

The Spanish Cosmetics, Toiletry and Perfumery Association (STANPA) on TRIS notification 2022/325

Draft Royal Decree on Packaging and packaging waste

Introduction

Spain notified to the European Commission a Draft Royal Decree on Packaging and Packaging Waste (hereafter, “the Royal Decree”).

The purpose of the Royal Decree is to transpose *Directive 2018/852, of the European Parliament and of the Council of 30 May 2018, amending Directive 94/62/EC on packaging and packaging waste*, and to adapt the Spanish legislation on packaging to the new extended producer responsibility scheme established not only by Directive 2018/851 of 30 May 2018, but also by *Directive 2019/904, of the European Parliament and of the Council, of 5 June 2019, on the reduction of the impact of certain plastic products on the environment*, once it has been incorporated into Law 7/2022, of 8 April, on contaminated waste and soils for a circular economy.

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 and develops the Extended Producers Responsibility (EPR) scheme for household packaging.

The Spanish Cosmetics, Toiletry and Perfumery Association (STANPA) fully recognizes and supports the need to reduce the environmental footprint of packaging. The industry has been approaching this challenge for many years, continuously experimenting with new packaging formats reflecting the waste hierarchy, and companies have signed several pacts and committed to voluntary actions. In this sense, at the end of 2021 the sector has voluntarily created a consortium, the *EcoBeauty Score Consortium*, to work on the design and implementation of a common tool for measuring the environmental footprint of products in the cosmetic and perfumery sector, currently counting with 50 members of companies and associations of the sector at European and international level.

The packaging plays an important role as an element of safety, hygiene maintenance and product integrity, as well as maintaining a key role in the consumer's perception of some high value-added products and in many cases not being a mere container but a preservative to prevent microbial contamination and an applicator that allows the correct use of the product.

Packaging legislation should allow flexibility for companies to design packaging systems that best meet the functional and regulatory requirements of products. The regulated nature of the cosmetics industry is an important factor to consider, as it can often limit or prevent changes to packaging material and design. Any measure to be implemented must comply with the provisions of *Regulation (EC) No 1223/2009 of the European Parliament and of the Council of November 30, 2009, on cosmetic products*, which imposes strict conditions aimed at guaranteeing the safety of health and safety.

The following draft measures are the object of this contribution:

- Chapter I in Title I - General provisions, particularly article 2.

- Chapter II in Title I - Packaging prevention and reuse, particularly articles 6 and 8.
- Chapter III in Title I - Packaging waste recycling, particularly article 11 (3) and (4).
- Chapter I in Title II - Packaging Design and marking obligations, particularly article 13.
- Chapter II in Title II - Obligations to provide information on placing packaging on the market, particularly article 14.

The Royal Decree provisions

Article 2 - Definitions

Regarding the definitions indicated in article 2, we understand that when it refers to the definition of “*reusable*”, the concept of recharging is included. This recharging system meets the objectives set out in the waste hierarchy in Directive 852/2018 that is being transposed and gives the consumer security about the safety of the cosmetic product, which is why we understand that it is included in this definition of the Royal Decree.

Several industry-driven initiatives to improve the reuse of cosmetic and personal care product packaging already exist on a voluntary basis, but any reuse initiative must encourage innovation and consider consumer acceptance and behavior change. It should also be considered that for some product packaging, legislative or regulatory provisions prohibit reuse due to consumer health or safety requirements. The cosmetic and personal care industry has made efforts to systematically reduce all packaging components which are not strictly needed, limiting packaging to what is purely functional. For example: by decreasing packaging weight, using thinner packaging materials, concentrating formulas to improve the ratio of product to packaging and encouraging reuse.

In relation to the definition of “*packaging recyclability*”, we understand that recyclability is a concept that is being currently valued in the revision of the Directive 94/62/EC on Packaging and Packaging Waste (hereafter “PPWD”), so there is no need to unilaterally advance a definition at the national level within a context of free movement of goods in the European Union.

The Royal Decree could infringe article 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (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.

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 PPWD. Article 4 (1) of the PPWD only foresee prevention targets for lightweight plastic carrier bags.

The proposed measure does not find a legal basis in any of the provisions currently enforced at EU level.

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.

In line with the principle of sincere cooperation (article 4.3 TEU), 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. Spain should not anticipate the setting of harmonised rules at EU level.

Article 8 - Recycling targets

The Royal Decree established recycling targets in line with the principle of the waste hierarchy, in order to encourage an increase in the proportion of reusable packaging placed on the market and of packaging reuse systems in a sound manner and without compromising the essential functions of the packaging and the necessary levels of safety and hygiene for the packaged product and the consumer.

In this respect, we believe that it is essential for the cosmetics and perfumery sector that refill is considered a reuse system for the purpose of meeting these objectives. In many product categories it is the only way to guarantee consumer health safety and it is also provided for in the PPWD itself.

Also, we regard that the following considerations should be taken into account when implementing reuse objectives:

- Life Cycle Analysis (LCA) demonstrate that there is no environmental superiority of reusable packaging over recyclable packaging, since it greatly depends upon the logistical context of each case, critically the transport distance, the number of rotations and other aspects such as the percentage of losses and breakages of reused containers.
- Inefficient reverse logistics of empty containers often makes recyclable packaging a better environmental option in long-distance transport.
- The introduction of targets for the re-use of commercial and industrial packaging not harmonised at Community level could be considered incompatible with the internal market
- EU businesses access to the Spanish market would be seriously hampered by the imposition of reuse quotas since reuse packaging systems are difficult or impossible to implement in long distance transport.
- The establishment of quotas for reusable packaging favours local producers and discriminates against Community producers, which could be considered by certain Member States as a protectionist measure not justified by environmental gains.
- The proposed Spanish Royal Decree lacks any assessment about the impact of the proposed reuses targets on local and European producers. Neither provides data about the current use of reusable packaging and justification for the targets proposed.

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

The Royal Decree obliges producers to ensure that the plastic containers they put on the market, which are not compostable plastic, meet a series of minimum requirements for recycled plastic content for 2025 and 2030. The text also establishes specific objectives of recycled content to reach by 2030 in different packaging segments.

As a result of these objectives, economic operators throughout Europe will not be able to place plastic containers on the Spanish market that do not contain the prescribed amount of recycled content. This is even though the same packaging will be considered PPWD compliant in another country.

Therefore, such measures are contrary to article 18 of the PPWD 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”*.

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

Likewise, it must be considered that currently the cosmetics sector needs quality, safety and performance of products and packaging must not be affected by the use of plastic recycled content. For instance, food-contact grade quality is required for some non-food cosmetics and personal care applications such as oral care and sensitive product applications, e.g., baby care.

The key challenge in relation to recycled content is a lack of high-quality of secondary materials at a competitive price. This is particularly the case for the cosmetics and personal care sector with its diverse range of products, and its need for high quality and availability of materials. As certain cosmetic products need to employ high quality materials comparable to food-contact requirements, they would therefore benefit from an improvement in the regulatory approval process for recycling processes for food-contact materials.

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

The 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. 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.

Articles 13 - Marking and Information Obligations

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 to indicate the container in which the empty household packaging must be deposited.
- the obligation to have an external certification to be able to claim that the packaging is recyclable and the percentage of packaging material available for quality recycling.

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” may mislead 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. These measures infringe article 8a (1) (d) of the Waste Framework Directive, which specifically prevents Member States from “...placing a disproportionate regulatory burden on producers...”. In this regard, 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 neighboring EU countries. The Spanish labelling requirements would impede this and require the redesign or reticketing 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, is mandatory in Italy and Bulgaria. Therefore, harmonized marking requirements are highly needed in order to avoid as barriers to intra-EU trade.

Furthermore, the prohibition to mark packaging with the claim “environmentally friendly” or equivalent labels clearly undermines the effectiveness of actions undertaken at EU level set out in the New Consumer Agenda and the Circular Economy Action Plan.

It contravenes forthcoming EU legislation, the European Commission proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information. This proposal aims to contribute to a circular, clean and green EU economy by enabling consumers to take informed purchasing decisions and therefore contribute to more sustainable consumption.

This forthcoming directive sets high requirements for explicit and generic environmental claims which will be banned if not based on a certification scheme or if the trader is not able to demonstrate recognised “excellent environmental performance” relevant to the claim. “Excellent environmental performance” means an environmental performance compliant with Regulation (EC) 66/2010 of the European Parliament and of the Council, with national or regional EN ISO 14024 type I ecolabelling schemes officially recognised in accordance with Article 11 of Regulation (EC) 66/2010.

Environmental claims are key to foster more sustainable purchases and to enhance the participation of consumers in the circular economy.

Considering 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 repackage.

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.

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 neighboring 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.

Finally, we consider that an external certification to be able to claim that the packaging is recyclable is not necessary, but a self-declaration by the person responsible for placing the product on the market is sufficient.

Article 14 – Creating the packaging section in the register of product producers

The creation of this new registry supposes a reiteration of similar registry obligations already existing or newly created at the national level, such as:

- Registration for compliance with the obligations of the tax on virgin plastic in Law 7/2022 on waste and contaminated soil for a circular economy.
- Annual declaration of containers to the extended producer responsibility system (SCRAP) for domestic containers and
- New creations of declarations for the new SCRAPs in industrial and commercial packaging.

This entails a high administrative burden with a cost of personnel and economic resources that is especially aggravated in SMEs and that can be a barrier to the marketing of products in Spain.

A period of only 3 months is given from the entry into force of the Royal Decree to carry out the registration, a time that is considered too short to be able to do so given the excessive administrative burden that compliance implies.

Conclusions

The Royal Decree pre-empts the forthcoming revision of the PPWD and therefore infringes article 6 (3) of Directive (EU) 2015/1535 on 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.

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.

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