

December 2012



THE TRIS PRIOR NOTIFICATION SYSTEM

National legislation regarding packaging, unlike WEEE, is subject to the TRIS prior notification system, under which member states must send Brussels the drafts of measures (other than fiscal measures) which they intend to adopt within the framework of the Packaging and Packaging Waste Directive.

This gives the Commission and the other member states a chance to challenge proposed measures which *prima facie* contravene EU free movement rules, and stop them coming into force.

The Commission and the other member states may issue “comments” which the member state making the notification might wish to take into account before finalising its measure, or a “detailed opinion” which triggers an additional three-month standstill to give the member state time to discuss the apparent contravention and either agree a compromise or abandon the proposal.

Once legislation is in place, the Commission still has the right to challenge it at any time, but infringement proceedings are slow and much damage may be done before the situation is rectified. For example,

- **Denmark:** The ban on cans for carbonated soft drinks (1977) and beer (1981) was not repealed until 2002 – 25 years after its implementation in the case of soft drinks and 21 years in the case of beer, and 8 years after infringement proceedings were begun.
- **Finland:** The Commission opened infringement proceedings in 2002, on the ground that Finland’s 1997 legislation allowed its packaging return, collection and recovery system to discriminate against foreign producers. The Commission also complained that membership of the board of the only deposit system for refillable containers operating nationwide was reserved for Finnish companies. The case was referred to the European Court of Justice in July 2003, but was withdrawn in November 2004 when Finland amended its legislation.
- **Germany:** The 1992 Packaging Ordinance set market share quotas for refillable beverage containers, with mandatory deposits for any drinks category that did not meet the quotas. The Commission challenged the applicability of this requirement to containers of mineral waters, as under EU rules,

mineral waters must be filled at source. The Commission argued that this was an unfair burden for waters transported over long distances, and the environmental cost of transport was not fully taken into account. It opened infringement proceedings in 1998, but it was not until 2003 that an amendment came into effect which repealed the market share quotas for refillables of all beverage categories affected, and replaced them with mandatory deposits on 'ecologically unsound' packaging.

- **Italy:** A tax on polythene took effect in 1994. The revenue was used to fund recycling, and research end-use markets. The Commission argued that using the revenue to develop recycling in Italy distorted the market in favour of Italian companies, and that foreign companies paid more because they mainly paid on the value of PE products, Italian producers paid on the raw material. The tax was repealed after three years, in 1997.
- **Netherlands:** Although the Commission issued a detailed opinion challenging the restrictions on beverage containers in Packaging Covenant III – producers of new pack/product combinations must not replace refillables by non-refillables unless they can demonstrate that the new pack will not have increased environmental impact – the Covenant was duly signed and came into effect in December 2003. The Commission opened infringement proceedings, and the Dutch authorities decided to allow large non-refillable PET bottles onto the market from 2006, albeit with a mandatory deposit system and new producer responsibility requirements.
- **Spain:** In 1999, a law in the Canary Islands banned the sale of canned beverage in catering outlets. The Commission objected to Spain's failure to notify measure before adoption, and other complainants challenged this ban on the ground that it infringed the free access provisions for all packaging that meets the Essential Requirements. The ban was repealed after 22 months.

The Single Market provision in the PPWD that requires Member States to give prior notification of proposed laws has proved to be a much more effective way to prevent discriminatory measures being implemented in the first place and has enabled the Commission to avoid having to spend costs and time requiring Member States to remove laws. The following tables show some examples of its successes.

**ISSUES WHERE THE NOTIFICATION PROCEDURE BROUGHT ABOUT CHANGES IN
NATIONAL PACKAGING POLICY IN FAVOUR OF FREE MOVEMENT OF GOODS**

COUNTRY	REF NO.	DETAILS OF LEGISLATION/ NATURE OF PROBLEM	LEGAL CHALLENGE	OUTCOME
Belgium	2002/280/B	<p>Requirements relating to eco-taxes for beverage containers:</p> <ul style="list-style-type: none"> Act amending eco-taxes. <p><i>The Commission challenged requirements to mark tax registration number on products (incl. Beverage containers) subject to the eco-tax, which could be a barrier to trade.</i></p>	<p>Notified in 07/02.</p> <p>Comments from Austria, Spain;</p> <p>Detailed opinion from Commission.</p>	Belgium amended its proposals before implementation.
Belgium	2002/494/B	<p>Requirements relating to eco-taxes for beverage containers:</p> <ul style="list-style-type: none"> Decree on marking of exempt containers <p><i>The Commission said the requirements could be a barrier to trade and considered it unnecessary to mark exempt containers.</i></p>	<p>Notified in 12/02.</p> <p>Comments from Finland, Germany, Italy, Sweden;</p> <p>Detailed opinion from Commission, Ireland, Netherlands, Portugal, Spain.</p>	Marking proposals abandoned.

COUNTRY	REF NO.	DETAILS OF LEGISLATION/ NATURE OF PROBLEM	LEGAL CHALLENGE	OUTCOME
Belgium	2002/495/B	<p>Requirements relating to eco-taxes for beverage containers:</p> <ul style="list-style-type: none"> Decree setting minimum content criteria for beverage containers (as the basis for exemption from eco-tax): <p><i>The Commission identified problems with procedures for demonstrating recycled content. Difficult for producers of packaging produced outside Belgium to prove to Belgian authorities that their packs were above the thresholds.</i></p>	<p>Notified in 12/02.</p> <p>Comments from Austria, Italy, Finland, Sweden;</p> <p>Detailed opinion from Commission, Italy, Netherlands, Portugal, Spain, UK.</p>	<p>Minimum content requirements not adopted as part of eco-tax regime in Dec 2003.</p>
Belgium	2002/496/B	<p>Requirements relating to eco-taxes for beverage containers:</p> <ul style="list-style-type: none"> Decree on registration and other admin measures. Would require exempt containers to be marked with a registration number. <p><i>The Commission referred to its comments in relation to 2002/280/B (above), and repeated its position that a requirement to mark a tax registration number on beverage containers would be a barrier to trade.</i></p>	<p>Notified in 12/02.</p> <p>Comments from Finland, Germany, Italy, Sweden;</p> <p>Detailed opinion from Commission, Italy, Netherlands, Portugal, Spain.</p>	<p>Replacement legislation says that exemptions for packs above the recycled content thresholds may be adopted, but would need to be approved by the Commission.</p>

COUNTRY	REF NO.	DETAILS OF LEGISLATION/ NATURE OF PROBLEM	LEGAL CHALLENGE	OUTCOME
Denmark	2002/98/D K	<p>Order 713/02 establishing requirements for containers of beer and carbonated drinks (incl. cans) to participate in a deposit system, and other requirements for the system:</p> <p><i>The Commission expressed concern that requirements could be disproportionately burdensome for imported products. Specific concerns included high participation costs, marking requirements and confidentiality concerns about market data.</i></p>	<p>Notified in 02/02.</p> <p>Comments from Commission, Italy;</p> <p>Detailed opinion from Austria, France, UK.</p>	<p>Order revised before implementation to address concerns: option for adhesive marking labels, independent reporting arrangements, and capped registration fees.</p>
France	2012/204/F	<p>Decree making it mandatory for all recyclable products covered by an extended producer responsibility system in France to be marked with a common sorting symbol:</p> <p><i>This would create a significant barrier to trade because products intended for sale in France would have to be specially manufactured to carry the symbol or else a label would have to be added. Cans would have to be printed separately for France.</i></p>	<p>Notified in 04/12.</p> <p>Comments from Italy, Netherlands, Slovakia;</p> <p>Detailed opinion from Commission, Luxembourg, Portugal, Spain, UK.</p>	<p>No final resolution yet, but adoption of the Decree has been delayed to allow for reconsideration and further negotiation.</p> <p>INCPEN persuaded BIS to submit a detailed opinion on behalf of the UK. This triggered a 3-month extension of the standstill. The Commission and 3 other Member States subsequently issued detailed opinions.</p>

<p>Germany</p>	<p>2001/128/D</p>	<p>2nd amendment to Packaging Ordinance:</p> <p>In 12/98 Commission sent Germany a Letter of Formal Notice opening infringement proceedings in respect of the provision in the original 1992 Packaging Ordinance imposing mandatory deposits on any drinks category that did not meet the market share quotas laid down. In 03/01, the Commission referred the case to the ECJ.</p> <p><i>The Commission's challenge was limited to containers of mineral waters, which must be filled at source. This was an unfair burden for waters transported over long distances and environmental cost of transport not fully taken into account.</i></p> <p>On 3/01, the Stuttgart Administrative Court also referred to ECJ a case brought by Radlberger Getränke GmbH & S. Spitz KG v. Land Baden-Württemberg.</p> <p><i>These Austrian companies importing drinks to Germany argue that deposit is a restriction to their imports, and that they have a right to participate in an established recovery organisation.</i></p>	<p>Notified in 03/01.</p> <p>Comments from Italy, Sweden;</p> <p>Detailed opinion from Austria, France, Italy, Luxembourg, Portugal, Spain, UK.</p> <p><i>The Commission argued that producers have no right to participate in a recovery organisation if a Member State imposes a deposit, but that the transition from one system to the other should be smooth.</i></p>	<p>The case relating to notification 2001/128/D was closed, but this was part of an ongoing legal debate about the proposed deposit system.</p> <p>6 years after the Commission opened infringement proceedings, the ECJ ruled in 12/04.</p> <p>Having lost the case, Germany agreed to repeal the market share quotas for refillables and replace them with deposits on 'ecologically unsound' packaging (which included some, but not all, types of non-refillable container).</p>
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COUNTRY	REF NO.	DETAILS OF LEGISLATION/ NATURE OF PROBLEM	LEGAL CHALLENGE	OUTCOME
Germany	2003/232/D	<p>Proposal to amend Packaging Ordinance to repeal refill quotas and instead impose deposits on all “environmentally unfavourable” containers of key beverages (i.e. all non-refillables except cartons, some pouches):</p> <p><i>The Commission challenged retention of provisions that allow “island solutions” to operate. It said this was a barrier to trade which was disproportionate and discriminatory against imports, and not in compliance with the Packaging Directive</i></p> <p><i>Others objected to the unclear definition of “environmentally unfavourable”.</i></p>	<p>Notified in 07/03.</p> <p>Comments from Italy, Sweden;</p> <p>Detailed opinion from Commission, Austria, France, Italy, Luxembourg, Portugal, Spain, UK.</p>	<p>Measure withdrawn. Ordinance amended 05/05 to rule out “island solutions” – retailers must refund the deposit on any deposit-bearing container made from the same material as containers that they sell.</p> <p>The Ordinance established a clearing system, DPG, which all producers must participate in.</p>
Germany	2009/512/D	<p>Proposal requiring all deposit-bearing containers to be clearly marked as either refillable or non-refillable:</p> <p><i>Marking non-refillables would involve a greater additional cost for producers located in other countries than for German producers.</i></p>	<p>Notified in 09/09.</p> <p>Comments from Austria, Spain;</p> <p>Detailed opinion from Commission, France, Hungary.</p>	<p>The proposal was not adopted.</p> <p>Instead, it is now proposed that deposit-bearing containers should be identified in-store as either refillable or non-refillable.</p>

<p>Germany</p>	<p>2011/105/D</p>	<p>General administrative provision in Land Berlin forbidding public and semi-public bodies from purchasing mineral water, beer, soft drinks and juices in non-refillable containers, except for cardboard packaging, even if they are deposit-bearing:</p> <p><i>Since such drinks are no longer produced in refillable bottles in many Member States, and given that the long-distance distribution of refillables would be uneconomic even where it is possible in principle, this measure would effectively restrict companies in other EU countries from supplying public authorities in Land Berlin.</i></p>	<p>Notified in 03/11.</p> <p>Comments from Commission, Austria, Denmark, Sweden;</p> <p>Detailed opinion from France, Ireland.</p>	<p>The proposal was not adopted.</p> <p>Land Berlin is now planning to tax foodservice disposables, but admits that it may not have the legal powers for this.</p>
<p>Greece</p>	<p>2011/405/G R</p>	<p>Decision laying down the conditions for use of environmental claims on plastic articles and packaging:</p> <p><i>The Commission objected that the proposed Decision was a prima facie breach of Single Market rules.</i></p> <p>Standstill was extended to 02/12 to allow time for discussions to take place on ways in which the Greek Government's policy objectives can be met without contravening the EU Treaty.</p>	<p>Notified in 08/11.</p> <p>Detailed opinion from Commission, France, Italy, UK.</p>	<p>Under the Decision finally adopted, plastics produced and/or sold legally in another EU Member State, Turkey or a member of the European Economic Area are deemed to comply with the Resolution and may claim biodegradability or compostability provided there is an equivalent level of protection for consumers and the environment.</p>

<p>Hungary</p>	<p>2005/646/H U</p>	<p>Product charge on certain categories of ‘commercial packaging’:</p> <p>Act CIII of 2004 had not been notified, and the Commission launched infringement proceedings for failure to notify.</p> <p>Hungary then notified an identical text, which was adopted as Act CLXVII in 2005. No detailed opinions were issued, but industry urged the Commission to continue infringement proceedings on the ground that <i>the charges were structured in such a way as to discriminate in favour of domestic drinks producers.</i></p>	<p>Notified in 11/05.</p> <p>Comments from Czech Republic, Germany, UK.</p>	<p>Although Act CLXVII was adopted, the Commission opened infringement proceedings in 06/06 because it now had concrete evidence of a barrier to trade. Act CLXVII was replaced by Act CXI of 2009.</p> <p>The TRIS system covers “technical specifications linked to fiscal measures which encourage compliance with such technical specifications”, but this was the first challenge directly related to a fiscal measure.</p>
<p>Italy</p>	<p>2011/174/I</p>	<p>Ban on single-use non-biodegradable carrier bags:</p> <p><i>Packaging in line with the Directive’s Essential Requirements is guaranteed free circulation throughout the European Economic Area.</i></p>	<p>Notified in 04/11.</p> <p>Comments from Germany, UK;</p> <p>Detailed opinion from Commission, UK.</p>	<p>The ban was postponed until 12/12, penalties will not be imposed before 12/13, and there is some uncertainty as to whether the law will be enforced.</p>

COUNTRY	REF NO.	DETAILS OF LEGISLATION/ NATURE OF PROBLEM	LEGAL CHALLENGE	OUTCOME
Luxembourg	1995/438/ L	<p>Proposal to adopt special requirements to promote use of refillable beverage containers including refill quotas, with an eco-tax on non-refillables if quotas were not met:</p> <p><i>The Commission argued that because far more domestically produced drinks were in refillables than imported products, imports would be hardest hit by the requirements. Luxembourg had failed to justify its preference for refilling.</i></p>	<p>Notified in 12/95.</p> <p>Comments from Netherlands, Spain;</p> <p>Detailed opinions from Commission, France, Italy, UK.</p>	<p>Bill withdrawn – measure never implemented.</p>
Portugal	1997/2/P	<p>Draft Decree which set market share quotas for refillable beverage containers sold to households, and required catering outlets to sell soft drinks, beer and bottled water in refillables only:</p> <p><i>The Commission argued that the refill requirements were likely to create barriers to trade.</i></p>	<p>Notified in 12/96.</p> <p>Comments from Netherlands;</p> <p>Detailed opinion from Commission, Finland, France, Italy, Spain, UK.</p>	<p>Decree no. 29-B/98 retained the 100% quota for catering outlets as one option, but offered them the alternative of selling beverages in non-refillables provided they either recycle them or take them back.</p>

Slovakia	2009/195/ SK	<p>Draft Packaging Act improving transposition of the Directive:</p> <p>Retained the requirement of the previous (2002) Act that PVC packaging should be phased out.</p> <p><i>The Commission objected that this was a barrier to the free movement of goods.</i></p>	<p>Notified in 04/09.</p> <p>Comments from Belgium, Finland, Hungary, Italy, Poland;</p> <p>Detailed opinion from Commission, France, Germany, UK.</p>	<p>The provision relating to PVC was deleted from Packaging Act no. 119 of 2010.</p>
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