

BRIEFING PAPER TO THE EUROPEAN COMMISSION

**AGAINST THE SPANISH DRAFT ROYAL DECREE .../2020 of ... 2020, APPROVING THE
QUALITY STANDARD FOR OLIVE AND OLIVE-POMACE OILS**

TRIS PROCEDURE

2020/581/E

Submitted by PETCORE Europe

18 December 2020

Table of Contents

1.	INTRODUCTION	3
1.1	PETCORE Europe.....	3
1.2	Measures challenged	3
2.	THE SPANISH DRAFT ROYAL DECREE VIOLATES A NUMBER OF FUNDAMENTAL PROVISIONS OF EU LAW	4
2.1	Breach of free movement of goods (article 34 TFEU).....	4
2.1.1	The measures introduced have an effect equivalent to quantitative restrictions	4
2.1.2	These cumulative restrictions have a severe impact on access to the market & intra-community trade	5
2.1.3	The abovementioned restrictions are unjustified, inappropriate and disproportionate	9
2.2	Breach of other secondary EU legislation	13
2.2.1	Breach of the SUP Directive	13
2.2.2	Breach of the Waste Packaging Directive	14
2.3	Breach of other general principles of EU law	15
2.3.1	Breach of the general principle of equal treatment.....	15
2.3.2	Breach of principle of legal certainty	15
3.	CONCLUSION AND REQUESTS.....	16

1. INTRODUCTION

1.1 PETCORE Europe

- (1) PETCORE Europe is the association representing the complete PET value chain in Europe since 1993. Its mission is to ensure that the entire PET industry is well aligned to enhance its value and sustainable growth, to represent the PET industry before the European institutions and other stakeholders, to ensure that PET is positioned as an outstanding packaging material and recognised as environmentally sound, to support and validate innovative packaging solutions from a recycling perspective, and to work with all interested parties to ensure a continuous increase of PET post-consumer collection and recycling.
- (2) PETCORE Europe considers that the notified draft Spanish Royal Decree for olive and olive pomace oil breaches a number of fundamental EU law provisions and principles and submits here below the legal arguments underlying its position.

1.2 Measures challenged

- (3) On September 18th 2020, the Spanish authorities notified to the European Commission a draft Royal Decree regulating the commercialisation of olive oil and olive-pomace oil.
 - (4) According to Article 1 of the draft Decree, its purpose is to lay down a quality standard for olive and olive-pomace oils. This standard shall apply to all olive and olive-pomace oils produced and placed on the market in Spain. It shall also apply to operators that produce or sell olive and olive-pomace oils in Spain.
 - (5) Article 8 of the Royal-Decree introduces a number of severe product requirements and restrictions affecting placing on the market of such products.
 - (6) By virtue of this Article, the following are prohibited :
 - a) *The production of blends of olive and olive-pomace oils with other oils or fats of vegetable origin for placing on the national market. These blends must not be sold under any food name referred to in Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.*
 - b) *The use of the term 'virgin' or 'extra virgin' on the labelling of food products with an oily appearance which may be confused with the olive oils from this standard, such as oils, condiments, dressings, and similar products.*
 - c) The placing on the retail market of extra virgin olive oils in plastic containers.**
 - d) *The transfer or filling of recipients or containers, intended for the end consumer, of olive oil or olive-pomace oil in communities.*
 - e) *The classification of previously classified virgin olive oil blends in a category above the lowest category of oil used.*
-

f) The existence in mills, warehouses and packing plants for virgin olive oil of facilities and specific technical means for deodorisation and/or any other stage or form of oil refining.

g) The receipt or processing in mills of olive pomace from other mills, or olives or their remains from dressing plants that have undergone treatments not permitted for obtaining virgin olive oils or their derivatives, or any other raw material for obtaining oil other than the whole raw fruit of the olive tree.

h) The deposit, storage and transport of olive and olive-pomace oils that are not properly identified by their product category, except in oil mills, where such classification is given before their dispatch. (emphasis added)

- (7) Article 8(1) (c) of this draft Royal Decree explicitly and fully **bans the placing on the retail market of extra virgin olive oils in plastic containers.**
- (8) Article 8(1) (c) is due to apply "as from 1.1.2024 for containers up to one litre and from 1.1.2025 for all other containers".
- (9) Whilst the note below will mainly concentrate on demonstrating that the ban on plastic packaging of extra virgin olive oils is contrary to EU law, it is submitted that all the restrictions introduced in article 8 taken together with it, make the violation to the internal market freedoms even more serious.

2. THE SPANISH DRAFT ROYAL DECREE VIOLATES A NUMBER OF FUNDAMENTAL PROVISIONS OF EU LAW

2.1 Breach of free movement of goods (article 34 TFEU)

2.1.1 The measures introduced have an effect equivalent to quantitative restrictions

- (10) Article 34 of the Treaty on the Functioning of the European Union ("TFEU") prohibits "*measures having equivalent effect to quantitative restrictions*" between Member States.
- (11) In the *Dassonville* case¹, the CJEU held that "*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions*". (emphasis added)
- (12) The ban on placing on the market extra virgin olive oils in plastic containers (Article 8(1)(c)) together with the restrictions in terms of labelling and identification of products that can be sold on the Spanish market as extra virgin oil (Article 8(1)(a) & (b) & (h)) undoubtedly qualify as such '*trading rules*' as they affect the trade of products which do not comply with such requirements by prohibiting their circulation, distribution and sale on the Spanish territory.

¹ Judgment of 11.7.1974 - case 8/74.

(13) The Spanish measures listed at article 8 constitute "product requirements" under the applicable EU case law since they relate to the extrinsic characteristic of the product concerned i.e. the packaging, presentation, composition and labelling of the product. They require traders to alter the packaging and labelling of products, entailing important additional costs.

(14) The considerable economic effects of the measures have been acknowledged by the Spanish authorities in the impact assessment accompanying the law which emphasises that :

" In terms of the economic impact that approval of the regulation will have on the sector, the main cost will derive from the ban on placing extra virgin olive oils packaged in plastic containers on the retail market, which includes the modifications operators will be forced to make to their packaging lines to adapt them to the new materials or formats used, as well as any other costs derived from the new form of presentation." (emphasis added)

2.1.2 These cumulative restrictions have a severe impact on access to the market & intra-community trade

(15) Whilst it takes some time and reading between the lines to establish the genuine aim and effect of the measures introduced - their rationale is maintained blurry on purpose by the Spanish authorities - the industry is not fooled by the disguised motives pursued by the authorities.

(16) The real aim and effect of the combined restrictions introduced by Article 8 of the Draft Royal decree law are indeed twofold.

(17) First of all, the State is forcing on the industry a set of requirements aimed at transforming the extra-virgin oil that is being placed on the Spanish market into an "exclusive" & "upmarket" product and this is done through the set of restrictions on labelling and packaging set in article 8.

(18) This can be inferred from the impact assessment accompanying the draft decree (and shows that the sustainability argument put forward sporadically is neither the primary nor the genuine justification of the measures) :

" This measure serves to promote the exceptional quality of these oils, which belong to the highest category of olive oils. It is considered a mechanism that will considerably improve the image and increase the value of extra virgin olive oils, and which will therefore help to overcome the serious price crisis currently affecting the sector."

(19) Second, the State is de facto encouraging the Spanish consumer to purchase domestic products.

(20) Indeed, by introducing the above-mentioned stringent labelling and packaging restrictions, the Spanish authorities are assimilating high premium extra virgin olive oil only to oil which is sold in non-plastic containers (e.g. glass or brass containers) creating a measure having equivalent to a quantitative restriction on imported products, notwithstanding the presence of a mutual recognition clause.

- (21) Indeed, a foreign extra virgin oil product which does not abide by the labelling and packaging requirements stipulated at article 8, stands no chance at all of being identified by the Spanish consumer as a competitor of the premium segment of the market for extra virgin olive oil, which would have been tipped in favour of the glass/brass containers of such products. One has to take into account that in terms of world markets for olive oil, the Spanish market is by far the largest, so that it constitutes the most attractive one for intra-community trade (see annexes).
- (22) Access to the Spanish market of olive oil legally manufactured and packaged in other Member States in PET will be rendered difficult since the ban on plastic packaging together with the other labelling measures are aimed at influencing customer behaviour into assimilating that only non-plastic packaging of olive oil constitutes the premium authorised extra virgin oil, whilst the product which would be packaged abroad in PET would not be classified in the same premium segment of the market
- (23) Thus both the aim and effect of the measure is to favour and increase value of Spanish products that due to the combined requirements are obliged to change both their labelling and trade their PET packaging for glass and will ultimately force foreign producers/importers to make their packaging compliant with the new materials and formats prescribed, so as to stand a chance to compete on the premium segment of the Spanish market.
- (24) Thus it is clear that the mutual recognition clause is merely 'illusory' and the MEEQR is characterised.
- (25) The case-law of the CJEU and past practice of the Commission have clearly found that national measures that aim to i) influence the conduct of traders and consumers thus frustrating the aims of the EU internal market and/or ii) encourage the purchase of domestic products, infringe Article 34 TFEU, notwithstanding any argument made by the national authorities that the measures would pursue a quality policy.
- (26) The existence of a restriction for the purposes of Article 34 TFEU must indeed be determined by reference to the effect on trade of the measure concerned.
- (27) This case-law, which bears similarities with the current Spanish context - is recalled below :

I. Judgment of the Court of 5 November 2002, Commission v Federal Republic of Germany, Case C-325/00.

The Commission brought an action before the Court for a declaration that by awarding the quality label 'Markenqualität aus deutschen Landen' (quality label for products made in Germany) to finished products of a certain quality produced in Germany, the latter failed to fulfil its obligation under Article 30 EC.

The Court ruled in favour of the Commission and stated the following:

"The contested scheme has, at least potentially, restrictive effects on the free movement of goods between Member States. Such a scheme, set up in order to promote the distribution of agricultural and food products made in Germany and

for which the advertising message underlines the German origin of the relevant products, may encourage consumers to buy the products with the CMA label to the exclusion of imported products" (Para. 23)

"The fact that the use of that quality label is optional does not mean that it ceases to be an unjustified obstacle to trade if the use of that designation promotes or is likely to promote the marketing of the product concerned as compared with products which do not benefit from its use" (Para. 24)

"In the same way, the argument that **the fact that the contested scheme pursues a quality policy takes it outside the scope of Article 30 of the Treaty must be dismissed. The existence of a restriction for the purposes of Article 30 of the Treaty must be determined by reference to the effect on trade of the measure concerned**" (Para. 25) (emphasis added)

II. Judgment of the Court of 24 November 1982, Commission of the European Communities v Ireland, Case 249/81, the "Buy Irish" case

Matter in dispute : In a speech delivered on 18th January 1978 the Minister for Industry, Commerce and Energy, launched a three-year programme for the promotion of Irish goods. The Commission considered such measures to be contrary to article 30 of the EEC Treaty and took Ireland to court stating that : "measures which encourage the purchase of domestic products only must be regarded as contrary to the prohibitions contained in the Treaty" (Para. 20 of the judgment)

The Court famously ruled :

"The advertising campaign to encourage the sale and purchase of Irish products cannot be divorced from its origin as part of the government programme, or from its connection with the introduction of the "Guaranteed Irish" symbol and with the organization of a special system for investigating complaints about products bearing that symbol. The establishment of the system for investigating complaints about Irish products provides adequate confirmation of the degree of organization surrounding the "Buy Irish" campaign and of the discriminatory nature of the campaign" (Para. 26)

"Such a practice cannot escape the prohibition laid down by Article 30 of the Treaty solely because it is not based on decisions which are binding upon undertakings. Even measures adopted by the government of a Member State **which do not have binding effect may be capable of influencing the conduct of traders and consumers** in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty." (Para. 28)

"That is the case where, as in this instance, such a restrictive practice represents the implementation of a programme defined by the government which affects the national economy as a whole and which is intended to check the flow of trade between member states by encouraging the purchase of domestic products , by means of an advertising campaign on a national scale

and the organization of special procedures applicable solely to domestic products , and where those activities are attributable as a whole to the government and are pursued in an organized fashion throughout the national territory .

Ireland has therefore failed to fulfil its obligations under the treaty by organizing a campaign to promote the sale and purchase of Irish goods within its territory"
(emphasis added)

(28) Reference is also made to two precedents where the Court ruled on a similar packaging type of restriction to intra-EU trade, based on infringement actions launched by the European Commission.

(29) First of all, the Danish bottle case². Denmark had introduced the requirement that producers and importers must use only containers approved by the National Agency for the Protection of the Environment, and furthermore, only a limited number of different containers would be approved.

(30) The Court notably highlighted the following aspects:

"16 (...) it must nevertheless be observed that under the system at present in force in Denmark the Danish authorities may refuse approval to a foreign producer even if he is prepared to ensure that returned containers are re-used.

*17 In those circumstances, a foreign producer who still wished to sell his products in Denmark would be **obliged to manufacture or purchase containers of a type already approved, which would involve substantial additional costs** for that producer and therefore make the importation of his products into Denmark very difficult.* (emphasis added)

(31) The breach to the free movement of goods is also confirmed in the German bottle case³ ; in this case, France intervened to support the Commission against the restrictions imposed in the way German law had initially organised a stricter regime for plastic bottles (PET compared to glass bottles). Court has notably stated the following:

*"53 The Commission, supported by the French Government, submits that Paragraphs 8(1) and 9(2) of the VerpackV **make it more difficult or more expensive to distribute natural mineral water from other Member States** and that they therefore constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC."*

"60 As the Commission has observed, without being contradicted by the German Government, producers of natural mineral water which originates from other Member States use considerably more non-reusable plastic packaging than German producers.

² Judgment of the Court of 20 September 1988 in Case C-302/86, Commission v Denmark, ECLI identifier: ECLI:EU:C:1988:421).

³ Judgment of the Court of 14 December 2004 in Case C-463/01, Commission v Germany, ECLI identifier: ECLI:EU:C:2004:797.

The Court concluded that:

"by establishing, through Paragraphs 8(1) and 9(2) of the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste), a system seeking the re-use of packaging for products which, under Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters, must be bottled at source, the Federal Republic of Germany has failed to fulfil its obligations under Article 5 of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste in conjunction with Article 28 EC."

- (32) On the basis of the above precedents, the same causes producing the same effects, the European Commission can only follow its previous practice and EUCJ jurisprudence and conclude that the Spanish measures examined constitute measures having equivalent effect to quantitative restrictions within the meaning of Article 34 TFEU as they purport to influence the conduct of traders and consumers so as to advantage Spanish extra virgin oil products in the new prescribed packaging format and *de facto* introduce a disguised discrimination on trade between Member States forcing non-Spanish economic operators to change their packaging and abandon PET packaging for glass or other alternatives while increasing the value of this premium segment favouring Spanish products.
- (33) Foreign producers and importers who still wish to sell their products in Spain and stand a chance to compete with the local olive oil premium would be obliged to manufacture or purchase containers of a type other than PET, which would involve substantial additional costs for those producers. They will have no choice knowing that Spain is first market for olive oil in the EU, so representing a very significant part of the Internal Market.
- (34) These MEEQRs obviously also affect the free movement of PET packaging which is thus being prohibited.

2.1.3 The abovementioned restrictions are unjustified, inappropriate and disproportionate

- (35) According to settled EU case-law, measures having equivalent effect to a quantitative restriction can be justified only if i) that measure is appropriate for securing the achievement of an overriding reason of public interest, ii) the objective in question could not be achieved with at least an equivalent level of effectiveness by less restrictive methods and iii) the legislation does not constitute a means of arbitrary discrimination or disguised restriction on trade between the Member States.
 - (36) It is submitted here below that not only the measures are disproportionate, unjustified but they also constitute a means of disguised restriction on trade.
-

(a) Lack of admissible and adequate justifications for such measures

(37) The Spanish authorities fail to put forward adequate and substantiated overriding reasons of public interest for the introduction of such restrictions, contrary to the standard of proof required by EU case-law.

(38) The only rationale put forward in the impact assessment is limited to a couple of phrases on the pursuit of a quality policy as first aim and an additional beneficial effect on environment. There is no doubt that the aim pursued is a pure economic objective, serving interest of Spanish producers :

" a ban on placing extra virgin olive oils sold in plastic containers on the retail market has been introduced into the text. This measure serves to promote the exceptional quality of these oils, which belong to the highest category of olive oils. It is considered a mechanism that will considerably improve the image and increase the value of extra virgin olive oils, and which will therefore help to overcome the serious price crisis currently affecting the sector. This measure also has a very positive environmental impact as it helps to reduce the use of plastics, replacing them with an inert material with a much lower impact. This will put the sector on a path towards achieving its sustainable development targets and help the transition to an environmental and sustainable economy."

(39) It is recalled that economic justification, even based on "quality" pursued, has been considered by CJEU case-law⁴ as inapt to save a measure from being considered an illegal restriction to free movement due to its impact on trade.

(40) A justification on the protection of the environment is equally inadmissible, in the present case since i) it is clearly not the primary objective put forward in the impact assessment and ii) in any case, the authorities have failed to adduce evidence and impact assessments of the necessity and appropriateness of absolute bans on all plastic packaging for olive oil, for the purpose of environmental protection.

(41) Indeed, Spain appears to be acting alone in implementing such restrictive solution - there is currently no consensus in the EU that a ban on using plastic packaging for olive oil is of overriding public interest.

(42) All the more so, since such a solution is neither warranted by the SUP Directive nor the Waste and Waste Packaging Directive (as further developed below).

(b) Disguised economic and protectionist considerations which constitute a disguised restriction on trade

(43) As developed *supra* points 20-24, it is submitted that the measures are not founded on any objective overriding reason of public reason, nor can it be claimed *ex post* that they pursue the protection of the environment.

⁴ Judgment of the Court of 5 November 2002, Commission v Federal Republic of Germany, Case C-325/00, paragraph 25.

- (44) This is confirmed by the total lack of any environmental impact assessment and the casual reference in the impact assessment to the fact that measure would "also" have an incidental environmental impact, which shows that the Spanish authorities cannot come with environmental justifications ex-post when it is clear that environmental considerations had no central part to play in the rationale for this regulation.
- (45) According to settled case-law, national restrictions must pursue the stated objective in a genuine and consistent manner.⁵ In the present case, this condition is clearly not met by the Spanish authorities.
- (46) The real aim of the measures is to promote and protect the economic interests of domestic olive oil producers and incite consumers (through the restrictions introduced) to buy domestic products over imported ones.
- (47) Although the Spanish authorities are trying their best to conceal the real aim of the measures, this aim can be already inferred from the following phrase of the impact assessment :

" It is considered a mechanism that will considerably improve the image and increase the value of extra virgin olive oils, and which will therefore help to overcome the serious price crisis currently affecting the sector ".

- (48) It is recalled that the protection of a certain category of economic operators - in this context mainly the domestic olive oil producers - is a purely economic justification which is inadmissible to justify any restriction on the free movement of goods, as stated by settled case-law.⁶

(c) Lack of proportionality

- (49) Bans of the type of that in article 8(1)c) of the Draft Decree are the gravest form of trade barrier.
- (50) In the present case, such ban disproportionately affects both the producers & importers of olive oil as well as the producers of PET - who are being banned from selling their plastic containers, for no objective reason.
- (51) More details on the Spanish PET industry can be found in the annexes submitted in attachment.⁷
- (52) It is recalled that according to settled case-law, the Member State adopting restrictive measures on trade must prove with substantiated evidence that the objective sought by the restrictive measures could not be achieved by restrictions that are less extensive, or that are less disruptive of trade within the European Union.

⁵ Judgment of the Court of Justice of 30 April 2014, *Pfleger*, C-390/12.

⁶ Judgment of 13 January 2000, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH*, C-254/98 ECR 2000 I-151 paragraph 33, Judgment of 5 June 1997, *Syndesmos tot en Iladi Touristikon v. Ypourgos*, C-398/95, ECR 1997-I-03091

⁷ Annexes 1 & 2.

- (53) Spain has in this case failed to substantiate the absence of less restrictive means to bans to achieve the stated quality objective. In any case, there are plenty of alternative less restrictive measures implemented in all other Member States with olive oil production. Indeed, improving the value of a premium segment should start with marketing initiatives of producers or their trade organisations. The State measure can only be considered disproportionate since it intervenes in a field which should primarily rely on private initiative regarding market segmentation.

(d) The creation of discrimination between types of packaging

- (54) The Spanish ban on plastic containers also creates an unjustified discrimination between types of packaging : plastic is being prejudiced against alternative packaging materials, without any objective reasons for discrimination.
- (55) As explained above, the Spanish authorities cannot avail themselves of an environmental justification for this policy, as they themselves cite "quality" as their motivation and only refer to environment as an ancillary "positive effect".
- (56) In any event, there is sufficient scientific evidence - also attached in the annex for convenience - that shows that the environmental effects of other types of packaging such as glass are, contrary to what is being asserted, is far worse than those of PET, thus confirming that environmental justifications in support of the measures cannot be retained.
- (57) For example, according to a study of Biointelligence Service sponsored by Tetrapak⁸, 325 gr of Co2 are needed to produce a one litre bottle in glass, while 129 gr Co2 are needed for the same PET bottle. This is without prejudice to the weight of the former which also increases Co2 consumption due to transport.
- (58) Comparative studies⁹ suggest for example with regard to beverage containers that the alternatives will increase the CO2 footprint. They notably show that a larger mass of alternative materials is needed compared to plastics to produce the same beverage container :

"Plastic could theoretically be substituted with alternatives in many of its applications in the consumer goods sector. However, in most cases the substitution of plastics is not one for one – the different physical properties of plastic compared to its alternatives mean that a larger mass of alternative materials is typically needed to achieve the same function as plastic. A good example is the plastic beverage container. Packaging a 500ml carbonated beverage in a typical polyethylene terephthalate (PET) plastic bottle requires just under 30 grams of plastic. However, an equivalent bottle manufactured from a weighted average mix of alternative materials used in this market (tin, aluminium, glass and paper) would weigh 141 grams in the USA (mass ratio of 4.7 to 1). This logic of functional equivalence is applied to all

⁸ http://www.agrion.org/docs_imgs07/documentation_pdf/DocsIntervenants/Emballages/DeNoray_TetraPak.pdf.

⁹ See notably study Trucost and ACC (American Chemistry Council) : from <https://www.trucost.com/publication/plastics-and-sustainability/>, as well as the report published by Imperial College London on 6th June 2020 "Examining material evidence – the carbon fingerprint", whose executive summary can be found at the following address :
file:///C:/Users/DCA04001/AppData/Local/Temp/Plastic_Whitepaper.pdf

*plastic applications modeled in the consumer goods sector to estimate the total quantities of a mix of alternatives needed to replace plastic. Previous studies suggest that approximately 3.5 times more alternative material would be needed to replace plastic in common packaging applications in North America (Franklin Associates, 2013) and 3.7 times more for a selection of product and packaging applications in Europe (Denkstatt, 2011¹⁰)."*¹¹

- (59) By way of example, if all plastic bottles used globally were made from glass instead, the additional carbon emissions would be equivalent to powering around 22 large coal-fired power plants. This is equivalent to the electricity consumed by a third of the UK¹².
- (60) These studies thus confirm that it is simply wrong to assume that alternative packaging materials would perform better, and it is important to consider the carbon benefits that arise from plastics use.
- (61) The Spanish policy, if adopted, would result in producers having to turn to other packaging such as glass whose economic and environmental footprint would be worse and in any case less efficient regarding environmental protection than an efficient collection and recycling/reuse scheme. Since olive oil packaging in glass are also in average smaller than those in PET, this would also have an impact on the Co2 footprint of private consumers, in particular regarding the high level of consumption of olive oil in Spain.

2.2 Breach of other secondary EU legislation

- (62) The ban on plastic packaging of oil olive is also not in line with either the Plastics Directive nor the Waste and Waste Packaging Directive.

2.2.1 Breach of the SUP Directive

- (63) It has been considered whether the Spanish measures can be reconciled with the EU legislation regarding plastics and the answer is negative.
- (64) The recent SUPD Directive does not regulate such type of measures. The spirit of this Directive furthermore is to encourage recycling and re-use of plastic, and only bans limited and specific single-use products only as listed in part B of the Annex to the SUP Directive.
- (65) These products include, for example, cotton-bud sticks (except if they fall within the scope of Council Directive 90/385/EEC or Council Directive 93/42/EEC relating to medical devices), cutlery (forks, knives, spoons, chopsticks), plates, straws (except if they fall within the scope of Directive 90/385/EEC or Directive 93/42/EEC relating to medical devices), beverage stirrers, etc.

¹⁰ http://denkstatt-group.com/files/the_impact_of_plastic_packaging_on_life_cycle_energy_consumption_and_greenhouse_gas_emissions_in_europe.pdf

¹¹ Ibid Trucost study, (p. 14-15).

¹² Ibid Imperial College London Whitepaper, page 1.

- (66) Such bans are not intended to cover "general" plastic containers for olive oil.
- (67) The Spanish ban clearly deviates from this Article as it bans products which are not in this list. There is no legal basis for doing so even more since this has been recently harmonized.
- (68) It is established case law that in case a Member State imposes stricter measures in an area which has been regulated by (minimum) harmonization, it is necessary to consider whether the Member State has infringed other provisions of Community law.
- (69) This is even explicitly requested by the Treaty regarding protection of environment (Article 192 and 193 TFEU).
- (70) In fact, the Commission's Environment Directorate General in its letter to Ambassadors regarding the transposition and implementation of the SUP Directive stated clearly that:
- (71) *"In accordance with Article 193 of the Treaty on the Functioning of the EU, Member States are required to notify national transposition measures that are stricter than those in the SUP Directive, should they be adopted. Such measures have to comply with the Treaty requirements and cannot be contrary to secondary EU law. In particular, Member States must demonstrate that the measure in question is adequate and does not go beyond what is necessary to attain the objective of preventing and reducing the impact of certain plastic products on the environment and does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."* (emphasis added)
- (72) As has been demonstrated in section 2.1, the ban on plastic packaging clearly breaches Article 34 on the free movement of goods, thus there is no doubt that it would also breach the SUPD (and affect the recycling industry accordingly).

2.2.2 Breach of the Waste Packaging Directive

- (73) The scope of the Packaging and Packaging Waste Directive is defined in Article 2(1) as follows:
- "This Directive covers all packaging placed on the market in the Community and all packaging of waste, whether it is used or released at industrial, commercial, office, shop, service, household or any other level, regardless of the material used."*
- (74) The Packaging and Packaging Waste Directive lays down a number of measures to prevent the production of packaging waste, reuse packaging, recover (hereunder recycle) packaging waste and, therefore, reduce the final disposal of such waste (Cf. notably Articles 4-7). It also introduces product requirements for packaging.
- (75) Article 18 of the Directive provides for freedom to place on the market of packaging which satisfies the provisions of that Directive (so clearly preventing any measures with effect similar to quantitative restrictions) :
-

" Member States shall *not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive* " (emphasis added)

- (76) In fact, the only measure similar to a ban introduced in this Directive is the provision in Article 4(1a) stating that *"Member States shall take measures to achieve a sustained reduction in the consumption of lightweight plastic carrier bags on their territory."*
- (77) Therefore, a ban on olive oil plastic packaging would also violate article 18 of the Packaging and Packaging Waste Directives.

2.3 Breach of other general principles of EU law

2.3.1 Breach of the general principle of equal treatment

- (78) According to settled case-law, the general principle of equal treatment and non-discrimination requires that comparable situations are not treated differently unless differentiation is objectively justified.
- (79) It is submitted that banning one type of packaging over another i.e. plastic packaging over glass packaging, based on purely economic motivation serving the interest of domestic olive producers, without any other precise justification and balanced impact assessment, in the way Spain implements it violates the general principle of equal treatment (and its extension known as technological neutrality) as it stigmatizes a type of packaging over other types of comparable packaging for no objective reasons.

2.3.2 Breach of principle of legal certainty

- (80) According to settled case-law, legal certainty is a right Member states should protect and the lack of such legal certainty may as such be qualified as a restriction to Internal market freedoms¹³, notably the free movement of goods.
- (81) The Spanish measures applicable to olive oil products are clearly creating disproportionate legal uncertainty, by instilling doubts as to their rationale and effect on the EU internal market (i.e. premium product is assimilated to non plastic bottle by law).
- (82) In addition, the limited timeframe granted to economic operators to adapt¹⁴ to the restrictions, creates both legal uncertainty and disproportionate barriers within the Internal market.
- (83) This uncertainty is harming the PET industry both in Spain and abroad.
- (84) In Spain, up to now, plastic bottling lines have been integrated into the plants of companies - which are well established since they account for 95% of AOVE's sales.

¹³ Cases T-115/94 - Opel Austria v Council paragraph 124, C-333/08 paragraph 111 and C-15/15 point 42.

¹⁴ Judgment of the Court of Justice in case C-201/08 of 10 September 2009 § 46, Judgment of the Court of Justice of 13 December 2012 in case C-347/06 § 47.

- (85) The new decree would make it necessary to dismantle all of them and replace them with glass or brass, which are the only two alternative containers on the market and are not expressly prohibited by the project.
- (86) There are 1,800 AOVE packaging companies in Spain, of which:
- 20 can be considered as large companies,
 - another 20 medium sized ones,
 - and the rest are SMEs.
- (87) The average investment for a complete new packaging line - depalletising, filling, labelling, boxing and palletising - is two million euros.
- (88) A totally disproportionate investment precisely at a time of crisis and uncertainty about consumption with the pandemic that will surely accompany the industry in the coming years.
- (89) Same effects are to be foreseen by importers who as explained above, would be forced to comply with the new packaging so as to have the slightest chance to compete with the local producers, having to comply with the new packaging rules.
- (90) It will also discourage the PET industry to invest across the EU along the whole recycling supply chain, from beverage industry to recycling industry. It is indeed difficult to reconcile the efforts undertaken by the European Commission (DG Grow in particular) under the Circular Plastics Alliance, to secure the availability and uptake of quality recycled plastics with Spain's notified measures.

3. CONCLUSION AND REQUESTS

- (91) As has been explained above, the notified Draft Decree, is in breach of a number of fundamental European Union law provisions and principles, namely:
- The free movement of goods as guaranteed by article 34 TFEU,
 - The EU secondary law, namely SUPD and Waste packaging Directives,
 - The principles of non-discrimination and legal certainty,
- (92) Therefore, PETCORE Europe calls on the Commission to :
- Issue a detailed opinion under TRIS procedure against the restrictions introduced in the Draft Decree clearly pointing to the breach of free movement principles,
 - Send a letter of formal notice to Spain, pursuant to Article 258 of the Treaty on the Functioning of the European Union, notably if the notified Draft would be adopted without account being taken of the abovementioned objections.
-

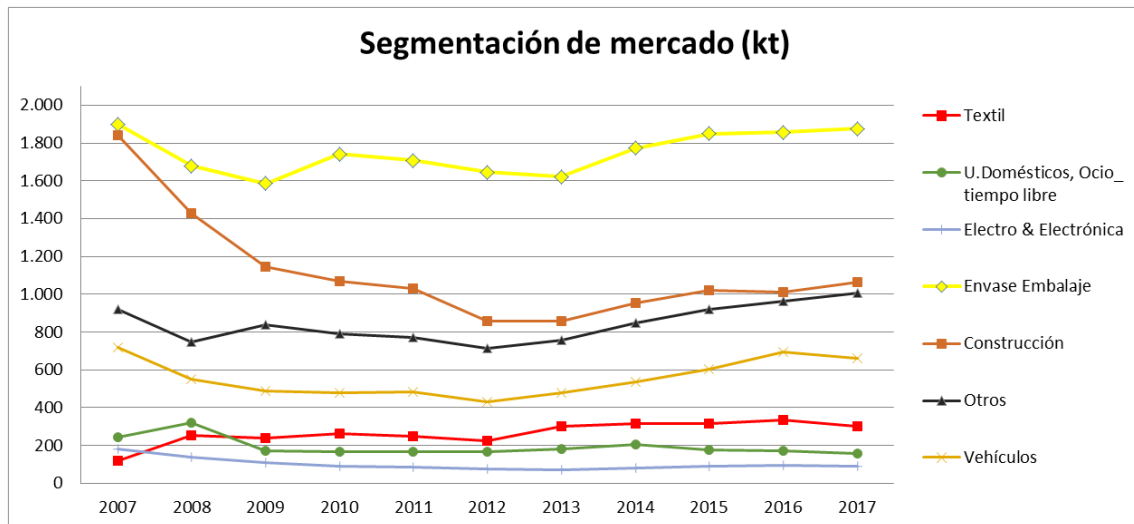
ANNEX 1: MAIN DATA ON THE PLASTICS AND PLASTIC PACKAGING MARKET IN SPAIN.

THE PLASTIC INDUSTRY

In Spain the plastics industry contributes 21% of manufacturing industry and represents 2.7% of GDP.

Of all the raw materials, "other thermoplastics" (PET, PVC...) are the ones that we are concerned with and make up the largest segment of production.

Total Materias Primas Plásticas: Producción Millones tn												
Nº	Pro_Plast_A	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
	POLIOLEFINAS	2,055	1,858	1,688	1,835	1,951	1,796	1,824	2,038	2,140	2,361	2,423
	OTROS TERMOPLASTICOS	3,118	2,785	2,439	2,862	2,770	2,649	2,657	2,977	3,157	3,076	3,104
	OTROS PLASTICOS	0,288	0,272	0,227	0,211	0,214	0,195	0,196	0,242	0,247	0,259	0,275
	(incluido PUR)											
	Total General	5,461	4,915	4,354	4,908	4,935	4,640	4,677	5,257	5,544	5,696	5,802



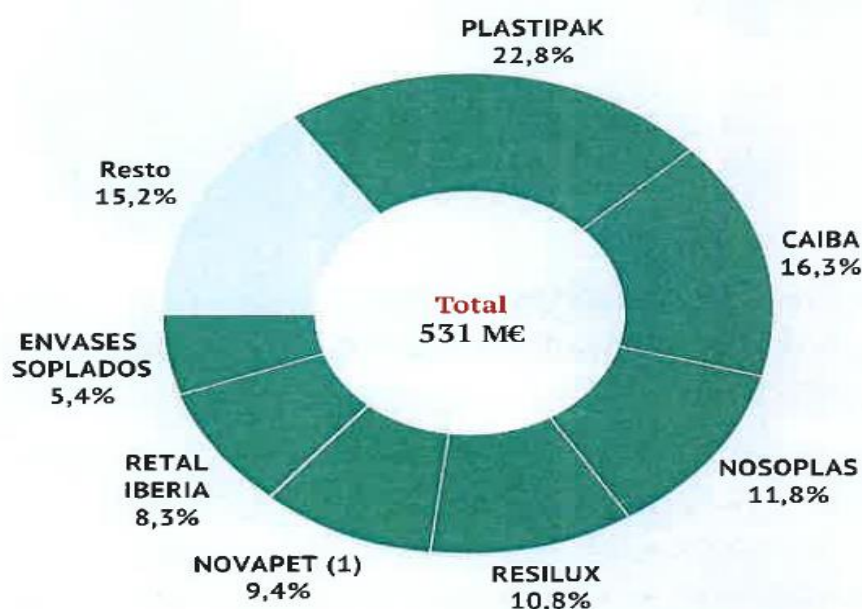
Source: Deep View, ANAIP.

THE INDUSTRY OF THE PLASTIC PACKAGING

About thirty companies are active in Spain in the production of plastic packaging for food.

According to the latest data (2020) from the specialist publication Alimarket - Packaging, seven of them account for more than 84% of the market.

Reparto del mercado de envases de PET para alimentación en España en 2019 (Valor)



(1) Datos del negocio de preformas y transformados de PET de Novapet, incluyendo la aportación de Famaplas, S.A.

Fuente: Alimarket Envase

Among those mentioned in the graph, Nosoplas, Novapet and Caiba are Spanish, while Alpa Ibérica is from Austria, Resilux, Belgium, and the rest of third countries (USA, Russia).

The turnover in 2019 according to the same source was 531 million euros.

The production plants are spread over practically the whole of Spain: Castilla la Mancha, Castilla y León, Madrid, Andalucía, Cataluña, Comunidad Valenciana, Murcia and Aragón.

As can be seen in the table below, among those engaged in plastic packaging for oils there are many SMEs and micro-SMEs which are mentioned in the above graph under "rest".

Volúmenes comercializados de envases de PET para alimentación (M ud.)

Empresa	Tipo (1)	Volumen (2)		Capacidades	Int. (3)	Principales sectores de destino
		2018	2019			
NOSOPLAS, S.L.	P	2.500 (*)	2.636	De 0,35 a 2 l	No	Productos 'Coca-Cola'
PLASTIPAK IBERIA, S.L.	P/B	2.750	2.500	De 0,1 a 8 l	Sí	Aguas, refrescos, zumos, detergentes, lácteos
NOVAPET, S.A. - DIV. PREFORMAS Y TRANSF.	P	1.700	1.641	De 0,33 a 5 l	Sí	Aguas, refrescos, zumos, leche, productos de hogar
	B	44	89			Salsas, productos alimentarios procedentes del huevo, productos del hogar
	T	8	n.d.			Salsas
CAIBA, S.A.	P	942	1.145	De 0,8 a 8 l	Sí	Aguas, aceites, productos de hogar
	B/T	460	495			
RETAL IBERIA, S.L.	P	1.271	1.173	De 0,25 a 8 l	No	Aguas, refrescos, productos de hogar
RESILUX IBÉRICA PACKAGING, S.A.	P	980	1.064	De 0,10 a 25 l	Sí	Aguas, beb. carbónicas, aceites, zumos, salsas, lácteos, cervezas, vinos, detergentes
	B	20	38			
ALPLA IBÉRICA, S.A.	P	500 (*)	500 (*)	De 0,25 a 8 l	Sí	Alimentación, higiene, cosmética
ENVASES SOPLADOS, S.L.	B/T/P	365	380	De 0,020 a 25 l	No	Aceites, especias, aceitunas, encurtidos, miel, frutos secos, salsa, vinagres
LOGOPLASTE CONSULTORES TÉC. ESP., S.L.	B	170 (*)	170 (*)	De 0,9 a 5 l	Sí	Aceites, salsas, lácteos, agua, limpieza
GRUPO INDEN	B	160	160 (*)	De 0,10 a 10 l		Licores, espirituosos, especias, cítricos, golosinas
SEYCA PLASTIC PACKAGING, S.L.	B	99	100	De 0,1 a 10 l	No	Alimentación, cosmética, higiene, farmacia, hogar
TORREPLAS, S.L.	B	60	70	De 0,1 a 10 l	No	Aceites, vinagres, detergentes, productos químicos
	T	20	20	0,75 y 1 l		
PLÁSTICOS GUADALAVIAR, S.A.	P/B	40	40	De 0,03 a 8 l	No	Alimentación, agroquímicos
GRUPO ITC PACKAGING	P/B/T	33,8	36	De 0,75 a 8 l	No	Especias, golosinas, café, frutos secos, bebidas, cosméticos
V. JUVASA, S.L. (GRUPO)	B/T	15	22	De 0,25 a 7 l	No	Alimentación
PLÁSTICOS TORRIJOS, S.L.	B	20 (*)	20 (*)	De 0,5 a 5 l	No	Aceites, vinagres, aguas
PLASTYCASSET, S.A.	B	13	13	De 0,5 a 2 l	No	Alimentación, limpieza
FUENTES ENVASES PLÁSTICOS, S.L.	B	10 (*)	8 (*)	De 0,37 a 5 l	No	Alimentación, limpieza
PLÁSTICOS PINATAR, S.A.	T	8 (*)	8 (*)	0,75 y 1 l	No	Aceitunas, encurtidos, golosinas, confitería
ENVASELIA CENTRAL DE ENVASES, S.L.	B	6	6 (*)	n.d.	No	Aceites, salsas, encurtidos
SELEC ENVAS 2004, S.L.	B/T	6	6 (*)	De 0,25 a 2,5 l	No	Alimentación
CUBIL, S.L.	B	n.d.	n.d.	n.d.	No	Alimentación
LOGOPLASTE TORIJA, S.L.	B	--	--	De 10 a 30 l	No	Cerveza, sidra, vino, productos químicos
PLASTBED, S.L.	B	--	--	--	--	n.d.

(*) Estimación. n.d.: No disponible. (1) Indica el producto de que se trata: (P) Preformas, (B) Botellas, (T) Tarros. (2) Incluye datos de otros sectores como cosmética, perfumería, higiene o limpieza, pero la alimentación es la partida principal. (3) Indica si tiene integraciones en las plantas de sus clientes.

Fuente: Alimarket Envases

ANNEX 2: THE WORLDS MARKET FOR OLIVE OIL.

Ranking	País	2015/16	2016/17	2017/18	2018/19*	2019/20**	Evolución últimas 5 cosechas
1	España	1 403,3	1 290,6	1 262,2	1 789,9	1 230	-12,35%
2	Italia	474,6	182,3	428,9	173,6	340	-28,36%
3	Grecia	320	195	346	185	300	-6,25%
4	Túnez	140	100	325	140	300	114,29%
5	Turquía	150	178	263	193,5	225	50,00%
6	Marruecos	130	110	140	200	145	11,54%
7	Portugal	109,1	69,4	134,8	100,3	125,4	14,94%
8	Siria	110	110	100	100	120	9,09%
9	Argelia	82	63	82,5	97	82,5	0,61%
10	Egipto	16,5	30	39,5	7	27,5	66,67%
	Francia	5,4	3,3	6,2	5,5	5,9	9,26%
	TOTAL UE	2 324	1 752	2 188,5	2 263,5	2 011	-13,47%
	TOTAL MUNDO	3 176,5	2 561,5	3 379	3 217,5	3 144	-1,02%

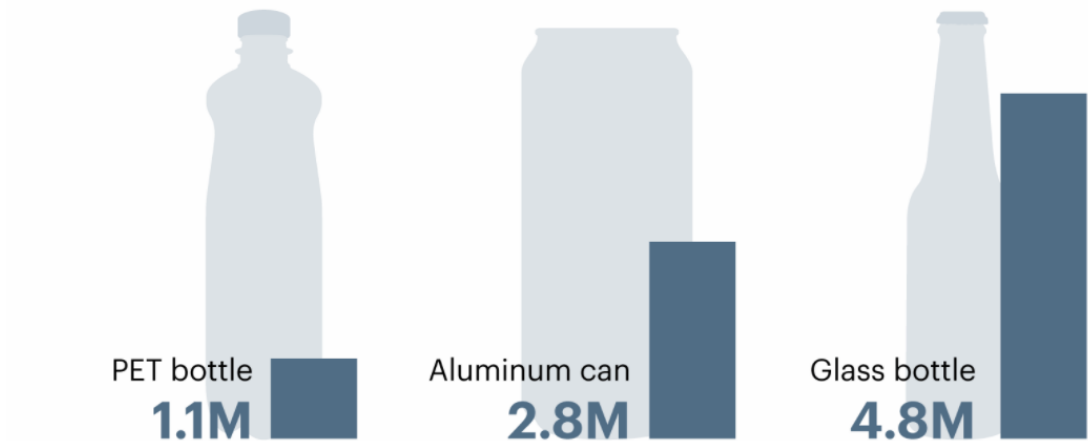
Fuente: Elaboración propia a partir de los datos del Consejo Oleícola Internacional.

Source. Spanish Institute for Foreign Trade, ICEX

ANNEX 3: COMPLEMENTARY SCIENTIFIC EVIDENCE.

Plastic bottles produce lower greenhouse gas emissions than aluminium or glass




Greenhouse gases generated, in millions of pounds of CO₂ equivalents per 100,000 oz. of packaged soft drink



Source: Goldman Sachs, 2019

Fuente: Solving the Consumer Plastics Puzzle. Bain & Company. April 2020

PET ALUMINIUM OR GLASS?
PET IS FAR GREENER THAN ALUMINIUM OR GLASS

Container Type	Energy (million BTU)	Solid Waste Weight (lb)	Solid Waste Volume (yrd ³)	Greenhouse Gas (CO ₂ equivalents)
	16.0	767	0.95	2,766
	26.6	4,457	2.14	4,848
	11	302	0.67	1,125

Lifecycle inventory of three single-serving soft drink containers, Franklin Associates, August 2009 (figures are per 100,000 ounces of soft drink)
Also - T. H. Owen & K. Boyd, Beverage Container Review - Final Report, Thompson Rivers University, Office of Environment & Sustainability 2013

Source: Franklin Associates, August 2009