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Communication from the Commission — Beverage packaging, deposit systems and free movement of goods

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1. INTRODUCTION

Packaging has a vital social and economic function. It is an essential part of modern goods handling. Sooner or later packaging also becomes part of the waste stream. In 2006, around 81 million tonnes of packaging waste were generated in the EU. In order to limit its environmental impact and to reduce final disposal of packaging, Directive 94/62/EC on packaging and packaging waste (1) lays down measures to prevent the production of packaging waste and, in addition measures intended at reusing, recycling and recovering such waste. This Directive requires Member States to ensure that management systems are put in place for the collection, reuse of used packaging and the recycling or recovery of packaging waste in order to channel it to the most appropriate waste management alternatives. To this end it envisages as a first priority measures aimed at preventing the production of packaging waste, it lists, as additional fundamental principles, reusing packaging, recycling and other forms of recovering packaging waste.

National reuse systems for packaging operate with regard to several types of packaging. Some of these systems work very well, particularly those for transport packaging, such as crates and pallets, but also for beverage packaging in the hotel, restaurant and catering sector. In other areas, however, public intervention may be needed to encourage reuse systems, regardless of their actual commercial viability. In this respect, most of the debate in the European Union is focused on consumer beverage packaging (which accounts for around 20 % of total packaging by weight) (2).

While regulatory steering measures taken at Member State level in order to introduce systems for the reuse of beverage packaging may serve environmental goals, they also have the potential to divide the internal market. For market operators engaged in activities in several Member States these systems often make it more difficult to take advantage of business opportunities within the internal market. Instead of selling the same product in the same packaging in different markets, they are required to adapt their packaging to the requirements of each individual Member State, which usually leads to additional costs.

The harmonising effect of Directive 94/62/EC, which is also aimed at ensuring the functioning of the internal market, remains limited in this area. Instead, the provisions of the Directive must be read in the light of the general principles of Community law and the obligations under the EC Treaty (especially Articles 28 to 30, 81, 82, 86 and 90 EC).


Directive 94/62/EC has brought about a significant degree of convergence between the recycling rates of the Member States, and the notification procedure of Directive 98/34/EC (3) has made it possible to resolve many internal market issues before the proposed legislation was adopted and would have created problems in practice. However, the goals of securing the functioning of the internal market and reducing trade barriers have not yet been fully achieved for all types of packaging. Past experience and ongoing cases show that the adoption of unilateral measures in different Member States still poses problems. In particular, infringement procedures in the beverage sector have shown that national measures can lead to distortions of competition and, in some cases, to the partitioning of the internal market, which runs counter to the internal market aim of Directive 94/62/EC.

In its 2006 report on the implementation of Directive 94/62/EC the Commission undertook to further evaluate the need for clarification in this field (4) This Communication is regarded as a non-regulatory step in this direction and is intended to lead to greater transparency in the applicable legal framework at Community level by describing some ‘do's and don'ts' from a Community point of view.

This Communication seeks, in particular, to support relevant economic operators and the Member States’ authorities that deal with beverage packaging and beverage packaging waste, by providing them with a comprehensive and up-to-date overview of the principles of EC law and secondary legislation. It reflects the Commission’s interpretation of the Directive, Treaty provisions and the case law of the Court of Justice.

The Commission will continue to closely monitor the correct implementation of the current principles and is committed to react to any measures which are liable to disrupt the functioning of the internal market and which are not justified for environmental protection reasons.

2. FREE MOVEMENT OF GOODS AND BEVERAGE PACKAGING REQUIREMENTS

2.1. The problem of beverage packaging quotas

In past years, some Member States have set certain target figures (quotas) for the numbers of reusable containers for certain beverages. There is no objection to quotas of this kind as long as they define general policy goals. However, these quotas can be tied to certain specific obligations in the event of surpluses or shortfalls. These obligations could give rise to internal market concerns, one reason being that, given the additional costs linked to the organisation of reuse systems and the transport distances involved, importers of beverages normally use considerably more non-reusable packaging than do domestic producers.

If such quotas were to lead to quantitative restrictions, i.e. prohibiting the placing on the market of further products in a certain beverage packaging once the quota has been reached, this would amount to a barrier to trade contrary to Article 28 EC (5).

Moreover, the Commission believes that national provisions which construe a direct link between the proportion of reusable packaging used for specific beverages and the need to establish a deposit and return system for one-way packaging have to be seen with particular caution from an internal market perspective. A quasi-mathematical mechanism that depends on the current quota runs the risk of being biased by short-term developments, which do not mirror the general trend. In such circumstances a direct link to those figures in national provisions may not be flexible enough and fail to deliver the necessary reliability, especially in the planning of commercial decisions by the businesses concerned. Therefore, it may be more appropriate to keep developments in the packaging sector under regular review and, based on this assessment, to decide on any measure deemed necessary to encourage reuse systems or to influence the packaging split.


2.2. Ban on beverage packaging

Directive 94/62/EC lays down the essential requirements governing the composition of packaging. Under the terms of Article 18 of that Directive, Member States shall not impede the placing on the market of their territory of packaging which satisfies its provisions. It follows that Member States are not allowed to ban marketing of certain types of beverage packaging that comply with Community legislation (6). In this regard the Directive aims at the twin objectives of protecting the environment and ensuring the functioning of the internal market by, for example, establishing essential requirements for packaging and limiting values for heavy metals present in packaging.

National provisions that limit the quantity of products which may be imported in a certain type of beverage packaging would also be contrary to the clause on free movement in Article 18 of the Directive (7).

2.3. Prior authorisation of beverage packaging

National systems that subject the marketing of goods to prior authorisation restrict access to the market of the importing Member State, and must therefore be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC (8). Moreover, in the specific case of beverage packaging, any market access restrictions on beverage packaging that complies with the essential requirements of the Directive would contravene the Directive and Article 28 EC. This may be even true where the authorisation requirement is based on a voluntary agreement between the industry concerned and the Member State, given that by participating in or fostering such a covenant, the Member State endorses the result and risks infringing its responsibilities under Community law which disallows any market access barrier for beverage packaging complying with the Directive. Beverage packaging marketed in another Member State is deemed to satisfy the essential requirements of the Directive; dealing with them on the internal market cannot therefore be impeded.

3. FREE MOVEMENT OF GOODS AND BEVERAGE PACKAGING MANAGEMENT SYSTEMS

3.1. Reuse, recovery and recycling of beverage packaging

In the case of beverage packaging 'reuse' means that a specific container, which has been conceived and designed to accomplish within its life cycle a minimum number of rotations, is refilled for the same purpose for which it was first put on the market (9). Reused beverage packaging is often named 'refillable'.

Directive 94/62/EC does not establish a clear hierarchy between the reuse of packaging and the recovery of packaging waste (10). The eighth recital in the preamble to the Directive states, however, that 'until scientific and technological progress is made with regard to recovery processes, reuse and recycling should be considered preferable in terms of environmental impact'.

Apart from this, Article 5 of Directive 94/62/EC allows Member States to encourage, in conformity with the Treaty, systems for the reuse of packaging that can be reused in an environmentally sound manner. Thereby Article 5 highlights an option, which can be taken up by Member States subject to their own discretion. When making provision for such policy, Member States must comply not only with the requirements that flow from the Directive's provisions, but also with obligations resulting from the provisions of the Treaty, in particular on the free movement of goods (11).

(6) See Opinion of Advocate General Colomer in Case C-246/99 Commission v Denmark, para. 40 as well as his opinion in Case C-233/99, para. 24 (both cases were removed from the Court's register without judgment). This is without prejudice to the Member State's right to submit a derogation request under Article 95(5) EC on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.


(8) See for instance Case C-432/03 Commission v Portugal (2005) ECR I-9665, para. 41.


(10) Case C-309/02 Radlberger Spitz (2004) ECR I-11763, para. 33; Case C-463/01 Commission v Germany (2004) ECR I-11705, para. 40. The recently revised Waste Framework Directive (2008/98/EC), to which the Packaging Directive is lex specialis, enumerates a priority order in waste prevention, management legislation and policy (prevention, preparing for reuse, recycling, other recovery like energy recovery and disposal), where and insofar as this order delivers the best overall environmental outcome. This may require specific waste streams departing from this order where this is justified by life-cycle thinking on the overall impacts of the generation and management of waste taking into account, inter alia, technical feasibility, economic viability and environmental protection.

3.2. Global beverage packaging collection systems

The management of packaging and packaging waste requires Member States to set up systems for return, collection and recovery. These systems have a twofold purpose: first, the return and/or collection of used packaging and packaging waste and, second, the reuse of the packaging or the recovery of packaging waste collected (12). 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.

Traditionally, refill systems are combined with payment of a deposit in order to guarantee that a large proportion of containers are returned for refilling. These deposit and return systems are often operated on a voluntary basis by the fillers concerned. They either set up their own system for the products they distribute or pool resources with other producers by using common containers and crates. Voluntary schemes of this kind for refillables are rarely covered by legislation. Nevertheless, a few Member States have adopted regulatory provisions to set certain common parameters. These parameters are normally limited to general rules, such as a common deposit rate. From an internal market perspective, voluntary systems are unlikely to create any barriers to trade, given that they are based on voluntary decisions by the industry concerned. However, if Member States opt for a national legislative framework for such systems for refillables, they must observe at least the conditions set out in Article 7 of Directive 94/62/EC, which are:

— The requirements set shall apply to imported products under non-discriminatory conditions, and

— Distortion of competition must be avoided.

From a business perspective it has to be observed that refillable schemes are mostly used by domestic fillers, given that they require a certain turnover of containers and that costs normally increase with the distance between the filler and the points of sale.

For non-refillable containers, it is the global collection systems that continue to dominate. However, some Member States have also introduced mandatory deposit systems for non-reusable beverage packaging. Community law, as it stands, leaves it to each Member State to choose between a deposit and return system, on the one hand, and a global packaging-collection system on the other, or to opt for a combination of the two systems depending on the type of product; with the proviso that the systems chosen should be designed to channel packaging to the most appropriate waste management alternatives and form part of a policy covering all packaging and packaging waste (13).

However, this choice still has to comply with Article 7 of Directive 94/62/EC and the relevant provisions of the Treaty:

— The system must be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities.

— The system chosen must also apply to imported products under non-discriminatory conditions, including the detailed arrangements and any tariffs imposed for access to the system. As regards the latter, Member States should avoid arrangements that lead to the unjustified doubling of participation charges at different levels for the same service provided which would risk hampering specifically small businesses.

— The system must not create unjustified trade barriers and thereby infringe Articles 28–30 EC.

— The system must not distort competition as outlined in Articles 81, 82 and 86 EC.

(12) Article 7(1) Directive 94/62/EC.
3.3. Mandatory deposit systems as a barrier to trade

To make non-refillable beverage packaging subject to a mandatory deposit and return system creates barriers to trade, given that such systems make it impossible to sell the same product in the same packaging in more than one Member State. Instead, producers or 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 (14).

The fact that they would qualify as a trade barrier, however, does not prevent these national provisions from being 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 (15). 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.

In practice, this means that Member States are allowed to introduce mandatory deposit systems if, on the basis of the individual Member State's discretion, this is considered necessary for environmental reasons.

If a Member State opts for a mandatory deposit and return system, it must nevertheless observe certain requirements in order to ensure that a fair balance is struck between environmental objectives and internal market needs. In view of the additional burden on imported products, such systems must take note of the specific situation and must use means which do not go beyond what is necessary for the purpose envisaged.

On the basis of Directive 94/62/EC and the principle of proportionality under Articles 28–30 EC, the Court of Justice has identified several safeguards that have to be respected in relation to the design of the system.

3.3.1. Transitional period

A changeover from one waste management system to another demands good and thorough preparation by all key players involved, given that this phase is critical for market operators, since uncertainties about the legal and factual position can create instabilities in the market. The changeover to the new system must take place without interruption and without jeopardising the ability of businesses concerned to actually participate in the new system as soon as it becomes operational. This means that features of the system have to be developed and put in place, manufacturing lines and distribution chains have to be adapted and consumers have to be informed. This takes time and effort. Therefore, producers and distributors must be given a sufficiently long transitional period to enable them to adapt to the requirements of the new system before the deposit and return system enters into force. In the case of a complete changeover that requires a new system to be developed at the outset, a period of six months between the legal announcement and the entry into force was considered insufficient (16). In such circumstances, a period of at least one year seems necessary.

On the other hand, once a deposit and return system is established, future modifications may be subject to a shorter deadline than the one granted for the initial establishment. Overall, the specific time needs have to be evaluated by national authorities on a case-by-case basis when setting the specific transitional period.

3.3.2. Design of the system: fair, open and transparent

The operational conditions that must be fulfilled by a mandatory deposit system for non-refillables are another key feature. Some of these parameters flow from Article 7 of Directive 94/62/EC; others were developed by the Court of Justice in its caselaw on Article 28 EC.

(a) A countrywide system should be provided which covers the whole territory affected by the mandatory deposit system. However, this does not assume the existence of only one system operator. Several providers would also be possible as long as the systems are compatible with each other and not exclusive. The purpose of a countrywide system is to make available a sufficient number of points of return so that consumers can recover the deposit independently of the initial place of purchase. This strengthens the acceptance of any such system by consumers, facilitates the return of empty packaging and undoubtedly increases the amount of collected material. Past experience has shown that the lack of a countrywide system leads to the proliferation of retailer-own solutions (so-called island solutions), which means a patchwork of different return systems that are not compatible with each other. Moreover, island solutions often allow retailers to require their suppliers to adapt the packaging to their own proprietary requirements, forcing additional costs on suppliers. This is likely to aggravate the negative effect on the internal market. Seen in this context, a countrywide system is of primary importance.

(b) Any mandatory deposit and return system must be open to the participation of all economic operators in the sector concerned. It shall also apply to imported products under non-discriminatory conditions. This includes the detailed operational arrangements of a system as well as the fees or tariffs imposed by the organisation running the system. The purpose of these guarantees is to avoid creating any unjustified barrier to trade or distorting competition.

(c) Member States must ensure that there is no discrimination between those products that are exempt and those that are subject to the deposit requirement and that any differentiation is based on objective criteria. Therefore the Commission is of the opinion that the differentiation should in principle be based on the material used for the containers and not on the content of the beverages, for reasons that the content in itself is not related to the environmental performance of the packaging.

Member States may choose between setting up such a system by themselves and leaving the task to the industry concerned (e.g. producers and distributors). Nevertheless, the latter option does not relieve the Member State of its obligation to ensure a proper workable system. In this respect, the Member State bears responsibility for the result. This demands an active approach on the part of national authorities. In order to discharge this guarantee function Member States may outline particular features of the system in regulatory provisions or may lay claim to certain monitoring or supervision tasks vis-à-vis the entity responsible for the system.

3.3.3. Best practice solutions

To address some of the issues mentioned above, Member States may consider making use of the following practical solutions:

(a) Labelling: In order to make it easier for the consumer to identify beverages or beverage packaging that is covered by a deposit and return system, it may be considered useful to label the products concerned, e.g. with a common logo. However, the described benefit for the consumer may give rise to additional costs for the manufacturer or distributor as the label has to be adapted to the specific requirements of the national market. Any such obligation to alter packaging can potentially constitute a barrier to trade under Article 28 EC. To balance the competing interests involved — i.e. consumer information and easy market access — any such labelling requirement should be kept to the necessary minimum. In the case of a mandatory deposit mark, it would be useful to give producers easy access to the design features and printing specifications in order to facilitate its use. Moreover, stickers may be supplied to importers of small quantities; this would allow small-scale distributors to supplement the original labelling with such an additional sticker, instead of obliging them to change the whole labelling. Finally,

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. Clearly, in specific circumstances parallel labelling of the packaging concerned with several deposit logos may be restricted due to anti-fraud considerations. For a further labelling feature, the European Article Number (EAN) codes used on products, similar considerations apply. The need for country-specific EAN-codes should be avoided as these codes could also make country-by-country packaging necessary which would risk again an impediment to cross-border trade.

(b) Clearing system: A clearing system would help to guarantee a levelling out of the different amounts of the deposit collected and returned between the players involved. It is advisable to make the system easily accessible, irrespective of the Member State in which the producer or distributor concerned has its seat.

(c) Exemptions for small businesses: Member States may reduce some of the operational obligations concerning deposit systems for participating small businesses, based e.g. on de minimis considerations. To give an example: Small kiosks may not have the storage space necessary for meeting their take-back obligations. Therefore, it might be considered reasonable to grant them certain exemptions. However, it is advisable to assess whether any such exemption would not affect the overall quality and functioning of the deposit and return system as such, or would lead to discriminatory application of its conditions.

(d) Easy import/export: Mandatory deposit and return systems make the market access for imported products more difficult as they require a regular reconditioning of the product concerned. At the same time they may impede exports, given that it might prove difficult to market such products in another Member State once they have been specifically designed for the deposit and return system in the Member State in which they were first placed on the market. Some of these trading difficulties are certainly the unavoidable consequence of such systems, as they are related to the situation in a specific Member State and not to the situation in the whole of the EU. However, Member States should avoid any regulatory provisions which would make exports, re-imports or parallel imports of beverages virtually impossible due to particular handling requirements for packaging.

3.4. No distortion of competition

Article 7 of Directive 94/62/EC requires that Member States avoid any distortion of competition when establishing return, collection or recovery systems. Where the task of setting up such systems is given to private entities, national authorities should avoid these systems potentially being used to inhibit the market entry of new competitors. Appropriate safeguards should be provided in the legislative setting. It should be emphasized that, above all, the private entity takes responsibility for any abuse of a dominant position or anticompetitive behaviour under Articles 81 and 82 EC. Nevertheless, Member States are called upon to screen the design and operation of the deposit and return system for any potential risk that could facilitate such abuse.

4. ALTERNATIVE APPROACHES

4.1. Tax-based systems

Article 15 of Directive 94/62/EC highlights the power of Member States to adopt in the absence of harmonised provisions economic instruments to promote objectives of environmental policy. Such instruments should respect, inter alia, the polluter-pays principle as well as the obligations arising from the Treaty.

Member States may consider national tax-based systems as one form of such economic instruments and as an alternative way to achieve a certain steering towards sustainable packaging. The costs of complying with national environment-driven tax systems are often lower than the additional costs linked to mandatory deposit systems as described above. Nevertheless, packaging taxation is not neutral as to its internal market effects. Such taxes, if they are related to the specific material used, could cause material switching, given that in beverage packaging the various materials are normally effective substitutes. Moreover, as such taxes are often passed on they increase the retail price and thus may influence consumer choice.
Against this background, Member States must ensure that national taxation complies with Article 90 EC Treaty. The purpose of this provision is to guarantee the complete neutrality of internal taxes in respect of the competitive situation of domestic products and products imported from another Member State (20). It prevents Member States from applying national taxation that favours domestic economic operators at the expense of their competitors in other Member States who are producing similar or competing products. This principle of non-discrimination must be respected both in law and in fact. The Commission will evaluate possible incompatibilities of national systems of taxation with Article 90 EC on a case-by-case basis.

Against this provision, a differentiation between similar products is allowed if it pursues objectives of economic, social or environmental policy which are themselves compatible with the requirements of the EC Treaty and the Community's secondary legislation, and if the detailed rules are such as to avoid any form of discrimination (21). It follows from this criterion that Member States may adopt tax arrangements which differentiate between similar products, on the basis of objective criteria such as the nature of the raw materials used or the production processes employed (22).

In the present context, differentiation criteria may be considered objective if they reflect the environmental impact of the material used. Such environmental criteria need to be applied in a consistent manner. Where taxes are levied on account of the non-reusable character of the packaging, differentiations according to its content, a factor which in itself is independent from the environmental impact of the packaging, have to be seen with particular caution.

The above considerations apply to the whole system of taxation, including tax reductions. Any preferential treatment must be extended without discrimination to products from other Member States that satisfy the same conditions.

4.2. Voluntary systems

Voluntary or manufacturers' own return systems are often applied in the case of reusable containers, because in these situations it is greatly in the producers' interest to collect a large proportion of the packaging used so that the 'refill cycle' can work. From an internal market viewpoint, such systems do not amount to barriers to trade. Member States may nevertheless set certain parameters with a view to ensuring interoperability, access and consumer protection.

5. NOTIFICATION REQUIREMENTS FOR MEMBER STATES

Directive 98/34/EC (23) provides a notification procedure in the field of technical standards and regulations in order to prevent the adoption of national standards and technical regulations which create new barriers to trade within the internal market. According to this Directive, Member States are obliged to notify technical regulations at a draft stage to the Commission. This procedure gives the Commission and Member States the possibility to analyse the draft technical regulations of (other) Member States before they are adopted, which enables them to eliminate at source any barriers to the free movement of goods.

The notification obligation applies to draft technical regulations. According to Article 1 point 11 of the Directive a technical regulation comprises technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory.

According to Article 1 point 3 of the Directive a technical specification is a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the products is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures. The term 'technical specification' also covers production methods and processes used in respect of agricultural products and products intended for human consumption.

(20) Cf. Case C-167/05 Commission v Sweden, para. 40.  
(23) Cited in footnote 3.
According to Article 1 point 4 of the Directive, an ‘other requirement’ is a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing.

National regulation relating to the management of packaging waste or seeking to impose a return or reuse system for packaging, or even the separate collection of certain products can be expected to contain provisions which fall into the category of ‘other requirements’ and have therefore to be notified to the Commission under the notification procedure of Directive 98/34/EC.

Thereby the notification obligation applies to technical regulations which are compulsory, de jure or de facto, including voluntary agreements to which a public authority is a contracting party.

In addition, Article 16 of Directive 94/62/EC on packaging and packaging waste provides that Member States should notify the Commission of drafts of any measures they intend to adopt in the framework of Directive 94/62/EC prior to its adoption, so that it can be established whether or not they comply with Directive 94/62/EC.

Therefore, Article 16 extends the notification obligation, since measures which are not technical regulations in the sense of Directive 98/34/EC, but fall within the framework of Directive 94/62/EC shall also be notified by the Member States to the Commission. Measures that contain technical regulations need to be notified under both, Directive 94/62/EC and Directive 98/34/EC.

In order to ensure the smooth operation of these notification procedures, a ‘one-stop shop’ was set up for these draft measures. They shall be notified through the 98/34 procedure and will be analysed following this procedure.

Indeed, Member States regularly notify their draft legislation, and in particular draft legislation concerning deposit, return and collection systems, under Directive 98/34/EC. This has provided the Commission with an insight into national regulatory initiatives and has led to the creation of a genuine discussion forum (including participation from industry) and prevented problems beforehand, thus avoiding costly and controversial infringement proceedings which can only be launched after the measure has entered into force.

6. CONCLUSION

This Communication presents different legal aspects through which regulatory measures in the field of beverage packaging may have repercussions on a truly internal market. Being aware of these, Member States, acting in the interests of better regulation, are called upon to notify and preventively scrutinise national measures on these aspects in order to facilitate the free flow of goods and guarantee interoperability of national systems as much as possible.

For its part the Commission will continue to monitor developments in the sector of beverage packaging and if necessary verify to what extent further steps on a regulatory or non-regulatory level, including a review of this Communication, should be taken.