

## Notification 2024/0396/HU: Draft Act No. T/7992 on protecting children's health

- 1 The Republic of Hungary (Hungary) proceeded on 12 July 2024 to notify (2024/0396/HU) (“**the notification**”) according to Directive (EU) 2015/1535 Draft Act No. T/7992 on protecting children's health. The standstill period will end on 15 October 2024.
- 2 The draft act on the protection of children's health :
  - prohibits the sale or supply of energy drinks to people under eighteen years;
  - enables the consumer protection authority to impose sanctions for violations of the prohibition, taking into account the specific circumstances such as the severity, duration, repetition and benefit gained from the violation, including to temporarily close the business for a maximum of 30 days;
  - enables the government to define energy drinks in a decree
- 3 Notification 2024/0396/HU was published together with notification 2024/0397/HU and 2024/0398/HU, whereas notification 2024/0397/HU constitutes the Government Decree defining the category of energy drinks and the restrictions that shall apply to this product category.
- 4 The draft amendment addresses specifically the product category of energy drinks. Energy drinks are an established product category across Europe and in Hungary. They are sold in all countries of the European Union, have been consumed for more than 36 years and are sold in more than 175 countries around the world.
- 5 Energy drinks are functional, non-alcoholic beverages, which typically contain the same amount of caffeine (32 mg per 100 ml) as a cup of home-made coffee and the same amount of sugar as orange juice (11 g per 100 ml). Energy drinks are safe products that comply with European law, and the safety of their ingredients has been confirmed by regulators in individual EU member states and by the European Food Safety Authority in numerous scientific opinions.
- 6 Setting an age limit of 18 years old for the sale of energy drinks is therefore arbitrary, without scientific basis and disproportionate. Such an approach is likely to be in breach of the TFEU.
- 7 Therefore, for the reasons outlined below, we urge the European Commission when examining the draft act to issue a detailed opinion to the effect that the restrictions on energy drinks infringe Articles 34 to 36 TFEU which prohibit any quantitative restrictions and measures having equivalent effects on imports and exports of goods between member states.

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## INFRINGEMENT OF THE FREE MOVEMENT OF GOODS ACCORDING TO ART. 34 TO 36 TFEU

### Summary

- 1 EDE is of the firm view that as per established ECJ case law the legislative proposal in the notification is in breach of Articles 34 to 36 of the TFEU for the following reasons:
- 1) The measure imposes **discriminatory product restrictions** and therefore falls within scope of trade regulated by Article 34 of the TFEU;
  - 2) There is **no justification for the notification in respect of Article 36** of the TFEU because the notification:
    - a) lacks a legitimate aim; and
    - b) would not be appropriate to achieve any claimed legitimate aim; and
    - c) is more trade restrictive than necessary as alternate measures exist to address any claimed legitimate aim; and
    - d) is not proportionate.
- 2 As a result, the intended sales restrictions in the draft act on the protection of children's health are discriminatory and therefore constitute a barrier to the trade and the free movement of goods within the internal market according to Art 34 to 36 TFEU.
- 3 Accordingly, the European Commission when examining the draft act in the notification should issue a detailed opinion to the effect that the restrictions infringe the free movement of goods, specifically of energy drinks, within the Internal Market.

### Measure having equivalent effect affecting intra-community trade

- 4 The proposed sales restriction of energy drinks to people under 18 years old is applicable to both imported and domestic energy drinks. However, a relevant part of energy drinks sold in Hungary is imported from other EU countries.
- 5 Even though the proposed draft act is *de lege* applicable indistinctively to imported and domestic products, *de facto* it therefore is a disguised restriction of trade between Member States and infringes the free movement of goods according to Article 34 TFEU. As per firm jurisprudence<sup>1</sup> such regulations are considered measures having equivalent effects to an arbitrary or direct discrimination.<sup>2</sup> It is not relevant whether the legislator is intentionally distinguishing between domestic and imported products. Also unintentional restrictions to imports may constitute an arbitrary discrimination or disguised restrictions on the intra-Community trade.<sup>3</sup>

### *Discriminatory product restrictions prima facie breach of TFEU*

- 6 Importantly, a distinction must be made between selling-related limitations (i.e. limitation of place of sales) and product-related restrictions (i.e. product composition requirements or ingredient limits and thresholds).<sup>4</sup> For restrictions on selling-arrangements, measures must discriminate against imported products for them to be considered an infringement to the freedom of goods. However, for product-related restrictions, even measures applicable indistinctively to domestic and imported products can infringe on the free movement of goods.<sup>5</sup>
- 7 The Hungarian draft act enables the government to issue a decree defining the category of energy drinks, notably "*to lay down in a decree the composition of energy drinks*"<sup>6</sup> and hence provides the basis for the subsequent governmental decree to base the scope of sales ban on the composition of

<sup>1</sup> e.g. ECJ 11.07.1974, C-8/74, *Dassonville*; ECJ 26.6.1980, C-788/79 *Gilli and Andres*; ECJ 10.7.1980, C-152/78, *Commission vs. France*; ECJ 17.3.1983, C-94/82, *De Kikvorsh*; et. al.

<sup>2</sup> *Borchardt*, Die rechtlichen Grundlagen der Europäischen Union<sup>6</sup>, para. 955

<sup>3</sup> *Piska in Mayer/Stöger* (eds.), EUV/TFEU Art 36 TFEU, para 7

<sup>4</sup> ECJ 24.11.1993, C-267/91 and C-268/91, *Keck and Mithouard*

<sup>5</sup> ECJ 5.4.1984, C-177/82, *van de Haar*

<sup>6</sup> *Hungary*, Draft Act of 2024 on the protection of children's health, Section 3.

products.<sup>7</sup> Therefore, as per *Advocate General L.A. Geelhoed*,<sup>8</sup> the Hungarian draft act provides the basis for a product-related restriction as it enables the government to set "rules relating to the characteristics of products or restricting the marketing of products which have certain characteristics." In simple terms, the proposed act is the basis for product restrictions to impose selling related restrictions. This clearly triggers obligations under the TFEU.

- 8 The proposed restrictions are thus capable of directly or indirectly restricting the intra-Community trade because products defined as energy drinks may be sold only under more difficult conditions than in other EU member states. This restriction of the freedom of goods has a negative effect on trade flows, which constitutes an obstacle to the trade under Article 34 TFEU.<sup>9</sup> As shown below, the restrictions cannot be justified legally.

### No justification under Article 36 TFEU

- 9 According to Article 36 TFEU as well as according to the intrinsic justifications of Article 34 TFEU,<sup>10</sup> restrictions to the free movement of goods can only be justified if they pursue a legitimate aim, are appropriate for achieving the aim, are the least-restrictive measure available, and are proportionate.

- 10 It is clear that measures designed to protect public health must be evidence based. For example the ECJ has clearly held that a prohibition to market certain foodstuffs "is in fact the most restrictive obstacle to trade for products lawfully manufactured and marketed in other Members States", which is why it "can only be adopted if the alleged real risk for public health appears to be sufficiently established on the basis of the latest scientific data available".<sup>11</sup> Even though the cited case law on *Commission vs. France* addressed a full market-restriction, it nevertheless indicates that any prohibition to market foodstuff requires sufficient grounds, has to follow a legitimate aim, and must be proportionate, suitable and least-restricting in order for it to be justified. This is a core principle settled in EU law in order to protect the functioning of the intra-Community market.

- 11 Industry has the clear view that notification 2024/0396/HU is neither justified under the intrinsic justifications of Article 34 TFEU, nor under the explicit justifications in Article 36 of the TFEU. This is for the following reasons:

#### a. Lack of a legitimate aim

The Hungarian notification clearly refers to the protection of public health and the youth. Undisputably, public health reasons *can* constitute a legitimate aim that might justify restrictions to the free movement of goods. In absence of relevant harmonization, it is for the Member States to implement regulatory measures and implementing controls to protect public health. However, for a legitimate aim to justify restrictions to the free movement of goods, first of all the measures must be based on probative evidence for them to be considered legitimate. Article 36 of the TFEU is not an unqualified loophole for a Member State to avoid their obligations as a participant in the Single Market.

- 12 The safety of energy drinks and their ingredients is not in doubt and cannot be the basis for an Article 36 justification. Energy drink ingredients have been evaluated extensively, in particular by the European Food Safety Authority (EFSA). Based on current guidance by EFSA, a daily caffeine intake of 400 mg for adults and 3 mg per kg of body weight for children and adolescents is a safe level to consume.<sup>12</sup> This view was confirmed inter alia by the Norwegian Scientific Committee for Food and Environment.<sup>13</sup> In addition, the Swedish National Food Agency has also confirmed the safety of energy drink

<sup>7</sup> Borchardt, Die rechtlichen Grundlagen der Europäischen Union<sup>6</sup>, para. 955

<sup>8</sup> Opinion of L.A. Geelhoed 28.06.2005, C-366/04, *Schwarz v Mayor of Salzburg*

<sup>9</sup> *Streinz*, TEU/TFEU Art 37, para 35.

<sup>10</sup> ECJ 20.02.1979, C-120/78, *Cassis de Dijon*

<sup>11</sup> ECJ 5.2.2004, C-24/00, *Commission vs. France*

<sup>12</sup> EFSA Panel on Dietetic Products, Nutrition and Allergies, Scientific Opinion on the safety of caffeine, EFSA Journal 2015; 13(5):4102, pp. 120ff.

<sup>13</sup> VKM, Ellen Bruzell, Monica Hauger Carlsen, Berit Granum, Inger Therese Lillegaard, Gro Haarklou Mathisen, Josef Daniel Rasinger, Camilla Svendsen, Tove Gulbrandsen Devold, Jens Rohloff and Trine Husøy 2019, Risk assessment of energy drinks and caffeine. Scientific Opinion of the Panel on Food Additives, Flavourings, Processing Aids, Materials in Contact with Food, and Cosmetics of the Norwegian Scientific Committee for Food and Environment. VKM Report 2019:01, ISBN: 978-82-8259-317-5, ISSN: 2535-4019..

ingredients.<sup>14</sup> These findings are clearly contrary to the alleged negative consequences Hungary makes in the notification,<sup>15</sup> which are scientifically unfounded: Contrary to the notification, caffeine overconsumption via energy drinks alone can also not be the concern. Oddly, in respect of caffeine consumption by children — who are the stated cohort to be protected by the Hungarian draft act — it is chocolate, coffee, cola drinks and tea that are the largest sources of caffeine intake and that contribute more than 90% to the caffeine consumption of this age group.<sup>16</sup>

13 For the purpose of providing probative evidence, Member States must take into account analysis and evidence from other Member States.<sup>17</sup> However, to the contrary, Hungary not only did not consider risk analysis from national and international risk analysis authorities but is proposing measures that run contrary to the conclusion of other current (and former) EU Member States. For example, in the United Kingdom, the UK Food Standard Agency’s Committee on Toxicity<sup>18</sup> and the House of Commons Science and Technology Committee<sup>19</sup> have both concluded that there was insufficient scientific evidence to support an age restriction on energy drinks. More recently, the Scottish government, following research findings on caffeinated energy drink consumption patterns in children and young people, confirmed that there is insufficient evidence to pursue a mandatory ban of energy drinks to children and adolescents.

14 Therefore, the draft act lacks credible scientific substantiation and clear evidence of a legitimate aim. Hungary has a burden of proof to justify any restriction to the free movement of goods according to Article 36 TFEU<sup>20</sup> based on reasons of public health — which it has failed to satisfy. Moreover, it cannot sustain the assertion that the proposal does satisfy the requirements for being a legitimate aim under the TFEU, as the evidential foundation for such a claim has not been established or provided.

*b. Not appropriate for achieving the legitimate aim*

15 Notwithstanding the above, even if one were to wrongly assume that the notification does pursue a legitimate aim, it would still not be an appropriate and least restrictive measure for achieving that aim, nor would it be proportionate.

16 As outlined above and clearly contrary to what Hungary stated in the notification, national and international food safety authorities have repeatedly confirmed the safety of energy drinks and their ingredients and that energy drinks are not the main source of caffeine or sugar intake. Therefore, if one was to wrongly conclude (as has been done by Hungary) that the ingredients of energy drinks are of a particular concern, the only appropriate way of addressing that concern would be to extend the proposed restrictions to all products containing those ingredients (i.e. caffeine). This is not what is included in the Hungarian proposal.

17 It can therefore be concluded that energy drinks are treated differently to comparable non-alcoholic beverages with similar functional effects. In particular, Hungary itself in the notification noticed that it “*is a negative trend that the majority of young people nowadays consider energy drinks to be fashionable, almost like soft drinks, which they consume without limit, ignoring their caffeine content*”.<sup>21</sup> While Hungary in the notification therefore compares energy drinks to soft drinks with regards to the consumption habits, it fails to also compare the ingredients of the products and the consequences the consumption habits of the products have on the health. In fact, contrary to the notification, energy drinks — as stated above — do not contribute the biggest amount to the overall caffeine intake in the age cohort in question. Hence, with regards to the effects of the consumption of energy drinks and other caffeinated products, equal legal treatment is required. This is not the case. As per firm jurisdiction,<sup>22</sup> measures are inappropriate, inter alia, if similar situations are treated differently, as it is the case in Hungary.

<sup>14</sup> *Livsmedelverket report*, ‘Risk management measures to keep down the consumption of energy drinks / caffeine among children and adolescents’, December 2018, D no. 2018/00523.

<sup>15</sup> Hungary, Notification 2024/0396/Hu.

<sup>16</sup> *EFSA Panel on Dietetic Products, Nutrition and Allergies*, Scientific Opinion on the safety of caffeine, *EFSA Journal* 2015; 13(5):4102, pp. 120ff.

<sup>17</sup> ECJ 23.9.2003, C-192/01, *Commission vs Denmark*

<sup>18</sup> *Committee on Toxicity*, 2018 Interim position paper on potential risks from “energy drinks” in the diet of children and adolescents.

<sup>19</sup> *House of Commons Science and Technology Committee*, Energy Drinks and Children, 27 November 2018.

<sup>20</sup> i.a. ECJ 5.2.2004, C-270/02, *Commission vs Italy*

<sup>21</sup> Hungary, Notification 2024/0396/Hu.

<sup>22</sup> ECJ 27.11.1990, C-67/88 *Commission vs Italy*

- 18 Not only is the proposal discriminatory by treating similar products in a different way, but the discrimination itself contributes to the draft proposal being inappropriate. It may be assumed that other products that contain higher amounts of caffeine not included in the scope of the proposed restriction will be consumed more frequently and to a greater extent. Therefore, the overall caffeine consumption is likely to increase as product substitution is permissible and encouraged. This is clearly inappropriate. This view has been supported also by the Swedish National Food Agency<sup>23</sup> concluding that “*A total ban for children and adolescents to buy energy drinks is therefore regarded as not being effective or proportionate in order to reduce the consumption of caffeine*”.
- 19 Therefore, the proposed measures do not only lack scientific evidence for pursuing a legitimate aim, but also inappropriate for achieving the legitimate aim.
- c. More suitable measures have already been implemented and alternatives are possible*
- 20 As a fundamental principle of trade law, for a restriction to be justified and not infringing the freedom of movement for goods (in addition to it being proportionate and appropriate for achieving a legitimate aim) the least restrictive measure must be implemented. This is not the case in respect of the Hungarian notification. There are numerous less restrictive and more effective measures that could be adopted and that have been adopted both at EU level and by other Member States.
- 21 For example, Annex III, Regulation (EU) 1169/2011 requires foods with a caffeine content higher than 150mg/L (with the exemption of beverages based on coffee, tea or coffee or tea extract where the terms “tea” or “coffee” are part of the name of the food) to display the advisory statement “*High caffeine content. Not recommended for children or pregnant or breastfeeding women*”. In addition, the amount of caffeine in mg per 100 ml must be included on the label, providing all consumers with caffeine content information. This unified legal rule has been adopted by the positive vote of all Member States including Hungary and has been since its implementation date EU wide implemented in a solid and efficient manner.
- 22 This labelling requirement pursues a similar legitimate aim, namely, to raise awareness on caffeine intake. However, it is more effective than a sales ban, as it is not arbitrarily singling out a certain product category. With regards to effect, information to consumers on various characteristics of the foodstuff, including in particular an increased caffeine content, is a key element of Regulation (EU) 1169/2011. Labelling requirements fulfil the principle of informing consumers about the composition of foodstuffs, and empowering them to make an informed decision and were hence in particular recognized as being a less invasive yet equally effective measure to regulate the marketing of certain products for which public health concerns were raised.<sup>24</sup>
- 23 Alternatively, a less restrictive approach would be to formalise an evidenced based product definition for energy drinks in domestic law – arrived at following a clear food regulatory process – to ensure that all energy drinks on the Hungarian market are standardised and meet minimum product and ingredient standards. This approach has been adopted in other member states, for example the German Bundestag rejected calls for age bans for energy drinks, preferring instead to legislate for ingredient reference values that all energy drink manufacturers must comply with in order to be placed on the market.<sup>25</sup>
- 24 In addition to the existing regulatory framework, there are long-standing commitments on marketing and sales practices by relevant manufacturers on a European and national level. The members of Energy Drinks Europe (EDE), the European association for energy drinks producers have complied with stringent commitments in the Code of Practice for the Labelling and Marketing of Energy Drinks since 2014,<sup>26</sup> including voluntarily adding “consume moderately” on the labels of energy drinks, a commitment not to market to children, and inter alia, the commitment to position products with a net content of 250ml as the main selling proposition for individual consumption. As early as 2010, the

<sup>23</sup> *Livsmedelverket report*, ‘Risk management measures to keep down the consumption of energy drinks / caffeine among children and adolescents’, December 2018, D no. 2018/00523.

<sup>24</sup> ECJ 5.2.2004, C-24/00, Commission vs. France, ECJ 19.6.2003, C-420/01 Commission vs. Italy.

<sup>25</sup> Bundestag document no. (BT-Drs.) 18/9251, p. 1, 2016; this position was confirmed by the German Food Ministry in 2018.

<sup>26</sup> [EDE Code of Practice](#)



members of the association of European Soft Drink Manufacturers (UNESDA) committed, among other things, not to market energy drinks in or in the immediate vicinity of schools.

- 25 Specifically with regards to concerns about excessive consumption, UNESDA members have also voluntarily committed to include on their labels an advisory statement “*Consume Moderately*” or a similar wording.<sup>27</sup> In addition to numerous national beverage associations, UNESDA members also include large energy drink companies. Building on the existing commitments, it should be noted that industry-self-commitments or co-regulation as well constitute alternative and less-restrictive measures, that equally pursue the legitimate aims of protecting public health.
- 26 The Hungarian government has not, to date, had a discussion with relevant industry on the communication, improvement, enforcement, or codification of common standards of practice for industry, be that on marketing, location restrictions (such as commercial activity in schools or places where children are present), or on product information and education. Such alternative approaches have been validated at EU level, as seen by DG SANTE’s 2021 EU Code of Conduct for Responsible Food Business and Marketing Practices under the EU Farm to Fork Strategy.<sup>28</sup>
- 27 Other mitigating measures would include education campaigns focusing on all sources of caffeine intake, in particular those that primarily contribute to caffeine intake in order to increase awareness and contribute to the protection of public health. In addition, the control of portion sizes is also a suitable measure to achieve the legitimate goal, as smaller portion sizes of energy drinks (250ml) can contribute to a moderate consumption of caffeine. Notably, portion control has been identified as one of the most effective solutions for moderate consumption by various stakeholders, including the European Commission and the OECD <sup>29</sup>. It is also a recommendation of industry associations, such as UNESDA in respect to overall caloric reduction (UNESDA Sugar Reduction Commitments).<sup>30</sup>
- 28 Overall, there are more appropriate and less restrictive measures available that have already been implemented and could be adopted to address the claimed concern. Even in the case of the wrongful assessment of the sales ban to have a legitimate aim and be appropriate, it would still be not justified as there are less restrictive measures that could be implemented instead.

*d. Lack of proportionality*

- 29 Notwithstanding the above, with the internal market and the freedom of movement for goods being a core element of the European Union, even restrictions that pursue a legitimate aim, are appropriate for pursuing said aim and are the least invasive measure must still be proportionate to the aim, in line with the prohibition of excessive measures.<sup>31</sup>
- 30 In this respect, fundamental freedoms should be protected, i.e. even legitimate regulations may only justify a restriction of the fundamental freedoms if such a restriction is proportional. For them to be justified, restrictions cannot be based on generic criteria, but rather a specific risk analysis with regards to the specific characteristics of the products and the risks and concerns associated therewith have to be conducted.<sup>32</sup> To be proportionate, the evidence used in this assessment should be of high quality, be properly designed, and all relevant publications should be included – including those from reputable European Risk assessment agencies. The quality and breadth of evidence matters, and without this being done a proportionate manner Article 36 is destined to become a problematic avenue for trade restrictions within the common market.
- 31 As a general remark, labelling requirements are considered sufficient in order to avoid consumer confusion, following which regulations on the composition of certain products are not proportionate in most cases. <sup>33</sup>

<sup>27</sup> [UNESDA Code for the Labelling and Marketing of Energy Drinks](#)

<sup>28</sup> [https://food.ec.europa.eu/document/download/08709964-ef08-4332-a899-a456bdf0bff5\\_en?filename=f2f\\_sfpd\\_coc\\_final\\_en.pdf](https://food.ec.europa.eu/document/download/08709964-ef08-4332-a899-a456bdf0bff5_en?filename=f2f_sfpd_coc_final_en.pdf)

<sup>29</sup> *European Commission*, 2014, EU Action Plan on Childhood Obesity 2014-2020), *OECD*, 2019, The Heavy Burden of Obesity: The Economics of Prevention, OECD Health Policy Studies, Paris, further also: *McKinsey Global Institute*, 2014, Overcoming obesity: An initial economic analysis), *World Health Organisation*, 2020, Improving dietary intake and achieving food product improvement. Policy opportunities and challenges for the WHO European Region in reducing salt and sugar in the diet)

<sup>30</sup> [UNESDA Soft Drinks Europe Commitment to reduce average added sugars in its beverages by another 10% across Europe](#)

<sup>31</sup> i.a. ECJ 15.12.1976, C-35/76 *Simmenthal*, ECJ 16.4.1991, C-347/89 *Eurim Exit GmbH*

<sup>32</sup> ECJ 9.6.2005, C-2111/03 *Orthic BV*, ECJ 23.9.2003, C-192/01, *Commission vs Denmark*

<sup>33</sup> *Borhardt*, Die rechtlichen Grundlagen der Europäischen Union<sup>6</sup>, para. 953.

- 32 Specifically with regards to the Hungarian notification, industry is concerned with the assertion the mentioned comparison of energy drinks and soft drinks, coming to the wrong conclusion that energy drinks might affect the health differently to soft drinks<sup>34</sup>
- 33 This claim is scientifically wrong and contrary to the conclusions of EFSA where the interactions between caffeine and other typical energy drink ingredients have been specifically addressed. In its scientific opinion on caffeine safety, EFSA specifically concluded that caffeine from all sources in combination with other typical constituents of energy drinks is safe.<sup>35</sup> Hence, as EFSA concludes that there is no scientific difference between different sources of caffeine, then any differentiation between different product categories containing caffeine is inappropriate. Further the scientific opinion also clearly shows that restrictions to the product category as proposed by Hungary are per se not proportionate. Given EFSA's status as the pre-eminent food risk assessor in Europe, and one of the most respected risk assessors globally, it is bizarre that EFSA's conclusions in its scientific opinion on caffeine are not referenced by Hungary in the notification.
- 34 Therefore, even if the notification is wrongfully considered to be justified up to this point, it would still not be justified as it is excessive and hence not proportionate, thus infringing the freedom of movement for goods.

### **Conclusion**

- 35 As a result, the intended sales restrictions in the draft act are discriminatory and arbitrary and therefore constitute a barrier to the trade and the free movement of goods within the internal market according to Art 34 to 36 TFEU.
- 36 Accordingly, we urge the European Commission when examining the draft act in the notification to issue a detailed opinion to the effect that the restrictions may infringe the free movement of goods, specifically energy drinks, within the internal market.

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<sup>34</sup> Hungary, Notification 2024/0396/HU

<sup>35</sup> EFSA Panel on Dietetic Products, Nutrition and Allergies, Scientific Opinion on the safety of caffeine, EFSA Journal 2015; 13(5):4102, pp. 120ff.