

66 National and EU industries call to safeguard the Internal Market for Packaging and Packaged Goods in the Circular Economy Package

The crucial role of the Internal Market legal base of the Packaging and Packaging Waste Directive

The 66 undersigned industry associations share a common concern regarding the potential erosion of the Internal Market legal base (Article 114 TFEU) of the Packaging and Packaging Waste Directive (94/62/EC) (PPWD).

The co-signatories of this paper believe that the loss of the Internal Market legal base will open the door to disparate Member State measures on packaging that will impact the free movement of packaged goods within the EU. The vast majority of goods circulating within the Union are packaged in some way and are therefore at risk of being impacted by such a potential change. The importance of this risk is even acknowledged by the Commission¹, which explicitly chose the Internal Market legal base for the proposal amending the PPWD “*because packaging is particularly sensitive to Internal Market barriers.*”

The legal base discussion is one of the most important issues industry has collectively faced within the context of packaging since the PPWD was enacted in 1994. It is important to recall that before the PPWD, differences in national rules on the management of packaging and packaging waste created barriers to the free movement of goods, resulting in divergent levels of environmental requirements, an uneven playing field for businesses and a serious impediment to the Internal Market for goods.

The signatories of this letter therefore call on the European Parliament, Council and Commission to maintain the Internal Market legal base of the PPWD and all its amending acts, including the current proposal amending the PPWD, for the following reasons:

1. The loss of an Internal Market legal base is inconsistent with the fundamental policy objectives of the Circular Economy Package.
2. The change of legal base would potentially precipitate the end of the free movement of packaging and packaged goods.
3. The PPWD is fundamentally different from other waste legislation as it both deals with requirements for placing products on the market and with packaging waste.
4. This is not merely a technical/legal argument devoid of real implications. The potential for significant harm is real.
5. The likelihood of a full recast of the whole Directive is real and is already formally under consideration in Council, thereby risking the end of the Internal Market for packaging and packaged goods.

The detailed rationale for each of these points is given in the following pages, as well as the signatories of this statement.

¹ European Commission (2014) Ex-post evaluation of certain waste stream directives

(1) The loss of an internal market legal base is inconsistent with the fundamental policy objectives of the Circular Economy Package:

- The Circular Economy Package repeatedly highlights (i) the importance of actions at EU level, (ii) the need to preserve the Internal Market and (iii) the necessity to address barriers or obstacles in order to facilitate the development of a Circular Economy. This makes sense as a truly successful Circular Economy will be reliant on the proper functioning of commerce and trade across the EU.
- A narrow analysis based on the individual objectives of selected provisions in isolation fails to consider the connection with the broader fundamental objectives of the PPWD and the Circular Economy Package as a whole (i.e., to facilitate the development of a Circular Economy by action at the EU level to create an internal market without barriers or obstacles).
- The Circular Economy needs economies of scale to be successful. The Internal Market provides for the necessary scale in supply chains, operations, investment and innovation. A change in legal base would therefore risk failure of the Circular Economy Package objectives as they relate to both economic and environmental performance, which are inextricably linked.

(2) The change of legal base would potentially precipitate the end of the free movement of packaging and packaged goods:

- If Member States take unilateral measures on packaging, the ability to import/export packaged goods across the internal borders of the EU will correspondingly be limited. This may require country-specific packaging solutions. This will impact consumers in terms of both price and product choice (especially if production were to stop for smaller markets with unilateral packaging measures).
- The vast majority of consumer goods are packaged in some way. Divergent member state measures on packaging will result in a disparate patchwork of requirements that will impact the free movement of goods.
- Existing safeguards concerning national protectionist or discriminatory measures (i.e. the TRIS pre-notification procedure under (EU) 2015/1535, formerly 98/34/EC) that preclude barriers to the free movement of goods within the Internal Market would be put at risk. The Lisbon Treaty stipulates the free movement of goods. However, TRIS is a mechanism to ensure intervention can be made in a timely manner to guarantee the free movement before an infringement would occur. Otherwise rectification can only be made after the event and after economic damage has occurred.
- The Commission's "Ex-post Evaluation of Five Waste Stream Directives"² points out that the Internal Market legal base "*allows Member States to only introduce new national measures based on new scientific evidence relating to the protection of the environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. And such measures can only be maintained if they are not a means of discrimination. The environmental legal base instead allows Member States to maintain or adopt more restrictive protective provisions.*"

² http://ec.europa.eu/environment/waste/pdf/target_review/Final%20Report%20Ex-Post.pdf

- The potential introduction of Article 192 TFEU (environmental protection) as a basis for Article 5 of the PPWD on 'Reuse' for example is likely to lead to Member States taking divergent measures. In the past, both the Commission and the CJEU³ have confirmed that disruption results from such measures through the creation of barriers that undermine the correct functioning of the Internal Market.
- The competitiveness of EU industry will therefore be negatively impacted if the economies of scale needed for sustainable, innovative and affordable packaging solutions were to be impacted by the lack of free access across all Member States.

(3) The PPWD is fundamentally different from other waste legislation as it both deals with requirements for placing products on the market and with packaging waste:

- The PPWD is fundamentally different from other EU waste stream Directives because it integrates both product requirements (i.e. provisions relating to the functionalities of packaging and the free movement of packaged goods) and requirements relating to packaging waste management.
- At present, Article 114 TFEU is the sole legal basis of the PPWD. Additionally, there are significant recitals and articles in the PPWD stipulating that the functioning of the internal market is one of the core purposes of the legislation.
- The need for an Article 114 TFEU legal basis was highlighted by the Commission within the [1992 proposal](#) for the current Directive. There was an explicit acknowledgement of the necessity to address the divergent member state measures that were hindering the free movement of packaged goods and distorting the internal market. The appropriate legal basis was therefore identified as Article 100 (now Article 114 TFEU).
- Both the economic and environmental objectives of the PPWD can still be served by preserving the Internal Market as its sole legal basis as it also encompasses and safeguards the PPWD environmental aims.

(4) This is not merely a technical/legal argument devoid of real implications. The potential for significant harm is real:

- No impact assessment has been carried out in line with the EU's "*Better Regulation*" agenda to understand the potential consequences of changing the legal basis, which is particularly regrettable.
- Amendments to legislative acts must take into account the context of the "amended act" in order to avoid the continuous and piecemeal erosion of its core purpose and the impairment of its cohesion and operational effectiveness.
- Article 192 TFEU should not be used as a legal basis for amendments to the PPWD as it would create legal uncertainty about the residual member state competences and their notification obligations.

(5) The likelihood of full recast of the whole Directive is real and is already formally under consideration in Council, thereby risking the end of the Internal Market for packaging and packaged goods:

- Although the suggested change of the PPWD legal base concerns only its amendments so far (not the parent 94/62/EC Directive), there is a clear parallel risk of a full recast

³ [Case C-463/01](#), [Case C-309/02](#), [C-246/99](#)

(legal review) of the Directive in the near future. This is mentioned by the Council in its draft compromise text⁴.

- The ambitions of certain Member States with regards to specific measures on ancillary packaging have evidently been hindered by the Commission's interpretation of Article 18⁵ of the PPWD. Reducing the effectiveness of Article 18 by changing the legal base of the whole Directive is a risky short-cut to resolving these specific matters and would allow for fragmented national measures on all packaging. This short-term strategy would ignore the long-term implications of such a change. Somewhat with foresight, key associations warned of the risks of precedent-setting when Article 18 was amended to allow national provisions on plastic bags. This risk has now become a reality.
- In the case of a proposal for a total recast, it will be up to the European Commission to then decide which legal base is the more appropriate, based on an assessment of which of the two objectives of the PPWD (the functioning of the Internal Market or the environment protection) is predominant. A change of the legal base now is likely to set a precedent and facilitates further ultimate change, thereby risking the free movement of goods and by consequence future growth and employment which is the purpose of the Circular Economy Package and the European Union.

Brussels, 29 May 2017

The undersigned organisations are as follows (in alphabetical order):



ACE - The Alliance for Beverage Cartons and the Environment



AGVU - Arbeitsgemeinschaft Verpackung und Umwelt e.V., Germany



AIDEPI - Associazione delle Industrie del Dolce e della Pasta italiane, Italy



AIM - European Brands Association

⁴ New recital 19(a) PPWD: *“Therefore, in view of the fact that Directive 94/62 has already been amended six times, and that the present amendment has as its predominant purpose the protection of the environment and therefore a legal basis different from the original Directive, it would be appropriate to recast Directive 94/62 in the near future.”* (Source: politico)

⁵ Art 18: **Freedom to place on the market:** Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.



ANFIMA - Associazione Nazionale fra i Fabbricanti di Imballaggi Metallici ed Affini, Italy



ANIA - Association Nationale des Industries Alimentaires, France



AmCham EU - American Chamber of Commerce to the European Union



APEAL - The Association of European Producers of Steel for Packaging



ARA - Altstoff Recycling Austria AG, Packaging Compliance Scheme, Austria



ARAM - Association for Packaging and the Environment, Romania



BVE - Bundesvereinigung der Deutschen Ernährungsindustrie e.V, Germany



CEPI - Confederation of European Paper Industries



CEPI Eurokraft - European Producers of Sack Kraft Paper and Kraft Paper



CICPEN - Industrial Coalition on Packaging and the Environment, Czech Republic



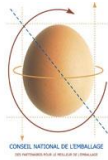
CITPA - International Confederation of Paper and Board Converters in Europe



COREPLA- Consorzio nazionale per la raccolta, il riciclaggio e il recupero degli imballaggi in plastica, Italy



Cosmetics Europe - The Personal Care Association



CNE - Conseil National de l'Emballage, France



DSD - Der Grüne Punkt Dual System for Packaging Recycling, Germany



Eco - Emballages - Packaging Recovery Association, France



EFBW - European Federation of Bottled Waters



ELIPSO - Les entreprises de l'emballage plastique et souple, France



Envase y Sociedad- Plataforma por la Sostenibilidad de los Envases, Spain



EPRO - European Association of Plastics Recycling & Recovery Organisations



EUPC- European Plastics Converters



EUROCOMMERCE - The voice of retail and wholesale in Europe



European Aluminium



European Aluminium Foil Association e.V



European Bioplastics



EUROPEN - The European Organization for Packaging and the Environment



EUROSAC - European Federation of Multiwall Paper Sack Manufacturers



EXPRA - Extended Producer Responsibility Alliance



Fédération du Commerce et de la Distribution
French Retail Federation

FCD- Fédération du Commerce et de la Distribution



FEA - European Aerosol Federation



FEBEA- Fédération des Entreprises de la Beauté, France



FEFCO - European Corrugated Packaging Association



FEVE
The European Container
Glass Federation

FEVE - The European Container Glass Federation



FIMET - Associação Portuguesa das Industrias de Embalagens Metálicas, Portugal



Flexible Packaging Europe



HDE
Handelsverband
Deutschland

HDE- Handelsverband Deutschland e.V, Germany



ILEC - Institut de liaisons et d'études des industries de consommation, France



INCPEN - The Industry Council For Research On Packaging And The Environment, UK



INTERGRAF - European Federation for Print and Digital Communication



La Boîte Boisson, France



Latas de Bebidas, Spain



Lewiatan - Business Confederation, Poland



Markenverband e.V., Germany



Metal Packaging Europe



Miljöpack – The Trade & Industry Group, Sweden



MPMA - Metal Packaging Manufacturers Association, UK



MVN – Metalen Verpakkingen Nederland, The Netherlands



Pack2Go Europe - Europe's Convenience Food Packaging Association



Pakkaus - Packaging Association, Finland



PlasticsEurope - Association of Plastics Manufacturers



Pro Carton - The European Association of Carton and Cartonboard manufacturers



REKOPOL - Recovery Organisation S.A., Poland



REPAK - Packaging Recovery Organisation, Ireland



Serving Europe - Branded Food and Beverage Service Chains Association



SLICPEN – Industrial Coalition on Packaging and the Environment, Slovakia



SNFBM - Syndicat National des Fabricants de Boîtes, Emballages & Bouchages Métalliques, France



Sociedade Ponto Verde, S.A. - Packaging Recovery Organisation, Portugal



UNESDA - Union of European Soft Drinks Associations



The organisation of Europe's food & drink industry



TIE - Toy Industries of Europe



Valpak - Environmental Compliance, Recycling and Sustainability Solutions, UK



VMV - Verband Metallverpackungen, Germany