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Subject: Notification 2024/521/FI

Government proposal to Parliament for an Act amending the Alcohol Act

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Madam,

Within the framework of the notification procedures laid down under Directive (EU) 2015/1535 ⁽¹⁾, the Finnish authorities notified to the Commission on 18 September 2024 a draft '**Government proposal to Parliament for an Act amending the Alcohol Act**', under the reference 2024/521/FI (hereafter, the 'notified draft').

According to the notification message, the draft aims at amending the Alcohol Act to allow the alcohol company Alko Oy and domestically licensed retailers to sell alcoholic beverages online and to enable the delivery of alcoholic beverages from their facilities to customers or other recipients. As a result, alcoholic beverages could also be supplied to the purchaser from the retail outlet of farm wines and craft beers producers insofar as the alcoholic beverages comply with the strength limits applicable to other retail stores (i.e. 8.0 %). According to the notified draft, the amendments would be implemented while ensuring age control. The Act would enter into force on 1 January 2025.

¹) Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

The examination of the notified draft has prompted the Commission to issue the following detailed opinion.

Section 3 of the Alcohol Act includes the definition of “retail sale of an alcoholic beverage”, which is being amended by the notified draft to include under this definition cases where *“the alcoholic beverage is supplied directly from a domestic retail outlet or the government-owned alcohol company Alko to the buyer of the alcoholic beverage, the holder of the delivery licence or the alcoholic beverage delivery driver carrying out the delivery arranged by the holder of the delivery licence, for delivery to the buyer or another recipient”*.

Section 5 of the notified draft explicitly provides that *beverages shall not be produced, sold or delivered from domestic retail trade or the government-owned alcohol company Alko without a licence*.

Section 17 of the notified draft provides inter alia, that *(t)he retail licence for farm wine and craft beer applies to retail sale inside one retail establishment or the supply of alcoholic beverages for delivery from the retail outlet pick-up points specified in the licence and is granted to the producers of said alcoholic beverages in a production location where fermentation takes place or in its immediate vicinity, in a building referred to in the Land Use and Building Act. Alcoholic beverages referred to in subsection 1 may also be sold at the retail outlet*.

Section 17a of the notified draft lays down the conditions under which a **licence for delivery** of alcoholic beverages is granted. It further states that the licensing authority may impose further conditions and restrictions on the licence.

According to the Section 35 of the notified draft, *“(T)he retailer must be able to retrospectively verify the name and licence number of the delivery licence holder carrying out the delivery of the alcoholic beverage”*.

Regarding the case of online purchases, it is stated in Section 35 that *“the licensed retailer and Alko shall ensure, by means of strong electronic identification, that the buyer is not under the age of 18, or, in the case of online purchases of spirits, under the age of 20”* (underlining added).

Section 35a of the notified draft lays down the rules on the delivery of alcoholic beverages. Namely it provides that *“(t)he delivery of alcoholic beverages under a delivery licence shall only be permitted if the alcoholic beverage has been purchased and picked up from a domestic retail store or the government-owned alcohol company Alko. An alcoholic beverage delivery driver may only supply to a buyer or other recipient such alcoholic beverages supplied for delivery that the retail licence holder and Alko have the right to sell under their retail licence or the law.”* Section 35 a further specifies that the age of the recipient would be verified *“at the point of delivery”* of the alcoholic beverage. Further, the information of the verification would be stored in the licence holder’s register for 2 years. It follows from this that it is the delivery licensed person/company who would perform the verification of the buyer of the alcoholic beverage, not the licensed retailer. The delivery persons would, according to Section 57 as amended by the notified draft, need a “delivery passport” demonstrating knowledge of the regulations on delivery of alcoholic beverages in the Alcohol Act and the Guidance of Delivery. Section 58 describes further how such a passport is obtained.

Section 40 further specifies that “*The purchaser of the delivery of an alcoholic beverage is obliged to prove his age before purchasing the alcoholic beverage. If the alcoholic beverage is purchased remotely, the purchaser of the alcoholic beverage is obliged to prove his age by means of strong electronic identification. In addition, the recipient of the delivery of the alcoholic beverage shall be required to prove, by means of a document referred to in subsection 1, their age to the person delivering the alcoholic beverage*” (underlining added).

Article 34 TFEU

The Commission notes that the delivery regime for alcoholic beverages purchased online covered by the delivery licenses at stake is not covered by harmonized EU rules and should therefore be assessed against articles 34-36 of the Treaty of the Functioning of the European Union (TFEU) on the free movement of goods.

Article 34 TFEU prohibits quantitative restrictions and all measures having equivalent effect between Member States.

In accordance with the settled case-law, the prohibition of measures having equivalent effect to quantitative restrictions on imports laid down in Article 34 TFEU covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Union trade. ⁽²⁾ Measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU cover measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favorably, measures that lay down requirements to be met by goods even if those measures apply to all products alike, and any other measure which hinders access of products originating in other Member States to the market of a Member State. ⁽³⁾

The CJEU has also ruled that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, as long as those provisions apply to all relevant traders operating within the national territory, and they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. ⁽⁴⁾ The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products. Accordingly, it is necessary to examine whether the national legislation at issue meets said two conditions, in other words, whether it applies to all relevant traders operating within the national territory and whether it affects in the same manner, in law and in fact, the selling of domestic products and the selling of those from other Member States.

The Commission has identified certain elements which raise concern regarding the notified draft's compliance with Article 34 of the TFEU. In particular, the Commission raises concerns as to whether the requirement to hold a delivery licence, as described in Section 5 of the notified draft read in line with Section 35 would also apply to delivery

² () Judgment of the Court of 11 July 1974, Dassonville, C-8/74, EU:C:1974:82, para. 5.

³ () Judgment of the Court of 10 February 2009, Commission/Italy, C-110/05, EU:C:2009:66, para. 37.

⁴ () Joined cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECLI:EU:C:1993:905, para. 16.

operators carrying alcoholic beverages on behalf of operators established in other Member States, which have been purchased online by a consumer residing in Finland. In this case, Finland would appear to be imposing a Finnish retail sales and delivery licensing requirements on all operators wishing to sell alcoholic beverages online to Finnish consumers, including those established in other Member States.

Such a rule would impose requirements on operators established in other Member States and would amount to a quantitative restriction on imports or a measure having equivalent effect, in breach of Article 34 TFEU as it may be capable of hindering, directly or indirectly, actually or potentially, trade between Member States. In fact, the Court confirmed in paragraph 108 of *Visnapuu* judgment that “*legislation of a Member State, such as that at issue in the main proceedings, under which a seller established in another Member State **must hold a retail sale licence** in order to import alcoholic beverages with a view to their retail sale to consumers residing in the first Member State, where that seller, or someone acting on his behalf, transports those beverages, **constitutes a measure having equivalent effect to a quantitative restriction on imports** within the meaning of Article 34 TFEU.*” (bold added) ⁽⁵⁾.

Article 36 TFEU

National measures constituting measures of equivalent effect to a quantitative restriction can be justified on one of the grounds of public interest laid down in Article 36 TFEU or by mandatory requirements recognized by the Court. In either case, the restriction must be appropriate for securing the attainment of the objectives pursued and must not go beyond what is necessary in order to attain it. ⁽⁶⁾ The burden of proof in justifying such measures lies with the Member State concerned. ⁽⁷⁾ Article 36 TFEU constitutes an exception to the fundamental rule of the free movement of goods within the European Union and must be strictly interpreted. ⁽⁸⁾

The Court established in *Visnapuu* that the derogation from Alko’s monopoly which was subject to evaluation in that case “*could have the effect of protecting the national production [...]. The existence of such an effect does not however suffice to establish that the health and public policy grounds on which the Finnish authorities rely have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or indirectly to protect certain national products, for the purpose of Article 36 TFEU*” (underlining added). The Court further added that “*it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion*”.⁽⁹⁾ The Court further established, that “*(I)it is for the referring court to examine, on the basis of all the relevant legal and factual circumstances, in particular the limited, traditional and artisanal nature of the national production enjoying the benefit of that derogation invoked by the Finnish Government in its observations submitted to the Court, whether the health and public policy grounds relied on by the*

⁵ () Judgment of the Court of 12 November 2015, *Visnapuu*, C-198/14, ECLI:EU:C:2015:751 para 97.

⁶ () Judgments in cases C-150/11 *Commission vs. Belgium*, para. 53 and C-198/14, *Visnapuu*, para 110.

⁷() Judgment in case C-286/07, *Commission vs. Luxembourg*, para. 37.

⁸() Judgment of 10.01.1985, *Leclerc v Au blé vert*, C-229/83, EU:C:1985:1, § 30. Judgment of 11.09.2008, *Commission v Germany*, C-141/07, EU:C:2008:492, paragraph 50. Judgment of 9.12.2010, *Humanplasma*, C-421/09, EU:C:2010:760, paragraph 38

⁹ () Judgment of the Court of 12 November 2015, *Visnapuu*, C-198/14, ECLI:EU:C:2015:751 para 118.

Finnish authorities have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or indirectly to protect certain national products, for the purpose of Article 36 TFEU.” ⁽¹⁰⁾

Thus, in the case before the Court, the licensing scheme was not deemed to be *per se* incompatible with EU-law. In fact, the Finnish Supreme Court later ruled that the measure was justified in light of Article 36 TFEU as the derogation was applied on a very **small scale** and the sales were **tied to the place of production**. ⁽¹¹⁾

However, as rightly indicated by the Finnish authorities themselves on p. 13 of the notified draft, the extension of the derogation from Alko’s monopoly to allow farm wines and craft beers to be delivered from the retail outlet to the buyer/recipient as provided by Section 17 of the notified draft means that the reasoning of the Court and especially the justification by the Finnish Supreme Court on the grounds that the sales are tied to the place of production, could no longer be applied in case it were adopted. Online sales and direct delivery to consumers would mean that the sales would no longer be tied to the place of production. This further risks increasing the scale of the application of the derogation in Finland, while enforcing delivery restrictions on beverages sold online and transported from other Member States (without legal ground), potentially falling outside what can be justified by Article 36 TFEU under the objective of safeguarding of health and life of humans, by reducing the amount of alcohol consumed.

Distance sales from other Member States

As mentioned already above, the main concern for the Commission is the discriminatory effect the licensing regime would have on operators established in other Member States wishing to provide alcoholic beverages for consumers in Finland. The Commission has already highlighted that the ambiguity surrounding the legality of cross-border distance sales under Finnish law as well as the dubious applicability of the licensing requirements set out in the notified draft to cross-border distance sales and delivery of alcoholic beverages to Finnish consumers by operators established in other Member States would constitute, in itself, a violation of Article 34-36 TFEU.

The persistence of legal uncertainty over these aspects is confirmed on page 13 of the notified draft, where it is indicated that in Finland, ***“the legal position is unclear as to whether foreign operators have the right to sell alcoholic beverages to Finland or not.”*** On one hand it is pointed out in Section 32 of the Alcohol Act as currently in force, that ***“alcoholic beverages may be imported without a separate import licence for personal use and for commercial or other business purposes. However, for commercial or other business operations involving alcoholic beverages containing more than 2.8 % by volume of ethyl alcohol, the user needs a licence specified in this Act for their operations and the imported alcoholic beverage.”***

On the other hand, on p. 14, it is indicated that ***“(T)he Government Programme of Prime Minister Petteri Orpo includes an entry on distance selling. According to the Government Programme, the prevailing unclear interpretation will be clarified unambiguously so that Finns have the right to buy alcohol through distance selling from companies operating in other EU countries. Provisions on the clarification of distance selling from abroad will be laid down in a separate government proposal.”***

¹⁰ () Judgment of the Court of 12 November 2015, Visnapuu, C-198/14, ECLI:EU:C:2015:751 para 97.

¹¹ () ECLI:FI:KKO:2018:49 of 28.6.2018 available at [KKO:2018:49 - HD-prejudikat - FINLEX ®](#)

The Commission notes the reply of the Finnish authorities to the request for supplementary information concerning Notification 2024/387/FI, concerning a prior version of the notified draft, which seems to suggest that the requirement to hold a delivery licence, as described and regulated in the notified draft, does not apply to delivery of alcoholic beverages from operators established in other Member States, which have been purchased online by consumers residing in Finland. In order to guarantee legal certainty and transparency for sellers and delivery services, this should be clearly indicated in the notified draft.

With respect to the applicable EU legislation, the Court has clarified in *Ker-Optika* (para. 44) that a national measure concerning an arrangement characterised by the sale of goods via the Internet and the delivery of those goods to the customer's home is to be examined only with regard to the rules relating to the free movement of goods and, consequently, with regard to Articles 34 TFEU and 36 TFEU. In the case at hand, it is undisputed that a prohibition to distance sell alcoholic beverages cross border would deprive traders from other Member States of a particularly effective means of selling those products and thus significantly impede access to those traders to the Finnish market. With regard to the current uncertainty which prevails in Finland in this regard, the notified draft puts into question the proportionality of the overall licensing scheme, especially the proposed delivery license, which would appear to be disproportionate, incoherent and potentially discriminatory, insofar as it would channel demand towards said local products. In fact, clarifying the legal situation with respect to domestic distance sales, while leaving cross-border distance sales into a legal grey area, albeit referring to clarification in an upcoming proposal, would appear to place, at least temporarily, domestic products (and even producers with respect to farm wines and craft beers) in an advantageous position compared to foreign ones and to channel demand towards them. Therefore, postponing the clarification of the legal status of distance selling from abroad while setting out a clear regime for online sales and deliveries by domestic retailers would appear to be unjustified and potentially discriminatory.

In essence, the notified draft would, indeed, add to the legal uncertainty surrounding the question of distance selling from operators established in other Member States while clearly allowing domestic economic operators to sell alcoholic beverages with home delivery. Insofar as domestic retailers (including farm wines and craft beer producers within the meaning of Section 3 of the Alcohol Act) would be allowed to distance sell and deliver their products to domestic consumers, the notified draft would appear to be in breach of Articles 34 and 36 TFEU.

For the above-mentioned reasons, the Commission delivers a detailed opinion provided for in Article 6(2) of Directive (EU) 2015/1535 to the effect that the Alcohol Act as amended by the notified draft would not be compatible were it to be adopted without giving due consideration to the above observations.

The Commission reminds the Finnish authorities that under the terms of Article 6(2) of Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State, which has drawn up the draft technical regulation concerned to postpone its adoption for six months from the date of its notification. This deadline therefore comes to an end on 19 March 2025.

The Commission further draws the attention of the Finnish Authorities to the fact that, under this provision, the Member State, which is the addressee of a detailed opinion, is

obliged to inform the Commission of the action which it intends to take as a result of the opinion.

The Commission furthermore recalls that once the definitive text has been adopted, it must be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

Should the Finnish authorities not comply with the obligations foreseen in Directive (EU) 2015/1535 or should the text of the draft technical regulation under consideration be adopted without account being taken of the abovementioned objections or be otherwise in breach of European Union law, the Commission may commence proceedings pursuant to Article 258 of the Treaty on the Functioning of the European Union.

Yours faithfully,

For the Commission

Stéphane Séjourné
Executive Vice-President