

Joint industry comments on TRIS notification 2022/167/F (France)

Decree on the Prohibition of Certain Single-Use Plastic Food Containers made of Expanded or Extruded Plastics

1. Object of the TRIS contribution

On 18 March 2022, the French government notified to the European Commission a Draft Decree on the Prohibition of Certain Single-Use Plastic Food Containers made of Expanded or Extruded Plastics (hereafter “the Draft Decree”).

The undersigned organisations consider that the Draft Decree will introduce unjustified and disproportionate barriers to trade across the EU and will thus infringe TFEU Single Market provisions and EU legislation.

1. The Decree requirements

The Draft Decree prohibits the provision of single-use plastic food containers consisting entirely or partly of extruded polystyrene, expanded or extruded polypropylene and intended for on-site or nomadic consumption. This is, according to the French legislator, to limit the possibility of circumvention of the provisions of the AGECL law¹ which previously forbid expanded polystyrene containers or receptacles for on-site or on-the-move consumption.

2. Infringement of EU legislation

The measures adopted by the French government infringe TFEU provisions on Single Market and EU legislation.

Infringement of TFEU provision on Single Market

In line with Article 4 of the Single-Use Plastics Directive (SUPD), single-use plastic food containers for immediate use or take away are subject to consumption reduction measures, which may include marketing restrictions in derogation of Article 18 of Directive 94/62/EC on Packaging and Packaging Waste (PPWD). However, the article clearly states that measures adopted pursuant to this paragraph shall be proportionate and non-discriminatory. This is because, in addition to pursuing the objective of reducing the impact of certain plastic products on the environment, measures proposed in application of the SUPD shall also contribute to the efficient functioning of the internal market (SUPD, Article 1).

Contrary to the above, we believe that the Draft Decree creates unjustified barriers to the trade of goods between Member States which are not justified by the attainment of the SUPD environmental objectives. Bans are the most extreme form of obstacle to trade possible. France has not established that such a

¹ Loi du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire.

significant restriction is justified nor needed to fulfil the SUPD objectives, as it would be required by Article 36 TFEU. While the protection of the environment is indeed a legitimate aim, the Draft Decree falls short to justify how a full-fledged ban (and not, for instance, additional investments for the appropriate collection, sorting and recycling of those applications, or awareness raising campaigns) is suitable to achieve this objective.

In practice, the Draft Decree will translate into a ban for most single-use plastic food containers for immediate or on-the-go consumption, which will be applicable in France only, making producers established outside France unable to market their products in a single EU Member State. This constitutes a measure equivalent to a quantitative restriction on imports, prohibited by Article 34 TFEU. In addition to deviating from harmonised provisions set out in the SUPD and PPWD, this unilateral action undermines the legal certainty of economic operators, who will bear the costs of complying with divergent national transpositions.

The Draft Decree's ban is therefore disproportionate as additionally restrictive measure are imposed unilaterally to limit the circumvention of an already enacted ban. This, even before the effectiveness of the SUPD, and therefore of an EU-wide approach to marine littering, is assessed in 2027.

Infringement of Directive (EU) 2019/ 904 on the reduction of the impact of certain plastic products on the environment

In addition to the Single Market implications mentioned above, the Draft Decree is more restrictive than requirements provided for in the SUPD, which exclusively forbid the placing on the market of food containers made of expanded polystyrene in Article 5 and related Annex.

The Draft Decree goes beyond the requirements established at EU level to tackle marine litter and plastic waste and is, therefore, in open contradiction with the underlying purposes of the legislative procedure, wherein the European legislators provided for an exhaustive list of banned single-use plastic applications in Annex - Part B to the SUPD. This list reflects the scientific evidence identified by the impact assessment that accompanied the legislative proposal.

The above is also confirmed by the provisions in Article 10 of the SUPD, which require Member States to incentivise responsible consumer behaviour by informing on, among others, the impact of littering and inappropriate waste disposal practices of single-use plastic food containers for immediate or on-the-go consumption. This further puts into question the validity of the proposed ban, which is likely to prompt material substitution with very limited impact on consumer behaviour.

3. Conclusions

The undersigned organisations are concerned that, in addition to already disproportionate measures adopted by France to transpose the SUPD², the Draft Decree would additionally and unnecessarily fragment the Union market.

The European Commission should take any opportunity to improve and strengthen the well-functioning of the Single Market, including by recalling Member States on a rigorous transposition of EU legislation.

We therefore request the European Commission to adopt a detailed opinion concluding that the Draft 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 the SUPD requirements.

² Décret n° 2020-1828 du 31 décembre 2020 relatif à l'interdiction de certains produits en plastique à usage unique.

Signatories



CICLOPLAST – Spanish Association of Plastics Transformers and Raw Materials Producers for Promoting Plastics Packaging Recycling



Der Grüne Punkt – Duales System Deutschland GmbH



ELIPSO – Les Entreprises de l'Emballage Plastique et Souple, France



EUPB – European Bioplastics



ECMA – European Carton Makers Association



EuPC – European Plastics Converters



EUROPEN – The European Organization for Packaging and the Environment



FoodDrinkEurope – The Organisation of Europe's Food & Drink Industry



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