

EUROPEN's comments on TRIS notification 2023/0701/BE (Belgium)

Draft Order of the Walloon Government amending the Order of the Walloon Government of 6 July 2017 on plastic bags

1. Object of the TRIS contribution

On 8 December 2023, the Belgian Government notified to the European Commission a [draft Order of the Walloon Government amending the Order of the Walloon Government of 6 July 2017 on plastic bags](#) (hereafter "the draft Order"). The draft Order sets out measures to prohibit the use of single-use primary packaging for unprocessed fruit and vegetables.

The following draft measure is the object of this contribution:

- > Article 4 - prohibition to use, from 1 January 2025, any single-use plastic primary packaging, around unprocessed fruits and vegetables in retail premises and spaces as part of any contractual relationship or offer to contract between: (1) traders, including their agents and subcontractors; and (2) customers or consumers; and related derogations¹.

EUROPEN contests the lawfulness of the above-mentioned measure on the following grounds:

- > Article 4 in the draft Order 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](#) on 30 November 2022.
- > The draft Order therefore infringes Article 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (TRIS)².
- > The proposed ban 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).
- > If adopted, the draft Order will have negative economic impacts on economic operators without added environmental value.

2. Infringement of EU legislation

¹ The same article derogates from the prohibition: (1) unprocessed aromatic herbs; (2) organic unprocessed fruits and vegetables that are not identifiable in a manner different from that involving single-use plastic primary packaging, such as a label or laser engraving; (3) unprocessed fruits and vegetables which present a risk of deterioration when sold in bulk: (a) broccoli; (b) mushrooms; (c) salad; (d) corn salad; (e) nursery plants; (f) spinach; (g) sorrel; (h) edible flowers; (i) cranberries; (j) blueberries; (k) winter cherries; (l) sprouted grains; (m) raspberries; (n) strawberries; (o) blueberries; (p) blackberries; (q) gooseberries; (r) wood sorrel; (s) blackcurrants; (t) kiwis.

² 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 measure proposed by the Walloon Government infringes 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 measure infringes 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”. The measure 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 9(1)(g) of the Waste Framework Directive (2008/98/EC)**, which 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*”. It should also be recalled that, as part of its [proposal for a targeted revision of the Waste Framework Directive](#), the Commission has set out concrete food waste reduction targets.
- > **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 draft Order can be questioned. In its notification, the Walloon Government has provided limited to no justification on the 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 draft Order 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 Authorities of the draft Order to the Technical Regulations Information System (TRIS).

The draft Order, 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 Plan³, adopted in March 2020, and has been the object of several consultations at EU level⁴. Finally, it has been confirmed by the publication of the [PPWR proposal](#) by the EU Commission on 30 November 2022, which includes a similar ban in Article 22, row 2 of Annex V.

It is notable to observe that, despite the above, the Walloon Government has decided to proceed with the adoption of a provision that clearly pre-empts harmonisation efforts at EU level.

3. Economic and environmental impacts

Economic 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, which will instead be undermined by the introduction of a unilateral measure at national level. This is not only a precondition for the free movement 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. Economic actors operating in Belgium will instead have to bear unnecessary costs and administrative burden derived from the adaptation to the requirements of the PPWR, once adopted probably in April 2024.

The implementation of the proposed ban will also create single market barriers. The Walloon Government has already drawn a list of fresh fruit and vegetables that will be exempted from the requirement. While the Commission's proposal for the revision of the PPWD foresees the adoption of a similar ban in Article 22 and Annex V, the latter does not provide a mechanism for the establishment of a harmonised list of fresh fruit and vegetables that would be exempted from the mentioned requirement. This could entail the divergent application of the ban across EU Member States with negative implications for the single market and increased burden for economic operators.

Environmental impacts

The ban on single-use plastic primary packaging for unprocessed fruit and vegetables risk to have unintended consequences, in the form of increased food loss and waste of fresh fruit and vegetables.

The Food Waste Index Report 2021⁵, 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.

³ 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."

⁴ 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.

⁵ [UNEP Food Waste Index Report 2021](#).

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.

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