

Toy Industries of Europe (TIE) Comments

TRIS Notification 2021/118/P (Portugal)

Toy Industries of Europe (TIE), the voice of the reputable toy sector, wishes to comment on the notified Draft decree (fifth amendment to Decree-Law nº152-D/2017).

General comments

We share the objective of improving the sorting of packaging waste pursued by the Portuguese authorities. However, we believe that the introduction of new country-specific mandatory labelling requirements on information to consumers is in conflict with the existing EU legal framework on free circulation of goods. These measures will result in more packaging waste, disruption of companies' supply chain operations, remove any flexibility to respond to changing customers demands and bring additional costs for producers.

The notified measures appear to be in conflict with the following provisions:

- In the absence of applicable harmonized rules, Article 34 of the Treaty on the Functioning of the European Union (TFEU) prohibits any quantitative restrictions on imports and all measures having equivalent effect between Member States. This includes any measure likely to hinder, directly and indirectly, actually or potentially, intra-Community trade (C-8/74 Dassonville)
- Article 7 of Directive 94/62/EC on packaging and packaging waste requires the establishment of Extended Producer Responsibility schemes for all packaging in accordance to Articles 8 and 8a of the Directive 2008/98/EC on waste. In particular, Article 8a(1)(d) sets out two obligations: EPR schemes established by the Member States (i) shall “ensure equal treatment”, and (ii) shall not place “a disproportionate regulatory burden on producers”. The new requirements are disproportionate because they require the introduction of separate labelling for the Portuguese market. Producers might need therefore to change their packaging and labelling to sell their products in Portugal. Such requirements can lead to significant administrative burden and costs for producers.
- Article 18 of the Directive 94/62/EC on packaging and packaging waste states that “Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. Article 18 comprises a free movement clause and constitutes maximum harmonisation because the provision does not enable Member States to lay down more restrictive or simply different rules from those of the Directive.
- Article 12 of Directive 2009/48/EC on the safety of toys ensures the free circulation of toys that comply with the provisions of this Directive. This article comprises a free movement clause and prevents Member States from laying down more restrictive or simply different rules from those of the Directive.

Toys are not exclusively packaged and labelled for one country. Toy manufacturers usually create packaging for several markets. In many cases, they have the same packaging globally or at least for a large part of the world. That allows them to ship products to markets where demand is highest, avoid unsold stock, maximise efficiency and ultimately get a better deal for consumers. Specific labelling requirements for the Portuguese market will have several negative impacts:

- Restriction on the free circulation of toys across the EU Single Market;
- Increased size of packaging to accommodate the new labelling requirements with the subsequent consumption of resources (water, cardboard, plastic, ink);
- Additional costs for toy companies that will need to redesign and adapt their packaging;
- Confusion of consumers in other Member States who might misunderstand the information;
- The proliferation of numerous national logos and markings risks distracting consumers from relevant safety information such as warnings.
- Additional logos and texts in foreign languages which are unknown in other markets also legitimately raise concerns among national authorities e.g. green washing, misleading information for consumers.

Enforcement of these new labelling requirements could also be challenging when it comes to online sellers established outside Portugal. Existing compliance issues with online rogue traders who deliberately ignore the rules will continue while reputable manufacturers will need to abide by additional rules, not harmonised at EU level.

Specific comments

On the provisions of the notified proposal, we would like to highlight:

Paragraph 4 of art. 28 of Draft Decree-Law

“4 - In order to facilitate the collection, reuse and recovery, including recycling, the packaging must indicate the nature of the packaging material (s) used, for the purpose of identification and classification by the respective industry, according to the identification system. established in Decision No. 97/129 / EC, of the Commission, of January 28, 1997, the regime of which is set out in Annex IX to this Decree-Law and of which it forms an integral part.”

Article 8.2¹ of Directive 94/62/EC on packaging and packaging waste foresees the use of the identification system established in the Decision No. 97/129/EC. Nevertheless, article 3² of this decision mentions that any decision to introduce on a binding basis should be done in accordance with the procedure laid down in Article 21 of Directive 94/62/EC. As far as we know, such decision has not been made.

The unilateral introduction of this requirement by Portugal could act as a trade barrier for toy companies. Toy companies willing to sell their products on the Portuguese market will need to repackage them or quit the market. This could infringe articles 34-35 of the TFEU. In addition, these requirements could be incompatible with the freedom of circulation of goods recognized by both, the Toy Safety Directive (Article 12) and the Packaging and Packaging Waste Directive (Article 18).

Paragraphs 5, 6 and 7 of art. 28 of Draft Decree-Law

¹ Article 8.2: To facilitate collection, reuse and recovery including recycling, packaging shall indicate for the purposes of its identification and classification by the industry concerned the nature of the packaging material(s) used on the basis of Commission Decision 97/129/EC

² Article 3: A decision whether to introduce on a binding basis the identification system for any material or materials may be adopted in accordance with the procedure laid down in Article 21 of Directive 94/62/EC.

“5-In order to promote the correct separation of waste and increase the levels and quality of recycling, recyclable packaging placed on the market is subject to marking with the indication of its appropriate destination, namely the colour of the recycling bin where it should be placed, under the terms to be determined by ordinance of the members of the Government responsible for the areas of the economy and the environment.”

“6- The marking referred to in the previous paragraph shall comply with the following requirements:

- a) It may be presented by iconography or written text, or both;
- b) It must be printed in a visible, legible and indelible form.”

“7-Primary packaging and secondary packaging intended for the consumer shall be covered by the marking obligation referred to in paragraph 5”

Consumers in other Member States could be misled by the recycling bin colour, iconography or sorting information displayed on their packaging as these differ per country. This could negatively impact the sorting of waste in other Member States. In addition, additional logos and texts in foreign languages which are unknown in other markets also legitimately raise concerns among national authorities e.g. green washing, misleading information for consumers.

Especially if other Member States follow the same path, toy products will be obliged to increase the size of their packaging to accommodate the different information requirements. This will result in increased use of resources (cardboard, water, ink) and the generation of more packaging waste. The proliferation of markings and other information on packaging risks distracting consumers from relevant safety information, such as warnings.

Several other Member States have brought forward proposals for mandatory sorting instructions (e.g. France -Notification 2020/410/F, Italy – Legislative decree n° 116 of 3 September 2020). Compliance with the requirements brought forward by Portugal will be incompatible with these requirements. Companies will therefore be required to overlabel, for example, through stickers, which will bring extra costs, waste and risks (e.g. overlabelling mandatory safety or conformity markings).

Paragraph 9 of art. 28 of Draft Decree-Law

“9-In order to clarify information to consumers and promote the correct routing of packaging waste, it is prohibited, as from the date of entry into force of the obligation provided for in paragraph 5, the placing on the market of recyclable and reusable packaging that are marked with the tidy man symbol.”

Even if the notified proposal foresees an exemption for packaging from other Member States, this appears to be limited to non-reusable primary packaging. For the other types of packaging, companies might need to use different packaging for the Portuguese market only or quit the market. In the same way as other measures commented here, this would infringe article 34-35 of the TFEU. In addition, these requirements are possibly incompatible with the freedom of circulation of goods recognized by both, the Toy Safety Directive (Article 12) and the Packaging and Packaging Waste Directive (Article 18).

Call for Action

We call on:

- The European Commission to closely examine the notified measures and to present a detailed opinion;
- Portugal to bring the requirements in line with EU legislation;
- EU Member States to raise concerns with the specific Portuguese measures that will restrict access to the Portuguese market.

We ask for the alignment of these national obligations with the upcoming proposals from the European Commission in the context of the Green Deal (e.g. Review of packaging rules, Sustainable Product Initiative, Empowering Consumers for the Green transition or the development of a harmonised model for separate collection of waste and labelling to facilitate separate collection).

About Toy Industries of Europe

Toy Industries of Europe (TIE) is the voice of the reputable EU toy manufactures. Our mission is to promote the right of every child to play safely and securely and to promote fair practices and fair legislation, allowing responsible toy companies to continue to grow.

TIE's membership includes 18 direct international companies, eight European national toy associations who represent their local manufactures, and seven affiliate members who also have an interest in toy manufacturing.

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