

Joint industry comments on TRIS notification 2022/325/E (Spain)

Draft Royal Decree on Packaging and Packaging Waste

On 06 May 2022, Spain notified to the European Commission a [Draft Royal Decree](#) on Packaging and Packaging Waste (hereafter “the Royal Decree”). The Royal Decree sets out packaging reduction objectives, as well as obligations for packaging reuse, recycling of packaging waste and marking requirements. It also reviews the Extended Producers Responsibility (EPR) scheme for household packaging.

This TRIS contribution focuses on the measures and requirements in the draft Royal Decree listed below:

- > Chapter I in Title II - Packaging Design and marking obligations, particularly articles 13 and 21 (3).
- > Chapter III in Title II – Ecomodulation, Article 23 (3) and Annex VIII
- > Chapter III in Title II – Visible fee, article 23(5)
- > Chapter III in Title I – Mandatory plastic recycled content, article 11(3) and (4)

1. Executive Summary

The signatories are aligned with Spain’s objective to move towards a circular economy and are committed to prevent packaging waste.

We would like to share our views on how to achieve Spain’s objectives in the draft Royal Decree without endangering the proper functioning of the single market and sending relevant and consistent signals to manufacturers to encourage the circularity of their packaging.

First and foremost, it is of paramount importance to acknowledge that packaging requirements do have a major impact on the free movement of goods within and beyond the EU, hence **harmonized regulatory measures** to prevent and reduce packaging waste are essential to ensure the continued success of the EU internal market. Misalignments on proposed measures (e.g. labelling requirements, eco-modulation criteria, information to be displayed on invoices, mandatory minimum recycled content) -or on definitions and referenced standards- can uneven the playing-field, increase regulatory complexity and operational burden of manufacturers and potentially jeopardize the expected outcome.

Additionally, it is essential to **avoid a ‘one rule fits all’ approach** and take into consideration the different realities of specific sectors whenever discussing mandatory targets or requirements (e.g. minimum recycled content, labelling requirements). Unintended environmental impacts can cancel or exceed the positive effects of such an approach, resulting in regrettable material substitution and the necessity of a system to manage exceptions.

2. The Royal Decree requirements

Packaging prevention and reuse measures

Article 8 proposes the introduction of ambitious reuse targets for domestic channels and commercial and industrial packaging to be achieved at national level.

We would like to recall that, at the time of this submission, the European Commission has announced its intention to set reuse targets at EU level as part of the PPWD revision. Therefore, **the establishment of unilateral national reuse targets risks undermining the upcoming revision of the PPWD**, which is looking at ways to boost reuse through harmonised measures at EU level. In line with the principle of sincere cooperation, Spain should refrain from adopting regulations to address an issue which can only be adequately addressed at EU level and in a field which the EU intends to harmonise. This is the case for the deployment of reusable packaging systems.

In addition to this, the proposed targets may have the effect to restrict the free movement of products and discriminate against foreign manufacturers.

The free movement of goods prohibits measures capable of hindering, directly or indirectly, actually or potentially intra-community trade. According to settled case law, this is the case if requirements for the presentation, labelling and packaging of goods force the manufacturers to change their packaging formats, even if they apply without distinction to domestic and imported products¹. **In the absence of an EU legal framework, national regulation on mandatory reusable packaging infringes the EU principle of the free movement of goods.** Despite the fact that the setting of reuse objectives would be in accordance with Art. 5 of the PPWD, the same article also establishes that the above measures must be adopted "in conformity with the Treaty", which implies, among other requirements established in the case law of the CJEU, that they must be proportionate to the purpose pursued and that in no case imply an infringement of the internal market, which is doubtful in view of the approaches of Article 8 of the Royal Decree.

Finally, mandatory reuse targets affect more strongly foreign manufacturers than domestic manufacturers. **Producers exporting products to Spain would need to create an entire new logistic chain to be able to comply with the reuse targets established in the Royal Decree**, which puts them at a competitive disadvantage compared with locally established producers (not exporting outside of Spain) for whom it will be easier to comply.

Reuse requirements should therefore be introduced in a harmonized way at EU level.

Marking requirements

Articles 13 the Royal Decree introduces several measures related to the labelling of packaging, including the obligation to mark B2C packaging with sorting instructions:

- the use, on a voluntary basis, of the alphanumerical codes regulated by Decision 97/129/EC to indicate the material composition of the packaging.
- the obligation to indicate that a packaging is "reusable" and display the symbol associated with the relevant deposit, return and refund system or accrediting the participation to an EPR scheme.
- the prohibition to mark packaging with the claim "environmentally friendly" or equivalent labels.

¹ See i.a. ECJ Case C-470/93, Mars, par 13, C-3/99, Cidrerie Ruwet, par 46ff.

In addition to this, Article 21 (3) - which established general obligations for EPR schemes - states that accreditation symbols shall be clear and unambiguous and not mislead consumers. In this regard, the “Green Dot” is considered to be misleading to consumers.

The above-mentioned requirements must be regarded as barriers to intra-EU trade in that they directly affect the product and thus trade within the EU. Article 34 TFEU prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. By obliging all economic operators to introduce (or remove) specific labels on all packaged goods destined to Spain, the Royal Decree is imposing labelling requirements on products originating from other Member States and thereby impacting their free circulation across the internal market.

The Spanish requirements will also add a disproportionate regulatory burden on producers, who will be required to adopt their packaging executions to comply with the Royal Decree. To date, most companies operating within the Internal Market use only one type of packaging execution for the EU as a whole or for a group of several neighbouring EU countries. The Spanish labelling requirements would impede this and require the redesign or re-stickering of all packaging destined for the Spanish market, or the production of separate variants for that market only.

Likewise, labelling with sorting instructions will cause additional confusion for consumers since rules for separate collection do vary from municipality to municipality. Given the number of separate collection systems and setups within Spain, it would not be feasible for manufacturers to provide unique labels for every scenario. Consumers can be much better informed by local awareness campaigns promoted by competent authorities in collaboration with all relevant stakeholders in waste collection and management.

Labelling exemptions shall be considered (e.g., internal packaging components, parts with low masses, optional for commonly recyclable materials such as paper and cardboard, glass, metal...), as well as the alignment with EU regulation and applicable standards (e.g. plastics ≥ 25 grams should be labeled with alphanumeric codes per ASTM D7611 / EU Directive) and the flexibility of the labelling (e.g. not necessarily requiring to label the material itself).

Overall, e-labelling solutions (understood as a broad range of options including websites, apps, QR codes, etc...) would be more effective to communicate packaging information and to assure readiness, traceability and up-to-date information compared to physical labels or markings, without the need to increase packaging size or repackage. That way, manufacturers and producers can ensure that data is available to identify the materials in the packaging and to ensure that dissimilar materials are separable when the consumer wants to discard them. While consumers can benefit from a simple access to detailed, user-friendly, and up-to-date information.

This is in addition to the fact that **producers are increasingly required to comply with cumulative or even contradictory marking requirements**.

Labelling requirements should be harmonized at EU level and follow internationally recognised definitions, standards and markings. National marking requirements not only severely impede the integrity of the single market, but also increase the administrative burden and operational cost of manufacturers and undermine the circularity of products and secondary materials within the EU. In light of the above, the ongoing review of the EU’s Packaging and Packaging Waste Directive (PPWD) represents a great opportunity to set common requirements on the packaging information to be provided

to consumers and the ways to do so, including the use of e-labelling solutions, instead of introducing unilateral labelling requirements that clearly undermine the effectiveness of actions undertaken at EU level.

Eco-modulation requirements

In Article 23 (3) the Royal Decree sets Eco-modulation requirements. Any modulation requirements should be harmonized at EU level and follow internationally recognized definitions and standards in order to preserve the integrity of the single market. Implementing details should be defined through a collaborative approach with all relevant stakeholders and in alignment with the ongoing policy developments at EU level.

The harmonization of the criteria with the collective systems of extended producer responsibility and with the different Member States is key to avoiding inconsistencies and creating differences, or even contradictions, between the different countries that make their application to packaging design impossible.

Any modulation system will be based on fee structures that adequately reflect the real costs of effective and efficient end-of-life management for those products or categories of products to which it is specifically targeted, and that consistently incentivize and reward and consistent to those manufacturers that improve the circularity of their products.

Therefore, we strongly recommend ensuring the development of criteria harmonized with the European Commission.

Visible Fee

Visible fees on commercial invoices should not be compulsory for producers but a voluntary measure, as is current practice for WEEE.

Flexibility should be applied whenever adopting extended producer responsibility approaches where producers can voluntarily decide whether to display or not the EPR contributions on invoices and/or commercial documentation. A mandatory display on invoices will lead to a massive administrative burden. Many manufacturers work with tens of thousands of product codes with their respective packaging, and such a measure will have huge impact on the resources and cost needed for administration and maintenance, as well as costs in IT projects to adjust the administration systems.

Mandatory minimum recycled plastic content in packaging

The draft Royal Decree requires producers to ensure that the non-compostable plastic packaging they place on the market meet several minimum recycled plastic content requirements by 2025 and 2030 as well as specific recycled content objectives to be achieved by 2030 across different packaging segments.

The practical implication is that economic operators from outside Spain will not be able to place on the Spanish market plastic packaging that does not contain the prescribed amount of recycled content, even

when that same packaging would be compliant with the PPWD and marketable in the rest of the EU. This is a clear contravention of article 18 of the PPWD.

Furthermore, the European Commission has publicly announced its intention to set recycled content targets for plastic packaging as part of the ongoing process to review the PPWD. To avoid creating a barrier to the single market for recycled plastic, it is critical that plastic recycled content targets are harmonised at EU level.

3. Infringement of EU legislation

The above mentioned measures infringe the following EU legislation and TFEU provisions:

- > **Article 18 of the Packaging and Packaging Waste Directive (94/62/EC)**, which provides that, even if Member States are allowed to go beyond the requirements laid down in its provisions, they “shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. All the measures analysed as part of this contribution will effectively impede the marketing of packaged goods in Spain that are fully compliant with the PPWD and are therefore in violation of the Article 18. It is also noteworthy that the legal basis of the PPWD is Article 114 of the TFEU. This further limits the discretion of Spain vis-à-vis imposing additional requirements on packaging in contradiction to Article 18 of the PPWD.
- > **Article 8a(1)(d) of the Waste Framework Directive (2008/98/EC)**, which prevents Member States from “placing a disproportionate regulatory burden on producers” and Article 8(3) of the Waste Framework Directive, which provides that when applying Extended Producer Responsibility (EPR) Schemes, Member States must respect “the need to ensure the proper functioning of the internal market”.
- > **Article 34 TFEU**, which prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. Quantitative restrictions can only be justified by one of the public interest grounds set out in Article 36 TFEU or by one of the overriding and mandatory requirements developed by case-law in the EU Court of Justice. Such rules must be necessary to attain legitimate objectives and be in conformity with the principle of proportionality, which requires that the least restrictive measure be used. The proportionality of measures mandated by the Royal Decree can be questioned, since the pursued objectives of preventing and reducing packaging waste can be achieved by less restrictive measures and better addressed by an EU-wide approach.
- > **Article 4(3) TEU**: In line with the principle of sincere cooperation, a Member State should refrain from adopting legislation to address an issue which can only be adequately resolved at EU level and in a field which the EU intends to harmonise. This is the case for packaging in the context of the ongoing revision of the PPWD.

4. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, Spain should abstain from imposing unilateral requirements which will pre-empt forthcoming EU legislation and create barriers to trade. Based on the findings from our contribution, we submit the following requests to the Commission:

- to adopt a detailed opinion concluding that the Royal Decree may create barriers to the free movement of goods in Europe and should not be adopted since it contravenes TFUE Single Market provisions and EU legislation.
- to inform Spain that the Royal Decree is in breach of Article 6 (3) of Directive (EU) 2015/1535 on TRIS.

Signatories

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