

## SPANISH FOOD AND DRINK FEDERATION (FIAB) COMMENTS ON TRIS NOTIFICATION 2022/325/E (SPAIN)

### DRAFT ROYAL DECREE ON PACKAGING AND PACKAGING WASTE

#### 1. OBJECT OF THE TRIS CONTRIBUTION

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.

The following draft measures are the object of this contribution:

- Chapter II in Title I - Packaging prevention and reuse, particularly articles 6 (1) (a), 6 (2), 7 (4) (a) (b), 8 and 9 (4).
- Chapter III in Title I - Plastic recycled content, particularly article 11 (3) and (4).
- Chapter I in Title II - Packaging Design and marking obligations, particularly articles 13 and 21 (3).

FIAB contest the lawfulness of the above-mentioned measures on the following grounds:

- The Royal Decree pre-empts the forthcoming revision of the Directive 94/62/EC on Packaging and Packaging Waste (hereafter “PPWD”) and therefore infringes Art. 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (TRIS).
- The proposed measures will impede the placing on the market of packaging that is fully compliant with the provisions of the EU packaging legislation, thus being contrary to article 18 of the PPWD. Similarly, most obligations will create unjustified barriers to intra-EU trade and consequently amount to quantitative restrictions on imports or measures having equivalent effect, which are prohibited by article 34 of the TFEU.
- Several requirements in the Royal Decree do not find a legal basis in any of the currently enforced EU legislations or depart from already adopted EU laws.
- If adopted, the Royal Decree will have negative economic impacts on economic operators without added environmental value.

#### 2. THE ROYAL DECREE REQUIREMENTS

##### PACKAGING PREVENTION AND REUSE MEASURES

- **Article 6 (1) (a) - achieve a 13% packaging waste reduction in weight by 2025, and a 15% reduction by 2030, compared to 2010 levels.**

The Royal Decree sets unilateral and ambitious waste reduction targets, which go beyond what is currently stipulated in Directive 94/62/EC on Packaging and Packaging Waste (hereafter “PPWD”). Article 4 (1) of the PPWD only foresee prevention targets for lightweight plastic carrier bags.

In addition, the Royal Decree effectively pre-empts the ongoing revision of the PPWD, whereby the European Commission is expected to establish EU-wide waste reduction targets at Member State level. This creates confusion in the regulatory framework and additional regulatory hurdles for economic actors operating on the Spanish market.

- **Article 6 (2) - achieve a 20% reduction in the number of single-use plastic beverage bottles placed on the market by 2030.**

Directive 2019/904 on Single-Use Plastics (SUP Directive) clearly states that only single-use plastic products listed in Part A of its Annex are subject to a sustained reduction in consumption. The Spanish requirement, therefore, over-transposes the SUP Directive, since the adoption of consumption reduction measures exclusively applies to single-use plastic beverage cups and food containers destined for on-the-go consumption. Such measure also runs counter the objective of the SUPD which aims to drive the uptake of recycled content and increase the separate collection of single-use plastic beverage bottles, whereby promoting the circularity of these packaging solutions.

In addition to deviating from provisions set out in the SUPD, the requirement is formulated in very vague terms. The text mentions that this reduction objective could be achieved by “measures contained in this Royal Decree and others that may be adopted”. Such formulation undermines the legal certainty of economic operators, who will bear the costs of complying with a requirement that will be enforced in Spain only.

Finally, the measure could create unjustified barriers to the trade of goods between Member States which are not justified by the attainment of the SUP Directive environmental objectives, thus not uphold by the *lex specialis* principle set in art 4 of the SUP Directive, nor compliant with article 18 of the PPWD. The latter obliges Member States to allow the placing on the market of their territory of packaging which satisfies the provisions of the Directive.

- **Article 7 (4) (a) and (b) - ban on packaging for fruit and vegetables in retail stores.**

This ban would not apply to batches of more than 1.5 kg or to fruits and vegetables at risk of deterioration when sold in bulk. The latter will be determined by the Spanish Agency for Food Safety and Nutrition, in coordination with the Ministry of Agriculture, Fisheries and Food.

As established for Article 6 (1) (a) and (2), the proposed measure does not find a legal basis in any of the provisions currently enforced at EU level. In relation to plastic packaging, the SUP Directive does not foresee a ban on the packaging of fruit and vegetables. These packaging applications are not listed in Part B of the Annex to the SUP Directive, which provides an exhaustive list of the single-use plastics items subject to restrictions on the placing on the market, nor are fruits and vegetables covered by the Spanish measure intended for immediate consumption or typically consumed from the receptacle. Similarly, for other packaging materials, the requirement is not justified by any of the Essential Requirements listed in Annex II of the PPWD.

The proposed ban will have potentially adverse implications for food waste. Packaging plays a central role in extending food life shelf, thus minimising food losses and preventing the waste of resources and the greenhouse gases emissions associated with discarded food. In relation to this, we would like to stress that Article 9 (1) (g) of Directive 2008/98/EC on Waste (WFD) requires Member States to take measures to prevent the generation of waste, including to *“reduce the generation of food waste in [...] retail and other distribution of food, [...] as a contribution to the United Nations Sustainable Development Goal to reduce by 50% the per capita global food waste at the retails and consumer level [...] by 2030”*. The proposed measure also clearly infringes Article 18 of the PPWD which provides that Member States *“shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”*. Since the proposed ban will effectively impede the marketing of packaged goods in Spain that are fully compliant with the PPWD, this requirement violates Article 18. In relation to this, we agree with the reasoned opinion that Spain submitted when France notified its Draft Decree on the obligation to display for sale fresh, unprocessed fruit and vegetables without packaging composed entirely or partly of plastic:

*“[...] the free movement of goods between Member States is a fundamental principle of the Treaty on the Functioning of the European Union, which finds its raison d’être in the prohibition contained in Article 34 of the Treaty, which prevents quantitative restrictions on imports between Member States, and all measures having equivalent effect. In accordance with Article 114 TFEU, if, following the adoption by the European Parliament and the Council, the Council or the Commission of a harmonisation measure, a Member State considers it necessary to maintain national provisions justified by one of the important reasons referred to in Article 36 or related to the protection of the working environment or the environment, that Member State shall notify the Commission of those provisions and the reasons for their maintenance. Since Article 36 of the Treaty contains a strict interpretation exception to the free movement of goods within the Community, it is incumbent upon the national authorities invoking it to demonstrate in each case, considering the results of international scientific research, that their rules are necessary to effectively protect the interests referred to in that provision and, in particular, that the marketing of the products in question poses a real risk to public health (Commission/Denmark, Commission v France C-24/00).”*

It is notable to observe that, when notifying the Royal Decree, Spain has not provided any scientific evidence demonstrating the need for and the non-discriminatory nature of the proposed ban. We also challenge the proportionality of the measure in light of the fact that economic operators will have to comply with a requirement set unilaterally within a very limited time frame, notably four months after the publication of the list of exempted fruits and vegetables by the Spanish Agency for Food Safety and Nutrition.

- **Articles 8 and 9 (4) - reuse targets and measures.**

Article 8 proposes the introduction of ambitious reuse targets for beverage containers in the HORECA sector, beverage packaging marketed in the retail sector, as well as reuse targets for other packaging applications (reusable packaging marketed in the retail sector and reusable B2B packaging), to be achieved at national level.

It is also required by Article 9 (4) that retail food establishments offer at their points of sale, and depending on the size of their commercial area, a certain number of beverage references in reusable packaging.

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 products. 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. This could be interpreted as a serious restriction of the market for foreign producers, since they would practically only have access to the percentage that is allowed for "non-reusable" packaging – sharing this quota with national single use packaging; an extreme case would be 2030 reuse targets in HORECA sector (50% for mineral water; 80% for soft drinks and 90% for beer).

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

## MANDATORY MINIMUM CONTENT OF RECYCLED PLASTIC IN PACKAGING

- **Articles 11 (3) and (4) - mandatory plastic recycled content**

The Royal Decree 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. The text also sets specific recycled content objectives to be achieved by 2030 across different packaging segments.

As a result of such targets, economic operators from across Europe will not be able to place on the Spanish market plastic packaging that does not contain the prescribed amount of recycled content. This is despite the fact that the same packaging will be considered compliant with the PPWD in another country. Therefore, such measures are contrary to Art. 18 of the PPWD.

Further, the European Commission has publicly announced its intention to set recycled content targets for plastic packaging as part of the PPWD revision. To avoid creating barriers to the developments of a single market for recycled plastic, it is important that plastic recycled content targets are set in a harmonised fashion.

Finally, the Royal Decree clearly departs from the SUP Directive as it establishes the obligation to include by 2030 a 35% minimum plastic recycled content in beverage bottles which are not destined for single-use, for example plastic bottles of up to 5 litres, as well as packaging items not in scope of the SUP Directive.

In consideration of the above, Spain should refrain from introducing unilateral mandatory plastic recycled content targets, for which a unified measurement, verification and reporting method will also have to be defined at EU level.

## MARKING REQUIREMENTS

### • Articles 13 and 21 (3) - marking requirements

The Royal Decree introduces a number of measures in relation to the labelling of packaging, notably:

- the use, on a voluntary basis, of the alphanumeric 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, on a voluntary basis, accrediting the participation to an EPR scheme;
- the prohibition to mark packaging with the claim “environmentally friendly” or equivalent labels.
- the obligation for household packaging to indicate the fraction or container/bin in which said packaging waste must be deposited.

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, Article 21 (3) also indicates that 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 restickering of all packaging destined for the Spanish market, or the production of separate variants for that market only.

This is in addition to the fact that producers are increasingly required to comply with cumulative or even contradictory marking requirements. As an example, the use of the “Green Dot” logo is penalised in France but is allowed in other Member States and, to date, is even mandatory in Spain. In the absence of clear and harmonised measures, manufacturers will need to develop national-specific packaging or use stickers to cover the “Green Dot”. Similarly, the use of the alphanumerical codes, which will be voluntary in Spain, will soon become mandatory in Italy and Bulgaria.

In light of the above, the ongoing review of the PPWD represents a great opportunity to set common requirements on which information should be provided to consumers and how this should be done, including the use of digital solutions that can help provide required information without the need to increase packaging size or repackaging.

Once again, by introducing unilateral marking requirements, Spain is anticipating forthcoming EU legislation, most notably the revision of the PPWD and the European Commission proposal for a Directive on Empowering Consumers for the Green Transition. This clearly undermines the effectiveness of actions undertaken at EU level.

### 3. INFRINGEMENT OF EU LEGISLATION

The measures adopted by the Spanish Government infringe EU legislation and TFEU provisions on Single Market and Directive (EU) 2015/1535 on the Technical Regulations Information System.

#### INFRINGEMENT OF EU LEGISLATION, TFEU PROVISIONS ON SINGLE MARKET AND TEU PROVISIONS

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 in order 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. As mentioned above, Spain has failed to provide adequate justification on the need and proportionality of the proposed measures. Even if the intended objective to prevent and reduce the impact of packaging and packaging waste on the environment would be considered legitimate, the measures are not proportionate as this objective can be achieved by less restrictive measures and better addressed by an EU-wide approach, which the Royal Decree currently undermines.

> **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 the packaging legislation. Spain should not pre-empt the setting of harmonised rules at EU level, such as provisions relating to recyclability, reuse, recycled content and labelling. These matters should be dealt with at the EU level as part of the ongoing revision of the Packaging and Packaging Waste Directive.

#### INFRINGEMENT OF DIRECTIVE (EU) 2015/1535 ON THE TECHNICAL REGULATIONS INFORMATION SYSTEM

We welcome the submission from the Spanish Government of the Royal Decree to the Technical Regulations Information System (TRIS).

The Royal Decree, however, infringes Art. 6 (3) of Directive (EU) 2015/1535 on TRIS, which prescribes that Member States shall postpone the adoption of a draft technical regulation for 12 months when the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU. The EU Commission intention to revise the Packaging and Packaging Waste Directive and the Waste Framework Directive was well known to Spain at the time of elaboration of the Royal Decree. Such intention was publicly announced by the Commission as part of the New Circular Economy Action Plan , adopted in March 2020, and has been the object of several consultations at EU level.

It is notable to observe that, despite the above, Spain has decided to proceed with the adoption of a number of provisions that clearly pre-empt harmonisation efforts at EU level. This is the case for most of the obligations proposed in the Royal Decree, particularly measures on packaging waste prevention, reuse, as well as requirements on plastic recycled content and labelling of packaging.

#### 4. ECONOMIC AND ENVIRONMENTAL IMPACTS



Rigorous implementation and enforcement of the Single Market principles are key to ensure harmonised legal requirements facilitating economies of scale, long-term investments and strengthening the business case for innovative products and technologies. This is not only a precondition for the free movements of packaged goods and packaging materials across the EU, but it is essential to strengthen the implementation of packaging and packaging waste targets in all Member States.

We detail below negative economic and environmental impacts derived from the Royal Decree, notably the labelling requirements, the targets on reuse, minimum plastic recycled content, and the ban on packaging for fruit and vegetables.

## ECONOMIC IMPACTS

The obligation for additional labelling on all packaged goods marketed in Spain is highly problematic to industry as many 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. Some other Member States are also seeking to impose additional labelling obligations that may be cumulative or even contradictory to the Royal Decree. Necessitating separate packaging obligations for packaged goods marketed in each Member State would significantly add to costs and limit intra-community trade.

The Spanish measures therefore impedes the use of a single packaging execution and consequently requires the redesign of all packaging across the entire internal market destined for Spain or the production of separate variants for the Spanish market. As an example, the indicative cost for a change to an artwork (printing) file would amount to approximately €1,500 which include evaluation by a regulatory specialist to ensure veracity of all other mandatory labelling requirements (CLP etc). When a few thousands Stock Keeping Unit (SKUs) are put on the market, this can represent a potential one-off cost of a few million Euros for a single company, even before any ongoing costs for separate production of packaging executions for Spain. Redesigning all packaging destined to the Spanish market will also entail costs for manufacturing new print cylinders, managing multiple packaging raw materials stocks and multiple data sets. Increasing the changeover complexity in manufacturing operations will have repercussions on operational efficiency and loss of economies of scale.

Regarding reuse targets in the HORECA sector, the objectives proposed in the Royal Decree are excessively demanding. The establishment of ambitious targets, to be achieved in such a short period, would have a very important economic impact for companies, since it would require a change in their business model. This could compromise the competitiveness of the sector and even have a disincentive effect for companies that invest in reuse.

Similar considerations are true for the achievement of reuse target in the retail sector. This reuse model is not operational in the domestic channel, so it is necessary to previously assess the acceptance it will have by the consumer, and the different problems at a technical and logistical level. This involves a huge economic investment in a short period of time, since it implies great changes in the structure of the production and packaging plants, which not all companies can afford.



In relation to the minimum recycled content in plastic packaging, industry will incur in cost related to higher prices of post-consumer recycled plastics when compared to virgin plastic.

There is significant on-cost due to post-consumer recycled plastic being more expensive than virgin plastic. The gap between virgin and recycled plastic varies significantly between rPET and rPE and rPP, as well as r(E)PS. Today, mechanically recycled plastic represents an on-cost of 25% to 40% compared to virgin plastic, while advanced or chemically recycled plastic for food grade represents an on-cost of 100%. The evolution of this cost will depend on the speed of building capacity as well as the development of virgin prices that are coupled with crude oil prices.

Finally, costs for R&D development and for operations (e.g. quality control equipment, extra cleaning, purging time, separate handling) should also be accounted for.

## ENVIRONMENTAL IMPACTS

The Spanish labelling obligations will also have potential negative environmental repercussions:

a) If companies decide to create a packaging variant for Spain:

- Any mismatch in supply would risk inadequate supply (empty shelves) or an excess of Spanish specific product. This will increase the risk of product scrappage, as companies will not be able to send unsold products to other markets unless they can be re-packaged/re-configured for other markets (which will also entail additional resources). All actors would ultimately want to avoid the destruction of unsold goods.
- Qualification of any new packaging variant will entail some initial post-industrial waste. As such the creation of a new packaging variant for Spain may lead to increased post-industrial waste as multiple packaging variants (for different countries each requiring different labels) would need to be qualified as opposed to one single variant.
- Reduced flexibility in supply logistics may mean that the re-stocking of products dedicated for the Spanish market may require use of quicker, but less efficient modes of transport with concomitant impacts on transport emissions. The flexibility to employ inter-modal transport systems will be correspondingly reduced.

b) If companies decide to redesign all packaging across the internal market to integrate Spanish (and the proliferation of other national) labelling laws

- This carries a risk of an increase in packaging weight and volume to accommodate all such labels/instructions. This obviously applies to smaller rather than larger items, but the potential has been demonstrated to be real in some sectors such as batteries and toys. Any need to add additional packaging to accommodate extra on-pack labels runs against one of the core objectives of the PPWD.
- There is also the question of opportunity cost from such measures. Any resources that need to be invested in adapting to national labelling requirements are not available to companies that may otherwise have invested those resources in order to attain their own goals on packaging. Many companies have made public commitments to the reduce of virgin feedstocks and promoting the use of secondary raw materials. The current 'delta' between virgin resin prices and post-consumer recycled (PCR) resins is circa €500 per tonne. As an

example, a company with 2,500 SKUs on the market in Spain will spend an initial €3.75 million simply 9 changing artwork printing files, even before any other costs derived from inefficiencies. This would have otherwise allowed the same company to purchase 7,500 tonnes of PCR instead of virgin material.

Beyond environmental impacts associated with marking requirements, the ban on packaging fruits and vegetables risk to have unintended consequences, in the form of increased food loss and waste of unprocessed fruits and vegetables.

The Food Waste Index Report 2021<sup>10</sup>, developed by the United Nations Environment Programme (UNEP) and partner organisation WRAP, finds that food services and retail outlets produce 5% and 2% of food waste respectively. On a global per capita-level, 121 kilograms of consumer level food is wasted each year. The UN Food and Agriculture Organization (FAO) warns that one third of all food produced globally is lost or wasted. In the European Union, around 88 million tonnes of food waste are generated annually with associated costs of 143 billion euros, according to the most recent estimate.

Preventing avoidable product losses and food waste at all stages of the supply chain is an important part of delivering a circular economy. Food waste represents a missed opportunity to feed the growing world population, a major waste of resources and a major source of greenhouse gas emissions accounting for 6% of total EU GHGs emissions.

Packaging has an essential role to play in the prevention of food waste, protecting products and minimising waste at all stages of the value chain. To this end, the Spanish ban overlooks how high-performance packaging solutions and technologies can preserve food safety by minimising sources of contamination and reduce food waste from spoilage. Innovative packaging designs also help consumers buy and use food in portions that match their needs and reduce food waste from leftovers.

## 5. 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.