Draft Spanish royal Decree on packaging and packaging waste (TRIS 2022/325/E) - NMWE comments

Introduction

Natural Mineral Waters Europe (NMWE) fully subscribes to EU's ambition to become the first carbon neutral continent and a global leader on sustainable food production. Natural mineral and spring water producers want to be a partner towards reaching those EU ambitions with packaging circularity and sustainability a key element of its decarbonisation journey. We welcome the current revision of the EU Packaging and Packaging Waste Directive and see it as an opportunity to accompany our industry's efforts in achieving its commitments (and the goals of the Single Use Plastic Directive-SUPD) while safeguarding the EU internal market.

However, our members are deeply concerned at the current inflation of Member States' initiatives in the field of packaging at a time when the European Commission has itself embarked on a thorough overhaul of its relevant legislation. Those national initiatives greatly affect the visibility and certainty required by economic operators at a time when they are having to navigate a very challenging context. They also risk partitioning the internal market.

The draft Spanish royal Decree on packaging and packaging waste notified on 6 May 2022 by the Spanish authorities under the so-called 'TRIS procedure' (registered under number 2022/325/E), is an example of such national measures which risk partitioning the internal market, placing operators in discriminatory situations across the EU.

In addition, we believe that the notified text contains some discriminatory and disproportionate measures placing heavy burden on the industry without substantiated justification in terms of expected environmental benefits.

Detailed analysis

- *Obligation to defer adoption of new national legislation*

The purpose of the Spanish Decree is essentially to transpose EU Directive 2018/852 on Packaging and Packaging Waste and Directive 2019/904 on reducing the impact of certain plastic products on the environment. The European Commission is currently working on the revision of the Packaging and Packaging Waste Directive and has publicly

announced the publication of a new legislative proposal in November 2022 (initially scheduled for July 2022). It is foreseen that it will be a Regulation.

Aspects that are expected to be included in the future Regulation include measures to reduce the generation of packaging waste, reduction targets, reuse quotas and minimum content of recycled material by 2030.

In this regard, we would like to point out that Article 6 of Directive 2015/1535 states the following:

> *…"3. Member States shall defer the adoption of a draft technical regulation, excluding draft rules on services, by twelve months from the date on which the Commission receives the communication referred to in Article 5(1) of this Directive, if within three months of that date the Commission communicates its intention to propose or adopt a Directive, regulation or decision on this matter, in accordance with Article 288 TFEU."*

Spain should therefore be asked to refrain from legislating pending the adoption of the announced EU Regulation on the various aspects which will be covered by it.

- *Prevention targets (article 6)*

Article 36 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) establishes the prohibition of quantitative restrictions or measures having equivalent effect on the internal market. Spain's proposed 20% reduction target in the number of bottles for single-use plastic beverages placed on the market by 2030 (Art. 6.2 of the notified draft Decree) could constitute a measure having equivalent effect to quantitative restrictions on imports as defined by Article 34 TFEU, by de facto limiting the marketing of legally manufactured and marketed products, both in Spain and in other Member States.

In addition, the proposed measure discriminates between packaging materials, packaging types and products categories. Indeed, the Spanish Decree specifically targets single use plastics beverage bottles (i.e. PET bottles). No scientific justification is provided for the adoption of such a discriminating policy option. In fact, unlike many polymers, PET bottles are highly recyclable with available statistics consistently showing that they are by far the most collected and recycled single use plastic items.

Also, beverage producers' long-standing efforts towards circularity and packaging sustainability (including towards reduction) should be considered; they have been pioneers in design for recycling (e.g. EPBP.org) and in light-weighting (little more than 20 gr is needed for a 1.5 litre still mineral water bottle). Natural mineral water and spring water producers are currently looking at further reduction via the use of larger packaging formats for instance.

More generally, our members are funding the collection and recycling of their packaging (via standard EPR systems and/or Deposit Return Systems), often cross-subsidizing the management of other less recyclable packaging managed by municipalities. They also incorporate steadily increasing amounts of recycled materials in their new packaging, helping to reduce an already fairly low environmental footprint. Our members' efforts should be acknowledged and accompanied, not discouraged.

We observe that while proposing ambitious reduction targets for SUP beverage bottles, no data is provided by Spanish authorities as to the existence of more environmentally friendly substitution materials. In addition, no similar targets are being proposed for other materials or product categories.

We would therefore urge the Commission to ensure that all packaging materials and product categories are treated fairly into the Spanish draft, taking into account their respective environmental credentials, and that beverage producers are not subject to unreasonable reduction targets as is being proposed.

- *Reuse objectives (articles 8 and 9)*

Natural mineral water producers use only refillable and/or recyclable packaging materials. NMWE supports the increased use of refillable packaging where it makes environmental sense. However, whilst the implementation of the measures proposed in the draft Spanish Royal Decree will place a very heavy burden on producers, no scientific justification is provided to justify them (lack of science-based assessment as to their expected environmental benefits - LCA). Depending on local conditions, in some instances, it would be more environment friendly to recycle PET containers than to send them back for washing and refilling.

Also, setting up reuse systems requires dramatic changes to distribution models and will imply significant investments in existing plants (fillers and retailers). This will put a huge burden on natural mineral water producers, a vast majority of which are SMEs, located in rural areas.

For foreign manufacturers, the measure risks amounting to a barrier to trade as they will not only have to bear the additional financial and organizational burdens but will also need to adjust their offer for a specific market.

Regarding the proposed reuse targets in the domestic channel (retail), it should be noted that this model is currently only operational in some member states, so consumer acceptance will also need to be assessed and resistance overcome, in addition to the technical and logistical aspects to be addressed.

In view of the discriminations highlighted above, the absence of consideration for clear environmental benefits and because the EU is currently looking at setting refill targets in the context of the ongoing revision of the EU Packaging and Packaging Waste legislation, we would therefore urge the Commission to request that Spain abstains from setting reuse targets pending the publication of its expected legislative proposal.

- *Target for the incorporation of recycled material (article 11)*

NMWE supports the targets laid down under the SUPD for rPET incorporation and our members aspire to go beyond them and ultimately reach full circularity (see NMWE's aspirations and commitments under the EU Code of Conduct for responsible business and marketing practices).

However, our sector's ability to meet its circularity ambitions and even satisfy the SUP targets for rPET incorporation (25% by 2025, 30% by 2030) are currently jeopardized by the scarcity of food contact recycled PET on the market. This is due to lagging collection rate in many member states with standard EPRs and to insufficient installed industrial recycling capacity in several Member States.

In addition, although the PET collected for recycling in the EU and beyond comes mainly from beverage bottles, the resulting recycled material is mostly destined for other non-food applications (sheets, straps, automotive, tires...). The use of recycled PET into non-food products amounts to downcycling thus breaks the circularity of the beverage industry. The incorporation measures contemplated should therefore necessarily be accompanied with measures facilitating bottlers' access to the recycled PET from their bottles (such as priority access).

Therefore, any mandatory target for recycled PET incorporation should be accompanied by measures to reinforce the performance of beverage packaging collection in Member States and secure circularity through priority access for obliged sectors (such as bottlers) to (de minimis) a quota the recycled material derived from the packaging they put on the market. This is the more necessary in the present case as Spain proposes higher targets than those laid down in the SUPD.

Contrary to the provision in the Spanish draft, we would strongly request that the recycled content obligations be in line with the provisions of Directive 2019/904, which indicates that the targets for the incorporation of recycled plastic for certain packaging be attained at Member State level.

This would provide greater flexibility to companies and sectors to meet the objectives, since not all industries have the same resources or purchasing capacity of recycled material of the quality necessary for food contact material. In a situation of scarcity and

price volatility, it will be very challenging for SMEs to meet the stated targets individually, unless enabling measures are adopted.

We urge the Commission to invite Spain:

- to bring its proposed recycled plastic incorporation targets in line with those laid down in the SUPD;

- to provide for compliance at Member State level, in order to allow for flexibility and take into account the access issues for respective operators.

➢ *Marking and information obligations (article 13)*

The draft Spanish royal Decree states that:

" (...) Household packaging shall indicate the fraction or container in which such packaging waste is to be deposited.

3. The marking of packaging with the words 'environmentally friendly' or any other equivalent likely to lead to its abandonment in the environment shall be prohibited."

In line with Article 6 of Directive 2015/1535, we urge the Commission to ask that marking requirements be excluded from the Spanish Royal Decree harmonise marking requirements, as they will be addressed in the upcoming EU Regulations, and if imposed at national level, will inevitably generate obstacles to the free movement of packaged goods in the EU internal market and create unnecessary burden for economic operators.

➢ *Extended producer responsibility (article 34).*

Beverage producers have been pioneers in setting up and funding Extended Producers Responsibility schemes for their packaging. EPR contributions should fund local infrastructures (collection, sorting and recycling) and not be used for other purposes that go beyond European Directives. Producers' obligations for clean-up costs should not be endless especially in situations where collection systems put in place achieve above outstanding collection levels (uncivil behaviour needs to be addressed as well).

➢ *Overall transition periods:*

In addition, the proposed transition periods laid down will be difficult to meet by Spanish companies. In the case of beverage bottlers, they are currently implementing the measures imposed by the SUPD, including the attached cap obligation, which implies substantial industrial changes and related investments.

We would greatly appreciate it if the Commission could relay and concerns to the Spanish authorities and request that reasonable transpositions deadlines be provided, especially taking into account the many SMEs in the sector.

General conclusions

Due to the European Commission's work on the revision of the EU Packaging and Packaging Waste legislation, Spain should refrain from legislating on the same pending the publication of the Commission's upcoming proposal for a new Regulation. This is absolutely critical for the preservation of the EU's single market.

In accordance with Community legislation and case-law, measures likely to affect intra-Community trade are permitted only where they are motivated by overriding reasons in the public interest and, moreover, are indispensable and proportionate to the attainment of those objectives, without there being less burdensome alternative means of achieving them.[1] In the present case, we believe that some of the proposed measures in the notified draft Spain going beyond those stated under the Single Use Plastics Directive and other EU instruments, are overly burdensome without due regards to scientifically expected environmental benefits.

We urge the Commission to convey our concerns to the Spanish authorities and hope for an ambitious and harmonised approach to circularity across Europe in which each sector invests in the circularity of the materials it puts on the market.

NMWE members wish to reiterate their support on ambitious packaging legislation and the review of the EU packaging and packaging waste legislation. They believe that national initiatives should be in line with EU legislation so that companies can operate under a clear legal framework and enjoy long-term visibility and plan their investments accordingly (e.g. tethered caps, reuse). Ambitious circularity targets must go hand in hand with improved waste management infrastructure and policy choices should be science-based. Circularity in the beverage industry can pave the way towards decarbonization but the industry needs priority access to its recycled materials so that it can be a fully resource efficient industry.

Consistency of action at EU and national level, science-based policy choices, availability of investment tools and predictability of actions are crucial elements to ensure that all our packaging remain a valuable resource, used in closed loop. Circularity has a vital role to play not only towards environment sustainability and carbon neutrality but also towards jobs generation and economic recovery.

[1] For example, Judgments of the CJEU "Blackcurrant of Dijon" (see note 1) or of 24 March 2011, C-400/08, *Commission c. Spain*, ECLI:EU:C:2011:172, paragraph 74.

About NMWE - Natural Mineral Waters Europe

Natural Mineral Waters Europe represents almost 550 natural mineral and spring water producers in Europe, mostly small- and medium-sized companies.

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