

4 July 2007

Consultation on the Commission Green Paper on market-based instruments for environment and energy related policy purposes

- Response by beverage can producers and their suppliers -

The EU beverage can makers and their aluminium and steel suppliers (**EAA- European Aluminium Association**¹ and **APEAL – The Association of European Producers of Steel for Packaging**²) produce a packaging which contributes to delivering the widest possible choice of drinks across Europe and is highly recycled after use. They have supported the adoption and implementation of a major piece of EU legislation, namely Directive 94/62/EC on packaging and packaging waste. This directive pursues two equally important policy objectives, namely the proper functioning of the internal market and a high level of environmental protection by preventing packaging waste and reducing a maximum the final disposal of such waste thanks to re-using packaging and recycling / recovering packaging waste.

The Green Paper “*fits into the framework set by the new integrated energy and climate change agenda where market-based instruments and fiscal policies in general will play a decisive role in delivering the EU’s policy objectives*”. The Green Paper rightly distinguishes between options for further application of market-based instruments (MBIs) in influencing energy use (point 3) and such options in environment policy (point 4). These are different though inter-related policy areas which should not be confused. Packaging has been addressed under the environment policy objective with two precise Commission questions :

¹ Avenue de Broqueville, 12 – 1150 Brussels

² Avenue Louise 89 – 1050 Brussels

(1) ” Does the Community legal framework provide sufficient scope for Member States to use MBI to address waste management issues ? “

We are negatively surprised by the suggestion that Member States should possibly be given more freedom to adopt national measures to differentiate between different packaging materials and systems depending on the products’ environmental impact. This conflicts clearly with the Commission’s recent Report on the implementation of Directive 92/64/EC and its impact on the environment as well as on the functioning of the internal market (6 December 2006)³. In this report, the Commission stressed that “ *despite the directive’s aim to contribute to the functioning of the internal market and to reduce trade barriers, these goals have not yet been fully achieved for all types of packaging. Past experience and ongoing cases show that unilateral measures adopted in different Member States still pose problems by requiring market operators to adapt their packaging to the requirements of each individual Member State which makes it more difficult for them to benefit from business opportunities within the internal market by selling the same product in the same packaging in different markets. In particular, the infringement procedures in the beverage sector show that national measures can lead to distortions of competition and in some cases partitioning of the internal market, which contradicts the objectives of the directive. The beverage packaging sector has signalled such impacts from mandatory deposit systems for non-refillable containers... Besides, the use of taxation to drive packaging policy can potentially disrupt the internal market if the taxes are applied in a way that protects local producers. The Commission is committed to react on any measures that risk disrupting the functioning of the internal market and are not environmentally justified, and will further evaluate the need to clarify or amend the provisions of Articles 5 (re-use encouragement) and 7 (return, collection and recovery systems) of the Packaging Directive in order to facilitate the free circulation of goods within the internal market.* ”

The Report concluded that national measures using MBI for (beverage) packaging affect actually or potentially the free movement of goods, and that the Commission should clarify the limits for national initiatives. A newly integrated energy and

³ COM(2006) 767 final



environment policy may not supersede one of the fundamental freedoms of the Treaty, and consequently the prime objective should be Commission guidance for packaging MBI to ensure the proper functioning of the internal market and not further (uncontrolled) national freedom.

Experience shows that MBI assessment under Article 28 EC (free movement of goods), for instance of deposit conditions for non-refillable packaging, proves easier⁴ than disputing tax provisions under Article 90 EC. We wish to recall major limits to a proper EU scrutiny of national tax measures in relation to Community harmonisation measures such as the Packaging Directive :

(i) *EU assessment of a proposed national tax measure will not stop its implementation* : The Packaging Directive obliges Member States to notify any draft implementation measures in accordance with the procedure of Directive 98/34/EC on technical standards and regulations. Experience⁵ shows the key value of this procedure, especially the minimum three months' standstill, to prevent adoption of disproportionate national measures for packaging, especially drinks containers. This is in line with the Lisbon "Better Regulation" agenda as stressed in recent Commission / Member State objections under this procedure. Unfortunately, tax measures fall outside the standstill obligation and Commission / other Member State objections may concern only the aspect which may hinder trade, but not the fiscal or financial aspect of the measure. It means that only aspects (such as labelling) which may be dissociated from the actual tax measure, may be disputed. This procedural limit makes it difficult to use the notification procedure for tax measures. Member States use and are likely to use increasingly this loophole to circumvent preventive EU control over packaging MBI.

(ii) *Limited legal scrutiny of a national tax measure* : Such a measure may be questioned only if it leads to an actual discrimination of imported goods or if local products are protected. This restricts considerably the legal scrutiny, because distortions of competition on the domestic market may not be challenged. In case C-246/99 Commission v Kingdom of Denmark, the Commission acted, for

⁴ though leading to lengthy procedures with sometimes unsatisfactory results (cf. German deposit on non-refillable drinks containers)

⁵ see Perchards study for DG ENTR on the progress of the implementation and impact of Directive 94/62/EC on the functioning of the internal market (6 May 2005)

instance, against a purely national ban of non-refillable plastic and glass drinks containers⁶ as contrary to the Packaging Directive.⁷ This was legally possible in conjunction with Article 28 EC, but would not have been possible if Denmark had opted for a tax measure to achieve this objective which is undoubtedly an infringement of the Packaging Directive and its harmonisation purpose which benefits both national and imported goods.

(iii) *No control of tax levels and risk of abuse for general budgetary reasons* : Article 90 EC does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect.⁸ The risk exists, therefore, that Member States may adopt, for instance for purely budgetary reasons, high tax measures on packaging while these products bear at the same time other burdens for the financing of packaging waste recovery/recycling (“green dot” fees and alike). The proportionality of such combined financial burdens under the Packaging Directive may hardly be assessed, if Article 90 EC is used in conjunction with the Packaging Directive.

These experience – based considerations lead to the conclusion that the scope for national MBI for packaging is currently too wide and very difficult to control under EU law.

(2) “Should the Commission facilitate the application of MBI in this area, e.g. through supporting exchanges of information ?”

The reference to the “Danish model” (“*Denmark has adapted its packaging tax to reflect the differences in environmental impact of each material*”) illustrates the risks which lie ahead by promoting uncontrolled exchange of information between 27 Member States on MBI. The Danish law escaped EU legal scrutiny – both the notification⁹ and infringement¹⁰ procedures because of the above enumerated procedural hurdles. The law is “*based on the environmental effect of the packaging*”

⁶ Importers were theoretically allowed to use such packaging; metal cans, however, were prohibited completely

⁷ See EU OJ C 246, p. 19 of 28.8.1999

⁸ see, for instance, ECJ judgment in Case C-383/01 point 38

⁹ It should be noted, however, that one Member State raised objections concerning the Danish draft

¹⁰ Formal complaints were lodged with the Commission by EAA, APEAL and PlasticsEurope

materials investigated, primarily energy consumption, fossil resource consumption and waste generation” which have been calculated under a national, non standard life cycle method. Important mistakes have been admitted since by the Danish authorities, especially concerning the calculation of the recycling of aluminium packaging. Furthermore, the Green Paper (more precisely the annexed Commission Staff Working Document¹¹) conveys a simplified, misleading message by not stressing that the Danish law does not cover drinks packaging because of its very high recycling rates.

This Danish law should not be qualified, therefore, as ‘best practice’. If the proposed MBI Forum (intended to stimulate exchanges of experience between Member States) were to ‘export’ such disputable initiatives to other countries, it would bear more risks than opportunities for the Community. For packaging (especially drinks packaging), national measures discriminate too often between packaging materials and systems – normally to protect some national interests – on the basis of a subjective ranking of environmental impact categories and marginal differences without a proper proportionality test. The EU Court Advocate General warned against the risks of using life cycle assessments to discriminate between packaging materials / systems because they do not take into account the Single Market requirements and are “ *based on a working hypothesis, the practical implementation of which is most uncertain ; if the authors of the study had chosen other hypotheses by modifying the specific weight attached to each element, the calculation results would have been different...*”¹² Similar caution has been expressed in the CEN Report on criteria and methodologies for life cycle analysis (LCA) of packaging. It stresses *inter alia* that “ *LCA of different materials used for the same packaging purpose should be interpreted with great caution; there is no certainty that one packaging material can fulfil the same functions as another material”* and “ *only significant differences should be noted and the proportionality test is recommended...*”

The Green Paper is focusing on global environmental impacts, more precisely energy use and climate change impacts. The beverage can industry supports the societal objective of promoting efficient energy consumption and launched a major

¹¹ page 23

¹² Advocate General D. Ruiz-Jarabo Colomer in Cases C-246/99 Commission v Kingdom of Denmark and C-383/01 De Danske Bilimportorer



global sustainability project with focus on a low carbon economy. For beverage cans, recycling remains a key factor for saving natural resources and energy. The can is a packaging with one of the highest recycling performances which, in addition, avoids down-cycling allowing to recycle again and again the collected material. We feel supported by the Commission Report on the functioning of the Packaging Directive which concluded that **recycling “ can be classified with a relatively high degree of certainty among the most cost-efficient options to reduce CO2 emissions and other environmental impacts...”**

The beverage can makers and their material suppliers have identified no need for the Commission to facilitate the application of national MBI in the specific field of packaging policy, as the environmental objectives of the Packaging Directive have been met according to the Commission’s own recent Report and as unilateral national measures cause barriers to trade.

The beverage can makers and their aluminium and steel suppliers wish, however, to contribute actively to broadly based, non packaging specific EU policy initiatives resulting from the newly integrated energy and climate change agenda.
