Message 103

Communication from the Commission - TRIS/(2024) 1046

Directive (EU) 2015/1535

Notification: 2024/0032/BE

Forwarding of the observations of a Member State (Spain) (article 5, paragraph 2, of Directive (EU) 2015/1535). These observations do not have the effect of extending the standstill period.

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1. MSG 103 IND 2024 0032 BE EN 22-07-2024 17-04-2024 ES COMMS 5.2 22-07-2024

2. Spain

3A. Ministerio de Asuntos Exteriores, UEy Cooperación
DG de Coordinación del Mercado Interior y Otras Políticas Comunitarias
SG de Asuntos Industriales, Energéticos, de Transportes y Comunicaciones, y de Medio Ambiente

3B. Comisión Interministerial para la Ordenación Alimentaria
Agencia Española de Seguridad Alimentaria y Nutrición.
Ministerio de Derechos Sociales, Consumo y Agenda 2030.

4. 2024/0032/BE - C50A - Foodstuffs

5. article 5, paragraph 2, of Directive (EU) 2015/1535

6. Under Directive 2015/1535, on 19 January 2024, the Government of Belgium gave notice of the draft Royal Decree on advertising of beverages containing alcohol (2024/0032/BE).

Examination of the draft has led the Spanish authorities to submit the comments set out below pursuant to Article 5(2) of the said Directive.

The draft Royal Decree covers three main aspects:
1. it prohibits the advertising of beverages containing alcohol in media primarily intended for minors;
2. it prohibits the free distribution of beverages containing alcohol, except with the purchase of a beverage containing alcohol and during tastings;
3. it requires the inclusion of a health warning, the content and form of which shall be laid down by the Minister, in all advertising of beverages containing alcohol.

In Spain’s view, it is necessary to clarify some aspects of the draft Royal Decree submitted by Belgium.

1. Firstly, and for the proper application of the text, it is essential to correctly define the scope of the draft Royal Decree.

Article 1 of the draft establishes a definition for the term ‘Advertising’ that aims to cover aspects related to the provision of audiovisual media services and aspects that go beyond these services, such as the use of a logo or brand. This aspect, as far as goods are concerned, could affect the labelling or marking of products.

For aspects related to the provision of audiovisual media services, the Audiovisual Media Services Directive provides precise definitions that should be used in this Royal Decree. These definitions have been harmonised in the EU, and the

Member States are familiar with facilitating the implementation of the legislation and avoiding divergences between the Member States.

As regards advertising that may affect goods, such as alcoholic beverages, Regulation 1169/2011 refers to the definition of 'advertising' in Article 2(a) of Directive 2006/114/EC with the meaning of the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

Given that for both of the areas there is a definition of the term 'advertising' at European level, the Belgian draft Royal Decree should refer to one or both of them if applicable.

Since the Royal Decree sets out that the affixing of a mark or logo shall also be regarded as advertising, it is important to know whether it is referring to the marking of goods. If that is the case, the obligation laid down in Article 7 would mean that, if the logo or trademark is used on a beverage, whether alcoholic or not, and on any other type of product (clothes, glasses, coasters, etc.), it would be necessary to include a health warning, specifically, the one established by the Belgian minister. Owing to the way many products are presented, the use of brands and logos is directly related to labelling aspects, so this measure would mean changing either the labelling or the product itself (as would be the case with clothes, glasses, etc.). As a result, economic operators in other Member States that want to market their products in Belgium would have to bear additional costs, which would make this a burdensome measure for them though this would not be the case for operators that are marketing their products in Belgium.

2. Secondly, with regard to Article 7, which sets out that all advertising for beverages containing alcohol shall contain a health information message, the content and form of which shall be laid down by the Minister, that only health information messages laid down by the Minister may be mentioned on advertisements, and that any other health message, educational slogan or other wording is prohibited, it should be borne in mind that, due to the lack of clarity of the scope of the Royal Decree, it could end up being applicable to different goods, such as alcoholic beverages themselves. That is, it is not clear whether the objective is to regulate only the advertising of beverages containing alcohol or also the trade of these beverages.

Furthermore, although there is currently no harmonised legislation on this matter, the establishment of mandatory health information would run counter to other initiatives that are intended to be developed at European level, such as the proposal for mandatory labelling on health warnings on alcoholic beverages, which is set out in the Communication from the Commission to the European Parliament and the Council as part of Europe's Beating Cancer Plan.

Additionally, in relation to the application of this draft Royal Decree to alcoholic beverages, the prohibition of the use of any other health message, educational slogan or other wording constitutes an obstacle to trade in products from other Member States, which would have to adapt their labelling to the Belgian market and incur additional costs that are difficult to bear. This would be a disincentive for manufacturers in other Member States to bring their products to market in Belgium, which means it would effectively become a disguised restriction on trade and all without the measure being sufficiently justified.

3. Thirdly, the draft Belgian Royal Decree gives rise to interpretation problems. In particular, Article 6 on the prohibition of offering beverages containing alcohol free of charge as part of a promotional campaign, except when the consumer buys a beverage containing alcohol and as part of tastings, does not make it clear whether the exception is made for promotional campaigns where the consumer buys a beverage and for promotional campaigns involving tastings or whether the exception is made only for promotional campaigns where the consumer buys a beverage and, in addition, these are campaigns that include tastings. In any event, the exception that the consumer has to buy a beverage containing alcohol to be able to offer them free beverages containing alcohol as part of a promotional campaign does not make sense. According to what is stated, the measure seeks to avoid inducing consumers to consume an alcoholic beverage that they have not chosen to buy but, conversely, the proposed measure could promote buying an alcoholic beverage to be able to consume another alcoholic beverage that is offered free of charge. In addition, in the context of tastings, sampling the product before buying it can be decisive both to buying it and to not buying it.

4. Finally, if it is a measure that could affect goods as might be the case with the current wording, it would be necessary to include a mutual recognition clause.

Accordingly, the Belgian authorities are requested to provide the following:
• clarification on the scope of the draft Royal Decree, for example, whether the placement of the logo of a brand on a bottle ready for sale would be considered advertising, or if the placement of the logo on T-shirts, glasses, etc. would also entail the need to include the warning phrase (still to be defined by the Belgian minister);
• clarification on whether any health warning other than the phrase of the Belgian minister is intended to be prohibited (e.g. pictograms of pregnant women, the phrase 'wine in moderation' of the EU-sponsored campaign, etc.);
• clarification on the prohibition of the free offer of an alcoholic beverage in the context of a tasting, since the phrase seems confusing;
• inclusion of a mutual recognition clause.

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