.^{xiii}

Furthermore, the trade restriction of Article 40(4) of the Notified Law cannot be justified on environmental protection grounds. Measures prohibited under Article 34 of the TFEU may only be justified for environmental reasons if they are necessary to protect the environment, proportionate and not discriminatory.^{xiv} Article 40(4) does not meet these conditions as Spain has not shown that plastic ring carriers have a particularly negative environmental footprint or that they have an environmental footprint that is more negative than that of other collective secondary plastic packaging that is not restricted by Article 40(4).^{xv} (See further under Part IV below.)

IV. Infringement of the Fundamental Principle of Non-Discrimination

Article 40(4) of the Notified Law also constitutes a violation of the EU principle of non-discrimination, which requires that comparable situations must not be treated differently unless such treatment is objectively justified.^{xvi} Spain has not shown any objective evidence that justifies the different treatment of plastic ring carriers in comparison with other secondary collective plastic packaging.

In fact, Hi-Cone’s plastic carrier rings are likely to have a lower environmental impact than other secondary plastic packaging. While they are made of minimum plastic by weight and volume and use very small amounts of raw material in comparison with other secondary plastic packaging, they provide an efficient means to contain, handle and deliver multipacks of beverage cans and bottles.

V. Infringement of the Principle Legal Certainty

We also note that Article 40(4) of the Notified Law fails to provide economic operators with sufficient legal certainty on the materials they should use to comply with its requirements. It requires operators to substitute non-compostable plastic carrier rings with other compostable materials, but fails to define what is “compostable.” Instead, the Notified Law only provides a vague definition of “biodegradable plastic,”^{xvii} even if the European Commission has made clear that currently there is no EU harmonized standard or criteria to define what is biodegradable plastic.^{xviii}

Nevertheless, Hi-Cone is testing materials to develop a biodegradable plastic carrier ring and expects to be able to market products complying with Standard ASTM 6954.^{xix} Hi-Cone is also continuing to investigate with Spanish based suppliers new materials that can pass Standard EN 13432.^{xx}

ⁱ Directive (EU) 2015/1535 of the European Parliament and of the Council of September 9, 2015 Laying Down a Procedure for the Provision of Information in the Field of Technical Regulations and of Rules on Information Society Services, OJ L 241, 17.9.2015, pp. 1–15. The notification is available online at (<https://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2020&num=658&mLang=EN>).

ⁱⁱ Directive (EU) 2019/904 of the European Parliament and of the Council of June 5, 2019 on the Reduction of the Impact of Certain Plastic Products on the Environment, OJ L 155, 12.6.2019, pp. 1–19.

ⁱⁱⁱ (<https://hi-cone.com/>).

^{iv} European Parliament and Council Directive 94/62/EC of December 20, 1994 on Packaging and Packaging Waste, OJ L 365, 31.12.1994, pp. 10–23.

^v The original Spanish version of Article 40(4) of the Notified Law reads: “*En relación con las bandejas de plástico que sean envases y no estén afectadas por el anexo IV, con productos monodosis de plástico, anillas de plástico que permiten agrupar varios envases individuales y palos de plástico usados en el sector alimentario como soportes de productos (palos de caramelos, de helados y de otros productos), todos ellos fabricados con plástico no compostable, los agentes implicados en su comercialización avanzarán en una reducción de su consumo mediante la sustitución de estos productos de plástico por alternativas reutilizables y de otros materiales tales como plástico compostable, madera, papel o cartón, entre otros. El Ministerio para la Transición Ecológica y el Reto Demográfico llevará a cabo un seguimiento de la reducción del consumo de estos productos y, en función de los resultados, podrá establecer reglamentariamente otras medidas encaminadas a lograr una reducción significativa, en particular el establecimiento de un calendario de reducción*” (emphasis added).

^{vi} First Subparagraph of Article 3(1) of the Packaging and Packaging Waste Directive.

^{vii} Point (b) of the Second Subparagraph of Article 3(1) of the Packaging and Packaging Waste Directive.

^{viii} Indent (i) of the Third Subparagraph of Article 3(1) of the Packaging and Packaging Waste Directive.

^{ix} Judgment of 10 November 2016, *Ecoemballages*, Joined Cases C-313/15 and C-530/15, EU:C:2016:859; Judgment of 24 April 2004, *Plato Plastik Robert Frank*, C-341/01, EU:C:2004:254.

^x Article 18 of the PPW Directive states : “Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.”

^{xi} This interpretation is confirmed by two Opinions Advocate General Ruiz-Jarabo Colomer of September 13, 2001, in *Commission v Denmark*, C-246/99, EU:C:2001:441, and in *Anklagemyndigheden v Tonny Haugsted Hansen*, C-233/99, EU:C:2001:440. A Commission Communication on Beverage Packaging, Deposit Systems and Free Movement of Goods (2009/C 107/01) also states that: “[u]nder the terms of Article 18 of that [PPW Directive], Member States shall not impede the placing on the market of their territory of packaging which satisfies its provisions. It follows that Member States are not allowed to ban marketing of certain types of beverage packaging that comply with Community legislation.”

^{xii} Judgement of July 11, 1974, *Dassonville*, C-8/74, EU:C:1974:82; Judgment of September 20, 1988, *Commission vs. Denmark*, C-302/86, EU:C:1988:421.

^{xiii} Judgement of November 15, 2005, *Commission of the European Communities v Republic of Austria*, C-320/03, EU:C:2005:684; Judgement of October 22, 1998, *Commission v France*, C-184/96, EU:C:1998:495.

^{xiv} These conditions must be interpreted strictly. See Judgment of June 17, 1981, *Commission v. Ireland*, C-113/80, EU:C:1981:95.

^{xv} Judgement of December 3, 1998, *Blume*, C-67/97, EU:C:1998:584; Opinion of Advocate General Ruiz-Jarabo Colomer of 14 September 2001, *Commission v. Denmark*, Case-246/99, EU:C:2001:441.

^{xvi} Judgment of July 8, 2010, *S.P.C.M. SA*, C-558/08, EU:C:2009:430 para. 74; Judgement of January 10, 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10.

^{xvii} See Article 2(ao) of the Notified Law, which defines “biodegradable plastic” as “plastic capable of undergoing physical or biological decomposition so it ultimately decomposes into carbon dioxide (CO₂), biomass and water, and in accordance with European packaging standards, is recoverable through composting and anaerobic digestion.”

^{xviii} See Answer given by European Commission on August 19, 2020 to Parliamentary Question E-002738/2020 submitted by MEP Androuët. The Commission’s answer is available online at (https://www.europarl.europa.eu/doceo/document/E-9-2020-002738-ASW_EN.html).

^{xix} Standard ASTM 6954 -- Guide for Exposing and Testing Plastics that Degrade in the Environment by a Combination of Oxidation and Biodegradation.

^{xx} Standard EN 13432:2000 -- Requirements for Packaging Recoverable through Composting and Biodegradation - Test Scheme and Evaluation Criteria for the Final Acceptance of Packaging.