



EUROPEAN COMMISSION

Brussels, 08.05.2015

C (2015) 3064 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: State aid SA.34528 (2015/NN) (ex-2012/CP) – Estonia – exemption from packaging deposit and packaging excise duty with respect to beverages delivered on board of ships

Sir,

1. PROCEDURE

1. On 17 February 2012 the Commission received a complaint from Aldar Eesti OÜ concerning the above mentioned measures which it transmitted to the Estonian authorities for comments. Those comments were received on 15 May 2012.
2. On 15 May 2012 and 9 August 2012 the complainant submitted an update of its complaint following which, on 13 August 2012, the Commission asked the Estonian authorities additional questions. The reply of the Estonian authorities was received on 4 October 2012.
3. On 25 September 2012 the complainant submitted another letter which did not include significant new elements. Following this, on 16 November 2012 the Commission services sent a letter pursuant to the second sentence of Article 20(2) of Regulation 659/1999¹ to the complainant explaining that based on the information submitted the contested measures did not appear to constitute State aid. In addition, the Commission services explained that the complaint did not constitute a priority.

¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.03.1999, p. 1.

Keit Pentus-Rosimannus
Välisminister
Islandi väljak 1
15049 Tallinn
ESTONIA

4. On 14 December 2012 the complainant contested the Commission services' preliminary assessment that the measure did not involve State aid. Consequently, on 22 May 2013, the Commission sought complementary information from the Estonian authorities. The reply of the Estonian authorities was received on 19 June 2013 and was followed by the complainant's comments on 13 July 2013, the Estonian authorities having shared their reply with the complainant.
5. On 6 November 2013 the Commission services sent a second letter to the complainant, confirming their preliminary assessment that the measures do not seem to entail State aid. That preliminary assessment was contested by the complainant on 2 December 2013.
6. On 28 May 2014 the Estonian authorities sent a letter to the Commission which recapitulated the functioning of the packaging legislation in Estonia and explained why it could not be extended to deliveries on board of ships. On that basis, the Estonian authorities asked the Commission to close the complaint. On 26 September 2014, the Commission services sent a third letter to the complainant, again confirming their preliminary assessment that the measures do not appear to constitute State aid. That preliminary assessment was again contested by the complainant who insisted that the Commission take a formal decision in the above case.

2. DESCRIPTION OF THE CONTESTED MEASURE

7. The complaint concerns the Estonian packaging legislation and specifically the exemptions from that legislation applicable in certain situations.

2.1. Estonian packaging legislation – the general principles

8. Under the Estonian legislation (The Packaging Act - Pakendiseadus² and the Packaging Excise Duty Act - Pakendiaktsiisi seadus³), packaging undertakings (i.e. producers and importers of beverages)⁴ are responsible for taking back, recovering and recycling the 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)⁵.
9. If they do not meet the packaging recovery 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"). That duty is a one-tier levy which is only paid by the packaging undertakings (intermediaries and retailers do not bear the responsibility if the stipulated packaging recovery ratios are not attained). In practice hardly any revenue is collected by the State through the packaging excise duty.
10. To provide the necessary incentives for the customers to bring back used packaging and to attain the waste recovery objectives laid down by the packaging legislation, Estonia has implemented a packaging deposit system with respect to low-alcohol beverages, ciders, perries and soft drinks. Importers/producers factor the packaging deposit in the price of the beverages with respect to every packaging sold and label the packaging accordingly. Such beverages should be sold at

² <https://www.riigiteataja.ee/akt/13328511>, adopted on 21.04.2004 and in force since 1.06.2004, as subsequently amended.

³ <https://www.riigiteataja.ee/akt/13328507>, adopted on 19.12.1996 and in force since 01.03.1997, as subsequently amended.

⁴ The entity which places the packaged goods on the market for the first time.

⁵ OJ L 365, 31.12.1994, p. 10.

each stage with a deposit. Retailers are obliged to take back from consumers used packaging, refund the entire sum of the deposit and then forward the collected packaging for recycling/processing (thus in their turn getting 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.

11. The deposit for beer packaging (which is the packaging specifically covered by the complaint) is EUR 0.08 per bottle/can, implying a price supplement of about EUR 2 for the widely-sold cast of 24 beers.
12. Under the existing legislation the packaging undertakings can delegate their obligations to an organisation licensed by the State. For the packaging concerned by the complaint (packaging covered by the packaging deposit system) all packaging undertakings have chosen to delegate their duties to Eesti Pandipakend OÜ which is a non-profit company owned by four business associations. Eesti Pandipakend OÜ not only manages the packaging deposit system but also pays the packaging excise duty on behalf of the packaging undertakings in case the recovery ratio is not achieved. The main source of the income of Eesti Pandipakend OÜ which is used for paying the packaging excise duty to the State is the deposit sums not claimed back by customers.

2.2. Exemptions contained in the Estonian packaging legislation and contested by the complainant

13. The Estonian packaging legislation provides exemptions from the packaging deposit and excise duty with respect to the packaging of drinks delivered on board ships involved in international transport.
14. In accordance with Section 21(4¹)2) of the Packaging Act, packaged beverages delivered by packaging undertakings to another country or delivered on board aircrafts or vessels involved in international transportation for purchase by passengers is not covered by the standard requirements of the packaging legislation. This means that no packaging deposit should be paid for such packaging and that no special labelling is required. Consequently, no packaging excise duty can apply to such deliveries (Section 8(2)4) of the Packaging Excise Duty Act).
15. The Estonian authorities opted for that approach as most of the packaging of beverages sold on ships relates to take-away sales and the waste ends up in another country. As a result, there is no possibility for Estonian operators to recover and to recycle such packaging.
16. As regards packaging related to consumption on board of ships, the objectives underlying the national packaging legislation are still met, even when shipping companies bring back to Estonia the packaging waste. The relevant packaging is treated by a designated port operator who should ensure maximum reuse/recycling of the waste from ships and is financed from port charges paid by ship operators. More generally, ship generated waste does not go to landfill, as it is in practice financially a very expensive method of disposing of waste in comparison with the alternatives⁶.

⁶ According to the Estonian authorities, landfilling currently costs the party delivering the waste approximately EUR 50–55 per tonne, while incineration costs approximately EUR 30–35 per tonne. In contrast, materials for recycling which, with some provisos, are clean and sorted have a positive value (i.e. the party delivering the waste receives a payment for the material): approximately EUR 2 000 per tonne for aluminium drinks cans, EUR 200–300 per tonne for PET drinks bottles and up to EUR 100 per tonne for cardboard packaging. In consequence, economic operators avoid landfilling such materials and arrange for as much as possible to be recycled. If, however, packaging waste is mixed with food or other

17. According to Estonian authorities it would also be disproportionate to extend all requirements of the Estonian packaging legislation to packaging of beverages consumed on board, which normally constituted a limited part of the beverage purchases⁷. Handling the packaging according to all the requirements of the existing legislation (including take-back obligation) would require dedicated space that not all ship or aircraft operators⁸ could allocate for that purpose. It is also not evident how the relevant legislative requirements could technically be extended to non-Estonian companies calling at Estonian ports, including cruise ship operators.

2.3. The complaint

18. The complainant is a shop-owner operating in the vicinity of the port of Tallinn (Aldar Eesti OÜ). Finnish tourists buying alcohol (mainly beer) for take-away purposes are an important part of its clientele. The exemption from the standard norms of the packaging legislation for deliveries on board of ships normally makes it cheaper for Finnish tourists to buy alcohol on ships rather than in town.

19. The complaint covers two issues:

20. First, the complainant considers that the exemptions from packaging deposit and packaging excise duty mentioned in recitals (13) and (14) amount to incompatible State aid ("Issue 1"). In that respect, the complainant alleges that 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 land in Estonia. That price difference supposedly constitutes an advantage to the ferry companies and distorts competition and affects trade since it would induce certain customers to buy beer on the ferries rather than in Estonian shops.

21. Secondly, the complaint covers the past practice of selling beverages in the Tallink group's shop located in the Port of Tallinn without proper application of packaging deposit and other provisions of the Estonian packaging legislation ("Issue 2"). That practice was subsequently discovered by the Tax and Customs Board. The pre-order Netshop (belonging to Tallink duty-free, which is one of businesses of AS Tallink Group) operated on the port quay which is to be considered as a territory of Estonia.

3. ASSESSMENT

3.1. Scope of assessment

22. In terms of the measures contested, the present assessment covers only measures related to the delivery of packed beverages on board ships involved in international traffic.

23. As regards Issue 2, i.e. the past sales in the Tallink group's shop located in the Port of Tallinn in breach of the Estonian packaging legislation, the Commission notes that it concerns an individual instance of breach – on the part of the undertaking - of the national rules on packaging placed on the market in Estonia. The Commission understands that the Estonian authorities, once that breach had been identified, took the appropriate legal measures to enforce the national law and end that individual case of misapplication. There is no indication that the national authorities did not act with due diligence to remedy that situation and enforce the applicable rules. As such,

organic waste, it is treated as mixed municipal waste and, since the spring of 2013, has mostly been sent to a special waste incineration plant.

⁷ Take-away purchases can go up to 70 litres per person.

⁸ Aircraft operators are equally concerned by the contested exemption.

even assuming that Tallink indeed failed to pay the taxes and fees due in that particular situation, it cannot be considered as an advantage imputable to the State and can therefore not constitute State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union (TFEU).

24. As regards Issue 1, i.e. the specific exemptions from the general packaging legislation, a possible existence of State aid could in principle be assessed at two levels. The direct beneficiaries of the measures covered by the complaint (if indeed they constitute aid) would be packaging undertakings delivering packed beverages for sale on board ships, as they are the ones who would otherwise bear the liability for not ensuring recovery of the packaging, with the ensuing cost. However, the complainant also considers that the alleged aid benefits the shipping companies Tallink, Eckerö Line, Viking Line and St Peterline⁹, which purchase beverages from Estonian packaging undertakings and then sell them on board their ships¹⁰. The complaint specifically concerns the sale of beer on board the ferries which those companies operate out of the port of Tallinn to other Member States.
25. For State aid control purposes indirect beneficiaries (such as, in this case, the shipping companies) are considered as potential aid recipients only if the first level beneficiaries are not undertakings¹¹ or if it is established that the State resources allow the second level beneficiaries to obtain goods or services on conditions which are not market conditions. It is therefore far from obvious that the shipping companies, even assuming that the measures would constitute State aid, would be considered as beneficiaries of that aid. The Commission will however for the sake of completeness consider undertakings at both levels in its assessment.
26. Finally, the scope of assessment will be limited to "take-away" sales of alcoholic beverages. The complainant did not submit that its interests were affected in the context of on-board consumption of beverages. In any event, the consumption of the alcoholic drinks that passengers have brought with them on board ships is prohibited, which is a standard practice by shipping companies¹². The consumption of beverages and food on board of ships is allowed only in the restaurants and other catering places of the ship. Therefore there is no effective competition between shore-based retailers and shipping companies as regards consumption on board.

3.2. Existence of aid

27. Pursuant to Article 107(1) TFEU *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market"*.
28. The qualification of a measure as aid within the meaning of Article 107(1) TFEU requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that

⁹ It should also be noted that there is one more company providing regular maritime passenger transport connections from Estonia (not mentioned by the complainant): DFDS Seaways which provides transportation from Paldiski port in Estonia to Sweden (Kapellskär).

¹⁰ It also has to be mentioned that the measure equally applies to airlines.

¹¹ Commission decision in Case C 52/2005 *Digital Decoders (Mediaset)*, OJ L 147 8.06.2007, p. 1.

¹² See e.g. <http://www.tallinksilja.com/en/web/int/good-to-know#16661470>

advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

29. As long as at least one of the above conditions is not met, the measure does not qualify as State aid and there is no need to analyze the other conditions.
30. For the purposes of the assessment, it is appropriate to distinguish between the exemption from packaging deposit and the exemption from packaging excise duty.

3.2.1. Packaging deposit scheme

31. The Commission considers that the packaging deposit does not constitute State resources because the relevant funds originate from consumers of packaging, are managed by the industry itself and never come under control of the State.
32. State resources within the meaning for Article 107(1) TFEU include all resources of the public sector but can also, under certain circumstances, include the resources of private bodies. The origin of the resources is not relevant provided that, before being transferred to the beneficiaries, they enter under public control and are therefore available to the national authorities,¹³ even if the resources do not become the property of the public authority.¹⁴ However, regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not entail a transfer of State resources.
33. As regards the Estonian packaging deposit scheme, the entire system is controlled by Eesti Pandipakend OÜ which is a producer responsibility organisation set up and operated by the packaging undertakings themselves¹⁵. The shareholders of Eesti Pandipakend OÜ are Beer Union, beverages Producers Union, Beverages and Beer Importers Association and Trade Association¹⁶.
34. Unlike container collection schemes which benefit from sorting facilities that are financially supported by State, Eesti Pandipakend OÜ is financed entirely by its own resources¹⁷. Pursuant to the Packaging Act, beverage containers (for soft drinks, beer, low ethanol alcoholic beverages, cider, and perry) are subject to a fully refundable deposit. The level of the deposit is set by the producers themselves with a view to ensure the effectiveness of the deposit mechanism¹⁸ and is only subject to formal approval by the Minister of the Environment. The funds resulting from the deposits never transit through any government account and are thus never within the control of the government.
35. Eesti Pandipakend OÜ acts under accreditation by the Ministry of the Environment but enjoys a high degree of autonomy in its operations. For instance, it has established handling fees (not required by legislation) that are paid to all retailers and operators of redemption centres to cover the direct costs related to take-back and handling of both empty refillable and non-refillable deposit packaging. Similarly, it charges packaging undertakings an administrative fee to cover its own costs (a fee not established by the legislation). Eesti Pandipakend OÜ keeps all unclaimed

¹³ See, for instance Case C-206/06 *Essent Netwerk Noord*, ECLI:EU:C:2008:413, paragraph 70; Case C-83/98 P *France v Ladbroke Racing and Commission*, ECLI:EU:C:2000:248, paragraph 50.

¹⁴ See Case T-358/94 *Air France v Commission*, ECLI:EU:T:1996:194, paragraphs 65 to 67. See also Case C-83/98 P *France v Ladbroke Racing and Commission*, ECLI:EU:C:2000:248, paragraph 50.

¹⁵ See inter alia <http://www.taaratark.ee/wp-content/uploads/P-Eek-Deposit-EST-pres-Riga-8-12-2008.pdf>.

¹⁶ See e.g. http://www.palmenia.helsinki.fi/replastfinest/ws4/Birgit_Tolmann.pdf.

¹⁷ http://www.regions4recycling.eu/upload/public/Good-Practices/GP_Tallinn_deposit-packaging.pdf.

¹⁸ i.e. to ensure that consumers have a sufficient incentive to bring used packaging to designated collection points.

deposits and charges service fees. It has itself established a labelling system for covered beverages and all members of the organization must use that marking as well as an EAN bar code¹⁹.

36. To argue for the presence of State resources, the complainant refers *inter alia* to the judgment in Case 173/73 *Italy v Commission*²⁰ which concerned reliefs of charges payable by the textile industry to the State insurance scheme in relation to family allowances. Those reliefs were compensated by funds accruing from contributions paid to the unemployment insurance fund. The complainant stresses that the State aid was still deemed to be present even though the relevant funds were administered by institutions distinct from the public authorities.
37. The Commission, however, considers that the *Italian textiles* ruling concerned a substantially different situation to that under examination. The *Italian textiles* case concerned the unemployment insurance fund, the resources of which were clearly State resources because of the control exercised by the State and the fact that the State was responsible for paying the unemployment benefits related to compulsory unemployment insurance scheme of the Italian State. In addition, although the Italian unemployment insurance fund was managed by institution(s) distinct from the public authorities, it does not appear in the judgment that the institution managing the fund was not a State institution.
38. The Commission considers that, as in the situation described in *Preussen Elektra*²¹, the costs related to the Estonian packaging legislation are financed and managed by the private undertakings without State intervention. The Court found in this case that such an arrangement did not involve State resources.
39. Similarly, in *Pearle*²² the Court stressed that for advantages to be capable of being categorised as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State.
40. The recent ruling in *Vent De Colère*²³ does not change the evaluation of the Estonian packaging system, given that packaging deposit comes from the industry and is administered by the industry without State involvement. In particular, the Commission considers that, for the purpose of the State aid assessment, the roles of Eesti Pandipakend OÜ, a private industry-owned firm, and of the *Caisse des dépôts et consignations*, a public body involved in financing and managing the French renewable energy support scheme at issue in *Vent de Colère*, cannot be treated in the same way. Eesti Pandipakend OÜ, unlike the *Caisse des dépôts et consignations*, is set up and managed by the industry and has a considerable margin of manoeuvre when it conducts its operations with the objective of ensuring compliance with the obligations transferred by the industry to it. In *Vent De Colère*, there was also a direct involvement of the State if the collected para-fiscal charges were not sufficient, so that it therefore acted as a funder of the last resort.
41. Therefore the Commission concludes that packaging deposit does not involve State resources and that the exemption from packaging deposit therefore does not constitute aid within the meaning of Article 107(1) TFEU.

3.2.2. Exemption from the packaging excise duty

¹⁹ <http://www.bottlebill.org/legislation/world/estonia.htm>.

²⁰ Case 173/73 *Italy v Commission* ("*Italian Textiles*") ECLI:EU:C:1974:71.

²¹ Case C-379/98 *Preussen-Elektra* ECLI:EU:C:2001:160.

²² Case C-345/02 *Pearle BV* ECLI:EU:C:2004:448.

²³ Case C-262/12 *Vent De Colère* ECLI:EU:C:2013:851.

3.2.2.1. Involvement of State resources

42. Unlike the packaging deposit, the packaging excise duty represents State resources as it is payable to the State budget. Consequently, exemption from that duty for beverages delivered on board of ships involves the use of State resources. However, for that exemption to constitute State aid it must still meet all other cumulative conditions of Article 107(1) TFEU, including the requirement that the use of State resources must entail a selective advantage for certain undertakings or productions.

3.2.2.2. Presence of a selective advantage

43. According to case-law²⁴, the assessment of the material selectivity of a tax measure consists of three steps:

- first, it is necessary to identify the common or “normal” tax regime (the so-called “system of reference”) applicable in the Member State concerned.
- second, it is necessary to determine whether the measure at stake derogates from the common or “normal” tax regime insofar as it differentiates between economic operators that are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. If this is the case, the measure would be *prima facie* selective.
- third, it is still necessary to determine whether the derogation results from the nature or general scheme of the taxation system of which it forms part. Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State can show that the measure directly results from the basic or guiding principles of the tax system²⁵. In that context, it is for the Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system.²⁶

44. In the case under scrutiny, the system of reference is the Estonian legislation on packaging, and specifically the Packaging Act and the Packaging Excise Duty Act that lay down the (i) obligation to take back, recover and recycle a certain proportion of the packaging containing beverages and (ii) the conditions for the payment of the packaging excise duty tax if the target ratio is not reached. In respect of that system of reference, the exemption from the packaging excise duty derogates from the normal tax regime by allowing for the sale of beer without the imposition of packaging excise duty. It is therefore necessary to establish if that derogation results from the logic of the tax system in question.

45. In the present case, the logic of the tax system is to ensure that the packaging recovery ratio provided for in the legislation is met by the producers and importers of packaged beverages. That objective can reasonably only apply to beverages sold on the territory of Estonia. Estonian packaging undertakings cannot reasonably be held responsible for the recovery and recycling of the packaging of beverages if they are sold outside Estonian territory or for export and consumption outside 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.

²⁴ See, *inter alia*, Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 56; Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 49.

²⁵ See Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 42.

²⁶ See *inter alia*, Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511, paragraph 81 and Joined Cases C-78/08 to C-80/08 *Paint Graphos* ECLI:EU:C:2011:550, paragraph 65.

46. Consequently, the Commission considers that the exemption from the packaging excise duty does not represent a selective advantage because it is within the logic of the tax system of which it is part. Therefore, as that measure is justified by the nature and general scheme of the reference system, it does not constitute aid within the meaning of Article 107(1) TFEU.
47. The Commission does not agree with the complainant that the relevant exemptions obstruct the implementation of the Packaging Directive. The Commission considers that Member States are free to establish packaging collection systems which are best suited to their local needs, consumption and distribution patterns for the various types of packaging and packaged goods. According to the Packaging Directive, every Member State is responsible for waste generated within its borders, including waste originating from imported products. It is the responsibility of the national authorities to ensure the establishment of proper collection and recycling schemes to prevent packaging waste from imported products from littering the environment. The Packaging Directive does not e.g. prevent Estonia from exempting from a deposit scheme/package excise duty products which are consumed and enter the waste streams of another Member State. Those products become packaging waste that is subject to the waste management systems of the Member States into which they are imported.
48. Finally, based on the information available to the Commission, no other Member State (including Finland) extends its packaging-related legislation to supplies on board ships²⁷.
49. Therefore the Commission concludes that the exemption from the packaging excise duty does not constitute aid within the meaning of Article 107(1) TFEU.
50. In addition to the absence of State resources in relation to the exemption from the packaging deposit, the Commission notes that the reasoning regarding the absence of the selective advantage as regards the exception from the packaging excise duty is applicable *mutatis mutandis* to the exception from the packaging deposit.

4. Conclusion

The Commission consider that the measures covered by the complaint do not constitute State aid within the meaning of Article 107(1) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
B-1049 Brussels
Fax No: +0032 (0) 2 2961242

²⁷ See e.g. http://ec.europa.eu/environment/waste/packaging/cans/pdf/helsinki_workshop_summary.pdf;
http://ec.europa.eu/environment/enveco/taxation/pdf/ch12_packaging.pdf

Yours faithfully,
For the Commission

Margrethe Vestager
Member of the Commission