

APED STATEMENT ON THE TRIS NOTIFICATION 2021/118/P (PORTUGAL)

APED stands for the Portuguese retail association, representing 168 companies in the retail, wholesale, and electronic trade sector, in food and non-food areas, from small and medium-sized companies to large national and international retail chains. APED affiliates gather around 120 thousand employees in more than 3,000 stores and have a global turnover of around 19.9 billion euros, which represents more than 11% of national GDP.

APED welcomes the opportunity to comment on the Portuguese TRIS notification concerning marking, recycling instructions and responsibility of the intermediary networking service provider.

APED agrees with the overall objectives of the Portuguese authorities to reduce the environmental impact of packaging by aiming for more successful sorting and collection of packaging waste, and by looking at the issues raised by distance selling and delivery of products covered by the producer's extended responsibility principle.

However, due to the main reasons listed below, we believe that some of the measures will have a serious impact on retailers' activities, as well as a negative impact on the functioning of the EU Single Market and will not encourage consumers to better disposal behaviours. As business sector, we support the strengthening of the EU single market to enable the upscaling of sustainable products with the appropriate legislative framework.

GENERAL APPROACH

There is a strong concern that the proposed new articles constitute a serious obstacle to the free movement of goods as it brings significant technical, financial, and administrative burden contrary to articles 34 and 36 of the Treaty of the Functioning of the European Union.

Furthermore, the draft Decree-law - as it stands now- does not comply with the requirements set in article 8 of the Waste Framework Directive 2008/98/EC repeating the requirement of "equal treatment", without placing "a disproportionate regulatory burden on producers". Nor does the draft text echoes article 18 of the Directive 94/62/EC on packaging and packaging waste also calling for "equal treatment".

SPECIFIC COMMENTS ON THE DRAFT DECREE-LAW

Marking of packaging

- The wording of Article 28 raises questions on the meaning and scope of some measures. In fact, numbers 2 and 9 are related in terms of prohibitions on placing on the market, although

number 2 refers to “non-reusable packaging”, and number 9 determines a ban that includes “recyclable packaging”. It is therefore important to clarify the wording and concepts used, namely as regards “recyclable packaging”. As a principle, all packaging should be considered as recyclable, although recycling success would be dependent on the conditions and infrastructure existing in the place/region where they are treated.

- The provision foreseen in number 2 is important and beneficial, which allows placing on the national market of packaging which has been marked with a specific symbol at the origin. However, we find a different approach according to where products are produced: if the production is at national (Portuguese) level, marking would be prohibited; on the opposite, if products come from other Member State or outside the EU, placing on the national (Portuguese) market with the symbol would be allowed. It is not clear how consumer information would benefit from this different approach.
- Number 5 determines that the recyclable packaging placed on the market shall be marked with appropriate sorting instructions, in particular the colour of the recycling bin in which they are placed. Bearing in mind the different rules and recycling systems that may exist in the different Member States, namely the colour of the recycling bin, there is no added value in establishing this measure as an “obligation”, which would only apply to Portugal. **We consider it a strong barrier to the functioning of the Single Market, which would cause the need for additional markings for packaging placed in different Member States, with serious consequences in regard to financial and logistical costs.**
- Number 6 establishes additional requirements for marking of “recyclable” packaging, in terms of iconography and / or written text and printing. The proposed measures will have an impact on articles placed in different Member States, particularly as regards “written text”, as it will require successive translation needs. We don’t understand the need for this provision, especially for materials such as glass or paper.
- We are hence concerned by paragraphs 5, 6 and 7 of article 28 and consider this measure to be disproportionate and unfit for environmental purpose, as it would restrict the free circulation of goods and their packaging in the EU and would involve more costs to meet mandatory national labelling requirements.
- The prohibition established in number 9 for the tidy-man symbol demonstrates the need to obtain clarification at the EU level regarding the accepted symbols, to avoid situations where the same symbol is prohibited and mandatory in different Member States. This measure may constitute a barrier to the functioning of the Single Market, as there are EU countries where the use of this symbol is mandatory, which will cause constraints in case packaging is placed in different Member States.

- Regardless of the measure in question in article 28, there is a need to safeguard a sufficient time to guarantee stock clearance, to avoid destruction of products and the production of waste, which it is contrary to a circular economy perspective.

Responsibility of the intermediary networking service provider

- It is important to have clear and non-discriminatory rules for companies operating in the field of electronic commerce, specifically between national (Portuguese) and international operators, since the major international operators work without the same tax, environmental or labour costs as national operators.
- Regarding the proposal for article 20, it defines measures directed at the “intermediary provider of network communication transmission services”, putting on them the burden of fulfilling the obligations of third parties. In the present case, and in conjunction with the provisions of Decree-Law No. 152-D / 2017, the intermediary provider will be required to verify compliance with the obligations which are assigned to the Producers.
- In fact, the intermediary provider has no intervention in the storage of products, nor at any stage of the product value chain. The “Marketplace” platform acts merely as a sales channel. In addition, the majority of Marketplace platform sellers are not located in Portugal or even in Europe, making it difficult to comply with the provision.
- Thus, this obligation may be seen as a violation of the Producer's responsibility principle, in addition to creating unfair competition, as it harms and removes competitiveness to Marketplace platforms that operate in the national territory in favour of other Marketplace platforms that sell from other countries (e.g., in Europe and outside Europe). Although we understand and support the purpose of the measure, we consider that it does not solve the problem with the performance of international operators in the national market. Therefore, we suggest a change in the wording in a way that it no longer constitutes a factor of competitive imbalance for national companies.

FINAL REMARKS

In view of the inconsistency with European regulation, APED calls on the European Commission to seek additional information and clarification from the Portuguese authorities with regards to the concerns raised in this position and require the Portuguese State to modify the draft decree order to comply with EU law.

25 May 2021