Subject: Notification 2018/22/IRL

Draft amendments to the Public Health (Alcohol) Bill 2015

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535, the Irish authorities notified to the Commission on 19 January 2018 draft "amendments to the Public Health (Alcohol) Bill 2015" (hereafter "the notified draft").

The "Public Health (Alcohol) Bill" was notified on 27 January 2016 (notification 2016/42/IRL) and the Commission delivered comments on 28 April 2016. The procedure concerning that notification is still open, as the draft has not yet been adopted.

The aim of the "Public Health (Alcohol) Bill" is to reduce alcohol consumption in Ireland and to reduce the harms associated with alcohol.

According to the message accompanying the present notification, the notified draft adds three additional specifications:

- The inclusion of an additional health warning for alcohol products and in advertisements for alcohol products "is intended to inform the public of the direct link between alcohol and fatal cancers";

- A specification of the minimum proportion of printed material to be given to a health warning. In that context, the Minister may prescribe the form of a warning including its size and colour and the size, colour and font type of the printed material on the warning. The amendment adds that "at least one third of the printed material will be given over to evidence-based health warnings";

- The introduction of a broadcast watershed for advertisements for alcohol products: "a person shall not broadcast, or cause to be broadcast, an advertisement for an alcohol product on a television programme service between the hours of 3.00 a.m. and 9.00 p.m. A person shall not broadcast, or cause to be broadcast, an advertisement for an alcohol product on a sound broadcasting services on a week-day between the hours of midnight and 10.00 a.m. or 3.00 p.m. and midnight".

The Commission appreciates the considerable effort made by the Irish authorities in order to tackle the excessive patterns of alcohol consumption. In this respect, the Commission would like to highlight its commitment to prevent the harm caused by alcohol, enshrined in the Communication of the Commission on an "EU strategy to support Member States in reducing alcohol related harm", which is designed to help national governments and other stakeholders coordinate their action to reduce alcohol related harm in the EU.

The Communication focuses on preventing and cutting back heavy and extreme drinking patterns, as well as under-age drinking, and some of their most harmful consequences. The

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Commission recognises that there are different cultural habits related to alcohol consumption in the various Member States and, therefore, does not intend to substitute EU action to national policies, which have already been put in place in most of the Member States and relate to national competences in accordance with the principle of subsidiarity.

As stressed in the Communication, the Commission also encourages Member States to take action against alcohol-related harm. However, it underlines those national measures "should be evidence-based, proportionate and implemented on a non-discriminatory basis".

Furthermore, national measures adopted in pursuing the above justifiable objectives should be compatible with EU law.

In this regard, examination of the draft has prompted the Commission to issue the following comments.

1. HEALTH WARNING

The notified draft requires that the labels on alcoholic beverages carry health warnings which are intended to: 1) inform the public of the danger of alcohol consumption; 2) inform the public of the danger of alcohol consumption when pregnant; 3) inform the public of the direct link between alcohol and fatal cancers. The notified draft provides that "at least one third of the printed material will be given over to evidence-based health warnings".

The draft has been also notified to the Commission under Article 45 of Regulation (EU) No 1169/2011. The health warnings are being examined by the Commission on the basis of Article 39 therein which provides:

"In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt measures requiring additional mandatory particulars for specific types or categories of foods. justified on grounds of at least one of the following:

a) The protection of public health [...]"

The present observations concern only the size of the health warnings which is not regulated under Regulation (EU) No 1169/2011 and is to be examined in the light of the TFEU rules on free movement of goods. The present observations of the Commission are thus without prejudice to the assessment by the Commission of the health warning under Regulation (EU) No 1169/2011.

In the context of the current notification under Directive (EU) 2015/1535, the Commission expresses strong concerns on the proportionality of the requirement that "at least one third of the printed material will be given over to evidence-based health warnings". The Commission is very concerned about the impact that this requirement would have on the export of alcoholic beverages to Ireland.

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The prohibition of measures having equivalent effect to quantitative restrictions on imports under Article 34 TFEU applies to any regulations or measures enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade (see, inter alia, judgment of the ECJ in case Dassonville, C-8/74, paragraph 5). In this regard, article 34 TFEU prohibits, in the absence of harmonization at EU level, obstacles to the free movement of goods which are the consequence of applying to goods lawfully manufactured or marketed in other Member States rules that lay down requirements to be met by those goods (see, inter alia, judgment of the ECJ in case Rewe Zentral, "Cassis de Dijon" C-120/78, paragraph 14; and, more recently, in case Commission v Italy, C-110/05, paragraph 58), such as those relating to their name, form, size, weight, composition, presentation, labelling and packaging, even if those rules apply to national and imported products alike (see, inter alia, judgment of the ECJ in case Commission v Spain, C-12/00, paragraph 72).

Even if a national measure violates Article 34 TFEU, it may be justified under Article 36 TFEU, including on the ground of protection of human health. The national measure can be properly justified only if: 1) it is appropriate for securing the attainment of that objective and 2) does not go beyond what is necessary in order to attain it (proportionality test) (see, inter alia, judgment of the ECJ in cases Deutsche Parkinson, C-418/15, paragraph 34; and in case Human plasma, C-421/09, paragraph 34 and in case The Scotch Whisky Association and Others, C-333/14, paragraph 33).

The Court also held it is for the national authorities to provide the necessary evidence to that effect. The reasons which may be invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see, inter alia, ECJ judgment in case Deutsche Parkinson, C-418/15, paragraph 35; see also case The Scotch Whisky Association and Others, C-333/14, paragraph 54).

The Commission considers the size of the warnings to be disproportionate to the aim pursued - public health protection - in circumstances where the Irish authorities did not provide any justification in support of the requirement for such a big portion of the label being allocated to health warnings.

In the light of Commission's concerns with respect to the proposal for the size of the health warnings and their compliance with the principle of proportionality, could the Irish authorities explain how they consider that the requirement that "at least one third of the printed material will be given over to evidence-based health warnings" is proportionate in the light of Article 36 TFEU and of the ECJ jurisprudence mentioned above? Would not the same objective be achieved if the health warnings had a smaller, yet visible, size?

2. ADVERTISING RESTRICTIONS

The notified draft introduces further restrictions on the advertising of alcoholic beverages in Ireland by adding the obligation to include in the advertisement "a warning that is intended to inform the public of the direct link between alcohol and fatal cancers". As the Commission already noted in its comments for notification 2016/42/IRL, restrictions on adverts that are part of a publication would block the free circulation of such publications. In this respect such restrictions should be appropriate and proportional to the aim to be achieved.

Moreover, in its judgement of 8 March 2001 in case C-405/98 (Gourmet International Products) concerning the Swedish prohibition on advertising of alcoholic beverages, the
Court found that such a measure not only prohibits a form of marketing a product, but in reality refrains producers and importers from directing any advertising messages at consumers and must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products, therefore constituting an obstacle to trade between Member States caught by Article 34 TFEU (see paragraph 25 of the judgement). The Court added that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television (...) is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar (paragraph 21).

The justification provided by the national authorities must also be interpreted in the light of fundamental rights, which include freedom of expression (case C-368/95 mentioned above, grounds 24 and 25).

Such obstacles may be justified however by the protection of public health, a general interest ground recognised by Article 36 TFEU. In that regard, the Court has accepted that rules restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflects public health concerns (see, inter alia, judgment of the ECJ in joined cases Aragonesa de Publicidad Exterior and Publivia, C-1/90 and C-176/90, paragraph 15). The measure concerned must nevertheless be proportionate to the objective to be achieved, in a way that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection sought could not be obtained by less extensive prohibitions or restrictions or by measures having less effects on intra-EU trade (case C-405/98 mentioned above, paragraph 34).

The Commission considers that a more targeted approach on restrictions on advertisements could be more appropriate. The proposed prohibition would mean that for instance a magazine distributed all over Europe that contains only one page of advertising which advertises an alcoholic product would need to be reprinted before being lawfully marketed in Ireland.

Could the Irish authorities explain how they consider that the restrictions on advertising are proportionate in the light of Article 36 TFEU and of the ECJ jurisprudence mentioned above? Could not the objective sought be achieved by less extensive prohibitions, having less effect on intra-EU trade?

3. BROADCASTING RESTRICTION

Finally, the notified draft also introduces a prohibition to broadcast or cause to be broadcast, an advertisement for an alcohol product on a television programme service between 3.00 a.m. and 9.00 p.m., and on a sound broadcasting service on a week-day between midnight and 10.00 a.m. or 3.00 p.m. and midnight. The aim, according to the Irish authorities, is to restrict broadcast advertisements to specified hours based on the viewing and listening times of children, as they are continuously exposed to positive, risk-free images of alcohol and its use.

The measure at hand is intended to protect children and young people from exposure to alcohol marketing. In this respect it should be noted that under Article 4(1) of the
Audiovisual Media Services Directive\(^3\) (hereinafter "AVMSD"), Member States are free to require media services under their jurisdiction to comply with more detailed or stricter rules, provided that such rules are in compliance with EU law. However, according to Article 2(1) AVMSD, audiovisual media service providers (including broadcasters) must comply only with the rules of the Member State under whose jurisdiction they fall (country of origin principle).

Could the Irish authorities confirm that the scope of application of the notified draft is limited to broadcasters under Irish jurisdiction?

The Commission invites the Irish authorities to take into account and to address all of the above comments and reply fully to all questions.

For the European Commission

Lowri Evans
Director-General
