

EUROPEN comments on TRIS notification 2022/196/I (Italy)

Decree-Law No 114 of the Minister for Ecological Transition of 16 March adopting the Guidelines on the labelling of packaging, pursuant to Article 219(5) of Legislative Decree No 152/06.

1. Object of the TRIS contribution

We are writing to you regarding [TRIS notification 2022/196/I](#) of Italy. This draft Decree adopts Guidelines for economic operators on how to comply with packaging labelling obligations already introduced by Article 3(3)(c) of Legislative Decree 116/2020 amending Article 219(5) of Legislative Decree 152/2006 ("Italian Environmental Code").

The guidelines, as well as the packaging labelling obligations that the guidance document aims to specify, constitute the object of this contribution.

2. The guidelines and the packaging labelling requirements

The newly notified Decree No 114 of the Minister for Ecological Transition of 16 March 2022 provides guidelines that clarify how to comply in practice with the labelling requirements set by Article 3(3)(c) of Legislative Decree No 116/2020. The labelling requirements are further detailed below.

Article 3(3)(c) of Legislative Decree No 116/2020 introduces additional labelling requirements on the packaging of packaged goods (hereinafter referred to as "the measures"):

- 219(5) point one: The obligation to label the packaging of products marketed to consumers with information to facilitate the collection, reuse, recovery and recycling of the waste packaging.
- 219(5) point two: The obligation to label the packaging of packaged goods with an indication of the nature of the packaging they use in accordance with Commission Decision 97/129.

With Article 11 of Decree-Law No 228/2021, both requirements have been suspended until 31 December 2021, with entry into force now due for 30 June 2022, pursuant to Article 11 (1) and 11 (2) of the Decree-Law No 228/2021.

The guidelines notified in Decree No 114/ 2022 mention that additional modifications to Article 11 of Decree-Law No 228/2021 have been adopted with Law No 15 of 25 February 2022, including the suspension of the labelling requirement until 31 December 2022.

Hence, Decree-Law No 228/2021 and Law No 15 of 25 February 2022 only postpone the entry into force of the packaging labelling requirements, without any modification to their impact on the free movement of packaged goods. Despite the attempt to clarify their implementation in a guidance document, the marking requirements will still lead to fragmentation and erosion of the internal market as they will be having an equivalent effect of a quantitative restrictions on imports.

Further, even if we appreciate the clarification in the guidelines that digital solutions can be used to comply with the measures, this will not mitigate the negative economic impacts derived from the labelling obligations. As an example, the use of digital means entails gathering the budget and resources to build a country-specific brand site for the sole purpose of providing labelling information specific to that country. Most importantly, it would still require a change of all artworks to redirect consumers to a dedicated webpage whereby the environmental labelling content related to a specific packaging will be conveyed.

Below we clarify why the notification of the guidelines does not solve the infringement of EU legislation and will still result in negative economic and environmental impacts.

3. Infringement of EU legislation

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

Infringement of Directive (EU) 2015/1535 on the Technical Regulations Information System

The newly notified Decree No 114 of the Minister for Ecological Transition of 16 March 2022 clarifies how to implement Art. 3 (3) of the Legislative Decree 116/2020. As such, this decree does not substantially modify the provisions of Art 3 (3) of the Legislative Decree 116/2020, nor it notifies the labelling requirements introduced by Italy.

In spite of this new submission, therefore, Italy is still in breach of Directive (EU) 2015/1535 on the Technical Regulations Information System (TRIS).

At the time of this submission, Italy has still not notified Article 3(3)(c) of Legislative Decree 116/2020 amending Article 219(5) of Legislative Decree 152/2006 ("Italian Environmental Code"). As a result, the Italian measures infringe Art 5 (1) of Directive (EU) 2015/1535 on the Technical Regulations Information System, which provides for the obligation for Member States to notify to the Commission all draft technical regulations concerning products before they are adopted in national law. According to well-established case law, " (...) breach of the

obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals¹”.

If duly communicated, the Italian measures would have also infringed 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 propose a harmonised framework for labelling as part of the Packaging and Packaging Waste Directive and Waste Framework Directive revisions was well known to Italy at the time of adoption of the measures. Such intention was publicly announced by the Commission as part of the New Circular Economy Action Plan, adopted in March 2020².

While the Italian government did not notify its Legislative Decree 116/2020 (which constitutes the actual technical regulation), Italy chose instead to notify Decree 228/2021 via an urgency procedure. Decree 228/2021 simply postpones the application of packaging labelling requirements established under Legislative Decree 116/2020. Since Decree 228/2021 does not lay down any product characteristic or conditions of use, it does not amount to a technical regulation according to Art. 1 (f) of Directive (EU) 2015/1535. Decree 228/2021 is neither:

- A “technical specification” “laying the characteristics required of a product”; nor
- “Other requirements (...) such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing.”

It is therefore evident that Decree 228/2021 is not the right object of the notification, as it is not a technical regulation to be notified in accordance with Directive (EU) 2015/1535. Italy should have notified the Legislative Decree 116/2020, which has still not occurred at the time of this submission.

The Italian government has also improperly used the emergency procedure³. There are no grounds for Italy to use the emergency procedure since the conditions established Art. 6 (7) of Directive (EU) 2015/1535⁴ simply cannot apply:

- There are no “unforeseeable or serious circumstances” warranting the urgent adoption of packaging labelling requirements. The Italian government had first introduced the provision on packaging labelling requirements through a decree issued in September 2020 (Decree 116/220). Therefore, the application of labelling requirements cannot be qualified as serious and unforeseeable, as this has been foreseen for one year and half; and
- There are “no public health or safety hazards” stemming from the lack of packaging labelling requirements.

¹ Judgement of April 30, 1996, CIA Security International SA v. Signalson SA and Securitel SPRL, C-194/94, EU:C:1994

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “A New Circular Economy Action Plan For a cleaner and more competitive Europe”, COM/2020/ 98 final, p. 9 “[...] As part of the initiative to harmonise separate collection systems referred to in section 4.1, the Commission will assess the feasibility of EU-wide labelling that facilitates the correct separation of packaging waste at source.

³ [notification 2022/0018/I](#)

⁴ Art. 6 (7) foresees that a government can use the emergency procedure “for urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules on services, also for public policy, in particular the protection of minors.”

It is notable to observe that, in the section on the grounds for emergency⁵, the Italian government did not explicitly provide any “serious and unforeseeable circumstance relating to the protection of public health or safety” as a motivation to justify the emergency procedure.

In the absence of a TRIS submission notifying the labelling requirements and the time limit for their application, Italy has failed to inform economic operators across Europe in due time of their obligations and of the postponement of the entry into force of the measures. For instance, the most recent suspension of the labelling requirement until 31 December 2022 has only been communicated in non-binding guidelines and 2 months after the adoption of Law No 15 of 25 February 2022. A timely and orderly notification of Legislative Decree 116/2020 and its subsequent modifications as required by Directive (EU) 2015/1535 would have ensured economic operators are made aware of new technical regulations in due course.

Infringement of EU legislation and TFEU provision on Single Market

These measures infringe the following EU legislation and TFEU provisions:

- **Article 18 of the Packaging and Packaging Waste Directive (94/62/EC)**, hereinafter referred to as “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”. The measures will effectively impede the marketing of packaged goods in Italy that are fully compliant with the PPWD and is 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 Italy vis-à-vis imposing additional labelling 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”.
- **Art. 34 TFEU**. According to established case law, labelling requirements must be regarded as barriers to intra-EU trade in that they directly affect the product and thus trade within the EU. In the absence of harmonized rules (in this case on sorting labels)*, Article 34 TFEU prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”.

It is notable that Commission Decision 97/129/EC (as referenced in the new Italian labelling provisions) explicitly indicates that the identification system established by the Decision is entirely voluntary (i.e., Article 3 states that “(T)heir use shall be voluntary” for the materials laid down in the annexes). By obliging all economic operators to introduce additional labels on all packaged goods or face a significant financial penalty €5,200 up to €40,000⁶, Italy is effectively imposing labelling requirements on products originating from other Member

⁵ See justification from Italy: The need to proceed with urgency arises from the labelling requirement for packaging manufacturers from 1 July 2022, which results in the application of penalties for non-compliance with the same requirement. It should also be noted that the provision is found in an emergency measure (Decree-Law) which must be converted into law within 60 days of the date of its publication in the Official Journal, otherwise the Decree-Law will be ineffective ex tunc. The Converting Law may amend the Decree-Law. Moreover, this provision postpones the regulation of the labelling methods to an implementation measure to be adopted before the requirement for producers comes into force, who, in the absence of clear rules, would not be able to comply with the regulations provided for.

⁶ Under Article 261(3) of the Italian Environmental Code.

States and thereby impacting their free circulation across the internal market and intra-community trade in violation of Article 34 TFEU.

There are several CJEU rulings on national labelling requirements that have been held to have an equivalent effect to a quantitative restriction as prohibited under Article 34 of the TFEU. These include C-463/01 (Commission v. Federal Republic of Germany⁷) and C-143/03 (Commission v. Italy⁸). The Germany and Italian labelling requirements were both within scope of the Article 34 prohibition as they impacted or were potentially liable to impact intra-community trade by adding to costs and complicating marketing and distribution. A similar rationale has also been employed by the European Commission itself in the TRIS Detailed Opinion⁹ on the French Triman marking requirements. The Commission argued that “by forcing economic operators to affix the Triman symbol to their products, the instructions or the packaging, the French authorities are imposing different labelling requirements on products from other Member States, which entails additional packaging costs and restricts the marketing of those products. It is highly likely that this measure violates Article 34 TFEU.”

Any such restrictive measures 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 objective of the Italian measures is to improve the collection of separated waste and the functioning of recycling streams. The proportionality of mandated measures can be questioned. Even if the intended objective to protect the environment would be considered legitimate, the measures are not proportionate as this objective can be achieved by less restrictive measures with a lesser impact on intra-Community trade. For instance, instead of mandating such labelling and increasing packaging costs or penalizing non-compliance, communication campaigns by key actors such as EPR schemes and/or producers can be envisaged to provide consumers with greater clarity on sorting and waste management of packaging. This would be far less restrictive than forcing companies to change the packaging of products marketed across multiple Member States. A similar rationale has been employed by the European Commission when assessing the proportionality of the French Triman marking requirements, in its above-mentioned detailed opinion, questioning the value-add that “the mandatory information symbol brings compared with other approaches that can lead to increased recycling, such as improved collection systems, simpler sorting and citizen engagement initiatives”.

4. Environmental and competitiveness impact

Disparate national packaging requirements impede the use of a single packaging execution and therefore require the redesign of all packaging across the entire internal market destined for an individual country or the production of separate variants for that market.

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

⁷ Judgment of December 14, 2004, Commission of the European Communities v Federal Republic of Germany, C-463/01, EU:C:2004:797.

⁸ Judgement of October 14, 2004, Commission v. Italy, C-143/03, EU:C:2004:629.

⁹ Detailed Opinion from the European Commission TRIS (2020) 03628 in respect of the French Draft Decree on Consumer Information Symbols Indicating the Sorting Rule for Waste Resulting from Products Subject to the Principle of Extended Producer Responsibility (Notification 2020/410/F) as notified to the European Commission on June 30th, 2020.

increase packaging size or repackage. EUROPEN together with more than 40 other organisations has developed a proposal ¹⁰in this regard, which we have shared with the relevant services of the EU Commission and of the Permanent Representations of the Member States. However, a harmonised EU system will take time to see the light and produce concrete outcomes. In the meantime, therefore, concrete and urgent action is needed to halt the proliferation of unilateral and divergent national measures and sanction infringements.

Economic impacts

The obligation for additional labelling on all packaged goods marketed in Italy 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 (e.g., clusters such as IT/ES/PT/FR). Some other Member States are also seeking to impose additional labelling obligations that may be cumulative or even contradictory to the Italian decree. Necessitating separate packaging obligations for packaged goods marketed in each Member State would significantly add to costs and limit intra-community trade. The penalties imposed by the Italian decree for non-compliance are not insignificant and range from €5,200 up to €40,000.

The Italian 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 Italy or the production of separate variants for the Italian 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 costs of a few million Euros for a single company, even before any ongoing costs for separate production of packaging executions for Italy. Redesigning all packaging destined to the Italian 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.

Even if we appreciate digital solutions can be used to comply with the measures, this will not mitigate the negative economic impacts identified above. As an example, the use of digital means entails gathering the budget and resources to build a country-specific brand site for the sole purpose of providing labelling information specific to that country. Most importantly, it would still require a change of all artworks to redirect consumers to a dedicated webpage whereby the environmental labelling content related to a specific packaging will be conveyed.

Environmental impacts

The Italian measure will also have potential **negative environmental repercussions**:

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

¹⁰ [Joint-position-EU-harmonised-consumer-sorting-instructions_FINAL-1.pdf \(europen-packaging.eu\)](#)

- Any mismatch in supply would risk inadequate supply (empty shelves) or an excess of Italian 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 Italy 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 Italian 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 Italian (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 Packaging and Packaging Waste Directive.

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 Italy will spend an initial €3.75 million simply 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.

5. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, Italy should abstain from imposing labelling requirements and sorting instructions, which will inevitably create barriers to trade without achieving the objective of harmonising and clarifying the information provided to consumers. The EU is better placed to deal with this matter and is already considering doing so.

Based on the findings from our contribution, we submit the following requests to the Commission:

- to adopt a detailed opinion concluding that Article 3(3)(c) of Legislative Decree 116/2020 may create barriers to the free movement of goods violating Article 34 TFEU and EU secondary legislation. This is despite well-intentioned efforts to clarify compliance with the requirements in the notified guidelines;
- to inform Italy that Article 3(3)(c) of Legislative Decree 116/2020 is in breach of EU law and to request Italy (i) why it did not notify it following the TRIS procedure despite the fact that it restricts intra-EU trade and (ii) the measures that it intends to take in order to comply with EU law.