

UNESDA SOFT DRINKS EUROPE

Comments on Notification 2022/325/E

Spanish Royal Decree on Packaging and Packaging Waste

We are writing to you regarding the [draft Spanish Royal Decree on packaging and packaging waste](#).

UNESDA-Soft Drinks Europe is highly committed to accelerating the transition to a circular economy, including by reducing packaging waste. In our [packaging vision towards 2030](#) we are making several far-reaching commitments, going well beyond EU law, including on recyclability, recycled content and reuse.

We are therefore very supportive of initiatives aiming at reducing packaging waste and improving the sustainability and circularity of packaging. However, to be efficient, such initiatives should never threaten the proper functioning of the EU's internal market.

It is our opinion that the Spanish draft Royal Decree on Packaging and Packaging Waste, as notified pursuant to the TRIS procedure under notification number 2022/325/E, may constitute a restriction of the free movement of goods within the European Union and has the potential to create market distortions.

Spain should not be permitted to adopt the Spanish draft Decree because (i) it would create barriers to trade within the EU Single Market, (ii) violate existing EU secondary legislation and (iii) the European Commission has already announced its intention to legislate on the matters in question.

Please see below a list of our concerns regarding the content of this draft Decree.

1. Barriers to the internal market

The Spanish draft Decree must comply with (i) Articles 34-36 TFEU which guarantee the free movement of goods, and which are intended to “eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-[EU] trade”, as well as (ii) secondary legislation that the EU already adopted on the relevant matters addressed in the Spanish draft Decree. Pertinent secondary legislation in this regard includes the EU Packaging and Packaging Waste Directive (PPWD) and the Single-use Plastics Directive (SUPD). While directives permit EU Member States a certain margin of discretion, the exercise of that discretion must not lead to unjustified barriers to trade within the Single Market.

Requirements introduced by individual EU Member States regarding the packaging, labelling and other requirements (such as recycling and re-use) have consistently been held to be obstacles to the Single Market unless they are justified, even if they apply to all products without distinction (see, for example, Case 302/86, *Commission v Kingdom of Denmark*, Case C-470/93, *Mars*). In fact, the European Commission unequivocally recognized the potential for market distortion in its inception impact assessment for the revision of the PPWD by stating that “[u]ncoordinated national measures to address sustainability aspects of packaging result in obstacles to the free movement of goods and hinder the development of markets for secondary raw materials.”

The requirements introduced by the Spanish draft Decree risk introducing divergences on key areas of packaging sustainability legislation, creating barriers to the free movement of goods and hampering the stability that businesses need to invest in circular packaging solutions. This is not in line with internal market principles or the objectives of the European Commission to promote a sustainable and circular economy.

2. Overlap with ongoing EU legislative work, with the risk of creating unharmonized and confusing requirements

In cases where legislation at EU level is imminent, it would be unreasonable, confusing and burdensome for businesses if Member States were to introduce rules which will inevitably be superseded by EU rules shortly thereafter. This is the rationale underlying Article 6(3) of Directive 2015/1535 (the TRIS procedure Directive) which provides that Member States must postpone the adoption if the European Commission announces its intention to propose a legislative act on the matter in question. In the case of the matters covered by the Spanish draft Decree, the European Commission has already published initiatives and announced it would propose, inter alia, the revision of the PPWD before the Spanish draft Decree was notified.

The Spanish draft Decree includes a series of provisions that are currently discussed and will soon be regulated at EU level. The text indeed includes provisions on the labelling and marking of packaging, recycled content, reusable packaging, and waste prevention measures, among others. All those elements are currently being discussed by the European Commission in the context of the revision of the PPWD, with a proposal for a new Regulation foreseen for November 2022.

We believe it is essential that the future Spanish draft Decree be in line with the future European Regulation to avoid contradictory requirements at the EU and national levels.

3. Specific elements of the Spanish draft Decree which risk creating diverging and confusing rules and thus introduce barriers within the Single Market

A. Reuse targets

Article 8 of the Spanish draft Decree introduces reuse targets, including for soft drinks packaging:

- HORECA channel (for soft drinks): 70% by 2025 and 80% by 2030.
- Household channel (for all beverages): at least 10% by 2030.

UNESDA-Soft Drinks Europe supports an increase in the use of reusable beverage systems as they are an important pillar of our objective to reduce the environmental footprint of our sector. However, any measure to increase reuse should be designed in a way that guarantees a well-functioning Single Market and a positive environmental impact. Therefore, the requirements, which are clearly barriers to trade between Member States, must pursue a legitimate objective, be appropriate to achieve the objective, and be proportionate. They should also ensure certainty and not impose an undue burden on businesses.

First, **the revised PPWD is expected to include reuse targets and should therefore be considered as the only act of reference for reuse measures.** Any conflicting national measure should be avoided. This will prevent the development of a patchwork of national reuse targets, making any measurement very difficult, hindering the efficiency of the measures, and creating barriers to the EU Single Market. Indeed, the European Commission set out in the inception impact assessment that: “[i]t is necessary

to strive for full harmonisation of rules on packaging across the internal market to preserve its integrity and allow for a smooth free movement of packaging and packaged goods.”

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.

Second, the freedom of movement of goods prohibits measures capable of hindering, directly or indirectly, actually or potentially intra-community trade. This is inter alia the case if requirements for the presentation, labelling and packaging of goods force the manufacturers to change their packaging even if they apply without distinction to domestic and imported products according to settled case law (see i.a. ECJ Cases C-470/93, Mars, par 13, C-3/99, Cidrerie Ruwet, par 46ff). **National regulations on mandatory reusable packaging, in the absence of an EU legal framework, therefore violate the free movement of goods.**

The European Commission has noted (see “Beverage packaging, deposit systems and free movement of goods” (2009/C 107/10)) that national beverage packaging systems may divide the internal market as manufacturers are required to adapt their packaging to different requirements, which leads to additional costs.

National legislation on mandatory reusable packaging also affects more strongly foreign manufacturers than domestic manufacturers. This is because the costs for both the transportation as well as the organization of reusability systems increase with the distance between the manufacturer and the points of sale, because reusable containers are often much heavier than single-use containers. Thus, foreign manufacturers will have to produce at lower prices than domestic manufactures. This constitutes a significant barrier for competitive market access.

This obstacle is even bigger for foreign manufacturers that not only have to bear the additional financial and organizational burdens but also must adjust their packaging and product appearance to offer reusable packaging options. Upon adoption of the targets they would have to not only consider to completely change their packaging but also set up a system for the organization and transport for reusable packaging, including the extensive costs for both the packaging change and the set-up of the organizational system.

Finally, **national regulations on compulsory forms of packaging are considered an extreme form of interference with the free movement of goods** and the European Court of Justice is thus critical towards such measures (see inter alia ECJ case C-3/99, Cidrerie Ruwet, par 45 ff; Case 16/83, Prantl, par 22 ff, Case 302/86, Commission/Denmark, par 17).

UNESDA does not dispute the legitimacy of environmental protection as justification for restricting the EU fundamental freedoms. However, **restrictive measures must be suitable to achieve the goals pursued** (see Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, par 37). **Reusable containers are only ecologically preferable to other types of packaging under specific circumstances** (i.a. short transport routes, reaching certain circulation repetitions, etc.). Therefore, their use should only be promoted in those circumstances. Otherwise, the measures are neither suitable nor proportionate to achieving the aim sought.

The targets proposed by the Spanish draft Decree are not suitable to achieving the objective of environmental protection. The use of reusable beverage systems should only be increased when and where it makes sense for our environment, as required by the principles governing the justifications of

barriers to trade within the Single Market. The level of the measures should therefore be based on a thorough environmental impact assessment, showing net environmental benefits and waste reduction to ensure that the measures are suitable to achieve the environmental objectives and are proportionate to those objectives. The current proposed objectives in the Spanish draft Decree are extremely high and we believe they will not offer the necessary flexibility to only invest in reusable systems where it makes sense for our environment.

The Spanish draft Decree thus constitutes an undue obstacle to the Single Market and should not be adopted, especially in light of the fact that the European Commission is likely to propose soon EU level targets on reuse.

B. Recycled content

The Spanish draft 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, and it sets specific recycled content objectives to be achieved by 2030 across different packaging segments.

First, recycled content targets for our sector are already provided by the SUPD and are likely also to be addressed in the upcoming revision of the PPWD. The Spanish draft Decree would therefore pre-empt EU level regulation and create unnecessary uncertainty, as well as burdens for businesses which will inevitably have to adapt to the new EU rules once those are adopted.

Second, the Spanish draft Decree conflicts with secondary EU law. As a result of targets introduced by the Spanish draft Decree, 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 Member State. Therefore, such measures are contrary to Art. 18 of the current PPWD, which provides that Member States must not impede the placing on the market of packaging which satisfies the provisions of the PPWD.

We also observe a lack of alignment between the EU and national level when it comes to the calculation of the recycled content. As stated in the SUPD, recycled content should be calculated as an average for all PET bottles placed on the market on the territory of the Member State (and not at the operator level, as suggested in the Spanish draft Decree).

Third, 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, e.g., to address the mismatch between supply and demand of secondary raw materials, as envisaged by the European Commission and set out in the New Circular Economy Action Plan. 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 be defined at EU level.

C. Waste prevention

The Spanish draft Decree sets unilateral waste reduction targets which go beyond what is stipulated in the current PPWD and SUPD. Article 4 (1) of the PPWD only foresees prevention targets for lightweight plastic carrier bags and the SUPD clearly states that only single-use plastic products listed in Part A of its Annex are subject to a sustained reduction in consumption.

However, Article 6 (1) (a) of the Spanish draft Decree aims at achieving a 13% packaging waste reduction in weight by 2025, and a 15% reduction by 2030, compared to 2010 levels.

This 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) of the Spanish draft Decree also aims at achieving a 20% reduction in the number of single-use plastic beverage bottles placed on the market by 2030.

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 to 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, thereby 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 SUPD environmental objectives, thus not uphold by the *lex specialis* principle set in Article 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.

Those measures have not been duly justified and could constitute a quantitative restriction on the free movement of goods.

D. Marking requirements

The Spanish draft Decree introduces a number of 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.

In addition to this, Article 21 (3) of the Spanish draft Decree - which establishes general obligations for EPR schemes - states that accreditation symbols shall be clear and unambiguous and not mislead 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 Spanish draft Decree is imposing labelling requirements on products originating from other Member States and thereby impacting their free circulation across the internal market.

The requirements set out in the Spanish draft Decree can also not be justified because they add a disproportionate regulatory burden on producers, who will be required to adopt their packaging executions to comply with the 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. It would clearly be more appropriate to wait for the EU institutions to adopt relevant requirements at EU level in order to ensure a uniform approach to marking requirements.

The requirements in the Spanish draft Decree add to the already burdensome jungle of cumulative or even contradictory marking requirements that producers are required to navigate.

Once again, by introducing unilateral marking requirements, Spain is pre-empting 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.

As regards the prohibition to mark goods with the claim “environmentally friendly” we also note that the European Commission is working on the initiative “[Environmental performance of products & businesses – substantiating claims](#)” which will address the issue of misleading green claims (“greenwashing”) by setting out standard methods for quantifying products’ environmental footprint. Therefore, it would not be appropriate for Spain to walk this path alone as this clearly undermines the effectiveness of actions undertaken at EU level.

4. Conclusion

To conclude, we would like to stress the need for the European Commission to urgently address all national initiatives disrupting the efforts made to harmonise the legislative framework to advance packaging sustainability across all Member States, and to take action when these initiatives threaten the Single Market.

[About UNESDA Soft Drinks Europe](#)

Established in 1958 UNESDA Soft Drinks Europe is a Brussels-based association representing the European soft drinks industry. Its membership includes both companies and national associations from across Europe producing drinks including still drinks, squashes, carbonates, powders, iced teas, iced coffees, syrups, energy drinks and sports drinks.

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