



Beverage industry comments on Notification 2021/510/F

French 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 the minimum proportion of reused packaging to be placed on the market annually in France for the years 2022 to 2027 in order to achieve the reuse targets set out in Article L541-1 of the Environmental Code.

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.

UNESDA, NMWE and AIJN comments

UNESDA Soft Drinks Europe, Natural Mineral Waters Europe (NMWE) and the European Fruit Juice Association (AIJN) are committed to accelerating the transition to a circular economy, as is also the objective of the EU Circular Economy Action Plan.

UNESDA and NMWE, in particular, have their Packaging Visions towards 2030 whereby they are making several far-reaching commitments, going well beyond EU law, on recyclability, collection, recycled content and reuse of our beverage packaging.

We support an increase in the use of refillable bottles on a case-by-case basis wherever they can contribute to our objective to reduce the environmental footprint of our sectors. However, the introduction of reuse/refill quotas needs to be supported by solid environmental analysis. It is important that any change considers the environmental impact of both the current and future (refill) systems. In addition, in order to guarantee a well-functioning internal market in the EU, any packaging requirement should be introduced at EU and not at Member State level. The European Commission is currently working on the revision of the Packaging and Packaging Waste Directive with reuse being also considered.

It is our opinion that 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. The proposed refillable quotas are discriminatory, not suitable for the legitimate goal, excessive and as such disproportionate: they restrict the freedom of goods within the EU without any environmental justification.



Restriction of free movement of goods

The freedom of goods prohibits measures capable of hindering, directly or indirectly, actually or potentially intra-community trade. This is inter alia the case if requirements for the presentation, labelling and packaging of goods force the manufacturers to change their packaging even if they apply without distinction to domestic and imported products according to settled case law (see i.a. ECJ Case C-470/93, Mars, par 13, C-3/99, Cidrerie Ruwet, par 46ff). Therefore, in the absence of EU legal framework national regulations on mandatory reusable packaging, violate the free movement of goods.

The European Commission has noted (see “Beverage packaging, deposit systems and free movement of goods” (2009/C 107/10)) 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.

An additional point to consider is the large scope of the mandate which has a prohibitive effect in certain cases. If a mandatory quota for reusable packaging has a significant effect on the appearance of a product, such as e.g. for products that hitherto have been offered mainly or solely in metal cans, it exerts a de facto prohibitive effect. This prohibition might lead to a material substitution with more negative environmental effects.

Quotas discriminate against foreign beverage manufacturers

Regulations on mandatory reusable packaging affect foreign manufacturers more strongly than domestic ones. This is because the costs for both the transportation as well as the organization of reusability systems increase with the distance between the manufacturer and the points of sale, even more so as reusable containers are often much heavier than single-use containers. Thus, foreign manufacturers will have to produce at lower prices than domestic manufacturers. 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 quotas, they would have to not only completely change their packaging but also to set up a system for the organization and transport of the reusable packaging. This will entail extensive costs for both the packaging change and the system set-up.

Quotas not suitable to achieve the pursued environmental goals

UNESDA, NMWE and AIJN do not dispute the legitimacy of environmental protection as justification for restricting the EU fundamental freedoms. However, restrictive measures must be suitable to achieve the pursued goals. Reusable containers are only ecologically preferable to other types of packaging 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 in France and a life-cycle analysis have not yet been made or communicated. Therefore, the proposed mandatory reusable quotas lack justification and are therefore not suitable to achieve the environmental goal pursued. Thus, we believe that an LCA study needs to be commissioned and following its results the reuse trajectory can commence (in 2023 as it is illustrated in AGECE law).



Quotas are not justified because there are excessive and disproportionate

Even if the quotas were suitable to achieve the pursued environmental goals, they still would not be justified because the proposed measures go beyond what is necessary for the legitimate purpose and are disproportionate. Indeed, national regulations on compulsory forms 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 quotas, there are numerous alternative measures equally (or even more) suitable to pursue the legitimate goal and that are at the same time less restrictive towards the circulation of goods, thus less likely to interfere with the intra-community trade. For example, in the case of beverage drinks, it is far more efficient to introduce a deposit return scheme (DRS) to increase collection and eliminate litter. Several countries around Europe have shown results above 90% collection thereby de facto removing beverage bottles from the waste equation. In addition, DRS enable closed loop bottle-to-bottle recycling, resulting in the use of more recycled content, even up to 100%, in new beverage bottles. This is the definition of circularity and as responsible beverage sectors we expect Member States to encourage innovation and remove barriers.

Unit of Measurement for soft drinks - Discriminatory regarding the equal treatment principle

Article 9 of AGECE defines a path in order to “reach a proportion of 5% of reused packaging put on the market in France in 2023, expressed in sales unit or sales unit equivalent, and 10% of reused packaging put on the market in France in 2027, expressed in sales unit or sales unit equivalent. Reused packaging must be recyclable”. Article 1 of the draft decree says: ‘III. – The unit of measurement of reused packaging shall correspond to any primary, secondary, or tertiary packaging. ‘However, the producer may adopt another unit of measurement for reused packaging corresponding to an equivalent capacity, where they can justify that such equivalent unit of measure is more suitable for packaged products. In this case, the unit of measurement shall correspond to a capacity equivalent to 0.5 litre for liquids and 0.5 kilogram otherwise.’”

However, for some beverage products like soft drinks, this is not the typical size for the immediate individual consumption which is 33cl (e.g. cans) or less. When one pours a drink at a drink dispenser, he or she does not pour 0.5 litre of beverage but less.

Adopting a one-size-fits-all unit of measurement is not meaningful to the purpose of this law and it is unfair: For example, a standard laundry detergent bottle (e.g. 2 liters) would amount to 4 or more sales units when a soft drink can or another beverage would be lower; this does not reflect the standards of the beverage industry. Therefore, a sectorial “sales unit equivalent” is necessary to better reflect market realities.

The non-inclusion of sector specificities regarding the definition of the sale unit equivalent (e.g. 0.5 liters for liquids and 0.5 kilograms otherwise) violates the European principle of equal treatment. The principle of equal treatment constitutes a general principle of law as set out in Article 20 (“Equality before the law”) and Article 21 (“Non-discrimination”) of the Charter of Fundamental Rights of the European Union (See CJEU, Sept. 14, 2010, *Akzo Nobel Chemicals*, case C-550/07, pt. 54.). Equal treatment presupposes equality of situations. In this sense, identical treatment without considering the singularity of the situations would be discriminatory.



In short, the proposed mandatory quotas for reusable packaging would be an unfair and discriminatory measure, creating significant administrative and operational burden for soft drink and natural mineral water producers currently importing products in single use containers to France, hurting local retailers and beverage producers, while not providing a measurable environmental advantage as required according to EU law. In addition, the “one size fits all” approach on the unit of measurement is discriminatory and does not correspond to the reality for soft drink beverages.

UNESDA, NMWE and AIJN would like clarifications to be made in the decree to ensure a simple implementation by companies that cannot operate in a climate of regulatory uncertainty and call for better readability. The clarifications needed are:

The definition of a “producer” must be detailed to define what is the level of calculation. Thus, the decree should specify whether it is the legal entity, the group or the subsidiary where they exist.

The calculation methodology must be detailed to define on what basis the objectives are calculated. It would be relevant to provide that the starting point is on 31 December 2022.

The definition of refill must take into account "container" refills, i.e. those that can be made of paper, plastic or other recyclable single-use packaging, and that allow consumers to recharge their product at home in reusable packaging.

Finally, while we welcome the possibility of a collective structure to achieve the objectives, this system must not place the responsibility only on a few actors.

About the European Fruit Juice Association (AIJN)

AIJN is the representative association of the fruit juice industry in the EU. It defends the interests of the juice industry including the entire value chain and promotes the sector by engaging with the EU Institutions and other relevant stakeholders.

www.aijn.eu

About Natural Mineral Waters Europe (NMWE)

Natural Mineral Waters Europe represents almost 550 natural mineral and spring water producers in Europe, most of them small- and medium sized companies. NMWE is dedicated to promoting the unique qualities of natural mineral and spring waters as well as sustainable use of water resources and circular economy. It is signatory to the EU Transparency Register (No: 562370525222-50).

www.naturalmineralwaterseurope.org

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