

Joint industry comments on TRIS notification 2022/827/B (Belgium)

Draft Royal Decree to limit the placing on the market of single-use products harmful to the environment and to increase the recycled content of certain products

1. Object of the TRIS contribution

On 29 November 2022, Belgium notified to the European Commission a [Draft Royal Decree](#) to limit the placing on the market of single-use products harmful to the environment and to increase the recycled content of certain products (hereafter “the Royal Decree”). The Royal Decree sets out measures to phase out the marketing of certain single-use plastic products and packaging and encourage the use of recycled plastics. It also prohibits to place on the market for the first time packaging containing PFAS.

The following draft measures are the object of this contribution:

- > Article 3 - prohibition to place on the market for the first time any single-use plastic (SUP) container intended for the distribution of food or drink for immediate consumption either on-the-spot or take-away, with the exception of SUP containers which are industrially pre-filled.
- > Article 4 § 1 and § 2 - prohibition to place on the market for the first time, non-compostable labels intended to be glued to fruit and vegetables and, from 1st January 2025, to place on the market for the first time labels which are not compostable at home, intended to be glued to fruit and vegetables.
- > Article 5 - prohibition to place on the market for the first time SUP packaging intended to pack unprocessed fresh fruit and vegetables (see below the related exemptions).
- > Article 6 § 1 - prohibition to place on the market for the first time products (listed in Annex 2 of the Royal Decree¹) which are not composed of post-consumer recycled plastic.
- > Article 7 - prohibition to place on the market for the first time the single-use products listed in Annex 3 of the Royal Decree².
- > Article 9 - prohibition to place on the market for the first time single-use cups made of cardboard with a plastic coating.

The undersigned signatories contest the lawfulness of the above-mentioned measures on the following grounds:

- > Many of the provisions in the Royal Decree pre-empts the forthcoming revision of the Directive 94/62/EC on Packaging and Packaging Waste (PPWD), for which the EU Commission has published a [legislative proposal](#)

¹ The following minimum recycled plastic content targets are foreseen for these product categories: (1) Shrinkable sleeves, also called pallet sleeves or pallet cover sleeves; materials consisting of a plastic film that is placed on a product or series of products to be packaged. By means of a heat source, the sheet retracts shrinks and fits very tightly to the material to be packaged (25% by 2014 and 50% by 2026); (2) Plastic compost drums and bins, except for moving parts of the compost bin or compost barrel (80% by 2024 and 100% by 2026); (3) Plastic rolling containers for waste except the container body, lid, chassis and wheels (50% by 2024 and 80% by 2026); (4) Plastic nursery pots, nursery trays and plant trays used for the cultivation and packaging of flowers and plants (80% by 2024 and 100% by 2026); (5) Urban furniture with plastic parts, where the plastic parts have not been produced from recycled plastics, with the exception of plastic assembly elements intended to connect the different parts of the furniture into a single structural unit (80% by 2024 and 100% by 2026)

² The following products are listed in Annex 3: (1) Plastic confetti; (2) Plastic glitter; (3) Plastic sticks other than for medical applications; (4) Plastic skewers; (5) Plastic coffee, tea and herbal tea bags; (6) Single-use coffee capsules containing plastic or aluminium; (7) Cutlery and plates other than home compostable ones; (8) Laminated advertising cards

on 30 November 2022. The Royal Decree therefore infringes Article 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (TRIS)³.

- > Some of the proposed obligations will impede the placing on the market of packaging that is fully compliant with the provisions of the EU packaging legislation currently in force, thus being contrary to Article 18 of the PPWD. Similarly, those obligations will create unjustified barriers to intra-EU trade and consequently amount to quantitative restrictions on imports or measures having equivalent effect, which are prohibited by Article 34 of the Treaty on the Functioning of the European Union (TFEU).
- > Several requirements in the Royal Decree do not find a legal basis in any of the currently enforced EU legislations or depart from already adopted EU laws.
- > If adopted, the Royal Decree will have negative economic impacts on economic operators without added environmental value.

2. The Royal Decree requirements

- > **Article 3 - prohibition to place on the market for the first time any SUP container intended for the distribution of food or drink for immediate consumption either on-the-spot or take-away, with the exception of SUP containers which are industrially pre-filled, and**
- > **Article 9 - prohibition to place on the market for the first time single-use cups made of cardboard with a plastic coating.**

Directive 2019/904 on Single-Use Plastics (SUP Directive) clearly states that **only SUP food and beverage containers and cups for beverages made of expanded polystyrene are subject to the restriction on placing on the market established in Article 5 of the Directive**. Although Article 4 of the SUP Directive (consumption reduction) allows Member States to adopt marketing restrictions for SUP food containers and beverage cups in derogation from Article 18 of Directive 94/62/EC, it is notable to observe that, when notifying the Royal Decree, **Belgium has not provided any scientific evidence demonstrating the proportionality and the non-discriminatory nature of the proposed measures**. Furthermore, **the product category covered by Article 3 of the Royal Decree is broader than the one in scope of the SUP Directive**, where consumption reduction measures are only foreseen for SUP food containers and cups for beverages, their cover and lids.

Finally, **the mentioned measures, which are due to enter into force on 1 January 2024, effectively pre-empt the ongoing revision of the PPWD**. In relation to the latter, the EU Commission has published on 30 November 2022 a legislative proposal, including proposed measures on restrictions on use of certain packaging formats (Article 22 and Annex V) and re-use and refill targets (Article 26 (2), (3) and (6)). Therefore, **the Royal Decree infringes Article 6 (3) of Directive (EU) 2015/1535 on TRIS** and creates confusion in the regulatory framework as well as additional regulatory hurdles for economic actors operating on the EU market.

- > **Article 7 - prohibition to place on the market for the first time the single-use products listed in Annex 3 of the Royal Decree (i.e. plastic confetti; plastic glitter; plastic sticks other than for medical application; plastic skewers; plastic coffee, tea and herbal tea bags; single-use coffee capsules containing plastic or aluminium; cutlery and plates other than home compostable ones; laminated advertising cards).**

³ Article 6 (3) of Directive (EU) 2015/1535 on TRIS states: “[...] Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within three months of that date, the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU.”

The SUP Directive clearly states that **only single-use plastic products listed in Part B of its Annex are subject to restrictions on placing on the market**. The Royal Decree requirement, therefore, **over-transposes the SUP Directive while not having a legal basis in any of the provisions currently enforced at EU level**.

Since Article 7 of the Royal Decree bans several products which would be lawfully marketed in other Member States, **the measure could create unjustified barriers to the trade of goods between Member States which are not justified by the attainment of the SUP Directive environmental objectives**, thus not upheld by the *lex specialis* principle set in art 4 of the SUP Directive, **nor compliant with Article 18 of the PPWD**. The latter obliges Member States to allow the placing on the market of their territory of packaging which satisfies the provisions of the Directive.

- > **Article 4 § 1 and § 2 - prohibition to place on the market for the first time, non-compostable labels intended to be glued to fruit and vegetables and, from 1st January 2025, to place on the market for the first time labels which are not compostable at home, intended to be glued to fruit and vegetables, and**
- > **Article 5 - prohibition to place on the market for the first time SUP packaging intended to pack unprocessed fresh fruit and vegetables, with the exception of fruit and vegetables packaged in batches of 1.5 kilograms or more and fruit and vegetables presenting a clear risk of deterioration when sold in bulk (i.e. edible flowers, raspberries, strawberries, blueberries, blackberries, redcurrants and blackcurrants).**

As established above for Articles 3 and 9, **the measures proposed in Article 4 and 5 of the Royal Decree largely mirror the provisions in Article 8 (compostable packaging) and Article 22 & Annex V (restrictions on use of certain packaging formats) of the EU Commission proposal for the revision of Directive 94/62/EC on Packaging and Packaging Waste**, published on 30 November 2022. Therefore, the Royal Decree is once again in breach of Article 6 (3) of Directive (EU) 2015/1535 on TRIS.

Further to the above, **Article 5 of the Royal Decree does not find a legal basis in any of the provisions currently enforced at EU level**. In relation to SUP packaging, the SUP Directive does not foresee a ban on the packaging of fruit and vegetables. These packaging applications are not listed in Part B of the Annex to the SUP Directive, which provides an exhaustive list of the single-use plastics items subject to restrictions on the placing on the market, nor are fruits and vegetables covered by the Royal Decree intended for immediate consumption or typically consumed from the receptacle without any further preparation, such a washing.

The proposed ban will have potentially adverse implications for food waste. Packaging plays a central role in extending food life shelf, thus minimising food losses and preventing the waste of resources and the greenhouse gases emissions associated with discarded food. In relation to this, we would like to stress that Article 9 (1) (g) of Directive 2008/98/EC on Waste (WFD) requires Member States to take measures to prevent the generation of waste, including to “reduce the generation of food waste in [...] retail and other distribution of food, [...] as a contribution to the United Nations Sustainable Development Goal to reduce by 50% the per capita global food waste at the retails and consumer level [...] by 2030”.

The proposed measures also clearly infringe Article 18 of the PPWD since the proposed bans will effectively impede the marketing of packaged goods in Belgium that are fully compliant with the PPWD.

- > **Article 6 § 1 - prohibition to place on the market for the first time products (listed in Annex 2 of the Royal Decree) which are not composed of post-consumer recycled plastic.**

We would like to recall that, at the time of this submission, the European Commission has published its proposal for the revision of Directive 94/62/EC on Packaging and Packaging Waste, which includes in Article 7 EU-wide minimum recycled content targets for plastic packaging.

The measure proposed by the Belgian Government will be contrary to the stated objective of the EU Commission proposal for a Packaging and Packaging Waste Regulation (PPWR). As an example, the requirement to include

80% and 100% post-consumer plastics in applications such as plastic compost drums and bins, urban furniture with plastic parts, plastic nursery pots, nursery trays and plant trays used for the cultivation and packaging of flowers and plants **will promote downcycling and further undermine economic operators' ability to fulfil already ambitious recycled content targets proposed as part of the PPWR.**

As a result of such targets, economic operators from across Europe will not be able to place on the Belgian market plastic packaging that does not contain the prescribed amounts of recycled content. This is despite the fact that the same packaging will be considered compliant with the EU packaging rules in another country. Therefore, **such measures are contrary to Art. 18 of the PPWD.** Furthermore, to avoid creating barriers to the development of a single market for recycled plastic, it is important that plastic recycled content targets are set in a harmonised fashion across EU Member States.

Finally, **the Royal Decree clearly departs from the SUP Directive** as it establishes the obligation to include minimum plastic recycled content in product categories which are not in scope of the SUP Directive.

In consideration of the above, Belgium should refrain from introducing unilateral mandatory plastic recycled content targets, for which a unified measurement, verification and reporting method, as well as harmonised specifications for labelling, will also be defined at EU level.

3. Infringement of EU legislation

The measures proposed by the Belgian Government infringe EU legislation and TFEU provisions on Single Market and Directive (EU) 2015/1535 on the Technical Regulations Information System.

Infringement of EU legislation, TFEU provisions on Single Market and TEU provisions

The above-mentioned measures infringe the following EU legislation and TFEU provisions:

- > **Article 18 of the Packaging and Packaging Waste Directive (94/62/EC)**, which provides that, even if Member States are allowed to go beyond the requirements laid down in its provisions, they “shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. All the measures analysed as part of this contribution will effectively impede the marketing of packaged goods in Belgium that are fully compliant with the PPWD and are therefore in violation of the Article 18. It is also noteworthy that the legal basis of the PPWD is Article 114 of the TFEU. This further limits the discretion of Belgium vis-à-vis imposing additional requirements on packaging in contradiction to Article 18 of the PPWD.
- > **Article 8a(1)(d) of the Waste Framework Directive (2008/98/EC)**, which prevents Member States from “placing a disproportionate regulatory burden on producers” (see below the economic impacts of the Royal Decree).
- > **Article 34 TFEU**, which prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. Quantitative restrictions can only be justified by one of the public interest grounds set out in Article 36 TFEU or by one of the overriding and mandatory requirements developed by case-law in the EU Court of Justice. Such rules must be necessary in order to attain legitimate objectives and be in conformity with the principle of proportionality, which requires that the least restrictive measure be used. The proportionality of measures mandated by the Royal Decree can be questioned. As mentioned above, Belgium has failed to provide adequate justification on the need and proportionality of the proposed measures. Even if the intended objective to prevent and reduce the impact of packaging and packaging waste on the environment would be considered legitimate, the measures are not proportionate as this objective can be achieved by less restrictive measures and better addressed by an EU-wide approach, which the Royal Decree currently undermines.

> **Article 4(3) TEU:** In line with the principle of sincere cooperation, a Member State should refrain from adopting legislation to address an issue which can only be adequately resolved at EU level and in a field which the EU intends to harmonise. This is the case for the packaging legislation. Belgium should not pre-empt the setting of harmonised rules at EU level, such as provisions relating to recycled content. These matters should be dealt with at the EU level as part of the ongoing revision of the Packaging and Packaging Waste Directive.

Infringement of Directive (EU) 2015/1535 on the Technical Regulations Information System

We welcome the submission from the Belgian Government of the Royal Decree to the Technical Regulations Information System (TRIS).

The Royal Decree, however, infringes Article 6 (3) of Directive (EU) 2015/1535 on TRIS, which prescribes that Member States shall postpone the adoption of a draft technical regulation for 12 months when the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU. The EU Commission intention to revise the Packaging and Packaging Waste Directive was publicly announced by the Commission as part of the New Circular Economy Action Plan⁴, adopted in March 2020, and has been the object of several consultations at EU level⁵. Finally, it has been confirmed by the publication of the PPWR proposal by the EU Commission on 30 November 2022.

It is notable to observe that, despite the above, Belgium has decided to proceed with the adoption of a number of provisions that clearly pre-empt harmonisation efforts at EU level. This is the case for most of the obligations proposed in the Royal Decree, particularly measures on plastic recycled content and on the restriction of specific packaging formats.

4. Economic and environmental impacts

Rigorous implementation and enforcement of the Single Market principles are key to ensure harmonised legal requirements facilitating economies of scale, long-term investments and strengthening the business case for innovative products and technologies. This is not only a precondition for the free movements of packaged goods and packaging materials across the EU, but it is essential to strengthen the implementation of packaging and packaging waste targets in all Member States.

We detail below negative economic and environmental impacts derived from the Royal Decree.

Economic impacts

Regarding **recycled content measures**, the targets proposed in the Royal Decree are excessively demanding and contrary to the objectives of the Packaging and Packaging Waste Directive revision. The establishment of the mentioned targets would pose additional hurdles to the sourcing of post-consumer recyclates, which are already more expensive compared to virgin plastic feedstock.

There is significant on-cost due to post-consumer recycled plastic being more expensive than virgin plastic. The gap between virgin and recycled plastic varies significantly between rPET and rPE and rPP, as well as r(E)PS.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A New Circular Economy Action Plan For a cleaner and more competitive Europe", COM/2020/ 98 final, p. 8: "[...] the Commission will review Directive 94/62/EC to reinforce the mandatory essential requirements for packaging to be allowed on the EU market and consider other measures [...]", and p. 13: "[...] In addition, the Commission will put forward waste reduction targets for specific streams as part of a broader set of measures on waste prevention in the context of a review of Directive 2008/98/EC."

⁵ As an example, a formal public consultation on the revision of the PPWD has been conducted by the European Commission between September 2020 and January 2021.

Today, mechanically recycled plastic represents an on-cost of 25% to 40% compared to virgin plastic, while advanced or chemically recycled plastic for food grade represents an on-cost of 100%. The evolution of this cost will depend on the speed of building capacity as well as the development of virgin prices that are coupled with crude oil prices.

Economic actors operating in Belgium will have to bear unnecessary costs and administrative burden derived from the adaptation to the requirements of the PPWR, once adopted probably in May 2024. This potentially involves large economic investments in a short period of time, since it implies the readaptation of production lines and changes in the structure of the production and packaging plants.

Finally, regarding the proposal in Article 7 to ban single-use coffee capsules containing plastic or aluminium, economic operators that have been investing in new packaging designs to improve the recyclability of their products will experience losses and will not be allowed to market products they have been developing with high R&D costs. In relation to this, we would like to bring to the attention of the EU Commission a recent announcement made by the Belgian Extended Producers Organisation Fost Plus regarding the possibility, as from January 2023, to sort all coffee capsules in the Blue Bag (PMC).⁶

Environmental impacts

The ban on packaging fruits and vegetables risk to have unintended consequences, in the form of increased food loss and waste of unprocessed fruits and vegetables.

The Food Waste Index Report 2021⁷, developed by the United Nations Environment Programme (UNEP) and partner organisation WRAP, finds that food services and retail outlets produce 5% and 2% of food waste respectively. On a global per capita-level, 121 kilograms of consumer level food is wasted each year. The UN Food and Agriculture Organization (FAO) warns that one third of all food produced globally is lost or wasted. In the European Union, around 88 million tonnes of food waste are generated annually with associated costs of 143 billion euros, according to the most recent estimate.

Preventing avoidable product losses and food waste at all stages of the supply chain is an important part of delivering a circular economy. Food waste represents a missed opportunity to feed the growing world population, a major waste of resources and a major source of greenhouse gas emissions accounting for 6% of total EU GHGs emissions.

Packaging has an essential role to play in the prevention of food waste, protecting products and minimising waste at all stages of the value chain. To this end, the Belgian ban overlooks how high-performance packaging solutions and technologies can preserve food safety by minimising sources of contamination and reduce food waste from spoilage. Innovative packaging designs also help consumers buy and use food in portions that match their needs and reduce food waste from leftovers.

5. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, Belgium should abstain from imposing unilateral requirements which will pre-empt forthcoming EU legislation and create barriers to trade. Based on the findings from our contribution, we submit the following requests to the Commission:

- to adopt a detailed opinion concluding that the Royal Decree may create barriers to the free movement of goods in Europe and should not be adopted since it contravenes TFUE Single Market provisions and EU legislation.

⁶ See the announcement [here](#).

⁷ UNEP Food Waste Index Report 2021.

- to inform Belgium that the Royal Decree is in breach of Article 6 (3) of Directive (EU) 2015/1535 on TRIS.

Signatories



AGMPM - Association of Greek Manufacturers of Packaging & Materials



CEFLEX - A Circular Economy for Flexible Packaging



EAFA - European Aluminium Foil Association



ECMA - the European Carton Makers Association



EuPC - European Plastics Converters



EUROPEN - The European Organisation for Packaging and the Environment



EVA - European Vending & Coffee Service Association



EXPRA - Extended Producer Responsibility Alliance



FDE - FoodDrinkEurope



FPE - Flexible Packaging Europe



IK - Industrievereinigung Kunststoffverpackungen



INTERGRAF - European federation for print & digital communication



Plastics Europe



Pro Carton - Association of European Cartonboard and Carton Manufacturers



UNESDA - Union of European Beverages Association



Unionplast - The Italian Plastics Converting Association