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CEEV contribution to the TRIS notification 2021/510/F on French (draft) Decree on the minimum proportion of reused packaging to be placed on the market annually

The **Comité Européen des Entreprises Vins** (CEEV – www.ceev.eu) represents the wine companies in the industry and trade in the European Union: still wines, aromatised wines, sparkling wines, liqueur wines and other vine products. It brings together 25 (TBC) national organisations from 12 EU Member States, plus Switzerland, the United Kingdom and Ukraine, as well as a consortium of 4 leading European wine companies. Its members produce and market the vast majority of quality European wines, with and without a geographical indication, and account for over 90% of European wine exports.

CEEV is pleased to submit, here below, its contribution to the TRIS notification 2021/510/F¹ on the French (draft) Decree on the minimum proportion of reused packaging to be placed on the market annually.

CEEV COMMENTS

The above referenced TRIS notification raises a number of concerns in the light of TFEU² rules.

According to art. 34, « *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.* »

According to art. 36, « *The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy, or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.* »

The Directive 94/62/EC³ establishes, in its art. 7.1.b, that « *Member States shall take the necessary measures to ensure that systems are set up to provide for [...] the reuse or recovery including recycling of the packaging and/or packaging waste collected.* »

Art. 7.3 also highlight the fact that such measures should also « *take into account, in particular, requirements regarding the protection of the environment and consumer health, safety and hygiene, the protection of the*

¹ <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2021&num=510&mLang=fr&CFID=2337102&CFTOKEN=a590296d8f2fc46-50734C5E-C195-38AD-946AF827F3F69879>

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² Consolidated version of the Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj

³ European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (PPWD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31994L0062>

quality, the authenticity and the technical characteristics of the packed goods and materials used, and the protection of industrial and commercial property rights. »

In February 2020, France adopted the Law n° 2020-105⁴, that amended the provisions (art. L 541-1) of the French Environmental Code⁵. It establishes a new goal, namely to increase the share of reused packaging put on the market compared to single-use packaging, so as to reach a proportion of 5% of reused packaging marketed in France in 2023, expressed in sales unit or sales unit equivalent, and 10% of reused packaging marketed in France in 2027, expressed in sales unit or sales unit equivalent.

The notified French Decree (draft) proposal is designed to implement the goals set in the Law:

- Establishes a mandatory minimum of level of reuse for packaging that increases from 1,5% in 2022 up to 10% in 2027;
- The implementation schedule depends on the annual turnover of the packer or the importer;
- Such obligation relies on all packaging put on the French market, whether they are produced in France, introduced from another member state or imported from a third country;
- Eco-fees paid by packers or importers may vary to reach such objectives.

Need for clarification

According to the Law n° 2020-105⁶, the notified draft decree is derived from, requirements regarding reuse of packaging are based on the volume of sales units “put on the French market”. This concept should be clarified especially for excise products, insofar as an excise product should be considered to be put on the French market when it is released for consumption in France, as described under art. 6 of the Council Directive (EU) 262/2020⁷.

Conformity with TFEU⁸

Such rules do not fit with TFEU art. 36 requirements:

1. According to art. L 541-10 of the French Environmental Code⁹, the enlarged producer’s responsibility opens the possibility for an obligation « *to provide or contribute to the prevention and management of the waste that comes from it as well as to adopt an eco-design approach for products, to promote the extension of the lifespan of said products while ensuring the best overall professional repairers and individuals concerned the availability of the means essential for efficient maintenance, to support re-employment, reuse and repair networks such as those managed by the structures of the social and solidarity economy or promoting integration by the employment, to contribute to development aid projects for the collection and treatment of their waste and to develop the recycling of product waste. »*

Such obligation widely exceeds those set in art. 36 which are limited to « *public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property »*.

⁴ <https://www.legifrance.gouv.fr/eli/loi/2020/2/10/TREP1902395L/jo/texte>

⁵ https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041599099/

⁶ <https://www.legifrance.gouv.fr/eli/loi/2020/2/10/TREP1902395L/jo/texte>

⁷ Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast) <https://eur-lex.europa.eu/eli/dir/2020/262/oj>

⁸ Consolidated version of the Treaty on the Functioning of the European Union https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj

⁹ https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041599099/

2. In addition, such requirements do have an effect on the single market:
 - a. Any company placing less than 10.000 containers a year on the French market is exempted from such obligations (art. R 541-372 in art. I of the draft decree). But a new exporter to France, which will be beyond that limit, usually sell its product through a local partner (importer or distributor), which might have a global output on the market higher than 10.000 containers. As a consequence, this exporter will have to take these obligations into account despite he sells less than 10.000 containers a year. In that respect, this exporter is in a less favourable position than a national one. This situation constitutes « *a means of arbitrary discrimination or a disguised restriction on trade between Member States* », prohibited under art. 36 TFEU.
 - b. The same concern can be raised with the application of turnover criteria: such criteria does not consider the fact that this turnover may not relate to the French market. For instance, a Spanish company exporting 11.000 bottles of wine in France has a global turnover of 55 million euros. It will have to fulfil all the new obligations even if its turnover related to French sales is much lower than 20 million euros. In that respect, this company is disadvantaged to a French one that has a global income lower than 20 million euros.
 - c. The distinction created between reuse end recycling could oblige companies to manage two different ways of packaging which are incompatible:
 - i. On one hand, one-way bottles are the core for recycling: they are usually designed to reduce their impact on environment, mainly looking for light weight bottles. But such bottles cannot be reused as they are not resistant enough for a multi-use scheme;
 - ii. On the other hand, packaging (bottes) designed for reuse purposes are usually thicker and heavier. This is due to their specific resistance requirement.

From a marketing perspective, it is quite difficult, not to say impossible, to combine both approaches. In many cases, a company that ships its products on foreign markets, it usually uses lightweight bottles to reduce freights costs and because of local requirements on waste management, that impose higher fees on heavy bottles.

The French requirement would create a technical barrier to trade within the Single market, because most companies will not be able to manage two different packaging lines, that would represent high additional costs. As a consequence, this requirement will tend to exclude EU producers and distributors from the French market, because of an equivalent effect to quantitative restrictions on imports, in breach of art. 34 TFEU.

 - d. One could also consider that these requirements will play also against French exporters and their EU importers as such measures have an equivalent effect to quantitative restrictions on exports, in breach of art. 35 TFEU.
3. Such requirement will create a barrier to trade for those products which have to comply with a mandatory bottling at source. As an example, Port wine product specification establishes a mandatory bottling at source as a condition for guaranteeing the authenticity as well as the quality of Port wines. Having to reuse bottles would then mean to bring the bottles back from consumption areas to production and bottling ones, which does not provide any environmental benefit. This is particularly true with France, as this country is the first import market in volume for Port wines.

4. Art. 7 of Directive 94/62/EC¹⁰ sets the rules on return, collection and recovery systems. It considers in particular « the reuse or recovery including recycling of the packaging and/or packaging waste collected », without establishing a preference between both.

But it should be stressed that while such measures shall take into account, requirements regarding the protection of the environment, they need to consider also « *the protection of the quality, the authenticity and the technical characteristics of the packed goods and materials used, and the protection of industrial and commercial property rights* ».

The draft decree does not take these criteria into account: there is no protection granted to producers regarding quality and authenticity, which is key for GI products and brands, as well as IP protection, especially when it comes to bottle designs.

5. Last but not least, mandatory requirement for reuse brings artificially in France when they were before located in other European regions: this if for instance the case for transport (bulk wine or empty bottles) or bottling (in France rather than in the country of origin). This new regulation tends in practice to relocate various activities in France. This approach is in breach of TFEU art. 56 as it will reduce trade in services opportunities for companies established in EU Member States other than France.

CONCLUSION

The draft Decree notified by French authorities tends to establish requirements that are in breach of art. 34 to 36 TFEU, as well as art. 56, as it hampers the good functioning of the Single Market. It should be at least amended in order to fulfil such rules as well as GI and intellectual property protection.

¹⁰ European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (PPWD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31994L0062>