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

On 06 May 2022, Spain notified to the European Commission a Draft Royal Decree on Packaging and Packaging Waste (hereafter "the Royal Decree"). The Royal Decree sets out packaging reduction objectives, as well as obligations for packaging reuse or marking requirements.

Through this contribution, we would like to address the following questions included in the draft:

- Articles 6 (2), 8 and 9 (4) of Chapter II in Title I - **Packaging prevention and reuse**.
- Articles 13 and 21 of Chapter I in Title II - **Packaging Design and marking obligations**.

Article 6 (2) – To try to achieve a 20% reduction in the number of single-use plastic beverage bottles placed on the market by 2030:

The reduction measure included in the project that entails a restriction on the marketing of the number of plastic beverage bottles is clearly disproportionate in light of the SUP Directive. Although the protection of the environment is considered an overriding reason of general interest recognized by jurisprudence, it can only be invoked as justification for a regime that limits the free movement of goods, such as a restriction on the marketing of a product, when it is the measure most appropriate to achieve the intended objective of risk prevention, for human health and the environment, identified through the corresponding studies.

Directive 2019/904 on Single-Use Plastics (SUP Directive) clearly states that only single-use plastic products listed in Part A of its Annex are subject to a sustained reduction in consumption. The

Spanish requirement, therefore, over-transposes the SUP Directive, since the adoption of consumption reduction measures exclusively applies to single-use plastic beverage cups and food containers destined for on-the-go consumption.

In the case of beverage bottles, the SUP Directive establishes other mandatory requirements that were considered the most appropriate, such as the obligation of a % of recycled plastic, separate collection objectives or the obligation of the attached cap.

Moreover, the measure could create unjustified barriers to the trade of goods between Member States which are not justified by the attainment of the SUP Directive environmental objectives, thus not uphold by the *lex specialis* principle set in art 4 of the SUP Directive, nor compliant with article 18 of the Package and Packaging Waste (Directive PPWD). The latter obliges Member States to allow the placing on the market of their territory of packaging which satisfies the provisions of the Directive.

Measures must be proportionate to the result to be achieved and non-discriminatory. They will not jeopardize the essential functions of the container, nor the necessary safety, hygiene and acceptance. Moreover, the efforts made by companies going beyond the mandatory targets to incorporate recycled plastic making the bottles more circular must be recognised and should not be targeted by the reduction measure.

Articles 8 and 9 (4) - reuse targets and measures:

Article 8 proposes the introduction of ambitious **reuse targets** for beverage containers in the HORECA sector, beverage containers marketed in the retail sector, as well as reuse targets for other packaging applications to be achieved at national level.

We would like to recall that, at the time of this submission, the European Commission has announced its intention to set reuse targets at EU level as part of the PPWD revision. Therefore, the establishment of unilateral national reuse targets risks undermining the upcoming revision of the PPWD, which is looking at ways to boost reuse through harmonised measures at EU level. In line with the principle of cooperation, Spain should refrain from adopting regulations to address an issue which can only be adequately addressed at EU level and in a field which the EU intends to harmonise. This is the case for the deployment of reusable packaging systems.

In addition to this, the proposed targets may have the effect to restrict the free movement of products and discriminate against foreign manufacturers.

The free movement of goods prohibits measures capable of hindering, directly or indirectly, actually or potentially intra-community trade. According to settled case law, this is the case if requirements for the presentation, labelling and packaging of goods force the manufacturers to change their packaging formats, even if they apply without distinction to domestic and imported products. In the absence of an EU legal framework, national regulation on mandatory reusable packaging infringes the EU principle of the free movement of goods. Despite the fact that the setting of reuse objectives would be in accordance with Art. 5 of the PPWD, the same article also establishes that the above measures must be adopted "in conformity with the Treaty", which implies, among other requirements established in the case law of the CJEU, that they must be proportionate to the purpose pursued and that in no case imply an infringement of the internal market, which is doubtful in view of the approaches of Article 8 of the Royal Decree.

Producers exporting products to Spain would need to create an entire new logistic chain to be able to comply with the reuse targets established in the Royal Decree, which puts them at a competitive disadvantage compared with locally established producers (not exporting outside of Spain) for whom it will be easier to comply. Therefore, reuse requirements should be introduced in a harmonised way at EU level.

It is also important to note that sectors are at very different starting points in the country. Some with specific national regulations that regulate the issue for many years and due to its volume or the characteristics of the beverage contained, reuse systems are already implemented for some references in the HORECA channel. However, for other sectors, to comply with the reuse objectives set for “Others” is unaffordable due to the lack of reuse systems currently in place.

The volume of the juice category in Spain is too low to make the reuse systems viable and the distribution channel made up of numerous intermediaries between the supplier and the end customer makes the reverse logistics process especially complicated. In addition, the reconditioning of our bottles poses additional problems due to the density and organic content of the product. Due to the viscosity and pulp content of the fruit, the residues deposited on the walls and bottom of the container tend to solidify due to the loss of humidity, which would imply the need for many washes with the consequent expense of water, energy and cleaning and chemical products, disinfection, and can also significantly increase the risk of contamination by foreign bodies by losing asepsis.

On the other hand, the economic investments that it would imply are currently unaffordable without forgetting that the reuse lines require an important space due to the additional stages of the process that companies do not currently have due to how they have been designed.

Due to the location of the factories, the distribution of products in reusable containers throughout the national territory would imply that the empty container would have to travel long distances, so the environmental impacts generated by return logistics would be very high.

For all these reasons, we encourage the promotion of reuse through feasibility and pilot studies and incentive measures, according to the demand of society and environmental, technical and economic/social factors, before imposing specific and non-viable targets.

Articles 13 and 21 (3) Marking requirements:

The Royal Decree introduces a number of measures in relation to the labelling of packaging. For example, the obligation for household packaging to indicate the fraction or container in which the packaging waste must be deposited.

This requirement is clearly a barrier to intra-EU trade because obliging all economic operators to introduce specific labels on all packaged goods destined to Spain, the Royal Decree is imposing labelling requirements on products originating from other Member States and thereby impacting their free circulation across the internal market.

The Spanish labelling requirements add a disproportionate regulatory burden on producers, who will be required to adopt their packaging executions to comply with the Royal Decree.

To date, most companies operating within the Internal Market use only one type of labelling provisions for the EU as a whole or for a group of several neighbouring EU countries. The Spanish labelling requirements would impede this and require the redesign or restickering of all packaging destined for the Spanish market, or the production of separate variants for that market only.

In light of the above, the ongoing review of the PPWD represents a great opportunity to set common requirements on which information should be provided to consumers and how this should be done, including the use of digital solutions that can help provide required information without the need to increase packaging size or repackage.

Conclusions:

Rigorous implementation and enforcement of the Single Market principles are key to ensure harmonised legal requirements, long-term investments and strengthening the business case for

innovative products and technologies. This is not only a precondition for the free movements of packaged goods and packaging materials across the EU, but it is essential to strengthen the implementation of packaging and packaging waste targets in all Member States.

The current draft Royal Decree pre-empts the forthcoming revision of the Directive 94/62/EC on Packaging and Packaging Waste (hereafter “PPWD”) and therefore infringes Art. 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (TRIS).

The proposed measures will impede the placing on the market of packaging that is fully compliant with the provisions of the EU packaging legislation, thus being contrary to article 18 of the PPWD. Similarly, most obligations will create unjustified barriers to intra-EU trade and consequently amount to quantitative restrictions on imports or measures having equivalent effect, which are prohibited by article 34 of the TFEU.

Several requirements in the Royal Decree do not find a legal basis in any of the currently enforced EU legislations or depart from already adopted EU laws.

Moreover, some of the provisions of the draft legal text addressed in this contribution will clearly jeopardize the competitiveness of European companies without a clear environmental benefit. In this sense, we believe it is essential to ensure non-discriminatory measures that preserve the essential functions of the containers, the necessary safety, hygiene and acceptance.

The life cycle analysis plays a key role as well as the economic cost/ecological benefit analysis that must be deeply carried out before establishing this kind of measures.

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