



EUROPEAN COMMISSION

Brussels 22.6.2023
C(2023) 4340 final

Mr Szijjártó Péter
Minister for Foreign Affairs
and Trade
Ministry of Foreign Affairs
and Trade
Bem rakpart 47.
HU - 1027 Budapest

Subject: Notification 2023/125/HU

Draft Government Decree laying down detailed rules on the establishment and application of deposit fees and the marketing of products with a deposit fee

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

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535 ⁽¹⁾, the Hungarian authorities notified to the Commission on 22 March 2023 the draft ‘Government Decree laying down detailed rules on the establishment and application of deposit fees and the marketing of products with a deposit fee’ under the reference 2023/125/HU.

The draft is aimed at proposing measures concerning all “*products with a deposit fee which are placed on the domestic market*” (Article 1 of the draft). In this respect, Article 2(8) of the draft specifies that “*products with a deposit fee include products with a mandatory deposit fee and products with a voluntary deposit fee*”. In particular, Article 2(5) provides that products with a mandatory deposit fee “*include the packaging of any beverage product ready-for-consumption or a concentrate, with the exception of milk and milk-based beverage products, where the packaging contains plastics, metals or glass and comes in the form of bottles or cans, either reusable or non-reusable, of a capacity*”

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.

of 0 to 6 litres, excluding the packaging of beverage products marketed by small emitters”.

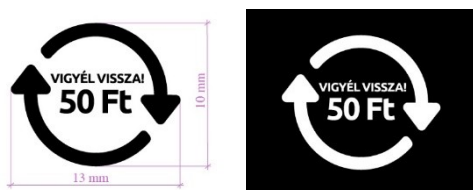
Examination of the notified draft has prompted the Commission to issue the following detailed opinion.

Section 7 (1) and (2) of the draft provides that:

“(1) The producer shall ensure that the marking in accordance with Annex 1 is clearly visible, permanent and legible on the product which is subject to a mandatory deposit fee.

(2) A product with a mandatory deposit fee may **only be marketed with the markings specified in paragraph 1.** [...]”.

Annex 1 to the draft (“Marking of a product with a mandatory deposit fee”) provides the details of the marking that “shall be affixed to the product or its label”, which shall include “The Hungarian GTIN number and bar code of the product, which cannot be the same as the ones of a product placed on the market before 1 January 2024” and the picture provided in the same Annex 1:



Based on the above, it can be concluded that all products placed in Hungary (domestic and foreign) subject to a mandatory deposit fee (which include, according to Section 2(5) “packaging of any beverage product ready-for-consumption or a concentrate, with the exception of milk and milk-based beverage products, where the packaging contains plastics, metals or glass and comes in the form of bottles or cans, either reusable or non-reusable, of a capacity of 0 to 6 litres, excluding the packaging of beverage products marketed by small emitters”) shall bear a marking that need to comply with the requirements under Annex 1.

The national measures in question relate to a sector which is covered by provisions of secondary EU legislation, in particular Directive 94/62/EC on packaging and packaging waste (hereinafter ‘PPWD’). However, the Commission considers that labelling requirements of products for the purpose of informing consumers about the fact that such products are subject to a mandatory deposit fee do not fall within the matters for which the PPWD brought full harmonisation. The PPWD does not preclude, therefore, the application of Articles 34 to 36 TFEU to the draft measure.

Article 34 TFEU, as interpreted by the Court, prohibits any measures that is likely to form an obstacle to intra-European Union trade, directly or indirectly, actually or potentially. National rules that lay down requirements (such as those relating to presentation, labelling, packaging) to be met by goods coming from other Member States

where they are lawfully manufactured and marketed, represent obstacles to free movement of goods and constitute measures of equivalent effect prohibited by Article 34 TFEU ⁽²⁾. In accordance with constant case-law of the Court, national-specific labelling requirements might have an effect equivalent to a quantitative restriction prohibited under Article 34 TFEU, where these requirements impact or are potentially liable to impact intra-EU trade by not only adding extra costs but also complicating marketing and distribution ⁽³⁾.

The draft measure, by imposing a specific label on all products placed in Hungary (domestic and foreign) subject to a mandatory deposit fee would require the organisation of specific production and compliance procedures in order to adapt products to be placed on the Hungarian market. In fact, products which can be marketed in other EU Member States could not be placed on the Hungarian market without modifications, as products imported from other Member States would need to be specifically adapted to bear the elements required by the draft measure.

In other terms, to enter the Hungarian market foreign economic operators would be required either to prepare Hungarian-specific production/packaging variants, or to increase packaging size to accommodate different Member States' requirements, facing related increased costs, delaying production and potentially affecting both business' models and economies of scale.

These requirements are likely to result, therefore, in an additional and significant economic and regulatory burden for economic operators, notably affecting SMEs from other Member States wanting to access the Hungarian market, seriously affecting cross-border sales. It should be underlined that, according to the Court, *“the mere fact that an importer is deterred from introducing or marketing the products in question in the Member State concerned amounts to a hindrance to the free movement of goods”* ⁽⁴⁾ and *“measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and/or marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as ‘measures having equivalent effect to quantitative restrictions on imports’ for the purposes of Article 34 TFEU”* ⁽⁵⁾.

In light of the above, it can be considered that the imposition to affix specific elements, on-pack can be considered to hinder the free movements of goods, resulting in a violation of Article 34 TFEU.

Even if a measure is considered as contrary to Article 34 TFEU, it may still be justified under Article 36 TFEU or based on one of the overriding requirements in the public interest recognized by the Court. In this respect, national legislation which is capable of restricting a fundamental freedom guaranteed by the Treaty, such as the freedom of

²⁾ See judgment of 11 July 1974 in case 8/74, *Dassonville*, EU:C:1974:82.

³⁾ Judgment of December 14, 2004, *Commission of the European Communities v Federal Republic of Germany*, C-463/01, EU:C:2004:797 and judgement of October 14, 2004, *Commission v. Italy*, C-143/03, EU:C:2004:629.

⁴⁾ Judgment of 6 October 2011, *Philippe Bonnarde v Agence de Services et de Paiement*, Case C-443/10, EU:C:2011:641, para. 26.

⁵⁾ Judgment of 6 October 2011, *Philippe Bonnarde v Agence de Services et de Paiement*, Case C-443/10, para. 27.

movement of goods, can be properly justified only if it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it⁽⁶⁾. The Court also held that the burden of proof on this regard falls with the Member State imposing the restrictive measure. The reasons which may be invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments⁽⁷⁾.

According to the notification message, the purpose of the notified draft is to ensure “*the reuse of packaging, recycling or other recovery of packaging waste and preventing and reducing the impact of certain plastic products on the environment, in particular on the aquatic environment and on human health*”.

It can be first observed that the environmental considerations have been recognised by the Court as a ‘mandatory requirement’ that may, in principle, justify certain limitations to the free movement of goods. In this respect the Court observed that “*national measures capable of hindering intra-Community trade may be justified by the objective of protection of the environment provided that the measures in question are proportionate to the aim pursued*”⁽⁸⁾.

Even assuming that the measure could be considered fully suitable to attain the above-mentioned environmental objective, it would still be necessary to assess whether the measure does not go beyond what is necessary to attain the objective pursued (i.e., the same objective could not be attained by other less restrictive means). With respect to this aspect, the Court stated that “*measures adopted to protect the environment must not go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection*”⁽⁹⁾.

It should be noted that the notified draft does not provide a specific justification substantiating the proportionality of the imposition of the specific requirements provided in Annex 1 for the purpose of attesting that a product is covered by a mandatory deposit fee.

In this respect, it can also be observed that Hungary seems not to have considered the “*Communication from the Commission — Beverage packaging, deposit systems and free movement of goods*” (2009/C 107/01). In this Communication, in the part discussing the opportunity for using labelling to identify beverages or beverage packaging that is covered by a deposit and return system, it is observed that “*it is recommended not to make any requirement to label beverage packaging with a logo exclusive, but to allow the use of other logos that are in use in other Member States. This would allow producers to use the same label for several Member States. [...]*”.

For the reasons stated above, the Commission delivers a detailed opinion as provided for in Article 6(2) of Directive (EU) 2015/1535 to the effect that it considers Section 7 (1) and (2) and Annex 1 of the notified draft to be in breach of Articles 34 and 36 TFEU,

⁶⁾ See judgment of 19 October 2016, Case C 418/15, *Deutsche Parkinson Vereinigung*, EU:C:2016:776, para. 34; judgment of 9 December 2010, Case C-421/09, *Humanplasma*, EU:C:2010:760, para. 34 and judgment of 23 December 2015, Case C-333/14, *The Scotch Whisky Association and Others*, EU:C:2015:845, para. 33.

⁷⁾ See Case C-418/15, *Deutsche Parkinson Vereinigung*, para. 35; see also Case C-333/14, *The Scotch Whisky Association and Others*, para. 54.

⁸⁾ Judgment of 4 June 2009, Case C-142/05 *Mickelsson and Roos*, EU:C:2009:336, para. 32

⁹⁾ Judgment of 20 September 1988, Case C-302/86 *Commission v Denmark*, EU:C:1988:421, para.11.

were it to be adopted without giving due consideration to the above remarks, as they may create obstacles to the internal market.

The Commission would remind the Hungarian authorities that under the terms of Article 6(2) of Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State that has drawn up the draft technical regulation concerned, to postpone its adoption for six months from the date of its notification.

This standstill period therefore comes to an end on 25 September 2023.

The Commission further draws the attention of the Hungarian authorities to the fact that under the above-mentioned provision the Member State that is the addressee of a detailed opinion is obliged to inform the Commission of the action that it intends to take as a result of the opinion.

The Commission furthermore invites the Hungarian authorities to communicate to it on adoption the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

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



For the Commission

Thierry Breton
Member of the Commission