

Message 116

Communication from the Commission - TRIS/(2020) 04083
Directive (EU) 2015/1535
Translation of the message 115
Notification: 2020/0510/D

Forwarding of a detailed opinion received by a Member State (Netherlands) (article 6, paragraph 2, second indent of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 18-02-2021.

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamused - Επιμεριστωμένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Amplia el plazo del estatu quo hasta 18-02-2021. - Produzuje lhůtu pro stávající stav až do 18-02-2021. - Fristen for status quo forlænges til 18-02-2021. - Die Laufzeit des Status quo wird verlängert bis 18-02-2021. - Praeguse olukorra tähtaega pikendatakse kuni 18-02-2021. - Παρατείνει την προθεσμία του status quo μέχρι την 18-02-2021. - Extends the time limit of the status quo until 18-02-2021. - Prolonge le délai de statu quo jusqu'au 18-02-2021. - Proroga il termine dello status quo fino al 18-02-2021. - Pagarina "status quo" laika periodu līdz 18-02-2021. - Prateşia status quo laiko limitā iki 18-02-2021. - Meghosszabbítja a korábbi állapot határidejét 18-02-2021-ig. - Jestendi t-terminu ta' l-istatus quo sa 18-02-2021. - De status-quo-periode wordt verlengd tot 18-02-2021. - Przedłużenie status quo do 18-02-2021. - Prolonga o prazo do statu quo ate 18-02-2021. - Časový limit momentálneho stavu sa predĺži až do 18-02-2021. - Podaljša rok nespremenjenega stanja do 18-02-2021. - Jatkaa status quo määräaika 18-02-2021 asti - Förlänger tiden för status quo fram till: 18-02-2021 - Удължаване на крайния срок на статуквото до 18-02-2021 - Prelungeşte termenul status quo-ului până la 18-02-2021.

Die Kommission hat diese ausführliche Stellungnahme am 17-11-2020 empfangen.
The Commission received this detailed opinion on the 17-11-2020.
La Commission a reçu cet avis circonstancié le 17-11-2020.

(MSG: 202004083.EN)

1. MSG 116 IND 2020 0510 D EN 18-02-2021 17-11-2020 COM 6.2(2) 18-02-2021

2. Nederland

3A. Ministerie van Financiën
Belastingdienst/Douane Centrale Dienst voor In- en Uitvoer

3B. Ministerie van Economische Zaken en Klimaat

4. 2020/0510/D - C50A

5. Article 6(2), second indent of Directive (EU) 2015/1535

6. Under the notification procedure laid down in Directive (EU) 2015/1535, the German authorities notified on 17 August 2020 the draft of the Twenty-second Ordinance amending the Consumer Goods Ordinance (2020/510/D, hereinafter referred to as 'the draft Ordinance').

As a core element, the draft Ordinance provides for an obligation to use a functional barrier in the production / placing on the market of food contact materials and articles (FCM) that are (partly) made of waste paper (recycled paper/cardboard). This is intended to prevent the transfer of mineral oil aromatic hydrocarbons (MOAH) in order to, according to the German authorities, take consumer health protection into account in this regard. Certain possibilities for exemption from the barrier obligation are provided for.

The detection limit for demonstrating that MOAH transfer does not take place is 0.5 mg MOAH / kg of food for a transfer to the food. If corresponding tests are instead carried out with food simulants and not in food, a detection limit of 0.15 mg MOAH / kg of food simulant is used.

The Netherlands has taken note of the draft Ordinance. Examination of the draft Ordinance has led the Netherlands to submit the following detailed opinion.

Article 1 of the draft Ordinance aims to amend the current Consumer Goods Ordinance to provide that certain food contact materials and articles that are (partly) made of paper, corrugated cardboard or cardboard, in particular recycled paper/old paper, can only be placed on the market in Germany if they have a functional barrier (i.e. 'one or more layers or coatings of a food contact material'). The Netherlands notes that this prevents food contact materials and articles lawfully placed on the market in other EU Member States that (partly) consist of waste paper (i.e. recycled paper/cardboard), or are packaged therein, from being traded with Germany.

It follows from Article 6 of Regulation (EC) No 1935/2004 on materials and articles intended to come into contact with food that, in the absence of specific measures adopted by the European Commission as referred to in Article 5 of that Regulation, Member States may maintain or adopt national provisions only if they are in conformity with the Treaty. The Netherlands notes that no special measures have been adopted in the field of recycled paper/cardboard as referred to in the above-mentioned Article 5. The compatibility of the draft Ordinance with the Treaty must therefore be examined. Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States. This prohibition includes any measure which may hinder, directly or indirectly, actually or potentially, trade between Member States (8/74 Dassonville, paragraph 5). As the German authorities oblige producers of food contact materials and articles that consist (partly) of waste paper to use a functional barrier in the production / placing on the market of these materials and articles, producers are forced to adapt their manufacturing processes, thereby incurring additional costs. Moreover, although the draft Ordinance provides for exemptions, the burden of proof lies with producers. Indeed, according to the draft Ordinance, the relevant food contact materials and articles, may also be produced / placed on the market without a functional barrier if the food business operator using them explicitly grants a corresponding exemption to the manufacturer of the materials and articles or the company placing them on the market. In these cases, however, the food business operator must themselves take appropriate measures / guarantee conditions to ensure that the transfer of mineral oil aromatic hydrocarbons is below the detection limit provided for. This hampers trade in the internal market. As a result, the draft Ordinance is likely to infringe Article 34 TFEU.

Obstacles to the free movement of goods must be justified on the basis of Article 36 TFEU or, in the case of measures which are indiscriminate, on the basis of exceptional grounds accepted by the Court of Justice of the European Union in its case-law. In view of the notification sent by the German authorities, the draft Ordinance aims to protect consumer health. The German authorities thus appear to invoke the 'protection of health and life of humans' as referred to in Article 36 TFEU. The Netherlands does not dispute that the protection of consumer health constitutes a legitimate justification. The Netherlands recognises that the draft Ordinance does not seek to make a distinction according to the origin of the materials and articles. However, obstacles to the free movement of goods must be necessary to achieve their objective. In addition, obstacles must be proportional, because they are appropriate for the objective pursued, do not go beyond what is necessary to achieve that objective, and the objective cannot be achieved by other, less restrictive measures.

First of all, the Netherlands doubts whether the draft Ordinance is appropriate for achieving the stated objective of protecting consumer health.

The Netherlands points out that mineral oil aromatic hydrocarbons (MOAH) can be traced back to many different sources, such as harvesting machinery, machine oils, chemical preparations and means of food processing, air pollution from industry and traffic, and even the food itself. Thus, the transmission of MOAHs cannot be traced exclusively to food contact materials and articles that (partly) consist of waste paper (i.e. recycled paper/cardboard). Research by the National Institute for Public Health and the Environment (RIVM) (see below) shows that the contribution of cardboard packaging made from recycled material is relatively small, at least in the Netherlands. However, the draft Ordinance aims to protect consumer health only by specifically regulating the production and placing on the market of recycled cardboard more stringently, thus achieving only a negligible proportion of transferred MOAHs. At the same time, the burden of proof lies with the producers of recycled cardboard, as explained above.

Secondly, the Netherlands doubts whether the draft Ordinance does not go beyond what is necessary to achieve the objective of protecting consumer health.

The Netherlands points out that there is currently no European legislation on food contact materials and articles that (partly) consist of waste paper (recycled paper/cardboard). With regard to the provisions in the draft Ordinance on mineral oil aromatic hydrocarbons (MOAH), the Netherlands notes that the proposed German standard for migration (i.e. 0.5 mg/kg when measured in food, 0.15 mg/kg when measured in food simulants) from paper/cardboard is much stricter than the action limit recently set by the European Commission for the total presence of MOAHs in infant formulae, irrespective of the origin of the MOAHs, i.e. 1 mg/kg per C fraction. Thus, in the case of infant formulae packed in recycled paper or cardboard, this German legislation considerably tightens the standard.

In support of the two reservations set out above about the draft Ordinance, the Netherlands refers to a recent report by the Netherlands National Institute for Public Health and the Environment, RIVM, (B.M. van de Ven et al., 'Mineral oils in food; a review of toxicological data and an assessment of the dietary exposure in the Netherlands', National Institute for Public Health and the Environment: RIVM Letter report 2017-0182; <https://www.rivm.nl/bibliotheek/rapporten/2017-0182.pdf>). RIVM concluded that it is important to carry out research into mineral oil aromatic hydrocarbons (MOAH), because some MOAHs are carcinogenic. However, it is not possible to indicate whether people are ingesting too much, because there is no health standard for MOAHs.

According to RIVM, carcinogenic MOAHs are mainly found in crude or inadequately purified mineral oils and in oils that have been heated. They are not in all the sources from which MOAHs can end up in food. The total MOAH content therefore does not provide any information as to whether the intake of that MOAH is harmful. According to RIVM, it makes sense to identify the sources from which MOAHs end up in food. Subsequently,

measures can be taken to avoid harmful sources as much as possible. An example of a polluting source is jute sacks treated with oil in which cocoa beans are packed.

According to RIVM, the contribution of another polluting source, cardboard packaging made from recycled materials, does not seem to be very significant in the Netherlands. Dry foods such as rice, pasta, breakfast cereals and chocolate sprinkles are often wrapped in them. In the intake calculations, intake via these foodstuffs appears to contribute only marginally to the total exposure of food to mineral oils. RIVM therefore concludes that measures to limit exposure from cardboard packaging will have a limited effect.

Thirdly, the Netherlands notes that the notice sent by the German authorities with the notification does not clarify whether they have examined whether the stated objective of protecting consumer health can also be achieved by less restrictive measures.

In view of the reservations expressed above about the notified draft Ordinance, the Netherlands hereby indicates by means of a detailed opinion, as referred to in Article 6(2) of Directive (EU) 2015/1535, that the proposed measure has aspects which may create obstacles to the free movement of goods in the context of the internal market.

European Commission

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