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REFIT- Evaluation of the pre-packaging legal framework Directives 75/107/EEC, 76/211/EEC and 2007/45/EC

Accompanying the document

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the application of the pre-packaging legal framework Directives 75/107/EEC, 76/211/EEC and 2007/45/EC

{COM(2016) 438 final}

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1 INTRODUCTION

1.1 Purpose of evaluation

The purpose of this evaluation is to assess the performance of the legal framework for pre-packaging that is governed by three Directives: Directive 2007/45/EC on nominal quantities for pre-packed products, Directive 75/107/EEC on bottles used as measuring containers and Directive 76/211/EEC on the making-up pre-packaged products (by weight or volume). This exercise aims at judging whether the Directives in their current form are fit for purpose and meet their objectives (effectiveness) at acceptable costs (efficiency), whether they are still relevant in relation to stakeholders needs and relevant to achieve the overarching political objectives, i.e. promoting the internal market and regulatory simplification with the least red-tape for SMEs, coherence with other EU policies and having EU added value.

Article 9(1) of the Pack sizes Directive 2007/45/EC[1], stipulates that the Commission has to provide a report on application and effects of the Directive by 2015. Directive 76/211/EC was evaluated in 2005[2] while Directive 75/107/EEC has never been evaluated. Since the three Directives are closely related, it was decided to take this opportunity to evaluate the functioning of those three Directives in a consistent evaluative package and to link it to the Regulatory Fitness and Performance Programme (REFIT) of the Commission in 2014[3].

1.2 Scope of the evaluation

The subject area of the evaluation concerns the pre-packaging directives dealing with the measurement of quantities contained in pre-packaged goods and with their sizes.

- Directive 75/107/EEC[4] on bottles used as measuring containers provides for the free circulation of 3-marked bottles. Its application is voluntary, meaning that operators can choose to apply EU law or not, but once they do so, the provisions of the Directive have to be followed. It also provides for market surveillance authorities a statistical test for the content of the bottles;

- Directive 76/211/EEC[5] on making-up pre-packaged products (by weight or volume) concerns the quantity indicated on pre-packed products. It guarantees free circulation of e-marked pre-packages. It also provides a statistical test for the market surveillance authorities of the quantity in the pre-packages. Just as Directive 75/107/EEC, this

[1]Directive 2007/45/EC of the European Parliament and of the Council of 5 September 2007 laying down rules on nominal quantities for pre-packed products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC.

[2] Report on packaging consultation, ENTERPRISE AND INDUSTRY DIRECTORATE-GENERAL, 24 August 2005

[3]COM(2014)368 and SWD(2014)192.

[4]Council Directive 75/107/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to bottles used as measuring containers

[5]Council Directive 76/211/EEC of 20 January 1976 on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain prepackaged products.

directive also falls under optional harmonization as it is the choice of the packer/importer to apply it;

- Directive 2007/45/EC on nominal quantities of pre-packed products introduced total harmonization by prohibiting Member States to regulate on pack/bottle sizes up to 10L/kg whilst prescribing mandatory EU sizes wines and spirit drinks. It applies to all pre-packed products.

The geographical coverage is the European Economic Area; the evaluation covers a 5-year period starting on 1 January 2009 (2009 – 2013).

The evaluation covers the part of the production chain concerned with filling and labelling that are regulated by the directives. It concerns only the metrological aspect, not other aspects such as product description, nutritional content, ingredient listing, health claims, packaging materials, commercial practices and advertisement, and price labelling, which are subject to other pieces of Union legislation.

2 BACKGROUND ON THE DIRECTIVES

2.1 Description of the directives and their objectives

In the 1960s, national laws and specifications concerning bottles used as measuring containers differed, notably as regards markings, and presented barriers to trade in the internal market. This was due to national habits and these obstacles were recognised when the European Commission decided to harmonize the different national rules on nominal quantities, leaving the choice to companies operating mainly or exclusively in their home markets to continue their practices based on national law without any need to change. The result of this effort was the introduction of Directive 75/107/EEC on bottles as measuring containers and Directive 76/211/EEC on quantities in pre-packages.

In 2000, the European Court of Justice[6] ruled that Member States are precluded from prohibiting the marketing of a pre-package having a nominal volume not included in the (non-mandatory) Community range[7], which is lawfully manufactured and marketed in another Member State, unless such a prohibition is designed to meet an overriding requirement relating to consumer protection, applies without distinction to national and imported products alike, is necessary in order to meet the requirement in question and is proportionate to the objective pursued, and that objective cannot be achieved by measures which are less restrictive of intra-Community trade. As its point of reference the Court considered that the "average consumer is reasonably well informed and reasonably observant and circumspect".

Therefore, in the context of the SLIM exercise for simpler legislation[8], liberalisation of pack sizes (except for EU sizes for wines and spirits) was introduced in 2007. Based on an impact assessment[9], including a wide consultation of all interested stakeholders, it aimed in many

[6]European Court of Justice, Case C-3/99. Judgement of the Court (Sixth Chamber) of 12 October 2000. Cidrerie. Ruwet SA v. Cidre Stassen SA and HP Bulmer Ltd.
[7]Non-mandatory sizes were laid down for many products by Directive 75/106/EEC and 80/232/EEC, next to mandatory sizes for wine and spirits.
[8]Simpler legislation: SLIM-IV (COM (2000) 56 final-pp 9-11 & 21, 22 of 4 February 2000.
[9] SEC(2004) 1298, 25.10.2004 related to proposal COM(2004)708 final

sectors, by means of free nominal quantities to increase the freedom of producers to provide goods according to consumer tastes and enhance competition as regards quality and price on the internal market. In wine and spirits, however, it was deemed more appropriate, in the interests of consumers and business, to retain mandatory nominal quantities for the time being. Consumer protection was considered already to be facilitated by the full application of then existing legislation, notably by the Directive on unit pricing[10].

The three Directives are closely related to one another. Bottles complying with Directive 75/107/EEC are 3-marked and can be used as measuring containers (but need not be) to comply with Directive 76/211/EEC allowing affixing the e-mark next to the nominal quantity indication. Both these Directives are optional for the packer, but must be implemented and market surveillance undertaken by Member States. The alternative to using the Directives is national law which may be the same or different from the two Directives. However, the possibility to affix the 3- or e-mark is not provided under alternative national law. The pack sizes Directive 2007/45/EC is mandatory for all prepacked products (and not only those 3- or e-marked) – it prohibits Member States to regulate sizes, it lays down fixed EU sizes for wines and spirit drinks and it waives aerosols volumes from also being labelled by weight.

Directive 75/107/EEC concerns bottles used as measuring containers, i.e. bottles that contain a certain quantity of liquid depending on the level to which they are filled. The Directive requires the manufacturer to register himself ex-ante with the authorities and has obligations for precision and markings whilst it provides a check by the market surveillance authorities for statistically testing the quantity of the bottles. The Directive guarantees free circulation of the bottles marked with the reverse epsilon mark, 3-mark, which is defined by Directive 2009/34/EC[11].

The Directive is optional in the sense that it is the choice of the manufacturer to apply it. His alternative is to apply national specifications and his products are then subject to the Articles of the Treaty concerning mutual recognition (Article 34-36 TFEU).

The Directive dates from the 1970s when effectively national laws presented barriers to most trade on the internal market. National specifications concerning bottles used as measuring containers differed, notably as regards markings, and this caused barriers to trade. The Directive led to a level playing field and was quickly adopted by industry as best practice. The statistical test provided by the Directive allows for regular market surveillance and gives a legal basis for mutual trust by national authorities.

There exist no international standards upon which the Directive is based.

Directive 76/211/EEC concerns the quantity contained in pre-packed products, i.e. the indicated quantity in pre-packages that are filled without the consumer being present. The Directive contains the legal requirements for precision (so-called tolerance) and markings whilst it provides a statistical test for the market surveillance authorities by which to check the

[10]Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

[11] Directive 2009/34/EC of the European Parliament and of the Council of 23 April 2009 relating to common provisions for both measuring instruments and methods of metrological control (recast of Directive 71/316/EEC).

quantity of pre-packs during one hour of production. The Directive guarantees free circulation of the pre-packages marked with the lower case e-mark, which is defined by Directive 2009/34/EC, recast of Directive 71/316/EEC. The Directive is optional in the sense that it is the choice of the packer/importer to apply it.

Should a packer not wish to apply the directive, his alternative is to apply national specifications and his products are then subject to the Articles of the Treaty concerning mutual recognition (Article 34-36 TFEU). These national specifications may differ as regards the tolerances (more or less than in the Directive[12]) and markings (often no marking).

The Directive dates from the 1970s when effectively national laws presented barriers to trade in prepacks on the internal market. The Directive led to a level playing field and was quickly absorbed into best practice.

The Directive is based upon international standards, i.e. the recommendations of the International Organisation for Legal Metrology: OIML R79[13] and OIML R87[14] prescribing the average system[15], meaning that the quantity of one hour production of pre-packages must on average be equal to what is indicated. Laws of the EUs trading partners are also based on these international standards, thus giving EU exports of pre-packed products access to all world markets.

Market surveillance consists of (quality) assessing pre-packaging procedures and, as defined by the Directive, the competent authority may undertake a statistical sampling check of a batch of one-hour production, which takes place at the premises of the packer or importer.

Directive 2007/45/EC on rules on nominal quantities for pre-packed products (pack sizes) extended the scope of Directive 76/211/EEC to include all liquids and repealed two Directives.[16] It freed all pack/bottle sizes up to 10L/kg whilst maintaining a reduced number of mandatory EU sizes for certain sizes of wines and spirit drinks. A phasing-out period for national sizes in certain other products was allowed until 2012/2013, in Member States that previously had such laws. Moreover, it waives labelling by weight for aerosols already labelled by volume[17].

The Directive is not based on international standards. It is, however, based on the notion of "the average consumer (being) reasonably well informed and reasonably observant and circumspect" that the European Court of Justice takes as the point of reference in the area of pre-packaging and advertisement to consumers[18].

[12]Tolerances reduce depending on pack size: from 9% for up to a 50g pack to 1.5% for a kilo/litre pack and over (Directive 76/211/EC, Annex 1, table 2.4).
[13] http://www.oiml.org/en/files/pdf_r/r079-e97.pdf.
[14]http://www.oiml.org/en/files/pdf_r/r087-e04.pdf.
[15]The alternative to the average system is the minimum system which means that every pack is filled at least with the indicated quantity. This system however is not the international standard and would mean filling 3-18% more, depending on the size of the pack.
[16]Directives 75/106/EEC and 80/232/EEC.
[17]Aerosol Dispensers Directive 75/324/EEC.
[18]Case C-3/99 Ruwet v. Cidre Stassen/H.P.Bulmer [2000] ECR I-08749, paragraph 53, Case C-220/98 Estée Lauder Cosmetics v. Lancaster Group [2000] ECR I-117, paragraph 27, Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 31.

The Directive should therefore be understood as being complementary to other harmonised EU law that directly or indirectly protects consumers:

• Consumers are able to compare prices per litre or kilo (so-called unit prices), shown on the shelf directly next to the product as is required by the unit prices Directive[19]. In the case of downsizing the quantity, the price per kilo/litre of the product will increase relative to competitors and this will be apparent from the unit price indication.

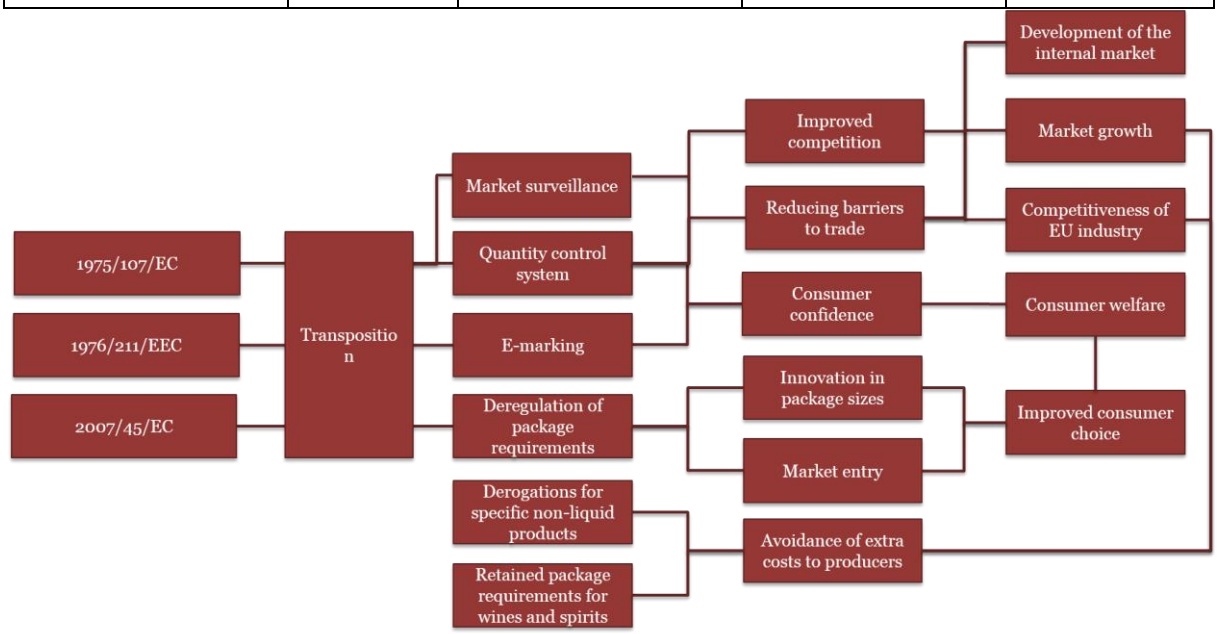
• Consumers are protected from deception due to excessive packaging of products under the terms of the Packaging and packaging waste Directive[20]foreseeing that: "Packaging shall be so manufactured that the packaging volume and weight be limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer."

• Specific rules apply to pre-packed foodstuffs, for example concerning the additional indication of drained weight and not including in the nominal quantity the ice (glaze) contained in frozen products[21].

Summarising, the objectives of the three directives are to enable **free circulation** (promoting internal market – the level playing field) of pre-packed products, contributing in turn to market growth and the competitiveness of EU industry. By means of coordinated market surveillance, **consumers are guaranteed the quantities** that are indicated on the packages contributing to **consumer welfare whilst deregulation of sizes has improved consumer choice**. In the case of wine and spirit drinks, the fixed pack sizes shield small business from demands for other bottle sizes by supermarkets and distributors, thereby improving competition.

The intervention logic diagram makes these causalities explicit:

Legal instrument	Inputs	Mechanisms	Results	Impacts



[19]Directive 98/6/EC
[20]Directive 94/62/EC Annex II, point 1(1).
[21]Regulation (EC) No 1169/2011 on the provision of food information to consumers.

2.2 Baseline

Back in the 1960s and 1970s, barriers to trade caused by discriminatory national rules nurtured home market champions. Under these conditions, mutual recognition under the EC Treaty was in effect blunted to virtual non-existence. The jurisprudence by the European Court of Justice at the end 1970s, sometimes referred to as Cassis de Dijon case-law, led to a clarification of the concept of mutual recognition of Treaty Articles 34-36 (TFEU) based on proportionality of national law. Steps to improve the implementation of the Mutual Recognition principle have been taken (e.g. Regulation (EC) N°2008/764). However, the functioning of the principle is not optimal yet[22]. It is observed that producers relying on mutual recognition may still face numerous challenges in terms of managing to access the internal market. Harmonisation of pre-packaging offers a credible alternative to avoid such issues. It aimed at breaching national defences, by defining packs that were produced voluntarily (i.e. at the choice of the manufacturer) according to common EU law (e-mark, 3-mark) in common mandatory (metric) units of measurement and in common sizes allowing free circulation in all Member States. The common sizes for wines and spirits became mandatory towards the end of the 1980s and early 1990s, meaning that any different national sizes were no longer allowed.

3 EVALUATION QUESTIONS

The evaluation assesses the effectiveness, efficiency, coherence, relevance and EU added value of the 3 Directives. To this end, a set of questions was defined to guide the analysis of the performance of the three legislative acts (see Annex 3) and are answered in section 6.

4 METHODOLOGY

The evaluation builds on a report by an external consultant conducted during one year and ending on 29 July 2015 [add web link to the published version].

4.1 Data collection and representativeness

Data were collected by the external consultant by means of:

- desk research: qualitative and quantitative analysis of existing documents and reporting;
- qualitative interviews with EU officials;
- qualitative interviews with officials from 23 national administrations (all EU except for France, Italy, Lithuania, Latvia and Malta);
- qualitative interviews with 25 selected representatives from industry (15 European industry associations, 10 companies);
- online surveys targeting consumer organisations, individual firms, industry associations, national authorities;

[22] Evaluation of the Application of the mutual recognition principle in the field of goods, June 2015 (see third last link on: http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition/index_en.htm)

- market analysis.

- online open public consultation (EU survey via Your Voice) has been held from 13 January till 7 April 2015 in 22 languages.

Main stakeholders are:

1. Consumers, Consumer organisations and NGOs
2. Producers of glass bottles and Bottle fillers
3. Packers (other than bottles)
4. Importers
5. Retailers (supermarket, shop, do-it-yourself store (DIY) often arranging for packing to be done
6. Wholesalers/distributors of pre-packaged products
7. Other legal persons arranging for the packing to be done
8. Industry federations in food and non-food and of SMEs
9. Competent departments (authorities)
10. Market-surveillance authorities

The representativeness of the on-line survey and open public consultation was satisfactory. The online survey for industry received a total of 248 completed responses, 85% of which are companies situated in the EU. Approximately half of these respondents are SMEs. The great majority (77%) of industry survey respondents fall under one of the three following categories: bottle filler, packer, or producer of pre-packaged goods. The online open public consultation received 109 industry stakeholder responses, with 83 responses coming from SMEs. The responses were equally divided over all size categories of firms (micro to large). As for the online survey for consumer associations, the response rate was quite low (only twelve completed responses). However, the low response rate to the survey was compensated by the participation of consumers, consumer associations and NGOs in the online open public consultation (150 responses). While 35 responses to the consumer part of the online open public consultation came from pre-packaging "experts", rather than consumers per se, these do not differ significantly from consumer responses and they have all been included in the findings presented in the consultant report.

4.2 Limitations – robustness of findings

The data collection presented several challenges. These are summarised below and more details are provided in Annex 1.

Firstly, there are no systematically collected market data on the pre-packaging sector or on the number or share of companies applying the Directives. Pre-packaging is an activity which often takes place within larger companies that produce pre-packaged products (e.g. food products). However, pre-packaging itself is only a very small subset of the activities of these companies. Furthermore, no secondary data exist on the application of the e-mark or 3-mark, either in commercial or public databases. The consultant collected this information from primary data sources (surveys and interviews with industry associations and national authorities). Therefore, estimates of market size, market share of the marking Directives and

related compliance costs need to be interpreted with care and they should be seen as indications of an order of magnitude rather than as precise point estimates. Furthermore, no information was available from primary sources on the use of the markings among imports.

Secondly, given the large geographic, sector and size coverage of the evaluation, there were significant challenges because of the limited number of company interviews that could be carried out and the consultant took measures to try to ensure representativeness.

Thirdly, a major challenge lay in the relative lack of stakeholder engagement and difficulty in identifying individuals who would be prepared and sufficiently knowledgeable to contribute. Indeed, as the results clearly indicate, the majority of stakeholders are relatively satisfied with the status quo and they do not see the need for a major revision of the Directives or the current pre-packaging regime. Similarly the number of importers who contributed is relatively small. This may lead to an over-estimation of the perceived « problems » with the Directive which needs to be kept in mind when drawing conclusions and formulating recommendations.

Summarizing, the consultant interviews would seem representative in the case of industry and industry associations as well as 23 authorities[23]. The consultant survey of consumer organisations did not have a full response, even though all national and European consumer organisations known to the Commission were invited to respond.

Given that it was extremely difficult to capture the impacts of the 3 directives on the internal market, competitiveness and improved competition, the benefits are described in a qualitative way.

[23] France, Italy, Lithuania, Latvia and Malta did not respond

5 STATE OF PLAY OF THE IMPLEMENTATION (RESULTS)

5.1 Implementation

All Member States have transposed and implemented the Directives. Authorities and stakeholders in WELMEC[24] have inventoried differences between Member States in their Guide 6.10 which is published on the public web[25], with the aim to focus attention of authorities when deciding on which guidance to make.

WELMEC guide 6.10 and consultant report findings show that:

- in many Member States national laws are not different from the optional directives, so that many 3- and e-marked products are in fact the same as non-marked products;
- some countries require down-payment fee when first assessing a packer or importer, although industry considers these amounts not to be excessive, they might deter some firms;
- in some countries controls of 3- and e-marked products are more frequent, but the survey showed that at least 70% of packers are controlled once every one or two years;
- Consultant analysis showed there are differences in the way directive 76/211/EC is implemented in national legislation. In some countries[26], its rules and requirements are implemented directly in the national legislation meaning that in practice, all companies have to comply with it in these countries, whether or not they use the e-mark. The analysis showed also that in some countries, companies have to apply or pay for the e-mark, leading to some differences in market surveillance controls[27].

These differences in national implementation concern administrative and production control processes and do not lead to differences in outcomes as regards the harmonised products placed on the market.

As regards the temporary allowance to maintain existing national sizes in certain sectors (milk, butter, dried pasta, coffee until 2012 and white sugar until 2013) only one authority mentioned the extension, namely for dried pasta. The reason mentioned was to protect consumers who were used to very specific types of packages, but when the exemption ended the size of these products did not change, in fact.

5.2 State of play

As regards market surveillance under Directive 76/211/EEC there are various approaches. Findings based on WELMEC Guide 6.10 and from interviews by the consultant show that

[24]WELMEC is the European Cooperation on Legal Metrology and consists of authorities of all EU Member States, EEA states and enlargement countries. All are also member of the International organization of Legal Metrology (OIML). Non-authority stakeholders also participate in the working groups of WELMEC, of which working group 6 concerns itself with prepackaging for which it has written comprehensive guidance.

[25]http://www.welmec.org/fileadmin/user_files/publications/WELMEC_06.10_Controls_on_Prepacked_Products_wp6-10_issue.

[26] E.g. Austria, Belgium, Estonia, Spain, Croatia, Poland, Portugal, Romania, Slovakia, UK

[27] Details on specific situations in some Member States can be found in Chapter 7.2 of the Consultant report.

- Eight Member States base their market surveillance on risk of non-compliance based on past assessment[28], which leads to more frequent checks for companies performing less well in terms of quality assurance.
- Most do a system quality check as well as the reference test described in Directive 76/211/EEC.
- Next to the 8 who do risk-based checks, 9 do annual checks, 4 do a check every 2 years and 3 a longer interval. (4 Member States are missing)
- Some countries check non-e-mark packers with the same frequency others less often.
- Importers are mentioned by some as being difficult to find, for example because they are not registered as such or they change products and sources regularly.
- Budget cuts have led to fewer checks, but keeping better records of past visits has led to authorities becoming 'smarter'.

Use of the directives based on survey results is as follows:

- 3-marked bottles are used by 60% of large firms and by 40% of SMEs.
- Two thirds of glass bottle manufacturers produce 3-marked bottles.
- E-mark filling is used by 80-90% of large firms and by 70% of SMEs
- Estimated number of enterprises using the 3- and e-markings is 92 glass manufacturers, 3,300 bottle fillers and 96,000 packers, giving 640.000 full time employed (0.3% of EU employment).

Drivers for usage of the 3- and e-marked Directives:

- As best practice, directives have become part of routine production process design
- Directives facilitate trade (one third) and transparency of compliance with market surveillance (one third)
- Not using the directives is mainly because it is allowed to use the national alternative and because of concentration on the home market.

5.3 Unexpected results in other areas

Stakeholders did not identify any significant negative unintended consequences. One positive effect identified by national authorities is the recognition of the e-mark system (Directive 76/211/EEC) in countries outside the EU.

As a positive spill-over effect the industry points out that there are unexpected environmental benefits associated with all three Directives. Greater efficiency in logistics (associated with the scale effect due to fixed sizes in the 2007 Directive) has led to lower emissions from transport whereas the harmonisation afforded by e- and 3-marking of bottles provides an incentive for producers to use lightweight glass to reduce costs of transport which is beneficial to the environment. In the absence of the markings, there may not have been the incentive for producers to develop light glass, thus not decreasing packaging relative to the volume of product sold.

[28] This "risk of non-compliance" is different from the "serious risk to the health of) users" referred to in Regl (EC) N°765/2008 on market surveillance

A second effect is that industry considers the e-mark to be a favourable marketing aspect because consumers know the mark and like it.

6 ANSWERS TO THE EVALUATION QUESTIONS

6.1 Effectiveness

6.1.1 To what extent have the objectives been achieved? Which main factors have contributed or stood in the way of achieving those objectives?

The three Directives meet the objectives that they aimed to reach i.e. by means of contributing to enhancing the internal market, facilitating trade within the Union, increasing market growth and competitiveness and boosting consumer welfare by means of offering more choice of sizes of products and protection of consumers by means of appropriate market surveillance.

6.1.2 More internal market promoting growth and competitiveness

The main driver for industry behind the use of both markings, based on the consultation process, is to ensure that their products can be sold anywhere in the EU. The Directives have harmonised how companies market their products and they are now a standard part of product labelling. Furthermore, industry does not identify any major barriers to the implementation of any of the three Directives that would negatively impact the internal market.

As it proved difficult to link directly the effects of the directives to the trade flow, because trade figures do not reflect whether the Directives or national law have been applied, survey results could serve as a proxy. An indication of growth in an efficient internal market is that turnover since 2009 was up in 40% of companies answering the industry survey and online open public consultation (against down in 10% and 50% no change)[29] whilst employment went up in 20% of companies (against down in 10% and 70% no change)[30].

Also there are some indications that the mandatory pack size Directive has promoted more diverse sized prepacked products in the EU. According to the industry survey and online open public consultation, approximately half of producers and packers introduced different pack sizes over the last five years (larger, smaller, and both larger and smaller). This result illustrates the existing interest on behalf of industry to produce and sell pre-packaged goods in wider diversity of sizes. Interestingly, survey and consultation results also show that in fixed sizes sectors (wines and spirits), a number of respondents (27%) also indicated having introduced a wider range of packs or bottle sizes over the last five years[31].

In terms of social and competitiveness impacts and benefits: from a social point of view, the pre-packaging sector provides for an estimated 640,000 full time employment – though not solely attributable to the Directives – which is significant.
In terms of competitiveness, three types of impacts can be distinguished:

[29]Consultant report, Annex 6, graph Q6, p.139.
[30]Consultant report, Annex 6, graph Q9, p.142.
[31]Consultant report, 8.1.2, p.68.

- Cost competitiveness is not negatively affected by the marking Directives because they are a) optional and b) do not impose significant costs on companies. In addition, many imported goods that are sold throughout the Single Market also use the Directives;
- International competitiveness is improved because the two marking Directives have facilitated trade across the Single Market and (in some cases) beyond the EU and
- Innovation competitiveness is improved by the liberalisation of pack sizes (except for wines and spirits) which has brought a greater variety of pack sizes and bottles to the market.

6.1.3 Better consumer welfare by more choice of sizes

As regards pack sizes consumers are broadly supportive of the current situation. Two thirds of consumers think wine and spirits sizes should remain fixed by law and more than half want sizes outside wines and spirits to remain free. These findings should be considered in the light of the approximately half of producers and packers having introduced different pack sizes over the last five years (larger, smaller, and both larger and smaller). There would clearly seem to be an increase in the variety of consumer choice which is valued as such by consumers. The reported relatively high percentage of firms controlled by authorities (see next chapter) and compliance rate seems to confirm that indeed, protection of consumers in relation to the quantities they are providing is ensured.

About half of consumers have never noticed the 3-mark which is not surprising since this marking is not meant directly for end-consumers but for businesses that use bottles as measuring containers and for authorities for market surveillance purposes. About 55% of consumers are not familiar with the e-marking (either because they have never seen it or because they do not know what it means). In this case there is a lack of awareness in the sense that the consumer is assured that the (EU) law has been applied. Industry considers the e-mark to be a favourable marketing aspect because consumers know the mark and like it.

Two thirds of consumers who responded to the online open public consultation rarely or never doubt the content of the pre-packaged products that they purchase (Annex 2, Figure 6). National authorities consider that, as a result of the e-mark, consumers are informed more consistently across the EU about nominal quantity than would otherwise be the case.

Consumer concerns relate primarily to the risk of being misled by deceptive packaging (e.g. air in pack, bag in box, extra packaging material in the pack, dark and non-transparent glass, oval shaped (cosmetics) bottles to increase the area in the consumer vision) and drained weight/desiccating products. Authorities point out that liberalisation of pack sizes (other than wines and spirits) is not an obstacle to consumer protection because mandatory unit prices (Directive 98/6/EC) allow consumers to compare prices of products in a simple and transparent way.

Regarding the exception for wines and spirits in Directive 2007/45/EC, six Member States suggest removing the exception since unit prices address the issue from a consumer protection point of view but five Member States say that the exception should be kept to protect consumers and the remaining ten Member States think that there are both advantages and disadvantages to either option and, in the absence of complaints, the status quo should be maintained.

The development in prices of alcoholic beverages broadly tracked that of food and non-alcoholic beverages with year-on-year increases averaging 2.6% in the 2005-2009 period and 2.3% thereafter[32]. There appears to be no upward shift in the price trend after 2009 coinciding with the freeing of pack sizes.

6.1.4 Level playing field by means of market surveillance

The main contribution of the e- and 3-marking Directives is that they have increased trust and understanding among market surveillance authorities and thereby facilitated the operation of the Single Market. This is particularly relevant given the results of a recent evaluation of the principle of mutual recognition which finds that lack of trust in the authorities of other Member States is a key barrier to the free movement of goods. As a result, the Directives enjoy broad support from national authorities.

Survey results show that 70% of companies are inspected on compliance at least once every 2 years. National authorities indicate that limited resources, the low priority of pre-packaging as a result of there not being many issues in relation to consumer complaints, and the adoption of smarter (risk based) controls means controls specific to pre-packaging are not more frequent.

Smart (risk based) controls seem to be extremely effective where the packaging process is quality assured, which is nowadays generally the case in fully automated batch packaging installations. Market surveillance then is about checking the reporting mechanism which allows retroactively controlling the compliance of each batch in the case of a complaint. It would seem that the percentage of inspections is adequate in relation to consumer protection.

However the perception of market operators (packers, bottle fillers, distributors and importers) that there are differences between the approaches in various jurisdictions indicate that there is apparently a need to further reinforce cooperation by competent departments and to better hone best practice and adaptation to technological innovation within the remits of the legislation. In line with the emphasis on improving market surveillance in the context of the follow-up to the Single Market Strategy more regular and more representative meetings of authorities could be envisaged.

[32]Eurostat "Harmonised index of consumer prices", Consultant report, figure 8 on p.34.

6.1.5 Are there any aspects/means/actors that render certain aspects of the Directives more or less effective than others, and - if there are - what lessons can be drawn from this?

Industry does not identify any major barriers to the implementation of any of the three Directives. For instance, for the coffee industry, potential barriers to free movement relate mainly to other labelling requirements and languages used on labels (which are not the subject of the 3 Directives).

In the light of the perception that national approaches in applying EU law may differ, it would seem that a more coherent approach on an EU-wide scale could help realise the full potential of the level playing field on the internal market.

Some national authorities pointed to issues relating to Directive 76/211/EEC, that they consider to be relatively small, but that would represent in their views possible opportunities to further harmonise the EU market[33], see Annex 4 for more details. Those issues concern viscose products in mass or volume, wrappings with pre-packages, the control of activities carried out by importers.

6.1.6 What are, if any, the consequences or effects (either positive or negative) that were not originally planned?

From an environmental point of view industry reports that the 3 directives have facilitated the development of light glass and improved logistics which in turn leads to lower transport emissions (see §5.3 above).

6.2 Efficiency

6.2.1 What are the costs associated with the compliance with the directives and how do they compare to the benefits? Are the benefits achieved at reasonable costs (with focus on SMEs)?

On the whole, the costs associated with the use of optional markings are low and deemed affordable by stakeholders considering the benefits the three directives bring. Furthermore, there are no significant one-off or recurring costs to the pack size Directive (2007/45/EC) which simply liberalises pack sizes for most sectors.

The different types of costs to be considered are the one-off costs related to investment in equipment and the recurring costs of complying with the Directives (including administrative burden).

It is estimated that the total one-off cost of the marking Directives across the EU 28 at EUR 440 million[34] (=1.3% of annual value added). The majority of these costs would, however, also be incurred in the absence of the optional marking Directives since the requirement to

[33]Industry interviewees did not raise any barriers when asked this question.
[34]Consultant report, p.74:.

indicate nominal quantity would remain. Most of these costs were incurred a long time ago but given the relatively low cost of weighing equipment, new market entrants are unlikely to perceive costs as an obstacle to taking up the markings. Some Member States impose fees on companies using the markings but where data were available the level of these fees was rather low and they are unlikely to act as a significant disincentive for companies (including SMEs) wanting to use the markings.

Depending on the way in which they are implemented at national level, recurring costs mainly relate to the recognition of the procedures by the competent authorities at national level. They can include

- costs associated with receiving or producing evidence of nominal quantity,
- costs associated with sampling pre-packages;
- costs associated with inspection (time and any fees levied by the national authority where applicable);
- costs associated with the application and use of the 3- and e-mark (where applicable).

It should be noted that all of these costs (except for the last one) would be incurred in whole or in part irrespective of the use of the marking as part of general market surveillance and control of nominal quantity. The annual costs imposed by the Directives were reported in the surveys to in the order of 1% and they were not mentioned as being a disadvantage by SMEs or as being significant by industry interviewees in general.

The rather limited costs are proportionate to much more extensive (albeit difficult to quantify) benefits of the Directives which include improved free movement of goods, enhanced consumer protection, greater harmonisation of packaging practices, recognition of high quality procedures between companies, consumers and authorities, consensus and trust between Member States and a clear definition of tasks and responsibilities of products including a legal framework for enforcement.

6.2.2 Taking into account the objectives and benefits of the directives, is there evidence that the legislative requirements have caused unnecessary burden (e.g. administrative and reporting burden), especially for SMEs?

In support of the above conclusion, cost issues were not mentioned by industry interviewees as particularly significant and there is a widespread perception that costs of the Directive are proportionate to the benefits (i.e. facilitation of the Single Market and market surveillance, building consumer trust). Administrative burdens are seen as minimal[35]:

- Administrative burdens are seen as negligible with industry generally unable to provide any evidence of unnecessary administrative burdens;
- the spirits industry argues that there is little administrative burden associated with the Directives.

[35]Consultant report, pp. 73, 75, 77 and 93.

- The key benefit is that by using the marking Directives, administrative burdens are seen as minimal as compared to what might be required under mutual recognition in case market access would be denied by the Member State of destination.
- On the whole, the costs associated with the use of optional markings appear to be low;
- This includes one-off costs, fees (applicable in some countries) and administrative burdens, none of which were raised as important by industry.

However, while the overall burden remains very low, the cost burden on SMEs linked to the use of the marks does appear to be slightly higher than for large companies[36]: among 3- and e-mark users, 70% of SME respondents indicate the cost of the marking is less than 1% of their annual turnover, compared to 77% for large companies.

Finally, enforcement costs vary substantially between Member States. These differences relate to the size of the country, the number of companies using the markings, and not least, the way in which enforcement of the Directives is organised at national level. In some countries enforcement is the responsibility of local governments, while most have central government departments. In some countries costs are partly offset by, companies have to apply and pay for a certificate in order to use the e-mark. Elsewhere national authorities carry the full burden of inspections themselves. However, this can happen where subsidiarity comes into play as is the case with Directives.

None of the national authorities criticise any of the Directives' provisions regarding market surveillance and they consider that the benefits of the Directives outweigh the costs and that the additional costs are not very high given that inspections would continue even in the absence of the Directives on e- and 3-markings.

6.3 Coherence

6.3.1 To what extent are there overlaps/ complementarities between the Directives and any other Union or Member State action in the relevant areas? To what extent are they coherent?

None of the stakeholder groups identified any significant overlaps or complementarities between the Directives and other EU or national action.

According to the external consultant, some national authorities mentioned limited overlaps of some product-specific Directives and Directive 76/211/EEC, without being too specific, see Annex 5 for a detailed list of reported legislation (e.g. legislation on cosmetics, detergents, fertilizers, food information regulation conflicting with Directive 76/211/EEC and the aerosols directive conflicting with Directive 2007/45/EC.). In all these cases concerning Directive 76/211/EEC, there is no contradiction but complementarity instead between the mentioned EU laws in the sense that they give the requirements to be fulfilled when the optional directives are not followed. The choice for e-marking is voluntary and, if chosen, it leads to additional requirements that are particular to Directive 76/211/EEC.

[36]Consultant report p. 75:.

A perceived conflict of Directive 2007/45/EC (equal to its predecessor Directive 80/232/EEC in this respect) with the Aerosols Directive is not a real conflict because every Member State implements Directive 2007/45/EC by giving an exemption to all aerosols (since 1982). How such should best be legally formulated can be taken account of in the current evaluation of the Aerosols Directive[37].

Several pieces of Union legislation are in place to protect consumers which are relevant for pre-packaging as indicated in Annex 6 (e.g. directives on packaging and packaging waste, on business practices deceiving consumers, on unit price indications and on food labelling) but no overlaps or inconsistencies were noted.

6.4 Relevance

6.4.1 To what extent are the objectives of the Directives still relevant in relation to the stakeholders needs and overarching political objectives? What is the level of support of stakeholders for them?

Overall, all three Directives are still seen as highly relevant to consumer, industry and authorities' needs for correctly filled pre-packs.

The e- and 3-marking Directives are widely used by industry though coverage is somewhat higher among larger companies than among SMEs. Indeed, smaller companies are more likely to take advantage of the voluntary nature of the e- and 3-markings and they use national law because they mainly produce for the national market.

The main reasons for companies to use the e-marking and 3-marking Directives are in line with their political objectives. Of those who apply the 3-mark 84% do so either to facilitate trade or to facilitate compliance with market surveillance. For the e-mark, the main driver of usage is more evenly split between facilitation of trade (37%), market surveillance (30%) and customer requests / market demand (30%).

Regarding the pack size Directive (2007/45/EC), the majority of respondents to the industry survey and online open public consultation - including more than 70% of bottle fillers - agree or strongly agree that for wine and spirit drinks, bottle sizes should continue to be fixed by law. In addition to bottle fillers, support is particularly strong among retailers, wholesalers and distributors of pre-packaged goods. At the same time, for non-wine and spirits products, most respondents agree that producers should remain free to choose pack sizes (e.g. 60% of packers (other than bottles), 50% of bottle fillers)). Finally, approximately half of all producers have introduced different pack sizes since the 2007 Directive came into force.

The widespread support by consumers and authorities is discussed in the next paragraphs.

6.4.2 How well do the (original) objectives (still) correspond to the needs within the EU?

Industry and consumers are very supportive of all 3 Directives because they consider current EU law fits their needs and they do not see a need for fundamental change in the current regime.

[37] Evaluation of the Aerosol Dispensers Directive: http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_grow_001_evaluation_aerosol_en.pdf

1. Levels of dissatisfaction with the e- and 3-marks among consumers are low at 15-17% and national authorities confirm that there have been very few complaints from consumers regarding the Directives.[38] Similarly, for Directive 2007/45/EC, only 17-18% of consumers disagree with the status quo in terms of regulation of pack / bottle sizes. Like the total of consumers, among those who disagree with the current regulatory regime, there are no clearly discernible patterns regarding desired changes with some arguing for less regulation and others for stricter rules,
2. Only 20% of industry respondents to the survey and consultation indicate that they are dissatisfied with the law on pre-packaging and where there is dissatisfaction this is mainly due to the perception of strict national application and a certain tolerance towards imports from outside the EU. Interviews with industry associations are even more supportive and there support from the sector representations to the Directives as they consider that the current pre-packaging regime works well, at reasonable costs and suits their needs.
3. Corroborating these results, all 22 interviewed national authorities also feel that the objectives of the Directives are indeed still relevant today. Nearly all authorities emphasise the importance of removing any barriers to trade and correctly informing consumers about the nominal weight or volume contained in pre-packages.[39]

6.4.3 How well adapted is the Directive to technical/international progress?

Several authorities point to the fact that there have only been a few adaptations to Directive 76/211/EEC and Directive 75/107/EEC over time. Interviewees noted that the Directives are designed in such a way that they allow for technological progress without losing their relevance or applicability. Also Directive 2007/45/EC is considered to be up-to-date and in line with today's consumer preferences.

While industry and authorities are generally satisfied with the applicability of the Directives to current operations within firms and with their "fitness for purpose", some raised issues about expanding the scope of Directive 76/211/EEC, see Annex 7. These issues relate to: products sold by length, area or number (few products and already covered by national law); drained weight (no international standard), larger weight/volume of pre-packs (few products and already covered by national law), speed of production and samples of pre-package batches. As these issues relate to technical and/or international progress they are and should remain subject of prospective research by stakeholders as is currently the case in WELMEC.

6.5 EU Added value

[38]This figure needs to be interpreted with care since a large share of consumers indicate not knowing the marking or its significance. In addition, consultation results also show that, when prompted, less than one third of consumers "sometimes" doubt the quantity of prepackages. However, these doubts do not translate into actual consumer complaints that are picked up by national authorities.

[39]Only one authority questioned the relevance of one of the Directives, namely Directive 75/107/EEC on bottles used as measuring containers. The authority argues that given the fact that Directive 76/211/EEC has to be complied with anyway in order to be able to use the e-mark, the relevance of the 3-mark Directive is limited (and only exists for those companies bying the bottles from producers).

6.5.1 What is the added value of the Directives for stakeholders?

There is a general consensus among all stakeholders that the Directives generate significant added value.

Consumers are broadly supportive of the current situation, irrespective of whether they are aware of the markings or not. Two thirds of consumers think wine and spirits sizes should remain fixed by law and more than half want sizes outside wines and spirits to remain free for producers to choose.

For industry, the added value lies mainly in creating trust and credibility among buyers of pre-packaged products (consumers and retailers), marketing benefits, and cost savings as a result of a lower variety of bottle sizes as well as facilitation of market surveillance controls.

In the view of national authorities, the impacts of the Directives would have been unlikely to be achieved by Member States individually or by other initiatives. There is significant value added over mutual recognition through harmonisation of packaging practices, high quality labelling procedures, consensus between Member States and a clear definition of tasks and responsibilities.

6.5.2 To what extent do the issues addressed by the directives continue to require action at EU level?

Free circulation of pre-packed products and consumer choice are the issues addressed by the three directives in the context of EU law. A barrier free internal market has been achieved and will continue to be achieved by the legislation. Free sizes increase choice of consumers whilst rules on correct quantity filling and containers in conjunction with regular market surveillance guarantee consumer protection in relation with the amount they are provided with. Important is also that the law gives appropriate means to authorities to check compliance and the framework as a whole offers a basis for mutual trust amongst authorities. Based on the consultation, there is continued tacit support by consumers and widespread expressed support by industry and national authorities for maintaining the functioning current acquis, either with improvements or, at least, in the state as currently is.

The alternative to EU law of mutual recognition would involve large uncertainty to industry about potential disproportional administrative burdens imposed by national legislation and the lack of administrative cooperation between authorities.

7 CONCLUSIONS

The Commission concurs with the consultant conclusions that all three Directives continue to be relevant, that they are generally considered efficient and effective with significant value added for all stakeholder groups. None of the three Directives impose significant administrative or compliance costs. At the same time, they are perceived as beneficial in terms of contributing to consumer protection, fostering competitiveness and facilitating the Single Market. The Directives are also coherent with and complementary to other legislation at EU and national level. As a result of this, there is widespread support from all stakeholder groups (industry, consumers and national authorities) for all three Directives. On the basis of his analysis, the consultant concluded that the Directives are "fit for purpose" and do not require fundamental reform.

The consultant report highlights a number of issues, in order of importance and provides recommendations on how to tackle them:

1. Different structures and interpretations across countries on how the Directives should be applied are leading to variations in national implementation: the contractor has proposed to engage discussions with Member States on difference in national implementation with the view to exchange "good practices".
2. In relation with market surveillance, weakness in systematic information exchange between national authorities leading to unclarity, lack of coherent approach towards imports and lack of trust in the market surveillance system across the EU were noted. The consultant suggested developing a systematic information exchange system between national authorities.
3. In relation with unclarities related to minor or technical aspects for specific industries such as products sold by length, area or number, drained weight, larger batch definitions, provisions on the speed of production and sampling, viscose products in mass or volume, wrappings with pre-packages, it recommended clarification to be made via expert discussion in WELMEC WG6.
4. In relation with the fact that many consumers do not understand the meaning of the e-mark or are not aware of it - whereas consumer protection is one of the primary objectives of the legislation – it recommended more explanation to be made on the Commission website.

The issues reported by the consultant and its recommendations for improvement seem supported by the evidence provided in this report. The Commission will consider them in its follow-up work with competent experts and stakeholders, with the view to improve the application of the directives.

ANNEXES

ANNEX 1: PROCEDURAL INFORMATION concerning the process to prepare the evaluation

- Lead DG: DG GROW
- Agenda planning/Work Programme references: 2015/GROW/045
- Organisation and timing: The inter-service Steering Group consisted of SG, AGRI, MARE, SANTE, JUST and GROW. After kick-off on 2/6/14 it met 4 times in 2014 and 5 times in 2015.
- Consultation of the Regulatory Scrutiny Board (if relevant). Not relevant.
- External expertise: the evaluation work was outsourced to a consultant.
- Methodology - Robustness

  The data collection presented several challenges. These are summarised below.

  Firstly, there are no systematically collected market data on the pre-packaging sector or on the number or share of companies applying the Directives. Pre-packaging is an activity which often takes place within larger companies that produce pre-packaged products (e.g. food products). However, pre-packaging itself is only a very small subset of the activities of these companies. Furthermore, no secondary data exist on the application of the e-mark or 3-mark, either in commercial or public databases.

  As a result, this information needed to be collected from primary data sources, namely surveys and interviews with industry associations and national authorities. The robustness of these data depends on the survey and interview response rates. The following steps were used to estimate the size of the pre-packaging market and the share of companies applying the Directives:
  1. First, absolute numbers of companies applying the Directives were requested from national authorities.
  2. Where these were not available, figures obtained in the industry survey were used to calculate the proportion of companies applying the Directives.
  3. Where gaps remained, estimates were produced based on data from other Member States and Eurostat structural business statistics.
  4. Compliance cost data collected through primary sources was very limited. Where quantified estimates were provided by stakeholders, these were taken into account and complemented with secondary information from other published evaluations of related legislation (e.g. automatic weighing instruments in Measuring Instruments Directive 2004/22/EC)

  As a result of the above data challenges, estimates of market size, market share of the marking Directives and related compliance costs need to be interpreted with care and they should be seen as indications of an order of magnitude rather than as precise point estimates. Furthermore, no information was available from primary sources on the use of the markings among imports.

Secondly, given the large geographic, sector and size coverage of the evaluation, there were significant challenges because of the limited number of company interviews that could be carried out.

The following steps were used to ensure representativeness:

1. The industry interview programme focused on EU level industry associations in sectors that involve pre-packaging. A list of interviewees is presented in Annex 5 of the consultant report. By focusing on organisations that speak on behalf of all companies in their sector, it has been possible to gather a more representative industry input, than it would have been possible if only individual companies were interviewed. Consumer input was gathered through the online open public consultation (EU survey) and from the online survey for consumer organisations, to which 12 organisations responded, all but 2 anonymously as well as the online open public consultation, to which 6 organisations responded, one of which identified itself.

2. The survey and online open public consultation questionnaires focused on gathering input from individual companies, consumer associations, consumers and other stakeholders whose input could not be covered in interviews. The survey and online open public consultation were based on the same questionnaire and run concurrently, the latter in all official languages thus giving stakeholders the possibility to provide input in as user-friendly a way as possible. The consultant report presents in Annex 6 the results of the industry and consumer association surveys the results of the online open public consultation (implemented by the European Commission) have been integrated into the main body of the consultant report.

3. Follow-up interviews were carried out with 10 companies which had agreed to be contacted in the survey / online open public consultation (consultant report, Annex 5). These interviews served mostly to cross-check results and fill data gaps. There were no significant differences in the opinions of the companies interviewed and their sector representations at EU level.

4. At national level, all competent authorities were contacted for interview to ensure as wide a geographic coverage as possible. A list of the 23 Member State authorities interviewed is in Annex 5 of the consultant report.

5. By triangulating data from survey, interviews and online open public consultation, it has been possible to identify whether there were any major divergences between data collected through these different tools. Where differences were noted, these are highlighted in the main report and they should be kept in mind when interpreting the findings.

Third, a major challenge lay in the relative lack of stakeholder engagement and difficulty in identifying individuals who would be prepared and sufficiently knowledgeable to contribute. Indeed, as the results clearly indicate, the majority of stakeholders are relatively satisfied with the status quo and they do not see the need for a major revision of the Directives or the current pre-packaging regime.

The consultant spent a significant amount of resource and effort on convincing stakeholders (authorities as well as companies and industry associations) of the rationale for the research and the need to gather their input. However, the absence of a significant motivation (i.e. a desire for regulatory change) made many stakeholders reluctant to respond. Where stakeholders repeatedly declined to participate, alternative contacts were sought for interview.

In interpreting the findings, it is therefore important to note that the evaluation is based on data collected among stakeholders who agreed to contribute. Amongst national authorities, for instance, this means that France, Italy, Lithuania, Latvia and Malta are not included because the research team did not receive any input from these authorities. Similarly the number of importers who contributed is relatively small. This may lead to an over-estimation of the perceived « problems » with the Directive which needs to be kept in mind when drawing conclusions and formulating recommendations.

Finally, no full analysis of each Directive and its implementation at national level was conducted. National differences in implementation were therefore investigated on the basis of interviews with a selection of Member State authorities (Consultant report Annex 5) as well as consultations with industry and consumers (Consultant report Annex 6).

Summarizing, the consultant interviews would seem representative in the case of industry and industry associations as well as 23 authorities. The consultant survey of consumer organisations did not have a full response, even though all national and European consumer organisations known to the Commission were invited to respond.

Given that it was extremely difficult to capture the impacts of the 3 directives on the internal market, competitiveness and improved competition, the benefits are described in a qualitative way.

ANNEX 2: STAKEHOLDER CONSULTATION – SYNOPSIS REPORT

1. Data Collection

In the scope of this evaluation, the following groups of stakeholders were consulted:

- Consumers (individuals)
- Consumer organisations
- Private companies in the EU28
- EU and national industry associations
- Market surveillance authorities

The following data collection techniques were used: (face-to-face or telephone) interviews (private companies, industry associations and market surveillance authorities) and two targeted online surveys (companies and consumer organisations). In parallel to the consultant, the European Commission ran an online open public consultation. All stakeholders were consulted through targeted and online open public consultations, with the exception of consumers (individuals), whose views were gathered only through the EC online open public consultation. The results of the online open public consultation were used for informing the evaluation and drawing final conclusions and recommendations.

All market surveillance authorities in the EU28 were contacted to participate in the evaluation. A total of 23 **market surveillance authorities** in 22 EU Member States accepted to participate and were consulted via telephone interviews (Consultant report, Annex 5).
In addition, in-depth interviews informing all evaluation questions were conducted with 14 **EU industry associations** and 1 **national industry association**. 10 **private companies** were also consulted via telephone in-depth interviews (Consultant report, Annex 5).

Two on-line surveys were conducted in order to collect information on the level of use and effects of the pre-packaging directives on two types of stakeholders: **industry stakeholders** (industry survey) and **consumer organisations**. In order to enhance the robustness of the survey, the results obtained were merged with the results of the **online open public consultation** carried out by the European Commission.

All Commission minimum standards for public consultations were met.

The main objectives of the industry survey were as follows:

- Collect market data in relation to market coverage of the Directives;
- Gather the perceptions of industry stakeholders in relation to whether the Directives are ‘fit-for-purpose’; and
- Achieve broad coverage of relevant sectors covered by the Directives across all EU-28 countries.

Firstly, the **industry survey** questionnaire was distributed through European industry associations (Consultant report, Figure 62). Secondly, it was also distributed to a list of selected EU28 companies obtained from the commercial database ORBIS (developed by Bureau Van Dijk). A total of 57,568 EU28 companies were contacted (Consultant report, figure 63). Thirdly, in order to boost the response rates and to ensure responses from each of

the EU Member States, national authorities provided the evaluation team with a list of nominated companies for their respective Member States following an official request from the European Commission. National authorities from 20 EU28 countries provided a list of representative stakeholders on their territory to the consultant. This corresponded to 372 contacts, including 346 companies, 13 competent authorities, 2 consumer organisations and 11 industry associations (Consultant report, Figure 64). The (online) industry survey was launched on 20 November 2014 and was opened for three months (closed on 20 February 2015). A total of 248 full responses were received to the industry survey. The results obtained were merged and jointly analysed with 109 additional responses from industrial stakeholders to the online open public consultation.

The **consumer organisations survey** was designed with the intention of collecting primary data for consumer organisations across EU-28 countries. It covered the following points:

- Size and location of the organisation
- Level of awareness of the directives and respective markings
- Perception of the impact of the directives & markings on consumer protection
- Relevance of the free and fixed sizes directives

The **consumer organisations survey** was distributed via consumer organisations, using the addresses of the consumer organisation network published by DG SANCO. This network provided access to two European consumer organisations, which are federations of national consumer organisations from across the EU: ANEC and BEUC. In addition, the consultant contacted additional national level organisations to ensure full geographic and sectorial coverage (Consultant report, Figure 65). A total of 12 answers were received from consumer organisations (Consultant report, Figure 67).

Finally, the European Commission **online open public consultation** ran between 13 January and 7 April 2015. It was available in 22 official EU languages and was publicised to SMEs by the DG GROW Enterprise Europe Network. There were 294 respondents. A total of 118 consumers and 6 consumer organisations responded to the consultation. From industry, 109 EU companies and 14 industry federations provided inputs. There was an equal distribution of micro, small, medium and large enterprises over a wide range of sectors. 12 Competent Authorities from 7 Member States also expressed their views.

2. Findings

The evaluation assesses the effectiveness, **efficiency, coherence, relevance and EU added value** of the 3 Directives. The latter two have drawn upon the answers mentioned below under the first three headings. For the first three criteria, the following questions have been answered**. (***NB. Page numbers in the text refer to the pages of consultant report***)**

- ***Relevance***

The majority of consumers and consumer organisations think that the current packaging law satisfies their expectations. This is particularly the case for respondents who have noticed the 3-mark (58% satisfied). For the e-mark the share of satisfied consumers is 48%. This compares favourably with the 14.86% and 16.67% respectively who are not satisfied.

Figure 1 Does EU law satisfy your expectations?

	Yes	No	No opinion	No response	Source
Consumer					
Noticed 3-mark	58%	15%	27%	2 on 148	Fig 29, p63
Noticed e-mark	48%	17%	35%	2 on 148	Fig 29, p63
Consumer organisation					
3 mark*	1	0	10	1 on 11	Q8, p168
e-mark*	5	2	4	1 on 11	Q7, p168
free sizes*	2	5	5	0 on 12	Q9, p168
Industrial firm	52%	20%	28%	96 on 261	Q17b, p157

* Does the law for 3-mark, e-mark, and free sizes protect consumers?

Figure 2 Should free / fixed sizes continue to be law?

	Yes	No	No opinion	No response	Source
Consumer					
free sizes	52%	31%	17%	1 on 149	Fig 41, p84
Fixed sizes	67%	15%	18%	0 on 150	Fig 41, p84
Consumer organisation					
free sizes	4	4	3	1 on 11	Q13, p169
Fixed sizes	6	1	4	1 on 11	Q12, p169
Industrial firm					
free sizes	56%	25%	18%	116 on 241	Q21b, p166
Fixed sizes	67%	16%	18%	106 on 251	Q21b, p166
Authority					
free sizes	24	0	0	0 on 24	p85
Fixed sizes	5(+10)	6	(10)	0 on 24	P85

- ***Efficiency***

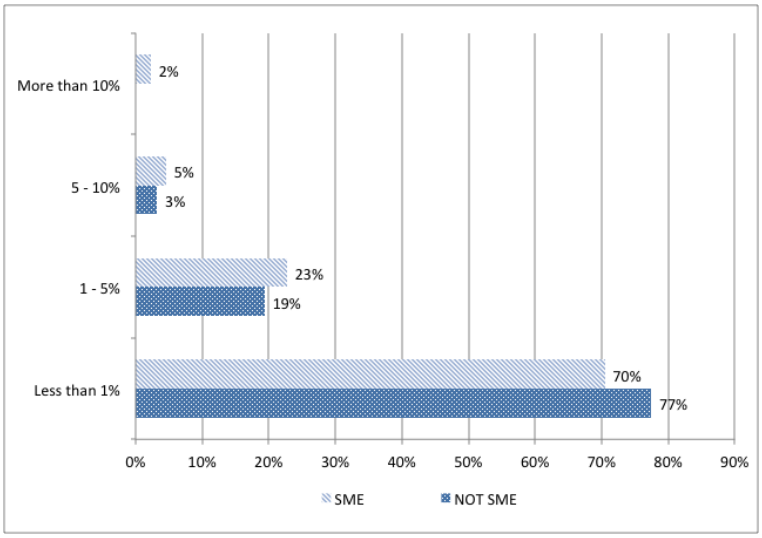
Cost issues were not mentioned by industry interviewees as particularly significant. This includes one-off costs, fees (applicable in some countries) and administrative burdens, none of which were raised as important by industry. There is a widespread perception that costs of

the Directive are low and therefore considered a fair price to pay for the benefits (i.e. facilitation of market surveillance, trade in the Single Market and building consumer trust). Administrative burdens are seen as negligible with industry usually unable to provide any evidence of administrative burdens. Furthermore no complaints about the cost of the Directives were identified, despite the fact that there are fees for the use of the e-mark imposed by authorities in some countries.

The electronic survey and online open public consultation results show that the great majority of users of the markings (72% for the 3-mark and 77% for the e-mark) indicate that the cost of marking nominal quantity, as a percentage of their annual production costs is less than 1%[40]. Less than 20% of respondents using the markings indicate that costs represent between 1% and 5% of their annual production costs. Only 7% of respondents using the 3-mark indicate the cost of marking the nominal quantity exceeds 5%, while this is only the case of 3% of e-mark users. Most of these respondents are SMEs (7 out of a total of 9 respondents).

While the overall burden is very low, the cost burden on SMEs linked to the use of the marks does appear to be slightly higher, compared to large companies. For example, among 3-mark users, 70% of SME respondents indicate the cost of the marking is less than 1% of their annual turnover, compared to 77% for large companies. The share of large e-mark users indicating the cost is less than 1% of annual turnover is also higher than for SMEs.

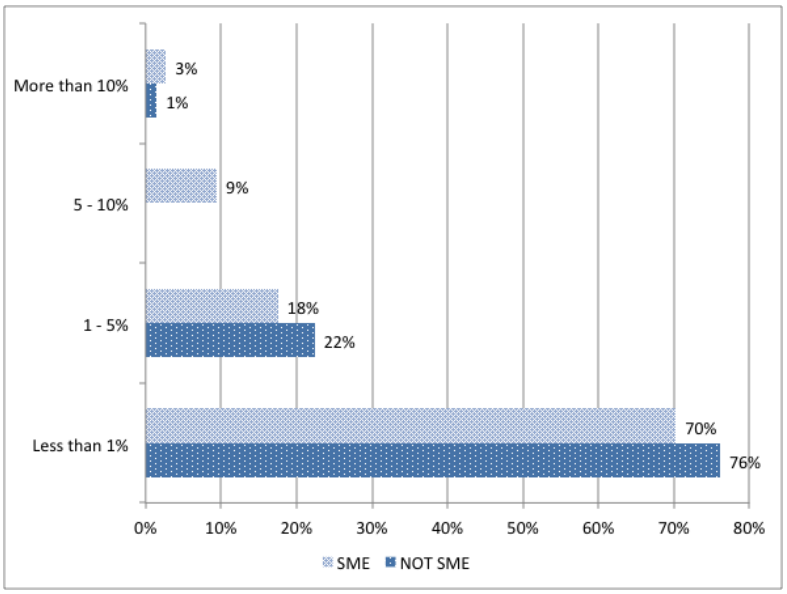
Figure 3 Estimate of the cost of marking nominal quantity, as a percentage of annual production costs (SME vs non- SME; 3-mark users), (p76)



Number of responses: 75. Source: electronic survey and online open public consultation.

Figure 4 Estimate of the cost of marking nominal quantity, as a percentage of annual production costs (SME vs non- SME, e-mark users), (p76)

[40] Indeed, a recurring market surveillance cost of EUR 3,500 (as in Sweden) represents only 0.35 percent of the annual turnover of a small company with EUR 1m in turnover



Number of responses: 141. Source: electronic survey and online open public consultation.

Comments from EU level industry associations on the cost of the Directives (p77)

- The beer industry suggested that the burden of the Directives had been incurred mostly on introduction with initial investments in equipment but with **little recurring cost**. The association could not indicate cost but suggested that this was not very significant in any case and the sector reiterated that burdens would lie mostly in any change to the Directives which should therefore be left as they are. This opinion is shared by other sectors that were interviewed. For instance, the spirits industry argues that there is **little administrative burden** associated with the Directives and **no differential impact on SMEs.** In addition none of the survey respondents mentioned costs as a particular obstacle in open text answers (2 respondents who provided open text comments suggested simplification/elimination of the Directives.
- For the wine industry **the impact of the 2007 Directive on SMEs is positive** because SMEs struggle more with large numbers of Stock Keeping Units (SKUs). There is also no evidence of problems and other costs associated with market surveillance or application of the Directives as a whole.
- Aerosols also suggested that **investments had been made a long time ago** and that the 2007 Directive did not represent a major change for the sector and no further costs were incurred.
- In the coffee sector, the EU association noted that the pack size Directive has not been a cost factor. Although the e-mark requires some administrative work, there is **no evidence of substantial costs** for this association.
- Similarly, the glass container industry suggested that the main cost driver for them is the number of moulds and that pack size restrictions under the 2007 Directive reduce the number of moulds required and thus this **Directive represents a cost saving**. Further the industry suggested that there was no additional cost to the e- and 3-marking since initial

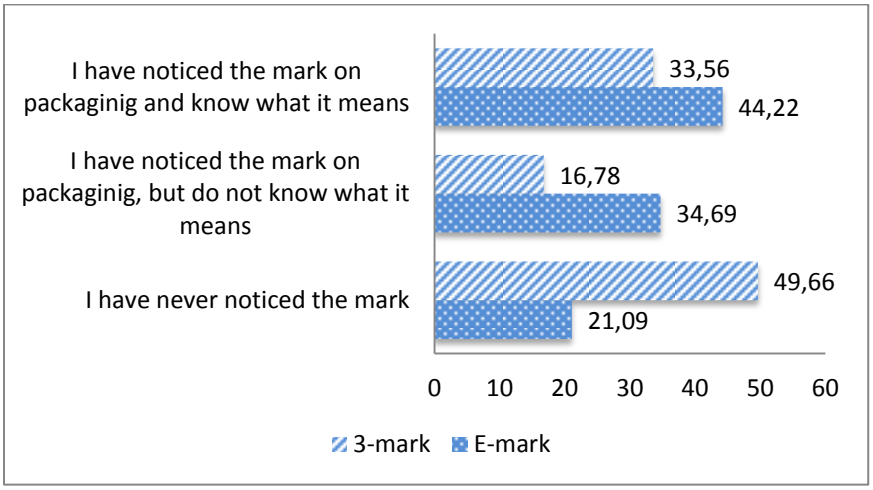
investments had been made a long time ago (and these investments were quote limited in any case).

- ***Effectiveness***

  - ***Consumers***

About half of consumers had never noticed the 3-mark which is not surprising since this marking is not actually meant directly for end-consumers but for businesses that use bottles as measuring containers. In comparison, only 21% of consumers had never noticed the e-mark. 44% of consumers had seen the mark and knew what it means whereas 34% did not know what it means. Put differently, about 55% of consumers are not familiar with the marking (either because they have never seen it or because they don't know what it means).

Figure 5 Consumer awareness of either e- or 3-markings on packaging (p.83)

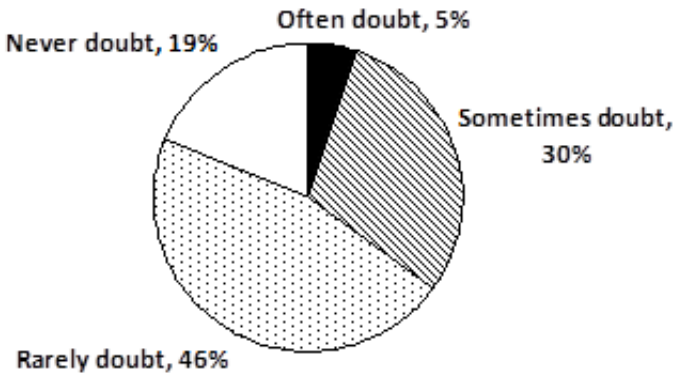


Number of responses: 147. Non response 3. Source: Online open public consultation.

At the same time, about 35% of consumers who responded to the online open public consultation sometimes or often doubt the content of the pre-packaged products that they purchase. Where consumers did express doubts regarding net quantity this is related to the feeling of being misled by deceptive packaging (e.g. air in pack, bag in box, extra packaging material in the pack, dark and non-transparent glass, oval shaped (cosmetics) bottles to increase the area in the consumer vision) which was raised in the online open public consultation. The most effective remedy against such deceptive packaging remains unit pricing.[41] The figure below shows the breakdown of responses to the online open public consultation by frequency of doubt of the quantity contained in pre-packages.

[41] At this point, the centrality of the concept of the average consumer in EU law should be underlined. The fairness or unfairness of a commercial practice is assessed against the "average consumer" benchmark. The average consumer, as interpreted by the European Court of Justice, is "reasonably well-informed and reasonably observant and circumspect", taking into account social, cultural and linguistic factors. If a commercial practice is directed at a particular group of consumers (such as vulnerable categories of consumers, then an average member of that group is the benchmark.

Figure 6 Consumer doubt on quantity contained in a bottle or in packaging (p.84)



Source: Online open public consultation, 118 answers, 0 non-response

As regards pack sizes, consumers were broadly supportive of the status quo. Two thirds of consumers thought wine and spirits sizes should remain fixed by law and more than half wanted sizes outside wines and spirits to remain free for producers to choose (see Table below).

Figure 7 Opinion of consumers on packaging sizes (p.84)

Opinion	Statement			
	For wine and spirits, bottles sizes should continue to be fixed by law		Outside of wine and spirits, sizes should continue to remain free by law for producers to choose	
	Freq.	Percent	Freq.	Percent
Agree	100	**66.67**	78	**52.35**
Disagree	23	15.33	46	30.87
No opinion	27	18	25	16.78
Total	150	100	149	100

Source: Online open public consultation.

- ***Industry***

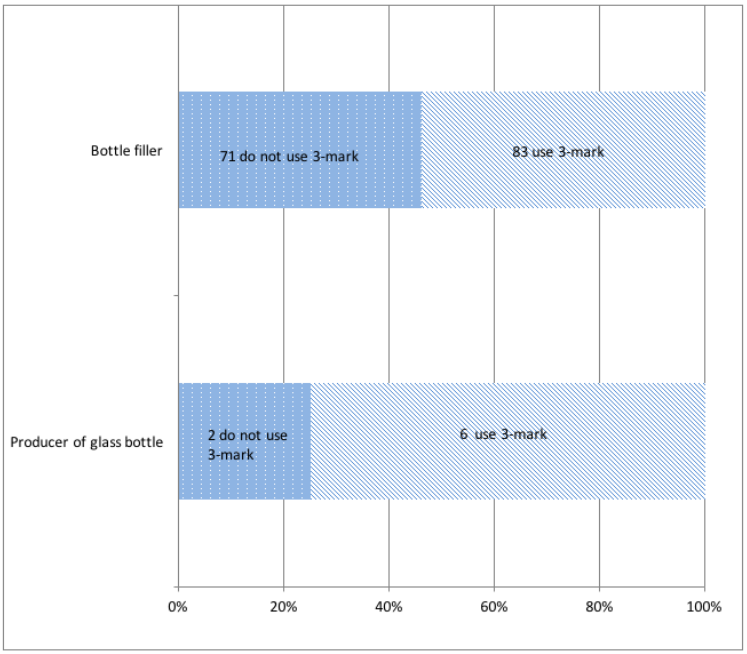
Overall, the survey and consultation found that approximately 55% of bottle fillers indicate using 3-marked bottles as measuring containers (see Figure below). Breaking this result down by company size indicates that 60% of large bottle fillers use 3-marked bottles as measuring containers, compared with 48% of SME bottle fillers.

In addition, interviews confirm that the 3-mark is very pervasive among bottle manufacturers (almost all manufacturers use it according to FEVE, the sector representation at EU level).[42]

[42] The number of glass bottle producers responding to the survey is too low to make any broad assessment on the basis of the survey only. However it is worth highlighting that six out of eight glass bottle producer respondents indicate using the 3-mark.

Based on electronic survey results only, it appears that the share of bottle fillers using 3-marked bottles as measuring containers is higher among those working with wines and spirits, compared with non-wine and spirits fillers.

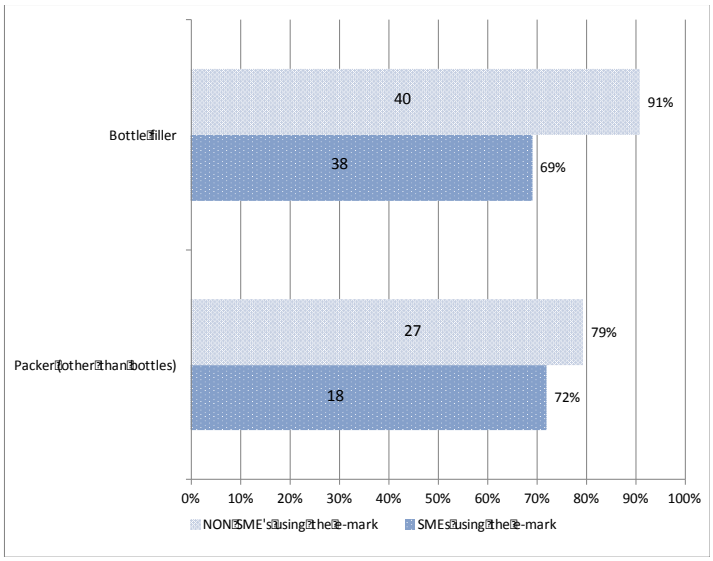
Figure 8 Use of 3-mark by type of respondent, (p.53)



Number of responses: 162. Source: electronic survey and online open public consultation.

Furthermore, industry survey and online open public consultation results show that glass bottles, spirit drinks, and wine sectors make the most intensive use of the 3-mark (64%, 58% and 51% respectively).[43] The share of users in non-alcoholic drinks (34%) appears to be lower than in the alcoholic drinks sectors.

Figure 9 Use of e-mark by type of respondent: SME vs non-SME (packers & bottle fillers*), (p.58)



[43] These figures only include sectors with more than 10 responses.

Number of responses: 123. Source: electronic survey and online open public consultation.

*These were the only two categories of respondents recording more than 15 responses, for which data on company size and turnover was provided.

Additional information on usage of the Directives by EU industry associations, (p.58)

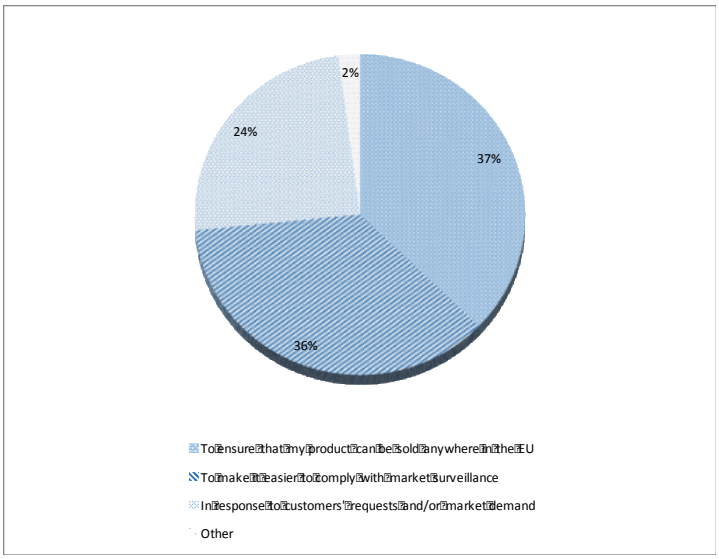
- The European ***container glass*** federation estimates that all companies in their sector use 3-marking. Companies in this sector only produce the glass containers, they do not fill them, and they do not know what share of production eventually leaves the EU as filled bottles. Hence all bottles tend to have the 3 symbol and the markings are probably also recognised outside the EU. In addition, the sector association suggests that, by observation, their clients who fill the 3-marked bottles also tend to use the e-marking on the 3-marked bottle.
- The ***spirits*** industry stated that all companies are very well informed about the Directives. In the case of the 2007 Directive, the industry has to comply with rules on nominal quantities and directors of production will also know about e and 3-marking, although they might not be aware of the European Directive at the origin of the markings. The e-marking is used by almost all producers with a few specific exceptions that are explained by the nature of the product (e.g. a spirits product in Poland that is filled into bottles at very low temperature and then dilates in the bottle) or by the specific destination market (e.g. a lot of Cognac is produced directly for export and these bottles will not appear on the EU market and may therefore not be e-marked).
- The ***beer*** industry suggested that there is widespread awareness of the 3 and e-marks and sufficient practical knowledge to be able to comply with the requirements of the Directives. In addition, almost all beer producers (90%) and certainly all of the large producers use the e-marking. The only exceptions to e-marking are some micro-breweries which might not see the need to use the Directives because they are less likely to trade across borders. For these stakeholders the fact that the Directives are optional is helpful because it gives smaller microbreweries the possibility not to apply them. There is also strong support from the beer industry for the 2007 Directive in the sense that it exempts beer from the mandatory pack sizes.
- Interviewees in the **wine sector** estimated that the level of uptake of e-marking is high because the filling machines that are used in the sector often have relevant tolerances built-in by default.
- The **aerosol** industry suggests that all companies use the e-mark and sector representatives are not aware of any companies not using it. The main reason for this is that the markings are well-recognised and they have become integrated into the production process as a matter of routine. At the same time and due to the pervasiveness of the mark, there would be a credibility issue for any products that are

not e-marked and this would be seen negatively. According to the industry representation, no companies ever question the use of the e-mark.

- The **coffee** industry suggested that major retailers require the e-marking and thus coffee producers have to comply to be able to get their products onto the market. Since large roasters supplying supermarkets will use e-marking, it is estimated that this accounts for approximately 80% of the market. At the same time, equipment manufacturers, where MS so require or if the manufacturer so chooses, provide catchweighers conforming to MID[44] that delivers the level of accuracy required for coffee producers to be able to comply with the Directive which facilitates widespread adoption of the e-marking.
- Representatives of the **salt** industry estimated that 75-80% of the market would be covered by e-marking although they found it difficult to estimate compliance by small companies.

When asked to choose the main reason for their use of the 3-marking, fully 73% of industry survey and consultation respondents stated that they apply the mark either to facilitate trade or to facilitate compliance with market surveillance (37% and 36% respectively). As national authorities explained these two answers are very inter-linked in that using the markings could reduce the chances of being controlled by the national authorities in the destination country.[45] This compares with only 24% who apply the marking in response to customer requests or market demand and a mere 2% who use the marking for another reason.

Figure 10 Main reasons for using the 3 mark, (p.61)



Number of responses: 94 by 65 respondents. Source: electronic survey and online open public consultation.

[44] Automatic catchweighers as defined in Class X in chap II, point 2.1 of Annex MI-006 of Directive 2004/22/EC may be used to comply with Directive 76/211/EEC anccording to its Annex I point 4.2

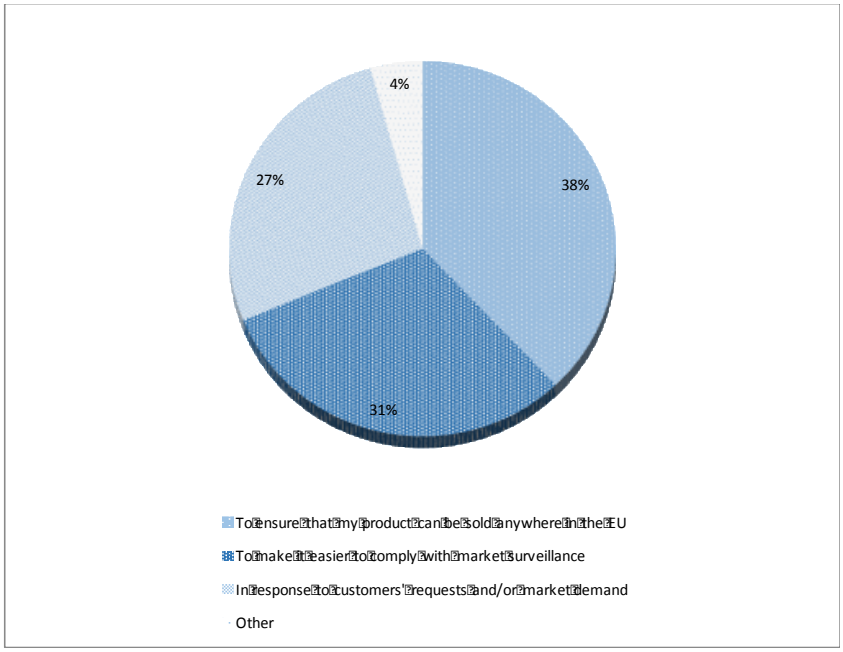
[45] It should be noted that the importance of this argument depends on the chances of being controlled by authorities (see also section 7.2). In addition, controls must be on site (the average system can hardly be meaningfully controlled without taking random sample from a batch as produced) so chances of control in the country of destination are virtually zero. This further underlines the importance of cooperation by national authorities.

For the e-mark (Figure below), survey and consultation results show that the main driver of usage is also facilitation of trade (38%). Market surveillance comes in second with 31% of responses, and responding to customer requests / market demand comes in third with 27%.

In relation to market surveillance, national authority interviews provide an insight into the way in which the use of the markings can be cost-effective. For instance, the e-mark allows companies to use the 'average-system' rather than the 'minimum system'[46]. This is beneficial for companies because it allows them to ensure that products are filled with the right amount *on average* (with certain margins of error) rather than having to overfill packages to ensure that *all packs contain a certain minimum.*

In relation to customer requests / market demand, it is important to note that, for producers, packers and fillers, this of course includes not just end-consumers but also retailers and distributors. Indeed, a few national authorities suggested in interviews that companies were sometimes forced to use the e-mark by large retail chains in Europe. Like for the 3-mark, only 3% of respondents indicated that there were other reasons for the use of the markings.

Figure 11 Main reasons for using the e-mark, (p.62)



Number of responses: 253 by 165 respondents. Source: electronic survey and online open public consultation.

For another perspective on the drivers of use of the markings, companies that are *not* using the markings were also asked why this was the case. For both markings, a majority (48% in the case of 3-mark and 44% in the case of the e-mark) stated that this was because the Directives were only optional. This compares with about 14% who were simply not aware of the 3-mark

[46] Annex 1(1) of Directive 76/211/EEC states that « Prepackages covered by this Directive shall be made up in such a way that the completed packages satisfy the following requirements: 1.1 . the actual contents shall not be less, on average, than the nominal quantity; 1.2. the proportion of prepackages having a negative error greater than the tolerable negative error laid down in 2.4 shall be sufficiently small for batches of prepackages to satisfy the requirements of the tests specified in Annex II; 1.3 . no prepackage having a negative error greater than twice the tolerable negative error given in the table in 2.4 may bear the EEC sign provided for in 3.3 »

(11% for the e-mark), and between 19% (3-mark) and 26% (e-mark) who indicated that they didn't use the markings because they only produce for their domestic market.

The reasons for not using the markings differ based on company size (SME vs. non SME). For example, when it comes to the 3-mark, SMEs are generally less aware about the marking compared to large companies (24% vs 14% respectively), leading to a lower use of the marking. On the other hand, mainly producing for domestic markets appears to be less of a barrier to the use of the 3-mark for SMEs than for non-SMEs (16% vs. 24% respectively). In addition, the fact that the marking is not required has a lesser influence on the level of use among SMEs (35%) than among non-SMEs (48%).

In terms of the e-mark, not knowing about the marking is also a more important barrier for SMEs than for non-SMEs (14% vs 8% respectively). The non-mandatory nature of the markings seems to influence the uptake of the marking among both groups equally (43% and 47% respectively), while mainly producing for the domestic market is clearly a more significant barrier for large companies than for SMEs (36% vs 19%).

Figure 12 Main reasons for not using the markings, (p.63)

	3-mark						**e-mark**					
Answer	*SME*	*%*	*NonSME*	*%*	*All*	*%*	*SME*	*%*	*NonSME*	*%*	*All*	*%*
I don't know about the marking	9	24%	4	14%	13	19%	6	14%	3	8%	9	11%
The marking is not required	13	35%	14	48%	28	40%	18	43%	17	47%	36	44%
I produce mainly for the domestic market	6	16%	7	24%	13	19%	8	19%	13	36%	21	26%
Not relevant to my work	5	14%	2	7%	9	13%	6	14%	1	3%	9	11%
Other	4	11%	2	7%	7	10%	4	10%	2	6%	7	9%
TOTAL	37	100%	29	100%	70	100%	42	100%	36	100%	82	100%

3. Information about any diverging views between or within stakeholder groups

Diverging views between stakeholders are:

- consumer concerns relate primarily to the risk of being misled by deceptive packaging (e.g. air in pack, bag in box, extra packaging material in the pack, dark and non-transparent glass, oval shaped (cosmetics) bottles to increase the area in the consumer vision) and drained weight/desiccating products,
- some in industry concerning the perceived complexity of the marking Directives,
- regarding the exception for wines and spirits in Directive 2007/45/EC, a minority of Member States suggest removing the exception,
- some national authorities mentioned limited overlaps between some product-specific Directives and Directive 76/211/EEC.

ANNEX 3: EVALUATION QUESTIONS

The evaluation assesses the effectiveness, efficiency, coherence, relevance and EU added value of the 3 Directives. To this end, the following questions are answered in section 6:

- **Effectiveness**

1. To what extent have the objectives been achieved? Which main factors have contributed or stood in the way of achieving those objectives?
2. Are there any aspects/means/actors that render certain aspects of the Directives more or less effective than others, and - if there are - what lessons can be drawn from this?
3. What are, if any, the consequences or effects (either positive or negative) that were not originally planned?

- **Efficiency**

4. What are the costs associated with the compliance with the directives and how do they compare to the benefits? Are the benefits achieved at reasonable costs (with focus on SMEs)?
5. Taking into account the objectives and benefits of the directives, is there evidence that the legislative requirements have caused unnecessary burden (e.g. administrative and reporting burden), especially for SMEs?

- **Coherence**

6. To what extent are there overlaps/ complementarities between the Directives and any other Union or Member State action in the relevant areas? To what extent are they coherent?

- **Relevance**

7. To what extent are the objectives of the Directives still relevant in relation to the stakeholders needs and overarching political objectives? What is the level of support of stakeholders for them?
8. How well do the (original) objectives (still) correspond to the needs within the EU?
9. How well adapted is the Directive to technical/international progress?

- **EU added value**

10. What is the added value of the Directives for stakeholders?
11. To what extent do the issues addressed by the directives continue to require action at EU level?

ANNEX 4: SUGGESTIONS BY AUTHORITIES ON TECHNICAL ISSUES

(ad § 6.2.5) Issues related to Directive 76/211/EEC, to render aspects of the Directives more or less effective:

- *Viscose products in mass or volume*: there were still some fundamental differences between Member States and within international standardisation agencies (Codex Alimentarius, OIML). Examples of such products included all sorts of pastes, ice-cream, yoghurt, mustard, paint, and hair gel. Nominal quantity is expressed in kilograms in some Member States, litres in others.[47] The lack of consistency has implications for the unit pricing of products (Directive 98/6/EC), complicating the calculation of the unit prices. In the case of an e-marked quantity both in weight and in volume, both need to be exact according to the Directive. The issue exists already for many years and Directive 76/211/EEC by its article 4 allows for differing trade practices even at regional and sector level. As long as there is no international agreement (between Member States and within Codex Alimentarius), there is no common basis for EU law. WELMEC is inventorying products and national rules.

- *Wrappings within pre-packages*: Two national authorities complained that they still disagree with the outcome of the 2005 evaluation of Directive 76/211/EEC[48], which concluded to apply the internationally recognised OIML R87 the definition of nominal quantity, namely by excluding the weight of the individual wrappings (of sweets for example). OIML R87 (point 2.9) provides a clear definition of 'packing material' namely *"everything of the pre-package that is intended to be left over after use of the product, except for items naturally in the product. Use includes consumption or subjecting to a treatment."* However, the interviewees explained that they think issue was not resolved in a *legally binding way i.e. by an explicit prohibition by the EU*. As a consequence, these two complaining Member States have not yet fulfilled their WTO/TBT commitment and applied the changed international standard as a basis for their national law (i.e. the transposition of Directive 76/211/EEC) and thus have continued to allow the weight of the wrappings to be included in the overall nominal weight whereas all other Member States apply the changed international standard. They suggested that a legally binding resolution to this issue would be beneficial but a proposal could conceivably go against international standardisation; allowing packaging material to be included as content would imply micro-legislation on the weight of such packaging material.

- Despite the fact that *importers* using the e-mark need to fulfil the same requirements as packers in Europe using the e-mark, it is much harder to control these importers because it is more difficult to trace them. In practice, this leads to a situation where

[47] This point is also related to the provisions of Article 23 of the FIC Regulation and the possibility to adopt delegated acts in the future for the expression of net quantity for certain specified foods.

[48] Report on the 2005 Packaging consultation, (p6): "There is widespread agreement to follow international definitions of content excluding the packaging not to be consumed. Respondents mentioned the following points:
- the quantity indicated should exclude wrapping of sweets, detergent tablets and wax on cheeses
- a non-dissociable dissolvable film on detergent liquitabs should be included as product."
http://ec.europa.eu/growth/single-market/goods/building-blocks/legal-metrology/pre-packaging/index_en.htm

packers are controlled more often than importers, which means that there is a risk of importers putting products with e-marks on the European market without complying with the conditions laid down in the Directive. This problem is hard to address, as it is hard to trace importers and they often does not have the premises to conduct controls. One longer-term possibility would be to move towards a global certificate-system. There are some developments in OIML going in this direction, but this is out of the scope of this report. In the meantime, WELMEC is improving its guidance on imports, which arguably has not been easy, thereby enhancing administrative cooperation and development of best practice.

ANNEX 5: PRODUCT SPECIFIC DIRECTIVES

(ad § 6.3.1)

1. **Possible overlaps / complementarities with Directive 76/211/EEC:**

- Cosmetics: Regulation (EC) No 1223/2009, although Article 19 on labelling does not seem to contradict Directive 76/211/EEC[49].
- Detergents: Regulation (EC) No 648/2004, although Article 11 on labelling does not seem contradict Directive 76/211/EEC[50]
- Fertilizers: Regulation (EC) No 2003/2003, although Article 9 on labelling and Article 13 on nutrient tolerances do not seem to contradict Directive 76/211/EEC [51]
- HACCP[52]: Regulation (EC) No 852/2004 on the hygiene of foodstuffs, although it does not mention "batch" so there is no apparent contradiction with the definition of batch as an hour production in Directive 76/211/EEC.
- Size of quantity indication The Food Information Regulation requires[53] that the net quantity of foods "shall be printed on the package in such a way as to ensure clear legibility, using a font size equal to or greater than 1.2 mm", with an exception for small packages[54]. Where the pre-packed food is not e-marked the above is the minimum height, but the printing has to ensure "clear legibility". For e-marked pre-packages the minimum heights referred to in Directive 76/211/EEC[55] are:

[49]Regulation (EC) No 1223/2009, Article 19 Labelling 1. Without prejudice to other provisions in this Article, cosmetic products shall be made available on the market only where the container and packaging of cosmetic products bear the following information in indelible, easily legible and visible lettering:(a) the name or registered name and the address of the responsible person. Such information may be abbreviated in so far as the abbreviation makes it possible to identify that person and his address. If several addresses are indicated, the one where the responsible person makes readily available the product information file shall be highlighted. The country of origin shall be specified for imported cosmetic products;(b) the nominal content at the time of packaging, given by weight or by volume, except in the case of packaging containing less than five grams or five millilitres, free samples and single-application packs; for pre-packages normally sold as a number of items, for which details of weight or volume are not significant, the content need not be given provided the number of items appears on the packaging. This information need not be given if the number of items is easy to see from the outside or if the product is normally only sold individually.

[50]Regulation (EC) No 648/2004, Article 11 Labelling 2. The following information must appear in legible, visible and indelible characters on the packaging in which the detergents are put up for sale to the consumer: (a) the name and trade name of the product; (b) the name or trade name or trademark and full address and telephone number of the party responsible for placing the product on the market; (c) the address, email address, where available, and telephone number from which the datasheet referred to in Article 9(3) can be obtained. The same information must appear on all documents accompanying detergents transported in bulk. 3. The packaging of detergents shall indicate the content, in accordance with the specifications provided for in Annex VII A. It shall also indicate instructions for use and special precautions, if required. 4. Additionally, the packaging of consumer laundry detergents and consumer automatic dishwasher detergents shall bear the information provided for in section B of Annex VII.

[51]Regulation (EC) No 2003/2003, Article 9 Markings 1. Without prejudice to other Community rules, the packages, labels and accompanying documents, referred to in Article 7 shall bear the following markings: (a) Compulsory identification - Net or gross mass and, optionally, volume for fluid fertilisers. If the gross mass is given, the tare mass must be indicated beside it; - The name or trade name and the address of the manufacturer.

[52]Hazard Analysis and Critical Control Points: a preventative food safety system in which every step in the manufacture, storage and distribution of a food product is scientifically analyzed for microbiological, physical and chemical hazards

[53] Regulation (EU) No 1169/2011, Article 13.2.

[54] Regulation (EU) No 1169/2011, Article 13.3.

[55] Directive 76/211/EEC, Annex I, section 3.1.

Nominal quantity and unit of measurement	Minimum height of quantity indication (actual height in brackets)
Exceeding 1L or 1 kg	6 mm (6 mm)
Exceeding 200g/20cl but not exceeding 1 kg / 1L	4 mm (4 mm)
Exceeding 50 g/5cl but not exceeding 200 g/20cl	3 mm (3 mm)
Not exceeding 50 g/5cl	2 mm (2 mm)
Food Information Regulation	1.2 mm (1.2 mm)

The choice for e-marking is voluntary and if chosen, the larger size requirement must be followed when the e-marking is affixed. Materially a large pack allows more room for a larger indication, so there does not seem to be a major issue there.

2. **Possible overlaps / complementarities with Directive 2007/45/EC:**

- Aerosols Dispensers: Directive 2007/45/EC waives the weight indication required by the Aerosols Dispensers Directive 75/324/EEC *Article 8* 1(e)[56] - this exemption exists legally since 1980 (Directive 80/232/EEC) and is supported by European industry[57].

[56]Directive 75/324/EEC *Article 8* 1. Without prejudice to Regulation (EC) No 1272/2008 of the European Parliament and of the Council (1), each aerosol dispenser or, where particulars cannot be put on the aerosol dispenser due to its small dimensions (maximum capacity of 150 ml or less) a label attached thereto must bear the following particulars in visible, legible and indelible characters: (a) the name and address or trade mark of the person responsible for marketing the aerosol dispenser, (b) the symbol '3' (inverted epsilon) certifying conformity with the requirements of this Directive, (c) code markings enabling the filling batch to be identified, (d) the details referred to in point 2.2 of the Annex, (e) the net contents *by weight* and by volume.

[57]FEA favours a mandatory labelling of the nominal quantities in volume (ml), which has been an established rule since 1980: http://www.aerosol.org/regulatory-policy-affairs/legal-metrology.

ANNEX 6: UNION LEGISLATION PROTECTING CONSUMERS

(ad § 6.3.1):

- Directive 94/62/EC[58] prohibits the use of excess packaging materials and Directive 2005/29/EC[59], which applies to business-to-consumer transactions, requires traders to provide consumers with information they need to take informed decisions and prohibits business practices that are likely to deceive consumers.
- Directive 98/6/EC[60] requires the selling price and the unit price (price per unit of measurement) to be indicated for products offered by traders to consumers, in order to improve consumer information and to facilitate comparison of prices.
- Regulation (EU) No 1169/2011[61] requires the net quantity of the food and, in the case of food presented in a liquid medium also the drained net weight, to be indicated on the label.

[58] OJ L 365, 31.12.1994
[59] OJ L 149, 11.6.2005
[60] OJ L 80, 18.3.1998
[61] OJ L 304, 22.11.2011

ANNEX 7: SUGGESTIONS FOR TECHNICAL/INTERNATIONAL PROGRESS

(ad § 6.4.3) Suggestions on the scope of Directive 76/211/EEC regarding technical/international progress:

- *Products sold by length, area, or number*: Five authorities mention that, unlike the international standard OIML R87[62], Directive 76/211/EEC does not cover products that are sold by length, area, or number[63]. Examples here are fabric (sometimes sold by metres) or screws and nails (sold by number). Some authorities feel that the Directive needs to be updated in line with these recommendations, in order to simplify and to harmonise rules in all countries (by making the recommendations obligatory for all Member States). A few others, however, are of the opinion that this is not necessary as all EU Member States must follow the OIML recommendation in their national law already[64].
- *Drained weight*: A couple of authorities mention that the Directive does not concern drained weight (e.g. product in liquid and frozen products). The interviewees explain that it is difficult to establish drained weight at the point of time when the product is measured. Due to the lack of harmonised procedures in this respect, the issue is still dealt with differently across Member States even though all products are in practice benefiting from free circulation. In the absence of an internationally accepted standard, guide 6.8 developed by WELMEC is considered an important step forward in increasing harmonisation in this respect – although as guidance it is not legally binding.[65]
- *Maximum weight/volume of pre-packs covered by the Directive*: Six out of 22 authorities mention that Article 1 of Directive 76/211/EEC stipulates that the Directive applies to pre-packages of "*not less than 5 g or 5 ml and not more than 10 kg or 10 l"*. A number of interviewees argue that while these limits may have been appropriate at the time the Directive was developed, consumers today buy prepacks containing much larger (but sometimes also smaller) quantities. Examples of products that regularly exceed the weight/volume limits of the Directive include cat litter, paint, and cement (more than 10kg/l) and saffron (less than 5g/ml). Although a limited number of products, expanding the coverage of the Directive would reflect this reality. However, national law can and does already take account of larger sizes, whereby the OIML recommendation serves as basis.

[62] OIML R87(2004), point 1: http://www.oiml.org/en/files/pdf_r/r087-p-e04.pdf

[63] The fact that other authorities did not mention these issues when asked about the how up to date the Directives are, should not be interpreted to mean that they disagree with the finding.

[64]Tthe FIC Regulation (EU) No 1169/2011 also addresses some of these points. In particular: Article 23.2 referring to the delegated acts that may be adoted by the Commission which may establish for certain categories of foods a different manner of expression of net quantity other than the units of mass or volume and Article 42 referring to national measures concerning the expression of net quantity for specified foods in a different manner which MS may maintain in the absence of Union rules. in the absence of Union rulest quantity for specified foods in a different manner
By 13 December 2014, the Commission had been informed by the following MS: UK, SE, IE, NL, DE, PL.

[65]WELMEC 6.8 - European Cooperation in Legal Metrology Drained Weight: "Guide on the Verification of Drained Weight, Drained Washed Weight and Deglazed Weight", May 2013.

- *Speed of production*: Two out of 22 authorities and the association of beer brewers mention that the Directives are based on outdated production speeds. In the 1970s when the Directive was drafted filling or packing 10,000 containers or packs an hour was considered a lot. Nowadays, however, multinationals sometimes produce up to 120,000 an hour (which means 10,000 only represents 5 minutes of production time). Therefore, they believe that this maximum batch of 10,000 should be adapted (for example to "an hourly production").

- *Sample of pre-package batches*: Paragraph 2.1.4 of Annex II of Directive 76/211/EEC stipulates that in order to pick the sample of pre-packages to be tested *"[…] the necessary sample shall be drawn at random from the first sample and marked. This marking operation shall be completed before the start of the measuring operations."* Two interviewees note that nowadays, random sampling can be done with software programmes[66]. Thus, there is no need to mark prepacks manually anymore. However, in one follow-up interview, the interviewee notes that if software programmes are used then there needs to be a proper validation process to ensure the calculations are correct. In practice, there have been instances where software systems at packers' premises led to systematic over- or under filling due to programming mistakes.[67]

[66]See WELMEC guide 6.4 on use of software: http://www.welmec.org/fileadmin/user_files/publications/6-4.pdf
[67]If the maximum batch is increased, then the sample size needs to be increased accordingly to ensure it is still statistically representative of the batch that is being controlled.