

EUROPEN, FoodDrinkEurope and UNESDA comments on TRIS notification 2021/510/F (France)

Decree on the minimum proportion of reused packaging to be placed on the market annually

We are writing to you regarding the draft French Decree defining for the years 2022 to 2027 the minimum proportion of reused packaging to be placed on the market annually in France in order to achieve the reuse targets set out in Article L541-1 of the Environmental Code, i.e. 5% in 2023 and 10% in 2027.

The following comments concern Art 1 of the draft Decree according to which food producers are obligated to place on the market a minimum proportion of reused packaging annually as follows:

- 1.5 % in 2022;
- 5 % in 2023;
- 6 % in 2024;
- 7 % in 2025;
- 8 % in 2026;
- 10 % in 2027.

EUROPEN, FoodDrinkEurope and UNESDA comments

EUROPEN, the European Organization for Packaging and the Environment, FoodDrinkEurope, the food and drink manufacturing industry, and UNESDA, the European soft drinks industry, are committed to accelerating the transition to a circular economy, in line with the objectives of the EU Circular Economy Action Plan. We recognise the role packaging reuse and refill can play in the transition towards a climate neutral and circular economy, as long as it makes sense from a sustainability standpoint and ensures product safety and hygiene are not compromised. The introduction of reuse requirements needs therefore to be supported by solid environmental analysis and introduced in a harmonised way at EU level. It is only in doing so that we can guarantee a well-functioning Single Market and the achievement of overall positive environmental impact.

The French draft Decree, as currently notified under the TRIS procedure, constitutes a significant restriction of the free movement of goods within the European Union which has not been accompanied by adequate justification on grounds of environmental protection. The proposed reuse quotas are discriminatory, not suitable for the legitimate goal, excessive and as such disproportionate.

Restriction of free movement of goods

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 (see i.a. ECJ Case 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 infringe on the EU principle of the free movement of goods.

For beverage packaging, the European Commission has noted 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 (see the Communication “Beverage packaging, deposit systems and free movement of goods” ([2009/C 107/10](#))).

Furthermore, the large scope of the mandate could have a prohibitive effect in certain cases. If a mandatory quota for reusable packaging has a significant effect on the packaging type/format, such as e.g. for products that have been offered mainly or solely in metal cans, this creates a competitive disadvantage and a market barrier.

Quota discriminates against foreign beverage manufacturers

Regulations on mandatory reusable packaging affect more strongly foreign manufacturers than domestic manufacturers. This is because the costs for both the transportation as well as the organization of reuse 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 quota 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.

Quota not suitable to achieve the pursued environmental goals

Environmental protection can, under specific conditions, be a legitimate justification for restricting the EU fundamental freedoms. However, restrictive measures must be suitable to achieve the pursued goals. Reusable containers can achieve optimal environmental performances only under specific circumstances (i.e. short transport routes, reaching certain circulation repetitions, etc.). So far, the French government has not provided any proof that this is the case nor produced a life-cycle analysis that proves that reusable containers are a preferable option. Therefore, the proposed mandatory reusable quota is not substantiated and cannot be considered suitable to achieve the desired environmental goal.

Quota not justified because it is excessive and disproportionate

EU Member States measures applied to packaging must not go beyond what is necessary for achieving their legitimate purpose and must be overall proportional. National regulations on compulsory formats 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).

With respect to the proposed mandatory quota, there are alternative measures equally suitable to pursue the legitimate goal and that are at the same time less restrictive towards the free movement of goods, thus less interfering with the intra-community-trade.

The objectives pursued can only be adequately served at EU level

In line with the principle of sincere cooperation, a Member State should refrain from adopting regulations 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 deployment of reusable packaging systems.

It is problematic that France should expand its legislation on packaging reuse systems precisely at a time when the European Commission considers doing the same as part of the ongoing revision of the Packaging Directive, for which a legislative proposal is now imminent. This creates confusion in the regulatory framework and additional regulatory hurdles for producers wishing to benefit from the freedom of movement of goods.

Under Article 4(3) TEU:

“the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

France (or any other Member State considered individually) is not adequately placed to adopt mandatory reuse quotas without creating undue barriers to trade between Member States or a disproportionate burden on producers. This matter should be dealt with at the EU level as part of the ongoing revision of the Packaging and Packaging Waste Directive.

Conclusion and requests to the European Commission

Based on these findings, we submit the following requests to the European Commission:

- We request the Commission to adopt a detailed opinion concluding that the notified Draft Implementing Decree may create barriers to the free movement of goods and violates EU secondary legislation. By extending the standstill period by six months following the TRIS notification in accordance with Article 6(2) of the TRIS Directive (i.e. three months following

the end of the three-month standstill period), this detailed opinion would provide France with the opportunity to explain how it intends to address the issues identified above.

- Additionally, considering that the Commission has announced in its Circular Economy Action Plan of 11 March 2020 its intention to harmonise the field, we request the Commission to ask France to refrain from adopting the Draft Implementing Decree for a period of twelve months following the TRIS notification, in accordance with Article 6(3) of the TRIS Directive.
- Finally, we request the Commission to request France to explain (i) why it did not notify the Law on Circular Economy following the TRIS procedure despite the fact that it restricts intra-EU trade; and (ii) the measures which it intends to take in order to make the Law on Circular Economy compatible with EU law.

About EUROPEN

The European Organization for Packaging and the Environment (EUROPEN), is the industry association representing the packaging industry value chain in Europe. EUROPEN's members are raw material manufacturers, packaging converters, brand owners and national packaging organisations. EUROPEN aims to achieve a fully accessible European market for packaging and packaged products, while protecting the products that consumers need and protecting the environment. At EUROPEN, we believe that packaging enables the transition to a climate neutral, circular and competitive EU economy while ensuring goods are delivered safely to EU citizens and businesses.

Email: packaging@europen-packaging.eu; Website: www.europen-packaging.eu; Twitter: @EUROPEN_ORG; LinkedIn: www.linkedin.com/company/europen

About FoodDrinkEurope

FoodDrinkEurope represents the food and drink manufacturing industry. Made up of 291,000 businesses - 99% of which are SMEs - and 4.8 million employees, the food and drink industry is Europe's largest manufacturing industry.

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. It is signatory to the EU Transparency Register (No: 25498952296-56).

www.unesda.eu