

To the European Commission
30 July 2021

COMMENTS RE NOTIFICATION 2021/262/A: AUSTRIA – AMENDMENTS UPDATING THE WASTE MANAGEMENT ACT 2002

We are writing to you regarding the draft legislative amendment transposing requirements from Directive (EU) 2019/904 into national Austrian law, specifically updating the Waste Management Act 2002 (AWG-Novelle-Kreislaufwirtschaftsgesetz).

The following comments concern Art 14b of the draft according to which food retailers are obligated to offer for sale certain quota of beverages in reusable packaging. Starting from 1 January 2024, at least a) 60% of beer and beer mixed beverages, b) 20% of mineral water, table water and soda, c) 10% of fruit and vegetable juice and nectar, d) 10% of soft drinks (e.g. lemonade, aromatized water, ice tea, energy drinks) and e) 10% of milk must be offered in reusable packaging.

Lithuanian Business Confederation comments

Beverage industry in Lithuania is committed to accelerating the transition to a circular economy, as is the objective of the EU Circular Economy Action Plan. The sector is going well beyond EU law, on recyclability, collection, recycled content and reuse of our beverage packaging. For the past 5 years, we have effectively operation deposit system for beverage packaging with high collection and recycling rates. We are aware that refillable bottles are important contributor to reduce the environmental footprint of the beverage sector. However, the introduction of requirements need to be supported by solid environmental analysis and introduced at EU level. It is only in doing so that we can guarantee a well-functioning Single Market and a positive environmental impact.

It is Lithuanian Business Confederation's opinion that the Austrian draft legislative amendment, as currently notified under the TRIS procedure, constitutes a significant restriction of the free movement of goods within the European Union. The refillable quota is discriminatory, not suitable for the legitimate goal, excessive and as such disproportionate: It restricts the freedom of goods within the EU by forcing manufacturers to modify their traditional packaging. This restriction can also not be justified on grounds of environmental protection.

Restriction of free movement of goods

The freedom of goods prohibits measures capable of hindering, directly or indirectly, actually or potentially intra-community trade. This is inter alia the case if requirements for the presentation, labelling and packaging of goods force the manufacturers to change their packaging even if they apply without distinction to domestic and imported products according to settled case law (see i.a. ECJ Case C-470/93, Mars, par 13, C-3/99, Cidrerie Ruwet, par 46ff). National regulations on mandatory reusable packaging, in the absence of an EU legal framework, therefore, violate the free movement of goods.

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The European Commission has noted (see “Beverage packaging, deposit systems and free movement of goods” (2009/C 107/10)) that national beverage packaging systems may divide the internal market as manufacturers are required to adapt their packaging to different requirements, which leads to additional costs.

If a mandatory quota for reusable packaging has a significant effect on a product’s appearance, such as e.g. for products that hitherto have been offered mainly or solely in metal cans, it exerts a de facto prohibitive effect. This especially applies if the alternative packaging and/or packaging appearance leads to a lower consumer acceptance on the market.

Quota discriminates against foreign beverage manufacturers

Regulations on mandatory reusable packaging stronger affect foreign manufacturers than domestic manufacturers. This is because the costs for both the transportation as well as the organization of reusability systems increase with the distance between the manufacturer and the points of sale, because reusable containers are often much heavier than single-use containers. Thus, foreign manufacturers will have to produce at lower prices than domestic manufactures. This constitutes a significant barrier for competitive market access.

This obstacle is even bigger for foreign manufacturers that not only have to bear the additional financial and organizational burdens but also must adjust their packaging and product appearance to offer reusable packaging options. This is inter alia the case for foreign beverages manufacturers who offer their products exclusively in metal cans. Upon adoption of the quota they would have to not only consider to completely change their packaging but also set up a system for the organization and transport for reusable packaging, including the extensive costs for both the packaging change and the set-up of the organizational system.

Quota not suitable to achieve the pursued environmental goals

Lithuanian Business Confederation does not dispute the legitimacy of environmental protection as justification for restricting the EU fundamental freedoms. However, restrictive measures must be suitable to achieve the pursued goals. Reusable containers are only ecologically preferable to other types of packaging under specific circumstances (i.a. short transport routes, reaching certain circulation repetitions, etc.). So far, the government has not provided any proof that this is the case in Austria. Therefore, the mandatory reusable quota lacks efficiency and is therefore not suitable to achieve the environmental goal as desired.

Quota not justified because it is excessive and disproportionate

Even if the quota was suitable to achieve the pursued environmental goals, it still would not be justified because measures must not go beyond what is necessary for the legitimate purpose and must be overall proportional. National regulations on compulsory forms of packaging are considered an extreme form of interference with the free movement of goods and the European Court of Justice is thus critical towards such measures (see inter alia ECJ case C-3/99, Cidrerie Ruwet, par 45 ff; Case 16/83, Prantl, par 22 ff, Case 302/86, Commission/Denmark, par 17).

With respect to the proposed mandatory quota, there are numerous alternative measures equally (or even more) suitable to pursue the legitimate goal and that are at the same time less restrictive towards the freedom of goods, thus less interfering with the intra-community-trade. Examples are the promotion of reusable packaging or campaigns to control consumer behavior.

In short, the proposed mandatory quota for reusable packaging would be an unfair and discriminatory measure, creating significant administrative and operational burden for soft drinks producers currently importing products in single use containers to Austria, hurting local retailers and beverage producers, while not providing a measurable environmental advantage as required according to EU law.

About Lithuania Business Confederation

The Lithuanian Business Confederation is the largest business organization in Lithuania that represents businesses that employ over 200 thousand employees that together create over 20% of the Lithuanian GDP. The mission of the Confederation is to responsibly represent the interests of its members. The Lithuanian Business Confederation is also a national committee of the International Chamber of Commerce.

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Sincerely,

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Eglė Radišauskienė

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