



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Message 103

Communication from the Commission - TRIS/(2024) 3418

Directive (EU) 2015/1535

Notification: 2024/0560/IT

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

MSG: 20243418.EN

1. MSG 103 IND 2024 0560 IT EN 08-04-2025 18-12-2024 AT COMMS 5.2 08-04-2025

2. Austria

3A. Bundesministerium für Arbeit und Wirtschaft
Abteilung V/8
A-1010 Wien, Stubenring 1
Telefon +43-1/71100-808805
E-Mail: not9834@bmaw.gv.at

3B. Bundesministerium für Arbeit und Wirtschaft
Abteilung V/5
A-1010 Wien, Stubenring 1

4. 2024/0560/IT - C00A - AGRICULTURE, FISHING AND FOODSTUFFS

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

6. Italy has presented a draft law for measures to combat shrinkflation, which affects requirements that are already conclusively regulated in food labelling law at EU level (see below for details).

The Italian draft legislative amendment obliges manufacturers who, also through retailers operating in Italy, offer for sale a consumer product which, while retaining the previous packaging, has experienced a reduction in the nominal quantity and thus an increase in the unit price, to inform the consumer of the reduced quantity and the percentage price increase by affixing a special label with a special graphic emphasis on the sales packaging. This obligation for manufacturers to provide information shall apply for a period of six months from the date on which the product is displayed in its reduced quantity.

From the perspective of Austria, the present Italian draft legislative amendment is incompatible with EU law.

In the media, shrinkflation is often equated with consumer deception. However, this is not automatically the case in the event of a change in the content of a product. The negative stance regarding the Italian draft law in detail:

Presentation and packaging of products:

Entrepreneurial freedom is expressed, among other things, by the fact that companies develop their products as they wish. In doing so, they must comply with statutory provisions. In addition to the freedom to formulate products, the presentation as well as the choice of packaging, packaging design, and packaging size is fundamentally left to the companies. There are a variety of criteria that determine the choice of packaging and packaging size, including technological specifications, resource conservation, recyclability, brand presence, (re)recognisability, availability and



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

price. The availability of packaging is still associated with long lead times since the coronavirus crisis: Packaging usually has to be ordered months in advance and in large quantities. Packaging changes are complicated and expensive for companies and are generally avoided as much as possible.

Packaging sizes:

Legal requirements related to packaging sizes exist, for example, for pre-packaged products that are placed on the market in constant, uniform nominal quantities (Pre-packaging Regulation). A gross mismatch between content and packaging size may be legally relevant in case of foodstuffs "as misleading for the consumer". According to Austrian case-law, so-called inadmissible "deceptive packaging" can be assumed if a packaging is filled to less than 50 percent without any comprehensible reason. In individual cases, consumers may also be misled by a deceptive packaging size with less empty space or a filling of up to two-thirds. Thus, the case law based on the existing deception regulations has already made clear what companies must observe when filling packaging.

Quantity actually contained in a package (net quantity):

There are clear, uniform EU-wide rules (EU Regulation on the provision of food information to consumers) to inform consumers about the quantity actually contained in a package. The indication of the net quantity of the foodstuff is one of the mandatory particulars and must meet strict requirements (Article 9(1)(e) in conjunction with Article 23 of the EU Regulation on the provision of food information to consumers). In case of pre-packages, the net quantity must be indicated in a minimum font size of 2 to 6 millimetres, depending on the dimensions of the packaging, to ensure good legibility (Pre-packaging Regulation). It must be indicated in the same area as the product name and must not be obscured or made unclear by other information. If the quantity contained in the packaging is reduced, the reduced quantity must also be indicated on the packaging. Therefore, the following applies: A look at the declared net quantity provides information on how much content the packaging actually contains.

Price labelling (base price):

The principle of price transparency vis-à-vis consumers laid down in EU law in the Price Indication Directive 98/6/EC also includes the price labelling per unit pricing, which is to be ensured by the retailer. This allows the consumer to quickly calculate how much a certain quantity costs and whether a product has become more expensive.

The proposed regulation would assume that manufacturers set the sales prices of their customers (retailers). Otherwise, how could the manufacturer know how the change in packaging affects the base price?

Article 101(1) TFEU, Regulation (EU) 2022/720:

Such a practice is considered resale price maintenance and thus concerns a hardcore restriction within the meaning of Article 4(a) of Regulation (EU) 2022/720 (cf. European Commission Guidelines on vertical restraints (2022/C 248/01) paragraphs 185-189). Pursuant to Recital 15 of Regulation (EU) 2022/720, agreements on fixed prices for resale are to be regarded as severe restrictions of competition which, because of the harm they cause to consumers, are excluded from the exemptions in this Regulation because, irrespective of the market position of the parties and the respective competitive environment, an infringement of Article 101(1) TFEU is to be presumed. Furthermore, it is presumed that the exemption provided for in Article 101(3) TFEU is not applicable to such restrictions of competition (European Commission Guidelines on vertical restraints (2022/C 248/01) paragraph 179; Schultze/Pautke/Wagener, Introduction to Vertical Block Exemption Regulation, paragraph 49; Case law: ECJ 18.11.2021, C-306/20 (Visma Enterprise) paragraph 44; 29.7.2023 (Super Bock Bebidas), C-211/22). According to the case law, this occurs when intra-brand competition is weakened, which is in any event the effect of the manufacturer setting the sales price. Furthermore, the present Italian legislative amendment does not fulfil the conditions for the exemption for efficiency-enhancing effects which, taken as a whole, have a pro-competitive effect under Article 101(3) TFEU. The indication by the manufacturer of the percentage increase in the sales price required by the Italian draft legislative amendment has no efficiency-enhancing effect and negatively affects competition (cf. European Commission Guidelines on vertical restraints (2022/C 248/01) paragraph 197).

It follows from these considerations that, for reasons of competition law alone, the legislation is contrary to EU law.

From a practical point of view, the question also arises as to the basis on which sales prices the manufacturers should



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

calculate the percentage price increase of the sales price, especially since products are sold to the consumer at different prices depending on the retailer, period, and possible discount campaigns.

In cases of fixed prices, as caused by the present draft legislative amendment, there is a reduction or even elimination of intra-brand price competition. Furthermore, the reduction of intra-brand price competition and the predictability of sales prices may subsequently favour horizontal price coordination at retailer level (European Commission Guidelines on vertical restraints (2022/C 248/01), paragraph 196).

Overall, by reducing price competition, the draft legislative amendment in question would lead to higher prices for the food products concerned and thus have a negative impact on consumers.

Directive 2005/29/EC:

The Unfair Commercial Practices Directive (Directive 2005/29/EC) establishes a legal basis to ensure uniform protection against misleading practices. Due to the full harmonisation provided for in Article 4, it is not permissible for the Member States to lay down rules which go beyond the content of the directive—even if the aim is to achieve a higher level of consumer protection (ECJ 14.1.2010, C-304/08 (Plus Warenhandels-gesellschaft) paragraph 41). The Italian legislative amendment goes beyond the scope of this Directive and is therefore incompatible with Directive 2005/29/EC.

Charter of Fundamental Rights of the European Union:

A regulation such as provided for in the Italian draft legislative amendment, constitutes an infringement of the right to conduct a business guaranteed by Article 16 of the Charter of Fundamental Rights, which guarantees "the freedom to exercise an economic or commercial activity, the freedom of contract and free competition" and thus "the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it". The freedom to conduct a business includes freedom of contract, "the freedom to choose with whom to do business and the freedom to determine the price of a service" (Bezemek in Holoubek/Lienbacher, Commentary on the Charter of Fundamental Rights Article 16, paragraph 6; ECJ 22.1.2013, C-283/11 (Sky Österreich), paragraph 41; 30.6.2016, C-134/15 (Lidl) paragraphs 27 et seq.).

Furthermore, it is pointed out that "the average consumer, who is reasonably well-informed and reasonably observant and circumspect", takes into account other product characteristics, in particular product quality, in addition to the price when making their purchase decision (cf. Recital 18 of Directive 2005/29/EC). Such striking price labelling, as provided for in this Italian legislative amendment, can all the more improperly influence and mislead consumers in their purchasing decisions. In combination with the price increase issue already described, Article 21 of the Italian draft legislative amendment is not suitable for promoting consumer protection and therefore does not meet the requirements of Article 52(1) of the Charter of Fundamental Rights (Rumler-Korinek/Vranes in Holoubek/Lienbacher, Commentary on the Charter of Fundamental Rights Article 52 paragraph 16).

The information needs of consumers regarding the quantity in a package, as addressed by the Italian legislative proposal, are already fully considered under the current EU legislation and also aim to prevent misleading practices, such as alleged "shrinkflation" (EU Regulation on the provision of food information to consumers, Pre-packaging Directive, etc.).

EU labelling law is harmonised throughout Europe and lies within the exclusive competence of the EU institutions. As a result, there is no room for national regulations under the law of jurisdiction; a unilateral national approach in this regard would be contrary to EU law. Ensuring the free movement of goods requires: Labelling law must be exclusively Community law.

The envisaged measures restrict the free movement of goods within the EU internal market and should therefore be rejected, as the notified draft constitutes a prohibited measure having equivalent effect pursuant to Article 34 TFEU. There are clearly no grounds for justification pursuant to Article 36 TFEU (including health or consumer protection), as the draft is not suitable for promoting consumer protection (as stated above).

It should also be noted that Article 21 of the Italian draft legislative amendment is contrary to Article 101(1) TFEU,



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Directive 2005/29/EC, and the consumer protection objectives of the TFEU.

European Commission

Contact point Directive (EU) 2015/1535

email: grow-dir2015-1535-central@ec.europa.eu