

Main flaws of the amendment to subsection 2.2.1 of the Draft Guidelines on the SUP Directive

This note briefly discusses the new version of subsection 2.2.1 of Part I of the Draft Guidelines on the SUP Directive and emphasises that this version is inconsistent with the fundamental principle of proportionality.

The unreasonable results deriving from the implementation of the current version of subsection 2.2.1 are also addressed in this note.

The new version of subsection 2.2.1 (Plastic content: ‘wholly or partly made of plastic’) of Part I of the Draft Guidelines reads as follows:

*“Single-use plastic products listed in the Annex of the Directive fall within its scope also if they are made partly from plastic, regardless of the amount of plastic contained. **The Directive does not envisage any de minimis threshold for the plastic content in a product.** This aspect of Article 3(2) has to be interpreted in close connection with the definition of plastic in Article 3(1) (see paragraph 2.1).”* (emphasis added)

EPPA considers that the inclusion in subsection 2.2.1 of the above-highlighted is incompatible with the spirit of the Directive and distorts its scope.

First, the fact that the SUP Directive does not envisage any de minimis threshold for the plastic content in a product, does not mean that the use of thresholds is prohibited under the SUP Directive for the purpose of determining whether a product partly made of plastic is a single-use plastic product.

Second, the fact that the new version of the Guidelines deprives the amount of plastic content in a product of any relevance for the purpose of Article 3(1) of the SUP Directive is flagrantly at odds with the principle of proportionality, which is the fundamental guiding element in the implementation of the SUP Directive.

The importance of the principle of proportionality is emphasized in Recitals 14, 22, 25 and 36, which dictate that the effects of the SUP Directive must be compatible with that principle. Particularly, Recital 14 states that *“where Member States decide to implement that obligation through marketing restrictions, they should ensure that such restrictions are proportionate and non-discriminatory”*.

Moreover, Recital 7 states that *“[t]o focus efforts where they are most needed, this Directive should cover only those single-use plastic products that are found the most on beaches in the Union”*, that is to say 86% of the single-use plastics found on

beaches in the Union. These products are not amongst the most commonly littered products and their inclusion in the Directive is disproportionate.

Accordingly, the application of the (restrictive) measures envisaged by the SUP Directive must be reasonable and limited only to the single-use products most frequently littered products.

Bearing the above in mind, it is obvious that the Commission's proposal according to which all products partly made of plastic, irrespective of the amount of plastic contained, would fall within the scope of the measures provided for in the SUP Directive runs counter the fundamental principle of proportionality.

Indeed, the interpretation proposed by the Commission in the Draft Guidelines would prevent Member States from relying on the sole instrument – a quantitative threshold for plastic content – capable of ensuring proper implementation of the SUP Directive in full compliance with the principle of proportionality, bringing immediate consumption reduction of 90% plastic in the case of paper cups.

Should the approach put forward by the Draft Guidelines be eventually retained, the effects would be totally unreasonable and illogical. This is witnessed by the following telling examples:

- Paper-fibre based cups and food containers, with a small amount of plastic content (for example, items made of 90% paper and 10% polymer), would be subject to the severe consumption reduction measures provided for in Article 4 of the SUP Directive;
- "Some paper-based products, with surface layers of polymer, are treated in different ways within the Directive than those which also have surface layers of polymer set out in Article 4; Article 6 (1-4) on product requirements, Article 8(2) on extended producer responsibility and Article 10 on awareness raising."
- Products made of 100% plastic, beverage bottles, which are one of the marine litter items that are found the most on beaches in the Union (see Recital 27) would be practically excluded from the measures provided for in the SUP Directive. Beers and Soda cans with plastic layer would also be exempted.

They are in fact only subject to product requirements measures under Article 6 of the SUP Directive.

The result of the Commission's approach would therefore be to penalise more the products with little plastic content, rather than those predominantly made of plastic.

The above-described situation is irreconcilable with the objectives of the SUP Directive – which are to prevent and reduce the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health, as well as to promote the transition to a circular economy (Article 1) – and the fundamental principle of proportionality underlying the SUP Directive.