

Lexxion Verlagsgesellschaft mbH

EstoniaAuthor(s): Daiga Lagzdiņa

Source: *European State Aid Law Quarterly*, Vol. 15, No. 2 (2016), pp. 322-325

Published by: Lexxion Verlagsgesellschaft mbH

Stable URL: <https://www.jstor.org/stable/10.2307/26694063>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



Lexxion Verlagsgesellschaft mbH is collaborating with JSTOR to digitize, preserve and extend access to *European State Aid Law Quarterly*

JSTOR

TFEU or that the legal measure that constitutes State aid is an appropriate, necessary and proportionate measure. Under these circumstances, the referred Guidelines on State aid for environmental protection and energy 2014-2020 are an essential resource, particularly regarding the criteria for the assessment of the principles of necessity and proportionality of the aid.

In conclusion, the CNMC report serves as an example of how State aid control is a politically sensitive area, as it touches upon one of the core competences of governments of sovereign States, namely the power to tax (whether at national

level or local governmental level). It is a reminder for State and regional tax policymakers to keep an eye on State aid provisions, which act as a limit to those legislative powers.

*Julia García-Royo Díaz**

* Deputy Head of State Aid Unit at Spain's National Markets and Competition Commission. The author would like to thank the anonymous peer reviewers for their helpful comments on an earlier draft. All views expressed in this article are personal.

Estonia

Exemptions From the Environmental Levies - When And Why Can It Be Justified by the Logic of the National Tax System?

I. Introduction

On 8 May 2015, the European Commission (hereinafter - the EC) declared the exemption from packaging deposit and packaging excise duty with respect to beverages delivered on board of ships introduced in Estonia as not constituting State aid within the meaning of Article 107(1) of the TFEU.* The case was initiated on the basis of the complaint submitted by Aldar Eesti OÜ (hereinafter - the complainant) in February 2012. Based on the information submitted by the Estonian authorities, initially the EC tried to close the case without adopting a formal decision explaining the complainant that the contested measure appears not constituting State aid. But the preliminary assessment of the EC was contested by the complainant insisting that the EC shall take a formal decision on the submitted complaint.

II. Packaging Deposit System and Obligation to Pay Packaging Excise Duty

How Are the Systems Interlinked? Under the Estonian Packaging Act and the Packaging Excise Duty Act (hereinafter - the packaging legislation) the packaging undertakings, i.e. producers and importers of beverages, are responsible for taking back, recovering and recycling packaging of beverages. The relevant legislative acts were enacted to transpose the requirements of the European Parliament and Council Directive 94/62/EC on packaging and packaging waste (the Packaging Directive).²

The packaging deposit system was introduced to provide necessary incentives for customers to

bring back used packaging thus helping to achieve environmental objectives defined in the packaging legislation.

Estonia has implemented a packaging deposit system with respect to low-alcohol beverages, ciders, perries and soft drinks. Packaging undertakings factor the packaging deposit in the price of beverages with respect to every packaging sold and label the packaging accordingly. Retailers are obliged to take back from consumers used packaging, refund the entire sum of the deposit, then forward the collected packaging for recycling and receive back the deposit sums paid. Retailers receive services from the packaging undertakings to cover the costs of taking empty packages back from the consumers and forwarding them for processing. The deposit what consumers are paying for bear packaging (type of packaging covered by the complainant) is €0.08 per bottle/can.

If the packaging undertakings do not meet the packaging recov-

* Lawyer-Expert at Ardenis Ltd.

² European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365, Date of effect 31 December 1994, p. 10

ery ratio stipulated in the legislation, e.g. 50% in case of metal packaging of beverages, the packaging undertakings must pay a specific levy - packaging excise duty. It shall be noted that the intermediaries and retailers do not bear the responsibility if the stipulated packaging recovery ratios are not attained.

All packaging undertakings, based on the provisions of the packaging legislation in force, have opted to delegate their obligations under the packaging deposit system to an organisation licensed by the State, i.e. to Eesti Pandipakend OÜ, which is a non-profit company owned by four business associations. Eesti Pandipakend OÜ also pays the packaging excise duty on behalf of the packaging undertakings in each case the recovery ratio is not achieved.

III. Exemptions Set in the Packaging Legislation and Contested by the Complainant

1) Exemptions

The deposit refund system on beverage packaging aims at increasing the proportion of empty packaging returned by consumers, providing points for reuse or recycling.

Based on the provisions of the Packaging Act,⁴ packaged beverages delivered by the packaging

undertakings to another country or delivered on board of aircrafts or vessels involved in the international transportation for purchase by passengers is not covered by the standard requirements of the packaging legislation, i.e. no packaging deposit should be paid for such packaging and that no special labelling is required.

Exemptions introduced in the packaging legislation are justified by the fact that most of the packaging of beverages sold on ships⁵ relates to take-away sales and the waste ends up in another country, therefore Estonian packaging undertakings cannot recover and recycle such packages. Therefore packaging undertakings delivering services to ships, and hence involved in international transport, would be placed in an unfavourable situation compared to packaging undertakings servicing retailers operating in the territory of Estonia. This is because the payment of the packaging excise duty is dependent on the volumes of the used packaging brought back by the consumer for recycling. That means, if the 50% ratio established by the packaging legislation would not be achieved due to beverage deliveries on board of aircrafts or vessels involved in the international transportation, packaging undertaking would be obliged to pay the packaging excise duty.

This concerns the packaging related to the consumption on board

of ships, according to the Estonian authorities, and induced exemptions from the packaging deposit system. It still serves in order to achieve the objectives of the national packaging legislation, when shipping companies bring back packaging waste to Estonia. Such packaging is treated by a designated port operator who should ensure the maximum reuse/recycling of the waste from ships and is financed from port charges paid by ship operators.

2) The Complaint

The complainant argued that the exemption from the packaging deposit system and from the packaging excise duty amount to incompatible State aid because the exemption from the charges related to the packaging legislation means that the "take-away" beer sold on board ferries between Estonia and other Member States (principally Finland and Sweden) is cheaper than the beer sold by shops on the land in Estonia. According to the complainant, the price difference constitutes an advantage to the ferry companies and distorts competition and affects trade since it would incentivise certain customers to buy beer on the ferries rather than in Estonian shops.

IV. Situation in Other Countries around the Baltic Sea?

Around the Baltic Sea following countries have introduced mandatory packaging deposit system: Denmark (since 1984, originally the system only covered refillable beverage containers, as of 2002 new types of packaging have been gradually added),⁶ Estonia (since May 2005), Finland (since 1996,

4 See Packaging Exercise Duty Act, § 8, Paragraph (2), sub-point 4, available at <<https://www.riigiteataja.ee/en/eli/527052014002/consolide>> Last accessed on 22 June 2016. and Packaging Act, § 21, Paragraph (4¹), sub-point 2, available at <<https://www.riigiteataja.ee/en/eli/ee/512012016003/consolide/current>> Last accessed on 22 June 2016.

5 The complaint concerns only the packaging of beverages sold on board of ships, but the same reasoning is equally applicable to the packaging of beverages sold on board of aircrafts.

6 Please see information available at <<http://www.pro-e.org/Denmark>> Last accessed on 22 June 2016.

initially aluminum cans were covered and since 2008 also PET bottles),⁷ Germany (since January 2003),⁸ Lithuania (since February 2016)⁹ and Sweden (since 1984 for cans and 1994 for PET plastic bottles).¹⁰

Purchases of alcoholic beverages on the ferries between multiple countries around the Baltic Sea at the current time are not subject to alcohol excise duty and also any packaging deposits as they are designated as 'tax free zones'. It was discussed at the workshop in Helsinki (Finland) on April 2011 (hereinafter - Helsinki workshop), that by applying a packaging deposit systems on beverages on ferries, presumably, other taxes should be applied as well, as a result, this would raise the question the continuation of the tax free zones.¹¹

At the Helsinki workshop, it was noted that the difference in alcohol excise duties applied to beverages in different countries is a significant consumer issue, incentivising consumers to go elsewhere to buy alcohol. For example Danish citizens tend to buy substantial quantities of beer in Germany.¹² In 2011, the European Parliament in its Briefing paper "A European Refunding Scheme for Drinks Containers" (hereinafter - The Briefing paper of the European Parliament) also provided an insight into this problem regarding one-way beverage can flows between countries around the Baltic Sea.¹³ The biggest cross-border beer can flow is reported from Germany to Denmark and from Germany to Sweden.

It shall be noted, that deposit values in Estonia are very small (either €0.04 or €0.08 depending on the type of packaging^{14/15}) com-

pared to many other countries around the Baltic Sea. Thus, arguments of the complainant that the price difference, for example, of €0,08 between beer sold on board of ferries and beer sold on the land incentivise customers to buy beer on ferries rather than in Estonian shops do not sound well-grounded.

V. The Decision of the European Commission

The EC decision after its assessment of the Estonian packaging legislation distinguishes between the exemption from packaging deposit and the exemption from packaging excise duty.

1) Packaging Deposit Scheme

The entire Estonian packaging deposit scheme is controlled by Eesti Pandipakend OÜ which is a producer responsibility organisation set up and operated by the packaging undertakings themselves and which is financed entirely by its own resources. Eesti Pandipakend OÜ acts as a subordinate body of the Ministry of the Environment,

at the same time it enjoys a high degree of autonomy in its operations.

According to the Estonian Packaging Act, beverage containers are subject to fully refundable deposit, its level is set by the producers themselves and is only subject to formal approval by the Ministry of Environment. The funds resulting from the deposit never transit through any government account and never fall under the scrutiny of the government.

Eesti Pandipakend OÜ has established handling fees that are paid to all retailers and operators of redemption centers to cover the direct costs related to take-back and handle both - empty refillable and non-refillable deposit packaging. Additionally, it charges packaging undertakings an administrative fee to cover its own costs. Both mentioned fees are not established by the Estonian legislation, but introduced by Eesti Pandipakend OÜ. Eesti Pandipakend OÜ keeps all unclaimed deposits and charges service fees.

Accordingly, it shall be concluded that the relevant funds to oper-

7 See information available at <<http://www.govsgocircular.com/cases/the-finnish-levy-and-deposit-system-on-one-way-drink-containers/>> Last accessed on 22 June 2016.

8 See information available at <http://www.bmub.bund.de/fileadmin/Daten_BMU/Download_PDF/Abfallwirtschaft/pfandpflicht_fa_q_en_bf.pdf> Last accessed on 22 June 2016.

9 See information available at <<https://www.bnt.eu/lv/juridiskie-jaunumi/1767-deposit-refund-system-to-be-introduced-in-lithuania>> Last accessed on 22 June 2016.

10 See information available at <<https://www.zerowasteurope.eu/tag/germany-deposit-refund-system/>> Last accessed on 22 June 2016.

11 Sum-up of information discussed at Workshop was held at the Finnish Ministry of Environment in Helsinki on 6 April 2011, available at <http://ec.europa.eu/environment/waste/packaging/cans/pdf/helsinki_workshop_summary.pdf> Last accessed on 22 June 2016.

12 See European Parliament, Directorate-General for External Policies, Policy Department, Briefing Paper 'A European Refunding Scheme for Drinking Containers' (October 2011), 7, available at <[http://www.europarl.europa.eu/RegData/etudes/note/JOIN/2011/457065/IPOL-AFET_NT\(2011\)457065_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/JOIN/2011/457065/IPOL-AFET_NT(2011)457065_EN.pdf)> Last accessed on 22 June 2016.

13 *European Parliament* (n12), 8 (Table 1), 19 (Table 5).

14 *Regions for Recycling* (n3), 8.

15 According to the Packaging Act, § 21, Paragraph (6) prescribes that a deposit cannot be set to be less than €0.03, available at <<https://www.riigiteataja.ee/en/eli/ee/512012016003/consolide/current>> Last accessed on 22 June 2016.

ate the Estonian packaging deposit system originate from consumers of packaging and its funds are managed by the industry without passing through any government accounts. Thus, the packaging deposit system in Estonia does not involve State resources within the meaning of Article 107(1) of the TFEU.

2) *Exemption from the Packaging Excise Duty*

Packaging excise duty represents State resources as it is payable to the State budget. But, to classify any exemption as State aid within the meaning of Article 107(1) TFEU, it is important to establish the reference system for the specific tax and whether derogation established for the sale of beer on boards of ships and ferries involved in the international traffic results from the logic of the tax system.

The logic of the specific tax is to ensure that the packaging recovery ratio provided the Estonian packaging legislation is met by the producers and importers of packaged beverages, which can reasonably apply only to beverages sold

on the territory of Estonia. It is therefore in the logic of the system to exempt 'take-away' beverages sold on board ships heading for foreign destinations from the packaging recovery system as the collection of the packaging taken abroad cannot be ensured.

Thus, the exemption from the excise duty does not represent a selective advantage because it is within the logic of the tax system of which it is part, therefore it cannot be classified as State aid within the meaning of Article 107(1) of the TFEU.

VI. Logic of Exemptions

Firstly, consumers are affected in applying the national beverage packaging deposit systems to take-away beverages and consumption outside the territory of a country where it was bought, as consumers cannot claim back the deposit in other countries (country of destination, for example). Only way to recover the paid deposit is to bring back packaging to the country of origin, i.e., the country where the beverage was bought. In October 2015, the author experienced the

dilemma as well while transiting via Frankfurt airport and buying a plastic bottle of still-water. A packaging deposit €0.25 per bottle was added to the original price with no option for exemption due to the onward journey outside Germany, and hence no possibility to claim it back in the country of destination.

Additionally, in a system similar to the one existing in Estonia, packaging undertakings would be affected as well, if all or the majority of packaged beverages would be delivered for take-away sales and consumption outside the country's territory where the packaged beverage was bought. Packaging undertakings would be disproportionately penalised for non-complying with packaging-waste recovery ratio.

To apply requirements of the national environmental rules to the packaging waste ending-up in another State, the EU-wide/ EEA-wide refund scheme for one-way beverage packaging shall be introduced. However such a system would not solve cross-border problems as well, i.e. it would not be applicable to packaging waste brought to non-EEA countries.

* Lawyer-Expert at Ardenis Ltd.

*Daiga Lagzdina**