

**European Paper Packaging Alliance (EPPA)****Arguments showing that polymer-coated paper fibre products do not fall within the scope of the SUP Directive*****Position paper – Executive Summary***

The European Paper Packaging Alliance (“EPPA”) is an association representing suppliers and manufacturers of renewable and sustainable paper board and paper board packaging for Food and Foodservice Industry. They include, e.g., Seda International Packaging Group, Huhtamaki, AR Packaging, Smith Anderson, Schisler Packaging Solutions, Stora Enso, Metsä Board, Mayr-Melnhof Karton, WestRock, Iggesund/Holmen, Reno De Medici, and Paper Machinery Corporation.

EPPA, in partnership with the European Foodservice operators, aims at identifying concrete solutions to encourage recycling and reduce carbon emissions of food and foodservice packaging. The overall European Foodservice sector is worth around EUR 335 billion, thanks to the daily work of 1.7 million companies employing around 8 million workers. The European Home Delivery sector is estimated at about EUR 17 billion in 2020, with a growth of 15% compared to 2019, and 160 million consumers.

Should single-use paper fibre packaging be included within the scope of the SUP Directive, through the Commission Guidelines under preparation, the entire supply chain would be seriously affected, including fast food operators, machinery-Equipment and furniture industries, packaging suppliers, distributors, and livestock and agriculture industries.

The paper packaging Industry, alone, employs more than 50,000 direct jobs that support a foodservice market (takeaway and home delivery) valued at €70bn and 1.6 million people.

**1. POLYMER COATED PAPER FIBRE PRODUCTS AND THEIR CONTRIBUTION TO THE CIRCULAR ECONOMY AND THE FIGHT AGAINST CLIMATE CHANGE**

The following main features of the paper fibre products should be taken into account:

- The negligible percentage of polymers (10%) does not alter the nature of the paper fibre products, which retain structural characteristics which are profoundly different from those of plastic products.

- Paper fibre products, mostly sourced from certified sustainable European forests, provide high standards of food safety and hygiene while ensuring a positive impact on the environment. In the EU alone, sustainably managed forests deliver an overall climate mitigation impact equal to 13% of European greenhouse gas emissions through sequestration, storage and the substitution of non-renewable, fossil-based materials
- Paper fibre products encourage the recycling and reuse of the main raw material (paper), while reducing waste production in full compliance with the principles of circular economy. Suffice it to say that the recycling rate for paper and cardboard packaging was around 86% in 2017, while the recycling rate for plastic was less than half in the same year (around 41%).

## 2. POLYMER-COATED PAPER FIBRE PRODUCTS ARE NOT “SINGLE-USE PLASTIC PRODUCTS” AND CANNOT BE INCLUDED IN THE SCOPE OF THE SUP DIRECTIVE

EPPA wishes to draw the Commission’s attention to the following arguments, which demonstrate that Articles 3(1) and 3(2) of the SUP Directive cannot be interpreted as including the paper fibre products in the definition of “single-use plastic materials”.

### 2.1 The SUP Directive expressly provides that the paper fibre products are not included in its scope

Even assuming that the presence of small quantities of polymers in paper fibre products would render them single-use “plastic” products – *quod non* (see Section 2.2 below) – EPPA considers that such products would not in any case fall within the scope of the SUP Directive.

The above conclusion arises from the text of the Directive to be read in the light of its recital 7. That recital provides that the scope of the SUP Directive is limited to products falling within 86% of total disposable plastic articles found on beaches in the Union. As paper fibre products under discussion do not fall among the products found on beaches, the SUP Directive cannot be applied by way of interpretation to the paper fibre products under discussion.

According to Recital 7, the SUP Directive only covers “those single-use plastic products that are found the most on beaches in the union as well as fishing gear containing plastic and products made from oxo-degradable plastic. The single-use plastic products covered by measures under this directive are estimated to represent around 86 % of the single-use plastics found, in counts, on beaches in the Union. Glass and metal beverage containers [that contains plastic] should not be covered by this

directive as they are not among the single-use plastic products that are found the most on beaches in the union” (emphasis added).

## **2.2 Paper fibre products are not "single-use plastic products" within the meaning of the SUP Directive, interpreted in the light of its wording, regulatory context and aims**

The SUP Directive applies to “*single-use plastic products listed in the Annex*” and not to single-use products made from other materials such as, for example, paper fibre.

In order to assess whether the paper fibre products under discussion fall within the scope of the SUP Directive, it is thus necessary to interpret what is considered to be “*plastic*” and “*single-use plastic product*”, which, according to Article 3 of the SUP Directive, consists, wholly or partly, of a polymer which is its main structural component.

### ***i. The wording of Articles 3(1) and 3(2) of the SUP Directive***

Any interpretation of Article 3(1) and (2) of the SUP Directive including the paper fibre products in the definition of “single-use plastic products” irrespective of the fact that the polymer is not a main structural component would be contrary to the letter of those provisions in so far as it would deprive the term “main” of any meaning. As a result, that interpretation would go against the will of the EU Legislator.

### ***ii. The interpretation of Article 3(1) and (2) in the light of the context in which it occurs***

The interpretation of Articles 3(1) and 3(2) in the light of its regulatory context confirms that the notion of “*single-use plastic products*” cannot include the paper fibre products under discussion.

#### ***(a) The travaux préparatoires to the SUP Directive confirm that the paper fibre products cannot be included in the definition of "single-use plastic products"***

The proposal for the SUP Directive submitted by the Commission to the European Parliament and to the Council on 28 May 2018 explicitly provides, in its recital 8, that polymeric materials such as “*polymeric coatings, paints, inks, and adhesives*” are not to be included in the scope of the SUP Directive because they “are not capable of functioning as a main structural component of final materials” (emphasis added).

Moreover, in the context of the legislative procedure leading to the adoption of the SUP Directive, the Committee on Agriculture and Rural Development of the European Parliament expressed its position that the polymer-coated paper fibre products do not fall within the scope of the SUP Directive.

In the light of the foregoing, the *travaux préparatoires* to the SUP Directive confirm that the paper fibre products under discussion are not to be considered "single-use plastic products" within the meaning of Article 3(1) and (2) of the SUP Directive.

***(b) The possible inclusion of polymer coated paper fibre products in the scope of the Directive would be contrary to the fundamental principles of EU law of proportionality and equality***

The possible inclusion of polymer coated paper fibre products in the scope of the SUP Directive would be contrary to the fundamental principles of EU law of proportionality and equality.

As regards the principle of proportionality, it should be noted that the polymer coated paper fibre products are not included in the list of products most frequently found on beaches which threaten the marine environment. According to that list, paper fibre products are among the least common and therefore have a marginal incidence. More specifically, products falling within the category "*Paper/Cardboard - Cups, food trays, food wrappers, drink containers*" are in the 55th place and represent 0.27% of the marine litter concerned.

Consequently, an interpretation of Articles 3(1) and 3(2) of the SUP Directive leading to treat the paper fibre products as "single-use plastic products" would be contrary to the principle of proportionality.

As regards the principle of equality, it is clear that in view of the purpose to "*prevent and reduce the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health*" the paper fibre products at issue and the disposable plastic products are different products. In fact, unlike plastic, paper fibre products, far from polluting the marine environment, are put back into circulation through the recycling mechanisms. In this respect it is worth mentioning that paper and cardboard packaging is by far the most recycled material in Europe with a rate of 85.6% in 2017 [Eurostat], where the recycling rate of plastic products is less than half (41.2% in 2017 [Eurostat]).

In view of the fundamental differences between the paper fibre products and the single-use plastic products, any interpretation of Articles 3(1) and 3(2) of the SUP Directive to the effect of including the paper fibre products in the notion of "single-use plastic products" would be contrary to the principle of equality.

***iii. Interpretation of Article 3(1) and (2) of the SUP Directive in the light of its objectives***

Pursuant to Article 1 of the SUP Directive, "[t]he objectives of this Directive 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 with innovative and sustainable business models,

*products and materials, thus also contributing to the efficient functioning of the internal market*".

In the present case, any interpretation of Articles 3(1) and 3(2) of the SUP Directive including the paper fibre products in the concept of "single-use plastic products" would be manifestly contrary to those objectives and would risk to undermine the *effet utile* of the SUP Directive.

### **3. THE INCLUSION OF THE PAPER FIBRE PRODUCTS IN THE SCOPE OF THE SUP DIRECTIVE THROUGH THE GUIDELINES WOULD BE *ULTRA VIRES***

An interpretation of Articles 3(1) and 3(2) of the SUP Directive leading to the inclusion of the paper fibre products in the category of "single-use plastic products" would moreover constitute an *ultra vires* act, since it would violate the limits set out in Article 12(1) of the SUP Directive and the rules on the division of competences between the Commission and the EU Legislator laid down in the EU Treaties.

Indeed, a possible interpretation of the concept of "single-use plastic products" including the paper fibre products under discussion would have the effect of *de facto* amending the text of Articles 3(1) and 3(2) of the SUP Directive and broadening its scope of application, as defined in its Article 2 in the light of recital 7.

This would amount to amending the essential elements of the SUP Directive and, as such, would therefore infringe the principles laid down in Article 13(2) TEU, as interpreted in the light of the case-law. Such an amendment should instead be adopted following the legislative procedure laid down in Article 192(1) TFEU which, as mentioned above, requires the consent of the European Parliament and the Council. It cannot be adopted, even in consultation with the Member States, by the Commission without the consent of the EU Legislator.

In conclusion, any interpretation to the effect that paper fibre products are "single-use plastic products" within the meaning of the SUP Directive would be manifestly incompatible with, *inter alia*, the provisions and purpose of that act.

### **4. EPPA'S PROPOSALS WITH REGARD TO THE PAPER FIBRE PRODUCTS**

Any interpretation to the effect that paper fibre products are "single-use plastic products" within the meaning of the SUP Directive would be manifestly incompatible with, *inter alia*, the provisions and purpose of that act.

In a spirit of full and loyal cooperation with the EU Institutions and, in particular, with the Commission, EPPA considers appropriate to submit the following proposals:

1. Do not include – explicitly or implicitly – the polymer coated paper fibre products in the category of “single-use plastic products” under the SUP Directive. In view of the composition, characteristics, recycling rate and environmental impact of these paper fibre products, they cannot be equated to “single-use plastic products”.

2. In the alternative, to explicitly exclude all paper fibre products with a polymeric component of at least 10% from the scope of the SUP Directive. Each paper-based packaging container category has its own functional level of polymeric content to provide food and product safety. This can vary from 15 to 10%. For the reasons set out above, this provision requires a case-by-case analysis assessing the specific impact of the polymer on the finished product, taking into account, for example, qualitative and quantitative criteria. In this respect, EPPA notes that a proposed average threshold (10% of polymer) appears to be an appropriate quantitative criterion to guarantee, on the one hand, the achievement of the objectives of the SUP Directive and, on the other hand, the interests and rights of the companies active in the chain, while respecting the requirement of legal certainty provided for by the EU legislation.