



The Brewers of Europe

COMMENTS ON TRIS NOTIFICATION 2022/325/E (SPAIN)

DRAFT ROYAL DECREE ON PACKAGING AND PACKAGING WASTE

On 6th May 2022, Spain notified through the TRIS procedure a Draft Royal Decree on Packaging and Packaging Waste which includes obligations for packaging reuse, recycling of packaging waste and marking requirements which, to our opinion, infringe EU legislation, TFUE provisions on Single Market and Directive (EU) 2015/1535 on the Technical Regulations Information System.

Our main concerns are:

Reuse targets:

> Articles 8 and 9 on reuse targets and measures to implement them

- With mandatory reuse targets for beverage containers in the HORECA sector which include the following for beer: 80% in 2025 and 90% in 2030
- A minimum of 10% by 2030 is set for beverage containers marketed in the domestic channel
- The proportion of reusable containers marketed in the domestic channel with respect to the total of containers by weight should be 5% in 2030 and 10% in 2035.
- The proportion of commercial packaging and reusable industrial packaging, with respect to the total of packaging by weight for each of these categories, should be 20% in 2030 and 30% in 2035.
- Retail food establishments shall offer at their points of sale, in respect of beverage containers:

a) Since 2026:

1. At least one reference of drink in reusable container, if the establishment has a commercial area of less than 120 m²;
2. At least three references of drink in reusable container, if the establishment has a commercial area of 120 m² or greater and less than 300 m²;

b) Since 2025:

1. At least four references of drink in reusable container, if the establishment has a commercial area of 300 m² or greater and less than 1,000 m²;
2. At least five references of drink in reusable packaging, if the establishment has a commercial area of 1,000 m² or greater and less than 2,500 m²;
3. At least seven references of drink in reusable packaging, if the establishment has a commercial area of 2,500 m² or more

The European Commission is in the process of modification of the Packaging Waste Directive (94/62/EC) and mentions have been made to the fact that reuse targets may be part of the

PPWD revision at EU level. Therefore, **the establishment of unilateral national reuse targets risks undermining the upcoming revision of the PPWD** through harmonised measures at EU level to boost reuse. In line with the principle of sincere cooperation, Spain should refrain from adopting regulations to address an issue 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.

What is more, in the case of beer, a drink which is mostly consumed in the **HORECA in Spain, a reuse target of 90% by 2030 only leaves 10% of such market available for non-returnable packaging,** that is, almost **closing that channel to beers from other EU member countries.**

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:

- a) 35% for plastic bottles, demijohns and similar articles of up to 5 litres capacity, including their caps and lids;
- b) 15% for jars, tubs, trays, baskets and other similar articles of plastic;
- c) 15% for plastic films used in primary packaging applications, including, but not limited to, bags, liners, peel-off lids or wrappings;
- d) 30% for plastic films used in secondary or tertiary packaging applications such as, but not limited to, shrink wrapping, liners, sacks, bubble packs, envelopes, among others;
- e) 60% for pallets, crates, drums and wholesale storage containers and other similar plastic.

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 not only in beverage bottles which are not destined for single-use, for example plastic bottles of up to 5 litres, but also in 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 several measures in relation to the labelling of packaging, notably:

- 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.
- the obligation for household packaging to indicate the fraction or container 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 hinder this and require the redesign of all packaging destined to the Spanish market, or the production of different labelling 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.

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.

In short, 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 Plan⁸, adopted in March 2020, and has been the object of several consultations at EU level⁹.

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.

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