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WEEKLY

Deposit systems create barriers to trade, says Commission

Although member states are entitled to introduce mandatory deposit systems for non-refillable beverage containers, the European Commission warns that such systems "create barriers to trade" not just in terms of imports, but also exports, re-import and parallel imports of beverages because they "make it impossible to sell the same packaging" in more than one country.

In its long awaited Communication on beverage packaging, deposit systems and free movement of goods, published on 9 May in the *Official Journal* (C107/1), the Commission notes, however, that deposit systems can be "justified on grounds relating to the protection of the environment."

"According to the Court of Justice, a deposit and return system may increase the proportion of empty packaging returned, and at the same time lead to a more targeted sorting of packaging waste. Moreover, it may help prevent littering, as it gives consumers an incentive to return empty packaging.

"Finally, insofar as those national provisions encourage the producers or distributors concerned to have recourse to reusable packaging, they contribute towards a general reduction in the amount of waste disposed of, which is a general goal in environmental policy," writes the Commission, which adds that member states are "allowed" to opt for a deposit system if they can prove the environmental necessity of it.

The steel packaging industry said it welcomed the news that the Commission confirmed, through its analysis of the existing case law, that return systems create barriers to trade because the same product cannot be sold in the same packaging in more than one member state.

Background

The Commission notes that the packaging and packaging waste directive (PPWD) "does not establish a clear hierarchy between the reuse of packaging [refillable] and the recovery [one-way] of packaging waste," and that the PPWD does not have to conform to the hierarchy of the recently revised waste framework directive (WFD) because it is *lex specialis*. Therefore, says the Commission, "in the case of beverage packaging, the choice to be made between reuse and recovery is influenced by whether the containers are refillable or non-refillable."

Joris Nachtergaele from the Association of European producers of Steel for Packaging, APEAL, told **EE&PL** on 12 May that the Commission's "re-confirmation of the "*lex specialis*" status" of the PPWD was a welcome clarification. "The fact that the PPWD takes precedence over the WFD is very important for the steel packaging industry in the light of the revision of the directive in a few years," he said.

As Nachtergaele explained, during the revision, the debate will come up on the coherence between the two directives - the Commission is already carrying out a coherence project on this issue (see **EE & PL**, April 17, 2009, p.6) - and the fact that in the WFD the reuse of packaging is prioritised over recycling is a concern to APEAL.

"In our case, in some circumstances it is better to recycle, which is why we want to stick to the PPWD," he said explaining that because of its double legal base (environment and internal market), the PPWD could not be overruled by the WFD.

"This is an important statement for us," he said.

Deposit systems for refillables tend to be operated on a voluntary basis by the fillers concerned to ensure a good return rate. Therefore, from an internal market perspective, voluntary systems are "unlikely to create any barriers to trade," states the Commission, noting, however, that refillable schemes are mostly used by domestic fillers.

In terms of one-way beverage packaging, the Commission notes that "the global collection system continues to dominate" but that some member states have introduced mandatory deposit systems. The Commission accepts this as long as the system is open to all and non-discriminatory but notes that such a system usually works against imports.

"Producers and distributors may have to alter the packaging or the labelling of the imported products and have to bear additional costs connected with the organisation of the take-back system, the refunding of sums paid by way of deposit and any balancing of those sums between distributors. In these cases, even if such systems do not actually prohibit imports of drinks in non-reusable packaging, they do require substantial modifications and investment and thereby hamper the access of imported beverages to the market."

Commission advice

Since introducing a mandatory deposit system would require "good and thorough preparation by all key players involved," the text calls member states, who are considering introducing such a system to give producers and distributors "a period of at least one year" to adapt to the requirements.

The Commission also warns against imposing exclusive national logos and country-specific EAN codes as both risk being "an impediment to cross-border trade."

Exemptions for small businesses should be assessed carefully to ensure they do not affect the overall functioning of the deposit system and lead to discriminatory application while any deposit system introduced in a given country must cover the whole territory even if several system operators co-exist. In that case, states the Commission, member states must ensure that the systems are compatible with each other and not exclusive.

Joris Nachtergaele welcomed the new one year transitional period requirement introduced by the Commission and said the steel packaging industry also approved of the proportionality principle whereby member states are still free to establish a deposit system as long as all requirements are met (non-discrimination, no distortion of competition, environmental protection, countrywide system, open to all economic actors).

Above all, however, Nachtergaele said he was satisfied with the Commission's confirmation that "mandatory deposit and return systems create barriers to trade" which substantiates APEAL's opinion. As he explained, independent research has shown that deposit systems, when added to existing holistic collection systems are often counter-productive from an environmental point of view.

"In particular, deposit systems have been shown to endanger well performing, existing kerbside collection systems which exist in most EU member states,"he said. "In addition, they lead to increased prices for the consumer and are an ineffective tool in fighting litter as beverage packaging only constitutes 0.45 per cent of all litter. By contrast, countries using well-established kerbside collection systems consistently score the highest when it comes to packaging recycling rates and achieve this at a significantly lower cost."

No new measures

However, the communication will not lead to new legislation. An official from DG Enterprise told **EE&PL** that this was not a forward looking document and the Commission would not come up with a new legislative proposal as a result.

He said "this Communication represents the legal state of play. It's a legal evaluation and a legal assessment. It's simply a guidance for member states and stakeholders and will not lead to any new regulatory measures. There will be no next step."

For more information: To read the Communication, go to:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:107:0001:0009:EN:PDF>