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Brief Expert Opinion

on
Legal Issues Concerning the Separate Collection Rate
in Art. 9 of Directive (EU) 2019/904

by
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A. Objective

The author has been commissioned to draft a brief expert opinion on three questions concerning the calculation of the separate collection rate for single-use plastic beverage bottles (hereinafter also referred to as: “beverage bottles”) pursuant to Art. 9(1) subpara. 1 of Directive (EU) 2019/904 of 5 June 2019 (known as the “Single-Use Plastics Directive”). The issues that this document aims to examine relate to the inclusion of beverage bottles from the residual waste bin, how to establish “single-use plastic products placed on the market” and how to determine the quantity of actually collected beverage bottles.

B. Summary

Beverage bottles from the residual waste bin are not included in the collection rate pursuant to Art. 9(1) subpara. 1 of the Single-Use Plastics Directive. When choosing the method of calculation for determining the collection rate, taking into consideration the objectives of the Single-Use Plastics Directive, it is imperative to choose a method that gives an accurate picture of the waste that is produced and then actually collected. This results both from the Single-Use Plastics Directive and from general principles of European law.

C. Legal Analysis

The following paragraphs present the detailed legal assessment of the individual issues

I. Separate Collection

Pursuant to Art. 9(1) subpara. 1 of the Single-Use Plastics Directive, Member States are required to achieve a collection rate of 90% for single-use plastic beverage bottles by 2029, for example through deposit systems.

The first issue that this document intends to clarify is the question of whether the collection rate, set at first at 77% (by 2025) and then at 90%, means that 77% or 90% of all single-use plastic bottles placed on the market are to be collected exclusively through deposit systems, plastics bins or similar systems that are specifically designed for the purpose of recycling, or whether the collection rate can rather also be achieved by including in the calculation rate – in addition to the beverage bottles already collected because they were separated from other trash – beverage bottles from residual waste bins following so-called “residual waste splitting”.

Pursuant to Art. 9(1) subpara. 1 of the Single-Use Plastics Directive (“Separate collection”) Member States are required to take the necessary measures to ensure that single-use plastic beverage bottles are collected separately for recycling purposes according to the collection rate.

For the definition of “separate collection”, the Single-Use Plastics Directive refers in Art. 3(13) to Article 3(11) of Directive 2008/98/EC of 19 November 2008 (known as the EU Waste Framework Directive, in short: WFD). There, “separate collection” is defined as “collection where a waste stream is kept separately by type and nature so as to facilitate a specific treatment”.

The primary objective of collecting beverage bottles separately from the outset is made clear already in the wording of the Single-Use Plastics Directive and in the definition in the EU Waste Framework Directive. Splitting is not the same as collecting. The choice of words “separate collection”, “collected separately” and above all “kept separately” clearly shows that mixing different types of waste is exactly the issue that must be prevented with a view to the goal of an economic and effective recycling economy. According to Art. 3(11) WFD, separate collection is expressly intended “to facilitate a specific treatment” of the waste. Said aim of facilitating specific treatment would be counteracted by the inclusion of residual waste splitting.

Including the residual waste bin fundamentally contradicts the idea of separate collection. Residual waste splitting has nothing to do with *collecting* waste, but only with subsequent *sorting*. However, the Single-Use Plastics Directive aims precisely at promoting the separate collection of waste already at the first step, so as not to be reliant on downstream sorting of residual waste through waste recycling companies.

The fact that the rate regulation aims at collection “in the first step” is also illustrated by the exemplary mention of the introduction of deposit systems in Art. 9(1) subpara. 3(a) of the Single-Use Plastic Directive. Furthermore, the Directive aims to change consumption patterns (see Recital 13) and to promote responsible consumer behaviour (see Recital 26). Plastic waste is mainly due to inefficient separate waste collection systems and to the low level of consumer participation in these systems, which is why the Directive establishes that it is “necessary to promote more effective separate collection system” (Recital 27).

These objectives would be thwarted if waste from the residual waste bin were to be included in separate collection under Article 9(1) of the Single-Use Plastics Directive. In

particular, the reminder of the still low level of consumer participation makes it clear that the “minimum separate collection target” (Recital 27) cannot be about waste that is separated through residual waste splitting. Separate collection is intended to encourage the population, in particular, to feel accountable. The collection rate is to be positively influenced by the Single-Use Plastics Directive. The knowledge that beverage bottles that are thrown into residual waste disregarding waste separation are nevertheless counted as “separate collection” considerably reduces the incentive for consumers to participate in waste separation systems. The inclusion of the residual waste bin would therefore go against the minimum rate as an effective instrument for achieving the objectives of the directive.

This is also not contradicted by Art. 9(1) subpara. 4 of the Single-Use Plastics Directive, according to which (1) shall apply without prejudice to Article 10(2) and point (a) of Article 10(3) of the WFD. The reference to the fact that it should continue to be possible to collect certain types of waste together merely clarifies that single-use plastic beverage bottles do not necessarily have to be disposed of completely separately from other plastic waste (such as yoghurt cups), but that disposal in the plastics bin, for example, is still allowed. This in no way implies that beverage bottles from the residual waste bin are taken into account when calculating the collection rate of (1). This is also shown by the fact that only certain types of waste can be collected together and this possibility is excluded if it impairs high-quality recycling in accordance with the waste hierarchy pursuant to Art. 10(2) and (3)(a) WFD. According to this, the mixing of residual waste and plastic waste is always inadmissible. This would be tantamount to abolishing waste separation and would therefore be contrary to Article 10(3) subpara. 2 WFD, according to which the Member States, when considering exemptions, shall take into account separate waste collection best practices.

It must therefore be concluded that single-use beverage bottles that are sorted out of the residual waste bin through so-called residual waste splitting cannot be included in the calculation of the collection rate. Furthermore, the logic and purpose of the Single-Use Plastics Directive emphasize the primary objective that the EU Member States set up systems for the separate collection of single-use plastic beverage bottles, although partial separate collection (e.g. using plastics bins) is still permissible.

II. Legal Requirements for the Calculation of the Separate Collection Rate

It is true that the Single-Use Plastics Directive does not lay down a concrete method for the calculation and verification of the targets for separate collection and that these issues

require further elaboration by the EU Commission (Art. 9(3)). Nevertheless, the Single-Use Plastics Directive and general principles of European law already provide legally binding guidelines for the calculation.

1. Determination of the Products Placed on the Market

According to the clear wording of the Single-Use Plastics Directive, the collection rate is determined on the basis of the quantity of single-use plastic beverage bottles placed on the market in a Member State or, alternatively, on the basis of the amount of waste from single-use plastic beverage bottles in a Member State (Article 9(1) subpara. 1 and subpara. 2). It is presumed that the quantity placed on the market matches the quantity of waste generated.

Art. 3(6) of the Single-Use Plastics Directive defines “placing on the market” as “first making available of a product on the market of a Member State”, and Art. 3(7) defines “making available on the market” as “any supply of a product for distribution, consumption or use on the market of a Member State in the course of a commercial activity, whether in return for payment or free of charge”.

It is therefore clear already at this stage that the Directive considers products that are *actually* placed on the market to constitute the basis for the calculation. This also means that the alternative method of calculation (amount of waste generated in a Member State) must take into account *total* waste generated, including carelessly discarded bottles that are not collected (see also Recital 27). It also follows that the basis for determining the calculation basis cannot be provided solely by the quantity licensed by waste handlers in the dual system. Taking into consideration the clear wording of the Directive, the basis for calculation cannot be provided by an indication of amount that does not include the waste volume produced by so-called system objectors (who have no licenses) or those who use partial licenses (who practice so-called “sub-licensing”).

In view of the objectives of the Directive, focusing solely on the licensed quantity is also inadmissible. A directive is to be implemented so as to ensure that the binding objectives set by the directive are achieved. The implementation must be carried out in an effective manner (*Ruffert*, in: Calliess/ Ruffert, TFEU, 5th ed. 2016, Art. 288 Recital 28; *Wolf*, in: Grabitz/Hilf, Das Recht der EU, 40th ed. 2009, A 1. Grundzüge Recital 26). The Member States are obliged, within the freedom of choice left to them, to choose the most appropriate forms and means of ensuring the practical effectiveness (*effet utile*) of the Directive in consideration of its pursued objective (ECJ, Case 48/75/0010 ECR 1976, 497, Recitals 69/73 at the end – *Royer*).

The aim of the Single-Use Plastics Directive is notably to prevent and reduce the impact of certain plastic products on the environment, in particular the marine environment, and on human health (Art. 1). This objective can only be effectively achieved if the calculation basis reflects total waste actually generated. In view of these objectives, preference should, in relation to the issues analysed in this document, therefore be given to those calculation methods that are most suitable to best achieve the objective of environmental protection.

It is therefore imperative that the method of calculation be defined so as to provide the most accurate picture possible. Calculation methods which do not reflect the actual amount of products placed on the market or the actual amount of waste generated are unlawful.

2. Determining the Weight Percentage of Collected Waste

Art. 9(1) subpara. 1 of the Single-Use Plastics Directive establishes that 77 or 90% of the waste from single-use beverage bottles placed on the market in a given year by weight must be collected separately.

The general principles set out above also apply when calculating the percentage by weight. Reference is therefore made to the above. An appropriate and effective method of calculation must be established with a view to maximising environmental protection. The objective of the Single-Use Plastics Directive can be best achieved only if the underlying calculation methods are suitable to determine the amount of waste actually collected.

In order to maximise the practical effectiveness (*effet utile*) of the Single-Use Plastics Directive, it is therefore necessary to determine as accurately as possible how many beverage bottles are actually collected. In particular, high error rates, such as those associated if checks are only random, must be avoided. In view of the objectives of the Directive, it must be ensured that there are reliable methods for determining the exact percentage by weight. When determining weight, it should be borne in mind that when sorting and subsequently weighing bottles, residual fill quantities, contamination, etc. must be taken into account.

Among several possible methods, preference should be given to the one which is most suitable for achieving the objective, i.e. the method that gives as accurate a picture as possible of the amount of waste collected. This is, for example, the case especially with

systems where the collection process is documented for each individual single-use plastic beverage bottle.

In order to prove that the rates for separate collection have been achieved, Art. 13(1) subpara. 1(c) of the Single-Use Plastics Directive, Member States must report to the EU Commission on the single-use plastic beverage bottles collected separately each year. The data and information submitted by the Member States must be accompanied by a Quality Control Report ((2), first sentence). The reporting must enable the EU Commission to verify whether the calculation and verification of separate collection targets in the respective Member State has been properly carried out. In particular, the calculation method and quantities determined must be traceable. Against this background, it is clear that the Member States cannot simply rely blindly on quantities reported, for example, by the Dual System in the Member State. Instead, Member States must (additionally) develop their own (control) mechanisms to ensure that the waste amount and collection quantity are accurately reflected in the weight determination.

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